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Equitable Exemplary Damages: Have We Made Coward of Conscience?

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Exemplary damages for breaches of equitable obligations have been awarded in New Zealand, but their availability rests on shaky conceptual grounds. The author frames the award in terms of the right-remedy relationship and argues that under the monist view (which integrates the right and the remedy), exemplary damages are anomalous. A dualist approach, treating exemplary damages as appropriate based upon the circumstances of the case in question, is the proper approach for explaining exemplary awards.

The author then discusses the circumstances under which exemplary damages would be appropriate in the dualist sense, addressing the objection that "equity and penalty are strangers" and drawing upon the reasons given in Paper Reclaim v Aotearoa International Ltd *for abolishing exemplary damages for pure breach of contract.*

The author concludes that equitable exemplary damages are conceptually sound under a dualist approach to civil liability and would most likely be needed in cases where existing equitable remedies would not adequately mark out the defendant's conduct for condemnation, notably in cases where malicious defendants are granted equitable allowances alongside an account of profits, or where personal injury is the loss resulting from an equitable breach.

> The man who has a conscience suffers while acknowledging his sin. That is his punishment.
>
> – Fyodor Dostoevsky, *Crime and Punishment*

I. INTRODUCTION

Equity binds a person's conscience and prevents him, to a varying extent, from acting in his own self-interest at another's expense.[1] If he does so intentionally and in a particularly egregious manner, should equity punish that betrayal? This dissertation will explore whether one punitive measure, equitable exemplary damages (that is, exemplary damages awarded for outrageous breach of an equitable duty) ought to be available in New Zealand.

Exemplary damages punish and deter outrageous wrongdoing committed intentionally or in a subjectively reckless manner.[2] The remedy[3] has undergone a tumultuous series of restatements, revisions and reductions, foremost because of its anomalous nature: exemplary damages allow civil courts to punish and denounce private wrongdoers and to deter further wrongdoing. Many

[1] PD Finn *Fiduciary Obligations* (The Law Company Limited, Sydney, 1977) at 4.
[2] *Couch v Attorney-General* [2010] NZSC 27 at [58] per Blanchard J.
[3] (Presuming, of course, that exemplary damages *are* indeed a remedy and not some other operation of the private law or the court's discretion.)

consider these purposes ought to be reserved for the criminal law,[4] as civil law's primary concern is compensation.[5]

Notwithstanding the strength of those arguments, New Zealand law currently permits exemplary damages awards in response to tortious and equitable wrongdoing, but not for contractual wrongdoing:

- The availability of exemplary damages for tortious wrongs has been authoritatively affirmed by Supreme Court, Privy Council and Court of Appeal authority.[6]
- Court of Appeal authority precludes exemplary awards for breach of contract.[7]
- To date, exemplary damages have been awarded once for breach of fiduciary duty,[8] with other judgments expressing that there is no reason in principle to withhold exemplary damages for equitable wrongdoing in appropriate circumstances.[9]

The conceptual reasons given in justification of awarding equitable exemplary damages are disappointingly lacking (at least compared with those regarding the remedy's availability in tort law and unavailability in contract law), opening the authorities to criticism that they might be incorrect, and that equitable exemplary damages ought not to be awardable at all.

This dissertation addresses the lacuna of principled argument regarding the availability of equitable exemplary damages and attempts to find a conceptually consistent basis on which this availability can be justified. The premises and parameters of inquiry are set out in Chapters II and III: Chapter II outlines the structure of the various rights or interests which equity secures in imposing liability for breach of an equitable duty; and Chapter III examines the structure of exemplary damages within the right-remedy relationship. I conclude that exemplary damages likely cannot flow from any interest of the plaintiff and must serve an ulterior purpose: effecting considerations external to the content of equitable rights. Those considerations should inform exemplary damages' appropriateness as an available remedy in a given case.

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[4] Bill Atkin "Remedies" in Stephen Todd and others (ed) *The Law of Torts in New Zealand* (Thomson Reuters, Wellington, 2017) at 59.25.3.03; *Rookes v Barnard* [1964] AC 1129 (HL) at 1226-1229 per Lord Devlin**;** see also A Beever "The Structure of Aggravated and Exemplary Damages" (2003) 23 OJLS 87.
[5] *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) at 1086 per Lord Reid.
[6] *Couch v Attorney-General* above n 2; *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721; *Daniels v Thompson* [1998] 3 NZLR 22 (CA).
[7] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) ("*Paper Reclaim*").
[8] *Cook v Evatt (No 2)* [1992] 1 NZLR 676 (CA) ("*Cook v Evatt*").
[9] *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) ("*Aquaculture*"); *Fa'agutu v Derhamy & Anor* [2019] NZHC 404 ("*Fa'agutu*").

Building upon this conclusion, Chapter IV discusses factors within equity which might disqualify exemplary damages awards, as well as whether the policy factors given in *Paper Reclaim Ltd v Aotearoa International Ltd*[10] to justify abolishing contractual exemplary damages hold in the case of equitable wrongs. Lastly, Chapter V considers target situations of equitable exemplary damages in order to discern whether there is a *need* for the remedy generally.

[10] Above n 7.

II. DEFINING EQUITABLE INTERESTS

A. Monism and Dualism

As this inquiry examines exemplary damages within the structure of the right-remedy relationship, I first note the two approaches to structuring that relationship which Weinrib terms "monism" and "dualism":[11]

> The "monist" integrates the right and the remedy, treating the remedy as the mirror image or reflex of the right—in Peter Birks's words, "the same thing as the right, looked at from the other end." The "dualist" separates the right from the remedy, postulating that the court in determining the remedy chooses from the basket of all potential remedies the context-specific one that is most appropriate in the circumstances.

Monism treats the remedy as the continuation of the plaintiff's right in circumstances where the defendant's actions have been or will be inconsistent with it. The remedy removes infringements which are imputable to the defendant; the plaintiff's right is the reason for both the defendant's *primary* duty to abstain from infringing on it and his *secondary* duty to eliminate or remedy any such infringement should it occur.[12] Primary and secondary duties are conceptually identical, their contents merely changing before and after the injustice.[13]

Dualism, meanwhile, allows for the remedy to serve purposes unrelated to the reason for imposing liability in the first place.[14] The court starts with the nature of the obligation breached (and this may well be the most important consideration);[15] however it may then also consider factors absent from the initial determination of liability in selecting appropriate remedies.[16] The introduction of new considerations at the remedial stage "makes it implausible to regard the remedy simply as the right viewed from the other end";[17] however, by starting with the infringed right dualism still recognises the relationship therebetween, maintaining that "the remedial stage involves considerations that are both different from and yet unbreakably related to the infringed right."[18]

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[11] Ernest J. Weinrib *Corrective Justice* (Oxford University Press, Oxford, 2012) at 107.
[12] At 110.
[13] Ibid.
[14] At 107-108.
[15] At 109.
[16] At 108.
[17] Ibid.
[18] At 109.

I shall model the right-remedy relationship according to the monism-dualism dichotomy. This suggests that equitable exemplary damages either spring from the plaintiff's equitable interest or are selected by the court based upon circumstances which render an exemplary award appropriate.

B. Equitable Interests

If an equitable remedy flows from an equitable duty, the right secured by that duty should be understood, requiring an examination of equitable interests. Equity's intervention is triggered by matters affecting the conscience of a person who acts on behalf of another. Generally, I will denote the person *owed* an equitable duty as the "principal", and the person *owing* an equitable duty as the "fiduciary", while highlighting that the equitable duty owed may not always be a *fiduciary duty*. Though the fiduciary may enforce his rights at law (e.g. as legal owner of trust property), equity intervenes where to do so would be unconscionable, rendering equity a "Court of conscience".[19] The fiduciary's conscience is typically burdened by "an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information" for the benefit of the principal,[20] coupled with the principal's imparting of trust or confidence in the fiduciary.[21] Common law disregards this imbalance, assuming that parties to a contract are independent actors concerned primarily with their own self-interest[22] and that "the party for whose benefit the relationship exists … can, if he is so minded, control through his agreement how his interests are to be served".[23] If the principal's trust is abused in a way not involving dishonesty or fraud, then the common law is impotent,[24] prompting equity's intervention to protect the principal's legitimate expectation of proper behaviour. In this sense, equity is "parasitic" upon the common law, reacting to the latter's inadequacy "both in terms of the sorts of causes of action which it recognised, and … in respect of the relief which it was prepared to grant to a successful party".[25]

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[19] *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh* [1998] 3 NZLR 171 (CA) at 175.
[20] *Liggett v Kensington* [1993] 1 NZLR 257 (CA) at 281.
[21] Bradley Toben and Kris Helge "Sexual Misconduct of Clergypersons with Congregants or Parishioners – Civil and Criminal Liabilities and Responsibilities" (unpublished paper, 2009) <http://www.baylor.edu/clergysexualmisconduct/> at 6.
[22] *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 (SCC) at 543 per McLachlin J; in William Gummow, "Dishonest Assistance and Account Of Profits" (2015) 74 Cambridge Law Journal at 406-407.
[23] Finn, above n 1 at 12.
[24] Paul Finn "The Fiduciary Principle" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) at 12-13.
[25] Andrew S. Butler and Tim Clarke (eds) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 1029.

Finn's "hierarchy of standards of protective responsibility" illustrates the content of the interests secured by equitable relationships. It comprises three primary standards of responsibility: unconscionability, good faith, and fiduciary responsibility,[26] all concerning the extent to which one party to a relationship is obliged to acknowledge and respect the other's interests:[27]

> "Unconscionability" accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other's interests, it then proscribes excessively self-interested or exploitative conduct. "Good faith," while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The "fiduciary" standard for its part enjoins one party to act in the interests of the other – to act selflessly and with undivided loyalty.

These categories of equitable standards are not exhaustive, but "dominant shades" on a spectrum from contract law's permission of entirely selfish behaviour (excepting dishonesty or fraud) to fiduciary law's strict standard of loyalty. Three considerations determine the standard to apply in a given equitable relationship:[28]

(1) The relationship's nature, purpose and progress as manifest in the parties' dealings;
(2) Whether, given the circumstances of the relationship, the principal is reasonably entitled to expect (generally or in particular circumstances) that the fiduciary will act in her own interests, have regard to the principal's interests, or act in the principal's interests; and
(3) Any independent policy justifications for regulating the fiduciary's conduct, or according a significant primacy to the principal's expectations.

I now elaborate on the particulars of each standard of responsibility and the relationships in which they typically arise.

(i) Unconscionability

Unconscionability arises in "relationships … in which both parties would, as a matter of course, be expected to look after their own interests in their dealing *inter se*, but in which the principal, because of his own circumstances or because of the relative positions of both, is in fact unable to conserve his own interests".[29] The nature, purpose and progress of the relationship must

[26] Finn, above n 24 at 4.
[27] Ibid.
[28] At 5.
[29] At 6.

render the principal vulnerable to exploitation or manipulation by the fiduciary in certain respects. Historically, such vulnerability arose out of the principal's weakness; in recent times, the concern has widened "to protect a person because of another's strength – to curb an overweening and self-interested power rather than to aid an inept and incompetent interest."[30] An obvious example is relational undue influence. Contract law generally assumes parties to a contract are equally able to protect their own interests. However, where a bargain is struck within a relationship "which justifies the conclusion that the disposition or agreement was not the result of a free exercise of the disponer's will",[31] equity allows the disponer to void the bargain on the basis that it is inherently unconscionable for a person to rely on a transaction that is procured by overbearing another's will.[32] The doctrine invokes a rebuttable presumption arising from the relationship between the parties, either as a matter of law or where there was actual trust and confidence within the relationship.[33]

Therefore, equity presumes in certain situations that one party has a legitimate interest in the other to act in the former's best interests in respect of certain matters. For instance, although the employment relationship does not typically give rise to any such interest after the relationship is terminated, equity forbids the employee from using confidential information gained in the course of his employment to the detriment of his former employer.[34] In that sense, equity imposes a limited equitable standard of conscience upon parties by virtue of their relationship and the legitimate expectations arising therein.

