Equity's Wergeld: Monetary Remedies for Emotional Distress by way of the Equitable Obligation of Confidence

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Abstract

Many aspects of social and commercial life depend on our ability to confide secrets in others. The law, responsive to societal needs, developed the action for breach of confidence, traditionally offering relief through an order enjoining continued publication. However, in an era where instantaneous, irrevocable digital publication of information can be achieved by a single keystroke, such an order is no longer enough. Once online, the damage is done: the internet never forgets. It is settled that courts of equity may order equitable compensation as an alternative remedy for breach of confidence in commercial settings. However, courts have struggled to articulate a compelling jurisdictional basis for the same order in personal contexts. This article locates such a basis in a unified theory of equitable actions for breach of confidence: that the doctrine is a species of equitable fraud, and that it is this feature that justifies grants of monetary relief. While quantification methodology will differ between personal and commercial settings, there is no jurisdictional reason for monetary awards to be made in commercial contexts but not the personal.

I Introduction and Context

Some say that three may keep a secret, if two of them are dead.[1] This is not particularly practical advice. Interpersonal relations and commercial transactions alike depend on our ability to repose trust in one another so as to facilitate sharing of confidential information.

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1 Benjamin Franklin (ed), *Poor Richard's Almanack for 1850-1852*, compilation and republication (John Doggett Jr, 1851) 43.

Australian law recognises the value of such trust through the equitable action for breach of confidence.[2] The conventional remedy obtained by such an action in both personal and commercial settings is an injunction to restrain breach of that confidence.[3] It is also accepted that, where the obligation has arisen in respect of commercial information, an alternative remedy is monetary relief.[4] Some Australian courts have also awarded monetary compensation in *personal* settings, where the information has no commercial value, but disclosure has caused emotional distress.[5]

The archetypal example is publication of intimate sexual imagery by ex-partners, but the concept has far broader application. For example, in *Evans v Health Administration Corporation* ('*NSW Ambulance Class Action*'),[6] claimants brought an action against their employer for sale of their medical records to personal injury law firms (the case settled without resolving the availability of monetary compensation).[7] Had a clear jurisdictional basis for ordering monetary compensation for distress existed, it is plausible that the settlement calculus may have been different,[8] or injurious disclosure prophylactically deterred outright.

Given the normative value to society of our ability to repose trust in one another, and the importance of human dignity preserved by control over our personal information, the hurt caused by disclosure of confidential material should not go unremedied. The question for this article is whether Australian courts ordering monetary awards for such distress have an equitable jurisdiction to do so, or whether, as one critic puts it, the 'boldness' of such awards 'hides intellectual timidity'.[9]

This article argues the former: ordering equitable compensation to remedy a breach of confidence causing emotional distress (but no pecuniary loss) falls squarely within the existing jurisdiction of courts of equity. The argument is straightforward: the jurisdictional basis for such monetary relief in commercial

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2 See, eg, *Del Casale v Artedomus Pty Ltd* (2007) 165 IR 148 ('*Del Casale*'); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah*'); *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 ('*Smith Kline*'); *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 ('*Moorgate Tobacco*'); *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 ('*John Fairfax*'); *De Beer v Graham* (1891) 12 LR (NSW) Eq 144 ('*De Beer*').

3 See above n 2, and also *Stephens v Avery* [1988] Ch 449 ('*Stephens v Avery*'); *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 ('*Coco v AN Clark*'); *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302 ('*Duchess of Argyll*'); *Pollard v Photographic Co* (1888) 40 Ch D 345 ('*Pollard*'); *Morison v Moat* (1851) 9 Hare 241; 68 ER 492 ('*Morison v Moat*'); *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171 ('*Prince Albert*'); *Abernethy v Hutchinson* (1825) 1 H & Tw 28; 47 ER 1313 ('*Abernethy*').

4 *Smith Kline* (n 2) 83 (Gummow J); *Seager v Copydex Ltd* [1967] 1 WLR 923, 932 (Lord Denning MR; Salmon and Winn LJJ agreeing) ('*Seager*'). See also *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413, 415 (Lord Greene MR; Somervell and Cohen LJJ agreeing) ('*Saltman Engineering*').

5 *Wilson v Ferguson* [2015] WASC 15 ('*Wilson*'); *Giller v Procopets (No 2)* (2008) 24 VR 1 ('*Giller (No 2)*'); *Doe v Australian Broadcasting Commission* [2007] VCC 281 ('*Doe v ABC*').

6 *Evans v Health Administration Corporation* [2019] NSWSC 1781 ('*NSW Ambulance Class Action*'), settlement of which was approved pursuant to s 173 *Civil Procedure Act 2005* (NSW).

7 *NSW Ambulance Class Action* (n 6) [29], [38] (Ward CJ in Eq).

8 Ibid [29] (Ward CJ in Eq).

9 PG Turner, 'Rudiments of the Equitable Remedy of Compensation for Breach of Confidence' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 239, 271 ('Breach of Confidence').

contexts is the same jurisdiction invoked for monetary relief in personal contexts. This is because the jurisdictional basis for equity's intervention in all cases of breach of confidence (not being in equity's auxiliary jurisdiction)[10] is that such breach constitutes equitable fraud. The equitable fraud, constituted by departure from the standards of conduct mandated by equity, gives rise to a liability akin to a debt commensurate with the magnitude of that departure, discharged by payment of equitable compensation. It is this fact of departure which is remedied by equitable compensation, not injury caused by the departure. Critically, this goes beyond a mere desire for formal symmetry in remedies (that is, in circumstances where an injunction is available, compensation ought also to be available):[11] grounding the obligation of confidence in equitable fraud allows for a substantive justification for the award of monetary relief.

A similar concept long existed in Anglo-Saxon law. Historically, a person who did proscribed wrongs owed the victim of said wrongs a sum of money as wergeld.[12] The obligation to pay wergeld arose by reason of doing the wrong, not by reason of any injury *caused* by the wrong (contrasted with botgeld, which compensated for injury).[13] For example, a murderer owed wergeld to the kin of their victim, the sum of which was fixed by reference to the ascertained value of the victim,[14] not by reference to any actual loss suffered by the mediæval family. By reason of the murder, the murderer owed the mediæval family a debt that was discharged by payment of wergeld. The wergeld was a second-best substitute for the person, not compensation for injury caused by the death of the person.

Modern equity has more refined tools than blood money. A plaintiff bringing an action for breach of confidence may obtain a quia timet injunction to restrain anticipated breach and/or a mandatory injunction enjoining future disclosure. Either is closer to performance by the confidant of their obligations than money alone, but both (requiring coercive intervention by the court or State) are second-best substitutes for performance. Equitable compensation is merely another substitute. The defaulting confidant is obliged to restore the confider to as close as possible the position they would have been in had the obligation been performed:[15] whether by

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10 For example, an action in assumpsit by way of the doctrine of part performance.

11 See criticism of the 'symmetry argument': PG Turner, 'Privacy Remedies Viewed through an Equitable Lens' in Jason NE Varuhas and NA Moreham, *Remedies for Breach of Privacy* (Bloomsbury, 2018) 265, 272–4 ('Privacy Remedies').

12 Old English, wer (man) + geld (gold). See also Theodore FT Plucknett, *A Concise History of the Common Law* (Butterworth, 5th ed, 1956) 426 ('*A Concise History*'); Harold Potter, *An Historical Introduction to English Law and its Institutions* (Sweet & Maxwell, 3rd ed, 1948) ('*Historical Introduction*') 341; Sir William Holdsworth, *A History of English Law* (Methuen; Sweet & Maxwell, 7th ed, 1969) vol I, 22 ('*History of English Law*').

13 Old English, bot (recompense) + geld (gold).

14 For example, in 771 CE a thegn (a minor noble) was worth 1200 shillings, but a commoner a mere 200: F Liebermann (ed), *Die Gesetze der Angelsachen 3 Vols* (Halle, 1903–1916) vol I, 392–3. The author thanks his sister for translation assistance. See also Plucknett, *A Concise History* (n 12) 629.

15 *McKenzie v McDonald* [1927] VLR 134, 146 (Dixon AJ) ('*McKenzie v McDonald* '), citing *Nocton v Lord Ashburton* [1914] AC 932 ('*Nocton*') (generally) and *Robinson v Abbott* (1894) 20 VLR 346, 365–8 (Holroyd J) ('*Robinson v Abbott*'). See also *Re Collie; Ex parte Adamson* (1878) 8 Ch D 807, 820 (James and Baggallay LJJ) ('*Ex parte Adamson*'); *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, 216 (Street J) ('*Re Dawson*').

actual (albeit legally compelled) performance, or by substituted performance in the form of monetary compensation.

Had the Anglo-Saxons possessed the coercive power of the modern State, one could expect they too would have developed such refined remedies. Precursors to the injunction can be seen in the concept of 'pay the wer or bear the feud':[16] legally sanctioned violence against recalcitrant debtors is not dissimilar to enforcement of an injunction by threat of committal.[17] Moreover the development of more sophisticated remedies does not eradicate their older cousins, nor deprive those blunter instruments of a role to play. Much like recovery of wergeld for murder, in the digital era, actions for breach of confidence occur after the fact, when information is irrevocably publicised and injunctive relief unhelpful.

A *Why Equity?*

An anterior question is 'why bother with equity at all?'. The answer is twofold. First, it is argued that the power to order equitable compensation is derived from equity's exclusive jurisdiction. Given that the existence of parallel remedies does not necessarily erase either (such as parallel contractual and equitable relief for breach of confidence),[18] the possibility of remedies at law does not eradicate existing remedies in equity.

Second, the common law has not been generous in alternative remedies. As information is not property,[19] rights in rem are not directly of aid (though they may serve an ancillary function, such as an action in replevin to recover a diary), nor are there statutory remedies in Australia for interpersonal breaches of privacy,[20] in contrast to the United Kingdom ('UK').[21] In New South Wales ('NSW'), in cases of criminal non-consensual recording and distribution of intimate images,[22] statute provides for compensation by court order out of the convicted person's property.[23] However, this is no panacea: not only has the victim limited control over the

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16 Plucknett, *A Concise History* (n 12) 444.

17 *Lever Bros Ltd v Kneale and Bagnall* [1937] 2 KB 87, 94 (Greene LJ); Holdsworth, *History of English Law* (n 12) vol I, 454–8; Edmund Robert Daniell, *The Practice of the High Court of Chancery* (Stevens & Sons, 1871) vol II, 1533–6 ('*High Court of Chancery*').

18 *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281, 290 (Finn, Sundberg and Jacobson JJ) ('*Optus v Telstra*'); *Del Casale* (n 2) 175 (Campbell JA); *Yovatt v Winyard* (1820) 1 Jac & W 394; 37 ER 425 ('*Yovatt v Winyard*').

19 *Breen v Williams* (1996) 186 CLR 71, 90 (Dawson and Toohey JJ), 111 (Gaudron and McHugh JJ) ('*Breen v Williams*'); *Smith Kline* (n 2) 120 (Gummow J).

20 Contrast regulation of corporate conduct: *Privacy Act 1988* (Cth) s 6 (definition of 'entity').

21 *Human Rights Act 1998* (UK) s 6 ('*Human Rights Act*'); *PJS v News Group Newspapers Ltd* [2016] AC 1081 ('*PJS v News Group*'); *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) ('*Mosley*'); *McKennitt v Ash* [2008] QB 73 ('*McKennitt v Ash*'); *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 ('*Campbell v MGN*'); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004 CETS No 194 (entered into force 1 June 2010) art 8 para 1 ('*ECHR*').

22 *Crimes Act 1900* (NSW) div 15C.

