

The Limitations of Unjust Enrichment :

A New Perspective on Restitution

Joachim Dietrich

A thesis submitted for the degree of Doctor of Philosophy of The
Australian National University

September 1994

Except where otherwise acknowledged, this thesis
comprises my own work

Joachim Dietrich

September 1994

To Mum and Dad with love.

Without your love and support throughout my life,
this would not have been possible.

acknowledgments

There are many people who have assisted me in the course of the production of this thesis over the last three and a half years. Since it is not possible to thank all here individually, I offer my sincerest gratitude to all of you who have made the task a little easier.

In particular, I would like to thank my Supervisory Committee, consisting of **Professor Paul Finn, Mr. Nicholas Seddon and Professor Jim Davis**, all of The Australian National University. Special mention must go to Paul Finn, for the considerable time and effort devoted to me in his principal supervision, and for his invariably helpful comments and criticisms. The influence of Paul's ideas are no doubt evident in the final product. Thanks also to Nick Seddon for his detailed and helpful comments on earlier drafts.

Special thanks are due to **Rick Bigwood** for his careful reading of earlier drafts, and his editorial work and thoughtful comments which were of invaluable assistance to me. My gratitude to Rick for his time and effort is immense. But even more so, I wish to thank Rick for his friendship, support and understanding during what were for me difficult times.

Special thanks also goes out to **Wendy Riemens, Janine Bush and Jason Poxon** for their friendship and tolerance.

Thanks also to **Mrs. Anne Robinson**, for making my reluctant initiation into computers relatively painless, for her administrative assistance, and above all, for her kindness; and thanks to **Mr. Andrew Burrows**, for his stimulating comments during the final stages of my work.

For their financial assistance, I wish to thank **The Australian National University and Anutech**.

Last, but in no way least, I would like to thank the members of my family, **Mum and Dad**, to whom this thesis is dedicated, and **Irene**, for their love and support.

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abstract

This thesis is about attempts to provide a theoretical framework for the law of Restitution, a subject in which there is growing academic and judicial interest.

Part I of the thesis considers the concept of "unjust enrichment", which is currently gaining the status of orthodoxy as an explanation of Restitution. The law of Restitution, perceived to be a third category, alongside contract and tort, of the law of obligations, is said to consist of liability rules uniformly explicable as having a purpose of the reversal of unjustly obtained or retained enrichment. As a brief historical survey of Restitution demonstrates, unjust enrichment theory is an a-historical attempt to unify and explain a very diverse range of topics. Part I goes on to consider what unjust enrichment means, specifically by considering the content given to the two most important parts of that concept: "unjustness", and "enrichment" or "benefit". A range of views as to the meaning of both parts are considered. None of these views or approaches, however, satisfactorily allows us to explain liability in many cases. Many cases said to be explicable on the basis of the reversal of unjust enrichment are not in fact so concerned. It is concluded that the concept of unjust enrichment is not useful as an explanation of much of the law of Restitution.

In Part II of this thesis, the writer consequently seeks alternative ways of conceptualising Restitution. Rather than conceive of that subject as explicable in terms of one, unifying principle, the writer instead identifies four distinct categories of cases. Each category addresses very different types of problems, and is explicable in terms of distinct ideas.

In the first category of cases, (Chapter 6) liability is imposed because of particular conduct of a defendant, where a plaintiff has relied on such conduct to his or her detriment. Liability is imposed on a defendant at least to return the plaintiff to his or her previous position before the offending conduct, and irrespective of whether the defendant has obtained any benefit.

In the second category of cases (Chapter 7) liability may arise because parties share a common interest in a matter, which matter is affected by an unprovided for contingency. In such cases, the parties community of interest in the matter justifies the operation of a principle of "just sharing", which principle requires the parties to share gains and losses arising as a result of the contingency,

according to their relative contributions to the matter in which they have the common interest.

In the third category of cases (Chapter 8) liability may arise where a plaintiff has justifiably intervened in another's affairs, and seeks to recover the costs of such intervention from that other. Social policy concerns appear to be the most important factor in determining in which circumstances such recovery will ensue.

In the fourth category of cases (Chapter 9) recovery is sought from an innocent defendant who have received something (money, goods or services) from a plaintiff. The plaintiff will be entitled to recover the money or goods, or obtain some form of remedial relief for the services conferred, where such remedial relief or recovery in no way leaves the innocent defendant at a disadvantage.

PART I

VENTURING INTO THE RESTITUTION THICKET

*Those who venture into the restitution thicket not infrequently become lost.*¹

§ 1.1 GENERAL INTRODUCTION

After a long period of relative obscurity,² the law of Restitution,³ as it is

¹ *Snider v. Dunn*, 160 N.W. 2d 619 (1968) 628, per Levin J. (dissenting). Levin J. went on to add: "It is part of our task to see that they are heard from again." The writer hopes that this thesis may make a contribution toward that task.

² Cf. Birks, P., *Introduction to the Law of Restitution* (1985) (hereinafter: "Birks"), 1-8, who considers that Restitution was for a long time "hidden under the fringes of other better-known subjects" (at 5). Similarly, in "The English Recognition of Unjust Enrichment" [1991] L.M.C.L.Q. 473, 473, Birks writes:

Historically the law of restitution has been so effectively concealed by clouds of impenetrable language that its very existence has been debateable. And it has laboured under the extraordinary handicap of having to manage without any intelligible generic name for the events to which it, restitution, is the remedial response. All that is now over.

In a similar vein, Butler has described Restitution as an "area of law ... neglected for a period as a back-water tucked away in contract": Butler, P.A., "Viewing Restitution at the Level of a Secondary Remedial Obligation" (1990) 16 Univ. Q.L.J. 27, 27; and Laycock has said "restitution is a relatively neglected and underdeveloped part of the law": Laycock, D., "The Scope and Significance of Restitution" (1989) 67 Texas L.R. 1277, 1277.

According to Birks, this neglect of Restitution was the deleterious consequence of the "implied contract" theory, which sought to explain obligations in quasi-contract (the historical name of much of the subject-matter of Restitution: see *infra*, § 1.2.1) on the basis of an "implied" promise to perform the obligation. The effect of the "implied contract" theory "was to drive these non-contractual obligations into the category of contract": Birks, 4. The "implied contract" theory has now been widely rejected as a *general* explanation of *all* liability in Restitution (see *infra* nn. 4, 85), a view with which the writer concurs. However, it will be seen in Chapter 6 that some parts of Restitution are best explained in contractual terms, that is, that the obligations appear "contract-like". For further on "implied contract" theory, generally, see Lord Goff of Chieveley & Jones, G., *The Law of Restitution* (4th ed., 1993) (hereinafter: "Goff & Jones"), Chp. 1; Birks, 29-39; and Birks, P., & McLeod, G., "The Implied Contract Theory of Quasi-Contract" (1986) 6 O.J.L.S. 46.

³ References to the legal *category* of Restitution will be capitalised in order to

now commonly called,⁴ is exciting much legal interest.⁵ Not only are we seeing judgments of the highest judicial authorities—in Australia⁶ and elsewhere⁷—address issues in Restitution, there is also a spirited theoretical debate at large, much of it concerned to “reveal the skeleton of principle which holds [Restitution] together.”⁸ The focus of much of this debate is on the concept of “unjust enrichment”, a concept claimed to provide such a “skeletal” framework for the liability rules said to constitute Restitution. These liability rules are said to be explicable as having the purpose of reversing unjust enrichment, which purpose is given effect in an individual case by the remedial response of the

distinguish it from the *remedial response* of restitution, the meaning of which will be considered below.

⁴ Previously, much of the subject-matter now claimed for Restitution coalesced under the historical title of “quasi-contract”. This title has now become unfashionable, for reasons which will become obvious below. Nevertheless, some recent writing on the subject has persisted with the historical title. See, e.g., Stoljar, S.J., *The Law of Quasi-Contract* (2nd ed., 1989) (hereinafter: “Stoljar”). It will be argued in this thesis that many of the liability rules gathered under Restitution do not have a restitutionary remedial purpose and, to that extent at least, “Restitution”, as a designation for *all* of the subject-matter it is commonly claimed to encompass, may be misleading. The nature of the remedial response of restitution will be considered *infra*, § 1.3.2.2.

⁵ Cf. Goff & Jones, (3rd ed., 1986), *v.*

⁶ See, e.g., the High Court decisions of *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577; *ANZ Banking Grp v. Westpac Banking Corp.* (1988) 78 A.L.R. 157; *David Securities Pty Ltd v. Commonwealth Bank* (1992) 109 A.L.R. 57; *Baltic Shipping Co. v. Dillon* (1993) 111 A.L.R. 289.

⁷ The Supreme Court of Canada has been active now for many decades in the field of Restitution. Generally, see McCamus, J.D., “Restitution and the Supreme Court: The Continuing Progress of the Unjust Enrichment Principle” (1991) 2 S.C.L.Rev. (2d) 505. In England, the House of Lords has also been called upon in recent times to consider the law of Restitution, in, for example, *Lipkin Gorman v. Karpnale Ltd* [1991] 3 W.L.R. 10 and *Woolwich Equitable Building Society v. IRC* [1992] 2 All E.R. 737.

⁸ Birks, 1. Generally, see the attached bibliography for detailed references to the principal sources used in this thesis. Listed below are non-American books and collections of essays on the topic published in the last ten years or so:

Beatson, J., *The Use and Abuse of Unjust Enrichment* (1991) (hereinafter: “Beatson”); Burrows, A., (ed) *Essays on the Law of Restitution* (1991) (hereinafter: “Burrows, Essays”); Burrows, A., *The Law of Restitution* (1993) (hereinafter: “Burrows”); Birks, *Introduction*; Birks, P., *Restitution—The Future* (1992) (hereinafter: “Birks, Restitution: The Future”); Finn, P., (ed.) *Essays on Restitution* (1990) (hereinafter: “Finn”); Fridman, G., *Restitution* (2nd ed., 1992) (hereinafter: “Fridman”); Goff & Jones, *The Law of Restitution*; Jones, G., *Restitution in Public and Private Law* (1991); Klippert, G.B., *Unjust Enrichment* (1983) (hereinafter: “Klippert”); Maddaugh, P.D., & McCamus, J.D., *The Law of Restitution* (1990) (hereinafter: “Maddaugh & McCamus”); Stoljar, *The Law of Quasi-Contract*.

disgorgement of enrichment, that is, restitution. In short, preventing⁹ unjust enrichment is argued by many to be the crux of any theory of Restitution.¹⁰ It is the burden of this thesis to examine “unjust enrichment” critically and to question its value as a unifying and explanatory concept.¹¹ In Part II of this thesis, an alternative and, it is suggested, more appropriate conceptualisation of Restitution will be proffered.

§ 1.1.1 The Law of Restitution

To refer to a law of Restitution, without clarification, is not overly informative. The subject-matter of Restitution, even to many lawyers, is largely unfamiliar. In the view of one writer:

In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground.¹²

One must begin, then, by locating Restitution on this “mental map”.

One way of identifying Restitution, if seeking an overview of the broad divisions of the law, is to view it as one category, alongside contract and tort, in a tripartite division of the law of obligations.¹³ Contract and tort are legal categories, or subjects, which are organised around common “causative events”,¹⁴ that is, the particular liability rules and doctrines which establish the

⁹ It is also labelled as the principle *against*, or of reversing, unjust enrichments. More usually, however, a shorthand formulation, the principle *of* unjust enrichment, is used. These forms are all common and the shorthand version will, for the most part, be utilised here, although admittedly it does not convey quite the same meaning.

¹⁰ In the words of Lord Goff of Chieveley, “The Future of the Law of Restitution” (1989) 12 Syd. L.R. 1, 2, unjust enrichment is the “principle lying at the root of the subject.”

¹¹ The task is undertaken in the context of strident claims as to the triumph of unjust enrichment theory: see Birks, *supra* n. 2, 473, referring to sceptics of a law of Restitution based on unjust enrichment as “flat-earththers”.

¹² Laycock, *supra* n. 2, 1277, a comment made in 1989. Similarly, Patterson, E.W., “The Scope of Restitution and Unjust Enrichment” (1936) Mo.L.Rev. 223, 223: Restitution “does not at once bring to mind a well recognized division of the field of private law.”

¹³ See generally Burrows, A., “Contract, Tort and Restitution—A Satisfactory Division or Not?” (1983) 99 L.Q.R. 217; Birks, 28 *et seq.*

¹⁴ Birks, P., “The Independence of Restitutionary Causes of Actions” (1990) 16 Univ. Q.L.J. 1, 13 calls the primary source of obligation the “causative event”, involving an inquiry into the “facts constitutive of a remedy”. Primary rights, that is, ones which establish the basis of legal liability, are usually contrasted with secondary or remedial rights which merely determine the appropriate remedy once liability has been established. See, e.g., Perillo, J.M.,

right to relief are satisfied by similar criteria.¹⁵ In the words of Stoljar,

to acknowledge a proper subject, one forming a distinctive source of obligation, we have to concentrate on the causes of action, causes coherently grouped together according to their internal affinities.¹⁶

The question, then, becomes one of whether Restitution consists of causes of action (or liability-establishing rules) which can be "coherently grouped together" on some common basis. Within a tripartite division, and to simplify the matter,¹⁷ Restitution is perceived as imposing a personal obligation on a defendant in circumstances different to those justifying liability in contract or in tort. Consequently, liability rules are sought to be divided into three "distinct doctrinal pigeon-holes".¹⁸ The burden of the tripartite division is that it

separates at least most of the law based on each of the three most

"Restitution In A Contractual Context" (1973) 73 Col. L.R. 1208, 1214-15, and further on this, § 1.3.2.1

¹⁵ This contrasts with earlier divisions of the law according to the form of relief or remedy sought, specifically, according to the writ utilised. Remedy and right are, however, closely related. Dobbs, D.B., *Remedies* (hereinafter: "Dobbs"), at *xiv*, considers that "right and remedy are merely two expressions of the same legal policy—or ought to be". Similarly, it has been said that "both remedy and obligation are part of a whole": Carlston, K.S., "Restitution—The Search For a Philosophy" (1954) 6 J.Leg. Ed. 330, 335; and Goulding J., in *Chase Manhattan Bank v. Israel-British Bank* [1979] 3 All E.R. 1025, 1037, considered that:

Within the municipal confines of a single legal system, right and remedy are indissolubly connected and correlated, each contributing in historical dialogue to the development of the other, and save in very special circumstances it is idle to ask whether the court vindicates the suitor's substantive right or gives the suitor a procedural remedy, as to ask whether thought is a mental or a cerebral process. In fact the court does both things by one and the same act.

¹⁶ Stoljar, S., "Unjust Enrichment and Unjust Sacrifice" (1987) 50 M.L.R. 603, 605. Cf. Denning J., in *Nelson v. Larholt* [1947] 2 All E.R. 751, 752.

¹⁷ Proprietary remedies in Restitution also need to be taken into account, whereas the tripartite division focuses on *personal* liability. Generally speaking, proprietary claims are ones over some specific property. For the most part, proprietary claims will not be considered in this thesis. The reason for this is that this thesis concentrates on two stages of inquiry: firstly, the nature of the liability rules and the reason for imposing liability; and secondly, the appropriate *measure* of any remedy (leaving aside the possibility of non-monetary relief such as injunctions, for example). The measure of recovery may be determined according to the plaintiff's losses, the defendant's gains, or the plaintiff's expectations. See further, *infra* n. 139. But the form of recovery, personal or proprietary, will in many cases be peripheral to the first two stages of inquiry.

¹⁸ Hedley, S., "Contract, Tort and Restitution; or, On cutting the legal system down to size" (1988) 8 Legal Studies 137, 141.

important principles of the law of obligations. And these three cardinal principles are the fulfilment of expectations engendered by a binding promise [contract], the compensation of wrongful harms [tort], and the reversing of unjust enrichment [Restitution].¹⁹

The utility of dividing obligations into three sharply defined categories has been questioned:²⁰ one obvious drawback is that it does not address how property law (with which parts of Restitution share a strong affinity) and personal obligations imposed in equity fit into such a division.²¹ Other problems which spring from such a division will become evident in Part II below. Nevertheless, a tripartite division does highlight that certain factual circumstances may activate liability rules which cannot be subsumed *readily* within our existing²² conceptions of contract or of tort.²³ This does not, however, greatly assist us in identifying the subject-matter of Restitution.

¹⁹ Burrows, *supra* n. 13, 217. Cf. *infra* n. 139.

²⁰ See, for example, Atiyah, who has argued that the principles which underlie contract, tort and Restitution are not largely separate and distinct (contrary to Burrow's view, for example), but instead "permeate" the whole of the law of obligations: Hedley, *supra* n. 18, 140. See Atiyah, P.S., *The Rise and Fall of the Freedom of Contract* (1979) 768, 778-9, and "Contracts, Promises and the Law of Obligations" (1978) 94 L.Q.R. 193, 220-3. For a different perspective again, see Hedley, *ibid*; as well as Hedley, S., "Unjust Enrichment as the Basis of Restitution—An Overworked Concept" (1985) 5 *Legal Studies* 56. Theorists who favour a tripartite division concede that such a division cannot be too sharply made. See, e.g., Davis, P., "Restitution: Concept and Terms" (1968) 19 *Hastings L.J.* 1167, 1170, citing Prosser, W., *Selected Topics on the Law of Torts* (1955), 380:

Actually there are, of course, no such distinctly segregated compartments of the law. Everywhere the fields of liability and doctrine interlock; everywhere there are borderlands and penumbras, and cases which cut across arbitrary lines of division

Nevertheless, such a tripartite division is seen as the starting point for understanding the imposition of personal legal obligations and much emphasis is placed on keeping the categories conceptually separate. See, e.g., Davis, 1170-6, and Birks, P., "Unjust Enrichment—a reply to Mr. Hedley" (1985) 5 *Legal Studies* 67, 69-72.

²¹ This assumes, of course, that equitable obligations are more than just a "gloss" on the common law, are indeed, substantive doctrines in their own right.

²² It will be argued in Chapter 6 that many of the liability rules said to fall within Restitution do in fact share a close affinity with concerns fundamental to contract or tort. Nevertheless, if this view is correct, it still leaves for consideration liability rules which do not share such affinities and which must consequently be explained in other terms.

²³ Cf. Patterson, *supra* n. 12, 226, referring to quasi-contract, the historical predecessor of much of Restitution:

In Anglo-American law, as in Roman law, [quasi-contract] was invented as a category to include obligations which could not be conveniently subsumed under either contract or tort, as soon as those two categories came to be defined by general principles. Quasi-contracts was the catch-all.

While "contract" and "tort" *do* suggest the sorts of factual circumstances with which they are concerned,²⁴ Restitution is not of this nature. It is useful, then, to provide a number of examples which illustrate the types of facts which may activate liability rules claimed to lie in Restitution. The term "claimed" is used deliberately, for reasons which will become clear shortly.

- (1) Perhaps the simplest example is the mistaken payment of money. If a bank credits a client's account with \$1000 as a result of, say, a computer error, the bank may have a right to recover such a mistaken payment.
- (2) A plaintiff who mistakenly improves his or her neighbour's property, say, by building a house on one corner of that neighbour's land, may be entitled to recover the costs incurred, or perhaps even claim an interest in the defendant's land.
- (3) A plaintiff who performs services under an agreement with a defendant, where such agreement is legally unenforceable as a contract,²⁵ nevertheless may still have a right to either reasonable compensation for the work done, or perhaps even a claim for the agreed remuneration. Historically, the *Statute of Frauds* has proved fertile ground for examples of claims under unenforceable contracts.
- (4) A plaintiff who attempts to save a defendant's life or property in an emergency may have an entitlement, in strictly circumscribed circumstances, to claim either reimbursement for expenses incurred or reasonable remuneration for the services rendered.
- (5) Finally, a de facto spouse who has made financial or other contributions to the domestic relationship may seek a share in property legally owned by the other (ex-)spouse after the breakdown of the relationship.

The above examples are not intended as an exhaustive list of the types of problems which may be resolved, at least on some views,²⁶ by reference to the law of Restitution. Indeed, much "territory" is claimed for Restitution, for on most current theories, as will be seen below, the very subject-matter of

²⁴ In the case of contract, one might consider, generally, "agreements", or more specifically, transactions such as sales of goods or land, employer-employee relationships, and so on. In the case of tort, one might consider, generally, "wrongdoing", or more specifically, circumstances such as trespass to the person or property, negligent conduct, or defamation.

²⁵ The unenforceability may be the result of some statutory or common law rule.

²⁶ In Australian law, the fifth example would likely be resolved by resort to equitable principles (presuming there is no statute governing the situation). Nonetheless, in Canada, Restitution has provided the doctrinal vehicle for recovery by de facto spouses in such circumstances. See § 7.4.

Restitution is largely or exclusively determined by unjust enrichment. But since "[t]he boundaries of the law of unjust enrichment are only now being drawn", the "pioneers" of that concept, "in the spirit of true frontiersmen ... have sought to annex as much territory as possible."²⁷ Hence, the supposed pervasive reach of unjust enrichment throughout our law sustains the existence of a "large" subject of Restitution.²⁸

The expansive claims of modern unjust enrichment theory represent a marked shift from the historical development of the subject of Restitution. In the past, the sheer diversity of topics encompassed by Restitution (and its historical predecessor, quasi-contract²⁹) was undoubtedly one reason for the subject being perceived as "no more than a heterogeneous collection of unrelated topics".³⁰ Today, much opinion has shifted to the opposite extreme, with Restitution argued to be principally or exclusively a manifestation of a single, overarching concept of unjust enrichment.³¹ Before we can proceed to consider in greater detail the relationship of unjust enrichment with Restitution, it is necessary to survey the historical development of the subject.

§ 1.1.2 The Organisation of This Chapter

In § 1.2, it is proposed to survey the historical sources of Restitution. This involves a consideration of the origins of quasi-contractual obligations. In this century, however, attempts have been made to unify such obligations on the basis of unjust enrichment, and thus the supposed reach of Restitution has been extended.

In § 1.3, the relationship of Restitution and unjust enrichment will be

²⁷ Garner, M., "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 O.J.L.S. 42, 42.

²⁸ In support of this point one need only refer to the considerable subject-matter covered by modern texts on Restitution such as Goff & Jones and Maddaugh & McCamus. Such texts may be compared with earlier works on quasi-contracts, such as Munkman, J.H., *The Law of Quasi-Contract* (1950), and the claim of Stoljar that quasi-contract is a "relatively small subject": Stoljar, *v*, (preface). See also Birks, P., "In Defence of Free Acceptance" in Burrows, *Essays*, 105, 146.

²⁹ See *infra* n. 32. Restitution is said to incorporate all of quasi-contract and add new matter.

³⁰ Goff & Jones, 5.

³¹ Generally, see Chapter 2.

explored further. This section will introduce ideas to be developed in Part I of this thesis.

In contrast to the recent emphasis upon the unity of Restitution on the basis of unjust enrichment, § 1.4 will emphasise the diversity of the liability rules of Restitution and the equitable role (in the sense of a “gap-filling” or ameliorative function) such rules perform. This will lay the foundations for ideas to be developed in Part II of this thesis.

In § 1.5, the organisation of the thesis as a whole will be outlined.

§ 1.2 HISTORICAL DEVELOPMENT OF RESTITUTION

§ 1.2.1 The Sources of Quasi-Contract

Irrespective of the exact reach of Restitution, the subject’s origins can be traced to what is called “quasi-contract”. It is quasi-contract which still forms the core matter of Restitution. Goff and Jones, for example, consider that

the common law of quasi-contract is the most ancient and significant part of restitution and, for that reason, restitution is more easily understood if approached through that topic.³²

Quasi-contract has had a relatively obscure status within a legal system which itself is largely unfamiliar with what quasi-contract incorporates, let alone its conceptual basis.³³ Any attempt to map the terrain of quasi-contract must begin with a consideration of its history³⁴ and this history is inextricably linked with the development of certain forms of actions—the “common counts” as they became known—from the sixteenth century onwards.³⁵

³² Goff & Jones, 3. Similarly, Birks, 29, considers that Restitution has taken over quasi-contract, displaced the name, and added new matter.

³³ Cf. statements cited supra n. 2, in relation to Restitution; and cf. *Morrison & Morrison v. Canadian Surety Co.* [1954] 4 D.L.R. 736, 751. Stoljar has said that in the early 1960’s, quasi-contract was still “a novel subject, of somewhat remote interest”: *Stoljar, v.*

³⁴ For a detailed consideration, see Jackson, R.M., *The History of Quasi-Contract in English Law* (1936) (hereinafter: “Jackson”).

³⁵ Jackson, 3. The influence of the forms of action, although abolished in England in the mid-nineteenth century by s. 3 of the *Common Law Procedures Act 1852*, extended well into this century, so that Dawson remarked in 1952 (*Unjust Enrichment*, 16), that “[w]hen one reads modern English discussions of the subject, one has the sensation of being suddenly transported to the Middle Temple in 1603 to overhear some fresh debate on *Slade’s Case*.”

Claims which would now be considered within Restitution, such as for recovery of money paid under a mistake, date back to the middle ages and were upheld by the use of the ancient writs of account and debt.³⁶ But these writs had considerable drawbacks, such as a requirement for great particularity in pleading,³⁷ so that it was not until the late sixteenth century that an expeditious means of enforcing such suits became, potentially at least, available.³⁸ *Slade's Case*,³⁹ in the early seventeenth century, firmly entrenched this possibility by deciding that an action in *assumpsit* would lie once a plaintiff established the existence of a debt. Whereas previously, an action in *assumpsit* would only lie on the basis of an express promise to pay money, after *Slade's Case*, a promise to repay a debt could be implied or presumed subsequent to the debt arising.⁴⁰ Consequently, a separate promise to repay did not have to be proved, though the existence of the debt could itself be challenged.⁴¹ *Assumpsit*, or as it became known, *indebitatus assumpsit*,⁴² therefore became a preferable alternative to an action in debt, as it was not encumbered with many of the disadvantages of that action.

At the time of *Slade's Case*, the debt which formed the basis of the

³⁶ Holdsworth, W.S., *A History of English Law* (2nd ed., 1937), Vol. 8, 88. See also Jackson, *xxiv*, fn. 2, where he claims that the Yearbooks contain over 170 "cases" of actions of account before 1377.

³⁷ See Klippert, 10, for some of the disadvantages of the debt action; similarly, see Holdsworth, *ibid*, Vol. 3, 423-4. Contrast Baker, J.H., "New Light on *Slade's Case*" (1971) 29 C.L.J. 213, 234-5. Another significant disadvantage of the action in debt was that wager of law was available to a defendant, allowing such a defendant to resist a claim simply by obtaining the oaths of a number of persons.

³⁸ This occurred with the liberalisation of the action of *assumpsit*, which itself had originated as a species of an action on the case. See Holdsworth, *supra* n. 36, 88 et seq. *Assumpsit* was not utilised for such purposes, however, until the latter part of the 17th century. Holdsworth cites *Mayor of London v. Gorry* (1676) 2 Lev. 174, as an example. Stoljar, 11, cites earlier examples such as *Bonnel v. Foulke* (1657) 2 Sid. 4, *Babington v. Lambert* (1611) Moo. K.B. 1168, and *Cavendish v. Middleton* (1628) Cro. Car. 141; but note that Jackson, 9, and Holdsworth, 94, consider the latter to be an example of an "action on the case".

³⁹ (1602) 4 Co. Rep. 92A. The Court of King's Bench had been allowing such actions for some time, only to be overturned by the Exchequer Chamber. It has been said that it is an "unsolved mystery" as to why no attempt was made to reverse the King's Bench decision in *Slade's Case*, in the Exchequer Chamber. See Baker, *supra* n. 37, 233-36.

⁴⁰ Jackson, 40; Birks, 35. Contrast Baker, *ibid*, 234-5. For further references, see Stoljar, 11, fn. 24.

⁴¹ Jackson, 44.

⁴² An *assumpsit* implied from the fact of indebtedness: Stoljar, 11.

implied promise to repay nevertheless still had to have arisen from a genuine agreement.⁴³ By the middle of the seventeenth century, despite some opposition,⁴⁴ *assumpsit* began to be utilised to recover not only debts arising from executed contracts, in today's parlance, but also non-promissory "debts", such as a mistaken payment.⁴⁵ The notion that the defendant had promised to repay the debt thus appeared to be in some cases a "pure legal fiction"⁴⁶ devised to make possible conceptually quite diverse claims. Given the range of matters for which *assumpsit* now lay, it became necessary to indicate with more specificity the basis of the plaintiff's action.⁴⁷ Consequently a "series of stylised and yet simple forms of declaration",⁴⁸ known as the "common counts", were developed. Four of these are of significance here.

- (1) The action for money had and received, from which "the largest bulk of quasi-contractual solutions spring".⁴⁹ This action was available for the recovery of money paid under a mistake, or a consideration which had failed; money obtained by the defendant "through imposition ... extortion; or oppression";⁵⁰ or as a result of some "actionable wrong".⁵¹
- (2) The action for money paid to a third party to the defendant's use. A common example where such an action would lie was where the plaintiff had "compulsorily discharged" the defendant's liability.⁵²

⁴³ Ames, J.B., "The History of Assumpsit" (1888-9) 2 Harv. L.R. 1 & 54, at 64.

⁴⁴ Chiefly from Holt C.J. See, e.g., *Shuttleworth v. Garnet* (1689) 3 Lev. 261; *City of York v. Toun* (1700) 5 Mod. 444.

⁴⁵ See Birks, 35, fn. 20, and Stoljar, 11-2, for some authorities.

⁴⁶ Munkman, J.H., *The Law of Quasi-Contract* (1950), 6.

⁴⁷ Maddaugh & McCamus, 5.

⁴⁸ Fifoot, C.H.S., *History and Sources of the Common Law* (1949), 368.

⁴⁹ Stoljar, 10.

⁵⁰ *Moses v. Macferlan* (1760) 2 Burr. 1005, 1012. See also Stoljar, 13. Examples might be money extorted *colore officii* or by duress: *Morgan v. Ashcroft* [1937] 3 All E.R. 92, 105.

⁵¹ *Morgan v. Ashcroft*, *id.* The plaintiff in some cases could "waive the tort" and seek a remedy of money had and received, rather than damages in tort.

⁵² E.g. *Exall v. Partridge* (1799) 8 T.R. 308.

- (3) The *quantum meruit*⁵³ action, for the reasonable value of services rendered.
- (4) The *quantum valebant* action, for the reasonable value of goods supplied.

The latter two counts expanded the scope of *indebitatus assumpsit* by allowing unliquidated sums to be pursued.⁵⁴ Previously, in an action for debt, only liquidated sums were recoverable.⁵⁵ Once this restriction was overcome, new claims became possible and arose with greater frequency.⁵⁶

§ 1.2.2 The Rise of Quasi-Contract, and “the ties of natural justice and equity”⁵⁷

By the eighteenth century, the common counts provided litigants with a number of remedial options to pursue personal claims arising from both consensual and non-consensual transactions. It was still recognised, however, that in many of these claims, the promise to pay was fictional,⁵⁸ a convenience facilitating actions which would previously have had to find their home in the less useful actions of account and debt. “Promise”, or “agreement”, therefore was not the true basis of many of these claims. This was emphasised in *Moses v. Macferlan* when, in relation to the money had and received action, Lord Mansfield stated that

if the defendant be under an obligation, from the ties of natural justice,

⁵³ Klippert, 8, however, points out that there is debate as to whether the *quantum meruit* and *quantum valebat* actions were considered to be separate entities from *indebitatus assumpsit*—“linked by their historical derivation from the action of *assumpsit* but distinct in their development and application”—or whether they were “derived directly” from *indebitatus assumpsit*. In support of the former view, see Stoljar, S.J., *A History of Contract at Common Law* (1975), 108-10, who points out that the *quantum meruit* action started out as a species of express *assumpsit* and that “its early history was quite separate from that of the *indebitatus* count” (110). In support of this view, Stoljar cites cases pre-dating *Slade’s Case* (1602) 4 Co. Rep. 92A. Such evidence lends historical weight to the view of some commentators that service cases are conceptually distinct from money cases. Such views will be considered at various points in this thesis.

⁵⁴ Stoljar, 187.

⁵⁵ For possible exceptions to this rule, however, see Stoljar, 187, fn. 5.

⁵⁶ Generally, see Stoljar, Chp. 7, for some of the types of claim. Of particular interest because of their clearly non-consensual basis are those cases in which necessities are supplied to legally or otherwise incapacitated parties, or where services are performed in an emergency, and so on. See further on this, Chapter 8.

⁵⁷ *Moses v. Macferlan* (1760) 2 Burr. 1005, 1112.

⁵⁸ *Id.*

to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu," as the Roman law expresses it).⁵⁹

In alluding to "quasi ex contractu",⁶⁰ it does not appear that Lord Mansfield was intending to draw a link with contract.⁶¹ In fact, his reference to the Roman use of the term might be seen as an acknowledgment of the division in the Roman law of obligation into contracts, delicts (torts), quasi-contracts and quasi-delicts.⁶² This division, perhaps first made by Gaius,⁶³ was a recognition of the inadequacies of any classification based merely on contract and tort. The recovery of money paid under a mistake,⁶⁴ for example, would have made it difficult to sustain such a division. But in seeking to *explain* such obligations, Lord Mansfield, and others,⁶⁵ went no further than to appeal to the broadest equitable principles: defendants were required to refund money which, *ex aequo et bono* (in equity and good conscience) they were obliged to refund.⁶⁶ In subsequent cases, Lord Mansfield considered the action of money had and received as "analogous to a bill in equity"⁶⁷ and "founded on principles of eternal justice."⁶⁸

Such references to broad equitable notions were given, judicially at least,

⁵⁹ Ibid, 1008.

⁶⁰ This was not the first such reference in English law. Bracton, in his *De Legibus* in the thirteenth century, used the term. See Maddaugh & McCamus, 3.

⁶¹ Cf. Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32, 62. For a detailed consideration of the case, arguing that *Moses v. Macferlan* is the historical source of unjust enrichment, see Birks, P., "English and Roman Learning in *Moses v. Macferlan*" [1984] C.L.P. 1.

⁶² The latter term has failed to gain any currency.

⁶³ See his *Digest*, of the second century A.D. There is some evidence that the term may have been interpolated by Justinian's commissioners. See Birks, 29; Stoljar, 16, fn. 61.

⁶⁴ The Roman *condictio indebiti* for recovery of mistaken payments lay from very early times.

⁶⁵ E.g. *Edwards v. Bates* (1844) 7 Man. & G. 590, 597-8; 135 E.R. 238, 241, per Tindal C.J.

⁶⁶ *Moses v. Macferlan* (1760) 2 Burr. 1005, 1012.

⁶⁷ *Jestons v. Brooks* (1778) 2 Cowp. 793, 795; 98 E.R. 1365, 1366.

⁶⁸ *Towers v. Barrett* (1786) 1 T.R. 133, 134.

a mixed reception;^{68a} but certainly, much English authority was disapproving. There were two broad grounds of criticism.⁶⁹ First, there was a jurisdictional argument: the common law courts could not, of course, administer equity.⁷⁰ Secondly, and more substantially, the concepts to which Lord Mansfield appealed were often considered too vague and uncertain to be applied by the courts.⁷¹ One need only repeat the now famous comment by Scrutton L.J. in *Holt v. Markham* that the history of the money had and received action was one of "well-meaning sloppiness of thought".⁷²

The term "quasi-contract" did not meet such disapproval, however, and it was used intermittently by the courts.⁷³ By the nineteenth century, when the demise of the old forms of action led to the search for new theoretical foundations for the law,⁷⁴ it had become a convenient label for many causes of action which could not be placed readily into the developing categories of contract or tort.⁷⁵ More specifically, quasi-contract was being utilised to refer to claims originating in the four common counts noted above, though some of these claims were also recognised to be truly contractual.⁷⁶

68a Australian authorities early this century were often approving of quasi-contractual claims on the basis of broad equitable notions. See, e.g., *Campbell v. Kitchen & Sons Ltd* (1910) 12 C.L.R. 513, 531, per Barton J.; *R v. Brown* (1912) 14 C.L.R. 17, 25, per Griffith C.J.

69 Generally, see Winfield, P.H., *The Law of Quasi Contracts* (1952), 10.

70 The criticism is encapsulated by one judge's lamentation that "the character of the law of this country...has suffered more by the circumstances of courts of law acting upon what they conceive to be rules of equity than by any other circumstance": *Cooth v. Jackson* (1801) 6 Ves. Jun. 39; 31 E.R. 913, 927.

71 Winfield, *supra* n. 69, 10-14.

72 [1923] 1 K.B. 504, 513. A similarly famous statement is that of Hamilton L.J. (later to become Lord Sumner) in *Baylis v. Bishop of London* [1913] 1 Ch. 127, 140, who proclaimed that whatever may have been the case in Lord Mansfield's time, the courts were no longer free to "administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'." Dawson, 15-6, dates the beginnings of such reactions against Lord Mansfield's views to around 1850.

73 Although in the late 1920's, Fraser J. in *Hardie & Lane Ltd v. Chiltern* [1928] 1 K.B. 663, 680 still referred to it as "so-called quasi-contract."

74 Goff & Jones, 9.

75 See *supra* n. 23, where quasi-contract is referred to as a "catch-all"; Stoljar, 18, refers to it as a "renvoi-category". Similar references are numerous.

76 Cf. Goff & Jones, 4. In particular, *quantum meruit* and *quantum valebat* continued to be used to enforce contracts in which a term was implied as to the (reasonable) price to be paid,

Importantly to this point, there had been no notable attempts to bring together or rationalise actions originating in the common counts in a unifying principle. At most, appeals were made to "equity" and "natural justice". Instead, the outstanding feature of possible claims under the common counts was their sheer diversity, a point still emphasised this century in relation to quasi-contract. Thus, Corbin wrote in 1912:

It will be seen that [quasi-contractual obligations] are very numerous, that some of them have little in common with others, that some more closely resemble contractual obligations while others approach more nearly to torts, and in the past, in treatises upon the common law, they have generally been handled under diverse headings.⁷⁷

Reflecting this diversity of claims, many different reasons were given to justify individual decisions, both before and after the abolition of the forms of actions. In some cases, property notions were resorted to;⁷⁸ in others, promise or agreement was emphasised;⁷⁹ and in others still, tort notions emphasising the defendant's wrongdoing formed the basis of explanations of liability.⁸⁰ By the mid-nineteenth century, this began to change. Writers and judges began to search for the theoretical foundations of quasi-contract.

§ 1.2.3 "Implied Contract" and the Move Toward a General Theory of the Law of Quasi-Contract/Restitution

Partly for historical reasons, the search for some theoretical explanation of quasi-contract initially saw an "implied contract" theory gain hold. The non-contractual nature of much of quasi-contract was, for the most part, gradually

although some commentators may cavil with a view of such actions as contractual. See further, § 6.2.3.2.

⁷⁷ Corbin, A., "Quasi-Contractual Obligations" (1912) 21 Yale L.J. 533, 536. See also Corbin, A., *Corbin on Contracts* (1963), Vol. 1, 49: quasi-contracts includes "numerous odds and ends of obligation"; and Sullivan, T.J., "The Concept of Benefit in the Law of Quasi-Contract" (1975) 64 Geo.L.J. 1, 25: "The divergent factual settings in which quasi-contract principles are invoked stretch across an extraordinarily broad range of legal categories."

⁷⁸ E.g. *Clarke v. Shee & Johnson* (1774) 1 Cowp. 197 (Lord Mansfield); *Hudson v. Robinson* (1816) 4 M. & S. 475, 478 (Lord Ellenborough).

⁷⁹ This was so particularly in cases of *quantum meruit*, in which frequent references to implied promise were made.

⁸⁰ E.g. *Hall v. Swansea* (1844) 5 Q.B. 526, 547 (Lord Denman). See also Blackstone, Sir William, *Commentaries on the Laws of England* (9th ed., 1783; 1978 reprint, Garland Publishers), Vol. II, 163, and Austin, J., *Jurisprudence* (4th ed., 1879), Vol. 2, 944-5.

forgotten.⁸¹ Many courts and commentators sought to incorporate all of quasi-contract into developing contract law theories, with quasi-contractual obligations said to be “founded upon an implied contract by the defendant to pay to the plaintiff the money claimed by him.”⁸² The implied promise of old, in many cases previously and manifestly a fiction, was reified,⁸³ and the courts

81 A number of reasons have been given to explain this judicial amnesia and its most important consequence, the rise of the “implied contract” theory of quasi-contractual obligation. See generally Birks, 34-8. The first factor which may explain the implied contract theory’s rise was the obvious confusion that could arise as a result of the fictitious promise inherent in the *indebitatus assumpsit* action itself. As Stoljar, 14, has said, “*indebitatus assumpsit* was somehow always hinting at contract.” The fictitious promise became known as a “contract implied in law”, a development which was not surprising given that particular common counts (such as *quantum meruit*) were being used indiscriminately for both consensual and non-consensual transactions. Examples of the former include *Rolfe v. Sharp* (1627) Cro. Car. 77, and *Rogers v. Head* (1610) Cro. Jac. 261. Examples of the latter include *Jenkins v. Tucker* (1788) 1 H.B.L. 90; and *Rogers v. Price* (1829) 3 Y. & J. 28 (both “funeral” cases, on which see further, Chapter 8). See Maddaugh & McCamus, 6; Stoljar, 18. Given the willingness of the courts to infer the existence of contracts from the conduct of the parties (i.e., non-express contracts), it became difficult at times to establish whether the term “implied contract” was being used to refer to a non-express contract or to the fictional promise to pay the money.

Secondly, and compounding the confusion, even at the time of Lord Mansfield’s equitable rationale for the count for money had and received, Blackstone, in his *Commentaries on the Laws of England* (1768), was seeking to explain all legal obligations on the basis of “an implied original contract to submit to the rules of the community whereof we are members” (Vol. 3, 160). In the process of elucidating this “social contract” theory, Blackstone failed to differentiate clearly between those *indebitatus assumpsit* claims based on consensual relations and those imposed by the law in given circumstances. See *ibid*, Vol. III, 162-3; Vol. II, 443. See also Birks, 37-38, 4; Keener, W.A., *A Treatise on the Law of Quasi-Contract* (1893), 7. Cf. Holdsworth, *supra* n. 36, 96.

Finally, by the end of the nineteenth century, the term “quasi-contract” was being used to identify obligations which were said to originate from an implication of law and which, before the *Common Law Procedure Act* 1852 had been enforced by the use of some of the common counts. This term also had strong contractual overtones.

The combination of these three factors would have given a strong impetus to the implied contract theory: quasi-contractual claims based, as were all obligations, on a social contract, had in the past been enforced by means of common counts utilising an implied promise to repay! Not surprisingly, therefore, quasi-contract became inextricably linked with contract and scant attention was paid to these anomalous and little understood actions. See Maddaugh & McCamus, 7. Any scholarly consideration was limited to postscripts to early contract law texts, which in turn meant there was little scope for any conceptual development. Nevertheless, some judges continued to recognise the fictional nature of this implied contract and the inappropriateness of contractual doctrines. Thus, in *In re Rhodes* (1890) 44 Ch. D. 94, 105, for example, Cotton L.J. considered the term “implied contract” “erroneous and very unfortunate”, and Lindley L.J., at 107, indicated that it had been used to denote an “obligation which does not arise from any real contract.” The court considered that a quasi-contractual claim could potentially lie against a lunatic for necessities supplied even though such defendants could not, by reason of their legal incapacity, contract.

82 Goff & Jones, 6.

83 The implied contract theory reached a new height in *Sinclair v. Brougham* [1914] A.C. 398. In that case, the House of Lords considered that the “fictional” implied contract could

and commentators in consequence emphasised a bi-partite division of the law of obligations, namely into contract and tort.⁸⁴ It is not proposed to detail the developments of the implied contract theory. It suffices to say that as a general explanation of all of quasi-contractual liability, it has now been widely rejected by both commentators and the courts, essentially because of the artificiality of utilising implied contract to explain liability arising from non-consensual relationships.⁸⁵ The writer concurs with the rejection of implied contract as a

only be enforced in situations in which a contract between the parties, if it really existed, would be valid (415). Lord Sumner considered that claims for money had and received "rest, and long have rested, upon a notional or imputed promise to repay. The law cannot de jure impute promises to repay, whether for money had and received or otherwise, which, if made de facto, it would inexorably avoid" (452). Cf. Viscount Haldane L.C., at 415. Thus, a quasi-contractual action would not lie where the *ultra vires* doctrine would invalidate any contract actually entered by the parties. This approach seems inconsistent with that of the Court of Appeal in *Re Rhodes* (1890) 44 Ch. D. 94, a case which was not, however, referred to in the House of Lords. Ironically, the court proceeded to allow a far more "drastic" remedy of an equitable proprietary claim to succeed, thereby greatly relaxing the requirements of tracing "to a really startling extent" (Dawson, 17-8; see also Maddaugh & McCamus, 10). A satisfactory result was thereby achieved but in a way which further relegated quasi-contract to the status of an insignificant appendage to contract law. For similar views to those expressed in *Sinclair v. Brougham*, see, e.g., *Cowern v. Nield* [1912] 2 K.B. 419; *Chandler v. Webster* [1904] 1 K.B. 493. As a result of such cases, the fiction of an implied promise was given an existence of its own and contractual doctrines were applied to determine rights originating in quasi-contract. This, at times, led to injustice, or at the very least, doctrinal confusion.

On the reification of legal fictions, generally, see Fuller, L., "Legal Fictions" Pts I, II, & III, (1930-1) 25 Ill. L.R. 363; 513; 877.

⁸⁴ E.g. *Sinclair v. Brougham* [1914] A.C. 398, 415, per Viscount Haldane L.C.:

so far as proceedings in personam are concerned, the common law of England really recognizes (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions quasi ex contractu it refers merely to a class of action in theory based on a contract which is imputed to the defendant by the fiction of law.

⁸⁵ For example, recovery of money from a recipient of a mistaken payment or a thief. For some reasons for the rejection of the implied contract theory, see Goff & Jones, 6-10, who conclude that the concept is a "meaningless, irrelevant and misleading anachronism" (10). One of the most persuasive reasons they give is that the idea of a fictional implied contract does not indicate when and in which circumstances the contract is to be implied. Instead, it merely interposes an extra step in the process of reasoning. Cf. *Morrison v. Canadian Surety Co.* [1954] 4 D.L.R. 736, 754. In rejecting the generalisation of implied contract, however, Goff & Jones proceed under the assumption (and this is a "massive" assumption, according to Hedley, supra n. 20, 58) that there must be *one* coherent explanation for the diverse subject-matter covered. Thus, a rejection of implied contract is equated with an acceptance of an alternative unifying concept of unjust enrichment: e.g. Burrows, supra n. 13, 233-4. This does not, of course, necessarily follow: Hedley, 64., and see also Klippert, 22. See also Sutton, R., "Unjust Enrichment" (1981) 5 Otago L.R. 187, 198.

For a judicial rejection of implied contract theory, see *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 583, 603-4, but see infra n. 86.

general explanation of all of quasi-contractual liability. Nevertheless, as will be argued below, contractual notions are clearly of relevance to some Restitutionary claims and the rejection of a general theory of implied contract ought not to lead to the significance of contractual notions being ignored in at least such claims. Fortunately, the courts have still recognised the relevance of contractual notions in some such cases.⁸⁶

Growing disenchantment with the implied contract theory prompted the search for a unifying theory of quasi-contract, and it was a notion of unjust enrichment which began to emerge as a contender.⁸⁷ This was despite opposition to unjust enrichment from many judges, even until quite recently.⁸⁸ American writers and courts were at the forefront of these developments.⁸⁹ The

⁸⁶ See *Guinness plc. v. Saunders* [1990] 1 All E.R. 652. But contrast the unequivocal rejection of an implied contract explanation in relation to a *quantum meruit* claim under an unenforceable contract, in *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 583. It will be argued below that this case goes too far in suggesting that claims under unenforceable contracts are quite independent of contractual notions. See § 6.2.2.2. Reasoning such as that in *Pavey & Mathews* could arguably be the result of the “fanatical unbelief” in “implied contract” displayed by many unjust enrichment theorists. On “unbelief” see Hedley, *supra* n. 18, 139, fn. 9.

⁸⁷ Some supporters of unjust enrichment appear to equate the rejection of “implied contract” with the acceptance of unjust enrichment. In other words, it is assumed that there must be one unifying theory of quasi-contract, and the choice is expressed in sharp either/or terms. Cf. Hedley, *supra* n. 20, 58-9, 64.

⁸⁸ See, e.g., Lord Diplock in *Orakpo Investments v. Mansons Investment Ltd* [1978] A.C. 95, 104:

My lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law.

This is one of a long line of English judicial authorities showing a marked resistance to any “general doctrine” of unjust enrichment—judicial warnings against its “siren song” (*Re Byfield* [1982] Ch. 267, 276) are numerous. Generally, see Goff & Jones, Chp. 1. See also Dickson, B., “The Law of Restitution in the Federal Republic of Germany” (1987) 36 I.C.L.Q. 751, 760. Outside England, see, e.g., *Avondale Printers v. Haggie* [1979] 2 N.Z.L.R. 124.

It has been suggested that Lord Diplock was denying the existence of *any* unifying basis of Restitution, that no single theory, unjust enrichment or otherwise, “would do”: Hedley, *supra* n. 20, 58-9. See further, § 2.2.1.1.

⁸⁹ The first text on quasi-contract, by Keener, W.A., *A Treatise on the Law of Quasi-Contract*, was published in 1893. This work highlighted quasi-contract as a subject in its own right, covering, *inter alia*, such topics as money paid under mistake, compulsion or duress, waiver of tort, rights arising from unenforceable contracts, and the improvement of another’s land. Ames, in his seminal work on the history of assumpsit, in 1888, had already emphasised that the quasi-contractual obligation, created by law, “is no contract at all”: *supra* n. 43, 63. Keener perceived the implied contract as merely a remedial mechanism and, like Ames (at 66), argued that the most important source of quasi-contractual obligations could be found in the “doctrine” of unjust enrichment (19). Keener did identify certain exceptions, at 16-9—obligations created by judgments or statutory or customary duties—but these are no longer

subject of Restitution, incorporating quasi-contract *as well as* equitable and other doctrines claimed to be unjust enrichment-based, emerged.⁹⁰ As Muir has described these developments:

Anglo-American writers have only recently put restitution on a broad canvas so as to give the overall picture, as it were, rather than painting a series of intricate pictures not all of which could be hung as a series.⁹¹

Muir goes on to observe that the "broad canvas" approach is becoming quite fashionable.

§ 1.2.4 Imposing Order from Without: "The" New Interpretation of a Disordered History

The influence of unjust enrichment has been profound, particularly in Canada⁹² and, most recently, in England.⁹³ Its appeal is widespread, for

considered to form part of the law of quasi-contract or Restitution. See Winfield, *supra* n. 69, who considered them to be "pseudo" quasi-contracts. See also Stoljar, 18. Neither Goff & Jones, nor the *Restatement of Restitution* include these topics.

Keener's work was undoubtedly influential, for 20 years later another text (Woodward, *The Law of Quasi-Contracts* (1913)) presented similar views (although Woodward referred to the inequitable retention of a benefit received: see Wade J. "The Literature of the Law of Restitution" (1968) 19 *Hastings L.J.* 1087, 1089), and, in 1937, the American Law Institute published the *Restatement of the Law of Restitution*, authored by W.A. Seavey and A.W. Scott (hereinafter: "*Restatement of Restitution*"). This further expanded the claims for unjust enrichment. §1 states simply that:

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

⁹⁰ In advocating a general principle of unjust enrichment, the *Restatement of Restitution* not only sought the recognition of quasi-contract as a separate, clearly distinguishable subject, but also claimed that many other areas of law were based on this principle: most notably, equitable doctrines giving rise to relief in the form of specific restitution, constructive trusts, equitable liens, or subrogation. See Farnsworth, E.A., *Contracts* (2nd ed., 1990) 103. This incorporation of much equitable doctrine necessitated a new name for the subject. "Restitution" was adopted, to reflect what the authors considered to be the restitutionary nature of the remedy granted in these cases. See Seavey, W.A., & Scott, A.W., "Restitution" (1938) 54 *L.Q.R.* 29. The consequence of all this, in the view of Maddaugh & McCamus, 11, was that the *Restatement of Restitution* "established the law of restitution in America as an independent discipline entirely separate from both the law of contract and the law of tort".

⁹¹ Muir, G., "The Contribution of Professor Sam Stoljar To The Law of Quasi-Contract" Paper delivered to the Restitution Group, Society of Public Law Teachers Conference, Aberdeen, 1991, paragraph 3.01.

⁹² In the decision of *Degelman v. Guaranty Trust Co. & Constantineau* [1954] 3 *D.L.R.* 785, the Supreme Court of Canada accepted unjust enrichment as the basis of the law of Restitution. This followed a "spirited" attack on the theory of implied contract in *Morrison v. Canadian Surety Co.* [1954] 4 *D.L.R.* 736: Maddaugh & McCamus, 15. In the view of Cartwright J. in

reasons which will be considered in § 1.3. The principal aim for which unjust enrichment is invoked is to impose order upon and explain a difficult, even “utterly confused”⁹⁴ area of law. Although some *notion* of unjust enrichment has an undoubted historical pedigree, in much recent writing, unjust enrichment purports to provide a theoretical construct for the law. In this regard, it is being asked to perform an essentially a-historical role.

Early proponents of unjust enrichment did not identify the authority for their sweeping assertion of the pre-eminence of that concept,⁹⁵ but today, the common law origins of unjust enrichment are usually said to be traceable to Lord Mansfield, particularly his Lordship’s statements in *Moses v. Macferlan*.⁹⁶ But this case is not the unequivocal support for unjust enrichment theory it is said to be.⁹⁷ Certainly, references to “natural justice” and “equity” do not, of themselves, equate with unjust enrichment.⁹⁸ They are terms of sufficient

Deglman, at 794, the plaintiff’s successful action for *quantum meruit* for services rendered under an unenforceable contract (the agreement was not evidenced in writing as required by the *Statute of Frauds*) was said to be “based not on contract, but on an obligation imposed by law.” Since that case, Canadian courts have largely abandoned the idea of implied contract and embraced that of “unjust enrichment.” See Fridman, 12-9, for example. For some exceptions, see Fridman, 14, fn. 78.

⁹³ The effect of these events on Anglo-Australian law was delayed, but significant. In 1931, quasi-contract was still considered a “no man’s land ... not in the sense that there are constant battles for it but that nobody wants it”: Winfield, P., *The Province of the Law of Tort* (1931), 118. By 1966, however, after some earlier, minor interest in the subject—see works by Jackson, Winfield, *supra* n. 69, and Munkman, *supra* n. 28—Goff and Jones published their *Law of Restitution*. This wide-ranging text covered similar topics to that of Keener but, like the *Restatement of Restitution*, also incorporated numerous equitable doctrines such as subrogation; contribution; benefits acquired by undue influence, in breach of fiduciary duties or from unconscionable bargains; and maritime law doctrines such as salvage and general average contribution. Goff and Jones considered that all of these areas, despite their seeming diversity, involved restitutionary responses and, like their American cousins, considered that liability was explicable on a concept of “unjust enrichment”.

⁹⁴ Stoljar, 18.

⁹⁵ Neither Keener nor Ames give authorities for their general statements.

⁹⁶ (1760) 2 Burr. 1005.

⁹⁷ Contrast, however, Oldham, J., *The Mansfield Manuscripts, and the Growth of English Law in the Eighteenth Century* (1992), Vol.1, 226-31, who suggests that many of Lord Mansfield’s decisions suggest an “overall philosophy of moral transactional behaviour that required the honouring of legitimately created expectations and the return of benefits unjustly acquired” (231). See similarly, Fifoot, C.H.S., *Lord Mansfield* (1936), 145-6.

⁹⁸ Contrast Goff & Jones, 13-4, and Maddaugh & McCamus, 7, who simply jump from Lord Mansfield’s comments to a general unjust enrichment principle and are thereby equating it with natural justice and equity. See Davis, *supra* n. 20, 1168 for an even more sweeping

vagueness and generality to be utilised, in different contexts, in a variety of ways.⁹⁹ And certainly, no interpretation of such references sustains the complex theoretical constructs unjust enrichment has engendered.¹⁰⁰ In any case, whereas Lord Mansfield's statements were limited to one quasi-contractual action—money had and received¹⁰¹—unjust enrichment is today said to underlie quasi-contractual claims generally (including *quantum meruit* for services rendered),¹⁰² as well as liability rules and doctrines of equitable origin¹⁰³ (such as contribution and undue influence), and other doctrines of miscellaneous origin (for example, originating in maritime law).¹⁰⁴ Given this added diversity, one might expect greater difficulties in sustaining a single unifying concept than if merely seeking to explain quasi-contract.

The flirtation with unjust enrichment, however, has been far from universal. Professor Stoljar was one writer in Anglo-Australian law who questioned the utility of such a theory and doubted its "historical" justification. Stoljar, whose work was shaped by its "historical focus"¹⁰⁵ and "deep study of

historical inaccuracy. Admittedly, however, Lord Mansfield had earlier in his judgment made reference to Roman law which did recognise a principle of unjust enrichment. See also Birks, *supra* n. 61, particularly at 20.

⁹⁹ There is, however, today a tendency to equate unjust enrichment with general equitable notions. For example, in *ANZ v. Westpac* (1988) 78 A.L.R. 157, 162, it was said that "contemporary legal principles of restitution or unjust enrichment can be equated with the seminal equitable notions of good conscience." See also *Muschinski v. Dodds* (1985) 160 C.L.R. 583, 619, per Deane J.

¹⁰⁰ See particularly Chapters 3 & 4.

¹⁰¹ Cf. Hutchinson, R.B., "The Necessity of Conferring a Benefit For Recovery in Quasi-Contract" (1969) 19 *Hastings L.J.* 1259, 1262, who considers that it appears that Lord Mansfield meant his statements only "to apply when the defendant held *money* belonging to the plaintiff." (emphasis added).

¹⁰² The inclusion of *quantum meruit* claims for services rendered appears to be a recent phenomena. As Muir points out, "services were never conceptually part of the historical justification of unjust enrichment." See Muir, G., "Unjust Sacrifice and the Officious Intervener" in Finn, 304. There is continued judicial support for an analysis of service cases outside of any unjust enrichment principle. See, e.g., *Sabemo Pty Ltd v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880, 897, per Sheppard J.

¹⁰³ See, for example, the equitable topics incorporated by Goff & Jones, *supra* n. 93.

¹⁰⁴ Maritime salvage and general average contribution are commonly claimed.

¹⁰⁵ Muir, *supra* n. 91, paragraph 1.01.

legal history",¹⁰⁶ showed a marked hesitancy about modern developments. Stoljar appeared to see no need for the wide claims made for unjust enrichment and Restitution, "and indeed much danger in doing so."¹⁰⁷ Stoljar offered alternative explanations of different parts of quasi-contract and his ideas will be considered in greater detail at appropriate points in this thesis.

Not too much, however, should be made of these historical arguments against unjust enrichment. Proponents of that concept would concede the complex and confused history of quasi-contract and, thus, Restitution. Indeed, they reject the legacy of history and wish to strike out in new directions.¹⁰⁸ It is as a theoretical explanation that the strengths of unjust enrichment are proclaimed. It is as theory that it must be judged.

As an interesting aside, it might be noted that as one traces the historical development of Restitution in Anglo-Australian law, although interest in unjust enrichment is still clearly on the rise, its appeal may be short-lived. In the United States, despite early and influential writing, interest in unjust enrichment as a cause of action appears to be on the wane. This is evidenced by the decision, lamented recently by one of England's foremost Restitution lawyers, to shelve a second *Restatement of Restitution*.¹⁰⁹

§ 1.2.5 Summary of Historical Development

A number of points need to be reiterated, following this consideration of the historical development of the law of Restitution.

- (1) The sources of Restitution are diverse. Even within quasi-contract, the factual and conceptual variety of claims is notable, but given that equitable and other doctrines are also now claimed, the topics said to fall within Restitution raise a wide variety of conceptual problems.
- (2) It was not until comparatively recently that any attempt was made to explain these topics on the basis of any single concept. Although a

¹⁰⁶ Sutton, R., "Quasi-Contract: Lost Cause or Current Issue?" (1990) 7 Otago L.R. 336.

¹⁰⁷ Muir, *supra* n. 91, paragraph 1.05. Professor Stoljar's caution might be a warning to those who view unjust enrichment as an historical inevitability.

¹⁰⁸ See, e.g., Goff & Jones, (3rd ed., 1986) 29. Cf. Hedley, *supra* n. 20, 57, who points out that Goff & Jones "strenuously dispute" the historical divisions of the subject.

¹⁰⁹ Jones, G., "The Law of Restitution: The Past and the Future" in Burrows, *Essays*, 1-2. See also Birks, *supra* n. 14, 25-6.

notion of unjust enrichment has a long history, its perceived role as a unifying and explanatory concept of the *subject* of Restitution is essentially new. Restitution as a unified whole does not have the same deep historical roots as, say, contract. Hence, it is as theory that unjust enrichment and the constructs it has engendered must be judged. Thus, the thesis which follows is not a historical treatise but largely a theoretical discourse.

- (3) History does emphasise, however, that not all personal obligations can be explained in terms of contract and tort. The courts have repeatedly stressed the equitable basis of liability outside of mainstream contract and tort. Even though, at times, such claims have been seen as peripheral, they are nevertheless a significant part of our law. It will be seen that part of this significance stems from the gap-filling and ameliorative function such claims have performed.

§ 1.3 RESTITUTION AND UNJUST ENRICHMENT

§ 1.3.1 The Visceral Appeal of Unjust Enrichment

A concept such as unjust enrichment—that “no one should be made richer through another’s loss”¹¹⁰—strongly appeals to an innate sense of justice.¹¹¹ Unjust enrichment, when stated in such terms, has a powerful, visceral appeal. It is perhaps for this reason that the concept has captured the imagination of many commentators, even though it “expresses an aspiration that, as we know well, could never be realised fully in human affairs.”¹¹² No doubt, to take one example, it is in certain circumstances a morally satisfying conclusion to state that the recipient of a mistaken payment would be unjustly enriched if he or she is not required to return the money. Such a conclusion activates “our sense of justice in response to an allegedly undue benefit.”¹¹³

¹¹⁰ Pomponius, *Digest* 12.6.14; 50.17.206, quoted in Dawson, J.P., “Restitution Without Enrichment” (1981) 61 B.U.L.R. 563, 621. Maddaugh & McCamus, 32, suggest that the moral premise underlying unjust enrichment is a familiar one that one ought not reap where one has not sown.

¹¹¹ Cf. Dawson, 8. Unjust enrichment has been labelled a “moral principle”: see Scott L.J. in *Morgan v. Ashcroft* [1938] 1 K.B. 49, 75.

¹¹² Dawson, *supra* n. 110, 621.

¹¹³ Stoljar, *supra* n. 16, 603.

But the question to be asked is whether unjust enrichment can ever be much more than such a conclusion; whether it can ever provide us with solutions to individual problems, or, more saliently, the means of arriving at such solutions. If unjust enrichment does not provide useful analytical tools for solving problems in Restitution, and it will be argued here that it does not, then the fascination with that concept may prove a dangerous thing. Dawson, writing in the 1950's, noted that

once the idea [of unjust enrichment] has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock. This temporary intoxication is seldom produced by other general ideas, such as "equity," "good faith," or "justice," for these ideals themselves suggest their own relativity and the complexity of the factors that must enter into judgment. The ideal of preventing enrichment through another's loss has a strong appeal to the sense of equal justice but it also has the delusive appearance of mathematical simplicity. It suggests not merely the need for a remedy but a measure of recovery. It constantly tends to become a "rule", to dictate solutions, to impose itself on the mind.¹¹⁴

The danger exists that the morally satisfying conclusion, legitimately used to describe the result arrived at after a particular process of reasoning, may instead displace that process of reasoning. For example, if the application of certain rules result in a determination that D must pay P \$1000, we might say that D would be "unjustly" enriched *if* he or she did not pay. This is quite different to saying that D must pay *because* he or she is unjustly enriched.

Whether, indeed, unjust enrichment as a generalisation is "dictating solutions" to problems depends upon the role within Restitution assigned to that concept. This matter calls for further consideration.

§ 1.3.2 The Role of Unjust Enrichment Within Restitution

Unjust enrichment is argued by many to be central to any understanding and conceptualisation of Restitution. It is said, for example, that the scope of the subject of Restitution is itself *defined* by reference to a principle (if principle it be) of preventing unjust enrichment—that "Restitution and unjust enrichment identify exactly the same area of law."¹¹⁵ Alternatively, others

¹¹⁴ Dawson, 8.

¹¹⁵ Birks, 17. Similarly, Goff & Jones, 5, consider that Restitution is composed of "all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment". See also Burrows, 1. Cf. Davis, *supra* n. 20, 1193. See *contra*, references cited *infra* n. 116, particularly Hedley, 56-60.

perceive unjust enrichment to be at the core of Restitution, although it is accepted that the subject-matter of Restitution may extend beyond that principle.¹¹⁶ On either view, unjust enrichment is of critical importance, and a perception of that principle as paramount has become so widespread that it may "fairly be said to represent academic orthodoxy in this area."¹¹⁷ The

¹¹⁶ Beatson, 22, 24-5 (also in "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] C.L.P. 71, 73-4) sets out the different approaches of those who equate Restitution and unjust enrichment and those who do not. Beatson appears to fall within the latter category, a position he makes clear at 258:

[E]ven within restitution, it is no help to try to squeeze everything into unjust enrichment. But once we have filtered out the doctrines not based on restitutionary principles and recognized that unjust enrichment is not the only restitutionary basis, we shall be able to compare bodies of doctrine underpinned by similar principles.

Fridman, 28-30, notes that text-writers and judges seem to employ the terms "restitution" and "unjust enrichment" interchangeably, but considers that neither term is entirely satisfactory for purposes of reference to this part of the law. Later, he states that restitutionary recovery may occur where the defendant has not been enriched (33). The *Restatement of Restitution* also appears to concede that liability may arise in Restitution outside the operation of a principle of unjust enrichment (see at 15). This is borne out by the Introductory Note to the underlying principles of the *Restatement*, at 11, which states that the principles are "only intended as general guides for the conduct of the courts and are not intended to express that universality of application to particular cases which is characteristic of the statements made in subsequent chapters." Dawson also appears to favour such a notion of Restitution. See Dawson, *supra* n. 110, 620-1, who states:

We constantly use one overworked phrase, unjust enrichment, to describe the manifold disparities, arising in the most diverse ways, that the remedies assembled under this heading are used to correct.

See also Hedley, *supra* n. 20, who is generally sceptical of the role of unjust enrichment, but who nevertheless accepts that "speaking in very loose and general terms, Restitution can be said to concern the recovery of benefits unjustly retained" (56). He goes on to emphasise that there is not *one* underlying principle of Restitution and that there are other, different principles at work. Consequently, he perceives the subject-matter of Restitution as a miscellaneous category of topics not readily incorporated within existing categories. See at 56-60.

It should be noted that writers in quasi-contract, now largely (see the *Restatement of Restitution*, 1-3; Garner, *supra* n. 27, 58-9) or entirely (see Birks, 29) said to be subsumed within Restitution, did not perceive unjust enrichment to have an exclusive role therein. This includes writers who did not consider the implied contract theory satisfactory. Generally, see Stoljar, and Munkman, *supra* n. 28. Keener, 19, considered that "the most important and most numerous illustrations of the scope of quasi-contract" are based on the principle of unjust enrichment, nevertheless incorporated within quasi-contract a number of topics not considered by him to be based on that principle. Admittedly, those parts of quasi-contract which Keener did not consider to be based on unjust enrichment were subsequently left out of the *Restatement of Restitution*. For an excellent criticism of attempts to explain all types of actions formerly brought in quasi-contract on the basis of unjust enrichment, see Perillo, *supra* n. 14.

¹¹⁷ Hedley, *supra* n. 20, 56. Support for this view, if needed, can be found in the volume of recent academic literature in the area, of which a significant proportion proceeds upon the basic assumption (usually unquestioned) of the pre-eminence of unjust enrichment within Restitution. This raises the question as to why theorists who equate Restitution and unjust enrichment continue to refer to the subject as "Restitution". Birks, 10, makes the point

perceived pre-eminence of unjust enrichment is said to shape the very subject-matter of Restitution. Since the concern of the first part of this thesis is with the utility of unjust enrichment theory, it follows that the exact reach of Restitution, to the extent that it has a separate identity from that of unjust enrichment, becomes, for now, unimportant. The scope and limits of Restitution and its relationship with other legal categories such as contract, tort, property¹¹⁸ and equity can be put to one side. It is the claims of unjust enrichment theory which will set the agenda of the liability rules and doctrines to be considered. For the purposes of this thesis, then, Restitution will be taken to include both

(1) the historical sources of the subject (quasi-contract);¹¹⁹ as well as

(2) any other liability rules (many originating in equity) which on current theories are claimed to be unjust enrichment-based, that is, concerned with the restitution¹²⁰ of "enrichment".

This deliberately leaves Restitution with "fuzzy edges",¹²¹ as different

that contract, tort and Restitution are not a "properly aligned series", for the first two represent causes of action and the latter a remedial response. Fridman, 29, points out that "[i]t might be thought that, consistent with his parallel between unjust enrichment, tort and breach of contract, it would have been more apposite to speak of his introduction as being to the law of unjust enrichment." More recently, however, Birks has begun to write in terms of the "law of unjust enrichment". Interestingly, Deane and Dawson JJ. in *Baltic Shipping v. Dillon* (1993) 111 A.L.R. 289, 313, have made similar references to the "law of unjust enrichment", as well as to the "modern substantive categorisation" of "an action in unjust enrichment".

¹¹⁸ The relationship between Restitution and property law is one of particular difficulty. See, for example, the very unsatisfactory distinctions drawn by Birks, 49-73, between the two areas. As will be seen, some topics claimed for Restitution have a strong proprietary "flavour", suggesting a very close relationship with notions of property. These issues will be considered in greater detail in Chapter 9.

¹¹⁹ See § 1.2. A consideration of *all* of quasi-contract does not concede an unjust enrichment basis for that subject. As with Restitution, this question is open.

¹²⁰ As to the meaning of which, see § 1.3.2.2.

¹²¹ Cf. Hedley, *supra* n. 20, 60:

'Restitution' can simply join that vast class of English words with fuzzy edges—concepts whose main outlines are clear but which tend to fade away in any protracted argument about their 'true' or 'real' meaning. Any discussion of whether a particular rule is 'really' part of Restitution is, I contend, quite meaningless unless we first have a definition to work from;

The definition of 'Restitution' is not, I think, a matter of much practical importance. What is important is that significant branches of the law do not escape serious academic attention for the lack of a category within which they may be studied. This is precisely what happened to that body of law formerly called 'quasi-contract': and the

proponents of unjust enrichment have differing views as to what that concept encompasses. Consequently, a diverse array of doctrines needs to be considered.

It will be argued that unjust enrichment does not accurately explain many of the liability rules which are said to be manifestations of that concept. If this view is correct, it has one of two consequences: either (1) Restitution will be left as a small subject (if its contents are defined by unjust enrichment);¹²² or else (2) Restitution will be seen to consist of numerous heterogeneous topics (if its content is defined historically or otherwise).¹²³ In either case, this will require a reconsideration of those liability rules in Restitution which cannot be explained by unjust enrichment; specifically, one would need to consider how these liability rules appropriately should be categorised. It will be seen that some liability rules may best be understood by reference to ideas already familiar to us from contract or tort; but other liability rules invoke ideas beyond contract and tort, so that they cannot be understood by reference to those categories. These are matters to be returned to below.

§ 1.3.2.1 Unjust enrichment as a source of liability, unjust enrichment as a remedial response

It is important to stress that the concern here is with unjust enrichment as a source of and explanation of liability, rather than as a remedial concept. This distinction is important and worthy of further examination at this point.

As was noted above, legal categories today are organised around causative events which can be used to “coherently group together” liability rules. Thus, unjust enrichment, as a basis for organising *liability rules*, must

new law of Restitution is very welcome if it remedies that problem. ... It would be a pity, therefore, if bits of ‘quasi-contract’ were to drop out of sight again because they cannot be fitted into the notion of ‘unjust enrichment’. I agree with Birks that it goes too far to say that the boundaries of Restitution are *solely* the result of historical accident. But a major part of the justification for the study of Restitution must be that it remedies the historical accident which caused quasi-contract to drop out of sight; and this must to a certain extent influence its subject-matter. (footnote omitted).

¹²² E.g. Birks, P., “Unjust Enrichment—A Reply to Mr. Hedley” (1985) 5 *Legal Studies* 67. Birks argues that, as a matter of definition, it is impossible for Restitution to consist of anything other than liability rules which are a response to unjust enrichment. This may be logically correct, but it does not determine whether the subject-matter Birks then proceeds to claim to be unjust enrichment-based is indeed so.

¹²³ Cf. Hedley, quoted *supra* n. 121.

explain, or give rise to, "independent and primary rights".¹²⁴ This contrasts with unjust enrichment as a *remedial response*—that is, as "a remedial alternative to other responses ... such as compensation"—where the liability rule which gives rise to that remedial response rests on a breach of duty in tort or equity, or on a breach of contract.¹²⁵ The need for a clear distinction between unjust enrichment as a source of liability, as opposed to one remedial response amongst others, has been persuasively put by Birks¹²⁶ and is becoming widely accepted.¹²⁷ Birks has called this remedial or secondary role of unjust enrichment,¹²⁸ "restitution for wrongs". To take one example, liability rules in

¹²⁴ Beatson, 25.

¹²⁵ *Id.* The usual remedy for, say, a breach of contract, is an award in damages. Where, however, termination of a contract is sought and there has been a total failure of consideration by one party, in the sense that there has been no performance of the contract, then a plaintiff may obtain restitution of money and goods transferred under the contract. Such remedial relief involves a return of the parties to their previous position. Such restitutionary remedies are uncontroversial: the gain being disgorged equates with the plaintiff's detriment and remedial relief restores the plaintiff to his or her *status quo ante*. As will be argued in Chapter 6, the rules which determine when such a remedy is available, originate in the law of contract. The restitutionary remedy is but one of several remedial responses available to a plaintiff as a result of the defendant's breach of contract.

Controversy arises, however, as to whether restitutionary remedies of a second type, involving the disgorgement of profits derived by a breaching party as a result of the breach of contract, are available. Such profits, where there has been an "efficient" breach of contract, may not equate with any losses sustained by a plaintiff (indeed, the plaintiff may not have suffered any losses). Requiring a disgorgement of such profits does not restore the plaintiff to his or her *status quo ante*. In the United States, such a remedy would likely be available. See Farnsworth, E.A., "Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract" (1985) 94 *Yale L.J.* 1339. In Australia, such a remedy would appear to be precluded by the majority opinion of the High Court in *Hospital Products Ltd v. U.S. Surgical Corporation* (1984) 55 A.L.R. 417.

¹²⁶ According to Birks, whilst an enrichment must have been incurred "at the expense" of a plaintiff, this phrase has two quite distinct senses. It may mean by "subtraction from" the plaintiff, which identifies a cause of action in unjust enrichment; or it may mean, "by doing wrong to" the plaintiff, which identifies a cause of action on the basis of some *other* liability rules (the commission of a tort, or equitable wrong, or perhaps for breach of contract): Birks, 23-4. This latter category Birks calls "restitution for wrongs". See Birks, 22-7, 40-4, 132-9. The Canadian formulation of unjust enrichment (see Chapter 2, below), by emphasising a "corresponding deprivation" to a plaintiff, encompasses the notion of the "subtraction from" the plaintiff's wealth. See Smith, L.D., "The Province of the Law of Restitution" (1992) *Can. B. Rev.* 672. For unjust enrichment to be a source of obligation different to, say, contract or tort, it must be shown that the "causative event" (facts giving rise to liability) falls outside familiar categories of "causative events". See Birks, *supra* n. 14, 13. A similar point is made by Stoljar, *supra* n. 16, 605: any separate category of law must bring together "distinct group of causes in which P may recover irrespectively of other causes—more particularly, *without* any involvement of contract, tort or trust."

¹²⁷ See, e.g., Burrows, 16-23; Garner, *supra* n. 27, 62; Smith, *ibid.*

¹²⁸ In *Restitution—The Future*, 1, Birks states the division in terms of that part of

tort will establish when a tort has been committed. One remedial option which *may* be available to the victim of a tort is a restitutionary one to claim a benefit derived by a defendant as a consequence of that tort.¹²⁹ Similarly, where an equitable wrong has been committed, for example, a breach of confidence or breach of fiduciary duty, an enrichment-based remedy, such as an account of profit, may be one possible remedy. As Finn has indicated:

There are very few equitable doctrines, I would suggest, that have the prevention of an unjust enrichment as their sole or principal purpose, though a possible (often usual) remedy for their breach can have the effect of denying such an enrichment Fiduciary law's loss, gain and avoidance remedies for *the same wrong* neatly illustrates this.¹³⁰

Consequently, restitution for wrongs is not of principal concern when attempting to establish the role of unjust enrichment as a *liability-creating* concept. Where a wrong has been committed, restitution of an enrichment may

Restitution which is substantial and that part which is purely remedial. The latter part

is called remedial because it is not concerned to describe and define any cause of action but only to ask whether causes of action defined in the law of civil wrongs trigger by way of remedy a right to restitution. ...

By contrast the substantive part of the law of restitution focuses on causes of action which are not defined in other categories. They are causes of action specifically in unjust enrichment and nothing else. Substance here means cause of action.

¹²⁹ See, e.g., *Oughton v. Seppings* (1830) 1 B. & Ad. 241, in which the defendant had wrongfully seized and sold a horse belonging to the plaintiff, who was held entitled to recover the proceeds of the sale, rather than for damages to be assessed. This remedial option has been called "waiver of tort". Such a claim is maintainable even where the plaintiff has suffered no loss. See *Strand Electric and Engineering Co. v. Brisford Entertainment* [1952] 2 Q.B. 246, although a user fee for use of the plaintiff's property, as was ordered to be paid in that case, may now be recoverable as damages for loss of use. See Goff & Jones, 722-3.

¹³⁰ Finn, P., "Equity, Commerce and Remedy", Paper delivered to the New Zealand Law Conference, 1993, 22 (emphasis in the original). See also Finn, P., "Mr. Beatson's 'Unfinished Business'", Paper delivered to the Restitution Group, Society of Public Law Teachers Conference, Aberdeen, 1991, 2-3; and Stoljar, *supra* n. 16, 610. This is well illustrated by the case of *McKenzie v. McDonald* [1927] V.L.R. 134, in which the defendant had purchased property from the plaintiff in breach of a fiduciary duty toward her. Normally, the plaintiff would have been entitled to rescission of the contract (which may be considered a form of specific restitution), but as this was not possible in the circumstances, the Court considered that the plaintiff should be indemnified for the losses suffered by her, namely the difference between the value of what the plaintiff received for her property (money and the defendant's property in exchange) and the market value of the plaintiff's property at the time of the sale (146-7).

be one possible remedial response¹³¹ available to a plaintiff. In Finn's words, the same wrong may give rise to loss, gain or avoidance remedies. Where, however, the underlying source of legal liability is said to be unjust enrichment, there is no such remedial flexibility. Although there are different conceptions of unjust enrichment—to be considered in Chapter 3—the distinguishing feature of all these conceptions is that the purpose of the liability-creating rules is considered to be exclusively or primarily the disgorgement of unjustly retained or unjustly obtained enrichment.¹³² In other words, unjust enrichment as a liability-creating event is said to give rise to only one remedial response, that of restitution.

§ 1.3.2.2 The remedial response of restitution

The term "restitution" is defined in *The Oxford English Dictionary* as the "action of restoring or giving back something to its proper owner, or of making reparation to one for loss or injury previously inflicted."¹³³ Thus, incorporated within the definition of restitution is the idea of restoring someone to his or her original position. It might be said, for example, that a criminal ought to make restitution to the victim of a crime. But when used in this sense, "restitution" does not allow us to distinguish one form of remedy from another: it serves no different function to that of "recompense" or "compensation".¹³⁴ Damages in tort could, on this definition, be described as "restitutionary". Consequently, "restitution" will not be utilised in this way here and most writing in the area excludes such a wide meaning.¹³⁵

¹³¹ A restitutionary response may be effected by a number of specific remedies, such as recovery of money had and received, an account of profits, a constructive trust or a lien.

¹³² However enrichment is defined.

¹³³ Vol. VIII, 551.

¹³⁴ Cf. Laycock, *supra* n. 2, 1282-3.

¹³⁵ See, e.g., Birks, 10-1:

There can be restitution of a thing or person to an earlier condition and restitution of a thing to a person. These two usages shade into one another but it is important to be aware of the difference. Only the second is intended in this book. ... [W]hen restitution is used in this first sense there is no suggestion that the person who is to effect the restoration of the status quo has himself received anything which will now have to be given up. The thing or person to receive restitution has merely suffered a loss or damage required to be made good. This is the crucial contrast with the second sense. Where restitution is not of someone or something to a prior condition but is rather of something to someone, the implication always is that the person who is to make restitution has received the something. ...

Instead, in this thesis, restitution will be used in the first sense as defined above to refer to the return of something (received from a plaintiff) or giving up of something (received from a third party) to the plaintiff.¹³⁶ The “something” to be disgorged¹³⁷ is an enrichment, or benefit,¹³⁸ in a defendant’s hands. For example, the obligation upon a recipient of a mistaken payment to repay the equivalent sum can be said to be restitutionary. The measure of recovery is determined not by any loss or harm suffered by the plaintiff, but by the identifiable gain of the defendant. It is this “disgorgement-of-benefit” sense of restitution which is linked to unjust enrichment theory and which distinguishes it from remedial responses such as loss compensation or the making good of expectations.¹³⁹

The reason why it matters to be alert to and to lay aside the first usage is that ‘restitution’ in that sense is not distinct from ‘compensation’. ... [T]his book is concerned only with the second sense of ‘restitution’. That is, with gains to be given up, not with losses to be made good.

Contrast Fridman, 23-5, who appears to include recompense within his definition of restitution. This appears to reflect Fridman’s recognition that many of the remedies in Restitution are not benefit-driven, but fulfil other purposes. In this writer’s view, this conclusion is correct, but it should be acknowledged by means other than a wide use of the term restitution, which tends to suggest a return of, or giving up of, a benefit. It is important to note that the “restitution of a thing to a person” could incorporate the law of property. As will be seen in Chapter 9, those liability rules which do appear to have a remedial aim of restoring something to a plaintiff share a strong affinity with property law.

¹³⁶ Cf. *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, 155. Usually, most of the cases under consideration here will be of the former situation. The reason for this is that the concern here is only with unjust enrichment as an explanation of liability rules giving rise to an obligation. Where the defendant has received a benefit from a third party, a plaintiff will in most circumstances only be able to claim such a benefit where he or she can show some wrongdoing on the part of the defendant. On most theories, liability does not depend in such circumstances upon any concept of unjust enrichment. Unjust enrichment is only considered to be a basis for imposing liability where a defendant has received a benefit—in the language of Birks, gaining wide acceptance—by “subtraction from” the plaintiff. This means that the defendant will, most usually, have received the benefit *directly* from the plaintiff. The exceptions to this are cases in which the plaintiff can show that the benefit received by the defendant from a third party “belongs” to the plaintiff. See further § 9.3.

¹³⁷ This neutral term includes both the return of a thing and the giving up of a thing.

¹³⁸ The terms are used interchangeably throughout this thesis.

¹³⁹ See the seminal article by Fuller, L., & Perdue, W., “Reliance Interest in Contract Damages” (1936) 46 Yale L.J. 52; 373, which draws the distinction in a contractual context between different remedial responses, by considering the “interest” of the plaintiff—restitution, reliance, or expectation—which such remedial responses protect. The “restitution interest” is measured by any value conferred upon a defendant, which he or she may be required to disgorge. The “reliance interest” represents the change of position of a plaintiff in reliance on a promise and the measure of damages required to return a plaintiff to his or her position before

There is one further sense in which the term restitution is here used. At times, the "something" to be disgorged may be the *very thing received from a plaintiff*, that is, *specific* restitution is possible. A remedy effecting specific restitution, by its nature, also returns the plaintiff to his or her *status quo* before the event which gave rise to the right to specific restitution. As will be seen in Chapter 9, the remedial aim of specific restitution may be such restoration of the *status quo ante*. The issue of whether the defendant has been enriched may be unimportant in the pursuit of such an aim.¹⁴⁰ Hence, "restitution", will be used to refer to the disgorgement of benefits generally, whereas "specific restitution" will refer to the return of the very thing received by the defendant from the plaintiff.¹⁴¹

§ 1.3.2.3 The relationship between Restitution, the subject, and restitution, the remedy

For the purpose of this thesis, the subject-matter of Restitution has been given a broad and indefinite scope, to take into account both its historical sources as well as the widest claims of unjust enrichment theorists. In the view of the writer, much of the "territory" claimed for unjust enrichment has been claimed unjustifiably. It will be argued that many of the liability rules to be considered in detail in this thesis cannot be explained as having a restitutionary—that is, an unjust-enrichment related—purpose. This will be seen to be so for either of two reasons: (1) the remedial response to some liability rules is not in all cases, or even characteristically, restitutionary; or, (2) even where a remedial response is restitutionary, the particular liability rule giving rise to it cannot be said to have a *purpose* of reversing enrichment.

Nevertheless, the use of the subject title "Restitution" is necessitated by

the promise. The "expectation interest" is the value of any expectations which a promise creates and the measure of damages required to put a plaintiff in the same position as if the promise had been performed. See Fuller & Perdue, 53-4.

¹⁴⁰ The restitution of benefits suggests that benefit disgorgement, rather than returning parties to their *status quo*, is the remedial aim. However, even restitution need not be aimed at benefit disgorgement if a plaintiff has also suffered loss and that loss is the determinative measure of any recovery. Since in most cases this is conceded to be so—an enrichment being said to be disgorgeable only to the extent that it was at the expense of the plaintiff—this will be seen to be one of the serious weaknesses of unjust enrichment theory.

¹⁴¹ For further on the distinction between "restitution" and "specific restitution", see Laycock, *supra* n. 2, particularly at 1279-81.

the widespread acceptance of such by many writers.¹⁴² Its use here does not concede that Restitution forms *one* subject—a coherent whole explicable on the basis of one general concept. Rather, the burden of the argument of this thesis is that unjust enrichment lawyers, “in attempting to build a single coherent law of restitution, [have] treated very different kinds of cases with identical doctrine.”¹⁴³ It will be suggested that such a treatment is not justified; nor does it lead to a clarity of analysis when attempting to solve problems in Restitution. Instead, it will be argued that a number of distinct groupings of liability rules may be identified within Restitution, which liability rules are better explained in terms of the distinctive features justifying their common grouping. Some of these rules share considerable affinities with contract and tort, perhaps even so much so as to require a reconsideration of our definitions of contract and tort in order to incorporate or explain topics presently “peripheral” to those categories. Other liability rules appear to be manifestations of ideas unique to the groups or categories of which those liability rules form part. These matters will be considered in Part II.

§ 1.3.3 Summary

To this point, it is the diversity of Restitution which has been emphasised. Historically, there has not existed a single subject of quasi-contract or Restitution, which factor of itself casts doubt on the capacity of any single concept to adequately explain the variety of liability rules now said to coalesce under that rubric. Nevertheless, cases in Restitution perform a significant gap-filling and ameliorative function which itself needs to be considered. In particular, this function is emphasised in repeated references to “equity” and “natural justice”, and is highlighted by the “peripheral” nature of many of the topics to be considered. This gap-filling and ameliorative role of Restitution forms the subject of the next section .

¹⁴² See, Davis, *supra* n. 20.

¹⁴³ Childres, R., & Garamella, J., “The Law of Restitution and the Reliance Interest in Contract” (1969) 64 N.W.L.Rev. 433, 436.

§ 1.4 THE GAP-FILLING AND AMELIORATIVE ROLE OF RESTITUTION

§ 1.4.1 Introduction

Restitution consists of liability rules which cannot readily be encompassed within mainstream contract, tort or property law. Perhaps because of the seemingly peripheral status of many of these rules, a number of commentators have equated their role with the traditional role of equity of ameliorating the harsher consequences of the strict application of the common law.¹⁴⁴ Thus, Laycock has noted that:

The rules of restitution developed much like the rules of equity. Restitution arose to avoid unjust results in specific cases—as a series of innovations to fill gaps in the rest of the law.¹⁴⁵

This statement subsumes two albeit-not-distinct functions of Restitution to be illustrated below: (1) filling gaps where other existing rules and doctrines fail to address a particular problem, and (2) ameliorating harsh or unacceptable consequences flowing from the application of existing rules and doctrines which address a particular problem. Such processes of gap-filling and amelioration are worthy of further consideration, for they may provide us with a greater insight into the possible utility of any generalisation that seeks to unify liability rules which have performed such functions. If Restitution indeed augments equity, finding a unifying theory for Restitution may be difficult,¹⁴⁶ if for no other reason than that equity itself has not been explained on the basis of one unifying theory.¹⁴⁷ This is unless liability rules in Restitution have largely filled only *one* significant gap in our law. If this were the case then a single concept such as unjust enrichment may indeed explain and underlie

¹⁴⁴ Cf. comments of Finn, cited in text to n. 159.

¹⁴⁵ Laycock, *supra* n. 2, 1278.

¹⁴⁶ Cf. Sullivan, *supra* n. 77, 26:

In fulfilling this ubiquitous impulse to do justice where legal logic has failed, quasi-contract has presented extraordinary difficulties to those who have sought to systemize and reconcile the distinctly unsystematic and conflicting cases that constitute the law of quasi-contract. The doctrine, in both its origin and its application, has proved itself immune to such attempts at organisation.

¹⁴⁷ In recent times, however, there have been calls for the more systematic and explicit exposition of the organising ideas and principles of equity: see, e.g., Finn, "Mr. Beatson's 'Unfinished Business'", *supra* n. 130, 8, and see Beatson, Chp. 9.

much of, or perhaps all of, Restitution.¹⁴⁸ But if the liability rules in Restitution have filled a number of gaps in our law and performed varying ameliorative functions (and it will be argued that they have), then any single generalisation is unlikely to prove useful or accurate. We may need to resort to a number of explanatory ideas.

It will be argued that both common law and equitable¹⁴⁹ liability rules claimed for Restitution fill gaps in the law and ameliorate the effects of extant rules and doctrines which applications would lead to results contrary to perceived notions of justice. This explains why rules performing a gap-filling and ameliorative function are usually perceived to derive from the broadest notions of "equity", to yield results "compelled by natural justice";¹⁵⁰ and explains why, at times, such rules are justified by no more specific reason than an appeal to such broad notions.

§ 1.4.2 The Need For Gap-Filling and Amelioration

Much of the process of the development of the common law has been concerned with the search for rules and principles recognised as necessary grounds for the decision in a particular case and distilled from the results of many cases.¹⁵¹ Thus, in *R v. Bembridge*, Lord Mansfield stated that "the law

¹⁴⁸ This is the view of the law which appears to be espoused by unjust enrichment lawyers. See e.g., Cooke, P.J., and Oughton, D.W., *Common Law of Obligations* (2nd ed., 1993), 281: Restitution "straddles the boundary between the law of contract and the law of tort" (emphasis added).

¹⁴⁹ Statutes have had little direct influence on the development of the particular rules and principles of concern here. Indirectly, of course, many quasi-contractual and equitable liability rules have been utilised to overcome the less desirable consequences of statutory provisions (such as the *Statute of Frauds*). But in such cases, the statutes themselves are merely the forum for the development and application of *common law* (i.e., judge-made law) principles.

¹⁵⁰ Sullivan, *supra* n. 77, 20, where Sullivan is referring to quasi-contract. In this writer's view, this is a valid conclusion in relation to all of Restitution, the boundaries of which (given the broad definition adopted) in any case extend to many equitable doctrines.

¹⁵¹ Sir Frederick Pollock, writing in *The Progress of Continental Law in the Nineteenth Century* (various authors) (1918, reprinted Little, Brown and Co., 1969), at *xliv*, wrote:

[J]udicial authority belongs not to the exact words used in this or that judgment, nor even to all reasons given, but only to the principle recognised or applied as necessary grounds for the decision. Therefore, it has never been possible for the courts to impose dogmatic formulas on the common law, and the efforts of text-book writers to bind it in fetters of verbal definition have been constantly and for the most part happily frustrated by the reconsideration and restatements of guiding principles in the judgments of the highest tribunals.

There is considerable judicial support for such views. See, e.g., *In re Montagu's Settlement Trusts*

does not consist of particular cases, but of general principles which are illustrated and explained by those cases."¹⁵² As with any abstract thought, however, the articulation of rules and principles, or indeed any broader underlying ideas, is a complex process.¹⁵³ As lawyers, we would be most familiar, for example, with the processes of classification and generalisation. In order even to begin to comprehend what would otherwise be the vast, shapeless bulk of the law, resort is made, at the level of broad generality, to classifications in order to divide and compartmentalise. We identify divisions such as public, as opposed to private, law; personal, as opposed to proprietary, obligations; contract, as opposed to tort.

These processes, though necessary, have their inherent dangers. For the categories created, distinctions drawn and rules articulated may not adequately or exhaustively reflect the underlying notions of justice at work. As Hayek has pointed out:

The common law judge is bound to be very aware that words are always but an imperfect expression of what his predecessors struggled to articulate.¹⁵⁴

[1987] Ch. 264, 278, per Megarry V.C.:

There is today something of a tendency in equity to put less emphasis on detailed rules that have emerged from the cases and more weight on the underlying principles that engendered those rules, treating the rules less as rules requiring strict compliance, and more as guidelines to assist the court in applying the principles.

For recent arguments in the same vein, see his Honour Mr. Justice E.W. Thomas, "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 V.U.W.L.R. Monograph, No. 5.

¹⁵² (1783) 3 Dougl. 332. See also *Gorton v. Hancock* (1745) Harg. MSS. 353 f.122, per Lord Hardwicke, cited in Holdsworth, W.S., *Some Lessons from Our Legal History* (1928), 17-8.

¹⁵³ In our pursuit of knowledge, in law as elsewhere, words become our means of creating and communicating our image of reality and such communication will often be furthered through the use of tools such as metaphors and fictions. See Fuller's seminal article on legal fictions: Fuller, L., "Legal Fictions" Pts I, II, and III, (1930-1) 25 Ill. L.R. 363; 513; 877. As to the process of abstract thought generally, see Part III. Even the most elementary thought processes only proceed via a "conscious generalization of experience". *Ibid*, 907. For example, the creation of elementary classifications such as that of "person" proceeds despite the fact that it is impossible to visualise a "person" in the abstract—"persons" must either be male or female, black or white, short or tall, and so on (cf. *ibid*, 884).

¹⁵⁴ Hayek, F.A., *Law, Legislation and Liberty*, (1973) Vol. I, 87. A similar point is made by Roscoe Pound when he states that "[t]he trained intuition of the judge leads him to the right results for which he is puzzled to give unimpeachable legal reasons": "The Theory of Judicial Decision" (1923) 36 Harv. L.R. 940, 951.

At times, however, the essentially arbitrary divisions utilised to make the law more manageable and comprehensible¹⁵⁵ become ends in themselves, rigidly adhered to—a process which Dawson has labelled “that well-known ailment of lawyers, a hardening of the categories.”¹⁵⁶ Similarly, previous statements of rules of law are at times given “biblical reverence”¹⁵⁷ and adhered to strictly or formulistically in circumstances they were never intended to include.

In order to avoid the consequences of such developments, resort is sometimes made to legally creative methods: one example is the time-honoured use of legal fictions.¹⁵⁸ Historically, of course, when the common law has applied rules formulistically and in a manner which appeared contrary to conscience, it was the role of the Court of Chancery to provide remedies that might achieve justice. But as Finn has pointed out, this “creative and ameliorative” role has generally, and “often uncritically, [been] attributed to

¹⁵⁵ Cf. Fridman, G.H.L., “The Foundations of Restitution: A Canadian Perspective” (1989) 19 W.A.L.Rev. 131, 138-9:

Our notions of contract, tort or restitution are not naturalistic, they are constructs of law, intended to serve certain ends or policies. There is no inherent reason for making any distinction between contract, tort and restitution other than those which may be derived from history or convenience.

See by way of example, Hedley, S., “Contract, Tort or Restitution; or Cutting the Legal System Down to Size” (1988) 8 Legal Studies 137, who seeks to reclassify the law of obligations (itself a classificatory convenience) on an entirely different basis. Such attempts, as with existing classifications, are neither “right” nor “wrong” but merely more or less useful. A similar restructuring will be attempted by this writer, one which it is hoped will prove more useful than resort to a concept of unjust enrichment.

¹⁵⁶ Dawson, J.P., “Restitution or Damages” (1959) 20 Ohio St.L.J. 175, 187. Rejecting rigid divisions, see Deane J. in *Hawkins v. Clayton* (1988) 78 A.L.R. 69, 101:

The law of contract and the law of tort are, in a modern context, properly to be seen as but two of a number of imprecise divisions, for the purpose of classification, of a general body of rules constituting one coherent system of law. Where rules classified in different divisions would otherwise conflict or compete, an essential function of the whole system is to avoid, resolve or rationalise such conflict or competition, not to induce or preserve it.

¹⁵⁷ See Finn, P., “The Liability of Third Parties For Knowing Receipt or Assistance” in Waters, D.W.M., (ed.) *Equity, Fiduciaries and Trusts* (1993) 195, 205, where he considers the excessive reverence given to Lord Selborne’s statements in *Barnes v. Addy* (1874) L.R. 9 Ch. App. 244.

¹⁵⁸ Fuller, supra n. 153, 516: “Generally, a fiction is intended to escape the consequences of an existing, specific rule of law.” But these fictions may themselves at a later stage be inappropriately utilised, as where they are reified, and their initial purpose is forgotten. Thus new difficulties are created. Perhaps this is an inevitable and ongoing process. But as Fuller has pointed out, it would seem that the problem is not the process of conceptualism itself, but “clumsy, hypostatizing conceptualism” (909).

equity...[and], equally uncritically, is still so often denied the common law."¹⁵⁹ It is suggested that quasi-contractual rules, though not originating in equity, nevertheless serve an equitable role, both filling gaps in our legal system and ameliorating the effects of the application of rules, principles or categorisations which appear to preclude a desired result. This will be demonstrated by a number of examples.

§ 1.4.3 Illustrating Gap-Filling

One of the reasons why gaps arise in our legal system is as a result of the processes of classification: existing legal categories of what are perceived to be related liability rules do not extend beyond their self-defined boundaries. It is not relevant for our purposes how and why categories come about, or the advantages and disadvantages of a particular categorisation. What is clear is that as with any process of classification, boundaries that include of necessity must also exclude. The categories thus created will always leave a miscellany of cases that cannot be subsumed readily within the ambit of those categories.

The history of quasi-contractual actions provides an illuminating illustration of the process of filling gaps which arise as a consequence of the adoption of particular legal classifications. As has already been seen, quasi-contractual type claims (such as for money paid under mistake) which lay from the earliest days of the common law, were enforced by the end of the seventeenth century in the action of *indebitatus assumpsit*.¹⁶⁰ A myriad of quite diverse claims could be brought in *indebitatus* and these were, at a later stage, differentiated by the use of individual "common counts". With the abolition of

¹⁵⁹ Finn, "Mr. Beatson's 'Unfinished Business'", supra n. 130, 1. But the Court of Chancery was not always capable of properly performing such a function. During a period lasting from the seventeenth to the nineteenth century, equity shed its "ex tempore characteristics" by the development of positive principles: Meagher, R.F., Gummow, W.M.C., & Lehane, J.R.F., *Equity: Doctrines and Remedies* (3rd ed., 1992), 7-8 (hereinafter: "Meagher, Gummow & Lehane"). This was no doubt desirable in that it ended a period of *ad hoc* decision making, so that the "whims of the Lord Chancellor were no longer sufficient" (8), but one of the consequences was that the Court of Chancery was also at times guilty of the application of these "principles" in as strict and formulistic a manner as the common law.

¹⁶⁰ See § 1.2.1

the old forms of actions, however, "it seemed necessary to adopt a new system of classification."¹⁶¹

Gaining particular prominence were two types of claims, contractual, essentially those concerned with enforcing consensually assumed obligations, and delictual, essentially those concerned with wrongdoing causing another harm. The categories of contract and tort began to develop.¹⁶² Clearly, however, many circumstances arose which demanded recovery, but in which no real contract could be said to exist or breach of a duty in tort could be said to have occurred. The common counts continued to be utilised in order to impose liability in such circumstances. The money had and received action for the recovery of mistaken payments provides the obvious example. But the common counts proved useful in filling other gaps as well. For example, the *quantum meruit* action was utilised, albeit rarely, to allow plaintiffs to recover for services rendered in an emergency. This filled the gap arising as a result of the common law's failure to embrace a general doctrine of justifiable intervention in another's affairs, or *negotiorum gestio*.¹⁶³

Eventually, however, and despite the clearly non-consensual nature of much quasi-contractual liability, all of quasi-contract became to be viewed as based on implied contract. This "false" classification of quasi-contract led to a two-fold division of personal obligations, into contract and tort.¹⁶⁴ Quasi-contractual claims thus became a subset of contract.¹⁶⁵ One of the

¹⁶¹ Perillo, *supra* n. 14, 1210.

¹⁶² See Chapter 6, for further on the essential characteristics of contract and tort.

¹⁶³ See further, Chapter 8. Many of the gaps which arose were the consequences of the increasingly rigid self-limiting definitions, particularly of contract, adopted by the courts. Consequently, as equity also demonstrates (consider, for example, the use of estoppel to impose both contract-like and tort-like liability), much of this gap-filling occurred and occurs at the *boundaries* of, or near, contract and tort.

¹⁶⁴ The existence of a two-fold division was strenuously reiterated by Viscount Haldane L.C. in *Sinclair v. Brougham* [1914] A.C. 398, 415, *supra* n. 84. For an interesting modern reformulation of these ideas, see Butler, *supra* n. 2, 29-36, particularly at 32.

¹⁶⁵ Cf. Perillo, *supra*, n. 14, 1210-1:

Private law was seen as a great dichotomy between contracts and torts ... [and such] non-consensual obligations which previously had been enforced by the writ of general *assumpsit* ... came to be regarded as 'contracts implied in law'.

One possible consequence of such reasoning was that it staved off any need to explore the real basis for such claims.

consequences of this development was that quasi-contract was eviscerated of its creative gap-filling function.¹⁶⁶

In due course, it came to be recognised again that many cases of implied contract were not contracts at all and that the law was imposing obligations for reasons other than the parties' express or implied agreements.¹⁶⁷ The category of quasi-contract was given a separate status and the three-fold division of the law of obligations emerged. All common law personal obligations which could not be subsumed readily within contract or tort were argued to fall within the bounds of this third category. Munkman, for example, perceived quasi-contract as that "residue of cases" remaining after the process of the legal "differentiation" of contract and tort.¹⁶⁸ Importantly, the outstanding feature of quasi-contract as a category of rules fulfilling a gap-filling function was again being given recognition. The point is made expansively by Rinker:

Quasi-contract from its very inception has overlapped other fields of law; from sheer necessity, it developed to supplement the more cumbersome common law actions and to supply a remedy for cases which would not fit neatly into one of the law's established pigeon-holes.¹⁶⁹

§ 1.4.4 Illustrating the Amelioration of Specific Rules and Doctrines

The application of specific rules and doctrines which address a problem arising from particular fact circumstances may result in harsh or undesired consequences. Consequently, the courts have at times resorted to ameliorative techniques either to circumvent such rules or doctrines, or to modify or recast their application in a given circumstance. Quasi-contractual rules have often performed such ameliorative functions.

An interesting example which illustrates the point arises in the context of the impact of the *Statute of Frauds* on the enforceability of contracts. To

¹⁶⁶ *Sinclair v. Brougham* [1914] A.C. 398, is a telling example.

¹⁶⁷ *Re Rhodes* (1890) 44 Ch.D. 94, is an early example, a decision ignored, however, in *Sinclair v. Brougham* [1914] A.C. 398.

¹⁶⁸ Munkman, *supra* n. 28, 1. Similarly, Sullivan, *supra*, n. 77, 4 & 20.

¹⁶⁹ Rinker, G.A., "Quasi-Contracts—Concept of Benefit" (1948) 46 Mich.L.Rev. 543, 551. See also Fridman, 22, who considers that the "old law of quasi-contract therefore filled a gap left by the laws of property, contract and tort."

simplify the matter,¹⁷⁰ the *Statute of Frauds* sought to prevent fraudulent allegations of the existence of certain contracts by providing that unless such contracts were evidenced in writing, they were unenforceable. Yet if applied literally, such a rule could have manifestly harsh consequences. For example, parties transferring land under an oral contract of sale might be refused a claim either for the sale price or for the return of the land, action on the unenforceable oral contract being precluded. If such situations were to be left unremedied, then the *Statute* would itself become a vehicle for perpetuating fraud and rules and doctrines both in equity and at common law arose to ameliorate such potentially harsh consequences.¹⁷¹

One doctrine which developed was the equitable doctrine of part performance.¹⁷² This doctrine allowed for the specific enforcement of an oral contract caught by the *Statute* where there were sufficient acts of part performance¹⁷³ referable to the oral contract. Yet by the late nineteenth century, the House of Lords in *Maddison v. Alderson*¹⁷⁴ applied a restrictive and technical interpretation of the doctrine.¹⁷⁵ Its purpose of "vindicating

¹⁷⁰ The issue is considered in greater detail in Chapter 6.

¹⁷¹ Meagher, Gummow & Lehane, paragraphs 1220, 2035. Numerous statements exist in which judges have emphasised that the courts would not allow the *Statute of Frauds* to be utilised as an instrument for fraud. See, e.g., *Simon v. Motivos* (1766) 3 Burr. 1921, per Lord Mansfield:

The key to the construction of the act is the intention of the legislature, and therefore many cases, though seemingly within the letter, have been let out of it; more instances, indeed, in Courts of Equity than of Law, but the rule is the same in both. No advantage shall be taken of this Statute to protect the fraud of another.

See also per Wilmot J.:

Had the Statute of Frauds been carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than by preventing, fraud.

These are cited in Fifoot, C.H.S., *Lord Mansfield* (1936), 125-6. See also *Anon.* (1773) Lofft 330, per Lord Mansfield: "[t]he very title and the ground on which the Statute [of Frauds] was made have been the reason of many exceptions against the letter of the Statute."

¹⁷² Meagher, Gummow & Lehane, paragraphs 2036-2045.

¹⁷³ For further on this, see *ibid.*, paragraph 2037.

¹⁷⁴ (1883) 8 App.Cas. 467.

¹⁷⁵ This was part of a general development which Lord Simon described in *Steadman v. Steadman* [1976] A.C. 536, 560 as "a hardening of equity's arteries, an increasing technicality until quite recent times. The Chancellor's foot evolves into the Vice Chancellor's footrule."

conscientious dealing", thus preventing innocent parties from suffering harm as a consequence of an unmeritorious and technical reliance on the *Statute*, appeared to be ignored. It is this setting which provides the background of one of Canada's foremost Restitution cases: *Deglman v. Guaranty Trust Co. of Canada & Constantineau*.¹⁷⁶

In *Deglman*, the plaintiff performed various domestic services for his aunt prior to her death, on the basis of an oral agreement that she would bequeath him part of her real property.¹⁷⁷ This contract was unenforceable under the provisions of the *Statute of Frauds*, yet the Ontario Court of Appeal allowed specific performance of the oral contract on the basis of the doctrine of part performance and distinguished *Maddison v. Alderson*. The Supreme Court, however, overruled the Court of Appeal and accepted the more restrictive approach of the English House of Lords on the question of whether the acts of part performance were referable to the contract alleged.¹⁷⁸ But so as to avoid the plaintiff being left without any remedy, the Supreme Court instead imposed an obligation to pay the reasonable value of the services rendered. The basis of this obligation was said to lie in "quasi-contract or restitution",

¹⁷⁶ [1954] 3 D.L.R. 785.

¹⁷⁷ A contract was found to exist by both the trial judge and the Ontario Court of Appeal [1953] O.W.N. 665. One might argue that this case appears to fall within the very province of the *Statute of Frauds*, as such a contract could easily be alleged and difficult to disprove. Consequently, it may be argued that evidence in writing was essential in establishing the probity of the plaintiff's claim. But if that had been the view of the Supreme Court (for clearly, it did not trouble the Courts below), then it could not have relied on the contract to prove the non-gratuitous nature of the services provided by the nephew. Those services could arguably have been motivated by love and affection, as part of the aunt's and nephew's domestic arrangements. The nephew would not then have been entitled to the *quantum meruit* award. In *Deglman*, the Supreme Court simply accepted that the services were given on a contractual footing and were to be "paid" for: [1954] 3 D.L.R. 785, 788. Such a finding, of course, would not have been made had there been serious doubts about the probity of the plaintiff's claims.

¹⁷⁸ In *Maddison v. Alderson* (1883) 8 App. Cas. 467, the test was stated as requiring acts which were "unequivocally, and in their own nature, referable to some such agreement as that alleged": per Lord Selborne, at 479. Cf. *Chaproniere v. Lambert* [1917] 2 Ch. 356, 361. The question thus turned on whether the plaintiff's acts of part performance were referable to the alleged contract for the transfer of the land. The Supreme Court considered that this could not be shown by the plaintiff. The Court of Appeal, by way of contrast, considered that provided "the acts of part performance were referable to some contract and consistent with the contract alleged, then evidence was admissible as to the precise terms of the particular contract alleged": [1953] O.W.N. 666. Cf. Fry, *Specific Performance* (6th ed., 1921), 278. Admittedly, the plaintiff's claim to specific performance in *Deglman* appears not as strong as it did in *Maddison v. Alderson* itself. In *Maddison*, the plaintiff gave 20 years services at great sacrifice to herself in return for real estate intended to be left to the plaintiff by will. The deceased's attempt to bequeath the property failed for want of adequate testation. The existence of the invalid will provided strong evidence of the deceased's intentions and the truth of the plaintiff's claims.

which provided a remedy for what would otherwise be an "unjust enrichment".¹⁷⁹

In the view of many Canadian academics, *Deglman* represents the "starting point" of that country's development of the law of Restitution.¹⁸⁰ Yet, as this brief outline of the case demonstrates, it is probably fair to conclude that *Deglman* illustrates the imaginative utilisation of a common law doctrine to overcome the restrictive interpretation of an equitable rule;¹⁸¹ an equitable rule, ironically enough, which had itself originated to overcome the harsh consequences of the *Statute of Frauds*. Where equity had "failed", Restitution assisted, providing a remedy of last resort.¹⁸² An "exception" to the part performance "exception" was applied, illustrating that the process of amelioration is an ongoing one which allows courts to avoid results they are not prepared to countenance.

As will be seen in Chapter 6, statutes rendering contracts void, voidable or unenforceable have provided fertile ground for the operation of rules ameliorating the consequences of the literal application of such statutory provisions. But this is only one context within which rules having an ameliorative functions are in evidence. Examples abound, many, of course, being found in equity. For example, equity has ameliorated and given greater sophistication to "crude" and unacceptably limited common law rules governing transaction avoidance. Thus, equity's transaction avoidance for

¹⁷⁹ The court cited Lord Wright in *Fibrosa Spolka v. Fairbairn Lawson* [1943] A.C. 32, 61. It should be noted, however, that the remedy, and the circumstances in which it was granted, was more akin to the operation of the estoppel doctrine than to any unjust enrichment concept. For a consideration of the doctrine of estoppel in greater detail, see Chapter 4. In Australia today, the doctrine of estoppel would probably provide a potential means of recovery for a plaintiff in a similar position to that of the plaintiff in *Deglman v. Guaranty Trust Co. of Canada & Constantineau* [1954] 3 D.L.R. 785. If it could be shown that the plaintiff had acted on the basis of the representations of the deceased, the defendants may then have been estopped from relying on their strict legal rights where the insistence on those rights would contradict the representations relied upon, thereby causing the plaintiff detriment. The appropriate remedy would either compensate the plaintiff for the losses incurred or alternatively, enforce the deceased's representation if this were the only means of avoiding the plaintiff's detriment. See, e.g., *Riches v. Hogben* [1986] Qd. R. 315.

¹⁸⁰ E.g. Fridman, 12; Maddaugh & McCamus, 13.

¹⁸¹ Cf. Mason, K., "Restitution in Australian Law" in Finn, 20.

¹⁸² If the Supreme Court of Canada had simply distinguished or disapproved the rule in *Maddison v. Alderson* (1883) 8 App. Cas. 467 (as the Ontario Court of Appeal had done), it could have granted relief in far less a circuitous manner. The contract could simply have been enforced on the basis of the part performance doctrine.

innocent misrepresentation overcame the common law's insistence on fraud, and actual undue influence expanded the notion of common law duress. Significantly, such transactions-avoidance rules are now often claimed for Restitution.

§ 1.4.5 Recognition of the Gap-Filling and Ameliorative Role of Restitution

As these above examples illustrate, gap-filling and amelioration can occur in a variety of different contexts. In fact, the two functions could be said to be merely aspects of the same process—producing just results in circumstances in which existing rules either do not address an issue, or address it in an unacceptable way. The difference between gap-filling and amelioration may often be blurred or non-existent, so that a rule might equally be described as performing either function. What is significant is that the fundamental importance of rules performing such function has been widely recognised, perhaps because our legal system's very capacity to attain "justice" is at issue. Holdsworth, for example, emphasises how Lord Mansfield in *Moses v. Macferlan*¹⁸³

found an incoherent set of rules stated in a number of heterogeneous cases; and if there was any one principle at their back, it was the innate feeling of the judges that it was just and equitable that a convenient remedy should be given in these cases.¹⁸⁴

Similarly, Sullivan, writing much more recently, has said quasi-contract is

a doctrine to be pressed into service when the application of more conventional doctrines would not yield a result that is compelled by natural justice.¹⁸⁵

He adds that it

owes its origins to the persistent desire to do justice; it saves a

¹⁸³ (1760) 2 Burr. 1005.

¹⁸⁴ Holdsworth, W.S., *History of English Law* (2nd ed., 1937), Vol. 8, 97.

¹⁸⁵ Sullivan, *supra* n. 77, 20. See also at 1 & 4. Modern Canadian law has been described in this vein: "Canadian judges have been willing, even anxious, to bring into play restitutionary principles to fill gaps left by the original common law." See Fridman, G.H.L., "The Reach of Restitution" (1991) 11 *Legal Studies* 304. As to the role of equitable notions in European law of Unjust Enrichment, see Zweigert, K., & Kotz, H., *An Introduction to Comparative Law* (2d ed., 1987) Vol. II, 254-5.

deserving plaintiff's claim from failure under conventional legal principles.¹⁸⁶

Obviously, the reason for a perception that there exists a need to gap-fill or ameliorate the effects of a rule will depend on the very instance-specific problem arising from the facts of a given case. This fact, it is suggested, is no better illustrated than by the very diversity of legal topics within Restitution, and the diversity of reasoning adopted in Restitution cases to achieve "just" results. When our existing rules do not, at first blush, appear to provide acceptable solutions to problems, our "innate" need for a remedy is triggered. In the past, our attempts to avoid the unjust consequences of *not* providing a remedy in such cases gave rise to much of the diverse and thus perhaps inevitably difficult law of Restitution. This diversity alone makes it unlikely that any single principle could ever unify these topics.

If the origins of Restitution can be traced to such an important aspect of the legal process itself, of performing a fundamental role of gap-filling and amelioration, then this suggests a need for great caution before any general theory of Restitution is embraced. A generalisation which seeks to do too much—one that is all encompassing or claims to be universal in its ambit—may obscure this function and create the fiction of the wholeness or unity of Restitution rather than highlight its diversity. As will be seen below, much of the theoretical writing on unjust enrichment appears to suffer from such a shortcoming.¹⁸⁷ It is one of the fundamental arguments of this thesis that the liability rules of Restitution do not just fill one gap in our law (the reversal of unjust enrichment), but fill a number of gaps and perform various ameliorative functions. Consequently, any ordering of Restitution must embrace a number of different principles and informing ideas, rather than merely one. Such an ordering will be attempted in Part II of this thesis.

§ 1.5 ORGANISATION OF THIS THESIS

The burden of Part I of this thesis is a consideration of the concept of "unjust enrichment". This part of the thesis is largely descriptive of both current theories of unjust enrichment and criticisms which have (in many cases

¹⁸⁶ Sullivan, *supra* n. 77, 26.

¹⁸⁷ See, for example, some of the more dogmatic assertions, such as that by Burrows that unjust enrichment is the only explanation of Restitution. See § 2.2.1.2; § 2.2.1.3.

traditionally) been levelled at such a concept. Such a descriptive task needs to be undertaken, however, in order to give the reader an overview of the ideas and debate at large in Restitution.

In Chapter 2, differing approaches to unjust enrichment will be examined. This chapter will consider both judicial and academic interpretations of the role of unjust enrichment in the law of Restitution. Although these approaches differ greatly, most share one essential feature: unjust enrichment is utilised as a means of analysing and solving problems in Restitution. To successfully fulfil such a function is the critical challenge of, and for, unjust enrichment. Does it indeed provide a sensible means of solving Restitution problems? The argument of this writer, to be the subject of Chapter 3 and Chapter 4, is that it does not.

Chapter 3 will take a more detailed look at unjust enrichment theories; specifically, to consider the interaction between the constituent "parts" of that concept, namely, "unjust" and "enrichment". It will be shown that irrespective of the meaning of "enrichment", unjust enrichment theory is ultimately dependent upon the existence of some better outcome for the defendant which triggers the liability rule. Such an outcome, in turn, is said to give rise to a remedial response of reversing that outcome. It will be argued, however, that there are considerable difficulties with any "outcomes"-driven approach. Perhaps the greatest difficulty is that such an approach must identify some means of determining why the outcome is undesirable; why it ought to be remedied; why, in short, it is "unjust". The mere existence of a benefit or enrichment does not of itself tell us why it needs to be reversed. It will be argued that "unjust" either proves to be too vague and uncertain to serve any useful analytical function, or else represents merely a conclusion reached by reference to more specific rules about which "unjust" tells us little or nothing.

Chapter 4 will consider specific attempts at giving meaning to "enrichment". This will involve detailing a number of complex theoretical constructs which have been the subject of recent debate. It will be argued that none of these constructs prove adequate; for, to generalise, many of the liability rules claimed for Restitution are not ultimately concerned with the reversal of enrichments as a *sine qua non* for imposing liability. This conclusion will be reached via a number of specific arguments, but the crux of these is that (1) in many cases, the remedy is not, in fact, restitutionary, that is, concerned with the disgorgement of enrichment; and (2) in many cases in which the remedy is restitutionary, it is nonetheless merely one available remedial response to

liability rules whose purposes are ones other than, principally, the reversal of enrichment.

Chapter 5 will introduce Part II of this thesis and this writer's own ordering of the liability rules claimed for Restitution. Part II will categorise the liability rules of Restitution into four groups, each group consisting of liability rules linked by certain affinities shared with other liability rules in that group. Each individual group, however, is identified by very different underlying concerns from the next, so that four largely distinct "clusters" of liability rules will be considered. Of course, such a categorisation must by its nature be an imprecise process: borderline cases do exist. Nor are the four categories identified necessarily exhaustive of all possible categories, though they do cover a considerable part of Restitution. The four categories are as follows:

- (1) The first category of liability rules are activated by the defendant's conduct, where such conduct is either "contract-like", that is, tantamount to an assumption of liability, or "tort-like", that is, essentially amounting to a breach of duty causing harm. The defendant's conduct in either circumstances gives rise to an obligation, at the very least,¹⁸⁸ to make good any losses incurred by the plaintiff. There is thus no need to identify any benefit in the defendant's hands to justify imposing liability. Of course, where such a benefit exists and equates with the plaintiff's losses, restitution may be one means of effecting loss compensation.¹⁸⁹ Examples of "contract-like" liability include liability rules which operate when a plaintiff who has performed his or her part of an unenforceable contract seeks relief against a defendant who refuses to perform his or her part of the agreement. Examples of "tort-like" liability include liability rules which give rise to the right to avoid transactions on the basis of conduct such as duress, misrepresentation, or unconscionable conduct. Such liability rules form the subject-matter of Chapter 6.
- (2) The second category of liability rules are activated by the existence of parties sharing a "common interest" in a matter. Where an unprovided for contingency effects the parties' common interest, so that the parties suffer disproportionate losses and gains as a result, such parties may be

¹⁸⁸ Expectation-based remedies may also be available.

¹⁸⁹ Where the losses and gains are not equal, then the defendant will still be liable to make good the plaintiff's losses.

held to owe a responsibility to each other (stemming from their community of interest) to share such losses and gains. Examples of parties sharing common interests include parties to a contractual relationship, co-sureties, and partners to a marriage, de facto or otherwise. Thus, for example, where a de facto marriage breaks down, disputes as to the ownership of property may be settled by a "principle of just sharing", as it will be called. Such liability rules form the subject-matter of Chapter 7.

