

The Comparative Distinctiveness of Equity

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Comparative law is difficult and controversial. One reason for the difficulty is the complexity of legal systems and the need for more than a merely superficial knowledge of the foreign legal system in order to profit from recourse to it. One way in which it is controversial is that it has been suggested that the use of comparative law conceals the reasons for decisions reached on other grounds. This paper maintains that equity is distinctive, and that one of the ways in which equity is different from other bodies of law is that there is greater scope for the development of equitable principle by reference to foreign jurisdictions. That difference is a product of equity's distinctive history, underlying themes and approach to law-making. Those matters are illustrated by a series of recent examples drawn from appellate courts throughout the Commonwealth.

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I. Introduction

This paper is about the ways in which courts within the Commonwealth look to each others' decisions for guidance. It considers whether that occurs in ways that turn on the nature of the litigation, and, especially, when courts are dealing with equitable principles. Its principal contention is that courts use comparative law in a distinctive way when developing and applying principles of equity. It seeks to give a series of examples and thereby to identify plausible reasons for that contention.

II. The Problem of Generality

One problem with many statements as to the use of comparative law is that they are too general. It is worth reiterating Professor Nelson's observation that "[c]ommon-law decisionmaking is extraordinarily complex, and it may not lend itself to a unitary description".¹ The ways in which foreign law is used by courts in the common law tradition are quite nuanced. Much may be lost in generalities.

It is one thing for a court to have regard to foreign law when an issue of general policy is to be determined, particularly when the court

1. Caleb Nelson, "The Legitimacy of (Some) Federal Common Law" (2015) 101:1 Virginia Law Review 1 at 8.

is an ultimate appellate court.² For example, should advocates have an absolute immunity for negligence? Should a plaintiff harmed by exposure to asbestos fail because he or she cannot prove precisely when the exposure occurred? Should a legal system recognise a claim for wrongful birth? Examples could readily be multiplied. Courts faced with such questions will regularly seek to gain assistance from the experience in a comparable legal system. This is a perfectly legitimate (and recurrent) approach to assist in the resolution of common legal issues. Sir Basil Markesinis and Dr. Fedtke have observed that “[t]he similarity of the problem, coupled with the growing similarity in socio-economic environments (at any rate among developed nations), may call for a similarity in legal outcome notwithstanding undoubted differences in language and legal techniques”.³ Many or most readers will be familiar with the Australian, Canadian, New Zealand and United Kingdom solutions to the particular questions — all tortious — mentioned above.⁴

The fact that courts — especially ultimate appellate courts — employ a comparative approach on such issues is unquestionably true, but it is *not* the sort of use of foreign decisions addressed in this paper. Indeed,

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2. See *e.g. Jones v Kaney*, [2011] UKSC 13 (“[i]t is highly desirable that at this appellate level, in cases where issues of legal policy are concerned, the Court should be informed about the position in other common law countries” at para 76) and, conversely, as a strand of the reasoning rejecting a submission, in *Commissioner of Customs and Excise v Barclays Bank*, [2006] UKHL 28 (“it is a notable feature of this appeal that the Commissioners adduce no comparative jurisprudence to support their argument” at para 20).
 3. Sir Basil Markesinis & Jörg Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (Abingdon, UK: Routledge, 2006) at 125.
 4. In relation to advocates’ immunity from suit see *e.g. D’Orta-Ekenaike v Victoria Legal Aid*, [2005] HCA 12 at para 61 and see now *Attwells v Jackson Lalic Lawyers Pty Ltd*, [2016] HCA 16 (immunity reformulated, by reference to principles of finality); *Lai v Chamberlains*, [2006] NZSC 70; *Arthur J S Hall v Simons*, [2002] 1 AC 615 (HL) (immunity abrogated). In Canada, barristers’ immunity from suit was never part of the common law: see *Demarco v Ungaro* (1979), 21 OR (2d) 673 (Ont Ct J (Gen Div)); *Henderson v Hagblom*, 2003 SKCA 40, leave to appeal to SCC refused [2004] 1 SCR ix.