23 *Victims Rights and Support Act 2013* (NSW) s 97(1).

proceedings, but guilt must be established beyond reasonable doubt and the offence is restricted to specific types of information.[24]

The fêted developing tort of privacy lies nascent:[25] only one District Court judgment has awarded damages solely on the basis of such a tort,[26] and just three judgments have awarded undifferentiated damages on bases inclusive of such a tort.[27] Judicial statements such as that it is 'difficult to see' how such a tort could be pleaded in NSW,[28] and that 'Australian common law does not recognise a tort of privacy'[29] render such claims ambitious. This is notwithstanding that damages for distress are already available as consequential loss in other tort claims (for example, the tort of conversion,[30] statutory misleading and deceptive conduct claims,[31] or under *Wilkinson v Downton*[32]), or even contractual claims (where the object of a contract is to provide enjoyment,[33] damages have been awarded for inconvenience,[34] distress,[35] or even a 'feeling of anxiety'[36]).

Accordingly, the plaintiff turns to equity, pleading for its intervention to 'soften and mollify the Extremity of the Law'.[37]

B *Existing Approaches in Equity*

Three Australian cases have ordered equitable compensation to remedy emotional distress caused by breach of confidence. In *Doe v Australian Broadcasting Corporation*, the trial judge awarded equitable compensation on the basis that they were bound by the Victorian appellate decision of *Talbot v General Television*

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24 *Crimes Act 1900* (NSW) s 91N (definitions of 'intimate image', 'private act' and 'private parts').

25 *NSW Ambulance Class Action* (n 6) [30] (Ward CJ in Eq); *Glencore International AG v Commissioner of Taxation* (2019) 372 ALR 126, 128 [7] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Lenah* (n 2) 248–51 (Gummow and Hayne JJ).

26 *Grosse v Purvis* [2003] QDC 151, [441]–[442] (Skoien J).

27 *Giller (No 2)* (n 5) 6 (Maxwell P); *Doe v ABC* (n 5) [157]–[164] (Hampel CCJ). See, more recently, *Scala v Scala* [2019] FCCA 3456, [60], [79] (Burchardt J), which describes *Wilson* (n 5) and *Giller (No 2)* (n 5) as discussing the 'tort' of breach of confidence (at [60]), but which does not analyse the jurisdictional bases for the award of compensation.

28 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 319–20 (Callinan J).

29 *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484, 515 (McColl JA). See also *NSW Ambulance Class Action* (n 6) [30] (Ward CJ in Eq): 'such a tort [of invasion of privacy] has not been recognised in [NSW]'.

30 *Graham v Voigt* (1989) 95 FLR 146, 155–6 (Kelly J) ('*Graham v Voigt*'); *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144, 150 (Quilliam J) ('*Jamieson's Tow*').

31 *Newman v Financial Wisdom Ltd* (2004) 56 ATR 634, 696–8 (Mandie J); *Holloway v Witham* (1990) 21 NSWLR 70, 85–6 (Lee CJ at CL).

32 *Wilkinson v Downton* [1897] 2 QB 57. See also *Magill v Magill* (2006) 226 CLR 551, 589 (Gummow, Kirby and Crennan JJ) ('*Magill*'); *Tame v New South Wales* (2002) 211 CLR 317, 376 (Gummow and Kirby JJ) ('*Tame v NSW*'); C*ivil Liability Act 2002* (NSW) s 31.

33 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 363 (Mason CJ), 370 (Brennan J), 382 (Deane and Dawson JJ).

34 *Burton v Pinkerton* (1867) LR 2 Ex 340, 351 (Kelly CB); *Hobbs v London and South Western Railway* (1875) LR 10 QB 111, 116 (Cockburn CJ).

35 *Jarvis v Swan Tours Ltd* [1973] QB 233, 237–8 (Lord Denning MR).

36 *Kemp v Sober* (1851) 1 Sim (NS) 517, 520; 61 ER 200, 201 (Lord Cranworth V-C).

37 *Earl of Oxford's Case* (1615) Ch Rep 1, 7; 21 ER 485, 486 (Lord Eldon LC) (capitalisation in original) ('*Earl of Oxford*').

Corporation Pty Ltd [38] to assess 'damages' in equity by the method most appropriate to compensate for the breach.[39] *Talbot* relied on the assertion that a breach of confidence was a 'wrongful act' within the meaning of Victoria's *Lord Cairns' Act* provisions (then in original form),[40] a controversial proposition (see discussion in Part IVA below).

The second case was the appellate decision in *Giller v Procopets (No 2)*.[41] There, two parties in a de facto relationship had an acrimonious breakup, following which one party distributed images and video of their past sexual intercourse to the other's friends and family. The trial judge refused monetary award because, inter alia, Australian law did not permit award of damages to compensate distress resulting from breach of confidence where the distress fell short of recognised psychiatric injury.[42] The appellate Court unanimously rejected this reasoning. First, Victoria's amended[43] *Lord Cairns' Act* provisions removed any wrongful act requirement: because the Court had the jurisdiction to hear an application for an injunction in the case, it had the jurisdiction to order damages. The Court also stated, in obiter dicta, that a breach of confidence was a 'wrongful act' under the unamended *Lord Cairns' Act*.[44] Second, the Court held that equitable compensation (not damages)[45] was available in equity's exclusive jurisdiction by parity of reasoning with injunctive relief.[46] This was because conferral of equitable jurisdiction on a court carried with it 'inherent jurisdiction to grant relief by way of monetary compensation for breach of an equitable obligation, whether of trust or confidence',[47] and an inability to award compensation would leave Ms Giller without an effective remedy.[48]

The third case, *Wilson v Ferguson*, dealt with facts materially similar to *Giller (No 2)*. There, Mitchell J awarded equitable compensation for breach of confidence.[49] Two bases were provided. First, that *Giller (No 2)* was not 'plainly wrong'[50] in its interpretation of non-statutory law, and therefore binding as an

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38 *Talbot v General Television Corporation Pty Ltd* [1980] VR 224, affd on appeal at [1980] VR 224, 250 (Young CJ), 253 (Lush J) ('*Talbot*').

39 *Doe v ABC* (n 5) [141]–[142], citing *Talbot* (n 38) 244–5 (Marks J).

40 *Supreme Court Act 1958* (Vic) s 62(3); cf *Chancery Amendment Act 1858*, 21 & 22 Vict c 27, s 2 ('*Lord Cairns' Act*').

41 *Giller (No 2)* (n 5).

42 *Giller v Procopets* [2004] VSC 113, [165]–[170] (Gillard J).

43 *Supreme Court Act 1986* (Vic) s 38. See also *Supreme Court Act 1933* (ACT) s 34, *Civil Proceedings Act 2011* (Qld) s 8.

44 *Giller (No 2)* (n 5) 94 (Neave JA), citing *Talbot* (n 38). See also discussion in *Wentworth v Woollahra Municipal Council (No 2)* regarding whether purely equitable claims are wrongful acts under *Lord Cairns' Act*: (1982) 149 CLR 672, 676–7 (Gibbs CJ, Mason, Murphy and Brennan JJ) ('*Wentworth v Woollahra (No 2)*').

45 *Giller (No 2)* (n 5) 102–3 (Neave JA), discussing *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 303 (Spigelman CJ) ('*Digital Pulse*').

46 *Giller (No 2)* (n 5) 32 (Ashley JA), 100 (Neave JA; Maxwell P agreeing), citing, inter alia, *Stephens v Avery* (n 3).

47 *Smith Kline* (n 2) 83 (Gummow J), quoted in *Giller (No 2)* (n 5) 100 (Neave JA).

48 *Giller (No 2)* (n 5) 32 (Ashley JA) 100 (Neave JA), citing *Cornelius v De Taranto* [2000] EWHC 561 (QB) ('*De Taranto*').

49 *Wilson* (n 5) [55]–[60] (Mitchell J), citing, inter alia, *Duchess of Argyll* (n 3) and *Prince Albert* (n 3).

50 *Wilson* (n 5) [76] (Mitchell J).

interstate intermediate appellate decision.[51] Second, that the Supreme Court of Western Australia, being a court of equity, has inherent jurisdiction to make monetary compensation for breach of an equitable obligation, 'whether of trust or confidence'.[52] Because the two bases for the decision (*Lord Cairns' Act* and the exclusive jurisdiction) independently justified the relief given, either could be read as the ratio decidendi of *Wilson*.[53]

Doe v ABC, *Giller (No 2)* and *Wilson* have been subject to some criticism. Most forcefully, Turner argues that pleas that to do otherwise than grant relief would leave a wrong without a remedy[54] hide 'intellectual timidity'.[55] Given that equitable doctrines traditionally focus on economic interests[56] and that the days of unfettered equitable discretion have long passed,[57] Turner argues that reversing equity's settled attitude against award of damages for personal loss (traditionally the realm of torts) requires more than mere perceived injustice.[58]

Neither *Giller (No 2)* nor *Wilson* turned on unfettered discretion: compensation was awarded by parity of reasoning with injunctive relief for breach of confidence.[59] In commercial settings, neither injunctive relief[60] nor equitable compensation[61] for breach of confidence requires proof of monetary loss: the jurisdiction is enlivened by proof that the obligation was breached, not that a breach caused a particular category or quantum of injury.[62] Moreover, parallel legal and equitable actions can (and do) coexist. The fact that they result in different quanta of compensation, apply different tests of causation, and are subject to different defences reflects the fact that the actions vindicate different values and principles.[63]

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51 Ibid [75]–[76] (Mitchell J), applying *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

52 *Smith Kline* (n 2) 83 (Gummow J), cited in *Wilson* (n 5) [69] (Mitchell J).

53 *Day v Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335, 346 (Leeming JA; Meagher and Emmett JJA agreeing); *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665, 713 (Campbell JA; Giles and Whealy JJA agreeing).

54 *Wilson* (n 5) [79]–[82] (Mitchell J).

55 Turner, 'Breach of Confidence' (n 9) 271.

56 *Paramasivam v Flynn* (1998) 90 FCR 489, 504 (Miles, Lehane and Weinberg JJ) ('*Paramasivam*'); Turner, 'Breach of Confidence' (n 9) 270–1.

57 *Digital Pulse* (n 45) 304 (Spiegelman CJ); *Gee v Pritchard* (1818) 2 Swans 403, 414; 36 ER 670, 674 (Lord Eldon LC).

58 Turner, 'Breach of Confidence' (n 9) 271–3.

59 *Giller (No 2)* (n 5) 100 (Neave JA, Maxwell P agreeing), citing, inter alia, *Stephens v Avery* (n 3); *Duchess of Argyll* (n 3).

60 *NRMA v Geeson* (2001) 40 ACSR 1, 10–11 [58] (Ipp AJA; Mason P and Giles JA agreeing); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 190 (McHugh JA); *Moorgate Tobacco* (n 2) 438 (Deane J).

61 *Smith Kline* (n 2) 83 (Gummow J); *Seager* (n 4) 932 (Lord Denning MR; Salmon and Winn LJJ agreeing); *Saltman Engineering* (n 4) 415 (Lord Greene MR; Somervell and Cohen LJJ agreeing).

62 *Smith Kline* (n 2) 112 (Gummow J); *Moorgate Tobacco* (n 2) 438 (Deane J).

63 Justice Leeming, 'Equitable Compensation for Breach of Confidence' [2017] (Spring) *Bar News* 39 (In reply to PG Turner Seminar Paper, NSW Bar Association and Ross Parsons Centre of Commercial, Corporate and Taxation Law, 30 March 2017) 44 ('A Response to Peter Turner'). See also *Gulati v Mirror Group Newspapers Ltd (No 2)* for a discussion of different approaches to quantifying damages for distress, including for invasion of privacy: [2017] QB 149, 167–74 (Arden LJ; Rafferty and Kitchin LJJ agreeing).

II The Obligation of Confidence

A *The Nature of the Obligation*

It is a 'broad principle of equity that he who has received information in confidence shall not take advantage of it'.[64] This principle, and the concomitant power to enjoin breaches of confidence, has been asserted since the 19th century[65] and is a settled feature of Australian law.[66] From early recognition as distinct from actions in property or contract,[67] through mid-20th century revivification[68] and the present day,[69] the primary remedy has been an injunction ensuring performance of the obligation. Monetary compensation has been primarily[70] (though not exclusively)[71] sought and awarded in commercial settings.