- (3) The third category of liability rules are activated by conduct of a plaintiff amounting to an unsolicited intervention in another's affairs such as an act of rescue of a defendant's life or property, which intervention the law considers to be "justifiable" in the circumstances. Where a plaintiff has incurred reasonable "costs"—expended money, goods, time and effort—in pursuing the justifiable conduct, the courts may allocate such costs to a defendant who is considered a more appropriate party to bear them. Both the issues of the justifiability of a plaintiff's conduct and the appropriateness of the defendant as cost bearer will be seen to be determined largely on grounds of social policy and utility. Liability rules to be considered include maritime salvage and "agency of necessity", as well as rules governing recovery for justifiable self-interested intervention by a plaintiff in another's affairs. Such liability rules form the subject-matter of Chapter 8.
- (4) The fourth category of liability rules are activated in circumstances in which money, goods or services of a plaintiff are conferred on an entirely "innocent" defendant, that is, where there is no conduct on the defendant's part, or shared common interest, or any reason of social policy, to justify making the defendant bear or share in the plaintiff's losses.¹⁹⁰ Nevertheless, a plaintiff may seek to be returned to his or her position before the conferral, because no intention exists or now exists to "transfer" the money, goods or services to the defendant. To the extent that such restoration is possible without impinging on the *innocent* defendant's right to deny any responsibility for the plaintiff's losses, the courts will be prepared to grant such relief. Such remedial relief, often by means of specific restitution or what in effect amounts to specific restitution, will be seen to achieve a fair outcome as it will not generally

¹⁹⁰ If "blame" were to be allocated, it would attach to the plaintiff, whose mistake was the cause of the conduct which is now sought to be undone.

leave the innocent defendant at a disadvantage. Liability rules to be considered include those concerning the recovery of mistaken payments of money or relief in limited circumstances for the mistaken improver of another's property. Such liability rules form the subject-matter of Chapter 9.

The consequence of such a division of liability rules is that Restitution is not treated as one amorphous area of law. And as most of these categories operate within the "borderlands and penumbras"¹⁹¹ of contract, tort, property and equity, they raise implications for our understanding of those categories and invites us to reconsider their relationship with Restitution. Some of the issues raised by the re-ordering of Restitution proposed in Part II will be touched on in the Conclusion, Chapter 10 .

¹⁹¹ See Prosser, cited supra n. 20.

THE JURISPRUDENTIAL STATUS OF UNJUST ENRICHMENT

But the solution of the problem through the invention of a new generalization is no final solution: The new generalization breeds new problems. Stressing a newly perceived likeness between many particular happenings which had theretofore seemed unlike, it may blind us to continuing unlikeness. Hypnotised by a label which emphasizes identities, we may be led to ignore differences ... For with its stress on uniformity, an abstraction or generalization tends to become totalitarian in its attitude towards uniquenesses.¹

The abundance and confusion of our materials should have trained us in skepticism towards general forms of statement.²

§ 2.1 INTRODUCTION

Different conceptions of the status of unjust enrichment in Restitution abound, both in terms of its perceived existing role or function in the law, and in terms of the role or function that it is argued that it ought to perform. Unjust enrichment has been characterised in a variety of ways: amongst others, as an “informative generic label”;³ as a “unifying legal concept”;⁴ as the “underlying principle” of Restitution providing a “rationalisation” of the law;⁵ or as a

¹ *Guiseppi v. Walling*, 144 Fed. 2d 608 (1944), 618-19, per Frank J.

² Dawson, 25.

³ *Muschinski v. Dodds* (1986) 160 C.L.R. 583, 617, per Deane J.

⁴ See *David Securities Pty Ltd v. Commonwealth Bank* (1992) 109 A.L.R. 57, 73, which recognises unjust enrichment as a “unifying legal concept” in Australian law, citing *Pavey & Mathews v. Paul* (1987) 162 C.L.R. at 256-7, per Deane J.

⁵ See, Coleman, A., “The Concept of Unjust Enrichment in English Law” (1979) 10 *Cambrian Law Rev.* 8, for example, who utilises such language, but also argues that restitutionary claims ought to be developed into “general actions for the prevention of unjust enrichment”. This, it would seem, places Coleman with those who advocate a general cause of action in unjust enrichment, a position arguably different from those who merely advocate unjust enrichment as the underlying principle of a number of individual, specific and

“cause of action”⁶ giving rise to a “generalised right to restitution”.⁷ Before we can begin to consider the substance and meaning of unjust enrichment, or perhaps more accurately as part of the process of so doing, it is necessary first to consider the various possible roles of unjust enrichment in Restitution. This task must be undertaken in the context of the range of views one encounters throughout the common law, views at times expressed without clarification. In the High Court of Australia, for example, descriptions of unjust enrichment as a “unifying legal concept” have been left largely in the air, and the exact status of unjust enrichment in Australian law remains uncertain. This will be returned to below.

Apart from purely semantic differences,⁸ what is evident is that the different descriptions of unjust enrichment reflect a progression or spectrum of views whereby unjust enrichment has an increasingly important status within Restitution as one moves from one end of the spectrum to the other. At the “weaker” end of the spectrum, unjust enrichment is seen as merely one idea informing our law, alongside other ideas. At the “stronger” end of the spectrum, unjust enrichment is seen as a single, generic cause of action itself determinative of liability: previously seemingly autonomous individual liability rules are subsumed by the cause of action, becoming merely manifestations of it arising in the context of particular facts. And in between, unjust enrichment is an explanatory principle administered through specific liability rules. Such an explanatory principle is given an increasingly exclusive role as one “moves” toward the “stronger” end of the spectrum. What is important to note is that as the perceived role of unjust enrichment varies, so will the theoretical constructs built around that concept, though underpinning

historically confined actions.

⁶ See, e.g., Litman, M.M., “The Emergence of Unjust Enrichment as a Cause of Action, and the Remedy of Constructive Trust” (1988) 26 Alb. L.R. 407, and see references cited *infra* n. 51.

⁷ See, e.g., Goff & Jones, (3rd ed., 1986) 15, 57. Goff and Jones have since changed the emphasis of their argument and in the fourth edition merely call for the recognition of a general principle of unjust enrichment which unites the “particular cases” representative of that principle. See Goff & Jones, 70.

⁸ At times, only individual choices of language distinguish commentators sharing essentially similar views. For example, unjust enrichment as an underlying principle has been said to provide a “rationalisation” of the law of Restitution: Coleman, *supra* n. 5. Such a view does not seem to be essentially different to, say, Burrows’ description of unjust enrichment as an “organising tool” for legal decisions in Restitution (Burrows, 1, 54-5).

all such theoretical constructs is an emphasis upon the reversal of "enrichment" unjustly gained at another's "expense".⁹

The notion of a spectrum of views highlights that the boundaries between closely related views may be blurred. But at the extremes, the views of the status of unjust enrichment are irreconcilably at odds. It is proposed then to consider this spectrum of views. In particular, this will be done by identifying three broad and, at least in some significant respects, distinct conceptions of the role of unjust enrichment. The conceptions considered, by no means exhaustive of all possible views, are representative and descriptive of much of the current thinking amongst both commentators and the judiciary.

§ 2.2 THE ROLE OF UNJUST ENRICHMENT

The three broad conceptions of the role of unjust enrichment to be considered are as follows: (1) unjust enrichment as but one "informing idea" which exerts influence over Restitution, but does not exclude the operation of other ideas; (2) unjust enrichment as the "underlying principle" of Restitution, which principle unifies and rationalises the liability rules in Restitution and provides a means of analysing them; and (3) unjust enrichment as a "cause of action", whereby *prima facie* liability is justified once the constituent elements of that cause of action have been made out. Each of these will be considered in turn, though it needs to be reiterated that these conceptions are merely representative of views forming part of the spectrum wherein the divides between different views may be blurred. Clearly, there are other ways of describing the role of unjust enrichment.¹⁰

§ 2.2.1 Three Conceptions of Unjust Enrichment

§ 2.2.1.1 Unjust enrichment as but one "informing idea"

The notion of unjust enrichment as but one "informing idea" is used here to identify views whose distinguishing characteristic is their emphasis upon the non-exclusive status of unjust enrichment. In other words, unjust enrichment is perceived as only one idea or principle—albeit on some views, an

⁹ This is a term of art of quite specific meaning in Restitution writing. See Chapter 3.

¹⁰ Contrast, for example, the distinction drawn by Sutton, R.J., "Unjust Enrichment" (1981) 5 Otago L.R. 187, between unjust enrichment as: a "classification of legal rules", a "social goal", a "general right" or a "general principle".

important one—amongst other ideas or principles informing the law of Restitution.¹¹ As such, unjust enrichment exerts influence over Restitution and may even be a material consideration in determining how some at least established liability rules and doctrines are shaped (or reshaped) and applied to given problems. But significantly, unjust enrichment on such views does not exclude the operation of other ideas.¹²

Proponents of unjust enrichment as an informing idea or general principle point to the diversity of claims in Restitution and previously, quasi-contract, to support a conclusion that no overarching principle, unjust enrichment or otherwise, can cogently explain such a wide variety of claims.¹³ Thus, Muir has suggested that

there is no single and simply expressed principle which explains recovery, even in the mainstream money had and received situation.¹⁴

Similarly, Sutton, after considering the possible role of unjust enrichment in Restitution, concludes that “underlying cases on restitution there is not one

¹¹ Generally, see Hedley, S., “Unjust Enrichment as the Basis of Restitution—an Overworked Concept” (1985) 5 *Legal Studies* 56; Sutton, *ibid*; Muir, G., “The Contribution of Professor Sam Stoljar To The Law of Quasi-Contract” Paper delivered to the Restitution Group, Society of Public Law Teachers Conference, Aberdeen, 1991. Hedley, at 66, sums up his views as follows:

The concept of unjust enrichment, then, is of some use within the law of Restitution. But its use as the universal solvent to all problems within Restitution leads to disaster. It simply does not work. To find the way forward, ‘unjust enrichment’ lawyers must retreat, and recognise that their concept is only one amongst several of value in Restitution.

¹² For a consideration of some other concepts of relevance, see Part II of this thesis, in which a number of informing ideas or principles of relevance to different areas of the law of Restitution will be outlined.

¹³ Hedley, *supra* n. 11, 58, points out that the “alleged internal coherence of Restitution is not a proven fact” but instead a “massive assumption” of unjust enrichment lawyers.

It is interesting to note that no other theory of Restitution has sought to encompass so much “terrain” as many supporters of unjust enrichment perceive that concept to encompass. For example, implied contract theory only ever applied to quasi-contractual obligations and further, did not so much seek to explain such obligations and the liability rules giving rise to them, as to provide a “convenient” categorisation for them. Similarly, Stoljar’s proprietary theory, noted below and considered in detail in Chapter 9, only seeks to explain some claims in quasi-contract. In contrast, however, Sutton, *supra* n. 10, 198, considers that the “various theories of restitution” *all* “assume that there is a single, unifying principle upon which we can draw to explain and justify the decisions within its ambit.”

¹⁴ Muir, *supra* n. 11, paragraph 3.12.

principle, but at least three and possibly more.”¹⁵ Sutton, for example, considers that contractual and property law notions are of relevance.¹⁶ The importance of such notions in Restitution will become evident in Part II of this thesis.

Stoljar is another writer whose views may arguably be characterised as falling within a conception of unjust enrichment as but one informing idea. Stoljar sought to divide quasi-contract according to a number of distinct theoretical grounds. Although he was rather dismissive of the value of unjust enrichment, to the extent that Stoljar perceived it to have any relevance at all,¹⁷ it was only in relation to *some* of the obligations originating in the common counts and subsumed as part of quasi-contract. Stoljar considered that much of quasi-contract was concerned with what are essentially contractual notions.¹⁸ And his development of ideas of unjust sacrifice¹⁹ further limited the scope of quasi-contract as an unjust enrichment-based subject. Stoljar thus stressed the relatively minor significance of unjust enrichment ideas.²⁰

One variation on this theme of unjust enrichment as informing idea suggests that unjust enrichment may exert influence not only over Restitution, but over other areas of law as well.²¹ Beatson considers the burden of such

¹⁵ Sutton, *supra* n. 10, 199. See also Hedley, *supra* n. 11.

¹⁶ Specifically, Sutton, *supra* n. 10, 199-207, outlines what he labels the “principle of transactional integrity” and the “principle of security of property”.

¹⁷ Stoljar did make references to “unjust enrichment”, but did not appear to consider it an overly useful concept. See *The Law of Quasi-Contract* (2nd ed., 1989), *passim*, and particularly 1-2, 6-7, as well as “Unjust Enrichment and Unjust Sacrifice” (1987) 50 M.L.R. 603. Instead, Stoljar sought to give “a more concrete clarification” of what is meant by unjust enrichment by developing his own proprietary theory as an explanation of some of the money claims. See Burrows, 5.

¹⁸ Stoljar was not, however, an advocate of a general implied contract theory.

¹⁹ See particularly Stoljar, *supra* n. 17, and more generally, *Negotiorum Gestio*, Pt I, and the discussion of these ideas in Chapter 8, below. See also Muir, G., “Unjust Sacrifice and The Officious Intervener” in Finn, 297.

²⁰ Stoljar never much concerned himself with those equitable doctrines now said to be based on a principle of unjust enrichment. This is reflected in his preferred title for the subject, “quasi-contract”, and its relative “smallness” when compared with the wide range of subject-matter of texts on Restitution.

²¹ Atiyah is perhaps the most prominent proponent of such views. See Chapter 1, n. 20. Hedley appears to support such views. See Hedley, *supra* n. 11, particularly at 66; as well as “Contract, Tort and Restitution: or, On Cutting the Legal System Down to Size” (1988) 8 Legal Studies 137.

views to be that while unjust enrichment exerts interstitial influence over a number of areas in the law of obligations and elsewhere, it is not a complete explanation of any single category. Beatson notes that on such views there cannot be said to exist a “coherent” law of Restitution on the basis of unjust enrichment.²²

As an informing idea, then, unjust enrichment is not unimportant, but too much must not be asked or made of it.²³ Unjust enrichment may have some explanatory value, but other ideas and concepts must be sought to assist in explaining the causative events in Restitution. The reluctance of proponents of unjust enrichment as but one informing idea to place too much weight on the concept reflects, perhaps, their awareness of that concept's abstract nature. Unjust enrichment, for the most part, is either used merely as a description of a factual state of affairs suggesting a need for legal redress, or else provides a useful shorthand label for the conclusion reached after a particular process of legal reasoning. The limited value of the concept when used in such ways does not seem problematic. Unjust enrichment as informing idea makes no claim to exclusivity. No attempts are made to impose any particular analysis on all Restitution problems. Other principles must also be taken into account when explaining or formulating liability rules in Restitution. There is some judicial support for such views.²⁴

²² Beatson, 24; also in [1987] C.L.P. 71, at 73.

²³ Cf. Hedley, *supra* n. 11, 66.

²⁴ See, e.g., *Morgan v. Ashcroft* [1938] 1 K.B. 49, 76-7, per Scott L.J., who points to the “heterogeneous list” of the causes of action falling within the field of “implied contract”, and notes (emphasis added)

the importance of trying to find some common positive principle upon which these causes of action ... can be said to rest, and which will not altogether exclude that of unjust enrichment

[These causes of action] are so various in kind as almost irresistibly to invite the inference that there may be one *or more* unifying principles upon which they rest.

It should be noted, however, that although Scott L.J. referred to “implied contract” to describe quasi-contractual liability, he had earlier stated (at 75) that the name was a misnomer, with “no element of agreement about it.”

The famous statement of Lord Diplock in *Orakpo v. Mansons Investments Ltd.* [1978] A.C. 95, (cited Chapter 1, n. 88) has been interpreted, by Hedley, *supra* n. 11, 58, as suggesting that there exists no single explanatory principle of all of Restitution; that “no [single] theory would do”. Admittedly, however, there have been a number of other, quite different interpretations of this statement, so that its value as authority may be limited. For example, Sutton, *supra* n. 10, 197-8, appears to consider that Lord Diplock was suggesting that there are no principles or theories which explain quasi-contract and thus “worth pursuing”. Sutton rightly goes on to reject such a

Perhaps surprisingly, given the modest claims made for unjust enrichment as but one informing idea, such views appear unfashionable in the context of the current debate. Many commentators make more ambitious claims for unjust enrichment. The allure of that concept has engendered theories which give unjust enrichment a more significant status within Restitution. Broadly speaking, unjust enrichment is perceived by many writers today as either the underlying principle of Restitution, or else as a cause of action. These approaches, although considered separately, will be seen to share much common ground which distinguishes both approaches from one which perceives unjust enrichment merely as but one informing idea.

§ 2.2.1.2 Unjust enrichment as “underlying principle”

A view of unjust enrichment as the underlying principle of the liability rules of Restitution is perhaps the most prevalent in current writing on the subject outside Canadian legal circles.²⁵ Unlike many Canadian commentators, such a view rejects unjust enrichment as a single cause of action giving rise to a right of Restitution once the constituent elements of that cause of action have been satisfied.²⁶ Proponents of unjust enrichment as the underlying principle tend to reject the view that the generalisation of unjust enrichment can be used

view (197-8). A different interpretation again is offered by Birks, who perceives Lord Diplock's comments as supporting Birks' own view of unjust enrichment as the underlying principle of Restitution, rather than as a cause of action. See Birks, 26-7.

²⁵ Commentators who appear to view unjust enrichment in this light include Birks (see particularly Birks, 26-7, and “Unjust Enrichment—a Reply to Mr Hedley” (1985) 5 *Legal Studies* 67, 68: unjust enrichment is a “principle whose function is to integrate not one, but many liabilities”); Burrows (see Burrows, 54-6, and Burrows, A.S., “Contract, Tort and Restitution—a Satisfactory Division or Not?” (1983) 99 *L.Q.R.* 217); and Goff and Jones, who in previous editions called for a “generalised right to restitution”, but have in their fourth edition, at 70, changed their emphasis to unjust enrichment as the principle which unites the “particular cases” of Restitution. This would also appear to accurately describe the views of the House of Lords. See *Lipkin Gorman v. Karpnale Ltd* [1991] 3 *W.L.R.* 10 and *Woolwich Building Society v. IRC* (No. 2) [1992] 3 *All E.R.* 737, particularly per Lord Browne-Wilkinson (quoted *infra* n. 31). This would also appear to be the legal position in the United States. See the *Restatement of Restitution*, particularly the first section, on underlying principles; Seavey and Scott, “Restitution” (1938) 54 *L.Q.R.* 29; and Dawson, particularly 3-8. Contrast Coleman, *supra* n. 5, 17. In Canada, Fridman would seem to fall within the unjust-enrichment-as-principle school of thought (see Fridman, Chp. 2), but as will be seen below, such a view would appear to be contrary to much mainstream thought in that country.

Beatson is another commentator who utilises unjust enrichment as an explanatory principle which unifies much of the law of Restitution, but does not, however, appear to give unjust enrichment an exclusive role within Restitution. See references above, Chapter 1, n. 116.

²⁶ As to which elements, see below.

as a determinative of liability.²⁷ Instead, unjust enrichment is perceived as a principle which unifies, or rationalises, or provides an "organising tool"²⁸ for, the liability rules of Restitution. Although the language of "underlying principle" is often used and will thus be adopted here, perhaps more accurately such views could be described as perceiving unjust enrichment as an "overarching principle". This follows from the emphasis upon that principle's *unifying* qualities.²⁹

An important feature of such theoretical writing is that unjust enrichment is utilised to *explain* individual liability rules. But what is more, unjust enrichment is utilised as an explanatory principle which does not just provide us with an imprecise guide, perhaps merely identifying particular values at play (much as, say, "good faith" and "unconscionability" have explanatory force), it is instead utilised as an analytical tool which prescribes our forms of analysis of legal problems and "dictates" solutions.³⁰ Thus, unjust enrichment is perceived to provide a mechanism for organising the "individual instances in which the law does give a right of recovery."³¹ It is a means of rationalising causes of action and as such, becomes the "universal or complete

²⁷ Birks, especially, has argued strongly against unjust enrichment as a cause of action. In his *Introduction*, 27, for example, he points out that a "general doctrine" of unjust enrichment, "if it would be intelligible at all, would be unusably vague." See also, in particular, Birks, *supra* n. 25, 67-8. In Birks, P., "The English Recognition of Unjust Enrichment [1991] L.M.C.L.Q. 473, 475, he states:

Important as is the high-level principle against enrichment, it must not be mistaken for a rule of immediate liability. ... It merely co-ordinates and gives direction to the many specific grounds for restitution.

²⁸ Burrows, 1, 54-5.

²⁹ Claims for unjust enrichment as the unifying principle of Restitution are made despite the fact that contract and tort law, at least, have largely withstood any attempts at explanation on the basis of single principles.

³⁰ Cf. Dawson, quoted § 1.3.1. Whereas Dawson seems to suggest that this is a process over which we have little control, theorists here under consideration, such as Birks, purposefully use unjust enrichment to prescribe a methodology aimed at imposing certainty, perhaps even rigidity, into the law.

³¹ In *Woolwich Building Society v. IRC (No. 2)* [1992] 3 All E.R. 737, Lord Browne-Wilkinson states:

Although as yet there is in English law no general rule giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense, the concept of unjust enrichment lies at the heart of all individual instances in which the law does give a right of recovery.

legal touchstone whereby to test³² specific causes of action in Restitution. The principle is converted into an operational analytical tool by reference to stages of inquiry, or questions to be asked, in resolving problems in Restitution. Birks, for example, considers that the principle allows us to identify the “instantly recognisable phases” of inquiry that provide for the stable analysis of Restitution problems.³³ According to Birks, these are:

Was the defendant enriched? if so, Was he enriched at the plaintiff’s expense? if so, Was there any factor calling for restitution? if so, Was there any reason why restitution should none the less be withheld?³⁴

Unjust enrichment as the underlying principle of Restitution is used to rationalise past decisions, solve future problems and shape liability rules.³⁵ Generally linked with such theoretical constructs is the fact that many proponents of unjust enrichment as underlying *principle* give it an *exclusive* role within Restitution.³⁶ Burrows, for example, perceives that the “principle of unjust enrichment provides the *only* rational explanation for a large body of law.”³⁷ Other commentators similarly emphasise that principle’s “unifying” qualities, or claim it to be the basis of Restitution.³⁸ Any suggestions that other principles may be at work in this area of law, or that they are even relevant, are often perfunctorily dismissed.³⁹ At the very least, the principle is perceived as

³² *Morgan v. Ashcroft* [1938] 1 K.B. 49, 75, per Scott L.J.

³³ Similarly, unjust enrichment is said to provide the “shared analytical scheme which the subject lacks”: Birks, 19.

³⁴ Birks, 7.

³⁵ On such constructs, unjust enrichment might even be used as a basis for “fixing” defects in our existing liability rules.

³⁶ Hedley, *supra* n. 11, 57.

³⁷ Burrows, *supra* n. 25, 233 (emphasis added). Cf. *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, 151: “The concept of restitution for unjust enrichment in the common law world has evolved ... toward a body of law unified by a single set of coherent rules applicable in all cases.”

³⁸ Birks, *supra* n. 27, 473. See also Birks, 17. Hedley, *supra* n. 11, 147, states: “Birks is claiming a special status for his framework, saying that it is not *a* classification but in some sense *the* classification. Other classifications threaten this thesis by their very existence” (emphasis in original).

³⁹ See, for example, Birks’ dismissal of the view that Restitution may extend beyond unjust enrichment, in *Restitution—The Future*, 101. See also Birks, *supra* n. 25, where he stresses the illogicality of any contrary view. According to Birks, as a matter of definition the subject of Restitution consists only of those doctrines concerned with the reversal of enrichment. This is hardly helpful, however, if the doctrines *claimed* to be principally concerned with the reversal of

paramount, utilised to explain the bulk of Restitution, if not all of it.⁴⁰ In short, on most views of unjust enrichment as the underlying principle of Restitution, that principle both provides a means of analysis and is exclusive. It need only be noted at this stage⁴¹ that, given that so much is asked of unjust enrichment on such theories, one justifiably can expect that the suggested analytical tools or “phases of inquiry” are capable of reasonably certain application.

One traditional criticism of unjust enrichment has pointed to the uncertainty of that concept, which it is claimed appeals to “an unknowable justice in the sky.”⁴² This criticism will be considered in Chapter 3, but for now it suffices to say that this criticism is less cogent where unjust enrichment is seen as the underlying principle of Restitution, as opposed to where it is seen as a cause of action.⁴³ This is because the “unjust” part of the *principle* is said “to identify in a general way those factors which, according to the cases themselves, call for an enrichment to be undone.”⁴⁴ Or, as Seavey and Scott have stated, “[i]t requires an extensive set of individual rules to spell out what is meant by ‘unjust’”.⁴⁵ Accordingly, “unjust” can be viewed simply as a shorthand description of the specific legal rules and doctrines which must be referred to in order to determine questions of liability.⁴⁶ “Unjust”, therefore, in

unjust enrichments, and thus within Restitution, are not in fact so concerned. The mere fact that a remedial response in a given case is restitutionary does not mean that the purpose of the liability rule giving rise to that response is the reversal of enrichments. See Chapter 4. For views similar to those of Birks, see Burrows, 1-6.

⁴⁰ Beatson uses the language and formula of unjust enrichment to describe and explain much of the law of Restitution, but concedes that some topics claimed may not satisfy the concept of “enrichment” and must be explained by resort to other ideas. Nonetheless, he appears to consider such other topics to fall within the law of Restitution. See, in particular, Chp. 2 of *The Use and Abuse of Unjust Enrichment*.

⁴¹ The point is made in Chapters 3 and 4.

⁴² Birks, 19.

⁴³ Sutton, *supra* n. 10, 194-7.

⁴⁴ Birks, 19. See also Birks, *supra* n. 27, 475.

⁴⁵ Seavey & Scott, *supra* n. 25, 36. This also appears to be the view of those who perceive that the principle should be more accurately described as “unjustifiable enrichment”, the emphasis thus being shifted from questions of “justice” to ones of *legal justification*. See Angus, W.H., “Restitution in Canada Since the Deglman Case” (1964) 42 Can. B. Rev. 528, 530.

⁴⁶ Such a “descriptive” function of “unjust” is only possible where unjust enrichment is seen as a principle underlying more specific rules which determine liability. If, instead, unjust enrichment is said to be a cause of action, then “unjust” will of necessity have a far more

the words of Birks, "does not look up to an abstract notion of justice".⁴⁷ As will be seen, this is perhaps the most significant contrast with conceptions of unjust enrichment as a cause of action.

§ 2.2.1.3 Unjust enrichment as a "cause of action"

Seemingly⁴⁸ far wider claims are made for unjust enrichment when it is said to constitute a "single action"⁴⁹ giving rise to a *prima facie* case of liability once the constituent elements of that cause of action have been satisfied.⁵⁰ There has been significant academic support for such a view of unjust enrichment, in Canada at least.⁵¹ As for judicial recognition, although there is

significant role—see § 2.2.1.3, and Chapter 3. Contrast Smith, L.D., "The Province of the Law of Restitution" (1992) 71 Can. B. Rev. 672, however, who considers unjust enrichment to be a cause of action, but nevertheless views "unjust" in the same light as Birks. Given the diversity of the specific doctrines that "unjust" then refers to, each doctrine satisfied by reference to its own specific elements, it is difficult to see how they can all be considered to be part of *one* generic cause of action.

⁴⁷ Birks, 99. See also *Lipkin Gorman v. Karpnale Ltd* [1991] 3 W.L.R. 10, 33, per Lord Goff. If this view is accepted, however, then the statement that *unjust* enrichments are reversible or remediable "is a truism, rather than a truth." For if "unjust" merely refers to those specific rules which determine whether an enrichment is remediable, then the statement becomes "remediable (according to law) enrichments are remediable": Abbott, E.V., "Keener on Quasi-Contracts" (1896) 10 Harv. L.R. 209, 221-3. This point will be considered in Chapter 3.

⁴⁸ But see below.

⁴⁹ Klippert, 42. This "cause of action" will be subject to any available defences.

⁵⁰ *Ibid*, 37-8.

⁵¹ Litman, *supra* n. 6, 408 considers that the Supreme Court decision of *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257, amounts to a recognition of a cause of action in unjust enrichment. See also Klippert, 37-8, where he suggests the necessary elements of the cause of action, though his formulation has not gained widespread acceptance. Maddaugh & McCamus, 27, tentatively at least, appear to support such a role for unjust enrichment: note, for example, their view that in Canadian jurisprudence, there has been a "recognition of a general right of restitution". But compare their conclusion that the issue "may not be a matter of great moment", *infra* n. 74. See also McCamus, J.D., "Restitution and the Supreme Court: The Continuing Progress of the Unjust Enrichment Principle" (1991) 2 S.C.L.Rev. (2d) 505, 509, who considers "[t]hat the notion that a generic cause of action has been recognised by the Court is, at the very least, a plausible one." Contrast Fridman, 15-9.

Outside Canada, support for unjust enrichment as a cause of action is muted. But see Coleman, *supra* n. 5, 17, who appears to advocate a general right of restitution. Coleman proceeds to identify the elements necessary and sufficient for establishing a claim, despite an earlier acceptance of the view (at 9) that "unjust enrichment" is an "abstract proposition of justice" and probably undefinable (citing Goff & Jones (2nd ed., 1986), 11). Goff and Jones in the past seem to have advocated such an approach in English law but no longer do so. See *supra* n. 7.

still debate in some Canadian circles,⁵² it is probably fair to conclude that the law in that country now recognises a "full fledged cause of action" of unjust enrichment.⁵³ In fact, it has been emphasised that the developments in unjust enrichment thinking and the challenges such developments pose have been fuelled not so much by academic analysis and reorganisation, but by an active Canadian Supreme Court.⁵⁴ Thus, Dickson J. (as he then was), in his seminal judgment in *Pettkus v. Becker*,⁵⁵ considered that there were three necessary requirements or elements of "unjust enrichment" which needed to be satisfied in order to establish liability: "an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment."⁵⁶

There can be little doubt that the influence of unjust enrichment is being felt throughout the Canadian legal system and in different ways. Courts are granting relief on facts which previously would not have fallen within traditional heads of recovery;⁵⁷ the constructive trust, said to remedy unjust

⁵² See discussion of this question in Maddaugh & McCamus 21-7. Cf. Fridman, 15-9.

⁵³ Litman, *supra* n. 6, 408. See also Klippert, Chp. 2, and Fridman, G.H.L., "The Nature and Scope of Restitution: Past, Present and Future", Unpublished Paper, at 16, who states:

While there is some uncertainty in Canada as to whether unjust enrichment is a cause of action or a general principle, it seems to me that the way Canadian courts have been utilising the notion of unjust enrichment as set out by Chief Justice Dickson in the *Pettkus* case indicates their assumption that it is a cause of action in appropriate circumstances.

The issue seems to have been put beyond doubt by *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, see particularly at 154. This is especially so when one considers the very general analysis now utilised by the Canadian courts. See, for example, the decision of the Supreme Court of Canada in *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, particularly at 6. See also the comments of La Forest J. in *White v. Central Trust Co.* (1984) 7 D.L.R. (4th) 236, 246-7. Not all Canadian cases, however, have abandoned the language of quasi-contract and implied contract. See, e.g., *Building Design 2 Ltd v. Wascana Rehabilitation Centre* [1992] 6 W.W.R. 343.

⁵⁴ McCamus, *supra* n. 51, 507, emphasises the unusual extent to which the Supreme Court has been involved in this process of "mapping out the contents of this new legal subject."

⁵⁵ (1980) 117 D.L.R. (3d) 257.

⁵⁶ *Ibid*, 274. See also *Sorochan v. Sorochan* [1986] 2 S.C.R. 38, 44, per Dickson C.J.C.

⁵⁷ See, e.g., *White v. Central Trust Co.* (1984) 7 D.L.R. (4th) 236, and Maddaugh & McCamus, 21-7, 478-9. See also *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, and McCamus, *supra* n. 51, 506-9. But such developments may also be a possibility where unjust enrichment is given a less significant role. For example, in *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 604, Deane J. (with whom Mason C.J. and Wilson J. agreed) considered that

the concept of unjust enrichment ... constitutes a unifying legal concept which explains why the law recognises in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the

enrichment, is being utilised to shape legal rights,⁵⁸ and increasingly, the language of unjust enrichment appears as a shorthand justification for a wide array of conclusions which previously would have been reached within the narrow and self-limiting confines of specific claims in quasi-contract or equity.⁵⁹ It has even been stated that the categories of Restitution "are never closed".⁶⁰ Outside of Canada, however, developments have not been as dramatic, and a view of unjust enrichment as a general cause of action has been judicially disavowed.⁶¹ Nonetheless, some commentators advocate the recognition of a cause of action as a next necessary step in the development of the law of Restitution.⁶²

As was already noted, in one regard unjust enrichment as a cause of action is significantly different to unjust enrichment as the underlying principle of Restitution. For "unjust", on the cause of action approach, does not appear to function as a shorthand description referring back to the specific rules and doctrines of Restitution.⁶³ Instead, "a general right to restitution"⁶⁴ will arise whenever the elements of the cause of action have been satisfied (and Dickson C.J.C.'s formulation has become standard in Canadian courts) and this may enable courts to grant a remedy whether or not the situation is covered by any

expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.

⁵⁸ See, e.g., *Rawluk v. Rawluk* (1990) 65 D.L.R. (4th) 161.

⁵⁹ See Smith, *supra* n. 46, 678.

⁶⁰ *James More & Sons Ltd v University of Ottawa* (1974) 49 D.L.R. (3d) 666, per Morden J.

⁶¹ See e.g., *David Securities Pty Ltd v Commonwealth Bank* (1992) 109 A.L.R. 57, 75-6, and see § 2.2.2. Cf. *Lipkin Gorman v. Karpnale Ltd* [1991] 3 W.L.R. 10. According to one proponent of that concept, the judicial acceptance of unjust enrichment as a cause of action giving rise to a generalised right to restitution "must be a long way away": Lord Goff of Chieveley, "The Future of the Law of Restitution" (1989) 12 Syd. L.R. 1, 4. See, however, Gummow, W.M.C., "Unjust Enrichment, Restitution and Proprietary Remedies" in Finn, 49, who considers that statements of Goff J. (as he then was) in *B.P. Exploration v. Hunt (No.2)* [1979] 1 W.L.R. 783, 839, are "consistent with the proposition that there is a cause of action to deprive a defendant of 'unjust enrichment.'" But this interpretation would appear inconsistent with recent pronouncements on the issue by the House of Lords.

⁶² See *supra* n. 51.

⁶³ Cf. Sutton, *supra* n. 10; Hedley *supra* n. 11. But note Smith, *supra* n. 46.

⁶⁴ Maddaugh & McCamus, 27.

previous authority or perhaps even existing rule or doctrine.⁶⁵ In fact, the status of such a cause of action has been compared to that of a negligence action in tort.⁶⁶ Viewing unjust enrichment as a cause of action assumes the explanatory value of unjust enrichment—indeed, subsumes all “weaker” claims made for unjust enrichment. Unjust enrichment must have explanatory value and be exclusive to justify a generic cause of action within which liability is determined by resort to the highly generalised elements of the cause of action, rather than by the very particular liability rules to which “unjust” refers when part of the underlying principle of Restitution. Consequently, apart from the “extremely broad” nature of this approach (a point conceded and extolled by its proponents),⁶⁷ it does also inevitably place a far greater burden, perhaps even a decisive burden, upon the idea of “unjustness” and would appear to free that concept from the “vital constraint” that it must conform to the case law.⁶⁸ With such a burden on “unjust”, moreover, there is the concomitant danger of the uncertainty already alluded to above, namely, that the concept of unjust enrichment becomes no more than an appeal to abstract and individual notions of justice.⁶⁹ This matter will be discussed further in Chapter 3, but this difference, important though it may be, should not obscure the significant common feature shared by the two conceptions of unjust enrichment as underlying principle and cause of action.

At first blush, unjust enrichment as a cause of action appears to suggest few limitations, representing a break with the fetters of the historical development of doctrine.⁷⁰ Although whereas unjust enrichment as the

⁶⁵ Cf. Hedley, *supra* n. 11, 65, who interprets Coleman’s views, *supra* n. 5, similarly. See also comments of Deane J. cited *supra* n. 51.

⁶⁶ Klippert, 43.

⁶⁷ Cf. Litman, *supra* n. 6, 425-6, discussing the concept of “enrichment”.

⁶⁸ Cf. Hedley, *supra* n. 11, 65-6. Cf. Sutton, *supra* n. 10, 194. Maddaugh & McCamus, 23, point out that one argument in support of a principle of unjust enrichment, as opposed to a cause of action, derives from the “abstract and generalised nature” of unjust enrichment.

⁶⁹ And Birks, *supra* n. 27, 474, fn. 9, has said of the Canadians that on occasions they apply unjust enrichment “too impressionistically”.

⁷⁰ Such a break with history is one against which the courts, and others, have warned. Cf. *Holt v. Markham* [1923] 1 K.B. 504, 513, per Scrutton L.J.; Holdsworth, W.S., “Unjustifiable Enrichment” (1939) 55 L.Q.R. 37, 52.

underlying principle of Restitution suggests a more conservative approach,⁷¹ irrespective of whether labelled one or the other, unjust enrichment is said by most advocates of either approach to provide the framework for the analysis of Restitution.⁷² Depending on the approach, unjust enrichment provides either a framework for the analysis of specific and distinct causes of action, which can all be explained in the same way, or alternatively, it provides a framework for analysis in terms of the elements of one cause of action, of which specific liability rules are individual instances. In either case, unjust enrichment is called upon to explain past decisions and to provide the formula for analysing future problems. And some theorists seek to impose their analytical formulae with particular rigour.⁷³ Closely linked with the explanatory and analytical role assigned to unjust enrichment is the exclusive province claimed for that concept. It is either implicit in much of the writing on unjust enrichment or else expressly stated that unjust enrichment is the only relevant concept within Restitution. Hence, unjust enrichment becomes the *only* explanation and means of analysis of the liability rules in Restitution.⁷⁴

⁷¹ The emphasis on this approach being on the rationalisation of various extant doctrines and rules in terms of one overarching explanatory principle.

⁷² Compare, for example, the approaches of Birks and Burrows, on the one hand, with Smith, *supra* n. 46, and Litman, *supra* n. 6, on the other.

⁷³ For example, it is interesting to note that Birks, who argues for unjust enrichment as a principle, advocates what is perhaps one of the most rigorous theoretical approaches for the determination of all Restitution problems. Indeed, as legal analysis generally appears to be moving toward more flexible approaches, Birks' analysis begins to look decidedly formulistic.

⁷⁴ See § 2.2.1.2. Consequently, Maddaugh & McCamus, 21-7, after a consideration of the status of unjust enrichment in Canada, may well be justified in concluding that whether one describes the Canadian position "as the 'acceptance of a general principle', [or] the 'recognition of a general cause of action' ... may not be a matter of great moment." At 22 they state:

[T]he unjust enrichment principle provides a theoretical foundation for the pre-existing law of quasi-contract and constructive trust and, further, that it provides a source of guidance for the adjustment and improvement of that doctrine through the recognition of new causes of action at a particularized level. Against this background, it may be asked whether there is any practical consequence to taking what appears to be the further step of embracing the notion that unjust enrichment has become recognized as an independent cause of action. In these circumstances, it may be that recognition of unjust enrichment as a cause of action represents little more than a shift in the style of writing, rather than in the manner of deciding restitution cases.

Similarly, Kos, S., & Watts, P., *Unjust Enrichment—A New Cause of Action* N.Z. Law Society, Seminar Series, 1990, at 26, see "little significant practical difference" between these two approaches. Hedley, 65, sums up these views when he states that unjust enrichment supporters would not appear to perceive the acceptance of a cause of action of unjust enrichment to be a "major innovation". Hedley disagrees with such conclusions, because of the greater emphasis placed on "unjust" in the latter case. This is a significant difference which will be considered in

This common feature distinguishes this end of the spectrum of views from those views within which unjust enrichment is but one informing idea amongst others. This represents a significant divide between those who seek to impose an exclusive analytical framework for all of Restitution and those who perceive other explanatory principles to be relevant. But any unjust enrichment theory formulated to be an exclusive means of analysis must be shown to be more than just of some explanatory value in Restitution. The formulation of the theory must be shown to provide a workable means of analysis of the law. Further, such theory must have sufficiently wide an application as to justify the generalisation to the point of that theory being treated as an exclusive analytical concept. These are, it is suggested, demanding challenges. In one regard then, it seems unimportant whether we label such an exclusive, analytical concept a cause of action or a principle. Rather, what is important is whether unjust enrichment can in fact perform such an exclusive analytical function in Restitution.

If unjust enrichment cannot adequately perform an exclusive analytical function, and it will be argued that it cannot, then we need to resort to other principles. If, however, unjust enrichment theory does meet this challenges, the further issue remains of whether a move toward a generalised right to restitution arising from a single cause of action in unjust enrichment is a natural and justifiable progression in the development of the law. Until unjust enrichment can prove its value as an exclusive means of analysis, it is suggested that such a development will not be forthcoming, at least in Australian law.

§ 2.2.2 The Status of Unjust Enrichment in Australia

The above consideration of the different conceptions of the role of unjust enrichment within Restitution has failed to address the status of that concept in Australian law. Clearly, the High Court of Australia has rejected resort to unjust enrichment as a cause of action.⁷⁵ However, the High Court has utilised the terminology of unjust enrichment and it is unclear whether unjust enrichment is perceived to be but one informing idea or the underlying

Chapter 3. But in this writer's view, there is also much overlap in the theoretical burden of the two approaches.

⁷⁵ See *David Securities Pty Ltd v. Commonwealth Bank* (1992) 109 A.L.R. 57, 75-6. Cf. Butler, P., "Viewing Restitution at the Level of a Secondary Remedial Obligation" (1990) 16 Univ. Q.L.J. 27, 34.

principle of Restitution. More particularly, it is unclear whether the High Court perceives unjust enrichment to be an explanatory concept which provides the means for analysing problems in Restitution and shaping the formulation of liability rules. The language of the High Court is ambiguous and open to differing interpretation.

There are a number of statements of the High Court of Australia which recognise unjust enrichment describing it, for example, as an "informative generic label"⁷⁶ or "unifying legal concept".⁷⁷ Some commentators have interpreted such statements as supporting a view of unjust enrichment as the underlying principle of Restitution.⁷⁸ Certainly, some of these statements—though ambiguous—are open to such an interpretation and some Justices of the High Court have shown particular enthusiasm for unjust enrichment.⁷⁹ But the real issue is whether the High Court is utilising unjust enrichment as an exclusive means of analysis in Restitution. It would seem that the High Court has not taken such a step. Support for such a conclusion may be found in the very generality of the statements of the Court; no attempts have been made in the cases cited, for example, to apply the "recognisable phases of inquiry"⁸⁰ that, say, Birks suggests. Instead, the High Court has reached its decisions by resort to the detailed and very specific doctrinal learning of the particular causes of action.⁸¹ And in *David Securities Pty Ltd v. Commonwealth Bank*, the majority expressly rejected the view

⁷⁶ *Muschinski v. Dodds* (1985) 160 C.L.R. 583, 617.

⁷⁷ *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 604, cited supra n. 57. See also *David Securities Pty Ltd v. Commonwealth Bank* (1992) 109 A.L.R. 57, 73, 75. For other references, see *ANZ v. Westpac* (1988) 78 A.L.R. 157, 161-2; *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 87 per Toohey J.

⁷⁸ Commentators who appear to interpret these statements in such a way include Beatson, 2 (see also Beatson, J., "Unjust Enrichment in the High Court of Australia" (1988) 104 L.Q.R. 13); Mason, K., "Restitution in Australian Law" in Finn, 20; and Jones, G., "The Topography of the Law of Restitution" in Finn, 12-3.

⁷⁹ See, e.g., Deane and Dawson JJ. in *Baltic Shipping v. Dillon* (1993) 111 A.L.R. 289, 313, where their Honours make references to the plaintiff's "action in unjust enrichment" and to the "law of unjust enrichment".

⁸⁰ Birks, 7.

⁸¹ See, e.g., *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, but contrast the approach of Gaudron J. in *Stern v. McArthur* (1988) 81 A.L.R. 463. In the former case, the use of the language of unjust enrichment appears to be no more than a conclusion which further justifies the Court's decision, rather than a necessary step in reaching that conclusion.

that in Australian law unjust enrichment is a definitive legal principle according to its own terms and not just a concept.⁸²

Certainly, it is safe to conclude that, unlike their Canadian counterparts, the High Court and Australian courts generally largely have shown a restrained attitude toward unjust enrichment.⁸³ At present, that concept's influence is far from pervasive. We are perhaps at a pivotal point in the development of the law of Restitution in Australia. As yet, unjust enrichment is not dictating solutions, by imposing the means of analysis of Restitution problems. In the writer's view, moves in such a direction should be resisted. The generalisation of unjust enrichment, it will be argued, is of limited value in explaining past decisions and as such, should not be utilised to analyse and solve future problems. Many of the liability rules in Restitution, it will be seen, are not principally concerned with the reversal of enrichment.

This chapter commenced with the warnings of others against "general forms of statement", against stressing uniformity whilst ignoring differences.⁸⁴ Yet despite such warnings in the past, the appeal of a concept of unjust enrichment has led, increasingly, to theories which seek to monopolise the diverse and very complex law of Restitution. As will be seen, varied factual circumstances, such as those encountered when considering remedial relief for a co-surety claiming contribution,⁸⁵ or a necessitous intervener,⁸⁶ or a mistaken improver of another's land,⁸⁷ raise complex and sophisticated issues, seemingly peculiar to the type of factual context within which the liability rules operate. Is it likely that a single generalisation can explain and, further still, provide us with the means of analysing all such cases? In this writer's view, the answer to this question must be no. But in their attempt to shape a coherent law of Restitution, unjust enrichment theorists have chosen to treat very different

⁸² (1992) 109 A.L.R. 57, 75.

⁸³ See, e.g., *Service Station Association Limited v. Berg Bennett & Associates Pty Limited* (1993) 45 F.C.R. 84, 97, per Gummow J.

⁸⁴ See *supra*, text to nn. 1 & 2.

⁸⁵ See Chapter 7.

⁸⁶ See Chapter 8.

⁸⁷ See Chapter 9.

cases identically.⁸⁸ This may well prove to have deleterious consequences for, as will be argued in this thesis, the explanatory value of unjust enrichment may prove to be limited. What is more, even *if* unjust enrichment proved to be a particularly useful principle, it ought not be allowed to exclude other significant principles where they offer an at-least-equally useful explanation of parts of the law of Restitution.

In the following two chapters, we will consider current theories which attempt to give substance to unjust enrichment and utilise it as an analytical tool. The value of such theories will be tested by reference to the numerous and diverse cases applying liability rules and doctrines now claimed to be unjust enrichment-based.⁸⁹ Many of these cases involve claims for the recovery of money paid by a plaintiff to a defendant, but there will be a greater focus on non-money cases, that is, where a plaintiff seeks recovery for "services" rendered (which "services" will be defined below). The reason for this emphasis is that the greatest test for any enrichment-based analysis arises in such service cases. Of course, money cases will not be ignored. Indeed, it will be argued that no distinction in principle should be drawn purely on the basis of whether a plaintiff expended money or provided services.

⁸⁸ Cf. Childres, R., & Garamella, J., "The Law of Restitution and the Reliance Interest in Contract" (1969) 64 N.W.L.Rev. 433, 436.

⁸⁹ Perhaps such an approach is justified for no other reason than that it will dispel any "illusion of certainty" and therefore cast doubts on any generalisation which seeks to do too much, which is stated in absolute terms, or is sought to be used mechanically. See Gilmore, G., *The Death of Contract* (1974), 58, quoting I Corbin, *Contracts* (1963) §109:

[A] sufficient reason for comparative historical study of cases in great number is the fact that such study frees the teacher and the lawyer and the judge from the illusion of certainty; and from the delusion that law is absolute and eternal, that doctrines can be used mechanically, and that there are correct and unchangeable definitions.

THE MEANING OF UNJUST ENRICHMENT

*Unjust enrichment is an indefinable idea in the same way that justice is indefinable.*¹

*Many attempts have been made to define the concept of unjust enrichment, but the concept of unjust enrichment is essentially an "abstract proposition of justice", and, as such, it is probably indefinable.*²

§ 3.1 INTRODUCTION

Although unjust enrichment has been described as an "abstract proposition of justice", of itself, such an abstract nature may not preclude that concept having some explanatory value, much like other general principles or informing ideas (for example, "good faith", "unconscionability") can perform a valuable explanatory role in helping us to understand bodies of law, or at least their general burden. As has been noted by others, at the level of general principle one would not expect to find "precise 'common formula'".³ Yet as has

¹ Palmer, G.E., *The Law of Restitution* (4 Vols, 1978), Vol. I, 5.

² Coleman, A., "The Concept of Unjust Enrichment in English Law" (1979) 10 *Cambrian L.R.* 8, 9. Coleman's reference to an "abstract proposition of justice" is from Goff & Jones, (2nd ed., 1978), 11. See also Goff & Jones, 13.

³ Goff & Jones, 13, who refer to the "vagueness" of other general principles. At 14, they cite *Carl Zeiss Stiftung v. Herbert Smith (No. 2)* [1969] 2 Ch. 276, 301, per Edmund Davies L.J., in support of the view that a principle "may defy definition and yet the presence in or absence from a situation of that which [it denotes] may be beyond doubt." As Goff and Jones point out: "The search for principle should not be confused with the definition of concepts." The authors proceed to provide "subordinate principles" which they suggest are the basis of analysis of Restitution problems, and include the existence of a benefit or enrichment as a precondition for imposing liability (at 16). The "subordinate principles" they identify are directly derived from the principle, indeed, appear to be little more than a fuller statement of the original principle. See further, § 3.2.1.

In a similar vein, it has been said that "concepts need not be determinate to be useful organising devices for thinking about a problem": Braucher, J., "Defining Unfairness: Empathy And Economic Analysis at the Federal Trade Commission" (1980) 68 *B.U.L.R.* 349, 389. Wurzel, K.G., "Methods of Juridical Thinking" in Vol. IX of *The Science of Legal Method* (various authors,

already been seen, many perceive unjust enrichment to be more than just an informing idea or general principle. Further claims are made, both as to its utility as a means of analysis of liability rules, as well as to its exclusive or at least paramount status in the law, so that unjust enrichment becomes excluding of other formulations or means of analysis. More strongly still, claims are made that the generalisation is (or ought to become) a cause of action itself and as such determinative of liability in Restitution. But the more we ask of a concept, the more we are entitled to expect of it in terms of the clarity of its meaning and purport. Even presupposing that unjust enrichment as a general principle does have explanatory value, as one moves along the spectrum of viewing unjust enrichment, from the "weaker" to the "stronger" end, one would expect an increasing precision in the way the concept is utilised. This calls for a consideration of the content characteristically given to unjust enrichment.

§ 3.2 GIVING CONTENT TO UNJUST ENRICHMENT

§ 3.2.1 The "Component Parts" of Unjust Enrichment

The ideal of unjust enrichment, that no one "should be made richer through another's loss",⁴ is usually given content by reference to a number of "subordinate principles",⁵ "component parts"⁶ or "essential elements".⁷ On most formulations, the last of these component parts is the issue of available defences, but defences can be left to one side for now, as they are not relevant to establishing *prima facie* liability. Characteristically, this leaves three component parts, variously formulated in different theories, but the essence of which can be distilled as: (1) the existence of a "benefit"; (2) which benefit is

1917), 403-5, refers to terms which are left deliberately vague and uncertain as "safety-valve concepts".

⁴ To take but one formulation: Pomponious, *Digest* 12.6.14; 59.17.206, quoted in Dawson, J.P., "Restitution Without Enrichment" (1981) 61 B.U.L.R. 563, 621. Cf. Maddaugh & McCamus, 31-6, who identify the principal underlying moral premise of unjust enrichment to be that "one ought not reap where one has not sown", but also identify a second rationale, "that a person shall not be permitted to profit from his wrongdoing."

⁵ Goff & Jones, 16.

⁶ Burrows, 7, who seeks to "strip" "the cause of action principle down into its component parts." These take the form of four questions to be answered.

⁷ Maddaugh & McCamus, 36.

gained "at the plaintiff's expense"; and (3) the presence of some "unjust factors" justifying Restitution.⁸ As has been noted in Chapter 2, Birks, for example, describes the following "phases of inquiry":

Was the defendant enriched? if so, Was he enriched at the plaintiff's expense? if so, Was there any factor calling for restitution?⁹

In a similar vein are *Burrows*¹⁰ and *Goff and Jones*,¹¹ but outside of Canada there has been only limited *judicial* adoption of such formulations.¹² In Canada, the formulation often cited is that of Dickson C.J.C. as repeated in a number of cases, that in order to establish unjust enrichment,

the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason—such as contract or disposition of law—for the enrichment.¹³

Leaving aside the linguistic differences in these formulations, the essential feature of all of them is an enrichment or benefit (the terms are

⁸ Cf. *Burrows*, 7, fn. 17, who concedes the terminology of "unjust factors" is "inelegant, but saves repeating the long-winded formulation that the question at issue is whether the enrichment at the plaintiff's expense is *unjust*" (emphasis in original).

⁹ *Birks*, 7.

¹⁰ *Burrows*, 7.

¹¹ *Goff & Jones*, 16.

¹² See, e.g., *B.P. Exploration Co (Libya) Ltd v. Hunt (No. 2)* [1979] 1 W.L.R. 783, 839, per Goff J. (as he then was). Goff J. considered that, in relation to a claim under the *Law Reform (Frustrated Contracts) Act 1943*, a claim for restitution was founded on unjust enrichment, which presupposed the three component parts identified above. In the Court of Appeal, [1981] 1 W.L.R. 232, 243, however, upholding the decision of Goff J., the Court nonetheless concluded that "[w]e get no help from the use of words [unjust enrichment] which are not in the statute."

Although the "unifying legal concept" of unjust enrichment has been recognised in the High Court of Australia, the writer knows of no Australian decision which has utilised such a three-point formulation as the basis for analysing liability in Restitution. Note, however, Kirby P.'s consideration of unjust enrichment in *Bryson v. Bryant* (1992) 16 Fam. L.R. 112, 127-32. Specifically, at 131, he applies the Canadian formulation to the facts of the case as one possible analysis. Contrast *Sheller J.A.*, at 144-5.

¹³ *Rathwell v. Rathwell* (1978) 83 D.L.R. (3d) 289, 306, per Dickson J. as he then was. See also his Honour's seminal judgment in *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257, 273-4; and *Sorochan v. Sorochan* [1986] 2 S.C.R. 38; 29 D.L.R. (4th) 1. This is the formulation adopted by *Maddaugh & McCamus*. Contrast *Klippert*, 37-8.

usually,¹⁴ and will be here, used interchangeably) in the defendant's hands, gained at the plaintiff's expense, which is for some reason unjust. Most commentators tend to focus separately on these commonly identified component parts of unjust enrichment.¹⁵ It is nevertheless conceded that these parts are "closely interrelated and cannot be analysed in complete isolation from each other."¹⁶ This needs to be stressed, for although much of the debate about the content of unjust enrichment proceeds on the basis of a separate treatment of the questions of "enrichment", "unjust" and "at the plaintiff's expense", with the emphasis on the first two, the issues are linked and cannot be treated entirely separately. Each component part may well have separate work to do, but that work must be related back to an overall concern with preventing unjust enrichment.

If the most prominent several parts of unjust enrichment are "unjust" and "enrichment", linking those parts is the intermediate requirement that the enrichment was gained at the expense of the plaintiff. Birks has argued that "at the expense of" has two quite distinct meanings: that the enrichment was obtained (1) by the defendant doing wrong to the plaintiff; or (2) by "subtraction from" the plaintiff.¹⁷ A defendant will be said to have gained an enrichment by "wrongdoing" where, for example, he or she has received a benefit as a result of the commission of a tort, a breach of a fiduciary duty or a breach of contract. Birks has argued, and the view has gained widespread acceptance,¹⁸ that in such cases of "restitution for wrongs", unjust enrichment operates merely as a remedial or secondary concept. Hence, liability is established by rules which are in the particular province of the law of torts,

¹⁴ But contrast, e.g., Fridman, 30-36; Rinker, G.A., "Quasi-Contracts—Concept of Benefit" (1948) 46 Mich.L.Rev. 543, 543. See also Woodward, F.C., *The Law of Quasi-Contracts* (1913), §8.

¹⁵ E.g., Birks, 109, considers them "distinct issues".

¹⁶ Goff & Jones, 16.

¹⁷ Birks, 22-7, 40-4, 132.

¹⁸ See, e.g., Burrows, 16-23; Garner, M., "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 O.J.L.S. 42, 62; Smith, L.D., "The Province of the Law of Restitution" (1992) Can. B. Rev. 672; cf. Maddaugh & McCamus, 32-36, 44-45; and see § 1.3.2.1. Beatson, 25-6, generally accepts such a division, but does not accept that all cases of "restitution for wrongs" treated as such by Birks are instances of unjust enrichment performing merely a secondary or remedial role. See Beatson, Chp. 8. For a good summary by Birks of his own views, see *Restitution—The Future*, 1-2.

fiduciary wrongs, contract, and so on.¹⁹ This wrongdoing gives rise to a restitutionary remedial response.²⁰ But as our concern is with unjust enrichment as a liability-establishing concept,²¹ it is not proposed to consider this aspect of "at the expense of".

The second aspect of "at the expense of", namely, that the enrichment was gained by subtraction from the plaintiff, or as the Canadians have formulated it, that the enrichment has resulted in a corresponding deprivation of the plaintiff, is said to explain liability rules in Restitution. This is the province claimed for an "autonomous unjust enrichment",²² in which that concept is utilised as an explanation of the causative events giving rise to liability.

Where an "enrichment" and an "unjust factor" can be established, the subtraction from the plaintiff will often readily be provable, for the "enrichment" will usually have passed directly from the plaintiff to the defendant.²³ For our present purposes, then, the question of "at the expense of"

¹⁹ As Burrows, 23, points out, the reference to "wrongs" is not, therefore, an appeal to any individual conceptions of unacceptable behaviour, but merely a reference to conduct which amounts to a breach of an established legal duty. The profits derived as a result of such breach of duty may be recoverable, and such profits may not have been obtained from the plaintiff, but rather from a third party. Hence, it will not be necessary to show where such remedies are available (and they are not available for all "wrongs") that there has been any subtraction from the plaintiff; that is, the plaintiff need not have suffered any loss. Where, however, unjust enrichment is said to provide the primary source of liability, the plaintiff will need to show that the enrichment was gained by subtraction from him or her; that is, that the plaintiff has suffered a corresponding deprivation or loss. Therefore, where purely profit-based remedies are available, it is conceded by unjust enrichment theorists (with the exception of Beatson, noted *supra* n. 18) that unjust enrichment does not provide the explanation of the liability rule.

²⁰ Burrows, 17. Other remedial responses, such as compensation for losses incurred, or the fulfilment of a plaintiff's expectations, may also be available.

²¹ See § 1.3.2.1

²² Burrows, 16. "Autonomous" highlights that no wrong need be shown in order to establish the claim.

²³ Birks, 133, considers that "the question covered by the phrase 'at the plaintiff's expense' will almost always be uncontroversial" but concedes "one important area of difficulty", which Birks considers under the label of "interceptive subtraction". In some cases, according to Birks, a claim may be available against a defendant who has not received the "enrichment" directly from the plaintiff, but intercepted it *en route* from a third party. Birks considers that an autonomous unjust enrichment claim by subtraction from the plaintiff will then be available "[i]f the wealth in question would certainly have arrived in the plaintiff if it had not been intercepted". Cf. Goff & Jones, 35. Three-party transactions in which a defendant has received something from a third party which can be said to belong to the plaintiff will be considered in Chp. 9. See also Smith, L., "Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991) O.J.L.S. 481.

is rarely a critical issue when considering the application of unjust enrichment theory to a particular case.²⁴ For the most part it is proposed to concentrate on the issues of “unjust” and “enrichment”.

§ 3.2.2 The Crux of Unjust Enrichment Theory: The Reversal of Unjust “Better” Outcomes

The crux of all unjust enrichment theory is that the liability rules which unjust enrichment is said to explain are concerned with reversing a defendant’s unjust enrichment gained at the plaintiff’s expense.²⁵ Whatever “unjust” may mean, then, it can only operate once there has been an identifiable “enrichment”, however that term is understood.²⁶

The notion of “enrichment”, as will be seen in Chapter 4, is the subject of much debate. There are a range of views as to what the term encompasses. At one extreme, one could take a strictly materialistic view of enrichment, whereby, say, only money, corporeal property or advantages realised in money are considered enriching. At the other extreme, one could take a largely metaphysical view, whereby enrichment might be said to constitute any advantage, “however fleeting or tenuous it might be.”²⁷ A range of intermediate views are possible.²⁸

It will be argued in Chapter 4 that some reasonably precise conception of

In theory, there should also be a causal link between the “enrichment at the plaintiff’s expense”, and the “unjust factor”, but the issue is rarely addressed. Cf. Burrows, 23-7.

²⁴ In *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, 24, Cory J. considered that in the context of contributions having been made by a party to a domestic relationship, “the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic.” Little attention is paid to the issue of “at the expense of” in much of the commentary. See, e.g., Arrowsmith, S., “Ineffective Transactions and Unjust Enrichment” (1989) 9 Legal Studies 121, 133.

²⁵ Cf., e.g., Goff & Jones, 12; Burrows, 1; Maddaugh & McCamus, 3, and *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, 154.

²⁶ An identifiable “enrichment” becomes a precondition for a claim in Restitution. See, e.g., Goff & Jones, 16. As the authors stated in their 3rd edition, (1986), 16: “In restitution it is not material that the plaintiff has suffered a loss if the defendant has gained no benefit.”

²⁷ According to Rinker, *supra* n. 14, 552, in order to establish a benefit “there must be some sort of advantage or gain, however fleeting or tenuous it might be.”

²⁸ In particular, objective tests, whereby the market or reasonable person are utilised to determine enrichment, can be contrasted with subjective tests, whereby the “benefit” must be of value to the particular defendant. Cf. Birks, 109. See further, Chapter 4.

benefit is required for unjust enrichment as a whole to be a workable analytical concept.²⁹ But even if one accepts an imprecise approach to enrichment (a "fleeting or tenuous" advantage sufficing), such an approach nevertheless shares with the more "rigorous" conceptions of benefit adopted by most theorists an ultimate focus upon some "better" outcome which is sought to be reversed. There must be some discernible change in the defendant's position when compared with his or her position immediately before a particular transaction or course of events. In other words, the defendant must be "better off" as measured against some identified standard and relative to a prior state of affairs.³⁰ If unjust enrichment is to have any explanatory force, the purpose of any liability rule on such an "outcome-orientated"³¹ approach must be to "undo" that outcome.³²

Let us accept for now (the contrary will be argued in Chapter 4) that the liability rules of Restitution can be said to be explicable in terms of a purpose of undoing the beneficial change in a defendant's position, that is, the reversal of enrichment in the widest sense of the term. This raises for consideration the question of what it is about such an outcome that we do not consider to be acceptable. In which circumstances should the outcome be reversed? When, in short, can it be said to be "unjust"? In unjust enrichment theory, it is the term "unjust" which bears the burden of informing us as to when an enrichment should be reversed. Hence, we will consider attempts to give meaning to "unjust" in § 3.3.

Before we proceed to consider such attempts, however, it is worth

²⁹ The various attempts made to give substance to enrichment will be considered.

³⁰ The standard by which the "better" outcome is measured would constitute the test of enrichment. For example, we might measure the outcome of a transaction, say, a contractual transfer of goods, against some objective standard such as a market valuation in order to determine whether any party has been advantaged (or conversely, disadvantaged) by the transaction.

³¹ Getzler, J., "Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Review" (1990) 16 Monash U.L.R. 283, 305.

³² One could argue that the full range of views as to what constitutes an enrichment could be incorporated into an unjust enrichment approach, with the form of an enrichment (or "better" outcome) being an important factor in the overall interaction of the "unjust" and "enrichment" components of unjust enrichment. It might be said that where there is a clearly discernible enrichment, such as a receipt of money, then perhaps the less outrageous need be the "unjustness" of it. Conversely, where no clear-cut benefit is identifiable, with a defendant receiving at most a "fleeting or tenuous" advantage, then the "unjust factor" may be far more crucial in establishing liability: perhaps some egregiously bad conduct on a defendant's part may be required.

briefly emphasising one possible danger of any outcome-orientated approach. There is a danger in that by focusing on an outcome, especially one that seems particularly outrageous or unfair, we may lose sight of the need to identify those factors which justify the outcome being reversed. Even where a defendant has received a large windfall,³³ one still needs to determine whether the defendant is entitled to retain it or not. The mere existence of the windfall, or any advantage, does not of itself answer this question.³⁴

There are a range of different reasons as to why in law an outcome ought to be reversed. For one, there may have been some procedural unfairness which produced the outcome. "Procedural unfairness" refers to the fact that the focus is upon some conduct on the part of a defendant which is considered unacceptable in law: some fraud, unfair dealing or sharp practice, for example, which attracts the operation of a particular doctrine. A seemingly "unfair" outcome, such as a particularly large windfall in one party's hands, might be evidence of some procedural unfairness, though such an outcome is not necessary in establishing such procedural unfairness. Alternatively, an outcome may be seen as "substantively unfair", that is, the outcome is perceived to result in some injustice "if relief were not granted, irrespective of the conduct of the parties."³⁵ An outcome may be seen as substantively unfair because it is inconsistent with parties' particular allocation of risk, or because an outcome is contrary to a particular social policy³⁶ or perhaps some statutory provision,

³³ This term of itself suggests some judgment about how the gain was obtained. Certainly, it suggests that the gain was not earned.

³⁴ Cf. Mason C.J. in *Stern v. McArthur* (1988) 81 A.L.R. 463, 471 (a case of relief against forfeiture, to be considered below): "The contest therefore concerns the question: who should have the benefit of the windfall increase in the value of the land." See also at 482-4, per Brennan J. Cf. also the Earl of Halsbury L.C. in *Ruabon Steamship Company Ltd v. London Assurance* [1900] A.C. 6, 12-13, who denied the existence of some general principle of justice "that a man ought not to get an advantage unless he pays for it." Similarly, see Lord Macnaghten, at 15.

³⁵ Parkinson, P., "The Notion of Unconscionability" in *Laws of Australia*, Vol. 35, 35.5, 14-5.

³⁶ As an historical aside, it is interesting to note that the expectant heir cases in equity provide one of the few examples in which the law has been prepared to scrutinise the value exchanged in a contractual transaction by reference to an objective test of adequate price. "[E]ven a minor discrepancy between the value exchanged" would lead to the cancellation of the transactions, even ones in which no procedural unfairness was evidenced: Dawson, J.P., "Economic Duress—An Essay in Perspective" (1947) 45 Mich.L.R. 253, 271. See, for example, *Bromley v. Smith* (1859) 26 Beav. 644, cited by Dawson at 272. It is interesting to note that since such cases were concerned with substantive outcomes, that is, when an objectively determined benefit was gained, then the "unjustness" of the benefit was not established by reference to any moral notion of equality or justice. Instead, as Dawson points out, the doctrine aimed at the "narrow objective [of] the protection of the landed aristocracy against its own improvidence"

and so on. But there must be a reason for a perceived substantive unfairness.

While focusing on outcomes, if the pejoratives "unjust" or "unfair" are then applied, it may at times be forgotten that the underlying reasons (other than the mere existence of a substantial unequal outcome) for reversing such outcomes need still be articulated.³⁷ The danger with outcomes-driven reasoning is that courts may explain liability rules by reference to nothing more than the need for the reversal of the outcome. Courts may construct "unjustness" or "unfairness" in idiosyncratic ways, without regard to the reasons in principle (if any) which justify their decision.

The point may be illustrated by the decision of the High Court in *Stern v. McArthur*.³⁸ In that case, the majority³⁹ was prepared to reverse the particular outcome (forfeiture of the purchasers' interest in land by the vendor, after repeated breaches by the purchasers of their obligation to make payments under an instalment contract),⁴⁰ despite the apparent absence of any dishonest

(267.) "The motive was clear—to preserve for a dominant class the economic resources upon which its prestige and power depended" (268.)

³⁷ See, however, the *Contracts Review Act* 1980 (N.S.W.), s. 9, under which relief may be granted if a contract is determined to be "unjust". The consequences arising from compliance with the contract (i.e., the outcome) may of themselves justify a contract being determined to be "unjust".

³⁸ (1988) 81 A.L.R. 463.

³⁹ Deane and Dawson JJ., in a joint judgment, and Gaudron J. The appeal against a N.S.W. Court of Appeal 2:1 decision was dismissed.

⁴⁰ The McArthurs purchased land from the Sterns under a long term instalment contract. The purchasers took possession and built a home on the land. After several years occupation, the purchasers failed to pay their monthly instalments over a period of nearly one year, and fell into arrears. The purchasers then made attempts to pay outstanding instalments, but the vendors demanded (pursuant to the terms of the contract) the whole purchase price still owing. After another considerable delay, during which time the purchasers unsuccessfully sought to meet this demand, the vendors rescinded the contract. The vendors undertook to compensate the respondents for the value of any improvements to the land (see 81 A.L.R. 463, at 465), but as there had been a large increase in the unimproved value of the land, the purchasers nevertheless sought relief against forfeiture.

The vendors' undertaking to compensate for the improvements made prevented the High Court from drawing a comparison with an earlier decision, *Legione v. Hately*, (1983) 152 C.L.R. 404; 46 A.L.R. 1, in which the vendors of land had sought to appropriate the improvements made to the land by the purchasers, by relying on their right to forfeiture. In *Legione* this was the major factor leading to the Court's decision that the vendors' conduct was unconscionable. The Court indicated that such relief would only be given in exceptional circumstances (see also *Ciavarella v. Balmer* (1983) 48 A.L.R. 407), and that the basis for such relief was the unconscionability of the vendors' conduct.

or unfair conduct by the vendors before or after the purchasers' repeated breach of contract.⁴¹ Although the majority did utilise the language of

⁴¹ Seemingly, the only possible way in which the vendors' conduct can be described as unconscionable, thereby justifying relief against forfeiture on the basis of some procedural unfairness, is if the parties' understanding of the underlying purpose of the transaction was one which essentially equated the transaction with a mortgage. If this was indeed the parties' understanding of the transaction, then keeping any windfall after outstanding debts were paid would appear to be unconscionable conduct on the vendors' part. This was the approach of Deane and Dawson JJ. In their Honours' view, the parties' conduct was relevant to demonstrate how the transaction was regarded by the parties, (81 A.L.R. 463, 490) and in the case at hand, their Honours perceived that the transaction was

essentially an arrangement whereby the appellants [vendors] undertook to finance the respondents' purchase upon the security of the land. In other words, there was a close and obvious parallel between it and a purchase with aid of a mortgage (489).

Their Honours thus accepted an approach adopted in some United States jurisdictions, equating long term instalment contracts of this type with mortgage agreements (citing *Jenkins v. Wise*, 574 P. 2d 1337 (1978)). The respondents' attempt to terminate the contract and thus gain the windfall of the increase in value was therefore said to amount to unconscientious conduct.

Gaudron J., making up the majority, justified her finding in one sense, more narrowly and in another, more broadly. More narrowly, because her Honour rejected the view that all sales of land by instalment contract could be equated with a purchase with the aid of a mortgage. Gaudron J. considered that such an equation may be true of some instalment contracts, but not of all (498). The dissentients, Mason C.J. (468-9) and Brennan J. (482), rejected such an equation, so that it can be said to have been rejected by a majority of the judges. More broadly, because her Honour considered that the respondents' insistence upon their strict legal rights was unconscionable in the circumstances. Specifically, the loss of the appellants' home and their interest under the contract, as well as the considerable profit that would accrue to the respondents by reason of the sale of land, justified intervention (499). Since, however, all these factors related merely to the outcome of the vendors' exercise of their rights, and do not of themselves point to any unfairness in so doing, the outcome rather than any conduct leading up to that outcome appears to have driven the unconscionability finding.

The reasoning of Gaudron J. has been criticised. See, e.g., Mason, K., "Restitution in Australian Law" in Finn, 20. It has even been said that her Honour's approach reduces the "doctrine" of unjust enrichment to "the incoherent level of unstructured discretion": Bryan, M., "Book Review" of Finn, P.D., (ed.) *Essays on Restitution* (1990), in (1991) 18 M.U.L.R. 201, 202.

The above suggests that, unless the interpretation of the parties' transaction adopted by Deane and Dawson JJ. is correct, the outstanding feature of *Stern v. McArthur* is the absence of any conduct on the vendors' part which could be described as unconscionable. The purchasers always had adequate time to meet their contractual obligations and this was one of the facts which led Mason C.J. and Brennan J., dissenting, to deny that relief against forfeiture was appropriate. Mason C.J. considered that a finding of "unconscionability" in the present circumstances would "drain unconscionability of any meaning" (472), given the absence of any conduct on the vendors' part that "caused or contributed to a situation in which it would be unconscionable ... to insist on the forfeiture of the purchaser's interest" (471). See also the judgment of Brennan J., who concluded that "[t]he so-called 'windfall' of the natural increment in land value properly belongs to the vendors" (484). Brennan J. added, however, that the vendors were "bound to compensate the purchasers for the value of the improvements made." This focuses sharply on the differences between the minority and majority. The minority were concerned to ensure that the purchasers did not suffer any loss (as measured against the *status quo ante*), but this formed the limit of their willingness to interfere. The majority, however, were concerned to ensure that the vendors did not acquire the windfall gain as a result of the transaction.

"unconscionability" to describe the vendors' conduct,⁴² as one commentator has concluded, "it is difficult to envisage how the vendors could have 'conscionably' exercised their right of termination and forfeiture, once the purchasers fell behind in their payments."⁴³ Instead, the jurisdiction to grant relief appears to have been driven by a desire to remake a bargain which in the circumstances resulted in particularly harsh consequences for the purchasers.⁴⁴ In the view of one writer:

If the majority position is to be accepted, what ought be openly acknowledged is that in such circumstances the court is prepared to remake the parties' contract, because as events have turned out it leads to very unfair consequences. It is the bargain which is mended not the vendors' conduct which is unconscionable.⁴⁵

If this interpretation of the majority's grounds for the decision are correct, then the majority judges, though perhaps warranted in their conclusion, did not clearly spell out the standard of "fairness" on which their conclusion was based.⁴⁶ Were the consequences "unfair" because the purchasers had not expected such an outcome,⁴⁷ or because of a general

⁴² Of the majority, Deane and Dawson JJ., in a joint judgment, considered that:

The general underlying notion is that which has long been identified as underlying much of equity's traditional jurisdiction to grant relief against unconscientious conduct, namely, that a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself ... (488).

⁴³ Nicholson, K., "*Stern v. McArthur*—The Jurisdiction to Relieve Against Forfeiture and Instalment Contracts" (1989-90) 2 J.C.L. 148, 158.

⁴⁴ If there had been no increase in value of the land (other than the improvements) it is unlikely, from the reasoning of the majority, that relief would have been granted.

⁴⁵ Nicholson, *supra* n. 43, 158.

⁴⁶ Cf. Getzler, *supra* n. 31, 305, who has described the majority's view of unconscionable conduct as a "discretionary, outcome-orientated concept of unconscionable conduct". He earlier concluded:

The minority approach in *Stern v. McArthur* is perhaps more principled and coherent than that of the majority: it is difficult to see how a court of equity can rationally identify 'unconscionability' in an insistence on an unjust enrichment or outcome, entirely without reference to either the quality of the relational conduct of the parties or the intrinsic fairness of the legal rights which gave rise to such final outcome. The *Stern v. McArthur* majority gave no reasons as to why the enrichment accruing to the vendor was 'unjust', beyond asserting that it was 'reasonable' that purchaser and not vendor should win the benefit of the capital gain (footnote omitted).

⁴⁷ The conclusion by the Court, that the reasonable expectations of the purchasers were that they would obtain the advantage of the increased value, does not really add much

principle that any increase in the value of land should inure to a purchaser in possession? One can only speculate given the doubts which remain after considering the majority's reasoning.

None of the above need of course be seen as specifically an attack on unjust enrichment *per se*. Unjust enrichment theorists themselves emphasise that the existence of an enrichment gained by subtraction from another does not of itself justify relief. It must still be "unjust". But given that "unjust" can at times be no more than an appeal to individual notions of justice, the term may be used merely as a pejorative conclusion which avoids a need to identify the reasons for a decision. As will be seen, most unjust enrichment theorists reject such a use of the term "unjust", and yet "unjust" is asked to fulfil the important function of isolating the reasons as to why an enrichment is reversible. It remains to be considered then, whether "unjust" can successfully fulfil such a function.

§ 3.3 THE MEANING OF "UNJUST"

§ 3.3.1 The Rejection of "Unjust" as a Reference to Individual Notions of Justice

Although few would cavil with the view, encapsulated by Sir Anthony Mason and Gageler, that "[u]ltimately, legal rules, whether based in statute or the common law, are justifiable only in terms of their justice and social utility",⁴⁸ it is equally uncontroversial to conclude that rules or judgments which merely invoke such terms as "justice" do not necessarily guarantee a just result. In any case, appeals to notions such as "justice", it has been said, "are persuasion, not argument."⁴⁹ In the context of unjust enrichment, one might

and may not even be accurate. Can a *defaulting* purchaser be said to have such an expectation? This might depend on whether the parties view the relationship from the outset as a mortgage. If so, then purchasers would expect to receive such gains, even where they foresaw the possibility of default. But if the parties did not view the transaction in this way, then any reasonable purchaser would know that if they defaulted, they could not expect to gain the benefit of any increase in value in the land.

⁴⁸ The Hon. Sir Anthony Mason & Gageler, S.J., "The Contract" in Finn, P.D., (ed.) *Essays on Contract* (1987), 1, 30.

⁴⁹ Ross, A., *On Law and Justice* (1958), 274:

To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate. That is no proper way to mutual

describe past decisions in which recovery was granted by concluding that in all such cases, the defendants' enrichments were unjust, but this, without more, does not explain those decisions, nor does it provide one with any guidance for approaching future cases.

It has of course been a "traditional criticism" of unjust enrichment⁵⁰ that it is too vague⁵¹ or uncertain a notion to form the basis for the adjudication of legal rights.⁵² "Unjust", standing alone, would appear to be an arbitrary appeal to the "formless void of individual moral opinion."⁵³ To decide cases merely on the unjustness or otherwise of the issue, it has been said, is to succumb to decision-making on the basis of "subjective judicial opinion as to where the merits lie."⁵⁴ The very generality of the notion prevents such doubts being readily assuaged.⁵⁵ As will be seen, such traditional criticism may still have

understanding. It is impossible to have a rational discussion with a man who mobilises 'justice', because he says nothing that can be argued for or against. His words are persuasion, not argument.

⁵⁰ Sutton, R., "Unjust Enrichment" (1981) 5 Otago L.R. 187, 194.

⁵¹ Cf. *Baylis v. Bishop of London* [1913] 1 Ch. 127, 140, per Hamilton L.J.:

Whatever may have been the case 146 years ago, we are not now free in the 20th century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'

⁵² See, e.g., Holdsworth, W.S., "Unjustifiable Enrichment" (1939) 55 L.Q.R. 37, 51-3. At 51, he states that

whatever theory is adopted, the law must adopt some technical rules to determine whether or not an action for unjustifiable enrichment will lie; ... if the result ... is to leave the matter wholly to the discretion of the judge, it means in effect that the law has thrown up the sponge, and has abandoned the attempt to produce any workable rules on this question.

See also Lord Sumner in *Sinclair v. Brougham* [1914] A.C. 398, and for an excellent summary of such views, see the judgment of Mahon J. in *Avondale Printers & Stationers Ltd v. Haggie* [1979] 2 N.Z.L.R. 124, 144-55. For a recent case that appears to give weight to these criticisms, see the decision of the Manitoba Court of Appeal in *Hill Estate v. Chevron* [1993] 2 W.W.R. 545, discussed below.

⁵³ *Carley v. Farrelly* [1975] 1 N.Z.L.R. 356, 367.

⁵⁴ *Avondale Printers & Stationers Ltd v. Haggie* [1979] 2 N.Z.L.R. 124, 153, per Mahon J. At 149, his Honour considered that in some cases, unjust enrichment is being invoked "as a principle of fairness applicable by reference to the assumed merits of each individual case."

⁵⁵ This generality, according to Birks, 18, gives rise to a "fear" of uncertainty. Cf. *ibid*, 152.

considerable force in Canada, given the role assigned to "unjust" in that jurisdiction as an element of a cause of action.

Though its resonances are still being felt, for the most part, this historical debate is of little relevance in English or Australian law. There are two reasons for this. Firstly, there have been repeated and authoritative rejections by the highest judicial authorities of any attempt to utilise "unjust" merely as a justification for "judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate."⁵⁶ As the High Court of Australia indicated in *David Securities v. Commonwealth Bank*:

[I]t is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality.⁵⁷

Secondly, most theoretical writing rejects any discretionary approach based merely on vague notions of "fairness" and "justice".⁵⁸ It is generally accepted that if unjust enrichment as a whole is to have explanatory value, some clarification of the operation of "unjust" is necessary. The predominant view amongst English theorists perceives "unjust" as operating merely as a

⁵⁶ *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 604, per Deane J.

⁵⁷ (1992) 109 A.L.R. 57, 75, per Mason C.J., Deane, Toohey, Gaudron and McHugh JJ. See also *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 604 per Deane J. In the House of Lords, see *Lipkin Gorman v. Karpnale Ltd* [1991] 3 W.L.R. 10, 33, per Lord Goff.

Cf. the view of Parkinson, *supra* n. 35, 35.5 at 7, in relation to "unconscionability":

However, a clear understanding of the term is necessary because, without it, the notion [unconscionability] can decline all too readily into a generalised justification for the courts doing whatever they deem to be fair. In Australian law, such an approach has clearly been rejected. (fns. omitted).

In a similar vein is The Honourable Sir Anthony Mason, (1989) 12 N.S.W.L.J. 1, 2.

⁵⁸ See, e.g., Burrows, 1, 21; Goff & Jones, 15-6. Birks' views are considered below. Some Canadian theorists concur with this view (e.g., Fridman, 18-19; and see also Fridman, G.H.L., "The Reach of Restitution" (1991) 11 Legal Studies 304, 324-5), but other Canadian commentators are little troubled by charges of uncertainty arising from an appeal to individual notions of what is fair and just. One writer considers that "unjust" can "embrace any argument capable of persuading the judicial mind": Litman, M.M., "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 Alb. L.R. 407, 434-5. Litman responds to the traditional criticism levelled against such discretionary decision-making by referring to the subjectivity of all decision-making. It is hoped that this is not intended to suggest that there is no longer any need to give principled reasons for a decision, outlining the competing considerations to be taken into account and how such competitions are to be resolved. Contrast the comments of Sutton, *supra* n. 50.

shorthand description which refers to the specific rules and doctrines found by reference to the case law and statute.⁵⁹ It is those specific rules and doctrines which then determine the limits of liability.⁶⁰ This view warrants a more detailed consideration.

Perhaps the most comprehensive, though by no means earliest,⁶¹ articulation of a view of "unjust" as merely a descriptive label can be seen in the writing of Birks. Birks, noting the judiciary's "fear of uncertainty", and rejecting a subjective appeal to "abstract conceptions of justice", writes:

It should be obvious, therefore, that 'unjust' can never be made to draw on an unknowable justice in the sky. ...

In the phrase 'unjust enrichment' the word 'unjust' might, with a different throw of the dice, have been 'disapproved' or, more neutrally, 'reversible'. Those words might have been better in being more obviously downward-looking to the cases. The essential point is that, whatever adjective was chosen to qualify 'enrichment', its role was only to identify in a general way those factors which, according to the cases themselves, called for an enrichment to be undone. No enrichment can be regarded as unjust, disapproved or reversible unless it happens in circumstances in which the law provides for restitution. The answer to the fear of uncertainty is not to reject the word but to deal firmly with any argument which attempts to detach it from the law.⁶²

Birks summarises his views as follows:

'Unjust' ... is merely a general word expressing the common quality of those factors which, when present in conjunction with enrichment, have been held to call for restitution.⁶³

Such a view has widespread support,⁶⁴ and appears consistent with references

⁵⁹ Birks, 99. See also Chapter 2 above.

⁶⁰ As well as any limits imposed by the particular meanings of "enrichment" and "at the expense of" that are adopted.

⁶¹ See, e.g., Seavey & Scott, "Restitution" (1938) 54 L.Q.R. 29; Angus, W.H., "Restitution in Canada Since the Deglman Case" (1964) 42 Can. B. Rev. 528, particularly at 530; and Patterson, E.W., "Scope of Restitution and Unjust Enrichment" (1936) 1 Mo.L.Rev. 223, 228: "This is not to say that such a vague principle [as unjust enrichment] is a workable test of liability in a particular case, if unaided by precedent."

⁶² Birks, 19.

⁶³ Birks, 99.

⁶⁴ E.g., Burrows, 1-2, 21; and references cited supra n. 61. Cf. Fitzgerald, B., "Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment" (1993) 2 G.L.R. 1, 11-13. This view is usually closely associated with a view of unjust enrichment as the underlying principle of

to unjust enrichment in the High Court of Australia and the House of Lords.⁶⁵

But for one sweeping assumption, it is difficult to take issue with such views, as far as they go. It must be stressed, however, that Birks' approach really tells us very little. If "unjust" looks "down to the cases", it makes no claims to describing the content of our law of Restitution, but merely refers us to our sources of law. Indeed, the statement that "unjust enrichments are remediable" can be distilled down to a rather trite truism, that "remediable (according to law) enrichments are remediable".⁶⁶ Birks appears to concede the point:

The generic conception [unjust enrichment] of the event which triggers restitution adds nothing to the existing law and effects no change except what comes from better understanding of what is there already.⁶⁷

Nevertheless, Birks considers that unjust enrichment has useful work to do, particularly in providing a "shared and stable pattern of reasoning" for the law of Restitution.⁶⁸ But if "unjust" merely refers us back to the very specific rules and doctrines giving rise to obligations in Restitution, such a formulation of "unjust" avoids, almost by sleight of hand, what is perhaps the most fundamental issue. The general explanatory principle is given content by reference to the liability rules it is said to explain. This circularity of reasoning assumes, though, that the liability rules *are* explicable on the basis of unjust enrichment. It assumes the purpose of the rules to be the reversal of enrichment. This assumption needs to be proved for such reasoning to be valid. It will be rejected in Chapter 4. If the liability rules identified by "unjust" have purposes other than the reversal of enrichment, "unjust" becomes a conclusion about something other than enrichment.

Even if the assumption is correct, however, and "unjust" performs the

Restitution. But contrast Smith, *supra* n. 18, who considers unjust enrichment as a cause of action, but appears to view "unjust" in the same light. Such a position would seem difficult to sustain, given that "unjust" would refer back to rules and doctrines which are very dissimilar, each having their own very specific formulations and elements.

⁶⁵ See, respectively, *David Securities Pty Ltd v. Commonwealth Bank* (1992) 109 A.L.R. 57, and *Lipkin Gorman v. Karpnale Ltd* [1991] 3 W.L.R. 10.

⁶⁶ Cf. Abbott, E.V., "Keener on Quasi-Contracts" (1896) 10 Harv. L.R. 209, 221-4.

⁶⁷ Birks, 27.

⁶⁸ Birks, 19-22.

function of alerting us to the fact that the purpose of the specific liability rules is the reversal of enrichment, such a formulation still tends to suggest against an *exclusive* principle. For in looking down to the cases, other extrinsic principles may be seen to be relevant; principles perhaps of far greater explanatory value than the shorthand description, "unjust". Moreover, if this is so, one may question the need to resort to "unjust enrichment" in the first place.⁶⁹

§ 3.3.2 The Canadian Approach to "Unjust"

In Canada, "unjust" is perceived to have a far more active role in the law of Restitution: it operates as more than just a reference to very particular rules and doctrines. This follows from the almost certain acceptance by the Canadian courts of unjust enrichment as constituting a single cause of action giving rise to a right to Restitution. "Unjust" becomes one element of a cause of action and one need only satisfy that element to establish *prima facie* liability to reverse an enrichment gained at the plaintiff's expense. "Unjust" is required to do its own work. The possibility of claims being decided on the basis of idiosyncratic notions of fairness becomes very real and the determination of the "unjustness" of an enrichment may not even be tempered by reference to existing doctrine or case precedent.⁷⁰

As Sutton has pointed out, advocates of a general right of Restitution face a dilemma. If such concerns about the vagueness of "unjust" are not rebutted or addressed, one's worst fears are confirmed: the term "unjust" is merely a reference to personal moral opinion. If instead the response is to point to a set of rules applied in a predictable way, then the very generality of the original theory appears thus to have been refuted.⁷¹ Hence, if "unjust" is to operate as an element of an independent cause of action, it must be given content beyond mere references to the detail of particular doctrines, whilst at the same time avoiding charges of uncertainty, that is, of operating either at too high a level of abstraction or else as justifying decision-making on the basis of

⁶⁹ Cf. Abbot, *supra* n. 66, 224-6. Contrast Learned Hand, "Restitution or Unjust Enrichment" (1898) 11 Harv. L.R. 249.

⁷⁰ Hedley, S., "Unjust Enrichment as the Basis of Restitution—An Overworked Concept" (1985) 5 Legal Studies 56, 65-6, states that "if the terms 'unjust' and 'enrichment' are no longer tied to the cases, the charge that they are too vague to be of practical use really comes home to roost."

⁷¹ Sutton, *supra* n. 50, 194-6. See also Hedley, *ibid.*

idiosyncratic notions of justice.⁷² Can "unjust" be given content in a way which treads this middle path?

At first blush, a statement that an enrichment is unjust appears merely to be a statement of conclusion—it in no way identifies the intellectual processes which have been applied to reach such a conclusion. It thus raises far more questions than it answers. Which principles determine when an enrichment is unjust? Should recovery, for example, be granted because of factors relating to the conduct of the defendant, the plaintiff, both, or neither? "Unjust" sheds no light on these questions. Yet it is not unreasonable to demand of any legal system that its courts openly justify and explain their resolution of legal issues.

This is not to suggest that "unjust" in this context must be capable of precise definition. Many important legal concepts are incapable of definition, yet they perform an important function in the law.⁷³ The point is often stressed by the courts.⁷⁴ Not surprisingly, proponents of unjust enrichment often refer to the generality of other principles to rebut the traditional criticism of the uncertainty of unjust enrichment.⁷⁵ Unjust enrichment has been equated, for

⁷² One way in which "unjust" could be given content is by applying a general theory of justice to the law of Restitution. Such a general theory would need to be clearly articulated before "unjust" could operate merely as a consideration of the "justice" of a particular claim. Cf. Fitzgerald, *supra* n. 64, 11-3. The search for a theory of justice might be considered as part of the process of searching for, in the words of Sir Owen Dixon, "deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice": Sir Owen Dixon, "Concerning Judicial Method" in *Jesting Pilate and Other Papers and Addresses* (1965) 165. In this writer's view, it seems unlikely, however, that such a theory of justice can be found.

⁷³ Indeed, some consider that definitions ought generally to be avoided. It has been said, for example, that to "attempt to devise precise definitions ... is an unnecessary and perhaps impossible task." See Cairns, H., "A Note on Legal Definition" (1936) 36 Col.L.Rev. 1099, and the opinions cited therein. This is not just a modern sentiment. Roman jurists expressed similar concerns in the maxim "All definition in law is dangerous, for one can rarely be found that cannot be overthrown" (*Omnis definitio in jure civili periculosa est, parum est enim ut subverti possit*) (1099).

⁷⁴ In *National Westminster Bank Plc. v. Morgan* [1985] 1 A.C. 686, 709, Lord Scarman stated that "definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case." In the High Court of Australia, see Deane J.'s comments in relation to "unconscionability" in *Commonwealth v. Verwayen* (1990) 170 C.L.R. at 441. Similarly, in relation to notions of "fairness", see *O'Connor v. Hart* [1983] N.Z.L.R. 280, 289. Extra-judicially, the Chief Justice of Australia has expressed no difficulty with such views. See the Honourable Sir Anthony Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in Waters, D.W.M., (ed.) *Equity, Fiduciaries and Trusts* 1993, 20. In relation to "unconscionability", his Honour was of the opinion that it is "very much a matter of fact, degree and value judgment so that greater guidance will only come from an array of decisions on particular fact situations." See also 22-3.

⁷⁵ See, e.g., Goff & Jones, 12-3; Litman, *supra* n. 58; and Davis, P.W., "Restitution:

example, with concepts such as "unconscionability".⁷⁶ Perhaps one of the difficulties with such arguments is that, whereas concepts such as "unconscionability" operate for the most part within the strict confines of very specific doctrines,⁷⁷ this may not be the case with "unjust". For if "unjust" is perceived as one element of a cause of action, then the only restriction on "unjust" is the need to show an enrichment at the plaintiff's expense.⁷⁸ But

Concept and Terms" (1968) 19 Hastings L.J. 1167, 1175-6, for examples of rebuttals of this type. Analogies have been drawn with the law of negligence (see, e.g., Klippert, 36-7). Birks has persuasively argued, however, that such an analogy is unacceptable, as unjust enrichment stands on "too abstract a moral plane" to function in the same way as the neighbourhood principle in *Donoghue v. Stevenson*. See Birks, P., "Unjust Enrichment—A Reply to Mr. Hedley" (1985) 5 Legal Studies 67, 67-8. Sutton, *supra* n. 50, 194 points out

that the answer most often given to the criticism [of uncertainty] is an affirmation of faith in the ability of judges to work things out, coupled with dark hints about other generalised doctrines which, in the view of the restitutionary theorist, are really no better. Our understanding of the issues is not, I am afraid, much enhanced by such debates.

⁷⁶ See, e.g., *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 86-7, per Toohey J. Cf. *Pasi v. Kamana* [1986] 1 N.Z.L.R. 603, 605, per Cooke P.

⁷⁷ As Gummow J. in *Winterton Constructions v. Hambro Aust. Ltd.* (unreported, case no. 6733 of 1990, Federal Court of Australia, N.S.W. District) at page 20, has indicated in rejecting the use of "unconscionable" to assert a "legal right to remedy injustice":

the meaning of the term "unconscionable" is, as Deane J. has reminded us in *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, at 444, more accurately conveyed by the term "unconscientious" which indicates its roots in equitable doctrines.

For example, the doctrine of estoppel (accepting that there is a unified doctrine of estoppel: see *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394) may arise if it would be "unconscionable" for a defendant to insist upon his or her strict legal rights. Though unconscionability remains an open-textured notion, which seeks to test the standards of the defendant's conduct against some bench-mark, the notion only comes into play after the doctrine of estoppel has filtered out most fact situations by reference to the operative criteria of that doctrine. In other words, the question of whether someone has acted unconscionably does not roam at large. Randomly asking whether people have behaved "unconscionably" would be quite a meaningless exercise. Instead, such a question is asked only after certain specific requirements have been met. Taking estoppel, there must first have been the creation of an expectation by the conduct or representations of the defendant; and the plaintiff must reasonably have acted on the basis of this expectation to his or her detriment. Only then will the courts determine whether it would be unconscionable for the defendant to act in a manner contrary to that expectation by insisting on his or her legal rights.

⁷⁸ The concept of enrichment may not in any case provide a clearly articulated limit to relief. Cf. Fridman, G.H.L., "The Nature and Scope of Restitution: Past, Present and Future" Unpublished Paper, at 14, who has said:

Since 'unjust' in the context of enrichment is itself a nebulous expression, it would appear undesirable to attempt to elucidate and explain it by reference to the equally vague concept of benefit.

many ordinary day to day transactions can result in at least some "advantage" (to take the broadest possible view of enrichment) to a particular party, and it will usually also be possible to identify someone who has suffered a corresponding deprivation.⁷⁹ Many transactions then, are potentially open to question, and subsequent reversal, if it can be said that they were "unjust".

In Canada, the element of "unjust" has been formulated in terms of an "absence of any juristic reason" for the enrichment.⁸⁰ "Unjust" is thus sought to be given content by defining it negatively, that is, by seeking to identify criteria which establish when an enrichment is *not* unjust. Such an approach is not exclusively the province of Canadian jurists and commentators—others outside that country have articulated similar views⁸¹—but it is an approach which does appear to have the imprimatur of the Supreme Court of Canada. Hence, the formulation "unjust" becomes "the absence of any juristic reason" for the enrichment, and attempts are then made to identify the types of circumstances which amount to a sufficient juristic reason for the enrichment.⁸²

Maddaugh and McCamus well exemplify the Canadian approach. They argue that once the three elements of the claim have been established, a "presumptive case of unjust enrichment" is made out. Such a claim will fail, however, if a general limiting principle—the officious conferral of a benefit—is satisfied.⁸³ Similarly, outside of Canada, Goff and Jones have in the past advocated a "generalised right to restitution",⁸⁴ and identified the "six broad

⁷⁹ For example, if a contract is seen as a good or bad bargain according to some objective standard, then it might be said that there was an "enrichment" and corresponding deprivation. This highlights a significant difference between "unconscionable" and "unjust". Whereas unconscionable *conduct* is the concern of equitable doctrines such as estoppel, "unjust" qualifies the concept of enrichment, which does not refer to conduct but to a particular outcome. Consequently, an "enrichment" presumably must be identifiable with some certainty. This may not, however, be the case, as will be seen in Chapter 4.

⁸⁰ This appears to add little without further clarification. Birks, P., "Review" (1991) 70 Can. B. Rev. 814, 819, says of the Canadian formulation that it is "unhelpful. For an already dangerous abstraction, 'unjust', it merely substitutes an unintelligible legal construction."

⁸¹ Goff and Jones appear to be amongst them. They identify six limits upon the operation of unjust enrichment which will determine that a benefit "has not been unjustly gained." See Goff & Jones, 44, et seq.

⁸² Cf. *Rathwell v. Rathwell* (1978) 83 D.L.R. (3d) 289, 306, per Dickson J., who considered "contract or disposition of law" as two examples of a juristic reason for an enrichment.

⁸³ Maddaugh & McCamus, 46. See generally, 45-9.

⁸⁴ See Goff & Jones, 15-6, 29 (3rd ed., 1986), although they acknowledge the English courts' hesitancy in taking such a step. In the fourth edition, calls for the recognition of such a

classes" of limits which "should alone mark the boundaries of the law of restitution and the principle of unjust enrichment."⁸⁵ They include in this list the officious conferral of benefits by the plaintiff.

§ 3.3.2.1 Criticisms of the Canadian approach

There are a number of criticisms which can be made of any approach to define "unjust" by reference to limiting criteria which establish when an enrichment is *not* unjust. First, the limiting principles that are invoked often appear as vague and unhelpful as "unjust" itself. To take the commonly cited limiting principle of "officiousness": the use of the term of itself does not spell out the underlying ideas at issue. For example, the label "officious" appears to have been used at times to describe risk-takers who perform services in the hope that they will be paid for. To be sure, the consequences of their failed gamble ought to be borne by such risk-takers and such claims have thus been rightly rejected. But if such policy concerns go unstated and are not self-evident from the use of the term "officious" itself,⁸⁶ one begins to sense that "officiousness" becomes merely a mantra to be uttered whenever relief is to be denied.⁸⁷ Similar criticisms can be made of other limiting principles invoked, such as that "public policy precludes restitution."⁸⁸ Public policy considerations may well be a feature of the law generally. Usually, however, such considerations operate in combination with specific rules, rather than merely as part of a determination of unjustness.⁸⁹ Otherwise, "public policy"

generalised right have been dropped.

⁸⁵ *Ibid*, 29 (emphasis in text). See at 30 for the six limits. Even though Goff and Jones no longer write in terms of a generalised right of restitution, they still consider that the six limits which they describe will determine the boundaries of liability. The six limits are *derived* from the "subordinate" principle that the enrichment must be unjust (44, 4th ed.). Litman, *supra* n. 58, cites these limiting principles and indicates that these will have to be expanded and refined, having earlier stated that "[i]n the process of fleshing out the concept of juristic justification, the existing law of restitution should not be forgotten" (436)!

⁸⁶ See, for example, an early, and entirely unsatisfactory attempt to explain the meaning of this term, by Hope, E.W., "Officiousness" (1929) 15 *Cornell L.Q.* 25; 205.

⁸⁷ See generally, Sutton, *supra* n. 50, 194-5.

⁸⁸ Goff & Jones, 62-8.

⁸⁹ Dawson has pointed out that, whereas defining "unjust" negatively may be a workable approach in European systems where other quite stringent restrictions on imposing liability exist, there is much danger in adopting such an approach in the common law. As Dawson indicates, the common law has not sufficiently advanced to have addressed some of the issues European systems have developed doctrine to deal with: Dawson, *Unjust Enrichment*

would operate as the sole criteria for determining whether liability arises once an enrichment at a plaintiff's expense is identified.

A second criticism that can be made of negatively defining "unjust" is that by commencing legal analysis by reference to a *prima facie* "right to restitution", subject to any contrary limiting principles, there is a strong suggestion that the onus is upon a defendant to justify the retention of the enrichment.⁹⁰ This may perhaps even lead to a reversal of the onus of proof generally in Restitution cases, which some commentators, at least, appear to support.⁹¹ Yet this would be an extraordinary development, contrary to the whole tenor of a common law which makes it clear that advantages *per se* do not have to be justified. For example, in *Ruabon Steamship Co. Ltd v. London Assurance*,⁹² the Earl of Halsbury L.C. could not

understand how it can be asserted that it is part of the common law that where one gets some advantage from the act of another, a right of contribution towards the expense from that act arises on behalf of the person who has done it.⁹³

A reversal of onus of proof would seem particularly undesirable given

120-7. In German law, for example, recovery is only possible in cases of *direct* enrichment, and this is stringently enforced. This concept of "directness" has its own detailed jurisprudence. Dawson gives one example, in which a plaintiff by contract with X agreed to loan money to X to pay off a mortgage on X's land in return for assignment of the mortgage. As a result of a mistake of a notary, the mortgage was not assigned, but recorded as discharged. The plaintiff brought an action against a second mortgagee, whose mortgage had been promoted through the recorded discharge. The court refused relief, though it did not deny the defendant's enrichment. It considered that, instead, the plaintiff's claim lay against X for the defendant's gain was a result of the third party contract which governed the parties. In Dawson's view (123), in the United States, the decision would almost certainly have been otherwise.

⁹⁰ See, e.g., Litman, *supra* 58, 436 and generally, 431-4, who considers that "[a]n enriched defendant should only be able to retain a benefit if there are cogent and persuasive reasons for so doing." Yet this reflects a remarkable captivation with enrichment. One may understand the visceral appeal of an argument for the disgorgement of an *unjust* enrichment, which label includes, as it does, a moral conclusion as to the appropriateness of retaining that benefit in the particular circumstances. But this is far removed from an assumption that *all* benefits must be justified. For this seems to assume that all benefits are *prima facie* unjust. Litman never justifies this quite startling conclusion and thus appears to take it as an *a priori* position.

⁹¹ See Litman, *ibid.* See also Klippert, 43.

⁹² [1900] A.C. 6.

⁹³ *Ibid.*, 10. Similarly, Lord Macnaghten stated that "there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a benefit from it" (15).

that a defendant in a Restitution case will often merely be an innocent recipient of money or some other advantage, and may yet be asked to justify why he or she should not become the insurer of the plaintiff's loss.⁹⁴ If a defendant is required to justify a benefit whenever received, claims could succeed where an enrichment is not unjust, in the non-technical sense, but the defendant cannot point to any *reason* for the enrichment.⁹⁵ Unjustness and the "absence of juristic reason" are not coextensive ideas.⁹⁶

For the above reasons, the notion of "absence of any juristic reason" does not give any meaningful content to "unjust". Instead, it merely shifts the potential for discretionary decision-making one step along in the process of reasoning, to the point at which it is decided what amounts to "juristic reason".

⁹⁴ This would be so where a defendant is an innocent "recipient" of mistakenly conferred services.

⁹⁵ This may be exemplified by the approach of Maddaugh and McCamus in relation to the United States case of *Ulmer v. Farnsworth*, 15 A. 65 (1888). The authors suggest that in that case "there is a strong argument in favour of restitutionary liability" (Maddaugh & McCamus, 744). In this writer's view, however, such a conclusion is unjustifiable. In *Ulmer v. Farnsworth*, the defendant quarry owner received an advantage as a consequence of the drainage by the plaintiff of his own nearby quarry, at some expense. This resulted in the defendant's quarry also being drained, and he proceeded to work the quarry. The plaintiff sought a contribution to the costs of drainage, alleging a local custom to that effect. The plaintiff had acted entirely in self-interest and the court, for this reason and others, denied relief. Goff & Jones, 57, for example, would agree with this conclusion. See also the *Restatement of Restitution*, which states in §106 that:

A person who incidentally to the performance of his own duty or to the protection or improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.

There are a number of reasons why recovery should have been denied: the self-interested actions of the plaintiff; the lack of an emergency, so that there was ample opportunity for the plaintiff to negotiate with the defendant (see Chapter 8 as to the requirements of a sufficient emergency to justify granting recompense for unsolicited services); and the defendant's lack of choice in the matter if forced to contribute to the plaintiff's cost. More importantly, however, what needs to be emphasised is not that there were reasons for denying recovery, but that there were no reasons for granting it. This fact is forgotten if one simply perceives the plaintiff's expenditure and the defendant's *advantage* (on a number of tests of "enrichment" to be considered in Chapter 4, it would be concluded that there was no enrichment: cf. Goff & Jones, 57, but contrast Maddaugh & McCamus, 744), and then proceeds to ask whether there was any "juristic reason" for that advantage. Clearly, there was no *reason*, juristic or otherwise, for the defendant's advantage, it simply followed as a natural consequence of the plaintiff's action. But without some further factor, to impose liability in such a case seems inappropriate. As Birks has pointed out, *supra* n. 80, 819: "Almost anything can be made to add up to insufficient *cause*. This encourages intuitive decision-making, with *ex post facto* labelling of the results."

⁹⁶ As *Ulmer v. Farnsworth*, discussed *ibid*, illustrates an enrichment may not be unjust and yet there may have been no juristic reason for it. But also, conversely, an enrichment may be held to be "unjust", as *Stern v. McArthur* (1988) 81 A.L.R. 463 illustrates, and yet there was a juristic reason for it. In that case, the contract itself provided for the forfeiture of the property.

A recent Canadian case illustrates the difficulties inherent in legal decision-making on the basis of the "absence of any juristic reason" for a benefit. In *Hill Estate v. Chevron Standard Ltd*,⁹⁷ the plaintiff estate of the deceased, Hill, brought an action for the return of mineral rights granted to the defendant oil company by the wife of the deceased under a power of attorney. The court held that the deceased was mentally incompetent at the time of the grant of the power, and that the power of attorney was thus void. Consequently, the mineral rights granted under that power were also void. The oil company cross-claimed, seeking a declaration of a constructive trust to remedy the plaintiff's unjust enrichment. The company had carried out work on the land, had paid rent to the estate of the deceased (who had died soon after the lease had been granted), and had proceeded to drill for oil, leading to the establishment of a producing well. The Manitoba Court of Appeal concluded that the estate had been enriched and that the company had suffered a corresponding deprivation, but concluded that there was a "juristic" reason for the enrichment, namely that the company was at all times a trespasser.

This reasoning is, with respect, unhelpful. In relation to the improvements to the land, the company was acting under a mistaken assumption that it had a valid lease.⁹⁸ It was thus a mistaken improver. The pejorative "trespasser" has in the past been used in cases denying relief,⁹⁹ but this is hardly an adequate explanation, given that mistaken improvers are not entirely precluded from relief, as will be seen in Chapter 9.¹⁰⁰ There may well have been legitimate grounds for denying relief in the circumstances,¹⁰¹ but

⁹⁷ [1993] 2 W.W.R. 545.

⁹⁸ This was the case, at least initially. Before they drilled for oil, the defendants were asked to surrender the lease by counsel for the estate, who considered the power of attorney void. The court did not, however, consider this request to be of significance, and in any case it does not suggest that the company did not legitimately continue to believe that it had a valid lease.

⁹⁹ *Brand v. Chris Building Co. Pty Ltd* [1957] V.R. 625, 628.

¹⁰⁰ In Canada, such relief would be available, either under various "Betterment Statutes" (see Maddaugh & McCamus, 291-301), or in the form of a passive claim—that is, as a set-off to claims for mesne profits earned by the trespasser, or for compensation for the value of improvements where the legal owner is seeking equitable relief. See Maddaugh & McCamus, 284-8. In the view of Maddaugh & McCamus, there may also be an active claim on the basis of an unjust enrichment.

¹⁰¹ Specifically, the fact that the estate, as owners of the land, may have been required to pay for improvements that were not desired and may have been forced to "delve" into estate funds to pay for the oil companies expenses in improving the land.

these were not discussed or explored. In the course of the judgment, the Court went close to acknowledging the discretionary nature of recovery. It stated:

Decided cases are of little assistance in determining what is meant by "juristic reason". It simply comes down to this: if there is an explanation based upon law for the enrichment of one at the detriment of another, then the enrichment will not be considered unjust and no remedy, whether by constructive trust or otherwise, will be available.^{101a}

Another consequence of the Court's broad-brush approach to "unjust" was that conceptually, and previously doctrinally, discrete claims were dealt with as one. The Court did not deal separately with the question of whether lease rental payments made by the oil company could be recovered on the basis of either a claim for return of a mistaken payment, or for a total failure of consideration. In the past, a principled discussion of these quite different issues would have been necessary, given that the claim would have been framed in specific terms,¹⁰² but instead, the all-encompassing "unjust enrichment" claim led to merely a blanket approach. The Court's reference to the defendant's status as a trespasser, moreover, seems irrelevant to a consideration of a claim for the return of the money payments.

In this writer's view, decisions such as that in *Hill Estate v. Chevron* reflect an emerging trend in Canada, in which judges conclude that there is no juristic reason for an enrichment, without giving adequate reasons for such conclusions.¹⁰³ The traditional criticism as to the uncertainty of invoking "unjustness", when made in the context of Canadian jurisprudence at least, continues to have considerable force.

^{101a} [1993] 2 W.W.R. 545, 560.

¹⁰² For example, in the form of a claim for money had and received for the return of money paid under a mistake.

¹⁰³ Perhaps Dickson J.'s seminal judgment in *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257, is itself an example. At 274, Dickson J. states that retention of the benefit must be "unjust" in the circumstances of the case." His Honour reaches the conclusion that the "unjustness" element has been satisfied, but gives little in the way of justification. Of course, this is not to deny that the law of Restitution has not progressed considerably in Canada, and that unjust enrichment has not given impetus to a renewed consideration of Restitution in conceptual terms, thus freeing the subject from its arcane and little understood origins.

IDENTIFYING ENRICHMENT

*The term "benefit" has no single meaning in the law of restitution; instead, meaning will vary with the circumstances, especially with the ground for restitution.*¹

§ 4.1 INTRODUCTION

Unjust enrichment theory seeks to unite liability rules which are said to have the uniform purpose of the reversal of benefits or enrichments unjustly gained. As was seen in the previous chapter, speaking very generally, "enrichment" could be said to refer to any "better" outcome gained by a defendant, which outcome triggers an inquiry as to whether it was unjustly gained at the plaintiff's expense. Such a general description avoided a detailed consideration of the "enrichment" component of the unjust enrichment formulation. It is to such a detailed consideration that we now turn.

If the purpose of reversing enrichment is, according to unjust enrichment theory, the very crux of liability in Restitution,² then logically, the existence of some benefit becomes a necessary condition or precondition for the operation of the liability rules claimed to be unjust enrichment-based.³ As Wade has said, "[a] benefit to the defendant is obviously necessary before he can be held liable" in Restitution.⁴ Not surprisingly, then, irrespective of how

¹ Palmer, Vol. I, 44. See also Sullivan, T.J., "The Concept of Benefit in the Law of Quasi-Contract" (1975) 64 Geo. L.J. 1, particularly at 12.

² This is subject to the qualification that some theorists concede other purposes may also be served by liability rules in Restitution. See § 1.3.2. and § 2.2.1.1.

³ E.g., Goff & Jones, 16; Burrows, 6-7; Garner, M., "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 O.J.L.S. 42. See also *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, 154: "At the heart of the doctrine of unjust enrichment ... lies the notion of restoration of a benefit which justice does not permit one to retain. ... Thus for recovery to lie, something must have been given, whether goods, services or money." See also at 155.

⁴ Wade, J., "Restitution for Benefits Conferred Without Request" (1966) 19 Vanderbilt

the component parts of unjust enrichment are formulated in different theories, all such formulations include an initial inquiry into whether a defendant has been enriched or benefited. But to be able to answer such an inquiry requires some means of identifying enrichment, at least with reasonable certainty. Without such means of identification, it is of course meaningless to describe liability in a given case as founded on a purpose of preventing unjust enrichment.

There is a further reason for requiring that a benefit be identifiable with reasonable certainty before unjust enrichment can be considered as a plausible explanation of liability in a given case. Given the supposed restitutionary purpose of liability rules in Restitution, theorists have stressed that the remedial response to the unjust enrichment gained at the plaintiff's expense must be restitution of that enrichment. As Birks has indicated, unjust enrichment (a causative or liability-creating event) and restitution (the response) "quadrates" with each other,⁵ and "[a] restitutionary right is definitively and necessarily measured by the amount of the enrichment at the plaintiff's expense."⁶ Such an approach is implicit in most academic and judicial writing on the subject,⁷ though not universal.⁸

L.Rev. 1183, 1186.

⁵ Birks, 17.

⁶ Ibid, 46

⁷ Cf. Smith, L., "The Province of the Law of Restitution" (1992) 71 Can. B. Rev. 672, 682; Muir, G., "Unjust Sacrifice and the Officious Intervener" in Finn, 299; and see references supra n. 3.

⁸ Certainly, the Canadian courts appear to be far more flexible in their approach to remedy. In fact, unjust enrichment appears to function as a convenient conclusion which, rather than limit remedial relief to restitution, instead gives rise to a number of remedial options. Fridman has commented that the "law of restitution is an amalgam of common law and equity and under this law a court is permitted to invoke whatever type of remedy is appropriate to produce the desired result": Fridman, G.H.L. "The Nature and Scope of Restitution: Past, Present and Future" Unpublished Paper, at 20. The results in a number of Canadian decisions appear to justify such a conclusion. For example, Birks considers that both *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257 and *Soroohan v. Soroohan* (1986) 29 D.L.R. (4th) 1, are cases in which the parties' expectations were fulfilled, despite liability being founded on "unjust enrichment": Birks, P., "Review" (1991) 70 Can. B. Rev. 814, 817-9. These cases concerned property disputes arising after the breakdown of a domestic relationship of cohabitation. But contrast Fridman, G.H.L. "The Foundations of Restitution: A Canadian Perspective" (1989) 19 W.A.L.R. 131, 143, who says of the cohabitation property cases generally, that "[r]estitution is the aim, but compensation appears to be the result." See also Maddaugh & McCamus, 660-70. Some Canadian courts may have expressly accepted such remedial flexibility. In *Atlas Cabinets & Furniture Ltd v. National Trust Co.* (1990) 68 D.L.R. (4th) 161, the majority of the British Columbia

Characteristically, then, unjust enrichment is perceived as being "remedy-specific". To the extent that the category of Restitution is unjust enrichment-based, it follows that it is inextricably linked with restitutionary remedial responses. It is worthwhile briefly to consider such a seemingly singular perception of Restitution: "singular", for in other broad categories of law, such as contract, a range of remedial responses to a single liability-creating event may be possible.⁹ And there are moves in the common law toward the availability of the full armoury of remedial responses to any given liability-creating event: a view encapsulated within, and given impetus by, the judgment of Sir Robin Cooke in *Aquaculture Corporation v. New Zealand Green Mussel Co. Ltd.*¹⁰ Such developments are no doubt of interest,¹¹ but they are

Court of Appeal considered that once unjust enrichment had been established, the court had a choice of remedies. Alongside the constructive trust, these included "an order to pay money, as damages" and "other remedies stemming either from legal origins or equity origins, as the circumstances of the case may require" (174). It is unclear, however, whether the court was referring merely to the form of the remedy, with all such remedies still moulded by the extent of the defendant's enrichment, or whether the court was in fact suggesting that different remedial responses other than as measured by the defendant's enrichment may be pursued.

Outside Canada, cf. Finn, P.D., "Equity, Commerce and Remedy", Unpublished Paper delivered to the New Zealand Law Conference, 1993, 22: "An outcome may appear to create an unjust enrichment if, but only if, reparation in some form (not necessarily restitutionary) is not awarded." In the United States, in the case of *U.S. Potash Co. v. McNutt*, 70 F. 2d 126 (1934), although the action was in Restitution, damages were awarded and determined at a contract rate. This is not an isolated example. See generally Perillo, J.M., "Restitution in a Contractual Context" (1973) 73 Col. L.R. 1208; and Childres, R. and Garamella, J., "The Law of Restitution and the Reliance Interest in Contract" (1969) 64 N.W.U.L.Rev. 433.

It will be argued below, however, that if the remedial response to the application of a particular liability rule is not restitutionary—that is, measured by a defendant's enrichment, whatever conception of enrichment is adopted—then the purpose of such a liability rule cannot be said to be the reversal of enrichment.

⁹ As Birks notes in "The Independence of Restitutionary Causes of Action" (1990) 16 Univ. Q.L.J. 1, 13: "[A]ny one cause of action may give rise to more than one remedy." An example is provided by the range of remedial responses which may follow a finding of fiduciary wrongdoing. See § 1.3.2.1. However, Birks does not apply this view, as a matter of definition, to causes of action explicable in terms of unjust enrichment.

¹⁰ [1990] 3 N.Z.L.R. 299, 301, where Cooke P. states that, for a breach of duty of confidence, "a full range of remedies should be available as appropriate, no matter whether they originate in common law, equity or statute." Cf. Denning J. in *Nelson v. Larholt* [1947] 2 All E.R. 75.

¹¹ There is much that appeals in a more liberal approach to the potential availability of differing remedial responses, though it need be added that this is not intended to suggest a judicial *carte blanche*. The question for the future becomes one as to which principles should govern the "appropriate" relief: Finn, P.D., "Mr. Beatson's 'Unfinished Business'" Unpublished Paper delivered to the Restitution Group of the Society of Public Law Teachers Conference, Aberdeen, 1991, 24.

peripheral to unjust enrichment theory, which excludes the possibility of such remedial flexibility. It is widely perceived, in this writer's view correctly, that the explanatory integrity of unjust enrichment is dependent upon its remedy-specific nature.¹² Unjust enrichment theory draws an inevitable link with restitution and of necessity must do so. For if a wide range of remedial responses were available to meet the concerns of a given liability rule, it could hardly be said that *the* purpose of that liability rule is the reversal of enrichment. If restitution is merely one remedial option amongst others capable of satisfying the concerns of a liability rule, remedying unjust enrichment can at best only be one such concern and an unjust enrichment explanation of that liability rule becomes unsustainable.¹³ Unjust enrichment becomes descriptive of one remedy, but not the explanation of the liability rule itself.

Arguably, the remedy-specific focus of unjust enrichment theory suggests that such theory developed from a process of reasoning backwards. That is, where a remedy is restitutionary (recovery of money had and received is an obvious example) it might be said that a defendant would be unjustly enriched if restitution were not ordered. Such a conclusion, however, does not support the converse, that the *reason* for restitution is the "unjustness" of the enrichment and further, that the purpose of the liability rule is the reversal of the enrichment. To take such a step is to put the effect (the remedy) before the cause. There may be any number of other underlying causes for that restitutionary remedial response which fail to be addressed when the generic unjust enrichment is applied. The point is well made by Finn, writing in the context of equitable doctrine. Finn emphasises that although the particular remedial response to the application of an equitable doctrine may have the effect of denying an enrichment, few equitable doctrines will have the

¹² See, for example, Birks' criticism of the Canadian Courts' seemingly non-restitutionary remedial responses to unjust enrichment. *Supra* n. 8.

¹³ Even if the existence of some form of enrichment might still be said to be a precondition for liability, if the remedial response is not restitutionary, the purpose of the liability rule can hardly be said to be the reversal of enrichment. There is one possible exception. If one uses enrichment as merely referring to a defendant who has in some way gained a "better" outcome which must be avoided, then arguably any number of remedial responses other than restitution may be available to avoid such outcome. If this were so, then enrichment could still be said to be a precondition for liability and the fact that remedies other than restitution were available would not then be significant in challenging the validity of enrichment as a precondition for liability. No unjust enrichment theorist, however, has clearly articulated such an explanation of liability rules. Some such idea, however, has at times been hinted at. See, for example, the discussion *supra* n. 8, in relation to the Canadian Courts' approach to remedy.

prevention of unjust enrichment as their "sole or principal purpose".¹⁴ If this is indeed the case, it must be stressed that any theory which focuses on the remedial response of restitution and reasons backwards from such response cannot elicit principles, other than unjust enrichment, of relevance to the operation of a given doctrine.¹⁵

Irrespective of how unjust enrichment theory developed, however, vital to its operation is a concept of enrichment, firstly as a precondition for liability, and secondly as a measure of the remedial response which arises once liability has been established. But if enrichment is to perform such a vital function, it is clear that it must be capable of being identified. Previous decisions cannot be explained in terms of benefit disgorgement if no identifiable benefit capable of being returned has been received. As Muir has pointed out,

disgorgement is the only sanction for failure to return the benefit. It is very difficult to disgorge what one has not first engorged.¹⁶

This is not intended to suggest, however, that enrichment need be a *definable* concept. Many useful legal concepts cannot be readily defined.¹⁷ Nonetheless, some means of identifying or some test of enrichment must exist. To be sure, such tests could be very general identifying, say, merely the broad, distinguishing characteristics of enrichment. Perhaps even resort could be made to presumptions of law or deeming devices in order to establish enrichment.¹⁸ But it must be possible, after the application of an appropriate

¹⁴ Finn, *supra* 8, 22.