it is open to criticisms which are not without force. Writing of the use of comparative law (ancient and modern) in the *Fairchild v Glenhaven*⁵ appeal — ironically, itself much lauded as exemplary⁶ — Lord Hoffmann observed: “[t]he foreign authorities were cited in the way courts always use comparative law; as a rhetorical flourish, to lend support to a conclusion reached on independent grounds”.⁷ In a similar vein, Justice Scalia said that to “invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry”.⁸ There is a measure of rhetorical overstatement in both those passages. However, it is tolerably clear that ultimate appellate courts are not likely to determine issues of general policy by reason of foreign decisions. Local conditions are apt to prevail. The divergent solutions to the examples given above well illustrate this.⁹

Now consider the other extreme. It is perfectly clear that comparative law has a large and often determinative role to play in cases turning on international conventions.¹⁰ A notable example is aviation litigation

5. [2002] UKHL 22.

6. See *e.g.* Markesinis & Fedtke, *supra* note 3 (“the House of Lords decision in *Fairchild v Glenhaven*, [2002] 1 AC 32 (HL) comes closer to the ideal we are advocating” at 48).

7. Lord Hoffmann, “*Fairchild* and After” in Andrew Burrows, David Johnston & Reinhard Zimmermann, eds, *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford: Oxford University Press, 2013) 63 (“the reasoning in *Fairchild* was simply that we thought it very unfair that an employer should be able to escape any liability for mesothelioma suffered by a worker whom he had negligently exposed to asbestos simply because the worker had also been (negligently or otherwise) exposed to asbestos by someone else” at 64). The antipathy between the two on this topic is evident from Lord Rodger’s dissent in *Barker v Corus (UK)*, [2006] UKHL 20 and, especially, what is disclosed in Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013) at 189-90.

8. Dissenting, in *Roper v Simmons* (2005), 125 S Ct 1183 (US) at 1228.

9. *Supra* note 4.

10. See Jonathan Mance, “Foreign and Comparative Law in the Courts” (2001) 36:3 *Texas International Law Journal* 415 at 420-24 (this has long been the case, as his Lordship has observed).

involving the Warsaw Convention¹¹ and its successors, whose self-evident purpose was to harmonise the laws of all contracting States on the liability of carriers for the commercial carriage of passengers and cargo by air. It is trite that it is desirable that decisions in different jurisdictions should, so far as possible, be kept in line with each other in such cases; otherwise the purpose for entering into and implementing the treaty would be frustrated.¹² This sort of use of foreign law, where a uniform legislative text is imposed from without, is once again, *not* what this paper addresses.

Between those two extremes, there lies an intermediate area, to which this paper is directed. The essential idea is found in the following passage from Lord Wilberforce's speech in *Buttes Gas & Oil Co v Hammer (Nos 2 & 3)*:¹³

[w]hen the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours, but that to which all the parties before us belong, spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it.¹⁴

This paper focuses upon what his Lordship said of legal approaches being akin, of the closely interwoven fabric of legal doctrine, and of

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11. *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 261 UNTS 423.
 12. See e.g. *Stott v Thomas Cook Tour Operators Ltd*, [2014] UKSC 15 at paras 34-44; *Povey v Qantas Airways Ltd*, [2005] HCA 33 (“[i]mportantly, international treaties should be interpreted uniformly by contracting states” at para 25); *Emery Air Freight Corporation v Nerine Nurseries Ltd*, [1997] 3 NZLR 723 (CA); *Thibodeau v Air Canada*, 2014 SCC 67 at paras 52-57 (“[t]o sum up, the text and purpose of the *Montreal Convention* and a strong current of international jurisprudence show that actions for damages in relation to matters falling within the scope of the *Montreal Convention* may only be pursued if they are the types of actions specifically permitted under its provisions. As the Supreme Court of the United Kingdom put it very recently, ‘[t]he Convention is intended to deal comprehensively with the carrier’s liability for whatever may physically happen to passengers between embarkation and disembarkation’: *Stott*, at para 61” at para 57).
 13. [1982] AC 888 (HL) [*Buttes Gas & Oil Co*].
 14. *Ibid* at 936-37.

the language and reasoning being convincing.¹⁵ Equity decisions in the Commonwealth are capable of answering that description.