The orthodox formulation is that in *Coco v AN Clark (Engineers) Ltd*,[72] subject to modifications extending the doctrine to eavesdroppers and innocent finders of information.[73] The obligation arises where:

(i) specifically identifiable[74] information;

(ii) having the necessary quality of confidence;

(iii) is received in circumstances importing an obligation of confidence.

The requirement at (iii) is akin to (though distinct from) constructive notice: information is received in circumstances where a reasonable person on reasonable grounds would realise they were not free to deal with the information as their own.[75]

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64 *Seager* (n 4) 931 (Lord Denning MR). See also *Lord Ashburton v Pape* [1913] 2 Ch 469, 475 (Swinfen Eady LJ), quoted in *John Fairfax* (n 2) 50 (Mason J).

65 See, eg, *Morison v Moat* (n 3).

66 *Moorgate Tobacco* (n 2) 437–8 (Deane J); *John Fairfax (*n 2) 50–2 (Mason J).

67 *De Beer* (n 2) 146–7 (Owen CJ in Eq); *Yovatt v Winyard* (n 18) 426 (Lord Eldon LC).

68 *Coco v AN Clark* (n 3) 53 (Megarry J); *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293, 1317 (Roskill J); *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* [1960] RPC 128, 130 (affirming Roxburgh J at first instance).

69 *Wilson* (n 5) [90] (Mitchell J); *Smith Kline* (n 2) 121 (Gummow J).

70 *Smith Kline* (n 2) 83 (Gummow J); *Seager* (n 4) 932 (Lord Denning MR; Salmon and Winn LJJ agreeing); *Saltman Engineering* (n 4) 415 (Lord Greene MR; Somervell and Cohen LJJ agreeing).

71 *Wilson* (n 5) [90] (Mitchell J); *Giller* (n 5) 50 (Ashley JA) 100–2 (Neave JA; Maxwell P agreeing); *Campbell v MGN* (n 21) 493 (Lord Hope), 502 (Baroness Hale), 505 (Lord Carswell); *De Taranto* (n 48) [84] (Morland J).

72 *Coco v AN Clark* (n 3) 47 (Megarry J).

73 *Optus v Telstra* (n 18) 290 (Finn, Sundberg and Jacobson JJ).

74 See *O'Brien v Komesaroff* (1982) 150 CLR 310, 326–8 (Mason J Murphy, Aickin, Wilson and Brennan JJ agreeing) ('*Komesaroff*').

75 *Del Casale* (n 2) 171 (Campbell JA), quoting *Coco v AN Clark* (n 3) 47–8 (Megarry J) and citing its adoption in, inter alia, *John Fairfax* (n 2) 51 (Mason J); *Komesaroff* (n 74) 326 (Mason J; Murphy, Aickin, Wilson and Brennan JJ agreeing); *Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443 (Gummow J) ('*Corrs Pavey*'); *Smith Kline* (n 2) 86–7 (Gummow J).

Disagreement exists as to the jurisdictional basis of this action.[76] Canadian[77] and New Zealand[78] jurisprudence treat the obligation as 'sui generis',[79] and the arguably formulaic[80] nature of the test suggests it could be characterised as a tort (at least in conflict of laws contexts).[81] New Zealand treatment suggests the 'mingling or merging'[82] of legal and equitable remedies means any or all are available for breach of confidence.[83]

Australia recognises a purely equitable obligation of confidence founded in conscience arising in the circumstances of the case.[84] It is enforced by equity's intervention on the basis that the obligation fastens, on 'grounds of faith or confidence',[85] upon the conscience of the confidant.[86]

B *A Brief History*

Equity's origins lay in petitions to the monarch in the name of God and charity[87] to safeguard the immortal souls of their subjects by restraining legal, but sinful, exercise of rights at law.[88] Over the centuries, this ecclesiastic compulsion secularised into a 'technical morality';[89] a conscience *civilis et politica* dispensed by

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76 See discussion of the consequences of classification in Barbara McDonald and David Rolph, 'Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Bloomsbury, 2018) 239.

77 *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, 161–3 [26]–[28] (Binnie J; L'Hereux-Dubé, Gonthier, McLachlin, Iacobucci, Major and Bastarache JJ agreeing) ('*Cadbury Schweppes*'); *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 615 (Sopinka J dissenting), contra La Forest J at 672 ('*Lac Minerals*').

78 See, eg, *Splice Fruit Ltd v New Zealand Kiwifruit Board* [2016] NZHC 864, [120] (Health J) ('*Splice Fruit*').

79 See Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) ch 4 ('*Gurry*'); Jennifer E Stuckey, 'The Equitable Action for Breach of Confidence: Is Information Ever Property?' (1981) 9(2) *Sydney Law Review* 402, 403 ('Is Information Ever Property?').

80 See Laura Hoyano 'The Flight to Fiduciary Haven' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 169, 206–7.

81 Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41(2) *University of New South Wales Law Journal* 490.

82 *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301 (Cooke P; Richardson, Bisson and Hardie Boys JJ, Somers J agreeing) ('*Aquaculture*'). See also *Day v Mead* [1987] 2 NZLR 443, 451 (Cooke P).

83 *Otoy New Zealand Ltd v Kozlov* [2017] NZHC 2294, [52]–[55] (Muir J) ('*Kozlov*'); *Splice Fruit* (n 78) [120] (Health J); *Skids Programme Management Ltd v McNeill* [2013] 1 NZLR 1, 28 (Ellen France, Venning and Asher JJ) ('*Skids*').

84 *Smith Kline* (n 2) 83 (Gummow J); *Moorgate Tobacco* (n 2) 437–8 (Deane J); *De Beer* (n 2) 146 (Owen CJ in Eq).

85 *Morison v Moat* (n 3) (1851) 9 Hare 241, 241; 68 ER 492, 492 (Turner V-C).

86 *Abernethy* (n 3) 1317–8 (Lord Eldon LC); *Morison v Moat* (n 3) (1851) 9 Hare 241, 255; 68 ER 492, 498 (Turner V-C). See also *Tipping v Clarke* (1843) 2 Hare 383; 67 ER 157.

87 Daniell, *High Court of Chancery* (n 17) vol I, 266–7, 311.

88 *Earl of Oxford* (n 37) 487 (Lord Ellesmere LC). See also Potter, *Historical Introduction* (n 12) 558; Holdsworth, *History of English Law* (n 12) vol I, 408–9; PW Young, C Croft and M Smith, *On Equity* (Lawbook, 2009) 10 [1.20].

89 Joseph Story, *Commentaries on Equity Jurisprudence, As Administered in England and America*, Melvin M Bigelow (ed) (Little, Brown and Company, 13th ed, 1886) vol I, 310 [308] ('*Commentaries*'). See also George Spence *The Equitable Jurisdiction of the Court of Chancery* (V & R Steven and GS Norton, 1847) vol I, 411–4 ('*Equitable Jurisdiction*').

the Lord Chancellor in a scientific, systematic fashion[90] by way of in personam orders against delinquent parties to compel performance of personal obligations.[91] From this conscience emanates the normative rules of equity that are contextually recognised through enforcement of equitable obligations.

In 1969, Megarry J (as the later Vice-Chancellor then was) articulated the equitable jurisdiction to restrain breaches of confidence in this fashion: a specific manifestation of norms of equity expressed in a couplet posthumously attributed to Lord Chancellor Sir Thomas Moore: 'Three things are to be helpt in Conscience; Fraud, Accident and things of Confidence'.[92] Confidence (a form of fidelity) was said to be the 'cousin of trust';[93] enforcement of both was part of the Chancery's jurisdiction to act in personam to restrain conduct contrary to conscience.

To illustrate: a trust is a relationship between a trustee and beneficiary in respect of certain property[94] importing as incidents of that relationship certain duties cognisable in equity (for example, exercise of due care and skill in investment).[95] Those duties are cognisable in equity not because of any claim at law, but because the norms of behaviour mandated by equity's secular morality are enforced through imposition of standards of conduct.[96] The metes and bounds of these standards form the subject of disputes as to the scope and content of equitable obligations. The obligation of confidence, fastening on the conscience of the confidant,[97] is analogous: the relationship of confider and confidant imports incidental obligations as specific manifestations of the general norms of conduct demanded by equity's conscience *civilis et politica*.[98]

Early case law restrained misuse of confidential information on the basis of proprietary 'common-law copyright',[99] or by implied contractual obligations[100] (enforced in equity's auxiliary jurisdiction).[101] Property-based analysis is inconsistent with modern Australian law: information is not property[102] and (unlike property) a confidant need not account for or even remember information, merely

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90 *Earl of Feversham v Watson* (1680) Rep Temp Finch 445; 23 ER 242, extracted in DEC Yale (ed) *Lord Nottingham's Chancery Cases* (Selden Society, 1957) vol II, 739.

91 J Brunyate (ed) *Equity: A Course of Lectures by FW Maitland* (Cambridge University Press, 1969) 17–8.

92 H Rolle, *Rolle's Abridgement* (1668) vol I, 374; *Coco v AN Clark* (n 3) 46 (Megarry J).

93 *Coco v AN Clark* (n 3) 46 (Megarry J). See also Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010) 242 ('*Fiduciary Loyalty*').

94 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 1.

95 See *Speight v Gaunt* (1883) 22 Ch D 727.

96 See, eg, *Breen v Williams* (n 19) 107 (Gaudron and McHugh JJ).

97 *Moorgate Tobacco* (n 2) 438 (Deane J); *De Beer* (n 2) 146–7 (Owen CJ in Eq); *Morison v Moat* (n 3) (1851) 9 Hare 241, 255; 68 ER 498, 492 (Turner V-C).

98 See AH Chaytor and WJ Whittaker (eds), *The Forms of Action at Common Law: A Course of Lectures by FW Maitland* (Cambridge University Press, 1965) 2 (Lecture I).

99 *Statute of Anne 1710*, 8 Ann c 21 (also cited 8 Ann c 19); *Earl of Lytton v Devey* [1884] 54 LJ Ch 293 ('*Lytton*'). See also Aplin et al, *Gurry* (n 79); Stuckey, 'Is Information Ever Property?' (n 79).

100 *Tipping v Clarke* (n 86) 2 Hare 383, 392–3; 67 ER 157, 161 (Wigram V-C); Aplin et al, *Gurry* (n 79) 17–24.

101 *Optus v Telstra* (n 18) 290 (Finn, Sundberg and Jacobson JJ). See also *Morison v Moat* (n 3).