(ii) Good faith

This standard sits between equity's proscription of "the naked exploitation of another's vulnerability" (i.e. unconscionability) and "the dereliction of a responsibility to act in another's interests" (i.e. the fiduciary principle).[35] A fiduciary in a good faith relationship "is simply not,

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[30] At 7.
[31] *Contractors Bonding v Snee* [1992] 2 NZLR 157 (CA) at 165.
[32] *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321; in Jeremy Finn, Stephen Todd and Matthew Barber (eds) *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis NZ Limited, Wellington, 2018) at 428, n 86.
[33] *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL) at 189-190, [1993] 4 All ER 417 at 423; in Finn, Todd and Barber, above n 32 at 431, n 93. Relationships in the former category include solicitor and client, doctor and patient, parent and child; the latter category includes husband and wife or employer and employee, where influence must be proved as a matter of fact: at 430.
[34] *Faccenda Chicken Ltd v Fowler* [1986] Ch 117 (CA) at 134. See also *Skids Programme Management Ltd v McNeill* [2012] NZCA 314 at [78], in Gordon Anderson and John Hughes *Employment Law in New Zealand* (LexisNexis NZ Limited, Wellington, 2014) at 245, n 310.
[35] Finn, above n 24 at 11.

as a rule, in a relationship in which his function and purpose is to act in [the principal's] interest";[36] rather, good faith "subordinate[s] the regular pursuit of one's individual interest by obliging one party to acknowledge the "legitimate interest" of the other notwithstanding that their relationship might be for their several interests".[37] Good faith relationships arise where:[38]

> [T]hough entitled to pursue his own self-interest in a relationship, [the fiduciary's] decision or action may bear so directly upon the interests of [the principal] that basic fairness may require that in some circumstances he should have regard to [the principal's] interests in addition to his own.

Finn does not specify whether this standard imposes a positive duty to act in good faith, which is more onerous on the fiduciary, or a negative duty to not act in bad faith, which is less onerous. An appraisal of the three overlapping themes within the standard of good faith fails to illuminate whether the duty is positive or negative; these are promoting cooperation (a positive duty), curtailing use of one's power over another (a negative duty), and exacting neighbourhood responsibilities in a relationship (which could be positive or negative).[39]

Finn's cites as an example of a duty of good faith the obligation upon banks to notify customers prior to terminating a line of finance. Notwithstanding that such termination is the bank's legal right under its lending agreement, the customer's reliance on the facility entitles them to reasonable notice of the bank's intentions.[40] This duty appears to be positively framed, as it requires the bank to act the customer's interests by notifying them. I would suggest that a parent/guardian's actions bear directly upon a dependant such that the former must have regard to the latter's interests. While the place of equity in the family context is contentious,[41] two New Zealand authorities concerning such relationships proposed that lack of "bad faith, or an absence of good faith"[42] are elements of a breach of fiduciary duty causing "physical or mental harm, as opposed to economic loss".[43] Notwithstanding the use of the term "fiduciary duty" I would venture this example better fits a duty of good faith framed negatively. This is because it would be undesirable from a public policy perspective to positively require parents or caregivers to act in the best interests of their clients or children at all times. The authorities suggest that their duty is a lesser one requiring them not to treat the principal in bad faith or in

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[36] At 13.
[37] At 11.
[38] At 13.
[39] At 11.
[40] At 13-14.
[41] Nicola Peart "Equity in family law" in Butler, above n 25 at 1222-1225.
[42] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 277.
[43] *Surrey v Speedy* HC Auckland CP279sd99, M1561im98, 23 May 2000 at [9].

a way which prejudices their interests. This suggests that those in care have a legitimate expectation to be treated as such, but that this expectation does not extend to a strict standard of loyalty.

Whether the duty of good faith is a positive or negative one may depend on the circumstances. Finn might have benefited from separating the good faith standard into two sub-duties, one positive and one negative, but the merits thereof are outside of this inquiry's focus.

(iii) Fiduciary relationships

The trust and confidence at the core of the fiduciary relationship supports more intrusive intervention to enforce fiduciary obligations, justifying the stricter standard of liability under the Chancery courts' dictates of "conscience".[44] As fiduciaries wield greater control over their beneficiaries' interests than is found in the arm's length morals of the marketplace, they are to be held to a higher standard than "that trodden by the crowd".[45] Equity therefore requires more from fiduciaries than mere honesty, but rather "the punctilio of an honour the most sensitive":[46] liability for breach requires no loss to the principal, no prospect on the latter's part to have gained the benefit for herself and no bad faith on the breaching fiduciary's part.[47] While unconscionability and good faith are concerned with mediating the extent to which one party is able to pursue his own ends, or to which the other party's interests should be protected, fiduciary obligations "secure the paramountcy of *one* side's interests or … a joint interest".[48]

Fiduciary law's "vigorously prophylactic"[49] remedial regime purportedly flows not from any moral concern but rather:[50]

> ..the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.

[44] Finn, above n 1 at 4.
[45] *Meinhard v Salmon* (1928) 164 N. E. 545, at 564 per Cardozo J.
[46] At 546.
[47] William Gummow, "Dishonest Assistance and Account Of Profits" (2015) 74 Cambridge Law Journal 406-407.
[48] Finn, above n 24 at 27.
[49] Butler, above n 25 at 485.
[50] *Bray v Ford* [1896] AC 44 at 51 per Lord Herschell.

The social purpose of fiduciary law is to promote desirable behaviour[51] through preserving trusting relationships,[52] themselves so fundamental to human interaction as to be "the pervasive force which allows man to be the social animal his instincts demand".[53] Finn suggests that it is fallacious not to acknowledge this public policy rationale,[54] although a monist perspective would take issue with the implication that liability is imposed to protect an interest of *society as a whole* rather than one of the *plaintiff's*. Equity's social purpose may be reconciled with the monist approach by emphasising the principal's legitimate expectation, arising reasonably from the parties' relationship, that the fiduciary will act in the beneficiary's interests or for the benefit thereof.[55] Relationships where such a degree is generally exacted – in other words, relationships of such trust, confidence and vulnerability as warrant equity's "unbending and inveterate" intervention[56] – include those of trustees and beneficiaries and solicitors or professional advisers and their clients.

Finn's standards of responsibility enunciate the plaintiff's interests of which breach may trigger exemplary damages either (a) as a continuation of those interests (under monism), or (b) as the appropriate response in a context-specific evaluation of all the circumstances (under dualism). I now turn to consider which of these alternative explanations for exemplary damages is most sound.

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[51] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SCC) ("*LAC Minerals*") at 47 per La Forest J.
[52] Butler, above n 25 at 485.
[53] JC Shepherd *The Law of Fiduciaries* (Carswell, Toronto, 1981) at v., in Butler, above n 25 at 485, n 56.
[54] Finn, above n 24 at 26.
[55] Finn, above n 1 at 15.
[56] *Meinhard v Salmon*, above n 45 at 546.

III. STRUCTURING EXEMPLARY DAMAGES

In New Zealand, for exemplary damages to be available as a remedy, the defendant must:

1. Have committed a wrong to the plaintiff capable of founding a civil action;
2. Have done so consciously or in reckless disregard of the plaintiff's rights;[57] and
3. Have committed the wrong in such an outrageous manner that something more than compensation is required.[58]

Before structurally assessing exemplary damages within the right-remedy relationship, their purpose must be ascertained.

A. The Purpose of Exemplary Damages

Typically, civil law responds to a wrong committed against a plaintiff by ordering that the defendant compensate them – that is, put the plaintiff into the position they would have occupied had the wrong never been committed.[59] However, compensation was occasionally viewed as an inadequate response to particularly egregious, contumelious or outrageous behaviour by the defendant.[60] Exemplary damages were "parasitic" on compensatory damages' inability to "exact the necessary punishment" in certain cases;[61] they served not to put right the plaintiff's loss, but instead to punish conduct that is "so malicious, oppressive and high-handed that it offends the court's sense of decency".[62] Illustratively, they have been awarded where the plaintiff incurred no loss either due to insurance[63] or where the tort was a mere trespass incurring no actual loss.[64] Moreover, superior court authority affirms that a perceived need for further compensation is not a proper basis for awarding exemplary damages.[65]

If not to compensate the plaintiff, then what purpose do exemplary damages serve? Authority provides several responses:

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[57] *Couch v Attorney-General*, above n 2 at [150] per Tipping J.
[58] At [231] per McGrath J.
[59] Alison Doecke "Exemplary Damages: Retribution and Condemnation - The Purpose Controlling the Scope of the Exemplary Damages Award" (2017) 38 Adel L Rev 87 at 87.
[60] Law Reform Commission (Ireland) *Consultation paper on aggravated, exemplary and restitutionary damages* (ILRC, 1998) at 104. E.g. where compensation was less costly to the defendant than avoiding the commission of the tort altogether: David Morgan "*Harris v Digital Pulse*: The Availability Of Exemplary Damages In Equity" (2003) 29 Mon ULR 377 at 380.
[61] *Couch v Attorney-General*, above n 2 at [58] per Blanchard J, and at [93] per Tipping J.
[62] *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at 185.
[63] *Lamb v Cotogno* (1987) 164 CLR 1 (HCA); in Morgan, above n 60 at 380.
[64] *Cousins v Wilson* [1994] 1 NZLR 463 (HC).
[65] *Bottrill v A*, above n 6 at [64].

- "To punish the wrongdoer for his outrageous conduct";[66]
- To deter the defendant and others from any such conduct in the future;[67]
- To mark the court's execration, detestation and disapproval of the defendant's conduct;[68]
- To vindicate the plaintiff's infringed right;[69] or
- To vindicate the law by "[showing] that it cannot be broken with impunity".[70]

These all serve generally to make example of the defendant.[71]

The most commonly touted purposes are punishment and deterrence. As neither of these focus on the loss the plaintiff has suffered,[72] they will be the main purposes examined in this inquiry. As dual goals, however, they are not necessarily compatible.[73] Punishment looks backward and is concerned primarily with "the wrong of the defendant";[74] the goal of a punitive measure is to "reflect the community's sense of outrage at [the defendant's] wrongdoing".[75] The emphasis is on the defendant's blameworthiness, taking into account her state of mind and the degree of harm caused or likely to be caused by her conduct.[76] Deterrence, meanwhile, looks beyond the immediate circumstances of the case and the defendant's wrongdoing, aiming to prevent future undesirable conduct by the defendant and others.[77] Purely deterrent measures ought to disregard the wickedness of the defendant's actions and be based on the appropriate sum to make the defendant's private costs outweigh the benefits of her wrongdoing.

Some argue this distinction makes punishment and deterrence contradictory, requiring one purpose to be preferred over the other. In *Couch v Attorney-General*, Blanchard J questioned

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[66] *Conway v INTO* [1991] 2 IR 305 at 509 per Griffin J.
[67] Law Reform Commission (Ireland) *Consultation paper on aggravated, exemplary and restitutionary damages* (ILRC, 1998) at 105.
[68] *Wilkes v Wood* (1763) 98 ER 489.
[69] David Neild "Vindicatory Damages in the Child Welfare Tort Cases" (LLM Thesis, Victoria University of Wellington, 2011) at 13.
[70] *Rookes v Barnard* [1964] AC 1129 at 1227.
[71] *Taylor v Beere* [1982] 1 NZLR 81 (CA); *Bottrill v A*, above n 6 at [29] per Lord Nicholls of Birkenhead and at [77] per Lords Hutton and Millett; *Couch v Attorney-General*, above n 2 at [58] per Blanchard J, at [93] per Tipping J, and at [238] per McGrath J.
[72] *Couch v Attorney-General*, above n 2 at [58] per Blanchard J.
[73] Anthony Duggan "Exemplary Damages in Equity- A Law and Economics Perspective" (2006) 26 OJLS 303 at 319; Gina Hefferan "Exemplary Damages In Contract – Another Anomaly?" (2005) 1 NZPGLeJ 1.
[74] Law Reform Commission (Ireland) *Consultation paper on aggravated, exemplary and restitutionary damages* (ILRC, 1998) at 106.
[75] Duggan, above n 73 at 308.
[76] Ibid.
[77] Ibid.