III. The Use of Foreign Equity Decisions

The use of foreign law, and in particular foreign decisions when developing and applying equitable principle, is illustrated by two recent judgments of the UK Supreme Court, both written by Lord Neuberger for a unanimous Court. Both decisions expressly employed a comparative approach. In 2014, the Court noted how other courts in other leading common law jurisdictions had departed from the United Kingdom in relation to whether a bribe received by a fiduciary was held on trust, overturned the English decision, *Sinclair Investments Ltd v Versailles Trade Finance Ltd*,¹⁶ and instead chose to follow principles adopted elsewhere in the Commonwealth.¹⁷ Lord Neuberger stated:

[a]s overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.¹⁸

In 2015, in an appeal in proceedings alleging passing-off, having considered Australian, Canadian, Irish and New Zealand authorities,¹⁹ his Lordship reiterated the point:

it is both important and helpful to consider how the law has developed in other common law jurisdictions – important because it is desirable that the common law jurisdictions have a consistent approach, and helpful because every national common law judiciary can benefit from the experiences and thoughts of other common law judges.²⁰

15. *Ibid.*

16. [2011] EWCA Civ 347.

17. *FHR European Ventures LLP v Cedar Capital Partners LLC*, [2014] UKSC 45 at para 45 [*FHR*]. See also the consideration of Australian, New Zealand and North American decisions in *Lawrence v Fen Tigers Ltd*, [2014] UKSC 13 at paras 241-43.

18. *FHR, ibid.*

19. *Starbucks (HK) Ltd v British Sky Broadcasting Group*, [2015] UKSC 31 at paras 38-43.

20. *Ibid* at para 50.

Those statements were not, as I read them, merely supportive of conclusions already reached.²¹ Indeed, a remarkable aspect of the first appeal is that the decision overturned a previous decision written by its author.²² Moreover, in the second appeal, the Supreme Court departed from Australian and Canadian authorities.

Both appeals concerned questions of equitable principle. Here there is greater scope for harmonisation than in most mainstream areas of judge-made law.²³ There are at least three reasons why. First, equity enjoys a longer readily comprehensible history than most areas of private law. There is simply more material to work with articulating a coherent legal tradition. Second, parts of equity are either unaffected by statute, or have been influenced by statute so long ago that the original statutory text has become unimportant, such that there is greater scope for, and ease of, the harmonisation process.²⁴ Third, the underlying principles and maxims of equity tend to enhance a mode of reasoning apt to support a comparative approach. A foreign judgment is apt to be “spelt out in convincing language and reasoning” (to use Lord Wilberforce’s language) when its reasoning involves familiar themes and motivating principles common to equitable jurisprudence.

For the purposes of this paper, by “equity” and “equitable principle” I mean merely the doctrines and remedies deriving from Chancery. Professor (now Lord Justice) Beatson said, of “the unenacted law made up of common law and equity” that “[e]ach comes from a separate source with its own bundle of traditions. Each functions somewhat differently”.²⁵ I appreciate that to some that historical definition may seem old-fashioned, unhelpful, or indeed one which distorts a more

21. *Cf. supra* notes 7, 8.

22. *Supra* note 16.

23. Admiralty law is another such area, with a historical background in some respects resembling that of equity, but this is a matter beyond the scope of this paper.

24. See Mark Leeming, “Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room” (2013) 36:3 *University of New South Wales Law Journal* 1002 at 1004-05.

25. Jack Beatson, “Has the Common Law a Future?” (1997) 56:2 *Cambridge Law Journal* 291 at 298.

coherent analysis of the legal system. I have elsewhere sought to explain why considering equity as a separate body of law within the legal system is a helpful approach.²⁶ For present purposes, I observe merely that it is unquestionably the law of Australia,²⁷ that the theme chosen by the Editors-in-Chief of this volume presupposes the continued utility of the term and that considerations of historical continuity are central to the thesis that foreign equity decisions are used in a distinctive manner. That said, as the passing-off appeal mentioned above illustrates, there are numerous differences at the level of detail within the Commonwealth. But that is no new thing, nor is it unhealthy. I turn to this immediately.