102 *Breen v Williams* (n 19) 90 (Dawson and Toohey JJ), 111 (Gaudron and McHugh JJ); *Smith Kline* (n 2) 112 (Gummow J). See also *Phipps v Boardman* [1967] 2 AC 46, 129 (Lord Upjohn) ('*Phipps v Boardman*').

not put it to improper use.[103] While contractual actions remain viable today, from as early as 1825 equitable jurisprudence held that unauthorised reproduction of information could be restrained independent from contract on the basis that the recipients were under a 'trust' not to misuse the information.[104] This was applied in *Prince Alfred*, where reproduction of a catalogue of Queen Victoria's etchings was restrained because the catalogue constituted information obtained by breach of 'trust'.[105] In *Morison v Moat*, Turner V-C concluded that, where a party obtains confidential information by improper means (such as facilitating another's breach of contract), equity 'fastens the obligation [of confidence] on the conscience of the party, and enforces it against him'.[106]

> By 1902, Ashburner stated as accepted doctrine that:
>
> > information obtained by reason of a confidence reposed or in the course of a confidential employment, cannot be made use of either then or at any subsequent time to the detriment of the person from whom or at whose expense it was obtained.[107]

Ashburner gave personal letters as an example: '[i]n the case of letters sent to A by B, A's duty is not to deal with those letters *so as to wound the feelings* of B.'[108] Proof of detriment was unnecessary. Three further contemporaneous cases affirmed that equity could restrain a breach of confidence independent from action in property or contract.[109] The purpose of this historical survey is to demonstrate that the only thing necessary for equitable intervention is the risk of affront to conscience. An inquiry into the nature or quantum of injury suffered by the confidant's breach is at most 'merely a test' of the duty imposed.[110]

In 1911, the *Copyright Act 1911* (UK)[111] provided a more convenient alternative to breach of confidence, including statutory damages[112] and a lower evidentiary bar.[113] While the statute expressly did not abrogate the equitable jurisdiction to restrain a breach of confidence,[114] a 1928 House of Lords case affirming that jurisdiction was seemingly viewed as unimportant and went unreported until 1963.[115] Nevertheless, after World War II the equitable action saw a resurgence and the first monetary awards. In 1948, Lord Greene was willing to award *Lord Cairns' Act* damages,[116] and in 1963, Lord Denning MR expressed in

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103 *Breen v Williams* (n 19) 111–12 (Gaudron and McHugh JJ).
104 *Abernethy* (n 3) 1317–8 (Lord Eldon LC).
105 *Prince Albert* (n 3) 1 Mac & G 25, 45; 41 ER 1171, 1179 (Lord Cottenham LC).
106 *Morison v Moat* (n 3) (1851) 9 Hare 241, 255; 68 ER 492, 498 (Turner V-C).
107 Walter Ashburner, *Principles of Equity* (Butterworths, 1902) 515 ('*Principles*'); repeated verbatim in the second edition: D Browne, *Ashburner's Principles of Equity* (Butterworths, 2nd ed, 1933) 374 ('*Principles 2nd ed*').
108 Ibid 515 (emphasis added).
109 *Lamb v Evans* [1893] 1 Ch 218, 230 (Bowen LJ), 235–6 (Kay LJ); *Robb v Green* [1895] 2 QB 315, 318 (Lord Escher MR; AL Smith LJ agreeing); *De Beer* (n 2) 145 (Owen CJ in Eq).
110 Ashburner, *Principles* (n 107) 515.
111 *Copyright Act 1911* (UK) 1 & 2 Geo 5, c 46 ('*Copyright Act*').
112 Ibid s 6(1).
113 *Tett Bros Ltd v Drake & Gorham Ltd* (1934) [1928–1935] MacG Cop Cas 492, 495 (Clauson J).
114 *Copyright Act* (n 111) s 31.
115 *O Mustad & Son v Dosen* (1928) [1964] 1 WLR 109, 110–1; [1963] 3 All ER 416, 418–419 (Lord Buckmaster; Viscount Dunedin, Lords Phillimore, Blanesburgh, and Warrington agreeing).
116 *Saltman Engineering* (n 4) 414–5 (Lord Greene MR; Somervell and Cohen LJJ agreeing).

obiter dicta the 'broad principle of equity' that one receiving information in confidence shall not take unfair advantage of it,[117] later awarding damages without clarity as to jurisdiction.[118] The doctrine was also applied in new contexts. For example, the reciprocal trust inherent in a matrimonial relationship[119] meant disclosure of marital confidences amounted to 'breach of faith' restrained in equity.[120] Similarly, where secrets were conveyed in a close friendship it would be 'unconscionable for a person who has received information on the basis that it is confidential to reveal that information'.[121]

C *The Modern Position*

The High Court of Australia adopted this articulation of breach of confidence when Deane J asserted in *Moorgate Tobacco* that equity's jurisdiction to enjoin a breach of confidence was enlivened where the circumstances of receipt of information affected the conscience of the confidant,[122] a position since followed.[123] Proof of economic injury is not a necessary precondition to the existence of the obligation or the availability of relief: the relevant inquiries are (1) does conscience mandate a certain standard of conduct; and (2) was that standard met.

Other jurisdictions have taken divergent paths. Canada views breach of confidence as a sui generis doctrine with hybrid roots in equity, property, and torts,[124] with a multiplicity of remedies.[125] New Zealand views 'damages' as available for breaches of confidence[126] on the basis that equity may draw upon the full arsenal of remedies in law,[127] including exemplary damages.[128]

English jurisprudence is complicated by the *Human Rights Act 1998* (UK), which requires[129] courts to give effect to the *European Convention on Human Rights* art 8 privacy right.[130] For example, the UK Supreme Court has enjoined

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117 *Seager* (n 4) 931 (Lord Denning MR; Salmon and Winn LJJ agreeing), citing inter alia *Saltman Engineering* (n 4).

118 See *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 ('*Seager (No 2)*').

119 *Duchess of Argyll* (n 3) 322 (Ungoed-Thomas J).

120 Ibid 321 (Ungoed-Thomas J), citing North J in *Pollard* (n 3) (in turn quoting *Tuck v Priester* (1887) 19 QBD 629, 638 (Lindley LJ)).

121 *Stephens v Avery* (n 3) 456 (Browne-Wilkinson V-C).

122 *Moorgate Tobacco* (n 2) 438 (Deane J), discussing *John Fairfax* (n 2) 51 (Mason J).

123 *Smith Kline* (n 2) 83, 86–7 (Gummow J); and as examples: *Wilson* (n 5); *Optus v Telstra* (n 18); *Giller (No 2)* (n 5); *Del Casale* (n 2); *Lenah* (n 2).

124 *Lac Minerals* (n 77) 615 (Sopinka J, dissenting), cited in *Cadbury Schweppes* (n 77) 158–63 [22]–[28] (Binnie J; L'Hereux-Dubé, Gonthier, McLachlin, Iacobucci, Major and Bastarache JJ agreeing).

125 *Cadbury Schweppes* (n 77) 162–3 [28] (Binnie J; L'Hereux-Dubé, Gonthier, McLachlin, Iacobucci, Major and Bastarache JJ agreeing).

126 *Aquaculture* (n 82) 301 (Cooke P; Richardson, Bisson and Hardie Boys JJ, Somers J agreeing).

127 *Splice Fruit* (n 78) [120] (Health J); *Skids* (n 83) 28 (Ellen France, Venning and Asher JJ); *Aquaculture* (n 82) 301 (Cooke P; Richardson, Bisson and Hardie Boys JJ, Somers J agreeing).

128 *Kozlov* (n 83) [52]–[55] (Muir J); *Skids* (n 83) 28 (Ellen France, Venning and Asher JJ).

129 *Human Rights Act* (n 21) s 6(1). A court is a public authority for the purposes of the *Human Rights Act*: see *Human Rights Act* (n 21) s 6(3); *R v Brown (Edward)* [2016] 1 WLR 1141, 1153 (Fulford LJ).

130 *ECHR* (n 21) art 8 para 1.

infringement of art 8 even where equity would not traditionally intervene,[131] extending the 'action for breach of confidence' to encompass intrusion into privacy.[132] The action has variously been labelled as a tort[133] or equitable doctrine expanded by statute:[134] either explanation renders monetary awards easier to justify.[135] Moreover, in 1981 the English *Lord Cairns' Act* was amended to remove the 'wrongful act' requirement,[136] such that 'damages' are arguably available for purely equitable actions (see discussion in Part IVB).

III Equitable Compensation for Equitable Fraud

A *Justifying Equitable Intervention*

This article argues that equity's jurisdiction to restrain breaches of confidence can be located in its jurisdiction to remedy equitable fraud. The term 'equitable fraud' requires clarification. It is trite to note 'equitable fraud' is a *nomen generalissimum*,[137] appearing in 'kaleidoscopic'[138] guises, with precise definition variously described as impossible,[139] undesirable,[140] or at best non-exhaustive description.[141] It is said the scope of equitable fraud is not closed:[142] fraud is the residuary legatee of that which offends conscience.[143]

While they have been said to be perspicacious,[144] such catechisms are apt to confuse.[145] For this article, it is sufficient to rely on a subset of this definition: the

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131 *PJS v News Group* (n 21) 1097 (Lord Mance JSC; Lord Neuberger PSC, Baroness Hale DPSC and Lord Reed JSC agreeing).

132 Ibid 1099 (Lord Mance JSC; Lord Neuberger PSC, Baroness Hale DPSC and Lord Reed JSC agreeing).

133 *McKennitt v Ash* (n 21) 80 (Buxton LJ; Latham and Longmore LJJ agreeing); *Campbell v MGN* (n 21) 465 (Lord Nicholls dissenting).

134 See *OBG v Allan; Douglas v Hello! Ltd (No 3)* [2008] AC 1.

135 *Mosley* (n 21) [184]–[186] (Eady J), citing *Aquaculture* (n 82) 301 (Cooke P).

136 *Senior Courts Act 1981* (UK) s 50.

137 *Torrance v Bolton* (1872) LR 8 Ch 118, 124 (James LJ). Trans: 'a most general name'.

138 *Stonemets v Head*, 248 Mo 243 (1913) 263 (Lamm J).

139 JD Heydon, MJ Leeming, and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 439–41 [12-035]–[12-040] ('*MGL's Equity*'); John Norton Pomeroy, *Equity Jurisprudence and Equitable Remedies* (Bancroft-Whitney, 3rd ed, 1905) vol II, 1553–4 ('*Equitable Remedies*'). See also *Reddaway v Banham*, where equitable fraud is described as 'infinite in variety': [1896] AC 199, 221 (Lord Macnaghten).

140 See, eg, Lawley v Hooper (1745) 3 Atk 278, 279; 26 ER 962, 963 (Lord Hardwicke LC); DM Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge University Press, 1890) 237 ('*Historical Sketch*').

141 See, eg, *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125, 155; 28 ER 82, 100 (Lord Hardwicke LC) ('*Chesterfield v Janssen*'); Young, Croft and Smith, *On Equity* (n 88) 285–6 [5.35]; Browne, *Principles 2nd Ed*, 288–90; Spence, *Equitable Jurisdiction* (n 89) vol I, 625–6. See also LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman, 1957) 167 ('*Fraud*').

142 *Re La Rosa; Ex parte Norgard v Rocom Pty Ltd* (1990) 21 FCR 207, 288 (French J); Young, Croft and Smith, *On Equity* (n 88) 284 [5.20]; Sheridan, *Fraud* (n 141) 167.

143 Heydon, Leeming and Turner, *MGL's Equity* (n 139) 440 [12-035]; Sheridan, *Fraud* (n 141) 210. See also *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 194 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ) ('*SZFDE*').

144 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 (Gummow J); Heydon, Leeming and Turner, *MGL's Equity* (n 139) 443 [12-050].

145 Cf discussion of 'moral obloquy' in *ASIC v Kobelt* (2019) 93 ALJR 743, 763–4 [91]–[92] (Gageler J).

concept of so-called 'constructive fraud',[146] encompassing conduct which is 'fraudulent' not because of conscious deceit,[147] but because it is inconsistent with the standard of conduct required by a normative rule enforced by equity's morality *civilis et politica*.[148] This fraud is 'constructive' because the standard of conduct (and jurisdiction to enforce it) arises from application of normative rules to the parties' circumstances regardless of subjective intent.[149] For example, breach of fiduciary duties entails 'the stench of dishonesty — if not of deceit, then of constructive fraud'.[150]

Analytically, this definition of equitable fraud is comprised of four concepts:

(1) 'conduct' (the action or inaction complained of);

(2) 'normative rule' (the rule/value/morality enforced by equity's conscience and therefore warranting judicial enforcement. The determination of what offends this conscience is a matter of jurisprudence and judicial policy[151]);

(3) 'standard' (the standard of conduct applicable in the specific circumstances as required for maintenance of the rule/value); and

(4) 'inconsistency' (the degree of departure by the conduct from this standard).

The equitable obligation of confidence can be rationalised through this framework. The 'normative rule' is the value of confidentiality to interpersonal relations, commerce, social order, and relationships of trust and fidelity recognised by the courts for centuries. The 'standard' is imposed if the factual circumstances of receipt of information are such as to attract enforcement of the normative rule,[152] that is, if a reasonable recipient of the information would realise on reasonable grounds that they were not free to deal with the information as their own,[153] or if a

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146 *Nocton* (n 15) 954 (Viscount Haldane LC). See also *Earl of Aylesford v Morris* (1873) 8 Ch App 484, 490–1 (Lord Selborne LC; Mellish LJ agreeing) ('*Aylesford*'); *Chesterfield v Janssen* (n 141) 100 (Lord Hardwicke LC).