¹⁵ In this writer's view, a more appropriate process of reasoning progresses through two stages of inquiry: first, to determine the relevant causative events giving rise to liability, i.e., to elicit the purpose or purposes addressed by a liability rule; and secondly, and *secondarily*, to determine which remedial response best gives effect to the liability rule's purpose(s) in the particular case at hand?

¹⁶ Muir, *supra* n. 7, 299. The measure of recovery is a particularly crucial matter for any plaintiff seeking legal redress for an alleged "unjust enrichment". When such a plaintiff seeks legal advice, or further, initiates legal action, the response to his or her query of "to what am I entitled?" cannot be left in the realm of vague generality.

¹⁷ Commentators tend to avoid any definition of "enrichment", or define it in the broadest of terms. See, e.g., Davis, P., "Restitution: Concept and Terms" (1968) 19 *Hastings L.J.* 1167, 1190, who states that enrichment "is a specific fact and might be defined as a receipt of something of value." It is unclear what this means. See also Rinker, G.A., *Quasi-Contracts—Concept of Benefit* (1948) 46 *Mich.L.Rev.* 543, 552. Similarly, Sullivan, *supra* n. 1, 25 considers that the concept of benefit is expressed "so generally that the definition becomes essentially meaningless as precedent."

¹⁸ Cf. the reference by Deane J. in *Foran v. Wight* (1989) 64 *A.L.J.R.* 1, 24E to "constructive enrichment", criticised by Birks, P., "In Defence of Free Acceptance" in Burrows,

test, to determine with reasonable certainty that an enrichment exists.¹⁹

The importance of enrichment to the very explanatory integrity of unjust enrichment theory is well understood. Many academic commentators have sought to expound tests of enrichment; there are a variety of approaches as to its meaning and scope. These attempts to give content to enrichment have led to considerable debate, particularly in England, focusing on the appropriateness of the various tests expounded.²⁰ The literature is both voluminous and difficult. The significant differences of opinion reflected in the debate merely may be the product of healthy legal argument over the refinement of the important concept of enrichment. Alternatively, however, and in this writer's view, the continuing debate may be evidence of the fundamental problems which arise when seeking to explain liability in Restitution in terms of benefit reversal. However conceived, it will be submitted, enrichment simply does not do the work asked of it.

Essays, 105, 130. But to deem something which is not actually an enrichment a "constructive" enrichment raises the question as to what purpose such a fiction serves. It could even be suggested that "[w]hen the law behaves like this you know it is in trouble, its intellect either genuinely defeated or deliberately indulging in some benevolent dishonesty." Cf. Birks, *Introduction*, 22, and his discussion of the use of "quasi" and "constructive" in Restitution.

¹⁹ There will, of course, always be hard, borderline cases, but there should nevertheless be a core of cases in which enrichment is readily identifiable.

²⁰ English articles include: Beatson, J., "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] C.L.P. 71 (also in Beatson, Chp. 2); Burrows, A.S., "Free Acceptance and the Law of Restitution" (1988) 104 L.Q.R. 576; Mead, G., "Free Acceptance: Some Further Considerations" (1989) 105 L.Q.R. 460; Garner, *supra* n. 3; Birks, in Burrows, *Essays*. See also Burrows, 7-16; and Birks, P., *Restitution—The Future* (1992), Chp. 4. In Canada, see Klippert, Chp. 3; and McInnes, M. "Incontrovertible Benefit and the Canadian Law of Restitution" (1991) 12 *Advocates' Quarterly* 323. There are also numerous more general articles which consider in part the issue of enrichment.

In the United States, however, there has been relatively little detailed discussion of any generally applicable tests of enrichment. Palmer, for example, in his four volume treatise devotes less than three pages to benefit generally. Instead, he deals with benefit in great detail when considering individual topics. Palmer's approach is largely practical, identifying the different measures of enrichment adopted to suit specific liability rules applied to particular facts. This reflects Palmer's concession that the meaning of benefit varies according to the particular liability rules in question. It will be argued below, however, that this concession powerfully suggests against any explanation of a wide range of liability rules in terms of a purpose of reversing unjust enrichment.

§ 4.2 VARIOUS APPROACHES TO IDENTIFYING ENRICHMENT

§ 4.2.1 Introduction

The concept of enrichment is elusive. Unfortunately, though not surprisingly, as with other fundamental legal concepts, "there is no generally accepted analysis, let alone definition [of enrichment], that may be cited as being authoritative."²¹ A number of different approaches therefore need be considered. For the most part, these various approaches bear upon the question of benefit in relation to the provision of services.²² In order to provide the reader with an overview of the available alternatives, this section will outline the more influential approaches that have been propounded by commentators. It must be stressed at the outset, however, that this task is made difficult by the absence in the literature of any uniformly accepted terminology.

The different approaches to identifying enrichment considered below are deliberately stated in broad and general terms. There are in fact a diverse range of possible views, many of which are expounded in considerable detail and which have been the subject of debate. Individual tests of enrichment advocated by commentators will be considered in the context of the broad approach within which such tests—at least in terms of their general thrust—can be subsumed. Three general approaches will be considered, each concerned with the issue of when services are enriching. In essence, these three are: (1) an objective approach, whereby services are considered enriching if they are capable of being objectively valued by reference to a market for such services; (2) a "receipt of wealth" approach, whereby services are considered enriching if they have increased the net value of a defendant's property or saved him or her necessary expenditure; and (3) a subjective approach, whereby services are considered enriching if some conduct of a defendant can be interpreted as an acknowledgment by that defendant of the value of such services

The resort to broad general approaches is necessitated by the continuing debate as to the scope of, and possible refinements to, the various tests propounded. But this resort to general approaches must not be allowed to obscure the fact that the issue of enrichment is one of considerable difficulty

²¹ Cf. Fridman, 30. Fridman is actually referring to unjust enrichment as a whole, but the view expressed is equally valid for enrichment.

²² What that term encompasses will be considered at § 4.2.1.1.2.

and complexity.²³ Although it was once said by Birks that the issue of enrichment is "simple"²⁴—he appears since to have recanted²⁵—this is in fact far from the case. For those unfamiliar with the debate, it may seem inaccessible, with much use made of technical, specialised terminology.²⁶

Ultimately, the debate as to the meaning of enrichment will be seen to be an arid one. The very complexity one encounters, it is suggested, is evidence of the failure of enrichment intelligibly to explain many of the liability rules supposedly united by unjust enrichment. A consideration of the various approaches to enrichment will bear out this conclusion.

The issue which needs to be addressed by unjust enrichment theory is when it can be said that a defendant has been benefited. Burrows sums up the range of possible approaches facing unjust enrichment theorists and the choice that consequently needs to be made:

It is submitted that as a matter of fact a person may be benefited either negatively—that is by being saved an expense—or positively—that is by making a gain—and that as a matter of policy one may judge the issue on a range from total subjectivity (solely through the defendant's own eyes) through to total objectivity (solely through the eyes of the reasonable man, which in this context means the market).²⁷

As already noted, the differences between the range of approaches to enrichment to be considered turn largely on the issue of when *services* are

²³ For example, one specific concept to be considered below—"free acceptance"—is the subject of a number of long and detailed articles.

²⁴ Birks, 131. Similarly, see Maddaugh & McCamus, 38: "the existence of a benefit is not likely, as a practical matter, to be a point of difficulty"; and Jones, G., in "The Law of Restitution: The Past and the Future", in Burrows, *Essays*, 3, considers the notion of benefit as the "least troublesome" of subordinate principles.

²⁵ Birks, in Burrows, *Essays*, 127, states under the heading of "Establishing the Enrichment", that "[t]his is as difficult as it is important."

²⁶ The use of the technical terminology and the complexity of much of the debate, it is suggested, is still a major barrier to the accessibility of the law of Restitution to the profession as a whole. The point is well made by Bryan, M., in a recent "Book Review" of Finn, P.D., *Essays on Restitution* (1990) in (1991) 18 M.U.L.R. 201:

[T]hose who regard restitution lawyers as a closed priesthood chanting repellent refrains of 'subjective devaluation' and 'interceptive subtraction' will have their prejudices reinforced rather than removed by some of the essays under review.

²⁷ Burrows, *supra* n. 20, 579. See also *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, 156.

enriching. This invites a consideration of the nature of services and their distinguishing features when compared with money.

§ 4.2.1.1 Concerning money and services

§ 4.2.1.1.1 Money

The receipt of money by a defendant is generally assumed to be enriching,²⁸ although, of course, subsequent events may result in the dissipation of that enrichment.²⁹ This assumption is not usually questioned and is based upon the character of money as a universal medium of exchange.³⁰ Clearly, money has an objectively verifiable value. In fact, it is the very measure of other valuables.³¹ Property, goods, services and less tangible advantages such as the enjoyment of life and freedom from pain and suffering³² are quantified in terms of their monetary value.

Although, as will be seen, one may argue that services have or have not been of "advantage" according to differing individual, subjective preferences, arguments seeking to deny the value of money in recipients' hands on the basis of those recipients' subjective conception of "value" are difficult to sustain.³³ There are probably few who value money in and of itself, but money can be used to satisfy many of the preferences and choices of its recipient. The receipt of money, *in that form*, does not constrain recipients in their freedom to spend or invest as they see fit.³⁴ This contrasts with the receipt of services, requiring

²⁸ To some extent, the term "enriched" does have connotations that may be inappropriate in some contexts in which money has been received. This arises from the constant association of enrichment with "at the expense of", and that phrase's negative moral connotation that someone has suffered a loss as a result. Thus, where money is given as a gift, it may not be usual to say that the recipient has been "enriched", for this may connote a judgment as to the circumstances of the payment—that the recipient is not somehow entitled to keep the money.

²⁹ Such dissipation may perhaps give rise to a defence of estoppel or change of position. See further, Chapter 9.

³⁰ Goff & Jones, 17.

³¹ Cf. Birks, 109.

³² A damages award in tort for negligence, for example, may include sums for the loss of enjoyment of life or for pain and suffering resulting from the negligent act.

³³ Cf. Maddaugh & McCamus, 38: The receipt of money "offers no scope for the subjective devaluation argument", as to which see § 4.2.2.1.

³⁴ Maddaugh & McCamus, 38. And if a recipient is perverse and has absolutely no use for money, then any sums received can in any case simply be returned. Importantly, ordering

payment for which obligates a defendant to allocate money in ways he or she may not have wished.

It is therefore uncontroversial to conclude that the receipt of money is of benefit to the recipient. Yet, whereas this seems rather trite, and unjust enrichment advocates point to the money cases as the strongest evidence for the existence of a principle against unjust enrichment (though, as will be seen, the status of unjust enrichment within money cases is also questionable),³⁵ it is important to stress that a transfer of money is also of detriment to the party who has divulged it. Further, this detriment generally equates with the defendant's gain.³⁶ Unjust enrichment theory presupposes this (for the benefit must have been gained by subtraction from the plaintiff),³⁷ but also assumes that restitution in money cases arises from the application of liability rules having a restitutionary *purpose*. Yet this need not necessarily be so, for the purpose of the liability rules could equally be loss compensation. As Hedley has noted:

A substantial number of Restitution cases are situations which could equally be described as the recovery of a loss suffered or of a benefit gained. Neither can be made out as a better description than the other, for they both describe the same thing from two different viewpoints.³⁸

Which description is appropriate depends ultimately upon the factors giving rise to the remedial right and these may vary considerably according to the

specific restitution of something need not follow from any perception that the recipient of that something money has been "enriched". This is an important point which will form the basis of the discussion of mistake in Chapter 9.

³⁵ See further, § 4.4.3.4, where it will be argued that money and service cases ought not be artificially separated merely on the basis of unjust enrichment. See also Chapter 9. It will be suggested that where services cannot be considered to be enriching, but recovery is nevertheless allowed, explanations other than unjust enrichment must be sought. As will be seen in Part II of this thesis, such explanations may successfully explain liability in both money and service cases.

³⁶ *B.P. Exploration v. Hunt (No.2)* [1979] 1 W.L.R. 783, 799, per Goff J. (as he then was).

³⁷ Where unjust enrichment is said to constitute the causative event giving rise to a restitutionary remedial response, the "at the expense of" component part will be satisfied if the benefit was gained by subtraction from the plaintiff. Consequently, loss and gain are often equal and this "plus-minus" (or zero sum) equation has been emphasised. Cf. Muir, *supra* n. 7, 303-4. Should the loss suffered by the plaintiff be less than the defendant's gain, then unjust enrichment theory argues that recovery will be limited to the loss suffered.

³⁸ See Hedley, S., "Unjust Enrichment as the Basis of Restitution: An Overworked Concept (1985) 5 Legal Studies 56, 61-2.

factual context within which a problem arises. We will return to this matter at various points.

§ 4.2.1.1.2 *Services*

Services raise greater difficulties for those seeking to incorporate the conferral of services within a conception of benefit. A "service" will be taken to include the expenditure of time, labour, skill, or materials, as well as the payment of money, other than the payment of money directly to the party from whom remedial relief is sought (that is, the defendant). Since in many cases the performance of work and the transfer of goods, especially in the form of materials, will inextricably be linked,³⁹ any reference in this thesis to services will include the incidental transfer of goods as part of the provision of the service.⁴⁰ Where goods alone are received by a defendant, they will not be considered to be a service, for unless they have been consumed or disposed of, such goods can be returned.⁴¹ This ability readily to return goods raises matters distinct from the receipt of services, which can never be "returned".⁴² Thus, "services" include improvements to land or goods; professional services; labour expended; tasks performed in employment; domestic chores; the payment to a third party of a defendant's debts (whereby the debt may potentially be discharged); or the performance of any obligation owed by a defendant to a third party. In short, any potential advantage to a defendant other than the personal receipt of money or goods (not incidental to a service), will be considered as services.

³⁹ For example, where work is performed on a building site.

⁴⁰ A distinction between the transfer of goods alone and the provision of services should be much easier to draw than the distinction in contract law between contracts for the sale of goods and contracts for the provision of services. The considerable body of contract law may, however, be of assistance.

⁴¹ Specific restitution of goods may be possible, either in a claim (1) in tort, in detinue or replevin, if property in the goods has not passed (Fridman, 419-21), or (2) in equity. See, e.g., *McKeown v. Cavalier Yachts Pty Ltd.* (1988) 13 N.S.W.L.R. 303. If the goods are specifically recoverable then the question of whether the goods are of benefit to a defendant would seem quite superfluous.

Land, although not necessarily of benefit to its recipient, can be returned specifically where title still resides in the recipient. Most Australian states have specific statutory provisions dealing with the rectification of an incorrect Registration of Title.

⁴² However, as will be seen in Chapter 9, the end-product of a service may well be goods capable of being "returned" to the party who performed the work which created the goods.

There are significant differences between the receipt of money by a defendant and the conferral of services upon a defendant. The first is that whereas a like amount of money can usually be repaid,⁴³ the same cannot be said of services, which, by their nature, cannot be restored.⁴⁴ Any claim must always be for recompense for the value of those services, that is, a money claim.

A second significant difference between money and services is that services are not necessarily of any advantage to a defendant. For example, although considerable work and expense may go into the redecoration of a house, (a) whether the end-result is perceived to be advantageous is a highly subjective matter of personal taste;⁴⁵ and (b) the end-result when measured by reference to its external market, may result in a loss rather than a gain.⁴⁶

A third significant difference between money and services is that even where it may be said that the receipt of services has been of some benefit, measuring that benefit in money terms may not be easy. The courts may have to choose between a number of valuing options: a market determination of the reasonable value of such services, including, perhaps, a profit element; the market value of the recipient's accretion in wealth; the value of any necessary expenditure saved by the recipient; or even the amount a recipient of the services was prepared to pay.

Because of these differences between money and services, it is the conferral of services which raises most sharply the issue of whether a defendant has been enriched. Not surprisingly then, it is with services that competing approaches to enrichment concern themselves.

Let us proceed then to outline the possible approaches which may be utilised to determine whether a particular service can be said to be enriching. Importantly, in a given fact situations, the operation of different approaches may lead to quite different conclusions as to whether a service is of benefit. Within each broad approach it is proposed to consider some of the specific tests adopted by commentators. Such tests will be consistent with the general thrust

⁴³ Subject to a defendant not being insolvent, for example.

⁴⁴ Cf. *B.P. Exploration v. Hunt (No. 2)* [1979] 1 W.L.R. 783, 799; Goff & Jones, 18.

⁴⁵ Cf. *Buccini v. Paterno Construction Co.*, 170 N.E. 910 (1930).

⁴⁶ The house may have a lower market value as a result of the service than it did before the work was done.

of the approach within which they are considered, though not necessarily on all fours with that approach.

§ 4.2.2 An Objective⁴⁷ Approach to Services as Benefit

One possible approach to enrichment is to treat any service conferred upon a defendant as enriching, provided such service is capable of being valued objectively by reference to a market.⁴⁸ The mere conferral of the service may be seen to involve a transfer of time, labour, skill and so on, and as such, beneficial to a defendant who has been saved the expense of the reasonable value of such services.⁴⁹ Of course, the service may not appear to be of particular benefit to the defendant, who may not have wanted the service performed and may not have been saved any necessary expenditure or received any wealth as a result. Nevertheless, once the service has been conferred and received by the defendant, he or she could be said to have been benefited by the amount of the expense saved. The requirement that services must have been received means that where a plaintiff has commenced services, such as writing a book,⁵⁰ no parts of which are ultimately conferred upon a defendant, then such services cannot be considered objectively beneficial. The defendant must have received at least some of the product—the parts of the book—before he or she can be said to have been objectively benefited.⁵¹ A

⁴⁷ The term “objective” can be used to describe two very different senses of benefit: (1) the objective or reasonable value of any service for which there is a market; and (2) the objective increase or net accretion in the value of given property if it were to be sold. For example, if a house is painted, we could objectively determine the reasonable value of such a service by reference to the market in house painting; or we could objectively measure the increase in market value of the painted house. See Dobbs, *Remedies* (1979) 261 (hereinafter: “Dobbs”). The term “objective” will be used here to describe the first sense of objective benefit. The expression the “receipt of wealth” will be used to include objective benefits in the second sense of “objective”. Cf. Beatson, 29, (also in [1987] C.L.P. 71, 75). Some writers use the expression “objective” benefit in both senses and this may create confusion. See, for example, Birks, who usually uses “objective” in the first sense, but in “Unjust Enrichment: A Reply to Mr. Hedley” (1985) 5 *Legal Studies* 67, at 74 appears to use it in both senses. See also Goff & Jones. Compare their use of “objective” at 20, with its use at 21.

⁴⁸ Given the diversity of choice available, even quite idiosyncratic services may have a market. Birks gives the example of fur-styling for poodles. See Birks, *ibid*, 74.

⁴⁹ The defendant can thus be said to have received a form of negative enrichment.

⁵⁰ Cf. *Planche v. Colburn* (1831) 8 Bing. 14, discussed § 4.3.2.

⁵¹ If a service has not been received, then unless there is some other applicable test which concludes such a service to be enriching, it cannot be considered to be an enrichment. There is no connection with the plaintiff’s service and the defendant. See Burrows, 8-9. For example, as Burrows points out, if a plaintiff makes a made-to-measure suit it is not objectively beneficial to the defendant unless he or she receives it. This seems correct. Burrows perceives Birks as arguing the contrary, that requested services may be beneficial once performance

plaintiff's purely self-inflicted losses could not be considered as objectively beneficial to a defendant, as no service will have been conferred.

Consistently with an objective approach to benefit, "pure" services, that is, services which do not leave any valuable end-product or save a necessary expense, would nonetheless be considered enriching.⁵² Examples of "pure" services are hair-styling or car-cleaning. Consequently, an objective approach is very broad: all services received and capable of being valued objectively are enriching.

§ 4.2.2.1 Countering an objective approach: "subjective devaluation"

As a generally applicable identifier of enrichment, most commentators reject an objective approach.⁵³ They consider such an approach too wide and over-inclusive. Although particular services may be valuable in the market, it is argued that "the law must be concerned with the issue of benefit in relation to the particular defendant."⁵⁴ Consistently with such a concern for a defendant's position, in the language of Birks, a recipient of services may raise an argument

commences. This appears to be part of Birks' subjective test, however—the performance, though not complete and not received by the defendant, must have been requested. There has thus been a "limited" acceptance of the partial performance by such a defendant. See in particular, Birks, in Burrows, *Essays*, 137-41. Burrows concludes that "[t]his seems an unrealistic and overinclusive notion of benefit" (9). Although this seems a fair comment, Birks reaches his contrary conclusion not by contradicting the view that services must be received to be "objectively" enriching, but via a subjective approach to benefit (to be considered further in § 4.2.4). Although Burrows also adopts a subjective test (which he labels "bargained-for" benefit test) he takes the view that the operation of such a subjective test is dependent upon the enrichment first being "objectively" valuable: see particularly at 15. This does not appear to be the view of Birks. See also Goff & Jones, 21, whose conclusion may be consistent with Birks:

The concept of benefit is consequently extended to embrace services which have been requested but which have not been rendered. In our view, a defendant should be deemed to have received a benefit only if he has received an objective benefit, in the sense that he cannot deny that he has made a realisable gain or has been saved an expense.

With respect, however, the above statement is quite confusing to this writer.

⁵² Contrast Beatson, Chp. 2, who argues that "pure" services can never be enriching. Beatson considers this to be the case even where a subjective test might establish an enrichment. Beatson appears to favour a "receipt of wealth" approach considered in § 4.2.3.

⁵³ Although some commentators accept that in some cases such an approach may be appropriate. Birks, for one, considers that cases exist which are only explicable on an "objective" identification of benefit, satisfied merely by the performance of the services (124-8).

⁵⁴ Burrows, 9.

from "subjective devaluation". Birks considers that benefits in kind (services and goods)

are less unequivocally enriching [than money] because they are susceptible to an argument which for convenience can be called 'subjective devaluation'. It is an argument based on the premiss that benefits in kind have value to a particular individual only so far as he chooses to give them value. What matters is his choice. The fact that there is a market in the good which is in question, or in other words that other people habitually choose to have it and thus create a demand, is irrelevant to the case of any one particular individual.⁵⁵

Birks argues that, in deference to a defendant's freedom of choice, the courts have developed two tests of enrichment—"incontrovertible benefit"⁵⁶ and "free acceptance"⁵⁷—which are "compatible with the basic acceptance of subjective devaluation."⁵⁸ These tests will be considered below as part of two broader approaches—labelled the "receipt of wealth" and "subjective" approaches—which counter an objective approach to services as benefit. The broad thrust of both these approaches is widely accepted by commentators. On many theories, if either one of the two approaches is satisfied, then a defendant can be said to have been enriched.⁵⁹ But the details of individual *tests*

⁵⁵ Birks, 109.

⁵⁶ Which test, according to Birks, 116, moderates the "greater absurdities of a subjective approach" and thus, when satisfied, overrides a purely subjective determination.

⁵⁷ This is an essentially subjective approach. Garner, for one, does not consider it subjective enough. See *infra* nn. 87-103, and text thereto.

⁵⁸ Birks, 124. But as will be seen, as formulated, the "incontrovertible benefit" test to some extent "trumps" subjective devaluation. Birks' third "test" of enrichment consists of miscellaneous cases that he cannot explain on the basis of these two tests.

⁵⁹ Most commentators conclude that both types of test are applicable. Where the subjective test is not met, then a defendant will nonetheless have been enriched if there has been a receipt of wealth, usually in the form of an incontrovertible benefit. And if conversely, no incontrovertible benefit exists, then the defendant will nonetheless have been enriched if there has been some subjective benefit. See, e.g., Palmer, Vol. I, 45, who considers that the two most important meanings of benefit are

[F]irst, that there has been an addition to the defendant's wealth or an increase in his estate; and second, that a performance requested by the defendant has been rendered.

Surprisingly, Palmer does not further elaborate on these meanings, but it would appear that the first corresponds with a receipt of wealth approach emphasising net accretion in wealth, and the latter with a subjective approach, particularly Burrows' bargained-for test of benefit considered below.

Beatson, however, rejects the view that a defendant can have been benefited if there is no receipt of wealth, in the form of a net increase in the value of property or saving of a necessary

considered within each broad approach vary greatly. Indeed, there is much debate as to the exact scope of these tests. The differences will become evident when each broad approach is considered.

§ 4.2.3 A "Receipt of Wealth" Approach to Services as Benefit

A defendant may be said to have been enriched where he or she has received some "wealth" by virtue of the conferral of services, either (1) in the form of a net accretion in the value of the defendant's property (a "positive" enrichment), or (2) by being saved a "necessary" expense which would otherwise have been incurred by the defendant (a "negative" enrichment).⁶⁰ A net accretion in value can be said to arise where the services have left some marketable residuum;⁶¹ that is, the provision of services has resulted either in some new end-product which can be converted into money or in an increase in the market value of existing property.⁶² A necessary expense may have been saved where, for example, a plaintiff pays an existing debt owed by the defendant.⁶³

expense. In other words, according to Beatson, "pure" services are never considered enriching. Similarly, Muir, *supra* n. 7, 303, considers that enrichment is limited to "positive transfers of wealth". This would appear to exclude a subjective approach as giving rise to enrichment, but is consistent with the receipt of wealth approach.

⁶⁰ The use of the term "wealth" is not therefore intended simply to include any interests capable of being given a monetary value. Contrast, however, Birks' use of the term: see Birks, 13, for example. Instead, wealth is used in the very specific way it has been defined here, in order that this approach coincide with the burden of the tests of enrichment encompassed within it.

⁶¹ Cf. Beatson, 23, also at [1987] C.L.P. at 72. According to Beatson, services which do not result in such a marketable residuum cannot be considered to have resulted in a benefit. Beatson, 32, also at [1987] C.L.P. 76, cites Alfred Marshall, *Principles of Political Economy* (8th ed., 1947), 56: "services and other goods, which pass out of existence in the same instant that they come into it, are of course, not part of the stock of wealth."

⁶² In the words of Beatson, something which has "exchange-value" has been created. See Chp. 2.

⁶³ Which debt presumably was discharged by the payment. If the debt was not discharged, then arguably the defendant has not been saved any expense at all. The question of when a debt is discharged and thus enriching where paid by a party other than the debtor causes considerable difficulty to unjust enrichment theorists and is the subject of much controversy. See, e.g., Goff & Jones, citations at 17, fn. 2. In this writer's view, the debate is an arid one. By focusing on whether or not a debt has been discharged one fails to address directly what, with respect, is the crux of the matter, namely, in which circumstances is it appropriate that a defendant should reimburse the plaintiff. This will depend largely on the reasons for the payment of the debt. See § 9.2.3.3. The issue of reimbursement for payment of another's debt will be addressed in individual areas throughout Part II of this thesis, rather than as a single

Both a net accretion in the value of property and any saving of necessary expense must be determined objectively, so that resort needs to be had either to the market or the reasonable person.⁶⁴

This is only a very general outline of the burden of a number of more specific tests. Generally, these specific tests are narrower in their operation than the receipt of wealth approach, though still consistent with its broad thrust.

One test, that of "incontrovertible" benefit, has been widely advocated, though only recently and very exceptionally has such language been adopted by the courts.⁶⁵ There are, however, different views as to what precisely constitutes an incontrovertible benefit and the concept is consequently not easy to grasp.⁶⁶

Characteristically, there are perceived to be two distinct ways in which incontrovertible benefit can be established. The first, of which there are three different formulations, is if there has been some positive accretion in wealth which (1) has been realised in money⁶⁷ (for example, by the sale of an improved asset by its owner),⁶⁸ (2) is "readily realisable" in money,⁶⁹ or (3) is

topic.

⁶⁴ When explaining his "incontrovertible" benefit test, considered below, Birks, 124, states that it will be satisfied whenever "no reasonable man would say that the defendant was not enriched".

⁶⁵ See *Monks v. Poynice Pty Ltd* (1987) 8 N.S.W.L.R. 662; *Proctor & Gamble Philippine Manufacturing Corp. v. Peter Cremner GmbH* [1988] 3 All E.R. 843; *Cadorange Pty Ltd (In Liq) v. Tanga Holdings Pty Ltd* (1990) 20 N.S.W.L.R. 26, 35. In *McKeown v. Cavalier Yachts Pty Ltd* (1988) 13 N.S.W.L.R. 303, Young J. concluded that the owner of a boat's hull to which substantive improvements had been made, had been "incontrovertibly benefited" by those improvements. Young J. adopted the tests of enrichment of Birks, but appears to have gone further than Birks himself does. Birks argues that only a realised net gain in the value of property amounts to an incontrovertible benefit, but in *McKeown's Case*, the yacht had not been sold. Young J. proceeded to order an inquiry into the "increased value of the yacht ... rather than the cost of providing such work" (at 314). His Honour therefore adopted a test of incontrovertible benefit as being satisfied by the yacht owner's net accretion in wealth. See also the discussion of incontrovertible benefit in *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, 158-61.

⁶⁶ Contra, Burrows, 9. See the long and detailed analysis of incontrovertible benefit by McInnes, supra n. 20, which, with respect, merely bears out the complexities. And the differences in approach are often merely postulated as normative assertion rather than on any conceptual basis. See, e.g., McInnes, 346-7, and his list of propositions.

⁶⁷ Birks, 121-4. Cf. Burrows, 10-1, and Burrows, supra n. 20, 579, and note the modification he makes to Birks' "realised" test. See infra n. 71.

⁶⁸ Birks considers that *Greenwood v. Bennett* [1973] 1 Q.B. 195 may indirectly support

simply realisable in money.⁷⁰ The differences in these formulations are not merely linguistic: they lead to potentially different conclusions when applied to given facts.⁷¹ For example, if the accretion in wealth needs to have been realised, then whether a defendant has sold an asset at the date of trial becomes crucial in determining whether or not that defendant has received an incontrovertible benefit.⁷² This is not so with the other two formulations, but these have their own difficulties. For example, one must determine, seemingly arbitrarily, when a market increase in value is "readily" realisable or just realisable, since it is clear from the views of the commentators that not all increases in wealth are "realisable".⁷³ In other words, under all these

such an approach, but he has doubts and alternatively suggests that the case may simply have utilised an objective measure (121-5).

⁶⁹ Goff & Jones, 178. Contrast at 23 (merely "realisable"), and compare also in their third edition, at 19, that the benefit be "immediate and realisable".

⁷⁰ Maddaugh & McCamus, 42-4, consider that it is "perhaps" sufficient if the benefit is "realisable" in money. Accordingly, improvements made to a car, for example, would be enriching to the extent that such improvements increased the market value of the car. They cite *Greenwood v. Bennett* [1973] 1 Q.B. 195, and argue that the owner of the car had been enriched regardless of whether he had sold the car at the time or not. The authors qualify this "realisable" gain test, however, so that recovery will not be allowed in circumstances where "it would impose a hardship on a particular defendant to, in effect, force a sale" (44). As a general limitation on whether a defendant should be ordered to pay the increased value, this is understandable, but as a proviso forming part of a test of *enrichment*, it does seem a little curious.

⁷¹ According to Goff & Jones, 23, for example, an improvement to land increasing its value would not qualify as an incontrovertible benefit, as such a benefit would not readily be realisable, or even "realisable". To be sure, owners of land mistakenly improved by another are generally not required to pay for the increase in the value, but it seems odd to describe this phenomena by suggesting that the gains are not realisable. Contrast Maddaugh & McCamus, 44, who would appear to go further than Goff and Jones in accepting that *prima facie*, an improvement to land may be an incontrovertible benefit being a realisable increase in value. Cf. Burrows, 10-1, who considers that some improvements to land may readily be realisable, depending on the circumstances of the individual defendant in question. But even where an increase in value is readily realisable, Burrows considers that a defendant need not have been benefited. This leads Burrows to accept Birks' "realised" test, but he adds "that the defendant will also be regarded as incontrovertibly benefited where the court regards it as reasonably certain that he will realise the positive benefit" (10). This modification overcomes one of the difficulties with the unmodified "realised" test, namely that the date of the trial is crucial in determining whether the defendant has been enriched.

⁷² This is so unless one accepts Burrows' modification of the realised test, *ibid*.

⁷³ See *supra* n. 71. In some jurisdictions in the United States, it is suggested that any net increase in the value of land as a result of the services performed, say, by a mistaken improver, are enriching. See Palmer, §10.9 (e). This does not mean, however, that such an enrichment need be recoverable in all circumstances. Other limitations may be imposed where, for example, allowing recovery could cause hardship to a defendant.

formulations, the mere receipt of wealth is not sufficient.

Underlying such different formulations, it is suggested, are different views as to when a defendant should pay for services resulting in an increase in the value of property, where the defendant has not subjectively valued the services. But such differences of opinion, then, as will be seen, seem to flow from differing views of how competing interests should be balanced,⁷⁴ rather than from different perceptions as to what amounts to an enrichment.

The second way of establishing incontrovertible benefit is where the plaintiff has anticipated, either legally⁷⁵ or factually,⁷⁶ necessary expenditure of the defendant. Although this test has not given rise to any significant differences of opinion amongst unjust enrichment theorists, it seems equally as unsatisfactory as the first. A legally necessary expenditure may well readily be identifiable,⁷⁷ but when can an expenditure be said to have been factually necessary?⁷⁸ Answering this question would seem to depend largely on differing individual interpretations. Of itself, this may not be problematic. The law often turns on subjective notions or even malleable notions such as the "reasonableness" of conduct. But if a test of enrichment is formulated thus, it appears to be functioning as a test of liability, whereby we determine whether a defendant *should* pay for services conferred, irrespective of whether we consider such a defendant thereby to have been enriched. This will be returned to below.

Apart from differences as to the exact content of incontrovertible benefit, other commentators reject such a test, or consider it too broad. Fridman, for

⁷⁴ This will be seen in Chapter 9.

⁷⁵ An example is said to be payment of the defendant's debts. Birks, 117-8, cites *Exall v. Partridge* (1799) 8 T.R. 308, in which a plaintiff compulsorily discharged the defendant's debt.

⁷⁶ An example is said to be the performance of a company's director's duties. Birks, 117-9, cites *Craven-Ellis v. Canons Ltd* [1936] 2 K.B. 403, a better explanation of which will be given in Chapter 6. Neither *Craven*, nor *Exall v. Partridge* (1799) 8 T.R. 308, mention a concept of incontrovertible benefit.

⁷⁷ There is, however, also an element of question-begging about such a test, as demonstrated by the issue of whether a debt anticipated by the plaintiff's payment is a legally necessary expenditure. For example, just because the plaintiff has paid a defendant's creditor and thereby, seemingly, saved the defendant a legally necessary expense, does not determine the issue. Whether the defendant has been saved such an expense appears to turn on whether or not the debt was discharged by the payment.

⁷⁸ See discussion, § 4.3.4, as to whether an unsolicited service performed in an emergency can be said to have saved a necessary expense of the defendant.

example, considers that incontrovertible benefit is "very questionable, both as to its scope and meaning and as to its acceptance as an explanation of liability."⁷⁹ Another Canadian writer, Klippert, rejects incontrovertible benefit as a test of enrichment and postulates his own "irrebuttable" benefit test.⁸⁰ Irrebuttable benefit is limited in scope, encompassing only payments by a plaintiff which discharge a statutory obligation of the defendant. In the case of Klippert and others,⁸¹ the rejection of incontrovertible benefit appears to follow from a strong commitment to a "subjective" approach to enrichment, which approach invites further consideration.

§ 4.2.4 A Subjective Approach to Services as Benefit

The burden of a subjective approach to services as benefit is that it is necessary to identify some conduct of a defendant which can be interpreted (albeit objectively) as an acknowledgment by that defendant that the services are regarded as of value. Characteristically, this will be shown by a request for the services, or perhaps and more controversially within the unjust enrichment camp itself, by some form of acceptance of or acquiescence in the plaintiff's conduct by the defendant. A number of tests have been propounded the rationales of which are based on a subjective determination of benefit. Once one of these tests has been satisfied—they vary considerably in detail—a defendant is precluded from resorting to an argument of "subjective devaluation".⁸²

Importantly, under a subjective approach, services which do not result in any receipt of wealth (that is, "pure" services) could nonetheless be enriching. As Garner points out, a "subjectively determined benefit does not require an end-product."⁸³ Poodle-styling (an example given by Birks) does have a market because some people choose such services: where solicited, the

⁷⁹ Fridman, 32. The case usually cited as authority for such a concept, *Craven Ellis v. Canons Ltd* [1936] 2 KB 403, can probably best be explained on other grounds, which will be considered in Chapter 6.

⁸⁰ Klippert, 55. See McInnes, *supra* n. 20, for a summary of the views of Klippert and other commentators.

⁸¹ E.g., Garner, *supra* n. 3.

⁸² Cf. Birks, 114-5; Goff & Jones, 18-20.

⁸³ Garner, *supra* n. 3, 53, has called this the "subjective revaluation" of otherwise valueless services. See also 62-3. Jones, G., "Restitutionary Claims for Services Rendered" (1977) 93 L.Q.R. 273, 275, says of freely accepted service: "Because this was [the defendant's] own unhampered choice, it is irrelevant to inquire whether or not he has obtained any real benefit such as a net increase in his assets, from their receipt."

request indicates a preference for the services and supports the conclusion that the requesting recipient has been subjectively enriched.⁸⁴ Conversely, the mere fact that a defendant has received some wealth does not mean that he or she has been subjectively enriched thereby. Consider, for example, unrequested, value-enhancing improvements to a defendant's land which a defendant does not consider of value.

It is necessary to canvass a number of the specific subjective tests which have been proposed. Birks and Goff and Jones, though they differ in some details, consider that an enrichment may be established according to a concept of "free acceptance". In the language of Birks, free acceptance "occurs where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept."⁸⁵ Thus, if receivers of services have requested them, they cannot deny that such services are of value to them. Further, a party who merely acquiesces in another's performance of services cannot subsequently turn around and resort to a subjective devaluation argument. Birks gives the example of a window cleaner who cleans X's windows in the hope of payment. X stands by, watching the window cleaner proceed. According to Birks, X cannot deny the value of the services if X has reason to believe that the cleaner would desist in his work if he knew that X did not intend to pay.⁸⁶

The concept of free acceptance has led to considerable academic interest and has been much criticised. One line of criticism concurs with a subjective approach, but places a greater emphasis on a defendant's freedom of choice.⁸⁷

⁸⁴ A reasonable value of the services could be determined, even though there was no net accretion in wealth or saving of a necessary expense.

⁸⁵ Birks, 265. See also 104, 114-6. Birks considers that free acceptance also goes to the question of "unjustness" and is therefore a ground for Restitution. According to Birks, a defendant who freely accepts services cannot deny responsibility for paying for such services (104). Free acceptance then, establishes both the enrichment of the defendant and that the defendant has been *unjustly* enriched. Cf. Goff & Jones, 18-9. But if conduct which amounts to free acceptance grounds a claim in Restitution, one may ask why it is necessary to go further and say that it also establishes an enrichment. In many cases, as we shall see, a plaintiff's *detrimental* reliance on a defendant's conduct which might be described as free acceptance will be sufficient to justify recovery, even where there is no corresponding benefit to the defendant on any test of enrichment other than free acceptance.

⁸⁶ The example appears in Birks, 265. Note the modification to the example made by Birks, in Burrows, *Essays*, 115, 121-2, where, however, Birks is considering the issue of free acceptance as an "unjust" factor. See also 127-32.

⁸⁷ See Burrows, *supra* n. 20; Garner, *supra* n. 3; Mead, *supra* n. 20.

Burrows, for example, offers detailed arguments as to why a test of free acceptance ought to be rejected as a determinant of enrichment.⁸⁸ The gravamen of these arguments is that a freely accepting receiver is just as likely as not to be indifferent to the performance of the service: mere acquiescence does not of itself establish that the receivers of the services regard themselves as benefited thereby.⁸⁹ Consequently, it is argued, requiring a defendant to pay for merely freely accepted services does not adequately protect the defendant's freedom of choice. In a similar vein is Garner, who considers that a subjective benefit can only be said to exist where a "defendant has manifested a willingness to pay for that benefit *as a present priority*."⁹⁰ The critics of free acceptance would not consider that X, in Birks' window cleaner example, has been enriched. Although such critics accept a subjective approach, the burden of their criticisms is that a free acceptance test is not subjective enough.⁹¹

Birks, in a reply to these criticisms, maintains that whilst free acceptance does not establish that a recipient of services values them at a particular sum, it nevertheless does prevent that recipient from resorting to an argument based on the "subjectivity of value."⁹² Birks, in other words, stresses the "unconscientious" conduct of a defendant appealing to a subjective devaluation argument.⁹³ Such unconscientiousness also justifies, according to Birks, valuing the services at the reasonable market rate.⁹⁴ This focus on the unconscionability of the defendant's conduct⁹⁵ may explain why he or she

⁸⁸ Burrows, 11-4, rejects free acceptance as having any role to play in Restitution, even as an "unjust factor".

⁸⁹ Burrows, *supra* n. 20. Garner calls this the "indifference" argument, *supra* n. 3, 50. Mead, *supra* n. 20, points out the difficulties inherent in answering the question of whether the defendant had an "opportunity to reject": what does this mean and what sort of test should be applied to determine the issue?

⁹⁰ Garner, *supra* n. 3, 65 (emphasis added). Would the defendant's active encouragement of the plaintiff's action, as opposed to mere acquiescence, meet this test? See also Mathews, P., "Freedom, Unrequested Improvements, and Lord Denning" (1981) 40 C.L.J. 340.

⁹¹ It must be noted, though, that the respective position of the critics varies as well. Burrows, 13, for example, has said that "Garner goes too far to the other extreme: that is, he advocates too subjective an approach".

⁹² Birks, in Burrows, *Essays*, 128-9.

⁹³ *Id.*

⁹⁴ *Ibid.*, 129-30.

⁹⁵ Consequently, "unconscionability bear[s] on the enrichment enquiry": Garner,

ought to pay the reasonable price of the services, but it seems unconvincing to suggest that this is because it establishes the existence and value of the defendant's enrichment. The defendant may well have accepted the service expecting to pay considerably less than the market rate.⁹⁶ Birks tries to counter this difficulty by arguing that

[a]utomatic market valuation of the freely accepted benefit is qualified to the extent that the free acceptance itself is qualified. For example, where a defendant accepted in the belief that the thing with a market value of £20 was being offered at £10, the valuation cannot exceed £10.⁹⁷

One difficulty with this response becomes immediately apparent. How does one determine the "belief" of the recipient in circumstances other than where the work was requested for a fixed sum?⁹⁸ The courts for the most part do not concern themselves with such matters and impose a reasonable market valuation of the services—see *quantum meruit* claims discussed below—and Birks, subject to the above proviso, would approve of this.

One of the difficulties with free acceptance, as with any subjective approach, is that the focus on the defendant's conduct may well isolate factors which determine when a defendant should pay for services, irrespective of whether he or she has been *benefited* thereby. This will be demonstrated below in two contexts: "precontractual" liability and proprietary estoppel. But for now, it suffices to say that acquiescence in another's detrimental conduct may, in equity or quasi-contract, give rise to an obligation to compensate a plaintiff

supra n. 3, 52.

⁹⁶ Burrows, supra n. 20, 580, fn.18, briefly alludes to this point. Alternatively, the defendant may only value the services to the extent that they are freely provided, or to the extent that they enhance the defendant's wealth, say, by leaving a marketable residuum. To insist, then, upon a reasonable market valuation of the services would appear to contradict the very subjectivity which is said to justify a finding of enrichment in the first place.

⁹⁷ Birks, in Burrows, *Essays*, 129.

⁹⁸ A related criticism of Hedley, supra n. 38, 63, has much force. Work decreasing the value of a house clearly does not enhance a defendant's wealth, yet subjectively, according to Birks and those advocating a similar view, it could be enriching, if the owner thinks it is. Hedley states:

With the greatest respect to all concerned, this is nonsense. An enquiry into the owner's view of what constitutes a 'benefit' is neither practicable nor relevant. Can it be seriously suggested that it would make a difference if the owner's taste changed while the work was in progress, so that by the time it was complete he too was of the opinion that it did not constitute a benefit?

for losses incurred in the form of services performed but never conferred upon the defendant, and which consequently cannot be said to be even subjectively enriching. A plaintiff who changes his or her position on the basis of certain conduct of the defendant may have legal recourse against such a defendant. Liability in such cases appears little different to those circumstances in which a defendant has acquiesced in the conferral of services and for which that defendant is required to pay a reasonable value.⁹⁹ The point is highlighted by Birks' resort to the language of "unconscientiousness". His emphasis upon the probity of a defendant's conduct begins to mirror quite markedly the emphasis of equitable doctrines clearly and indisputably concerned with remedying detrimental reliance.¹⁰⁰

Given the criticisms to which free acceptance has been subjected, alternative tests have been proposed. To take one example, Burrows suggests a "bargained-for" test of benefit. Burrows considers that:

[a] defendant can be regarded as negatively benefited where the plaintiff performs what the defendant bargained for. The reasoning behind this is that where the defendant has 'promised' to pay for a particular performance the outward appearance is that he regards that performance as beneficial, or, put in an alternative way, that he has been saved expense that he would otherwise have been willing to incur.¹⁰¹

According to Burrows, it follows that defendants will in general¹⁰² have benefited even where they have received only part of what was bargained for.¹⁰³

⁹⁹ In other words, such liability appears to be independent of any need to show that the defendant has been "enriched" by the services. Certainly, the defendant need not have received any wealth.

¹⁰⁰ Equitable doctrines such as estoppel, at least in Australian law. See *Commonwealth v. Verwayen* (1990) 95 A.L.R. 321. Burrows, 13, considers that Birks

tends to merge the 'injustice' and 'enrichment' sides of free acceptance with both ultimately resting on the same supposed injustice—the unconscientiousness—of the free acceptor's conduct.

¹⁰¹ Burrows, 14.

¹⁰² This is a rebuttable presumption. Burrows, 14, considers that defendants who have received part of what they have bargained for will consider themselves benefited by "each part of that performance" even if the defendants had agreed to pay only on completion. The presumption is rebuttable: for example, where the cost of completion would be as much again as the agreed total price.

¹⁰³ Contra Garner, *supra* n. 3, 53.

In summary, a number of subjective tests have been variously formulated. They all share a common concern with a defendant's entitlement to subjectively attribute value to services according to his or her own preferences. But in the absence of any widely accepted formulation it is proposed when considering the application of a subjective approach to adopt the broadest view giving the greatest possible scope to enrichment. This will preclude any argument by unjust enrichment theorists that any identified failings in enrichment analysis are the result of a too-restrictive approach to enrichment having been adopted.

§ 4.2.5 Exemplifying the Different Approaches

There is a range of views amongst commentators as to how the above approaches interact to provide the most accurate picture of liability in Restitution. For example, Birks argues that for the most part, a plaintiff can rely on either free acceptance (within the subjective approach) or incontrovertible benefit (within a receipt of wealth approach) to establish enrichment. Birks considers that an objective approach to benefit has generally been rejected as part of English law.¹⁰⁴ Beatson, by way of contrast, rejects free acceptance as a test of enrichment¹⁰⁵ and considers that services can only be of benefit where they are also incontrovertibly beneficial.¹⁰⁶ Such differences of opinion are critical to the operation of unjust enrichment, for when applied to any one fact situation, varied approaches to enrichment can lead to dramatically different determinations, both as to the existence of an enrichment and, once identified, the value of that enrichment.

To take a simple example, let us say that P expends \$400 to have repairs made to a car which P mistakenly believes to be his, but which in fact belongs to D. Let us say that the money spent was necessary to preserve the car in a workable state of repair. The value of the vehicle before the expenditure was \$1000, and afterwards, \$1200. D was unaware of P's actions and has since reclaimed the car, which she still owns. Has D been enriched and if so, to what

¹⁰⁴ Birks, 110-14.

¹⁰⁵ Beatson does not reject free acceptance as a factor establishing the unjustness of an enrichment otherwise established. Beatson, 38.

¹⁰⁶ That is, the services result in a receipt of wealth to the defendant or in Beatson's own language, produce exchange-value. Beatson includes increases in "human capital" (such as a newly learned skill) as producing exchange-value. See Beatson, Chp. 2.

extent? Under an objective approach, services have been conferred upon D,¹⁰⁷ which services can objectively be valued at \$400. Under a receipt of wealth approach, there has been an accretion in D's wealth of \$200 or alternatively, and arguably,¹⁰⁸ D has been saved a necessary expense of \$400. Finally, on a subjective approach, D has not been enriched—there is no conduct to show D personally values the services. In summary:

Objective value of services conferred:	\$400.
Receipt of wealth: ¹⁰⁹	\$200 or \$400.
Subjective enrichment:	\$0.

These different results merely follow from the application of the broad approaches to enrichment. The intricacies of specific tests within each broad approach have been avoided. For instance, under the receipt of wealth approach, whether D has been incontrovertibly benefited by the accretion in her wealth depends upon whether the accretion needs to have been realised (D not enriched) or whether it need merely be realisable (D enriched by \$200). All these possibilities arise in what is a simple example. The example would raise far more difficult issues if D was aware of P's mistaken conduct, but did not alert P to the mistake; or further, if the work had only been partially completed.¹¹⁰

The complexities which can result from the application of different tests of enrichment will be highlighted below, when we consider a number of topics in Restitution. If liability has been imposed in cases purportedly explicable in unjust enrichment terms, then an enrichment must exist, identifiable on at least one of the different approaches. Where necessary, specific tests, within an approach will also be considered. If liability rules operate irrespective of any enrichment, then their concern cannot be said to be the reversal of unjust benefits. This also follows even if an enrichment is identifiable, but the remedy granted is other than restitutionary. When applying the different approaches to enrichment, the most liberal test within each approach will be adopted, so as to

¹⁰⁷ The value of D's property has been affected by P's services.

¹⁰⁸ The issue depends upon whether one concludes that keeping a car in working order is a factually necessary expense.

¹⁰⁹ One could label \$200 as D's positive enrichment and \$400 as D's negative enrichment.

¹¹⁰ These modifications would bring into focus the difference of opinion over the different subjective tests.

give enrichment the maximum possible reach. Nevertheless, despite such a concession, it will be seen that many liability rules said to be unjust enrichment-based are not readily explicable in terms of the reversal of enrichment.

The areas of law which have been selected to test the operation of the different approaches to enrichment reflect the diversity of Restitution. It is proposed to consider:

(1) and (2) Two areas in which resort has traditionally, though not exclusively, been made to quasi-contractual liability rules: incomplete contracts and "defective" contracts.¹¹¹ For convenience, a different type of case problematic for enrichment analysis will be dealt with in each area, though each type of problem case occur in both areas.

(3) An equitable doctrine now said to be explicable in unjust enrichment terms: contribution.

(4) An area consisting of miscellaneous doctrines utilised to facilitate recovery for unsolicited services, but which doctrines are now said to be united by unjust enrichment: necessitous intervention.

(5) An area in which recently, resort has been made to unjust enrichment by some courts to resolve a growing problem: property disputes arising on the breakdown of de facto marriage relationships.

Each of these areas will raise quite distinct problems for any analysis in terms of the reversal of enrichment.

§ 4.3 THE OPERATION OF DIFFERENT APPROACHES TO ENRICHMENT IN SPECIFIC CONTEXTS

§ 4.3.1 Incomplete Contracts: Precontractual Liability

An issue as to the potential liability of a defendant may arise where a plaintiff acts detrimentally by expending time, skill, money, materials and the like, in anticipation of a contractual relationship with a defendant which never

¹¹¹ In Chapter 6, a detailed consideration will be given to the difference between incomplete and "defective" contracts. It suffices to say for now that they raise quite distinct problems for the law, though there are also considerable similarities between cases of either type.

eventuates.¹¹² For example, P performs preliminary planning work at D's request, under the expectation (created by D's conduct) that P will obtain a large and profitable building contract. P does not expect to be paid independently, given the prospects of the lucrative contract. But subsequently, when P is not granted D's contract, P may resort, amongst other claims, to *quantum meruit* in order to recover at least the costs incurred in the performance of any service.¹¹³

Precontractual liability is said to be a manifestation of unjust enrichment with relief aimed at the reversal of the defendant's enrichment.¹¹⁴ Can it be said, however, that precontractual liability is dependent upon a finding of enrichment? Certainly, in many cases, a gain will be identifiable on at least one of the approaches to benefit, but this is not true of all cases. A plaintiff may have relied upon the expectation of a future contract to rearrange his or her affairs detrimentally: incurring "costs" in time and money, or by changing his or her position or circumstances. For example, the plaintiff may have made alterations to his or her property in expectation of the future contract.¹¹⁵ Despite the absence of any seemingly beneficial outcome for a defendant as a

¹¹² That is, no enforceable contract is held to have arisen. Whether an enforceable contract exists or not is a determination of contract law. In many cases, it is merely a technical failing which precludes a finding of a contract. In Chapter 6 it will be argued that liability in cases of precontractual obligations is contract-like. That is, such obligations arise from circumstances which share with contractual liability all or most of the substantive (i.e. non-technical) features which distinguish contractual obligations from other obligations. For some reason, however, the rules of contract do not allow a conclusion that there is a final contract, and quasi-contractual and equitable remedies have been resorted to in order to fill the gaps which would otherwise arise.

¹¹³ Commonly cited examples are *William Lacey (Hounslow) Ltd v. Davis* [1957] 2 All E.R. 712 and *Sabemo Pty Ltd v. North Sydney Municipal Council* [1977] 2 N.S.W.L.R. 880. As will be seen in § 4.4.1, there are a number of possible measures of *quantum meruit* relief, including recovery for any costs incurred, or alternatively, the "reasonable value" of any services rendered. At times, the practical consequence of a *quantum meruit* award may also result in a plaintiff's actual (i.e. contractual) expectations being met.

¹¹⁴ See, e.g., Burrows, 293, et seq., Goff & Jones, Chp. 25, and Maddaugh & McCamus, Chp. 21, who all deal with the topic in this way.

¹¹⁵ E.g., *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 Q.B. 428.

result of such work, recovery may ensue, for at least the losses incurred,¹¹⁶ even in quasi-contract (or Restitution).¹¹⁷ No services will have been conferred upon the defendant, so that neither an objective benefit, nor a receipt of wealth can be identified. At times, the plaintiffs may have acted in response to a request, which raises the possibility of a subjective benefit,¹¹⁸ but even this need not have been the case. There are examples of recovery for precontractual work which was not requested or freely accepted by the defendant, but merely carried out in detrimental reliance upon the expectation of the future contract. This is best evidenced by two types of cases: (1) those in which the plaintiff incurs expenses in preparation to performing the contract: such work will rarely have been requested by the defendant, at best only "encouraged or approved", and at other times, the performance of the work will only have

¹¹⁶ Recovery has at times been granted by resort to estoppel, with the effect of the remedy being either to compensate the plaintiff for reliance losses suffered, or even to make good the plaintiff's expectations. See, e.g., *Waltons Stores v. Maher* (1987) 76 A.L.R. 513 and *Crabb v. Arun D.C.* [1975] 3 All E.R. 865. It will be argued in Chapter 6 that often, resort has been made to the different doctrines in order to grant relief to a plaintiff who has performed services or incurred expenses precontractually. But this ought not obscure the uniting features of all cases of precontractual liability. See also further, § 4.4.3.3.

¹¹⁷ E.g., *Brewer v. Chrysler Canada* [1977] 3 W.W.R. 69 and *MacIver v. American Motors* (1976) 70 D.L.R. (3d) 473, though in *Brewer*, the court referred to "an award by way of unjust enrichment or quantum meruit." For a discussion of these and similar cases, see Cauchi, G.F., "The Protection of the Reliance Interest and Anticipated Contracts Which Fail to Materialize" (1981) 19 U.W.O.L.R. 237.

¹¹⁸ The issue of whether such requested but unconferrred services are enriching more commonly occurs in the context of contracts which are not enforceable, and will be discussed there. An example in the precontractual context is *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 Q.B. 428, in which preliminary work was performed by the plaintiffs on their own property. The work had been requested, but none of the results of work were ever conferred upon the defendant. Hence, no objective valuation of any benefit was possible and Burrows, 297-8, for example, considers that any benefit would be difficult to establish in that case. Contrast Birks, 283-4, who would consider that the defendant was enriched in that case, but with respect, his discussion is unconvincing and confusing to this writer. And see also the discussion of Goff & Jones, 555-63, particularly of *William Lacey (Hounslow) Ltd v. Davis* [1957] 1 W.L.R. 932. In relation to *Brewer St.*, they conclude at 562, fn. 49, that the defendant "had gained little real benefit from what the plaintiff had done." This conclusion is surprising, given that earlier, Goff and Jones take the view that where services are requested but "not rendered" they are nonetheless beneficial (see 21). In *Brewer St.*, the work had been requested. On the widest possible conception of subjective benefit, the defendant could be said to have been enriched. But in any case, the remedy awarded in that case was measured by the costs incurred by the plaintiff. It will be argued at § 4.3.2 that even where costs are incurred at a defendant's request, it is artificial to consider recompense for such costs as a form of restitution. Further, judgments which have based their findings on enrichment often are unsure as to an appropriate test of enrichment. See, for example, the judgment in *Deacon v. Adams* (1982) 55 N.S.R. (2d) 218, which exhibits a confusion between objective and subjective measures of enrichment, and moves from one to the other without analysis (see at 231 & 235). Some cases, however, have equated requested work with benefit: *Magical Waters Fountains v. Sarnia* (1992) 91 D.L.R. (4th) 76.

been reasonably foreseeable;¹¹⁹ and (2) cases in which the plaintiff performs work which would have benefited the plaintiff, had the contract proceeded, but which benefits do not flow to the plaintiff or the defendant because the contract does not eventuate.¹²⁰ Recovery in either type of case is not justifiable on a

119 In *Brewer v. Chrysler Canada* [1977] 3 W.W.R. 69, the plaintiff actively began to recruit prospective staff, rented storage space and generally incurred expenses in preparation to commencing business, in expectation of being awarded a car dealership. The "benefit" of this work was ultimately either wasted, or went to a third party (the party eventually granted the dealership). Importantly, the plaintiff, succeeding in *quantum meruit*, was awarded not only the full expenses he had incurred, but also successfully recovered two months' salary, based on his previous earning rate, for the time spent organising the preparatory work. In *MacIver v. American Motors* (1976) 70 D.L.R. (3d) 473, recovery was allowed, amongst other expenses, for costs incurred by the plaintiff in moving his business to new premises owned by the defendant. Cf. Farnsworth, E.A., "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations" (1987) 87 Col. L.R. 217, 237. See *Hoffman v. Red Owl*, 133 N.W. 2d 267 (1965), in which the representations of the defendant could "reasonably be expected by promisor to induce action or forbearance" (267). As a consequence of representations by the defendant that a franchise would be granted, the plaintiff sold his business at a loss. He was able to recover the losses incurred in the sale. The case is discussed in Cauchi, *supra* n. 117, 257-62. Cf. *Drennan v. Star Paving*, 333 P 2d 757 (1958); *Wheeler v. White*, 398 S.W. (2d) 93 (1966); and *Goodman v Dicker*, 169 F. 2d. 684 (1948), in which the plaintiff incurred preliminary expenses in preparation to commencing a franchise business, on faith of a promise that the franchise would be granted; the expenses were incurred with the knowledge and encouragement of the appellants. The court considered, at 685, that "[t]he true measure of damages is the loss sustained by expenditures made in reliance upon the assurance of a dealer franchise."

120 Although these cases usually involve work on the defendant's land (the subject of the incomplete contract), they are nevertheless particularly interesting, because in many examples the work will not have resulted in any *objectively measurable* benefit. A number of Canadian decisions, of which *Estok v. Heguy* (1963) 40 D.L.R. (2d) 88, is one, are of interest here. In *Estok*, the plaintiff fertilised land belonging to the defendant, in anticipation of a sale of the property to him. The contract was insufficiently certain to be enforceable, and the sale was never completed. The plaintiff claimed for the costs incurred by him and succeeded in the action, despite the fact that the work was not requested or accepted by the defendant with the knowledge it was to be paid for, and nor did the work enhance the value of the land, as the defendant was not intending to use the land for agriculture. Although the court ostensibly resorted to unjust enrichment, the remedy awarded was to compensate for expenses incurred. The plaintiff was held entitled to recover the money expended in depositing the fertiliser. Unjust enrichment theorists accept that in *Estok v. Heguy* no benefit arose. Consequently, the decision is criticised and the view taken that an obligation to compensate the plaintiff's loss should not have been imposed. See Goff & Jones, 486, and compare the implicit criticism of this case and a number of others, in Klippert, 79. Cf. *Maddaugh & McCamus*, 399, and see also Crawford, [1964] Can. B. Rev. 318. Yet if this case and similar ones are seen alongside other anticipated contract cases (such as ones in which estoppel is utilised, see further, Chapter 6), then the decisions are perfectly explicable. Reliance loss is sufficient to found recovery where such loss is incurred in expectation of a contract and is reasonably foreseeable by a defendant, and the risk of such loss lies with the defendant. Further, it appears that in all these cases, the defendants were at fault in the failure to complete the contract. Although the judgment in *Estok* does not make this clear, it seems implicit from the facts that the defendant refused to proceed with the contract. Cf. *Maddaugh & McCamus*, 42, 289, 399. In other cases, the defendants were clearly at fault in the failure to proceed with the agreed sale. See *Fridman*, 337-8. And usually, these cases have resorted to the language of contract or estoppel in order to justify recovery. See, e.g., *Preeper v. Preeper*, (1978) 84 D.L.R. (3d) 74, which used the language of acquiescence. Cf. the similar facts of *Lee-Parker v. Izzet* [1972] 2 All E.R. 800, in which estoppel was argued.

conception of *benefit* disgorgement.

Many commentators now accept that detrimental reliance is, or ought to be, the *sine qua non* for precontractual liability.¹²¹ Although in many cases the defendant will also have benefited, this is not a precondition for recovery. It might be argued that those cases in which no benefit exists are explicable in other terms, but that cases in which there is a benefit are explicable in terms of unjust enrichment. Such an argument will be rejected at § 4.4.3.3, where it will be suggested that to accept such an argument would result in cases of precontractual liability being divided on an artificial and ultimately uninformative basis. Instead, it will be seen in Chapter 6 that, irrespective of the specific liability rules utilised, cases of precontractual liability share a number of common essential features which provide the basis for an explanation of when liability will arise. The existence of an enrichment is not one such feature.

¹²¹ See, e.g., Farnsworth, *supra* n. 119, 224. Cf. *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880. See also *Coleman Engineering Co. v. North American Aviation*, 420 P. 2d 713 (1966), 729, per Traynor C.J.:

If in fact the performance of services has conferred no benefit on the person requesting them, it is pure fiction to base restitution on a benefit conferred. '[I]t is submitted that allowing a recovery in these cases on a theory of benefit conferred is purely fictional, and the real basis is a moral obligation to restore to his original position a party who has acted to his detriment in reliance on a representation, technically unenforceable, by another that he will give value for the detriment suffered.' (Note (1928) 25 Mich.L.Rev. 942, 943.)

When two parties mistakenly believe that a contract exists between them, but the agreement is too uncertain and indefinite to be enforced, the one rendering performance and incurring expenses at the request of the other should receive reasonable compensation therefor without regard to benefit conferred upon the other. Such a rule places the loss where it belongs—on the party whose request induced performance in justifiable reliance on the belief that the requested performance would be paid for.

The case is discussed in Hutchinson, R.B., "The Necessity of Conferring a Benefit for Recovery in Quasi-Contract" (1968) 19 Hastings L.J. 1259. See also *Earhart v. William Low*, 600 P 2d 1344 (1979). Beatson, J., in "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] C.L.P. 71, at 78 has said: "It is clear that a person who has rendered services requested, accepted or acquiesced in by the defendant is entitled to recompense whether or not the defendant has gained from the services." Consequently, he considers that to base cases such as *Brewer St.* and *Sabemo* on unjust enrichment involves "wholly fictitious reasoning". For a recent English decision in which it was suggested that for a *quantum meruit* claim, one need not show any benefit, see *The Batis* [1990] 1 Lloyd's Rep. 345, 353. See also Cauchi, *supra* n. 117, 269:

Unless the legal community in Canada is willing to accept the proposition that the underlying basis of restitutionary claims is not necessarily the "unjust enrichment" of the defendant, but the "unjust impoverishment" of the plaintiff at the hands of the defendant, then it would appear that the most glaring weakness of the law of restitution is its inability to deal with cases where the defendant has not been "incontrovertibly benefited".

The features to be identified are common to cases imposing liability as a result of parties' precontractual dealings on the basis of quasi-contract or otherwise, for example, within doctrines such as estoppel. Of course, such different liability rules may give rise to diverse remedial responses beyond mere restitution, confirming that the purpose of the liability rules, even where an enrichment does exist, is not the reversal of such an enrichment.

§ 4.3.2 "Defective" Contracts

Resort has commonly been made to quasi-contract by parties who have acted on the basis of a contract, but who are unable to proceed in any contractual claim, though there is a completed agreement, because the contract is defective for some reason and thus not enforceable.¹²² As with cases of precontractual liability, recovery has been allowed even where a plaintiff has acted merely in preparation of performing the contract, at least in the United States: for example, buying machinery in order to fulfil a contractual obligation.¹²³ As was argued above, such cases are inexplicable in terms of benefit disgorgement.

In the typical defective contract claim, however, a plaintiff will have performed services requested by a defendant, usually the contractually agreed upon obligation. Where such performance has been conferred upon the defendant, the issue of benefit is unproblematic. But at times, plaintiffs have successfully claimed for losses incurred where no part of their performance was ever received by the defendants. For example, an engineer builds specialised

¹²² The problem most commonly arises where a contract is unenforceable for want of some formality such as evidence in writing as required under a statute. The types of reasons which may preclude a contract being enforceable will be considered in Chapter 6.

¹²³ *Riley v. Capital Airlines, Inc.*, 185 F. Supp. 165 (1960), in which the court held, quoting from the headnote:

Where plaintiff purchased expensive equipment in good faith pursuant to defendant's specifications in fair endeavor to perform contract, even though executory portion of contract was unenforceable due to application of statute of frauds, plaintiff was entitled to recover loss in equipment which was not used by it for any other purpose.

See also cases cited in Palmer, §6.3 (a), and Fuller, L., & Perdue, W., "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 57, 373, 392-4. Palmer concedes that such cases cannot be considered to be unjust enrichment-based, with the plaintiffs instead recovering their reliance losses. See further, Chapter 6. This writer is not aware of any English or Australian authorities allowing recovery for such preparatory work in quasi-contract or Restitution. But in principle such a claim should potentially be available, given that such claims have been allowed in the context of precontractual dealings, that is, where a contract is incomplete.

vehicles which are never delivered to the defendant,¹²⁴ or a writer completes half a book, no part of which is ever delivered.¹²⁵ Burrows concludes that there can be no enrichment in such circumstances and that to argue the contrary would be to resort to an "unrealistic and overinclusive notion of benefit."¹²⁶ Although this writer would concur with such a view, nonetheless, some commentators resort to subjective tests to argue that a defendant may have been enriched in such circumstances.¹²⁷

An example, *Planche v. Colburn*,¹²⁸ raises the issue most sharply; though it should be noted that that case actually concerned a claim under an *enforceable* contract terminated for breach. This fact is not relevant, however, to the issue of benefit. In *Planche v. Colburn*, the defendant requested the plaintiff to write one of a series of books. The author, having completed part of the work, was told the series had been abandoned. Rather than sue in damages, the plaintiff successfully sued in *quantum meruit* for the value of the work done. Perhaps because of the quasi-contractual form of the claim,¹²⁹ the case has been said by some to be based on unjust enrichment. Birks, for example, seeks to explain the decision and, presumably, similar cases¹³⁰ by arguing a defendant's request for the work precludes a resort to subjective devaluation, because it would be unconscionable for a defendant to raise such an argument.¹³¹ Consequently, a

¹²⁴ Cf. *Coleman Engineering Co. v. North American Aviation, Inc.*, 420 P. 2d. 713 (1966), per Traynor C.J. (dissenting). The majority held that a contract existed and thus allowed a contractual claim. Traynor C.J. would have allowed a claim in quasi-contract. The views of Traynor C.J. have been followed in *Earhart v. William Low Co.*, 600 P. 2d 1344 (1979).

¹²⁵ Cf. *Planche v. Colburn* (1831) 8 Bing. 14, a case in which the claim was under an enforceable contract terminated for breach, but this fact does not affect the issue of benefit.

¹²⁶ Burrows, 9. Cf. Beatson, J., "Unjust Enrichment in the High Court of Australia" (1988) 104 L.Q.R. 13, 16. No wealth will have been received by the defendant in the form of valuable property or saving of a necessary expense.

¹²⁷ Burrows, 8-9, does not consider a subjective approach to be appropriate if services have not been received by the defendant, as no objective benefit can be said to have been received. Cf. at 15.

¹²⁸ (1831) 8 Bing. 14.

¹²⁹ Note, however, Goff & Jones, 426, fn. 35.

¹³⁰ There is, however, relatively little authority outside the United States (see Goff & Jones, 425-6). In the United States, see the American Law Institute's *Restatement of the Law of Contracts* (1932) at §348, comment a. And see Palmer, §4.2 and the cases cited therein.

¹³¹ Birks, 126, 286-7, attempts to show how the enrichment issue is satisfied. Contra Burrows, 267. See also Birks, in Burrows, *Essays*, 127-32. Birks formulates the argument thus: that either a market valuation of the services rendered may be applicable against a wrongdoer,

market valuation of such services, though never received by a defendant, is justified.¹³² This is despite the fact that the defendant never requested nor had the opportunity to accept or decline an incomplete book.

Examples of the *Planche v. Colburn* type, though rare in Anglo-Australian law, are not isolated in the United States.¹³³ On Birks' very broad and controversial¹³⁴ views of subjective enrichment, liability in all such cases could be said to be explicable in terms of the reversal of unjust enrichment. But this seems an odd description of cases such as *Planche v. Colburn*. We could say that a defendant in such circumstances was enriched by the plaintiff's actions, that it would be unjust for such a defendant to retain that benefit.¹³⁵ And we could describe the plaintiff's recovery of his or her reasonable costs as restitution of

or alternatively, that a concept of "limited acceptance" may apply. In relation to the latter concept, Burrows, *supra* n. 20, 584-5, 588, considers that "limited acceptance" "is a further and equally unwarranted step down the line from free acceptance." See also Garner, who questions the validity of such an approach. See *supra* n. 3, 50-52, and particularly his discussion of *Van den Berg v. Giles* [1979] 2 N.Z.L.R. 111.

¹³² Birks, *id.* Note also the British Columbia *Frustrated Contracts Act* 1974, s. 5(4), which deems that a benefit means "something done in the fulfilment of contractual obligations, whether or not the person for whose benefit it was done received the benefit." But the purpose of this provision is to allow a party to be indemnified against their reasonable costs, so as to distribute both losses and gains between the parties. See Stewart, A., & Carter, J.W., "Frustrated Contracts and Statutory Adjustment" (1992) 51 C.L.J. 66, 82. Hence the reference to "benefit" is a blatant fiction, as evidenced by the obviously different use of the term within the section.

¹³³ See discussion generally and cases cited in Childres & Garamella, *supra* n. 8; Hutchinson, *supra* n. 121, 1260; Perillo, *supra* n. 8; Sullivan, *supra* n. 1, at 11, fn. 69. A most striking example of such claims succeeding is where builders have performed work to alter an existing building. Such builders may recover for the work done even where the building has subsequently been destroyed. See Dawson, J.P., "Restitution Without Enrichment" (1981) 61 B.U.L.R. 563, 586-7. He notes that "restitution is used in such cases to transfer losses, indeed to add one more to the losses that the owner has already incurred." As Childres and Garamella show, many cases of quasi-contractual relief in a contractual context, though cloaked in restitutionary terms, are in fact protecting the reliance interest of the plaintiff. Sullivan sums up the difficulty with these cases when he states, *supra* n. 1, at 12, that

any inquiry into the definition of benefit must account for those cases ostensibly decided on quasi-contractual grounds that permit recovery without requiring a finding of gain.

An Australian example is *Riches v. Hogben* [1986] 1 Qd.R. 315, though liability was imposed here on grounds of estoppel. English authorities are not common, but see those cited by Goff & Jones, 425, fn. 31, in which cases the contracts were discharged through breach.

¹³⁴ Note the criticisms considered above, § 4.2.4.

¹³⁵ The unjustness arising from the total failure of consideration for the enrichment.

the defendant's enrichment. But with respect, this seems a fictional¹³⁶ and unhelpful description of such cases. In this writer's view, such cases are far more informatively described as ones in which a plaintiff, in reliance on the defendant's "contractual" promise to act in a certain way, has commenced performance and hence incurred losses. *Quantum meruit* relief to allow a plaintiff to recuperate such reliance losses will follow where a defendant refuses to perform as promised and seeks to rely on the unenforceability of the contract to avoid any obligation.¹³⁷ In other words, liability is based on a defendant's "conduct", given the plaintiff's performance.

In the United States, even cases ostensibly based on "unjust enrichment" have allowed plaintiffs to recover their reliance losses, employing "obfuscating logic" in order to "satisfy" the need to show a defendant's benefit.¹³⁸ The courts for the most part appear to have recognised that to insist that a defendant has been genuinely benefited in such circumstances could result in injustice.¹³⁹ This is because the defendant's unacceptable conduct is the direct

¹³⁶ Contrast Palmer, who has sought to explain these cases on the basis of a bargained-for benefit approach. At Vol. II, 19, fn. 6, he states that it is "not a fiction to find benefit in the performance of services on which the defendant placed value by agreeing to provide compensation in a free exchange." But Palmer later concludes that:

Ultimately, in a case such as that described, liability rests upon the belief that it is unconscionable for a person to bargain for the services of another and escape paying the value of services rendered by repudiating the agreement, even though the agreement is oral and lays no basis for a damage claim (19-20).

This "unconscionability" appears to be the crux of the matter, so that it seems quite unnecessary to engage in a complex debate about what constitutes the benefit.

¹³⁷ For a fuller consideration of the parameters of liability of a defendant who has "breached" an unenforceable contract, see Chapter 6.

¹³⁸ Perillo, *supra* n. 8, 1221, considers general statements describing all quasi-contractual claims as turning on the recovery of benefits, and concludes:

One difficulty with statements of this nature is that they do not accurately state the law. Another disturbing fact is that the courts have tended to accept these generalizations as accurate but have, in a quest for justice, been forced to use obfuscating logic to explain their decisions. Particularly popular has been the "Pickwickian" technique of defining the plaintiff's reliance expenditures as a benefit conferred upon the defendant. Only occasionally has a court utilized the forthright approach of declaring the inapplicability of the unjust enrichment theory (footnotes omitted).

Instead of a genuine concern with reversing enrichment, it is usually a defendant's unacceptable conduct which appears to trigger liability. As Rinker states, *supra* n. 17, 548,

in all these cases, it is clear that the element of fault is as much a factor in determining recoverable benefit as is actual gain or advantage to [the defendant].

¹³⁹ Cases which have insisted that a defendant must have been genuinely benefited

cause of the plaintiff's losses. This will be considered further in Chapter 6.

§ 4.3.3 Contribution

Largely originating in equity,¹⁴⁰ the modern doctrine of contribution has been claimed to be unjust enrichment-based.¹⁴¹ The doctrine has a long history¹⁴² and has manifested itself in a number of fields including the law of sureties and guarantees, insurance law and land law.¹⁴³

An example will illustrate the operation of the contribution doctrine, specifically in its application to the law of sureties. If two or more sureties guarantee the same debt owed by a principal, any one of those co-sureties called upon to pay, say, the whole of the debt, will have a right of contribution from the other co-sureties. Such a right will arise whether the co-sureties guaranteed the debt jointly, or jointly and severally, on the same or different instruments, and even if unknown to each other.¹⁴⁴ Where all the co-sureties have guaranteed the debt to the same extent, the right of contribution will arise where anyone of them is called upon to bear a greater than equal share of the

before recovery will be allowed have been criticised. See Hutchinson, *supra* n. 121, 1266-7, and his discussion of *Boone v. Coe*, 154 S.W. 900 (1913). In that case, the plaintiff had incurred great expense in moving his family to Texas in reliance upon an oral promise by the defendant to lease certain lands in that state. The contract was unenforceable and the defendant reneged on his agreement. The plaintiff's action to recover his expenses incurred failed. The court emphasised that the plaintiff had failed to show that any benefit had been conferred on the defendant.

¹⁴⁰ Note, however, the right of contribution amongst co-sureties at common law and the right of general average contribution in maritime law. The equitable right to contribution itself appears to owe its origins to the maritime law doctrine: *infra* n. 142.

¹⁴¹ E.g., Goff & Jones, 304; Simpson, *On Suretyship* (1950), 242; *The Restatement of Restitution*, 364; Birks, 192-3; Burrows, 219 et seq.; Maddaugh & McCamus, Chp. 9. Cf. Phillip, J., & O'Donovan, J., *The Modern Contract of Guarantee* (2nd ed., 1992), 526-7. There has been some judicial support for the view that maritime average contribution is based on unjust enrichment. See *Fletcher v. Alexander* (1868) L.R. 3 C.P. 375, 381, per Bovill C.J.

¹⁴² In *Albion Insurance Co. v. G.I.O. of N.S.W.* (1969) 121 C.L.R. 342, 350, Kitto J. considered that the right of contribution originated in the maritime law of general average contribution. See further, Chapter 7. For a recent consideration of the law of contribution, see *Cummings v. Lewis* (1993) 113 A.L.R. 285, per Cooper J.

¹⁴³ A claim for contribution by a plaintiff amounts to a claim for services rendered, as defined, as the money paid by the plaintiff will have gone to a third party, rather than to the defendant.

¹⁴⁴ *Deering v. Earl of Winchelsea* (1787) 2 Bos. & Pul. 270; 126 E.R. 1276. See also *American Jurisprudence* (2d) Vol. 74, 145.

burden.¹⁴⁵ Thus, A, B and C all agree to guarantee a debt owed by D to E of, say, \$12000. If E should call upon A to pay this sum, as a result of D's default, then A will have a right of contribution of \$4000 each from B and C.

Can it be said that co-sureties called upon to make contribution have been enriched? Since the co-sureties may have been unaware of the existence of other co-sureties, even until the time they are called upon to make contribution, a subjective approach to enrichment cannot in such circumstances be satisfied.¹⁴⁶ The issue of enrichment then, turns on whether a defendant (the co-surety called upon to contribute) has been objectively enriched by being saved an expense, "necessary" or otherwise.

To answer this question, the nature of the obligation of each co-surety to the creditor needs to be considered. Payment by a co-surety of the guaranteed debt is dependent upon two contingencies. First, the principal debtor must have defaulted. If this has occurred, then the co-surety is under an obligation to pay up to the full amount of the guaranteed debt if called upon. Secondly, the creditor must have called upon the co-surety to pay, or at least, the co-surety must have voluntarily paid in anticipation of being called upon. If the first contingency is satisfied, then it could be said that a co-surety not called upon to pay has been saved an expense. But the expense saved is up to the full amount of the debt, not just the co-surety's "share" of that debt. If one focuses on the second contingency, this will not have been satisfied in relation to the co-surety from whom contribution is sought. One might say (but for the doctrine of contribution) that such a co-surety has been lucky: another has been called upon to bear the burden. The expense saved is therefore nil. Given the doctrine of contribution, however, each co-surety is required to contribute equally to the total liability. There is a presumption of equal sharing of the burden. One could argue that each of the co-sureties who has not paid is enriched as to their proportionate share of the debt. But this presumes a status of equality between

¹⁴⁵ Simpson, *On Suretyship* (1950), 240. See also the *Restatement of Restitution*, §81. Normally, the principal debtor should be made a party to the action (as the sureties would be subrogated to the creditor's rights) but his or her insolvency may be inferred from the circumstances. See *Hay v. Carter* [1934] 1 Ch D. 397. If the sureties have guaranteed a debt to different amounts, then the right to contribution will arise proportionately, according to the sums guaranteed: *Albion Insurance v. G.I.O.* (1969) 121 C.L.R. 342, 350; *Ellesmere Brewing Co. v. Cooper* [1896] 1 Q.B. 75, 80-81; *Godin v. London Assurance Corp.* (1758) 1 Burr. 489; 97 E.R. 419; *Steel v. Dixon* (1881) 17 Ch D. 825.

¹⁴⁶ There could not be any acquiescence in, or request for, the co-surety's "services" in paying the creditor. This is reflected in the fact that the right of contribution is not dependent upon any express or implied contractual relationship between the parties.

the co-sureties without explaining why such a presumption should exist. The reason for the presumption cannot be the co-sureties' enrichment. Such an argument would be circular.¹⁴⁷ The most one could say is that *because* of the presumption of equality, each non-paying co-surety has been enriched to the extent of an equal share of the entire debt. Liability then, is not dependent upon any finding that a co-surety called upon to contribute has been enriched, but on the basis of some other underlying reason which justifies the presumption of equal sharing. This underlying reason rests on the parties common interest in the matter and their failure to provide for the particular contingency, and will be considered in Chapter 7.

§ 4.3.4 Necessitous Intervention in Another's Affairs

In limited circumstances, the law allows reimbursement for expenses incurred and, more exceptionally, remuneration for services rendered, where a plaintiff has unsolicitedly intervened in another's affairs. Many of these cases concern actions undertaken in the context of an emergency, to preserve another's life or property or well-being.¹⁴⁸ In one example, a plaintiff who incurred expenses in "preserving" the defendant's horse where it would otherwise have been endangered was entitled to compensation for the expenses incurred.¹⁴⁹ Other circumstances in which common law courts have allowed recovery for unsolicited services include the salvage of ships and cargo in maritime law; the supply of necessaries to legally incapacitated parties;

¹⁴⁷ Cf. Abbot, E.V., "Keener on Quasi-Contract" (1896) 10 Harv. L.R. 209; 479, at 506. It should also be noted that as the party seeking contribution has voluntarily assumed the risk of liability to pay the *whole* debt, he or she has not suffered a corresponding detriment. See Butler, P., "Viewing Restitution at the Level of a Secondary Remedial Obligation" (1990) 16 Univ. Q.L.J. 27, 40-41. Consequently, it cannot be said that any "benefit", even if it could be shown, was *at the expense* of the plaintiff.

¹⁴⁸ Admittedly, liability in such cases is rare and some commentators are dismissive of such claims. See, e.g., Dawson, 60, who considers *negotiorum gestio* (the civil law doctrine of justifiable intervention in another's affairs) to be a "body of doctrine that contradicts almost totally the conclusions of modern American law." See also Buckland & McNair, *Roman Law and Common Law* (2d ed., 1952), 334; Hope, E.W., "Officiousness" (1929) 15 Corn. L.Q. 25; Long, R.A., "A Theory of Hypothetical Contract" (1984) 94 Yale L.J. 415, 418. Such sweeping dismissals of claims for unsolicited intervention in another's affairs appear to be overstated. See Stoljar, S.J., "Unjust Enrichment and Unjust Sacrifice" (1987) 50 M.L.R. 603, 611, and Chapter 8, for a further and more detailed consideration. As will be seen in that chapter, intervention in an emergency to aid another are not the only possible claims for unsolicited intervention. There are also cases in which self-interested actions may give rise to liability imposed upon another to bear the costs of such actions.

¹⁴⁹ *Great Northern Railway v. Swaffield* (1874) L.R. 9 Ex. 132. Acts done for the protection of another's property have only rarely, however, resulted in liability being imposed upon the recipient of such services. Cf. Mathews, *supra* n. 90, particularly at 349-50.

intervention to effect burial of the dead; and the saving of human life.¹⁵⁰ Of the few successful claims outside of maritime law, resort has been made to quasi-contract and a number of other doctrines,¹⁵¹ often quite imaginatively, to allow recovery in such cases.

Can it be said that successful claims are explicable in terms of a purpose of reversing benefits gained by defendants? In all cases of necessitous intervention, some service has been conferred. Provided such a service can be valued, the defendant will have been objectively benefited¹⁵² to the extent of the reasonable market value of such service. On this approach, an enrichment is identifiable in all cases of necessitous intervention. For reasons already noted above, however, unjust enrichment theorists reject such a liberal test of enrichment as having any general application in the law of Restitution.¹⁵³ But even if one adopts such an objective approach, contrary to most unjust enrichment theorists, so that the existence of an enrichment is consequently not at issue, it still needs to be ascertained whether the existence of the enrichment translates into a restitutionary remedy, so that the liability rule could be said to have a purpose of reversing enrichment. We will return to this shortly, after a consideration of a subjective approach and a receipt of wealth approach.

Any subjective approach to enrichment would be inapplicable in this context. The very distinguishing feature of cases of necessitous intervention is the unsolicited nature of the services. The defendant is either legally or factually incapacitated¹⁵⁴ or absent, or it is not practicable to communicate with him or her. This leaves the receipt of wealth approach, which will be satisfied if a defendant has been saved a necessary expense.¹⁵⁵ Arguably, such a conclusion may be appropriate where the intervention was successful—a life or property was saved or disaster was avoided—but if the intervention was

¹⁵⁰ Although there appear to be no English or Australian cases on point, the right has not been disputed in English or Australian law. See, e.g., Goff & Jones, 375-8.

¹⁵¹ *Inter alia*, the law of agency, giving rise to the “agency of necessity” doctrine, implied contract, subrogation and contract law. See further, Chapter 8.

¹⁵² The defendant has been saved the expense of the objectively valuable services.

¹⁵³ See § 4.2.2.1.

¹⁵⁴ For a case of factual incapacity, see *Matheson v. Smiley* [1932] 2 D.L.R. 787 (suicide attempt, patient unconscious). For a case of legal incapacity, see *Re Rhodes* (1890) 44 Ch.D. 94 (mental disorder).

¹⁵⁵ There can have been no accretion in the value of a defendant’s property.

unsuccessful, it does seem inappropriate to talk of the saving of a necessary expense.¹⁵⁶ Yet successful claims outside of maritime salvage do not appear to be dependent upon a successful intervention.¹⁵⁷

Alternatively, one could argue that unsuccessful acts of rescue, provided they are reasonable, still save a necessary expense. That is, on a reasonable person test, the necessity of the expense at the time it was incurred does not require a guaranteed successful outcome.¹⁵⁸ On such a conception of benefit, the "recipient" of emergency services, even where those services were unsuccessful, could be said to have been enriched. But as Stoljar points out, such a conclusion

would not only be odd, it would not be very relevant. For [the plaintiff's] recompense is calculated by the normal worth of his services or supplies, not by their actual benefit to [the defendant].¹⁵⁹

Indeed, recompensing a plaintiff for the reasonable value of the services is only one possible remedy. Instead, a plaintiff may be reimbursed merely for expenses incurred (thus compensating his or her losses), or at the other extreme, he or she may even be granted a reward.¹⁶⁰ This highlights the

¹⁵⁶ Cf. Burrows, 247, fn. 2, who considers that a "reasonable man could say that he would only have been willing to pay for a result not an attempt" and that there can have been no incontrovertible benefit.

¹⁵⁷ Even where a rescued party ultimately dies, recovery may still ensue. See *Matheson v. Smiley*, [1932] 2 D.L.R. 787. In the United States, see *Cotnam v. Wisdom*, 104 S.W. 164 (1907) which expressly rejected the need to show a benefit, provided the intervener exercised due care and skill; and see *The Estate of Crisan*, 107 N.W. (2d) 907 (1961). Similarly, even if property sought to be saved is destroyed, reasonable expenses incurred by the intervener may be recoverable. See the example from German law in Stoljar, *Negotiorum Gestio*, 99. Admittedly, there appear to be no common law decisions. Goff & Jones, 375, accept the principle, however, in those limited cases in which recovery for interveners saving property is allowed. Contrast Rose, F., "Restitution For The Rescuer" (1989) 9 O.J.L.S. 167, 173. Cf. Birks, P., "Negotiorum Gestio and the Common Law" [1971] C.L.P. 110, 114.

¹⁵⁸ The argument would be, in effect, that "it is proper to assume that the defendant would have authorised this expenditure if he had been given the opportunity of doing so": Goff & Jones, 375, arguing that the lack of success of an intervention ought not necessarily to preclude recovery. Contrast Burrows, *supra* n. 20. Goff and Jones appear to be applying a reasonable person test. One of the features of such test is that it ignores the idiosyncratic desires of the defendant and therefore Goff and Jones are not making a determination as to whether the defendant *would* have paid for or sought the services, but whether he or she *should* pay. Such a conclusion, it is suggested, is based upon unstated policies other than a need to reverse the defendant's enrichment. Asking whether a defendant has been enriched in such cases seems quite removed from the real determinative factors governing recovery. Indeed, it may obfuscate those other relevant issues.

¹⁵⁹ Stoljar, *supra* n. 148, 612.

¹⁶⁰ Cf. Goff & Jones, 374. See further Chapter 8. Certainly, no attempt has ever been

problem with any unjust enrichment analysis of necessitous intervention cases. Even accepting that an enrichment is identifiable in all such cases, there are a number of alternative remedial responses not all of which can be considered restitutionary. Given the diversity of such remedial responses, it is difficult to argue that the *purpose* of recovery is benefit disgorgement to prevent unjust enrichment. Perhaps not surprisingly, then, many unjust enrichment theorists concede that cases of recovery for necessitous intervention are not unjust enrichment-based.¹⁶¹

§ 4.3.5 Property Disputes Upon a Breakdown in De Facto Relationships

After a breakdown in a domestic relationship, such as marriage or de facto marriage, claims may be made by one party to property legally owned by the other. Where no statutory provisions govern, which is commonly the case in the context of the breakdown in de facto relationships,¹⁶² common law rules will govern the resolution of such claims. The basis of liability in such cases will be considered in Chapter 7. In Canada, the courts have resorted to unjust enrichment to resolve such property disputes.¹⁶³ Clearly, in the vast majority of cases, one party may indeed have benefited, on at least one approach to enrichment, at the expense of the other.¹⁶⁴ For example, one party (the defendant) may retain full legal ownership of real property, despite contributions of income, resources, domestic services or materials by the other

made to determine whether a defendant has received any wealth. As Goff and Jones have noted, "it has never been contemplated that the value of [the rescuer's] services should be deemed to be the value of the life or property which he has saved": Goff & Jones, (3rd ed., 1986), 29. Cf. (4th ed., 1993), 30-1.

¹⁶¹ Cf. Goff & Jones, 26; Birks, *supra* n. 43, 75, who concedes that claims by "agents of necessity" and salvors may not be based on unjust enrichment. Contrast Burrows, 247, who does not consider an analysis in terms of benefit disgorgement to raise any difficulties in most cases of necessitous intervention. At fn. 5, however, Burrows suggests that *Matheson v. Smiley* [1932] 2 D.L.R. 787, is a case concerning loss recovery.

¹⁶² In most common law jurisdictions, statutory provisions apply for the resolution of property disputes upon the breakdown in a relationship of marriage

¹⁶³ And note the possible support for such a development in Australia. See *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 87, per Toohey, J.

¹⁶⁴ In most relationships, however, this will usually be mutually so. That is, the other party will almost invariably at the same time also have benefited at the other's expense. The Canadian courts have not explained how the different "benefits" of each party are to be balanced.

party, to the relationship as a whole, or specifically for the maintenance, improvement or purchase of the property itself. In other words, one party may have made contributions to the relationship, of which a disproportionate share has inured to the benefit of the defendant. But importantly, the remedy in response to the defendant's "unjust enrichment" in many Canadian cases cannot be related back to any measure of the defendant's enrichment. At times, the remedy granted effects the fulfilment of the plaintiff's expectations, rather than merely the restitution of benefits received by the defendant.¹⁶⁵ The point has been noted by Birks, for example, who has criticised the use of unjust enrichment to achieve such results.¹⁶⁶

The point is simple but critical. There are cases in Restitution, including ones even specifically justified in terms of unjust enrichment, in which the remedy granted is not restitutionary. This suggests that the liability rule giving rise to the obligation in such cases is not aimed at reversing unjust enrichment. It may well be that restitution is the usual remedial response, but nevertheless, the liability rule's purpose extends beyond mere benefit disgorgement. At best, then, explanations based on unjust enrichment may tell us little about the rationale for liability in such areas of law. At worst, they may positively mislead.

§ 4.3.6 Summary

To this point, specific problems arising from the use of an enrichment analysis in various topics in Restitution have been highlighted. Advocates of unjust enrichment might reply that such problems are not of themselves insurmountable or necessarily detract from unjust enrichment theory as a whole. It might be argued that all legal concepts must deal with borderline and "hard" cases, that problems at the fringes of legal doctrine must always be overcome. Further, it might be argued that some of the difficulties noted above merely suggest that overzealous claims have at times been made for unjust enrichment—that the reach of unjust enrichment is more limited—but that unjust enrichment is still the crux of a significant body of law. It should be noted, though, that some of the problems highlighted above arise in the very

¹⁶⁵ Cf. *Sorochan v. Sorochan* (1986) 29 D.L.R. (4th) 1, and *Pettikus v. Becker* (1980) 117 D.L.R. (3d) 257.

¹⁶⁶ See Birks, *supra* n. 8, 817-9, and discussion *supra* n. 8. Cf. Maddaugh & McCamus, 660-70.

heartland of Restitution, that is, cases in which resort traditionally has been made to quasi-contract.

Arguments such as those above fail to address a number of fundamental problems with any analysis emphasising the existence of enrichment as a precondition for remedial relief. The difficulties highlighted above, it is suggested, are merely symptomatic of these more fundamental problems, which will now be considered.

4.4 FUNDAMENTAL PROBLEMS OF ENRICHMENT ANALYSIS

§ 4.4.1 The Nature of Remedial Relief Where Services Have Been Rendered

As is evident from the above discussion of cases in which services have been rendered, quasi-contractual relief characteristically takes the form of a *quantum meruit* for the "reasonable value" of the services. Unjust enrichment advocates have suggested that *quantum meruit* awards equate with the value of defendants' enrichment in such cases,¹⁶⁷ so that *quantum meruit* relief is therefore restitutionary. Purely as a matter of logic, if one accepts the equation of the reasonable value of a service with benefit received, such a conclusion is indisputable. And consistently with the tendency of the courts to eschew other measures of recovery¹⁶⁸ in many areas of law,¹⁶⁹ theorists have not generally

¹⁶⁷ See, e.g., Jones, *supra* n. 83, 289; Goff & Jones, 28-31. See also *Degelman v. Guaranty Trust Co & Constantineau* [1954] 3 D.L.R. 785. Indeed, it is said that where services have been freely accepted, such a measure of "benefit" is preferable to an award based on the receipt of wealth, for example, by measuring any net market increase in the value of property. Cf. Goff & Jones, (3rd ed.) 143 and (4th ed.) 171. This reflects the overwhelming tendency of the case law in awarding the reasonable value of services. See, however, commentators cited *infra* n. 179, who treat *quantum meruit* as a form of loss recovery.

¹⁶⁸ In relation to necessitous intervention, for example. See *supra* n. 160.

¹⁶⁹ But note that in the United States, in cases of the mistaken improvement of land, recovery tends to be limited to the increase in market value of land or costs incurred by the plaintiff, whichever is the less. See Palmer, §10.9(e) and the *Restatement of Restitution*, §42. See also *Van den Berg v. Giles* [1979] 2 N.Z.L.R. 111, in which the plaintiff had improved the defendant's land under a mistaken belief (induced by the defendant) that a contract to purchase would be granted. Recovery based on the increased market value of land was awarded. Such a measure of recovery is criticised in Chapter 6, n. 310.

advocated other possible measures of "benefit" in service cases.¹⁷⁰ But as has already been suggested, a description of *quantum meruit* relief as a restitutionary remedy, that is, as effecting benefit disgorgement, is open to question. It is necessary, then, to explore the nature of *quantum meruit* relief.

Quantum meruit means "as much as he earned",¹⁷¹ or "as much as he deserved".¹⁷² As McKendrick has pointed out, however, it is possible to identify three different valuations of a *quantum meruit* claim:¹⁷³ (1) the "market value" of the service;¹⁷⁴ (2) the cost to the seller of providing the service, with an allowance for profit;¹⁷⁵ and (3) the cost to the seller, with no allowance for profit.¹⁷⁶ McKendrick considers that the courts have shown "no clear preference" for any of these measures.¹⁷⁷

These are quite different methods of valuation, representing quite different measures of recovery. But whichever method of valuation is adopted, it seems artificial to describe any of these measures as having a restitutionary effect. If a plaintiff's costs or expenses are recoverable, without any profit element, the remedy compensates the plaintiff for his or her losses incurred;¹⁷⁸ and many commentators perceive *quantum meruit* precisely as a loss recovery

¹⁷⁰ E.g., *supra* n. 160.

¹⁷¹ Bird, R. (ed) *Osborne's Concise Law Dictionary* (7th ed., 1983).

¹⁷² Saunders, J.B. (ed) *Mozley and Whiteley's Law Dictionary* (7th ed.).

¹⁷³ McKendrick, E., "The Battle of The Forms and The Law of Restitution" (1988) 8 O.J.L.S. 197, 218. Cf. Dobbs, 260-9.

¹⁷⁴ "[T]he sum which a willing supplier and buyer would have agreed upon.": Goff & Jones, 28. Given that suppliers in the market are generally motivated by the pursuit of profit, such a valuation will usually include a profit element. Cf. *The "Batis"* [1990] 1 Lloyd's Rep. 345, 353; *Lodder v. Slowey* [1904] A.C. 442, 444, 453.

¹⁷⁵ Hence, again, the plaintiff receives at least a reasonable profit. Cf. *Gino D'Alessandro Constructions v. Powis* [1987] 2 Qd.R. 40, 43.

¹⁷⁶ E.g., as in *Vickery v. Ritchie*, 88 N.E. 835 (1909) according to Goff & Jones, 492, fn. 62, but the report does not make this clear. See *infra* n. 200. In cases of necessitous intervention, recovery will more likely merely be for expenses incurred rather than either the reasonable value of services, or costs incurred plus a profit element. See Chapter 8.

¹⁷⁷ Contrast Carter, J.W., "Ineffective Transactions" in Finn, 206, 235, who considers that valuation is a "very straightforward process."

¹⁷⁸ In precontractual liability cases, this appears to be the measure of relief where work on a defendant's land was not requested or acquiesced in by the defendant, such as in *Esiok v. Heguy* (1963) 40 D.L.R. 2d. 88.

mechanism.¹⁷⁹ Alternatively, the reasonable value of services usually includes a profit element, as services on the market are not usually provided at cost price.¹⁸⁰ Similarly, a "cost plus profit" valuation includes a reasonable profit element. In both these methods of valuation, then, a plaintiff is awarded what he or she might reasonably be entitled to expect, the profit element being determined at a market rate rather than according to a plaintiff's own or "actual" expectations. Further, and perhaps surprisingly given that many *quantum meruit* cases arise in the context of incomplete or defective contracts, the practical consequence of many *quantum meruit* awards is to fulfil a plaintiff's actual, usually "contractual" expectations. For example, as will be seen in Chapter 6, where a plaintiff performs services under a contract unenforceable for want of formality, the courts may refer to the contract price as evidence of the reasonable value of such services. It is not unusual for that contract price to be adopted as the measure of relief.¹⁸¹

A plaintiff awarded a *quantum meruit*, then, recovers at the very least his or her losses incurred and, commonly, a further element of reasonable profit. The very focus of *quantum meruit* is on a plaintiff, and what that plaintiff is reasonably entitled to expect, rather than on the extent to which a defendant has obtained a benefit. As one case expressed it, a plaintiff is remunerated "according to his deserts".¹⁸² Given this emphasis, to adopt a very wide conception of benefit and concomitantly, a wide conception of restitution, seems merely a convenience or fiction rather than an accurate reflection of the

¹⁷⁹ See, e.g., Stoljar, *Negotiorum Gestio* 10; Dobbs, 792, but cf. at 261; Fuller & Perdue, supra n. 123, 394; McKendrick, supra n. 173, 218; Henderson, S.D., "Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts" (1971) Va. L.R. 1115, 1147, 1150-1; Perillo, supra n. 8; and Beatson, Chp. 2, though it would seem only in relation to *quantum meruit* awards for "pure" services. Contrast *Fabian v. Wasatch Orchard Co.*, 125 P. 860 (1912), 863, which suggests that a *quantum meruit* claim for reasonable value will not equate with the loss suffered by the service provider. Commentators who see *quantum meruit* as a loss-recovery mechanism, however, tend to ignore the profit element included in many such awards.

¹⁸⁰ See supra n. 174.

¹⁸¹ See further, Chapter 6. Examples are *Scarisbrick v. Parkinson* (1869) 20 L.T.R. 175; and *Ward v. Griffiths* (1928) 28 N.S.W.L.R. 425.

¹⁸² *Scott v. Pattison* [1923] 2 K.B. 723, 727, per Salter J. See also *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 600. In *The "Batis"* [1990] 1 Lloyd's Rep. 345, 353, Hobhouse J. considered that the

relevant type of *quantum meruit*, implied agreement to pay reasonable remuneration, does not depend upon an assessment of the gain to the person who has made the request for the services but upon assessing the proper remuneration for the person who has, at the other's request, rendered the services.

remedial effect of *quantum meruit* awards. The artificiality is even more apparent if one goes on to suggest that the purpose of the liability rules is benefit disgorgement. The point is well made by Fuller and Perdue:

As the "benefit" received by the defendant becomes more ethereal, the role in the total judicial motivation which is properly assignable to a desire to prevent the defendant from keeping an unjust gain becomes increasingly less, until the point is finally reached where it must be assumed to disappear altogether. An attenuation of the concept "benefit" means, therefore, at least an increasing emphasis on the reliance interest (making the plaintiff whole), and it may mean that the protection of that interest has become the exclusive *raison d'être* of judicial intervention.¹⁸³

In the United States, at least, the use of quasi-contract or Restitution to effect loss-recovery has been persuasively demonstrated and the cases comprehensively documented.¹⁸⁴ Many of these cases *may* be explicable on a wide conception of benefit as preventing unjust enrichment. But the inutility of such an explanation is further highlighted by the fact that in many of these cases, *quantum meruit* is utilised in the context of contracts which are

¹⁸³ Fuller & Perdue, *supra* n. 123, 393. At 394 they stress the point again:

When the benefit received by the defendant has become as attenuated as it is in some of the cases cited, and when this benefit is "measured" by the plaintiff's detriment, can it be supposed that a desire to make the defendant disgorge is really a significant part of judicial motivation? When it becomes impossible to believe this, then the courts are actually protecting the reliance interest, in whatever form their intervention may be clothed.

Some American courts have recognised that the motivation behind recovery is the compensation of losses incurred as a result of the defendant's conduct. The point is made in *Kearns v. Andree*, 139 A. 695 (1928), 697 (recovery under an unenforceable contract, for services in the form of work and modifications to the plaintiff's own property):

The basis of that implication [of a contract] is that the services have been requested and have been performed by the plaintiff in the known expectation that he would receive compensation, and neither the extent nor the presence of benefit to the defendant from their performance is of controlling significance.

The point has also been made by Getzler, J., "Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Review" (1990) 16 Monash U.L.R. 283, 313:

It is difficult to see how clarity of analysis is advanced by describing the value of a detriment resulting from reliance as an objective 'enrichment' on the basis of free acceptance. ... [I]t makes better sense to state that by inducing or accepting expenditures and services, a defendant becomes liable to remedy any corresponding detriment because he is responsible for that detriment *per se*;

¹⁸⁴ See, e.g., Dawson *supra* n. 133, particularly at 588, 621; and generally Perillo, *supra* n. 8; Childres & Garamella, *supra* n. 8.

incomplete or defective. Plaintiffs' losses will have been caused by their reliance upon the defendants' representations or conduct and the defendants' subsequent refusal to perform as promised. As will be seen in Chapter 6, this clear causal link between such plaintiffs' losses and the defendants' conduct allows us to draw comparisons with liability in contract and suggests that a requirement that defendants have benefited as a result is unnecessary and unwarranted. The existence of loss alone will be sufficient to trigger liability. This means that in many areas of law where the issue of enrichment is most troublesome to unjust enrichment theorists, such enrichment is not conceptually relevant to the operation of the liability rule.¹⁸⁵

§ 4.4.2 "Enrichment" as a Conclusion of, as Opposed to Precondition for, Liability

As has been seen, a number of different approaches to enrichment are possible. Within each general approach, a number of specific tests formulated by various commentators were considered. Yet none of these specific tests, or even general approaches, are capable of universal application, explaining liability in all Restitution cases. A particular approach may "work" in one area, but clearly be inapplicable to others. For example, in cases of necessitous intervention, a subjective approach is inapplicable, a receipt of wealth approach faces difficulties, leaving only an objective approach to identify an enrichment in all cases. Yet such an objective approach has been widely rejected as having general application in the law of Restitution. In other areas of law, no approach to enrichment explains liability, with no enrichment being identifiable, or else the remedial response to an identifiable enrichment being one other than restitution of that enrichment.

If no approach to enrichment is of universal application, one might resort to a combination of the different approaches and the refinements and qualifications thereto in order to explain liability in most (though still not all) of the topics claimed for Restitution. Some commentators advocate such a flexible conception of enrichment.¹⁸⁶ One may then say that most cases can be seen as conforming to an enrichment analysis, or more accurately, to several enrichment analyses. But rather than seeing this as a vindication of an explanation based on enrichment reversal, it must be seen as evidence of its

¹⁸⁵ The cases considered in § 4.3.1 and § 4.3.2 provide good examples. See further, Chapter 6.

¹⁸⁶ See *infra* n. 189.

failure. The crux of this failing is that such a flexible conception does not answer the question as to which approach to enrichment should be utilised in a given case. Since different approaches to enrichment can lead to radically different conclusions as to whether a defendant has in fact been enriched, there must be some reason for choosing one approach over another. Merely to do so either to make past decisions conform with an unjust enrichment analysis, or alternatively, to solve future problems in accordance with certain unstated objectives, suggests strongly against enrichment reversal as the underlying motivation for recovery. As Sutton has correctly pointed out, if benefit is capable of being given so many different meanings,

[l]ogically, the 'principle of unjust enrichment' cannot determine which of these meanings of 'benefit' are selected in any particular case, since 'benefit' is one of the elements of the principle itself. So some other policy or principle must also be at work here, the term 'benefit' being left ambiguous to allow for this.¹⁸⁷

Without the supplementation of the notion of benefit by such other policies or principles, enrichment merely becomes "a conclusory label that judges affix when they have decided, for whatever reason, to allow the plaintiff to recover".¹⁸⁸ No advocate of enrichment theory has yet adequately identified any systematic or principled basis upon which to determine when and why a particular test of enrichment is more appropriate than another in a given fact situation. For example, Palmer has stated that

the term benefit has no single meaning in the law of restitution; instead, meaning will vary with the circumstances, especially with the ground for restitution.¹⁸⁹

This is a remarkable concession, for Palmer does not provide us with any guide, other than *sui generis* conclusions, as to why one approach is appropriate in one case, but not in others. This suggests other legal or moral principles or policies are being applied. To say a defendant was "enriched" appears to be the

¹⁸⁷ Sutton, R., "Unjust Enrichment" (1981) 5 Otago L.R. 187, 194.

¹⁸⁸ Long, *supra* n. 148, 418.

¹⁸⁹ Palmer, Vol. I, 44. See also Sullivan, *supra* n. 1, at 12, who considers that "the definition of benefit has varied depending upon the exigencies of a particular case." Also, at 25: "[C]ourts often express the concept of benefit so generally that the definition becomes essentially meaningless as precedent." Dobbs, 260, states that the measure of restitution should reflect the substantive law purposes that call for restitution in the first place. This, of course, means that such "substantive law purposes" cannot simply be described in terms of unjust enrichment. Similarly, see Rinker, *supra* n. 17, 553: "Ideally, perhaps, benefit in each case should be determined on its particular facts, and the remedy moulded accordingly."

end result of the application of such other factors. Consequently, it would seem that "enrichment" is not the precondition for liability.

An example will illustrate the point. If P mistakenly improves D's property, without D's knowledge, a number of approaches are possible. Theorists who emphasise the law's deferral to a subjective approach¹⁹⁰ would suggest recovery may be precluded. Theorists who stress a receipt of wealth approach would support recovery of, say, any increase in the market value of D's property. Both results are possible under unjust enrichment theory which, without more, does not indicate why one approach is to be preferred over the other. Of course, each theorist may argue that his or her approach is the correct one; either normatively, or as a description of past decisions. But in canvassing one approach in preference to another, one needs to resort to arguments of policy and principle unrelated to any concept of enrichment. The debate about "enrichment" becomes merely the pretext for promoting other principles.¹⁹¹ The circularity in reasoning is obvious if one states that the crux of the liability rule determining the rights of the mistaken improver is benefit disgorgement.

The considerable detail and complexity of tests of enrichment propounded by some commentators suggests that such commentators¹⁹² have attempted to incorporate the nuances and subtleties normally found within liability *rules* into the definition of enrichment. Perhaps no better example is provided by the concept of "free acceptance"—said to establish the issue of benefit—the very elements of which focus on a defendant's conduct. Indeed, Birks considers a free acceptance test will be satisfied where it would be unconscionable for a defendant to resort to subjective devaluation. Yet the type of conduct thus focused upon, such as the creation of false expectations, or acquiescence in certain detrimental actions of a plaintiff, may well justify relief irrespective of any enrichment of the defendant, that is, even where a plaintiff merely has incurred foreseeable losses in reliance upon such conduct.¹⁹³

¹⁹⁰ English law has been described as deferring to a subjective approach: e.g., Birks, 109-14, particularly at 110-1.

¹⁹¹ Consider, for example, the debate as to what incontrovertible benefit encompasses. The differences of opinion are particularly relevant to a determination of when a mistaken improver may be entitled to some form of relief.

¹⁹² Birks appears to be a particularly notable example

¹⁹³ Beatson, 34-9, (also at [1987] C.L.P. 78-82), highlights this when he states that free acceptance is established by factors ("consent", "reliance", etc.) which independently give rise to obligations and therefore render such claims as dependent upon liability creating factors

One might reply that the complexities associated with enrichment could be avoided if the nuances and subtleties of the liability rules are reflected in the "unjust" part of unjust enrichment. As Fridman has pointed out,

[t]he unjustness of the enrichment, or perhaps of the conduct of the defendant, seems to be of greater relevance than the question of benefit.¹⁹⁴

Such an argument does not erase, however, the difficulties created by the connection of the epithet "unjust" with enrichment. For a restitutionary purpose is still said to be the crux of the matter. And not all cases, even on the widest possible approach to benefit, can be described as having a purpose of the reversal of enrichment.

There remains a further difficulty for any enrichment-based analysis of Restitution problems. Even accepting that a defendant has been enriched in a given case, which *measure* of enrichment should form the basis of any restitutionary remedy? As the measure of benefit can vary considerably according to which approach to enrichment is used, so too can the measure of restitution.

An example, a variation on the facts of the American case *Vickery v. Ritchie*,¹⁹⁵ illustrates the difficulty. Two parties agree that the plaintiff should build a swimming pool on the defendant's land. As a result of a mutual misunderstanding, the fault of neither party, the defendant believes she is to pay \$5000 for the work; and the plaintiff believes he will receive \$9000 for the work. The mistake is discovered after the completion of the swimming pool. The "contract" is held void, due to the parties mutual misunderstanding as to price.¹⁹⁶ The plaintiff seeks recovery, but the defendant refuses to pay more than \$5000. If unjust enrichment analysis is applied, what is the measure of the defendant's enrichment?

A number of possible measures could be adopted. First, there is the

other than unjust enrichment.

¹⁹⁴ Fridman, 36.

¹⁹⁵ 88 N.E. 835 (1909).

¹⁹⁶ Cf. *Vickery v. Ritchie*, 88 N.E. 835 (1909), in which the mistake was the result of the fraud of a third party.

reasonable value of the services conferred, objectively measured at, say, \$8000.¹⁹⁷ Secondly, the net accretion in the value of the defendant's land (which may be an incontrovertible benefit), might be, say, \$6000.¹⁹⁸ Thirdly, if one adopts a subjective approach, there is some debate as to what the appropriate measure should be. Clearly, the defendant has indicated that the pool is of value to her, but she was only prepared to pay \$5000. Some commentators would argue this to be the appropriate subjective measure.¹⁹⁹ In contrast, others have argued that the reasonable value of the services (\$8000) is the appropriate measure of subjective enrichment, given that the work was accepted and that the plaintiff could not have known of the defendant's expectation of only paying \$5000.²⁰⁰ In fact, some unjust enrichment theorists has advocate "loss-splitting" as an appropriate alternative remedial response to this sort of problem.²⁰¹ Applying unjust enrichment does not provide a solution as to which measure ought to be adopted. This is evidenced by the range of views as to the correct conclusion in examples such as this.²⁰²

If unjust enrichment is abandoned, however, it may well be possible to

¹⁹⁷ Leaving aside whether this includes a profit element or not.

¹⁹⁸ Williston, *Contracts* (3rd ed., 1970) §1485, 314-5, appears to support such a measure of recovery in circumstances such as those in the above example where such a measure is greater than the sum which the defendant expected to pay.

¹⁹⁹ Birks, in Burrows, *Essays*, 129, 136-7.

²⁰⁰ Cf. Goff & Jones, 29. This last measure accords with the actual result in *Vickery v. Ritchie*, 88 N.E. 835 (1909), which adopted such a reasonable value. There is some doubt as to whether or not the sum awarded in that case included a profit element. Goff & Jones, 492, fn. 62, assert unequivocally that the plaintiff recovered only his "total cost". In this writer's view, however, the report suggests that the sum awarded was the reasonable value, including a profit component. Such an interpretation would seem to have the support of Kos, S., & Watts, P., "Unjust Enrichment—The New Cause of Action" New Zealand Law Society Seminar, 1990, at 140. Cf. Palmer, Vol. III, 453.

²⁰¹ Palmer, Vol. III, 453, advocates such a solution to *Vickery v. Ritchie*-type problems. In that case, a rogue was responsible for the mistake. In Palmer's view, loss-splitting (the loss being the difference between the reasonable value of the work and the increased value of the land) is not precluded in Restitution, for it is open to a court to "determine the fairest way to measure that benefit in money." Palmer, 454-5, suggests such a solution wherever neither party was responsible for the misunderstanding, but this appears to contradict an earlier expressed view that in cases of mutual misunderstanding, a "reasonable" value is appropriate: 452. Kos & Watts, supra n. 200, 140, consider a loss-splitting solution as an "attractive one", but concede difficulties of "making this solution compatible with the concept of enrichment generally accepted." Goff & Jones, 492, also consider loss-splitting as one possible solution in cases such as *Vickery v. Ritchie*, but finally support the "reasonable value" solution actually adopted in that case.

²⁰² See supra nn. 197-200.

postulate other explanatory ideas which also suggest the appropriate measure of recovery. It will be argued in Chapter 6 that in cases of contracts which are defective or incomplete, the basis for imposing liability rests on the existence of most or all of the essential (that is, substantial as opposed to technical or formal) elements of an ordinary contract. Recovery is contract-like in appearance. To take the above example, the defendant has requested services in circumstances where she clearly expected to pay for such services. The plaintiff performs and completes the non-gratuitously conferred services. But the parties are not *ad idem* as to the appropriate price. Indeed, there is no way of ascertaining a mutually agreed upon price. The solution which flows from such an analysis is one the courts have traditionally resorted to where price is uncertain or left unspecified. The defendant is required to pay, perhaps in contract,²⁰³ but more usually in quasi-contract, a reasonable price for the services. Such a reasonable price may be more than one party expected to pay, or less than the other party expected to receive, but there is no reason, *ceretis peribus*, why the court should prefer one party's expectations over those of the other. Such a solution accords with results in cases raising the same problem as the above example.²⁰⁴

In summary, different approaches to enrichment can lead to different conclusions as to the existence of a benefit and its appropriate measure. Unjust enrichment theory does not provide any guidance as to why and when one approach is to be preferred over another. Consequently, "enrichment" does not appear to be the precondition for liability in many cases said to be explicable in terms of benefit disgorgement, but instead appears to be a conclusion reached after a process of reasoning quite unrelated to the issue of benefit.

§ 4.4.3 The Problem of Doctrine Excision

Undoubtedly, there are difficulties in applying unjust enrichment analysis to as wide a range of topics as have at times and by different

²⁰³ See Chapter 6, where the possibility of an implied term as to price in an otherwise complete contract will be considered.

²⁰⁴ E.g., *Vickery v. Ritchie*, 88 N.E. 835 (1909). See also *Meem Haskins Coal Corp. v. Pratt*, 187 S.W. 2d. 435 (1945). In *Vickery v. Ritchie*, the defendant was required to pay the plaintiff the "fair value of his labor and materials." Goff and Jones suggest that the plaintiff received only the "total cost" of the work, excluding the usual profit element. Although this view was doubted, *supra* n. 200, even if correct, the slightly lower award, still within one possible *quantum meruit* valuation, may be justifiable because the mutual misunderstanding was the result of a third party's fraud. Perhaps the court considered that the plaintiff ought not profit from that fraud by making a profit, even only a reasonable one, on the contract.

commentators been claimed for unjust enrichment. This is acknowledged by most participants in the current debate over the exact reach of unjust enrichment.²⁰⁵

One way in which theorists respond to such difficulties is to argue that particular cases or specific liability rules or doctrines ought to be excluded from unjust enrichment and, perhaps, Restitution.²⁰⁶ Consequently, for example, cases of precontractual liability in which merely reliance losses have been recovered, have been conceded by some to have a purpose other than the reversal of enrichment.²⁰⁷ In relation to necessitous intervention, it has been said that some cases allowing recovery "may simply reflect society's concern to encourage intervention in an emergency rather than its desire to deprive a defendant of an unjust benefit."²⁰⁸ Outside the realm of specific doctrine, a general competing theory of "unjust sacrifice" has been developed to explain recovery for those services which are not considered enriching.²⁰⁹ Alternatively, it has been argued, recovery for "pure" services reflects, *inter alia*, notions of "reliance".²¹⁰

Such theoretical developments are in one sense commendable. Such developments either concede the difficulties inherent in a concept of "benefit"

²⁰⁵ As evidenced by concessions by various commentators noted throughout this chapter, that individual cases, particular liability rules, or even parts of Restitution, are not concerned with the disgorgement of enrichment. The context which necessitates such concessions is described by Beatson, 21:

For restitution lawyers the temptation is artificially to enlarge the category of obligations which are based on the defendant's unjust enrichment at the expense of the plaintiff by an overinclusive concept of enrichment.

²⁰⁶ Those who perceive Restitution as being itself defined by unjust enrichment would be in this camp. Others perceive Restitution as a subject extending beyond unjust enrichment.

²⁰⁷ See, e.g., Goff & Jones, 554-63, particularly at 557, in relation to *William Lacey (Hounslow) Ltd v. Davis* [1957] 2 All E.R. 712. Contrast Birks, in Burrows, *Essays*, 141-3.

²⁰⁸ Goff & Jones, 26. Cf. Burrows, 247.

²⁰⁹ Stoljar, S.J., "Unjust Enrichment and Unjust Sacrifice" (1987) 50 M.L.R. 603. See also Stoljar, *Negotiorum Gestio*, 8-17, for a more detailed discussion. Muir, *supra* n. 7, has developed these ideas.

²¹⁰ Beatson, Chp. 2. Birks, *Restitution—The Future*, 101-2, and Garner, *supra* n. 3, point out that "reliance" does not specify the doctrinal vehicle for recovery and in Birks' view, this supports his argument that such cases are examples of unjust enrichment. But Beatson appears to concede that Restitution extends beyond unjust enrichment and that hence, quasi-contractual remedies, amongst others, may be used to recover reliance-losses.

generally²¹¹ or at least concede that unjust enrichment is more limited in its operation than has at times been claimed.²¹² But there is a fundamental problem which results from such reasoning. The problem, to be labelled perhaps somewhat uninformatively as "doctrine excision", calls for consideration in some detail. The problem of doctrine excision manifests itself as two closely related consequences which follow from distinguishing between cases in which restitution of a benefit, on at least one approach, is discernible,²¹³ and cases in which no benefit is conceded to exist. These two consequences are as follows:

(1) Coherent and intelligible, individual doctrines would be divided artificially into two doctrines. One of these "new" doctrines will then be said to be explicable in terms of unjust enrichment,²¹⁴ simply because the remedy utilised is restitutionary in all cases incorporated within the new doctrine. Such a conceptualisation would ignore the previously single doctrine's coherent explanation which recognises the possibility of a number of remedial responses (including restitution) to fulfil the doctrine's purpose.

(2) Separate doctrines, operating in one subject area raising similar problems (for example, precontractual dealing),²¹⁵ would be given disparate treatment, despite such doctrines being unified by the existence of common underlying principles other than unjust enrichment. Some doctrines would be treated as unjust enrichment-based and others would be left for consideration elsewhere.²¹⁶ Such a disparate treatment would follow despite the fact that certain common elements necessary for relief can be identified, allowing for recovery in one or other of the doctrines. The existence of a benefit may at most merely influence which doctrine appropriately should be utilised.