IV. The Variegated Common Law of the Commonwealth

There is a firmly established comparative law tradition in courts throughout the Commonwealth. In part that reflected the idea that there was a single common law (including equity). Appellate judges in England long sat in the Privy Council hearing appeals throughout the Empire and Commonwealth (as well as the substantial quantity of Scottish appeals to the House of Lords and the Supreme Court). Moreover, although originally the idea was that there was a single “common law of England” uniform throughout the British Empire, it became clear by the second half of the twentieth century that there were distinctive local varieties. Two tort appeals from Australia and New Zealand to the Privy Council

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26. See Mark Leeming, “Subrogation, Equity and Unjust Enrichment” in Jamie Glister & Pauline Ridge, eds, *Fault Lines in Equity* (Oxford: Hart Publishing, 2012) 27 at 39-43; Mark Leeming, “Equity: Ageless in an Age of Statutes” (2015) 9 *Journal of Equity* 108.
27. *Bankstown City Council v Alamo Holdings Pty Ltd*, [2005] HCA 46 (the normative complexity of the Australian legal system derives from “the interaction between the rules of law, principles of equity, requirements of statute, and between legal, equitable and statutory remedies” at para 27).

illustrate the point.²⁸ In the first, the Privy Council recognised that the Australian law of libel might diverge from that established in England, saying that it was a question for the High Court to decide whether the decision of the House of Lords in *Rookes v Barnard*²⁹ compelled a change in the law of libel in Australia.³⁰ In the second, the Privy Council concluded that the New Zealand Court of Appeal was entitled to depart from English decisions on the grounds that conditions in New Zealand were different. The Court of Appeal of New Zealand “should not be deflected from developing the common law of New Zealand ... by the consideration that the House of Lords ... have not regarded an identical development as appropriate in the English setting”.³¹

Those statements are remarkable for at least three matters which may be underappreciated. The first is that they were decisions when appeals lay as of right to the Privy Council, yet the men who constituted it also sat in the House of Lords and would in that capacity decide the same question of law differently. The second is that in both instances regard was expressly had to policy and different local conditions. The third is that the measure of deference accorded by the Judicial Committee is inconsistent with there being a single, monolithic body of common law throughout the Commonwealth.

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28. See also Andrew Burrows, “The Influence of Comparative Law on the English Law of Obligations” in Andrew Robertson & Michael Tilbury, eds, *The Common Law of Obligations: Divergence and Unity* (Oxford: Hart Publishing, 2015); William Gummow, “The Australian Constitution and the End of Empire – A Century of Legal History” (2015) 33:1 *Law in Context* 74 at 84; Mark Leeming, “Farah and Its Progeny: Comity among Intermediate Appellate Courts” (2015) 12:2 *The Judicial Review* 165 at 168-69.
29. [1964] UKHL 1.
30. *Australian Consolidated Press Ltd v Uren* (1967), 17 CLR 221 (PC (Austl)) at 241.
31. *Invercargill City Council v Hamlin*, [1996] 2 WLR 367 (PC (NZ)) at 376. Note the consideration of divergent Australian and Canadian developments in reaching that conclusion.

V. Three Examples of Equitable Principle in Ultimate Appellate Courts

Below, I examine some of divergent workings-out of the same equitable principle by three ultimate appellate courts.

A. *Barnes v Addy*: Liability for Knowing Assistance in Australia, Canada, and the United Kingdom

An area which is wholly equitable but where there are divergent views in Australia, Canada and the United Kingdom is the liability of those who assist in a breach of fiduciary duty, even though liability in all places may be traced to Lord Selborne's words in *Barnes v Addy*³² that "strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, ... unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees".³³

The Australian approach still requires there to have been a "dishonest and fraudulent design" by the fiduciary, as to which the third party assisted and had sufficient notice. Here, notice includes knowledge of the circumstances which would indicate the facts to an honest and reasonable person, but mere constructive notice is insufficient.³⁴ Moreover, the High Court of Australia has emphasised that the formulation by Lord Selborne was not an exhaustive statement of the circumstances in which a person who was not a recipient of trust property and had not acted as a trustee *de son tort* might be liable.³⁵ In particular, a person who induces or procures a trustee to commit a breach of trust will be liable irrespective of the

32. (1874), LR 9 Ch App 144 (CA (Eng)).