"whether a civil court should involve itself in punishing people", but nevertheless accepted that "there is a proper moral role for exemplary damages as a deterrent to outrageous harmful behaviour."[78] Conversely, McGrath J viewed deterrence as an *effect* of a punitive award and so incidental to its core aim of retribution,[79] implying that exemplary damages awards should be aimed at directly responding to the defendant's outrageous conduct, rather than seeking to deter future conduct.

McGrath J's view that deterrence ought not to be the core purpose of exemplary damages is to be preferred for two reasons. First, notwithstanding the divergent aims of punishment and deterrence, one is seldom mentioned in the authorities without the other, with the remedy's aim commonly described as to "punish *and* deter".[80] Worth noting also is persuasive authority describing equity's stripping of secret profits from fiduciaries as containing "a penal element calculated to deter fiduciaries from [making secret profits]", suggesting that deterrence and punishment are co-related even outside the doctrine of exemplary damages.[81] It is difficult to foresee any punitive measure not having some deterrent effect, suggesting that the effects of punishment and deterrence are complementary with one reinforcing the other. These factors support the proposition that deterrence ought to be viewed as an integrated function of punishment rather than a separate consideration.

Second, even if punishment were inappropriate for civil wrongdoing (as Blanchard J suggests), deterrence alone would not justify exemplary damages. Deterrence is not solely achieved through exemplary damages; any remedy which negates the benefit to be gained from wrongdoing, whether through compensation[82] or gain-stripping (e.g. through accounting of profits)[83] arguably has a deterrent effect. Feldthusen considers that a purely deterrent focus cannot explain exemplary damages' requirement that the defendant's conduct be exceptional:[84]

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[78] *Couch v Attorney-General*, above n 2 at [59].
[79] At [95] per Tipping J and at [238] per McGrath J.
[80] *Taylor v Beere*, above n 71 at 89 and at 95; *Paper Reclaim*, above n 7 at [178]; *Daniels v Thompson*, above n 6 at 7.
[81] *Phipps v Boardman* [1965] Ch 992 at 1030 per Pearson LJ; *Paul A Davies (Australia) Pty Ltd (in liq) v Davies* [1983] 1 NSWLR 440 (NSWCA) at 444.
[82] Beever, above n 4 at 102.
[83] *Chirnside v Fay* [2006] NZSC 68 at [137] and [151] per Tipping J.
[84] B Feldthusen "Punitive Damages in Canada: Can the Coffee Ever Be Too Hot?" (1995) 17 Loy L A Int'l & Comp L J 793; in Beever, above n 4 at 101, n 60.

> There is no reason to require the defendant to act outrageously, maliciously, or with reckless and wanton disregard, if deterrence is the goal. Strictly speaking, there is no reason to require the defendant to do anything wrong if deterrence is the goal.

If deterrence is the primary goal then the appropriateness and size of exemplary damages should follow from the likely *effect* of the award, not the seriousness of the wrongdoing.[85] The Court ought to prefer the remedy which achieves maximum deterrence, in theory justifying awards which could be totally out of proportion to the wrong inflicted on the plaintiff.[86] This is a patently undesirable outcome which in any case does not match the voluminous judicial expression already outlined that exemplary damages awards respond to particularly reprehensible conduct, along with empirical evidence that the quantum of exemplary damages awards are modest, and that the awards themselves are rare.[87] Such factors indicate that deterrence is not the main purpose of exemplary damages.

I will therefore treat exemplary damages as a primarily punitive remedy, with deterrence on lesser footing as an *effect* of the punishment wrought by the remedy; this was McGrath J's approach in *Couch*. Although many justifications for exemplary damages hinge either on the remedy having a purely deterrent or a purely punitive purpose, going forward my inquiry will treat justifications for deterrence as complementary to justifications for punishment. The determinant of the suitability of exemplary damages should therefore be whether punitive measures are appropriate, fitting with Beever's conclusion that deterrence can only justify exemplary damages if punishment in the civil context is appropriate.[88] That is the question I will now address in discussing whether exemplary damages are coherent within the right-remedy relationship.

B. Modelling the Right-Remedy Relationship – Performative and Reparative Remedies

Modelling remedies in the private law involves an interplay between two foundational ideas of the common law: demanding a right and complaining a wrong.[89] In the former case, actions:[90]

> …look not to compensation for misconduct but to the restoration of some right; they are prospective rather than retrospective …. Where possible they resulted in the

[85] Beever, above n 4 at 101.
[86] At 101, n 60.
[87] *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA) at 107 and 116.
[88] Beever, above n 4 at 102.
[89] SFC Milsom *Historical Foundations of the Common Law* (2nd ed, Butterworths, London, 1981) at 243; in Steven Elliott "Compensation Claims Against Trustees" (PhD Thesis, University of Oxford, 2002) at 34, n 74.
[90] JH Baker, *An Introduction to English Legal History* (3rd ed, London, Butterworths, 1990) at 67; in Elliott, above n 89 at 35, n 78.

> recovery of the right, enforced by a writ to hand over the thing in demand or to do what was asked.

Claims which vindicate the plaintiff's right are termed "vindication claims".[91] Specific performance of contractual obligations, prohibitive injunctions preventing the subject from impinging the claimant's right or interest, and equitable accounts are examples of remedies which vindicate the plaintiff's right.[92] Because each of these remedies can be characterised as securing the performance of an obligation owed to the claimant, they are termed "performative remedies".

Where wrongs are claimed ("wrong" being "conduct … whose effect in creating legal consequences is attributable to its being characterised as a breach of duty"),[93] "a claimant who originated action by way of plaint – a plaintiff – sued on the violation of his rights for damages."[94] Such claims are termed "satisfaction claims", as rather than vindicating the plaintiff's infringed right, they seek to retrospectively satisfy the plaintiff's violated right.[95] Remedies such as compensatory damages seek to repair the plaintiff's loss; thus, satisfaction claims yield "reparative remedies".

Elliott identifies that the distinction between vindication and satisfaction claims corresponds to Lord Diplock's distinction between primary and secondary obligations:[96] primary obligations are those to perform duties; and secondary obligations arise upon failure to perform primary obligations and are imposed by law.[97] Performative remedies enforce primary duties, while reparative remedies enforce secondary duties. Thus, while satisfaction claims rely on a breach of the plaintiff's right, vindication claims do not: the vindicatory remedy of specific performance requires no breach in order to be awarded (although a breach of contract is "usually requisite to induce the court to interfere") because:[98]

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[91] Elliott, above n 90, at 37.
[92] At 36.
[93] P Birks *An Introduction to the Law of Restitution* (Oxford University Press, Oxford, 1989) at 313; in Andrew Burrows "Remedial Coherence and Punitive Damages in Equity" in Simone Degeling and James Edelman (eds) *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) at 387 n 23.
[94] At 35.
[95] At 36-37.
[96] *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331 (HL) at 350; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) at 848-849; in Elliott, above n 90 at 37, n 85.
[97] The trite example being the obligation to pay damages for failing to perform a primary contractual obligation.: Elliott, above n 90 at 37.
[98] At 39.

> The cause of action … is not a breach of the contract … but is the duty considered in equity to be incumbent on the defendant of actually doing what he promised by the contract to perform.

Likewise, lack of loss to the plaintiff is no obstacle to a performative remedy:[99]

> [T]he plaintiff who claims payment of a debt need not prove anything beyond the occurrence of the condition on the occurrence of which the debt became due. He need prove no loss….

As reparative remedies focus on the *consequences* of the breach, matters such as causation, remoteness, contributory fault and mitigation become relevant considerations in determining the quantum of remedy. Vindication claims, however, do not award relief based upon the consequences of any breach: their concern is "the nature of the defendant's obligation that is being enforced",[100] allowing plaintiffs to sidestep having to prove matters like causation and remoteness.

Under monism, exemplary damages are only awardable as a remedy if they are integrated with the plaintiff's right, implying that a primary or secondary obligation owed by the defendant gives rise to an interest of the plaintiff's in receiving a primarily punitive award. To determine whether exemplary damages are consistent with a monist approach, in equity or otherwise, the place of exemplary damages within this model of the right-remedy relationship must be established.

C. Applying the Model to Exemplary Damages

In determining whether exemplary damages can be described as either a performative or reparative remedy, their relationship with the plaintiff's breached right is decisive. Performative remedies are not awardable dependent on any breach or loss; their concern is not with any wrong occasioned to the plaintiff, but rather the ongoing vindication of the plaintiff's right. Were exemplary damages a performative remedy, they would in theory be awardable without needing any breach of the plaintiff's rights to be established.

This conclusion implies that the plaintiff would have an ongoing performance interest in punishing the defendant *before* the defendant committed any wrongful act against the plaintiff. Such an interest is hard to justify as punishment is necessarily backwards looking and focuses on the wrongdoing of the defendant. An interest in punishment only makes sense if it is

[99] J*ervis v Harris* [1996] Ch 195 (CA) at 202-203; in Elliott, above n 90 at 40, n 91.
[100] Elliott, above n 90, at 41.

triggered by the defendant doing something blameworthy against the plaintiff, such as breaching a duty. Moreover, even if an independent performance interest in punishing the defendant could exist, persuasive authority suggests that interest would be illegitimate; the rule against penalties, for instance, rejects the proposition that one can have a performance interest in punishing a contractual defaulter.[101]

If punitive awards cannot flow from a performative interest of the plaintiff then exemplary damages are consequentially not a performance remedy. Monism would prescribe that exemplary damages should not be awardable in claims seeking vindication of an equitable interest (e.g. by demanding an account for profits obtained in breach of fiduciary obligations). However, existing case law does not reflect this prescription. In *Cook v Evatt*,[102] the defendant was an investment adviser who sold investment property to the plaintiff, Ms Cook, in which he had a financial interest. Fisher J found that Evatt's making of a secret profit amounted to a breach of the defendant's fiduciary obligations to avoid conflicts of interest and to make full disclosures.[103] His Honour ordered an account of profits (a performative remedy); however exemplary damages were also awarded in order to achieve deterrence. Under monism, this outcome may only be explained if either (a) *Cook* was decided incorrectly, or (b) exemplary damages respond to a different interest – that is, they are a reparative remedy. I will examine the latter option.

Upon breaching a primary duty to the plaintiff, the defendant incurs a secondary obligation to repair the breach. Exemplary damages' availability as a reparative remedy implies that they are a continuation of the plaintiff's right; the purpose of imposing liability for breach must therefore correspond to the purpose of exemplary damages – to punish the defendant's outrageous wrongdoing. Under monism, the plaintiff must be owed the defendant's punishment upon breach. Beever outlines several flaws within this argument. Firstly, if the defendant breaches a duty to the plaintiff in an outrageous manner, the normative conclusion that the defendant ought to be punished requires an additional premise.[104]

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[101] *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172 at [32].
[102] Above n 8.
[103] At 689-691.
[104] Beever, above n 4 at 106-107.

Secondly, Beever argues that where the plaintiff has been fully compensated for loss inflicted upon her by the defendant's breach of duty (i.e. placed in the position she were in had she not been wronged at all), any additional interest in extracting damages from the defendant will demand the plaintiff be placed in a better position than she initially was in; in other words, she would be owed a windfall.[105] This would also be true were the primary function of exemplary awards deterrence instead of punishment: the plaintiff's interest in deterrence would likewise sit on top of the compensation to which she was entitled. The rule against penalties mobilises against such a prospect as "[t]he court cannot impose a secondary obligation to overcompensate".[106] The premise that the plaintiff is owed the defendant's punishment or deterrence is unsound for two reasons: it has a missing premise, and it would confer an undue windfall upon the plaintiff.