147 *Aylesford* (n 146) 490–1 (Lord Selborne LC; Mellish LJ agreeing); George Goldsmith, *The Doctrine and Practice of Equity* (Butterworths, 6th ed, 1871) 178–9 ('*Practice of Equity*'); Spence, *Equitable Jurisdiction* (n 89) vol I, 626; Sheridan, *Fraud* (n 141) 25; Pomeroy, *Equitable Remedies* (n 139) 1662–3.

148 *Nocton* (n 15) 953 (Viscount Haldane LC), citing Lord Eldon in *Bulkley v Wilford* (1834) 2 Cl & F 102; 6 ER 1094 ('*Bulkley*'). See also Story, *Commentaries* (n 89) vol I, 265 [285]–[289]; Goldsmith, *Practice of Equity* (n 147) 178–9; Spence, *Equitable Jurisdiction* (n 89) vol I, 626.

149 *Nocton* (n 15) 955 (Viscount Haldane LC); *Bulkley* (n 148) 1121–2 (Lord Eldon). See, by way of example, equitable duties imposed on solicitors: *Nocton* (n 15) 956 (Viscount Haldane LC). See also *Digital Pulse* (n 45) 369, 407–9 (Heydon JA); *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592–3 (Rich, Dixon and Evatt JJ); *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, 471 (Lord Cranworth LC) ('*Aberdeen Railway*'); Conaglen, *Fiduciary Loyalty* (n 93) 61–76.

150 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 246 (Ipp J; Malcom CJ and Seaman J agreeing), quoting *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361 (SC), 362 (Southin J). See also *McKenzie v McDonald* (n 15) 146 (Dixon AJ); *Nocton* (n 15) 954 (Viscount Haldane LC); Conaglen, *Fiduciary Loyalty* (n 93) 107.

151 Heydon, Leeming and Turner, *MGL's Equity* (n 139) 440 [12-040].

152 *Moorgate Tobacco* (n 2) 438 (Deane J).

153 See the test in *Del Casale* (n 2) 171 (Campbell JA).

confidant is 'deemed to know' information is confidential[154] (where the information is obtained surreptitiously,[155] is obviously confidential on its face,[156] or the confident has actual[157] or constructive[158] knowledge that disclosure to them was in breach of confidence). The 'conduct' is the actual disclosure of information, and the inquiry as to whether this destroys its confidentiality. The 'inconsistency' is whether disclosure contravenes this standard — allowing, for example, the defence that there is 'no confidence in an iniquity'.[159]

Put alternatively: respect for confidentiality is a norm recognised in equity's conscience. Where one person receives confidential information from another, equity will examine the circumstances to determine whether (and in what contexts) subsequent disclosure would be repugnant to this norm. The scope of permitted disclosure defines the existence and content of the recipient's obligation of confidentiality, which is then enforced by courts of equity. Breach of this obligation, being conduct incompatible with standards of conduct mandated by equity's conscience *civilis et politica*, falls within the ambit of equitable fraud.

Other doctrines derived from equitable fraud may similarly be described as restraint of impropriety:[160] exercises of legal rights contrary to the standards of conduct imposed by application of norms recognised by equity's conscience to specific circumstances and relationships.[161] For example, solicitors' fiduciary obligations are imposed due to the normative value of their role as trusted advisors of selfless fidelity.[162] Presumptions of undue influence arise from the possibility of abuse of trust in relationships characterised by dominance of one person over another — for example, parents, religious superiors, physicians.[163] Unconscionable conduct is restrained where a particular vulnerability is recognised by equitable norms as deserving of protection such that it ought not to be exploited by another to their advantage.[164]

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154 *National Education Advancement Programs (NEAP) Pty Ltd v Ashton* (1995) 128 FLR 334, 344 (Young J); *Prince Albert v Strange* (1849) 2 De G & SM 652, 714; 64 ER 293, 320 (Knight-Bruce V-C).

155 *Franklin v Giddins* [1978] Qd R 72, 79–80 (Dunn J). See also *Lenah* (n 2) 224 (Gleeson CJ), 272 (Kirby J), 317 (Callinan J); Aplin et al, *Gurry* (n 79) 267–9.

156 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 (Lord Goff).

157 *Lenah* (n 2) 227 (Gleeson CJ), 320 (Callinan J).

158 Ibid; *Campbell v MGN* (n 21) 471–2 (Lord Hoffmann).

159 Allowing disclosure of crimes to authorities: *Corrs Pavey* (n 75) 453 (Gummow J).

160 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J) ('*CBA v Amadio*').

161 *Hart v O'Connor* [1985] AC 1000 (PC), 1024 (Lord Brightman) ('*Hart v O'Connor*'), citing *Aylesford* (n 146) 491 (Lord Selborne LC). See also Holdsworth, *History of English Law* (n 12) vol I, 454–8; GW Keeton, *An Introduction to Equity* (Pitman & Sons, 6th ed, 1965) 224; *Chesterfield v Janssen* (n 141) 86, 100 (Lord Hardwicke LC).

162 *Maguire v Makaronis* (1997) 188 CLR 449, 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 (Gibbs CJ) ('*Hospital Products*'); *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

163 *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 51 (Starke J), 67 (McTiernan J), 84–5 (Williams J); *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ), 126 (Starke J), 134 (Dixon J; Evatt J agreeing), 142–3 (McTiernan J); *Allcard v Skinner* (1887) 36 Ch D 145, 171 (Cotton LJ); 182–3 (Lindley LJ) ('*Allcard*').

164 *Louth v Diprose* (1992) 175 CLR 621, 629–30 (Brennan J), 637–8 (Deane J; Mason CJ, Dawson, Gaudron, and McHugh JJ agreeing), 650 (Toohey J); *CBA v Amadio* (n 160) 461 (Mason J), 474

Each of fiduciary duties,[165] undue influence,[166] and unconscionable conduct[167] has been expressly categorised as an example of equitable fraud. Each also shares the cardinal feature that breach of the obligation is censured due to its unconscionability:[168] the breach contravenes a standard of conduct derived by application of a normative rule to specific circumstances. The open texture of this concept (namely, application of the same norm to differing circumstances will result in variable standards of conduct) underlies equity's suppleness[169] in offering relief against 'every species of fraud'.[170]

The inclusion of the obligation of confidence alongside the aforementioned examples of equitable fraud is not wholly novel. The learned authors of *On Equity*[171] and *Principles of Australian Equity and Trusts*[172] both categorise breach of confidence within equitable fraud. The authors of *On Equity* cite Privy Council authority that described 'abuse of confidence' as equitable fraud, but that made no reference to confidentiality.[173] Meanwhile the authorities cited in *Principles of Australian Equity and Trusts* categorise breach of confidence as 'unconscientious conduct'.[174] Presciently, in 1871 one author asserted that the jurisdiction exercised to restrain breach of confidence in *Prince Albert v Strange*[175] was that of remedying equitable fraud.[176]

B *Equitable Compensation*

Australian law recognises the award of equitable compensation for breach of non-fiduciary equitable duties.[177] It is helpful to clarify the different monetary remedies

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(Deane J); *Blomley v Ryan* (1956) 99 CLR 362, 385 (McTiernan J), 405 (Fullagar J), 428 (Kitto J) ('*Blomley v Ryan*').

165 *McKenzie v McDonald* (n 15) 146 (Dixon AJ). See also Conaglen, *Fiduciary Loyalty* (n 93) 92–3, citing *SZFDE* (n 143) 194 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ).

166 *Allcard* (n 163) 183 (Lindley LJ).

167 *Blomley v Ryan* (n 164) 385 (McTiernan J).

168 *CBA v Amadio* (n 160) 461–2 (Mason J), quoting *Blomley v Ryan* (n 164) 405 (Fullagar J), 415 (Kitto J).

169 Heydon, Leeming and Turner, *MGL's Equity* (n 139) 446 [12-075].

170 *Chesterfield v Janssen* (n 141) 100 (Lord Hardwicke LC).

171 Young, Croft and Smith, *On Equity* (n 88) 285–6 [5.35].

172 Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2016) 314 [12.4] ('*Australian Equity and Trusts*').

173 *Hart v O'Connor* (n 161) 1024 (Lord Brightman; Lords Scarman and Bridg, and Sir Denys Buckley agreeing); citing R Megarry and PV Baker, *Snell's Principles of Equity* (Sweet & Maxwell, 27th ed, 1973) 545 et seq. Later editions of *Snell's* discussing *Hart v O'Connor* view 'abuse of confidence' as referring to undue influence and unconscionable conduct: John McGhee (ed), *Snell's Equity* (Sweet & Maxwell, 33rd ed, 2015) 200 [8-002].

174 Radan and Stewart, *Australian Equity and Trusts* (n 172) 184 [9.30]; *R v Department of Health; Ex parte Source Informatics Ltd* [2001] QB 424, 437 (Simon Brown LJ; Aldous and Schiemann LJJ agreeing); *Lenah* (n 2) 227 (Gleeson CJ); *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556, 1562 (Lord Neuberger PSC; Lords Clarke, Sumption, Reed, and Carnwath JJSC agreeing).

175 *Prince Albert* (n 3).

176 Goldsmith, *Practice of Equity* (n 147) 154–5, 178.

177 *Smith Kline* (n 2) 83 (Gummow J); *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 816 (McLelland J) ('*Hospital Products Trial*') (McLelland J's reasoning was immaterial to the appeal: *Hospital Products* (n 162)); *McKenzie v*

caught by the category of 'concealed multiple reference'[178] of equitable compensation. To illustrate, a beneficiary has three options for monetary remedy against a defaulting trustee.[179] First, should an account of administration[180] reveal a disbursement in breach of trust (reducing the value of the beneficiary's proprietary interest[181] in the trust corpus), the beneficiary may recover an equitable debt equivalent in value to that reduction from the trustee[182] by way of equitable compensation[183] (satisfaction of this debt is secured by a lien over any property acquired through the disbursement).[184] Second, rather than falsifying the disbursement, the beneficiary may affirm the disbursement and trace[185] into property (for example, money from sale) thereby acquired, such that it is held on trust for the beneficiary.[186] The beneficiary thereafter may require disgorgement of the property unto them (just as a fiduciary profiting in breach of fiduciary duty[187] or a recipient charged as constructive trustee under *Barnes v Addy*[188] must account to their beneficiaries). Third, where there is a reduction in trust corpus caused by a deficiency in the trustee's performance of this duty (regardless of whether new property was acquired), compensation can be sought on the basis of 'wilful default': the beneficiary 'surcharges' the account (calculating what the value *should* be), and brings a claim in debt for the difference in value.[189]

Each option entails two steps. First, equity recognises a debt presently due and payable to the beneficiary. In cases of wrongful disbursement or wilful default, this debt is ascertained by an account of administration revealing diminution in the trust corpus. In cases of tracing and disgorgement, it is the value of the thing called upon to be disgorged unto the beneficiary (whether by conveying property or

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McDonald (n 15) 146 (Dixon AJ); *Nocton* (n 15) 946 (Viscount Haldane LC). See also Heydon, Leeming and Turner, *MGL's Equity* (n 139) 210 [5-375].

178 Heydon, Leeming and Turner, *MGL's Equity* (n 139) 801 [23-015].

179 Setting aside actions in contract, tort, or any nascent doctrine of unjust enrichment.

180 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681, [167]–[172] (Lord Millet NPJ) ('*Libertarian Investments*').

181 The characterisation of this proprietary interest will vary, see *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 109–12 (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ), quoting (at 112) *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 497.

182 *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1, 64 (Edelman J) ('*Agricultural Land*'); *Ex parte Adamson* (n 15) 819 (James and Baggallay LJJ).

183 See, eg, *Libertarian Investments* (n 180); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 ('*Youyang*').

184 *Foskett v McKeown* [2001] 1 AC 102, 131 (Lord Millet) ('*Foskett*'). See also *Scott v Scott* (1963) 109 CLR 649, 662–4 (McTiernan, Taylor and Owen JJ).