33. *Ibid* at 251-52.

34. *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975), 132 CLR 373 (HCA); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007), 230 CLR 89 (HCA) [*Farah Constructions*]; *Hasler v Singtel Optus Pty Ltd*, [2014] NSWCA 266 (Austl) [*Hasler*]; *FTV Holdings Cairns Pty Ltd v Smith*, [2014] QCA 217 (Austl) at paras 58-62; cf. *Westpac Banking Corporation v Bell Group Ltd (No 3)*, [2012] WASCA 157 (Austl) at paras 2112-25 (on a more relaxed test of "dishonest and fraudulent design").

35. *Farah Constructions, ibid* at para 161.

quality of the breach. A person who participates in the breach but falls short of inducing or procuring it will only be liable if the breach amounts to a dishonest and fraudulent design.³⁶ That is a relatively nuanced formulation of accessory liability, which reflects a close adherence to Lord Selborne's words.

The approach in the United Kingdom was reformulated in *Royal Brunei Airlines v Tan*³⁷ ("*Royal Brunei*"), where it was held that a third party could be liable, even for a wholly innocent breach by the fiduciary, if the third party had the requisite state of mind. There has been some fluctuation in *Twinsectra v Yardley*³⁸ and *Barlow Clowes International Ltd v Eurotrust International Ltd*³⁹ on the question of the third party's state of mind.⁴⁰ But whatever be the position on knowledge, the English test appears to subsume the distinction made in the Australian authorities.

It seems that an intermediate position obtains in Canada. In the Supreme Court's decision in *Air Canada v M & L Travel Ltd*,⁴¹ a more relaxed view appears to have been taken of the quality of the fiduciary's breach. It was stated (*obiter dicta*) that equity would regard "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary" as "dishonest or fraudulent" such as to be "sufficient to ground personal liability".⁴² Subsequently, as Professor Waters has observed, leave to appeal has been refused in a case where the trustee's breach was not dishonest

36. See *Farah Constructions*, *ibid* at para 164; *Hasler*, *supra* note 34 at paras 77-78; Charles Harpum, "The Stranger as Constructive Trustee: Part 1" (1986) 102:1 Law Quarterly Review 114 at 144.

37. [1995] 2 AC 378 (PC (Brunei)).

38. [2002] UKHL 12.

39. [2005] UKPC 37 (Isle of Man).

40. For insight into the differing formulations, see Paterson, *supra* note 7 at 183-84.

41. [1993] 3 SCR 787 [*Air Canada*]. See also *Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805; *Gold v Rosenberg*, [1997] 3 SCR 767.

42. *Air Canada*, *ibid* at 826; McLachlin J expressly declined to decide this issue at 830.

or fraudulent.⁴³ It would appear that a settled position has not yet been reached.

It is not the purpose of this paper to criticise or to express a preference for any of the formulations as a matter of policy. Instead, it may be noted that close regard was given in each of the Australian and Canadian decisions to earlier United Kingdom authority. Indeed, prior to 2007, it was widely thought that the reformulation of liability in *Royal Brunei* reflected the Australian law.⁴⁴ To use Lord Wilberforce's words, "it is plain that this is an area where the jurisprudential fabric is closely interwoven".⁴⁵ Of course, that is largely a consequence of history. Each of the Australian colonies, and most of the Canadian colonies, inherited the law of England including equity. Each participated for many decades in a judicial system which culminated in appeals to the Privy Council. And in each case, liability exists at general law, relatively unaffected by statute. Although there are local divergences, it remains easy to compare and contrast those divergences. It is right to do so. Indeed, the High Court has reserved to itself the right to consider, in a future case, whether to adopt aspects of *Royal Brunei* as a matter of Australian law.⁴⁶ The differences which presently exist result in large measure from decisions to relax the precedential weight accorded to much earlier English decisions — which is to say, precisely the phenomenon seen in the Privy Council tort appeals referred to above.⁴⁷ Those differences do not deny either the shared historical basis for these forms of liability, nor the ability of courts readily to have regard — and at the level of fine-grained detail — to the reasoning processes of foreign courts. The common historical background makes it easier to undertake comparative analyses, and to do so not merely at the crude level of arguing that the *outcome* is preferable,