²¹¹ Cf. also Fridman, 33-6.

²¹² E.g., Beatson, Chp. 2.

²¹³ Although the remedial response may thus be restitutionary, either indisputably so, or at least on a wide conception of that remedy, it does not follow that the liability rules giving rise to liability necessarily have a restitutionary purpose, a point which will be illustrated here.

²¹⁴ Whereby unjust enrichment is the "underlying principle" of that doctrine, or else the doctrine is a specific manifestation of a generic cause of action in unjust enrichment.

²¹⁵ In which type of case estoppel, quasi-contract, or even "implied contract" have variously been utilised.

²¹⁶ And, as Hedley points out, supra n. 38, 60, perhaps to "drop out of sight again" and be ignored.

The burden of the problem has been summed up by Finn, when considering the appropriateness of unjust enrichment as an explanation of particular equitable doctrines:

[Those] doctrines are to be explained, and can better be explained, in other ways which reveal their essential purpose, their vital ingredients, as also their relationship with other bodies of law. There seems to me to be little useful purpose to be served in dismembering presently intelligible doctrines to satisfy restitution's imperialism (or perhaps to assuage its self-doubts) merely because those doctrines in some factual contexts can secure restitutionary results.²¹⁷

As will be seen, the problem of doctrine excision arises essentially because formalistic distinctions are being adopted as part of the conceptualisation of much of what is now Restitution. Such formalistic distinctions are not ones which enlighten our understanding of liability rules and doctrines. Such formalism must be rejected. As Birks has said, "[n]obody would wish to encourage the inconvenience of dispersing in different books the different species of similar responses to a single event."²¹⁸ Yet, as will be seen, this is a perhaps inevitable consequence of any theory which isolates benefit disgorgement as the critical factor in understanding liability rules.

To fully explain and illustrate the problem of doctrine excision, a number of specific examples will be considered: proprietary estoppel; the notion of duress, manifesting itself in the operation of a number of doctrines; and liability arising from precontractual dealing. As well, a more general manifestation of the problem of doctrine excision—a division between money and service cases—arising potentially in all areas of Restitution, will be considered.

§ 4.4.3.1 Proprietary estoppel

Australian law appears to be moving toward a recognition of "one concept of estoppel common to, or straddling, common law and equity",²¹⁹ which concept is unified by an "over-arching" concern of preventing detriment to a plaintiff who has relied on the correctness of an assumption or expectation,

²¹⁷ See Finn, *supra* n. 11, 15-6. See also, Finn, *supra* n. 8, 22.

²¹⁸ Birks, 33.

²¹⁹ The Hon. Sir Anthony Mason, "The Place of Equity and Equitable Doctrines in the Common Law World: An Australian Perspective" in Waters, D.M., *Equity, Fiduciaries and Trusts* (1993), 19. See also *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394.

encouraged or at least acquiesced in by the defendant.²²⁰ The estopped party will be prevented from denying the correctness of the assumption by insisting on his or her legal rights or resiling from an assumed state of affairs, where it would be unconscionable to do so. Should such a recognition of a unified estoppel take root, then the historically distinct category of proprietary estoppel would be seen as but one species or manifestation of a single doctrine. Alternatively—and this still appears to be the case in England—proprietary estoppel may itself be seen as a single doctrine.²²¹ In either case, proprietary estoppel has certain features distinguishing it as a discrete body of specific rules governing recovery within a particular factual context.²²²

The operation of proprietary estoppel can be exemplified by the case of *Hamilton v. Geraghty*.²²³ In that case, X built a small dwelling on a block of land owned by the defendant, under the mistaken belief it was his own. The defendant, knowing of X's mistake, allowed him to persevere in his error and subsequently took possession of the land and refused the plaintiff, the assignee of X's interest, entry. The plaintiff was held to be entitled to a lien for the expenditure incurred.²²⁴ There are numerous similar cases, either where a landowner has stood by, knowing of a plaintiff's mistake,²²⁵ or alternatively, actively created expectations upon which a plaintiff has detrimentally relied.²²⁶

220 Cf. Mason, *id.*, that the concept of equity

seeks to avoid detriment to a party who has acted upon the correctness of an assumption or state of affairs which the party estopped has encouraged or expected or ought reasonably to have expected.

221 Cf. Gray, K., *Elements of Land Law* (2nd ed., 1993), 312-4, and generally Chp. 11.

222 These specific rules are nonetheless ones consistent with the unifying concerns of estoppel as a whole.

223 [1901] 1 N.S.W.R. 81

224 This was the remedy sought by the plaintiff in *Hamilton v. Geraghty* [1901] 1 N.S.W.R. 81, though the court made it clear that the plaintiff would have been entitled to the transfer of the defendant's interest if such a remedy had been sought.

225 E.g., *Huning v. Ferrers* (1711) Gilb. Rep. 85; *Taylor's Fashions v. Liverpool Victoria Trustees* [1982] 1 Q.B. 133; *Jackson v. Cator* (1800) 5 Ves. Jun. 688; *Stiles v. Cowper* (1748) 3 Atk. 692; *Dann v. Spurier* (1802) 7 Ves. Jun. 231.

226 E.g., *Dillwyn v. Llewelyn* (1862) 4 De G.F. & J. 517, 45 E.R. 1285; *Plimmer v. Mayor of Wellington* (1884) L.R. 9 A.C. 699.

Initially, it was considered that there were two separate lines of authority: "acquiescence" cases, and "active encouragement" cases. It has been said that "[t]he historical justification for their particular dichotomy is negligible" and that "the acquiescence and the encouragement

The remedy arising from the estoppel may vary according to the circumstances giving rise to the equities in the plaintiff's favour.²²⁷ At times, defendants have been required to compensate the plaintiffs for their losses, for example, by means of a lien for expenditure incurred.²²⁸ At other times, defendants have been required to fulfil a plaintiff's expectations, for example, by transferring their interest in land to the plaintiffs.²²⁹

The coherence of proprietary estoppel stems from a plaintiff's reliance upon a belief or expectation encouraged or acquiesced in by the defendant as to an existing or future interest in land, which belief or expectation is subsequently falsified. The plaintiff's reliance would result in detriment if a defendant who acquiesced in or encouraged the plaintiff's behaviour is allowed to insist on his or her strict legal rights to deny the correctness of the plaintiff's belief or expectation.²³⁰

Often, defendants will be asserting their strict legal rights in order to

cases are each but emanations of the 'wider equitable jurisdiction': Finn, P.D., "The Making Good of Expectations" in Finn, P.D. (ed.), *Essays in Equity* (1985), 70, citing *Taylor's Fashions v. Liverpool Victoria Trustees* [1982] 1 Q.B. 133, 147. It will be seen below that a consequence of unjust enrichment analysis could be to revert to such a separation of acquiescence and encouragement cases.

²²⁷ In *Plimmer v. Mayor of Wellington* (1884) L.R. 9 A.C. 699, 714, it was stated that "the Court must look at the circumstances in each case to decide in what way the equity may be satisfied."

²²⁸ Such as in *Unity Joint Stock Mutual Banking Association v. King* (1858) 25 Beav. 72; 53 E.R. 563. And note *Hamilton v. Geraghty* [1901] 1 N.S.W.R. 81, itself.

²²⁹ *Plimmer v. Mayor of Wellington* (1884) L.R. 9 A.C. 699. And see the differing views of the majority and minority in *Jackson v. Crosby* (1979) 21 S.A.S.R. 280, as to the measure of recovery.

²³⁰ Cf. *Ward v. Kirkland* [1967] Ch. 194, 235, per Ungood-Thomas J. Courts have emphasised the need to show "bad faith" or a "bad conscience" on the part of the defendant. Where, however, there has been no acquiescence in, or active encouragement of, a plaintiff's actions, so that the defendant's insistence on his or her strict legal rights cannot be said to have been "unconscionable" in some way, a plaintiff will generally be denied relief. This will be so even where a plaintiff has acted under a mistake. Thus, in *Brand v. Chris Building Co. Pty Ltd* [1957] V.R. 625, the plaintiffs mistakenly built a house on the defendants' vacant lot without the knowledge of the defendants. They were refused any recovery. In *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129 and *Willmott v. Barber* (1880) L.R. 15 Ch.D. 96, two significant cases in establishing the principles of proprietary estoppel claims, the courts found that the defendants in each case were not aware of the plaintiffs' mistakes. Consequently, no rights arose. In both cases it was concluded that the defendants' lacked the requisite degree of knowledge of the plaintiffs' mistaken assumption. In *Ramsden v. Dyson*, this seems a very harsh finding of fact and the dissenting conclusions of fact of Lord Kingsdowne appears preferable.

seize an advantage, such as improvements made to their property.²³¹ But this will not be so in all cases and the receipt of a benefit is not a pre-requisite for the operation of proprietary estoppel. Thus in *Crabb v. Arun District Council*,²³² the plaintiff acted on the faith of representations made by the defendant and subsequently unfulfilled,²³³ in a way which affected the value of the plaintiff's own property.²³⁴ Nevertheless, the court was prepared to grant relief, by requiring the defendants to make good their representations, thus fulfilling the plaintiff's expectations.²³⁵

Given the absence of any benefit and the nature of the relief in cases such as *Crabb v. Arun*, Birks has argued that cases which fulfil a plaintiff's expectations cannot be considered restitutionary and thus based on unjust enrichment.²³⁶ Doubtless, this is correct. But Birks goes on to argue, nevertheless, that acquiescence cases *are* explicable in terms of unjust enrichment, with the defendant's benefit established by his or her free acceptance of the plaintiff's services. Birks thus suggests a possible division of proprietary estoppel cases into two distinct doctrines. Cases in which a defendant has acquiesced in a plaintiff's conduct are said to be based on unjust enrichment, giving rise to a restitutionary remedy. Those cases in which a plaintiff relied on an expectation created by the defendant as to some existing or future interest in the defendant's land are enforceable on the basis of "a doctrine of promissory estoppel".²³⁷

²³¹ Thus, in *Huning v. Ferrers* (1711) Gilb. Rep. 85, 85, the court noted that the plaintiff's repairs on the land were carried out whilst the defendant stood by "with a design to reap the whole benefit thereof."

²³² [1975] 3 All E.R. 865

²³³ Representations were made that an easement would be granted over the defendant's land.

²³⁴ The plaintiff subdivided his land, leaving part of the subdivision without any road access. The defendant's refusal to grant the easement seriously affected any possible use to be made of the land.

²³⁵ Defendant was required to grant an easement to the plaintiff, to provide him with access to his land. In *Crabb v. Arun*, the defendant did not intimate any acceptance of a benefit and in fact, they were not even aware of the plaintiff's detrimental actions, although such actions were foreseeable. No "service" was performed that could be "freely accepted." The plaintiff's actions solely produced a loss.

²³⁶ Birks, 290-4. Birks' ideas are discussed and criticised by Getzler, *supra* n. 183.

²³⁷ Birks, 290-1:

The effect of such a division would be entirely deleterious, "dismembering"²³⁸ proprietary estoppel ultimately along irrelevant lines. There are, for a start, a number of criticisms of detail which can be made of such a division. For example, it may be difficult in some circumstances to draw a clear factual distinction between conduct which is merely acquiescent on the one hand and conduct which actively creates expectations on the other, such as where a plaintiff's assumption is "only tentatively held" so that the defendant's acquiescence confirms and "in a sense, positively generates that assumption."²³⁹

More importantly, the basis for Birks' division rests purely on the remedial response to given facts. But in some acquiescence cases, the courts have been prepared to fulfil expectations.²⁴⁰ In Australia, the weight of authority appears to favour a view of estoppel as a doctrine aimed at averting or reversing a plaintiff's detriment. But at times, the only way in which this may be possible is by the fulfilment of the plaintiff's expectation.²⁴¹ Often, such expectation-fulfilling remedies may be necessary where the plaintiff's detriment resulted from reliance upon a positive expectation (e.g., "I will receive an interest in D's land") as opposed to a negative expectation (e.g., "I will not be harmed by D insisting on her strict legal rights"). Although a

The [proprietary estoppel] doctrine in *Ramsden v. Dyson* has a dimension to it which has nothing to do with restitution/unjust enrichment. On some facts the courts will respond in a way which gives the plaintiff far more than he would get if he could claim only the enrichment obtained by the defendant at his expense. The variety of response is at present treated as a matter of discretion, not as something controlled by identifiable differences between one class of fact-situation and another. This makes for deplorable uncertainty. It may later turn out to be possible to predict, with better accuracy, which facts will give only restitution and which will give more. If so, the exercise will be tantamount to a recognition that 'the doctrine in *Ramsden v. Dyson*' was really not one doctrine but two. And the dividing line which is most likely to be drawn is between a doctrine of free acceptance (or, acquiescence) and a doctrine of promissory estoppel.

²³⁸ Finn, loc. cit., text to supra n. 217.

²³⁹ Getzler, supra n. 183, 312. Such problems may also arise as a matter of evidence, as in *Denny v. Jensen* [1977] 1 N.Z.L.R. 635, in which case it was unclear whether an oral promise to sell land had in fact been made.

²⁴⁰ *Hamilton v. Geraghty* [1901] 1 N.S.W.R. 81, being one, though note the actual remedy granted in that case. *Bath and Montague's Case* (1693) 3 Chanc. Cas. 55; 22 E.R. 963, and *E.R. Ives Investment Ltd v. High* [1967] 2 Q.B. 379, appear to be other examples.

²⁴¹ See, e.g., *Waltons Stores v. Maher* (1987) 76 A.L.R. 513, and *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394.

positive expectation will usually result from a defendant's active encouragement, it may also be sustained by acquiescent conduct. And, conversely, a plaintiff's negative expectation may have resulted from a defendant's active encouragement such as a promise.

Undoubtedly though, the most serious problem with Birks' division of proprietary estoppel is that the doctrine may be activated, even in acquiescence cases, despite the absence of any benefit obtained by the defendant.²⁴² Indeed, the very formulation of liability for acquiescence extends to cover a plaintiff's detrimental conduct in relation to his or her own land.²⁴³ The commonly accepted probanda governing liability would thus need to be changed, or else, a further division *within* acquiescence cases would need to be made.

The possibility of liability arising despite the absence of benefit, even in acquiescence cases, goes to the crux of the matter. In all proprietary estoppel cases,²⁴⁴ the estoppel arises where the plaintiff would suffer detriment were the defendant not estopped. Detriment is a *sine qua non* for liability. Often, of course, a defendant will also have received a corresponding benefit. But not in all cases. Thus, to divide proprietary estoppel cases according to whether a benefit has been received is to ignore the unifying rationale of preventing detriment. It would be to divide estoppel according to what in explanatory terms is an irrelevant consideration.

§ 4.4.3.2 Duress

The legal phenomenon of duress is concerned with illegitimate pressure exercised by a defendant in order to obtain some benefit through coercion.²⁴⁵ Such pressure must indeed have been coercive, in the sense that it caused or contributed to²⁴⁶ a plaintiff acting in a way he or she otherwise may not have

²⁴² E.g., in *E.R. Ives Investment Ltd v. High* [1967] 2 Q.B. 379, it was held that estoppel could arise from a defendant's acquiescence in a plaintiff's expenditure on his own land. These are similar facts to those in *Crabb v. Arun* [1975] 3 All E.R. 865. See Getzler, *supra* n. 183, 312. For a consideration of the issue of benefit in relation to proprietary estoppel cases generally, see Garner, *supra* n. 3, 45-52.

²⁴³ See *Willmott v. Barber* (1880) 15 Ch.D. 96, 105-6, in which Fry J. considered that a plaintiff's detrimentally reliant action need not necessarily relate to the defendant's land.

²⁴⁴ This includes those in which an expectation remedy is granted.

²⁴⁵ Cf. Seddon, N., & Hall, P., "Duress" in *Laws of Australia*, 35.7, 7; *Crescendo Management Pty Ltd v. Westpac Banking Corporation* (1988) 19 N.S.W.L.R. 40, per McHugh J.A., 45-6; Birks, P., "The Travails of Duress" [1990] L.M.C.L.Q. 342, 343; Burrows, 161.

²⁴⁶ *Crescendo Management Pty Ltd v. Westpac Banking Corporation* (1988) 19 N.S.W.L.R.

and which denies the plaintiff reasonable alternatives. Often, the issue of duress arises in the context of contractual relations entered into by the plaintiff and defendant, where the plaintiff alleges that his or her consent was vitiated by the illegitimate pressure.²⁴⁷

Duress draws on various and diverse historical sources such as tort law, contract law and equitable doctrine, and its present operation defies simple explanation.²⁴⁸ There is a tendency today, however, to treat duress as an "amalgam" of principles derived from these various historical sources.²⁴⁹ In particular, it is argued that the "divide between common law and equity" should not "drive a wedge through uniting principle."²⁵⁰ In Australian law, at least, unconscionability has been identified as such a unifying principle.²⁵¹

The crux of duress is the issue of what amounts to illegitimate pressure and which pressure denies a plaintiff reasonable alternatives. Overwhelmingly, this issue is raised by parties seeking to avoid transactions allegedly entered under duress. Commonly, such a transaction will take one of two forms:²⁵² (1) the transfer of money or property to a defendant without consideration;²⁵³ or

40. The pressure need not be the "sole" or "overwhelming" reason for the plaintiff's actions: Birks, *ibid.* Cf. Seddon & Hall, *ibid.*, 11.

²⁴⁷ Cf. Burrows, 162; Birks, *ibid.*, 344. Vitiating here does not mean that the plaintiff's will was overborne. In the words of McHugh J.A. in *Crescendo Management Pty Ltd v. Westpac Banking Corporation* (1988) 19 N.S.W.L.R. 40, 45-6: "[T]he subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action". For a persuasive criticism of a requirement of coercion of the will, see Birks, *supra* n. 245.

²⁴⁸ There has also been considerable statutory "intrusion" in the area. See Seddon, N., "Compulsion in Commercial Dealings" in Finn, at 138. As Seddon notes, merely one category of duress, "economic" duress, has been shown by Dawson to have been shaped by the common law of duress, undue influence, the expectant heir cases and equity's concern for the adequacy of consideration. See 144, fn. 34, citing Dawson, J.P., "Economic Duress—An Essay in Perspective" (1947) 45 Mich.L.Rev. 253.

²⁴⁹ Cf. Seddon & Hall, *supra* n. 245, 7.

²⁵⁰ Burrows, 161.

²⁵¹ See *Crescendo Management Pty Ltd v. Westpac Banking Corporation* (1988) 19 N.S.W.L.R. 40.

²⁵² Cf. Palmer, Vol. II, 257-8.

²⁵³ Benefits in kind, that is, services, theoretically could also be conferred under duress. Burrows, 164, states that there are no reported English cases, but notes the Canadian case, *Peter Kiewit Sons' Co of Canada v. Eakins Construction Ltd* (1960) 22 D.L.R. (2d.) 465. In that

(2) entry into or variation of a contractual relationship, between the plaintiff and defendant.

In either case, where the transaction is successfully avoided, the remedy can be seen as restitutionary. Typically, in the first case, where money has been transferred under duress, a quasi-contractual claim for money had and received will succeed.²⁵⁴ Typically, in the second case, contract avoidance at common law or in equity and further, restitution of any benefits conferred under the contract, are the appropriate remedial responses. Given such remedial responses, most writers focus on the procurement of benefit as an essential feature of duress. Certainly a party exerting illegitimate pressure seeks some advantage, making demands to which the plaintiff must have acceded for there to have been coercion. But is it helpful to go on to say, as many commentators do,²⁵⁵ that the purpose of duress is to prevent a defendant's unjust enrichment?

Certainly, in most cases, a defendant will have obtained a benefit as a result of the exercise of the illegitimate pressure: money or goods received without consideration, or the advantage of a contractual relationship, the plaintiff's obligation under which is of itself of benefit, irrespective of whether

case, a plea that services had been conferred under duress was rejected by the Supreme Court of Canada.

²⁵⁴ *Morgan v. Ashcroft* [1938] 1 K.B. 49, 76-7. See generally, Winfield, P.H., "Quasi-Contract Arising From Compulsion" (1944) 60 L.Q.R. 341. For an early history, see Jackson, R.M., *The History of Quasi-Contract in English Law* (1936), 7, 64-72. Historically, a distinction existed between duress and compulsion. Although the origins of the former are far more ancient, the latter was far more broadly based and technically easier because the applicable action was for money had and received: Stoljar, 59-61. Strictly speaking then, quasi-contractual claims would have been for compulsion and not duress, but "duress" is the term which has prevailed as the generic title of this area of law.

Traditionally, under the established categories of quasi-contractual claims for duress, such a claim would lie where money was paid, for example, under threat of an improper application of the legal process (e.g., *The Duke de Cadaval v. Collins* (1836) 4 Ad. & E. 858) or under threat of retention of the plaintiff's goods (e.g., *Astley v. Reynolds* (1731) 2 Str. 915). There appear to be no cases allowing a claim for money had and received where the duress was alleged to have taken the form of actual or threatened violence against a plaintiff, or his or her near relatives. Goff & Jones, 234, speculate that this may be because of the alternative remedial options available in the criminal law and the law of torts. The authors consider, however, that in principle such an action should lie.

²⁵⁵ Cf., e.g., Palmer, §9.4; Burrows, 161-5; Dawson, supra n. 248, 282 et seq. Dawson considers, at 282, that the prevention of unjust enrichment is the "main function of duress doctrines."

the defendant obtains an "inequality in the agreed exchange of values".²⁵⁶ It must be stressed, however, that in all such cases, the plaintiff will have incurred a corresponding and equal loss.²⁵⁷ Any restitutionary remedies then, always have the effect of returning plaintiffs to their *status quo* before the transaction was entered. Such plaintiffs' losses are effectively compensated. This is an important point, to be returned to shortly.

Although it has been stressed that restitution is the usual remedial response to duress, this is not always so. Often, illegitimate pressure amounting to duress and giving rise to avoidance remedies may also constitute an independent wrong, such as a specific tort,²⁵⁸ or breach of contract.²⁵⁹ Damages may thus be an available remedy to compensate a plaintiff for any loss suffered.²⁶⁰ Clearly such a remedy is not restitutionary, but since liability is founded on the independent wrong, this does not seem problematic for an unjust enrichment explanation of duress when utilised as a transaction avoidance mechanism.

It has even been suggested, however, by Lord Scarman in *Universe Tankships Inc. of Monrovia v. I.T.W.F.*,²⁶¹ that

²⁵⁶ Palmer, Vol. II, 260-1, and see §9.4 generally. Cf. Dawson supra n. 248.

²⁵⁷ Entry into the contract by the plaintiff being an equal detriment to the defendant's gain of the right to enforce the contract (were the contract not voidable).

²⁵⁸ See *Equiticorp Financial (NSW) v. Equiticorp Financial (NZ)* (1992) 29 N.S.W.L.R. 260, 296, per Giles J., who considered the effect of a finding of duress to be that:

The transaction will be voidable rather than void ... so that if the transaction is avoided there may be a claim to return of money paid as money had and received but if it is not avoided the claim will be for damages where the economic duress is a tort

There are a number of economic torts which may be infringed—conspiracy, intimidation, interference with contractual relations and perhaps, interference with trade or business by unlawful means.

²⁵⁹ See Seddon, supra n. 248, 158-63, and Seddon & Hall, supra n. 245, 51. And as economic duress commonly occurs in the context of an existing contractual relationship, it has been suggested that only by reference to the terms of the contract sought to be rescinded, or the original contract which has been modified, can the elements of duress properly be brought out. See Stoljar, 78-83, particularly 82-3.

²⁶⁰ Such damages may also, more controversially, be available in equity. See discussion by Seddon, supra n. 248, 161-2. Damages may also be available under statutory provisions. In Australia, a number of sections of the *Trade Practices Act 1974* (Cth) potentially apply.

²⁶¹ [1983] A.C. 366. The action in that case was for money had and received for

[i]t is ... already established law that economic pressure can in law amount to duress; and that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss.²⁶²

This statement suggests that any duress sufficient to justify a contract being avoided (or benefit being recovered) is itself a tort where it causes loss.²⁶³ This view is not uncontentious, however. Lord Diplock, in the same case, took the view that "[t]he use of economic duress to induce another person to part with property or money is not a tort per se".²⁶⁴ The same point has been argued strongly by Birks.²⁶⁵

The law may not go down the road of recognising all cases of duress as amounting to tortious conduct. If it does not, then coercion which gives rise to a right to have a transaction avoided will not necessarily infringe a duty in tort, in which case, if no other independent wrong has been committed, damages will not be an available remedy. Would this, however, be a desirable state of the law? The focus of duress is upon the conduct of a defendant which is unacceptable in law: exerting illegitimate pressure in order to obtain some advantage. Perhaps implicit in Lord Scarman's statement is a recognition that coercive conduct may be unacceptable in law, not only where a defendant has benefited as a result, but also in any circumstances in which a plaintiff has acceded to the defendant's demands and suffered a loss as a result.

Let us consider an exceptional case. A defendant exercises illegitimate pressure upon a plaintiff, which coerces that plaintiff to confer a benefit to (pay

restitution of payments made as a result of economic pressure. The claim thus fell within the complex and developing category of duress known as "economic" duress. Initially, the law of duress focused upon threats to one's person, but has since developed to recognise threats to one's property and more recently, threats to one's business or trade (i.e., economic interests) as giving rise to actionable duress. See Lord Scarman, 400.

²⁶² Ibid, 400.

²⁶³ Seddon, *supra* n. 248, 160, has interpreted Lord Scarman's statement as supporting the view that duress itself constitutes a tort.

²⁶⁴ [1983] A.C. 385. And Lord Diplock, alongside Lord Russell of Killowen and Lord Cross of Chelsea, formed the majority in the case. The difference between the minority and majority did not, however, turn on this question. Lord Russell concurred with this part of Lord Diplock's judgment, but Lord Chelsea did not express an opinion on the precise point being discussed. More recently, see Lord Goff in *The Evia Luck* [1992] 2 A.C. 152, 166.

²⁶⁵ Birks *supra* n. 245, 348-9.

money to, or enter into a contract with) a third party. It may be possible to avoid the transaction with the third party,²⁶⁶ but if not, should the plaintiff be precluded from recovering his or her losses from the defendant in those cases in which the defendant's conduct did not constitute an independent tort? In this writer's view, the answer should be no: the wrongful, unacceptable conduct should not go unremedied. This should be so, even though the defendant will in no way have been enriched.²⁶⁷ There is some judicial support for such a view. In *Fedon v. Fedon*, O'Sullivan J.A. considered that:

Where a person induces another wrongfully to part with his money, even though the money does not go to the inducer, so that it cannot be said that the inducer is enriched, there may well be a case for imposing on the inducer an obligation to indemnify his victim.²⁶⁸

The law, it is suggested, faces an important choice in relation to duress. It could focus on unjust enrichment as the explanation of duress where it gives rise to transaction avoidance remedies.²⁶⁹ We would thus need to consider

²⁶⁶ Where the benefiting third party was innocent of any involvement in the duress, that is, did not have actual or constructive knowledge of the duress, then avoidance of the transaction would only be available in limited circumstances. Cf. *American Jurisprudence* (2d) Vol. 25, "Duress and Undue Influence" §21. See also *Corpus Juris Secundum* Vol. 70, §109, 90: "The compulsion or coercion must come from the party to whom or by whose direction the payment is made" (emphasis added).

²⁶⁷ In such circumstances, the defendant will not have been enriched regardless of which approach to enrichment is adopted. Although the defendant has been advantaged by the fact that the plaintiff has done what the defendant requested, there could not be said to have been a benefit under any conceptions of that term. Merely acceding to the demand does not confer a benefit. Even if we consider that it does, the remedial purpose of any relief cannot be restitutionary, for such a nebulous, indeed, metaphysical "benefit" cannot be disgorged as such. Even if a restitutionary remedy were available *vis à vis* the third party, this could not be said to constitute restitution of the defendant's "benefit".

²⁶⁸ [1978] 2 W.W.R. 723, 740. Note, however, that Goff & Jones, 235, appear to disagree with this conclusion. In relation to cases of the improper application of the legal process, they write that "where the payment has been made not to those responsible for the irregular arrest but to a third party, no action is available against the former for the recovery of the money, for the good reason that they have not received it." They cite *O'Connor v. Isaacs* [1956] 2 Q.B. 288. But that case involved a magistrate who, in good faith, but incorrectly for want of jurisdiction, ordered the plaintiff to pay maintenance to a third party (his wife). The case thus raises a number of policy grounds which may justify the decision. They include the *bona fides* of the magistrate and the need to protect the integrity of the court, so that mistakes of law, as in that case, are rectified by resort to the usual judicial process. As a general rule, the lack of the receipt of the money ought not be a prohibition. Arguably, (cf. Goff & Jones, 235, and Winfield, *supra* n. 254, 342) the money had and received action would not have allowed such a claim, but the forms of action no longer govern. Remedial relief could be formulated on equitable grounds, or as *Fedon v. Fedon* suggests, in Restitution.

²⁶⁹ Although in cases in which disgorgement is the remedy, to say that the basis of that remedy is one of unjust enrichment appears to be little more than a statement of conclusion. At the "unjust" phase of the inquiry, the focus would be on those issues common to

separately, at least conceptually, cases in which duress constitutes an independent wrong and gives rise to non-restitutionary remedies, with the defendant perhaps not even having obtained a benefit.²⁷⁰ Yet such a distinction would be made despite the fact that in all cases in each category, a plaintiff will have suffered a loss, so that cases in the "restitution" category could equally be described as having a purpose of preventing "unjust" losses.

Alternatively, the law could focus on a defendant's unacceptable conduct—illegitimate pressure exercised to obtain an advantage—which coerces a plaintiff to act in a way other than he or she may have done. Such conduct, with its tort-like appearance, would give rise to a number of possible remedial responses whenever a plaintiff has suffered a loss as a result. Of course, in most cases, the defendant will have received a corresponding benefit, but such benefit would not be a precondition for relief. Such a less-formalistic approach would see duress as one doctrine—that is, there would be one law of duress—concerned with the exercise of illegitimate pressure that coerces.²⁷¹ The focus then, would remain on what in this writer's view is the real burden of duress: determining when indeed, illegitimate pressure can be said to be coercive.

§ 4.4.3.3 Precontractual liability

As has been seen, some cases of precontractual liability cannot be described as giving rise to a restitutionary remedy, even on the widest possible approach to enrichment. Relief may nonetheless ensue in such cases, in quasi-

all duress cases. These issues include the nature of the pressure or threats applied, the factual context of those threats, the affect of those threats on the plaintiff's available choices, and the plaintiff's consequent actions. Such inquiries as to the legitimacy of the defendant's pressure and the consequences of that pressure are the feature of any claim based on notions of duress, whether the claim is for the return of money, the rescission of a gift or contract, or for losses incurred on the basis of one of the economic torts of conspiracy, intimidation, or interference with contractual relations.

²⁷⁰ A view with which Burrows, 163, would appear to concur:

Even if duress were itself a tort, one would still need to recognise that benefits conferred because of illegitimate pressure could be recovered in unjust enrichment by subtraction albeit that in practice a plaintiff would then almost always choose to sue in tort for compensatory damages (footnotes omitted).

²⁷¹ Such a unity may be evident even in the earliest development of duress. As Stoljar has pointed out, after a consideration of early cases of compulsion, that "procedure apart" the conceptual problems of what sort of pressure amounts to compulsion "hardly differ whether they arise in quasi-contract or tort." Stoljar, 63. See also 61-4, 78-9.

contract, Restitution or estoppel. Many have acknowledged that such cases, given that they often concern detrimental reliance, cannot be incorporated within unjust enrichment.²⁷² Thus, where a plaintiff performs detailed planning work never ultimately of any use to the defendant, in the (as it turns out) false expectation of receiving a major building contract,²⁷³ Beatson, for example, accepts that recovery in such a case is for a plaintiff's reliance loss and outside the reach of unjust enrichment.²⁷⁴ Yet, as will be seen in Chapter 6, recovery of a plaintiff's reliance loss will follow on the same basis as recovery for services performed and which might²⁷⁵ be considered to be of benefit to the defendant. To generalise somewhat, it will be seen that a defendant may be liable where a plaintiff has incurred losses as a result of his or her detrimental reliance upon an expectation of a future contract, in circumstances in which the risk of such a contract not eventuating lies with the defendant. Where the plaintiff's detrimental reliance is in the form of a service performed, *quantum meruit* is commonly awarded, irrespective of whether a defendant has benefited as a result of the plaintiff's actions. If unjust enrichment is utilised to explain those cases in which a defendant's enrichment plausibly may be identified, then an artificial division will be created. Essentially similar cases, in which a plaintiff has suffered losses ultimately as a result of the defendant's conduct, will be considered separately, entirely on the basis of whether or not the defendant has been enriched.

At times, a plaintiff may have suffered a loss in the form of a pre-payment of money to the defendant,²⁷⁶ in anticipation of a contract never completed. Since money, unlike services, can be "returned",^{276a} a plaintiff may be entitled to recover such pre-payment without needing to show the same elements of "wrongful" conduct of a defendant as is necessary in cases of recovery for services. Simply put, no new burden or obligation is being imposed when a defendant is asked merely to return money received. Hence, restitution of money payments made in anticipation of a contract may be

²⁷² See § 4.3.1

²⁷³ Cf. *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880; *William Lacey (Hounslow) Ltd v. Davis* [1957] 2 All E.R. 712.

²⁷⁴ Beatson, Chp. 2. And see § 4.3.1.

²⁷⁵ This depends on the approach to enrichment which is considered applicable.

²⁷⁶ An act which unequivocally enriches the defendant.

^{276a} More accurately, in most cases only the equivalent value can be returned.

possible on more liberal grounds than recovery for services rendered. But conversely, a change of position defence may be available to a defendant who no longer has the economic advantage of the money.²⁷⁷ These ideas will be considered further in Chapter 9. The point that needs to be made here, however, is that if a defendant's conduct is "wrongful", that is, sufficient to justify reliance loss liability in the form considered in precontractual dealing cases, then such a change of position defence ought not be available.²⁷⁸ The unifying idea of liability founded on the plaintiff's detrimental reliance ought not to be obscured by the fact that the plaintiff's detriment takes the form of an unequivocally enriching payment of money to the defendant.

This raises a point of more general concern extending beyond precontractual liability: the need to avoid similar cases being treated separately merely on the basis of whether factually they concern the payment of money as distinct from the performance of services. This distinction calls for further consideration.

§ 4.4.3.4 Maintaining unity between money and service cases

Much of this chapter has concentrated on services and specifically, on the issue of when services can be considered to be enriching. As has been seen, in many cases in Restitution, plaintiffs may recover for services rendered by them which are not of benefit to the defendant receiving them. The receipt of money, however, is unequivocally enriching. But to persist with an unjust enrichment explanation of money cases within areas of law in which recovery is also possible for services performed in detrimental reliance, would result in a division of such topics between money and service cases. In this writer's view,

²⁷⁷ Unjust enrichment advocates, such as Birks, *Restitution—The Future*, Chp. 6, perceive a change of position defence (now recognised by the High Court of Australia in *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57; by the English House of Lords in *Lipkin Gorman v. Karpnale Ltd* [1991] 3 W.L.R. 10) as embodying enrichment ideas. Consequently, liability will be reduced where the defendant's surviving enrichment is reduced or dissipated. In this writer's view, change of position has a subtly different significance. See Chapter 9.

²⁷⁸ In cases in which conduct on the defendant's part gives rise to the claim in Restitution, a change of position defence seems inapplicable. Cf. Beatson, 38-9, who queries whether change of position defence should ever be a defence where there has been "free acceptance". This would exclude all the consensual, acquiescence, and estoppel-type cases. This limits the change of position defence to conceptually narrow circumstances, including mistaken payments of money. Where no such defence is available, this suggests that even where a defendant is no longer "enriched", he or she will still be liable. The matter is considered further in Chapter 6 and the Canadian case of *Conmac Western Industries v. Robinson* [1993] 6 W.W.R. 375, will be criticised for ignoring this point.

such a divergence would be unwarranted; like cases would be treated differently. Birks has said that to argue that the grounds of Restitution differ according to the form in which the value is received (money or services) is "plainly nonsense".²⁷⁹ This writer's point is similar: to suggest that the grounds of recovery differ according to the form of the plaintiff's detrimental reliance (that is, payment of money or provision of services) is unacceptable in those topics in which a plaintiff's detrimental reliance may be sufficient to justify recovery. In other words, a distinction should not be drawn solely between those cases in which a plaintiff's detrimental reliance results in a benefit to the defendant (typically, money payments) and cases in which the plaintiff's detrimental reliance does not result in any benefit to the defendant (many service cases).

In Part II of this thesis, a division of the subject-matter of Restitution will be proposed which does not distinguish between money and services cases, but which concentrates on the causative events which form the basis for imposing liability. The causative events of Restitution will be identified and grouped according to the different types of conduct and circumstances that give rise to liability, irrespective of whether the plaintiff's actions have taken the form of money payments, the transfer of goods, or the rendering of services.²⁸⁰

²⁷⁹ Cf. Birks, P., *Restitution—The Future*, 86; see also 91. See also Birks, in Burrows, *Essays*, 111-2 and 127; and Birks, "Review" (1991) 70 *Can. B. Rev.* 814, 820. Contra Stoljar, *supra* n. 148, 613, who clearly draws such a distinction between money and services. This follows logically from Stoljar's rejection of the relevance of unjust enrichment in service cases. Birks acknowledges that if unjust enrichment is narrowly confined, then "asymmetry" between money and service cases will become a real problem (*Restitution—The Future*, Chp. 4). Perhaps the best way of avoiding this problem is to reject unjust enrichment.

²⁸⁰ A good example may be provided by cases of frustration of contracts. Let us say X commences work, at considerable cost to himself, in performance of a contract between X and Y, which is subsequently frustrated through no fault of either party. If the work performed in no way advantages Y, X has suffered loss and Y, assuming she has not paid any money under the contract, is in the same position as before the contract was entered. It will be argued in Chapter 7 that the purpose of legal intervention in such an example ought to be the sharing of the losses and gains of both parties and some statutory schemes now expressly adopt such an approach. This could be achieved here by requiring Y to pay X for half his losses incurred, despite the lack of any enrichment on Y's part. If, however, X had paid Y \$1000 under the contract whilst neither X nor Y have incurred any other expenses, then the same purpose of loss and gain apportionment could be achieved simply by a restitutionary remedy. Such a remedy should not detract, however, from the essentially similar rationale for imposing that remedy in the circumstances. The different *form* of the transaction (money or services) should not alter the basic similarities in the justification for imposing the remedy.

§ 4.5 CONCLUSION

The issue of enrichment is not an easy one. But the complexity of the issue is itself a product of unjust enrichment theory. In attempting to make enrichment work, in attempting to show that liability rules in Restitution indeed have a purpose of benefit disgorgement, different tests of enrichment have been propounded, debated and refined. Despite these efforts, many topics in Restitution cannot satisfactorily be explained in terms of benefit disgorgement.

The problems arising from an enrichment-based analysis of Restitution have taken a variety of forms. There have been quite specific problems of detail as to the meaning and scope of individual tests of enrichment. Specific problems have also been highlighted in applying these various tests of enrichment to topics which prove difficult for unjust enrichment. And finally, more general and fundamental problems have been isolated, suggesting that the very focus on benefit disgorgement is seriously flawed.

It is not possible to sum up these criticisms in simple, overarching terms. The problems with enrichment are too diverse. Ultimately, it is the sheer complexity of the issue which stands out. In seeking to take a very abstract notion of unjust enrichment and give it explanatory force and further, to utilise it as a concrete mechanism for solving problems in Restitution, commentators have presented us with diverse, detailed and often inconsistent conceptions of enrichment. The very diversity of views encountered suggests that at best, unjust enrichment can be used selectively to explain parts of Restitution; but this runs counter to the very generality of claims made for unjust enrichment, for example, that unjust enrichment is the *only* explanation for a large body of law.

To attempt to rationalise all the different conceptions of enrichment and thus obtain an overall workable framework would be a difficult, perhaps impossible task. This writer has made no attempt to do so. The problems with enrichment, it is suggested, cannot be solved by resort to unjust enrichment itself, or within the parameters of the debate set by unjust enrichment theorists. This writer has another agenda. For if nothing else, the complexity of the issue of enrichment suggests that alternative ways of thinking about Restitution, beyond unjust enrichment, are warranted. It may be possible—indeed, it would seem necessary—to conceptualise Restitution in new and more informative ways. That is the agenda for Part II of this thesis.

PART II

A NEW PERSPECTIVE ON RESTITUTION

Demonstrably, there are problems with unjust enrichment jurisprudence. The endeavours of the theorists to give content to unjust enrichment are less than convincing. Such theorists seek to utilise unjust enrichment in a critically important way—as a tool for analysing liability rules in Restitution—despite the many problems of attempting to give content to the most important constituent parts of the unjust enrichment formulation: those of “unjust” and “enrichment”. Such problems were highlighted in Part I. It is not the purpose of this thesis to attempt to solve such problems, nor even to analyse Restitution within the conceptual confines of unjust enrichment theory. Instead, in this writer’s view, such problems invite a consideration of alternative theoretical frameworks for Restitution. It is time to consider Restitution from a new and different perspective.

To prepare the ground for such a reconsideration of Restitution, it is important to remind ourselves of the critical focus of unjust enrichment, namely, on the restitution of an “enrichment” gained by a defendant. Unjust enrichment theory seeks to deduce the reason for, or cause of, that remedial response of restitution from the very fact of the remedy itself. The cause (unjust enrichment) is deduced from the effect (restitution) in a process of reasoning backwards from that remedy. The argument is, in effect, that a defendant who has been required to disgorge a benefit must have been unjustly enriched and that it is such unjust enrichment which justifies and explains the remedy. In seeking an alternative framework for Restitution, this writer has approached the liability rules under consideration from a different perspective. Instead of reasoning backwards from remedy, this writer has sought to identify in the cases¹ those events or causes, such as particular conduct of a defendant or plaintiff, or the relationship of the parties, or some external factor, which activate individual liability rules. Different liability rules activated by the same

¹ By looking “down to the cases and statutes”, as Birks, 99, would have us.

or essentially similar causative events can be considered together to identify recurring themes common to such rules. Such themes may allow us to organise Restitution in better ways. To take one example, a number of liability rules and doctrines may be activated in circumstances very near, but not within, contract.² Such rules and doctrines, be they equitable (say, proprietary estoppel) or quasi-contractual (say, *quantum meruit* for services rendered under an unenforceable contract), will be seen to share certain common themes which provide a basis for explanation and analysis of liability in such cases.

Arguably, the concept of enrichment has been formulated by some theorists to focus on those causative events giving rise to an obligation, rather than on an outcome in the form of a defendant's enrichment. For example, as has already been seen,³ "free acceptance" appears to identify very particular conduct of a defendant which justifies an obligation being imposed on a defendant irrespective of any benefit gained. But as has been noted, it does so behind the facade of identifying enrichment so that it seems a circuitous and even artificial approach.⁴

This writer's focus upon the recurrent general themes of liability rules activated by similar causative events, has resulted in the identification of four broad categories within which liability rules claimed for Restitution can be grouped. These four categories, to be considered in this Part of the thesis, have been identified by the writer on the basis of *observable* common themes, rather than on any *a priori* rationalisation.⁵

Of course, no process of categorisation in law can ever be, or should seek to be, definitive. It is not suggested that the four categories identified provide the only method of organising liability rules in Restitution, nor that there may not be other possible concerns in Restitution not addressed within any of the

² For example, a plaintiff detrimentally changes his or her position as a result of reliance on an unenforceable contract. The defendant refuses to perform as agreed and as reasonably expected by the plaintiff, relying on the unenforceability of the contract to deny any contractual liability.

³ See § 4.4.2.

⁴ The debate as to what are the relevant identifiable causative events occurs in the context of word games as to the meaning and scope of "free acceptance". The arguments are put in terms of whether or not a defendant has indeed been "enriched" in the particular circumstance.

⁵ Cf. Sutton, R.J., "Unjust Enrichment" (1981) 5 Otago L.R. 187, 198-9.

four categories. Conceivably, some liability rules in Restitution may not sit comfortably within any of the categories to be identified. Furthermore, it is not intended to suggest that the categories to be considered have sharply defined boundaries. Undoubtedly, borderline cases may arise which conceivably could straddle the boundaries of two or more categories. There will always be points at which one category shades into another.

None of these limitations of categorisation should detract, however, from the overall value of identifying groups of liability rules which share common themes. Such common themes may provide us with a basis for rationalising the law of Restitution in an intelligible way. No system can perfectly describe or account for the observed outcomes, but it is suggested that the categories which follow do offer a more satisfactory basis for analysing most of the liability rules in Restitution than does unjust enrichment.

The broad concerns of each of the four categories appear to be quite distinct from the concerns of the other categories. Importantly, in at least three of the four categories, the reversal of unjust enrichment does not appear to be a significant concern.⁶ But if this is correct, then it follows that Restitution can no longer be seen to be a single, unified subject, exclusively explicable in unjust enrichment terms. This ought not to surprise: the very diversity of topics that have been sought to be incorporated within Restitution's bounds rebels against such unity. Nevertheless, many of the liability rules in all four categories do share one common feature, namely, that the origins of such rules can be traced to a function of gap-filling. Few proponents of unjust enrichment cavil with a view of Restitution as gap-filling in the law; in fact, some highlight it.⁷ But this

⁶ Of course, restitution may be one means of giving effect to the still to be identified broad concerns of each category.

⁷ See, e.g., Laycock, D., "The Scope and Significance of Restitution" (1989) 67 Tul.L.Rev. 1277, 1278. See also Fridman, G.H.L., "The Reach of Restitution" (1991) 11 Legal Studies 304: "Canadian judges have been willing, even anxious, to bring into play restitutionary principles to fill gaps left by the original common law."

Perhaps such proponents perceive that there was only ever one, or only one major, gap to be filled in the law of obligations; a gap which unjust enrichment is now considered to have closed. Such a perception of liability rules in Restitution was rejected in Chapter 1. Some unjust enrichment advocates, such as Birks, accept that there may be miscellaneous sources of personal obligations other than contract, tort or unjust enrichment, but do not perceive this to be a large group. Certainly, *most* topics that do not sit easily within contract or tort and, as will be seen in Chapter 6, even some that do on any non-formalistic approach to such categories, are claimed by proponents of unjust enrichment. By way of aside, it need only be repeated that the "neat" tripartite division of the law of obligations thus created tends to sideline those equitable liability rules not claimed to be unjust enrichment-based. This tripartite division also tends to down play the close links with property law that parts of Restitution undeniably have.

essentially equitable role of the liability rules does not of itself provide a sufficient link to justify treating Restitution as a conceptual whole. "Gaps" in the law undoubtedly have diverse origins and are located amongst and between many different categories, doctrines and liability rules.⁸ Hence the very different concerns of the four categories to be considered.

It is proposed now to outline the four categories, each of which will be considered in detail in the four following chapters.

(1) Conduct Giving Rise to Liability To Another. In the first category, to be considered in Chapter 6, liability rules are activated by *conduct* of the defendants. In all such cases, a defendant's conduct can be said to have resulted in some detriment to a plaintiff, who may have incurred financial losses, performed services, paid money, entered a contractual relationship he or she may otherwise not have, or in some way changed his or her position detrimentally. Such detriment is a precondition for an obligation being imposed upon a defendant. But the remedial responses to such detriment are not limited to compensation of losses and may vary considerably as to the measure of the defendant's liability. A plaintiff's reasonable or actual expectations may be fulfilled, or restitution may be awarded. Where restitution is awarded, however, it should be noted that since losses and gains will usually be the same, the effect of a restitutionary remedy will be to return the plaintiff to his or her previous position .

Within this broad category, it is possible to identify two sub-categories of liability rules. Although there are considerable points of overlap,⁹ the

⁸ Given the equitable function of the liability rules under consideration, indeed, their very utilisation as a result of the failings of other existing legal categories, doctrines and rules, a note of caution about any categorisation needs to be sounded. Certainly, it suggests against dogmatic assertions being made as to the boundaries of a particular category and its contents.

⁹ The two sub-categories of liability rules—encompassing tort-like conduct causing loss and conduct which, contract-like, amounts to an assumption of obligation or risk—share many similarities to contract and tort. Consequently, as with contract and tort, there may be considerable areas of overlap. There may be cases in which a defendant's conduct may well give rise to liability which could be described as falling into either sub-category. For example, in *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, the plaintiffs detrimentally relied upon an expectation that a contract with the defendant would be completed as a matter of course. The contract was never completed, however, with some formalities still outstanding and the defendant having reconsidered the project. The plaintiffs were allowed to recover damages on the same basis as if the defendant had breached a valid contract. Estoppel was used, in effect, to enforce the incomplete contract. But Deane J. considered that the plaintiff may also have had an action in negligence, for the defendant's breach of duty of care. The defendant had failed to intimate its reservations about proceeding with the contract in circumstances in which it was foreseeable that the plaintiffs would suffer loss as a result of the defendant's failure.

liability rules within each sub-category emphasise different types of conduct giving rise to an obligation.

The first sub-category of liability rules is principally concerned with conduct which, contract-like, amounts to an assumption of an obligation or of a risk by a defendant. Characteristically, the parties will have reached some mutual agreement or at least tacit understanding which results in a plaintiff acting upon an expectation as to the defendant's future conduct. Although such an agreement or understanding may not in law amount to a legally enforceable contract, the courts will nevertheless give at least limited recognition to the relationship should the defendant subsequently breach his or her agreement resulting in losses to the plaintiff as measured by reference to the plaintiff's original position. The term "limited" recognition highlights the fact that in many of these cases, a completed agreement is non-contractual because some statutory or common law rules preclude the contract being enforced.¹⁰ Consequently, in order to give effect to the policies of such statutory or common law rules, the courts may limit recovery to the restoration of the plaintiff's *status quo ante*, by means of compensation or restitution. In some cases, the relevant policy may preclude *any* remedy—restitutionary, compensatory or otherwise—being granted. The operation of "illegality" in some contexts best demonstrates the latter type of case. In other cases, however, full recognition of the parties' agreement may ensue, with a plaintiff's expectations being fulfilled. In effect, a full "contractual" remedy may be awarded. In such contract-like cases of liability, then, the reason for the contract not being enforceable will be a significant factor in shaping the availability and extent of remedial relief.

In this sub-category, both equitable and quasi-contractual liability rules may give rise to the obligation. Examples of the former include many cases of proprietary estoppel; and examples of the latter include most cases of quasi-contractual relief arising from unenforceable, or anticipated contracts, both for services rendered (*quantum meruit*), goods delivered (*quantum valebat*) and money had and received.

In the second sub-category, the principal concern is with tort-like

¹⁰ A failing which prevents a contract being enforced may, technically, render the contract "void", "voidable", "illegal" or "unenforceable". These terminological distinctions, it is suggested in Chapter 6, are not helpful. Instead, the crucial factor appears to be the underlying policies of the rules rendering the agreement defective and how such policies are best given effect.

conduct causing loss to a plaintiff. Consistently with the tort-like nature of a defendant's conduct—examples might be conduct akin to negligence or fraud, or which is an abuse of position or power—the remedy in such cases, as in tort proper, characteristically aims at restoring the plaintiff to his or her *status quo ante*. This end may be achieved by means of either compensatory remedies, the specific restitution of money or property, or the rescission of contracts entered into.

Tort-like conduct may be caught by equitable¹¹ or less typically, quasi-contractual¹² doctrines or rules. In such cases, the law in effect appears to be expanding legal notions of what amounts to a breach of duty to one's neighbours: a defendant has acted or omitted to act as a reasonable person ought to have done in the circumstances, given the detrimental consequences to the plaintiff which foreseeably could follow such act or omission. Although there will have been no breach of duty in tort, nonetheless an obligation to remedy the plaintiff's loss will be imposed.

(2) The Consequences of Unprovided For Contingencies on Parties With a Common Interest. In the second category of liability rules, obligations may arise despite the absence of any conduct on a defendant's part which can be said to have caused the problems which a plaintiff seeks to have remedied. But where a plaintiff and defendant share a "common interest", or perhaps a "community of interest",¹³ they may owe a responsibility to share losses and gains arising as a result of some unprovided for contingencies which affect their common interest. The meaning of "common interest" and what amounts to an unprovided for contingency will be explored in detail in Chapter 7. But a variety of factual assumptions are envisaged. For example, the parties may be linked in a common endeavour, such as a commercial joint venture or domestic

¹¹ Many equitable doctrines such as unconscionability and actual undue influence could be said to fall within such a sub-category of liability rules. As a general rule, the remedy to such unacceptable conduct takes the form of the avoidance of any transaction entered into, thus restoring the plaintiff to his or her *status quo ante*.

¹² An example of quasi-contractual relief for tort-like conduct might be where, for example, a defendant induces another into a "contractual" relationship, takes advantage of the plaintiff's performance and then seeks to deny an obligation to pay for the plaintiff's performance by relying on some legal technicality which renders the contract unenforceable. Most cases of relief for "ineffective" contracts, however, will not exhibit such fraudulent intentions and may be seen as examples of the courts giving a limited recognition to consensual relationships where the parties have agreed to assume particular obligations. On which, see the second sub-category below.

¹³ Goff & Jones, 301.

relationship, which endeavour fails, breaks down or is frustrated; or the parties may be involved in a contract which is frustrated; or the parties may be linked fortuitously by a common interest, such as where strangers all own cargo being carried on the same ship¹⁴ which is wrecked. Likewise, two co-sureties, unknown to each other, may have guaranteed the same debt, yet only one co-surety is called upon to pay the debt. In such an example, the unprovided for contingency is that recourse has only been had against one of the co-sureties, when both were liable to meet the obligation.

In all such cases, the unprovided for contingency, whether it be a frustrating event, a failure of a relationship or some other unforeseen event, results in burdens being borne by one party but not the other, or benefits being obtained by one party but not the other. Given the parties' common interest, the law characteristically responds by imposing a principle of just sharing. Burdens and benefits resulting from the contingency are required to be distributed justly, which often means proportionally, according to each party's contribution to the matter in which they have the common interest.¹⁵ Although restitutionary remedies may be utilised to effect loss and gain sharing,¹⁶ nonetheless, it will be argued that benefit disgorgement is not, or ought not to be, the main purpose of the liability rules under consideration and that unjust enrichment is therefore an inappropriate rubric for such liability.

These liability rules are diverse. Topics to be considered include the dissolution of partnerships and joint ventures; the frustration of contracts;¹⁷ the division of de facto and (where no statutory scheme governs) marital property upon the break-up of the relationship; the doctrine of contribution between co-

¹⁴ Consequently, the "strangers" have a common interest in the safe completion of the voyage.

¹⁵ Characteristically, losses and gains will be calculated by comparing the parties' position before the endeavour was undertaken, with their position after the frustrating event, but this may not always be the case.

¹⁶ If X pays Y \$100 under a contract which is subsequently frustrated and neither party has done anything further in performing the contract, then the simplest way of equalising the losses and gains in this example would be by requiring Y to make restitution of \$100.

¹⁷ Admittedly, a governing principle of loss and gain sharing has not been openly recognised in the common law relating to the frustration of contracts; nevertheless, most decisions are consistent with such a principle. Many decisions which are not consistent with a principle of sharing have been subjected to academic and, at times, judicial criticism. Further, recent statutory regimes introduced in a number of jurisdictions are based on principles of loss and gain sharing.

sureties and co-insurers; and the doctrine of general average contribution in maritime law.

(3) **Allocating the Costs of Justifiable Conduct.** In the third category, to be considered in Chapter 8, liability rules are activated in circumstances in which the law considers that a plaintiff's unsolicited intervention in another's affairs is justifiable. Consequently, any reasonable "costs" incurred by the plaintiff whilst intervening are allocated to the defendant where the law considers the defendant to be the more "appropriate" party in the circumstances to bear those costs. Thus, the salvor of a sinking ship and its cargo, or the rescuer of an accident victim, may be entitled to recover reasonable costs incurred. The recovery of reasonable "costs" incorporates both reimbursement of the actual expenses incurred by a plaintiff, the most common remedial response, but also in more exceptional cases, remuneration for services rendered.¹⁸

Liability in cases of justifiable intervention does not depend on any culpable or wrongful conduct on the defendant's part. Instead, a plaintiff's costs will be allocated to the defendant in those limited circumstances in which a plaintiff's actions are considered to be consistent with the promotion of certain desirable social goals and policies. Social policy considerations are at the crux of liability in this category. Although in many cases, the defendant will have received some benefit as a result of the plaintiff's actions, such a benefit is not a precondition for liability.

Although the common law courts have accepted that certain unsolicited interventions are justifiable and ought not be discouraged, liability in such cases has not been recognised as part of a single, coherent doctrine of justifiable intervention, or *negotiorum gestio*, as is recognised in civil law. Instead, liability arises for the most part in a diverse but numerically small collection of seemingly anomalous decisions and isolated instances.¹⁹ Nevertheless, one can draw from these instances sufficient common principles to provide us with some guidelines as to the limits of available relief. Liability rules to be considered within this category include recovery for a plaintiff's intervention to effect burial of the dead or to supply necessaries to (legally or otherwise)

¹⁸ In maritime salvage cases, such remuneration for services rendered may also include a reward.

¹⁹ The obvious exception is maritime salvage, an ancient and well-developed doctrine involving much detailed learning.

incapacitated parties, and recovery by "agents of necessity" who intervene to save another's life or property. Also to be considered are cases of self-interested intervention by a plaintiff, say, to pay a defendant's debt in order to protect the plaintiff's own property interests. Significantly, a distinguishing feature of the concerns addressed by the liability rules in this category is their very unlikeness to other concerns recurrent in property law, contract, tort or equity.

(4) **"Innocent" Recipients.** The fourth category of liability rules, to be considered in Chapter 9, is perhaps the most difficult. Whereas in the above three categories, the conduct of a defendant, the common interests of a plaintiff and a defendant, or the promotion of desirable social goals provide the foundations for the imposition of an obligation upon a defendant, this fourth category is characterised by the absence of any of the above factors. The concern here is with circumstances in which money, goods or services of a plaintiff have been conferred on an "innocent" defendant not legally responsible for such conferral. Where no requisite intention existed or now exists on the part of the plaintiff to "transfer" to the defendant such money, goods or services, a plaintiff may seek to undo the consequences of the "transfer" and seek to impose liability of some kind on the defendant, even despite the innocence of that defendant. One type of case, though not the only one to be considered, in which liability is sought to be imposed on an innocent defendant is where a plaintiff has acted under a mistake. As a result of a mistaken belief, a plaintiff may have entered or completed certain transactions, or modified his or her existing position or status, in a way in which he or she would not have done but for the mistake. But our discussion is limited to mistakes of a very specific kind: "spontaneous" mistakes of a plaintiff,²⁰ as they will be called, in no way created by or knowingly allowed to continue by the defendant. Thus, we are not here concerned with cases where, for example, a plaintiff's mistaken belief was the result of representations or acquiescent conduct of the defendant: proprietary estoppel cases provide a good example of this type of mistake and would fall within the first category of liability rules considered above.

To be included for consideration in this fourth category of liability rules are the topics of mistaken payments of money, the mistaken improvement of another's land or goods and the mistaken payment of another's debt or performance of another's duty.

²⁰ This is the language of Birks, 147.

This category presents considerable difficulties for any generalisation seeking to encompass the rules governing these topics. Certainly, in the mistaken payment of money cases, the "siren song"²¹ of unjust enrichment sounds its most persuasive. For clearly, the defendant will have been enriched at the time of the receipt. In many circumstances, the receipt of such money and its retention,²² barring some countervailing consideration such as a change of position, would appear "unjust". Hence, unjust enrichment may well prove to be a rationalising idea of continuing force and some utility in this area. It should be noted, though, that unjust enrichment still appears to be a statement of conclusion (albeit an appealing one), which does not indicate the processes of reasoning followed to reach that conclusion. Since not all mistaken payments are recoverable, it must still be determined when, indeed, the receipt and retention of the money is "unjust".

Substantial conceptual difficulties arise, however, if unjust enrichment is sought to be used to explain not only money cases, but also non-money (that is, service) cases as well. Mistaken "transfers" of things other than money are often difficult to analyse in terms of the receipt of a benefit and, where recovery is allowed, in terms of benefit *disgorgement*. One could overcome this difficulty by searching for a different conceptual basis for service cases. Yet a division between money and service cases does not seem desirable given the common event, the spontaneous mistake, which creates the problem. Thus it is proposed to suggest an alternative explanation to unjust enrichment which seeks to encompass all cases of spontaneous mistake.

The starting point for this alternative explanation is the absence, seemingly, of any independent reason for imposing an obligation on the innocent defendant. Although the plaintiff has suffered loss as a result of the mistake, the risk of such loss must surely lie with the party responsible for the loss, the plaintiff. It may be argued, however, that it is quite a different matter to ask the defendant to return gains he or she still retains. Certainly, money (more accurately, the economic advantage such money represents) or specific property still retained can be returned, but services cannot be "returned" as such, though the law can impose an obligation to pay for them. But given that the defendant has done no wrong and the plaintiff's losses are entirely the consequence of his or her own actions, why should the defendant pay?

²¹ *Re Byfield* [1982] Ch. 267, 276.

²² In the absence of an obligation to repay.

For the most part, the law's response to this question is that the defendant ought not to pay and in many cases, courts have refused recovery to a plaintiff for services rendered under mistake, even where a defendant has clearly been benefited by those services. Nevertheless, even in service cases, it may be possible to undo the effects of the mistake in a way which does not in any way leave the defendant at a disadvantage when compared with his or her position before the plaintiff's mistaken conduct. Thus, taking a United States example, the mistaken improver of another's land may be entitled to remove the improvements, even though technically, they are fixtures.²³ The burden of the case law appears to be that the courts will seek to restore plaintiffs to their previous *status quo*, as far as it is possible to do so, without requiring defendants "to reach into their own pockets".²⁴ Such remedial relief effects a "fair outcome", in that recovery does not disadvantage the defendant but goes at least some way to restoring the plaintiff to his or her *status quo ante*. The defendant, however, will not be required to be an insurer of any of the plaintiff's losses remaining after such remedial relief.

The notion of fair outcomes provides a means of uniformly analysing all spontaneous mistake cases. A fair outcome will be readily achievable where, *in effect*, the specific restitution of land, goods or money is possible. Recovery of mistaken payments of money provides the most generous scope for recovery because the receipt of money is best seen as a receipt of an *economic advantage*, rather than merely a form of personal property. Consequently, "specific" restitution of that economic advantage may be possible even where, for example, a defendant no longer has the money received. As with goods or land, a refusal by the defendant to part with the economic advantage which he or she still retains will amount in a broad sense to a retention of the plaintiff's "property". Consequently, many mistake cases have a strong proprietary flavour. But as the service cases will demonstrate, recovery is not limited to specific restitution. It may be possible to achieve a fair outcome by means of imaginative remedies which, like specific restitution, still do not disadvantage the defendant. A detailed consideration of the cases follows in Chapter 9.

²³ See Chapter 9 for a consideration of these cases. United States courts have at times utilised some quite imaginative remedies in such circumstances.

²⁴ See Dawson, J.P., "Erasable Enrichment in German Law" (1981) 61 B.U.L.R. 271, 272, who points out that this phrase is commonly used by German lawyers to describe the rule which protects innocent recipients of a benefit from surrendering more than their "surviving net gain."

If one surveys these four categories of liability rules, it is interesting to note that, from one category to the next, there is a lessening of the potential onerousness of the obligation which may be imposed upon a defendant. This reflects, perhaps, the degree of responsibility to the plaintiff which a defendant can be said to owe, given the circumstances. To take the two extreme categories of cases, in the first category, a defendant's conduct has *caused* a plaintiff some detriment and such conduct may even be described as wrongful. Consequently, a full range of obligations, including fulfilment of a plaintiff's expectation, may be imposed. By contrast, in the fourth category, a defendant is entirely innocent of any wrongdoing in relation to the plaintiff's detrimental position²⁵ and, generally speaking, will consequently only be required to, in effect, make specific restitution of any "property" of the plaintiff the defendant still retains.

Another interesting point to note is that some of these categories share common organising ideas with other established legal categories. For example, the first category addresses concerns essentially the same as those of established categories such as contract and tort law. Conversely, other categories operate uniquely outside of well recognised and established classifications, addressing concerns not openly recognised in other areas of the law. The unsolicited intervention cases in the third category provide a good example of this.

In many ways, the four suggested categories seem rather obvious. Their burden is familiar. Certainly, elements of each category have been discussed by other commentators. But it is their aggregation, providing us with an overall view of Restitution as consisting of four groups each unified by common features, which offers a new perspective on Restitution. In the writer's view, the very obviousness of the categories suggests their burden is consistent with a legal method which for the most part has emphasised the causative events giving rise to certain outcomes (conduct, relationships of parties, procedural matters), rather than those outcomes themselves, in order to determine when obligations should be imposed.

²⁵ A subsequent refusal to return a mistaken payment of money, for example, may be described as wrongful where the defendant still has the economic advantage of such a payment and is aware of the circumstances justifying the plaintiff's claim for the return of the money. But this does not explain the reason for the obligation, which arises at the time of receipt of the money and is not dependent upon a "wrongful" refusal by the defendant to return it.

CONDUCT GIVING RISE TO LIABILITY TO ANOTHER

It is only where behaviour which is regarded as unreasonable or improper threatens or impairs legitimate interests that legal remedies are and should be available.¹

§ 6.1 INTRODUCTION

Many liability rules claimed for unjust enrichment are activated by particular conduct of a defendant, specifically, conduct which justifies the imposition of legal liability because it is possible to draw a link between that conduct and some harm or detriment incurred by the plaintiff. Although unjust enrichment theory suggests that it is the receipt of a benefit which is the precondition for the activation of such liability rules, to be considered in this chapter, the important feature of these rules is that a defendant need not have obtained a benefit corresponding to the plaintiff's detriment in order for legal liability to arise. For this reason, the liability rules are better explained by reference to the particular qualities of a defendant's conduct activating those rules.² For example, conduct such as a defendant's breach of an agreement with

¹ The Hon. Sir Anthony Mason & Gageler, S.J., "The Contract" in Finn, P.D. (ed.), *Essays on Contract* (1987), 1, 32. As the authors go on to emphasise, however, the term "legitimate interests" deliberately leaves for further examination the issue of "which interests are to be regarded as legitimate in any given case".

² Although in many of the cases to be considered the defendant will have gained some benefit, liability is not preconditioned upon such benefit and the liability rules thus are not explicable in terms of a purpose of reversing unjust enrichment. This was demonstrated in Chapter 4, where a number of the liability rules to be considered in greater detail in this chapter were discussed specifically with regard to benefit. Be that as it may, it should be noted that even if one were to accept an unjust enrichment analysis of Restitution generally, it would still be possible to separately identify some liability rules in which the "unjust" factor could be said to have been satisfied by reference to the defendant's conduct. So, for example, Birks considers that concepts such as free acceptance and compulsion identify distinct unjust factors justifying liability in Restitution. These concepts isolate conduct on the part of the *defendant*, whereas, by way of contrast, liability in Restitution said to be founded on a mistaken transfer is justified because of the state of mind of the plaintiff at the time of the transfer. Consequently, even under an unjust enrichment scheme, it would be useful to identify cases in which particular conduct of a defendant constituted the unjustness of the "enrichment". Interestingly, according

the plaintiff or the exercise of undue pressure on the plaintiff may result in the plaintiff suffering some detriment. Liability rules of both quasi-contractual and equitable origin may thus be activated; in the former example, despite and because of the absence of an enforceable contract. Any liability which arises, however, need not necessarily be to restore the plaintiff to his or her position before the defendant's harm-inducing conduct occurred. The different doctrines and rules activated by a defendant's conduct may give rise to a number of different remedial outcomes. The burden of this chapter is to consider the broad, underlying rationale which explains at a general level the individual doctrines and rules under consideration.

As will be seen, the subject-matter of this chapter is diverse, covering a broad range of topics. In spite of this diversity, however, the liability rules under consideration manifest familiar concerns. Indeed, they share considerable affinities with liability rules encompassed by mainstream contract and tort. Consequently, the cases can be divided into two broad sub-categories: cases in which a defendant's conduct gives rise to "contract-like" liability and cases in which a defendant's conduct gives rise to "tort-like" liability. These sub-categories will be elaborated upon below. But first, it is necessary to consider the common characteristics of the cases in either sub-category, which characteristics justify their inclusion in a single, conduct-related category.

§ 6.1.1 The Common Characteristics of the Cases

The burden of the cases under consideration is that they share three characteristics which justify their common inclusion in one category. These characteristics are that (1) the plaintiffs have incurred some detriment as a result of conduct of the defendants, (2) which conduct does not give rise to liability in contract or tort, but (3) which conduct is contract-like or tort-like.

§ 6.1.1.1 Detriment incurred by a plaintiff as a result of the defendant's conduct

The first common characteristic of the cases is that they involve plaintiffs who have incurred some detriment as a result of conduct of the defendants.

to Birks' schema, free acceptance is also a test of enrichment, so that the *conduct* which is determinative of liability also establishes, though seemingly superfluously, the factor which is supposedly the precondition for liability: a defendant's enrichment.

Detriment is measured by reference to a change in a plaintiff's position from that subsisting before the defendant's "offending" conduct occurred.³ Thus, for example, a plaintiff may have acted in reliance upon the existence of a contract with the defendant which proves to be unenforceable, say, by rendering services or paying money in part performance of the contract. The defendant's subsequent refusal to perform as agreed under the contract leaves the plaintiff worse off. Without such detriment, relief will be denied⁴—a point, it need only be noted again, conceded by unjust enrichment theory in its requirement that any enrichment be at the expense of the plaintiff.⁵ Of course, in many cases a defendant will also have received some benefit as a result of the plaintiff's detrimental actions, and the existence of such benefit may aggravate the sense of loss, so that intuitively the plaintiff's claim against the defendant appeals more strongly than otherwise. But the existence of such benefit, conceptually, does not add anything and is not a necessary element of or precondition for establishing the plaintiff's claim. Loss on its own is sufficient to trigger the liability rules under consideration.

Although detriment to a plaintiff is thus a precondition for liability, the defendant's obligation to the plaintiff need not necessarily be one to restore the

³ In other words, detriment is measured by reference to the plaintiff's previous *status quo*. Detriment is thus not being measured by reference to any (subsequently unfulfilled) expectations generated by the defendant's conduct.

⁴ Thus, unlike in contract, entirely executory unenforceable contracts, where the plaintiff has not commenced performance of the contract nor done acts in preparation to performance, will not give rise to liability.

⁵ Most unjust enrichment theorists concede that in cases in which unjust enrichment is said to form the *basis* for the imposition of *liability* there is a need to demonstrate some detriment. This is encapsulated within the formulations of the component parts of unjust enrichment, which include the need to show that the enrichment was "by subtraction from" the plaintiff or that the plaintiff has suffered a "corresponding deprivation". See § 3.2.1.

Consequently, unlike some types of wrongs, such as breaches of fiduciary duties, the liability rules under consideration are not activated in circumstances where a defendant has profited as a result of wrongdoing, but the plaintiff has not also suffered any corresponding detriment. There are, of course, doctrines and rules which may allow disgorgement of a benefit obtained as a result of a defendant's wrongdoing even where there is no corresponding detriment. Examples are breaches of fiduciary duties and duties of confidence. But according to a widely accepted view, it is recognised that in such cases of independent wrongs unjust enrichment is not the explanation of the liability rule: liability rests on the independent wrong and the restitution of benefits is only one possible *remedial response*. Consequently, such wrongs—including a number of equitable rules and doctrines—are not claimed for unjust enrichment (as a liability-creating principle) and are thus not considered in this chapter. Other equitable rules and doctrines, however, such as undue influence, are claimed as examples of unjust enrichment by subtraction from the defendant. In other words, liability is said to be based on notions of unjust enrichment and can only be established by showing a benefit to a defendant as well as a corresponding detriment to the plaintiff.

plaintiff to his or her previous position. Certainly, the compensation of losses incurred by the plaintiff or, where benefits and gains are equal, restitution of benefits conferred on the defendant, will have a restorative effect. But other remedial responses are also common, including (1) enforcing a defendant's promise by specific performance, (2) damages to satisfy a plaintiff's *actual* expectations under an agreement, and (3) damages measured by what the plaintiff may *reasonably* be entitled to expect to receive in the circumstances.⁶

§ 6.1.1.2 Defendant's conduct does not give rise to liability in contract or tort

The second common characteristic of these cases is that although a plaintiff's detriment was the result of conduct of the defendant, such conduct generally falls short of conduct which establishes a cause of action in contract or tort. The plaintiff may not be able to satisfy some substantive element of a cause of action in contract or tort. For example, the parties may not have been *ad idem* as to some essential term of a contract so that the contract is "incomplete",⁷ or the defendant's conduct may not come within common law conceptions of fraud, so as to found a tort claim in deceit. Alternatively, specifically in contract-like cases, some formal or technical requirement of contract law may not have been met. A good example is provided by contracts caught by *Statute of Frauds*-type legislation, where the parties have finalised a sufficiently certain, mutual agreement, but the contract is "defective",⁸ a want of formality rendering it unenforceable.⁹

⁶ If, for example, X contracts with Y to perform certain services, in return for the transfer of Blackacre, then X's *actual* expectation is that the property will be transferred. If the contract is unenforceable, however, say, for want of some formality, X may only be entitled to a *quantum meruit* award for the reasonable value of his or her services. As such an award will usually include a reasonable profit element, it may go beyond compensation for losses or expenses incurred and may thus be characterised as the fulfilment of what X is *reasonably* entitled to expect in the circumstances. See § 4.4.1. Reasonable expectations in this sense must be distinguished from actual expectations which are reasonably held.

⁷ The meaning of this term will be clarified below.

⁸ The meaning of this term will also be clarified below.

⁹ In *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, for example, the plaintiff performed building work under an oral agreement rendered unenforceable by a failure to comply with certain statutory requirements governing the building industry. The defendant subsequently relied on the technical failure to justify her refusal to pay for the work carried out by the plaintiff.

§ 6.1.1.3 Conduct which gives rise to liability is contract-like or tort-like

The third common characteristic of these cases is that a defendant's conduct which gives rise to liability is contract-like or tort-like. In a very general sense, then, we can describe the liability which arises as contract-like or tort-like, by which is meant that the rationale for liability can be found in the ideas and concepts of contract and tort respectively. This does not mean, however, that liability is contract-like or tort-like in the sense that it necessarily gives rise to remedial responses typically associated with contract and tort. Contract-like liability characteristically arises in the context of facts very near contract, as the unenforceable contract example demonstrates. Tort-like liability is characteristically activated by conduct which causes harm and which infringes legal standards of acceptable conduct toward our "neighbours". For example, equitable and quasi-contractual liability rules or doctrines may be activated where a defendant exercises duress upon a vulnerable plaintiff in order to extract some advantage from that plaintiff.

A division of the cases into two sub-categories based on the traditional distinction in law between contract and tort is not intended to suggest that discrete boundaries can be drawn between contract and tort. Modern developments demonstrate the difficulties in drawing boundaries between any legal categories and contract and tort provide a cogent example of this.¹⁰ Undeniably, there is a considerable overlap and commingling of ideas between contract and tort. Nevertheless, there are also undeniably differing *core* concerns of each category. Thus, it may be possible to identify some ideas

¹⁰ Mason & Gageler, *supra* n. 1, 34, point out that "a rigid distinction between contract and other legal categories can no longer be drawn." See also *Hawkins v. Clayton* (1988) 78 A.L.R. 69, 93 et seq., per Deane J., particularly at 101:

The law of contract and the law of tort are, in a modern context, properly to be seen as but two of a number of imprecise divisions, for the purpose of classification, of a general body of rules constituting one coherent system of law.

A number of modern decisions, such as *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] A.C. 465, and *Junior Books Ltd v. Veitchi Ltd* [1983] 1 A.C. 520, have been "perceived as blurring the differences between contract and tort and their respective obligations." See Coote, B., "The Essence of Contract" Pts I & II (1988-9) 1 J.C.L. 91; 183, at 93, and cases and references cited at fnn. 16-8. See also Chapter 5, n. 9, and the discussion of *Waltons Stores v. Maher* (1988) 76 A.L.R. 513. Some commentators have gone so far as to advocate the absorption of contract into tort, or the absorption of contract, tort and Restitution into a single law of obligations. See, e.g., Gilmore, G., *The Death of Contract* (1974); Fuller, L.L., & Perdue, W.R., "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52, 373, at 419; Atiyah, P.S., "Contracts, Promises and the Law of Obligations" (1978) 94 L.Q.R. 193.

fundamental to contract which can be distinguished, though not delineated absolutely, from ideas fundamental to tort. Such a separation of the core concerns of contract and tort allows us to make the convenient division of the liability rules adopted herein.

For now, it suffices to say that liability is contract-like or tort-like because the conduct activating the liability rules is essentially similar to that which gives rise to liability in contract and tort, respectively. Hence, the underlying foundations for imposing liability in each type of case are essentially similar to those justifying liability in contract and tort, with concepts and ideas familiar to the law being utilised to solve problems near contract and near tort. Indeed, in cases near contract, this familiarity of concepts and ideas has traditionally manifested itself in the idiom of the courts, with liability founded in "quasi-contract", "implied contract" or "contract implied in law".

That there are recurrent themes in the law generally and Restitution particularly ought not to surprise, given the gap-filling and ameliorative role which liability rules in Restitution have historically performed (and still perform). Where a defendant's conduct appears to have resulted in harm to another, causes of action in contract or tort will often be available to remedy the consequences of such conduct; but clearly, this will not always be the case, even where there is a perceived need for the imposition of liability in some form. Contract and tort are categories self-limited by certain historical and conceptual criteria. Gaps consequently arise and gap-filling rules and doctrines develop. It is not surprising that rules utilised for gap-filling characteristically draw on concepts familiar to the law rather than on entirely new concepts, such as unjust enrichment. The point is perhaps best illustrated by equity as a whole, in its metamorphosis and development of ideas already familiar to the common law as part of its well-recognised ameliorative function. Notions such as common law fraud have been refined and given greater scope by the growth and development of notions of fraud in equity. It is proposed to illustrate this point at some length, by reference to one quintessential and wide-ranging equitable gap-filling technique: estoppel, which operates at the periphery of both contract¹¹ and tort and covers a diverse range of subject-matter, much of which is not claimed for unjust enrichment. Estoppel is a useful illustration, however, of gap-filling between and around contract and tort, by reference to

¹¹ As Stoljar has put it, in "Estoppel and Contract Theory" (1990-1) 3 J.C.L. 1, 1, estoppel is "continually winding in and out of contract".

ideas and concepts found within those categories.¹²

§ 6.1.2 Gap-filling between and around contract and tort: an illustrative example, estoppel

Estoppel does not operate in a doctrinal vacuum—it draws many of its ideas from the familiar categories of contract and tort. Estoppel, with its “underlying rationale of good conscience and fair dealing”,¹³ aims at preventing an “unjust”¹⁴ or “unconscionable”¹⁵ departure by the defendant from an assumption held by the plaintiff, encouraged or acquiesced in by the plaintiff, where such departure would result in detriment to the plaintiff. Despite this “underlying rationale”, however, historically, estoppel has manifested itself in distinct doctrines both at common law and in equity.¹⁶ Although we appear to be moving towards a unified view of estoppel,¹⁷ we are not yet at the stage where we can, with certainty, talk of a single doctrine.¹⁸

Irrespective of whether one perceives a single doctrine of estoppel or not, it is clear that despite certain “common threads”,¹⁹ an estoppel may arise from a very diverse range of facts. This was highlighted by Dixon J. (as he then was) in *Thompson v. Palmer*,²⁰ who identified the variety of conduct which can

¹² As has been noted in Chapter 1, gaps do not just occur between and around contract and tort and this will be illustrated by the three categories to be considered in the three subsequent chapters.

¹³ *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, 546, per Deane J., who appears to have been referring to both equitable and common law estoppel doctrines. See also his Honour's judgment in *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, 431-46.

¹⁴ See, e.g., *Thompson v. Palmer* (1933) 49 C.L.R. 507, 541.

¹⁵ See *Waltons Stores v. Maher* (1988) 76 A.L.R. 513.

¹⁶ Meagher, Gummow & Lehane, 405, talk of “various distinct species of estoppel”.

¹⁷ See Mason C.J.'s identification of the trend of recent authority in *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, 410-3, and his conclusion that the authorities point to “the emergence of one overarching doctrine of estoppel rather than a series of independent rules.” Meagher, Gummow & Lehane, 430-3, appear to be critical of this view.

¹⁸ The diversity of opinion in *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, and the plethora of subsequent commentary (see, e.g., references cited in Meagher, Gummow & Lehane, 405, fn. 1) offering differing interpretations of that case, precludes a view of the law of estoppel as yet settled.

¹⁹ *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, 524, per Mason C.J. and Wilson J.

²⁰ (1933) 49 C.L.R. 507.

lead to the conclusion that a defendant's departure from an assumption held by the plaintiff is unjust. Such conduct "depends on the part taken by [the defendant] in occasioning [the] adoption [of the assumption] by the other party". It can range from that which has a strongly contractual flavour, such as where an assumption "formed the conventional basis upon which the parties entered into contractual or other mutual relations"; to tort-like conduct, such as where imprudence or carelessness are the proximate cause of the plaintiff's reliance on an assumption.²¹ Although other conduct may not be so readily classified as contract-like or tort-like (exhibiting elements of both, for example), it is nevertheless proposed to consider briefly the use of estoppel in each of these ways.

Applications of estoppel in circumstances near contract, giving rise to contract-like liability, may be illustrated by cases in which a defendant is estopped from denying the existence of a formal, enforceable contract where a plaintiff detrimentally relies upon an assumption that the contract will be finalised. In *Metropolitan Transit Authority v. Waverly Transit Pty Ltd*,²² for example, the plaintiff (Waverly Transit) "incurred substantial expenditure" in the expectation that its contract with MTA would be renewed. This expectation arose as a result of repeated assurances to this effect by MTA and was consistent with the terms of the contract allowing for automatic renewal subject to notice of termination. The Full Court of the Supreme Court of Victoria held that MTA was estopped by its conduct from relying on their refusal to renew the contract. Significantly, the court ordered that the contract be renewed for two years: the plaintiff received the very contract it had expected. This remedial response is consistent with other authorities in which the courts have been prepared to fulfil expectations in situations near contract.²³

²¹ *Ibid*, 547. Dixon J.'s full statement reads:

Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct...; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption.

²² [1991] 1 V.R. 181.

²³ Meagher, Gummow & Lehane, 423, emphasise this point by considering these types

Applications of estoppel in circumstances near tort, giving rise to tort-like liability, may be illustrated by cases of acquiescence encompassed within proprietary estoppel. In such cases, a plaintiff detrimentally relies on a mistaken assumption as to an existing or future interest in property whilst the defendant stands by knowing of the plaintiff's mistake. Consequently, the defendant's assertion of rights contrary to the plaintiff's assumption may amount to unconscionable conduct.²⁴ For the most part, cases of acquiescence appear tort-like in that characteristically they involve defendants who are in a better position, *vis-à-vis* the plaintiffs, to avert the harm, but despite this, intentionally²⁵ or irresponsibly²⁶ fail to warn the plaintiffs against the reasonably foreseeable harm.

Consistently with the tort-like appearance of acquiescence cases, one might expect remedies to aim essentially at compensation of the losses suffered.²⁷ This is not always the case, however, with compensation being merely one of two usual remedial responses. The other is the fulfilment of a

of cases under the heading of "Acquisition by estoppel". See also *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, and *Collin v. Holden* (1989) V.R. 510. This is despite the view, expressed by some in the High Court, that the underlying purpose of estoppel is to prevent detriment. See particularly Mason C.J. in *Commonwealth v. Verwayen* (1990) 170 C.L.R., 411-3; cf. Brennan J. (454-5), Dawson J. (428-9), and contrast Deane J. (441-3). Such a view seems to ignore the weight of authority in cases of proprietary estoppel, in which expectations are commonly fulfilled. See also *Crabb v. Arun District Council* [1975] 3 All E.R. 865, arising in the context of incomplete negotiations as to an interest in land. Mason C.J. and Wilson J. in *Waltons Stores v. Maher* perceive those cases in which plaintiffs acquired an interest in land as an example of "merely one way of doing justice between the parties" (524), but this statement seems to ignore the strong bias of these decisions to fulfil expectations even where an equitable lien for expenses incurred might have proved an appropriate remedy.

²⁴ See *Ward v. Kirkland* [1967] Ch. 194, 235, per Ungood-Thomas J. Historically, the operation of the doctrine was based on "bad faith" or "bad conscience" on the part of the defendant. See, e.g., *East India Co. v. Vincent* (1740) 2 Atk. 83; *Stiles v. Cowper* (1748) 3 Atk. 692; *Jackson v. Cator* (1800) 5 Ves. Jun. 688; *Dann v. Spurrier* (1802) 7 Ves. Jun. 231; and see the comments of Scarman L.J. in *Crabb v. Arun District Council* [1975] 3 All E.R. 865, 877.

²⁵ An example might be where a defendant is motivated by fraudulent designs to take advantage of the plaintiff's likely improvement of the defendant's land.

²⁶ Where a defendant is careless, for example.

²⁷ As in *Unity Bank v. King* (1858) 25 Beav. 72, 53 E.R. 563; *Morris v. Morris* (1981) 1 N.S.W.L.R. 61; *Raffaele v. Raffaele* [1962] W.A.R. 29.

In another sphere, estoppel was held by the majority in *Commonwealth v. Verwayen* (1990) 170 C.L.R. 394, to give rise to a claim for damages incurred in reliance upon the defendant's representation. Cf. *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465.

plaintiff's expectations.²⁸ There is, then, some uncertainty as to the appropriate remedy²⁹ in cases of acquiescence, with this remedial schizophrenia suggesting that the courts may not be "entirely sure" of the purpose of legal intervention.³⁰ Perhaps expectations are fulfilled in cases in which such a remedy is perceived to be the only way of relieving detriment. Leaving this remedial uncertainty aside, however, the tort-like nature of the defendant's *conduct* in acquiescence cases seems clear.

§ 6.1.3 The Division of This Chapter

Liability near contract and near tort appears to be imposed in circumstances where a defendant's conduct is very similar to that which gives rise to contractual and tort liability. It is proposed now to consider in some detail liability rules in Restitution which can be said to be contract-like or tort-like in operation. The emphasis, however, will be on cases of contract-like liability, and this is reflected in the space allocated to each sub-category. There are two reasons for this. Firstly, much of Restitution consists of rules and doctrines of quasi-contractual origin and much of quasi-contract operates in circumstances near contract.³¹ Secondly, many of the doctrines claimed for unjust enrichment which appear tort-like in their concerns originate in equity: for example, undue influence, unconscionability, non-fraudulent misrepresentation and other doctrines generally concerned with transaction-avoidance. Not only is the inclusion of such doctrines within Restitution more

²⁸ E.g., *Bath v. Montague's Case* (1693) 3 Chanc.Cas. 55, 22 E.R. 963. In *Hamilton v. Geraghty* [1901] 1 N.S.W.S.R. 81, the court was prepared to fulfil the plaintiff's expectation interest but ordered only a reliance loss remedy as that was all that had been sought.

²⁹ "[T]he court must look at the circumstances in each case to decide in what way the equity may be satisfied": *Plimmer v. Mayor of Wellington* (1884) L.R. 9 A.C. 699, 714.

³⁰ Jones has said that the flexibility of equity's remedies may indicate "that judges are not entirely sure why they are intervening": Jones, G., "Restitutionary Claims for Services Rendered" (1977) 93 L.Q.R. 273, 283-4. And there is considerable uncertainty generally as to what the remedial focus of estoppel should be, an uncertainty highlighted by the divisions in *Commonwealth v. Verwayen* (1990) 95 A.L.R. 321. Given that cases such as *Waltons Stores v. Maher* have brought some underlying unity to estoppel, "one might see in future more attention directed to examination of the remedy which is appropriate to the particular case": The Hon. Sir Anthony Mason, "Foreword" (1989) 12 U.N.S.W.L.J. 1, 2.

³¹ As Dawson, 112, has noted, "[m]odern restitutionary remedies are chiefly employed for the unwinding of contracts." Similarly, see Patterson, E., "The Scope of Restitution and Unjust Enrichment" (1936) 1 Mo.L.Rev. 223, 233: "The law of quasi-contract is the hospital of frustrated plans and expectations." This is not the case with all of quasi-contract, however, as illustrated by quasi-contractual relief for compulsion (i.e. duress), considered within tort-like liability rules.

controversial, they are also treated fully in standard equity texts. Hence, it is not proposed to detail the operation of such doctrines, but merely to highlight their tort-like nature and that consequently, the restitutionary remedies often utilised in such cases principally aim at restoring plaintiffs to their *status quo ante*, rather than the disgorgement of defendants' benefits.

§ 6.2 CONTRACT-LIKE CONDUCT AND LIABILITY: The Assumption of Legal Obligations

A reexamination of the fundamentals of restitution may reveal that rules of quasi-contract, as well as rules governing other forms of restitution, when employed in the context of the "unwinding of contracts" are analytically, as well as functionally, contract rules akin to those governing contract damages.³²

§ 6.2.1 Introduction

Typically, cases of contract-like conduct arise in factual contexts where parties are in close relationships which are almost contractual. The parties may have reached or are in the process of reaching a bargain or an agreement about matters (often of a commercial nature) and will usually have gone so far as to render services, pay money, or in some way detrimentally change their position on the basis of a defective or incomplete contract. Of itself, however, a near-contract factual context does not necessarily mean that a defendant's conduct and any resulting liability which may arise is contract-like.³³ Both contract-like liability and tort-like liability may arise in such contexts, but it is only the former which is of interest for now.

It is not very useful to describe conduct or any liability resulting from such conduct as contract-like if we do not know what contract is. The question "what is contract?" is not easily answered. Much has been written in the search for a "general" theory of contract, providing lawyers with "a basis for predicting in a given situation whether a contract will arise or what the law of

³² Perillo, J.M., "Restitution in a Contractual Context" (1973) 73 Col. L.R. 1208, 1210. This is an excellent treatment of liability in Restitution in cases of near-contract.

³³ For example, fraud is often perpetuated in a bargaining or commercial context, giving rise to tortious liability.

contract will be."³⁴ Clearly, a consideration and discussion of the relative worth of the various contract theories is outside the scope of this thesis. This is particularly so given that no one theory has captured the field, or has on its own proved entirely satisfactory in accurately describing the boundaries of contract law.³⁵ Professor Atiyah has gone so far as to state that contract theory today "is a mess."³⁶ Regardless of whether this view is perhaps too damning, it is clear that there is much disagreement as to the relative worth of the various contract theories.

The absence of any unifying theory of contract, however, may not be a problem. For despite all of the theoretical uncertainty, it has been suggested that contract law "has rarely been questioned in its fundamentals."³⁷ Certainly, it is possible to identify fundamental features at the core of contract law³⁸ and make observations about the essential nature of contractual liability.

A useful starting point is provided by "the undoubted fact that the law of contract does enable people to impose obligations on themselves."³⁹

³⁴ Coote, *supra* n. 10, 97. As Coote points out, contract theories may have other, varying purposes as well, for example, providing justification for recognition and enforcement of contract, or purporting to "explain the role of contract in society".

³⁵ See generally Coote, *supra* n. 10, for a discussion of various, quite diverse theories and their failings. Perhaps the main failing of such theories is that they seek to be exclusive principles, or even to provide definitions of contract. According to Coote, they seek to make generalisations founded on too narrow a conceptual base (111). Coote considers that finding a theory of contract cannot be achieved by resort to

generalisation from any one type of contract, such as an agreement, or from the contracts of a single system, such as the common law. In other words it must be directed to the essence of contract rather than to developments from, or elaboration of, it.

³⁶ Atiyah, P.S., *Pragmatism and Theory in English Law* (1987), 173, as cited in Coote, *supra* n. 10, 94.

³⁷ Mason & Gageler, *supra* n. 1, 1.

³⁸ If one avoids the search for *unifying* principles, it is possible to identify concepts which are undeniably core concerns of contract, provided it is recognised that such concerns are not necessarily hallmarks of *all* of contract and that other concerns may also be central to contract. To this end, traditional theories of contract provide a useful guide, for as Coote has pointed out, *supra* n. 10, 191, they "must contain much of the truth or they would not have drawn the support they have."

³⁹ Atiyah, P.S., *An Introduction to the Law of Contract* (4th ed., 1989), 2 (hereinafter: "Atiyah"). Earlier on the same page, Atiyah states:

Broadly speaking, the law of contract is that part of the law which deals with obligations which are self-imposed. ... [But distinctions with other parts of the law of

Contract law provides one mechanism⁴⁰ whereby individuals can voluntarily⁴¹ assume or undertake both a particular obligation intended to have legal effect, and *the risk* of the legally significant consequences resulting from a failure to meet such an obligation. Contract law also sets the boundaries within which one exercises the powers and responsibilities which arise from a contractual obligation or which are incidental to it,⁴² and provides a vehicle for the allocation of risks generally.

One way in which parties can assume a particular obligation (as well as the risk of the consequences of not meeting that obligation), is by reaching an agreement intended to be legally binding. Agreements take the form of a

obligations] are by no means clear-cut, and one of the most striking phenomena of modern times has been the gradual blurring of the lines between the law of contract and other parts of the law of obligations. In particular, ... it will be suggested that many of the obligations recognized by the law of contract cannot be realistically thought of as self-imposed.

⁴⁰ It is not the only legal mechanisms by which an individual may voluntarily assume a legal obligation. The law of trusts provides another example. Cf. Coote, *supra* n. 10, 197-8. If one accepts that contract is essentially concerned with assumption of legal obligations, then deeds, or "contracts" under seal, can be seen to be genuine contracts. This contrasts with writers who, emphasising the idea of bargain as fundamental to a concept of contract, reject deeds as being contracts. See, e.g., Starke, J.G., Seddon, N.C., & Ellinghaus, M.P., *Cheshire & Fifoot's Law of Contract* (6th Australian ed., 1992), 46-7, (hereinafter: "*Cheshire & Fifoot* (Aust. ed.)"). Contrast Carter, J.W., and Harland, D.J., *Contract Law in Australia* (2nd ed., 1991), 89, (hereinafter "*Carter & Harland*") who distinguish deeds as formal contracts enforceable despite the absence of consideration. They suggest the "solemnity of 'form' may be seen as a justification for enforcement of a promise [under seal]."

⁴¹ "Voluntary" here is not intended to suggest that the parties have necessarily assumed the obligation as a conscious act of will, that is, have a subjective intention to do so. The use of an objective test to determine whether a contract exists (i.e., an objective interpretation of the parties' intentions as demonstrated through their outward conduct) means that this need not necessarily be the case. But the assumption of an obligation needs to be voluntary in the sense that it must not have been the result of some unacceptable influence upon the parties freedom to choose, for example, the result of pressure or undue influence exercised on the plaintiff, and that such choices must have been sufficiently informed, for example, not induced by a misrepresentation.

⁴² That is, persons can assume "legal contractual responsibility" only "to the extent and under the conditions which the law allows": Coote, *supra* n. 10, 194. Parties may take upon themselves legal contractual obligations merely by adhering to any particular legal system's formal processes of contract. Different legal systems at different stages of development may thus have different requirements as to what amounts to a commitment to contract. Coote argues that this view of contract as an assumption of legally enforceable obligations provides a theoretical explanation of contract law distinguishing it from other areas of law. For a criticism of this view, see Drahos, P., & Parker, S., "Critical Contract Law in Australia" (1990-1) 3 J.C.L. 30.

mutual exchange of undertakings and promises.⁴³ Most contracts are agreements, involving some bargain or exchange between the parties.⁴⁴ An important aspect of agreement is its emphasis upon the parties' intentions, both to be legally bound to an agreement and as to the actual terms of that agreement.⁴⁵ Significantly, however, the existence of the agreement is objectively identified, by reference to the parties' objectively determinable intentions—by "inferences drawn from what they said and did"⁴⁶—rather than the subjective intentions of the parties.⁴⁷ The objective approach to intention means that parties may contract by engaging in conduct perceived by the world at large as displaying an intention to do so, even though such parties may not have had an actual or subjective intention to do so. The parties contracting can be taken to have said, as a result of their conduct, "I assume an obligation in these terms."⁴⁸

⁴³ And some have argued that "promise" provides the moral basis for enforcing contracts. See, e.g., Fried, C., *Contract As Promise* (1981). There are difficulties with such a view, including the obvious observation that not all promises are enforceable.

⁴⁴ Cf. Atiyah, 10: "Very many, perhaps most, contracts are created as a result of the agreement of the parties, at all events, as to the essentials." The requirement of bargain or exchange highlights the need for some consideration for a contract to be, as a general rule, legally enforceable.

⁴⁵ Agreement and the intentions of the parties are central to both the will theory of contract (in which contracts are seen as expressions of the will of the parties to the agreement), and to the bargain theory of contract (emphasising the mutuality or reciprocity of obligations). On the bargain theory, see Farnsworth, *Contracts* (2nd ed., 1990) (hereinafter: "Farnsworth"), 43-5. For examples of transactions lacking bargained-for exchange, which may nevertheless be enforceable as contracts, see at 49-68. Although a formulation of contract as merely giving effect to the parties' intentions does not explain the present state of the law, as Mason & Gageler, *supra* n. 1, 31, have noted, "[t]his is not to deny that intention, where it is discernible, must remain a relevant and frequently decisive consideration in contractual analysis."

⁴⁶ Coote, *supra* n. 10, 100.

⁴⁷ See Farnsworth, 118-22, for a consideration of the dominance of the objective theory of assent. The High Court of Australia has pointed out that the objective theory appears to have "command of the field" in the debate in the decided cases and academic writing between the objective and subjective theories. See *Taylor v. Johnson* (1983) 151 C.L.R. 422. In the words of Atiyah, 10, "it matters not whether the parties have really agreed in their innermost mind." See discussion in Mason & Gageler, *supra* n. 1, particularly at 8, where they point out that the parties' subjective intentions are not without relevance, as evidenced by the development of an "expanded jurisdiction in equity to grant relief against mistake", including the unilateral mistake of one party. See also discussion in *Air Great Lakes Pty Ltd v. K S Easter (Holding) Pty Ltd* (1985) 2 N.S.W.L.R. 309.

⁴⁸ Consequently, the assumption of an obligation is not dependent upon any version of the will theory for its validity. For the parties' intentions are not important because of the primacy of the parties' will, but because they have engaged in conduct which they intended as an assumption of obligation in certain terms. Hence, a party may become bound by the

An objective determination of intention does not guarantee, however, that a contract can be ascertained in all particulars. Often, although the parties will have a clear intention that an obligation is being assumed, their intention as to all the terms of that obligation are not discernible from their words and conduct. In such cases, the courts may be prepared to imply reasonable terms⁴⁹ in order to give "business efficacy" to the parties' agreement.⁵⁰ Consequently, parties may be bound to an obligation which they have not in fact assumed but which they will be taken to have assumed. Clearly, this may involve imposition of a reasonable obligation on the parties, that is, one which operates reasonably and equitably between the parties. As will be seen below, the imposition of reasonable obligations to complete an otherwise incomplete agreement is also of considerable significance in circumstances near contract.

One reason why contracts are enforced is that persons to whom an obligation has been assumed may well order their affairs on the basis of their expectations as to the assuming party's⁵¹ future conduct. Such reliance may prove detrimental if the party having assumed the obligation fails to act in accordance with the assumed obligation. On some theories detrimental reliance is said to form the basis of all contractual liability.⁵² Since, however,

"common practice of assuming obligation in ignorance of its full extent as, for example, by a contract the terms of which are contained in an unread ticket or other common form": Coote, *supra* n. 10, 199.

⁴⁹ See *infra* nn. 228-40, and text thereto, concerned specifically with the implication of reasonable terms as to price.

⁵⁰ See *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* (1982) 149 C.L.R. 337, 347.

⁵¹ This includes parties whose conduct might be interpreted objectively as evincing an intention that they have assumed an obligation

⁵² It has been suggested that detrimental reliance is the basis of all contract, or ought to be. See Atiyah, *supra* n. 10, for example, whose views are summarised by Coote, *supra* n. 10, 105, as suggesting that "a contract arises (or should arise) whenever a promisee has relied upon a promise in a way which would cause detriment if it were not kept." See also Fuller & Perdue, *supra* n. 10. As an explanation of contract as a whole, however, this reliance theory has serious limitations and has not gained widespread acceptance. As will be seen, however, reliance is of significant relevance to contract and near contract. Contracts otherwise defective may become effectively enforceable if a defendant has allowed a plaintiff to rely on the defective contract. Interestingly, however, it appears that early enforcement of contracts was dependant upon some part performance by one party, so that merely executory contracts were not remediable. The significant breakthrough in the development of contract law, then, occurred when it became possible to enforce executory promises. See Farnsworth, 16-8, and 9, fn. 3.

detrimental reliance is neither a sufficient⁵³ nor necessary⁵⁴ condition for the existence of a contract, liability rules in contract may prove an insufficient protection for plaintiff's acting on the basis of other's seemingly assumed obligations undertaken a certain actions.

In what way do these observations about contract suggest that there are liability rules in Restitution which give rise to contract-like liability? In essence, in much of Restitution, liability which can be described as contract-like is imposed on defendants who either (1) had the actual intention to assume an obligation or risk, or (2) who can be taken to have assumed an obligation or risk because they have conducted themselves in a way that can be interpreted by a reasonable person as suggesting that such obligation or risk has been or will be assumed. In either case, the plaintiffs are entitled as a consequence of such conduct to order their affairs in reliance thereon. Although in the circumstances, the rules of contract say that no enforceable contract exists, not uncommonly simply because there has been some technical defect, nonetheless liability may attach to a defendant's conduct, provided the plaintiff has relied detrimentally on it. Such liability is very similar to contractual liability and is established by proving, in essence though not in form, similar elements. In effect, though there may not have been an assumption of a *contractual* obligation, nonetheless there was an assumption of some other, collateral obligation, on which reliance is justified.

There tend to be two reasons as to why a contractual obligation will not be enforced, reasons which form the convenient basis of a division of the case law. First, although parties have reached what is a completed and objectively clearly discernible agreement, they may have failed to comply with a statutory or common law rule which renders what would otherwise be a complete contract "unenforceable", "illegal", "void"⁵⁵ or, more exceptionally in the cases under consideration, "voidable".⁵⁶ The term "defective" contract will be used

⁵³ A promise may still be binding even where the promisee does not expect it to be fulfilled.

⁵⁴ Much social interaction gives rise to reasonable expectations as to future conduct which nonetheless do not form the basis of any contractual obligation.

⁵⁵ "Void" contracts are often so because of incompleteness, coming within the second type of ineffective contract considered below. However, a complete contract may also be void for illegality or incapacity.

⁵⁶ Contracts which are "voidable" are usually so as a result of some procedural unfairness arising at the time of formation, for example, duress or undue influence, and such cases will be considered within tort-like liability below. However, perhaps in exceptional cases,

to encompass all these variations. In cases of defective contracts, parties to the agreement characteristically believe they have a binding contract, at least at the time they enter into the agreement.⁵⁷ Secondly, in some cases it may not be possible to discern any concluded agreement at all between parties. For example, negotiations may have been incomplete; some essential terms may have been left for future agreement, or were vague or uncertain; or the parties may have been mistaken as to some vital matter. Consequently, no sufficiently certain and concluded agreement can be identified by the courts. In short, the "contract", even if the parties had a final intention to contract, is incomplete.

It is proposed now to consider each of these two types of case—defective and incomplete contracts—in turn. This is not intended to suggest that a contract may not fail on both counts, or that a distinction between defective and incomplete contracts can always sharply be drawn.⁵⁸ Nonetheless, it is a distinction which will be seen to provide a useful basis for dividing the case materials. In considering defective and incomplete contracts respectively, both quasi-contractual and equitable liability rules and doctrines will be discussed, including doctrines—such as part performance—which are not claimed for unjust enrichment, but which have been utilised to resolve the types of factual problems encountered. A consideration of such other doctrines is necessary because they are activated by essentially similar causative events which also activate doctrines claimed for unjust enrichment.

With the emphasis being on defective and incomplete contracts, it is not proposed to consider cases of the restitution of benefits conferred under

a complete contract not the subject of any procedural unfairness arising in formation may be voidable, for example, as a result of one party's incapacity.

⁵⁷ Cases of fraud are the obvious exception.

⁵⁸ See, e.g., *Deacon v. Adams* (1982) 55 N.S.R. (2d) 218, in which the parties had an oral "agreement" for the purchase of a house, the terms of which were very vague and perceived quite differently by the parties. One could consider such a case as either an incomplete agreement, for uncertainty or want of a final agreement on all terms, or alternatively, it could be seen as a complete but defective agreement, the contract rendered unenforceable by the want of writing.

A distinction between defective and incomplete contracts is not the only possible way in which the cases could be distinguished. For example, cases of contracts incomplete for uncertainty could be considered with defective contracts, linked by the common feature that in such cases the parties characteristically believe they have a valid contract. A distinction could thus be drawn with cases of anticipated contracts, in which the parties expect that a contract *will* be concluded.

enforceable contracts discharged for breach. The reason for this can be stated shortly. An innocent party's right to restitution⁵⁹ arises as a result of the breach of the contract and can be seen as an alternative remedy available alongside other remedies such as damages.⁶⁰ Like damages, the mere discharge of the contract ought not to obscure the fact that the remedial right of restitution accrues as a result of the breach of contract.⁶¹ Given that restitution is merely one alternative remedial response, a plaintiff will generally be precluded from obtaining both damages and restitution, as this would amount to double recovery for the same loss.⁶² Hence, one can perceive restitution in such a context as a secondary right arising from the breach of contract, rather than as being founded on some other primary basis of recovery or causative event such as unjust enrichment.⁶³

⁵⁹ Where a party in breach of a contract seeks restitution of benefits conferred, the basis for the claim does not rest on any conduct on the defendant's part. The defendant is innocent of any unacceptable conduct and, consequently, restitution would appear to follow only on a similar basis as is allowed against recipients of mistaken services or payments of money. See further, Chapter 9.

⁶⁰ As Perillo, *supra* n. 32, 1214, has pointed out:

We generally think in terms of damages as the normal remedial right [for breach of contract], with restitution and specific performance as alternatives in special situations. Two leading scholars—Woodward and Corbin—have recognised that in the context of *breach* of contract, restitution is not quasi-contractual but is a *contractual* remedy. (emphasis in original, footnote omitted).

See also Stoljar, 222-6, particularly at 223, where he makes it clear that restitution here is a remedy within contract, in contrast with restitution for compulsion or mistake, for example, based on other grounds than breach of contract.

⁶¹ Cf. *Baltic Shipping Company v. Dillon* (1993) 111 A.L.R. 289, 297, per Mason C.J., Toohey J. concurring, Brennan J. concurring with this part of his Honour's judgment.

⁶² *Id.*

⁶³ See Perillo, *supra* n. 32, 1213-9. See also *De Bernardy v. Harding* (1853) 8 Ex. 822, 824. Contrast most Restitution texts, however, which consider such a claim as being available on an alternative unjust enrichment basis, that is, that a right to restitution can arise on the primary basis of unjust enrichment by subtraction from the plaintiff. See, e.g., Birks, 334. Such a view may have the imprimatur of the High Court, although the position is uncertain. Cf. the judgment of Mason C.J. with that of Deane and Dawson JJ., in *Baltic Shipping Co. v. Dillon* (1993) 111 A.L.R. 289, particularly at 312-3, who state that restitution of payments made under a discharged contract is "not a claim on the contract." Given that it will be demonstrated in this chapter that quasi-contractual claims even under defective or incomplete contracts are essentially founded on contractual notions, usually by reference to the parties' breached agreement, such a view seems, with respect, artificial. This is reinforced by the fact that in establishing a restitutionary remedy to money payments, it is necessary to show a total failure of consideration and this is inextricably linked with the terms of the particular contract itself.

§ 6.2.2 Defective Contracts

Where a contract is defective, the parties to the particular transactions have agreed with sufficient certainty on all the essential terms so that a finalised agreement can be said to subsist. Although usually the parties believe they have an enforceable agreement⁶⁴ and conduct themselves accordingly, nevertheless a contractual claim may not be possible because some statutory or common law rule renders the contract "unenforceable", "illegal", "void" or "voidable". Apart from the fact that a "voidable" contract is enforceable until an election to set it aside, a description of a contract in one of these terms does not reflect consistent outcomes as to the availability and nature of relief to a party suffering detriment in reliance upon such a contract.⁶⁵ Consequently, the focus will be on the *reasons* for why a contract is considered defective, rather than the shorthand legal summary of the effect of a particular rule.

Contracts may be defective for a number of different reasons:⁶⁶

(1) A contract may fail to meet some formal, technical requirement, such as that it must be evidenced in writing,⁶⁷ or comply with a prescribed standard form.⁶⁸ Contracts defective as a result of some such failing as to

⁶⁴ One exception is where a defendant is aware of the intervening failing which renders the contract defective, but has been engaging in acts of deliberate fraud, whereby he or she induces the plaintiff to "contract" and perform his or her part of the agreed bargain. The defendant at all times intends to appropriate the advantages of the plaintiff's performance by refusing the reciprocal performance by relying on the absence of an enforceable contract.

⁶⁵ Where a contract is void *ab initio*, it is said that there was never any contract at all. Where a contract is unenforceable, however, the deficiency is merely procedural and does not deny the existence of the contract. Such distinctions are not particularly helpful, however, in determining whether recovery in some form will be permitted. Contract-like legal liability may at times arise from a "void" contract (consider, e.g., *Craven-Ellis v. Canons Ltd* [1936] 2 K.B. 403). Conversely, at times no liability may arise even though the parties have acted under a contract which is merely "unenforceable". Consequently, all such cases will be considered together under the rubric of defective contracts, even though some of these are technically, void, and thus not contracts at all.

⁶⁶ It is not proposed here to consider contracts voidable as a result of some procedural unfairness (these will be considered under the heading of tort-like liability), or contracts unenforceable because of a frustrating event (frustration will be considered in Chapter 7), or contracts unenforceable because of the expiry of a limitation period.

⁶⁷ *Statute of Frauds*-type legislation has historically been the most significant source of cases. See § 6.2.2.2. There are numerous modern examples, particularly of statutory or regulatory schemes which require written contracts or memoranda of contracts in order to protect consumers and other vulnerable classes of people. See, e.g., *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, concerning legislation covering building contracts.

⁶⁸ A common requirement of much hire purchase and credit legislation is that agreement be in a certain form, or that consumers be supplied with "plain" language

form will be classed as cases of "want of formality", and are said to be unenforceable. Unenforceable contracts form by far the most significant group of cases.

(2) A contract may be expressly or impliedly prohibited or proscribed by statute,⁶⁹ or have a purpose which is contrary to public policy at common law. Examples of the latter include agreements to commit a crime⁷⁰ and agreements which are an unreasonable restraint of trade. Such contracts will be classed as cases of "illegality", though the term raises difficulties both of meaning and of classification.⁷¹ These difficulties can largely be avoided if one uses the term "illegality" in an all encompassing way to refer to all cases in which contracts are defective as a result of either the subject-matter of the agreement, the purpose of the agreement, or the manner of its performance, as distinct from the *form* which that agreement takes.

(3) A contract may be entered into by parties who lack the legal capacity to contract. Examples include contracts entered into by minors, the mentally disordered, corporations acting *ultra vires* of their powers,⁷² or

summaries of the nature of the financial obligations incurred.

⁶⁹ A particular agreement may incur a statutory penalty and thus be considered to be impliedly prohibited by the statute.

⁷⁰ Such as a contract to commit a murder.

⁷¹ See Dickson, B., "Restitution and Illegal Transactions" in Burrows, *Essays*, 171, 171-3, for a summary of the different approaches to the treatment of illegality, specifically the process of classification and differentiation of illegal contracts. See also Carter & Harland, 477-8. Such difficulties led Farnsworth to prefer the label "unenforceability on grounds of public policy". See Farnsworth, 345-8.

Some commentators, such as Atiyah, draw a distinction between contracts void as contrary to public policy or interest on the one hand and "illegal" contracts on the other. See, e.g., Atiyah, Chps XVII & XVIII respectively. Similarly, see Cheshire, Fifoot & Furmston, *Law of Contract* (11th ed., 1986), and *Cheshire & Fifoot* (Aust. ed.), Chps 9, 10, 11 & 12. This would appear to be a difficult distinction to maintain and the approach is not followed by most commentators. See, e.g., Carter & Harland, 477-8 and Farnsworth, 345-50. Burrows, 333, states:

In this book a broad view of what is meant by illegality is adopted, which includes not only conduct which is sometimes described as 'contrary to public policy'. In particular it is believed that, in line with Anson and Treitel, the distinction drawn by Cheshire, Fifoot and Furmston between illegal contracts and contracts that are void on grounds of public policy is unhelpful." (References are in Burrows, fn.1).

⁷² The *ultra vires* doctrine has been abolished (see the *Corporations Law*, ss. 160 (5), 162), so that for practical purposes, the previous law on this is largely irrelevant. But contrast

by purported agents lacking authority to bind the principal or alleged principal.⁷³ In all such cases the concern is with a legal deficiency of the parties to an agreement and they will be classed together as cases of "incapacity". The effects of incapacity will not be considered here, for reasons which will be spelled out below.

Despite the contracts being defective in all these cases, but depending upon the reason for the contract not being enforceable,⁷⁴ a range of remedies may be available to a plaintiff who has paid money to the defendant, incurred expenses, performed services or in some way detrimentally relied on the faith of a subsisting agreement.⁷⁵ The range of available remedies stems from the variety of liability rules which may potentially be activated. A plaintiff may claim in *quantum meruit* (doubts as to whether such a claim is available where an unenforceable contract has not been completely discharged have been laid to rest in *Pavey & Mathews v. Paul*⁷⁶) or for money had and received, as well as

Burrows, 457. In cases of mental disorder and drunkenness, for a contract to be voidable, the party alleging incapacity must show that the other party knew or ought to have known of the other's mental incapacity. Hence, such cases can be seen as a specific type of unconscionability. See *Hart v. O'Connor* [1985] A.C. 1000.

⁷³ It could be said that the agent lacks capacity to bind the principal to the agreement in question. See, e.g., *Craven-Ellis v. Canons Ltd* [1935] 2 K.B. 403. A similar problem is raised where a defendant company was unincorporated at the time of the contract. See, e.g., *Re Banque de Moscou v. The Liquidator* [1952] 1 All E.R. 1269. Pre-incorporation contracts are dealt with in Australian law under statute.

⁷⁴ We are only concerned with voidable contracts which have been avoided.

⁷⁵ Cf. Fridman, G.H.L., "Reflections on Restitution" (1976) 8 Ottawa L.R. 156, 174, who makes a similar point:

the judges are ... permitting recovery of money, or payment for services rendered, in the absence of a contractual relationship in the strict sense, whenever ... one person has acted to his financial detriment and ought to be restored to his previous financial position.

⁷⁶ (1987) 69 A.L.R. 577. Previous doubts about the availability of a *quantum meruit* claim arose because it was perceived that a contract could not be implied where the express, though unenforceable, contract remained on foot, but this appears to have been a temporary aberration. Many of the earlier cases are inconsistent with the preclusion noted above, allowing a *quantum meruit* when a defendant had breached the unenforceable agreement, even though such a breach may not have been sufficient to discharge the contract. See discussion of the Australian cases in *Cheshire & Fifoot* (Aust. ed.), 262-5. The effect of these decisions (though not necessarily the reasoning, but see *infra* n. 116), as will be seen, was to allow the express contract to be enforced where it was not inconsistent with the policy of the rule rendering it "unenforceable". Consequently, the reasoning of the High Court, in *Pavey & Mathews*, that the basis of the claim was independent of contract and that the Court was consequently not enforcing the contract, will be questioned below.

resort to equitable doctrines such as estoppel,⁷⁷ constructive trust⁷⁸ and part performance.⁷⁹ Historically, a number of other actions have also at times been utilised.⁸⁰ As will be seen below, which of these options will be available in a given case depends largely⁸¹ on the reason for the contract being defective and the cases will be considered accordingly under the headings of want of formality and illegality. But first, it is proposed to consider the contract-like nature of liability in all such cases in which relief is granted.

§ 6.2.2.1 The contract-like nature of liability

The contract-like nature of liability stems from three observations which can be made about the cases.

(1) In all the cases, the parties have taken some steps towards the assumption of a contractual obligation, but have failed to satisfy all requirements necessary to give rise to an enforceable contract. Nonetheless, the parties generally will have conducted themselves as if they are legally bound and that certain obligations have in fact been assumed. At the very least, the plaintiff will have relied on the expectation that a legal obligation exists and will usually have partly⁸² or completely performed his or her part of the

⁷⁷ E.g., *Riches v. Hogben* [1986] 1 Qd. R. 315. Such relief is particularly common in the United States. See particularly §129 and §139 of the American Law Institute's *Restatement of Contracts, Second*, (1981).

⁷⁸ That is, when utilised as a substantive source of legal liability, rather than merely a remedial device. See, e.g., *Bannister v. Bannister* [1948] 2 All E.R. 133; *Ogilvie v. Ryan* [1976] 2 N.S.W.L.R. 504.

⁷⁹ This operates in relation to contracts unenforceable under the *Statute of Frauds* and derivative legislation. In England, amendments to the *Law of Property Act 1925*, according to Goff & Jones, 469, have rendered the part performance doctrine a "relic of the past". In Australia, this is not the case, though estoppel may largely supersede the doctrine. See *infra* n. 98.

⁸⁰ An example is an action in debt arising from a fully executed contract, as in *Fablo v. Bloore* [1983] 1 Qd.R. 107. See also *Turner v. Bladin* (1951) 82 C.L.R. 463. Such a claim may still be available today, though *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, has cast doubt on this. See particularly Deane J. at 602-3. Contrast the judgment of Dawson J., and see the detailed discussion of this point as well as the earlier authorities in Cooper, G., "The Statute of Frauds and Actions in Restitution and Debt" (1989) 19 W.A.L.R. 56. Other actions which have in the past been utilised include actions for money paid at the request of the defendant (*Knowlman v. Bluett* (1874) 9 Ex. L.R. 307), and for "account stated" (*Cocking v. Ward* (1845) 1 C.B. 854; 135 E.R. 781).

⁸¹ The historical development of doctrines and causes of actions is also of undeniable significance in determining whether a given liability rule is available.

⁸² Part performance will only give rise to recovery where the failure to complete the

agreement. The defendant, however, refuses to perform as agreed, in other words, "breaches" the defective contract so that the plaintiff's reliant actions prove detrimental.⁸³ The requirement that the plaintiff has detrimentally relied on the defective contract is essential, for where a plaintiff has not performed any part of the contractual obligation and the contract remains fully executory, no remedial relief will generally be available.⁸⁴ This is, of course, different to the position where a contract is enforceable and this difference will be returned to shortly. The point also needs to be stressed that it is only where the defendant has breached the assumed obligation that a plaintiff typically seeks relief. Indeed, if the agreement has been fully executed, then no liability, in Restitution or otherwise, is generally available even if the contract is illegal.⁸⁵

(2) Irrespective of the liability rules relied on to seek remedial relief, constant references need to be made to the defective contract to establish the necessary elements of a plaintiff's claim. It is the existence of and terms and conditions of the defective contract which ultimately determine whether a plaintiff can establish liability on the part of the defendant.⁸⁶ This suggests that

plaintiff's agreed performance is the fault of the defendant, such as where a breach of the contract has occurred or is anticipated. If the plaintiff does not complete, but the defendant is ready, willing and able to proceed, then no claim will succeed. See *Triple "C" Holdings Pty Ltd v. Hogan* (1983) 1 N.S.W.L.R. 252, and *Gino D'Allesandro Constructions v. Powis* [1987] 2 Qd.R. 40, 58. Examples include *Thomas v. Brown* (1876) 1 Q.B.D. 714 (a claim for the recovery of money), and *McCallum v. Mackenzie* (1979) 100 D.L.R. (3rd) 229.

⁸³ If the defendant fulfils his or her agreement, or is prepared to do so, the plaintiff will have his or her expectations under the agreement met.

⁸⁴ This is subject to the possibility of claims for work done in preparation of the performance of the contract. Such expenses may be recoverable in the United States. A good example is *Riley v. Capital Airlines*, 185 F. Supp. 165 (1980), allowing recovery in Restitution. See also *McDaniel v. Hutcherson*, 124 S.W. 384 (1910), overruled in *Boone v. Coe*, 154 S.W. 900 (1913). See Palmer, §6.3, who concedes that such cases are not benefit-based, and Fuller & Perdue, supra n. 10, 392-4. Cf. *Stevens v. Good Samaritan Hospital & Medical Ctr*, 504 P. 2d 749 (1972), though note the vigorous dissenting judgment. The writer is not aware of any English or Australian authorities allowing the recovery of preparatory costs in Restitution under a defective contract, but there are numerous examples of recovery for such reliance loss where a contract is incomplete, such as for work done in anticipation of an expected contract. See, e.g., *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880, and generally, § 6.2.3 below.