Might the defendant owe a primary duty not to breach an obligation to the plaintiff *in a particularly outrageous way*?[107] Such a right is also problematic as it could not be owed to the plaintiff without necessarily being eclipsed by the plaintiff's wider interest in not having her rights breached *at all*. As that wider duty is properly and fully remedied in a compensatory, restitutionary or other award, an exemplary award to recognise the outrageousness of the breach would go over and above what the plaintiff is entitled to as regards her injured right. To summarise these arguments, therefore, the plaintiff can have no legitimate interest in punishing the defendant for two reasons:

1. Such an award would improperly entitle the plaintiff to a windfall; and
2. Any duty to not breach the plaintiff's rights outrageously is eclipsed by the plaintiff's wider interest in having no breach at all.

The other potential source of a duty to pay exemplary damages is the remedy's marking of the court's disapproval of and contempt for the defendant's wrongdoing. This approach suggests that exemplary damages vindicate social standards of behaviour. Where general and aggravated damages cannot sufficiently achieve this, some argue the law must "show that it cannot be broken with impunity".[108] Exemplary awards amount to social denunciation of the defendant's conduct, marking it out for punishment in order to "deter the defendant from any repetition and

[105] At 107.
[106] Jessica Palmer **"**Implications of the New Rule Against Penalties" [2016] 47 VUWLR 305 at 315.
[107] Charles E Rickett "Punitive Damages: The Pulse of Equity" (2003) 77(8) ALJ 496 at 498.
[108] *Rookes v Barnard* [1964] AC 1129 at 1227.

to deter others from behaving in a similar manner".[109] Exemplary damages deriving from a *communal* interest solves the windfall problem outlined above, because the plaintiff's loss (and indeed her betterment as a result of the award) is incidental to society's execration towards the defendant's conduct. Execution of a communal interest also fits exemplary damages' disregard for the plaintiff's loss. In *Donselaar v Donselaar*,[110] Somers J expressed that the abolition of compensation for personal injury by the ACC scheme afforded "no sufficient reason to dispense with an objective which is still capable of serving a useful social purpose [exemplary damages]".[111] Even though ACC abolished claims which treat personal injury as a wrongful loss vis-à-vis its wrongful cause (i.e. the defendant's breach of duty),[112] exemplary damages are still awardable for personal injury. While *responding* to breaches of primary duties owed by defendants to plaintiffs, exemplary damages do not arise out of a secondary duty owed to the plaintiff but rather *to society as a whole*.[113] As such, exemplary damages are not *in personam*.[114]

Of course, if exemplary damages flow from a duty owed to society, then they do not flow from one owed to the plaintiff. While this is no problem in the criminal law (since punishment is concerned with the defendant's wrongdoing and requires no loss to the victim),[115] under monism's right-remedy conception of civil liability exemplary damages are anomalous, because the plaintiff has no primary interest giving rise to a punitive remedy.[116] This conclusion disqualifies monism as able to explain the availability of exemplary damages in private law, leaving dualism as the presumptive candidate to do so. Under dualism, exemplary damages may not proceed from the plaintiff's right (although those rights are important) but may also serve purposes unrelated to the reason for imposing primary liability – for instance, the need for the court to mark its condemnation of the defendant's behaviour. Dualism is not heresy as its prescription has some recognition in New Zealand, as evidenced in *Butler v Countrywide Finance Ltd*:[117]

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[109] *Couch v Attorney-General*, above n 2 at [58] per Blanchard J.
[110] Above n 87.
[111] At 117.
[112] Jesse Wall "No-Fault Compensation and Unlocking Tort Law's "Reciprocal Normative Embrace"" 27 NZULR 125 at 144.
[113] *Bottrill v A* [2001] 3 NZLR 622 at 116.
[114] Beever, above n 4 at 107.
[115] Ibid.
[116] At 108.
[117] [1993] 3 NZLR 623 (HC) at 631 and 633 per Hammond J.

> … [T]he law of civil remedies in this country is, as it should be, steadily evolving into a regime in which what is required of a Court is a context specific evaluation of which remedy is most appropriate in the circumstances of a given case, rather than doctrinaire or a priori solutions.
>
> …
>
> … [W]hat is involved in the allocation of the "appropriate" remedy in a given case is a matter of informed choice, bearing in mind the general compensation principle and the factors I have estimated above. These considerations do not lead to a wholesale abandonment of much of the traditional learning. They simply point to a more open remedial system; and a requirement for articulation and candour as to why the relevant choices are being made, rather than the formalistic application of (in many cases) somewhat arid doctrinal rules drawn from some far distant time.

Though hands may be wrung at the prospect of a remedy not proceeding *a priori* from the plaintiff's breached right, in my view no alternative approach can coherently explain the availability of equitable exemplary damages.

This conclusion implies that dualism may explain the current availability of exemplary damages in tort. The objection that there is no place for punishment as a response to civil liability is one that dualism still needs to grapple with; if punishment does not flow from an interest of the plaintiff, then what makes exemplary damages an appropriate part of the bag of remedies for civil wrongdoing, but not other criminal sanctions e.g. imprisonment? Imprisonment may be seen as a disproportionate infringement on civil liberties, but the same could well be said of a hefty exemplary award. The answer might be that only remedies which transfer wealth from the defendant to the plaintiff are appropriate. Dualism starts with the infringed rights of the plaintiff;[118] the extent to which a remedy can proportionately satisfy that infringement might a consideration in support of a given remedy. Imprisonment only indirectly satisfies an infringement, while exemplary damages go directly to the victim.[119] Therefore, exemplary damages might be justifiable in civil law generally as a punitive measure because their availability is related to the plaintiff's action against the defendant – namely, that while the defendant committed a social wrong in behaving outrageously, that wrong manifested in a breach of duty to the plaintiff. Exemplary damages respond to a breach of duty more effectively

[118] Weinrib, above n 11 at 109.
[119] *W v W* [1999] 2 NZLR 1 (PC) at 3 per Lord Hoffman.

than imprisonment, which may be why they are generally accepted as a civil remedy while imprisonment is not.

I will now consider objections to the prospect of primarily punitive awards in equity.

IV. OBJECTIONS TO EQUITABLE EXEMPLARY DAMAGES

There are two primary objections to the notion that it is appropriate for equity to make exemplary awards. The first is that 'equity and penalty are strangers'[120] – that the very nature of equity is repugnant to punishment. To sustain this objection would defeat any argument for equitable exemplary damages based upon their practical usefulness: to award them would be inconsistent with equity at a conceptual level. This argument must be dealt with first.

Secondly, analogy to the law of contract reveals some principled and practical problems with exemplary damages which justified New Zealand's abolition of exemplary damages for breach of contract in *Paper Reclaim*.[121] If the problems with contractual exemplary damages are analogous in equity, then the reasons for abolishing exemplary damages in the former should justify abolition in the latter. Therefore, it must be discerned whether the problems with contractual exemplary damages are also at play in respect of equitable exemplary damages.

A. "Equity And Penalty Are Strangers"

Equity preserves relationships of conscience between fiduciaries and beneficiaries.[122] Equitable wrongs occur where a fiduciary breaches an equitable duty to the principal;[123] the duty arises out of the principal's reasonable expectations in respect of the parties' relationship of trust and responsibility. Upon breach, all damages or gains caused by the breach must be restored to the *cestui qui trust*.[124] Equity's restitutionary and compensatory functions operate for reasons other than punishment:

> '[I]t is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon. It is simply on the ground that the Court finds that he actually made more,

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[120] *Aquaculture*, above n 9, at 302.
[121] Above n 7; see also the Australian abolition of contractual exemplary damages in *Gray v Motor Accident Commission* (1998) 196 CLR 1 (HCA) at 6-7.
[122] *LAC Minerals*, above n 51 at 47-48.
[123] Birks, above n 93 at 313.
[124] P D Michalik, "The Availability of Compensatory and Exemplary Damages in Equity" (1991) 21 VUWLR 391 at 403.

> constituting moneys in his hands "had and received to the use" of the cestui que trust.'[125]

Equity is not a penal jurisdiction, so the argument goes, because it does not set out to punish but instead to achieve other ends. My response to the argument that equity does not punish will unfold in two stages: first, discussing whether punishment *should* be one of equity's functions, and second, if the answer to the first question is yes, where in equity the power to punish would come from.

(i) A place for punishment in equity?

The first objection which must be addressed is the "good man" theory of equity. It supposes that equity's mechanism for correcting breaches of obligation with a performance remedy is to assume the wrongdoer meant to act in accordance with his duty:[126]

> [The fiduciary] must not place himself in a position where his interest may conflict with his duty. … He must not obtain a profit for himself out of his fiduciary position. If he has done so, equity insists on treating him as having obtained it for his principal; he will not be allowed to say that he obtained it for himself.

The common law, conversely, permits the defendant to be a "bad man" provided that he pays compensation.[127] Existing literature has not linked "good man" theory to equity and penalty being strangers. However, such linkage might suppose that equity's assumption of compliance with obligations has no place for penalty because penalty necessarily requires wrongdoing on the part of the defendant. Equitable remedies requiring the fiduciary to act in accordance with his duty cannot accommodate punishment, because a duty on the fiduciary to pay a punitive sum only arises on recognition that the fiduciary has breached his obligation. Thus, equitable remedies which treat the defendant as a "good man" who intended to execute his obligations may not give rise to punishment.

This argument does not serve to exclude a punitive purpose from equity generally, however. While "good man theory" outlines how performative remedies operate in equity, they do not purport to describe reparative remedies. If the remedies currently available in equity could *only*

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[125] *Vyse v Foster* (1872) LR 8 Ch App 309 at 333 per James LJ; *Chirnside v Fay*, above n 83 at [142] per Tipping J.

[126] Sir Peter Millett "Bribes and Secret Commissions" [1993] RLR 7 at 20, in *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 (PC) at 9. Later Millett LJ of the House of Lords.

[127] David Hayton "The Development of Equity and the 'Good Person' Philosophy in Common Law Systems" (2012) 76 Conv 263 at 268.

be described as those which require the defendant to perform his obligations, then the argument might serve to exclude exemplary damages because exemplary damages are not performative. However, equitable remedies which seek to repair the wrong against the plaintiff patently do exist in the form of equitable compensatory damages, refuting the notion that equitable remedies may only be performative.[128] Furthermore, per Chapter III exemplary damages must be awarded based in part on factors external to the right-remedy relationship. Thus, the fact that penal damages are not performative does not mean that they may not be awarded in equity, firstly because non-performative remedies are available in equity, and secondly because even if that were not the case, in my view the availability of equitable punishment is not determined by the right-remedy relationship.

Many justifications for equitable exemplary awards are based on the efficacy of deterrence. Deterrence alone may not justify exemplary damages, but an objection to deterrence-focused equitable remedies would be sufficient to disqualify exemplary damages. However, equity can clearly accommodate deterrence. Where ownership and control of information, property or an enterprise are split between the principal and the fiduciary,[129] the fiduciary may be incentivised "to deliberately take advantage of [the fiduciary's] position knowing that doing so is likely to be at the cost of another".[130] Deterring breaches of equitable obligations is therefore a core part of equity's concern with ensuring that fiduciaries conduct themselves "at a level higher than that trodden by the crowd".[131] Accounts of profits and constructive trusts have been expressly described as having a deterrent function by persuasive appellate authority.[132] On these bases, I do not consider that the deterrent effect of punishment raises any objection to a punitive equitable remedy. However, that non-punitive equitable remedies (compensatory damages, accounts of profits and constructive trusts) have deterrent effects means that deterrence alone may not justify equitable punishment.