43. *Gordon v Winnipeg Canoe Club* (1999), 134 Man R (2d) 213 (CA) leave to appeal to SCC refused, (2000) 153 Man R (2d) 160 (SCC); see Donovan WM Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4d (Toronto: Carswell, 2012) at 517.

44. See *Hasler*, *supra* note 34 at para 47.

45. *Buttes Gas & Oil Co*, *supra* note 13 at 936-37.

46. *Farah Constructions*, *supra* note 34 at paras 163-64.

47. See Part IV, above.

but at a more sophisticated level, of assessing the extent to which there has been a distortion in a coherent body of law.

B. Qualifications to the Rule in *Saunders v Vautier*

In some circumstances, in accordance with one aspect of the “rule”⁴⁸ in *Saunders v Vautier*,⁴⁹ fewer than all of a number of absolutely entitled adult beneficiaries can bring a trust to an end *pro rata*, by calling for the transfer of their shares of the trust property. May that occur where the trustee holds shares in a private company and the result is that there is a change of control in the company (*e.g.* by breaking up a blocking stake)?

The “rule” may readily be seen in eighteenth century decisions,⁵⁰ as well as in the first edition of *Lewin on Trusts*,⁵¹ all of which predated *Saunders v Vautier*. A different path was taken by United States decisions, influenced by early New York and Michigan statutes.⁵² In Australia, much of Canada and England, one beneficiary can bring to an end a trust of divisible property *pro rata*, subject to there not being “special circumstances”. A continuous line of authority holds that the mere breaking up of a parcel of shares is insufficient to constitute special circumstances.⁵³ However, if it is shown that the consequence is a loss in value, then there will be special circumstances. In *Beck v Henley*⁵⁴ (“*Beck*”),

48. The “rule” is better seen as a power on the part of the beneficiaries, with a correlative liability on the part of the trustee. See *e.g.* *CPT Custodian Pty Ltd v Commissioner of State Revenue*, [2005] HCA 53 at para 44.

49. (1841), 41 ER 482 (Ch).

50. See *e.g.* *Love v L'Estrange* (1727), 2 ER 532 (HL); *Barnes v Rowley* (1797), 30 ER 1024 (Ch).

51. See Thomas Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (London: A Maxwell, 1837) at 496.

52. See Paul Matthews, “The Comparative Importance of the Rule in *Saunders v Vautier*” (2006) 122:2 Law Quarterly Review 266 at 282-87; see also *Re Barton*, [2002] EWHC 264 (Ch).

53. See *In re Marshall*, [1914] 1 Ch 192 (CA (Eng)); *Re Sandeman's Will Trusts*, [1937] 1 All ER 368 (Ch); *Re Weiner's Will Trusts*, [1956] 1 WLR 579 (Ch (Eng)) and *Lloyds Bank Ltd v Duker*, [1987] 1 WLR 1324 (Ch (Eng)).

54. [2014] NSWCA 201 (Austl) [*Beck*].

the New South Wales Court of Appeal was asked to depart from that line of authority.⁵⁵ After considering the English decisions from which the “special circumstances” exception was derived, the Court held that it should not lightly depart from judicial authority that was “long standing and consistent”, and which had been applied and followed in other jurisdictions.⁵⁶ Further, the Court considered the potential consequences of deviating, stating that “[i]t is not possible to quantify the costs — in terms of certainty, and upsetting the considered and informed desires of settlors, testators and beneficiaries, of the change in the law for which [the appellant] contends. All that can be said is that those costs would be real”.⁵⁷ This was not a case where comparative law was cited merely to lend support to a conclusion reached on independent grounds.⁵⁸