⁸⁵ For example, property can pass under an illegal contract: see *Singh v. Ali* [1960] A.C. 167; *Leonard v. Booth* (1954) 91 C.L.R. 452, 483. Thus, if both parties have done everything required under the agreement, the courts will not usually upset the transactions. See *Tinsley v. Milligan* [1993] 3 W.L.R. 126, 143, per Lord Chauncey of Tullichettle.

⁸⁶ Mason and Wilson JJ. acknowledge as much in *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 583-4, ("[p]roof of the oral contract may be an indispensable element in the plaintiff's claim") but consider that "the purpose of proving the contract is not to enforce it but to make out another cause of action having a different foundation in law." For a criticism of this

the responsibility of the defendant to the plaintiff stems directly from the defendant's intention to assume an obligation evidenced by the parties' mutual agreement and the subsequent breach of that agreement if relied upon.

(3) Reflecting the wide range of potential actions to which a plaintiff may resort, there are a variety of remedial responses to a defendant's breach of an unenforceable contract. Some of these remedies are typically contractual, whereas others are not. But even in the latter case, the basis for the remedial relief is still the contract-like conduct of a defendant. Remedies which have been granted include the fulfilment of what a plaintiff can reasonably be entitled to expect⁸⁷ and compensation of a plaintiff's reliance losses.⁸⁸ In some cases, notably illegality, the court's response to the defective contract may be to preclude any remedial relief, even restitution of a benefit, such as money paid to the defendant. Most significantly, however, it is not uncommon for a plaintiff to be awarded the quintessential contractual measure of recovery, namely, to have his or her contractual expectation fulfilled. This will usually be by means of specific performance or damages measured to achieve this.⁸⁹ The effect of such remedies is to place the plaintiff in the same position as if the contract had been enforced.

The reasons for the different remedial outcomes may not always be easy to identify—there is no simple formula for accurately predicting a court's response to a defective contract. One stated reason, however, features prominently in many of the decisions: the courts, in granting or refusing a remedy, often claim to be giving effect to the true underlying purposes and policies of the statutory⁹⁰ or common law rule rendering the contract defective.

view, see § 6.2.2.2.

⁸⁷ Where, for example, a *quantum meruit* for the value of services rendered includes a reasonable profit element. See § 4.4.1 as to the different possible measures of a *quantum meruit* claim.

⁸⁸ Such compensation may be by means, for example, of a *quantum meruit* as measured by reference to expenses incurred; or by restitution of money paid under contract, in a claim for money had and received.

⁸⁹ Other means used to enforce the plaintiff's full contractual expectations include the remedy of the constructive trust (*supra* n. 78) and the action in debt for the contract price (see *supra* n. 80). Significantly, the practical consequence of a *quantum meruit* award is often the fulfilment of a plaintiff's full contractual expectations. This will be discussed further below.

⁹⁰ Where the rule is statute based, its underlying purpose may not always be discernible from the language of the statute itself, which may, if literally applied, suggest quite different consequences. The fact that the courts will often shun a literal application of statutory

Consistently with this view, the remedy granted in many cases will be seen generally to promote, or at least not to contravene, the policy of the rule in question. Hence, the division and consideration of the cases in terms of the reasons for a contract being defective, which reasons are crucial in establishing why and to what extent a defective contract will give rise to legal consequences.

§ 6.2.2.1.1 *One significant difference between contract-like liability and contractual liability: the requirement of detriment*

Despite the above similarities of claims under defective contracts to claims in contract, there is one significant difference. It is possible to establish an action if a defendant should breach an enforceable contract even where the contract is entirely executory and neither party has gone anyway toward performing his or her part of the agreed transaction. In such a case, it may be possible for the innocent party to enforce the contract either specifically, or by a claim for damages calculated by reference to the plaintiff's (unfulfilled) contractual expectation. However, a claim to enforce an executory contract is not possible when that contract is defective, even if the defect stems from a minor technical failing only. Despite their complete bargain, the parties have not in law taken all the steps necessary to assume a legally enforceable contractual liability. Before a claim can arise, a plaintiff must have relied on the existence of the defective contractual obligation in a way which proves detrimental when the defendant subsequently refuses to complete his or her part of the agreed bargain.⁹¹

provisions again demonstrates the gap-filling and ameliorative role of relief in Restitution—the courts will try to avoid unjust consequences that would flow if such provisions were given literal effect. Instead, the courts seek to promote the underlying purposes of the statutory provision. The most trite example of this can be seen in the *Statute of Frauds* cases, to be considered below.

⁹¹ As with the cases considered in this chapter generally, a defendant's enrichment is not a prerequisite for successful recovery under a defective contract. As will be recalled from Chapter 4, pure reliance losses will justify the imposition of an obligation even where the defendant has not received any of what was bargained for. See *Riches v. Hogben* [1986] 1 Qd.R. 315, in which case estoppel was the doctrinal vehicle for recovery. Work preparatory to contractual performance may be recoverable. See *supra* n. 84. In the United States, recovery has not been precluded even where a contract requires the transfer of benefits to a third party. Perhaps the most telling example is provided by *Clement v. Rowe*, 146 N.W. 700 (1914), seemingly an action in *quantum valebat*. The defendant had orally promised to transfer stocks to the plaintiff if the plaintiff transferred certain farmland to a third party. The plaintiff did so, but the defendant refused to perform as agreed, relying on the *Statute of Frauds*. The court considered that as "[t]he plaintiff had irrevocably surrendered the farm, relying upon defendant's promise, [the] defendant must therefore put him back as nearly as possible in statu quo" (703). Although note that earlier the court considered that :

Does this added requirement of detrimental reliance by a plaintiff detract from the contract-like nature of liability under a defective contract? Certainly, enforcement of entirely executory contracts appears to be the crowning achievement of contract law⁹² and, not surprisingly, the law will only grant such remedial relief where all legal formalities of contract law have been fulfilled. But this is only one, albeit an important, aspect of contract. If one focuses on contract as an assumption of obligation by means of agreement—the causative event, rather than the remedial response—then cases of defective contracts can also be described as involving an assumption of obligation by means of agreement. The parties will have reached a sufficient consensus, though according to the formal rules for identifying contracts, no legally binding contract arose. Once a plaintiff relies on the “contract” to his or her detriment, contract-like liability would appear to be justified, the plaintiff’s actions being precisely what the defendant should have anticipated—if not invited—because of his or her agreement with the plaintiff. The plaintiff’s detrimental reliance is always caused by or at least referable to the albeit defective contract. Consequently, the courts treat the defendant’s conduct, in failing to fulfil his or her agreement subsequent to the plaintiff’s reliance, as giving rise to rights consistent with the policies of the legal rule rendering the contract defective. The individual and distinct doctrines and rules to be considered provide the vehicles for liability in a given case; and these doctrines and rules often have their own substantive elements and features. But importantly, the rationale for such doctrines and rules lies in ideas at the core of contract law. This will be demonstrated as we now consider the case law in some detail.

§ 6.2.2.2 Contracts unenforceable for want of formality

Statutory requirements that contracts comply with certain formalities are not uncommon or new and a failure to comply invariably renders the contract

So far as the relations between plaintiff and defendant are concerned, the situation was the same as though the land really became the property of the defendant; but by his direction the title was taken in the name of a third person. In such a case the law will *presume* that the benefit of the transaction inured to the defendant (emphasis added).

When the law resorts to presumptions such as these, one can only suspect that policies other than the disgorgement of gains are at the back of recovery.

⁹² It should be noted, though, that this is rarely done via specific enforcement (specific performance) of the contract, but instead merely by awarding a substitute remedy of damages measured by reference to what a plaintiff’s position would be if the contract had been enforced.

unenforceable. Yet despite this unenforceability remedial relief may be available to plaintiffs who have acted to their detriment on the faith of the agreement, where defendants have breached such an agreement.

One of the most fertile grounds for such claims has proved to be the *Statute of Frauds*⁹³ and derivative legislation. Legislation requiring that certain contracts be evidenced in writing in order to be enforceable⁹⁴ is still commonplace. Such legislation may evince a variety of policy concerns. The *Statute of Frauds* has been interpreted as being specifically aimed at the prevention of fraud: contracts must adequately be evidenced in order to avoid the difficulties of proving or disproving potentially fraudulent allegations of oral agreements. Much of the case law concerns the *Statute of Frauds*, though cases arising under more recent provisions which evince other, quite different policy objectives⁹⁵ and utilise quite different language, will also be considered.

Although the *Statute of Frauds* provided that no causes of action could be brought on contracts caught within its provision, its effect was not as far-reaching as the clear language of the Act would at first suggest. For

[n]o sooner had the *Statute of Frauds* been enacted in 1677 than the courts set about relieving persons of its effect in cases where it was thought that the legislation could not have been intended to apply. In general terms, it was said that the courts would not allow the *Statute of Frauds* to be made an instrument of fraud, and that it did not prevent the proof of the fraud.⁹⁶

It was evident that if the *Statute* were strictly applied, then contractual claims based on genuine agreement could be defeated by unscrupulous defendants, even where a plaintiff had acted detrimentally in reliance upon the agreement. Thus, the *Statute* would protect dishonest conduct. The courts of both equity and common law did not perceive such results as desirable, and consequently a number of doctrines and remedies developed to circumvent the

⁹³ Passed in 1677; 29 Car. II C 3.

⁹⁴ The *Statute of Frauds*, s. 4, provided that "[n]o action shall be brought" upon certain agreements unless evidenced in writing.

⁹⁵ Different policy objectives may consequently give rise to different remedial relief.

⁹⁶ *Last v. Rosenfeld* [1972] 2 N.S.W.L.R. 922, 927, per Hope J. Put more succinctly, it is said that "the purpose of the *Statute* is to prevent fraud rather than to foster it": Hutchinson, R.B., "The Necessity of Conferring a Benefit for Recovery in Quasi-Contract" (1968) 19 Hastings L.J. 1259, 1266, citing *Huey v. Frank*, 182 Ill. App. 431 (1913). And see Meagher, Gummow & Lehane, 347, 514-5, as well as references cited § 1.4.3.2 and references infra n. 122.

strict application of the *Statute*. Many of these mechanisms for such circumvention are still relevant today and include⁹⁷ the doctrine of part performance⁹⁸ and actions for money had and received⁹⁹ and *quantum meruit*.¹⁰⁰

Since an oral contract caught by the *Statute of Frauds* is unenforceable, actions for the specific performance of such a contract or for damages for a failure to perform will fail where the contract is entirely executory.¹⁰¹ Similarly, actions for breach of specific terms of the contract will fail.¹⁰² Where, however, a plaintiff has relied on the existence of the oral contract and has partially or completely performed his or her part of the agreed bargain or, perhaps,¹⁰³

⁹⁷ It is uncertain whether an action in debt, where one party has fully executed his or her contractual performance, is still available. See supra n. 80. A number of other remedies have also been used in the past, but are no longer available as a result of the abolition of the forms of action. See supra n. 80.

⁹⁸ Although note the position in England, supra n. 79. The doctrine has a long historical lineage. Early cases include *Butcher v. Staeley* (1685) 1 Vern. 363, and *Lester v. Foxcroft* (1701) Colles Par. Cas. 106. The courts intervene by granting specific performance to a plaintiff who has partially performed his or her part of the alleged oral contract where such part performance was referable to "some such contract" as alleged: *Steadman v. Steadman* [1976] A.C. 536. The cases generally only apply to contracts transferring interests in land, though theoretically, the doctrine may not be so limited. See Carter & Harland, 167, and generally, Meagher, Gummow & Lehane, 515-22. Arguably, part performance may be superseded by estoppel, which is becoming an increasingly significant mechanism used to provide relief in cases of unenforceable contracts and may be more broadly based. See, e.g., *Collin v. Holden* [1989] V.R. 510, and *Riches v. Hogben* [1986] 1 Qd.R. 315. Some commentators have cautioned against the displacement of part performance by estoppel. See Nicholson, K.G., "Riches v. Hogben: Part Performance and the Doctrine of Equitable and Proprietary Estoppel" (1986) 60 A.L.J. 345.

⁹⁹ See, e.g., *Green v. Saddington* (1857) 7 El. & Bl. 503; *Gosbell v. Archer* (1835) 2 A. & E. 500.

¹⁰⁰ See, e.g., *Scarisbrick v Parkinson* (1869) 20 L.T.R. 175; *Ward v. Griffiths* (1928) 28 N.S.W.S.R. 425, though note discussion, supra n. 76.

¹⁰¹ See Carter & Harland, 162. Where a party to a contract has partially performed the obligations under the contract, this will not remove the contract from the *Statute* (unless the part performance doctrine applies) and no action can be maintained for the executory part of the contract. See *McBride v. City of McCook*, 321 N.W. 2d 905 (1982); cf. *Harman v. Reeve* (1856) 18 C.B. 587.

¹⁰² *Britain v. Rossiter* (1879) 11 Q.B.D. 123 (action for damages for wrongful dismissal unsuccessful); see also *Chevalier v. Lane's, Inc.*, 6 A.L.R. (2d) 1045 (1948), (bonus under an employment contract not recoverable). Contrast *Scott v. Pattison* [1923] 2 K.B. 723, in which the court considered that a claim for payment of sick leave might be maintainable where contracts of the type in question customarily included such a provision. This was despite the unenforceability of the contract itself.

¹⁰³ Acts done in preparation to commencing contractual performance may also, according to a number of American authorities, give rise to recovery in estoppel and even

merely done acts preparatory to such performance, a defendant who breaches his or her agreement may be liable to the plaintiff on the basis of a number of liability rules. The reasons for such liability appear contract-like, although the formal explanations given are not contractual.

Consistently with the contract-like qualities of the liability rules, the remedial responses often reflect this quality and appear contract-like. The plaintiff may be awarded what he or she may be reasonably entitled to expect in the circumstances, by means of a *quantum meruit* for services rendered, incorporating a reasonable profit component.¹⁰⁴ For our purposes, however, the most notable feature of *Statute of Frauds* cases (and want of formality cases generally) is that often the courts have been prepared to protect a plaintiff's actual expectations under the unenforceable contract. Alternatively, at times, the remedial responses are not typically contractual. For example, a defendant's liability to the plaintiff may take the form of an obligation to return the plaintiff to his or her previous *status quo*, by means *inter alia*, of the restitution of money paid under the unenforceable contract¹⁰⁵ or compensation for expenses incurred by the plaintiff.¹⁰⁶ Nonetheless, the basis for liability even where the remedial response is not contract-like, is still the contract-like conduct of the defendant.

Historically, the most significant mechanism for the protection of a plaintiff's actual expectations has been equity's part performance doctrine.¹⁰⁷

quasi-contract. See supra n. 84.

¹⁰⁴ This is a common practice in cases involving building or construction work. See, e.g., *Gino D'Allesandro Constructions v. Powis* [1987] 2 Qd.R. 40, in which \$6000 was included as a profit component above the expenses incurred by the plaintiff. Cf. *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577.

¹⁰⁵ Although the form of relief is restitutionary, it should not be seen as motivated by a desire to disgorge unjustly gained benefits, for to do so would be to isolate money cases from other forms of relief. Instead, it can be seen as a restitutionary remedy arising from breach of the unenforceable contract, aimed at restoring the plaintiff to his or her previous position.

¹⁰⁶ Recovery of the costs incurred by a plaintiff, without any profit element, is one measure of *quantum meruit*. See § 4.4.1 and cases such as *Estok v. Heguy* (1963) 40 D.L.R. (2d) 88, (expenses incurred in improving defendant's land in belief that an enforceable contract to purchase the land existed); and *Riley v. Capital Airlines*, 185 F. Supp. 165 (1960) (where preparatory expenses were recompensed).

¹⁰⁷ Note Fuller & Perdue, supra n. 10, 391, fn. 140, who concede that recovery under part performance normally is of the expectation interest, but nevertheless consider that the "various doctrines of 'part performance' are phrased broadly enough to furnish a substantial vent for the judicial impulse to compensate detrimental reliance." Where available, a claim for a

Where a plaintiff has performed services, paid money or in some other way acted in part performance of an oral contract transferring an interest in land¹⁰⁸ courts will grant specific performance of the contract where it would be fraudulent or unconscionable for a defendant to rely on the *Statute*. Interestingly, a plaintiff's actual expectations may also be protected by means of *quantum meruit* for services rendered.¹⁰⁹ This follows as a practical consequence of the view—for which there is considerable authority¹¹⁰—that recourse may be had to the oral agreement as evidence of the reasonable value of the work performed. In many cases, the courts have simply accepted the contract price as the reasonable value of the services.¹¹¹

References to the oral contract, however, are not limited to determining the reasonable value of services. Indeed, repeated references need to be made to the unenforceable contract in order successfully to formulate a claim for relief in Restitution or equity. For example, where the claim is for a *quantum meruit* for services rendered, it is necessary to prove, *inter alia*, that the services were not conferred at the plaintiff's own risk ("officially", as the cases would have) and were not intended to be gratuitous.¹¹² But proof of these factors, and

debt arising from the completion of one party's performance results in an award of that party's actual expectations under the contract. See, e.g., *Fabro Pty Ltd v. Bloore* [1983] 1 Qd.R. 107. Expectation interests may also be protected by resort to estoppel or constructive trust.

¹⁰⁸ Note, however, that part performance perhaps also extends to other types of contracts. See *supra* n. 98.

¹⁰⁹ Interestingly, most commentators perceive *quantum meruit* generally as a reliance loss remedy, but this ignores the practical consequences of many of the decisions. See § 4.4.1.

¹¹⁰ See, e.g., *Scarbrick v. Parkinson* (1869) 20 L.T.R. 175, 177, where the court considered that the jury "might have recourse to the agreement for the purpose of seeing what the defendant himself had valued the services at." This principle was affirmed by the High Court in *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 605. See also *Tipling v. T.P.R. Printing Co. Ltd* [1955] N.Z.L.R. 136. For United States decisions, see cases and references cited in Perillo, *supra* n. 32, 1216, fn. 55.

¹¹¹ E.g., *Scarbrick v. Parkinson* (1869) 20 L.T.R. 175; *Tipling v. T.P.R. Printing Co. Ltd* [1955] N.Z.L.R. 136. In *Ward v. Griffiths* (1928) 28 N.S.W.S.R. 425, the jury awarded a plaintiff £200 over and above what he had already received under an oral contract as the reasonable value of the work carried out; this sum was the same as that still outstanding under the oral contract.

¹¹² Historically, to pursue a *quantum meruit* claim successfully it was necessary to show a request (either express or implied from the circumstances) for the services by the defendant, that the work was not intended to be gratuitous and that the requested services had in fact been performed. Cf. Cauchi, G.F., "The Protection of the Reliance Interest and Anticipated Contracts Which Fail to Materialize" (1981) 19 U.W.O.L.R. 237, fn. 23, and references cited therein, and Birks, P., "Restitution for Services" [1974] C.L.P. 13, 30. The first

others,¹¹³ is only possible by reference to the oral contract. To utilise the language of unjust enrichment, the unjustness of the "benefit" is constituted by the defendant's failure to meet his or her *agreed* obligation. As Stoljar has indicated,

If P asks D to pay him for his executed services on the basis of restitution, D can say the services are officious; and if P rejoins the services cannot be officious because solicited by an agreement, D replies that the agreement is unenforceable. The restitution argument is thus caught in a vicious circularity, going round and round.¹¹⁴

And historically, although *pleading* the contract was unacceptable given its "unenforceability", at trial repeated references were nevertheless made to the oral agreement. Perillo has concluded that this highlights the contractual nature of claims under unenforceable contracts:

At every step and turn questions of fact and questions of law are definitively or partially resolved by reference to the contract. Yet we are still asked to believe that the action is non-contractual because in pleadings, but not in trials, centuries ago reference to the contract was taboo.¹¹⁵

two of these requirements were in turn satisfied by proving the oral contract. Given these elements of the *quantum meruit* claim, the attraction of an implied contract theory is not surprising: the basis of liability being that requested services were performed in the expectation that they were to be paid for. See, e.g., *Kearns v. Andree*, 139 A. 695 (1928), 697.

¹¹³ For example, the terms of the oral contract might be raised by a defendant in order to show that a plaintiff claiming under the contract had breached the agreement, thereby raising a possible defence.

¹¹⁴ Stoljar, 195-6. See generally his discussion of these issues, 192-6, 231-45.

¹¹⁵ Perillo, *supra* n. 32, 1216. Also note the judgment of Cardoza CJ. in *Buccini v. Paterno Construction Co.*, 170 N.E. 910, 911 (1930), who makes a similar point.

Despite these observations, the courts have for the most part¹¹⁶ refused to concede that they are, even in effect, enforcing contracts when imposing liability. Thus in cases of equitable relief (under the doctrine of part performance or estoppel, for example), it is said that the defendant is not charged upon the contract, but upon the equities which arise where the circumstances are such that it would be inequitable for the defendant to plead the *Statute*. Similarly, it has recently been stressed that a quasi-contractual claim for *quantum meruit* is an independent restitutionary claim. In the view of Deane J., for example:

the claim in restitution involves not enforcing the agreement but recovering compensation on the basis that the agreement is unenforceable.¹¹⁷

Admittedly, unlike for a contractual claim, it is necessary to show some detriment to the plaintiff; and further, the individual elements of each specific liability rule need to be met. Thus, in estoppel for example, the

¹¹⁶ Some early authorities took the view that where a plaintiff had fully performed his or her part of the contractual obligation and proceeded in an action for debt, the *Statute* simply did not apply to the contract. See, e.g., *Simon v. Metivier* (1766) 1 Black W. 599; cf. *Souch v. Strawbridge* (1846) 2 C.B. 808; *Green v. Saddington* (1857) 7 El. & Bl. 503. This view was rejected in Australia in *Hodge v. Rudd* (1902) 19 W.N. (N.S.W.) 119. See Cooper, *supra* n. 80, 58-9. Nevertheless, the courts continued to allow such actions in debt, but resorted to the fiction that such actions were not ones to enforce the contract: *Turner v. Bladin* (1951) 82 C.L.R. 463, 474-5. Such a debt action may no longer be available in the light of *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577. See *supra* n. 80. In the United States, the position appears to be that complete performance by one party of some types of contracts takes such contracts outside the *Statute*, so that such a party is entitled to sue on the contract. See *Corpus Juris Secundum*, Vol. 37, 762. Cf. Farnsworth, 443-4.

¹¹⁷ *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 607. Cf. the views of Mason and Wilson JJ. at 583:

Once the true basis of the action on a *quantum meruit* is established, namely execution of work for which the unenforceable contract provided, and its acceptance by the defendant, it is difficult to regard the action as one by which the plaintiff seeks to enforce the oral contract. True it is that proof of the oral contract may be an indispensable element in the plaintiff's success but ... [t]he purpose of proving the contract is not to enforce it but to make out another cause of action having a different foundation in law.

The various judges seem almost at pains to stress this point, despite its seeming artificiality, but contrast the dissenting judgment of Brennan J. See also *Gino D' Alessandro Constructions Pty Ltd v. Powis* [1987] 2 Qd.R. 40, 58 (claim for damages for loss of profits for breach of contract would involve enforcing the contract, whereas a *quantum meruit* claim would not). Although these cases did not concern *Statute of Frauds*-type legislation, they proceeded by considering *Statute of Frauds* authorities alongside other authorities concerning different legislative provisions. It was accepted in *Pavey & Mathews*, however, that differing statutory purposes would have to be taken into account in deciding whether relief was consistent with such purposes. In Canada, see *Deglman v. Guaranty Trust Co.* [1954] 3 D.L.R. 785.

unconscionability of a defendant's conduct needs to be shown. But such elements are proved, invariably, by reference to the unenforceable contract and its terms.¹¹⁸ One can conclude that the reason underlying the imposition of liability is a plaintiff's entitlement to expect that some obligation has been assumed and his or her reliance on the strength of such an assumption.¹¹⁹ But if this is so, one may ask whether Australian law ought not to be rationalised in the same way as has occurred in the United States, where detrimental reliance has been recognised as giving rise to a contractual claim in some cases.¹²⁰ In effect, a plaintiff's reliance on the agreement overcomes the want of formality,¹²¹ so that the parties can be taken to have assumed an obligation

¹¹⁸ Cf. Stoljar, *supra* n. 11, 17, discussing *Waltons Stores v. Maher* (1988) 76 A.L.R. 513:

Behind all the talk of estoppel, what really did inform the whole inquiry was whether an agreement could be properly inferred, an agreement, more exactly, which whatever its incompleteness was still sufficiently firm in outline to allow one party to act under it while the other, aware of what was happening, could no longer withdraw, not having retained a clear option to that effect (footnote omitted).

¹¹⁹ One could say that the defendant has a clear intention (as objectively determinable from the defendant's conduct) to assume an obligation and has subsequently breached that assumed obligation.

¹²⁰ See §90, §129 and §139 of the *Restatement of Contracts, Second* (1981). See also Farnsworth, §2.19. The effect of §90 is to overcome a want of consideration, but it has also been utilised in circumstances when an unenforceable contract is relied upon. In the past, §90 reliance was invoked to overcome the statutory bar to enforceability, even where reliance occurred in relation to promises supported by consideration. See Farnsworth, §6.12. Hence, §139 was added to the *Restatement of Contracts, Second*, in response to such cases. §139 reads

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if justice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

Consistently with this view, definitions of contract in the United States would include claims under "unenforceable" contracts. See, e.g., Farnsworth, 3: A contract is "a promise, or set of promises, that the law will enforce or at least recognise in some way" (emphasis in original). Similarly, see the *Restatement of Contracts, Second* §1: a contract is a "promise ... for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Clearly, even in Australian law, breach of many types of unenforceable contracts does give rise to some remedy. Cf. Stoljar, *supra* n. 11, 17, writing in relation to *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, 537:

[E]ven if [the parties'] agreement was but an informal one (a formal exchange not having taken place) the plaintiff's part performance ... easily eked out this deficiency, such that a binding contract resulted to be remedied either by specific performance or by damages.

¹²¹ Cf. Stoljar, quoted *ibid*.

which is legally enforceable, that is, gives rise to remedial rights, when breached.

The enforceability of a contract, of course, will be limited to the extent that it is consistent with the policies of the statutory or common law rule that has been contravened. Thus, the courts will not allow the avowed purpose of the *Statute of Frauds* to be defeated by permitting it to be made an instrument of fraud,¹²² but this may justify in appropriate circumstances the protection of a plaintiff's full contractual expectations.

Other statutory schemes may have quite different purposes to the *Statute of Frauds*. Consequently, different considerations must apply in determining whether a particular remedy will offend the purpose of the provision in question. Although the part performance doctrine does not apply to provisions other than the *Statute of Frauds* and derivative legislation, relief under other equitable doctrines and Restitution has been allowed, and usually such relief is consistent with the policy of the statute in question. As Mason and Wilson JJ. indicated in *Pavey & Mathews v. Paul*, "[a]n interpretation that serves the statutory purpose yet avoids a harsh and unjust operation is to be preferred."¹²³

Pavey & Mathews v. Paul provides a good example of the significance of the relevant statutory provision in determining whether relief should be allowed. In that case, a builder had completed construction work under an oral contract, rendered "unenforceable" by s. 45 of the *Builder's Licensing Act 1971* (N.S.W.). The High Court allowed the builder's *quantum meruit* claim for the completed work.¹²⁴ The Court considered that although on one view, the

¹²² See, generally, Meagher, Gummow & Lehane, 521-2. Under the part performance doctrine, the plaintiff must show that he or she "would suffer an injury amounting to fraud by the refusal to execute that agreement": *Frame v. Dawson* (1807) 14 Ves. Jun. 386, 386. Cf. *Maddison v. Alderson* (1883) 8 A.C. 467, 474, 476. The maxim that "Equity does not allow a Statute to be made an instrument of fraud" has been identified as the historical source of equitable intervention: *Caton v. Caton* (1866) 1 Ch.App. 137, 148. For an estoppel case, see *Riches v. Hogben* [1986] 1 Qd.R. 315; and for a case in which a constructive trust was utilised to prevent a fraudulent retention of property, see *Rochefoucauld v. Boustead* [1897] 1 Ch. 196, 206. All of these equitable doctrines can be seen as giving effect to the view that the *Statute* was not intended "to prevent the Court of Equity from giving relief in a case of a plain, clear and deliberate fraud": *Haigh v. Kaye* (1872) L.R. 7 Ch. App. 469, 474, per James L.J. In the United States, a similar rationale for equitable recovery is usually cited. See, e.g., *Howland v. Iron Firemans Mfg Co.*, 213 P. 2d 380 (1950), 382. On occasions, common law courts have also made reference to the purpose of the *Statute*. See, e.g., *Souch v. Strawbridge* (1846) 2 C.B. 808, a common law claim in which Tindal C.J. canvassed the objects of the *Statute*.

¹²³ (1987) 69 A.L.R. 577, 584.

¹²⁴ This also equated with the actual contractual remuneration provision agreed upon

policy of the Act was to protect "the building owner against spurious claims by a builder",¹²⁵ to preclude a builder claiming for work done under the contract would be a consequence so "draconian that it is difficult to suppose that [it was] intended",¹²⁶ whereas allowing recovery would not "frustrate the purpose" of the provision.¹²⁷ The approach of the High Court is consistent with the view that the "whole crux of the problem ... is to determine whether the purpose at the base of the statutory prohibition of the contractual action would be frustrated by the allowance of the restitutionary remedy",¹²⁸ or, it should be added, any other remedy.

An emphasis on the purpose of a statutory prohibition and recognition of the essentially contractual nature of liability where allowed will also assist in resolving a persistent problem in this area, namely, the relevance of the total

by the parties, in which the price was to be determined on a *quantum meruit* basis. This was, however, only coincidental, and the court emphasised that the builder would only have been entitled to the "fair" value awarded, even if the oral contract had provided for a greater sum. For the position if the contract had provided for a lesser sum, see below.

¹²⁵ 69 A.L.R., 584; on an alternative view, the Court considered that the purpose of the Act was (citing *Gino D' Alessandro Constructions Pty Ltd v. Powis* [1987] 2 Qd.R. 40) "to ensure, so far as possible, that a degree of precision is introduced into house building contracts, so that it can be readily determined what is the work to be done and whether loss or damage has been suffered".

¹²⁶ *Id.*

¹²⁷ In the view of Deane J. at 609:

the survival of the ordinary common law right of the builder to recover, in an action founded on restitution or unjust enrichment, reasonable remuneration for work done and accepted under a contract which is unenforceable by him does not frustrate the purpose of the section to provide protection for a building owner. The building owner remains entitled to enforce the contract. He cannot, however, be forced either to comply with its terms or to permit the builder to carry it to completion. All that he can be required to do is to pay reasonable compensation for work done of which he has received the benefit and for which in justice he is obligated to make such a payment by way of restitution.

The High Court contrasted various money-lender provisions which were held to preclude any claim by a money-lender for money loaned in contravention of such provisions. The Court did not consider them "really in point." See Deane J., at 608, and Mason and Wilson JJ. at 584-5, who could see no "compelling analogy" between those provisions and the ones under consideration in *Pavey & Mathews*. In the view of Mason and Wilson JJ., "[i]t is not possible to interpret [the money-lending] provisions so that they left on foot any quasi-contractual causes of action on the part of the lender."

¹²⁸ Ibbetson, D., "Implied Contracts and Restitution: History in the High Court of Australia" (1988) 8 O.J.L.S. 312, 326.

contract price as a ceiling upon *quantum meruit* recovery. If a plaintiff has rendered services reasonably valued at, say, \$6000, under an unenforceable contract providing for payment of \$5000 for such services, should the plaintiff's claim be limited to \$5000? Although there is some uncertainty as to the state of the authorities,¹²⁹ in principle, the total contract price ought to provide a ceiling to any claim.¹³⁰ In relation to unenforceable contracts, arguably, the law is now settled in favour of such a view in Australia.¹³¹ Perhaps the most persuasive reason for such a view follows from the very basis of liability. It is the parties' express assumption of an obligation and consequently, their express allocation of risk, which justifies holding a defendant liable when he or she breaches the agreement.¹³² Without such assumption of the obligation, there appears to be no basis for imposing liability. The agreed price represents the reasonable expectation which formed the basis of the plaintiff's detrimental reliance. The parties allocation of risk ought to be respected, especially given that if the contract price did not provide a ceiling to recovery, a plaintiff who has failed to meet the formalities of contract law could in theory recover more on the unenforceable contract than a plaintiff suing on an enforceable contract. In most cases, such recovery must be contrary to the policy of the rule rendering the contract unenforceable, especially if its purpose is to protect persons in the class of the defendant. None of the above, however, need suggest that a proportion of a contract price necessarily ought to provide a ceiling to a *quantum meruit* where only a proportion of the contract work has been performed.¹³³

¹²⁹ See, for example, the debate between B. Walker and J.W. Carter in (1990-1) 3 J.C.L. 158-62; cf. Hunter, H.O., & Carter, J.W., "Quantum Meruit and Building Contracts" (1989-90) 2 J.C.L. 95, 189, at 195.

¹³⁰ Cf. Jones, G., "Restitution: Unjust Enrichment as a Unifying Concept in Australia" (1988) 1 J.C.L. 8, 13-4. Cf. *Scarisbrook v. Parkinson* (1869) 20 L.T. 175.

¹³¹ See *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 605, per Deane J., and see Carter, J.W., (1990-1) 3 J.C.L. 161. Contrast Jones, *ibid*, who points out that the issue was only addressed by Deane J. in *Pavey & Mathews*, and remains open. Where however, the claim is by an innocent party for a *quantum meruit* for services rendered under an enforceable contract which has been breached, the contrary, that is, that no contract ceiling operates, appears to be the case, in New South Wales at least. See *Renard Constructions (ME) v. Minister for Public Works* (1992) 26 N.S.W.L.R. 234 (Court of Appeal).

¹³² Cf. McKendrick, E., "The Battle of the Forms and the Law of Restitution" (1988) 8 O.J.L.S. 197, 206: "English law generally does not allow a party to reverse the contractual allocation of risk by proceeding in *quantum meruit* rather than contract."

¹³³ This raises different issues. For example, performance of the contract may involve a disproportionate initial set-up cost, so that even if performed efficiently, 50% of the work

Does the above emphasis on the contract-like nature of liability represent a reversion to an implied contract theory of obligation? Such a theoretical explanation of claims on unenforceable contracts creates problems. For it is argued (and logically this view has some appeal) that a contract cannot be implied while an express one subsists.¹³⁴ There is no need, however, to resort to an implied contract¹³⁵ once it is realised that the courts have consistently been prepared to give a *limited* recognition to the "unenforceable" express contracts. The contract is enforced in the sense that remedial consequences attach to the breach of such contract (1) where the contract has in fact been relied on and provides the explanation for that reliance and (2) where such recognition promotes or at least does not contravene the purposes of the rule rendering the contract unenforceable.¹³⁶ The "unenforceability", of course, bars relief where a contract is executory and also bars actions for breaches of specific terms of an agreement. But as a general proposition, the cases suggest that *prima facie*, a plaintiff who has detrimentally relied on the contract should be entitled at least to be returned to his or her *status quo ante* as well as any further remedy which does not contravene the policy of the particular rule. Such a proposition, however, though it appears to be a reasonably accurate summary of the law in relation to want of formality, cannot be made as a general proposition covering all types of defective contracts. Where the defect in a contract is the consequence of a more "serious" failing than a want of formality, the results of the cases cannot be so easily reconciled. It is submitted, however, that such a proposition may prove to be a useful starting point for analysing remedial relief available under contracts which are defective for illegality.

under a contract may cost 75% of the total cost of performance. Only once a plaintiff has exceeded the bargained-for price is it possible to say with any certainty that a losing bargain has been entered into by the plaintiff.

¹³⁴ See *Britain v. Rossiter* (1879) 11 Q.B.D. 123, 127, per Brett L.J.: "It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract which is still subsisting." See also Brennan J. in *Pavey & Mathews v. Paul* (1987) 69 A.L.R. 577, 588-9; Denning L.J. in *James v. Thomas H Kent* [1951] 1 K.B. 551, 556; and Cooper, *supra* n. 80, 67. This is not a problem in cases of anticipated contracts, where there is no *completed* agreement to preclude the courts implying a contract. See § 6.2.3.

¹³⁵ Contrast Stoljar, 234, who still perceives that a separate implied agreement can be found.

¹³⁶ In effect, one could say that irrespective of the doctrinal vehicle for recovery, a defendant is precluded from raising the want of formality as a defence. See Perillo, *supra* n. 32, 1218, who has said in relation to the *Statute of Frauds*: "today we are perfectly willing to estop a party entirely from raising the defence of the *Statute*, and we can understand the remedy of restitution as based upon a partial estoppel."

§ 6.2.2.3 Contracts defective for illegality

The subject of illegality is complex.¹³⁷ As a general rule, the courts will not assist parties engaged in contracts either having an illegal purpose¹³⁸ or which are expressly or impliedly prohibited by statute. Such contracts will generally not be enforced. Examples are a contract to commit a crime and a contract, of itself to perform a lawful act but forming part of an overall illegal purpose such as tax fraud.¹³⁹ Unlike the cases considered above, the courts are also far less willing to countenance relief in equity or Restitution where one party has relied to his or her detriment on an illegal contract. Thus, money paid¹⁴⁰ or property transferred¹⁴¹ under an illegal contract is not generally recoverable and claims for services rendered under such an agreement will also usually fail.¹⁴² Despite the parties' attempted assumption of an obligation, as a general rule, no liability on that obligation will be recognised to have arisen in law.

The historical basis for the proscription against relief under an illegal contract is the view that the law will not assist a party who founds his or her claim on an illegal or immoral act.¹⁴³ But if the legal policy behind the general

¹³⁷ And in the view of Carter & Harland, 477, it is "one of the least satisfactory branches of contract law."

¹³⁸ Stewart, A., "Contractual Liability and the Recognition of Proprietary Interests" (1988-9) 1 J.C.L. 134, 134. The general legal position is summed up by the Latin maxim *in pari delicto potior est conditio defendentis*: "where both parties have acted illegally, the position of the defendant is strongest". See CCH, *Macquarie Dictionary of Law* (2nd. ed., 1993), 89. This rule has been "consistently applied" in the view of Goff & Jones, 499, but given the number of exceptions to the rule (see below) it is not easy to find a consistent rationalisation of the decisions. Significantly, even under an illegal contract, property can still pass: *Singh v. Ali* [1960] A.C. 167; *Leonard v. Booth* (1954) 91 C.L.R. 452, 483. Consequently, if both parties have performed everything required by the agreement, then the courts will not usually upset the transaction.

¹³⁹ Cf. *Weston v. Beaufils* (1994) 122 A.L.R. 240.

¹⁴⁰ E.g., *Kearley v. Thomson* (1890) 24 Q.B.D. 742; *Berg v. Sadler & Moore* [1937] 2 K.B. 158. For a more recent example, see *Bon Street Developments Ltd v. Terracan Capital Corp.* (1992) 76 B.C.L.R. (2d) 90.

¹⁴¹ E.g., *Bigos v. Boustead* [1951] 1 All E.R. 92; *M'Cahill v. Henty* (1878) 4 V.L.R. (E) 68.

¹⁴² E.g., *Bensley v. Bignold* (1822) 5 B. & Ald. 335, 340, per Bayley J.: "a party cannot be permitted, in a Court of Law to recover for work and labour done in direct violation of the law." See also *Wild v. Simpson* [1919] 2 K.B. 544.

¹⁴³ Cf. *Holman v. Johnson* (1775) 1 Cowp. 341, at 343; 98 E.R. 1120, 1121, per Lord Mansfield.

proscriptive rule is to promote lawful conduct, then an absolute bar to any remedial relief may lead to results "contrary to the real justice" of the situation, a point conceded by Lord Mansfield when articulating the general rule.¹⁴⁴ Nonetheless, the general rule of non-recovery¹⁴⁵—of not enforcing contracts nor of unwinding them—does effect the public policy of not assisting parties to an illegal transaction albeit by means of a "blunt instrument". The difficulty is that the rule does so indiscriminately, operating irrespective of the gravity of the illegality in a given case and the consequences which follow from its application.¹⁴⁶

Perhaps because of the potentially harsh consequences which can follow from the application of the general illegality rule, a number of exceptions to it have developed. One of these exceptions seeks to protect parties who are not equally culpable in the illegality.¹⁴⁷ Another exception permits recovery where a plaintiff has "repented" of the illegality before the illegal purpose is carried into effect.¹⁴⁸ It is outside the scope of this thesis to attempt to rationalise and catalogue all the different applications of the rule against illegality and its exceptions. It has been argued, however, and certainly the exceptions to the rule lend support to this view, that

the courts have always based, and will always base, their decision upon covert perceptions of justice and policy, a process naturally reflected by the contradictory, ambiguous or at best complicated state of the authorities.¹⁴⁹

¹⁴⁴ *Holman v. Johnson* (1775) 1 Cowp. 341, 343.

¹⁴⁵ The rule is sometimes stated in terms of "letting an estate lie where it falls": cf. *Muckleston v. Brown* (1801) 6 Ves. Jun. 52, 69, per Lord Eldon L.C.

¹⁴⁶ See generally Enonchong, N., "Illegality: The Fading Flame of Public Policy" (1994) 14 O.J.L.S. 295, and particularly 297-300.

¹⁴⁷ Plaintiffs may recover where they can show that they were not *in pari delicto* in the commission of the illegality by demonstrating, for example, that they belong to the class of persons sought to be protected by a particular statute rendering the contract illegal. See, e.g., *Kiriri Cotton Co. v. Dewani* [1960] A.C. 192. See generally, Goff & Jones, 505-12.

¹⁴⁸ The "repentance" exception appears to have been revived in *Taylor v. Bowers* (1876) 1 Q.B.D. 291. Its purpose appears to be the discouragement of an illegal purpose, but its scope is uncertain. See Goff & Jones, 512-5, for some of the difficulties. For a detailed consideration of repentance, see Beatson, J., "Repudiation of Illegal Purpose as a Ground for Restitution" (1975) 91 L.Q.R. 313.

¹⁴⁹ Stewart, *supra* n. 138, 135. The view is supported by the observation of Watermeyer J. in *Jajbhay v. Cassim* [1939] A.D. (S.A.) 537, 550: "the courts will discourage illegal transactions ... the exceptions show that where it is necessary to prevent injustice or to promote

The thrust of much of the debate in the literature appears to support the view that illegality should be no absolute bar to recovery, but that allowing or disallowing relief should give effect to a substantial public policy of discouraging dishonest and illegal conduct,¹⁵⁰ specifically, by promoting or at least not contravening the policies of the particular rule rendering the contract illegal. The writer concurs with such views. Rather than apply an indiscriminate rule which at best only promotes public policy in a crude way, courts should balance concerns of justice and policy. A number of factors could be taken into account, including the consequences of non-recovery, the gravity of the illegality as a whole and each party's involvement in it. Importantly, if a contract is illegal as contrary to a specific statutory provision, then the policies of that particular provision should be sought to be given effect.¹⁵¹ On balancing such considerations, remedial responses either of enforcing a contract to a limited extent, or perhaps of unwinding the transaction (restitution) may be seen to be appropriate. Consistently with cases of unenforceability above, the basis of liability is the albeit limited recognition of the defendant's assumption of obligation and plaintiff's detrimental reliance thereon. Where the remedy is restitution, it is nonetheless usually¹⁵² a remedial response arising from the defendant's breach of the illegal contract.

In Australia at least, there appears to be some judicial support for the suggested approach, of treating illegality as a form of unenforceability and tailoring any remedial response to the policy of the rule rendering the contract unenforceable.¹⁵³ It seems unlikely that there will be a repetition of some of the

public policy, they will not rigidly enforce the rule."

¹⁵⁰ See generally, Goff & Jones, 519-22. The authors have summed up one range of solutions as being "prompted by a desire to prevent the unjust enrichment of the defendant through the capricious application of the maxim *in pari delicto* ... and, nevertheless, to discourage illegal transactions where there is a serious moral turpitude" (520). In this writer's view, and in line with the discussion of earlier topics, the motivating policy ought to be at least to prevent a detriment to the plaintiff where the defendant has assumed an obligation to the plaintiff and where recovery would not promote an illegal purpose.

¹⁵¹ Cf. Enonchong, *supra* n. 146, 299-302.

¹⁵² The exception would appear to be the repentance doctrine, whereby a plaintiff may gain restitution if he or she repents before the illegal purpose is fully effected and despite the fact that the defendant may have been willing to continue with the illegal transaction.

¹⁵³ In *Hurst v. Vestcorp Ltd* (1988) 12 N.S.W.L.R. 394, for example, the N.S.W. Supreme Court considered that although the contract in question was "illegal" this did not necessarily preclude restitutionary relief where such relief was consistent with the intention of the legislation as a whole. McHugh J.A. appears to have treated the case on a par with

particularly harsh strict applications of the illegality rule that have occurred in the past.¹⁵⁴

In England, the Court of Appeal has accepted that justice and policy considerations need to be balanced to give effect to an overall policy of promoting lawful conduct. This appears to be the essence of the "public conscience" test.¹⁵⁵ The public conscience test, however, or indeed any other flexible principle of illegality, has been unanimously rejected by the House of Lords in its decision in *Tinsley v. Milligan*.¹⁵⁶ Although the result of that case is consistent with the application of a flexible principle, the reasoning of the majority, and both the reasoning and actual decision of the minority, is open to criticism.

In *Tinsley v. Milligan*, the majority of the House of Lords accepted a view

unenforceable contracts. See 445. See also *Weston v. Beaufils* (1994) 122 A.L.R. 240. In Canada, see *Vandekerhove v. Litchfield* [1994] 1 W.W.R. 596 (B.C.S.C.).

Early examples of the application of the illegality doctrine shows that the courts were not prepared to preclude recovery in any circumstances, without regard to the nature of the illegality and the purpose and policies of the relevant statute. In *Williams v. Paul* (1830) 6 Bing. 653, for example, a contract was illegal, having been concluded on a Sunday. Nevertheless, the plaintiff was entitled to recover on a *quantum meruit* for the value of the goods sold, as the defendant had retained the goods and had subsequently again promised to pay for them, so that his later refusal to pay was "not consistent with the practice of a very sincere Christian." Given the very "Christian" purposes the relevant statute was seeking to promote, the result seems perfectly appropriate.

¹⁵⁴ See, e.g., *Bigos v. Boustead* [1951] 1 All E.R. 92. The plaintiff, who had commenced an action on an illegal contract which had been abandoned at the start of the hearing, had deliberately sought to profit from the breach of a currency regulation by entering a contract with the defendant to supply currency illegally. The plaintiff never performed her part of the agreement. The defendant had deposited a share certificate with the plaintiff as security and subsequently sought to recover the certificate when the plaintiff had failed to provide the prohibited currency. The plaintiff pleaded the illegality. Although the court considered that her defence to the defendant's claim was "devoid of all merit" (96), nevertheless the plaintiff succeeded. It is difficult to see how this result could promote the policy of the regulation in question, given that the more culpable party was allowed to retain the benefit of her deliberate breach of the regulations.

¹⁵⁵ The "public conscience" test was accepted by the majority in the Court of Appeal in *Tinsley v. Milligan* [1992] 2 W.L.R. 508, but rejected by the House of Lords, [1993] 3 W.L.R. 126. The public conscience test precludes any relief to a party under an illegal contract only where such relief would be "an affront to the public conscience if by affording him the relief sought the court would be seen to be indirectly assisting or encouraging the plaintiff in his criminal act": *Thackwell v. Barclays Bank plc* [1986] 1 All E.R. 676, 678, per Hutchison J.

¹⁵⁶ [1993] 3 W.L.R. 126. For example, in the view of Lord Goff, at 140, such a test would result, in effect, in "discretion being vested in the court to deal with the matter by the process of a balancing operation, in place of a system of rules".

expressed in earlier decisions that illegality is inapplicable where a party can assert a claim which does not, as a matter of procedure, make reference to the illegal transaction. So, for example, if a person is asserting a legal¹⁵⁷ or equitable proprietary interest on the basis, say, of a contribution to the purchase price,¹⁵⁸ then such an interest will be protected even when acquired under an illegal transaction. But a view of illegality as a substantive doctrine promoting lawful conduct and the public interest suggests against a technical application of the illegality rule, whereby the plaintiff's success or otherwise depends upon whether he or she is able to assert the claim without reference to the illegal purpose. Such reasoning appears to reduce the notion of illegality to no more than a point of pleading.¹⁵⁹ The minority, rightly in this writer's view, rejected such an approach. But in so doing, the minority were prepared to apply strictly the rule of non-recovery in all cases where a transaction is tainted by illegality, disregarding the fact that in the circumstances, its application would have had a punitive effect on one party going well beyond the penalties provided for under the statute infringed by the parties' illegal conduct. Indeed, arguably, the minority view would promote fraudulent conduct, given the windfall which one of the parties to the illegal transaction would have received.¹⁶⁰

¹⁵⁷ See, e.g., *Bowmakers Ltd v. Barnet Instruments Ltd* [1945] 1 K.B. 65.

¹⁵⁸ See *Tinsley v. Milligan* [1993] 3 W.L.R. 126.

¹⁵⁹ Cf. Berg, A.G.J., "Illegality and Equitable Interests" [1993] *Jo. of Bus. Law* 513, 518. As Enonchong, *supra* n. 146, has stated, the *Bowmaker* rule applied in *Tinsley v. Milligan* "is a rule neither of justice nor of policy, it is merely a rule of procedure" and "rests on mere technicalities" (299).

¹⁶⁰ Cf. *Tinsley v. Milligan* [1993] 3 W.L.R. 126, 145, per Lord Lowry. In *Tinsley v. Milligan*, the parties jointly bought property, but the title was placed only in the name of one party, the plaintiff, in order to facilitate fraudulent social security claims by both parties. The defendant subsequently admitted her fraud, was successfully prosecuted and paid back the money received. Nevertheless, the plaintiff sought possession of the property and sought to deny the defendant her share in the property, citing the illegal purpose of the transaction. The majority of the House of Lords allowed the defendant's counter claim, asserting her half-share interest in the property. The result seems appropriate, given that the illegality was quite trivial when compared with the fraudulent nature of the defendant's conduct in denying the plaintiff a share in the property purchased by both parties. Given that the illegality had been admitted and already rectified through legal channels, allowing the equally culpable party to retain the property would be to impose a further, harsher punishment upon the plaintiff than was meted out under the provisions of the relevant legislation. Lord Goff, in the minority, conceded the harshness of such an outcome, but felt bound to apply the *in pari delicto* rule without making an exception, seemingly ignoring what would appear to be that rule's underlying principal purpose of discouraging illegal and dishonest conduct generally. It is ironic, given Lord Goff's championing of unjust enrichment, that the case is one in which, as a shorthand conclusion of the moral basis of the defendant's claim to her share of the property, unjust enrichment seems an appropriate description. Cf. Berg, *id.* For a criticism of the reasoning of the House of Lords,

§ 6.2.2.4 Contracts defective for incapacity

It is not proposed in this thesis to consider the rules relating to the effects of incapacity. Although this is undoubtedly an important area, the consequences of a contract being rendered defective for want of capacity cannot usefully be rationalised in a summary way. Indeed, and especially so given that common law rules have been supplanted by statutory provisions,¹⁶¹ the remedial responses available to parties who have detrimentally relied on contracts which are defective for incapacity are diverse and at times granted seemingly inconsistently. Speaking very generally, rules of incapacity aim at protecting from the consequences of their own actions the class of persons¹⁶² said to lack legal capacity to contract.¹⁶³ It is arguable, and in this writer's view conceptually appealing, that an incapacitated party's assumption of liability (that is, his or her contract-like conduct) should be given limited recognition where such recognition (in the form of remedial rights arising against the incapacitated party) does not contravene the policy underlying the incapacity rules, that of protecting persons of a particular class.¹⁶⁴ Consequently, the

see Enonchong, *supra* n. 146, and Stowe, H., "The 'Unruly Horse' has Bolted: *Tinsley v. Milligan*" (1994) 57 M.L.R. 441. Despite the shortcomings of the House of Lord's approach, Hill J. of the Federal Court of Australia, in *obiter dicta* in *Weston v. Beaufils* (1994) 122 A.L.R. 240, appeared to favour such an approach and suggested that the adoption of such a "narrower" view of illegality is not precluded on the Australian authorities.

¹⁶¹ For example, minor's contracts are now largely governed by statute.

¹⁶² Including corporations, in relation to the *ultra vires* doctrine. Minors, drunkards and the mentally disordered are other persons said to lack legal capacity to contract. One could also perceive of want of authority cases as protecting certain parties, in this case principals, who are seeking to avoid the consequences of their "agent's" unauthorised acts. Where a plaintiff has not performed any part of the alleged contract, this seems a plausible concern of the rules disallowing claims against such principals: the plaintiff has simply sued the "wrong" defendant.

¹⁶³ In relation to the purpose of incapacity rules in relation to minors, cf. *Chaplin v. Leslie Frewin (Publishing) Ltd* [1966] Ch. 71, 90, and *Carter & Harland*, 251 et seq. Given that incapacity renders certain contracts defective because of the status of at least one of the parties to the contract—rather than because of the form or substance of the agreement—one can say that the law does not allow certain persons to assume such legal obligations despite even a clear intention to do so.

¹⁶⁴ Included here are cases of want of authority. Consider, e.g., *Craven-Ellis v. Canons Ltd* [1935] 2 K.B. 403, in which the plaintiff was appointed managing director of the defendant company by directors who had no authority to do so. The plaintiff had performed the duties of a managing director for some time. The defendant company refused to pay for such services, claiming the contract was void. The court noted that this was purely a "technical defence" and that the company would not be allowed to avoid paying for services which it had received and accepted. Both the reasons for liability and the remedial response appear contract-like. The decision seems explicable on the basis of the courts refusal to allow the technicalities of

remedial responses may range from the full enforcement of contracts, to recovery of expenses or losses incurred, to the restitution of benefits, to absolute bars to any form of recovery in some cases.

Clearly not all cases can be rationalised in this way. One exception is where contracts are *ultra vires* a party's powers and thus "void". In cases of *ultra vires* contracts, where parties are incapable of entering or even ratifying such contracts in any circumstances, the liability rules do not appear contract-like, but instead aim at restoring parties to their *status quo ante*, on similar principles as govern recovery against recipients of mistakenly conferred money or services, considered in Chapter 9.^{164a} This exception aside, however, it is suggested unjust enrichment offers no better explanation as to when liability will be imposed and the limits of such liability than does an explanation based on the limited recognition of the parties assumed obligation, where such recognition is consistent with protecting the party lacking capacity.¹⁶⁵

company law to preclude what was essentially a contractual relationship, that is, a ratification by the company of the defective contract, not enforceable against it until such ratification. See, e.g., Greer L.J., at 409. See Fridman & McLeod, *Restitution* (1st ed., 1982), 438-9; cf. Fridman, (2nd ed., 1992) 309. Perhaps generally speaking, whether any contract-like liability arises in want of authority cases turns on whether the defendant can be said to have "ratified" the contract by any act amounting to an acceptance of the contract, rather than on whether the defendant can be said to have been unjustly enriched. Although the formalities of ratification may not have been fulfilled, or may even have been incapable of being fulfilled because of some technicality, nevertheless, such formalities will not be allowed to stand in the way of recovery where the defendant has effectively, by words or conduct, assumed a legal obligation. Such an analysis also avoids difficulties in identifying a benefit, which may not be readily possible: see Stoljar, 236-9. See also the discussion in Burrows, 306-7, who suggests an incontrovertible benefit was received in *Craven-Ellis*, the company having been saved a factually necessary expense. No reference to "incontrovertible" benefit was made in the case itself. Cf. *Monks v. Poynice* (1987) 8 N.S.W.L.R. 662, in which Young J. resorted to an incontrovertible benefit analysis to allow recovery on facts very similar to those of *Craven-Ellis*.

^{164a} Consider, e.g., *Sinclair v. Brougham* [1914] A.C. 398.

¹⁶⁵ See, e.g., *R. Leslie Ltd v. Sheill* [1914] 3 K.B. 607, in which a minor fraudulently misrepresented his age in order to obtain a loan of a substantial sum of money. The plaintiff sought to recover the money, but failed both in a contractual and quasi-contractual claim. The decision is criticised by unjust enrichment theorists. Certainly, the decision seems harsh. The rule of incapacity, the purpose of which is to protect minors against exploitation, was utilised by a minor as a mechanism for fraud. In the writer's view, the plaintiff should have been entitled to recover the money paid to the defendant. Such recovery would in no way impugn the policy of the incapacity rule. Cf. Burrows, A., "Public Authorities, Ultra Vires and Restitution" in Burrows, *Essays*, 39, 69, who considers disgorgement of the benefit in that case would not have infringed the policy of the incapacity rule protecting minors. Burrows considers, however, that a change of position defence should be available in such a case, so that only the defendant's surviving enrichment is returnable. In this writer's view, a defendant such as the minor in *R. Leslie Ltd* ought not be allowed to set up the incapacity policy to defraud the plaintiff and hence, such a defendant should be liable to make good any losses incurred. This

§ 6.2.3 Incomplete Contracts

In a world of increasingly complex transactions, claims often arise for the payment of work performed, expenses incurred, or money paid,¹⁶⁶ in a context in which a contractual relationship is believed to exist, or is anticipated by the parties, but doubts arise as to whether any concluded agreement has ever eventuated, either because negotiations were never completed,¹⁶⁷ or because no sufficiently *certain* agreement can be identified by the courts.¹⁶⁸ Often, the parties may have expected a contract to eventuate “as a matter of

would preclude a change of position defence: the injustice in *R. Leslie Ltd* lies not in the fact that the defendant was “unjustly enriched”, but because the plaintiff incurred losses in detrimentally relying on the defendant’s assumption of an obligation with an intent to defraud.

¹⁶⁶ The main cases of dealings in the context of incomplete contracts involve the performance of services rather than the payment of money to a defendant. Cf. Burrows, 293. Consequently, discussion will generally concern cases of recompense for services rendered, though special issues raised by claims for money paid will also be considered briefly below. Money paid cases arise more commonly in relation to complete, but defective contracts, which were considered above. For a Canadian case involving payment of money in anticipation of a contract which was never finalised, see *Conmac Western Industries v. Robinson* [1993] 6 W.W.R. 375.

¹⁶⁷ The parties may still be in disagreement over some essential term of the contract, as in *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 Q.B. 428 (disagreement as to an option to purchase term in a lease), and *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd* (1989) 16 N.S.W.L.R. 582 (rent not finalised). Alternatively, all terms may have been agreed, but formal exchange or execution of the contracts is still to occur, as in *Waltons Stores v. Maher* (1988) 76 A.L.R. 513 (exchange of contracts still to occur). In the latter type of case, one party at least, despite the completed agreement, has held back from taking a step necessary in law to indicate the assumption of a legal contractual obligation. Distinguishing the latter type of case from those of complete but defective contracts may not always be easy.

Bare “agreements to agree” do not generally give rise to contractual obligations. See *Coal Cliff Collieries v. Sijehama* (1991) 24 N.S.W.L.R. 1, 40, per Handley J.A., for a useful summary of the authorities. See also *Walford v. Miles* [1992] 2 W.L.R. 174, and a criticism of the decision in that case, Buckley, R.P., “Walford v Miles: False Certainty About Uncertainty—An Australian Perspective” (1993) 6 J.C.L. 58.

¹⁶⁸ For example, an essential term of the agreement may be vague, such as in *Stinchcombe v. Thomas* [1957] V.R. 509 (agreement to “well reward” the plaintiff held too uncertain to create legal obligations); *Shiels v. Drysdale* (1880) 6 V.L.R. (E) 126; and *Horton v. Jones* (1935) 53 C.L.R. 475. Contrast *Wakeling v. Ripley* (1951) 51 N.S.W.S.R. 183. Alternatively, the parties may have acted under a mistake, or may not have been *ad idem* as to some essential matter (often price). See, e.g., *Vickery v. Ritchie*, 88 N.E. 835 (1909), and *Turner v. Webster*, 36 Am.Rep. 251 (1880) (parties having different beliefs as to contract price). See also *Kearns v. Andree*, 139 A. 695 (1928), and *Preeper v. Preeper* (1978) 84 D.L.R. (3d) 74. Alternatively, consideration adequate in law may not have been provided by one party to the agreement. See, for example, Kirby P.’s interpretation of the agreement in *Beaton v. McDivitt* (1987) 13 N.S.W.L.R. 162, and contrast the interpretation of the agreement by Mahoney and McHugh JJ.A.

course",¹⁶⁹ or alternatively, at least one party believed a contract had been finalised,¹⁷⁰ but despite such a belief, traditional contractual analysis¹⁷¹ suggests that no sufficiently certain or completed agreement is identifiable. It is the lack of an objectively discernible, complete and reasonably certain agreement which provides the link between uncertain contracts and anticipated contracts to be dealt with together under the rubric of "incompleteness".¹⁷²

Despite the incompleteness of the contract, the parties may have gone some way toward assuming an obligation, and in some circumstances the courts, by resorting to, *inter alia*, equity and Restitution, are prepared to provide

¹⁶⁹ *Waltons Stores v. Maher* (1988) 76 A.L.R. 513.

¹⁷⁰ Given fact situations may be amenable to either interpretation. Consider for example, the complex facts in *Waltons Stores v. Maher* (1988) 76 A.L.R. 513. A majority of the judges (Mason C.J, Wilson and Brennan JJ.) proceeded on the basis that the plaintiffs believed an exchange of contracts, and thus a final and binding agreement, would take place as a matter of course. Deane and Gaudron JJ. proceeded on the assumption that the plaintiffs believed that a binding agreement was already in existence. The fact that these differing views did not result in a differing outcome in the decisions reached by the judges suggests that this distinction is not particularly significant.

¹⁷¹ For a comparison of the traditional view of contract negotiations derived from nineteenth century contract analysis, with the reality of modern day commercial relationships, see Farnsworth, E.A., "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations" (1987) 87 Col. L.R. 217, 218-9. It is arguable that the types of problems encountered in the cases included for consideration here stem largely from the application of contract rules developed specifically for determining when unexecuted agreements or promises should be enforced as contracts, to cases in which agreements or promises have been partly executed.

¹⁷² Cf. Carter & Harland, 67-8. The view that such cases should be treated together is supported by the judgment of Barry J. in *William Lacey (Hounslow), Ltd v. Davis* [1957] 2 All E.R. 712, 719:

I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made.

Contrast Goff and Jones, who treat contracts void (for mistake and uncertainty) and anticipated contracts separately (Chps 21 & 25 respectively). Burrows, 294, considers that such a distinction "seems so thin" as to warrant a combined consideration of these topics. This seems valid, given the sufficient similarities between these two types of cases and the difficulties inherent in drawing a distinction between circumstances in which parties believe a contract will be completed in the ordinary course of events and those in which parties mistakenly believe a contract has been completed: see discussion, *supra* n. 170, in relation to *Waltons Stores v. Maher* (1988) 76 A.L.R. 513.

Contrast incomplete contracts with contracts which are complete (in the sense that a final and sufficiently certain and precise agreement has been reached between the parties) but which are otherwise defective.

relief to a plaintiff who has acted on the basis of an obligation having been assumed. In many of these cases, the courts in effect complete the parties' incomplete bargains by imputing that an obligation which is reasonable in the circumstances has been assumed.

The circumstances in which liability may arise under an incomplete contract is best brought out with particular emphasis on the law relating to precontractual dealing. Cases of precontractual dealing—that is, in which services are performed, money is paid, or parties have in some way changed their position in anticipation of a contract which never eventuates—highlight most sharply the circumstances in which the courts will, despite the incompleteness of the contract, impose contract-like obligations on the parties. In recent times, the “courts have shown an increasing willingness to impose precontractual liability.”¹⁷³ Such “willingness” exists despite the courts' continued adherence to a general common law rule protecting the freedom of parties to negotiate contracts without the risk of incurring legal liability,¹⁷⁴ a view well encapsulated by Sheppard J. in *Sabemo v. North Sydney Municipal Council*:

It has long been the law that parties are free to negotiate such contract as they may choose to enter into. Until such contract comes about, they are in negotiation only. Each is at liberty, no matter how capricious his reason, to break off negotiations at any time. If that occurs that is the end of the matter and, generally speaking, neither party will be under any liability to the other.¹⁷⁵

Given that precontractual dealing cases are numerous, exhibit essentially similar facts patterns and are largely consistent in their results, much of the discussion will concern such cases, though the points to be made appear to be of general application to incomplete contracts. A good starting point will be to outline the preconditions for, or common elements of, liability under incomplete contracts, elements which need to be established irrespective of the doctrinal vehicle used to obtain relief.

¹⁷³ Farnsworth, *supra* n. 171, 222. Farnsworth's comment, in relation to United States courts, seems equally valid for Anglo-Australian jurisdictions. See also Jones, G., “Claims Arising Out of Anticipated Contracts Which Do Not Materialize” (1980) 18 U.W.O.L.R 447, 448.

¹⁷⁴ Farnsworth, *supra*, n. 171, 221.

¹⁷⁵ [1977] 2 N.S.W.L.R. 880, 900. Cf. *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, 537, per Brennan J.

§ 6.2.3.1 Common elements of liability

§ 6.2.3.1.1 Belief that a contract exists, or expectation of a future contract

Despite the absence of a complete agreement, the plaintiff¹⁷⁶ (or more usually, both parties)¹⁷⁷ believes that an agreement or contract already subsists, or expects one will be finalised in the future. In cases of anticipated contracts, the parties are often at an advanced stages of negotiating a contract and the plaintiff's expectation that the contract will be concluded "in due course"¹⁷⁸ is the result of the defendant's conduct,¹⁷⁹ the circumstances surrounding the negotiation process,¹⁸⁰ or the parties' mutual understandings.¹⁸¹ This expectation need not be one that the contract is an absolute certainty.¹⁸² It is sufficient that the plaintiff expects the contract to proceed in the ordinary course of negotiations.¹⁸³ In *Waltons Stores v. Maher*,¹⁸⁴ for example, the

¹⁷⁶ E.g., *Van den Berg v. Giles* [1979] 1 N.Z.L.R. 111; *Waltons Stores v. Maher* (1988) 76 A.L.R. 513.

¹⁷⁷ E.g., *Brewer Street Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 Q.B. 428, 429, (in which case there was a "mutual confidence" that a lease would be granted); *British Steel Corp. v. Cleveland Bridge and Engineering Co. Ltd* [1984] 1 All E.R. 504, 505 (the parties "confidently expected a formal contract to be concluded"); *Stinchcombe v. Thomas* [1957] V.R. 509; *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880.

¹⁷⁸ *Turriff Construction Ltd v. Regalia Knitting Mills Ltd* [1972] 2 Lloyd's Rep. 234, 259: "[B]oth parties expected that a formal contract would in due course be executed."

¹⁷⁹ The conduct will often be in the form of representations to the effect that the contract is "as good as" the plaintiff's. See, e.g., *MTA v. Waverly Transit Pty Ltd* [1991] V.R. 176. The representation need not equate with a contractual representation, (at 209), a point similarly made in *Hoffman v. Red Owl Stores, Inc.*, 133 N.W. 2d 267 (1965). Sometimes the representations may have an almost fraudulent underlying intent. In *Van den Berg v. Giles* [1979] 2 N.Z.L.R. 111, the defendant's conduct was directly responsible for the plaintiff's expectation that a contract for the sale of land (which the plaintiff was leasing and improving) would eventuate. At 120, Jeffries J. considered that the defendant "misled and inveigled the plaintiff into spending very considerable sums of money on her property" by repeatedly assuring the plaintiff that the property would be sold to him.

¹⁸⁰ For example, there may have been a request that the plaintiff commence the work which forms the subject of the contract under negotiation, as in *Butler Machine Tool Co Ltd v. Ex-cell-O Corporation (England) Ltd* [1979] 1 W.L.R. 401, (but in which case the court found a contract despite clear differences between each party's form of agreement, discussed further, § 6.2.3.2), and *British Steel Corp. v. Cleveland Bridge and Engineering Co. Ltd* [1984] 1 All E.R. 504.

¹⁸¹ In *William Lacey v. Davis* [1957] 2 All E.R. 712, 719, preliminary work was performed "under a mutual belief and understanding ... that the plaintiff's were obtaining the contract."

¹⁸² Cf. Cauchi's formulation of a "legitimate expectation" of a contract, *supra* n. 112, 268.

¹⁸³ The parties may even be aware that the contract is subject to a contingency, such as

respondents commenced demolition and construction work on their own premises on the assumption that the exchange of leasing contracts¹⁸⁵ with the appellant was a mere formality. Unbeknownst to the respondents, however, and despite the fact that all outstanding terms of the agreement had been agreed, the appellant had instructed its solicitors to delay the exchange of contracts until further notice.

At times, a request by a defendant that substantial *preliminary* work be carried out by the plaintiff may raise, or contribute to, an expectation that the *main* contract will be concluded. This was emphasised in *William Lacey (Hounslow) Ltd v. Davis*¹⁸⁶ and *Sabemo v. North Sydney M.C.*¹⁸⁷ The facts in both were similar, but taking *Sabemo* briefly, the plaintiff was requested to prepare considerable planning work after it had “successfully” tendered for a contract for the lease and redevelopment of certain land. The defendant decided not to proceed with the project, but was held liable to compensate the plaintiff for the work carried out. Sheppard J. pointed out that as

substantial and continuing work had been done over a period of three years ... [it would] be unthinkable that the plaintiff would have been prepared to do what it did, if it thought that the defendant might change its mind about proceeding with the proposal.¹⁸⁸

As this statement of Sheppard J. suggests, the fact that substantial work has

a third party's approval, as in *William Lacey v. Davis* [1957] 2 All E.R. 712. Where, however, both parties appreciated that they were free to withdraw at any time, then they may do so. See Brennan J. in *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, 537. The parties' "freedom to withdraw" was one of the main reasons for the failure of the appellant's claim in *Attorney General v. Humphreys Estate (Queens Gardens) Ltd* [1987] 1 A.C. 114. The appellant's attempt to raise an estoppel against the respondents withdrawal from an agreement in principle failed, as the appellants were "fully aware and intended that either party could at any time and without any reason withdraw from the agreement in principle" (121). Further, the respondents "did not encourage or allow a belief or expectation on the part of the [appellants] that [the respondents] would not withdraw." Contrast, however, *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 Q.B. 428, 433, per Somervell L.J. In that case, both parties knew that either could resile, but nevertheless the defendant was liable as it had expressly undertaken responsibility for the work, so that the risk of the contract not eventuating fell on the defendant.

¹⁸⁴ (1988) 76 A.L.R. 513.

¹⁸⁵ This was a necessity for a binding contract to be finalised.

¹⁸⁶ [1957] 2 All E.R. 712.

¹⁸⁷ [1977] 2 N.S.W.L.R. 880.

¹⁸⁸ *Ibid*, 901.

been requested is also relevant in determining with whom the risk should lie of no contract eventuating, a point to which we will return below.

§ 6.2.3.1.2 Plaintiff's detrimental reliance

In reliance upon an expectation that a contract exists or will be finalised, a plaintiff might change his or her position, such as by abandoning an existing legal right,¹⁸⁹ outlaying considerable expenses, performing substantial work, or paying money to the defendant.¹⁹⁰ Where a contract is anticipated, a plaintiff's reliant actions may involve work that is preliminary to the performance of an expected main contract, such as detailed planning work¹⁹¹ or cost estimates,¹⁹² or the preparation of buildings for future occupancy under an expected lease.¹⁹³ At other times, a plaintiff's actions will be unrelated to the performance of the expected contract, such as where a plaintiff improves the defendant's land in the expectation that a binding contract for its sale will ensue¹⁹⁴ or exists¹⁹⁵ and that the work will thus benefit the plaintiff. Occasionally, the plaintiff will have completed the very performance which forms the subject-matter of the incompletely negotiated contract.¹⁹⁶ Completed performance of the contract is the usual form of reliance where the plaintiff believes a contract already exists, but such contract is nonetheless insufficiently certain or complete.¹⁹⁷

¹⁸⁹ See *Avondale Printers Stationers Ltd v. Haggie* [1979] 2 N.Z.L.R. 124.

¹⁹⁰ See *Digiacinto et al. v. Aircadia Ltd* (1978) 21 N.B.R. (2d) 366. In order to recover such money payment, however, it would seem that there must have been a total failure of consideration, that is, the plaintiff must not have received any benefit in return for the payment. See also Palmer, §15.11.

¹⁹¹ *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880.

¹⁹² *William Lacey v. Davis* [1957] 2 All E.R. 712

¹⁹³ E.g., *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 Q.B. 428; *Waltons Stores v. Maher* (1988) 76 A.L.R. 513. These cases also show that the plaintiff need not have completed the work, even where it was requested.

¹⁹⁴ *Van den Berg v. Giles* [1979] 1 N.Z.L.R. 111.

¹⁹⁵ E.g., *Estok v. Heguy* (1963) 40 D.L.R. (2d) 88; *T. & E. Developments v. Hoornaert* (1977) 78 D.L.R. (3d) 606; *Reeves v. Abraham* (1957) 22 W.W.R. 429; *Preeper v. Preeper* (1978) 84 D.L.R. (3d) 74. Some proprietary estoppel cases also turn on similar facts.

¹⁹⁶ E.g., *British Steel Corp. v. Cleveland Bridge & Engineering Co. Ltd* [1984] 1 All E.R. 504. Cf. *Butler Machine Tool Co. Ltd v. Ex-cell-O Corporation (England) Ltd* [1979] 1 W.L.R. 401.

¹⁹⁷ See cases cited supra n. 168. If the work under the incomplete contract has not been

In all these cases, a plaintiff's reliance proves detrimental when the defendant refuses to complete the agreement or accept any responsibility to the plaintiff who has changed his or her position on the faith of the incomplete contract.¹⁹⁸ This element of detriment is highlighted by the belief of the plaintiff that the reliant action was not, ultimately, intended to be gratuitous. Even where the plaintiff does not expect the work to be paid for separately,¹⁹⁹ such a plaintiff must have expected remuneration in some form, for example, that the benefit of the work would inure to the plaintiff once the contract was completed,²⁰⁰ or that the plaintiff would be adequately compensated for the work by the defendant's performance of the expected contract.²⁰¹

§ 6.2.3.1.3 *Defendant's conduct is such as to suggest either that an obligation has been or will be assumed or else that the risk of no completed agreement eventuating rests with the defendant*

This element is stated very generally in order to encompass a variety of fact situations. Where, for example, a contract is uncertain in its terms, or the parties were not *ad idem* as to some essential matter, both parties will have

completed, then successful recovery may be dependent upon whether the defendant prevented the completion of the work or whether there was an anticipated "breach" by the defendant. Where the defendant was not responsible for the failure to complete the work (and excluding cases of frustration), then recovery in any form would not appear to be allowed. See *Triple "C" Holdings Pty Ltd v. Hogan* (1983) 1 N.S.W.L.R. 252, 257, a case of an unenforceable contract, and *supra* n. 82. The same principle should nevertheless apply to incomplete contracts. Where, however, there was an anticipated breach by the defendant or the defendant prevented the completion, then a plaintiff may be entitled to recover for the partially completed work or performance. Cf. *Planche v. Colburn* (1831) 8 Bing. 14, 131 E.R. 305, a case of breach of an enforceable contract; and *Mavor v. Pyne* (1825) 3 Bing. 286, in which the defendant "breached" an unenforceable contract and was held liable for those goods already delivered. Cf. the discussion by Carter, J.W., "Ineffective Transactions" in Finn, 206, 231-35.

¹⁹⁸ For example, in *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, there was a period of inaction on the part of the appellant during which time the respondents changed their position considerably by commencing work on their land in a way which proved detrimental once the appellant refused to complete the agreement, having decided not to proceed with the project.

¹⁹⁹ Most cases in which a plaintiff believes the work is being done in performance of an existing contract would be of this type. In some cases, however, even where work is done merely preliminary to an anticipated contract, separate payment may have been expected. See *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 K.B. 428.

²⁰⁰ For example, improvements made to land: *Van den Berg v. Giles* [1979] 1 N.Z.L.R. 111; *Estok v. Heguy* (1963) 40 D.L.R. (2d) 88.

²⁰¹ Where work is preliminary to an anticipated contract, a plaintiff may have expected adequate compensation from the profits of the "main" contract: *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880; *William Lacey v. Davis* [1957] 2 All E.R. 712.

conducted themselves as if an obligation has been assumed, though on an objective interpretation, the exact nature of their agreement and hence obligation is unclear and incomplete. But despite the incomplete agreement, it is nonetheless possible to discern some "underlying measure of agreement".²⁰² Thus, in *Vickery v. Ritchie*,²⁰³ the plaintiff made improvements to the defendant's house, but the parties were not *ad idem* as to the price to be paid. The defendant in that case had requested the work intending to pay for it and the plaintiff had performed the work expecting payment. Undeniably, the parties had agreed that the work performed was to be paid for. Such an underlying consensus is significant in determining the courts' response to such a factual problem and also highlights the contract-like nature of liability. This will be returned to below.

In cases of precontractual dealing, liability will be imposed where a defendant has expressly, or by implication from his or her conduct, assumed the risk of a contract not being completed. The express or implied assumption of risk by the defendant appears to be the crux of many of the decisions and allows the courts to answer the question: who should bear the risk of the consequences of no contract being completed. Usually, the risk of negotiations failing will be on both parties, so the question is really whether there exists any reason for shifting the balance of the risks.

Whether a defendant can be said to have assumed a risk depends, of course, on the facts of each case. Certain conduct has been held to amount to an assumption of risk such as where a defendant has expressly or impliedly requested (or at least actively encouraged) either preliminary work or commencement of the performance of the anticipated contract.²⁰⁴ In such cases, work of a substantial nature, which consequently raises or reinforces an expectation of the future contract being completed and which goes beyond what is performed at the risk of the plaintiff, must be contrasted with the type

²⁰² Fridman, 301.

²⁰³ 88 N.E. 835 (1909). See also discussion of the case at § 4.4.2.

²⁰⁴ Where a defendant *requests* substantial work, not normally performed gratuitously, this suggests that the defendant must be aware of the plaintiff's expectation to be remunerated in some way. To an objective bystander, a request in such circumstances would give the impression the work was to be paid for, so that perhaps even a legal presumption to this effect might be said to arise.

of work a plaintiff may "be expected to do without charge when tendering."²⁰⁵ In the tendering process, a tenderer should be well aware that the work is performed and expenses are incurred at his or her own risk.²⁰⁶

Other conduct which may be said to amount to an assumption of risk includes a defendant's acquiescence in the plaintiff's reliant actions, with knowledge of the plaintiff's assumption in so acting.²⁰⁷ Some cases have gone so far as to impose liability on defendants who could at least have reasonably foreseen that the plaintiff would act detrimentally in anticipation of the contract. There are a number of United States decisions²⁰⁸ as well as isolated Anglo-Australian authorities to this effect.²⁰⁹ These cases, however, though occurring in a near-contract factual context, appear not so much to impose liability because of a defendant's active assumption of the risk (and can thus be described as contract-like), but simply appear to allocate the risk to a defendant who was in a better position to avert the risk of loss or who has indulged in

²⁰⁵ *William Lacey v. Davis* [1957] 2 All E.R. 712, 716. The work performed by the plaintiff in *William Lacey* fell

clearly outside the type of work which any builder would be expected to do without charge when tendering for a building contract. The plaintiffs are carrying on a business and, in normal circumstances, if asked to render services of this kind, the obvious inference would be that they ought to be paid for so doing.

Cf. *Magical Waters Fountains Ltd. v. City of Sarnia* (1990) 73 D.L.R. (4th) 734, 742, and *Cauchi*, supra n. 112, 242-3.

²⁰⁶ *William Lacey v. Davis* [1957] 2 All E.R. 712, 715: where work is carried out by a party tendering for a contract, "there is no implication that he will be paid for the work, which is sometimes a very considerable amount of work ... he undertakes this work as a gamble."

²⁰⁷ In *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, the respondents' assumption that the contract would be completed as a matter of course was a result of the appellant's acquiescence in the respondents' commencement of the demolition work required to be done under the contract. See 526, per Mason C.J. and Wilson J.; 542-3, per Brennan. Deane and Gaudron JJ. proceeded on the basis that the respondents assumed that the contract had in fact been finalised, but again this assumption arose as a direct consequence of the appellant's conduct. Gaudron J. (568) stated that the "appellant's imprudence in failing to inform the respondents that the exchange [of contract] might not occur" was responsible for the respondents' detrimental conduct on the assumption that exchange had in fact occurred.

²⁰⁸ E.g., *Hoffman v. Red Owl*, 133 N.W. 2d 267 (1965).

²⁰⁹ *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, could be seen as an example. Note, for example, comments by Deane J. at 561, that a negligence claim may also have been a possibility in that case. A number of Canadian cases may also involve similar concerns: see supra n. 195.

socially unreasonable conduct. Consequently, such cases are perhaps best seen as examples of tort-like liability.²¹⁰

To conclude that a defendant has assumed the risk of a contract not being completed leaves unanswered, however, the question of the exact scope of that assumed risk. Presumably, the risk assumed will not extend to cover all possible contingencies (for example, frustrating events) which might prevent the contract eventuating. Consequently, the scope of the assumed risk will determine whether liability in fact arises and will perhaps also determine the remedial response following the occurrence of a contingency within the assumed risk. For example, a defendant's conduct may be such as to show that he or she has in effect guaranteed that a legally enforceable obligation has been assumed (the content of which obligation is dependent upon the particular risk assumed). In such a case, provided the parties agreement is also certain, the courts may be prepared to grant the plaintiff the very contract anticipated,²¹¹ or otherwise protect the expectation interest.²¹² Alternatively, the risk assumed may merely be that work done preliminary to and in anticipation of the expected contract will be paid for at a reasonable value, or that at least expenses incurred will be met.

A defendant will generally not be taken to have assumed in absolute terms the risk of no contract being completed, so as to include the possibility of the plaintiff breaking off negotiations. In cases in which a plaintiff was at fault in the failure to complete the contract, recovery has generally been denied, with the courts often highlighting the plaintiff's fault in the breakdown of the relationship before the contract was completed.²¹³ Similarly, where it appears

²¹⁰ It would seem that in these cases a defendant must have been at fault in the failure of the contract to proceed. If neither party was at fault, then the defendant has not been the cause of the plaintiff's losses, even where they were reasonably foreseeable by him or her. It might be said in such circumstances that the plaintiff could equally have safeguarded his or her interests by not proceeding with the work. Such a requirement of "fault" on the part of a defendant contrasts with cases in which the defendant has actively assumed a risk which includes the risk of a contract not being completed without fault.

²¹¹ As in *MTA v. Waverly Transit Pty Ltd* [1991] V.R. 176.

²¹² The expectation interest could be protected, for example, by an award of damages on that basis, as in *Waltons Stores v. Maher* (1988) 76 A.L.R. 513.

²¹³ E.g., see *Construction Design & Management Ltd v. New Brunswick Housing Corp.* (1973) 36 D.L.R. (3d) 458, *Austotel v. Franklins* (1989) 16 N.S.W.L.R. 582, and *Jennings & Chapman Ltd v. Woodman, Mathews & Co.* [1952] T.L.R. 409. In the latter case, the plaintiff was at fault as it had failed to obtain the permission of its landlord to enter into a sub-lease. As this was entirely within the control of the plaintiff, it failed in its claim. There is also *obiter dicta* in a number of cases which suggests that if the plaintiffs had been at fault, they would not have succeeded.

from the facts that a plaintiff was merely gambling as to the future outcome of contract negotiations, then recovery will not generally ensue.²¹⁴ A number of cases, however, have held that liability can arise where the failure to finalise the contract was neither parties' fault,²¹⁵ with the issue ultimately dependent upon whether a defendant can be taken to have assumed the risk of such contingency.²¹⁶

§ 6.2.3.2 The contract-like nature of liability under incomplete contracts and the remedial consequences

Once a plaintiff has established the three elements considered above, a defendant may be held liable despite the contract being incomplete. But there are a variety of rules and doctrines which have been utilised by the courts to impose liability and consequently, a variety of remedial responses may follow. Before we turn to consider one such remedial response in some detail, it is important to note that the courts often deal with the types of factual problems encountered in the cases under consideration by resort to contractual notions,

See, e.g., *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880, and *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 K.B. 428, per Romer & Somervell JJ.

²¹⁴ This was perhaps the main reason for the plaintiff's failure to recover in *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd* (1989) 16 N.S.W.L.R. 582. At 621, Rogers A-J.A. considered that the plaintiff's "deliberate and conscious decision to refrain from coming to agreement" on an essential term was a gamble which had failed, and the risk of such failure consequently lay with the plaintiff. See also *Construction Design & Management Ltd v. New Brunswick Housing Corp.* (1973) 36 D.L.R. (3d) 458, 462.

²¹⁵ E.g., *British Steel Corp. v. Cleveland Bridge & Engineering Co. Ltd* [1984] 1 All E.R. 504. In *William Lacey v. Davis* [1957] 2 All E.R. 712, it is unclear whether the fault of the defendant was a deciding factor or not. See also the judgment of Lord Denning in *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd* [1954] 1 K.B. 428, as well as comments of Somervell J. In the United States, see *Earhart v. William Low*, 600 P. 2d 1344 (1979). See also *Independent Grocers v. Noble Lowndes* (1993) 60 S.A.S.R. 525, in which the court determined liability for work done, not in anticipation of a contract which never eventuated but in anticipation of a superannuation scheme which never came to fruition, by reference to which party was the appropriate risk bearer.

²¹⁶ Where work is specifically requested, for example, in circumstances in which it was not intended to be gratuitous, the defendant ought to be (and the cases suggest he or she will be) liable to remunerate the plaintiff, irrespective of whether the defendant was at fault. The parties may well break off negotiation by mutual agreement and yet it would be legitimate for the plaintiff to demand payment for work done in reliance upon expectations created by the defendant's request. However, the position is not entirely certain. Sheppard J. in *Sabemo's* case took the view that if neither party in that case had been at fault in the breakdown in contractual negotiations, the plaintiff would not have recovered. This emphasis upon the defendant's fault has led some to interpret the judgment of Sheppard J. as supporting the notion of an implied term or duty to bargain in good faith and that this duty must have been breached before one is entitled to recover. See *infra* n. 249.

that is, a complete contract (either that intended or a collateral one) is found to exist, despite some difficulties in discerning a certain and complete agreement.

An example is provided by *Butler Machine Tool Co Ltd v. Ex-cell-O Corporation (England) Ltd*.²¹⁷ This case involved a so-called "battle of the forms", in which each party to the transaction utilised its own standard forms, despite the inconsistency of the terms of those forms as to the vital matter of price.²¹⁸ Nevertheless, each party proceeded on the basis that its terms and conditions governed the agreement to construct and sell a machine tool and the court held that a contract existed on the terms of one of the party's forms. This case, as well as similar decisions,²¹⁹ has been criticised as artificial in its finding of a contract.²²⁰ With respect, such criticisms are unjustified, for clearly the parties in *Butler's* case at all times proceeded on the assumption that they had a binding agreement²²¹ and, in the case of one party, performed the contractual obligation under that agreement. The court simply recognised that the parties entered into a consensual relationship intended to have legal force—that work was to be performed by one party and paid for by the other—and sought to give effect to those intentions. The artificiality of the reasoning in *Butler's* case occurs in resorting to traditional offer and acceptance analysis to try to overcome the difficulties of the incompatible terms.²²² Other mechanisms

217 [1979] 1 W.L.R. 401.

218 The inconsistency is highlighted by the occurrence of the dispute itself.

219 For further references to cases raising similar facts, see McKendrick, *supra* n. 132, 197, particularly fn. 2. For a "battle of the forms" case in which the court considered that no contract arose, see *O.T.M. Ltd v. Hydraulomatics* [1981] 2 Lloyd's Rep. 211. Instead, a *quantum meruit* was awarded, but without any analysis as to its basis.

220 See Rawlings, "Note" (1979) 42 M.L.R. 715, 717. See also Birks, P., "Restitution for Services" [1974] C.L.P. 13, and his discussion of *Peter Lind v. Mersey Docks* [1972] 2 Lloyd's Rep. 234, at 26 et seq. McKendrick, *id.*, suggests that the solution should have been found in the law of Restitution. As will be argued below, this is hardly useful given that the law of Restitution in this field has only operated by using essentially a contractual analysis. The approach of McKendrick has been criticised by Carter, J.W., "Contract, Restitution and Promissory Estoppel" (1989) 12 U.N.S.W.L.J., 30, 41, and see *infra* n. 222.

221 See Atiyah, P.S., in Jowell & Auslan, (eds), *Lord Denning: The Judge and The Law*, 32.

222 Carter, *supra* n. 220, 41, considers that

it seems wrong to conclude ... that the decision whether or not there is a contract may be made by a simple application of the rules of offer and acceptance. That would elevate concepts which are merely tools of analysis to the status of essential contractual requirements.

As Mason & Gager, *supra* n. 1, 10-1, point out, "[t]he formation of a contract by offer and acceptance has long been a source of conceptual difficulty." In their view, in cases such as

could have been utilised to produce a satisfactory result, such as a consideration of the transaction as a whole in order to imply a reasonable term as to price.²²³

Another example of solutions to this type of factual problem found within contract can be seen where the courts have enforced an express or implied contract ancillary to the incomplete main contract, to pay for any services rendered. Thus, in *Brewer St. Investments Ltd v. Barclays Woollen Co. Ltd*,²²⁴ for example, the defendant's (express) undertaking to pay for alterations made by the plaintiff to its own property was held to be enforceable, despite the fact that a contract for the lease of the plaintiffs' premises was never finalised.²²⁵

Butler Machine Tool, resort to the formal rules regulating offer and acceptance may produce "unsatisfactory results" turning "on formal, rather than substantial matters, and in particular on matters that were not in the minds or expectations of the parties. The risk is that although the parties consider that there is a contract, the court will rule otherwise." As the authors go on to emphasise, at 31, the

insistence on complete agreement on all essential matters may still operate in many instances to frustrate, rather than effectuate, the expectations or intentions of the parties, the more so when they produce an all or nothing result.

These difficulties may be the result of the inapplicability of classic contract theory to modern business conditions. See Farnsworth, *supra* n. 171, 222: "the classic sequence of offer and acceptance is often absent in important contract negotiations." See also generally, Ball, S.N., "Work Carried out in Pursuance of Letters of Intent—Contract or Restitution?" (1983) 99 L.Q.R. 572, 581-2, and his criticism at 576-9 of the findings of Goff J. in *British Steel Corp. v. Cleveland Bridge & Engineering Co. Ltd* [1984] 1 All E.R. 504, that no contract ever arose in that case.

²²³ Cf. the approach of Lord Denning in the *Butler Machine Tool* case. See also Mason & Gager, *supra* n. 1, 11, for other possible solutions.

²²⁴ [1954] 1 Q.B. 428. Similarly, see *Turriff Construction Ltd v. Regalia Knitting Mills Ltd* [1972] 2 Lloyd's Rep. 234, in which an ancillary contract to pay for work preparatory to a building contract was implied by the court, from the defendant's provision to the plaintiff of a letter of intent to grant the main contract. On letters of intent generally, see Ball, *supra* n. 222.

²²⁵ See the judgments of Somervell and Romer L.JJ., and a consideration of their judgments in *Stoljar*, 240-5. Cf. the judgment of Denning L.J., who considered that the plaintiffs were precluded from a contractual claim because of their failure to complete the agreed alterations once the negotiations for the lease broke down. Instead, Denning L.J., at 436, considered that the plaintiffs could succeed in their claim on the basis of a "request implied in law ... on a claim in restitution." Cf. Burrows, 297-8, who considers that in *Brewer St.*, "[t]he majority's apparent preference for contractual rather than restitutionary reasoning ... seems justified," given that there was no benefit to the defendant in that case. See also Burrows, A.S., "Free Acceptance and the Law of Restitution" (1988) 104 L.Q.R. 576, 597-8. See also *Jennings & Chapman Ltd v. Woodman, Mathews & Co.* [1952] 2 T.L.R. 409, in which the plaintiffs failed to recover from the defendant payment for alterations made to their building at the defendant's request and for which he had agreed to pay. The difference between *Jennings & Chapman*, and *Brewer St.*, is that in the former, the failure to finalise the lease agreement was the fault of the

The effect of decisions such as these is that either the parties' "main" or the parties' collateral agreement, as is objectively determined, is enforced. But such a remedial response may even occur outside of contract. For example, a defendant may be estopped from denying that a complete contract exists because of his or her acquiescence in the plaintiff's reliance on the existence of a completed contract.²²⁶ The plaintiff's expectations under the incomplete contract may thus be fulfilled.

In many cases, however, the parties will not have reached any agreement sufficiently certain for the courts to enforce. Although an obligation may clearly have been intended to be assumed, it may not be possible to determine the exact terms of such obligation. For example, a vital term has not been agreed, is ambiguous or uncertain, or the parties' offer and acceptance do not correspond. Where a plaintiff has nonetheless relied on an obligation having been assumed, it may be possible to restore the plaintiff to his or her previous position by ordering, for example, restitution of money paid by a plaintiff to a defendant.²²⁷ Of greater interest, however, and worthy of some

plaintiffs in not procuring the necessary consent to sub-let. The defendant was unaware of the fact that such consent was necessary.

²²⁶ See *Waltons Stores v. Maher* (1988) 76 A.L.R. 513, and *MTA v. Waverly Transit Pty Ltd* [1991] V.R. 176. For an early example, see *Gregory v. Mighell* (1811) 18 Ves. 328. For an example in which a plaintiff failed in its bid to raise such an estoppel, see *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd* (1989) 16 N.S.W.L.R. 582. Estoppel prevents a defendant from asserting the lack of a final, binding agreement in circumstances in which it would be "unconscionable" for the defendant to do so. *Waltons Stores* is an extreme example. Everything had been agreed by the parties and the respondents proceeded with their contractual performance whilst the appellant deliberately held back from taking the final step necessary for assumption of the contractual obligation. In the United States, there are many examples, including *Hoffman v. Red Owl Stores, Inc.*, 133 N.W. 2d 267 (1965), and *Goodman v. Dicker*, 169 F. 2d 684 (1948).

One of the significant features of estoppel is its emphasis upon the plaintiff's detrimental reliance, which is a necessary and *sufficient* basis of liability, so that no benefit need have accrued to the defendant. The point is stressed by Cauchi, *supra* n. 112, 238.

²²⁷ E.g., *Fowler v. Scottish Equitable Life Insurance Society* (1858) 4 Jur. (N.S.) 1169. The claim could be for money had and received, but also, for example, for recovery of money lent. See *Re Vince* [1892] 2 Q.B. 478, and *Goff & Jones*, 483. It would appear that consideration for the payment must have wholly failed for recovery to be allowed: *Goff & Jones*, 483, 488. But such a requirement has often been criticised and in this writer's view ought not be insisted upon. Two types of circumstances may arise. First, the defendant's conduct may be such as to justify liability to compensate the plaintiff for his loss: a breach of an assumed obligation on which the defendant has detrimentally relied. See further, § 6.2.3.3. Secondly, there may be no such conduct, but the contract being "void", a plaintiff may be able to claim restitution in order to be restored as near as possible to his or her previous *status quo*. Such recovery will be on the same principles as govern the recovery of mistaken payments (i.e., irrespective of any conduct on a defendant's part). Again, an insistence on total failure of consideration may defeat the purpose

consideration, are cases in which such a remedy is not possible, where, for example, services have been performed. Perhaps the most common problem arises where services have been performed under an agreement which is incomplete as to price.²²⁸ In such circumstances, the courts are usually prepared to impose an obligation that a reasonable price is payable for work performed by means of *quantum meruit*. In effect, it will be argued, once there has been detrimental reliance, the courts are completing the incomplete agreement by resort to reasonable implied terms.²²⁹

Although also used in respect of non-consensual transactions,²³⁰ of interest here is the liberal utilisation of *quantum meruit* in circumstances near-contract to allow recovery for the reasonable value of services rendered where a defendant has requested or accepted the services where they were clearly not intended to be gratuitous.²³¹ Is recovery of a reasonable price in such circumstances a liability which arises outside contract, or can it be described as

of the liability rules in such cases, as to which purpose see Chapter 9.

228 In cases in which a contract is anticipated, a problem which commonly arises is that the parties perform work for which remuneration in some form other than separate payment is expected. In *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880, and *William Lacey v. Davis* [1957] 1 All E.R. 712, for example, the court imposed an obligation to pay for requested preliminary work to an anticipated but non-eventuating contract, even though there was no expectation on the part of either parties to the respective agreements that such work would be paid for separately. But clearly, the parties had not intended the work to be gratuitous. Instead, the plaintiffs in each case had expected to be remunerated by being awarded the lucrative contracts. Note, in contrast, *Sinclair v. Rankin (No. 2)* (1908) 10 W.A.L.R. 126, which expressly rejected the view that where "the way [of remuneration] contemplated by the parties failed, it follows as a matter of law that a means not contemplated by either party should be substituted." Sheppard J. in *Sabemo* disapproved of the decision in *Sinclair v. Rankin*.

229 By contrast, estoppel does not allow for the imposition of reasonable terms into incomplete bargains: *Mason & Gageler*, supra n. 1, 15.

230 See Maddaugh & McCamus, 6, who state that *quantum meruit* has historically been utilised "without distinction in respect of both consensual and non-consensual transactions. This fact has been the source of a good deal of subsequent confusion." Cf. Goff & Jones, 4. The use of *quantum meruit* in respect of non-consensual transactions can be seen in cases of recovery for unsolicited services, considered in Chapter 8.

231 Cf. *Bryant v. Flight* (1839) 5 M. & W. 114, in arguendo: "When a party has performed valuable services for another at his request, the law will presume that he is to pay for them that which is reasonable." Recovery in *quantum meruit* may be more liberally available than in other doctrines. Recovery for requested work performed in circumstances in which it was not intended to be gratuitous suggests a broader scope than liability in estoppel, for example. Some support for this view may be found in the judgment of Rogers A.-J.A., in *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd* (1989) 16 N.S.W.L.R. 582, 621-2, where his Honour rejected the availability of an estoppel claim, but pointed to the possibility of a claim for "damages based on principles of restitution."

contractual? The latter possibility is raised because the courts are prepared to imply terms to "fill gaps where it is clear that a contract was made",²³² in order to facilitate performance of an obligation clearly undertaken.²³³ In other words, the courts use contract law techniques to otherwise complete incomplete agreements where parties have clearly intended to assume an obligation. It is generally said, however, that the courts will not make the bargain for the parties.²³⁴ Does such a position preclude an implied term as to price, where the price for services under an "agreement" is uncertain or has been left unspecified, for example?

Perhaps the orthodox view is that expressed by Fullagar J. in *Hall v. Busst*,²³⁵ that if "the parties [to a contract other than a sale of goods]²³⁶ are silent as to price, there can be no implication of a term that a reasonable price is to be paid." Any recovery for *quantum meruit* must consequently be seen as a non-contractual claim; price can be said to be an essential term of the agreement and the courts will not construct the parties' contract for them. Such a view, however, appears both to ignore the historical willingness of the courts to imply a reasonable term as to price, seemingly in contract,²³⁷ and is also out

²³² *Cheshire & Fifoot* (Aust. ed.), 210.

²³³ Note, however, that the implied term must not be inconsistent with or contradict the express terms of the agreement.

²³⁴ E.g., *Hall v. Busst* (1960) 104 C.L.R. 206, 222, per Fullagar J. Thus, where the parties appear merely to have agreed to agree as to some essential term, it is said that such "agreement" will not generally be enforced: *Cheshire & Fifoot* (Aust. ed.), 102-3; but even this rule is open to exception. The authors note that "[s]ome decided cases are difficult to reconcile with" such a rule. See cases cited, particularly *Foley v. Classique Coaches, Ltd* [1934] 2 K.B. 1, 11-2, per Greer L.J.

²³⁵ (1960) 104 C.L.R. 206, 222. See also *A.N.Z. Banking Group v. Frost Holdings* [1989] V.R. 695, though in that case, the parties had failed to agree on a number of essential matters, the very subject of the parties' negotiations. Importantly, the claim was for a loss of profits under the contract, which had not been executed.

²³⁶ In sale of goods, a term as to reasonable price is implied by various *Sales of Goods Acts*, (see Carter & Harland, 73-4), although such provisions appear to reflect the earlier common law position. See, e.g., *Joyce v. Swann* (1864) 11 C.B. N.S. 84, 102; 144 E.R. 34, 41-2, per Willes J.; and see Stoljar, 187-96.

²³⁷ Some early examples include *Bryant v. Flight* (1839) 5 M. & W. 114, and *Jewry v. Busk* (1814) 5 Taunt. 302. In the former case, the plaintiff had agreed to enter the defendant's services as "weekly manager" with the plaintiff agreeing that "the amount of payment I leave entirely up to you." In the latter case, the plaintiff agreed to perform certain services for the defendant in relation to some real estate (to "take care of the house, and air it, and shew it to persons applying to take it") in return for which the defendant would make the plaintiff a "handsome present". In both cases the court appears to have been prepared to award the plaintiffs reasonable recompense on the basis of the contractual agreement. In *Bryant*, for example, Baron Alderson considered that the "jury were to ascertain how much the defendant,

of step with the increasing preparedness of the courts to fill such a gap,²³⁸ accepting, in effect, that the parties must have intended a reasonable price, since none was specified.²³⁹ The fact that the value of remuneration has not been fixed in an otherwise certain contract does not, on this latter approach, render such a contract void for uncertainty and a *quantum meruit* may be awarded in what is an action "to enforce an implied term of an express contract."²⁴⁰

At least in some circumstances, then, agreements incomplete as to price

acting bona fide, would or ought to have awarded." The difficulty in interpreting past decisions is that they were nearly all decided, where *quantum meruit* was awarded, in terms of implied contract. In some cases, however, recovery was clearly stated to be based on the express contract, a term being implied as to reasonable price. This was unequivocally accepted as a general proposition in *Horton v. Jones (No. 2)* (1939) 39 N.S.W.S.R. 305, 319, per Jordon C.J. In considering the availability of *quantum meruit* in the situation with which we are here concerned, his Honour stated:

If a person employs another to do work, or agrees to buy goods from him, nothing being said as to the wage or the price, the law implies a promise to pay a reasonable wage or a reasonable price, and an action may be maintained for a *quantum meruit* or a *quantum valebat*. In this case, the action is one to enforce an implied term of an express contract. (Emphasis added.)

Although his Honour compares provisions of the *Sale of Goods Act*, the statement clearly extends beyond merely sale of goods. See also, generally, Stoljar, 187-96 and *Joyce v. Swann* (1864) 11 C.B. N.S. 84, 102; 144 E.R. 34, 41-2, per Willes J.

²³⁸ See Carter & Harland, 67-76. See also Coote, B., "Contract Formation and the Implication of Terms" (1993) 6 J.C.L. 51. Ball, supra n. 222, 584, has described this as the "realistic ability to construct a reasonable contract from the bare bones of agreement". Where a contract is executed, the courts may be more readily prepared to imply such terms. See Ball, 585, and Denning J. in *British Bank for Foreign Trade v. Novinex Ltd* [1949] 1 K.B. 623, 630. Ball, 583-4, is in favour of gap-filling by implying terms to render agreements complete. This appears consistent with the general policy of the courts "at least in modern times, [to] do their utmost" to uphold bargains: *Cheshire & Fifoot* (Aust. ed.), 98. Some examples include *Foley v. Classique Coaches, Ltd* [1934] 2 K.B. 1, particularly 11-2, per Greer L.J. and *Wenning v. Robinson* [1964-5] N.S.W.R. 614. See also Windeyer, dissenting, in *Hall v. Busst* (1960) 104 C.L.R. 206, 245. A reasonable term as to price may be implied even where remuneration has been agreed upon, but part of that remuneration remains unfixed. See, e.g., *Graves v. Okanagan Trust Co.* (1956) 6 D.L.R. (2d) 54.

²³⁹ Fridman, G.H.L., "Construing, Without Constructing, A Contract" (1960) 76 L.Q.R. 521, 536, has said that a preparedness of the courts to read a contract as involving, say, a reasonable price or commission, is not "tantamount to constructing a contract for the parties. It is really only giving effect to their intention by construing the contract as they must have intended it to be understood. For it is a fundamental postulate of contract law that the parties to a contract are deemed to be reasonable men."

²⁴⁰ *Horton v. Jones (No. 2)* (1939) 39 N.S.W.S.R. 305, 319, per Jordon C.J., quoted supra n. 237.

will be enforced after reliance by the implication of a term into the *contract* that a reasonable price is payable. Given the availability of such relief, determining whether a given *quantum meruit* award under an incomplete agreement is contractual or otherwise²⁴¹ appears ultimately to be a distinction of no effect. In either case, the remedial outcome is the same: the incomplete agreement gives rise to a right to recover the reasonable value of services performed. Where only recovery for the work performed is sought, it seems a moot point whether there is any difference between implying (or imposing) a reasonable term as to price in order to complete the *contract*, or instead, holding that the contract is incomplete (and incapable of being completed) and then imposing an obligation to pay a reasonable price.²⁴² This is especially so given that in both cases the underlying reason for imposing the reasonable price is the same: the parties have conducted themselves on the basis of having assumed an obligation. The parties either have a clear intention to assume some obligation²⁴³ (to pay for requested services rendered), though their exact intentions are not objectively completely discernible as to all terms (the price); or at least the defendant's conduct is such that the risk of the plaintiff's reliance rests with that defendant. Of course, a reasonable price may be more than one

²⁴¹ Unjust enrichment theorists claim that *quantum meruit* awards under incomplete or defective contracts are based on unjust enrichment principles. See, e.g., Birks, 270-6; Burrows, supra n. 225, 595-8; Fridman, 284-92. Cf. Deane J. in *Pavey & Mathews v. Paul* (1987) 67 A.L.R. 577, 600. Where a *quantum meruit* is awarded in absence of a consensual relationship of the parties—where there has been no attempted assumption of obligations, for example—then quite different concerns may be raised and such a *quantum meruit* cannot, of course, be considered contractual. An example might be recovery for unsolicited services rendered in an emergency.

²⁴² Of course, if damages for breach of contract are sought, then a determination of whether or not a contract exists is significant. Cf. *British Steel Corp. v. Cleveland Bridge Co.* [1984] 1 All E.R. 504, 509, per Goff J. (as he then was). Holding that there is no contract may preclude an assessment of whether the work performed fulfils all other requirements of the parties' incomplete agreement. This further suggests in favour of giving effect as far as possible to the parties' intentions, finding a contract, and filling in the gaps. See Ball, supra n. 222, 577, who makes the point that if only a remedy in Restitution is available,

[t]he whole of risk of negotiations breaking down after performance has commenced is thrown on to the [defendant]. The [plaintiff] receives his reasonable expenses plus a reasonable profit via the free acceptance principle and thus gets approximately what he always expected. The [defendant] has to pay for everything that he actually receives but gets no protection in relation to any expectations he had of greater or better performance.

If, on the other hand, a contract is held to have arisen, then those parts of the agreement which are completed and do represent the actual expectations of the parties can be given effect.

²⁴³ Cf. Burrows, 293, in relation to anticipated contracts: "[P]arties carrying on pre-contractual negotiations can often be said to have reached some kind of bargain before a binding contract is struck."

party expected to pay, or less than the other expected to receive, but there is no reason why one party's expectations are to be preferred over those of the other.²⁴⁴

There are some merits in treating all *quantum meruit* recovery on the basis of an incomplete agreement as nonetheless a remedy which is available within contract. One of the advantages of such an approach is that it avoids the perhaps impossible task of attempting to interpret past decisions as falling on either side of an artificial line, as being contractual or quasi-contractual. Since historically, nearly all *quantum meruit* cases²⁴⁵ used the language of implied contract as the basis for their decisions, the difficulty in making such a distinction is obvious.²⁴⁶ As Goff J. indicated in *British Steel Corp. v. Cleveland Bridge Co.*:

[The] quantum meruit claim ... straddles the boundaries of what we now call contract and restitution, so the mere framing of a claim as a quantum meruit claim, or a claim for a reasonable sum, does not assist in

²⁴⁴ See, e.g., *Vickery v. Ritchie*, 88 N.E. 835 (1909). See generally Palmer, §15.11.

²⁴⁵ See, e.g., *Way v. Latilla* [1937] 3 All E.R. 759; *Watson v. Watson* [1953] N.Z.L.R. 266, 270, 272, but note Birks, 274, who considers that the decision in that case "affirmed the non-contractual nature of the claim". Contrast Stoljar, 240. Two recent decisions, though not incomplete contract cases, have affirmed an implied contract basis for *quantum meruit*. See *Guinness plc v. Saunders* [1990] 1 All E.R. 652, and *Building Design 2 Ltd v. Wascana Rehabilitation Centre* (1992) 6 W.W.R. 343.

There are some exceptions. In *William Lacey (Hounslow), Ltd v. Davis* [1957] 2 All E.R. 712, in a judgment of rather confusing reasoning, the suggestion is made that the obligation is implied by law "irrespective of the actual views and intentions of the parties", 719, but at 717, Barry J. asks whether a *promise* to pay should be implied or not. Cf. Birks' interpretation of the case, 272-3. In *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880, resort was not made to implied contract. Instead, Sheppard J. promulgated a very specific rule; importantly, he indicated that liability did not rest in unjust enrichment. See particularly at 902-3.

For a defective contract case which asserted a quasi-contractual as opposed to a contractual basis for the claim, see *Craven Ellis v. Canons Ltd* [1936] 2 K.B. 403, 412, per Greer L.J.

²⁴⁶ One view is that in some of these cases, the implied contract is artificial, whilst in others, it is not. Cf. Brennan J. in *Pavey & Mathews v. Paul* (1987) 67 A.L.R. 577, 588:

quantum meruit is sometimes used to describe an action to recover a reasonable sum which is due under a contract and sometimes to describe an action to recover a reasonable sum when the obligation to pay it is imposed by law independently of actual contract.

See Stoljar, 187-96, 240 et. seq. for a discussion of such views. There is considerable confusion as to the status of a *quantum meruit* claim, as evidenced by the judgments in the South Australian Supreme Court in *Independent Grocers v. Noble Lowndes* (1993) 60 S.A.S.R. 525.

classifying the claim as contractual or quasi-contractual.²⁴⁷

Another advantage is that in recognising that a *quantum meruit* here is a contractual technique, equating with the filling of gaps in parties incomplete bargains by means of implied terms, it becomes clear that liability still ultimately attaches because the parties' clear intention that the services performed were to be paid for, and a plaintiff's reliance thereon.²⁴⁸ If *quantum meruit* in this context is instead seen as non-contractual, there are no alternative explanations as to why it is imposed. Historically, as already noted, the cases utilised the language of implied contracts; and the current favoured explanation, that of unjust enrichment, is seriously flawed. A defendant need not have been enriched as a result of a plaintiff's actions, and further, the unjustness of any enrichment can only be established by reference to those same factors which establish a contractual claim: the intention to assume an obligation to pay for requested services or at least conduct of the defendant which can objectively be determined as amounting to the assumption of such an obligation. In either case, the defendant can be taken to have assumed the risk of the plaintiff's reliance.

The relevance of a contractual analysis is well illustrated by the case of *Way v. Latilla*.²⁴⁹ The plaintiff, Way, agreed to supply the defendant with

²⁴⁷ [1984] 1 All E.R. 504, 509.

²⁴⁸ The scope of the liability should thus reflect as much as possible the mutual intentions of the parties which are discernible, for example, as to the quality and timing of the performance of the services. See *supra* n. 242. As Farnsworth, *supra* n. 171, 220, has said in considering problems arising in the context of precontractual dealing:

Some observers have concluded that existing contract doctrines are not adequate to the task of protecting the parties—I argue that, on the contrary, those doctrines, imaginatively applied, are both all that are needed and are all that are desirable.

And in the United States, courts have generally favoured an "implied-in-fact" contract approach as a common mechanism for resolving precontractual disputes: Farnsworth, *supra* n. 171, 233, fn. 52.

²⁴⁹ [1937] 3 All E.R. 759. Another good illustration is provided by what is perhaps a paradigmatic precontractual dealing case, *William Lacey v. Davis*, [1957] 1 All E.R. 712, in which the defendant requested substantial and expensive services in circumstances where neither party expected such work to be performed completely gratuitously. Although neither party expected the work to be paid for separately, this was only because of the mutual expectation that the "main" contract would be finalised and that recompense would take the form of profits from that contract. Subsequent commentators (e.g., Birks, 272-4) have emphasised this lack of an expectation of separate recompense to reject contract as an appropriate mechanism for recovery. But as Stoljar has emphasised,

[e]ven if, as here, [the parties] did not at the time intend special payment for the preparatory work, this lack of intention was still predicated on the contemplated

information relating to gold mine concessions in Africa and, *inter alia*, to secure appropriate mining concessions for the defendant. The defendant, in return, had agreed that the plaintiff would obtain "at least a fair share of the plums and rewards" of the concessions. Negotiations as to the nature and measure of the plaintiff's share in the "rewards" never reached fruition and the plaintiff's considerable work went unrewarded, despite the large profit ultimately derived by the defendant from the concessions. The plaintiff claimed damages for breach of a contract to share in the concessions obtained by the defendant.²⁵⁰ The House of Lords held that there "certainly was no concluded

contract indeed materialising in due course. Can it at all be said that the parties could have intended payment in no other event, such that P would be giving considerable services for free, even if D were to withdraw unexpectedly? Discerning such "counterfactual" intentions (what the parties would have said had the question actually been put) is precisely what contract does at many points ...

Stoljar, 242, footnotes omitted. Stoljar really is pointing out that contract law fills gaps in otherwise complete agreements by reference to what the parties would have agreed to had they turned their minds to the issue (as objectively determined). Stoljar goes on to say that this "is an exercise, moreover, for which quasi-contract offers no real help."

Stoljar gives a similar interpretation of *Sabemo v. North Sydney M.C.* [1977] 2 N.S.W.L.R. 880. At 244-5, he writes:

Notwithstanding his initial espousal of quasi-contractual liability, Sheppard J., in a somewhat curious reversal, declared 'the determining factor' entitling the plaintiff to succeed to be the circumstance that 'the defendant deliberately decided to drop the proposal'. The plaintiff, it was said, perhaps did take a risk in incurring the expenditure he did, 'that the transaction might go off because of a bona fide failure to reach agreement', but he did not take that risk for the event of one party changing his mind when final agreement was so near. ... It should be clear that this final principle, despite its choice of non-contractual language, is not only decidedly contractual in nature, admitting as it does the parties' agreement that certain preparatory or interim work is to be done for recompense. The new principle goes even further than ordinary contract law, in that it imposes a duty of good faith, that is, a duty not to withdraw for reasons other than a bona fide disagreement as to which neither party, is so to speak, at fault. But surely, there is no need to go so far as this in situations of this kind. ... In fact, all that is required for present purposes is simply to recognise that the parties are, or circumstantially must be, in agreement that work done by one while negotiating for a contract for the same or more work, is not work done gratuitously, but on a commercial basis, if only because neither the party doing the work nor the party accepting it can as yet be completely certain that the contemplated contract will indeed come about. Given such an agreement, obviously not express but one implied in fact, P has a contractual claim for his services,—the majority in *Brewer Investments* virtually decided as much (footnotes omitted.)

²⁵⁰ The potential size of a successful claim for a share in the concessions was much more than any claim merely for remuneration for the services rendered, even on the basis of the participation in the profits. This is illustrated by difference between the sum awarded by the trial judge (£30000), who accepted the plaintiff's claim at first instance, and the House of Lords award of £5000.

contract between the parties as to the amount of the share or interest that Mr. Way was to receive".²⁵¹ Consequently, the House of Lords considered that the only remedy available to the plaintiff was by way of an implied contract to pay reasonable remuneration.

In determining the value of the *quantum meruit* for the services rendered, considerable differences between the Court of Appeal and the House of Lords arose. The Court of Appeal awarded the plaintiff a sum calculated as a reasonable fee for the services rendered,²⁵² whereas the House of Lords awarded ten times this amount. The reason for this difference is significant. The House of Lords considered that the previous negotiations and the intentions and expectations of the parties should be taken into account, in order to fix an appropriate *quantum meruit* award. Lord Wright considered that the "communing of the parties" was evidence which was "admissible to show what the parties had in mind, however indeterminately, with regard to the basis of remuneration."²⁵³ Although the final form and measure of remuneration for the work was never finalised, it was clear that some "participation" in the gains of the defendant was anticipated by both parties. The recognition of an implied contract to pay for the services rendered thus reflected and sought to give effect to the intentions of the parties to assume a legal obligation, which intention was complete to all but one extent: the *value* of the remuneration. And here, the court simply implied a reasonable term, *taking into account* the parties negotiations and expectations.²⁵⁴

Birks has said that the decision of the House of Lords is "entirely satisfactory",²⁵⁵ but that the reasoning was "artificial" because of the courts

251 [1937] 3 All E.R. 759, 763.

252 A sum of £500, which, in the view of Lord Atkins in the House of Lords, ignored the "real business position": *ibid*, 764.

253 *Ibid*, 766. Lords Macmillan, Thankerton and Maugham concurred with the judgments of both Lords Wright and Atkin, which were essentially similar. Lord Atkin, at 764, considered that

if no trade usage assists the court as to the amount of the commission, it appears to me clear that the court may take into account the bargainings between the parties, not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services.

254 The view is expressed in a number of other cases as well. See, e.g., *Scarisbrick v. Parkinson* (1869) 20 L.T. 175, and *supra* n. 111, and text thereto.

255 Birks, 272.

discovery of an implied contract. With respect, however, without such resort to contractual reasoning, the House of Lords could not have reached the result Birks perceives to be satisfactory. The basis upon which the House of Lords derived a "*quantum meruit*" award ten times greater than the reasonable value calculated by the Court of Appeal was by reference to the intentions of the parties. There was thus no artificiality in resort to such evidence.²⁵⁶ If, instead, the House of Lords had proceeded to resolve the issues before it by application of unjust enrichment principles, the court would have faced the difficult problem of determining the value of the "enrichment" (accepting that there was indeed an "enrichment" under one of the propounded tests)²⁵⁷ received by the defendant? Why was not the Court of Appeal's assessment of the reasonable value of the work performed the more appropriate?²⁵⁸ To reply that the measure of the disgorgeable enrichment should reflect the intentions of the parties would be merely to recognise the contractual nature of the claim.²⁵⁹

In decisions such as *Way v. Latilla*, then, reasonable price reflects the contractual intentions of the parties. Indeed, one commentator has noted that, at least in relation to sale of goods,²⁶⁰ the courts tend to reject an "automatic espousal of the market price" and base their assessment of reasonable value on

²⁵⁶ Contrast Birks, *id.*

²⁵⁷ It could probably only be said that there was enrichment under a subjective test, such as free acceptance or the "bargained-for" test. These tests emphasise the notion of an underlying bargain and confirm the essentially consensual nature of the transaction, albeit transactions which fail to fulfil the strict formalities of contract law. Burrows, who advocates a bargained-for test of enrichment, concedes in relation to anticipated contracts that the parties have reached "some kind of bargain" (293).

²⁵⁸ Presumably, the Court merely arrived at the figure by determining the cost of hiring someone such as the plaintiff, to perform the sorts of tasks he was asked to do.

²⁵⁹ Another difficulty with any unjust enrichment analysis of *Way v. Latilla* [1937] 3 All E.R. 759, would arise in determining the "unjustness" of any enrichment. If, for example, one wished to establish the unjustness by the defendant's "free acceptance", it would need to be shown that the work was accepted with the knowledge it was to be paid for. But in order to prove such knowledge, it would be necessary to refer back to the intention to assume an obligation and the nature of the parties' expectations. Reference to "unjust" would thus add another unnecessary stage to the analysis. This is well illustrated by the case of *Canadian Co-Operative Implements Ltd v. Lou Petit Trucking Ltd* (1983) 27 Man.R. (2d) 177, in which the court proceeded on the basis of an implied contract, but also considered an alternative unjust enrichment analysis of the problem. In so doing, it isolated four elements to be satisfied, of which three only could be proved by reference to contractual notions (the fourth was that of benefit).

²⁶⁰ Under various *Sale of Goods Acts*, a term as to reasonable price can be implied where price has not been specified.

the intention of the parties; "reasonable price is something which takes account of individual quirks of the parties concerned."²⁶¹

§ 6.2.3.3 A note re money

To this point, the cases considered have mostly concerned plaintiffs who have performed services, or more generally speaking changed their position, in reliance upon an incomplete contract which reliance proves detrimental. Such reliant action need not, of course, necessarily be beneficial to a defendant. The cases impose an obligation upon a defendant where a plaintiff has incurred some detriment, in circumstances where the defendant's conduct justifies his or her being made liable to the plaintiff.

In many cases, however, the plaintiff's detrimental conduct may take the form of a direct part-payment or deposit of money to the defendant. The receipt of such money is clearly beneficial to the defendant. It may then be possible for a plaintiff to recover such part-payment²⁶² or, in more limited circumstances, a deposit,²⁶³ on similar terms and on similar principles governing recovery of a mistaken payment. As will be seen in Chapter 9, a plaintiff will be entitled to recover the economic advantage which such payment represents still retained by the defendant. Such liability is not conduct-based. This brings us to an important distinction which needs to be drawn. A plaintiff who has paid money to a defendant may be able to establish two distinct grounds of liability. The plaintiff may be able to point to conduct of the defendant such as would normally give rise to liability, say, to make good at least his or her losses

²⁶¹ See Ball, *supra* n. 222, 588.