Equity does not intuitively eschew punishment. Equitable relationships are characterised by power imbalances, vulnerability, reliance, trust and confidence. To that end, equity imposes high standards upon fiduciaries. It is not unthinkable that those who breach these high standards

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[128] Assuming, of course, that equitable damages *themselves* are conceptually correct.
[129] Which is typically the case within equitable relationships.
[130] Darryn Jensen "Punitive Damages for Breach of Fiduciary Obligation" (1996) 19 UQLJ 125 at 126.
[131] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (HCA) at 557-558.
[132] *Phipps v Boardman*, above n 81 at 1030; *Chirnside v Fay*, above n 83 at [137] and [151]; Duggan, above n 75 at 322.

ought to be punished. *Couch v Attorney-General* provides that a defendant who consciously and outrageously breaches a duty of care to someone who is only foreseeably affected by their actions may be liable for exemplary damages; why would this logic not extend to a defendant who has expressly or through conduct had trust, reliance or confidence reposed in him? As a matter of impression, the case for exemplary damages in equity is *stronger* than that in tort.

This argument was countered in *Harris v Digital Pulse*.[133] Heydon JA did not accept that it followed from the "high standards … expected of fiduciaries" that those standards were penal or punitive:[134]

> A standard can be high and it can be strict without the consequence being that the remedy for breach of it moves beyond compensation for loss and disgorgement of profit to punishment.

I agree with his Honour that a mere low threshold for liability, such as that which applies to breach of fiduciary duty, does not by itself imply a need to *punish* those who reach that threshold, at least where other remedies might be able to heal the consciences of the parties. The alternative would be an enthymeme – there is a missing premise needed to establish a justification for punishment.

The dissenting judge in *Harris*, Mason P, refuted that there was no basis for punishment in equity by arguing that other equitable remedies already punish wrongdoing. His Honour argued that "equity readily trumpets its punitive/deterrent intent" wherever a more stringent remedy would be selected for more culpable conduct – for instance, when "invoking estoppel against a miscreant" or withholding "exceptional allowances for skill, expertise or expenses".[135] Heydon JA rejected this argument, holding that requiring fiduciaries to discharge profits made in breach of fiduciary duty, and granting more liberal allowances for work and skill to innocent trustees than to culpable ones, were not designed to punish but rather to ensure that (a) the defendant retained no profit from their wrongdoing, and (b) that the plaintiff only received the profits to which they were entitled.[136] His Honour also pointed out that equity's obstruction of contractual penalty clauses and its refusal to grant injunctions against crimes pointed away from a punitive function, weakening the case for equitable punishment.[137]

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[133] (2003) 56 NSWLR 298 (NSWCA).
[134] At [362].
[135] At [166].
[136] Morgan, above n 60 at 386.
[137] At [338]-[339].

While I accept Heydon JA's finding that the described remedies may not be intended to punish, I respectfully reject the notion that that it is *only* appropriate for equity to be restitutionary or compensatory. Equity's purpose ought to be decisive: insofar as it seeks to preserve relationships between fiduciaries and principals,[138] exemplary damages may contribute to that purpose in a way which restitution and compensation may not. Referring to equity's concern for conscientious behaviour, Michalik suggests punishment may not be alien to equity because:[139]

> In certain circumstances the conscience of the defendant may demand that he or she not only return any profit he or she has made from the property of the defendant, but also that he or she make good any damage that he or she has done *and* submit to an appropriate punishment. Penance may sometimes be the very remedy required to restore "the health of men's souls".

Restoring good conscience between fiduciary and principal may sometimes "require that a court do more than simply compensate the victim and deprive the perpetrator of his or her gains";[140] requiring a thief to return stolen goods upon discovery of his or her wrongdoing may not render thieving unprofitable on the balance of probabilities.[141] As exemplary damages promote deterrence where, for whatever reason, the probability of a successful suit is less than 1 (thus making the defendant's private costs outweigh his or her private benefit), in those cases exemplary damages should be used to push the defendant's private cost to unprofitable levels.[142] While exemplary damages are not meant to compensate or restitute, a punitive response to outrageous breaches may achieve more effective protection of the principal's interests and of the relationship than either measure, through discouraging breach *ex ante*.[143]Alternatively, if the fiduciary's conduct amounts to "a direct denial of fiduciary loyalty", as Elias CJ found the defendant's concealment of his breach in *Chirnside v Fay* did,[144] imposing an additional charge on him may be necessary to avoid "undermining the obligation of loyalty".[145]

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[138] *LAC Minerals*, above n 51 at 47-48.
[139] Michalik, above n 124 at 412.
[140] Jensen, above n 138 at 130.
[141] John Glover *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995) at 271; in Jensen, above n 138 at 132.
[142] Duggan, above n 73 at 309.
[143] At 132.
[144] Above n 83 at [45].
[145] At [48].

Inserting this premise into the argument above relating to equity's high standards of behaviour, the result is that equity's protection of principals, who occupy a vulnerable position vis-à-vis their fiduciaries, is achieved in part by deterring breach of equitable obligations. Deterrence is achieved by compensation and restitution, but there may be circumstances where these are inadequate. As punishment deters, in those circumstances punitive awards will assist in discouragement, and so will help to protect beneficiaries. Therefore, as punitive awards promote equity's purpose, they are an appropriate response to equitable wrongdoing. Hence, the nature of equity itself is no objection to the appropriateness of equitable exemplary awards.

(ii) The power to punish

The power to award equitable exemplary damages may be inherent in equity, or it may come from the fusion of equity and common law.[146] The former argument supposes that "the flexibility a court of equity has in fashioning its relief" gives equity the power to punish outrageous equitable wrongdoing.[147] This proposition is interesting because it implies that an exemplary damages award in equity, and the associated test for its availability set out in *Couch v Attorney-General*, need not be identical to tortious awards. Rather:[148]

> The approach that holds equitable compensation to be an inherent power of courts of equity also gives a flexible remedy with characteristics defined by what we already know of equity, and other remedies available there. The remedy is discretionary. Equitable defences apply. It may be shaped so as to allow for the competing equities in the parties. The nature of the remedy is clear, and is not tangled up with questionable ideas of partial fusion of law and equity, with the corresponding uncertainty as to what remedy results.

Michalik defends the flexibility argument by analogy to historic instances of compensatory damages awards in Chancery cases.[149] The relative paucity of these authorities is explained as there being "few reported cases in which the remedies of restitution and account have not been a more satisfactory and available remedy".[150] However, his arguments are necessarily normative rather than empirical, with few other citations of the flexibility approach's curial use.

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[146] Jensen, above n 138 at 127.
[147] *White v Ruditys* (1983) 343 NW 2d 421 at 426; Michalik, above n 124 at 415.
[148] Michalik, above n 124 at 408.
[149] At 406.
[150] *Day v Mead* [1987] 2 NZLR 443 (CA) at 461 per Somers J; in Michalik, above n 124 at 407.

Equity seems to have punished transgressors prior to its purported fusion with common law in the passing of the Judicature Acts of 1873-75,[151] with "Chancery judges [exercising] a jurisdiction encompassing wrongs such as forgery and perjury", and the fining, pillorying and imprisonment of defendants, having been cited as examples.[152] However, these examples do not stand as examples punishing mere breaches of equitable duty; rather, they demonstrate "no more than that equity would punish when there was an assault on the nature of the equitable process".[153] This jurisdiction might be analogous to modern courts' powers to hold litigants in contempt of court or the statutory power to prosecute perjurers; the absorption of such powers into statute would explain why Morgan described this jurisdiction as obsolete and "anomalous even in its day".[154] These instances of equitable punitive measures are not compelling support for the flexibility argument, and so there appears to be little empirical support for the flexibility approach in New Zealand.

The fusion argument proposes that following the Judicature Acts of 1873-5, equity and common law have merged and so may borrow doctrines and remedies from each other. Burrows submits that, whether based in common law or in equity, damages serve essentially the same remedial function,[155] with the sole difference being the doctrinal basis of the wrong in question. As such, equity ought to draw upon the same remedies where the remedy adequately responds to the wrong, regardless of the conceptual source of those remedies.

This approach has more concrete support in New Zealand. The Court of Appeal has endorsed the view that "law and equity have mingled or are interacting"[156] and that a full range of remedies should be available as appropriate for breach of equitable obligations "no matter whether they originated in common law, equity or statute".[157] A disregard for the conceptual source of the power to award exemplary damages is also found in the House of Lords case *Kuddus v Chief Constable of Leicestershire Constabulary* in which Lord Nicholls held that

[151] Burrows, above n 93 at 383 (now Lord Burrows of the United Kingdom Supreme Court); see also *Harris v Digital Pulse*, above n 133 at [141]-[142] per Mason P.
[152] *Digital Pulse Pty Ltd v Harris* [2002] NSWSC 33, (2002) 40 ASCR 487 at [164].
[153] Morgan, above n 60 at 386.
[154] Morgan, above n 60 at 386.
[155] Burrows, above n 93 at 388.
[156] *Day v Mead*, above n 150 at 451; see also *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA) at 172.
[157] *Aquaculture*, above n 9 at 301.

"the availability of exemplary damages should be co-extensive with its rationale".[158] In other words, the source of the right outrageously disregarded by the defendant should be less decisive than the purpose of the remedy: "to punish and deter conduct that constitutes an outrageous disregard of the plaintiff's rights".[159] Where a court considers that punishment and deterrence is warranted in the context of a particular case, the conceptual source of such a power should be no objection to an award that has such an effect (although the context will of course inform whether punishment and deterrence are warranted; it has been suggested that breach of contract cases may not warrant them, for reasons I will shortly elaborate upon).[160]

While acknowledging that fusion is contentious and has met considerable opposition in Australia,[161] it is outside the scope of this inquiry to wade into discussions about whether or not we should allow remedies to be drawn upon regardless of their source. Suffice to say that the fusion argument appears to be endorsed in New Zealand, so far as the power to award equitable compensation is concerned; furthermore, fusion in respect of exemplary damages has support in the House of Lords. Alternatively, if fusion did not create the power to award exemplary damages in equity, that power may nonetheless be found if it is inherent in equity as Michalik argues. Thus there are two alternative bases for a power to award equitable exemplary damages in New Zealand.

B. Paper Reclaim *and the Case Against Exemplary Awards*

Exemplary damages for breach of contract were abolished in New Zealand by *Paper Reclaim*.[162] The Court of Appeal did not rule out exemplary damages awards for causes of action in both tort and breach of contract (e.g. where a landlord in evicting his tenant both trespasses and breached his tenancy agreement),[163] but did so in respect of pure contractual breach. Part of the ratio for this conclusion was that punishment fell outside the purpose of contractual actions, which are supposed to compensate, not punish, the claimant.[164] For the

[158] [2001] UKHL 29; [2002] 2 AC 122 at [65] per Lord Nicholls.
[159] Burrows, above n 93 at 401.
[160] Steven B Elliott and Charles Mitchell "Remedies for Dishonest Assistance" (2004) 67 MLR 16 at 36.
[161] *Harris v Digital Pulse*, above n 133 at [18] per Spigelman CJ, [146] per Mason P, and [353] and [391] per Heydon JA.
[162] Above n 7.
[163] At 183.
[164] At 170.

reasons just discussed, I have concluded that punishment does not necessarily fall outside of the purpose of equity, meaning that I do not find this objection material to my inquiry.

However, the Court also drew upon the reasons of the English Law Commission justifying the exclusion of exemplary damages for breach of contract:[165]

1. Exemplary damages had never been awarded for breach of contract;
2. The predominantly pecuniary nature of losses resulting from breach of contract, compared with the torts for which exemplary damages are most commonly awarded, which usually gave rise to claims for non-pecuniary losses;
3. The perception of a greater need for certainty in contract law, which reduced the scope for 'the sort of discretion which the courts must have in determining the availability and quantum of exemplary damages';
4. The private nature of contractual relationships; and
5. The doctrine of efficient breach.