The same decision illustrates another distinctive equitable phenomenon: the antiquity of equitable doctrine. In areas such as tort and contract, which were radically reformulated from the second half of the nineteenth century,⁵⁹ it is very hard to go back to the early nineteenth century (or earlier) in a way that assists legal analysis. Justice Windeyer once said — coincidentally, in an appeal linked to the divergence between the common law of Australia and the United Kingdom — that “like any attempt to trace the lineage of an idea, much depends on how far you wish to go back and how much certainty you demand in the connecting links”.⁶⁰ But it is much easier to consider the more distant legal past in equity, where (at least in the British Commonwealth) there was no occasion for such a reformulation as occurred at common law. The “rule” in *Saunders v Vautier* is one instance. Another striking example is *Pearne v Lisle*,⁶¹ whose abhorrent subject matter nonetheless discloses principles pursuant to which specific performance will be refused where damages are

55. *Ibid.*

56. *Ibid* at para 81 (the words are mine, with the agreement of Beazley P and Sackville AJA).

57. *Ibid.*

58. *Cf. supra* note 7.

59. Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford: Oxford University Press, 2007) at 187.

60. *Uren v John Fairfax & Sons Pty Ltd*, [1966] HCA 40.

61. (1749), 27 ER 47 (Ch).

an adequate remedy which have changed little in 260 years.⁶² As Justice Gummow has written, extra-judicially: “[i]n equity, the lineage of an idea may be quite clear and its persistence through changing circumstances all the more readily explicable”.⁶³

It is as well to recall another signal historical difference between the two main branches of English law. As stated in *Re Hallett's Estate*,⁶⁴ “the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is ... well known that they have been ... from time to time — altered, improved, and refined. In many cases we know the names of the Chancellors who invented them”.⁶⁵ The same point was made a century later by Sir Anthony Mason, stating that equity “made no secret of its evolutionary development”.⁶⁶ That there can more or less readily be a direct link to the Chancellors who first formulated equitable doctrine can but enhance the capacity for fruitful and insightful use of foreign law.

C. Judicial Advice

The ability to bring a trust to an end is largely unregulated by statute in Australia and the United Kingdom, although the same is not true in many North American jurisdictions.⁶⁷ But even in areas where statute has intruded (which are numerous), it can remain straightforward to apply a comparative approach to the development of equitable principle. Take for example judicial advice to trustees. Statute authorises a trustee to obtain the benefit of a statutory defence if the trustee follows advice

62. *Ibid* (contract for the sale of slaves).

63. William Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford: Oxford University Press, 1999) at 42.

64. (1880), 13 Ch D 696 (CA (Eng)).

65. *Ibid* at 710.

66. Anthony Mason, “The Impact of Equitable Doctrine on the Law of Contract” (1998) 27:1 *Anglo-American Law Review* 1 at 3.

67. In Canada, provincial statutes in Alberta and Manitoba have qualified the “rule” in *Saunders v Vautier*, *supra* note 49, by making the termination of the trust subject to judicial consent, thereby conferring a discretion upon the court to approve directions overriding the settlor’s or testator’s intention. See Waters, Gillen & Smith, *supra* note 43 at 1258-62.

given after full disclosure. It makes sense — given the character of the application and the nature of the defence — to regard this as essentially equitable. The subject was considered at length in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar*.⁶⁸ The High Court of Australia there observed that where the New South Wales legislation “reflected and even copied laws enacted, or made, for identical or analogous circumstances in England, it was permissible and helpful to construe the New South Wales legislation with the benefit of the experience expressed in judicial observations on the English analogues”.⁶⁹

Despite very significant differences in legislative history, the High Court pointed to what Lord St. Leonards had said in 1857 when introducing the Trustee Relief Bill as to its being a “cheap and simple process of determining questions”.⁷⁰ Nevertheless, the High Court had regard to the significantly altered (and expanded) provisions in section 63 of the New South Wales *Trustee Act 1925*⁷¹ as warranting the result that there should be no limitation confining the availability of advice to non-adversarial proceedings. Thus, with or without the intrusion of local statute, bodies of law which remain unmistakably “equitable” recur throughout the British Commonwealth. Assistance is gained by having regard to decisions throughout the Commonwealth, as well as from works of legal scholarship on equity and trusts in applying and developing equitable principle.