185 Regardless of whether tracing in equity operates by following ownership of value or by whether it is unconscionable for the owner to assert rights against the beneficiary: cf *Federal Republic of Brazil v Durant International Corporation* [2016] AC 297 (PC) 310 (Lord Toulson JSC for the Board) and JC Campbell '*Republic of Brazil v Durant* and the Equities Justifying Tracing' (2016) 42(1) *Australian Bar Review* 32, 47–50.

186 *Foskett* (n 184) 131 (Lord Millet), citing *Re Hallett's Estate; Knatchbull v Hallet* (1880) 13 Ch D 696, 709 (Sir George Jessel MR).

187 *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 561–2 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) ('*Warman*'); *Phipps v Boardman* (n 102) 105–6 (Lord Hodson) 123, 129–30 (Lord Upjohn).

188 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 358–60 [249]–[254] (Finn, Stone and Perram JJ); *Phipps v Boardman* (n 102) 105 (Lord Hodson); *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2 (Lord Selborne LC).

189 *Libertarian Investments* (n 180) [170] (Lord Millet NPJ); *Agricultural Land* (n 182) 65 (Edelman J).

liquidating assets and crediting the beneficiary's bank account). The second step is the ordering of equitable compensation to satisfy this debt. In all cases, the quantum of debt is calculated at the date equitable compensation is ordered. This is why considerations of remoteness and foreseeability 'do not readily enter into the matter':[190] equity's analogues to remoteness and foreseeability go to establishing the existence and quantum of the debt, not the amount recoverable to discharge that debt.

Take a tangible example. Assume a trustee holds three widgets on trust, and sells one widget in breach of trust. The beneficiary procures an account, and elects to falsify the sale (rendering it a wrongful disbursement). Then the value of the sold widget (that is, the diminution in the trust corpus or the beneficiary's change in position) is ascertained. At this point the trustee, who is liable to make the beneficiary whole, owes the beneficiary a debt equivalent in value to the sold widget (calculated as at the date the debt is ascertained), and the trustee can be ordered to pay equitable compensation to discharge this debt.

Equitable compensation paid in satisfaction of an equitable debt is equity's wergeld. The obligor has done a thing contrary to their duties. As a result, they have deprived the beneficiary of the obligation of the benefit of performance of those duties. This has resulted in a loss to the beneficiary equivalent in value to the difference between their present position and the position they would have been in had the obligation been performed. This loss can be recovered by way of an action for an equitable debt. A mediæval family would plead an almost identical case before Anglo-Saxon kings to recover wergeld from a murderer.

This analysis is consistent with precedent. In 1878, James and Baggallay LJJ stated that:

> The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or *value of the thing*, of which the cheated party had been cheated.[191]

Similarly in *Nocton v Lord Ashburton*, Viscount Haldane LC noted that while (absent a contractual or tortious claim) a demurer for want of equity would lie to a bill seeking to enforce a claim to damages for negligence against a solicitor, the Chancery's exclusive jurisdiction retained the power to order the solicitor 'to make compensation if he had lost [property] by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him'.[192] Breach of this 'special duty'[193] arising from the solicitor–client relationship constituted equitable fraud, and could be remedied by the 'old bill in Chancery'[194] to recover monetary

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190 *Re Dawson* (n 15) 215 (Street J). See also Steven B Elliott 'Restitutionary Compensatory Damages for Breach of Fiduciary Duty?' (1998) 6 *Restitution Law Review* 135, 140–1.

191 *Ex parte Adamson* (n 15) 819 (James and Baggallay LJJ) (emphasis added). 'Restitution' here is used in the sense of 'restoring' to the beneficiary their entitlement of the actual money or thing (or value thereof), rather than in the modern academic use of contradistinction to loss-based compensation.

192 *Nocton* (n 15) 956–7.

193 Ibid 956 (Viscount Haldane LC).

194 Ibid 946 (Viscount Haldane LC).

compensation.[195] To wit, in cases of equitable fraud (including breach of trust)[196] the defrauded party could recover from the fraudulent party the monetary value of the thing of which they were defrauded.

Davidson's notable 1982 article re-explored this jurisdiction, emphasising that such compensation is non-technical restitution in the form of the value of the thing of which the cheated party was cheated, where restitution in specie was not appropriate.[197] This echoes the description of equitable compensation by Dixon AJ (as the later Chief Justice then was) in *McKenzie v McDonald*, where an agent in breach of fiduciary duty procured sale by his principal to himself of certain land at below-market value. Rescission was unavailable (the property was sold to a bona fide purchaser),[198] but the breach of fiduciary duty (expressly categorised as a species of equitable fraud)[199] was remediable by equitable compensation to indemnify the principal for loss incurred by the below-market sale price.[200] This was explicitly independent of any obligation to account for profits obtained by breach of fiduciary duty.[201] Similarly, in *Canson Enterprises Ltd v Boughton & Co* McLachlin J cited *Re Collie; Ex Parte Adamson* and *Nocton* as authority for the principle that equitable compensation is a remedy that acts by compensating the claimant for the value of the thing they were deprived of by the obligor's fraud.[202] This 'thing' may be property or some other interest,[203] though in the latter case quantification may be challenging.[204]

Two points can thus be made. First, conduct constituting equitable fraud (often,[205] but not exclusively,[206] breach of fiduciary obligations) gives rise to a claim in equity for monetary compensation equivalent in value to the thing of which the claimant was deprived by the fraud. Second, it is not a requirement of such claims that the thing deprived be economic in character. For example, equitable compensation is available on the same basis to victims of breaches of the rule in

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195 Ibid 946, 956–8 (Viscount Haldane LC).

196 *Ex parte Adamson* (n 15) 820 (James and Baggallay LJJ). See also *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

197 Ian E Davidson, 'The Equitable Remedy of Compensation' (1982) 13(3) *Melbourne University Law Review* 349, 372–6, 396 ('Equitable Compensation').

198 *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

199 Ibid 146 (Dixon AJ). See also Heydon, Leeming and Turner, *MGL's Equity* (n 139) 439 [12-030].

200 *McKenzie v McDonald* (n 15) 146–7 (Dixon AJ). See application in *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1, 20–1 (Besanko J; Finkelstein and Jacobson JJ agreeing); *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383, [171] (Sackville AJA; Meagher and Barrett JJA agreeing); *Breen v Williams* (n 19) 135–6 (Gummow J).

201 *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

202 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, 547–52 (McLachlin J) ('*Canson Enterprises*'), citing *Re Dawson* (n 15) 216 (Street J); *Nocton* (n 15) 946 (Viscount Haldane LC); *Ex parte Adamson* (n 15) 819 (James and Baggallay LJJ).

203 *Canson Enterprises* (n 202) 546–8 (McLachlin J), citing, inter alia, *Nocton* (n 15) and *Re Dawson* (n 15).

204 *Canson Enterprises* (n 202) 550–2 (McLachlin J).

205 *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 37 [88] (Gageler J) ('*Lifeplan Australia*'); *Youyang* (n 183) 500–1 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Nocton* (n 15) 946 (Viscount Haldane LC). See also *Warman* (n 187) 559–65 (Mason CJ, Brennan, Deane, Dawson, and Gaudron JJ) (though without description as "equitable fraud").

206 *Smith Kline* (n 2) 83 (Gummow J); *Hospital Products Trial* (n 177) 816 (McLelland J).

Barnes v Addy, fraud on a power, and misuse of confidential information:[207] the jurisdictional precondition in each instance is simply that the conduct constitutes equitable fraud and has deprived the victim of a 'thing'. There is no additional requirement that the 'thing' be economic in character.

C *Difficulties in Quantification*

There are two main objections to equitable compensation, as contemplated by this article, arising out of difficulties in quantifying emotional distress. The first is that equity does not deal with such matters, restricting itself to concerns of commerce. The second is that practical challenges in quantification render such awards inappropriate.

The first objection is unsupported by authority:[208] case law indicates that confidence in information without economic value can be protected by injunction, such as the contents of personal letters,[209] photographs,[210] and artistic etchings,[211] or information obtained through personal contexts such as marriage[212] or friendship.[213] For example, in 2000 it was held that for a nanny, bound by an obligation of confidence in both contract and equity,[214] disclosure of their employer's financial records or that their employer was having an affair may equally be breaches of that obligation.[215]

There is similarly no principled reason why monetary remedies ought to be restricted to economic interests. Cases such as *Paramasivam v Flynn* do not provide such a basis.[216] In that case, the Full Federal Court held that a claim for equitable compensation failed because 'the interests which the equitable doctrines invoked by the appellant, and related doctrines, have hitherto protected are economic interests'[217] — however, the doctrine invoked was not that of breach of confidence. Mr Paramasivam brought an action for breach of fiduciary duty founded on allegations of sexual assault under the defendant's guardianship (tortious claims being statute-barred). The guardian–ward relationship gives rise to incidental

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207 JD Heydon and MJ Leeming, *Cases and Materials On Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) 1274–5 [41.10], citing *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153, *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46. See also Davidson, 'Equitable Compensation' (n 197) 396.

208 See, eg, Megan Richardson, Marcia Neave, and Michael Rivette, 'Invasion of Privacy and Recovery for Distress' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Bloomsbury, 2018) 165, 173–5 ('Recovery for Distress').

209 *Lytton* (n 99).

210 *Pollard* (n 3).

211 *Prince Albert* (n 3).

212 *Duchess of Argyll* (n 3).

213 *Stephens v Avery* (n 3).

214 *Hitchcock v TCN Channel 9 Pty Ltd* [2000] NSWSC 198, [64]–[65] (Austin J) ('*Hitchcock*'), reasoning on this point affirmed on appeal: *Hitchcock v TCN Channel Nine Pty Ltd (No 2)* [2000] NSWCA 82 at [19] (Heydon JA; Spigelman CJ and Mason P agreeing).

215 *Hitchcock* [65] (Austin J). See also *Cleary v Kocatekin* [2012] NSWSC 364, [32]–[33] (Davies J); *Maurice Blackburn Cashman v Ackland* [2001] NSWSC 863, [6] (Hamilton J).

216 *Paramasivam* (n 56) 504–8 (Miles, Lehane and Weinberg JJ).

217 Ibid 504.

equitable duties,[218] and in Canada encompassed avoidance of conflict between self-gratification (sexual assault) and the ward's well-being.[219] The Full Federal Court agreed that a central aspect of a guardian's legal obligations was to refrain from inflicting injury on their ward,[220] however centrality did not make the obligation fiduciary.[221] Fiduciary duties to abhor conflict and abjure profit protect particular interests through preventing infidelity.[222] A doctor may be a fiduciary such that undisclosed kickbacks from certain prescriptions would breach their fiduciary obligations,[223] but it does not follow that negligence or battery ought to be labelled as breach of fiduciary duties merely to improve the remedies available.[224] Cases such as *Paramasivam* stand for the proposition that fiduciary claims cannot be used as a proxy for damages claims at law. They say nothing as to the availability of equitable compensation for breach of equitable obligations more generally.

The second objection (difficulties in quantification render such awards inappropriate) must fail, as factual uncertainty as to quantum of a debt does not negative its legal existence. Moreover, High Court of Australia authority in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* indicates that in cases of an accounts of profits there is no reason that the 'benefit' disgorged must answer the description of 'property' or be quantifiable with mathematical accuracy.[225] As long as 'a substantial restitution'[226] can be achieved, equity is still able to order monetary relief.[227] There is no basis to take a different approach for equitable compensation in discharge of an equitable debt.

Moreover, difficulty in calculation does not generally preclude relief in law.[228] Where the evidentiary basis for quantification is thin, but where it would be wrong to use that thinness as reason for valuing the loss at zero, ample authority

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218 Ibid. See also, in relation to fiduciary duties: *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136; *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417; and in relation to undue influence: *Re Pauling's Settlement Trusts* [1964] Ch 303; *Lamotte v Lamotte* (1942) 42 SR (NSW) 99.