If these objections are alive in equity, as the Court found that they are in contract law,[166] then these may provide policy justifications against awarding equitable exemplary damages. I will consider whether each objection arises in respect of the three equitable standards of responsibility discussed in Chapter II: loyalty, good faith and unconscionability.

(i) Lack of precedent

Aquaculture,[167] *Cook v Evatt*[168] and *Fa'agutu v Derhamy*[169], whether correctly decided or not, affirm that equitable exemplary awards are available in New Zealand. In *Aquaculture*, Aquaculture shared confidential information with the defendant, NZ Green Mussel Co (NZGMC), about the former's mussel extract which could possibly be used for therapeutic purposes and possibly as a cure for arthritis. NZGMC misappropriated Aquaculture's confidential information by using it to manufacture a product called "Seatone", deliberately marketed as a cure for arthritis. This led the extract to be banned by the FDA as a quack remedy, allegedly injuring Aquaculture's trading prospects. The Court of Appeal held that NZGMC breached an obligation of confidence, which I characterised above as an example of equity's

[165] England and Wales Law Commission *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) at 118-119.
[166] A finding which is outside the scope of my inquiry to question or criticise.
[167] Above n 9.
[168] Above n 8.
[169] Above n 9.

intervention to prevent unconscionable conduct in an otherwise contractual relationship; the Court considered that exemplary damages were awardable for such actionable breaches but were unnecessary in that case due to the adequacy of compensatory damages. In my opinion, *Aquaculture* falls within the scope of the relationship of unconscionability.

In *Cook v Evatt* the defendant sold investment property to the plaintiff in which he had an interest. Fisher J considered the defendant's deliberate setting out to deceive Ms Cook was punishable conduct warranting an exemplary award. Meanwhile, in *Fa'agutu,* plaintiffs invested their life savings under a Mudharaba arrangement on the advice of Derhamy, who was the husband's friend and former accountant. He invested the capital in one of his client's companies which he knew was in a precarious debt situation. The company went into liquidation and the plaintiffs sued for recovery of the lost investment sum as well as exemplary damages.[170] The Court found a breach of fiduciary duty in, among other things, Derhamy's failure to disclose material facts including his conflict of interest.[171] Citing *Cook v Evatt*, Walker J accepted that exemplary damages were available for the fiduciary breach but found that Derhamy's behaviour, though cavalier, was motivated by a genuine belief that he was benefiting the plaintiffs and so his conduct did not "meet the high threshold for exemplary damages".[172] Another factor was the sufficiency of a compensatory award. In the scope of the advice given in both of these cases, I argue that Ms Cook and Ms Fa'agutu were each in relationships of loyalty, breach of which both cases affirm may give rise to exemplary damages.

A case on exemplary damages for breach of a duty of good faith does not appear to have been decided. However, that no precedent exists is no obstacle to awarding exemplary damages in equity provided that a principled basis for the remedy can be found. In light of the aforementioned authorities, however, I consider that any question of judicial silence on the issue can be set aside.

(ii) Pecuniary nature of contractual losses

Were the Court of Appeal (and the English Law Commission) correct in emphasising that contractual losses are predominantly pecuniary, the utility of such emphasis in my view speaks to the ease of monetary awards to adequately satisfy or vindicate the plaintiff's claim. Monetary

[170] At [1]-[10].
[171] At [133]-[139].
[172] At [150]-[151].

awards are easier to quantify in compensatory or restitutionary terms where the plaintiff's loss is itself a monetary sum; this may not be the case for tortious wrongdoing, especially where some personal injury or intangible loss is concerned.

Breaches of equitable duties have been found in cases of incest,[173] emotional abuse[174] and personal injuries.[175] All of these constitute non-economic losses to beneficiaries. Considering that at the heart of the fiduciary relationship is the trust and reliance of the beneficiary, rather than the exchange of economic promises, to confine the ability of equitable damages to compensation for pecuniary loss is counterintuitive.

(iii) The need for certainty

Certainty is emphasised in contract law because certainty promotes *contracting*, an act of economic utility:[176] without confidently knowing whether and when they are legally bound, parties will be discouraged from negotiating exchanges of promises as to their future conduct.[177] Thus, in Millett LJ's extra-curial view, the promotion of contracting and commerce requires "bright line rules" which common law provides but equity abhors.[178] This appears to be the basis for the Law Commission's aversion to discretionary awards.

Equity, the Aristotelian "leaden rule" to the common law's "golden and straight met-wand", has less concern for certainty.[179] Though its ability to stray from the law has been bounded, equity's ability to accommodate circumstances inappropriate for the common law's consideration remains an important part of modern equity.[180] Discretionary awards informed by the parties' conduct are not alien to equity in any sense, but are in fact unabashedly characteristic of it,[181] with an obvious example being the equitable allowance.[182] That

[173] *K M v H M* (1992) 96 DLR (4th) 289 (SCC) at 323.
[174] *B v R* (1996) 10 PRNZ 73.
[175] *Surrey v Speedy*, above n 43.
[176] Simon Connell, "Contract law, contracting and instrumentalism" in S Griffiths, M Henaghan & M B Rodriguez Ferrere (eds) *The Search for Certainty: Essays in honour of John Smillie* (Thomson Reuters, Wellington, 2016) 99-128 at 99.
[177] John Smillie "Is Sanctity of Contract Worth Pursuing? – Reflections on the Function of Contract Law" (2000) 16 JCL 148 at 110.
[178] PJ Millett, "Equity's Place in the Law of Commerce"(1998) 114 Law Quarterly Review 214.
[179] Sir Edward Coke, 4 Inst 41.
[180] Alastair Hudson *Equity and Trusts* (9th ed, Routledge, Oxon, 2017) at 1094.
[181] PD Michalik, above n 124 at 402-403; Roscoe Pound "The Decadence of Equity" (1905) 5 Colum L Rev 20 at 21-22.
[182] *Chirnside v Fay*, above n 83 at [49] per Elias CJ and [122] per Tipping J.

conclusion suggests that the need for certainty alone does not justify withholding equitable exemplary awards.

(iv) The private nature of contractual relationships

The English Law Commission considered that as "a contract is a private arrangement in which parties negotiate rights and duties", the notion of state punishment is less applicable to contract than to tort, wherein "duties … are imposed by law". The term "private arrangement" is unhelpful; insofar as private law is concerned with the relative positions of two individual parties, tortious and contractual duties are equally private. In my view, "private arrangement" refers to the *negotiation* of obligations and the requirement that those obligations are *voluntarily assumed* and not "imposed by law", as the Law Commission states tortious duties are. State punishment being typically reserved for the criminal law, insofar as the civil jurisdiction can also punish, tortious duties imposed by the state are the logical niche for civil punishment:[183]

> Many torts constituted crimes and accordingly, civil litigation raised issues of public interest, particularly involving a breach of the peace. In such a context it was entirely appropriate that considerations of punishment and deterrence arose in the context of actions in tort.

In contrast, equitable and contractual duties are not "greatly intermingled" with crime,[184] so no appeal to tradition supports treating them like tortious duties.[185] Indeed, the rule against contractual penalties, preventing parties from enforcing contractual penalty clauses against one another, eschews punishment.[186]

This prompts the question of where equitable relationships sit on the spectrum between duties imposed by the justice system (i.e. tort and criminal law) and private duties which parties create and impose upon themselves (i.e. contract law). I begin with fiduciary relationships which impose high standards of loyalty and selflessness. The purpose of fiduciary relations is different to contractual relations: "fiduciary relations are designed not to satisfy both parties' needs, but only those of the entrustor."[187] In *Harris v Digital Pulse*, Mason P took the view that fiduciary

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[183] *Harris v Digital Pulse*, above n 133 at 33 per Spigelman CJ.
[184] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (HCA) at 149 per Windeyer J; in *Harris v Digital Pulse*, above n 133 at 399 per Heydon JA.
[185] At 401 per Heydon JA.
[186] Although the rule's rationale might simply be to protect the court's monopoly on remedies: Palmer, above n 106 at 313.
[187] Tamar Frankel "Fiduciary Law" (1983) 71 Cal L Rev 795 at 801.

obligations are imposed, arguing that they arise out of a relationship and/or the parties' conduct, as opposed to "merely giving effect to the negotiated private arrangement that is a contract".[188] Spigelman CJ, meanwhile, saw fiduciary obligations as promise-based and analogous to contract, noting the critical feature of fiduciary relationships having been defined as the *undertaking or agreement* of a fiduciary to *act on the beneficiary's behalf*.[189] a proposition supported in Canadian authority.

However, the use of the term "undertaking" does not render undertakings to act with loyalty the same as voluntarily self-imposed contractual undertakings. Undertakings giving rise to fiduciary relationships "may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests."[190] At least in the former two cases, unlike a contract, an equitable relationship may be found even where such was not contemplated by the parties. An obvious example is the constructive trust which arises as a necessary consequence of certain facts and may require dishonest assistors of breach of trust (for example) to take on the duties of trustee, notwithstanding that they may well have had no prior relationship with the beneficiary-to-be at all or have received no benefit from the assistance.[191]

The argument that fiduciary obligations are voluntarily undertaken is strongest in respect of an express trustee or a solicitor who voluntarily assumes that position. Yet certain fiduciary obligations upon those parties still fit the characterisation of being imposed: the no-conflict rule applies even where conflicts of interest yield results which are ambivalent or beneficial to the principal's interests.[192] In this respect, equity's unyielding intervention indicates that the rule is not *a priori* consent-based.[193] Other rules of equity cannot be "contracted out" of: *Armitage v Nurse* states that "the duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the

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[188] Above n 133 at [182]-[184].
[189] *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 (HCA) at 96-97, *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 (HCA) at [17], *Pilmer v Duke Group Ltd (In Liq)* [2001] HCA 31, (2001) 207 CLR 165 at [70]; in *Harris v Digital Pulse*, above n 133 at [37]. This characterisation has also been supported in Canadian authority: see *Alberta v Elder Advocates of Alberta Society* (2011) SCC 24, [2011] 2 SCR 261 at [30]-[32].
[190] At [32].
[191] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 WLR 64, [1995] 3 All ER 97 at 102 per Lord Nicholls; in Gino Evan Dal Pont *Equity and Trusts in Australia* (6th ed, Lawbook Co, Sydney, 2015) at 1174-1175.
[192] *Boardman v Phipps* [1966] UKHL 2, [1966] 3 All ER 721.
[193] Burrows, above n 93 at 400.

trusts",[194] meaning that a trust deed may not allow a trustee to act otherwise.[195] On one reading, that duty is a state-imposed standard of behaviour (although on another, it may merely describe what a trust *is*, just as the rules of contract formation describe a contract as formed by an agreement for valuable consideration).

Discussion of equity imposing standards of conduct, rather than the parties voluntarily subjecting themselves thereto, also appears in New Zealand authority. In *Chirnside v Fay* the Court of Appeal stated that fiduciary law is not concerned with private ordering:[196]

> [I]t is not the function of fiduciary law to mediate between the various interests of parties who are dealing with each other. That is for contract law. Fiduciary law serves to support the integrity and utility of relationships in which the role of one party is perceived to be the service of the interests of the other. It does so by imposing a specific duty of loyalty.

In light of such a description, I do not consider Spigelman CJ's emphasis on undertaking to enter into a fiduciary relationship to be sufficient to render fiduciary obligations analogous to voluntarily self-imposed contractual obligations. It follows that fiduciary obligations ought not to be viewed as "private".

Analogies with contract may be appropriate in respect of Finn's good faith and unconscionability standards of protective responsibility. These are less onerous than the fiduciary standard, accommodating to various extents the parties' freedom to pursue their own interests. Could it be that the more similar the parties' interest is a contractual interest, the more likely that it would be "private" and inappropriate for state-imposed standards of behaviour?