I am most familiar with Australian decisions. However, even a superficial examination of recent Canadian decisions tends to bear out the themes in this paper. For example, irrespective of the relative merits of the majority and the minority judgments, one cannot fail to be struck by the fact that in a recent decision of the British Columbia Court of Appeal on equitable estoppel, extensive regard was given to recent English decisions,⁷² or that Justice Barrett’s decision from my own court in *Re*

68. [2008] HCA 42 [*Petar*].

69. *Ibid* at para 53. See also *Beck*, *supra* note 54 at paras 48-54.

70. *Petar*, *supra* note 68 at para 67.

71. No 14 (NSW)(Austl).

72. *Sabey v von Hopffgarten Estate*, 2014 BCCA 360.

*Gaydon*⁷³ has been applied in a series of decisions in Ontario and British Columbia.⁷⁴ Conversely, the New South Wales decision *Beck* relied on a 1949 Canadian decision, *In re the Trustee Act; In re Burger Estate*,⁷⁵ in support of issuing judicial advice in mandatory form.

The Chief Justice of the Federal Court of Australia has recently observed that “[e]quity, as a reflection of underlying norms and values (and often expressed thus rather than by rules that are precisely linguistically expressed) required, necessarily, a form of judicial technique different to the common law”.⁷⁶

Those norms transcend national boundaries, and the judicial technique likewise straddles temporal and geographic limits. In short there is, as Lord Wilberforce said, a common legal approach, a closely interwoven fabric of legal doctrine, which permits regard to be had to the convincing language and reasoning in different countries’ courts in the Commonwealth.⁷⁷

VI. Conclusion

One danger in any use of comparative law was identified by Justice Kriegler of the South African Constitutional Court:

because of the subtleties of foreign jurisdictions, their practices and terminology require more intensive study ... Even on a superficial view, there seem to me to be differences of substance between the statutory, jurisprudential and societal contexts prevailing in those countries and in South Africa as to render ostensible analogies dangerous without a thorough understanding of the foreign systems.⁷⁸

This paper has sought to explain why those difficulties — which are undoubtedly real — are less significant in the case of equity throughout

73. [2001] NSWSC 473.

74. See *Lomas v Rio Algom Limited*, 2010 ONCA 175, which in turn was applied in *Mayer v Mayer*, 2014 BCCA 293.

75. [1949] 1 WWR 280 (Alta (SC)).

76. *Paciocco v Australia and New Zealand Banking Group Ltd*, [2015] FCAFC 50 at para 271 (Allsop CJ, Besanko and Middleton JJ agreeing).

77. *Buttes Gas & Oil Co*, *supra* note 13 at 936-37.

78. *Bernstein v Bester NO*, [1996] ZACC 2 (SA), cited by Markesinis & Fedtke, *supra* note 3 at 159.

the Commonwealth. The result is that the use of comparative equity decisions is distinctive.

In advancing that argument, this paper has necessarily relied on a number of generalised propositions, illustrated by recent examples. It has not been possible within the confinement of this paper to undertake an empirical analysis⁷⁹ (and which would also present large definitional issues).⁸⁰ I do not mean to underplay those difficulties, although I do not regard them as insuperable. Although I have emphasised what is lost by generalisations as to the role of comparative law, I acknowledge that this paper unavoidably suffers from a similar vice. It may therefore best be seen as an overview of an attractive and plausible thesis. Those qualifications notwithstanding, it should be recalled that on any view the majority of civil litigation — contract, tort and statutory claims — does *not* involve the principled development or application of equitable principle. There is a distinctive character to the minority that *does*, which is shared throughout the Commonwealth and affects the ways in which a comparative approach is taken.

79. Contrast Keith Stanton, “Comparative Law in the House of Lords and Supreme Court” (2013) 42:3 *Common Law World Review* 269.

80. I am conscious that the metes and bounds of “equity” and “equitable principle” are contestable and that whatever they be, much litigation has elements of both common law and equity.