219 *M(K) v M(H)* (1992) 96 DLR (4th) 289.

220 *Paramasivam* (n 56) 506 (Miles, Lehane and Weinberg JJ), quoting ibid 327 (La Forrest J; L'Heureaux-Dubé, Sopinka, Gonthier, McLachlin and Iacobucci JJ agreeing).

221 *Paramasivam* (n 56) 506 (Miles, Lehane and Weinberg JJ).

222 Ibid 504–5 (Miles, Lehane and Weinberg JJ). See also *Lifeplan Australia* (n 205) 34 [78] (Gageler J); *Aberdeen Railway* (n 149) 471 (Lord Cranworth LC); Conaglen, *Fiduciary Loyalty* (n 93) 61–76.

223 *Paramasivam* (n 56) 507 (Miles, Lehane and Weinberg JJ), quoting *Breen v Williams* (n 19) 93–4 (Dawson and Toohey JJ), 110 (Gaudron and McHugh JJ), 136 (Gummow J).

224 *Paramasivam* (n 56) 507 (Miles, Lehane and Weinberg JJ); *Breen v Williams* (n 19) 110 (Gaudron and McHugh JJ).

225 *Lifeplan Australia* (n 205) 32–3 [75] (Gageler J; Kiefel CJ, Keane and Edelman JJ agreeing on orders), 72 [197]–[198] (Nettle J); affirming the Full Federal Court decision in *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1, 25–6 (Allsop CJ, Middleton and Davies JJ).

226 *McKenzie v McDonald* (n 15) 146 (Dixon AJ).

227 *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149, 195 (Northop, Ryan and Merkel JJ); *McKenzie v McDonald* (n 15) 146 (Dixon AJ); *Robinson v Abbott* (n 15) 368 (Holroyd J). See also Kerly, *Historical Sketch* (n 140) 144–5.

228 Contract: *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 349 (Mason CJ, Dawson, Toohey, and Gaudron JJ); *Fink v Fink* (1946) 74 CLR 127, 143 (Dixon and McTiernan JJ); personal injury: *New South Wales v Moss* (2000) 54 NSWLR 536, 554–5 (Heydon JA); negligent misstatement: *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 242–3 (Brooking J; Tadgell and JD Phillips JJ agreeing); *Bowen v Blair* [1933] VLR 398, 401 (Mann ACJ, Gavan Duffy J and Wasley AJ agreeing).

supports the adoption of a figure that is little more than a guess.[229] The term 'guess' does not suggest abandonment of rationality, but rather reflects that no judge is omniscient.[230] As much certainty and particularity in calculation must be insisted on as, having regard to the circumstances, is reasonable: '[t]o insist upon more would be the vainest pedantry'.[231] Indeed, in the specific context of commercial obligations of confidence, where such quantification is 'impossible with mathematical accuracy',[232] equity will 'guesstimate'.[233]

This does not liberate a claimant from the need to particularise loss. While admittedly easier in commercial contexts,[234] the law has various tools of quantification, such as defamation damages 'as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the judgment of a reasonable man', with past decisions providing standards from which to determine each unique case.[235] Settled benchmarks for quantification may take time to develop, but that does not erase an existing jurisdiction.

IV *Lord Cairns' Act*

In *Giller (No 2)*, *Lord Cairns' Act* was relied upon to award damages for breach of confidence.[236] This is clearly correct, as the Victorian Lord Cairns' provisions provide: 'If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.'[237] Given that the Victorian Court of Appeal has jurisdiction to hear an application for an injunction to restrain breach of confidence, statute confers on it the jurisdiction to award damages in substitution, definitively settling the matter in Victoria (and in the Australian Capital Territory ('ACT') and Queensland, which have near identical language).[238] The same logic cannot be applied *mutatis mutandis* elsewhere in Australia, and therefore is not relied upon in this article.

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229 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 83 (Mason CJ and Dawson J), 102 (Brennan J), 118–9, 122 (Deane J), 138 (Toohey J); *Jones v Schiffmann* (1971) 124 CLR 303, 308 (Menzies J), 316 (Walsh J). See also *Ratcliffe v Evans* [1892] 2 QB 524, 532–3 (Bowen LJ; Lord Esher MR and Fry LJ agreeing) ('*Ratcliffe*'); *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, 375–6 (Campbell JA) ('*Zorom Enterprises*').

230 *Zorom Enterprises* (n 229) 376 (Campbell JA).

231 *Ratcliffe* (n 229) 533 (Bowen LJ; Lord Esher MR and Fry LJ agreeing).

232 *Robb v Green* [1895] 2 QB 1, 19 (Hawkins J), affd *Robb v Green* (n 109). See generally *McKenzie v McDonald* (n 15) 146 (Dixon AJ); *Robinson v Abbott* (n 15) 365–8 (Holroyd J).

233 *Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd* [2002] QSC 222, [17] (Philippides J), cited in, inter alia, *Caves Beachside Cuisine Pty Ltd v Boydah Pty Ltd* [2015] NSWSC 1273, [195] (Kunc J); *Wilson* (n 5) [69] (Mitchell J); *Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd* (2014) 108 IPR 52, 89 [294] (Vickery J).

234 See Davidson, 'Equitable Compensation' (n 197) 396.

235 *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 349 (Hayne J; Gleeson CJ and Gummow J agreeing as to damages at 341) ('*Rogers v Nationwide News*'), quoting *Prehn v Royal Bank of Liverpool* (1870) LR 5 Ex 92, 99–100 (Martin B) ('*Bank of Liverpool*'). See also, in the context of negligence resulting in personal injury, *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118, 124–5 (Barwick CJ, Kitto and Menzies JJ) ('*Planet Fisheries*').

236 *Giller (No 2)* (n 5) 30 (Ashley JA), 95 (Neave JA; Maxwell P agreeing).

237 *Supreme Court Act 1986* (Vic) (n 43) s 38.

238 *Supreme Court Act 1933* (ACT) (n 43) s 34; *Civil Proceedings Act 2011* (Qld) (n 43) s 8.

A *The Nature of* Lord Cairns' Act

The jurisdiction to award damages created by *Lord Cairns' Act* is statutory in basis, originating in the English *Chancery Amendment Act 1858*.[239] As this post-dates the *Australian Courts Act 1828* (Imp),[240] early colonies enacted their own *Lord Cairns' Act* provisions. These have (with the exception of Victoria, Queensland, and the ACT) remained relevantly unchanged,[241] and (using NSW as an example) provide:

> Where the Court has power:
>
> (a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or
>
> (b) to order the specific performance of any covenant, contract or agreement,
>
> the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.

As an obligation of confidence enforced in equity's exclusive jurisdiction is not an agreement or a contract, nor a promise under seal (that is, a covenant),[242] *Lord Cairns' Act* is of aid in NSW only if breach of confidence constitutes a 'wrongful act'. This article argues that it does not. As noted by Heydon, Leeming and Turner, the report of the Chancery Commissioners preceding *Lord Cairns' Act* indicates that the intent was to remedy the Chancery's inability to offer complete relief for claims at law.[243] By contrast, in *Talbot* the Victorian Court of Appeal upheld a judgment describing breach of a purely equitable obligation of confidence as a 'wrongful act',[244] despite the English authorities relied upon providing no reasoning beyond assertions in support.[245]

Complicating matters is the obiter dictum of the High Court of Australia in *Wentworth v Woollahra Municipal Council (No 2)*.[246] That case dealt with damages in lieu of an injunction to restrain breach of a statutory planning ordinance[247] — the Court's ratio decidendi being that *Lord Cairns' Act* does not apply to public wrongs.[248] In passing, the High Court stated that an incidental object of *Lord Cairns'*

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239 *Lord Cairns' Act* (n 40) s 2. For a history of the Act (and its amendments), see Katy Barnett and Michael Bryan 'Lord Cairns's Act: A Case Study in the Unintended Consequences of Legislation' (2015) 9(2) *Journal of Equity* 150 ('Lord Cairns' Act').

240 *Australian Courts Act 1828* (Imp), 9 Geo 4 c 83, s 24.

241 *Supreme Court Act 1970* (NSW) s 68; *Supreme Court Act 1935* (SA) s 30; *Supreme Court Act 1935* (WA) s 25(10).

242 *Randall v Lynch* (1810) 12 East 179, 182; 104 ER 71, 72 (Lord Ellenborough CJ).

243 Heydon, Leeming and Turner, *MGL's Equity* (n 139) 801 [23-020], citing Sir John Romilly (Attorney-General) et al, *The Third Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice, and System of Pleading in the Court of Chancery* (Eyre & Spottiswoode, 1852–1856) 1–4. See also Barnett and Bryan, 'Lord Cairns' Act' (n 239) 153–5.

244 *Talbot* (n 38) 241 (Harris J), 244 (Marks J).

245 *Seager* (n 4) 932 (Lord Denning MR); *Seager (No 2)* (n 118) 813 (Lord Denning MR); *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272, 213 (Lord Evershed MR); *Saltman Engineering* (n 4) 415 (Lord Greene MR).

246 *Wentworth v Woollahra (No 2)* (n 44).

247 Ibid 674 (Gibbs CJ, Mason, Murphy and Brennan JJ).

248 Ibid 682 (Gibbs CJ, Mason, Murphy and Brennan JJ). See also ICF Spry, *Spry's Equitable Remedies* (Lawbook, 9th ed, 2014) 662.

Act was to provide relief in respect of all purely equitable claims.[249] This obiter dictum is not supported by the four cases it purports to rely upon. Two of those cases (*Ferguson v Wilson*[250] and *Elmore v Pirrie*[251]) dealt with damages in lieu of specific performance of contractual promises, to prevent parties from being 'bandied about' between courts of law and equity. These are claims in equity's auxiliary, not exclusive, jurisdiction.

Justice Cross in *Landau v Curton*[252] noted that an incidental result of *Lord Cairns' Act* was to enable awards of damages in a purely equitable claim made under *Tulk v Moxhay*.[253] However, such a claim is to enforce a restrictive covenant against a successor in title, on the basis that 'nothing would be more inequitable' than for the original covenantor to defeat their covenant by sale to a knowing, subsequent purchaser unencumbered by the covenant.[254] *Lord Cairns' Act* would apply as such a claim is to enjoin a breach of covenant, which is expressly contemplated by the statute. In the fourth case, Viscount Finlay LJ held that Lord Cairns' damages were available in lieu of an injunction to restrain a wrongful act but, with reference to authority, explicitly defined 'wrongful act' as a tort.[255]

While *Lord Cairns' Act* expanded the courts' jurisdiction to award damages in equitable claims where traditionally monetary relief was only available at law, it cannot be read to transmogrify all conduct censured by equity into 'wrongful acts'.[256] However, were the proposition in *Talbot* to be accepted, damages under *Lord Cairns' Act* are available for breach of confidence across Australia.

B *Amendment Jurisdictions*

In 1986, Victoria removed the 'wrongful act' requirement from the *Lord Cairns' Act* jurisdiction,[257] with the ACT (2010)[258] and Queensland (2011)[259] following suit. This means *Lord Cairns' Act* is a one-stop-shop jurisdiction for award of money damages where the court has jurisdiction to hear an application for an injunction.[260] Damages in lieu of an injunction are ordinarily calculated on a '*Wrotham Park*'[261] basis: what reasonable people in the position of the parties would negotiate for

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249 *Wentworth v Woollahra (No 2)* (n 44) 676 (Gibbs CJ, Mason, Murphy and Brennan JJ). Cf *Grant v Dawkins* [1973] 1 WLR 1406, 1410 (Goff J); *Wroth v Tyler* [1973] 2 WLR 405, 429 (Megarry J).

250 *Ferguson v Wilson* [1866] LR 2 Ch App 77, 88 (Turner LJ) 91–2 (Cairns LJ).

251 *Elmore v Pirrie* (1887) 57 LT (NS) 333, 335 (Kay J).