²⁶² Part payments are recoverable generally only where there has been a total failure of consideration. See Goff & Jones, 417-24, 428-38, in relation to breach of contract, but these rules are relevant to defective or incomplete contracts as well. Cf. Palmer, Vol. II, 47-8. Where a breaching party seeks recovery of a part payment, the right to recovery is in theory governed by the terms of the contract, though these terms may be in the nature of a penalty and thus in effect, ignored. The requirement of a total failure of consideration can be criticised. If a plaintiff is the innocent party to a breach of contract, the matter may not be critical: an alternative remedy for damages is available. But if the party seeking recovery is the breaching party, or is relying on a defective or incomplete contract, a requirement of total failure would seem harsh where the defendant's performance has only partially reduced the economic advantage received as a result of such payment. For example, the defendant may have received \$1000, but expended only \$200 in his or her performance. Yet the economic advantage retained (\$800) should still be recoverable on the same basis as a mistaken payment of such sum: see Chapter 9.

²⁶³ A deposit is generally only recoverable by a non-breaching party to a contract, a deposit being a guarantee of performance of the contract. This rule is subject to at least one proviso, namely that the forfeiture of a deposit must not be in the nature of a penalty so that it is unconscionable for the recipient to retain the money.

incurred, or alternatively, the plaintiff may be able to establish the receipt and retention by the defendant of an economic advantage.

An obligation grounded on the retention of an economic advantage received is quite different to one which makes a defendant responsible for the plaintiff's loss; for merely requiring a defendant to return an economic advantage retained does not leave him or her worse off than before the payment. The latter type of claim is not conduct-related and might succeed against an entirely "innocent" defendant. Unlike in the service cases considered above, it is not necessary to show, for example, that the defendant has breached an assumed obligation. But it follows that an innocent defendant may also raise any defences, such as a change of position considered in Chapter 9, which establishes that the defendant no longer retains the economic advantage the money represents.

Where, however, it is possible to identify conduct of a defendant sufficient to justify liability to compensate for loss, then such a defendant should be liable to repay the money/economic advantage received, even if he or she no longer retains it. In other words, in such circumstances, change of position and similar defences ought not to be available.²⁶⁴ The liability arises, not because the defendant retains the plaintiff's money which can simply be returned, but because the defendant's conduct justifies liability to compensate the plaintiff's loss. In such circumstances, the symmetry between non-money and money cases needs to be maintained and the common basis for imposing liability—the defendant's conduct—needs to be emphasised.

§ 6.2.4 Conclusion: Defective and Incomplete Contracts

Contract law provides one mechanism whereby parties can assume obligations intended to have legal effect. In circumstances near contract, the rules of contract suggest no contractual obligation has successfully been assumed. Yet the parties' conduct may suggest either a clear intention to

²⁶⁴ Contrast the decision of *Conmac Western Industries v. Robinson* [1993] 6 W.W.R. 375. In *Conmac*, the plaintiff had paid over money (pre-payments of royalties) in anticipation of a lease, even though, as it turned out, a number of critical matters had not been agreed. Eventually, these outstanding matters led to negotiations breaking off. It is unclear if either party was at fault in this breakdown (see 440-1). The plaintiff, seeking recovery of the pre-payments, conceded that a change of position defence, if made out, would reduce its right to recover such pre-payment. Such a concession may have been premature, however, for it may well have been possible for the plaintiff to establish all elements necessary for a claim for precontractual losses, at least in relation to the pre-payment. Arguably, the risk of the contract failing, in relation to the payment, lay with the defendants, who had requested, indeed insisted on, pre-payment under the contract (439).

assume some obligation or risk, or that a defendant can be taken to have assumed an obligation or risk. If, in such circumstances, the plaintiff has relied to his or her detriment on an obligation having been assumed, equity and Restitution, in their gap-filling and ameliorative capacity, may nonetheless allow for the enforcement of the assumed obligations, at least to a limited extent. Thus, generally speaking, defective contracts are enforceable to the extent that such enforcement does not contravene the policy of the rule rendering the contract defective. Similarly, the courts may complete an incomplete agreement in reasonable terms, where there exists a clear intention some obligation or risk was to be assumed. Arguably, some of the techniques utilised to complete incomplete agreements—such as *quantum meruit* award where price is incomplete—may even be considered to be contractual, rather than merely contract-like.

Ultimately, it may not be of great moment whether one goes so far as to describe liability arising under defective and incomplete contracts as contractual, rather than merely contract-like. Certainly, a less formal, more inclusive view of contract—consider, for example, Stoljar's discussion of "loose agreements"²⁶⁵—based on a common core concern with the assumption of obligations, could incorporate most of the rules and doctrines operating near contract. One benefit of such an approach is that it avoids a difficulty noted by Atiyah:

Since the law does not contain an authoritative and conclusive definition of contract, there is no way of saying what is 'truly' a contractual liability. And the fact that different legal systems may treat liabilities as contractual which English lawyers would treat as non-contractual suggests that the search for a liability which is 'truly' contractual is pretty artificial.²⁶⁶

But one need not go so far as to consider all doctrines near contract as contractual, so long as it is recognised that such cases (and some more so than others) do raise many of the same essential concerns as contract itself and may thus even allow us to understand contract more fully.²⁶⁷ The term "quasi-

²⁶⁵ Stoljar, 192-6, 239-45, and see Stoljar, *supra* n. 11, particularly 22, cited *infra* n. 267.

²⁶⁶ Atiyah, 44.

²⁶⁷ Cf. Stoljar, *supra* n. 11, 21-2, discussing estoppel in circumstances near contract, but his comments may be seen as equally applicable to Restitution where operating in this context. In Stoljar's view, in circumstances near contract, estoppel,

notwithstanding its special language suggesting a separate doctrine, turns out to be little more than a contract-supplementing exercise as it reveals an additional agreement

contract" may thus perhaps prove to be of continued utility, suggesting as it does the contract-like nature of recovery in these cases, whilst also implicitly suggesting that the accepted formalities of contract have not been satisfied.

§ 6.3 TORT-LIKE CONDUCT AND LIABILITY: Infringing Standards of Acceptable Conduct

*Society has no interest in the mere shifting of loss between individuals for its own sake. ... [A] shifting of loss is justified only when there exists special reason for requiring the defendant to bear it rather than the plaintiff on whom it happens to fall.*²⁶⁸

§ 6.3.1 Introduction

It is proposed now to consider liability rules arising in circumstances near tort, in which conduct of a defendant gives rise to tort-like liability. As with much of tort, the concern is with conduct which infringes certain minimum standards of acceptable conduct and results in harm to persons in relationships of some proximity to the defendant. As will be seen, such harm-producing conduct characteristically gives rise to an obligation to return the harmed party to his or her *status quo ante*.

Many of the topics claimed for Restitution which give rise to tort-like liability are rules and doctrines of equitable origin whose principal function is to provide mechanisms for the vitiation of transactions tainted by some wrongful conduct usually on the part of a party to the transaction.²⁶⁹

not included in the formal contract, or one which modifies the latter, or virtually replaces it, or is interpretative of some of its terms, or shows an 'agreement in principle' where a contract appears incomplete, not having gone through the usual offer-and-acceptance stages. In all these contexts ... estoppel is not really needed since we are, or should be, able to reconstruct our relevant contract principles so as to cure persistent deficiencies (footnote omitted).

²⁶⁸ Fleming, J.G., *The Law of Torts* (1992, 8th ed.), 3, (hereinafter: "Fleming").

²⁶⁹ It may also be possible to vitiate a transaction entered by P with D where P's actions are the result of wrongful conduct on the part of a third party, X. Where D was an innocent bystander to X's wrongdoing, such claims clearly fall outside the category of wrongful conduct, for P, though alleging unfair conduct, does not do so against D. Consequently, claims against D, the innocent bystander, must involve differing concerns and will thus be considered in Chapter 9, alongside other cases in which a plaintiff's claim is not based on any wrongdoing on the part of the defendant. In this section, reference to such three-party transactions will only be made in passing.

Transaction avoidance doctrines are not, of course, the exclusive province of equity, as duress illustrates.²⁷⁰ And such common law transaction avoidance doctrines will also be noted. But our concern is largely with equitable doctrines such as undue influence (actual and presumed), unconscionable dealings,²⁷¹ relief for non-fraudulent misrepresentations and relief for contracts entered under an operative unilateral mistake.

It may seem odd to consider such equitable doctrines within a thesis on Restitution, but such topics are covered within some texts on the subject. The inclusion of all or most of these doctrines, however, appears to be driven purely by the restitutionary remedial response—that is, transaction avoidance or “rescission”—which usually follows, leading to an incomplete or one-sided treatment of such topics. The focus is entirely on the doctrines when utilised with restitutionary consequences, as evidence of their supposed purpose of the reversal of unjust enrichment.²⁷² The artificial division of doctrines which follows from an unjust enrichment analysis seems entirely inappropriate in the light of moves toward greater remedial flexibility, as will be seen. Outside of Restitution texts, an unjust enrichment analysis of these equitable topics has not gained any foothold.²⁷³ They are for the most part explained in terms of

²⁷⁰ Many equitable doctrines have merely expanded common law rights to have a transaction rescinded. Note, for example, the expanded scope in equity for the rescission of transactions induced by non-fraudulent misrepresentations, including gifts and voluntary settlements: *Re Glubb* [1900] 1 Ch. 354. At common law, only fraudulent misrepresentations give rise to a right to rescind a transaction, unless there is a total failure of consideration, in which case money paid even on the basis of an innocent misrepresentation is recoverable. A negligent misrepresentation may, since *Hedley Byrne v. Heller* [1964] A.C. 465, give rise to a claim in tort, for damages incurred as a consequence of the misrepresentation.

²⁷¹ They are sometimes known as “catching” bargains.

²⁷² A striking example is provided by Goff & Jones, 15, who state:

The courts may well recognise new grounds to found a restitutionary claim; unconscionability may be one such ground. The judicial recognition of the unifying principle of unjust enrichment should encourage them to do so (footnotes omitted).

But with respect, this seems an inverted perspective of unconscionability. Undeniably, unconscionable conduct may result in a restitutionary remedy, but similarly, it may give rise to a number of other remedial consequences. Unconscionability is an idea which underlies many different doctrines and may even, of itself, found a cause of action (consider, e.g., *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, considered further Chapter 7). To suggest that its recognition as merely one more “unjust” factor within unjust enrichment is justified by a “unifying principle of unjust enrichment” appears to miss the non-remedy specific nature of the unconscionability idea.

²⁷³ See, e.g., Meagher, Gummow & Lehane, and Baker, P.V., & Langan, P. St.J., *Snell's Equity* (29th ed., 1990), neither of which make reference to unjust enrichment in their respective indexes. Interestingly, even in Restitution texts which cover these equitable topics, such as Goff

quintessential equitable notions such as unconscionable conduct and within the context of the development of each rule in the courts of equity. This means that the substantive content of the doctrines is thus largely dealt with outside of unjust enrichment. Perhaps not surprisingly, then, there is some debate within the unjust enrichment camp itself as to how much of equity can rightfully be claimed.²⁷⁴

For these reasons, the specific and detailed operation of individual equitable doctrines will not be considered.²⁷⁵ Instead, two purposes are proposed. First, it is proposed to highlight briefly the type of conduct caught by equitable and, of less significance, common law doctrines claimed for unjust enrichment which is indeed tort-like in appearance. Secondly, it will be shown that such tort-like conduct gives rise to tort-like liability in the form of a remedial response aimed at returning a plaintiff to his or her *status quo ante*. Hence, the restitutionary remedies which characteristically follow the activation of the doctrines under consideration, it will be argued, are best seen as having a restorative purpose rather than being aimed at the disgorgement of benefits. As other remedies increasingly become available in response to doctrines commonly used to set aside transactions, the non-restitutionary *purpose* of such doctrines will become more evident.

Before we proceed to consider these two points, it should also be noted that not all cases of tort-like liability are concerned with transaction avoidance. For example, this writer has already described proprietary estoppel cases when activated by a defendant's acquiescence as examples of tort-like liability.²⁷⁶

& Jones, little effort has been made to apply unjust enrichment analysis in any rigorous way.

²⁷⁴ Beatson, 257, concedes that one of the challenges facing unjust enrichment is to "identify those equitable doctrines and remedies whose main underlying purpose is restitutionary." In this writer's view, such an exercise is fruitless, for in this context, it leads to doctrine excision. Even though a doctrine may characteristically give rise to a restitutionary remedial purpose, its purpose may be other than restitutionary, as evidenced by the availability of other remedial purposes to fulfil that doctrine's purpose. Hence, if unjust enrichment were adopted as an explanation, such doctrines would have to be dismembered according to whether in an individual case, the doctrine gave rise to a restitutionary or non-restitutionary response. See generally, § 4.4.3, and Finn, P.D., "Mr. Beatson's 'Unfinished Business'", Unpublished Paper, delivered to the Restitution Group, Society of Public Law Teachers Conference, Aberdeen, 1991.

²⁷⁵ Hence, the weighting of this chapter in favour of contract-like rather than tort-like liability.

²⁷⁶ Though as was also noted, it is tort-like liability which may give rise to more than just compensatory (restorative) remedies. See § 6.1.2.

Such other examples of tort-like liability will be noted when the variety of conduct which may be described as tort-like is considered below.

§ 6.3.2 Tort-Like Conduct

To describe conduct as tort-like obviously emphasises the affinity of such conduct with that which infringes duties in tort. Yet attempting to isolate the distinguishing features of tort law is no easy task. Fleming, amongst others,²⁷⁷ has noted the difficulties in finding any satisfactory theory or theories of tort law and the "futility of seeking to impose a spurious unity upon a very complex congeries of problems."²⁷⁸ Put simply, tort law encompasses a variety of diverse duties infringed by a variety of conduct. Some torts are actionable *per se*, so that no actual damage need be shown for liability to arise. Nominal damages may be awarded for breach of such torts, which include trespass to land and defamation. But for our purposes, one of the principal aims of much of tort law is with the compensation of losses incurred as a result of a tortfeasor's conduct. Tort law, in its manifest and specific duties, indicates in which circumstances a plaintiff is entitled to claim compensation for losses by establishing some reason in law for shifting losses from the plaintiff to the defendant.²⁷⁹

Much of tort law proscribes deliberate conduct intended to harm another—conduct which can be described as wrongful and which thus generate a strong moral and legal basis for recovery.²⁸⁰ But conduct can also be described as wrongful where it is careless or irresponsible, involving unreasonable risk-taking or an unreasonable disregard for the consequences upon another of one's own action or inaction.²⁸¹ Negligence is a prime example of such socially irresponsible conduct. One factor which may persuade us to view conduct as socially irresponsible is where a party is in a better position,

²⁷⁷ See generally, Keeton, W. Page, (ed.) *Prosser and Keeton on the Law of Torts* (5th ed., 1984), Chp. 1, (hereinafter: "Keeton"), and Heuston, R.F.V., & Buckley, R.A., *Salmond and Heuston on the Law of Torts* (19th ed., 1987), Chp. 2, (hereinafter: "Heuston & Buckley").

²⁷⁸ Fleming, 6. Others, who perceive that there may be some unifying principle running through the law of torts, nevertheless have difficulty in formulating such principles. See Keeton, 3, fnn. 8-9.

²⁷⁹ *Supra* n. 268.

²⁸⁰ See Keeton, 21-4, 608-9; Heuston & Buckley, 24-7.

²⁸¹ Such conduct need not reflect any malicious intentions on the part of the actor.

vis-à-vis the party ultimately harmed, to recognise and thus take steps to avert the risk of a particular harm.

Although a defendant's wrongdoing is not the only basis for the imposition of liability in tort—strict liability²⁸² may attach to conduct which causes²⁸³ harm, even where the defendant has not acted wrongfully—for the most part, and perhaps increasingly so in Australia,²⁸⁴ tort liability attaches to conduct which can be characterised as wrongful. One particularly strong example of wrongdoing in tort is fraud. There are obvious parallels in equity. One of the remarkable features of much equitable doctrine is the pervasive use of the language of fraud (used in an expanded sense) to describe conduct of a defendant. But references to "fraud",²⁸⁵ "equitable fraud",²⁸⁶ or "unconscionable" or "unconscientious" conduct,²⁸⁷ are so widespread and used in such a variety of contexts that such references of themselves offer little guidance to characterising a defendant's conduct and the liability to which it gives rise as tort-like. Consequently, it is necessary to go beyond mere descriptions of conduct in the language of fraud in order to establish the types of conduct which can be described as tort-like.

§ 6.3.2.1 The essential characteristic of tort-like conduct

Perhaps one could encapsulate the essential characteristic of tort-like

²⁸² The imposition of strict liability may be particularly appropriate where conduct has inherent risks, or alternatively where the gains of an activity flow to a defendant, so that such a defendant should appropriately also bear the costs of such conduct.

²⁸³ This is a legal conception and raises its own problems. Obviously, a question of causation involves certain policy and moral choices and thus provides flexibility even when considering the imposition of "strict" liability. As Keeton points out, at 612, only "some among all the antecedents of a harm for which compensation is claimed will be separated out and treated as legally relevant causes."

²⁸⁴ The High Court appears to be limiting the possibility of strict liability, as evidenced by the view of the Court in *Burnie Port Authority v. General Jones Pty Ltd* (1994) 120 A.L.R. 42, that the rule of *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, imposing strict liability, no longer operated in Australian law as a separate liability rule. The majority of the Court considered that the rule was absorbed by the principles of ordinary negligence, subject to the possibility of liability in nuisance or trespass arising from a *Rylands v. Fletcher* situation.

²⁸⁵ As already noted, such language is particularly common in relation to equitable doctrine ameliorating the effects of unenforceability under the *Statute of Frauds*. But it is also commonly used in many other contexts. For example, in *Symons v. Williams* (1875) 1 V.L.R. 199, 216, Barry J. considered that "[u]ndue influence ... is in all cases bottomed in fraud."

²⁸⁶ See *Earl of Chesterfield v. Janssen* (1751) 2 Ves. Sen. 125; 28 E.R. 82.

²⁸⁷ *Stern v. McArthur* (1988) 81 A.L.R. 463, 488, per Deane and Dawson JJ.

conduct which activates equitable and common law liability rules within one general idea: that of abuse of power or position. The cases characteristically concern defendants in some superior position to that of the plaintiffs, possessing information not known to the other parties to a transaction (as in unilateral mistake cases), possessing some special knowledge generally, holding a position of trust or power, being aware of a particular vulnerability of the plaintiffs, or simply being in a better position *vis-à-vis* the plaintiffs to avert harm. The concern of the doctrines under consideration is with defendants who fail to use (either actively or through inaction) in an acceptable way, that is, abuse, such power or position.

Typically, the cases under consideration concern defendants who fail to have due regard for the consequences of their actions on their "neighbours", that is, persons who are particularly vulnerable to harm should the defendant act or fail to act in an acceptable way. The "neighbourhood" idea, and related concepts such as "proximity" and "duty of care", are evident in the cases.²⁸⁸ Other tort ideas are also emerging as important. As Finn has indicated, "liability limiting devices of risk allocation, *volenti* and the like are emerging (often under colourable guises) as available vehicles to blunt the otherwise too-unconstrained reach of equity."^{288a}

In describing unconscionable conduct in its tort-like manifestations, Finn has summed up the burden of the cases as being that:

a party should not, for its own advantage, or to the other's detriment, use its superior relative power or position to exploit the vulnerability of the other, be this by positive acts of manipulation or through inaction.^{288b}

This may well prove a useful signpost to the circumstances in which tort-like liability *generally* may be imposed. As Finn notes, the abuse of power or position may take one of two forms: (1) positive acts of abuse, or (2) inaction, that is a failure to act in circumstances where there exists a duty to assist another. Equitable and common law liability rules and doctrines may be triggered by conduct of either type and it is proposed only to note some examples.

²⁸⁸ See Finn, P.D., "Unconscionable Conduct", Unpublished Paper delivered to QLD Law Society Symposium, 1994, at 7.

^{288a} *Ibid*, 9.

^{288b} *Ibid*, 11.

§ 6.3.2.1.1 *Conduct amounting to a positive abuse of power or position*

(1) Conduct which amounts to an exercise of coercive pressure upon a plaintiff. Common law duress and actual undue influence—which in any case may nowadays “be one and the same phenomenon”²⁸⁹—are perhaps the most obvious exemplifying doctrines. Their concern is with the exercise of threats or pressure in respect of individual transactions where such threats or pressure both compels the will of the “victim” and is considered illegitimate by the law.²⁹⁰ Indeed, as noted in Chapter 4, even if duress is not of itself a tort, coercive conduct will usually infringe at least one of several economic torts, such as intimidation, if it has caused loss.²⁹¹

(2) An abuse of power as exemplified by the second class of undue influence: presumed, or relational, undue influence, as it has been called.²⁹² The concern of presumed undue influence is with particularly close relationships of dependence, such as those which come about through trust and confidence reposed by one party in the other, such that one party may have an ascendancy within that relationship and the other is to some extent peculiarly vulnerable to the former party’s influence.²⁹³ Relations of influence can be seen as examples of fiduciary relationships,²⁹⁴ and a presumption of undue influence arises where a

²⁸⁹ Birks, 184. See also Hardingham, I.J., “Unconscionable Dealing” in Finn, P., (ed.) *Essays in Equity* (1985) 1, 23-4.

²⁹⁰ See *Universe Tankships Inc. of Monrovia v. I.T.W.F.* [1983] A.C. 360, 400 per Lord Scarman. See § 4.4.3.2.

²⁹¹ § 4.4.3.2.

²⁹² Birks, 184. See generally, 204-8.

²⁹³ Certain “well-known relations” (*Johnson v. Buttress* (1936) 56 C.L.R. 113, 134) are presumed to be ones of influence—doctor/patient, solicitor/client, and parent/child, to name a few—as a result of the trust and confidence that inheres in such relationships and the consequent “likelihood of the exercise of authority by the [ascendant] party over the other.” See Meagher, Gummow & Lehane, 386. Trust and confidence and the associated potential ascendancy of one party over another are also the gravamens of relationships which are proved, de facto, by the weaker party to be ones of influence by reference to the specific history and nature of the parties’ relationship.

²⁹⁴ The close affinity of undue influence with fiduciary wrongs is obvious, and in Australian law, at least, relations of influence, whether presumed or proved de facto, have been equated with fiduciary relations. In *Johnson v. Buttress* (1936) 56 C.L.R. 113, 135, Dixon J. considered that in relations giving rise to a presumption of undue influence, the party holding a position of ascendancy

transaction is entered by parties in such a relationship.²⁹⁵ In order to rebut a presumption of undue influence, a defendant must show that the transaction entered into "was the independent and well-understood act of a man in a position to exercise a free judgement based on information as full as that of the [defendant]".²⁹⁶ Hence, a defendant is required to act only in the interests of the reliant party in order to avoid a conclusion that the position of influence has not been abused. Unlike tort law generally, there is thus no need to *prove* wrongdoing; it is presumed. In this regard, undue influence goes well beyond core tort-law ideas, imposing what is almost a strict liability; but even here, there are tort law analogs, such as the notion of *res ipsa loquitur* in negligence.

(3) Misrepresentations, either fraudulent (at common law) or non-fraudulent (in equity)²⁹⁷ which induce another to enter a transaction.

falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one man but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare.

The doctrine of undue influence may then be seen as preventing but one possible type of abuse of a fiduciary relationship, though not all relations of influence can be classed as fiduciary relations and *visa versa* (for example, that of parent and child: Meagher, Gummow & Lehane, 391). In contrast with Australian trends, English law appears to be moving away from a "fiduciary" treatment of undue influence. See *National Westminster Bank Plc v. Morgan* [1985] 1 A.C. 686, which, with its emphasis upon the need for a "manifest disadvantage" before a presumption of undue influence arises tends to shift the emphasis away from the relational concerns of the operation of the doctrine. But see more recent decisions, cited *infra* n. 309. If a perception of undue influence as part of the general law of fiduciaries and fiduciary wrongs is valid, then unjust enrichment proponents may have to concede, as they have done in relation to fiduciary wrongs generally, that liability in such cases is not rooted in unjust enrichment but in the commission of the wrong, with benefit disgorgement being but one remedial option available to "right" that wrong. Stoljar makes the point forcefully in relation to fiduciary wrongs generally: "Unjust Enrichment and Unjust Sacrifice" (1987) 50 M.L.R. 603, 610.

²⁹⁵ Where the law perceives that a relationship of influence exists, then gifts conferred upon the ascendant party (or to a third party at the instance of that party), or contracts entered into with the party (or with a third party at the instance of the party), are presumed to have been conferred or entered into under the party's *undue* influence and can be impugned, unless that presumption is rebutted by showing that there was no undue influence.

²⁹⁶ *Johnson v. Buttress* (1936) 56 C.L.R. 113, 134-5. A number of considerations are relevant to discharging this onus. These have been fully canvassed elsewhere. See, e.g., Meagher, Gummow & Lehane, 393-6; see also Finn, P.D., *Fiduciary Obligation* (1977), 86, for a list of some of the factors considered relevant to determining whether the presumption has been rebutted.

²⁹⁷ At common law, only a fraudulent misrepresentation gives rise to a right to rescind the contract. Equity, however, has been prepared to order rescission of contracts induced by non-fraudulent (innocent or negligent) misrepresentations. See Goff & Jones, 184-5.

Where representations are non-fraudulent, a party making such representations is effectively required to ensure the accuracy of statements made. Since the advantages of making the representations generally flow to the representer should they induce reliance, it seems reasonable to require such a party to bear the consequences of any false statements.²⁹⁸ The representer's positive act (in making the statement) misinforms the plaintiff and leads him or her to enter a transaction he or she otherwise would not have.

At times, positive abuses of power or position are motivated by dishonesty, such as a defendant's intention to deceive, defraud or mislead a plaintiff in order to seize an advantage. For example, a defendant may induce a plaintiff to enter into a contract with him or her by means of fraudulent misrepresentations. At other times, however, a defendant may merely have been careless or irresponsible in his or her actions, for example, where a misrepresentation is non-fraudulent.

§ 6.3.2.1.2 *Conduct amounting to an abuse of power or position by inaction*

(1) Conduct caught by equity's unconscionable dealing doctrine, activated where an individual transaction is entered as a result of a defendant unfairly take advantage of another's special or "serious disadvantage".²⁹⁹ The concern of the doctrine is to prevent a defendant exploiting the plaintiff's vulnerability in circumstances where a duty exists to ensure that the transaction entered by the plaintiff is "just, fair and reasonable".³⁰⁰

(2) Conduct giving rise to equitable relief for contracts entered into under a unilateral mistake, such as in *Taylor v. Johnson*.³⁰¹ In that case, the purchaser of land set out "deliberately in the course of conduct which [was] designed to inhibit discovery" by the vendor of a serious

²⁹⁸ Cf. *Redgrave v. Hurd* (1880) 20 Ch. D. 1, 12-3, per Jessel M.R., who justifies the right to rescind in cases of innocent misrepresentation in terms of wrongdoing, either for a defendant's failure to ensure its accuracy before making a statement intended to induce another into a transaction; alternatively, for a defendant's insistence on keeping a transaction once he or she knows that the representation which induced it was false.

²⁹⁹ See *Blomley v. Ryan* (1956) 99 C.L.R. 362, 405. See generally, *Commercial Bank of Australia v. Amadio* (1983) 46 A.L.R. 402, and *Louth v. Diprose* (1993) 110 A.L.R. 1.

³⁰⁰ *Commercial Bank of Australia v. Amadio* (1983) 46 A.L.R. 402.

³⁰¹ (1983) 151 C.L.R. 422.

mistake under which she was labouring as to the price payable.³⁰² The mistake was not induced by the defendant but the defendant should have apprised the plaintiff as to her mistake.

(3) A defendant's acquiescence in another's detrimental reliance on a false assumption as to an existing or future interest in land, founding a claim in proprietary estoppel. To take one case, *Denny v. Jensen*,³⁰³ in which the plaintiff had improved the defendant's land in the belief that he had a contract to purchase the land. The court pointed out that neither party had "set out to take advantage of the other", but that the defendant "must have known" of the plaintiff's detrimental conduct and thus shared "the responsibility" for the plaintiff's detrimental reliance, because of his failure to alert the plaintiff as to the true position.³⁰⁴ In acquiescence cases, the parties are invariably in relationships of close proximity, where a defendant will have or ought to have known that the plaintiff was "likely" or "might well" undertake detrimental actions³⁰⁵ which the defendant could readily avert. As a result, the defendant is under a duty to take reasonable steps to apprise the plaintiff of the true facts before any detrimental reliance occurs. In short, it appears in such cases that the "neighbourhood idea [is] most clearly at work."³⁰⁶ The significant difference in these acquiescence cases is that the courts are prepared to extend notions of duty of care to require positive actions on the part of a defendant, so that in effect, they are imposing a duty of rescue.³⁰⁷

³⁰² *Ibid*, 433.

³⁰³ [1977] 1 N.Z.L.R. 635.

³⁰⁴ *Ibid*, 637-8. The court considered that the defendant had not made it sufficiently clear to the plaintiff that the arrangement between them was merely a tenancy and that no right to purchase the property existed.

³⁰⁵ See Gray, K., *Elements of Land Law* (2nd ed., 1993), 331, fnn. 13-4, citing cases such as *Crabb v. Arun DC* [1976] Ch. 179, 198, per Scarman L.J.; *J.T. Development Ltd v. Quin* (1991) 62 P. & CR. 33, 52 ff; and *Salvation Army Trustee Co. Ltd v. West Yorkshire MCC* (1981) 41 P. & Cr. 179, 194, 196.

³⁰⁶ Cf. Finn, *supra* n. 288, 16.

³⁰⁷ Cf. Finn, *ibid*, 7, writing generally in relation to unconscionable conduct in its tort-like sphere of operation:

Where this moves beyond the domain of orthodox tort law is that (i) the duty of care, commonly, is a duty to take steps to protect the other from himself or herself—a duty

Again, as with a positive abuses of power, a defendant whose inaction triggers liability may have been acting dishonestly or fraudulently, or merely carelessly or irresponsibly. As proprietary estoppel cases show, at times, a defendant may be motivated by a dishonest "design",³⁰⁸ whereas at other times, a defendant may merely have been irresponsible or careless in allowing the plaintiff to incur foreseeable harm where the defendant could easily have averted such harm by apprising the plaintiff of the mistaken assumption under which he or she was labouring.

§ 6.3.3 The Tort-Like Nature of Remedial Responses: Returning Plaintiffs to Their *Status Quo Ante*

Most of the doctrines which encompass tort-like conduct of the type outlined above characteristically give rise to one remedial response: the rescission of transactions, be they gifts or contracts. If a transaction is set aside, *restitutio in integrum* follows, to return the parties to their previous position. This restitutionary remedy may explain the attempts to incorporate transaction avoidance doctrines generally within an unjust enrichment analytical framework, a position bolstered no doubt by the fact that in many of these cases the defendant will have been motivated by a desire to seize a material benefit from the plaintiff.³⁰⁹ But does this common restitutionary response

of rescue if you like; and (ii) the harm, the detriment, to be averted is characteristically purely economic.

³⁰⁸ Cf. *Huning Ferrers* (1711) Gilb. Rep. 85.

³⁰⁹ But this will not always be the case. For example, irresponsible or careless conduct giving rise to liability will generally not have been engaged in to obtain an advantage from the plaintiff.

In relation to some of these doctrines, there is debate as to whether the material outcome of a transaction entered into is a relevant, even decisive, consideration. For example, in relation to the presumption of undue influence, English courts have suggested that a material outcome is relevant in raising such a presumption. See *National Westminster Bank plc v. Morgan* [1985] A.C. 686. Cf. *Barclays Bank Plc v. O'Brien* [1993] 3 W.L.R. 786, and *C.I.B.C. Mortgages Plc v. Pitt* [1993] 3 W.L.R. 802, particularly at 809, questioning the "limits of the decision in *Morgan*." Even on this approach, however, it is sufficient for the presumption to arise if there exists a material *disadvantage* to the weaker party; it appears that a material *advantage* to the dominant party is not a prerequisite: *Morgan's Case*, 703-7, per Lord Scarman. Although Lord Scarman indicates that "unfair advantage taking" of the party subjected to influence is the basis of the wrong, he makes it clear that any "sufficiently serious" disadvantage is the only prerequisite to the presumption of undue influence arising (704). The Australian courts have taken a different position on the relevance of material outcomes, instead emphasising matters of process in an inquiry as to whether any influence was *unduly* exercised. On this approach, an unfair material outcome, whether in the form of an advantage or disadvantage, merely operates as evidence to rebut or bolster the presumption and is not a prerequisite to its arising. See *Johnson v. Buttress* (1936) 56 C.L.R. 113, 135-6, per Dixon J, and Meagher, Gummow & Lehane, 392-3, citing other

suggest that benefit disgorgement is the principal purpose of these doctrines? Given the analogies drawn with tort, one would not expect that benefit to a defendant is the precondition for liability,³¹⁰ nor that benefit disgorgement is

Australian authorities contrary to the English position. Cf. Hardingham, *supra* n. 289, 4. See, however, *James v. A.N.Z. Banking Group Ltd* (1986) 64 A.L.R. 347, 390.

³¹⁰ Normatively, there appears to be little reason why, given that a defendant's conduct caused the plaintiff's loss, the receipt of a benefit should be a precondition for a defendant's liability. In tort, support for such a proposition can be found in moral theories of "corrective" justice. Numerous attempts have been made to explain all, or some, of tort liability on the basis of theories of corrective justice. For the most part, such theories

claim that the only necessary condition of liability is the causation of a wrongful loss... . Wrongful gain to the defendant is neither a necessary, nor a sufficient condition of liability under this fault-based theory of corrective justice.

See Hurd, H.M., "Correcting Injustices to Corrective Justice" (1991) 67 Notre Dame L.R. 51, 64. Hurd considers theories by Holmes, Epstein, Fletcher, and Weinrib (see 56 for references). And such an approach seems intuitively correct—the defendant's wrongdoing has harmed the plaintiff (that is, upset the status of equality which is the concern of corrective justice) and thus a plaintiff is entitled to be restored to the *status quo ante*. One exception to this generally accepted view is provided by Coleman, who argues that an unjust gain is both sufficient and necessary for liability. As Hurd points out, however, Coleman appears to accept this as an *a priori* assumption, and never fully justifies it. See, e.g., Coleman, J., *Markets, Morals and the Law*, 189 & 375-6, fn.16, where his response does not seem adequate. Although Aristotle's theory of corrective justice (Irwin, (ed.) *Nicomachean Ethics*, 125-6, paragraphs 1132a-1132b) seems to require both profit and loss, according to Aristotle, the mere infliction of a harm is a "profit", so that both a killer and someone who wounds another have profited by their actions. What is required in such cases, of course, is the repair of the damage, rather than "subtraction from [the offender's] profit" (126). Other expressions of Aristotle's views suggest that profit is not essential: "the law looks only at the ... equals, when one does injustice while the other suffers it, and one has done harm while the other has suffered it. Here the judge tries to restore this unjust situation to equality, since it is unequal" (125). This emphasises not the gain of the actor, but the injustice or harmful affects of his or her conduct.

Although theories of corrective justice are all concerned with "wrongdoing", it must be remembered that this term is not always pejorative. Even innocent tortfeasors are liable in torts for the damage they cause. So where a defendant has *caused* a plaintiff's loss (whether in a morally reprehensible way or not), there will be many circumstances in which one can say that the defendant should compensate the plaintiff, irrespective of any gains derived by the defendant. Clearly, causation is not on its own a sufficient ground to justify recovery. In theories of corrective justice, for example, there must have been a "wrongful" loss. The adjective "wrongful" separates out those cases in which recovery will be allowed from those in which it will not. Other factors need to be satisfied. But as the cases of tort-like relief show, such factors may be satisfied in ways other than the breach of tort duties.

For normative reasons, therefore, an enrichment should not be a precondition for legal liability in cases in which a plaintiff's loss is caused by "wrongful" conduct of a defendant. The remedial response to such conduct ought to aim at compensating losses rather than disgorging benefits. A recent case exemplifies the point. In *Van den Berg v. Giles* [1979] 2 N.Z.L.R. 111, the plaintiff (a tenant of the defendant) effected considerable structural alterations and refurbishments on the defendant's house (at a cost of \$22500), in the belief that the defendant had agreed to sell the property to him. The defendant disputed the agreement and in any case, there was no written contract. Nevertheless, it was clear that the defendant had encouraged the plaintiff in his activity and that she was fully aware of the nature of the work and the plaintiff's

the remedial aim of the liability rule. A closer consideration of the remedy of transaction rescission will support such a conclusion.

In most cases, the transactions which are sought to be set aside are contracts. It may be argued that the entry into any contract is of advantage or benefit to a defendant: that the plaintiff's contractual obligation to the defendant is *of itself* a benefit, irrespective, of whether that contract ultimately gives rise to a *material* advantage to that defendant, that is, irrespective of whether it is a "good" bargain.³¹¹ In fact, even if it is a "bad" bargain and results in a material *disadvantage* to the defendant, the contract itself may still be seen as a legal advantage. If we accept this view, then rescission of the contract may be said to amount to the "return" or specific restitution of the very thing the dominant party has received, the contractual rights held by that party.³¹² Logically, such a view is persuasive. If, however, entry into the contract by a plaintiff is perceived to be of benefit to the defendant, then conversely, the *submission* by the plaintiff to the contractual obligation is of equal detriment to that plaintiff. Of course, this does not mean that the plaintiff need have suffered a substantive or material loss as a result of entry into the contract.³¹³ So on the contract-as-benefit approach, gains and losses must always be equal—a zero sum—and the rescission of the agreement can equally validly be seen as a remedy which restores the plaintiff to his or her previous *status quo*. To describe the whole process of rescission as a case of reversing (unjustly gained)

motives for acting as he did. The court concluded "that the defendant deliberately misled and inveigled the plaintiff into spending very considerable sums of money on her property" (120). Yet despite this finding, the court awarded the plaintiff not his costs incurred, but the enhanced value of the defendant's property, that is, her enrichment. On the facts of the case, this was \$20500, a minor difference in amount. Yet the principle is important, and if the enhanced value of the house had been, say, only \$5000 (due to fairly idiosyncratic improvements, for example), an award of such a sum would appear unjust. A theory of corrective justice explains why. The defendant's unacceptable conduct has upset the previous status and caused the plaintiff harm. Such harm should be redressed irrespective of the defendant's gain or enrichment. See also Garner, M., "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 O.J.L.S. 42, 51-2, and Birks, 275.

³¹¹ This view was first brought to my attention by R.A. Bigwood. See Bigwood, R.A., *Fair Dealing in Contract Formation: An Analysis of Exploitation in the Procurement of Bargain Transactions* (1993) Unpublished Doctoral Thesis, Australian National University, 266-68. See Mason J. in *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447, 464. Cf. Deane J. at 489. See also Birks, 65-7, 162-4, 170-3.

³¹² Cf. Birks, *id.*

³¹³ The doctrines under consideration may render a transaction voidable even if the plaintiff has entered a "good" bargain. The issue is one of procedural fairness—whether certain standards of acceptable conduct have been breached, which conduct induced the contract.

enrichments is no more a valid conclusion than describing the whole process as restoring the plaintiff to his or her *status quo ante*, equating with the compensation of (unjustly incurred) *detriment*.

It is the latter description which ultimately appears to reflect the true concern of the courts. This is evidenced by a number of factors. First and foremost is the reasoning of the courts themselves. Where a contract is rescinded, the aim of the courts is to effect *restitutio in integrum*. As the High Court of Australia indicated in *Alati v. Kruger*:

the situation is such that, by the exercise of its powers, including the power to take account of profits and to direct inquiries as to allowances proper to be made for deterioration, [the court] can do what is practically just between the parties, and by so doing restore them substantially to the *status quo*.³¹⁴

Restitutio in integrum may be relatively easy to achieve where property has been transferred, for example, and still remains in the hands of the defendant. Similarly, money payments can usually be readily returned. But even where "precise restitution"³¹⁵ is impossible, where, for example, services have been performed, or complex multi-faceted transactions fully executed, the court will attempt to achieve practical justice between the parties, by utilising remedies such as the reasonable remuneration for work performed or the disgorgement of profits made under a contract.³¹⁶

This desire to achieve practical justice between the parties might suggest that the focus of *restitutio in integrum* in this context is as much on the defendant as it is on the plaintiff. Such a conclusion would be misleading, however, as evidenced by an increasing trend toward compensatory damages being awarded against a defendant where *restitutio in integrum* is not possible or desirable. In the past, where *restitutio in integrum* was not possible, no other remedy was available.³¹⁷ But there is a growing trend in the common law

³¹⁴ (1955) 94 C.L.R. 216, 223-4, per Dixon C.J., Webb, Kitto and Taylor JJ. As Goff & Jones, 199, note, however, "[t]he principle is easier to state than to apply in practice."

³¹⁵ Goff & Jones, 198.

³¹⁶ As in *O'Sullivan v. Management Agency & Music Ltd* [1985] Q.B. 428, in which the fully executed contract entered into under undue influence was rescinded, an account of profits was rendered, but the defendant was granted an allowance of reasonable remuneration for the work performed.

³¹⁷ See generally, *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App.Cas. 1218, 1278, per Lord Blackburn.

world toward damages being an available remedy in response to a number of equitable doctrines previously limited in their remedial armoury to the rescission of transactions. These trends are consistent with the view of Davies J. in the Federal Court of Australia in *Federal Airports Corporation v. Makucha Development*,³¹⁸ who spoke of a "general principle of equity that a court may relieve against the detriment caused by unconscionable conduct". This view is given weight by the High Court's use of "unconscionability" as a cause of action, as well as the increasing remedial flexibility in equity generally.³¹⁹ Indeed, in *Commonwealth v. Verwayen*,^{319a} the majority of the High Court was prepared to award damages in estoppel. In Canada, the courts appear prepared to award "damages" for undue influence³²⁰ or unconscionable conduct, for example, in cases in which no rescission of the transaction is possible,³²¹ or even where no transaction in the form of a gift or contract was ever entered.³²² Although such an approach has been questioned in relation to undue influence,³²³ it does not seem odd and indeed has some force, if one perceives undue influence as but an exemplification of fiduciary

318 (1993) 115 A.L.R. 679, 698.

319 See, e.g., *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, and *Muschinski v. Dodds* (1985) 62 A.L.R. 429. In New Zealand, a damages remedy would almost certainly be available in equity, given the views expressed in a number of recent decisions. See, e.g., *Aquaculture Corporation v. New Zealand Green Mussell Co. Ltd* [1990] 3 N.Z.L.R. 299, and *Mouat v. Clark Boyce* [1992] 2 N.Z.L.R. 559, 569.

319a (1990) 95 A.L.R. 321.

320 This would take the form of a compensatory remedy to recover losses arising from the transaction entered into.

321 *Treadwell v. Martin* (1976) 67 D.L.R. (3d) 493, followed by the Court of Appeal of British Columbia in *Dusik v. Newton* (1985) 62 B.C.L.R. 1, 48. The links of undue influence with both fiduciary wrongdoing and underlying notions of unconscionability suggests that such a remedy will be available in Australia when required.

322 E.g., *Norberg v. Wynrib* (1992) 92 D.L.R. (4th) 449, in which equitable damages were awarded against the doctor of the plaintiff who had sexually exploited her; and *K.M. v. H.M.* (1992) 96 D.L.R. (4th) 289, in which damages were awarded against a parent who had sexually molested his child, in order to protect the non-economic interests of the child against abuse by a fiduciary.

323 Meagher, Gummow & Lehane, 397, who state in relation to *Treadwell v. Martin* (1976) 67 D.L.R. (3d) 493, that "[e]quity rescinds transactions vitiated by undue influence. Neither it nor the common law gives damages in respect of such complaint." Given the wrongful conduct, there is also normative justification for requiring a defendant to bear any losses. See, however, *Cheese v. Thomas* [1994] 1 F.L.R. 118, an undue influence case in which losses incurred upon the rescission of the contract were shared between the defendant and plaintiff. With respect, in the writer's view the decision is not justifiable.

wrongdoing³²⁴ so that consequently the full range of remedies available for fiduciary wrongdoing ought generally be available.

Such trends toward remedial flexibility in equity appear to be gaining momentum. In Australia, at least, the mood has been captured by statute, in s. 51AA of the *Trade Practices Act, 1974* (Cth) which proscribes corporations in trade or commerce³²⁵ from engaging "in conduct that is unconscionable within the meaning of the unwritten law". Consequently, a wide range of remedial response under Part VI of that Act are available against corporations engaged in unconscionable conduct. Leaving these statutory developments aside, it appears increasingly likely that compensation will be available for breach of many equitable duties where rescission (that is, specific restitution) is not possible or desirable. But this suggests that even where restitution is awarded in response to, say, undue influence or unconscionable conduct, the principal remedial purpose of such an award is restorative, not benefit disgorgement.³²⁶ If no benefit has been received, such as where a plaintiff, say, enters into a contract with a third party as a result of a defendant's tort-like conduct, a compensatory remedy may in any case still be available.³²⁷

³²⁴ Albeit this is a specialised kind of fiduciary wrongdoing in which a certain capacity or opportunity to influence exists.

³²⁵ These terms are broadly defined within the *Trade Practices Act 1974* (Cth).

³²⁶ To counter the view that compensation to restore a plaintiff to his or her previous position is the principal concern of transaction avoidance doctrines, it may be argued that the very recentness of these developments toward remedial flexibility and their still quite uncertain status suggests that compensation was never previously the aim of these equitable doctrines. Where, in the past, *restitutio in integrum* was not possible, then no remedy was available and plaintiffs would have to bear any losses themselves. Two responses can be made to such an argument. First, although it is true that if damages were unavailable, a plaintiff would have had to bear any losses where *restitutio in integrum* was not possible, equally, a defendant would have been allowed to retain any gains, despite the obvious "unjustness" of their acquisition. Secondly, the unavailability of a damages remedy may be a consequence of the historical development of the doctrines themselves and of the remedial restrictions existing generally in equity. If this is so, then modern trends toward remedial flexibility may provide a clue as to the real concerns of these doctrines. Will the courts generally award compensatory damages, in lieu of rescission, or limit recovery to the disgorgement of benefits? Australian and Canadian developments suggest the former. The point is made by Finn, *supra* n. 274, 4-5, in relation to unconscionable dealing:

The unconscionable dealings doctrine, because of its presently limited remedial capability, may, despite its obvious purpose, have the appearance of a restitutionary doctrine. But if it is to have the capacity to realise its purpose in fact [preventing abuse of power], what is required is a tort-like power to award damages for loss.

³²⁷ See discussion of duress, § 4.4.3.2. In such a case, unjust enrichment would be shown to be utterly inapplicable. No material or other benefit, such as a right to enforce a contract, can be said to have passed to a defendant, unless the third party's relationship with

§ 6.3.4 Conclusion: Tort-Like Liability

The concepts and ideas of tort are pervasive throughout much of equity and the common law where rules are activated by tort-like conduct of a defendant causing harm. Moreover, such concepts and ideas are entirely appropriate, given that the types of conduct which activate such liability rules share considerable affinity with the types of conduct caught within mainstream tort. Thus "fraud", "unconscionability", "foreseeable harm" and "duty of care" are obviously appropriate tools to determine the sorts of issues confronted by the courts. The fact that such inquiries often occur in the context of transactions which are sought to be rescinded ought not obscure this fundamental point. It is particularly where rescission of a transaction is not possible, or where a benefit has not been conferred upon a defendant (but where liability is still sought to be imposed), that the value of such tools becomes obvious.

By way of contrast, to utilise unjust enrichment in circumstances of tort-like conduct simply does not enlighten us. Unjust enrichment asks the wrong questions, particularly by commencing with an inquiry as to whether a defendant has been enriched. To take one example, raised by the Canadian case of *Peel (Regional Municipality) v. Canada*,³²⁸ in relation to compulsion. In that case, the municipality sought to recover payments it had been compelled to make to a *third party* under an (as it turned out) *ultra vires* statutory provision of the Canadian government. The Supreme Court of Canada rightly concluded that the government had not benefited as a result of the municipality's payments, the government being under no obligation to make such payments itself, so that consequently, no duty owed by the government had been fulfilled. Recovery was thus not allowed. But to deal with an issue of compulsion in this way is to suggest that a compelling party can only ever be liable in law where that party has benefited. This, with respect, seems incorrect,

the defendant is such that some of the third party's benefits redound to the defendant. Only if a plaintiff's *accession* to the defendant's *demands* is deemed to be of benefit could unjust enrichment apply, but such a benefit seems very tenuous (and difficult to value) and would appear to be no more than a contrivance to sustain the unjust enrichment analysis. If rescission of the contract with the third party is possible, then such compensatory remedies may not be necessary. Such rescission will be available where the third party is an accessory to the defendant's wrongdoing or knows or had reason to know of it. If a plaintiff conferred a gift upon the third party who still has the plaintiff's property or retains money that is still traceable, there is a strong case to be made that such property or money should be returned, even where the third party was quite innocent of any wrongdoing by the dominant party to the relationship. The issue is considered further in Chapter 9.

³²⁸ (1992) 98 D.L.R. (4th) 140.

as the discussion of duress in Chapter 4 has already suggested.³²⁹ Instead, *Peel v. Canada* raises fundamental issues of public policy, in particular, the extent to which a government in performing its functions, outside of its legal powers, can be held liable in tort for losses incurred as a result.³³⁰ Unfortunately, the Supreme Court precluded an in-depth consideration of this rather topical issue³³¹ by concluding at the outset that an action in tort was not available.³³²

³²⁹ § 4.4.3.2.

³³⁰ The case really seems to raise two fundamental issues. First, the one already noted, namely, the extent to which tort liability attaches to illegal government actions causing harm. This is a topical question in public law. See, e.g., *Northern Territory v. Mengel* (1994) 95 N.T.R. 8, the judgments of both Priestley and Angel JJ. Determination of this issue is ultimately dependent upon general public policy concerns. The second fundamental issue is that of the extent to which the demand made by the government in *Peel v. Canada* equated with *ultra vires* provisions imposing taxes. Rather than tax the municipality and use the revenue to make the desired payments, the government had instead short-circuited such a process and directed the municipality to make the payments to the third parties. If the former approach had been adopted, the issue would have been whether and in which circumstances such invalid taxes should be recoverable (presuming the provisions imposing taxes also to be *ultra vires*). See generally *Air Canada v. British Columbia* (1986) 30 D.L.R. (4th) 24, and *Woolwich Building Society v. Commissioners of Inland Revenue* [1992] 2 All E.R. 737.

³³¹ See discussion, *ibid.*

³³² 98 D.L.R. (4th), at 144.

COMMON INTERESTS: The Consequences of Unprovided For Contingencies

[W]here money or other property is paid or applied on the basis of some consensual joint relationship or endeavour which fails without attributable blame, it will often be inappropriate simply to draw a line leaving assets and liabilities to be owned and borne according to where they may prima facie lie, as a matter of law, at the time of the failure.¹

§ 7.1 INTRODUCTION

As was observed in Chapter 6, much of Restitution is concerned with liability imposed as a result of particular conduct of a defendant, which conduct often exhibits many of the characteristics of conduct giving rise to liability in contract or tort. In such cases, liability in Restitution may be seen as filling gaps arising from the failure of contract or tort doctrines to encompass such conduct. Yet other concerns are also addressed by liability rules in Restitution, and it is to one of these concerns that we now turn.

Where parties share a *common* interest in a matter (the nature of which interest will be considered below), in many cases events take their expected course, relationships achieve their goals, plans come to fruition. But where a contingency, perhaps not foreseen, but in all cases not provided for,² affects the

¹ *Muschinski v. Dodds* (1985) 62 A.L.R. 429, 454, per Deane J.

² Parties may have foreseen events, but did not provide for them, either because they were considered too remote or because they did not apply their minds to the question of how to deal with such circumstances. Even where the particular event is a clearly foreseeable outcome (such as the eventual break-up of a "rocky" marriage or de facto marriage), the parties may have deliberately avoided turning their minds to a mutual consideration of the consequences of such an outcome.

Even where events follow their expected course, this need not result in all of the parties' expectations being fulfilled. Expectations may be based on unrealistic assumptions, for example, such as where a party enters into a particularly bad, imprudent or foolish bargain, or

matter in which the parties have a common interest—a de facto marriage breaks down, a ship is wrecked at sea, or a contract is frustrated—it may result in “gains and losses [which] are haphazard, unanticipated, and the product of chance”³ to one or both parties. The question then arises as to whether any legal interference with the *status quo* after the contingency is warranted. Of course, if the parties have provided for the contingency which arises, having assumed, expressly or impliedly,⁴ the risk of its consequences, then the law will generally respect the assumption of risk. Similarly, where a party has engaged in wrongful conduct, or was at fault in some way, that party may be held fully responsible to bear all losses or give up all benefits arising from the conduct or fault. Such cases, however, are not within the province of this chapter.⁵

alternatively, events may not have taken a hoped-for course. As has been pointed out in the context of contract, by Kull, A., “Mistake, Frustration, and the Windfall Principle of Contract Remedies” (1991) 43 *Hastings L.J.* 1, 1-4, mistake and frustration are “endemic” to the bargain transaction. “Every agreement is to some extent ‘frustrated’ in that the precise cost and value of either side’s performance can never be known in advance. We form contracts in the knowledge that our information is imperfect”. Although this is accepted as an “inevitable incident of every contractual exchange”, the “risk of such disparity is usually allocated by the express or implied terms of the contract.” Thus, though the final outcome may not itself have been what the parties expected, in most cases it will nevertheless have been arrived at in a way which was within the contemplation of the parties.

³ Beatson, 80.

⁴ By means of some contract or agreement, for example, but such assumption of risk must cover the actual contingency which has arisen.

⁵ In such cases, a reason exists for shifting the losses or benefits. Cf. Fried, C., *Contract As Promise*, (1981), (hereinafter: “Fried”), 70:

In benefit and harm [principles] the predicate for shifting a burden or an advantage is the responsible act of one of the parties. Such responsibility may arise out of culpability—including negligence—a voluntary act, or a prior assumption of responsibility, as by a contract. ... [I]n some situations [however] there may be no basis for holding the parties responsible or accountable to one another. Rather, persons in some relation, perhaps engaged in some common enterprise, suffer an unexpected loss or receive an unexpected gain.

Cf. Kull, *supra* n. 2, 4. Where a contingency arose because of the fault of one of the parties, such fault must usually be actionable to give rise to obligations justifying a shifting in total, losses and benefits. In the contractual sphere, such fault would normally amount to a breach of contract and consequently there will be no difficulty in determining how losses and benefits should be allocated. A particularly interesting contract case, however, is that of *Albre Marble & Tile Co. v. John Bowen Co.*, 155 N.E. (2d) 437 (1959), in which the court proceeded upon the basis that the contract had been “frustrated”, but nevertheless held the defendant to be liable for losses incurred as it was to some extent at “fault” in that its “involvement in creating the impossibility was greater than that of its subcontractors [the plaintiff]” (440). Yet this fault was not sufficient to be actionable as a breach of contract and did not preclude a finding that the contract was “frustrated”.

Where unprovided for contingencies have resulted in haphazard losses⁶ and benefits⁷ to parties with a common interest, the law commonly resorts to a principle of sharing, encapsulated by the phrase that there be an "equality of burden and benefit",⁸ to adjust the parties' respective positions. But "equality" here does not necessarily connote equal sharing. Different parties may have disproportionately contributed to the matter in which they share a particular common interest. To divide losses and benefits equally in such cases may not be a particularly appropriate response, for "to treat as equal that which is unequal ... may be a very odious form of discrimination."⁹ And nor does the law respond in such a way. Instead, a presumption of "equality" generally results in a proportional distribution of losses and benefits, a proportionality determined by the parties' contributions to the matter in which they have a common interest. For example, if two co-sureties (co-sureties, it will be seen, share a common interest) have guaranteed a debt to \$10,000 and \$5000 respectively, clearly their respective interests in the matter are disproportionate, and moreover, can be measured in clear numerical terms. Consequently, this writer uses the language of the principle of "just sharing", rather than the language of "equality". The former appropriately encompasses notions of parties' just deserts, or what they might reasonably be entitled to expect, given their contribution to a common interest.

Before we consider in detail the context and scope of its operation, it is useful to exemplify the idea of a principle of just sharing by reference to one area of law—the division of losses and benefits upon the premature dissolution of partnerships or joint ventures¹⁰—where such a principle operates

⁶ As Kennedy, D., "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L.R. 1685, 1717, points out, "[s]haring may also involve participation in another's losses".

⁷ Such losses and benefits are not measured as against parties' pure expectations, such as under a contract, for example, since the particular contingency will have prevented the parties pursuing their interests to a satisfactory conclusion. In contract, the parties' expectations are unfulfilled precisely because of a frustrating event, so that no further performance on the part of either party toward completion of the contractual obligations is possible or necessary.

⁸ See *Houston v. Bain*, 196 S.E. 657 (1938), citing *Wayland v. Tucker*, 50 Am. Dec. 76. See also *Deering v. The Earl of Winchelsea* (1787) 2 Bos. & Pul. 270, 274, and *Ellesmere Brewery Co. v. Cooper* [1896] 1 Q.B. 75, 80-1.

⁹ Neave, M., "Living Together—The Legal Effects of the Sexual Division of Labour" (1991) 17 Monash U.L.R. 15, 17, quoting O. Kahn-Freund, (1971) 4 Human Rights J. 493, 510.

¹⁰ Some joint ventures are partnerships, but not all. A joint venture has been defined in *Brian Pty Ltd v. United Dominions Corporation Ltd* [1983] 1 N.S.W.L.R. 490, 506, per Samuals J.A., quoting from Williston, *Treatise on the Law of Contracts* (3rd ed., 1959), 555-6, as:

unequivocally. It must be stressed that while the rules governing dissolution of partnerships and joint ventures are not claimed for unjust enrichment or Restitution, such rules do illustrate the ideas which operate in other areas of law claimed to be unjust enrichment-based, which areas will be considered further below.

Where a partnership or joint venture prematurely is dissolved without "attributable blame" of any party,¹¹ the *prima facie* position, as in cases of ordinary dissolution, is that losses and benefits of the partnership or joint venture at the time of the dissolution are distributed according to the parties'

an association of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without, however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.

On appeal in the High Court, (1985) 157 C.L.R. 1, 10, see per Mason, Brennan and Deane JJ.:

As a matter of ordinary language, [joint venture] connotes an association of persons for the purpose of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. ... The borderline between what can properly be described as a "joint venture" and what should more properly be seen as no more than a simple contractual relationship may on occasions be blurred.

The indicia of partnership, by way of contrast, are generally stated in terms of parties carrying on business in common with a view of profit. See Fletcher, K.L., *Higgins & Fletcher The Law of Partnership in Australia and New Zealand* (6th ed., 1991) Chp. 2, (hereinafter: "Fletcher"); and I'Anson Banks, R.C., *Lindley and Banks on Partnership* (16th ed., 1990) Chp. 2, (hereinafter: "Lindley & Banks"). It is often a failure to satisfy the second requirement of carrying on business *in common* which distinguishes a joint venture from a partnership. "It is the mutuality of rights and obligations that is so crucial to the existence of a partnership" and which will be lacking in joint ventures in which parties pursue their own several interests and goals, though within a common scheme in relation to a particular project. See Griggs, L., "Joint Ventures, Partnerships and Fiduciary Obligations" (1994) Q.L.S.J. 77, 78-9.

¹¹ *Muschinski v. Dodds* (1985) 62 A.L.R. 429, 454, per Deane J.

agreement.¹² Where parties have not agreed as to the appropriate consequences of dissolution, however, to simplify the position somewhat, debts owed to outside creditors (that is, losses) are shared proportionally according to the proportion in which profits were to be distributed; any residue above initial capital contributions is shared in the same proportion; and finally, capital contributions are returned, again proportionally, according to each party's initial contribution.¹³ In short, the parties are required to share losses and benefits proportionally according to their input into the relationship and their expected benefits from the relationship.¹⁴ The effect of the application of these rules is clear: parties in partnerships or joint ventures cannot individually profit at the expense of, or be required individually to bear losses for the benefit of, the partnership or joint venture as a whole.

In both partnerships and joint ventures, the requirement that losses and benefits be shared by the parties is an aspect of the parties' joint interests deriving from their association for the purposes of a particular project. Indeed, in the case of partnerships, the parties share mutual interests, meaning that all parties must serve the interests of the group as a whole and are thus not free to pursue without restriction their several interests.¹⁵

¹² *Muschinski v. Dodds* (1985) 62 A.L.R. 429, 454-5, per Deane J. See also *Corpus Juris Secundum*, Vol. 48A, 452-3, 463. The dissolution of partnership is governed by the various *Partnership Acts* in Australian States and the United Kingdom. A similar rule of equity applies to joint ventures which are not partnerships. The position under the *Partnership Acts* merely encapsulates the pre-existing common law (or more accurately, equitable) position. The relevant section of the various State Acts in Australia is derived from the United Kingdom *Partnership Act 1890*, s. 44, which itself follows almost word for word the statement of the common law found in the 5th edition of *Lindley on Partnership*, 402, the seminal text on the topic. See *Lindley & Banks*, 641, fn. 15. For a case pre-dating the *Partnership Act 1890*, see *Lyon v. Tweddell* (1881) 17 Ch. D. 529, 531, per Jessel M.R.:

[I]t is the duty of the court when dissolving a partnership on equitable grounds to decide upon what fair terms the dissolution should be made. ... [I]t is the duty ... to do what is equitable between the parties.

¹³ See s. 44 of the NSW and United Kingdom *Partnership Acts*. This position is similar to that governing dissolution in the ordinary course of events. The courts may also apportion equitably any premium paid on entry into a partnership. Even before the *Partnership Acts*, the courts were prepared to apportion pre-payments or premiums upon frustration, so that strict common law rules applicable to the frustration of ordinary contracts were not applicable to partnership. Cf. *Atwood v. Maude* (1868) 3 Ch. App. 369.

¹⁴ Of course, in applying such a general principle, detailed rules have developed to take into account the myriad of possible fact variations which may arise. See, for example, the rule in *Garner v. Murray* [1904] 1 Ch. 57, and the divergence of opinion as to the method of application of the rule. See *Fletcher*, 256, fn. 307.

¹⁵ Cf. *Meagher, Gummow & Lehane*, 130.

However, the operation of a principle of just sharing is not limited to parties who share mutual or joint interests. The notion of a common interest, sufficient to give rise to a principle of just sharing, is a broad one. The essential feature distinguishing relationships in which parties can be said to have a common interest appears to be that such parties share a purpose or are pursuing the same hoped-for outcome, so that any contingency adversely or propitiously affects the prospects of achieving such a purpose or outcome. Parties with a common interest share in a "community of interest",¹⁶ as it so aptly has been described, and stand in a closer relationship than that which is shared "in the abstract relation of fellow citizens",¹⁷ at least in relation to the matter forming the subject of their common interest. Such a relationship is clearly evident in partnerships and joint ventures.

Other examples of parties with common interests include those who enter into relationships of marriage or de facto marriage to pursue co-operatively common domestic, social and economic goals. Each party usually enters into such a relationship to fulfil his or her individual needs, but through the pursuit of common goals by pooling resources (financial or otherwise) with another, modifying behaviour, forgoing other opportunities, and so on. A very different type of relationship which nonetheless similarly exhibits a modification of behaviour by parties to pursue a common interest is a contractual relationship.¹⁸ Parties to a contract come together to pursue their several interests by means of the (hopefully) fruitful completion of a transaction.¹⁹ Relationships of these kinds, where parties have deliberately and actively come together to pursue certain goals, will be called common

¹⁶ Goff & Jones, 301.

¹⁷ Fried, 73. At 72, Fried has said in relation to parties standing in a contractual relationship:

By engaging in a contractual relation A and B become no longer strangers to each other. They stand closer than those who are merely members of the same political community. ...[T]hey are joined in a common enterprise, and therefore they have some obligation to share unexpected benefits and losses in the case of an accident in the course of the enterprise.

See also Kennedy, *supra* n. 15, 1717-8.

¹⁸ Clearly then, the notion of a common interest is broader than the notion of a joint venture as, of course, most contractual relationships are not joint ventures. See *infra* n. 132.

¹⁹ See Fried, 72. In most cases, contracts are pursued by all parties in the belief that completion of the contract will benefit each of them. Otherwise, it is unlikely that the exchange would have occurred.

endeavours. This is a term of convenience which describes cases in which parties share a close relationship, as opposed to other types of common interests. At its broadest, the notion of parties sharing a common interest encompasses even parties not pursuing a common endeavour, but who simply have assumed a common risk in relation to a matter. A common interest may be discernible even amongst strangers, such as where co-sureties unbeknownst to each other have a common interest in their principal debtor's satisfaction of his or her debt;²⁰ or where individual cargo owners, strangers to each other, have a common interest in the safe voyage of a ship on which their cargo is carried. In such examples, it is merely circumstance which "unites" the parties.

Since the concern is with parties who are completely blameless in respect of the losses and benefits at issue, and since there are no assumptions or allocations of risk to protect or enforce, justification for adjusting parties' positions by the application of a principle of just sharing must lie elsewhere. Such justification lies with the parties' common interest and the community of interest to which it gives rise. It would seem inappropriate that an individual should suffer for the advantage of the "community" as a whole, or profit at the expense of the community as a whole. Precisely because contingencies or accidents *might* affect *all* parties, but in the circumstances have fortuitously resulted in losses and benefits being disproportionately distributed, we as members of a community might be entitled to expect to share such losses and benefits. This is an "unavoidably normative" determination²¹ based on what reasonable persons in the community are entitled to expect from their fellow members of the community. As Fried points out in relation to the frustration of contracts,

[s]ince actual intent is (by hypothesis) missing, a court respects the autonomy of the parties so far as possible by construing an allocation of burdens and benefits that reasonable persons would have made in this arrangement. ... "Reasonable" parties do not merely seek to accomplish rational objectives; they do so constrained by norms of fairness and honesty.²²

²⁰ Of course, in most cases, co-sureties will be aware of each other's commonly undertaken obligation and may even be joined on the same instrument.

²¹ Fried, 73.

²² *Id.* Such an allocation must be made on the basis of principles external to the intentions of the parties, as they have not provided for the contingency which has arisen. However, we can still look to any agreement of the parties (where they are in a consensual relationship) to determine what is reasonable in the circumstances, so that one "treats the [agreement] as a kind of charter or constitution for the parties' relation." Cf. Fried, 73. For a

As we have already seen, a policy choice in favour of a principle of just sharing has been made by the law in relation to partnerships and joint ventures. There are, however, other possible ways in which the law could respond to losses and benefits resulting from unprovided for contingencies. For example, losses and benefits could be left to lie where they fall,²³ so that an individual may indeed be left to suffer for the common good, or be allowed to benefit at the expense of the community. This was the initial response of the law to the frustration of contracts. The undeniably harsh consequences of such an approach has led to its amelioration by the application of restitutionary remedies, so that benefits gained at another's expense are required to be disgorged, leaving losses alone to lie where they fall.²⁴ This latter solution is one which follows from an unjust enrichment approach to this type of problem.²⁵ Interestingly, where a party's benefit corresponds with a loss of another party, restitution in such circumstances does equalise the parties' losses and benefits.²⁶ But where losses and benefits do not correspond (for example, only losses have been incurred), focusing purely on benefits is arbitrarily to draw a line which leaves part of the problem unaddressed. Such a solution seems inappropriate as contrary to what reasonable persons are entitled to

summary and discussion of Fried's views, see Trebilcock, M.J., *The Limits of Freedom of Contract* (1993), 141-6.

²³ *Chandler v. Webster* [1904] 1 K.B. 493. Note the response to this solution by Fried, 65-6: "The reasons why some losses are shifted and others not are as various as the law itself, but there must *be* reasons. Letting the loss lie where it falls is not an argument, a reason; at best it restates one possible conclusion of an argument." For well-articulated reasons for letting losses and benefits lie in the contractual context, see Kull, *supra* n. 2, whose views are discussed *infra* n. 135.

²⁴ See, for example, the discussion in *Fibrosa Spolka v. Fairbairn Lawson Combe* [1943] A.C. 32, in the context of frustrated contracts, as to the common law's incapacity to provide remedies to effect the sharing of only losses. Such a view, however, seems to ignore the doctrines to be considered below, as well as a willingness by the courts to require losses to be shared under frustrated partnership agreements, even before the *Partnership Acts* were passed. See Higgins & Fletcher, (4th ed., 1981), 214-5.

²⁵ See Stewart, A., & Carter, J., "Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal" (1992) 51 C.L.J. 66, who advocate such a view.

²⁶ Thus, where A pays B \$1000, as a pre-payment under a contract which is subsequently frustrated before either party has incurred any further costs under the contract, restitution of the money would effectively distribute equally losses and benefits resulting from the frustration. Thus a money had and received award is one possible remedial mechanism for giving effect to a principle of sharing.

expect where they share a common interest, and generally,²⁷ the courts do not apply such a one-sided solution in other areas of law and have accepted a principle of just sharing.²⁸

Let us turn now to a consideration of the operation of the principle of just sharing within specific areas of law. Historically, a principle of sharing "burdens and benefits" has been accepted in a number of areas of law and has been justified by appeal to broad equitable notions. More recently, the principle is being utilised to provide solutions to new problems. Topics to be considered are: (1) the maritime law of general average contributions; (2) rights of contribution arising amongst co-sureties, and parties in similar relationships; and (3) property disputes arising from the break-up of domestic relationships.²⁹ A fourth area, the frustration of contracts, will also be considered. Although the principle has not been consistently applied in contract cases, the results of many of the cases are consistent with such a principle. Further, in some jurisdictions, legislative initiatives have adopted the approach suggested in this chapter. It will be argued that the frustration of contracts raises problems sufficiently similar to other cases in which unprovided for contingencies impinge upon parties with a common interest. Consequently, it will be argued that the same underlying rationale for legal intervention—the principle of just sharing—is equally as applicable as in those other areas of law,³⁰ and that the law is moving toward the acceptance of such a policy choice.

§ 7.2 THE ORIGINS OF THE PRINCIPLE: General Average Contribution in Maritime Law

The doctrine of general average contribution in maritime law is of ancient lineage; its origins can be traced back to Rhodian law of as early as 1000

²⁷ See, however, the discussion of frustration of contract, § 7.5.

²⁸ A similar policy choice, between sharing losses amongst the community or allowing individuals to suffer for the community as a whole, has been faced in other areas of law as well. See, for example, developments in tort law in colonial Australia: see Finn, P., *Law and Government in Colonial Australia* (1987) 110.

²⁹ The discussion will mostly be limited to de facto relationships, for reasons which will be outlined below.

³⁰ See Fried, 69-73; and Kennedy, *supra* n. 6, 1718.

B.C.³¹ The doctrine applies where a ship carrying cargo faces a danger or emergency³² necessitating the sacrifice³³ of some of that cargo or part of the ship,³⁴ or the incursion of "extraordinary expenditure",³⁵ for the purpose of safeguarding the "common maritime adventure". If as a result of such a "general average act", as the sacrificing conduct is called,³⁶ at least part of the endangered property is thereby preserved, the law requires all parties to contribute to losses incurred by the "sacrificing owner".³⁷ Of course, the sacrificing owner will rarely have acted personally; the actions will usually have been carried out by the master of the ship, who, if acting reasonably and in the interests of the voyage as a whole, is authorised to take appropriate steps to safeguard the voyage, including by engaging in sacrificing conduct.³⁸ The

³¹ See *Pirie & Co. v. Middle Dock Co.* (1881) 44 L.J. 426, 429; *Simonds v. White* (1824) 2 B. & C. 805; *Aitchison v. Lohre* (1879) 4 App.Cas. 755. See also Wilson, D.J., & Cooke, J.H.S., *Lowndes & Rudolf: The Law of General Average and York Antwerp Rules* (11th ed., 1990), 13, (hereinafter "Wilson & Cooke").

³² As to which, see Goff & Jones, 338-9, for the types of perils sufficient to trigger the jurisdiction. There must have been an "imminent and real danger" for there to have been a sufficient emergency.

³³ The sacrifice must be genuine, in the sense that it must not involve merely the jettison of property already destroyed or irretrievable, for example, and the sacrifice must have been incurred voluntarily: *Pirie & Co. v. Middle Dock Co.* (1881) 44 L.J. 426.

³⁴ Sacrifice includes damage sustained to the ship. See, e.g., *The Seapool* [1934] P. 53, and *Birkley v. Presgrave* (1801) 1 East 220.

³⁵ "Extraordinary expenditure" includes contractual obligations reasonably incurred, so long as they are a "direct consequence" of the act giving rise to a right to general average contribution: *Australian Coastal Shipping Commission v. Green* [1971] 1 Q.B. 457, 481. See also Wilson & Cooke, generally at A68-A95, and Goff & Jones, 337-8. The cost of repairs, including temporary repairs, necessary for completing a voyage are subject to general average contribution: *Marida Ltd v. Oswal Steel* [1994] 1 W.L.R. 615.

³⁶ For some definitions of "general average act", see *Australian Coastal Shipping v. Green* [1971] 1 Q.B. 456, 478-9. Lord Denning cites the York Antwerp rules (internationally agreed rules which seek to standardise the law of general average) as one definition:

There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure. (1950, rule A).

³⁷ In relation to an individual item of cargo, who bears the risk of the loss of that cargo will depend on any contractual relationship governing such cargo. The risk of the loss may lie with a buyer or a seller, or an insurer, for example.

³⁸ *The Seapool* [1934] P. 53, 64. As to whether a general average act must have been authorised by the master, see Goff & Jones, 339.

losses incurred as a result of the general average act³⁹ must be contributed to proportionally by all those involved in the concern,⁴⁰ including the "owners" of the losses. The contributions of the parties are determined in accordance with the respective assumed value of all cargo, the ship and sacrificed property and expenditure.⁴¹ The sacrificing owner is also entitled to a lien over any goods saved.⁴²

The underlying rationale for the right to contribution is usually stated in the broadest of terms. In the words of Watkin Williams J.,

[i]t is a law founded upon justice, public policy and convenience, and rests ... upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force⁴³

These "obvious" reasons, however, are usually vaguely stated: the doctrine is said to rest on "foundation[s] in the plainest equity" and the "dictates of natural justice".⁴⁴ It is clear, though, that the rule is not dependent upon any contract, express or implied, between the parties,⁴⁵ although most

³⁹ Known as a "general average loss", a definition of which was provided by Lawrence J. in *Birkley v. Presgrave* (1801) 1 East 220, 228-9: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionally by all those who are interested." Such losses must not have been incurred as the result of any negligence or actionable fault on the part of claimants, who will have to bear such losses themselves. An example of this might be where a claimant is a shipowner whose ship was unseaworthy. See *Schloss v Heriot* (1863) 14 C.B. N.S. 59. Cf. *Strang, Steele & Co. v. Scott & Co.* (1889) 14 App. Cas. 601.

⁴⁰ This includes "all persons who chance to have an interest on board of a ship at sea exposed to some common danger threatening the safety of the whole": *Pirie & Co. v. Middle Dock Co.* (1881) 44 L.J. 426, 428-9.

⁴¹ This is as at the time the journey is completed, or, where the journey is not completed, at the point at which the journey is broken, rather than at the commencement of the journey, "so that the owner of the thing lost or damaged may be put in the same position as he would have been in if the sacrifice had not been made": Goff & Jones, 341-2

⁴² Through the agency, for that purpose, of the ship's master: *Strang, Steele & Co. v. Scott & Co.* (1889) 14 App. Cas. 601.

⁴³ *Pirie & Co. v. Middle Dock Co.* (1881) 44 L.J. 426, 429.

⁴⁴ *Strang, Steele & Co. v. Scott & Co.* (1889) 14 App. Cas. 601, 608.

⁴⁵ See, e.g., *Burton v. English* (1883) 12 Q.B.D. 218, per Brett M.R.; *Milburn v. Jamaican Fruit Importing Co.* [1900] 2 Q.B. 540, 546, 550. Note the brief flirtation with an implied contract theory in *Wright v. Marwood* (1881) 7 Q.B.D. 62, 67, and *Anderson v. Ocean Steamship Co.* (1884) 10 A.C. 107, 115.

charter provisions include general average clauses, which reflect the almost universal acceptance of the rule.⁴⁶

Although it has been said that the doctrine is based on notions of unjust enrichment,⁴⁷ its very operation, in providing for the proportional sharing of losses, militates against such an explanation.⁴⁸ Instead, the doctrine can be seen as the earliest manifestation of the principle of just sharing between parties linked by a common interest, where losses have arisen as a result of an unprovided for contingency. For we are dealing with parties who are all concerned in a common adventure, with common goals (the safe carriage of their cargo) and who are exposed to a common risk.⁴⁹ Where the parties have not made provision for the sort of emergency which triggered the general average act,⁵⁰ the law prescribes that the burden arising from the emergency be shared, proportionally, according to the parties' contribution to the venture. As William J. has said:

it would be unjust that the goods of one should be sacrificed for the

⁴⁶ *Castle Insurance v. Hong Kong Shipping Co.* [1984] A.C. 226, 233.

⁴⁷ *Goff & Jones*, 334. Some support for this view may be derived from the language of the courts, which have at times made reference to the benefit conferred upon the defendant. See, e.g., *Morrison Steamship Co. v. Greystoke Castle* [1947] A.C. 265. The term "benefit", however, appears to be used in such cases merely to indicate that the plaintiff has incurred losses for the general good of the voyage and for the defendant in particular. In any case, even if it could be said that a defendant has benefited, such benefit does not determine the measure of any recovery. See *infra* n. 48.

⁴⁸ The clear purpose of the rule is to partially indemnify plaintiffs for their losses. Although the liability attaches to the saved property of the defendant (so that the general average act must at least have been partially successful) the indemnity does not equate with any enrichment received, however that term is defined. For example, if cargo owner A has half of its \$1 million cargo jettisoned, in order to successfully save a ship owned by B (worth \$1 million) and cargo owned by C (worth \$1 million), both B and C may be required to pay one third of A's losses. Yet if the sacrifice prevented the loss of the entire ship and cargo, then surely B and C have been saved \$1 million each. Alternatively, it is entirely speculative to attempt to calculate the value of any property of B or C that would have had to have been sacrificed if A's cargo had not been jettisoned. Such analysis seems entirely unnecessary if one rejects unjust enrichment as an explanation of recovery. And to argue that the parties have been enriched according to their proportional share of the losses is to *presume* an obligation to share according to such proportion. This does not illuminate the basis of that assumption. See § 4.3.3.

⁴⁹ *Cf. Cummings v. Lewis* (1993) 113 A.L.R. 285, 319.

⁵⁰ The parties are always free to expressly or impliedly allocate the risks of the consequences of an emergency. An implied allocation of risk may be assumed where "risk and benefit are not in fair proportion": *Wright v. Marwood* (1881) 7 Q.B.D. 62, 67. In that case, it was held that deck cargo (cattle) was not subject to the right to contribution, as it was "dangerous cargo, certain to be jettisoned owing to the facility of doing it when cargo under hatches would not be."

benefit of all, and that one alone should be sacrificed for the benefit of all, and that one alone should suffer for the common safety.⁵¹

It is from this ancient doctrine that the principle of sharing of burdens and benefits originated, a principle of sufficiently strong appeal that it has been fostered by equity and spread to other areas of law.

§ 7.3 THE WIDER OPERATION OF THE PRINCIPLE: The Doctrine of Contribution

*Contribution amongst co-sureties is founded in natural justice and the equitable principles of equality of burden and benefit.*⁵²

Largely a “child” of equity,⁵³ the doctrine of contribution has a long history⁵⁴ and has manifested itself in a number of fields: the law of sureties and guarantees, insurance law and land law. The basic operation of the doctrine, as well as the inappropriateness of an unjust enrichment explanation of it, are matters considered previously in Chapter 4, and it is not proposed to dwell on these at the present juncture. The important point to be made for our current purpose is that the underlying rationale of the doctrine of contribution is the principle of just sharing of (in these cases) losses,⁵⁵ upon the occurrence of an unforeseen contingency affecting parties with a common interest.

To take co-sureties as an example, the parties’ common interest is readily identifiable where co-sureties have jointly undertaken their obligations on the same instrument. It could even be said that in such a case their relationship amounts to a common endeavour, the parties having together expressly

⁵¹ *Hallett v. Wigram* (1850) 9 C.B. 580; 137 E.R. 1018, 1029. There are also strong public policy grounds for the law of general average. The rules allow the masters of ships the freedom to take whatever reasonable steps are necessary, without taking business considerations into account, to safeguard the ship and its cargo. See, e.g., *Montgomery & Co. v. Indemnity Mutual Marine Insurance Company* [1902] 1 K.B. 734, and *Australian Coastal Shipping v. Green* [1971] 1 Q.B. 456, 475 *in arguendo*.

⁵² *Houston v. Bain*, 196 S.E. 657 (1938), citing *Wayland v. Tucker*, 50 Am.Dec. 76.

⁵³ Though note the right of contribution amongst co-sureties at common law (see Goff & Jones, 307) and its origins in maritime law. See *infra* n. 54.

⁵⁴ See *Albion Insurance Co. v. GIO of N.S.W.* (1969) 121 C.L.R. 342, 350, per Kitto J., who considers that the doctrine’s origins lie in general average contribution in maritime law.

⁵⁵ The duty being one to “divide and equalise any loss” of a party who has paid a disproportionate amount of the principal debtor’s debt: *American Jurisprudence* (2d) Vol. 74, 144.

undertaken the common risk of the principal debtor's capacity satisfactorily to meet his or her obligations. One could perhaps even imply a term into the parties' agreement to justify the imposition of an obligation to contribute, where there is no express term to this effect on the basis of fact.⁵⁶ Of course, where the parties have provided for the contingency, such as where they have modified the right to contribution by express agreement or by implication, such allocations of risk are given effect by the courts.⁵⁷

Where co-sureties were not aware of other co-sureties having undertaken a like obligation,⁵⁸ an analysis of their relationship as a common endeavour is not appropriate. Nevertheless, the parties still clearly share a common interest, not because they have expressly undertaken the obligation together, but because circumstances have dictated that they each share in the "common risk".⁵⁹ In the words of Eyre L.C.B., "they are joined by the common end and purpose of their several obligations, as much as if they were joined in one instrument."⁶⁰ Although it may not be until after a creditor has called upon a surety to pay a debt that such "sacrificing" party realises that the burden has been borne exclusively and for the benefit of the other parties, the doctrine of contribution still operates.

The unprovided for contingency in such cases is not the failure of a principal debtor to meet his or her obligation, for this is the very exigency all the co-sureties have jointly or individually contracted to meet. Instead, the unprovided for contingency arises from the unforeseen context in which a

⁵⁶ If the parties were asked at the time they entered into the contract whether they should be entitled to contribution from the other sureties if one of them were required to repay the whole debt, all parties would almost certainly answer "yes, that goes without saying, we all expect to pay equally." A term to this effect might be implied. Compare this with the implied contract approach adopted in some cases. See *Deering v. Earl of Winchelsea* (1787) 2 Bos. & Pul. 270; 126 E.R. 1276, and *Cornfoot v. Holderson* [1932] V.L.R. 4, 8. See also *Council of Windsor v. Enoggera* [1902] St.R.Q. 23, 80. But cf. *Morgan Equipment Co. v. Rodgers* (1993) 32 N.S.W.L.R. 467: the rights of co-sureties are now "substantially equitable rather than contractual."

⁵⁷ The parties are free to modify the rights to contribution by mutual agreement. Sureties can, for example, waive their right to contribution, or defer it. It is not possible, however, for sureties to unilaterally limit rights of contribution against themselves. See *Hong Kong Bank of Australia v. Larobi* (1991) 23 N.S.W.L.R. 593, and Fisher, S., "Suspension of Co-Surety's Right of Contribution" (1992) 7 B.J.I.B. & F.L. 231.

⁵⁸ It need not be exactly the same obligation, for example, as where co-sureties have guaranteed a debt to different amounts. The suretyship must, however, relate to the same debt.

⁵⁹ *Cummings v. Lewis* (1993) 113 A.L.R. 285.

⁶⁰ *Deering v. Earl of Winchelsea* (1787) 2 Bos. & Pul. 270.

debtor's failure to meet the obligation occurs: that there are other co-sureties who have undertaken the same risk and that the creditor has failed to share the burden of the debt proportionally amongst all of them.⁶¹ A co-surety meeting a disproportionate share of the burden is entitled to seek from other co-sureties contributions to the payments made. Where co-sureties have guaranteed a debt to different amounts, then the right to contribution will arise proportionally, according to the sums guaranteed.⁶² Consequently, the obligation springs not from a notion of "equality in its simplest form, but what has been sometimes called proportionable equality."⁶³

The rationale for the doctrine of contribution has always been stated in the broadest terms, to be "founded in equality",⁶⁴ or in the words of the High Court, on "principles of natural justice."⁶⁵ Not surprisingly, given such flexible statements of principle and their intuitive appeal to fairness, the doctrine of contribution extends beyond the law of guarantees, to insurance law (requiring contributions from co-insurers),⁶⁶ and even to land law (contribution from

⁶¹ At times, it has been sought to justify the doctrine of contribution on the basis of the creditors' inequitable exercise of their legal rights, by enforcing disproportionate contributions from co-sureties. See *Mahoney v. McManus* (1981) 55 A.L.J.R. 673, 680 per Brennan J. Support for this view may be found in *Stirling v. Forrester* (1821) 3 Bli. 575; 4 E.R. 714, 717. Such an argument does not indicate, however, why rights to contribution should then exist against co-sureties, with no corresponding rights against the creditors, and why such rights arise even where a surety simply pays a greater proportion of the debt in order to discharge it, without legal action or threat. Brennan J. appears to accept these difficulties in *Mahoney's* case. The fact is, the creditor "is not bound to take any steps to distribute the burden among the sureties": *McLean v. Discount Finance* (1939) 64 C.L.R. 312, 328, per Latham C.J. Consistently with his or her rights under the contract with the co-surety, a creditor is entitled to seek payment from only one party.

⁶² See, e.g., *Albion Insurance Co. v. GIO* (1969) 121 C.L.R. 342, 350; *Ellesmere Brewing Co. v. Cooper* [1896] 1 Q.B. 75, 80, and *Godin v. London Assurance Comp.* (1758) 1 Burr. 489, 97 E.R. 419, per Lord Mansfield.

⁶³ *Steel v. Dixon* (1881) 17 Ch.D. 825, per Fry J. For example, where three sureties have guaranteed a debt to limits of \$1500, \$1000 and \$500, then any final payment by one of them will have to be borne by the sureties in a ratio of 3: 2: 1.

⁶⁴ *Deering v. Earl of Winchelsea* (1787) 2 Bos. & Pul. 270; 126 E.R. 1276, 1285. See also *Albion Insurance Co. v. GIO* (1969) 121 C.L.R. 342, 350; *Ruabon Steamship v. London Assurance* [1900] A.C. 6, per Lord Redesdale; *Exchange Elevator Co. v. Marshall*, 22 N.W. 2d 403 (1946), 410.

⁶⁵ *Mahoney v. McManus* (1981) 55 A.L.J.R. 673, 676. The Roman maxim *qui sentit commodum, sentire debet et onus* (he or she who enjoys the benefit ought also to bear the burden) has also been cited as a justification for the doctrine and this might be seen as a reference to unjust enrichment notions. See, e.g., *Shelley's Case* (1579-81) 1 Co. Rep. 93b, 99; 76 E.R. 206; *Deering v. Earl of Winchelsea* (1787) 2 Bos. & Pul. 270, 274; and *Cummings v. Lewis* (1993) 113 A.L.R. 285, 319.

⁶⁶ In insurance cases, in order "for a contribution claim to succeed, there must be a common peril and the policies must cover the same interest in the same property": Goff &

parties having a common interest in realty).⁶⁷ All these topics exemplify the principle of just sharing.

§ 7.4 NEW APPLICATIONS OF THE PRINCIPLE: Property Disputes Upon the Breakdown of Domestic Relationships

*[A general principle of equity] operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.*⁶⁸

Where a joint relationship of two persons in a domestic arrangement, such as a married couple, ends, the legal system is often called upon to resolve disputes as to the ownership and respective rights of the parties to property and assets of one or both parties. Where a couple have never legally married,⁶⁹

Jones, 320. In *Godin v. London Assurance Comp.* (1758) 1 Burr. 489, 97 E.R. 419, the plaintiff, who was doubly insured, was nevertheless entitled to recover the full amount from one insurance company, though he was not entitled to recover more than the losses actually suffered by suing both insurers. Notwithstanding the fact that contractually, each insurer was bound to pay the whole loss suffered, which ever one was sued was entitled to contribution from the other. And the result seems sensible. For although both had insured against a particular event and that event had occurred, only one insurer had found itself bearing the anticipated loss, whilst the other was left free of any liability, but for the obligation to contribute. Their common risk assumption provided the link justifying that the losses should be borne equally.

⁶⁷ See *Cummings v. Lewis* (1993) 113 A.L.R. 285, 319. In an old case, *Webber v. Smith* (1689) 2 Vern. 103, 23 E.R. 676, several sub-lessees paid the full rent owed by all the sub-lessees in order to avoid forfeiture and were entitled to contribution from those other sub-lessees. There may also exist a right to contribution where the purchase price of land is provided by only one of several purchasers of the land, but such a right to contribution will not arise where it is clearly "contrary to the intentions of the parties at the time when the joint obligation was undertaken": *Coulls v. Bagot's Executor & Trustee Co. Ltd* (1966-7) 119 C.L.R. 460, 488, per Taylor and Owen JJ. See also *Gadsden v. Commissioner of Probate Duties* [1978] V.R. 653.

⁶⁸ *Muschinski v. Dodds* (1985) 62 A.L.R. 429, 455, per Deane J., who considered that this principle also finds expression in the common law, in the count for money had and received, and in the frustration of contracts. See 454-5.

⁶⁹ This prevents the courts from according the parties the status of marriage, even where the relationship has all the hallmarks of marriage. See Peart, N.S., "A Comparative View of Property Rights in De Facto Relationships" (1989) 7 Otago L.R. 100, 101, and cases cited fn. 13. See also at 132, where Peart states that the courts have "repeatedly declined" to equate de facto relationships with legal marriages. Nevertheless, the practical results of the legal

by choice, or because of some practical or legal impediment, the courts often cannot turn to wide discretionary powers such as those granted in matrimonial legislation in Australia⁷⁰ and elsewhere to resolve property disputes. Arguably, given the broad social policy issues raised, legislation may well be the most appropriate means of resolving disputes arising from breakdowns in de facto marriages.⁷¹ But where no such legislative provisions govern, the courts must instead utilise and develop common law and equitable rules and principles.⁷² Consequently, in order to highlight these common law and equitable developments, the focus, in Australian law at least, will largely be on cases of de facto "marriages", by which term it is intended to include "all relationships which resemble marriage".⁷³ In other jurisdictions, however, common law

resolution of de facto property disputes appear not dissimilar to cases in which a couple were legally married. In particular, the courts appear to be moving towards a distribution of the benefits and burdens arising from a relationship proportionally, according to the parties contributions towards that relationship. Cf. *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, 24-5, (Supreme Court of Canada). See further below.

⁷⁰ See the *Family Law Act* 1975 (Cth), s. 75. The High Court has recently confirmed the "unfettered nature" of this discretion in *Mallet v. Mallet* (1984) 52 A.L.R. 193.

⁷¹ And in New South Wales, Victoria, the Australian Capital Territory and the Northern Territory, de facto property legislation has been enacted which gives the courts wide discretionary powers to resolve property disputes arising from the breakdown of such relationships. See, e.g., the *De Facto Relationship Act* 1984 (N.S.W.), and an example of its application in *Brown v. Byrne* (1986) D.F.C. 95-061. See generally Chisholm, R., Jessep, R., & O'Regan, S., "De Facto Property Decisions in NSW: Emerging Patterns and Policies" (1991) 5 Aus. Jo. of Fam. Law 241. These Acts do not extend to homosexual couples sharing a domestic status akin to marriage.

⁷² This is not to suggest that legislative developments and the policies engendered therein may not have a marked effect on the development of common law principles. Statutory developments may provide a guide to changing community values, for example, although the very fact that a particular legislative scheme has not been extended to de facto relationships may be of significance.

⁷³ Adopting the definition of Parkinson, P., "Doing Equity Between De Facto Spouses: From *Calverley v Green* to *Baumgartner*" (1988) 11 Adel. L.R. 370. Such relationships may, of course, like marriages, vary greatly in their nature and the extent of the integration of the parties lives and commitment to each other. For some relevant considerations in determining whether a relationship is in the nature of marriage, see Narev, I., "Unjust Enrichment and De Facto Relationships" [1991] 6 Auck. U.L.R. 503, 525-7, and Rotherham, C.I., "The Contribution Interest in Quasi-Matrimonial Property Disputes" (1991) Cant.L.Rev. 407, 424. The definition is intended to include homosexual relationships which exhibit the hallmarks of a marriage. See Narev, 505, fn. 6. Cf. Peart, supra n. 69, fn. 1. Under the *De Facto Relationships Act* 1984 (N.S.W.), "de facto relationship" is defined as "the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other": s. 3. For judicial definitions of the term "de facto relationship", see, e.g., *Re Lambe* (1981) 38 A.L.R. 405.

The fact that sexual partners are also co-habitees need not necessarily suggest the relationship

rules may still govern disputes between previously married couples, or may have done so until quite recently.⁷⁴ Such cases will also be considered. It will be argued that the burden of the case law, as evidenced by developments in a number of jurisdictions,⁷⁵ suggests a growing acceptance of the principle of just sharing as the best non-legislative mechanism for distributing (usually) the benefits of a relationship upon its failure.

It is appropriate first to outline the nature of a "typical" domestic property dispute. Such disputes arise where a couple separate after several years co-habitation, with the legal title to most of the property used or acquired in the course of the relationship⁷⁶ vested in one party only (often the male), though both parties will have made substantial contributions to the relationship as a whole. These contributions may take the form of money, home improvements, domestic services, labour in general, child minding services, emotional support and other sacrifices or forgone opportunities. As a result,

[t]he essential question which confronts the court in such cases is whether a remedy, either personal or proprietary,⁷⁷ should be provided to a person who has made contributions to family resources.⁷⁸

Legal recognition of the need for intervention where a joint domestic relationship has failed requires the development of a principled basis for relief, the results of which are seen to be just and capable of reasonably certain application.⁷⁹ This is not an easy task, however, given the widely varying

is akin to marriage. Perhaps one of the most significant features is the pooling of financial and other resources and assets in an integrated way. Where this does not occur and the parties have kept their financial lives clearly separate, the relationship may not be akin to marriage, nor amount to a common endeavour, at least in relation to the pursuit of financial goals. See further below, n. 88.

⁷⁴ See, for example, the Canadian case, *Rathwell v. Rathwell* (1978) 83 D.L.R. (3d) 289. Even where statutory schemes have been introduced, the common law rules may still be of considerable importance. See, e.g., *Rawluk v. Rawluk* (1990) 65 D.L.R. (4th) 161.

⁷⁵ The approach adopted here is in the nature of a synopsis of developments in Australia, Canada, New Zealand and, to a much lesser extent, England.

⁷⁶ As to which see below.

⁷⁷ It is not proposed to discuss the appropriate form of recovery in this chapter; the concern is with the basis of liability and the appropriate measure of any recovery.

⁷⁸ Neave, M., "Three Approaches to Property Disputes" in Youdan T.G., *Equity, Fiduciaries and Trusts* (1989), 251.

⁷⁹ Cf. Scane, R.E., "Relationships 'Tantamount to Spousal', Unjust Enrichment and

nature of the relationships and disputes in question. Domestic disputes do not readily lend themselves to formulistic solutions, unless the courts are prepared to ignore the myriad of possible factual variations which provide the contexts for such disputes. Consequently, applications of any legal principles tend to be uncertain and highly contextual.⁸⁰ These difficulties are evidenced by the wide variety of legal responses to the problem in different jurisdictions, at least in terms of the stated reasoning of the decisions.⁸¹ It will be argued, however, that

Constructive Trusts" (1991) 70 Can. B. Rev. 260, 261-2.

⁸⁰ Cf. Toohey J., in *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 88. Cf. *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, 13, per McLachlin J. (La Forest, Sopinka and Iacobucci JJ. concurring): "[T]he courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases."

⁸¹ In Australia, the High Court has utilised equitable notions of unconscionability to impose a trust where it would be unconscionable for a defendant to deny a plaintiff's interest in particular property. This is an extremely broad notion. Significantly, however, the court has openly recognised that the underlying rationale for such a finding of unconscionability is the failure of the parties' joint endeavour, giving rise to unforeseen gains and losses. The High Court's approach will be explored further below, but its essence can be distilled from *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, and the judgment of Deane J. in *Muschinski v. Dodds* (1985) 62 A.L.R. 429.

In Canada, the courts are prepared to impose a constructive trust over property owned by a defendant in favour of a plaintiff, or alternatively, award monetary compensation to a plaintiff, on the basis of unjust enrichment. See *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257, and *Sorochan v. Sorochan* [1986] 2 S.C.R. 38. For a general consideration of the Canadian approach, see Scane, supra n. 79. An "enrichment" may be established by the plaintiff's direct or indirect contributions to particular property (Peart, supra n. 69, 120), or to the relationship generally, where the contributions are not "property related" (see *Everson v. Rich* (1988) 53 D.L.R. (4th) 410, particularly 473-5, and *Herman v. Smith* (1984) 34 Alta. L.R. (2d) 90). The "unjustness" of that enrichment is established by showing that the contributions were not intended as a gift, that the plaintiff had some "reasonable expectation" of a share in the assets of the relationship and that the defendant "freely accepted" such contributions: *Pettkus v. Becker*, at 274. See also *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1. Significantly, however, the Canadian courts have largely ignored the conceptual strictures and frameworks they themselves have placed upon the concept of unjust enrichment. In fact, a conceptually consistent unjust enrichment approach would probably not provide any guidance or assistance in many cases of de facto property disputes. This is discussed further below, nn. 109-17 and text thereto.

In England, the House of Lords, in *Pettit v. Pettit* [1970] A.C. 777, indicated that for a plaintiff to claim any share in the defendant's legally owned property, an implied or express agreement or "common intention" to that effect had to be discernible. But such an "intention" may be inferred from the parties' conduct. One method in which a common intention as to a share in the property may be shown is where one party has made a "substantial" financial contribution towards family expenses. See *Burns v. Burns* [1984] 1 All E.R. 244, 252, 265. In *Burns v. Burns*, the de facto wife made contributions to the relationship for 12 years, but was denied any interest in the family home because her contributions were largely of a non-financial variety. As the result in *Burns v. Burns* itself demonstrates, the English approach has reflected a far more conservative leaning by the judiciary, so that arguably the principle of sharing has not yet been recognised in that jurisdiction. Contrast, however, the far more liberal approach of Lord

the practical consequences of applying these different legal responses to the facts of the cases tend to be very similar, such that the courts in different jurisdictions may in fact all be "driving in the same direction", as Cooke P. put it in *Pasi v. Kamana*.⁸² This direction, it is suggested, in Australia, New Zealand

Denning, in *Eves v. Eves* [1975] 1 W.L.R. 1338, and *Cooke v. Heade* [1972] 1 W.L.R. 518, and the views of Lord Diplock and Lord Reid in *Pettit v. Pettit*, who considered that the parties would in most cases simply not have turned their minds to such issues and that instead, "[t]he Court would have to decide what the common intention of reasonable spouses would have been if they had addressed their minds to their respective proprietary rights" (823, 795, and see Peart, supra n. 69, 106). The views of Lord Diplock and Lord Reid, that a "common intention" could be imputed, did not have the support of the majority of the House, however, and Lord Diplock has since modified his views in *Gissing v. Gissing* [1971] A.C. 886, accepting that a "common intention" could at most be inferred from the parties' conduct. See Peart, at 106. With respect, the English emphasis upon parties' common intention asks the wrong question. The problems in domestic property disputes arise because the contingency (the failure of a relationship) has not been provided for: the parties have not expressed any clear intentions on the matter. By asking how the parties have provided for the contingency can only lead to a preservation of the *status quo*.

In New Zealand, the basis of recovery is said to rest on the "reasonable expectations" of the parties. The appropriate test is said to be "whether a reasonable person in the shoes of the claimant would have understood that his or her efforts would naturally result in an interest in the property": *Pasi v. Kamana* (1986) 4 N.Z.F.L.R. 417, 419. Significantly, however, "relief may be given even if neither of the parties actually had given any thought to the question of respective individual legal entitlements during the relationship": Rotherham, C., "The Redistributive Constructive Trust: Confounding Ownership with Obligation" [1992] Cant.L.Rev. 84, 92. It has been said by the Court of Appeal that such a principle of "reasonable expectations" underlies all the different doctrinal approaches evident in different common law jurisdictions. See infra n. 82, and see also *Gillies v. Keogh* [1898] 2 N.Z.L.R. 327, 331, per Cooke P.: "Whatever legal label or rubric cases in this field are placed under, reasonable expectations in the light of the conduct of the parties are at the heart of the matter." It is clear from cases such as *Gillies v. Keogh* that "reasonable expectations" are intended to refer to what the parties are reasonably entitled to expect rather than any actual expectations which are reasonable.

82 (1986) 4 N.Z.F.L.R. 417. In the view of Cooke P.:

I respectfully doubt whether there is any significant difference between the deemed, implied or inferred common intention spoken of by Lord Reid and Lord Diplock [in *Pettit v. Pettit*] ... and the unjust enrichment concept used by the Supreme Court of Canada. Unconscionability, constructive or equitable fraud, Lord Denning's "justice and good conscience" and "in all fairness": at bottom in this context these are probably different formulae for the same idea ... I think we are all driving in the same direction.

Some support for the views of Cooke P. may be derived from the views of Toohey J. in *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 87, who considered that there was little difference at a practical level between two doctrinal approaches: "The notion of unjust enrichment ... is as much at ease with the authorities and is as capable of ready and certain application as is the notion of unconscionable conduct." Cf. Peart, supra n. 69, 121, 126-7. Such a view may be accurate if one accepts that both doctrines give effect to an underlying rationale of the sharing principle arising from, in these cases, the failure or breakdown of a common endeavour, such that although the labels adopted are quite different, "unjust enrichment" and "unconscionability" in fact disguise similar results. It will be argued below, however, that if unjust enrichment is applied with conceptual rigour, it fails to provide any ready solutions to the types of problems raised by de facto property disputes.

and Canada, though perhaps not in England,⁸³ is towards an acceptance of a principle of sharing burdens⁸⁴ or, more usually, benefits proportionally according to each party's contributions to a relationship.⁸⁵ The results of many of the decisions in cases of domestic disputes are largely consistent with the application of such a principle.

In Australia, such results are being achieved by resort to notions of unconscionability, whereby

[e]quitable intervention is based on the principle that the failure of the enterprise makes it unconscionable for one partner to retain the benefit of contribution made for its purpose.⁸⁶

⁸³ In England, the courts have been far less ready to liberalise the basis for recovery, and consequently, relief tends to be circumscribed within the narrow confines of the need to show a "common intention". See, e.g., *Burns v. Burns* [1984] 1 All E.R. 244, noted supra n. 81. This suggests that the English courts have not yet consistently given effect to a principle of sharing in determining the property rights of domestic partners. Some decisions, however, are consistent with the principle. See *Eves v. Eves* (1975) 1 W.L.R. 1338, for example. Cf. Peart, supra n. 69, 140, who concludes that Cooke P.'s views are an accurate summation of the different developments in Australia, New Zealand, Canada and England, but adds that England is "in the slow lane".

⁸⁴ Burdens include debts in the name of only one party, but incurred for the benefit of the relationship. The recognition that losses may be incurred in the course of the relationship which are losses of the relationship as a whole and not just one party (even if in only one party's name), suggests that one party cannot simply claim an asset of the relationship without contributing to such losses. This ensures that creditors are given priority ahead of both parties to the relationship where a debt was integrally linked to the relationship. This may also shed some light on the question of the appropriate form of recovery, suggesting that a constructive trust ought not necessarily follow a finding that a plaintiff has a claim against the defendant.

⁸⁵ See Rotherham, supra n. 73, in which the author calls for the open recognition of the "contribution" interest. This is an excellent summary of the practical effects of the relief granted in different common law jurisdictions and this writer has drawn liberally on the ideas outlined therein. Rotherham also points to the problems which stem from the various doctrinal vehicles utilised to achieve the results they do without openly acknowledging the underlying principle of recovery. Giving recognition to parties' contributions to a relationship also has the support of Neave, supra n. 78, though she considers that unjust enrichment may be the best way of achieving this. Cf. Parkinson, supra n. 73, 372, who considers that the "common thread" of three High Court decisions (*Calverley v. Green* (1984) 56 A.L.R. 483; *Muschinski v. Dodds* (1985) 62 A.L.R. 429; and *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75) "is that the remedies will coincide more or less with the financial contributions of the parties" (emphasis added). The High Court in *Baumgartner*, however, suggested that non-financial contributions may also be taken into account in determining a party's share in the assets of the relationship. See below. And see Neave, M., "From Difference to Sameness—Law and Women's Work", Unpublished Paper.

⁸⁶ Neave, supra n. 78, 267. See *Muschinski v. Dodds* (1985) 62 A.L.R. 429, and *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, which extended the joint venture analogy used in *Muschinski* to the breakdown of de facto relationships which do not share the element of a common business venture which existed in *Muschinski*.

The High Court is recognising that this particular species of unconscionability is founded on the refusal by one party to allow the other to share benefits arising from the failure of the parties' common domestic endeavour.⁸⁷ Such endeavours take the form of particularly close relationships in which resources are pooled and behaviour is modified to pursue varied personal and social goals.⁸⁸ In these sorts of relationships, the parties' "lives and economic well-being [are] fully integrated"⁸⁹ and the parties share "in a relationship in the nature of a joint venture so that it would be artificial to treat them as independent actors."⁹⁰ When such relationships fail or breakdown,⁹¹ so that the parties' plans are frustrated, the parties will not usually have planned

⁸⁷ *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 84. See also *Muschinski v. Dodds* (1985) 62 A.L.R. 429.

⁸⁸ For a perhaps romanticised description of such domestic relations, see *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, 24-5, per Cory J.

Not all persons coming together in a domestic arrangement need be considered as having a common interest or as pursuing a common endeavour. Consider, for example, students sharing a group house. But even sexual partners who are co-habitees need not be considered to share a common interest for all purposes. Where the parties keep their financial affairs and resources strictly separate, it may be said that there is no common endeavour in relation to their financial and economic goals, as they have not integrated the *material* aspects of their lives. In such a case, although their relationship may still be a common endeavour for the pursuit of social, emotional and sexual goals and these may be frustrated by the breakdown in the relationship, the parties' financial and economic goals need not be frustrated in such circumstances. In other words, there is no unprovided for contingency arising in respect of any common financial or economic interest, as there is *no* common interest in relation to their purely financial affairs, each party having sought separately to protect their own interests.

⁸⁹ *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 476.

⁹⁰ Rotherham, *supra* n. 73, 423. In the past, the courts tended to approach domestic disputes as if they were ones between strangers acting in their individual interests. Feminists have pointed out the masculine nature of this latter perspective and that it is far removed from the reality of the situation. See Rotherham, 422, fn. 101, and 410.

⁹¹ It was stated earlier that as a general rule one party must not have been at fault or responsible for the particular unprovided for contingency preventing parties from successfully pursuing their common interests. Such an element was suggested as relevant to the breakdown of domestic relationships by Deane J. in *Muschinski v. Dodds* (1985) 62 A.L.R. 429, 456, where he considered that the frustration of the joint endeavour must not have been the result of any "attributable blame" of either party. With respect, however, this writer concurs with the views of Parkinson, *supra* n. 73, 392, that this "requirement does not transfer easily to the context of *de facto* relationships where the reasons for the breakdown of relationships are varied and complex." This view is reflected in legislation which abandons requirements of fault in relation to disputes arising out of failed marriages, one of the hallmarks of the *Family Law Act 1975*. Perhaps in cases of domestic common endeavours the courts will simply presume "no fault" on either party's part. In the view of Parkinson, 393, "[i]t is likely that the notion of blame will disappear quietly as a meaningful requirement."

accordingly as to the consequences of such a breakdown.⁹² Of course, where there exist clear express or implied common intentions of the parties as to their respective rights *vis-à-vis* any property or assets acquired "for the purposes of [their] joint relationship",⁹³ then these intentions will be respected by the courts.⁹⁴

The reasoning of the High Court is consistent with notions of a principle of sharing arising where an unprovided for contingency affects parties sharing a common interest. At a practical level, how does the a principle of sharing manifest itself in the decisions?⁹⁵ To simplify the burden of much of the case

⁹² "It is commonplace to observe that people who live together rarely make clear arrangements about their property interests. They are certainly unlikely to spell out complex understandings to the effect that the spouse who does the housekeeping will thereby derive an interest in the property." Neave, *supra* n. 78, 263. Cf. *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 31, quoted *infra* n. 100.

Where a relationship does not end as a result of a breakdown in the relationship, but continues until the death of one of the parties, disputes as to the ownership of property may still arise. See, e.g., *Bryson v. Bryant* (1992) 29 N.S.W.L.R. 188. Where the surviving party has title to the main property utilised in the relationship, the deceased party's estate would be unlikely to be able to successfully claim a share in the property (see *Bryson*). Conceptually, this seems an appropriate response, for the deceased party will have had the use of the property until death and the surviving party will have absolute use of the property thereafter. This is consistent with the position in many married couples, where real estate, money and other property is often held as joint tenants and would thus automatically pass to the surviving party. In other words, such an outcome will often reflect the way in which the parties would have provided for the contingency of each party's death in any case, had they turned their minds to the matter. Where, by way of contrast, the surviving party has no title to substantial assets used in the relationship and such property has not been left by will to the surviving party, then much stronger grounds exist for asserting some claim to the property. This could be done either on the basis of the common intentions of the parties, where they exist, that the surviving party was to have a share in the property, or alternatively, on the basis of the contingency of the death not having been provided for, in such a case, to secure a common purpose of the relationship that financial security extends beyond the death of the other party. An interesting decision is that of *Boccalatte v. Bushelle* [1980] Qd.R. 180, which supports the view that a claim in these latter circumstances will succeed. The court relied on the parties' common intention that the property belong to the surviving party and imposed a constructive trust. See also *Fleming v. Beevers* [1994] 1 N.Z.L.R. 385.

⁹³ *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 84.

⁹⁴ See Peart, *supra* n. 69, 103-4, and note the approval by the High Court in *Muschinski v. Dodds* (1985) 62 A.L.R. 429, of the NSW Court of Appeal decision in *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685. *Allen v. Snyder* had reaffirmed the view that a common intention had to "actually exist" and could not be imputed, but where such intention was discernible, it would be given effect. See also *Gillies v. Keogh* [1989] 2 N.Z.L.R. 327, in which the defendant had at all times asserted that the house the subject of the action was "hers and hers alone" (340). The plaintiff's contributions in that case were made in circumstances in which he could not have understood that he was acquiring an interest in the property. Consequently, the court denied the plaintiff a share in the assets owned by the defendant.

⁹⁵ One needs to bear in mind, however, the proviso above about the difficulties in drawing any general conclusions about the effect of decisions in these types of factual

law in Australia, as well as New Zealand and Canada, where similar results are being achieved, it is evident that the courts are beginning to balance parties' differing contributions, both "financial and in kind",⁹⁶ to relationships. Once the various individual contributions have been weighed up in order to determine their relative worth, though this is not usually done explicitly, the courts in many cases are making awards by dividing the assets of the relationship (which term appears to include any real or personal property utilised in the course of the relationship⁹⁷) according to the proportionate contributions of the parties to that relationship.⁹⁸ The language of

problems.

⁹⁶ See *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 84-5.

⁹⁷ Rotherham, *supra*, n. 73, 426, considers that all property used during the course of a relationship should be taken into account when assessing the property which can be the subject of an award, but that consequently, property such as money and real estate owned by one party at the commencement of the relationship should be treated as a contribution to the relationship. This would mean that parties with considerable assets at the outset of the relationship may be considered to have contributed a greater proportion to it. There is some merit in such an approach, which is highlighted by an example given by Rotherham:

A and B go into a relationship and for ten years live in a house inherited by B. A is the primary care giver and works as well while B does little at all. A is able to maintain the parties (sic) standard of living but no property is acquired. If the only property available for distribution was that acquired in the course of the relationship, A would not be entitled to an interest in the house. (426, fn. 127).

And the courts appear to have accepted that any property utilised in the course of the relationship may potentially be distributed. Principally, domestic property disputes concern the parties' family home and the fact that it was owned by one party at the outset of the relationship or purchased from the assets of one party will not preclude the other party claiming an interest. Nevertheless, there are also difficulties in such an approach, for it means that in any case in which one party brings considerable property to the relationship, there can be no presumption of equal contributions (as to which, see below) and the courts may then need to balance property contributions made at the outset, with contributions of a non-financial kind made during the course of the relationship. One way of avoiding this difficulty would be for the courts to merely consider initial assets as part of a determination of each party's benefits and losses resulting from the relationship. Consequently, a party who brings a house worth \$50,000 into a relationship can be considered to have benefited by \$50,000 if that house is worth \$100,000 at the end of the relationship. A presumption of equality of contributions could still then be applied to allow the other party a 50% share of the net increase. This would also avoid the difficulty of balancing initial assets as against contributions to relationships of an ongoing nature.

⁹⁸ In *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, for example, the family house was divided in a proportion of 55: 45 between the parties.

These types of approaches are evident throughout the common law world. In Canada, see, e.g., *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257. The appellant and respondent had lived as man and wife for nearly 20 years. For several years both were employed, the respondent's income being utilised to pay rent and living expenses, whilst the appellant saved his entire income. These

"contributions" to relationships is being openly used and the courts are giving recognition to a variety of contributions: the relative pooled incomes of the parties; any property owned by one party at the commencement of the relationship, but utilised in the course of the relationship;⁹⁹ and perhaps increasingly, non-financial contributions such as child-minding, housework and the maintenance of property.¹⁰⁰ Where one party's contributions are

savings provided the purchase price for a farm and apiary, in the appellant's name. Over a period of more than 10 years both worked diligently to build up the business (see 267-8, for a summary of the type of work undertaken by the respondent), and profits were used to purchase two more farms. The respondent, after the relationship had ended, claimed a share in the property. Her claim succeeded and the court held she was entitled to a half share which constituted her proportion of contribution to the relationship. In the words of Dickson J. (at 277): "The extent of the interest must be proportionate to the contributions, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal."

For a detailed consideration as to quantum of relief in the Canadian cases, see Parkinson, P., "Beyond *Pettkus v. Becker*: Quantifying Relief for Unjust Enrichment" (1993) 43 U.T.L.J. 217. The results of the cases considered there are broadly consistent with the principle outlined here. This is supported by Parkinson's own summary of the cases:

There will be an enrichment, and a deprivation without juristic reason, wherever one party denies to the other an *equitable share* of the wealth that represents the fruit of their domestic and economic *partnership*. (Emphasis added.)

Support for Parkinson's view can be found in the judgments of McLachlin and Cory JJ. in *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1. For example, at 25, Cory J. considered that "[b]oth the reasonable expectations of the parties and equity will require that upon the termination of the relationship, the parties will receive an appropriate compensation based on the contribution each has made to the relationship." See also at 31.

In New Zealand, see, e.g., *Cossey v. Bach* [1992] 3 N.Z.L.R. 612, and *Gibb v. MacDonnell* [1992] 3 N.Z.L.R. 475.

⁹⁹ See *Cossey v. Bach* [1992] 3 N.Z.L.R. 612; *Gibb v. MacDonnell* [1992] 3 N.Z.L.R. 475.

¹⁰⁰ In the past, non-financial domestic contributions were largely ignored by the courts, one of the consequences of which was that women were often denied an interest in property, given that contributions of this type are often made by women. See Neave, *supra* n. 85, 17: historically "the value of women's domestic labour has been disregarded in the family law context." See also Neave, *supra* n. 9, 63: "the existing law reinforces patriarchal gender expectations by failing to recognise the value of unpaid work in the home." As McLachlin J. put it in *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, 10: "The notion [that domestic services are not worthy of recognition by the courts], moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty". Today, however, there appears to be a growing recognition of the value of non-financial contributions, specifically domestic services, a process which can only be enhanced, it is submitted, by the acceptance of the rationale of the principle of sharing. In *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, references were made to contributions "financial or otherwise" and "in kind", and to the pooled "resources" and "efforts" of the parties. This suggests the court was intimating the possibility of non-financial contributions giving rise to a claim for a share of the assets utilised in the relationship, although it is unclear whether the Australian courts will be prepared to extend the principle of *Baumgartner* to purely domestic contributions. See, e.g., *Hohol v. Hohol* (1980) F.L.C. 75,212. Cf.

Willets v. Marks (C.A., Q.L.D., unreported, noted (1994) 68 A.L.J. 462). Outside Australia, a number of cases have expressly given recognition to non-financial contributions, giving rise to a share in the assets of the relationship, see, e.g., *Pettkus v. Becker* (1980) 117 D.L.R. (3d) 257, *Herman v. Smith* (1984) 34 Alta. L.R. (2d) 90, *Everson v. Rich* (1988) 53 D.L.R. (4th) 470, and *Peter v. Beblow*. Significantly, in the latter three cases, the contributions in question were largely of a non-financial kind. Cf. also *Eves v. Eves* [1975] 1 W.L.R. 1338.

Some of the Canadian cases which have given recognition to non-financial contributions have done so by the use of a *quantum meruit* award for housekeeping services rendered. *Herman v. Smith* is an example. In this writer's view, such an approach demeans contributions to the household, in that it equates a party responsible for such work with a paid housekeeper and ignores significant contributions of a less tangible kind: emotional support for children and spouse, planning decisions and so on. As Scane, *supra* n. 79, 280, has pointed out:

in a spouse-like arrangement, this marketplace approach seems far removed from reality. ... People normally do not enter into spousal arrangements expecting or relying upon receipt or payment of a market-valued *quid pro quo* for itemized services performed, akin to making a contract with a maid service or a plumber.

Scane points out some of the difficulties that result from such an approach, but goes on to state, at 281, that

[t]his is not an argument against a finding of enrichment. It is, I submit, an argument against using a *quantum meruit* approach based upon what must be, at best, the crudest of guesses about the net difference in the market value of the exchanged services, to establish the amount of unjust enrichment to be remedied.

Some support for this view may be gained from the judgment of Cory J. in *Peter v. Beblow*, 31-2:

[I]t is unlikely that couples will ever turn their minds to the issue of their expectations about their legal entitlements at the outset of their marriage or common law relationship. If they were specifically asked about their expectations, I would think that ... rather than expecting to receive a fee for their services based on their market value, they would expect to receive, on dissolution of their relationship, a fair share of the property or wealth which their contribution had helped the parties to acquire, improve, or to maintain.

In this writer's view, the *quantum meruit* approach highlights some of the difficulties with unjust enrichment. The Canadian courts have largely avoided applying the concepts of unjust enrichment with any rigour, reflecting the unsuitability of such tools in resolving problems of this type. Importing concepts such as *quantum meruit* appears artificial and tends to obfuscate the issues. A *quantum meruit* valuation of services in the context of domestic relationships could also lead to unjust outcomes. Take two extreme examples. In one, both parties are paupers and despite an equal contribution by each to the relationship, at the end of ten years, they still own nothing. On the strict logic of *Herman v. Smith*, since the domestic services were not intended to be "free", the housekeeping spouse could sue for the value of the ten years work (which might be practically worthwhile, for example where the other party has had a windfall win in lotto after the relationship has ended). Given that both parties have not gained from the relationship at the time it ends and their respective equal contributions, this would appear unjustifiable. In a second possibility, property of a relationship owned by one party only may increase dramatically in value, through a combination of market forces and maintenance and improvement work carried out by both parties. Why should the "housekeeping party" in such a case only be entitled to a *quantum meruit* award? If, alternatively, the plaintiff is entitled to a greater share, is such a share also based on unjust enrichment? How are the potentially different values of enrichment reconcilable and is a plaintiff entitled to pursue whichever is the greater? Such questions would need to be answered.

considerably greater than those of the other, any property of the relationship will be divided accordingly to reflect their respective contributions to the relationships.¹⁰¹

A considerably greater contribution on the part of one party will probably not be a common occurrence, and the courts have expressed the view that in most long-term relationships,¹⁰² a presumption of equal contribution should be the starting point for any judicial assessment. Where such a presumption is applicable, its application will result in the parties sharing the property of the relationship equally. In the view of Mason CJ., Wilson and Deane JJ., in *Baumgartner's* case:

Equity favours equality and, in circumstances where the parties have lived together for years and pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants-in-common, subject to adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financial or in kind.¹⁰³

It will be suggested below that a better and more realistic basis for recovery than a *quantum meruit* valuation of services is to commence with a presumption of equal sharing in most normal relationships.