Spigelman CJ may have been sympathetic to such a view. His Honour considered it decisive that the fiduciary duties arose from an employment contract:[197]

> The "undertaking or agreement" of the employees to act in the interests of the employer, and the employer's "entitlement to expect" that that will occur – imputed to the relationship by equity - is much closer to a contractual relationship than it is to circumstances creating obligations in tort. If argument by analogy of this kind is appropriate, I prefer the contract analogy.

I respectfully suggest that this misconceives the expectations to which the parties were entitled. In *Aquaculture*, it is difficult to say that Aquaculture could have legitimately expected that

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[194] [1997] 3 WLR 1046, [1997] 2 All ER 705 at 713.
[195] That rule is now codified in ss 25-26 Trusts Act 2019.
[196] *Chirnside v Fay* [2004] NZCA 111 at [51].
[197] At [43].

NZGMC would act in NZGMC's interest in respect of the confidential information. Even though the parties were in trade and so were not in such a relationship which would give rise to expectations of loyalty or good faith, one can easily attribute an expectation to Aquaculture that its confidential information would not be used for NZGMC's own benefit. Notwithstanding that unconscionability and good faith relationships are less onerous than fiduciary relationships, I likewise consider that they cannot be analogised with contract law's permissiveness towards selfish behaviour based simply upon the fact that the parties in the case may be in a contractual relationship.

A further justification for not viewing duties of good faith or not to behave unconscionably as disanalogous to contractual duties is the assumption inherent in contract law that there is no imbalance of power between contracting parties. The imposition of equitable duties responds to a risk that the conscience of one party might be affected by allowing him to enforce his rights at law. As I have discussed above, those duties typically arise in relationships where the principal has relied on the fiduciary not to behave in a certain manner, or where the fiduciary's conduct affects the principal such that the former ought to (at least) not deliberately act against the latter's interests. The case for freedom of contract becomes weaker when the assumption of equality between parties is relaxed.

The role played by equity in regulating the fiduciary's ability to pursue his own ends, in my view, supports the the standards of unconscionability, good faith and loyalty being characterised as state-imposed standards of behaviour rather than private obligations negotiated by the parties. In that sense, equity resembles tort more than contract and equitable relationships are likely not "private arrangements" such as the English Law Commission described.

(v) The doctrine of efficient breach

Efficient breach allows contracting parties to break contracts and pay compensatory damages if they are able to find a more remunerative use for the subject matter of the promise.[198] By promoting a Pareto-superior outcome, the theory reinforces an instrumentalist view that contract law promotes economically efficient transactions. The Law Commission considered

[198] Hefferan, above n 73, at 11.

that exemplary damages awards would tend to discourage efficient breach. By exceeding the amount necessary to compensate the plaintiff, exemplary damages undermine efficient breach because they encourage continued performance even when breach is more efficient.[199]

Efficient breach has little equitable application. The doctrine achieves Pareto-superior outcomes only where the "wronged" party is able to detect breach and sue for damages.[200] That ability typically does not arise among the asymmetries of power and information inherent in equitable relationships. Furthermore, the doctrine demonstrates that contract law does not deter breaches of obligations where breach is efficient or where deterrence might cut across the duty to mitigate.[201] The same cannot be said for equity: while "common law allows defendants to choose whether to perform or breach and pay damages, equity … orders defendants to perform."[202] The deterrent function of remedies like account of profits suggests that "equity repudiates the type of efficiency encompassed in the contractual notion of efficient breach."[203] A more rigid standard of loyalty is demanded, prohibiting fiduciaries from putting their own interests over that of their beneficiaries or from putting themselves in a position of conflicting duties to their principals.[204]

To summarise my findings on this point, I consider that policy concerns in respect of lack of precedent, the pecuniary nature of contractual losses, the need for certainty, the "private nature" of contractual relationships, and the doctrine of efficient breach do not apply to any of the equitable relationships I have described. It follows that the policy factors which justify abolishing contractual exemplary damages appear not to apply to equitable exemplary damages. Having set aside the objections to equitable exemplary awards, it remains to consider scenarios where achieving equity's purpose of promoting trusting relationships would require an exemplary award to punish and deter the defendant's wrongdoing.

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[199] At 12.
[200] Ibid.
[201] Burrows, above n 93 at 400.
[202] William Swadling "Constructive trusts and breach of fiduciary duty" [2012] *Trusts and Trustees* (Oxford, November 2012) at 997.
[203] *Harris v Digital Pulse*, above n 133 at [182]-[184]; *Phipps v Boardman*, above n 81 at 1030; *Chirnside v Fay*, above n 83 at [137] and [151].
[204] Simone Degeling "Breach of Fiduciary Duty: Consent and Prior Court Authorisation" in Paul S Davies, Simon Douglas and James Goudkamp (eds) *Defences in Equity* (Hart Publishing, Oxford, 2018). The only exceptions being the beneficiary's informed consent (*Breen v Williams* (1996) 186 CLR 71 (HCA) at 135 per Gummow J) or a statutory or equitable exception (e.g. s 51 of the Trustee Act 1956 or the court's inherent power to remove trustees (*Carmine v Ritchie* [2012] NZHC 1514 at [63])).

V. A NEED FOR EQUITABLE EXEMPLARY DAMAGES?

Prescribing situations in which a given remedy will be appropriate is complicated because equitable remedies are inherently discretionary, and existing cases turned on their own facts.[205] The test for the appropriateness of exemplary damages in a novel case will follow the elements of the remedy set out in *Couch v Attorney-General* (as I am assuming that equitable exemplary damages will be subject to the same test). The *Couch* test requires that a fiduciary breach an equitable duty to the principal, that the breach be outrageous, and, importantly, that existing equitable remedies are insufficient to condemn, punish and deter the defendant's conduct.

A. Breach and Outrageousness

A breach of equitable duty results from the fiduciary acting unconscionably, not in good faith, or disloyally vis-à-vis the principal. However, exemplary damages need not flow from any interest of the plaintiff in the defendant not acting as above, as although dualism starts from the breach of the plaintiff's right, it does not require the remedy to give effect to a performance interest of the plaintiff, nor repair her injured right.

Cook v Evatt[206] (the sole New Zealand example of an equitable exemplary award) is coherent under dualism. Evatt purported to give independent financial advice on property investments to Cook whilst not disclosing that he had an interest in the property concerned. Fisher J in the High Court found that in hiding his interest from Cook and then making a personal profit from her subsequent investing on his advice, he outrageously breached his fiduciary duty to her. In addition to exemplary damages, Cook received an account of profits (a performance remedy): this posed a problem under monism because exemplary damages cannot follow from a performance interest, which monism would require. The dualist answer to this problem was that the account vindicated Cook's interest in not being treated disloyally, while exemplary

[205] Jensen, above n 138 at 136.
[206] Above n 8.

damages followed from a separate *communal* interest in punishing and deterring Evatt. As exemplary damages do something other than vindicate the plaintiff's performance interest, therefore, *Cook* need not run into the problem of damages (a *prima facie* reparative remedy) for Evatt's performance breach.

Couch then requires the breach be done outrageously, and intentionally or recklessly. The requirement for outrageousness reflects the fact that exemplary damages are an exceptional remedy "reserved for extreme cases of flagrant wrongdoing";[207] thus, outrageousness tends to be found only where the defendant's conduct is motivated by malice, contempt or a "contumelious disregard" for the plaintiff's rights.[208] In *Cook*, the defendant's deliberate concealment of his personal interest in the property which the plaintiff bought on his advice was found to constitute an outrageous breach.[209] By contrast in *Fa'agutu*, although the defendant conflicted himself by investing the plaintiffs' money in one of his clients' businesses, his honest belief that he was benefiting the plaintiffs, and faithfully executing his duties to them, prevented his conduct from meeting the threshold of outrageousness.[210] Thus, any equitable wrongdoing qualifying for exemplary damages would likely need malicious intent or subjective gross recklessness to qualify as outrageous.

B. Inadequacy of Other Remedies

Once an outrageous equitable wrong has been established, exemplary damages require conventional remedies to be insufficient to punish the wrongdoer and execrate his error; in the context of equity, this refers both to compensation and gain-based remedies. As stated in Chapter III, any award of damages or stripping of profits is penal so far as the defendant is concerned. Where compensation for loss or an account of profits has been awarded, it is difficult to say where additional punishment would be required, as the adequacy of punishment is a highly subjective matter for the court's discretion and would depend upon the substance of the wrongdoing in the particular case. However, there would be a particular need for exemplary damages where other remedies are not available for the type of loss that the plaintiff has suffered (meaning those remedies cannot respond to or deter the defendant's wrongdoing), or where the presumptive remedy would in any case fail to achieve deterrence. Two fact patterns

[207] Atkin, above n 4, at 59.25.3.03(4).
[208] Ibid.
[209] Above n 8 at 706.
[210] Above n 9 at [150]-[151].

stand out as falling within these categories: equitable allowances and actions for personal injury.

(i) Equitable allowances

This example is best illustrated by the facts of the leading New Zealand authority on equitable allowances. In *Chirnside v Fay*,[211] the parties were in a joint venture to develop a property in which, by arrangement, Chirnside was responsible for providing most of the labour and was to receive an honorarium for his work, while Fay would locate an anchor tenant to ensure viability of the development. After Fay had done so and Chirnside had completed most of the development, Chirnside excluded Fay and secured finance for the development himself through his own company and solicitors. He concealed this from Fay for several months until Fay finally claimed an account as a partner on the joint venture. The Supreme Court held that Chirnside breached a fiduciary duty by excluding Fay and ordered the account. However, the court split on whether Chirnside's disproportionate contribution to the venture warranted granting him an allowance for his skill and expertise.

The approaches taken in *Chirnside* reflect divergent views of the basis for allowances, which each have separate implications for the appropriateness of exemplary damages. Elias CJ, in the minority, argued that Chirnside's dishonesty and bad faith set him apart from the recipients of allowances in previous cases (who merely failed to fully disclose matters to the beneficiaries, and indeed in cases such as *Boardman v Phipps,* had acted with the utmost integrity).[212] Chirnside's conversion of the venture amounted to "a direct denial of fiduciary loyalty", making an allowance inappropriate as, in her Honour's view, it would undermine the fiduciary relationship.[213] Her Honour's approach reflects the "strict" approach to equitable allowances endorsed by the House of Lords in *Guinness plc v Saunders*: their Lordships held that allowances should be made only in "exceptional circumstances" where it would be "inequitable ... for the beneficiaries to step in and take the profits without paying for the skill and labour which has produced it".[214] Under the strict approach, an allowance should not be made where it would "provide any encouragement to trustees to put themselves in a position where their

[211] Above n 83.
[212] At [45].
[213] At [48].
[214] [1990] 2 WLR 324, [1990] 1 All ER 652 at 667-668. The defendants' honesty in *Boardman v Phipps* could be an apt example of such exceptional circumstances justifying an allowance.

duties as trustees conflicted with their interests".[215] Furthermore, the effect of such a withholding in *Chirnside* would almost certainly have been penal, as it would have amounted to $200,000 being withheld from Chirnside. Under the strict approach to allowances which takes into account the defendant's conduct, sufficient punishment is arguably achieved by withholding the allowance and additional exemplary damages awards would be superfluous.

The majority in *Chirnside*, however, granted an allowance of $200,000. This decision can be interpreted in two ways. If the Court is read as applying *Guinness*, then that is consistent with their emphasis on Chirnside's breaching his fiduciary obligations *subsequent* to applying his skill and expertise.[216] Chirnside's misconduct postdating his major contributions to the venture suggests that his misconduct would not make it inequitable to award him the allowance. On this reading, the subsequent case of *Savage v Adlam*, where the defendant trustee had an allowance withheld due to her "blatant" breach of trust, is consistent with *Chirnside*. In that case, Adlam constructed and operated a geothermal power station on trust land, receiving a substantial profit. The breach of fiduciary duty occurred alongside her skill and expertise, for Adlam's provision of the land put her interests in conflict with her trustee obligations *before* she put the work into making the venture profitable. This part of the decision was upheld on appeal.[217] It could be argued that in both *Chirnside* and *Savage v Adlam* the parties' misconduct was distinguished based on the timing of the breach relative to the labour and skill: Chirnside's misconduct postdating his labour meant he should not have an allowance withheld, and *vice versa* for Adlam.