252 *Landau v Curton* [1962] Estates Gazette 369, 374–5 (Cross J).

253 *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143.

254 Ibid 2 Ph 774, 777–8; 41 ER 1143, 1144 (Lord Cottenham LC).

255 *Leeds Industrial Co-Operative Society v Slack* [1924] AC 851, 858–9.

256 Barnett and Bryan, 'Lord Cairns' Act' (n 239) 165.

257 *Supreme Court Act 1986* (Vic) (n 43) s 38.

258 *Supreme Court Act 1933* (ACT) (n 43) s 34, amended by *Justice and Community Safety Legislation Amendment Act 2010* (ACT) sch 1 pt 1.7 [1.31].

259 *Civil Proceedings Act 2011* (Qld) (n 43) s 8.

260 *Giller (No 2)* (n 5) 30 (Ashley JA), 95 (Neave JA; Maxwell P agreeing). See also Barnett and Bryan, 'Lord Cairns' Act' (n 239) 161.

261 *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [22]–[25] (Neuberger LJ; Scott Baker and Auld LJJ agreeing). See also *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 ('*Wrotham Park*').

release of the right being breached, including for breach of confidence.[262] In commercial breaches of confidence, *actual* refusal of the parties to negotiate is ignored on the ground that they could be assumed to act reasonably.[263] While such analysis is more difficult in interpersonal settings, difficulty in quantification does not erase the statutory jurisdiction created by *Lord Cairns' Act*.

This jurisdiction (and the mechanics of calculating damages thereunder) was recently examined in *One Step (Support) Ltd v Morris-Garner*,[264] wherein the UK Supreme Court emphasised that *Wrotham Park* or 'negotiating damages' are awarded 'to provide the claimant with an appropriate monetary substitute for an injunction in the circumstances of the particular case'.[265] Where a claimant's interest in performance of an obligation is *non-economic*, there is no reason they should be restricted to compensation for economic loss.[266]

C *An Inherent '*Lord Cairns' Act*' Jurisdiction?*

In *Wilson*, it was suggested that the 'cardinal principle of equity that the remedy must be fashioned' to meet the necessities of the case enables the award of 'equitable compensation' where required to do complete justice between the parties.[267] Such an approach echoes the New Zealand and Canadian approaches discussed above, and reflects pre-*Judicature Act* awards of 'damages' in equity,[268] such as the so-called action of 'equitable assumpsit'[269] to recover contractual debts too complex to quantify at law without ordering of an account.[270] On this view, there exists an equitable jurisdiction to award 'damages' independent of *Lord Cairns' Act* governed

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262 *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch),) [383]–[385] (Arnold J) ('*Force India F1*'); *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370, 2385–8 (Lord Walker JSC for the Board). See also *Attorney-General v Blake* [2001] 1 AC 268, 282–3, 286 (Lord Nicholls); RG Toulson and CM Phipps, *Confidentiality* (Sweet & Maxwell, 3rd ed, 2012) 231–2 [9-043]–[9-040].

263 *Force India F1* (n 262) [386] (Arnold J); *Wrotham Park* (n 261) 815 (Brightman J).

264 *One Step (Support) Ltd v Morris-Garner* [2018] 2 WLR 1353.

265 Ibid 1374 (Lord Reed JSC; Baroness Hale PSC, Lord Wilson and Lord Carnwath JJSC agreeing).

266 Ibid 1367–8, 1378, 1383 (Lord Reed JSC; Baroness Hale PSC, Lord Wilson and Lord Carnwath JJSC agreeing).

267 *Wilson* (n 5) [82] (Mitchell J), quoting *Warman* (n 187) 559 (Mason CJ, Brennan, Deane, Dawson, and Gaudron JJ); M Bryan, 'Injunctions and Damages: Taking *Shelfer* off the Shelf' (2016) 28(Special Issue) *Singapore Academy of Law Journal* 921, 925–6 ('*Shelfer* off the Shelf'), citing *Nocton* (n 15). See also discussion in Barnett and Bryan, 'Lord Cairns' Act' (n 239) 162.

268 See Young, Croft and Smith, *On Equity* (n 88) 1106–8 [16.1060]; Peter M McDermott, *Equitable Damages* (Butterworths, 1994) 8; Daniell, *High Court of Chancery* (n 17) vol II, 1238–9. See also *Untrue Suggestions in Chancery Act 1393*, 17 Rich 2 c 6.

269 CC Langdell, *A Brief Survey of Equity Jurisdiction* (Cambridge University Press, 2nd ed, 1908) 99–102.

270 See, eg, *Taff Vale Railway Co v Nixon* (1847) 1 HLC 111, 121–2; 9 ER 695, 699 (Lord Cottenham LC); *Kennington v Houghton* (1843) 2 Y & CCC 620, 628; 63 ER 278, 281 (Knight Bruce V-C).

by principles of general law,[271] eliminating the need to rely on a beneficent[272] construction of *Lord Cairns' Act*, or this article's concept of equitable wergeld.[273]

This line of argument is unsatisfying for three reasons. First, it elides the distinction between modern descendants of wergeld (that is, monetary awards in substitution for performance of an obligation) and descendants of botgeld (that is, monetary awards to compensate for injury incurred). Both equitable compensation and *Lord Cairns' Act* damages are awarded in substitution for performance: equitable damages providing compensation for injury are a wholly different concept. Second, there is some support for the view that justifications of monetary awards by reference to 'inherent jurisdiction to do complete justice'[274] is the result of a failure to appreciate that equitable *compensation* is the appropriate remedy.[275] On that view, the inherent 'damages' jurisdiction is just equitable compensation by another name. Third, although pragmatic, such reasoning is an argument of symmetry and form: that merely because an injunction could have *prevented* the harm, compensation should be able to *repair* the harm.[276] Such reasoning lacks firm doctrinal roots: for better or worse, the elegance of symmetry is not itself a source of precedent.

V Questions of Coherence

A *Trespass upon Torts*

The coherence of this article's position with the remainder of the law could be called into question, for example, by suggestions that an 'equitable law of torts'[277] would be inconsistent with (or superfluous to) existing law,[278] notably tort law's supposedly settled face against recovery of damages for purely mental harm without proof of psychiatric injury. However, this is not true of all torts: damages for unquantifiable anxiety and distress are recoverable in actions for defamation,[279] conversion,[280] or deceit (for which aggravated damages are also available).[281] Moreover, alleviating policy concerns regarding liability of negligence confidants, there is a strong argument that existing civil liability regimes may be applicable. For example, in

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271 Bryan, '*Shelfer* off the Shelf' (n 267) 925.

272 *Attorney-General v Observer Ltd* [1990] 1 AC 109, 286 (Lord Goff); Heydon, Leeming and Turner, *MGL's Equity* (n 139) 1185 [42-195].

273 At least one article suggests, without elaboration, that the inherent jurisdiction referred to in *Wilson* (n 5) and *Giller (No 2)* (n 5) was the jurisdiction to award equitable compensation in *Nocton* (n 15), consistent with this article: Richardson, Neave, and Rivette, 'Recovery for Distress' (n 208) 172.

274 Bryan, '*Shelfer* off the Shelf' (n 267) 926.

275 Ibid 925. See also Heydon, Leeming and Turner, *MGL's Equity* (n 139) 1185–6 [42-195].

276 Turner, 'Privacy Remedies' (n 11) 273.

277 Ibid.

278 Turner, 'Breach of Confidence' (n 9) 271–3. See also *Civil Liability Act 2002* (NSW) (n 32) s 31; *Magill* (n 32) 589 (Gummow, Kirby and Crennan JJ); *Tame v NSW* (n 32) 373–5 (Gummow and Kirby JJ).

279 *Rogers v Nationwide News* (n 235) 349 (Hayne J; Gleeson CJ and Gummow J agreeing as to damages at 341), quoting *Bank of Liverpool* (n 235) 99–100 (Martin B). See also *Planet Fisheries* (n 235) 124–5 (Barwick CJ, Kitto and Menzies JJ).

280 *Graham v Voigt* (n 30) 155–6 (Kelly J); *Jamieson's Tow* (n 30) 150 (Quilliam J).

281 See, eg, *Archer v Brown* [1985] QB 401, 424 (Peter Pain J), citing *Rookes v Barnard* [1964] AC 1129, 1226–30 (Lord Devlin).

NSW, statute limits recovery of 'any form of monetary compensation'[282] in actions for mental harm resulting from negligence 'regardless of whether the claim is brought in tort, in contract, under statute *or otherwise*'.[283] Given that 'negligence' is defined as a 'failure to exercise reasonable care and skill',[284] as Leeming J has noted extra-curially, there is no obvious reason why this would not apply to a purely equitable action for breach of confidence.[285]

A related policy concern is that interpersonal relations should not be regulated by the law. For example, in *Magill v Magill*, the High Court of Australia declined to recognise tortious liability in an intramarital context.[286] There, Gleeson CJ noted that the law of torts is underlain by a conception that, in certain circumstances, it is reasonable to expect people to act under threat of legal censure. In circumstances governed by subjective ethical standards and principles (such as marital relations), imposing general standards of responsibility and conduct may be inappropriate.[287] However, the equitable obligation of confidence is not a generalised standard of conduct: like all equitable interpositions,[288] the standard required by the obligation is moulded to the context-specific circumstances in which the obligation applies.[289]

A final argument is that this form of equitable compensation is precluded by equity's refusal to award punitive damages,[290] as equity and penalty are said to be strangers.[291] However, equitable compensation for breach of confidence is a restitutionary satisfaction of an equitable debt. It is not penal in character. To the extent such compensation is analogous to 'aggravated damages' for distress, aggravated damages are *also* compensatory, not punitive.[292]

B *Conclusion*

This article has argued that the jurisdictional basis of equity's restraint of breach of confidence in all cases is equity's jurisdiction to remedy equitable fraud. Accordingly, the character of the information (and whether hurt suffered by its disclosure is pecuniary) is irrelevant to the question of whether equitable compensation is available. Practical difficulties in quantification are no jurisdictional bar.

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282 *Civil Liability Act 2002* (NSW) (n 32) s 3 (definition of 'damages').
283 Ibid s 5A(1) (loss generally); s 28(1) (mental harm) (emphasis added).
284 Ibid s 5 (definition of 'negligence').
285 Leeming, 'A Response to Peter Turner' (n 63) 43–4.
286 *Magill* (n 32) 594–5 (Gummow, Kirby and Crennan JJ).
287 Ibid 570–1 (Gleeson CJ).
288 *Hart v O'Connor* (n 161) 1024 (Lord Brightman), citing *Aylesford* (n 146) 491 (Lord Selborne LC); *CBA v Amadio* (n 160) 461–2 (Mason J), quoting *Blomley v Ryan* (n 164) 405 (Fullagar J), 415 (Kitto J).
289 *Moorgate Tobacco* (n 2) 438 (Deane J), citing *John Fairfax* (n 2); *Duchess of Argyll* (n 3); *Saltman Engineering* (n 4); *Morison v Moat* (n 3) (1851) 9 Hare 241, 255; 68 ER 492, 498 (Turner V-C).
290 See, eg, Turner, 'Breach of Confidence' (n 9) 270–1.
291 See, eg, *Digital Pulse* (n 45) 347–8 (Heydon JA).
292 *Lamb v Cotogno* (1987) 164 CLR 1, 8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 130 (Taylor J), 145 (Menzies J), 149 (Windeyer J).

Beyond mere academic interest, such a remedy partially fills the lacuna left in Australian law by the absence of any tortious remedy for invasion of privacy. Apart from providing a clear framework to litigants, it is repugnant to good conscience that hurt suffered by those whose trust and confidence is betrayed go without a remedy merely because methods of publishing confidential information have become too fast to intercept. As has been judicially noted, such an outcome would leave the obligation of confidence effectively unenforceable in many instances.[293] It is the view of this author that the equitable jurisdiction holds in its existing arsenal all the tools necessary to avoid such a tragedy.

[293] *Wilson* (n 5) [82] (Mitchell J).