¹⁰¹ This will involve a re-adjustment of the rights of the parties according to their contributions, rather than their respective existing legal title to the property. See *Muschinski v. Dodds* (1985) 62 A.L.R. 429, and *Cossey v. Bach* [1992] 3 N.Z.L.R. 612. In *Muschinski v. Dodds*, the parties expressly agreed that the property should be held as tenants-in-common in equal shares, despite the purchase price being almost wholly provided by Muschinski. The common intention was premised, however, on the expectation that Dodds would make "substantial contributions" to the projected development in the future. This expectation was frustrated by a number of events outside the parties' control, including a failure to obtain necessary council permission for the development and the subsequent break-up of the relationship. Consequently, Muschinski was entitled to a greater share in the property than merely her legal entitlement of one half. The court ordered that Muschinski and Dodds should "hold their respective legal interests as tenants-in-common upon trust (after payment of any joint debts incurred in improvement of the property) to repay to each her or his respective contribution and as to the residue for them both in equal shares." See at 458. Cf. *Kais v. Turvey* (1994) Fam. L.R. 498 (Supreme Court of Western Australia). In *Cossey v. Bach*, property was held in equal shares, but had been purchased entirely from the defendant's assets. His contribution to the property in question was consequently far greater than that of the plaintiff and he was held entitled to a considerably greater share.

¹⁰² This, of course, avoids the issue of when a relationship may be considered long term, but this will undoubtedly be illustrated in future cases. Where a relationship is short term, the courts will pay much more attention to the initial assets brought into the relationship by each party. See cases, *ibid*.

¹⁰³ (1987) 76 A.L.R. 84-5. In *Cossey v. Bach* [1992] 3 N.Z.L.R. 612, 632, Fisher J. stated that:

Such a presumption of "equality of beneficial ownership at least as a starting point"¹⁰⁴ has considerable merit. It recognises that the parties' lives were fully integrated for a number of years.¹⁰⁵ It recognises that despite the quite different roles which each party might perform in a relationship (particularly one in which each party has adopted a "traditional" role),¹⁰⁶ the parties nevertheless are accorded an equal status¹⁰⁷ and can be presumed to

In a stable and enduring de facto relationship, and in the absence of any expressed intention to the contrary, it will readily be accepted as reasonable for the claimant to expect that following those contributions and sacrifices normally associated with de facto marriage, family assets would be shared. For this purpose contributions may be of an intangible nature, need not be traceable to the property in dispute, and may have little measurable value.

Similarly, Parkinson, supra n. 98, 256, states:

Where the contributions are approximately equal, the shares should be equal. Such would be the case where one party's contribution was mainly in the form of income while the other's took the form of domestic responsibilities.

Contrast Casad, R., "Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again" (1978) 77 Mich.L.Rev. 47, 60, who considers that although "marriage implies equal sharing of burden and benefits, and the courts and legislatures recognize that", it is "questionable" whether the same implication ought to apply to unmarried couples. In the view of this writer, where relationships are akin to marriage and thus display most of the hallmarks of that institution, so that parties can be said to share a common interest, the same legal consequences should apply where contingencies arise which the parties have not provided for. Even if parties refuse to marry in order to consciously and deliberately avoid the legal consequences of that institution, including consequences upon the failure of the relationship, they may in any case, then, have maintained separate financial lives. Contrast Parkinson, supra n. 73, 373.

Interestingly, a presumption of equality has been rejected by the High Court as a starting point for property settlements under the *Family Law Act 1975* (Cth). See *Mallett v. Mallett* (1984) 52 A.L.R. 193, which held that decisions must be made on a case by case basis, but this decision has to be considered in the light of the wide, unfettered discretion granted to the courts under the statute.

¹⁰⁴ (1987) 76 A.L.R. 84.

¹⁰⁵ Supra nn. 89-90.

¹⁰⁶ Housekeeping and child minding on the part of the female spouse and income production on the part of the male spouse.

¹⁰⁷ Where both parties are engaged in full-time work and thus contribute substantial income, there is no reason why the presumption of equal contribution should not apply, even where there are differences in the income earned by each. The courts should not simply compare the respective incomes of each party in order to assess contributions, for this would ignore the non-financial contributions which each party still makes. The result in *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, is thus open to criticism, as the court appears to have ignored the non-financial contributions of the plaintiff in reaching its figure of a 55: 45 division. Cf. Neave, supra n. 85, 16.

have contributed equally to the relationship. Such a starting presumption also avoids the difficulties inherent in attempting to balance non-financial contributions ("housekeeping" and so on) against income and property. A presumption of equal contribution will not apply, or will be readily rebutted, where one party has assets worth considerably more than those of the other party at the commencement of the relationship. In such a case, the initial contribution will entitle the party making it to a greater share in the assets of the relationship.¹⁰⁸

The Canadian courts have been at the forefront of liberalising common law rights to share in family property upon the break-up of a domestic relationship, and have also been far more willing to give recognition to non-financial contributions than courts in other jurisdictions. The results of the Canadian cases are generally consistent with the principle of just sharing.¹⁰⁹ Although the decisions, in their reasoning, rely upon the language of unjust enrichment, such language often appears merely as window dressing for reasoning which is very similar to that of the High Court of Australia in drawing an analogy with frustrated joint ventures.¹¹⁰ For example, in determining that there is "no juristic reason" for an enrichment, the Canadian courts have referred to a party's "reasonable expectations" of receiving an interest in the property.¹¹¹ But given the courts' readiness to find such expectations,

[t]here has developed in Canada a tacit legal presumption that an expectation of entitlement is to be inferred from the fact that substantial

¹⁰⁸ See cases *supra* n. 99. For an example under the *De Facto Relationships Act* 1984 (N.S.W.), see *Browne v. Byrne* (1988) DFC 75,734.

¹⁰⁹ See *supra* n. 98.

¹¹⁰ Indeed, note the reference to "joint family venture" in *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, 16.

¹¹¹ A number of cases have justified relief on the basis of the existence of a "reasonable expectation" of the plaintiff "of receiving an interest in property", where the other party "knows, or ought to know of that reasonable expectation": *Pettkus v Becker* (1980) 117 D.L.R. (3d) 274, followed in *Sorochan v. Sorochan* [1986] 2 S.C.R. 38. Alternatively, the courts have also utilised language emphasising detrimental reliance and the defendant's "inducement" to act detrimentally. See generally, Peart, *supra* n. 69, who concludes that some form of inducement is necessary. But such a requirement suggests wrongful conduct on the part of the defendant in gaining a benefit or creating the "corresponding" loss to the plaintiff (and in most cases, such a corresponding loss can only be assumed). The principle of sharing operates irrespective of whether there has been anything akin to one party's wrong in causing a loss or appropriating a benefit. Benefits and losses need to be shared irrespective of such wrongdoing. See also Neave, *supra* n. 78, 263.

contributions were made in a relationship akin to marriage.¹¹²

In recognition of the very essence of the problem at hand—that the parties have not turned their mind to the consequences of a break-up of their relationship¹¹³—the Canadian courts appear to be determining what parties are *reasonably entitled* to expect in the circumstances given their contributions to a relationship.

Significantly, the results of many Canadian cases are not consistent with an unjust enrichment analysis. Although a defendant's "enrichment" may readily be identifiable in most cases on an impressionistic basis, it is nonetheless often difficult to isolate and value any tangible¹¹⁴ benefit,¹¹⁵ which benefit should in theory also determine the measure of recovery. Instead of merely disgorging benefits, the Canadian courts have in many cases granted remedies reflecting the parties' actual expectations or what they could reasonably be entitled to expect.¹¹⁶ The latter two measures need not, of course, equate with any tangible benefit received by a defendant at the expense of a plaintiff.¹¹⁷ The language of unjust enrichment, then, obscures the practical

¹¹² Rotherham, *supra* n. 73, 410. He goes on to state that "[i]n reality the approach of the Canadian courts is not based on the expectations of the parties involved", by which he clearly means the parties' actual expectations. Cf. *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, 31-2, quoted *supra* n. 100.

¹¹³ Neave, *supra* n. 78, 262-3.

¹¹⁴ This is required according to Canadian unjust enrichment theory, at least: *Peel (Regional Municipality) v. Canada* (1992) 98 D.L.R. (4th) 140, 155.

¹¹⁵ Casad, *supra* n. 103, 59, has concluded that "[a]nalogies drawn from common restitution cases, therefore, probably cannot identify an unjust enrichment except where [the] disparity [between the parties' respective contributions] is extreme."

¹¹⁶ See Neave, *supra* n. 78, 260. See also Birks, P., "Book Review" (1991) *Can. B. Rev.* 814, 817-9.

¹¹⁷ This has lead Rotherham, *supra* n. 73, 413, to conclude that:

The provision of justice in this area through the development of unjust enrichment law has only been achieved by the courts doing considerable violence to the integrity of the doctrine involved. While paying lip service to doctrine, the Canadian courts fudge important questions of law and draw unwarranted inferences of fact.

See also at fnn. 38 and 40. Similarly, in the view of Scane, *supra* n. 79, 270:

[R]estitution theory, applied to typical "family property" cases, raises some problems whose solution is not obvious. Conclusions that the defendant has been enriched, that the enrichment is sufficiently connected to a corresponding deprivation suffered by the plaintiff, and that there is no juristic reason for the enrichment, standing alone, tell us that, in the particular case, the court has overcome these problems to its own

consequences of many of the decisions.

In this writer's view, a number of advantages would follow if the courts openly recognised that the underlying basis of recovery is the principle of just sharing applicable once parties' common domestic ventures have been frustrated. This would be consistent with the results achieved in many of the decisions. Parties would be entitled to share benefits of the relationship proportionally according to their contribution to the relationship (their "contribution interest", as it has been called).¹¹⁸ One advantage of formulating recovery on such a basis is that the courts would need to state openly which contributions are being taken into account and their relative worth. By identifying contributions, the process of adjusting the parties' rights allows for the incorporation of changing social values as to which types of contributions should be given recognition by the law as being valuable. Any disparate treatment of different types of contributions by parties to a relationship performing quite distinct roles¹¹⁹ would need to be stated and justified. For example, in identifying the relative worth of contributions, the courts would either have to accept an equal valuation of non-financial, domestic contributions, or else have to justify their continued depreciation.¹²⁰

Recognition of a party's contribution interest also raises considerable potential for creative, but principled, judicial developments. The courts might consider taking into account "negative" or depreciative contributions, such as where an alcoholic de facto husband beats his wife and children and is generally destructive around the household. It might be said that in such a case the husband has contributed less than fifty percent to the relationship, even

satisfaction. They do not, without more elaboration, tell us how it has done so.

Earlier, at 262, Scane writes that there is an "arbitrary appearance to many of the decisions."

See, however, Neave, *supra* n. 78, 259-62, who considers unjust enrichment an appropriate doctrinal vehicle for solving property disputes arising from the failure of a domestic relationship. See also Neave, *supra* n. 9, 27-8.

¹¹⁸ See Rotherham, *supra* n. 73.

¹¹⁹ Such roles are often determined on the lines of gender.

¹²⁰ Decisions such as *Anast v. Anastopolous* (1982) F.L.C. 91-201, may become a thing of the past. In that case, decided under the *Family Law Act* 1975, a wife worked full-time without wages for 6 years in her husband's business and, in the following 6 years, raised three children, continued to a lesser extent to work in the business and took some paid employment. Despite these efforts, she received only about a quarter of the property. See Neave, *supra* n. 85, 29.

where he has contributed a very substantial income to the household.¹²¹ Such an idea is only speculative, but worth consideration. The important factor is that the principle of sharing is sophisticated enough to incorporate such a possibility within a rational and intelligible legal framework; a framework which, it is suggested, may increase the likelihood of decisions appearing just, without compromising the need for clearly understood legal principles being applied with some certainty of outcome.

§ 7.5 THE UNCERTAIN STATUS OF THE PRINCIPLE IN CONTRACT: Frustration of Contracts

*The ideal solution, we suggest, is that the parties in such a case [of frustrated contract] should simply share the loss. Where the risk of loss has not been allocated to either party, they may be considered to be common victims, as it were, of a contractual accident in circumstances where there appears to be no reason for preferring the interests of one party over the other.*¹²²

The performance of contractual obligations may be frustrated by events beyond the control or foresight of either party. The question of what amounts to "frustration" in contract is largely settled in its definition and generates little debate, so that it has been said that "overall the doctrine itself engenders a

¹²¹ The alcoholism and violent conduct of the defendant in *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, may well have been a factor influencing the decision of the Supreme Court to apportion the assets of the relationship as it did in that case. See, e.g., at 9, 19. See also Behrens, J., "Domestic Violence and Property Adjustment: A Critique of "No Fault" Discourse" (1993) 7 Aust. Jo. of Fam. Law 9, concerning property orders under the *Family Law Act* 1975.

Another possibility is that forgone opportunities might be considered a form of contribution to a relationship, so that, for example, a party's decision to give up a high paying job with potential career prospects, might be said to be a contribution to the relationship. Cf. *Gillies v. Keogh* [1989] 2 N.Z.L.R. 327, 334, per Cooke P.: "One has to remember that sacrifice cannot always be measured in dollars and cents. The longer a union, the more likely that one or other partner will have forgone opportunities in life. This can be highly relevant, I think, in assessing reasonable expectations, unjust enrichment or unconscionability." Cf. *Peter v. Beblow* (1993) 77 B.C.L.R. (2d) 1, 26-7. There are serious problems, however, in treating forgone opportunities as contributions. All decisions in life involve making choices, by forgoing some opportunities in order to take up others. A choice of a domestic arrangement such as marriage or a de facto marriage is one which entails (potentially) lost opportunities for both parties, but nevertheless, parties may make such choices because of the perceived benefits of the relationship. It would be almost an impossible task to unravel the relative worth of different opportunities grasped and forgone as a result of such choices, and this task may thus be one best left alone by the judiciary.

¹²² Maddaugh & McCamus, 408.

certain feeling of contentment.”¹²³ Under one widely accepted definition, approved in the High Court of Australia,¹²⁴

frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.¹²⁵

It is not proposed to discuss the adequacy of this definition, for it clearly conforms with the notion of an unprovided for contingency outlined at the outset of this chapter, and thus satisfies one of the pre-requisites for the operation of the principle of just sharing. Instead, we will consider the debate which, amongst commentators and the judiciary, has centred on the consequences of frustration.

It should be noted that the entry into a contract by parties acting under some fundamental common or mutual mistake,¹²⁶ raises essentially the same problem as where a contract is subsequently frustrated. As one commentator has noted, “logically and functionally” mistake and frustration are indistinguishable, because in either case, there exists a risk of “potential disparity between the terms of exchange as envisioned at the time of contract formation and the terms of the same exchange as subsequently perceived in light of greater information”. In both cases, the “risks of the disparity in

¹²³ Stewart & Carter, *supra* n. 25, 66. For a detailed history of frustration sufficient to discharge a contract, see Wladis, J. D., “Common Law and Uncommon Events” (1987) 75 *Geo.L.J.* 1575.

¹²⁴ *Codelfa Constructions v. State Rail Authority of N.S.W.* (1982) 56 *A.L.J.R.* 459. Cf. *Brisbane C.C. v. Group Projects* (1979) 54 *A.L.J.R.* 25.

¹²⁵ *Davis Contractors v. Fareham U.D.C.* [1956] *A.C.* 696, 729, per Lord Radcliffe. The definition is sometimes stated in the form of the maxim *non haec in foedera veni* (it was not this that I promised to do.) Cf. Kull, *supra* n. 2, fn. 1.

¹²⁶ As to the meaning of these terms, see Carter & Harland, 381-2.

question was not allocated to either party, expressly or by implication."¹²⁷ Mistake and frustration, then, can be treated as raising the same essential problems and should involve essentially the same principles in their resolution, though what follows will be limited to a discussion of the law of frustration.

A frustrating event immediately and automatically discharges a contract as to any future obligations,¹²⁸ but parties to contracts may often have incurred expenses, paid money, transferred or received property or other benefits before the contract was frustrated. Is it satisfactory in such circumstances simply to leave the parties in the position they are in at the time of the frustrating event? If the principle of just sharing is applicable to the frustration of contracts, then the answer must of course be "No". It is submitted that parties in a contractual relationship do share a common interest (the matter will be further considered below), so that a principle of sharing should apply where a contingency is truly unprovided for.

In many contractual relationships, however, it will be likely that a determination as to an allocation of the risk of the consequences of a contingency to a more appropriate risk bearer can be made.^{128a} The courts' unwillingness to interfere in parties' transactions where an allocation of risk has expressly or by implication been made is particularly evident in cases of one-off, short term transactions, such as a sale of goods or real estate. Because of the nature of sale transactions, risk, by implication, usually passes with property and even if a contingency arises affecting the value of that property, the losses or benefits will usually be held to lie with the owner of the property at the time the contingency occurs.¹²⁹ In other words, the courts will let

¹²⁷ Kull, *supra* n. 2, 2-4. Strictly speaking, in mistake cases the parties' contract is not frustrated by a subsequent change of circumstances but was never possible of performance (or radically different to what was expected) in the first place. Since, however, the parties will have proceeded on the mistaken assumption that the contract was capable of being performed, the effect of their subsequent discovery of the mistake is no different to a frustrating event. Note, however, the view expressed by Cartwright, J., "*Solle v. Butcher* and the Doctrine of Mistake in Contract" (1987) 103 L.Q.R. 594, 604, fn. 48, that as a mistake is capable of discovery, it is at least arguable that the test for mistake should be stricter than that for frustration. This issue can be addressed by the courts in considering whether any party has assumed the risk of a particular mistake.

¹²⁸ *McDonald v. Denny Lascelles Ltd* (1933) 48 C.L.R. 457, 476-7, per Dixon J.

^{128a} This may be possible even where the contingency was not actually foreseen by the parties, but nonetheless was expressly or by implication provided for. Such a determination will leave no scope for the application of the principle of just sharing.

¹²⁹ In one-off, short-term transactions, frustration will be an unlikely event. Given that there is usually only a short space of time between entry into the contract and its execution (or

windfalls lie and confirm the *status quo*. Less usually, such an allocation of risk may also be made by implication where contracts are of an ongoing or relational nature.¹³⁰ It is not proposed to dwell on such cases, however, for importantly, they do not weigh against the general applicability to contract of the principle of just sharing, but preclude its operation because a precondition for such operation—that the risk of a contingency has not been provided for—has failed.

Leaving aside allocations of risk, the principle of sharing clearly ought to be applicable to contracts generally, given that the parties to a contract share a

the two may even occur simultaneously), it is unlikely that a supervening event will arise to render the contract incapable of performance. The longer a contractual relationship subsists, the more likely it is that a frustrating event will occur. The more likely source of complaint in one-off, short-term transactions will arise not from a frustrating event, but as a result of a mistake affecting both parties. For example, the buyer and seller of a cow which turns out to be fertile, may have believed it to be barren: cf. *Sherwood v. Walker*, 33 N.W. 919 (1887). As Kull, *supra* n. 2, 41, fn. 146, points out, the fact that a mistake is pleaded at all in such cases is a matter of “purest chance”. He notes, in relation to two sale of goods cases, including *Sherwood v. Walker*, that

[h]ad the new information in either case been available earlier, the disputed bargains would not have been made; were it discovered significantly later, no attempt would be made to avoid either transaction. When an item of property suddenly increases in value, our normal expectation is that the benefit accrues to its owner; when value decreases, the identical (converse) rule is that *res perit domino*. Thus a sudden change in value—windfall or casualty—gives rise to a dispute only when it occurs in awkward proximity to a transfer of ownership.

As Kull demonstrates, the common response in such circumstances is that losses and benefits are left to lie where they fall and no further performance is required. He has called this the “windfall principle” and he persuasively argues in favour of such a judicial response. But in this writer’s view, the unwillingness of the courts to interfere in the *status quo* in such cases is not as a result of the application of a windfall principle, but follows from an inference which can safely be made in many such cases: that the risk of a mistake (or frustrating event) passes with property. The onus is thus on the parties to safeguard their respective interests before and after that event. The one-off transaction cases do not necessarily indicate that a windfall principle (which is clearly contradictory to the sharing principle) is appropriate for dealing with frustration or mistake in contract generally, as Kull suggests. In this writer’s view, such an approach has little appeal where the parties share a common interest in having a contract performed and carried through to fruition and there exists no reasonable basis for allocating the risk of a frustrating event or mistake to one or the other party.

¹³⁰ See *McRae v. Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, in which the court held that the risk of a particular outcome lay with one of the parties to the contract, although the outcome was not foreseen by either party. Similarly, if the parties have stipulated how the consequences of frustration are to be dealt with (by incorporating a suitable arbitration clause, for example) the contract will not be discharged in relation to such terms: *Codelfa Constructions v. State Rail Authority of N.S.W.* (1982) 56 A.L.J.R. 459; *B.P. Exploration v. Hunt* [1979] 1 W.L.R. 783, 829. This is presuming that the contractually assumed risks can be said to have been intended to apply to post-frustration situations. This will not always be the case, however: Beatson, 84.

common interest in its continued performance to completion. Although the parties to a contract are usually pursuing their own individual commercial goals, they come together to achieve those goals through co-operative, mutually beneficial contractual relations, often lasting considerable periods of time, with the common aim that the parties' contractual obligations be fulfilled to the completion of the contract. Indeed, all parties to a contract have a right in law to expect the other parties to perform as obligated under the contract. Where a frustrating event precludes the continued performance of a contract, the parties' expectations as to future outcomes are shattered through no fault of any party.¹³¹ Although the ordinary contractual relationship is not as close as that which subsists between joint venturers, for example,¹³² nonetheless, the parties' common interest in the contract's successful¹³³ completion is clear. Consequently, the principle of just sharing is an appropriate legal response to losses and benefits resulting from the frustration of contracts. Yet despite this conclusion, the legal consequences of frustration are not, unequivocally, consistent with the application of such a principle.

In the past, it was considered acceptable that losses and benefits resulting from frustration should lie where they fell.¹³⁴ The "primitive"

¹³¹ "Self-induced frustration" is an oxymoron and does not amount to frustration in its legal consequences. See McKendrick, E., "Frustration, Restitution and Loss Apportionment" in Burrows, *Essays*, 147, 169, fn. 98. See Stewart & Carter, *supra* n. 25, 66, fn. 2.

¹³² The courts have rejected treating all contracts as joint ventures (see Stewart & Carter, *supra* n. 25, 109), and the view advanced here is not intended to contradict this position. It is argued here that the parties' common interest gives rise to only a very limited obligation in circumstances in which losses and benefits are incurred upon the frustration of a contract. No other rights and duties which attach to "true" joint venturers are relevant to a contractual relationship which is not also a joint venture. Thus, it is not suggested that there is an obligation on normal contractors to take "positive steps to conserve the welfare of their 'partners'" Contrast Stewart & Carter, at 109. The difference between obligations which may attach to all contractual relationships on the basis of the parties' common interest and obligations attaching to joint ventures, is borne out by *Cummings v. Lewis* (1993) 113 A.L.R. 285. In that case, the court rejected the existence of a joint venture, but nevertheless went on to consider whether a claim to contribution could arise. Since that case did not involve any frustration of the contract (i.e., no unprovided for contingency arose), the court rightly rejected such a claim. If, however, there had been a finding of a joint venture, then a claim that the parties should share losses would probably have succeeded, even though there was no frustration of the venture. Such an obligation may arise simply at the termination of a joint venture.

¹³³ "Successful" here refers to completion in an expected manner, rather than to completion in a way which fulfils all the expectations of the parties. See *supra* n. 2.

¹³⁴ See the discussion of *Chandler v. Webster* [1904] 1 K.B. 493 below, and see also *Appleby v. Myers* (1867) L.R. 2 C.P. 651.

fatalism¹³⁵ of such an approach has had little appeal this century and instead, the courts have characteristically turned to restitutionary remedies to ameliorate the consequences of such an approach by requiring the disgorgement of benefits. On the whole, such limited remedial relief has never seemed entirely satisfactory, a view reflected in the widespread criticisms of legal responses to frustration.¹³⁶ It is submitted that much of this criticism is founded upon the common law's failure, essentially for technical reasons,¹³⁷ to adopt the equitable principle of the sharing of burdens and benefits arising from the frustration of contracts. It is this principle which forms the underlying idea of much of the legal discontentment with the law's ordering of positions after frustration.

It is necessary then, to consider the rather unsatisfactory state of the law

¹³⁵ *Fibrosa Spolka v. Fairbairn Lawson Combe* [1943] A.C. 32, 72. See, however, a recent reformulation of the argument that the courts ought to let losses and benefits lie where they fall, which Kull, *supra* n. 2, calls the windfall principle. The general thrust of the argument is that the courts ought not to interfere (and generally have not, in the view of Kull), as this gives the parties the opportunities to allocate the risks of frustration themselves. On this view, even a non-allocation of risk amounts to a form of allocation by the parties. The argument is summarised thus:

But if the parties have not allocated the risk of a particular windfall or casualty loss to one of them, neither have they allocated it to the other. There is thus no basis in their bargain on which to justify a court's intervention to shift windfall benefits and burdens in either direction. ...⁽⁶⁾

[The source of the principle] is found in the individualistic conception of contractual obligation as something exclusively defined by the voluntary undertakings of the parties. It reflects, as well, the traditional skepticism of the common law toward the likelihood of increasing justice by requiring that casualty losses be shared ⁽⁷⁾.

Such a view, with respect, places too much emphasis upon the parties' autonomy to allocate risks. In these cases, the parties have not done so. Although as Kull points out, this is of itself an allocation, it is not one which reflects a conscious intention of the parties to allocate risks on the basis that losses and benefits will be left to lie where they fall. Thus, it seems appropriate to impose reasonable terms as to the parties' entitlements, to gap-fill the incomplete agreement. See also *infra* n. 145 for a rebuttal of Kull's views on *Chandler v. Webster* [1904] 1 K.B. 493.

¹³⁶ Such criticisms have come from both the judiciary and legal commentators. See, for example, references listed in Maddaugh & McCamus, 408, fn. 33.

¹³⁷ It has been said that the common law, unlike equity, has never developed mechanisms for loss sharing. See, e.g., *Fibrosa Spolka v. Fairbairn Lawson Combe* [1943] A.C. 32, 49, and McKendrick, *supra* n. 131, 167: "the common law has generally set its face against loss apportionment. There is no general principle known to the common law which requires that losses be shared between the parties." Cf. Kull, *supra* n. 2, 41. For an example of loss sharing on equitable principles upon the setting aside of a transaction, see *Cheese v. Thomas* [1994] F.L.R. 118, (C.A.). In this writer's view, however, since that case concerned a transaction entered into by the plaintiff as a result of the exercise of undue influence by the defendant, the loss in question ought to have been borne by him rather than shared.

as to the consequences of frustration, both at common law, which still governs most jurisdictions in Australia,¹³⁸ and under any statutory reforms made to such common law rules.

§ 7.5.1 Frustration at Common Law

Before the significant House of Lords decision in *Fibrosa Spolka v. Fairbairn Lawson Combe*,¹³⁹ the common law response to frustration was harsh and arbitrary—parties were to bear the consequences of frustration as and where they fell. In *Chandler v. Webster*,¹⁴⁰ for example, one of a number of cases arising out of the cancelled coronation procession of King Edward VII,¹⁴¹ the court stated that “the law leaves the parties [to a contract] where they were when the further performance of the contract became impossible.”¹⁴² Any rights or obligations arising after the frustrating event were discharged, but any rights which had accrued before the event could be enforced. Thus the plaintiff in that case failed to recover £100 paid in advance for the rental of a room intended to be used to view the procession. Further, the plaintiff was also required to pay £41 15s due under the contract before the cancellation of the procession.¹⁴³ The court conceded, however, that simply letting the loss lie where it falls is rather an “arbitrary” rule,¹⁴⁴ and the result has been much criticised and since overruled.¹⁴⁵ The court in that case did not give any

¹³⁸ Queensland, Tasmania and Western Australia, as well as the Australian Capital Territory and the Northern Territory do not have statutory provisions dealing with the effects of the frustration of contracts. Even in states which have legislatively intervened, such legislation generally does not cover all contracts. See Carter & Harland, 690, et seq.

¹³⁹ [1943] A.C. 32.

¹⁴⁰ [1904] 1 K.B. 493.

¹⁴¹ Another famous decision is that of *Krell v. Henry* [1903] 2 K.B. 740. See Wladis, supra n. 123, 1609, fn. 162, for an extensive list of reported decisions.

¹⁴² [1904] 1 K.B. 493, 500.

¹⁴³ The court dealt with the argument that there had been a total failure of consideration for the payment on the basis that the contract was not void *ab initio* but only from the date of the frustrating events. See also *Anglo Egyptian Navigation Co. v. Rennie* (1875) L.R. 10 C.P. 271. At times, the principle in *Chandler v. Webster* can lead to results consistent with the principle of sharing, where, for example, money is due under an employment contract which has been frustrated. In such a case, the employer will have received the benefit of the employee's work and the employee will have performed his or her required services. See, e.g., *Stubbs v. Hollywell Ry Co.* (1867) L.R. 2 Ex. 311.

¹⁴⁴ [1904] 1 K.B. 493, 499.

¹⁴⁵ *Fibrosa Spolka v. Fairbairn Lawson Combe* [1943] A.C. 32. The criticism of *Chandler v.*

persuasive principled reasons to justify its refusal to intervene: "letting the loss lie where it falls" on its own could justify a refusal to intervene in all circumstances, including for breach of contract, for example.¹⁴⁶ Consequently, it has been said that such a rule offers no solution at all, but is the "consequence of despairing of arriving at a conclusion."¹⁴⁷

The effects of the rule in *Chandler v. Webster* were subsequently moderated by the application of a doctrine of total failure of consideration in performance, in *Fibrosa Spolka v. Fairbairn Lawson Combe*.¹⁴⁸ Where one party to a contract has not received any part of what he or she bargained for,¹⁴⁹ such

Webster has at times been harsh. See, for example, the Scottish case of *Cantiare San Rocco S.A. v. Clyde Shipbuilding & Engineering Co. Ltd.* [1924] A.C. 226, 259, per Lord Shaw of Dunfermline:

The maxim [that "the loss lies where it falls"] works well enough among tricksters, gamblers and thieves; let it be applied to circumstances of supervenient mishap arising from causes outside the volition of parties: under this application, innocent loss may and must be endured by the one party, and unearned aggrandisement may and must be secured at his expenses to the other party. That is part of the law of England. I am not able to affirm that this is any part, or ever was any part, of the law of Scotland.

For a defence of the decision, however, see Kull, *supra* n. 2, who points out that one can consider that persons owning property on the coronation route suddenly obtained a valuable asset (the vantage for viewing the parade), which they could either enjoy personally or dispose of for profit as with any other property. Where the asset was "sold", Kull argues that the cancellation of the parade resulted in losses to whomever owned that asset at the time. See 26, and generally, 22-38. Kull considers that this is merely an example of the principle that "the loss from the destruction of property is for the account of the owner." This view would be both logically and morally appealing if one perceives the coronation cases as involving the straightforward transfer of property in which there is a clear-cut point at which property passes. In such a case, risk clearly follows the passing of property. Since this was not the case, however, as with most complex contractual arrangements the subject of frustration, such an analysis seems unsatisfactory. The parties' affairs were too interwoven to be viewed in such a way. The "windfall principle", *supra* n. 135, though maybe an accurate summary of the effect of legal responses to frustration or mistake affecting contracts for the sale of goods or real estate, seems inappropriate where parties share a common interest in the continued completed performance of ongoing contractual relationships. Such relationships are likely to be frustrated in a way which results in haphazard losses and benefits for which no allocation of risk has expressly or impliedly been made and to which the principle of sharing is thus applicable.

¹⁴⁶ Fried, 66; Beatson 79-80.

¹⁴⁷ Beatson, 79. In *Fibrosa Spolka v. Fairbairn Lawson Combe* [1943] A.C. 32, 59, Lord MacMillan considered that such an approach was "in truth a confession of impotence in the face of a problem deemed to be inextricable". See also McKendrick, *supra* n. 131, fn. 29.

¹⁴⁸ [1943] A.C. 32, 72.

¹⁴⁹ At common law, even where there has been some performance, no matter how trivial, recovery may be precluded. An extreme example is *Re Thompson* (1848) 1 Ex. 864, in which a £210 premium was paid for a 5 year articulated clerkship, in which the clerk died only one month later. None of the money was recoverable. Cf. *Whincup v. Hughes* (1871) L.R. 6 C.P. 78,

party will be entitled to the return of any money payments made.¹⁵⁰ Even this approach has obvious limitations, however, as was recognised by the House of Lords¹⁵¹ and as are illustrated by the facts of the case.

Fibrosa had prepaid considerable sums of money under a contract with Fairbairn, under which Fairbairn was to construct and deliver certain machinery. Delivery became impossible as a result of the outbreak of war. Fibrosa was held to be entitled to the return of the prepayment as the consideration for the payment had totally failed. No machinery had ever been delivered and Fibrosa thus had not received any of the bargained-for performance, despite the fact that Fairbairn had incurred considerable expenses in the construction of the machinery. In the circumstances, the result was not inconsistent with an apportionment of losses and benefits, as the machinery was readily saleable "and realisable without loss."¹⁵² Consequently, the resale of the machinery could cover Fairbairn's expenses and the return of the prepayment thus ensured that both parties were in much the same position as if the contract had never been entered into. Where losses and benefits are equal, restitution in such a case in effect achieves loss and benefit sharing in an "underhand" way.¹⁵³ The issue would have been much more problematic, however, if the frustrating event had destroyed the machinery.¹⁵⁴ For to order the return of prepayments in such circumstances would have left Fairbairn bearing a substantial loss. Such a result would be inconsistent with the operation of a principle of sharing, yet the common law, at present, does not

particularly at 86. The rule has been criticised by most commentators on Restitution and there does not appear to be any strong judicial commitment to the rule, so that it may in future be abandoned. Abandoning the rule may provide further opportunities for achieving results consistent with the principle of sharing at common law.

¹⁵⁰ The courts have not utilised the language of total failure of consideration in relation to services (cf. *Burrows*, 253; contrast *Birks*, 242-9). Since services cannot be returned, the party who has performed the services may be entitled to a *quantum meruit*, unless perhaps the contract is one which requires complete performance. See *Goff & Jones*, 409-12. It should be noted, though, that the law in this field is particularly uncertain.

¹⁵¹ In the course of the decision where there were a number of calls for legislative intervention: [1943] A.C. at 49, 57, 72, 78.

¹⁵² By the respondent's own admission ([1943] A.C., 76). But cf. *Mackinnon* L.J. in the Court of Appeal, [1941] 2 All E.R. 300, at 304, 307.

¹⁵³ *Weiss*, P.D., "Apportioning Loss of Discharge of a Burdensome Contract" (1960) 69 *Yale L.J.* 1054, 1066. Cf. *Beatson*, 85-6.

¹⁵⁴ As in *Appleby v. Myers* (1867) L.R. 2 C.P. 651.

offer any further prospect for relief.

If restitution of enrichment appears to be the only available remedy at common law, and some commentators perceive it to be an adequate remedial response,¹⁵⁵ it is worthwhile briefly to consider such a solution to an example in which no benefit *survives* in the hands of any party to a contract, yet losses have been incurred upon the frustration of the contract. Such an example brings out most sharply the arbitrariness of a restitutionary solution. For where one is dealing with losses alone—unlike in cases in which a plaintiff's total loss equate with a defendant's total benefit and thus restitution achieves an equitable result—any response other than loss sharing will leave one party bearing the entire loss.

Let us consider a claim by a plaintiff who has built machinery under a frustrated contract, for which no payment has been received. Has the defendant been enriched by the plaintiff's performance, where the frustrating event has resulted in the destruction of the machinery? Surprisingly, there are two possible answers to this question, giving rise to diametrically opposing results in similar circumstances. This is evidenced by the results reached in the United States, where unjust enrichment is the ostensible ground for recovery in such

¹⁵⁵ Stewart & Carter, *supra* n. 25. Stewart and Carter consider that loss sharing is not justifiable as parties engaged in commercial activity "do not generally engage in relations out of a spirit of mutual welfare, but rather to serve their own interests" and thus ought not be required to "insure" the other party for losses incurred (87-8, 109). They assert that unjust enrichment is the only legitimate basis for legal intervention (67). This, they argue, is more readily justifiable because the existence of a "benefit" in the hands of a defendant, which can be returned (though note their definition of benefit, at 68: "performance must be treated as a benefit because it has been requested"). Some fundamental criticisms of the views expressed by Stewart and Carter can be made. The requirement of loss *sharing* is not one of loss insuring and consequently is not dependent upon any rationale that the parties are responsible for the other party's mutual welfare in the contractual arena. The reason for remedial relief is the random nature of the losses and benefits which result from the unforeseen frustration of the common contractual purpose. Stewart and Carter suggest that "[w]hile the demise of the contract is not necessarily a reason for compelling parties to insure each other, there seems far less reason to allow benefits to be retained without payment." But the mere fact that one party has benefited as a result of certain events on its own is not sufficient to justify recovery. What is the reason for granting restitution in such a case (or, to utilise the language of unjust enrichment, why is the enrichment unjust)? It must surely be the frustration of the contract, as it is clearly not the result of any conduct on the defendant's part or any mistake on the plaintiff's part. But if frustration justifies the disgorgement of benefits where there is a corresponding loss, so that as a practical consequence, benefits and losses are reallocated between the parties, why does frustration not justify a re-allocation of losses where there is no corresponding benefit. If one advocates a windfall principle there appears to be no basis for making such a distinction. The *status quo* would need to be preserved in either case.

cases.¹⁵⁶ On an objective view of enrichment, the answer would be that there is no enrichment where the property has been destroyed, as the defendant has not received any of the plaintiff's performance. Accordingly, some states in America have taken such an approach and denied recovery.¹⁵⁷ But on an alternative view adopted in other United States jurisdictions, there would be an enrichment here—the requested contractual performance is considered of itself to be of value—and consequently recovery should be allowed.¹⁵⁸ The fact that such inconsistent reasoning has been adopted, and in both cases has been subjected to criticism,¹⁵⁹ suggests that neither approach is satisfactory. As an

¹⁵⁶ Many of the cases involve repairs to buildings which are destroyed before the repairs are completed.

¹⁵⁷ See Palmer, §7.8; Weiss, *supra* n. 153, 1062-3.

¹⁵⁸ See references, *ibid.* Cf. *Siegel v. Eaton* 46 N.E. 449 (1896). Even on this essentially subjective approach, it is difficult to see how the requesting party could have valued the partial performance of services from which nothing tangible was received. Birks would argue that there was no enrichment in such circumstances due to the lack of free acceptance. See 114-6. It thus appears illusory to find an enrichment in such situations. See Beatson, 84-5, and Dawson, J.P., "Restitution Without Enrichment" (1981) 61 B.U.L.R. 563, 585-92. See also McKendrick, *supra* n. 131, 150, who concludes that there would be no enrichment in this type of case. Some courts in the U.S. have acknowledged the artificiality of "unjust enrichment" in reaching a conclusion which allows recovery in such a situation. See *Albre Marble & Tile v. John Bowen Co.*, 155 N.E. (2d) 437 (1959). The court accepted that it was in effect allowing for the recovery of reliance losses. Note, however, the references to some element of "fault" on the part of the defendant. See *supra* n. 5.

Treating requested performance as a benefit is not artificial if one is dealing with employment contracts, in which the requesting party is paying for the time expended, irrespective of whether there is a valuable end-product.

¹⁵⁹ For example, Palmer, §7.8 criticises the former approach. See references, *id.* for criticisms of a finding of enrichment in cases taking the latter approach. See also the views of Stewart & Carter, *supra* n. 25, as to the solution to this type of problem. The authors reject the recovery of pure reliance losses, but conversely, adopt a very wide definition of benefit to include any performance under a contract. See at 68. In relation to the problem where the value of services has been destroyed by the frustrating event, Stewart and Carter suggest that the answer to the question of whether the non-performing party has been enriched by such services depends upon the terms of the contract. In the machinery example considered above, Stewart and Carter perceive that there should be a different outcome depending upon whether such a contract was for the building of machinery (hence performance, and consequently an enrichment to be disgorged) or instead, one for the installation of machinery (no performance, and hence no enrichment). Where there can be said to be an enrichment, Stewart and Carter consider this to be an example of restitution of benefit, but with respect, this is based on technical finding of benefit. The *quantum meruit* remedy advocated by the authors in effect shifts the entire loss from one party to another. The difficulty with the authors' approach is that it leads to an all or nothing outcome: the loss remaining entirely with one party, or being transferred in its entirety. It is not surprising that Stewart and Carter thus face considerable difficulty in drawing the line as to when one or the other solution is appropriate. See 74-7.

Significantly, many United States courts, despite the differing approaches, have managed to achieve a measure of loss and benefit sharing, via two mechanisms. (1) By determining that a contract is severable and adjusting rights accordingly. This approach by its nature ensures that

alternative to allocating the losses either entirely to a plaintiff or entirely to a defendant, requiring that the losses be shared in such cases seems intuitively just.¹⁶⁰ The principle of sharing, arising as a result of the unprovided for contingency causing loss to one party sharing a common interest with another, provides a rational and principled explanation for this intuitive response.

Many advocates of unjust enrichment concede that restitution may not always prove the fairest solution in cases of frustration and that loss sharing may be a more appropriate solution where losses alone remain after any restitutionary remedy.¹⁶¹ There are also a number of judicial utterances in support of such a view.¹⁶² It is submitted that given the long history of the recognition of such the principle of the sharing of burdens and benefits¹⁶³ in

any adjustments do not involve the entire potential losses or benefits from the frustration of the contract. (2) In relation to building contracts (where the building is destroyed), United States courts have developed a doctrine of incorporation, whereby materials which have been incorporated into a building may be recoverable, but other labour and expenses will not be. See Palmer, §7.8.

¹⁶⁰ Dobbs, 268-9. To take an example which illustrates the principle at work: X has paid \$2000 in advance as the full purchase price for the construction and delivery of machinery. Y has constructed half the machinery at a cost of \$1200, when a frustrating event occurs, discharging the contract and rendering the work worthless. By requiring Y to repay the \$2000, X's loss and Y's corresponding benefit will have been shared equally, but this still leaves Y with a \$1200 loss, which X should share by paying \$600. The net result is that Y should have to return only \$1400, which leaves both parties worse off by \$600. It is important to note, however, that the principle ought not to be utilised to require the sharing of losses or benefits which are the result of a good or bad bargain, rather than the result of frustration. See below.

¹⁶¹ Maddaugh & McCamus, 408, quoted supra n. 122, and see articles cited there, fnn. 33 & 36. See also Weiss, supra n. 153, 1058-9; Greig & Davis, 1338, & 1341, and the third supplement, 238.

¹⁶² E.g., *Fibrose Spolka v. Fairbairn Lawson Combe* [1943] A.C. 32, 58; and *National Carriers Ltd v. Panalpina* [1981] A.C. 675, 707: "justice may require the burden to be shared".

¹⁶³ In the United States, it has been suggested that the courts appear to be moving toward a recognition of a principle of sharing. See Fried, 71, who cites the *Restatement of Contracts, Second*, §272 (2), in support of the view that the recognition of the principle of sharing "is the direction in which courts are now moving." See also articles cited in Farnsworth, 736, fn. 32, but compare Farnsworth's own views, 735-7.

equity and elsewhere,¹⁶⁴ in those jurisdictions without statutory enactments there should be no impediment to the development of an equitable doctrine akin to contribution which gives effect to such a principle. The principle of just sharing is an ancient one, but flexible enough to deal with modern problems arising from the frustration of contracts.

To argue that the principle of just sharing is an appropriate basis for dealing with the consequences of the frustration of contracts is only a starting point for resolving complex issues. For example, how are losses and benefits which result from good or bad contractual bargains to be dealt with? Presumably, such losses and benefits ought to remain with each party. Potentially, one may be faced with complex factual problems,¹⁶⁵ but these should still be capable of resolution by reference to first principles. Only those losses and benefits which are the result of a frustrating event need to be distributed. Consider, for example, where P has incurred expenses of, say, \$4000, in nearly completing the construction of machinery for which only \$2000 was payable under the contract. If a frustrating event destroys the machinery, leaving it worthless, P cannot claim to have suffered a \$4000 loss as a result of the frustrating event. Instead, P's loss as a result of frustration is only approximately half that sum. The remaining loss arose purely as a result of P's bad bargain or inefficiency, or both, so that it would be inappropriate for D to assume any responsibility for it.¹⁶⁶

¹⁶⁴ The principle can also be seen in maritime law as well as at common law (the doctrine of contribution as it operates at common law, for example: see Goff & Jones, 307). As was noted above, supra n. 13, equitable principles were utilised to deal with the consequences of frustration of partnership contracts, even before the *Partnership Acts*, so that losses and benefits could be apportioned equitably amongst partners. The view that development of loss apportionment remedies may be appropriate is also supported by the thrust of legislative reform. See Haycroft, A.M. & Waksman, D.M., "Frustration and Restitution" [1984] *Jo. of Bus. Law* 207, 223; they cite Devlin L.J. in *Ingram v. Little* [1961] 1 Q.B. 31, 74:

It is only in comparatively recent times that the idea of giving to a court power to apportion loss has found a place in our law. I have in mind particularly the Law Reform Acts of 1935, 1943 and 1945, that dealt with joint tortfeasors, frustrated contracts and contributory negligence. These statutes ... show a modern inclination towards a decision based on just apportionment rather than one given in black or in white according to the logic of the law.

¹⁶⁵ As evidenced, for example, by the *Frustrated Contracts Act* 1978 (N.S.W.) which attempts to take such variables into account.

¹⁶⁶ The issue becomes more complex if the machinery had been only half completed, for example, in circumstances where it is clear that P's full completion would cost considerably more than the contract price. Determining the loss from the frustration in such a case is possible, however, by notionally determining the costs of P's full performance, given his or her expenses up to the point of frustration. P's loss as a result of frustration could then be

§ 7.5.2 Statutory Reform to The Common Law Position

In New South Wales, South Australia and British Columbia, legislative reforms have expressly adopted the equal sharing of burdens and benefits as their underlying objective.¹⁶⁷ The legislative provisions achieve this by quite different mechanisms,¹⁶⁸ but in essence, they firstly require the return of any benefits conferred (which given the corresponding losses, achieves an equal sharing of gains and losses), and then require the division of any further losses which have resulted from the frustrating event.¹⁶⁹ Thus, all three Acts "invoke the same principle of distributive justice",¹⁷⁰ that is, the principle of just sharing.

These Acts can be contrasted with the British *The Law Reform (Frustrated Contracts) Act 1943*, which has provided the model for many other jurisdictions.¹⁷¹ The underlying objective of this Act is unclear. It has been said that the aim of the Act is "the prevention of ... unjust enrichment",¹⁷² but contrary views have been expressed,¹⁷³ and some have claimed that the Act provides devices "for the adjustment of loss."¹⁷⁴ Such interpretations are

calculated accordingly: expenses incurred multiplied by contract price/notional total cost.

¹⁶⁷ *Frustrated Contracts Act 1978* (N.S.W.); *Frustrated Contracts Act 1988* (S.A.); *Frustrated Contracts Act 1974* (B.C.). See Stewart & Carter, *supra* n. 25, 82-4, 87.

¹⁶⁸ South Australia and British Columbia appear to have chosen relatively simple provisions (see s. 7, and ss. 5 and 7, respectively), whereas N.S.W. has adopted a complex and detailed scheme which seeks to cover all possibilities but which may consequently be unworkable. This fact is seemingly conceded by the drafter, who provide an "escape" clause allowing for such adjustments to be made as the court considers proper. See s. 15(1), and Stewart & Carter, *supra* n. 25, 82-3, 109. See also McKendrick, *supra* n. 131, 167.

¹⁶⁹ The South Australian Act appears to do this in "one hit" by aggregating the net gains and losses and then making a final adjustment. See s. 7.

¹⁷⁰ Stewart & Carter, *supra* n. 25, 87.

¹⁷¹ In Victoria, *The Frustrated Contracts Act 1959*, as well as in six Canadian provinces. In New Zealand, see the *Frustrated Contracts Act 1949*.

¹⁷² *B.P. Exploration v. Hunt* [1979] 1 W.L.R. 783, 799A, per Goff J.

¹⁷³ In the Court of Appeal in *B.P. Exploration* it was said that "no help from the use of words which are not in the statute" could be gained: [1981] 1 W.L.R. 232, 243.

¹⁷⁴ Haycroft & Waksman, *supra* n. 164, 216.

largely speculative, however, given the limited judicial guidance available.¹⁷⁵

¹⁷⁵ Apart from *B.P. Exploration v. Hunt* [1979] 1 W.L.R. 783, to this writer's knowledge, the only other reported decision relating to statutes of the British model is the Canadian case, *Parsons Bros. v. Shea* (1965) 53 D.L.R. (2d) 86.

ALLOCATING THE COSTS OF JUSTIFIABLE CONDUCT

*Necessity knows no law.*¹

§ 8.1 INTRODUCTION

In the previous two chapters the concern was with liability rules in Restitution which are activated by either a defendant's conduct toward, or common interest with, the plaintiff. More exceptionally, however, liability may be imposed upon a defendant despite the absence of any such conduct or common interest. One example is provided by liability rules which can be activated where a plaintiff unsolicitedly intervenes in some way in the affairs of another. For example, a plaintiff who rescues an endangered defendant may have a claim for recompense for such services. The successful pursuit of such a claim is not dependent upon showing that the dangerous situation was in any way caused or contributed to by any fault or breach of duty on the part of the defendant.² Claims arising as a result of such unsolicited interventions are the concern of this chapter.

Liability rules which allow plaintiffs to seek recompense for unsolicited services, amounting to some form of intervention in the affairs of others and not being rendered under any mistake, will be seen to occupy a small but

¹ *Necessitas non habet legem*: Publilius Syrus (attributed).

² If a defendant negligently causes an accident, for example, thereby putting himself or herself in a position of danger, then liability in tort may extend to persons who might foreseeably rescue the defendant. In *Baker v. TE Hopkins & Sons Ltd* [1958] 3 All E.R. 147, 153, Barry J., in an obiter opinion, considered that "[a]lthough no one owes a duty to anyone else to preserve his own safety, yet if, by his own carelessness, a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid." See also *Chapman v. Hearse* (1961) 106 C.L.R. 112 and Tiley, J., "The Rescue Principle" (1967) 30 M.L.R. 25. In Canada, see, e.g., *Horsley v. MacLaren* (1972) 22 D.L.R. (3d) 545, but contrast *Dupuis v. New Regina Trading Co Ltd* [1943] 4 D.L.R. 275. In the United States, see, e.g., *Carney v. Buyea*, 65 N.Y.S. 902 (1946).

important niche in our law of obligations. Other examples where such claims may arise include: (i) a physician (Plaintiff) renders medical aid to an unconscious accident victim who subsequently dies and whose estate (Defendant) is called upon to pay for the service;³ (ii) a neighbour (P) repairs an absent person's (D) storm damaged roof to prevent further loss;⁴ (iii) a physician (P) provides necessary medical assistance to a child, even though her parents (D) have declined to have her treated;⁵ (iv) a development company (P), realising that the resale value of its housing estate will be depreciated by the failure of the owner of the neighbouring estate (D) to install guttering (as required under council regulations), performs the work;⁶ (v) P pays a debt owed by D to a third party, in order to redeem goods owned by P and lawfully seized by the third party.⁷ In all of these cases, the plaintiffs seek recompense for the services rendered. With the exception perhaps of examples (ii)⁸ and (iv),⁹ in all these cases there would be a reasonable likelihood that such a claim would succeed.

The phrase "recompense for services rendered" will be used inclusively

³ Cf. *Matheson v. Smiley* [1932] 1 W.W.R. 758, 2 D.L.R. 787, in which the rescuee had attempted suicide.

⁴ Cf. *Berry v. Barbour*, 279 P. 2d. 335 (1954).

⁵ Cf. *Greenspan v. Slate*, 97 A. 2d 390 (1953). See also *Lamb v. Bunce* (1815) 4 M. & B. 275.

⁶ *George L. Schnader v. Cole Building Co.*, 202 A. 2d 326 (1964), in which the plaintiff paid the council to perform the work and sought reimbursement by claiming to be subrogated to the right of the council. The claim succeeded. Cf. *Guardians of the Poor of the Holborn Union v. Parish of St. Leonard* (1876) 2 Q.B.D. 145, to be discussed infra n. 149.

⁷ *Exall v. Partridge* (1799) 8 T.R. 308. For similar examples, see Goff & Jones, 346-7. Such cases are said to be examples of the "compulsory discharge of another's liability". The word "compulsion" must be treated with caution, however, for the compulsion does not stem from any actions of the defendant, but instead stems from the plaintiff's existing legal obligations or from the actions of a third party.

⁸ In *Berry v. Barbour*, 279 P. 2d. 335 (1954) the intervener (a building contractor previously employed by the defendant to repair the building) succeeded in a claim for recompense for the work done. Palmer, Vol. II, 373, however, considers that if the services had been provided by a neighbour "there is little or nothing in the case to indicate he would be entitled to recover the value of the labour and materials used." In the writer's view, the issue would turn on a number factors, including the reasonableness of the repairs, the urgency with which they needed to be made and whether or not the services were intended to be gratuitous. These matters will be considered further below.

⁹ See discussion in § 8.3, as to the difficulties facing the self-serving intervener in pursuing a successful claim in Anglo-Australian law. In the United States, it seems likely that such a claim would succeed. See supra n. 6.

to refer to two types of claims: (1) the reimbursement for goods expended and out-of-pocket expenses incurred; and (2) remuneration¹⁰ for a plaintiff's time and effort. Although a distinction between reimbursement and remuneration may seem artificial,¹¹ it will be seen below that in some circumstances it may be more difficult to pursue a claim for remuneration than merely for reimbursement. Consequently, such a distinction will at times need to be drawn.¹²

Significantly, irrespective of whether the claim is for remuneration or reimbursement, since the concern is with cases of unsolicited *services*,¹³ a defendant usually will not have received anything capable of being returned as

¹⁰ Another term commonly used in this context is that of "reward". Some writers use the terms remuneration and reward interchangeably to refer to recompense for time and effort, as distinct from reimbursement for expenses incurred. See, e.g., Stoljar, *Negotiorum Gestio*, Chapter 17, *International Encyclopedia of Comparative Law* (hereinafter: "Stoljar, *Negotiorum Gestio*"), and Honore, A.M., "Law, Morals and Rescue", in Ratcliffe, J.M., (ed.) *The Good Samaritan and the Law* (1966), 225, 234 (hereinafter: "Ratcliffe"). Others, however, appear to use reward to refer to something further, such as a bonus awarded, or an *ex gratia* windfall payment. See Rose, F.D., "Restitution for the Rescuer" (1989) 9 O.J.L.S. 167, 201. To avoid confusion, the term remuneration will be used to refer to claims for recompense for time and effort; reward will only be used in the sense of a bonus or windfall payment.

¹¹ Arguably, in the latter case, a plaintiff is simply seeking reimbursement for the expenditure of his or her *labour*. Cf. Stoljar, *Negotiorum Gestio*, 16-7. To draw such distinctions may also lead to anomalous results. As Rose points out, *supra* n. 10, 202: "The possibility of recovering expenses provides further support for the recoverability of remuneration in that to distinguish between the two types of recovery would be to create an anomaly. If a person can recover the expense of employing a warehouseman to store a cargo owner's grain, why should he not be remunerated for storing the grain himself?" (footnote omitted). There is some support for this view in the cases. In *Jenkins v. Tucker* (1788) 1 H. BL. 90, 94, for example, Wilson J. suggests that there is no difference between a claim (in that case for funeral services) by someone who has carried out a service personally, and one who has hired another to perform the service and "defrayed the expences". Similarly, see *Ambrose v. Kerrison* (1851) 10 C.B. 777, per Jervis C.J.

¹² While in theory there should be no differential treatment of claims for reimbursement and remuneration, nevertheless as a practical matter, where a claim is for remuneration only it may be more difficult to show that the services were not intended to be gratuitous, especially where carried out by a non-professional. It should be noted, however, that there are few claims solely for remuneration for time and effort, successful or unsuccessful. In many cases (such as in examples (ii) and (iv) above), the performance of services will require both the service provider's time and effort, as well as the outlay of expenses.

¹³ Unsolicited, non-mistaken payments of money directly to the defendant are likely to take the form of either gifts or loans and will thus not raise any legal difficulties. As Birks has pointed out in "*Negotiorum Gestio* and the Common Law" [1971] C.L.P. 110, 115, in relation to circumstances of necessity: "If my help in your emergency takes the form of money actually given into your hands it will either be a present or a loan. If I intend to recover at all, it will therefore be in contract." Consequently, the cases do not concern payment of money to a defendant directly.

such, that is, for which specific restitution can be ordered.¹⁴ So unless the plaintiff has fulfilled a pre-existing duty owed by the defendant to another (often in the form of a debt), an order for recompense for services, rather than return the parties to their *status quo* before the plaintiff's intervention, "creates a new financial burden for the defendant."¹⁵ A defendant will be forced to bear the costs of such services despite not having solicited them and despite the fact that such a defendant's wealth will not necessarily have been enhanced. The plaintiff in such a case effectively seeks to allocate the costs of his or her conduct to the defendant. Hence the reference in the chapter heading to the allocation of costs, rather than to the restitution of benefits, as some commentators would have.¹⁶

"Costs" refer to very specific types of losses of a plaintiff: deliberately assumed burdens—what some have labelled "sacrifices"¹⁷—such as expenses incurred, in goods and money, and time and skill expended. Excluded from the scope of the term "costs" are injuries or losses to the plaintiff's person or property fortuitously incurred in the course of his or her actions.¹⁸

¹⁴ An exception might be where the plaintiff has supplied goods to the defendant, which have not been consumed and of which he or she seeks the return, or where the services have produced an end-product which can be returned.

¹⁵ Stoljar, *Negotiorum Gestio*, 10. Where the plaintiff has paid a pre-existing debt, requiring a defendant to reimburse the plaintiff does not impose a new burden, though it does change the nature of the obligation, namely the identity of the obligee. This is clearly a lesser burden than being required to meet a new obligation to pay for unsolicited services and the significance of this will become apparent later.

¹⁶ Some commentators perceive the problem as one of the restitution of benefits. The difficulty with this view has been dealt with in Chapter 4, but the essential flaw rests in the artificiality of treating remedies shaped by the costs incurred by a plaintiff as being concerned with the disgorgement of benefits. The "restitutionalists" treat such services as a benefit even though in all these cases, the services will not have been requested or accepted and in many cases will not have resulted in a valuable end-product, or even, in some cases, have saved the defendant any "necessary" expenditure.

¹⁷ Stoljar, *Negotiorum Gestio*; Stoljar, "Unjust Enrichment and Unjust Sacrifice" (1987) 50 M.L.R. 603; Muir, G.A., "Unjust Sacrifice and the Officious Intervener" in Finn, 297.

¹⁸ Normally, fortuitous losses will only be recoverable by a plaintiff if such losses can be traced to someone's (the defendant's) breach of duty (for example, a duty of care). The cases considered here do not encompass such claims, limited as they are to costs which can be traced to the plaintiff's deliberate acts, but recovery for which is, as already indicated, not premised on any breach of duty on the defendant's part. The compensation of injury suffered by plaintiffs raises different issues to those addressed here and the theoretical constructs developed herein would not appear to be an appropriate mechanism for determining liability. For example, compensation claims for injury potentially may involve large sums and, given that defendants here may be completely innocent of any wrongdoing, it would be harsh to impose such liability on the same grounds as those on which other costs may be allocated. Stoljar rejects the use of

Let us return to the examples outlined above. As they illustrate, the interveners have deliberately rendered services without the request of the defendants and while not acting under any mistaken assumptions.¹⁹ Although the plaintiffs' actions amount to deliberate intervention in the defendants' affairs, few would argue that intervention in such circumstances is unreasonable. This is despite each plaintiff's very different motivations. The physicians and concerned neighbour of examples (i) (aid to accident victim), (ii) (medical treatment of child) and (iii) (repair to damaged roof) are motivated by altruistic concerns for the welfare of others, albeit, as will be seen, only by a limited form of altruism.²⁰ In examples (iv) (debt paid to redeem goods) and (v) (improvements to neighbouring estate), the interveners act largely or even entirely out of self-interest, to protect their own property and interests. We are considering then, two very different kinds of intervener: on the one hand, there are those intervening primarily to further their own interests, and on the other, there are those intervening primarily²¹ in the interests of others;²² in short, the self-server²³ and the altruist respectively. Nevertheless, in both types of case, the courts may be prepared to allocate the costs of an intervener's *justifiable* conduct to the defendant as the *more appropriate* party to bear those costs.

To say, however, that a plaintiff may recover in those circumstances

negotiorum gestio-type doctrines as appropriate for recovering for injuries sustained. See *Negotiorum Gestio*, 149-52. See also Dawson, J.P., "Rewards For the Rescue of Human Life" in Ratcliffe, 63, 85-9, for a persuasive argument against recovery on a no-fault basis from a rescuee for injuries incurred in the course of a rescue. Cf. Levmore, S., "Waiting for Rescue" (1986) 72 Va L.R. 879, 898-9. Contrast Honore, *supra* n. 10, who supports recovery from the no-fault rescuee for injuries sustained, but "only so far as his means reasonably permit" (236).

¹⁹ The mistaken improver of another's land or the mistaken payer of money are not of present concern and will be discussed in the following chapter.

²⁰ This is because a "pure" altruist (to use the terminology of Stoljar), is likely to render the services with a gratuitous or donative intent and this, as will be seen, is generally fatal to recovery.

²¹ It will be seen that altruists may recover even where motivated by some self-interest, provided they intended to act primarily in the interests of the defendant or some third party.

²² Cf. Palmer, Vol. II, 362.

²³ This term is not intended to be pejorative, for the protection of one's own interests is a legitimate motivation for acting. This is reflected by the law's response to the self-serving intervener, who, it will be seen, often succeeds in recovering costs incurred.

where a defendant is the "more appropriate" party to bear the costs of a plaintiff's "justifiable" conduct as an intervener, can never be intended to operate as a legal principle. It is simply too open-textured, too general, to be of any use in determining when a plaintiff's claim may in fact succeed. Such a general statement can at best merely describe the effect of a number of liability rules. But even as a descriptive device, the statement needs clarification as to the two fundamental concepts identified: (1) what sort of conduct can be said to be justifiable (as an intervention for which recompense may ensue)?²⁴ and (2) in which circumstances is the defendant the more appropriate party to bear particular costs? In order to answer these questions, it will be necessary to identify the different and competing concerns underlying the determination of a claim by an intervener. The purpose of this chapter is to attempt to isolate some of these concerns, which will vary according to whether the intervention was motivated by altruism or by self-interest. Thus, it is proposed to deal with these two types of cases separately. Importantly though, in both types of intervention, the distinctive feature of the cases under consideration is that the determination of legal liability is arrived at largely by focusing on the plaintiff's conduct, and on the effects of that conduct, rather than by focusing on the defendant's circumstances (his or her conduct, status, relationship with the plaintiff, enrichment, and so on).²⁵ Of course, a defendant's conduct may have created the condition precipitating a plaintiff's intervention in the first place, as

²⁴ A finding that a plaintiff's conduct is justifiable is part of the process of inquiry to determine whether recovery should be allowed: a conclusion that conduct is not justifiable is not intended to suggest that it is somehow morally reprehensible or wrongful.

²⁵ A number of grounds for recovery have been suggested which seek to justify recovery in these cases by reference to the defendant's circumstances. These do not, however, stand up to close scrutiny. It has been argued that one moral basis for imposing liability upon a defendant rests upon that defendant's moral obligation to compensate his or her benefactors. Cf. Goodin, R., *Protecting the Vulnerable* (1985), 99-104. But such a moral obligation would appear to depend upon the benefit having been accepted, which will not be so in cases under consideration here. Related to this type of argument is the view that a liability may be said to arise from a duty on the part of the defendant to show gratitude. Even if such a duty exists, however, it need not translate into and in fact suggests against a duty to make financial recompense for the services. There are many other ways of showing gratitude. See Berger, F.R., "Gratitude" [1985] *Ethics* 298. This view is given judicial support by the observations of Eyre C.J. in *Nicholson v. Chapman* (1793) 2 H. & BL. 254, 259, that "acts of benevolence from one man to another" arguably did not give rise to a legal duty for recompense (note, however, the contrary view expressed earlier in the judgment) and "should depend altogether for their reward upon the moral duty of gratitude." Thus, Eyre C.J. appears to be saying that a duty to show gratitude does not equate with a duty to make recompense.

Similarly, basing liability upon the defendant's failure to disgorge an enrichment does not stand up to scrutiny, given that the defendant will not usually have received any tangible benefit to disgorge. An order for recompense imposes a new financial obligation upon the defendant, in circumstances where he or she need not have been benefited. See *supra* n. 16.

examples (iii) (refusal by parents to treat child) and (iv) (failure to install required guttering) above demonstrate.

It is important to emphasise this feature of the cases. Whether a plaintiff will be entitled to recompense for his or her intervening actions is dependent upon balancing competing legal concerns and policies which revolve around judgments and conclusions about the plaintiff's actions. These include, in matters to be expanded upon below, judgments as to the reasonableness of the plaintiff's conduct and whether the plaintiff was a "proper" person to intervene or merely an "intermeddler". Similarly, in protecting a defendant's autonomy to order his or her own affairs, the courts consider whether a *plaintiff's actions* have unjustifiably deprived a defendant of an opportunity to choose to act otherwise. Even the issue of the "appropriateness" of the defendant to bear the costs turns on the plaintiff's conduct—whether he or she has acted altruistically or in self-interest, or whether the plaintiff's conduct has fulfilled some duty of the defendant.

Given these very special features of the claim by an unsolicited intervener, it is not surprising that the courts have been fairly cautious in allowing such claims. Although in the writer's view, some commentators have over-emphasised this caution,²⁶ it is nevertheless fair to say that the circumstances in which recovery will be allowed are fairly limited.²⁷ This is evidenced by the fact that it is the impediments to recovery rather than the principles upon which recovery can be claimed which the courts have tended to emphasise and which feature prominently in the language and reasoning of the cases. The reasons for this caution will be brought out more sharply below.

It is not easy to isolate the competing concerns underlying the determination of a claim by the altruistic intervener and the self-server, respectively. There appear to be two broad reasons for this. First, where the courts have denied recovery, they have often done so by using conclusory or even pejorative labels, such as "volunteer" or "officious intermeddler", to describe a plaintiff, without articulating the underlying concerns or limiting

²⁶ See, e.g., Hope, E.W., "Officiousness" Pt I & II, (1929) 15 Corn. L.Q. 25, 205, at 25, citing Radin, *Handbook of Roman Law* (1927), 301-2: "There are few persons for whom the common law has so little kindness as for the voluntary intermeddler in other persons' affairs."

²⁷ Such a caution exists also in jurisdictions which have a doctrine of *negotiorum gestio*. Stoljar, *Negotiorum Gestio*, Part 1, particularly at 11, has pointed out that the limits upon recovery evident in the common law are largely reflected in civil law systems.

policies these labels are meant to signify.²⁸ Such labels appear to do little more than “state conclusions rather than guide analysis.”²⁹ Secondly, when allowing recovery the courts have often resorted to vague language—appeals to “natural justice” are not uncommon—to justify their finding; and further, unlike the civil law, such recovery has been effected by resort to quite disparate doctrinal vehicles and never as part of any broader, coherent doctrine or principle.³⁰ Most decisions thus appear as single or isolated instances, or seemingly anomalous extensions of existing well-understood legal doctrines. Such doctrinal vehicles include amongst others:³¹ resort to quasi-contract,³² or more

²⁸ Klippert, 100, notes that in some cases, to call a “transfer voluntary is merely to use a legal term as a conclusion; it acts as a substitute for legal analysis. This causes a problem because we are not informed on what basis the court has decided to treat the claimant as a volunteer ...”. For the inadequacies of the term “volunteer”, see Hope, *supra* n. 26. It is often said that a “volunteer” will not recover (see, e.g., Radin, cited *supra* n. 26). Yet, to take but one example, in the *ex Argos* (1872-3) L.R. 5 P.C. 134, the court stressed the voluntary nature of the plaintiff’s actions before allowing recovery. Not surprisingly, Palmer, Vol. II, 359, has said that “volunteer” is a “word of many meanings”. See generally, Klippert, Chp. 4, who at 99 states that a “volunteer is an elusive person in restitution cases Most generalizations about him break down in light of the decided cases.” Hope, 28-9, prefers the term officious, but there are difficulties with this as well. Wade, J., “Restitution for Benefits Conferred Without Request” (1966) 19 *Vanderb. L.Rev.* 1183, 1212, has concluded that expressions like “officious” and “volunteer” are no more than “question-begging epithets”.

²⁹ Landes, W.M., & Posner, R.A., “Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism” (1977) 9 *J. of Legal Studies* 83, 84, note that “[t]he efforts of conventional legal scholarship to give these terms concrete meaning have not been very successful, and there is a growing tendency to acknowledge that, as currently employed, such terms state conclusions rather than guide analysis” (footnotes omitted). At 90, fn. 16, the authors provide an economic definition of “officious”.

³⁰ Cf. Stoljar, *Negotiorum Gestio*, 4: “At common law *negotiorum gestio* does not officially exist as an independent institution operating in its own right.” Similarly, Jackson, 24, has said that the “principle of *negotiorum gestio* does not exist in our law.” Nevertheless, in the view of Stoljar, the “common law, too, contains results, strewn over several places, all of them eminently comparable to those achieved in the civil law.” Cf. Birks, *supra* n. 13, 110, who “question[s] [the] reality” of the common law’s “supposed hostility” to claims for unsolicited services; and McCamus, J.D., “Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution” (1979) 11 *Ox. L.Rev.* 297. See also Powell, R., *Law of Agency* (2nd ed., 1961), 416: “A thorough investigation of English case law would reveal a large number of cases in which the basic principle of *negotiorum gestio* has in fact been followed.” Contrast the conclusions of Aitken, L.J.W., “*Negotiorum Gestio* and the Common Law: A Jurisdictional Approach” (1988) 11 *Syd. L.R.* 566. It has been argued that the refusal of the English common law to adopt a doctrine of *negotiorum gestio* is due to a difference in national temperament: Hope, *supra* n. 26, 29. Stoljar concludes, however, in *Negotiorum Gestio*, 34, that “[t]here is ... little or no justification for the idea that common and civil law are so starkly different as to reveal a deep cultural rift, a radical divergence of national temperament.”

³¹ See, e.g., *Sorrell v. Paget* [1950] 1 K.B. 252.

³² An example is a claim for *quantum meruit* for services rendered and money paid actions, as in the funeral cases, to be discussed below.

recently, particularly in Canada³³ and the United States, Restitution or unjust enrichment;³⁴ indirect relief in the form of the reduction of damages payable in tort by the tortious preservers of property;³⁵ enforcing contracts apparently in contradiction of the rule that past consideration is not valuable consideration;³⁶ a gradual expansion of the "agency of necessity" doctrine, to be considered below;³⁷ subrogation in equity;³⁸ and the enforcement of "implied" contracts.³⁹ Arguably, the absence of a coherent, single doctrine has proved to be an impediment to an ordered development of the law governing recovery for the unsolicited intervener.⁴⁰

³³ See, e.g., *Re Jacques* (1968) 66 D.L.R. (2d) 447, and *Samilo v. Phillips* (1968) 69 D.L.R. (2d) 411. In the latter case, Seaton J. considered "agency of necessity" as a "further branch of restitution".

³⁴ See the *Restatement of Restitution*, §§112-117. An example may be *Cotnam v. Wisdom*, 104 S.W. 164 (1907), although the basis of recovery is not entirely clear, with references also being made to implied contract.

³⁵ E.g., *Munro v. Willmot* [1949] 1 K.B. 295. The defendant allowed the plaintiff to store her car at his premises. After several years, and having tried unsuccessfully to communicate with the plaintiff, the defendant spent £85 to repair the car, in order to make it saleable, and subsequently sold it. The plaintiff sued for damages in detinue or conversion and succeeded, but the court allowed the defendant to credit the amount he had spent to render the car saleable against the damages awarded for the value of the car at the time of the sale.

³⁶ See, e.g., *Webb v. McGowin*, 168 So. 199 (1935), and the cases cited therein. In *Webb v. McGowin*, a promise to "care for and maintain" the promisee for the rest of his life, made subsequent to the promisee's rescue of the promisor from serious injury or even death and in consideration of the past act of rescue, was held enforceable. This case went far beyond remuneration for the services rendered, but other cases cited in *Webb* have involved promises to that effect. See also *Gibbons v. Proctor* (1891) 64 L.T. 594, and *Williams v. Cawardine* (1833) 4 B. & Ad. 621.

³⁷ See *Sims & Co. v. Midland Ry Co.* [1913] 1 K.B. 103; cf. *Springer v. Great Western Ry Co.* [1921] 1 K.B. 257. For the widest statement of the principle, see *Prager v. Blatspiel, Stamp & Heacock Ltd* [1924] 1 K.B. 566. See also *In re F. (Mental Patient: Sterilisation)* [1990] 2 A.C. 1, 75, per Lord Goff. Contrast the restrictive approach of Scrutton L.J. in *Jebara v. Ottoman Bank* [1927] 2 K.B. 255, 270. The doctrine has been said to be limited to existing agents, acting outside their usual authority, but has also been applied to parties who were not agents at the time of necessity. See *infra* n. 109.

³⁸ *George L. Schnader v. Cole Building Co.*, 202 A.2d 326 (1964).

³⁹ E.g., *Lamb v. Buncie* (1815) 4 M. & B. 275. See also *Great Northern Ry v. Swaffield* (1874) L.R. 9 Ex. 132, 137, per Pigott, B.; but contrast at 136, per Kelly C.B., and at 138, per Pollock, B. Note that this was considered to be a case of agency of necessity by McCardie J. in *Prager v. Blatspiel* [1924] 1 K.B. 566.

⁴⁰ The common law may, however, be moving towards an acceptance of a more general principle governing recovery, at least in relation to the altruistic intervener. See *In re F. (Mental Patient: Sterilisation)* [1990] 2 A.C. 1, per Lord Goff, particularly at 73-6, where his Lordship accepts the existence of a general principle of necessity. Lord Goff's statements are

Given this diversity of forms of action and the lack of a ready-made formula laid down in authoritative judgments, any attempt to find common ideas running through these cases is difficult. Consequently, any legal framework for such ideas must to a large extent be constructed from the results and reasoning of all the cases. Constructing such a legal framework is nonetheless possible. As will be seen, both the justifiability of a plaintiff's conduct and the appropriateness of the defendant to bear the plaintiff's costs are determined by the mostly uniform application of identifiable concerns, though admittedly these are often not expressly or clearly articulated.

An added difficulty in coming to some understanding of the basis of recovery for unsolicited services is that the number of decisions, particularly those concerning altruistic interveners, is small. Outside of maritime salvage, for example, the writer knows of no Australian authorities concerning claims for recompense by rescuers of property. And the dearth of authorities in some classes of case is not restricted to Australia. Consequently, it is proposed to consider common law decisions as a whole. This is not to presume that there may not be a distinctive English, Australian, Canadian or United States law, but rather to acknowledge that there is insufficient authority in many types of case (particularly outside the United States), to make any meaningful comparisons. Thus, the exercise here will essentially be a speculative one of attempting to state what the *common* law might be.⁴¹ And although arguably

expansive and accept a general principle of necessity at common law, applicable whenever actions are taken in the best interests of a person and where the necessity of the circumstances means that it is not practicable to communicate with the assisted person (75). These views, however, are expressed in the context of establishing the lawfulness of a person's physical interference with another's body without that other's consent. Lord Goff stresses that claims for recompense for services raise separate questions. It is unlikely that Lord Goff's general statement of principle can be applied without qualification to the latter type of case, where a plaintiff goes beyond seeking to establish the lawfulness of his or her actions and instead seeks to allocate the costs of such conduct to the defendant.

⁴¹ This is a necessity made more real by the age of some of the authorities. It would be entirely speculative to predict how some of these problems would be decided today, though this does not prevent us reaching a view as to how they ought to be decided.

the United States courts have been a little more liberal in granting relief⁴² than their English counterparts, so that United States decisions may have to be treated with some caution, such "liberality" may simply be a reflection of the greater volume of cases heard by United States courts, rather than of any significant divergence in legal principle.

Despite all of these difficulties (or perhaps because of them), claims by unsolicited interveners are perhaps of greater interest than any other in Restitution, for they bear no resemblance to other mainstream and well-recognised sources of liability in our common law. As such, they have often been marginalised and largely neglected.⁴³ However, such a fate need not be inevitable. In Continental legal systems, for example, many of these types of cases are united by the doctrine of *negotiorum gestio*, or "unsolicited intervention in another's affairs".⁴⁴ Such European doctrines are essentially limited to cases of altruistically motivated rescue or intervention⁴⁵ and are thus not as inclusive as the subject-matter of this chapter. *Negotiorum gestio* does, however, cover much of the material to be considered under the heading of altruistic intervener, to which we now turn.

§ 8.2 THE ALTRUISTIC INTERVENER

That selfless acts done for the welfare of another or of the community generally are morally good has been widely recognised amongst moral

⁴² See, for example, Stoljar's consideration of the rights of finders of goods, where he suggests that under United States law, the right to recover is more liberal. See *Negotiorum Gestio*, 122-3. But this may not be the case generally. Palmer, for example, and despite the recognition of liability for certain types of unsolicited interventions in the *Restatement of Restitution*, strikes an essentially pessimistic chord. He considers that the United States courts have been particularly restrictive so far as the altruistic intervener is concerned. See Palmer, §10.1. This compares, for example, with the views of Birks, writing in an English context. See Birks, *supra* n. 13.

⁴³ One notable exception is the writing of Professor Stoljar in what is perhaps the definitive comparative work, *Negotiorum Gestio*. This work is a significant achievement and this writer has drawn liberally upon it. Renewed interest in Restitution has also partially rectified the neglect of cases of unsolicited intervention (see, e.g., Goff & Jones, Chp. 15), but such interest has also had (in the writer's view) the deleterious consequences which follow from seeking to incorporate such cases within an unjust enrichment framework, within which they do not fit comfortably.

⁴⁴ Stoljar, *Negotiorum Gestio*, 3. See, however, *In re F.* [1990] 2 A.C. 1, discussed *supra* n. 40.

⁴⁵ This altruism, however, must be of the limited kind to be considered below.

philosophers⁴⁶ and the judiciary. Thus, by way of example, it has been said that "[t]he impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity."⁴⁷ Ever since the parable of the Good Samaritan⁴⁸ (and probably before), there has been little dissent from such views. But the law's concern is not with the virtue of the well-meaning actor, but with the issue of whether the "Good Samaritan" who intervenes in the affairs of another can obtain recompense for his or her services. When addressing this issue, the law has proved cautious in allowing recovery. This caution reflects the need to balance competing policies. In particular, when firstly determining whether conduct is a justifiable intervention for the purposes of establishing a right to recompense, very generally speaking, the courts repeatedly emphasise two countervailing concerns:

(1) On the one hand, it is desirable that the law encourage, or at least not discourage "socially useful" interventions.⁴⁹ These terms incorporates a number of ideas to be considered below, but reflects an overall conclusion that the conduct in question is likely to enhance social well-being or utility; and

(2) On the other hand, there is a need to protect individuals in society against undue interference in their liberty, by discouraging conduct which amounts to an unjustifiable disregard for the autonomy of others.

Balancing these conflicting policies leads to a determination as to whether a plaintiff's conduct was justifiable in the circumstances.⁵⁰

Once the question of justifiability is resolved, it is still necessary to go

⁴⁶ See generally, Honore, *supra* n. 10.

⁴⁷ *Scaramanga v. Stamp* (1880) 5 C.P.D. 295, 304, per Cockburn C.J.

⁴⁸ Luke, 10.30-37.

⁴⁹ Cf. Stoljar, *Negotiorum Gestio*, 49, who employs the term "useful", derived from notions of utility, found in the civil law of *negotiorum gestio*.

⁵⁰ This clash of policies is reflected in philosophical debate as to when paternalistic actions are morally justified. Considerations of paternalistic behaviour attracts two applicable moral principles. In the words of Lee, S., "On the Justification of Paternalism" (1981) 7 *Social Theory and Practice* 193:

One is the principle that prescribes the avoidance of harm to a person. The other is the principle that proscribes interference with another person's choices. The harm principle morally favors paternalistic interference, and the liberty principle morally opposes it; thus the clash.

one step further and show why it is that *the defendant* should bear the costs. For the defendant may still legitimately ask, "but why should I pay?".⁵¹ This raises a number of other issues which will be considered under the head of "appropriateness". But first, the justifiability of a plaintiff's conduct will be considered in detail by reference to the two general competing policies outlined above.

§ 8.2.1 Justifiable Conduct

§ 8.2.1.1 Not discouraging socially useful conduct: social utility

It should be noted from the outset that the term "socially useful" is not generally employed by the courts. It is merely a convenient short-hand conclusion arrived at after considering a number of more specific requirements which must be satisfied. To generalise, the burden of these requirements is the social utility of the conduct, a point which has been emphasised in the case law.⁵²

One requirement for conduct to be considered socially useful would appear to be that the purpose, or end-desired outcome, of the conduct is one which society perceives as worthwhile. Perhaps the simplest way of illustrating such worthwhile purposes is by reference to cases which have allowed recompense for particular types of conduct. Not surprisingly, given the undoubted worth of such actions, recovery has been allowed where a plaintiff has sought to save a life or preserve property.⁵³ Other services for which recovery has been allowed include: the supply of "necessaries" such as food,

⁵¹ The fact that society has an interest in not discouraging certain conduct might warrant public funds being used to recompense plaintiffs. This is indeed the situation in Austria, which has provided for a state fund from which saviours of another's life may be awarded grants. See Dawson, *supra* n. 18, 88. There are, of course, many publicly funded bodies (police, fire brigade, "state emergency services", and so on) whose function is to carry out socially useful acts of the type under consideration.

⁵² See, for example, references such as those to the "inconvenience to the public" that would arise if the plaintiff had not acted: *Rogers v. Price* (1829) 3 Y. & J. 28; 148 E.R. 1080, 1082, a case involving the burial of a corpse. Cases involving the supply of necessities to those in need have also stressed the social utility of the conduct in question. See, e.g., *Wentworth v. Tubb* (1841) 1 Y & C.C.C. 171; 62 E.R. 840, 842, in a passage cited *infra*, text to n. 148.

⁵³ Although outside of maritime law, recovery in the latter case may still be rare. See generally, McInnes, M., "Restitution and the Rescue of Life" (1994) 32 Alb. L.Rev. 37.

medicine, or other basic necessities of life⁵⁴ to the poor,⁵⁵ physically⁵⁶ or legally incapacitated;⁵⁷ actions taken in the interests of public health⁵⁸ and safety⁵⁹ (such as the prompt burial of the dead);⁶⁰ and the preservation of another's "credit"⁶¹ or financial position.⁶²

Another important aspect of the social utility of a plaintiff's conduct would appear to be the reasonableness of any costs incurred, in the sense that the intervention is a resource-efficient one, at least in the circumstances as they appear to the intervener. Clearly, where an intervener can, at little cost, save a person from serious injury or death, or save valuable property, society has benefited. Conversely, expending large sums in an attempt to save property which is obviously worth little, is particularly wasteful.⁶³ This element of utility—reasonable cost—has been stressed in a number of the cases⁶⁴ and is emphasised by economic analyses of rescue law. Such analyses have suggested that the rules appear to ensure that there be some proportionality between the

⁵⁴ See the discussion of "necessaries" in *Nash v. Inman* [1908] 2 K.B. 1. It has been held that acts to preserve the estate of a mentally disordered person are "necessaries". See *Williams v. Wentworth* (1842) 5 Beav. 325; 49 E.R. 603.

⁵⁵ *Lamb v. Bunce* (1815) 4 M. & S. 275; 105 E.R. 836

⁵⁶ *Re Jacques* (1968) 66 D.L.R. (2d) 447.

⁵⁷ Such as infants (*In re Clabbon* [1904] 2 Ch. 465) or the mentally disordered (*Williams v. Wentworth* (1842) 5 Beav. 325). Claims for such services have been allowed either directly against the recipient of the necessaries, or against a defendant who owed a duty to supply the necessaries to the recipient.

⁵⁸ *Guardians of the Poor of the Holborn Union v. Parish of St. Leonard* (1876) 2 Q.B.D. 145 (cleaning rubbish from premises).

⁵⁹ Note the comments of Kelly C.B. in *Great Northern Ry v. Swaffield* (1874) L.R. 9 Ex. 132, 135.

⁶⁰ See the series of decisions known as the funeral cases, to be considered further below.

⁶¹ See § 8.2.2.2 in relation to acceptor's of bills of exchange.

⁶² *Samilo v. Phillips* (1968) 69 D.L.R. (2d) 411.

⁶³ What is a reasonable cost becomes a much more difficult problem, as yet unaddressed by the law, where the rescue of life is the issue.

⁶⁴ Particularly in the funeral cases. For example, in *Tugwell v. Heyman* (1812) 3 Camp. 299, Lord Ellenborough noted that the charges incurred were "fair and reasonable" and that the services were "suitable to the [deceased's] degree and circumstances". See also *The Winson* [1982] A.C. 939, 958, per Lord Diplock.

value of the outcome which is sought to be achieved and the costs of achieving such an outcome. This idea is illustrated by the law of maritime salvage—the salvage of cargo and ships wrecked at sea. Landes and Posner, for example, argue that the rules governing maritime salvage⁶⁵ conform with notions of economic efficiency, that “the purpose of salvage awards is to provide incentives for efficient resource allocation.”⁶⁶

Finally, the need to establish social utility may require that conduct be reasonable in two other respects: first, that the plaintiff has acted reasonably in all the circumstances,⁶⁷ acting, for example, with due care and skill; and secondly, that it was reasonable for the particular plaintiff to have acted in the circumstances, a requirement perhaps manifested in the emphasis placed by some courts on the plaintiff being a “proper” or “appropriate” person to act. The meaning of such terminology, however, is not generally made clear.⁶⁸ Although few cases appear expressly to turn on these two requirements, they may explain⁶⁹ why claims for remuneration (for time and effort) generally only succeed where the claimants are professionals (such as physicians) or stand in some relationship with the defendant or the defendant’s property. Thus, in many of the cases involving the preservation of property (outside

⁶⁵ Which, unlike the rules governing most of the topics under consideration here, are well-settled. See generally Steel, D., & Rose F., *Kennedy’s Law of Salvage* (5th ed., 1985)

⁶⁶ Landes & Posner, *supra* n. 29, 102, and see also at 100. According to such economic analysis, court interference is justified in imposing an obligation upon defendants in such circumstances because of the “high transactions costs” of achieving a bargain. These costs include the possibility and costs of communication, the time available, and the expenses of bargaining. The professional nature of salvage operations is, however, a distinguishing feature which may mean that the conclusions of Landes and Posner may not readily translate to other types of rescue. See also Levmore, *supra* n. 18, who considers whether particular types of rules will maximise the incidence of life rescue.

⁶⁷ The action “must be such as a reasonable and prudent man would take in his own interest.” Rose, *supra* n. 10, 193. See also *Phelps, James & Co. v. Hill* [1891] 1 Q.B. 605, 611. Cf. *In re F.* [1990] 2 A.C. 1, 75, though note the context in which the comments were made: *supra* n. 40.

⁶⁸ See, e.g., *Jenkins v. Tucker* (1788) 1 H. BL. 90. In the funeral cases, this requirement appears to have been satisfied either by the plaintiff being an undertaker or some relative of the deceased. The requirement that a plaintiff be a “proper” person is not particularly widespread, however, and cases which have used such language have not tended to articulate when a plaintiff will be considered as proper. See Hope, *supra* n. 26, 42. In any case, a number of funeral cases have accepted that a stranger can perform such services. See *infra* n. 136. The requirement that a plaintiff be a “proper” person may also be a manifestation of the principle to be discussed below, that the plaintiff has not unjustifiably interfered in the autonomy of the defendant, that is, that he or she is not an intermeddler or “busybody”. See Birks, *supra* n. 13, 122-3.

⁶⁹ Other reasons will be considered below.

maritime law), the claims were by bailees of the property⁷⁰ or agents of the defendant.⁷¹

To summarise, in order to prove socially useful, a plaintiff's services will generally have had a purpose which the law considers worthwhile, and will generally have been carried out at a reasonable cost and been reasonable in all the circumstances. It is important to note, however, that it does not appear to be a prerequisite for a successful claim that the services have been of benefit to the defendant⁷² or the third party (such as a dependent of the defendant) for whom the services were rendered. In other words, the services need not have proved successful. Thus a plaintiff may still obtain recompense for a failed rescue attempt, as in *Matheson v. Smiley*,⁷³ where a doctor failed to resuscitate an injured person. The law's concern appears to be with the general social utility of the conduct of the type in question, rather than with any actual benefit conferred on an individual defendant in a given case. We will return to this point below.

The notion of social utility, then, incorporates these requirements. In circumstances in which they have been satisfied, it might be argued that allowing recovery is "a means of encouraging interventions which are perceived to be socially useful."⁷⁴ However, this may be stating the matter too broadly. Perhaps more cautiously, it could be said that allowing recovery aims not so much at actively *encouraging* socially useful conduct, but at not discouraging it.⁷⁵ The reason for this caution is that encouragement suggests an

⁷⁰ See Palmer, Vol. II, 371. See also 369, fn. 3, for American cases which have denied recovery for services aimed at preserving property.

⁷¹ See, e.g., *The Winson* [1982] A.C. 939, and *G.N.R. v. Swaffield* (1874) L.R. 9 Ex. 132. Alternatively, this may merely reflect that such persons are more likely to have been in the vicinity of the property and felt obliged to assist or perhaps were even under a duty to act.

⁷² The notable exception to this are claims for maritime salvage.

⁷³ [1932] 2 D.L.R. 787.

⁷⁴ McCamus, *supra* n. 30, 297-8. Similarly, John Austin has said that the basis of the obligation to indemnify one who has "to his own inconvenience" acted for the advantage of another, such as in cases of salvage, is "to incite certain useful actions. If the principle were not admitted at all, such actions would not be performed so often as they are." See *Jurisprudence* (4th ed., 1879) Vol. 2, 944 (emphasis in original). Note, however, that McCamus considers that the operating principle which justifies recovery by necessitous interveners is unjust enrichment: that benefit disgorgement is the underlying rationale. Cf. Goff & Jones, 26.

⁷⁵ The extent to which rules of law ever influence human behaviour, however, particularly in this sphere, is open to debate. Note the contrasting positions of some writers. See, e.g., McCamus, *supra* n. 30, 298, who considers it unlikely that the rules relating to rescue

active promotion of certain conduct.⁷⁶ Yet the common law does not appear to have gone this far. For example, unlike most civilian jurisdictions, the common law does not impose a general⁷⁷ duty to rescue.⁷⁸ Some commentators would cavil with the need for such an obligation and the positive encouragement of certain conduct that such a duty would entail.⁷⁹ It is unlikely, however, that anyone would argue that such conduct should actively be discouraged.⁸⁰ Yet a failure to recompense (and especially to reimburse) a plaintiff who has incurred expenses in performing such an act could almost be considered punitive. It has

will have an impact on shaping human affairs. Contrast Rudzinski, A.W., "The Duty To Rescue: A Comparative Analysis" in Ratcliffe, 91, 122: the "law quite successfully modifies human attitudes, reinforces moral impulses, and awakens the indifferent and the passive."

⁷⁶ It may even suggest an active promotion of a particular moral ideal, that we behave as Good Samaritans.

⁷⁷ Some persons in certain special relationships with others may owe them a duty of care, extending to a duty to rescue. These categories appear to be expanding. See Levmore, supra n. 18, 899-900. See also *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 28-31, per Mason J., as to circumstances in which a duty in tort may arise to take positive steps to protect persons, to whom the duty is owed, against foreseeable harm.

⁷⁸ As was stated in a United States case of *Union Pacific Railway Co. v. Cappier*, 72 P. 281, 282 (1903):

Those duties which are dictated merely by good morals or by human considerations are not within the domain of the law. Feelings of kindness and sympathy may move the Good Samaritan to minister to the needs of the sick and the wounded at the roadside, but the law imposes no such obligation; and the suffering humanity has no legal complaint against those who pass by the other side.

Some persuasive arguments have been put in support of a duty to rescue. See, e.g., Adler, J.M., "Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others" [1991] Wis. L.R. 867. See particularly at 878-86, for a persuasive attack upon the distinction drawn in tort law between misfeasance and nonfeasance, and at 901, for a brief summary of the author's alternative approach. See also Rudzinski, supra n. 75, particularly 119-25.

⁷⁹ See, e.g., Epstein, R.A., "A Theory of Strict Liability" (1970) 2 J. Legal Studies 151, 200-1. Landes & Posner, supra n. 29, 119 et seq., appear to reject the need for such a duty. See also Dawson, supra n. 18, 85-9, and generally Menlowe, M.A., & McCall Smith, A.M., (eds) *The Duty to Rescue: The Jurisprudence of Aid* (1993).

⁸⁰ E.g., Landes & Posner, supra n. 29, 119 et seq., point out that there is no reason based on economic efficiency to impose a duty to rescue, but support a right of "restitution". Note, however, that it could be argued that there is no essential difference between "encouragement" and absence of "discouragement". See Honore, supra n. 10, 232-3.

been said that there is no neutral position: if the law “does not compensate, it will indirectly penalise.”⁸¹ For if the

rescuer who suffers injury or incurs expense or simply expends his skill goes without compensation, the law, so far as it influences conduct at all, is discouraging rescue.⁸²

Even if one does not go so far, it seems clear that recompense for socially useful services ought not to be disallowed where a failure to recompense *may* discourage in future such socially useful conduct or can be considered to penalise a plaintiff who has engaged in such actions. Such a conservative statement of the underlying aim of recovery—not to discourage or penalise socially useful conduct—is supported by the requirements of utility already considered. The combined weight of meeting these requirements could in fact prove burdensome for interveners seeking recovery. In any case, these requirements are of themselves insufficient to justify recovery. There is little evidence of generosity in granting relief, which is also reflected in the next issue: the constraining concern of the need to protect the autonomy of others.

§ 8.2.1.2 Protecting the autonomy of the defendant

A respect for liberty requires that individuals have the freedom to make choices, in order to pursue their own goals and desires. Although of course such freedoms cannot be absolute (being subject to legal and social constraints), a society which values individual autonomy also needs to guard against those who unjustifiably intermeddle in the affairs of others. Such values are reflected in our legal system, and in relation to claims for unsolicited⁸³ services take the form of a preclusion against recovery where a plaintiff’s intervention amounts to an unnecessary or unjustifiable disregard for the autonomy of the defendant. Even if an intermeddler was acting in the “best interests” of another,⁸⁴ and the intervention in that other’s affairs was socially useful, such an intervention will nonetheless be unjustified where, to a reasonable person’s knowledge,⁸⁵ that

⁸¹ Honore, *ibid*, 232.

⁸² Honore, *id*.

⁸³ A request for services will be sufficient to establish that the plaintiff’s “intervention” was not in disregard of the defendant’s autonomy. See *Re Jacques* (1968) 66 D.L.R. (2d) 447.

⁸⁴ We are leaving aside the possibility that the plaintiff may even have been motivated by malice. See, e.g., *Norton v Haggett*, 85 A. (2d) 571 (1952).

⁸⁵ It is probably a sufficient justification for a plaintiff’s intervention if such plaintiff reasonably believed that the defendant was incapable of ordering his or her affairs. For

other was perfectly capable of ordering his or her own affairs. Thus a mechanic who makes substantial repairs to a client's car additional to those requested, without the client's knowledge,⁸⁶ doubtless has no claim for recovery, even where the repairs needed to be made.⁸⁷ The mechanic could simply have contacted the client to have the repairs authorised.

In legal parlance, preclusion against recovery by those who disregard the autonomy of others often take the form of admonitions against "officious" intermeddlers and "volunteers". The *Restatement of Restitution*, for example, has adopted the concept of "officiousness" as a general limiting principle upon a right to Restitution.⁸⁸ These terms will be avoided here, however, for they are of uncertain meaning and scope.⁸⁹ Instead, the restriction on recovery will be stated in terms of an unjustifiable disregard for the autonomy of others.⁹⁰ Such a statement, of course, requires substantiation as to what amounts to an "unjustifiable disregard". This will be done by setting out some of the specific factors that the courts appear to consider in deciding whether or not to grant

example, it has been held that it is possible to recover for necessities supplied to a "lunatic", where the lunatic was one not so found. See *Morrow v. Morrow* (1920) 52 D.L.R. 628

⁸⁶ If that other was aware of the repairer's actions, then a doctrine of acquiescence, for example, may give rise to a legal liability, founded on the "unconscionable" conduct of the owner in not disabusing the repairer of the owner's intention not to pay. This is doubtful, however, where the repairer has not acted under any mistake. In such a case, it could be argued that the repairer has taken the risk of not being paid. A similar debate, in unjust enrichment circles, has centred on whether a defendant who stands by while a risk-taker performs services can be said to have "freely accepted" those services and thus be liable to make "restitution" for the "benefit" conferred. See generally, Burrows, A.S., "Free Acceptance and the Law of Restitution" (1988) 104 L.Q.R. 576, and Birks, P., "In Defence of Free Acceptance" in Burrows, *Essays*, 105.

⁸⁷ The result will be the same even where the owner accepts that the repairs needed to be made; he or she is still entitled to choose how and when those repairs should be made. For an example of even more extreme conduct of this type, see *Finelli v. Dee* (1968) 67 D.L.R. (2d) 393, in which a contractor performed work after a contract with the defendant had been cancelled, waiting till the defendant had left for a holiday before performing the work.

⁸⁸ Section 2 states that "[a] person who officiously confers a benefit upon another is not entitled to restitution therefor" but then rather unhelpfully adds (comment a), that "officiousness means interference in the affairs of others not justified by the circumstances under which the interference took place."

⁸⁹ See supra n. 28.

⁹⁰ Advocates of unjust enrichment encapsulate this idea within the policy that benefits cannot be forced upon people against their will. See Wade, supra n. 28, 1212.

recovery, at the back of which, it is suggested, lies the desire to safeguard the autonomy of individuals.

There have been repeated judicial warnings against forcing liabilities upon people behind their back⁹¹ or "in spite of their teeth".⁹² Since ordering recompense for services involves limitations upon the defendant's use of his or her limited resources—it imposes a new obligation, in fact—the law is reluctant to interfere, even where the services can be seen to be beneficial.⁹³ For where the particular defendant was in a position to choose, the issue is one of allowing such choice.⁹⁴ As Baron Pollock laconically stated in *Taylor v. Laird*, "one cleans another man's shoes. What can one do but put them on."⁹⁵ The strength of this exclamation is not weakened by a plaintiff producing evidence of the social utility of clean shoes and his or her selfless motivation in seeking to rid the world of dirty shoes. For the fact is that in such a case, there is ordinarily no impediment to a plaintiff asking whether the defendant wants the shoes cleaned.⁹⁶ Unjustified intermeddling should not be encouraged by creating an expectation of recompense in such circumstances.⁹⁷ The notions, that freedom of choice is to be protected and intermeddling not to be encouraged, are alternative expressions of the same underlying idea: the need to protect against an unjustifiable disregard for individual autonomy.⁹⁸

⁹¹ *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234, 248, per Bowen L.J.

⁹² *Stokes v. Lewis* (1785) 1 T.R. 20, 22, per Lord Mansfield. For similar expressions of opinion, see also Wade, *supra* n. 27, 1183, fnn. 2 & 3.

⁹³ This will be so under whichever definition or approach to benefit one may care to take.

⁹⁴ For a strong articulation of the underlying concerns of liberty behind denying relief for unsolicited services, see generally Mathews, P., "Freedom, Unrequested Improvements and Lord Denning" [1981] C.L.J. 340. For an economic perspective to the "free choice" argument, see Levmore, S., "Explaining Restitution" (1985) 71 Va L.Rev. 65, 74-9.

⁹⁵ (1856) 25 L.J. Ex. 329, 332.

⁹⁶ Economists would argue that there are no high transaction costs and therefore no impediments to bargain. It is argued then that on grounds of economic efficiency alone, the court should refuse to impose such a bargain. See Levmore, *supra* n. 94, 79 et seq. Allowing recompense in such cases would result in "thin", that is, uncompetitive and inefficient, markets.

⁹⁷ Allowing recovery in such circumstances would amount to an endorsement of the plaintiff's conduct. As to when paternalistic behaviour is justifiable, see, Lee, *supra* n. 50.

⁹⁸ Contrast McCamus, *supra* n. 30, 300-1, who considers these to be quite separate concerns. This appears to ignore the fact that intermeddling conduct is conduct which gains its

How does this concern manifest itself in the legal rules under consideration? A distinction needs to be drawn for the purpose of answering this question between cases in which the plaintiff has acted in the defendant's interest (saving his or her property, for example), and cases in which the plaintiff has acted in the interests of a third party (supplying necessities to a dependent of the defendant, for example), including the public, thereby fulfilling a duty of the defendant. These two cases will be taken in turn.

§ 8.2.1.2.1 *Acting in the interests of a defendant*

Where a plaintiff has sought to act in the interests of the defendant, the law could take one of two approaches in order to protect the defendant's autonomy. First, the law could seek to protect the defendant's actual choices, by considering his or her subjective preference as to what he or she would have done in the circumstances: whether, in fact, the defendant would have chosen as the plaintiff did and incurred the liability or sought the services. It is clear that such an approach would be unsound and has not been adopted. It would make the success of a plaintiff's claim dependent upon facts he or she would have had no awareness of at the time of acting. Particular idiosyncrasies of the defendant, even quite perverse ones, could defeat the plaintiff's claims.

Instead, the courts protect a defendant's interests by restricting interference in the defendant's *opportunity* to choose, as a rational, capable adult. Where a plaintiff has deprived the defendant of an opportunity to act which he or she would otherwise have had, then recovery will generally be barred. Where, to a plaintiff's reasonable assumption, no opportunity has been interfered with, then the courts ignore any idiosyncratic choices the defendant may have made, but of which the plaintiff was unaware (such as an attempted suicide's desire to die),⁹⁹ and simply determine (on utility grounds) whether the defendant should pay in the circumstances.¹⁰⁰ No opportunity of a

character from the interference in another's affairs, interference which in some way limits that person's freedom of choice or autonomy.

⁹⁹ Cf. Goff & Jones, 377.

¹⁰⁰ Some unjust enrichment writers (see Goff & Jones, 375, Birks, 194) use the language of whether a defendant *would* have incurred the liability in the circumstances, but it is clear that they have in mind an objective determination by the courts or an objective bystander as to what such a choice of the defendant *should* be, rather than a determination based on his or her actual choice. To state that a defendant would have incurred the liability in question consequently amounts to no more than a conclusion that the defendant should pay. But by formulating this conclusion as part of a benefit-based approach, the whole process obscures the underlying reasons for why the defendant should pay, namely that the plaintiff justifiably

defendant to act will have been interfered with where there was an emergency, or the defendant was legally or physically incapacitated or absent,¹⁰¹ or where the plaintiff reasonably believed such circumstances to govern the situation.¹⁰²

To take an example, if P should mend D's storm-damaged roof to avoid a threatened danger of further storm damage, while D is absent on an extended overseas trip having left no means of contact, it cannot be said that P has interfered in D's opportunity to choose. There simply was no opportunity for D to make a choice: the need for swift action would preclude the argument that the matter could have been dealt with upon D's return. D's actual choices, as to whether to have the roof fixed at all, and the manner of fixing it, are not relevant to this determination.¹⁰³ Where, however, to P's knowledge D was only away at work for the day (and readily contactable), then D has every opportunity to act before the danger to his or her property eventuates, so that interference by P in such circumstances would amount to an unjustifiable disregard of D's opportunity to choose.¹⁰⁴

acted, non-gratuitously, in the interests of the defendant. It is not necessary that the defendant was benefited as a result of such actions. This is discussed under the heading of "appropriateness".

¹⁰¹ For a consideration of the necessity for consent to medical treatment, and the circumstances in which such consent will not be necessary, see *In re T. (Adult: Refusal of Treatment)* [1992] 3 W.L.R. 782, (C.A.). See also *In re F.* [1990] 2 A.C. 1.

¹⁰² There is little authority for this proposition, but where a plaintiff reasonably believes that there is no opportunity for a defendant to make a choice and acts accordingly and reasonably, then such conduct would seem justifiable. See *supra* n. 85.

¹⁰³ The example is not intended to suggest that a claim by P for recompense would necessarily succeed. P would still have to show that the work was socially useful (§ 8.2.1.1) and not intended to be gratuitous (§ 8.2.2). Cf. *Berry v. Barbour*, 279 P. 2d 335 (1954).

¹⁰⁴ An example used by Feinberg, J., "Legal Paternalism" in Sartorius, R., (ed.) *Paternalism* (1983) 8-9, further illustrates the point. He commences by quoting J.S. Mill:

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.

Of course, for all the public officer may know, the man on the bridge does desire to fall into the river, or take the risk of falling for other purposes. If the person is then fully warned of the danger and wishes to proceed anyway, then, Mill argues, that is his business alone; but because most people do *not* wish to run such risks, there was a solid presumption, in advance of checking, that this person did not wish to run the risk either. Hence the officer was justified, Mill would argue, in his original interference.

Where services take the form of the rescue of property or life, the defendant's opportunity to choose is generally protected by the need to show the existence of some necessity which justifies the intervention. This can be illustrated by the requirements of maritime law and the "agency of necessity" doctrine.

In maritime law, it is necessary that there was some danger at sea before a claim for salvage is potentially available.¹⁰⁵ It is sufficient for these purposes that "there was a possible contingency that serious consequences might have ensued."¹⁰⁶ Although it has been reconfirmed that the law of salvage does not extend beyond the seas,¹⁰⁷ where an emergency arises on land, the doctrine of "agency of necessity" has at times been used in an analogous way to allow recovery for services performed, usually by existing agents or persons acting on their behalf,¹⁰⁸ but also by "strangers",¹⁰⁹ in order to preserve property¹¹⁰ or

¹⁰⁵ Under English law, maritime salvage law has been extended by statute to aircraft. There is no equivalent legislation in Australia. See White, M.W.D., (ed.) *Australian Maritime Law* (1991), 210.

¹⁰⁶ *The Ella Constance* (1864) 33 L.J. Adm. 189, 193 per Dr. Lushington. Consequently, there need not have been an "immediate risk" or "immediate danger". One suggested test (in Steel, D.W., & Rose, F.D., *Kennedy's Law of Civil Salvage* (5th ed., 1985), 14), is that the danger must have been

so much a just cause of present apprehension, that, in order to escape out of it or to avoid it (as the case may be) no reasonably prudent and skilful seaman in charge of the venture would refuse the salvor's help if it were offered to him upon the condition of his paying for it the salvor's reward.

¹⁰⁷ *The Goring* [1988] 1 A.C. 831; see also in the Court of Appeal, [1987] Q.B. 687.

¹⁰⁸ Most cases involve either claims by existing agents who seek recompense for the services rendered or expenses incurred, or claims by parties who have been contracted by the agents, and who seek to recover in contract against the defendants, so that the issue turns on whether such contracts were "authorised". An example of the latter type of claim is *Langan v. Great Western Railway* (1874) 30 L.T. 173. The issue of whether a contract is authorised will depend upon whether the agent's powers were expanded by the necessity of the circumstances. In the House of Lords, it has been suggested that "agency of necessity" ought, strictly speaking, be used to refer only to the latter type of claim: *The Winson* [1982] A.C. 939, 958, per Lord Diplock, 965, per Lord Simon of Glaisdale. But the label has in the past been applied to both types of claim.

It has been argued, and the view has merit, that cases which concern existing agents are of less interest than those in which there is no pre-existing agency, given that notions of implied powers can adequately explain the former type of cases. Consequently, the former type of cases may be seen as nothing more than specialised cases of true agency, with all the usual consequences incidental to the exercise of an agent's power. See McCamus, *supra* n. 30, 303-10, particularly at 305. As he points out, the pre-existing relationship may give rise to a duty to act on the part of the agent. See *ex Argos* (1873) L.R. 5 P.C. 134, and *Langan v. G.W.R.*

¹⁰⁹ It has been suggested that there are in fact very few examples of "agency of necessity" cases extending relief beyond pre-existing agents. See Aitken, *supra* n. 30, 591-7, who

assist injured persons.¹¹¹ For the doctrine to apply, however, there must be, amongst other things¹¹² some necessity or emergency, so that there is a real danger to property or life,¹¹³ and a shortage of time, so that it can be said that there is a pressing urgency for action.¹¹⁴ This requirement encapsulates the idea that the owners of property (or parties responsible to injured persons) be given all reasonable opportunity to choose how best to deal with a particular situation. Consequently, it is sufficient if communication is merely impractical rather than impossible,¹¹⁵ given the emergency and the time available.¹¹⁶

concludes (at 596) that "[a]gency of necessity stands revealed as little more than an excrescence on a basally unsympathetic common law." Cf. Birks, *supra* n. 13, 130. Undeniably, however, there is *obiter* in support of a wide doctrine of agency of necessity. For the strongest judicial support, see *Prager v. Blatspiel* [1924] 1 K.B. 567. See also *In-re F.* [1990] 2 A.C. 1, 75. Contrast *Jebara v. Ottoman Bank* [1927] 2 K.B. 254. It is interesting that the earliest development of the doctrine involved cases of shipmasters, who, it has been argued, cannot realistically be seen as true agents of the cargo owners. See McCamus, 306; and Aitken, 594, who concedes the point. There are other cases as well which are difficult to rationalise on the basis of an existing agency, or even an existing relationship. See, e.g., *The "Cynthia"* (1852) 20 L.T.R. 52, and McCamus's discussion of *Hastings v. Village of Semans* ([1946] 4 D.L.R. 695), at 307. Contrast the conclusions of Aitken, 598.

110 E.g., *Tetley & Co. v. British Trading Corp.* [1922] Ll. L.R. 678, and *Sims v. Midland Railway Co.* [1913] 1 K.B. 103.

It must be conceded, however, that there is considerable English *dicta* denying a stranger a right to recompense for acts to preserve property. See, for example, the statement of Lord Reid in *The Tojo Maru* [1972] A.C. 242, 268: "On land a person who interferes to save property is not in law entitled to any reward." One case commonly cited in support of such a proposition is *Nicholson v. Chapman* (1973) 2 H. BL. 254; but that case concerned a claim for a lien, rather than a personal claim. There are conflicting statements in the case, some of which would appear to rather favour personal recompense for preserving another's property. See Birks, *supra* n. 13, 111-2. The conflicting statements are quoted *infra*, § 8.2.2.1. See also Muir, *supra* n. 17, 322, who points out that whilst the authority in support of a proposition against recovery for property saved on land is weighty, it consists entirely of *obiter*. In other jurisdictions, claims by strangers for the preservation of another's property have succeeded. See, e.g., *Re Pike* (1888) 23 L.R.I. 9 (Ireland), and *Frost v. Ponca*, 541 P. 2d. 1321 (1975).

111 A number of cases involve railway accidents in which existing agents arranged for the treatment of the injured. See, e.g., *Walker v. Great Western Railway* (1867) L.R. 2 Ex. 228, and *Langan v. Great Western Railway* (1874) 30 L.T. 173.

112 For the elements of a successful claim of an "agency of necessity", see *Prager v. Blatspiel* [1924] 1 K.B. 567, as well as Goff & Jones, 366-9, and *Hastings v. Village of Semans* [1946] 4 D.L.R. 695.

113 Rose, *supra* n. 10, 185.

114 Landes & Posner, *supra* n. 29, 100.

115 See also the *Restatement of Restitution*, §117 (1) (b).

116 *Sims v. Midland Ry.* [1913] 1 K.B. 103, 107, per Scrutton J.; Cf. Birks, 201. See also

Where a "principal" is absent or unreachable, it cannot be said that the rescuer has disregarded that principal's autonomy or opportunity to deal with the situation as he or she desires.

Where a plaintiff is in an existing relationship with the defendant (being a bailee of the defendant's property, for example), then there may arise a *duty* by virtue of that relationship to act in an emergency to protect such property. An "agency of necessity" in such circumstances may not only authorise the agent to act as he or she did, but may require it. The existence of such a duty, however, clearly entitles the plaintiff to recompense for costs incurred in discharging that duty,¹¹⁷ including perhaps remuneration for time expended.

In both rescue at land and at sea, then, the requirement that a danger to property or life amounts to some emergency is itself, if not defined by, at least given substance by, the very inability of the defendants to preserve their own interests. Thus a defendant might be unconscious or injured,¹¹⁸ absent,¹¹⁹ or incapable of being communicated with in the short time frame available given the pressing need for the services.¹²⁰ The plaintiff's actions do not unjustifiably disregard the defendant's opportunity to choose in such circumstances. Perhaps a more difficult issue, however, arises where conditions of emergency exist, but the plaintiff knew or had reason to know that the defendant did not desire such services.¹²¹ Should recovery for the services ensue? Some cases suggest not. Thus, in *Mulloy v. Hop Sang*, a patient whose arm was injured in an accident, expressed a clear desire that his hand be saved until he could see another surgeon. The operating physician was unsuccessful in his claim for services rendered when he amputated the hand, despite the reasonableness of

Springer v Grt Western Ry Co. [1921] 1 K.B. 257.

¹¹⁷ *The Winson* [1982] A.C. 939. See generally Muir, *supra* n. 17, 316-9, and particularly 320-1.

¹¹⁸ See *Matheson v. Smiley* [1932] 2 D.L.R. 787; *Cotnam v. Wisdom*, 104 S.W. 164 (1907); *Estate of Crisan*, 107 N.W. 907 (1961).

¹¹⁹ *Berry v. Barber*, 279 P. 2d 335 (1954).

¹²⁰ Economists might say that transaction costs are too high for a bargain to be negotiated. See Landes & Posner, *supra* n. 29, 100.

¹²¹ See the *Restatement of Restitution*, §116 (c). Presumably, this would include a desire to be left to die. See *In re T. (Adult: Refusal of Treatment)* [1992] 3 W.L.R. 782, but see also *Matheson v. Smiley* [1932] 2 D.L.R. 787, and cf. Goff & Jones, 377.

his actions.¹²² Such circumstances would be very rare, however, for even if, to take one example, a physician treats an attempted suicide, the physician may not know the suicide's true intentions (was it a "serious" attempt, or merely an attention-seeking exercise?),¹²³ or his or her mental competency.¹²⁴ Where, however, an adult with full mental capacity makes a clear choice to refuse treatment, which refusal clearly encompasses the circumstances which have arisen, then such a choice should be respected.¹²⁵

It has been argued by some (Birks, for example) that the existence of an emergency suggests some "involuntariness" on the part of the intervener: that the plaintiff's conferral of services has resulted from some form of moral compulsion.¹²⁶ To attempt to determine the issue in terms of voluntariness however, does not aid analysis. For it is often the case that the plaintiff had alternative choices. Birks concedes that in maritime salvage cases "it cannot be said that the law confines awards to those who have felt compelled to give assistance."¹²⁷ The same can be said of cases of the application of other

122 [1935] 1 W.W.R. Cf. *Malette v. Shulman* (1990) 67 D.L.R. (4th) 325. See also *Soldiers Memorial Hospital v. Sanford* [1934] 2 D.L.R. 334, in which the defendant, after being arrested, was taken to a hospital by the arresting officers in order to be treated for a serious wound. There was some evidence that the patient did not desire the services (335). Given the seriousness of his injuries and doubts about his level of consciousness at the time (see 338-9), this should not of itself have precluded recovery. Nevertheless, the decision disallowing recovery appears justified, given that the patient was under arrest and that there consequently resided a duty in the municipality (through the arresting officers) to ensure that he was adequately attended. The hospital therefore ought to have sued the municipality as the more appropriate defendant. See 337.

123 Cf. Honore, *supra* n. 10, 234—those who attempt suicide often "lack a settled determination in the matter." This could be one explanation for the decision in *Matheson v. Smiley* [1932] 2 D.L.R. 787, although there is a suggestion in the case that a wish to die might simply be ignored. In circumstances of an emergency and the surrounding uncertainty, this may be a fair conclusion. Otherwise, it is arguable that such a wish to die ought to be respected.

124 For a consideration as to when a person refusing to allow lifesaving medical treatment has sufficient capacity to decide, see *In re T.* [1992] 3 W.L.R. 782.

125 Where there is any doubt as to whether the choice was intended to cover the contingency or changed situation which arises, then an intervener will be justified in ignoring such choices. See *In re T.* [1992] 3 W.L.R. 782, at 797-8, 803. This will be the case where a refusal to receive medical aid was not "made with reference to the particular circumstances in which it turns out to be relevant": per Staughton L.J., 804-5. See also *Werth v. Taylor*, 475 N.W. 2d 426 (1991), and *Malette v. Shulman* (1990) 67 D.L.R. (4th) 325.

126 See Birks, 193-202. Birks does not provide a satisfactory definition as to what amounts to sufficient compulsion. At 173, he states: "The party who was compelled says that his brain could not operate freely for fear of some evil consequence."

127 Birks, 305; see also 304.

doctrines, such as agency of necessity. Thus, in *ex Argos*,¹²⁸ for example, the plaintiff (the master of a ship), was unable to discharge cargo at the port to which he had been requested to transport it. After several unsuccessful attempts to off-load the cargo at nearby ports, the plaintiff returned with it to the port of departure. The plaintiff was held entitled to recover back-freight and expenses, as he had sought to land the cargo where he considered most convenient. An explanation of this decision on the basis of compulsion would have been difficult to sustain, given the number of options available to the plaintiff and the adequate time for reflection. The court concluded that "a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary; I do not know that he is bound to do it."¹²⁹ Rose sums up the issue succinctly:

there is a right to restitution because the existence of necessity *authorises* rather than compels the plaintiff to act.¹³⁰

In some circumstances, where there is no imminent danger to life or property, but still some reasonably urgent need to act, recovery may be justified where it was not practical to inform the defendant. Perhaps the best examples are provided by a series of decisions—the funeral cases—in which the plaintiffs, in the interests of public health and safety, have proceeded promptly to bury the dead. In these cases, plaintiffs have recovered for the costs of interment where the parties principally responsible for the burial have been away¹³¹ or unable to be contacted.¹³² Some of these cases have indicated that the party intervening must be a "proper" or "appropriate" person to act, but it

¹²⁸ (1872-3) L.R. 5 P.C. 134.

¹²⁹ *Ibid*, 164.

¹³⁰ Rose, *supra* n. 10, 174, (emphasis in original); cf. at 79. See also Burrows, 242-3, who rejects moral compulsion as a general explanation of the necessity cases. For a consideration of some of the conflicting motivations which may be at work in the mind of both rescuers and persons who refuse to render aid in an emergency, see Gusfield, J., "Social Sources of Levites and Samaritans" in Ratcliffe, 183.

¹³¹ *Jenkins v. Tucker* (1788) 1 H. BL. 90, (husband abroad when wife died; buried by her father).

¹³² *Rogers v. Price* (1829) 3 Y & J. 28; 148 E.R. 1080, (no opportunity to consult with the executor). See, however, *Bradshaw v. Beard* (1862) 12 C.B. N.S. 344; 142 E.R. 1175, in which the defendant was never contacted, even though he did not live far away. Nevertheless, the plaintiff recovered.

is unclear what the underlying concerns of such references are.¹³³ One possibility¹³⁴ is that a conclusion that a person was a proper intervener may suggest that the plaintiff (being a relative of the deceased, for example) had an interest in acting as he or she did and was not therefore merely intermeddling. But in any case, it is not likely that such a requirement will limit recovery to persons in a pre-existing relationship with the deceased or defendant, especially where the need for action is more urgent.¹³⁵ Thus, even strangers have recovered for funeral services.¹³⁶

There is, however, a further aspect to the funeral cases: the existence of a public duty on the part of a defendant to bury the dead means that often, the element of choice is given little prominence. Even if a defendant could be contacted, recovery has been allowed where such defendant was unwilling to perform his or her duty.¹³⁷ The courts have repeatedly stressed the public benefit of such actions being performed—out of a “proper regard to decency and to the comfort of others”.¹³⁸ The funeral cases may thus best be seen alongside other cases in which a defendant’s duty has been fulfilled, and it is to this issue that we now turn.

§ 8.2.1.2.2 Fulfilling a defendant’s duty

A plaintiff may have acted not in the interests of the defendant, but in the interests of some third party or of the public generally and, further, may have fulfilled a duty owed by that defendant. What exactly is encompassed

¹³³ Those cases that have made such references usually have concluded, without explanation, that the plaintiff *was* a “proper” person.

¹³⁴ A conclusion that the plaintiff was an appropriate person to act may also suggest that the plaintiff has exercised reasonable skill and care (or was likely to have done so), or has acted in the interests of defendant. Cf. Birks’ consideration as to the significance of a pre-existing relationship in proving a plaintiff’s claim. See Birks, 202.

¹³⁵ As in *Shallcross v. Wright* (1850) 12 Beav. 558: deceased died of “malignant fever”, and there was a consequent urgency to dispose of the body as quickly as possible.

¹³⁶ E.g., *Tugwell v. Heyman* (1812) 3 Camp. 299, *Ambrose v. Kerrison* (1851) 10 C.B. 776, 138 E.R. 307.

¹³⁷ *Tugwell v. Heyman* (1812) 3 Camp. 299, per Lord Ellenborough, in which the executor had not “ordered anyone else to furnish the funeral, and the dead body could not remain on the surface of the earth. It became necessary that someone should see it consigned to the grave.”