On another reading, however, the rationale for the majority's granting of an allowance in *Chirnside* was to ensure Fay did not receive an undeserved windfall from Chirnside's labour. Rather than a benefit to be punitively withheld from the defendant because of his misconduct, this approach treats allowances as a deduction from the venture's profit, much like any other expense.[218] This approach is consistent with Australian authority which holds that the jurisdiction to award equitable allowances is meant to ensure that the plaintiff and defendant only receive the sums to which they are entitled.[219] However, this analysis is inconsistent with *Savage v Adlam*'s treatment of Adlam's misconduct as decisive in withholding an allowance:

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[215] Butler, above n 25 at 904.
[216] At [139] and [144].
[217] *Adlam v Savage* 2015 Māori Appellate Court MB 59 (2015 APPEAL 59) at [131].
[218] At [48].
[219] Morgan, above n 60 at 386.

there is arguably no room for consideration of the defendant's misconduct, as the concern should be with ensuring that the principal does not disproportionately benefit from the fiduciary's labour.

Both interpretations of the majority's decision have implications for exemplary damages in like cases. On *Guinness*' "misconduct" approach, the defendant's misconduct does not render it inequitable for an allowance to be awarded where the misconduct postdated the skill and expertise being rendered. This renders the allowance an inappropriate measure to respond to the defendant's breach of equitable obligations. On the "windfall" approach, concern may not be had for the defendant's misconduct at all as the purpose of an allowance is to prevent a windfall to the principal. On either interpretation of *Chirnside*, the effect of the allowance was that Chirnside received what he was originally entitled to. The account of profits stripped him of profits which he was not entitled to, but left him in a neutral position as between breaching and performing his equitable obligations. He therefore suffered no detriment *ipso facto* his breach. Where a defendant's misconduct is held not to disqualify him an allowance, this undermines the partially deterrent purpose of disgorging profits.[220] In such cases, there may be a need to respond to the defendant's outrageous breach of equitable obligations which therefore cannot be achieved by the account.

To summarise, where an allowance is withheld because the defendant's wrongdoing makes it inequitable to grant one (i.e. Elias CJ's approach in *Chirnside*), that would likely be punishment enough, negating the need for exemplary damages. If an allowance is given, however, then a separate order for exemplary damages could be necessary to censure the defendant's conduct. In *Chirnside*, Chirnside's deliberate exclusion of Fay from the venture in order to self-benefit might satisfy the threshold of an outrageous breach of fiduciary duty; an exemplary award equating in value to much of Mr Chirnside's allowance (though likely not the same size) would have been proportionate response in order to censure his misconduct. I clarify that while such an award might be set off against the allowance, they are not the same remedy and judges should be careful to clearly articulate that the two are separate and serve separate purposes: the allowance is to acknowledge the defendant's labour and prevent a windfall, while the exemplary damages are to mark his conduct out for condemnation.

[220] Butler, above n 25 at 904.

(ii) Personal injury

Where an outrageous breach of an equitable duty owed to the plaintiff causes personal injury to the plaintiff, exemplary damages might be an appropriate response to the defendant's wrongdoing. Exemplary awards are not compensatory and so are not barred by ACC,[221] rendering them the primary means for victims of personal injury to claim damages from those responsible for their injuries.

For such a claim to succeed it would be necessary to ensure the claim for breach of fiduciary duty does not overlap with one in tort for e.g. breach of duty of care. Facts giving rise to a breach of fiduciary duty may also give rise to a breach of duty of care *a fortiori*: if a fiduciary owes a duty of loyalty, good faith or to act in good conscience towards their principal, then the latter would also probably be foreseeably affected by the former's actions according to the neighbourhood principle. This proved obstructive to an exemplary award in *Attorney-General v Prince and Gardner*, where the plaintiff claimed exemplary damages for negligence and breach of fiduciary duty based on the same alleged facts; the court struck out the equitable claim as indistinct from the tortious one.[222]

An additional problem arises where equitable breaches are pleaded in order to get around the Limitation Act 2010, which does not apply to equitable claims; *Matai Industries Ltd v Jensen* provides that where there is:[223]

> [A] sufficiently close similarity between the exclusive equitable right in question and legal rights to which [the Act] applies a Court of equity will ordinarily act upon it by analogy … if there is nothing in the particular circumstances of the case that renders it unjust to do so.

In other words, if the tort claim were statute-barred, then so would be a claim in equity founded upon the same particulars. Excepting any unjust circumstances, an exemplary-damages-for-personal-injury claim would fail if the particulars giving rise to the claim were sufficiently similar to those which would found a statute-barred tort claim.

There is scope, however, for outrageous breach of an equitable obligation to amount to a separate wrong against the plaintiff, even where the loss is pure personal injury. In *Simpson v*

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[221] *Donselaar v Donselaar*, above n 87.
[222] Above n 42 at 277.
[223] [1989] 1 NZLR 525 (HC) at 544; in *Lamb v Attorney-General* [2015] NZAR 1737 (HC) at [67].

Elliott,[224] Master Kennedy-Grant declined to strike out a claim for breach of fiduciary duty because his Honour was satisfied that the defendant's acts or omissions did not amount in reality to tortious conduct or an analogy to such under s 4(9) of the Limitation Act 1950. The decisive pleadings were that the defendant "owed the plaintiff a fiduciary duty to refrain from taking advantage of, exploiting or using her for his own benefit or gratification", coerced her to do various sexual and physical acts and "abused his position of power over her or acted recklessly and in breach of her rights".[225] His Honour drew upon the Canadian Supreme Court case of *Norberg v Wynrib* in support of breaches of the doctor-patient relationship giving rise to more than tortious liability. In that case, McLachlin J (later Chief Justice of Canada) and L'Heureux-Dubé J had dissented from the majority in finding that Dr Wynrib's exploitation of his patient Norberg's dependence on painkillers to obtain sexual favours from her had breached his fiduciary duty to her, rather than committing the tort of battery as the majority found.[226]

Addressing the argument "that the fiduciary obligation adds nothing, except perhaps a duty of confidence and non-disclosure, to an action in tort or contract"[227] (which was the essence of the decision in *Prince*) McLachlin J considered that without a fiduciary dimension "the wrong done to the plaintiff can neither be fully comprehended in law nor adequately compensated in damages".[228] The wrong in this case was not Dr Wynrib's failure to take reasonable care of Norberg but rather a breach of his pledge to act in her best interests, which arose out of his position as her physician, by prescribing her the drugs to which she was addicted, failing to advise her to obtain counselling, and placing his interest in conflict with hers by obtaining sexual favours from her.[229] McLachlin J considered that the essence of fiduciary relations, with one party exercising powers on behalf of another, was sufficiently distinct from the common law assumptions of independence and self-interest that the latter could not adequately capture the wrong.[230]

This approach indicates that even where a fiduciary physically harms their principal, the actionable wrong may lie not in the assault, battery or otherwise but instead in the breach of

[224] HC Auckland CP54-99, 14 March 2001.
[225] At [14].
[226] [1992] 2 SCR 226 (SCC) at [63].
[227] At [92].
[228] At [95].
[229] At [83].
[230] At [65].

trust and reliance inherent in the relationship. Likewise, a duty to "refrain from inflicting personal injuries upon one's child" was recognised as being founded in equity in *Surrey v Speedy*.[231] These authorities stand for the proposition that a claim could be made for breach of fiduciary duty causing personal injury without being absorbed by an analogous claim in tort.

Exemplary damages awards might be the most appropriate remedy in cases of personal injury resulting from an equitable breach. The ACC scheme makes compensatory damages unavailable, prompting some other remedial response. Where personal injury is the sole loss attributable to the fiduciary's breach, however, other equitable remedies would also be of little use: performance remedies (injunctions, orders to perform an equitable obligation) are of little use when the harm has already been inflicted. Moreover, an equitable account would only be available if the defendant had profited from his wrongdoing; even in a *Norberg*-case where the defendant could be said to have benefited from his abuse of the plaintiff's trust, the benefit was intangible, making it difficult and artificial to quantify in terms of a monetary gain. The insufficiency of other remedies to condemn the defendant's equitable wrongdoing seems to justify exemplary damages in such personal injury cases.

To conclude this chapter, there is a need for equitable exemplary damages where outrageous breaches of equitable obligations cannot be adequately responded to by equity's traditional loss- or gain-based remedies such as damages or accounts of profits. This will primarily be the case in New Zealand regarding personal injury due to ACC. The implications of this finding for equitable exemplary damages in other jurisdictions are beyond the scope of my inquiry. As for breaches which undermine the duty of loyalty, gain-based remedies would be rendered insufficient *only* where allowances are given *and* those allowances would undermine the ability of those remedies to deter breach. Therefore I expect exemplary damages to be rarer in respect of the latter sort of equitable breach.

[231] [2000] NZFLR 899 at [35]. This case relied on Canadian case law describing the relationship between parent and child as intuitively fiduciary (*M (K) v M (H)* [1992] 3 SCR 6).

VI. CONCLUSION

Exemplary damages in any form cannot be explained by the monist conception of civil liability, as no legally recognised right of the plaintiff could give rise to an interest in punishing the defendant. They must therefore be a dualist remedy, selected based upon their appropriateness in the circumstances. Equity, while not setting out to punish, can accommodate punitive remedies with a punitive effect provided that these help to ensure that fiduciaries do not act unconscionably, disloyally or in bad faith vis-à-vis their principals. The three equitable standards of protective responsibility, being more similar to tortious than contractual obligations, are not subject to any of the public policy matters which justified excluding exemplary damages for breach of contractual obligations. Therefore, in my view there is no objection to the availability of exemplary damages *generally* which suggests they should not be available for equitable wrongdoing in New Zealand.

I qualify these remarks by restating the assumptions made in the course of this inquiry:

- I proceeded from the basis that exemplary damages are a civil remedy and that they are available in New Zealand for breach of tortious duties (a contentious proposition nonetheless supported by New Zealand authority). To that extent, some of my findings are contingent on New Zealand authority continuing to affirm that exemplary damages are available and that punishment and deterrence are not solely for the criminal law: the analogy with tort will be considerably weaker if exemplary damages are abolished for tortious wrongs!
- I assumed that the reasons given in *Paper Reclaim* for abolishing exemplary damages for breach of contract were valid and sound. I also assumed the accuracy of both the monist-dualist characterisations of private law remedies, and the reparative and performative categorisation of the right-remedy relationship. I make no comment on whether my arguments will survive a different characterisation of the right-remedy relationship.
- I also did not go into detail as to the source of the power to award equitable exemplary damages but assumed that one of the two options was operative in New Zealand.

It was outside the scope of this dissertation to relax these assumptions or to go into much detail defending their reasonableness. That will be a different scholar's task.

Insofar as this inquiry sought to explain the current availability of exemplary damages, I humbly suggest that goal was achieved. Current New Zealand authority does not contradict the findings that equity has the power to award exemplary damages, that exemplary damages can help equity police the consciences of parties in trusting relationships, and that equitable obligations are not subject to the policy concerns concerning contractual obligations. The upshot of my conclusions as to the objections to equitable exemplary damages, and the circumstances in which they ought to be awarded, is that what will be most determinative of the availability of exemplary damages is not so much the nature of the equitable interest which has been infringed but rather the ability of other equitable remedies, whether these be damages, account of profits or otherwise, to censure, punish and deter the defendant's conduct. For as long as that goal cannot be achieved, there will be a proper role for exemplary damages to play in securing the purposes of equity.

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