¹³⁸ *Ambrose v. Kerrison* (1851) 10 C.B. 776, 138 E.R. 307. See also *Croskery v. Gee* [1957] N.Z.L.R. 586, 589.

within the notion of "duty", including the issue of whether a duty can be said to have been fulfilled where a plaintiff has fulfilled other than a legal duty owed by a defendant to another, will be considered further below when we consider the appropriateness of a defendant to bear particular costs. For now, it suffices to say that the term duty is intended to include assumed obligations, such as in contract,¹³⁹ as well as obligations imposed by statute or common law.

A plaintiff who has fulfilled a defendant's duty must still establish that there has been no interference with the autonomy of the defendant to choose to act as he or she wishes. There is, however, one exception to this general requirement, which exception distinguishes "duty" cases from those in which no duty has been fulfilled. This exception entitles a plaintiff to ignore the defendant's communicated, preferred choices in circumstances where the law (post facto) and the plaintiff (at the time) determine that choice to be unacceptable.¹⁴⁰ An example, a variation of the facts of *Greenspan v. Slate*,¹⁴¹ will illustrate this. A child has incurred a serious sports injury. An acquaintance, seeing the injury, realises that unless action is taken, the child will suffer further serious damage. He informs the child's parents, who refuse to act. The acquaintance may justifiably have the child attended to and is likely to recover the medical fees expended.¹⁴² The parents' choice is limited by their

¹³⁹ Such private obligations, however, may have to have a public interest aspect. See infra n. 140.

¹⁴⁰ This also appears to be the position in the civil law. Under the German Code, for example, a gestor can disregard his or her principal's wishes where there is a duty imposed in the public interest, or for the maintenance of a relation: *Bürgerliches Gesetzbuch* (BGB), s. 679. See Schuster, E.J., *The Principles of German Civil Law* (1907), 356.

Where the duty is one owed to a third party, it would appear that there would need to be some public interest aspect to that duty. For example, the public has an interest in the prompt supply of necessaries to indigents and a plaintiff can thus fulfil this duty where the defendant refuses to act. Where entirely private rights are concerned (for example, a contractual debt), a plaintiff cannot simply pay the debt (fulfil the duty) in the interests of the third party. As Landes & Posner, supra n. 29, 114, have pointed out, the debt can be enforced by more effective or less expensive means: the third party can sue in debt or pursue bankruptcy proceedings, for example.

¹⁴¹ 97 A. 2d 390 (1953). The facts of which are as set out below, except that the intervener did not inform the parents before acting. It was considered by the court that this was not necessary because of the great urgency in taking immediate action. Palmer, Vol. II, 381, however, doubts whether one can say that there was a sufficient emergency requiring "immediate treatment" in that case. Consequently, he considers that the parents ought to have been informed of the actions beforehand, as they may not have been aware of the seriousness of the injury.

¹⁴² Query this conclusion, however, if the parents refuse particular treatment (such as

obligation to their child, which if breached would result in harm to her. This will be the legal position in any case in which a plaintiff supplies a minor, pauper, or mentally disordered person with "necessaries": food, medical aid or some other basic service or items with which every individual needs to be provided.¹⁴³ Although it may be possible to claim directly from the recipient of the necessities,¹⁴⁴ where such necessities are supplied in fulfilment of a duty owed by a defendant to the recipient, such services must be paid for even where the defendant did not wish them supplied. In *Carr v. Anderson*, a case in which a plaintiff supplied necessary legal services to the wife of the defendant, the Supreme Court of Minnesota indicated that

[i]t is unimportant that the husband, who does not furnish the necessary, does not want it furnished, or forbids its furnishing, or declares in advance that he will not pay. The law imposes an obligation, and enforces it by a contract remedy.¹⁴⁵

The plaintiff in such circumstances cannot, however, entirely ignore a defendant's opportunity to choose. Although defendants may not neglect their duty, they nevertheless have the right to choose by whom and in which manner necessities should be supplied. A plaintiff is not entitled simply to impose his or her own views as to what is best.¹⁴⁶ Thus, in the example above, the parents must still be given the reasonable *chance* to fulfil their duty, however they see fit, choosing their own doctor or hospital and so on.¹⁴⁷

a blood transfusion) on genuine moral or religious grounds; that is, on the basis of a concern for the child's spiritual, rather than physical, welfare. Ought the law to recognise such choices? Cf. Goff & Jones, 377. The answer may depend on the nature of the duty owed by the parents to the child, which at common law appears to be in an uncertain state. See McCamus, *supra* n. 30, 325-6. See also discussion in *Greenspan v. Slate*, 97 A. 2d 399 (1953).

¹⁴³ See *supra* n. 54.

¹⁴⁴ E.g., *In re Clabbon* [1904] 2 Ch. 465; or alternatively, from their estate (*In re Rhodes* (1890) 44 Ch.D. 94).

¹⁴⁵ 191 N.W. 407 (1923).

¹⁴⁶ In the words of Muir, *supra* n. 17, 327:

What the plaintiff must not do is avoid communicating with the defendant if possible thus denying the latter the chance to act himself or appoint someone else to do so. But if the defendant refuses to act, or even if he prohibits the plaintiff from acting but appoints no one else to do so, it is clear that the intervention should be rewarded.

¹⁴⁷ See *supra* n. 141.

It is accepted that the supply of such services is not only in the interests of the individual in question, but also in those of society as a whole. In *Wentworth v. Tubb*, it was said that

[t]he inconvenience which would ensue, if necessaries could not be supplied to a person in this situation ... would be great [S]uch a person might be left to casual charity—thrown upon the parish, or exposed to starvation.¹⁴⁸

Similar public interest considerations will also apply where a plaintiff has fulfilled a statutory duty of the defendant.¹⁴⁹

§ 8.2.2 The Appropriateness of the Defendant to Pay

Unsolicited services which are socially useful and which in law do not amount to an unjustifiable disregard of the autonomy of the defendant can thus be said to be justified. It is in the interests of society that such actions be carried out. The issue here, however, is not simply one of whether society values such conduct.¹⁵⁰ The issue is whether that cost should appropriately be allocated to a particular defendant. Although those cases which allow relief tend not to

¹⁴⁸ (1841) 1 Y & C.C.C. 171; 62 E.R. 840, 842, a case in which necessaries were supplied directly to the defendant.

¹⁴⁹ A good example is provided by *Guardians of the Poor of Holborn Union v. St. Leonard* (1876) 2 Q.B.D. 145, in which the defendants owed a statutory duty to the public to remove "dirt, ashes, rubbish and filth" from within their parish. The plaintiffs requested the removal of such material from their warehouse. The defendant refused and the plaintiff subsequently incurred expenses in doing the work themselves, reimbursement for which they successfully claimed. Since the legislature had imposed a duty, the plaintiffs were entitled to disregard the defendants' refusal to act. It would have defeated public policy to disallow the claim. The Court considered that it "would be unreasonable to hold that the duty cast upon the [the defendants] can be enforced only by indictment or mandamus." (149, per Mellor J.). See also Muir, *supra* n. 17, 326-7. A decision which appears in direct contrast, however, is that of *Macclesfield Corp. v. Great Central Ry* [1911] 2 K.B. 528. In that case, the plaintiffs acted after the defendants' refusal to fulfil their public duty (under statute) to keep a bridge in repair. The plaintiffs, the local authority, believed there may have been a "concurrent" liability to repair (see Cripps K.C., in *arguendo*). Given the dangerous state of the bridge, public safety may have required fairly prompt action (though there was no evidence on this: Stoljar, 211), and there was nothing to suggest the plaintiffs had in any way performed the work unreasonably (by incurring excessive costs, for example). Nevertheless, the claim failed, with the "court sheltering under the blanket observation that the plaintiffs [had] acted as volunteers": Stoljar, 211; see, e.g., per Farwell L.J., at 539, and per Kennedy L.J. at 541. The case has been criticised widely, and in the view of the writer, was wrongly decided. See also *Gebhardt v. Saunders* [1892] 2 Q.B. 452.

¹⁵⁰ It may even be argued that society ought to meet the costs of such conduct. See *supra* n. 51.

answer this question directly,¹⁵¹ it is possible to glean from the decisions two broad categories within which successful claims fall:

- (1) the services performed were intended to be in the *interests* of the defendant, and were not intended to be gratuitous; and
- (2) the services fulfilled a duty owed by the defendant to a third party or the public, and were not intended to be gratuitous.

These two categories will be considered separately, for although it is often stated as a general requirement that a plaintiff intended to act in the defendant's interests, it is clear that in the latter type of case (the duty cases), this will almost invariably not have been the case, with the plaintiff intending to act in the interests of the third party or in the public interest.

§ 8.2.2.1 Services performed in the interests of the defendant

In the context of the rescue-type case, although an intervener may have been motivated by some self-interest¹⁵² (a particularly notable feature of maritime salvage, to be discussed below), cases allowing recovery generally require that the plaintiff intended to act *bona fide* and primarily in the overall interests of the defendant.¹⁵³ In some cases, the plaintiff may not have been aware of the identity of the defendant, such as where a plaintiff saves apparently abandoned goods,¹⁵⁴ yet even here it can be assumed that the plaintiff is intending to act in the interests of the as-yet-unidentified owner.¹⁵⁵

¹⁵¹ Where the courts refuse relief it is often by reference to the fact that the defendant ought not to bear the burden in question.

¹⁵² The self-interested intervener in another's affairs may be entitled to recover in certain circumstances, to be considered in the next section.

¹⁵³ Where a plaintiff acts from mixed motives, it has been suggested that he or she may recover where they have intended to act primarily in the interests of the defendant. See *The Winson* [1982] A.C. 939, 965-6, per Lord Simon of Glaisdale; cf. 962-3, per Lord Diplock. Cf. also Rose, *supra* n. 10, 194-8, who considers that although in maritime law it is clear that partially self-interested interveners may still recover, provided they did not act solely in self-interest, the position in relation to other claims is not certain (195). He considers that mixed motives may defeat a claim (196). For an example of a case in which the plaintiff was partially motivated by self-interest and in which the claim failed, see *Kelley v. East Jordon Chemical Co.*, 127 N.W. 671 (1910).

¹⁵⁴ Cf. *Chase v. Corcoran*, 106 Mass. 286 (1871), a case refusing recompense for the act of rescuing a boat which was adrift, but allowing recovery for the storage and repairs necessary to preserve the boat.

¹⁵⁵ It may be that the intervener is intending to appropriate the property to himself or herself, or at least that this is at the back of his or her mind. But since the concern here is with

A requirement that a plaintiff intended to act in the interests of the defendant is also one of the fundamental elements of the civil law doctrine of *negotiorum gestio*.¹⁵⁶

Significantly, both the common law and civil law appear to share another important similarity. It seems that, excepting claims for maritime salvage, the plaintiff need not show that the acts done in the interests of the defendant were ultimately successful. No objectively identifiable benefit need have accrued to the defendant in order to recover.¹⁵⁷ It is sufficient if the plaintiff's actions were socially useful in the sense identified above. Thus the endangered property may not have been saved¹⁵⁸ or the rescuee may ultimately have died.¹⁵⁹

This seems reasonably straightforward. There is, however, a fundamental tension which has only been hinted at so far. For although a plaintiff must have intended to act in the interests of the defendant, he or she must also not have intended to act gratuitously.¹⁶⁰ Thus on the one hand, the

claims for recompense, this presumes the defendant has received back the property and thus such possibilities need not trouble us further.

¹⁵⁶ It is a requirement that the gestor "manifests an intention to act in the interests of or (more broadly) as an agent for [the principal]": Stoljar, *Negotiorum Gestio*, 46

¹⁵⁷ Contrast those commentators who perceive the claim of the necessitous intervener to be one in unjust enrichment. See, e.g., McCamus, *supra* n. 30; and Birks, *supra* n. 13. This usually involves a conclusory approach to the issue of enrichment.

¹⁵⁸ See the civil law cases cited in Stoljar, *Negotiorum Gestio*, 17, 52-3. See also de Vos, "Liability Arising from Unjustified Enrichment in the Law of the Union of South Africa" [1960] *Juridical Review* 125, 132. The writer knows of no cases in relation to property at common law, but such a view has the support of a number of commentators such as Goff & Jones, 375, and Dawson, *supra* n. 18, 85, the latter of whom considers that "[i]f the land-based rescuer voluntarily ... submits his own body or goods to the risk of loss or injury, there is no good reason why he should also assume the risk of failure." Contrast Rose, *supra* n. 10, 198-9, who considers that

there appears to be no specific judicial consideration at common law in England of whether a claim for restitution in an emergency should fail for lack of success. The problem has received consideration elsewhere, the general effect of the cases being that, without success, there is not the enrichment of the defendant necessary to require restitution by him.

But Rose does not cite any authorities in support of his proposition and does not indicate to which jurisdictions he is referring.

¹⁵⁹ See cases *supra* n. 118.

¹⁶⁰ See, e.g., *Re Rhodes* (1890) 44 Ch.D. 94. See also *Wentworth v. Tubb* (1841) 1 Y. &

law is demanding altruistic conduct, that the plaintiff be motivated by selfless concern for others; on the other hand, the plaintiff must not have been too selfless, to the point where he or she was acting charitably. Stoljar has recognised this point and labelled the requisite intentions of the plaintiff as a form of "calculated" altruism. For a "pure" or absolute altruist, one who performs services gratuitously, intending them as a gift, would fail in any claim should he or she subsequently seek recompense¹⁶¹ for those services.¹⁶² In the words of Stoljar:

One can surely say that precisely the altruist cannot demand recompense; he may deserve gratitude, he may earn a medal, but he does not deserve money if the help he gave came from the pure kindness of his heart. To put this criticism in another way: A theory of altruism or human aid can tell that we ought to help one another, particularly where there is a clear and present need; such a theory, however, does not explain how we can charge for our services if and when we unsolicitedly choose to help.

In this light, the altruism we now consider turns out to be an altruism of a special kind. It is a materialistic or calculated altruism, since the gestor does not act without intending to charge and, if necessary, even to enforce his claim in court.¹⁶³

Whether, indeed, a plaintiff can establish the requisite degree of calculated altruism may depend on the nature of the recovery sought. It may prove difficult for a non-professional service provider to show that the mere outlay of time and effort was not intended to be gratuitous, and to thus recover remuneration.¹⁶⁴ Where merely reimbursement for expenses is sought,

C.C.C. 171, 174.

¹⁶¹ This includes recompense in the form of reimbursement for expenses incurred.

¹⁶² Stoljar has pointed out that this point weakens any theoretical justification of recompense for the *negotiorum gestio* on the foundations of encouraging or rewarding altruism. See *Negotiorum Gestio*, 13-6.

¹⁶³ Stoljar, *Negotiorum Gestio*, 14. Stoljar illustrates the point thus:

Lending money without interest may well be called a kind act, but it is not charity. Similarly, lending another a book is assuredly a kind or helpful act but not a wholly altruistic one; the owner may lend the book for the other's advantage, even expect it to come back the worse for wear, yet he still remains only a lender, not a pure altruist making a gift. Indeed, the more altruistic the person the more gift-like or donative his acts; and the more he acts graciously, or as a favour, the weaker his right of recovery for what he gives or does.

¹⁶⁴ Take an example in which a motorist comes upon an road accident and spends one

however, in most cases there should not be any difficulty proving that the services were not intended freely.¹⁶⁵ But even this may not be the case given the sentiment sometimes expressed, "that virtue should be its own reward."¹⁶⁶ In effect, the courts appear to be raising a presumption of gratuitous intent; to be saying to a plaintiff—"Is not this the sort of charitable, friendly act we in society are all obliged to do, should the need arise?" Thus, in *Glenn v Savage* an Oregon court considered that

[t]he great and leading rule of law is, to deem an act done for the benefit of another without his request as a voluntary act of courtesy, for which no action can be sustained The law will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand¹⁶⁷

Such sentiments may be founded on the view that there exists a moral¹⁶⁸ obligation to the community to act in such circumstances.¹⁶⁹ Fingarette, for example, has said there is

a general acknowledgment of some fundamental and at least minimal obligation to make sacrifices for the sake of public order and the safety of those who belong in the community.¹⁷⁰

hour comforting and rendering first aid to an injured driver whilst waiting for medical help. It is difficult to perceive of such services as anything other than gratuitously intended. Even if they were not so intended and socially beneficial, how would they be valued? Contrast the situation where an ambulance driver comes upon the accident and provides one hour of paramedical assistance little different from that of the lay-person, above. It is far more likely that the ambulance driver's services are not intended to be gratuitous. It is also much easier for the law to value such services. See also Dawson, *supra* n. 18, 83, and Landes & Posner, *supra* n. 29, 110.

¹⁶⁵ Consider the friendly roof-repairer of example (ii) in the introduction to this chapter. It seems unlikely that such a plaintiff would intend to incur expenses gratuitously. Conversely, where only time and effort are outlaid and the roof repairer is not a professional, it would be difficult to show that the services were not intended to be gratuitous.

¹⁶⁶ Honore, *supra* n. 10, 234, rejects the validity of this sentiment and in any case doubts whether it can apply to claims for "compensation as opposed to reward."

¹⁶⁷ 13 P. 442 (1887), 448.

¹⁶⁸ Where there is a legal duty to act, this will strengthen a claim for recompense. See *ex Argos* (1873) L.R. 5 P.C. 134.

¹⁶⁹ In *Glenn v. Savage*, 13 P. 442 (1887), 448, the court went on: "let these meritorious and generous acts remain lasting monuments of the good offices intended in the days of good neighbourhood and friendship."

¹⁷⁰ See Fingarette, H., "Some Moral Aspects of Good Samaritanship" in Ratcliffe, 220.

Whereas Fingarette appears to consider this to be a justification for recompense for such acts,¹⁷¹ views such as those expressed in *Glenn v. Savage* would equally suggest that this obligation is one to act gratuitously.¹⁷²

It is perhaps the common law's difficulty in striking a balance between these competing ideas—that is, in coming to grips with a notion of limited altruism—which may explain some of the conflicting sentiments expressed and the, at times, inconsistent results of the cases. This conflict is perhaps no better exemplified than by the *dicta* of Eyre C.J. in *Nicholson v. Chapman*.¹⁷³ In considering whether a personal claim for recompense for services in preserving property might succeed, the Chief Justice made two contradictory statements. On the one hand, his Honour indicated that such services were

meritorious, at least in the moral sense of the word, and certainly intitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment.¹⁷⁴

On the other hand, later in the judgment, his Honour considered that

perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude.

These tensions need to be resolved. In this writer's view, the courts should reject the view that certain services ought to be performed gratuitously out of a sense of moral obligation, for the upshot of such a view is that persons who incur costs in so doing are in effect penalised for their actions.¹⁷⁵ The

¹⁷¹ Fingarette, *id.*, goes on to state: "This general obligation underlies and justifies the specific obligations spelled out in law and custom." See also at 223: "The law should encourage coming to another's aid by providing legitimate physical, financial, and legal protection".

¹⁷² The view being that the moral obligation to act is sufficient to stimulate acts of rescue; that there is thus no need for legal encouragement. Cf. *The Goring* [1987] Q.B. 710, per Ralph Gibson L.J.

¹⁷³ (1793) 1 H. BL. 254, 258-9. The case concerned a claim for a lien for expenses incurred in saving property. The court did not have to consider the issue of a personal claim.

¹⁷⁴ A footnote to the judgment adds:

It seems probable that in such a case, if any action could be maintained, it would be an action of *assumpsit* for work and labour, in which the Court would imply a special instance and request, as well as a promise.

¹⁷⁵ Cf. Honore, *supra* n. 10. Perhaps the common law courts could take guidance from civil law of *negotiorum gestio*, which requires that a *gestor* must have intended to *take charge* of

consequences of this must be apt to discourage such conduct in the future.¹⁷⁶ As it is, the limitations upon recovery are difficult to overcome. A plaintiff would need to show that the services were socially useful, were not performed in disregard of the defendant's autonomy, and were intended primarily to be in the interests of the defendant. Once these matters have been established, recovery should ensue where the plaintiff can show that he or she did not intend to act gratuitously;¹⁷⁷ to require an intent to charge¹⁷⁸ is too onerous, given that most necessitous interveners will not have turned their mind to the issue at the time.¹⁷⁹ When deciding whether the plaintiff was acting gratuitously, the courts could have regard to presumptions. For example, a rebuttable presumption that a near-relative of the recipient of the services intended to act gratuitously¹⁸⁰ may be warranted on public policy grounds alone.¹⁸¹

One further point needs to be made as to the appropriateness of a defendant to bear the costs of the plaintiff's conduct. If a plaintiff has assumed the risk of the defendant not paying, then he or she will not, and ought not, be

another's affairs. This gets to the crux of the matter, because it points to the critical requisite intention of acting in the interest of a defendant whilst not intending to do so gratuitously.

¹⁷⁶ See above discussion, § 8.2.1.1.

¹⁷⁷ Goff & Jones, 384, even suggest a reversal of the onus of proof—that the defendant must show that the services were intended to be gratuitous—but although this view has merit, it is not supported by the authorities.

¹⁷⁸ Some writers tend to oscillate between these two requisite intentions, despite the clearly different states of mind required in each case. See, e.g., Stoljar, *Negotiorum Gestio*, 44-9, 141. The *Restatement of Restitution* has a requirement that the plaintiff acted with an "intent to charge". See §§113-7.

¹⁷⁹ As Stoljar, *Negotiorum Gestio*, 141, points out, spontaneous rescue is "typically unreflective".

¹⁸⁰ See *Igbach v. Hoffman*, 198 P. 2d 266 (1948), in which the court expressed the view that in intra-family transactions, services such as board and lodging are presumed to have been supplied gratuitously. Cf. *Re Rhodes* (1890) 44 Ch.D. 94, which suggests that the onus is upon the plaintiff to prove that he or she intended to charge. Cf. Wade, *supra* n. 28, 1191-2. Where services such as the payment of expenses were performed gratuitously, there may nevertheless be a basis for recovery where they were rendered under a fundamental mistake, such as the plaintiff's mistaken belief as to the recipient's capacity to pay for the services out of their own pocket. See *Deskovick v. Ponzio*, 187 A. 2d 610 (1963), 613: "Such circumstances would take the payer out of the category of voluntary intermeddlers."

¹⁸¹ Such a presumption would avoid claims being brought after family squabbles, for example.

successful in a claim for recompense. This may be a further reason why a plaintiff who ignores the defendant's opportunity to choose will fail. Such interveners can be said to have assumed the risk of the defendant refusing to pay, having had the opportunity to bargain with the defendant first.

§ 8.2.2.1.1 *Exceptional features of maritime salvage*

It has already been noted that the law of maritime salvage displays a number of exceptional features, two of which stand out, for the purposes of our discussion. First, given the long historical recognition of claims for maritime salvage and the consequently well-established rules governing salvage at sea, a large-scale professional salvage industry exists. Given the professional nature of the salvage industry, most acts of salvage are now done in at least a partial self-interest—the pursuit of profit¹⁸²—for salvage awards not only include reimbursement for expenses and remuneration for time and effort, but additional rewards calculated according to the success of the operation.¹⁸³ The professional nature of salvage may also partially explain the second feature which appears unique to salvage at sea: that the act of salvage must have been successful, and thus beneficial, before a claim for recompense will be allowed.¹⁸⁴ Stoljar explains this difference by noting that where shipwrecks are concerned, it would be difficult to prove or disprove allegations of expensive services having been carried out unless one can point to some property or lives having been saved.¹⁸⁵ Since it cannot be said that salvors have intended to act

¹⁸² See Rose, *supra* n. 10, 194-8, who points out that “[t]he court has ... not only permitted but actually encouraged maritime salvors to act out of financial self-interest” (194). Rose considers that it is sufficient to justify recovery so long as the salvors were not acting “solely” out of self-interest (195). See also Birks, 304-5. For an example in which the salvor was clearly acting in self-interest, see *The Medina* (1876) 1 P.D. 272, *affd.* (1876) 2 P.D. 5. Birks, 305, considers that the salvors in that case behaved “shabbily”, by seeking to bargain for a “grossly exorbitant” sum with the victims of the disaster: see the report at 2 P.D. 5, 7.

¹⁸³ Where the parties' rights are not governed by an enforceable agreement, the matter is one for the discretion of the court. See Goff & Jones, 395:

In exercising this discretion, the court is not concerned to calculate reasonable remuneration for work done, as is done in *quantum meruit* claims. The court's task is to assess the amount of a reward which will, in the interests of public policy, encourage others to act as salvors, but which at the same time will not bear too harshly on the owners of the salvaged property.

See, e.g., *The Telemachus* [1957] P. 47, 49.

¹⁸⁴ See Rose, *supra* n. 10, 171: “[T]he cases indicate that, no matter how much public policy considerations permeate the whole of salvage law, the essential basis of the claim is in fact the provision of a benefit to the defendant.”

¹⁸⁵ Stoljar, *Negotiorum Gestio*, 121. Consequently, a claim *in rem* attaching to the cargo

as clearly in the interests of the defendant as in other cases of rescue, but are instead merely professional rescuers seeking to profit from their profession, this added requirement of benefit appears a perfectly reasonable basis for justifying the link between a plaintiff's conduct and the defendant's obligation to bear the "cost"¹⁸⁶ of such conduct.

§ 8.2.2.2 Plaintiff has fulfilled a duty of the defendant

Where a plaintiff's conduct can be shown to have been a justifiable intervention to protect the property, life, health or well-being of a third party, or to have been in the interests of the public generally, then such a plaintiff may recover whenever he or she has in the course of his or her actions fulfilled a legal or, perhaps, moral¹⁸⁷ duty which the defendant owed to that third party or the public. In the words of Rowell C.J. in *Mathie v. Hancock*:

[W]hen an obligation is imposed by law upon one to do an act because of an interest in the public to have it done, and that one fails to do it, he who does do it, expecting compensation, may recover therefor of him on whom the obligation is imposed.¹⁸⁸

It is not necessary in such cases for plaintiffs to show that their actions were intended to be in the interests of the defendants. It is sufficient if the actions were intended to be in the interests of a third party (including the public) to whom the defendant owed a duty. Again, plaintiffs also needs to satisfy the requirement that the services were not intended to be gratuitous. In duty cases, however, this requirement does not appear to have raised the same difficulties for plaintiffs as in the cases considered above.¹⁸⁹

or ship salvage is allowed, given that the existence of the cargo ship provides clear proof that beneficial services have been rendered.

It would also appear to be economically sound to limit the salvor's claim to the value of the property saved. See Landes & Posner, *supra* n. 28, 101-5, and note the different rules which apply where the concern is with saved lives.

¹⁸⁶ "Costs" here extending beyond mere recompense.

¹⁸⁷ Whether or not fulfilment of a moral duty will satisfy the requirement that a duty of the defendant has been fulfilled will be considered further below.

¹⁸⁸ 63 A. 143 (1906), 144. Note the above discussion, *supra* n. 140, on the need for some public interest aspect to the duty in question.

¹⁸⁹ This may be because a plaintiff will not have acted in the defendant's interest and may thus be less likely to need to answer a claim that he or she is an altruist.

For our purposes, it remains to consider what types of duty need to be fulfilled to give rise to a right to recompense. Certainly, the cases suggest that plaintiffs may recover where they have fulfilled defendants' legal duties, including duties to supply necessities to dependants; duties to the public to inter the dead,¹⁹⁰ or preserve public health and safety generally; and duties to pay debts owed to third parties.¹⁹¹

A specialised and long-established category of recovery for debts paid concerns acceptors for honour of bills of exchange.¹⁹² Such an acceptor is entitled to be subrogated to the rights and duties of the holder as against the party on whose behalf the acceptor paid (the defendant). Such an acceptor may have been a complete stranger, having no antecedent relationship with that party.¹⁹³ Although there need not have been anything in the way of an emergency, so that these cases cannot really be classed as one of "necessitous" intervention,¹⁹⁴ they nonetheless fit within the scheme adopted here. A plaintiff's (acceptor's) conduct can be considered socially desirable, in that it is in the interests of commerce that negotiable bills be honoured wherever possible. Secondly, the plaintiff will not have unjustifiably disregarded the defendant's opportunity to choose, as the acceptor will only be entitled to claim where a defendant has failed to meet the bill when presented and thereby has failed to fulfil his or her duty. Consequently, there is no need to show that the acceptor acted in the interests of the defendant, though perhaps one can presume this from the fact of the payment itself.

Although it is said that the owner of property does not generally owe a

¹⁹⁰ Primarily, such a duty will usually rest with the estate of the deceased. Where it appears that no arrangements for burial are being made, then such a duty may rest upon local municipalities, who will usually be given a statutory right to recover from the estate of the deceased.

¹⁹¹ An interesting example of the payment of a debt under necessity is provided by *Samilo v. Phillips* (1968) 69 D.L.R. (2d) 411, in which a son paid fines owed by his father for a criminal breach of tax provisions. The son never informed his father as to the existence of the debts as he feared that his father, suffering from failing ill health, would suffer serious harm as a consequence. The plaintiffs (the executors of the son's estate) successfully recovered the sums paid on the father's behalf from the estate of the father.

¹⁹² Although these rights have been given statutory recognition, these rules are merely codifications of common law rights that have a long history. See Aitken, *supra* n. 30, 577-80.

¹⁹³ Aitken, *supra* n. 30, 579-80.

¹⁹⁴ Contrast Goff & Jones, 378, and see *Hawtayne v. Bourne* (1841) 7 M. & N. 595, 599.

duty to preserve it,¹⁹⁵ in some circumstances such a duty may exist. In particular, where the welfare of animals are concerned, owners may be under a duty to ensure that animals are not mistreated. Today, such duties may be imposed by legislation, but even where this is not the case, it may be argued that we have a strong moral duty to not maltreat animals in our possession. Arguably, such a moral duty may be sufficient to justify a plaintiff disregarding the wishes of the defendant who has not fulfilled such a moral duty, and thus successfully claim recompense for the value of the services rendered.¹⁹⁶ This raises a more general and interesting question as to whether a plaintiff can recover in circumstances where he or she has fulfilled other than a legal duty of a defendant. In *Croskery v. Gee*,¹⁹⁷ McGregor J., when considering the agency of necessity doctrine, observed that it arose "where a person carries out the legal or moral duties of another, in the absence of the other." In this writer's view, there appear to be no justifiable reasons why a notion of duty should necessarily be restricted to legal duties. If a plaintiff has acted either in the interests of a third party or in those of the public (and thus not in the interests of a defendant), the only basis on which such a plaintiff can establish that the

¹⁹⁵ See *Morse v. Kenney*, 89 A. 865 (1914), 867: "There is no such obligation upon one to retain and preserve his property whether it be live animals or anything else. He may abandon it or destroy it, if he pleases."

The owner of property, such as a landlord, for example, may have a contractual duty to maintain it. In such a case, a tenant may in circumstances of necessity fulfil the landlord duty and claim recompense for the services. See, e.g., *Waters v. Weigall* (1795) 2 Anst. 575.

¹⁹⁶ Contrast *Morse v. Kenney*, 89 A. 865 (1914), 867, quoted *ibid*. Despite the sentiments expressed in that case, many of the cases which have allowed claims for the preservation of property have involved animals. See, e.g., *Great Northern Ry v. Swaffield* (1874) L.R. 9 Ex. 132 (horse, fed and stabled by the plaintiff; the court pointed out that if the plaintiff had not done so, this would have endangered the horse and the public: Kelly C.B. 136); *Todd v. Martin*, 37 P. 872 (1894) (stock taken care of after death of owner—estate liable); *Wilder Grain Co. v. Felker*, 5 N.E. (2d) 207 (1936) (estate liable for feed necessary to preserve deceased's stock). Contrast the result in the latter two cases with that in *Mathie v. Hancock*, 63 A. 143 (1906), in which the court did not consider that the plaintiff's actions were necessary in the circumstances. Admittedly, although in none of these cases was it suggested that the defendants did not wish the animals "preserved", in this writer's view, they ought not have been entitled to raise such a defence in any case. This view, however, runs contrary to a number of decisions in which the defendants had indicated they no longer wanted the chattel and in which plaintiff's (presumably as a consequence) failed to recover for the cost of keeping the chattel. See cases cited in Wade, *supra* n. 28, 1195, fn. 60 (the most recent of which was in 1901). Two of these cases involved horses, the third, a slave. Wade considers that "[a]s applied to living creatures, especially a human being, the application of this rule seems very questionable." In the writer's view, such views would almost certainly not prevail today. Cf. Rose, *supra* n. 10, 177. See also *Robinson v. Walker*, (1617) 3 Bulst. 269.

¹⁹⁷ [1957] N.Z.L.R. 586, 588.

defendant is the more appropriate party to bear the costs of the intervention¹⁹⁸ is by showing that some duty has been fulfilled. There may well be cases in which recovery is justified even though no *legal* duty of the defendant has been fulfilled.¹⁹⁹ To this writer's knowledge, however, there are no cases which have expressly decided that a plaintiff who has *not* acted in the interests of the defendant can nevertheless recover where he or she has fulfilled other than a legal duty of that defendant.²⁰⁰

§ 8.2.3 Summary

A plaintiff who selflessly intervenes in the affairs of another generally needs to show that the intervention was justifiable in that it was socially useful and did not disregard the autonomy of the defendant. Although it may well be in the interests of society that such justifiable interventions take place, it is still necessary to determine whether the defendant appropriately ought to bear the costs of the plaintiff's actions. The cases suggest that this will be so wherever the plaintiff has intended to act primarily in the interests of the defendant, or has otherwise fulfilled some duty owed by that defendant. The latter series of cases present few difficulties, but the former have generated considerable uncertainty, as tensions arise from the law's attempts to balance competing ideas and policies, to give meaning to the notion of limited altruism as the necessary motivation of the intervener. Such difficulties, as will be seen in the next section, are not faced by interveners who have acted primarily in self-interest, but nevertheless seek to allocate the costs of their actions to another party.

¹⁹⁸ Where a plaintiff has intended to act in the interests of the defendant, recovery may be allowed on that basis; it will not be necessary to show that any duty of the defendant, moral or otherwise, has been fulfilled.

¹⁹⁹ An interesting hypothetical example would support such a conclusion. A grazier refuses to mend a small segment of fencing on his property, adjacent to a busy road, despite repeated requests by the local council that he carry out such work. Numerous accidents and near-misses occur as a result of straying animals, but the grazier is exempted from any duty of care to the motorists to repair the fence, under the rule in *Searle v. Wallbank* [1947] A.C. 341 (House of Lords), (followed in the High Court of Australia in *S.G.I.C. v. Trigwell* (1979) 26 A.L.R. 67). The council has no authority to order the repairs but eventually does the work at a reasonable cost, motivated by a concern for public safety. Arguably, the council should be able to recover their costs, for the grazier has failed to fulfil his moral duty to do the repairs. Of course, the council would still need to show that the work done was socially desirable, cost effective and warranted in the circumstances. Admittedly, where such a conclusion could be drawn, this would suggest that the rule in *Searle v. Wallbank* is itself unjustifiable and that a legal duty ought to exist in such a case.

²⁰⁰ Although perhaps *Greenspan v. Slate*, 97 A. 2d 390 (1953) is an example.

§ 8.3 THE SELF-SERVING INTERVENER

The self-serving intervener, by definition, is motivated by very different concerns to those of the (limited) altruist considered above. Yet the rights of such an intervener can be described in the same terms: recovery in the form of recompense for services rendered will be allowed where the costs of the intervener's justifiable conduct should more appropriately be borne by the defendant. However, both these determinations—justifiability and appropriateness—reflect particular policy concerns which often are not articulated explicitly by the courts.

§ 8.3.1 Justifiable Conduct

Goff and Jones have said that “[a] person who confers a benefit on another while acting in his own self-interest cannot obtain restitution from that other.”²⁰¹ In English law, at least, general propositions to this effect have gained some support.²⁰² Yet it is clear from the results of the cases that in some circumstances self-serving interveners will be entitled, not so much to restitution, but to recompense for their costs incurred where they have fulfilled a duty owed by the defendant to a third party. This will usually be in the form of reimbursement for a debt “discharged”.²⁰³ Such liability will arise provided a plaintiff's “interest” is one which in law is recognised as sufficient to justify self-protective measures.

In both English and Australian law, many of these cases coalesce under the well-recognised rubric of “compulsory discharge” of another's liability. Although it is said in such cases that the plaintiff acted under some legal or

²⁰¹ Goff & Jones, 56.

²⁰² *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234, is often cited in support of this proposition. See, e.g., Birks, 195. Interestingly, the famous *dicta* of Bowen L.J. usually cited refers to acts done to preserve another's property and has nothing to say about preserving one's own. The case will be discussed further below. Similarly, *Ruabon Steamship Co. v. London Assurance* [1900] A.C. 6, is cited as authority. As will be seen below, however, the self-server will only be entitled to recovery where he or she has fulfilled a duty of the defendant, and *Ruabon Steamship Co. v. London Assurance*, both in its reasoning and result, is entirely consistent with this view.

²⁰³ The issue of when a debt owed by D to TP is said to be discharged by a payment by P, is complex. See generally, Beatson, Chp. 7. For our purposes, however, the crux of the matter is whether P is entitled to restitution from TP on the basis of mistake, compulsion, total failure of consideration, and so on. Where P is not entitled to restitution from TP, then the only recourse will be against the principal debtor, D, and these are the circumstances with which we are here concerned. See further § 9.2.3.3.

practical compulsion, this "compulsion" will usually take the form of (1) legitimate demands made by a third party that the plaintiff meet his or her legal (usually contractual) obligation to that third party (for which the defendant is primarily responsible),²⁰⁴ or (2) some threat to the plaintiff's property interests.²⁰⁵ Thus, to say that a plaintiff was "compelled" to act must not be allowed to obscure the ultimately self-interested nature of the plaintiff's actions. For the plaintiff has chosen the option which is in his or her best interests at the time,²⁰⁶ in order to meet a legal obligation or to protect property interests.²⁰⁷ Clearly, meeting one's legal obligation is a perfectly justifiable action, which, where it results in the defendant's primary duty being fulfilled, will usually give rise to a right to reimbursement.²⁰⁸ Protecting one's property interests is equally justifiable.²⁰⁹ Unhelpfully, however, although the courts

²⁰⁴ Where the plaintiff is under a secondary legal obligation to discharge a debt, for example. See *Moule v. Garrett* (1872) L.R. 7 Ex. 101.

²⁰⁵ Where, for example, property was lawfully distrained for rent. See example (v) in § 8.1, and *Exall v. Partridge* (1799) 8 T.R. 308; 101 E.R. 1405. See also *Edmunds v. Wallingford* (1885) 14 Q.B.D. 811, 814, per Lindley L.J.

²⁰⁶ The self-interested nature of the conduct is reinforced by the fact that in general, the plaintiffs will have been aware that primary responsibility lay with someone else; presumably, the possibility of reimbursement would always have been at the back of their minds at the time they paid.

²⁰⁷ *Exall v. Partridge* (1799) 8 T.R. 308; 101 E.R. 1405. Another common type of case involves lessees who seek to protect their interest by meeting the obligations of an assignee, such as to pay rent to the head-lessor. See *Goff & Jones*, 347-9.

²⁰⁸ One exception arises where plaintiffs have deliberately exposed themselves to the obligation against the wishes of the defendant and in circumstances where there was no reason in self-interest for so doing. A recent example is the decision of *Owen v. Tate* [1976] 1 Q.B. 402. The defendants had obtained a loan from a bank (the third party) secured by a mortgage upon property owned by a fourth party. The plaintiff, without the defendants' request, and in fact contrary to their wishes, deposited money with the bank (and signed a guarantee to pay should the defendant default) in return for the release of the fourth party's title deeds. When the defendants subsequently defaulted, they requested the bank to have recourse to the deposited sums. The plaintiff unsuccessfully sued for the reimbursement of the money. It was considered that the plaintiff's conduct was "palpably useless and officious", being contrary to the defendants' express wishes and therefore an unjustified interference in their choice as to how to run their affairs. The plaintiff had not been motivated by any self-interested desire to protect his own welfare. See *Fridman*, 253-4.

²⁰⁹ If a plaintiff has not acted out of justifiable self-interest or altruism, a claim for recompense for costs incurred in non-mistakenly intervening in the affairs of another will generally fail. See, e.g., *Owen v. Tate* [1976] 1 Q.B. 402; *In re National Motor Mail-Coach* [1908] 2 Ch. 515. This will be so even where the defendant has benefited as a result of the plaintiff's actions and even where the plaintiff fulfilled an obligation of the defendant, such as by payment of a debt owed. There is simply no reason why the costs of the plaintiff's actions should be borne by the defendant; in fact, the plaintiff may have been acting maliciously (e.g., *Norton v. Haggett*, 85 A. 2d. 571 (1952)), paternalistically, in order to gain the defendant's business (perhaps *McKissick v. Hall* [1929] 1 D.L.R. 48) or for no apparent reason at all (e.g.,

recognise this and recovery may ensue, such recovery is often allowed on the basis of a fiction that the plaintiff had no real choice but to act.²¹⁰ The fiction lies in the fact that other options may have been available to a plaintiff, who instead has chosen a course which he or she perceived was in his or her own best interests.²¹¹

Recovery by the self-server, even in English and Australian law, extends beyond the "compulsory discharge" cases. Sutton, for example, has pointed to a neglected²¹² but unrepudiated body of equitable authorities whereby part-owners of property are entitled to pay debts owed by other part-owners and charged upon the property, and yet keep that debt alive against the other part-owners.²¹³ Significantly, Sutton concludes that such debts

may be paid off by a part-owner, and a restitutionary claim pursued, without there having been any mistake, or any particularly compelling urgency to meet the claim. The matter is left to the judgment of the part-owner, considering what is most convenient in the management of the estate.

In the United States, the circumstances in which a self-interested intervener may recover are widely recognised. Dawson sums up the situation thus:

Tappin v. Broster (1823) 1 Car. & P. 112; 171 E.R. 1124). In such cases, the plaintiff's conduct is clearly not justifiable and the costs of that conduct should not be borne by anyone other than the plaintiff.

210 Further, to the extent that "compulsion" suggests an overborne will, it is misleading. For in these cases, although the plaintiff will have been acting under some form of pressure (and moreover, legitimate pressure) the plaintiff's response will be to act in a calculated, self-interested way to do whatever is best for the plaintiff given the limited choices available. The use of compulsion as the underlying source of recovery can thus lead to confusion. See, e.g., *Condev Project Planning Ltd v. Kramer Auto Sales Ltd* [1982] 2 W.W.R. 445, 453-4, in which the court accepted compulsion as a head of recovery, but also re-affirmed the preclusion in *Goff & Jones*, 56, quoted above, against recovery by the "self-interested" actor. Consequently, the court took the view that the plaintiff must not have been "compelled" by self-interest. Yet in all compulsory discharge cases, payment of the debt is clearly not motivated by altruism.

211 As with cases of duress, a plaintiff's will need not have been overborne by the pressure, the plaintiff often deliberately opting for the course of conduct which at the time is in his or her best interests.

212 Sutton, R., "Payment of Debts Charged Upon Property" in Burrows, *Essays*, 71, considers these to be authorities which have "atrophied through lack of use."

213 This will be in the form of a charge on the property.

Denial of restitution is usually expressed in the murky epithet "volunteer" that is applied to intervenors who fail to show a good enough reason for intervening.²¹⁴ But clearly one reason that is very often good enough is protection of the self-interest of the intervenor. If "volunteer" implies that a gift was intended, the motive of self-protection helps to negative generosity. But this ground for restitution does more than dispel some fog that is generated by a highly ambiguous epithet. In most modern decisions, promotion of self-interest that takes this form—the discharge of another's inescapable debt—is fully approved, is made to seem rational, almost laudable, and is freed from restrictive rules.²¹⁵

One American commentator has gone so far as to say that it is "paradoxical" that the self-interested intervener may have less difficulty in pursuing a claim than the altruist.²¹⁶ Certainly, recovery by a self-interested intervener cannot be based upon notions of recompense for altruism and the social utility in not discouraging such conduct. Hence, some other explanation must be found. Such an explanation lies in the fact that a plaintiff's self-interested (and self-protective) actions are only necessary as a result of the failure of the defendant to meet his or her own obligations: to pay a debt or to meet some other obligation owed to a third party.²¹⁷ Where the plaintiff's

214 This is reflected in one definition of volunteer which has consequently found favour in the United States. See *Irvine v. Angus*, 93 F. 629 (1899), per Judge De Haven:

A volunteer is one who has paid the debts of another without request, when he was not legally or morally bound to do so, and where he had no interest to protect in making the payment.

215 Dawson, J.P., "The Self-Serving Intermeddler" (1974) 87 Harv. L.R. 1409, 1437.

216 Palmer, Vol. II, 362, states:

Our law finds itself in the paradoxical position of aiding one who acted in his own interest while denying aid to one who acted from the generally more laudable motive of protecting the interest of another. This is not a satisfactory state of affairs, at least as to money payments, but the fact that it is a generally accurate statement of the law highlights the traditional attitude toward the intermeddler.

It is fair to say that the altruist does face considerable impediments. But this is not as paradoxical as it at first appears. The courts tread cautiously in such cases, primarily, it is submitted, in order to ensure that a defendant's autonomy has not been disregarded. Altruistic plaintiffs must show that they fall within the category of the limited altruist—someone acting in the interests of the defendant, but not too much so—to avoid being considered a gratuitous intervener. The self-server faces none of these difficulties. The need to protect one's own interests operates in a different context. Self-interest provides the reason for a non-gratuitous intervention and precludes any possibility of intermeddling of the sort considered in § 8.2.1.2.

217 This was the case in example (iv), § 8.1, in which the defendant was under a statutory obligation to make certain improvements to the property. See *George L. Schnader v. Cole Building Co.*, 202 A. 2d 326 (1964). In Anglo-Australian law, such a claim would be unlikely to succeed, unless it could be brought under the head of compulsion. Although in the *George L.*

actions result in that duty being fulfilled, the law accepts that the plaintiff should not bear the costs of the intervention. Protecting one's own interests is justifiable; and the underlying policy behind allowing recovery appears to be that where a legal obligation *justifiably* has been met by a plaintiff, it should ultimately be borne by those who are *primarily* responsible.²¹⁸ The primary responsibility of the defendant provides the clear link between the plaintiff's actions and the defendant being the appropriate party to bear the costs. This will be discussed below in § 8.3.2.

What sort of self-interested conduct in discharge of someone else's duty is sufficient to be considered justifiable by the law? We have already seen that meeting one's legal obligations will suffice. It would also seem that any acts to protect one's property rights,²¹⁹ the value of one's property, or one's financial well-being, will justify relief. It may even be that actions to protect one's honour or reputation are justifiable.²²⁰ In relation to property interests, it has been said that recovery will extend to "cases in which non-payment would or might eventually have presented a threat to the interest, but the threat was not immediate nor would it necessarily have an adverse effect on the payer's interest."²²¹ This appears to be the position in the United States, where payments of premiums owed by a defendant under an insurance policy, in which the payer has some concern, are recoverable. It may even be possible in the United States for a plaintiff to recover for the payment of debts charged on property in which the plaintiff has merely an expectancy of an interest, such as where he or she is an expectant heir to that property.²²² Often, United States courts have resorted to remedies of subrogation to allow recovery to plaintiffs who have made payments to protect these types of interests.²²³

Schnader case, the court did talk of the plaintiff being "economically compelled" to act, this case does not fall within the recognised heads of "compulsory discharge".

²¹⁸ See Birks, 186.

²¹⁹ Such as the right to continued possession of premises (e.g., *Allison v. Jenkins* [1904] 1 I.R. 331), or maintaining a security interest in property (e.g., *Butler v. Rice* [1910] 2 Ch. 277).

²²⁰ See *Alexander v. Vane* (1836) 1 M. & W. 511; contrast, however, *Child v. Morley* (1800) 8 T.R. 610; 101 E.R. 1574.

²²¹ Palmer, Vol. II, 343-4.

²²² See Palmer, §10.5 (c).

²²³ See *Corpus Juris Secundum*, Vol. 83, Subrogation, §3.5, as to the extremely liberal

In Anglo-Australian law, however, in order to recover on the same liberal grounds as in the United States, a plaintiff faces the difficulty of overcoming the decision of *Falcke v. Scottish Imperial Insurance Co.*²²⁴ In *Falcke's* case, the intervener had paid premiums on an insurance policy in which he had a residual interest, in the form of an equity of redemption. He failed in his claim for a lien over the proceeds of sale of the policy.²²⁵ This, of itself, is justified, given that the intervener was seeking a security interest ahead of other parties with an interest in the property. But the Court of Appeal also rejected any possibility of a personal claim for reimbursement of the sums expended. Arguably, the decision is inconsistent with the views expressed herein; alternatively, it may simply be said that the interests of the intervener were insufficient to justify the intervention;²²⁶ that there was not a sufficient reason of self-interest to make the conduct justifiable. Perhaps too much should not be made of this one decision. Given that authorities in Anglo-Australian law have granted recompense to self-interested interveners, *Falcke's* case should not be an impediment to acceptance of a general proposition allowing recovery to a self-interested intervener who is protecting a legitimate interest.²²⁷

§ 8.3.2 The Appropriateness of the Defendant

The issue of appropriateness can be dealt with briefly. Unlike the altruist considered earlier, the self-serving intervener will not have intended to act primarily in the interests of the defendant. Consequently, the defendant will only be held liable in these types of case (provided the plaintiff can firstly show

application of the remedy in the United States.

²²⁴ (1886) 34 Ch.D. 234.

²²⁵ And some have sought to interpret the case restrictively on this basis. Mathews, *supra* n. 94, 350-1, however, persuasively rejects such a view.

²²⁶ Sutton, *supra* n. 212, 86-96, and see cases discussed therein. Sutton persuasively argues that *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234, is not inconsistent with the cases in which part-owners of insurance policies have been able to recover for debts charged on the property which have been paid.

²²⁷ A residual interest in valuable property, such as the equity of redemption held by the intervener in *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234, should suffice as a legitimate interest. Contrast such an interest with the interest of a beneficiary of a third party contract. Such a beneficiary has an interest merely derivative of the contracting parties' choice to continue in their performance for their own and the beneficiaries benefit. Consequently, such a beneficiary should not be entitled to "repair" a breach of contract and seek recompense from the contract-breaker.

that conduct is justifiable) if the plaintiff's actions have fulfilled some duty owed by the defendant. In most cases, this will involve the payment of a defendant's debt. But some cases suggest that recovery will also be granted where an unliquidated legal obligation of the defendant is met.²²⁸

Where a plaintiff has not fulfilled a duty of the defendant recovery will generally²²⁹ be precluded even if the plaintiff's conduct was justifiable for reasons of self-interest. The position is enunciated in *Ruabon Steamship Co. v. London Assurance*, in which the Earl of Halsbury L.C. wondered

how it can be asserted that it is part of the common law that where one gets some advantage from the act of another, a right to contribution towards the expense from that act arises on behalf of the person who has done it.²³⁰

²²⁸ See *George L. Schnader v. Cole Building Co.*, 202 A. 2d 326 (1964) (supra n. 6, and example (iv), § 8.1). Cf. *Green Trees Estate v. Furstenberg*, 124 N.W. 2d. 90 (1963), in which the facts were almost the same as those in *Schnader's* case, except that the defendant did not have a duty to perform the work. Consequently, the plaintiff failed in its attempt to recover for the self-interested improvements it had made to the defendant's property. See also cases discussed in Palmer, §10.6.

It is speculative whether the fulfilment of a moral duty or obligation will be sufficient to justify recovery against the defendant. Given the self-interested nature of the conduct in these cases, it is perhaps less likely that this should suffice than in cases of altruistically motivated conduct. But consider an example where, say, a defendant neglects cattle owned by him or her, thereby breaching a moral duty not to maltreat animals. Consequently, the beasts are disease and tic ridden. A neighbouring grazier, fearing that the diseases and tics could spread to his or her own herd, expends money to treat the animals. Should the neighbour recover the costs of such actions, despite the entirely self-interested motivation for the action?

²²⁹ There are a few exceptional circumstances where recovery may nonetheless be allowed. One exception appears to be co-tenants who repair or improve their land for their own purposes. Although such tenants are not entitled to contribution for the costs of such repairs or improvements, they will be entitled to an allowance for the actual enhancement of the property, upon partition. See *Leigh v. Dickeson* (1884) 15 Q.B.D. 60, and *Maddaugh & McCamus*, 744-47. Life tenants may, in a few exceptional circumstances, be entitled to recompense from their remainderman for a portion of money expended on improvements. See *Maddaugh & McCamus*, 748, fn. 28. Contrast the position in America: Dawson, supra n. 215, 1422-7.

Another exception is the United States doctrine by which lawyers may in some circumstances be awarded recovery for services rendered from non-clients who have benefited from such services. For the general conditions governing recovery, see Palmer §10.8. For a more detailed consideration, see Dawson, J.P., "Lawyers and Involuntary Clients: Attorney Fees from Funds" 87 Harv. L.R. 1597 (1974), and Dawson, "Lawyers and Involuntary Clients in Public Interest Litigation" 88 Harv. L.R. 849 (1975).

²³⁰ [1900] A.C. 6, 10. See also per Lord Macnaghten, at 15. Cf. the *Restatement of Restitution*, §106:

A person who incidentally to the performance of his own duty or to the protection or improvement of his own things, has conferred a benefit upon another, is not thereby

Even though the plaintiff may have acted in justifiable self-interest, there is no reason why the defendant should bear the cost,²³¹ and recovery will not generally ensue.

The reasons for this appear twofold. First, the plaintiff, although perhaps seeking to improve his or her own property or financial position, will not be acting from a motivation of self-protection from the defendant's actions (or inaction) that is, the need for the plaintiff's conduct does not arise from the defendant's failure to fulfil a duty owed. No connection can be drawn with that defendant if he or she has not actually failed to meet such duty. Secondly, and perhaps more importantly, if recompense were granted in such circumstances the defendant would be forced to bear a new burden where none previously existed. This contrasts with the situation where the plaintiff has paid a debt owed by the defendant and seeks reimbursement. The effect of allowing reimbursement is merely to alter the party to whom the debt is owed, rather than impose an entirely new obligation. To impose a new obligation would be to require the defendant to allocate his or her resources in a way he or she may not have wished, merely because the plaintiff considered it to be in his or her own self-interest that the defendant do so. This is unacceptable in law as being an unwarranted interference with another's autonomy, and the defendant's position is not weakened by the fact that he or she may even have benefited as result of the plaintiff's actions. This is, after all, the very burden of the often quoted *dicta* of Bowen L.J. in *Falcke v. Scottish Imperial Insurance Co.*, rejecting

entitled to contribution.

²³¹ Cf. *First Nat. Bank v. Villegia*, 28 P. 97 (1891), 98, per Garoutte J.:

It clearly appears that plaintiff expended this money for his own benefit and his own advantage, and not for the benefit and use of the defendant. A party cannot of his own volition create an obligation in his own favor by doing some act for his own interests, and the necessity for which was caused by himself. This is in no sense an action brought for the recovery of money advanced for and to the use of defendant. No legal duty rested upon the defendant to perform the work for which money was expended...

The point is brought out most sharply by cases concerning co-tenants of land. Co-tenants who make improvements to land face "bleak prospects" should they seek contribution from fellow co-tenants (though note exceptions, *supra* n. 229). Co-tenants, however, who meet charges on the property can "confidently expect contribution if they expend more than their pro rata share in discharging liens on the common estate." See Dawson, *supra* n. 215, 1439. The reason for this seems clear. In the former case, no duties of the defendants will have been fulfilled; whereas in the latter case, duties of the defendants will have been discharged.

recovery for benefits conferred upon others against their will.²³² Where a plaintiff has fulfilled an obligation of the defendant, however, such *dicta* has little force. In effect, no new obligation is being imposed. Even if a defendant's obligation was not in the form of a money debt, so that ordering recompense would have the effect of crystallising the unliquidated obligation into a liquidated one, such recompense still seems appropriate and some United States cases have been prepared to accept that recovery should ensue. It is unclear whether courts in other jurisdictions are prepared to take this step, but there appear to be no reasons in principle why they should not do so.

²³² (1886) 34 Ch.D. 234, 248. See also *Ulmer v. Farnsworth*, 15 A. 65 (1888); *Restatement of Restitution*, §106; Goff & Jones, 56.

THE INNOCENT RECIPIENT OF MONEY AND SERVICES

§ 9.1 INTRODUCTION

Circumstances may arise in which money, services or goods (the emphasis will be on the first two) of a plaintiff are conferred on an entirely "innocent" defendant, where there is no requisite intention on the part of the plaintiff to "transfer" to the defendant such money, services or goods. Hence, a plaintiff may seek to undo the consequences of the "transfer" and seek to impose liability of some kind on the defendant, even despite the innocence of that defendant.

Rules governing the imposition of liability on innocent defendants are the concern of this chapter. In some ways, such liability rules, for example, those governing recovery from a recipient of a mistaken payment of money, are a residual category of case. The distinctive feature of this category is the absence of any conduct on the defendant's part, or shared common interest or any reason of social policy, to justify liability in the form considered in the previous three chapters. In many cases, though by no means all, the liability imposed (if any) takes the form of, and is limited to, the restitution of a benefit received and surviving in a defendant's hands. Thus unlike in the categories considered previously, a concept of unjust enrichment may have some work to do here. Nonetheless, as will be seen, unjust enrichment is not overly useful even in this category of liability rules. Instead, this writer will seek to unify the case law on the basis of a notion of achieving fair outcomes. The crux of this notion is the need to ensure that an innocent defendant is not disadvantaged by any relief aimed at undoing the consequences of a particular transaction.

Before we turn to an expansion of the notion of achieving fair outcomes, it is necessary to outline fully the types of circumstances which raise the essential problem at hand, that is, which potentially give rise to claims against innocent defendants.

Perhaps the most significant class of claims are those arising as a result of mistake. A mistake of existing¹ fact or law² may cause a plaintiff to pay money or transfer goods to, or perform services for, another, so that "but for"³

¹ Mistakes of existing fact must be distinguished from predictions as to a future outcome which prove incorrect (mispredictions). See Birks, 147-8. Persons who act on the basis of a prediction as to a future outcome cannot bring themselves within the jurisdiction of the courts to relieve against mistakes merely because the predicted outcome does not eventuate. An example of a misprediction is where a plaintiff makes improvements to property in the hope of obtaining a future inheritance, as in *Kelly v. Kelly*, 148 A.L.R. 331 (1943).

² For most practical purposes, the distinction between a mistake of fact and a mistake of law has been abolished. In Australia, see *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, noted in Burrows, A., "Restitution for Mistake in Australia" (1993) 13 O.J.L.S. 584. In Canada, see *Air Canada v. British Columbia* (1989) 59 D.L.R. (4th) 161, and cf. Maddaugh & McCamus, 256. These decisions overturn considerable authority precluding recovery of money paid as a result of a mistake of law. See, e.g., *Sawyer & Vincent v. Window Brace Ltd* [1943] 1 K.B. 32, 34. The preclusion still survives in England, despite the difficulties which may arise in drawing a distinction between mistakes of "fact" and "law" in given circumstances. See, e.g., Burrows, *The Law of Restitution*, 115-6. It has been suggested in the House of Lords, however, in *Woolwich Building Society v. IRC (No. 2)* [1991] 3 All E.R. 737, 783, per Lord Slynn, that the rule is "open to review". Despite the abolition of the distinction between mistakes of fact and law in Australia, such a distinction may still have practical significance in the context of available defences to a claim for recovery of mistaken payments. It has been said that "voluntary" payments made in satisfaction of honest claims—where a payer is "prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment"—will not be recoverable. See *David Securities*, at 71. Such "voluntary" submissions, which the court will uphold on the basis of a policy of enforcing "compromises freely entered into" (72), will more usually arise in the context of mistakes of law, rather than fact. As Goff & Jones, 144, point out:

The essential difference between a restitutionary claim arising from a mistake of law rather than of fact is that the limiting principle, that benefits conferred in submission to an honest claim are irrevocable, assumes considerable importance if the payer's mistake is one of law. But it is only in rare cases that a plaintiff's claim is defeated because he has voluntarily assumed the risk of his own mistake of fact.

Cf. Birks, 165-6. For examples of submissions to honest claims under a mistake of fact, see Goff & Jones, 127-30.

Contrast the views of the majority in *David Securities*, to those of Brennan J., at 87-92. As his Honour's judgment makes clear, there are difficulties in formulating a defence in terms of "voluntariness". See also Watts, P., "Mistaken Payments and the Law of Restitution" [1993] L.M.C.L.Q. 145.

³ It has been accepted in Australia that a mistake is operative in the context of mistaken payments of money and may thus give rise to a right to restitution wherever it causes the payment. See *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57. This is sometimes stated in terms of a simple "but for" test of causation. See Burrows, 101, 24-7. Under such a test, it would not appear that the mistake must be the predominant cause of the plaintiff's action. It is sufficient if it is a cause of the actions. See *David Securities*, 73-5, and contrast Watts, *ibid*, at 147-8, who doubts whether the courts will be able to apply only a causation test. In Watts' view, resort may still have to be had to some concept of "fundamentality" (despite the High Court's rejection of such a requirement), particularly in determining whether gifts should be recoverable or not. For the position in England, see *Barclays Bank Ltd v. WJ Simms Ltd* [1980] Q.B. 677, and Burrows, 95-109.

that mistake, the plaintiff would not have conferred the money, goods or services.⁴ Where a plaintiff's mistake was induced by the defendant,⁵ or allowed to continue by the defendant in circumstances suggesting a duty to apprise or disabuse the plaintiff of his or her mistake,⁶ liability may be imposed on the defendant on the basis of his or her conduct. The defendant's connection with the plaintiff's mistaken actions in such cases may trigger conduct-related liability rules considered in Chapter 6. Such mistakes are not of concern here.

Instead, the concern in this chapter is with mistakes of a kind such that the mistaken actor does not seek "to make anything of the way in which the mistake came about."⁷ To utilise the language of Birks, such mistakes can conveniently be labelled "spontaneous",⁸ which term encompasses the idea that the defendant is completely innocent in relation to the plaintiff's mistake and has not assumed the risk of such mistake. Indeed, if any blame for the plaintiff's mistaken actions were to be allocated in the cases under

⁴ The mistaken transfer of land presents problems peculiar to land law and will not be considered here. Usually such transfers will occur in the context of contractual mistakes, which, for reasons discussed below, are not considered in this chapter. Where the mistaken transfer was not contractual, the right to undo the transaction will in many jurisdictions depend upon statutory provisions relating to the rectification of registries of title.

⁵ A mistake may have been induced by a defendant where it was the result of representations made by a defendant, as in *Old Men's Home v Lee's Estate*, 4 So. 2d 235 (1941), or where it was the result of a defendant's negligent or mistaken conduct, as in *Phelps v. Kuntz*, 76 A 237 (1910). In *Phelps v. Kuntz*, the defendant landowner had mistakenly located the position of the plaintiff's lot in an estate so that the plaintiff proceeded to build on the defendant's land as a consequence.

⁶ An example of a mistake allowed to continue by a defendant would be where the defendant acquiesces in the plaintiff's mistaken conduct affecting the defendant's land, potentially giving rise to an estoppel against the defendant.

⁷ Birks, 146.

⁸ As Birks concedes, this is a somewhat inaccurate term, given that such mistakes may often have external causes. See Birks, 146-7. However, there appear to be no better labels. For example, the mistake need not be a "pure" unilateral mistake, for the defendant may have shared the mistaken belief.

consideration, such blame would rest with the plaintiff.⁹ The risks of the mistake and the perhaps even considerable losses of money,¹⁰ goods, or wasted time and effort such mistake may occasion to the plaintiff, are risks which the plaintiff can reasonably expect to bear. Given the plaintiff's responsibility for his or her own actions, one could say that as a starting premise, no reasons exist for overturning the *prima-facie* rule that loss lies where it falls.¹¹

Nonetheless, although we can say that plaintiffs bear the risks of their spontaneous mistakes, simply to allow the consequences of such mistakes to go unremedied may often result in considerable hardship. Where a plaintiff may not have acted in a particular way but for the mistake, the mistake can be said to vitiate his or her intention to act. This lack of requisite intention to act in the legal and factual circumstances actually prevailing provides a strong argument for "undoing" the consequences of a plaintiff's mistake,¹² in order to restore that plaintiff to his or her pre-mistaken position.

A plaintiff's intention to act in a particular way may be vitiated by more than just a mistake in the form of a false belief of existing fact or law. A person who merely is unaware of certain matters, rather than consciously believing the contrary, is also in a sense mistaken.¹³ Unawareness may extend to ignorance

⁹ The mistake may even have been the result of the plaintiff's own negligence. Such negligence, however, will not preclude recovery of a mistaken payment of money: *Kelly v. Solari* (1841) 9 M. & W. 54, 152 E.R. 243; *Maddaugh & McCamus*, 211. As will be seen, liability is justifiable despite the plaintiff's negligence, as such liability does not shift the risk of the plaintiff's mistaken actions to the defendant, who will not be disadvantaged where merely required to return the economic advantage received as a result of the mistaken payment. Query whether negligence will preclude recovery for *services* mistakenly rendered where such recovery would otherwise be allowed? The issue is not usually addressed, but some cases have emphasised the plaintiff's negligence as one basis for precluding relief: e.g., *Ings v. Industrial Acceptance Corp* (1962) 32 D.L.R. (2d) 611, 618-9, and *Taylor v. Shaw*, 55 So. 2d 502, 507 (1951).

¹⁰ See, e.g., *Chase Manhattan Bank v. Israel-British Bank (London) Ltd* [1979] 3 All E.R. 1025, in which some \$2 million were paid to the defendant by mistake.

¹¹ There may exist some policy reason for shifting losses to a defendant, but this would be an exceptional case. For example, it seems unlikely that a plaintiff's mistaken actions would ever trigger the liability rules considered in Chapter 8.

¹² Such an argument has far less weight, however, if a plaintiff has acted in a way which suggests that the risk of the consequences of his or her mistaken actions has been *assumed*, even outside of a contractual relationship. An example is provided by *McGrath v. Hazlett* (1973) 13 N.S.R. (2d) 567, in which a plaintiff in possession of land to which he believed he was entitled was aware of the defendant's competing claim to that land, but nevertheless proceeded with improvements. The court considered that the defendant, in failing to heed the defendant's notice of competing claim, "was the author of his own misfortune", (568), and refused any relief.

¹³ Such as where a plaintiff has forgotten that money has previously been paid. Cf.

of the very occurrence of a particular event, such as where money is lost from a torn pocket¹⁴ or transferred as a result of a computer error. Conceptually, there is no difference between the transfer of money in "ignorance"¹⁵ and under a consciously-held false belief (mistake). In neither case does a plaintiff intend the defendant to have the money,¹⁶ at least in the circumstances which actually apply. Provided the defendant was equally blameless in both situations,¹⁷ the problem to be addressed is the same: when will the law undo the consequences of the plaintiff's error-or-ignorance-induced "actions", given that no grounds exist for making the defendant bear, or share in, the plaintiff's losses? Hence, the term mistake will include cases of a transfer in "ignorance" direct from a plaintiff to the defendant.

Chase Manhattan Bank v. Israel-British Bank [1979] 3 All E.R. 1025. As was stated by Eves J, in *Lady Hood of Avalon v. Mackinnon* [1909] 1 Ch. 476, 482, a case concerning the setting aside in equity of a deed of gift:

It seems to me that when a person has forgotten the existence of a pre-existing fact, and assumes that such a fact did not pre-exist, he is labouring under a mistake, and he acts on the footing that the fact really did not pre-exist; ... I should have thought that a man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist.

¹⁴ Cf. *Holiday v. Sigil* (1826) 2 C. & P. 176.

¹⁵ See Birks, 140: an "ignorant" transfer of wealth is one which has occurred "wholly without the knowledge of the plaintiff".

¹⁶ Cf. Burrows, 139. Birks has persuasively argued that one cannot treat ignorance and mistake separately; that in principle, you cannot treat the mistaken payer of \$100 differently from one who loses \$100, subsequently found by the defendant. See Birks, 140-2. At 141, Birks states:

Restitution for mistake does not involve the proof of any wrong; and total ignorance is *a fortiori* from the most fundamental mistake. Hence a system which believes in restitution for mistake cannot but believe in restitution for ignorance, quite independently of any wrong incidentally committed.

See also Birks, P., "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296, 305-8. Birks goes on to treat three-party transactions, where a plaintiff's property is misdirected by a third party to the defendant, as examples of ignorance. In one sense, this may well be correct; but it does not deal with the very different manner by which the defendant in three-party transactions comes by the property in question. In mistaken transactions, it is as a result of the plaintiff's own actions. In three-party transactions, it is as a result of an independent transaction with a third party. These are very different causes of the problem. The important similarity is where both types of claim are against innocent defendants.

¹⁷ The recipient of funds transferred by computer error may be completely unaware of the mistake. By contrast, a person who picks up notes on a street will, of course, be aware of his or her lack of title to the money.

Excluded from consideration in this chapter are mistakes which occur in the context of contractual and precontractual relationships. Although mistake here is undoubtedly important, contract law has developed different approaches and rules as to the consequences of mistake in contract. The courts appear far more reluctant to undo contractual relationships entered by one or more parties acting under a mistake than, say, mistaken payments.¹⁸ This may well be as a result of the parties' allocation or assumption of risks, expressly or implicitly forming part of their contractual relationship. Such assumed risks may include the consequences of a mistake. Further, in order to protect the security of bargain transactions, the parties to a contract may be deemed to have assumed the risks of certain mistakes.¹⁹ Alternatively, even if a mistake is not one which either party can be taken to or is deemed to have assumed, perhaps a common or mutual mistake, then the parties' contractual relationship may justify the application of a principle of sharing (see Chapter 7).²⁰

¹⁸ Although the law of mistake in contract is far from straightforward, it is fair to conclude that the courts have tended to apply a far narrower test of what constitutes an operative mistake sufficient to allow a party to escape from a contract than merely a "but for" test. See *Midland Bank plc. v. Brown Shipley & Co Ltd* [1991] 2 All E.R. 690, 700-1. See Stoljar, 20-1. Goff & Jones, 110, state:

A claim to recover money paid under a mistake is essentially different from a claim to avoid or set aside a contract for mistake. To avoid a contract, the mistake "must be basic enough to overcome the pressures favouring finality of contract", hence the condition in cases of mutual or shared mistake that the mistake must be fundamental. A fundamental mistake in the sense used in contract law will, of course, enable money paid under such a mistake of fact to be recovered, whether the money was paid under a supposed liability or as a gift. But the test of mistake in restitution should be broader. The only transaction that needs to be set aside is the payment. A restitutionary claim "does not destroy expectations created by a previous bargain", it merely seeks to prevent the defendant's unjust enrichment. (footnotes omitted).

Burrows, 107, makes a similar point:

A contract generally constitutes a bargain between at least two parties; and one of the purposes of contract law is to allow the binding allocation of risks. It follows that the courts should not be as willing to allow an escape from a contract, thereby disappointing bargained-for expectations, as they are to allow the restitution of money paid. ... It is hard to believe that the courts would move to a position whereby a party could escape from a contract, in the sense of a legally binding bargain, simply by establishing that he had made a mistake but for which he would not have entered the contract.

¹⁹ Where one party enters a contract under a mistake and the other party does not know of that mistake (pure unilateral mistake), the courts will not generally interfere in the contractual relationship. Of course, where the other party is aware of the fact that the first party is mistaken, then the mistaken party may be entitled to rescind the contract. Such cases were considered under the heading of tort-like liability in Chapter 6.

²⁰ Such a principle will be particularly significant where the mistake occurs in the

A mistaken or ignorant conferral of money, goods or services by a plaintiff is thus one example which raises the problem of the potential liability of an innocent defendant. Another type of case in which essentially the same problem may arise is where a plaintiff transfers property²¹ to the defendant upon a condition which is not met, through no attributable blame of the defendant.²² For example, the plaintiff may have transferred money in pre-payment under a contract discharged for the plaintiff's breach. Recovery of the pre-payment in such circumstances, for total failure of consideration,²³ ought in theory (though in practice it may not)²⁴ follow on the same principles as govern recovery by a mistaken payer against an innocent defendant. Consequently, such cases will not be considered separately.²⁵

context of a long-term contractual relationship only partially performed. As has been argued previously, the problem raised in such cases can be dealt with akin to parties sharing common interests generally. Where, however, a shared mistake occurs in the context of discrete one-off transaction, the courts have generally let losses (and gains) lie where they fall at the time the mistake is discovered. Executed contracts are upheld and unexecuted contracts are not enforced. See § 7.5.

²¹ The issue does not really arise in relation to services. If services have been conferred, such conferral will either have been gratuitous or non-gratuitous, which factor will determine whether a defendant will have imposed upon him or her a contractual or contract-like (e.g., for services conferred in anticipation of a contract) liability to pay for the services.

²² However, one type of case which could be so described is not of concern here. Frustration cases (and included here are cases of common mistakes occurring in the context of contract) are ones in which a condition fails without blame of a defendant, but as was argued in Chapter 7, in such circumstances, the parties common interest justifies liability of a very different kind to that being considered here: namely, liability which gives rise to a duty to share gains and losses.

²³ This is provided that the consideration is entire. If consideration is severable, then consideration need only have failed as to the severable residue: *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 64-5, per Lord Wright. As to the meaning of failure of consideration, see Burrows, 251-3.

²⁴ As will be seen, the primary concern of liability rules governing innocent defendants is that such defendants are not disadvantaged. In one sense, a claim for money paid for total failure of consideration against an innocent defendant shares this concern. Any reliance by the defendant on the payments gives rise to an absolute bar to recovery. Such protection, however, may be more extensive than is desirable. If there has been only a partial failure of consideration, the defendant may still retain part of an economic advantage received and capable of being returned. The return of surviving economic advantage will be seen to be the essence of money claims. To ensure results consistent with those in mistake cases, the writer favours the view, gaining widespread acceptance, that a partial failure of consideration ought to suffice for a claim to be potentially available.

²⁵ Many claims for recovery of money under the rubric of total failure of consideration are not against innocent defendants and occur in the context of categories considered earlier. In such cases, an alternative claim on the same basis as against an innocent defendant may exist,

A third type of case—three-party transactions, as they will be called—also raises the issue of the potential liability of an innocent defendant. These cases involve transfers of money (using the term loosely, to include both cash and “bank money” such as cheques, credits in bank accounts and credit cards)²⁶ in three (or more)-party transactions, where a plaintiff’s money²⁷ is

even where a defendant’s conduct towards or common interest with the plaintiff justifies a more expansive liability. For example, if a plaintiff has paid money in performance of a contract and there occurs a breach by the defendant sufficient to justify termination of the contract, then such money payment will be recoverable, provided there was a total failure of consideration. In such a case, the plaintiff will have paid money on the basis of a condition (the defendant’s performance) which subsequently has not been fulfilled. Restitution in such a case is an alternative remedy aimed at restoring the plaintiff to his or her position before the contract was entered into. Normally, this alternative remedy will be subsumed by the more extensive rights arising as a result of the breach of contract: to seek damages or specific performance. In some circumstances, however, such a restitutionary right may be a significant one, where, for example, the payment made exceeds any contractual damages actually suffered. Although the plaintiff in such a case has made a bad contractual bargain, restitution of the full payment is nonetheless justifiable, given that the defendant retains the money received and that the condition upon which it was paid has failed.

As already noted, it is a requirement in English and Australian law that there be a total failure of consideration (that is, consideration in the sense of contractual performance) before a payment under a contract is recoverable. This requirement appears to reflect an unwillingness on the part of the common law to restore a plaintiff to his or her position where that plaintiff has received something in return for the payment, which something cannot be returned. For example, the plaintiff may have had services conferred, or perhaps had the use of goods transferred (note, however, *Rowland v. Divall* [1923] 2 K.B. 500). Such an absolute prohibition against restitution seems unjustifiable, given that the courts could take into account a plaintiff’s partially received performance in formulating the measure of restitution which achieves an approximate restoration. This should especially be so where a defendant’s breach of duty is the basis of the remedy, for in such cases, protecting a defendant from disadvantage should not be an overriding concern, as it will be seen to be in relation to innocent defendants. In the United States, restitution of money payments made under a contract is available where there has been a breach of vital importance, even if some consideration or performance has been received by the plaintiff. This is subject to the proviso that the plaintiff must return “in some way what he received as a part performance by the defendant”: Corbin, A.L., *Corbin on Contracts*, (1964), Vol. 5, 608, and see generally §1114. Where, however, performance is substantial, restitution is not an available remedy, as the condition upon which the payment was made has been satisfied and the defendant is entitled, contractually, to keep the payment. A plaintiff will be limited to a claim for damages resulting from the inconsequential breach. See, generally, Corbin, Vol. 5, §1102-§1121.

It may also be that claims for restitution of money paid in reliance upon a defendant’s wrongful conduct may mask a claim for recovery of reliance losses. This will often be the case where the money payment was made under an incomplete or defective contract. See § 6.2.3.3. Where this is the case, even only a partial failure of consideration should give rise to recovery of the difference between the payment made and the benefit received. Consistently with this view, where a defendant in receipt of money has changed his or her position in some way other than contractual performance, a change of position defence should not be available to such a defendant.

²⁶ In strict legal definition, “money” does not include such bank money. It has been suggested that the “quality of money is to be attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as

misdirected²⁸ by another, which money ultimately finds its way to the defendant. It is thus as a result of a third party's actions rather than a plaintiff's own actions that the problem arises. Three-party transactions are particularly complex and, as will be seen, raise issues not relevant to the mistaken conferral of money, goods or services directly upon a defendant by the plaintiff (two-party transactions). Consequently, this chapter is divided into two broad groups of cases—mistaken transactions and three-party transactions.²⁹ Cases in which a plaintiff seeks the recovery of mistakenly paid debts owed by the defendant to a third party are considered as mistaken transactions, involving the conferral of a service (the payment of the debt) directly upon the defendant.

It is convenient to consider mistake and three-party situations separately. The appropriate legal response to three-party problems is the subject of much debate, and the current legal position is in a state of some confusion. By firstly considering the limits of recovery in mistaken transactions, it is proposed to outline a rationale for recovery which, it will be argued, ought equally be applicable to three-party transactions. Such rationale will be argued to be one of restoring a plaintiff, as near as possible, to his or her previous position (before the mistake or misdirection), without disadvantaging the defendant. Where restoration on such terms is possible, a fair outcome can be said to result. It must be stressed that although the notion of restoration

universal means of exchange in the state of issue.”: Mann, F.A. *Legal Aspects of Money* (5th ed., 1992), 8, (hereinafter: “Mann”). In this writer's view, the essential characteristic of money of relevance here is its “inherent” quality as “wealth power” or purchasing power. Cf. Mann, 28-9. Consequently, for the purposes of this thesis, the term money is used to include bank money, which shares this quality. The different forms which money (speaking loosely again) can take, may be important if one is seeking to establish a tracing claim to property, but is not relevant where merely establishing a personal claim against the immediate recipient of the money.

²⁷ Three-party transactions do not typically involve goods or services.

²⁸ The term “misdirected” incorporates honest conduct by the transferor of money which nonetheless is in breach of some duty. See Birks, *supra* n. 16, 297:

“Misdirected” is intended to be neutral as to the moral quality of the misapplication. The most graphic case is the thief who steals the plaintiff's money and gives it to the defendant. But an honest mistake may equally underlie the misdirection, as where trustees misunderstand their duty and pay to the defendant money which ought to go to the plaintiff.

²⁹ For the purposes of simplification, the problem will be addressed by reference to a standard three-party situation in which X misdirects money to D, which P seeks to recover from D. Of course, in complex modern commercial dealings, any number of parties may be interposed between X and D.

achieving a fair outcome provides a rationale of the results of much of the case law on mistaken transactions and offers the most satisfactory basis for determining liability, it is not an explanation found in the cases themselves. Instead, the reasoning of the cases in recent times has often been in terms of unjust enrichment. Although, as will be seen, unjust enrichment provides a plausible explanation of money cases, it is not an appropriate tool for determining the limits of liability where services have been mistakenly conferred.

§ 9.2 MISTAKEN TRANSACTIONS

§ 9.2.1 Achieving Fair Outcomes: A Distinct Concept to that of Unjust Enrichment

If P mistakenly³⁰ pays \$1000 to D, then D has been enriched by that amount.³¹ Given P's mistake, if D is not required to repay such sum, it could further be said that he or she has been "unjustly" enriched.³² Mistaken payments, it is said, are "easy to analyse according to the unjust enrichment principle", and recovery of such payments is considered to be one of the clearest examples of the principle at work.³³ Certainly, the courts fairly readily grant restitution of money mistakenly conferred—a readiness which is perhaps even increasing³⁴—and in recent times have often done so, unequivocally,

³⁰ It will be presumed for the purposes of the discussion that the mistake has caused the payments or other actions and is one which the courts are prepared to consider, *prima facie*, sufficient to justify having the transaction undone. The nature of the mistake will thus not be relevant to the discussion of the issues at hand. It will be assumed that a mistake sufficient to ground restitution of money paid will also be sufficient, *prima facie*, to ground other remedial relief where the mistaken conduct took the form of the performance of services. However, the question of the nature of a mistake is not usually dealt with in service cases, since recovery is often refused for reasons other than the lack of a legally operative mistake.

³¹ The receipt of money is said to be unquestionably enriching at the plaintiff's expense. See, e.g., Goff & Jones, 17-8, and Birks, 109.

³² The payer's mistake "negatives the voluntariness with which the plaintiff paid the money": Burrows, 95; or "vitiates" the judgment of the plaintiff in relation to the transfer of the goods: Birks, 140-1, 146-7. Birks considers that once the mistake is discovered, the plaintiff may legitimately cry, "I did not mean you to have the money in those circumstances": cf. Birks, 140.

³³ Burrows, 95. Keener, 26, has said that recovery of mistaken payments affords "one of the most striking illustrations of the equitable nature of the quasi-contractual obligation, where the liability rests upon the doctrine of unjust enrichment".

³⁴ Contrast Burrows, 95, who considers that "English law has traditionally taken a narrow view of recovery". But the two restrictions upon recovery Burrows cites in support of

under the rubric of unjust enrichment.³⁵ We could, then, say that the recipient of a mistaken payment of money has been “unjustly enriched”, provided we can be sure of when indeed the enrichment is unjust. The issue at hand, however, is whether we should *want* to so describe the situation. Is it a particularly useful description at all, one which serves some explanatory role and provides us with clear concepts for approaching problems of mistake generally?³⁶ The danger exists that unjust enrichment may merely be a description of a conclusion that has been reached, rather than the means of arriving at that conclusion.

This note of caution is not intended as a prelude to a detailed reconsideration of ground already covered. It is sufficient to remind ourselves of the lack of clarity in the meaning of the term “unjust”.³⁷ In the context of mistake, this is no better evidenced than by the fact that the receipt of money by a defendant from a plaintiff acting under a mistake may not of itself be sufficient to ground recovery. For example, in the past, and there is still support for the view today,³⁸ the courts insisted on some notion of fundamentality before a mistake was considered operative. “Unjustness” does not even begin to hint at the possible policy reasons behind such a rule.³⁹

his view have been abolished in Australia (in *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57), and the English courts are likely to follow suit (cf. Burrows, 95). The abolition of these restrictions suggests a broadening of the right to restitution. The restrictions are: (1) the preclusion against recovery of payments conferred under a mistake of law (see supra n. 2); and (2) a requirement that a mistake be fundamental, or perhaps even more strictly, be one going to liability, (namely one whereby the mistaken payer was acting under the belief he or she was under a legal obligation to make the payment). It could also be said, however, that the courts are at the same time narrowing the right to restitution by recognising a general change of position defence. It is not certain what the scope of such a defence will be, or whether its operation will extend much beyond defences previously recognised and applied at common law. See § 9.2.2.2.

³⁵ See, e.g., *ANZ v. Westpac* (1988) 78 A.L.R. 157, and *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, though see the discussion in Chapter 2 as to the role of unjust enrichment in Australia, as perceived by the High Court.

³⁶ The question becomes all the more important if one accepts the view of the Court of Appeal of New Zealand in *Martin v. Pont* [1993] 3 N.Z.L.R. 25, 30, that although “unjust enrichment can be regarded as the rationale of (albeit not necessarily the test for) a number of restitutionary claims, it is not a prerequisite of the action for money had and received.”

³⁷ Generally, see Chapter 3.

³⁸ See supra n. 3.

³⁹ Similarly, available defences may preclude recovery, some of which defences, it has been suggested, may operate whenever it would not be unjust in the circumstances for the

Let us instead turn to another matter which raises considerable challenges to any unjust enrichment analysis of mistake. There exists a distinct dichotomy in the law which unjust enrichment may not be able to explain. To generalise very broadly, and thus perhaps somewhat inaccurately: on the one hand, mistaken money payments are fairly readily recoverable by the payer; on the other hand, where a mistake has resulted in the conferral of services, such as the improvement of a defendant's land or goods, the right to recovery tends to be more limited.⁴⁰ Can unjust enrichment theory explain this tendency (it is suggested to be no more than that) of the law to treat mistakenly conferred money and services differently?

Most attempts to explain in unjust enrichment terms the different tendencies of legal responses to money and services turn on the issue of enrichment. Since both the mistaken payer of money and mistaken service provider are mistaken, and since, on most views, a mistake on its own satisfies the requirement of unjustness, *prima facie* liability must then turn on whether a defendant has been enriched.⁴¹ The recipient of money is always enriched, but

defendant to retain the money. Birks considers that a change of position defence, to be considered below, may refer to both the issue of enrichment and unjustness, that is, that there are "enrichment-related changes of position" and "unjust-related changes of position". See Birks, *Restitution—The Future*, Chp. 6. In the former case, the defence is said to be concerned specifically with the continued existence of an enrichment in a defendant's hands. Of interest here are changes of position which no longer render it unjust for a defendant to retain a benefit. One may ask whether merely describing defences as "unjust-related" can ever tell us anything about the policies underlying the availability and scope of such defences. Birks accepts that "[t]here are, potentially, as many such versions [of 'unjust-related changes of position'] as there are sub-conceptions of justice capable of being invoked against the plaintiff's claim." (*Restitution: The Future*, 143). One may legitimately ask, what is a "sub-conception of justice"? For an example of unhelpful reasoning addressing the issue of whether it is "unjust" for a defendant to make restitution of money, specifically in the context of defences, see *McDiarmid Lumber Ltd v. Canadian Imperial Bank of Commerce* (1992) 94 D.L.R. (4th) 227.

⁴⁰ Of course, the mistaken service provider is not absolutely barred from relief; nevertheless, it could be said that such a provider will only exceptionally recover for those services, even in circumstances in which the defendant has clearly benefited (at least on a receipt of wealth approach) as a result of those services. To take one example, if P mistakenly builds a house on D's land, where there has been no acquiescence by D in P's conduct, the most recent Australian authorities suggest that P will be remediless. See *Brand v. Chris Building Co.* [1957] V.R. 625. Cf. *Beaton v. McDivett* (1987) 13 N.S.W.L.R. 162. This ignores the possibility of a claim under statutory provisions, but such provisions may in any case be narrowly interpreted. See *Amatek v. Googorewan* (1993) 67 A.L.J.R. 339. It will be suggested below that *Brand's* case ought to have been decided differently.

⁴¹ If one accepts the burden of most unjust enrichment theory, then a plaintiff's ignorance or mistake on its own meets the requirement of unjustness, as the voluntariness of the transfer has been negated. See, e.g., Birks, 140-2.

the "recipient" of services, it is said, may not be.⁴² In order to determine whether in fact a service recipient has been enriched, a number of tests have been proposed, none of which have proved entirely satisfactory. The complexities in relation to enrichment were discussed in Chapter 4, and there is no need to return to that debate. Suffice it to recall that this is a path leading to considerable conceptual difficulty. What is clearly indisputable is that there exists no widely accepted standard, let alone consensus, amongst commentators as to the meaning and scope of enrichment.⁴³ This is perhaps best illustrated by the example of a mistaken improver of another's land. According to Birks, the lack of any request or acceptance by the defendant of the improvement controverts enrichment, and therefore recovery will be, and ought to be, precluded.⁴⁴ Yet in some United States jurisdictions, courts faced with the same problem have concluded that the market increase in a defendant's land equates with his or her enrichment, and that such a sum is recoverable by the plaintiff.⁴⁵ Such completely irreconcilable results are said to flow from the same process of analysis: by asking whether a defendant was enriched.⁴⁶

Service cases, then, present some difficulties for unjust enrichment analysis. This has led some commentators to highlight the very differences between the law's response to money and service cases and to seek other

⁴² This is a consequence of the argument from "subjective devaluation" (Birks, 109-10, and see also Burrows, 7-16) considered previously in Chapter 4.

⁴³ More controversially, perhaps there can never be such a consensus: the diversity of the results of the cases suggests against any widely accepted standard of enrichment ever adequately doing the job. This conclusion follows from the problems in relation to enrichment highlighted in Chapter 4.

⁴⁴ Birks would not generally consider such an improvement to be an "incontrovertible benefit". See Birks, 411-2, 371-2, and Sutton, R.J., "What Should Be Done for Mistaken Improvers" in Finn, 241, at 255, who discusses Birks' approach to this specific question.

⁴⁵ See Palmer, §10.9 (c).

⁴⁶ This has simplified the debate; but the fact that greater complexity is possible supports the very point being made. Thus, *it is arguable* whether the owner of improved land has been "incontrovertibly" benefited or not, for example, but quite different results can be arrived at by applying the tests of different theorists. The conclusion reached would depend on one's interpretation of what amounts to "necessary" expenditure, or whether one considers that the test covers merely improvements "realised in money" (e.g., Birks), or extends to improvements "realisable" in money (e.g., Goff & Jones, and Maddaugh & McCamus). Consequently, one can pick the version of the test which gives the desired answer to a particular problem.

principled explanations exclusively of service cases.⁴⁷ Such an approach, however, has the unacceptable consequence of dividing like cases, which, it will be seen, can be explained on a unified basis. Birks is one writer who has repeatedly stressed the need to analyse money and service cases as one and the same, according to the common causative events which trigger liability.⁴⁸ Although in Birks' case, this argument is linked to his unjust enrichment analysis—that a benefit, once identified, is disgorgeable on the same grounds, irrespective of the form in which that benefit was received⁴⁹—it has merit beyond unjust enrichment. As was evident in this writer's analysis in previous chapters, liability rules the applications of which are triggered by similar causative events should be considered together. In all the cases to be considered in this section, the underlying cause of the legal problem is the same: the plaintiff's mistaken actions. Whether a mistaken action takes the form of the performance of services or the payment of money should not, theoretically at least, be of concern.⁵⁰ It is the consequences of their mistakes which plaintiffs wish to undo. In cases of spontaneous mistakes, a claim for any remedial relief cannot rest on a defendant's conduct towards or relationship with the plaintiff. The mistake, of itself, must be the *raison d'être* for any relief sought.

Is it possible to explain both services and money cases uniformly, whilst also accounting for the different emphasis of the law in its preparedness to grant recovery in money cases and its reluctance to do so in service cases? In the writer's view, an explanatory principle which satisfactorily links all cases of spontaneous mistake can be found.

⁴⁷ Stoljar and Muir, for example, have advocated theories of unjust sacrifice to explain service cases in distinct terms to any explanations of money cases. One advantage of such approaches is that they recognise the difficulties in seeking to incorporate recovery for services within a benefit-based analysis. Beatson, by excluding "pure" services from unjust enrichment analysis, goes partly along this route. Beatson perceives many of the cases claimed for unjust enrichment as examples of recovery of reliance losses. See Beatson, Chp. 2.

⁴⁸ See, e.g., Birks, P., "In Defence of Free Acceptance" in Burrows, *Essays*, 105, 111-2, 127; and Birks, *Restitution: The Future*, 86, 91.

⁴⁹ Birks, P., "Review" (1991) 70 *Can. B. Rev.* 814, 820:

Yet if the concept of an enrichment is properly understood—that is, if the first question [was the defendant enriched?] is answered fully—the law as to causes of action must be the same in whatever form the enrichment is received.

⁵⁰ The mistake which leads P to pay D \$100 because P believes that he or she owes D the money, when in fact P does not, is no different to the mistake which leads P to pay C \$100 in the belief that he or she owes C the money, when in fact the money is owed by D. Yet the former is a "money" case, the latter, a "service" case.

In seeking such principled explanation, it is important to remind ourselves of the innocence of a defendant in cases of spontaneous mistake. The plaintiff is responsible for his or her own actions and the risks of the consequences which follow. There are competing legal motivations at work here: on the one hand, to “undo” the mistake and thus relieve the plaintiff of the unintended and perhaps seriously detrimental consequences of his or her actions; on the other hand, not to impose a burden upon the defendant. It is the latter motive, suggesting the limitation on any recovery, which must be of primary concern, given the defendant’s innocence. Any relief to the plaintiff ought not leave the defendant at a disadvantage when compared with such defendant’s position before the plaintiff’s mistaken actions.

In some cases, however, it may be possible to go some way towards restoring a plaintiff to his or her pre-mistaken position, without infringing the primary concern of protecting the defendant. To take an example, P has mistakenly transferred goods (let us say, a car) to D, who still has those goods in his or her possession. If, according to the rules of property law, property in the car has not passed,⁵¹ P will be entitled to reclaim the car. If D does not re-deliver it, P may seek either specific restitution of the goods or damages in lieu.⁵²

Specific restitution of the very thing received by a defendant as a result of the plaintiff’s mistake is one example of remedial relief which does not disadvantage a defendant, yet the plaintiff is restored to his or her pre-mistaken position. A fair outcome is consequently achieved. To describe the outcome as fair is not a reference to fairness at large. The outcome is fair precisely because it promotes the policy of restoration without infringing the paramount concern of not disadvantaging an innocent party—the defendant.⁵³

⁵¹ An example of property not having passed might be where the mistake is as to the identity of the transferee. See Goff & Jones, 179.

⁵² Specific restitution of the goods may be possible in limited circumstances, either in an action in detinue or under equitable jurisdiction to grant specific restitution. In either case, the courts will generally only grant such a remedy where damages at common law would be an inadequate remedy, for example, because the goods have special value to a plaintiff or are not readily replaceable (see *North v. Great Northern Railway Co.* (1860) 2 Giff. 64, 69), or because the defendant is insolvent. An interesting example is *Orr v. Lane* (1951) 52 N.S.W.S.R. 37, in which an order was made for the specific restitution of money, since damages were an inadequate remedy against the insolvent defendant. See also *McKeown v. Cavalier Yachts* (1988) 13 N.S.W.L.R. 303, and Meagher, Gummow & Lehane, Chp. 22.

⁵³ To utilise the language of economics, such a result might be said to resemble a form of Pareto optimality or to be a form of Pareto improvement. A Pareto improvement, in the context of economic efficiency, is one which moves closer towards a social optimum by

Of course, it can be argued that the specific restitution of goods has nothing to do with Restitution, falling instead within property or tort law. In the mistake cases under consideration, specific restitution of the very things received will only be possible in exceptional cases. But the idea of specific restitution as a quintessential fair outcome is an important one. For in many of the cases under consideration, whether involving money or services, remedial relief will effect what in essence amounts to specific restitution. A defendant is asked to return something he or she still retains which can rightfully be said to belong to the plaintiff. In money cases, it will be argued, recovery is justifiable whenever a defendant retains the economic advantage which the mistaken payment represents. If a plaintiff mistakenly pays \$100 to the defendant, to require the defendant to return the \$100 does not impose any particular hardship upon the defendant where he or she still has the economic advantage which that \$100 conferred. A change of position defence will be critical in determining the survival of such economic advantage. In service cases, by way of contrast, remedies which achieve a fair outcome will be more exceptional, but nonetheless possible at times. If a plaintiff has expended \$100 in mistakenly painting the roof of the defendant's house, to order recompense of \$100 would be to impose a new (that is, different) obligation upon the defendant. In most cases, any relief should thus be refused, for otherwise the defendant would be required to reach into his or her own pockets, effectively to be made insurer of the plaintiff's loss.

Given the variety of forms services can take and the multifarious factual contexts within which they may be conferred, it is difficult to state a general rule of when a fair outcome is possible in service cases. The idea of protecting defendants could be stated in terms of not requiring them to "reach into their own pockets",⁵⁴ but this, at best, provides only a rule of thumb. What is clear is that any determination of liability which seeks to restore a plaintiff without disadvantaging a defendant should be context specific. Liability should not be determined formulistically, so that to some extent, the courts should exercise discretion in achieving a fair outcome. Discretion here does not suggest a

maximising utility in a way so that at least one person is made better off, but no one is made worse off. See Cooter, R., & Ulen, T., *Law and Economics*, (1988), 49-51. In the context of a plaintiff seeking relief for mistake, a remedy will be a Pareto optimal one where it puts the plaintiff somewhat back to his or her original position, but does not leave the defendant at a disadvantage. Any outstanding losses after a Pareto-optimal remedy must be borne by the plaintiff.

⁵⁴ Dawson, J.P., "Erasable Enrichment in German Law" (1981) 61 B.U.L.R. 271, 272.

judicial *carte blanche*. As will be seen when service cases are considered in detail, it is possible to articulate a number of factors which are relevant to the exercise of such discretion and which assist in a determination as to whether or not a defendant would be disadvantaged as a consequence of imposing a particular remedy. It must be noted, however, that the courts have not as yet accepted a discretionary basis for relief. Instead, the paramount concern of protecting defendants has led the courts to be more cautious in granting relief than is perhaps necessary.

It might be argued that wherever a defendant retains an enrichment received as a result of a plaintiff's mistake, restitution of that enrichment does not disadvantage such defendant; in fact, it achieves a fair outcome. As will be seen, however, an equation of disgorging unjust enrichment with achieving fair outcomes is not valid, at least in relation to service cases. Circumstances will arise where a defendant retains an enrichment, but disgorgement of that enrichment would leave the defendant at a disadvantage. Conversely, in some cases, a defendant will not have been enriched (on the "receipt of wealth" or subjective tests) but a remedy which does not disadvantage the defendant is nonetheless possible.

There are significant conceptual difference between applying unjust enrichment theory as opposed to seeking fair outcomes; and the difference between the two notions can lead to an albeit subtle divergence in results. The very focus of unjust enrichment is misplaced in the context of mistake cases. Unjust enrichment focuses on the status of a defendant as an unjustly enriched party as the triggering event justifying the imposition of liability;⁵⁵ and further, dictates that the remedial aim of relief is the reversal of that status, that is, the disgorgement of the enrichment. By way of contrast, it is suggested that the focus in mistake ought to be on the paramount concern of protecting the innocent defendant.⁵⁶ Further, the aim of any remedial relief ought to be on the *restoration of the plaintiff*, as near as is possible, to his or her pre-mistaken

⁵⁵ The language of unjust enrichment also has pejorative connotations, somehow always hinting that a defendant who is unjustly enriched is a wrongdoer. To be sure, unjust enrichment theory accepts that recovery is not premised on any wrongdoing of a defendant. But the language of unjust enrichment seems to suggest otherwise.

⁵⁶ In unjust enrichment theory, this protective concern would have to be given effect largely through the operative defences. This is because on most theories, *prima facie* liability is established by the mistake itself, satisfying the requirement of unjustness. Any protection of the defendant must then be via any operative defences. In the writer's view, this inverts the liability rule from that which it should be: a restorative principle confined in its operation to achieving fair outcomes, that is, ones which do not disadvantage a defendant.

position, without infringing this paramount concern. Balancing these two competing concerns is the essence of achieving fair outcomes.⁵⁷⁻⁵⁸

Let us turn now to a detailed consideration of the idea of achieving a fair outcome by reference to the case law on mistake, commencing with the mistaken payment of money.

§ 9.2.2 Mistaken Payments of Money

§ 9.2.2.1 A property analogy

Particular characteristics of money⁵⁹ distinguish it from other forms of personal property. Money is a universal means of exchange, so that once it has been negotiated to a *bona fide* purchaser—"passes into currency"—any claim, even to a specifically identifiable sum of money, is lost.⁶⁰ Thus, provided money is received in good faith and for valuable consideration without notice of the owner's interest, a transferee of money gets property to it even where the transferor had none.⁶¹ Even if the recipient of money was a volunteer or acted *mala fides*, money tends to lose its specific identity in the hands of its recipient or may have been negotiated on. Consequently, leaving aside the exceptional case in which notes or coins have been kept, say, in a box,⁶² any claim for the

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⁵⁸ The distinction between unjust enrichment and fair outcomes can be illustrated by reference to ideas at work outside the context of mistake, specifically, in equity's considerable powers to effect *restitutio in integrum* upon the unwinding of a transaction. Although characteristically restitution of benefits is the mechanism by which *restitutio* is effected, the principle which underlies such remedial relief has a more subtle purpose than merely the disgorgement of benefit. As the High Court emphasised in *Alati v. Kruger* (1955) 94 C.L.R. 216, 224, per Dixon C.J., Webb, Kitto & Taylor JJ., the purpose of *restitutio in integrum* is to "do what is practically just between the parties, and by so doing restore them substantially to the *status quo*." By making sensitive adjustments, equity can balance the parties' position to achieve a substantial and fair restoration of the parties to their *status quo ante*. And equity has a variety of tools at its disposal to achieve a substantially fair restoration. For example, equity may require an account of profits, or make allowances for deterioration in any property transferred. *Restitutio in integrum* aims at the restoration of both parties to a transaction, whereas in mistake, the aim is restoration of a plaintiff in a way which does not disadvantage the defendant. Admittedly, however, it may well be argued that equity's rules provide us with merely a more sophisticated notion as to when an enrichment is indeed unjust, so that achieving *restitutio in integrum* could still be said to be consistent with achieving the restitution of an *unjust* enrichment.

⁵⁹ The term money is being used inclusively, as discussed *supra* n. 26.

⁶⁰ Goff & Jones, 77; cf. Stoljar, 114, and Mann, 8-11. See *Sinclair v. Brougham* [1914] A.C. 398, 418, per Lord Haldane.

⁶¹ Cf. *Banque Belge v. Hambrouck* [1921] 1 K.B. 321, 329, per Scrutton L.J.

⁶² *Taylor v. Plumer* (1815) 3 M. & S. 562, 575, per Lord Ellenborough. See also *Orr v.*

return of money generally has to be an action *in personam*, for the return of an equivalent sum.⁶³ This will be so irrespective of whether the money was loaned to the defendant, or paid by mistake, or even stolen by the defendant.⁶⁴ This contrasts with the situation in respect of most chattels, which, potentially at least, are specifically recoverable in an action *in rem*.⁶⁵ Regardless, however, of whether a claim is for the return of money or some other chattel transferred, a plaintiff in all such cases is essentially seeking the return of his or her property, claiming that "what you received is mine".⁶⁶

One commentator, Stoljar, recognised the affinity of the money had and received claim with other claims for the return of property and developed his proprietary theory of quasi-contractual liability.⁶⁷ Stoljar considered that many claims⁶⁸ for money had and received could be seen as arising from the fact that

Lane (1951) 52 N.S.W.S.R. 37.

⁶³ Thus, to cite an early case, *Core's Case* (1537) Dyer 20a, 22b:

And besides if I bail twenty pounds to one to keep for my use, if the twenty pounds were not contained in a bag, coffer, or box, an action of detinue doth not lie, because the twenty pounds could not be discovered or known to be mine, but debt and account lie at my pleasure.

⁶⁴ Even where money can be "followed" into the hands of a third party, or into a product for which the money has been substituted, any proprietary claim over such money or its substitute still has to be one for the equivalent amount rather than the very notes (if any) originally held by the plaintiff. The concept of following money will be returned to when three-party transactions are considered below.

⁶⁵ See Stoljar, Chp. 5, particularly 117, Stoljar, S., "Unjust Enrichment and Unjust Sacrifice" (1987) 50 M.L.R. 603, 606, and Muir, G., "The Contribution of Professor Sam Stoljar to the Law of Quasi-Contract" Unpublished Paper, delivered to the Restitution Group, SPTL Conference, Aberdeen, 1991, paragraph 3.07.

⁶⁶ Cf. Muir, *ibid*, paragraphs 3.11, 3.13.

⁶⁷ The theory was first postulated in the first edition of *Quasi-Contract* (1964). The second edition, published in 1989, suggested a narrower ambit for the theory. A determination of whether money was recoverable was no longer to be on the same basis as a determination of the passing of property (as in the first edition). Instead, Stoljar appears to have perceived his proprietary theory more in terms of an analogy with tort claims such as detinue. As Muir, *ibid*, paragraph 3.11, has said in relation to the second edition, "it is fair to say that the proprietary theory had, at this stage, by Stoljar's own hand, been somewhat eviscerated. The extended formulation becomes descriptive but not explanatory."

⁶⁸ Claims for total failure of consideration, for example, were considered by Stoljar to be essentially contractual. See Stoljar, 222-6. See also Burrows, 4. Many of the topics Stoljar considered to be contractual in their underlying concerns (i.e., based on consensual relationships) have been considered in Chapter 6.

money belonging to the plaintiff had been received by the defendant without the plaintiff's consent (or intention to transfer) or, in the case of mistaken payments, without his or her sufficiently informed consent.⁶⁹ Stoljar's proprietary theory does not seek to explain all of quasi-contractual liability; in fact, it is limited to claims for mistaken payments and payments wrongfully acquired, under compulsion or otherwise.⁷⁰ Stoljar used other theoretical constructs to explain other areas of quasi-contract.⁷¹ Yet, although some commentators have criticised Stoljar on this basis—for "impairing the unity of the subject"⁷²—in this writer's view, one of the strengths of Stoljar's writing is its recognition of the very different grounds upon which quasi-contractual recovery was granted. Indeed, Stoljar's approach highlights the very gap-filling role which gives quasi-contract its unique quality as a "renvoi-category".⁷³

If one takes Stoljar's proprietary theory as an analogy or descriptive device,⁷⁴ then it proves particularly useful in relation to mistake, in two ways. First, it suggests why a mistaken payment can be sought to be undone at all. It is the lack of a sufficiently informed intention to dispossess oneself of particular property which is at the crux of the mistaken payer's claim. "[P]roof of mistake affirmatively excludes intention"⁷⁵ to transfer property. It is trite to reply that

⁶⁹ See particularly Stoljar, 5-6. The right to recovery is founded on the fact that a defendant came to the money "without any transmissive or transactional consent from [the plaintiff]" (emphasis in original). Stoljar clearly perceived a mistaken transfer to be non-consensual, but this must presumably be the consequence of the original consent being insufficiently informed. Cf. Muir, *supra*, n. 65, paragraph 3.14. For a historical account of the proprietary theory of the recovery of money, see Stoljar, S., "The Transformation of Account" (1964) 80 L.Q.R. 203, particularly 211-2.

⁷⁰ See Stoljar, 18, and generally, Chps 2-5.

⁷¹ See *supra* n. 68. To explain service cases outside of a contractual context, Stoljar developed his theory of unjust sacrifice. Many of the cases sought to be explained by this theory have been considered in Chapter 8.

⁷² Burrows, 4.

⁷³ Stoljar, 18. Stoljar considered that quasi-contract "remained a subject still strikingly disorderly".

⁷⁴ Cf. Muir, *supra* n. 65, paragraph 3.13, 3.14.

⁷⁵ *Norwich Union Fire Insurance Society v. Wm H. Price Ltd* [1934] A.C. 455, 463, per Lord Wright. The test for ascertaining such intentions is objective.

in most cases "property" in the money will have passed.⁷⁶ Stoljar appears to have recognised this.⁷⁷ Indeed, even if property in money has not passed, a right to specific money will almost always have disappeared, so that recovery must of necessity take the form of a claim for equivalent value.⁷⁸ The fact that property in the money has passed, however, does not preclude the plaintiff still asserting that it was not intended that the defendant should have the money in the circumstances under which the transfer in fact occurred. Thus, Muir has concluded that

it is undoubtedly true that in every circumstance in which property can be recovered because the owner did not consent to its transfer, money or its equivalent can or should also be recovered. The concept of consent is

⁷⁶ Unjust enrichment theorists consider that the fact that legal property in the money will usually have passed is sufficient to refute Stoljar's theory. See Burrows, 4, and Birks, P., "English Recognition of Unjust Enrichment" [1991] L.M.C.L.Q. 473, 482:

[The proprietary approach] brings with it the danger of a new heresy, requiring a continuing property as a condition of a claim for restitution. It is quite incorrect to assert or to imply that our law does or should make restitution depend on a continuing property in the plaintiff. If it did, there would be very restricted recovery of mistaken payments

Clearly, to argue that a claim for restitution of money is, or ought to be, limited to circumstances in which property has not passed is unsustainable. In *ANZ v. Westpac* (1988) 78 A.L.R. 157, 162, the High Court considered that a claim for recovery of a mistaken payment

is a common law action for recovery of the value of the unjust enrichment and the fact that specific money or property received can no longer be identified in the hands of the recipient or traced into other specific property which he holds does not of itself constitute an answer in a category of case in which the law imposes a *prima facie* liability to make restitution.

Glover, J., "Equity, Restitution and the Proprietary Recovery of Value" (1991) 14 U.N.S.W.L.J. 247, 248-50, considers that this statement contradicts a proprietary explanation of money had and received; that the claim is not "of nature proprietary". This is certainly valid if one takes the proprietary theory literally, as one of strict property law, rather than as an analogy. But Stoljar repeatedly stressed that the nature of money meant that any claim, for practical purposes, had to be for the return of equivalent value, rather than for the very property transferred. In other words, Stoljar's theory is concerned with explaining the *reason* for the remedy in money had and received and does not suggest that the *form* of that remedy is proprietary. The force of a property analogy remains: the plaintiff is essentially seeking the return of what "belongs" to him or her.

⁷⁷ Although at times Stoljar appears to suggest that legal property has not passed where money has been mistakenly paid (eg., Stoljar, 5-6), at other points he appears to state his proprietary theory more in terms of an analogy. The notion of property merely explains why money is recoverable: that there was no intention sufficient to give the defendant a better right to the money than the plaintiff. A claimant has only a *prima facie* right to property, which can be defeated by defences such as change of position (7). See also at 27, for example, where Stoljar talks of a "principle of property" that P "retains a *right* to his money" (emphasis added).

⁷⁸ *Supra* nn. 59-66 and text thereto.

at once familiar and narrative. Property cannot pass without consent.⁷⁹

As Muir points out, although there is consent in cases of mistaken payment,⁸⁰ yet this is not a sufficiently informed consent, so that the plaintiff may still assert "I did not mean [the recipient] to have this *in those circumstances*".⁸¹ Such an assertion is not far removed from one that there had been no consent at all to the transfer.⁸²

Stoljar saw his proprietary theory as giving substance to the conclusion that a recipient of money was unjustly enriched.⁸³

Instead of P claiming recovery merely on the ground that D is "unjustly" enriched ..., we can now say D's enrichment is indeed unjust: it is unjust precisely because D retains money without title, having got it without P's consent, so that P now has a claim on straightforward proprietary grounds. Thus if D were to dispute his claim, P can say: "I claim this money because it is mine."⁸⁴

Perhaps one of the reasons for the cursory dismissal of Stoljar's views by many unjust enrichment theorists is that they appear to take statements such as the

⁷⁹ Muir, *supra* n. 65, paragraph 3.13.

⁸⁰ Contrast Stoljar, *supra* n. 69.

⁸¹ Muir, *supra* n. 65, paragraph 3.14, emphasis added. A similar conclusion appears to have been reached by Watts, *supra* n. 2, 148, discussing the reasoning of the High Court in *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57:

[W]hat seems to be at play is a principle that persons should not be parted from, at least tangible, items of their wealth unless they acted freely and unqualifiedly and were fully apprised of relevant facts.

Watts goes on to state, however, "[a]t least within the confines of this principle, it seems not inappropriate to call the cause of action 'unjust enrichment'".

⁸² There will have been no consent at all to a transfer, for example, where money has been stolen. Perhaps Stoljar perceived the quasi-contractual claim as modifying notions already existing in property law as to what amounted to a sufficient intention to pass property.

⁸³ Burrows, 4, states that Stoljar saw his theory "as a more concrete clarification of what is meant by unjust enrichment."

⁸⁴ Stoljar, 6-7. Stoljar continues:

Certainly D is also unjustly enriched; but in confirming that he is, we are not so much activating our sense of justice in response to an allegedly undue benefit (though we may do that too) as rather stating that D is retaining money which, being non-consensually acquired, belongs to P. The injustice here lies in the retention of assets demonstrably belonging to someone else.

above too literally. If Stoljar had said that the money “in essence belongs” to P, his views would not be far removed from mainstream unjust enrichment explanations of the recovery of mistaken payments: that the mistake vitiates the intention to transfer, so that a plaintiff “did not mean” the defendant to have the money.⁸⁵

The second way in which a property analogy proves useful is that it suggests why recovery of a mistaken payment achieves a fair outcome, does not in fact disadvantage a defendant. To say that a defendant must return the plaintiff’s “property” hints at the crux of the money claim: that the recovery of money is akin to specific restitution of the very thing received by a defendant. Of course, specific restitution of money as banknotes⁸⁶ is almost invariably impossible. But this is an inconsequential observation, since the important characteristic of money is not the legal status as chattels of any specific notes transferred but its inherent or abstract quality as a means of exchange: a mechanism for purchasing other things—goods, realty, services—in short, as representing wealth.⁸⁷ A plaintiff seeking to recover money seeks to recover its value equivalent, or the “economic advantage” which money represents. It follows that if such economic advantage subsists in a defendant’s hands, the justification for its return becomes more compelling and any justification for its retention is diminished, even where the actual money received is no longer identifiable. To order restitution of that economic advantage does not impose hardship; it is not, in fact, a new obligation at all, but a form of specific restitution of the “very thing” (the economic advantage) originally transferred.

There is some judicial support for the view that a plaintiff is entitled to recover money which properly belongs to him or her and that further, the essential and relevant feature of money is as representing wealth. In the House of Lords, Lord Dunedin in *Sinclair v. Brougham* considered that:

both an action founded on a jus in re, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right

⁸⁵ Cf. Birks, 140.

⁸⁶ In any case, the use of banknotes in any large-scale modern transactions is becoming more and more infrequent. For example, electronic transfers of funds are a common means of facilitating modern transactions. Such transfers will involve merely the debiting and crediting of bank accounts.

⁸⁷ Money is also, of course, the *measure* of all wealth. Cf. Mann, 28-9. See also *Mutual Pools & Staff Pty Ltd v. Commonwealth of Australia* (1994) 119 A.L.R. 571, 606, per Dawson and Toohey, JJ.

to keep either property or the proceeds of property which do not belong to him.⁸⁸

But Lord Dunedin recognised that what was required to be returned was not the money itself, but the economic advantage, or "superfluity", which that money represented:⁸⁹

[I]f the proceeds of property can be shewn to be what I have called a superfluity in the person of the recipient, then [equity] will hold that that property is traced just as surely as if it was still in the original form.⁹⁰

More recent statements have similarly emphasised plaintiffs' rights to reclaim money "belonging" to them, particularly in three-party transaction cases.⁹¹ Moreover, the acceptance of a property analogy may also explain a preparedness on the part of some courts (though not without generating controversy) to allow a proprietary claim for the return of a mistaken payment, so that a plaintiff is entitled to priority ahead of other creditors in order to reclaim what rightfully belongs to him or her.⁹²

⁸⁸ [1914] A.C. 393, 436.

⁸⁹ At [1914] A.C. 393, 434, Lord Dunedin considers a superfluity to be "something which if [the defendant] kept would be pure gain to him" (434). Cf. per Viscount Haldane L.C. at 420. See also the discussion of Lord Dunedin's view in *Chase Manhattan Bank v. Israel-British Bank* [1979] All E.R. 1025.

⁹⁰ *Sinclair v. Brougham* [1914] A.C. 398, 437. See also *Mutual Pools v. Commonwealth* (1994) 119 A.L.R. 577, 606, per Dawson and Toohey JJ., who emphasise the nature of money as representing purchasing power or wealth and consequently as conferring economic advantage, rather than as property *per se*. Although the comments by Lord Dunedin were made in relation to a tracing claim in equity, they suggest a sufficiently liberal basis for such a claim so as to achieve a similar result as where a personal claim subject to a change of position is available. This will be explored further in § 9.3. In any case, Lord Dunedin makes it clear that equity here was merely "helping" the common law where the action in money had and received was unavailable (in *Sinclair v. Brougham*, because a contract could not be implied).

⁹¹ *Nelson v. Larholt* [1948] 1 K.B. 339, 342, per Denning J., as he then was; *Lipkin Gorman v. Karpnale* [1991] A.C. 10, 16, per Lord Templeman, and 27, per Lord Goff. For criticism of these views, see Birks, *supra* n. 76, 482. For an early opinion to this effect, see *Clarke v. Shee & Johnson* (1774) 1 Cowp. 197.

⁹² See *Chase Manhattan Bank v. Israel-British Bank* [1979] 3 All E.R. 1025, 1039, citing the commentary in the *Restatement of Restitution*, 664-5:

[W]here property is transferred under a mistake entitling the transferor to restitution, the transferor retains the beneficial interest in the property, and a holding that where the legal remedy is adequate he cannot have specific restitution is merely procedural. If the transferee is insolvent, the transferor is entitled to specific restitution, even though the property is of such a character that were he not insolvent the remedy at law would be adequate and the transferor would not be entitled to specific restitution.

Can the property analogy be taken further so as to suggest that the basis of recovery rests on the immoral conduct of a defendant in refusing to return the property? Some commentators, including Blackstone, for example, have emphasised the unjust retention by a defendant of money which he or she ought to refund.⁹³ Of course, where a defendant refuses to refund money once he or she becomes aware of the mistaken actions of the plaintiff, such a defendant may be acting wrongly or unconscionably. But this need not be the case. A defendant may refuse to return money because of an honestly held belief of a right to it, believing, for example, that the mistake was insufficient to vitiate the plaintiff's intention to transfer it. Alternatively, the defendant may genuinely believe that he or she has changed his or her position. We must remember that we are dealing with defendants who, at the outset at least, are innocent of any wrongdoing. Even once such a defendant becomes aware of the plaintiff's mistake, it does not necessarily follow that a refusal to repay from that point onwards is unconscionable. In any case, the view of the High Court of Australia, that a defendant's *prima facie* liability arises as soon as the payment is received,⁹⁴ appears to preclude basing liability on a defendant's wrongdoing. The defendant may not even be aware of the receipt of money and yet a *prima facie* obligation to refund it will arise. In this writer's view, a plaintiff's right to

The result in *Chase Manhattan* has been criticised by Tettenborn, A., "Remedies For the Recovery of Money Paid by Mistake" [1980] C.L.J. 272, and see the reply by Jones, G., [1980] C.L.J. 275. Whether the decision will be followed is questionable, after the Privy Council decision in *Re Goldcorp Exchange Ltd* [1994] 2 All E.R. Although the Privy Council did not express an opinion as to the correctness of the decision in *Chase Manhattan*, the judgment takes a fairly restrictive approach as to the circumstances in which a proprietary interest arises. But if one accepts the correctness of the result in *Chase Manhattan* (and the property analogy suggests it is correct, but policy considerations need to be weighed as to whether priority over other creditors is justified), the proprietary right should not give rise to a claim over any larger sum than the original economic advantage transferred. Thus, if the recipient of \$5000 mistakenly transferred buys a ring with that money, such ring now being worth, say, \$7000, the plaintiff should still only be entitled to recover \$5000. Cf. Lord Mansfield in *Moses v. Macferlan* (1760) 2 Burr. 1005, 1009, who states that a defendant "can be liable no further than the money he has received". See also Goff & Jones (3rd. ed., 1986), 78. The principle of achieving a fair outcome aimed at restoring a plaintiff to his or her previous position explains why this view must be correct. But contrast Burrows, 58-9, who argues that the plaintiff in such an example should be entitled to the value of the substituted property (i.e., \$7000).

⁹³ Blackstone, Sir William, *Commentaries on the Laws of England* (9th ed, 1783; 1978 reprint, Garland Publishers), Vol. III, 163. See also Austin, J., *Jurisprudence* (4th ed., 1879), Vol. 2, 944-5, *Kelly v. Solari* (1841) 9 M. & W. 54, 58-9; E.R. 24, 26, and *Avondale Printers v. Haggie* [1979] 2 N.Z.L.R. 124, 150.

⁹⁴ *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, 80-1. This conclusion follows from the High Court's view that a defendant is unjustly enriched from the moment of receipt.

be restored to his or her original position arises as soon as a plaintiff acts detrimentally on the basis of a mistake, and continues so long as a remedy achieving a fair outcome is possible. In many cases this will be so long as the economic advantage received survives in the recipient's hands.

§ 9.2.2.2 The significance of change of position

The recipient of money may either have retained that economic advantage received, even if preserved in a different form (for example, having been invested in gold bullion, shares or realty),⁹⁵ or else have dissipated that economic advantage (for example, having gambled it away or expended it on travel). If the law is concerned with achieving fair outcomes, then a crucial inquiry is whether a defendant can return all or some of the economic advantage received. The common law has acknowledged the importance of such an inquiry in its recent recognition of a "change of position" defence.⁹⁶ As will be suggested, the essence of a change of position is that the defendant has innocently dissipated some or all of the economic advantage received, which part thereof is consequently not returnable and restitution of which ought not be required.

Even before the express recognition of a change of position defence, other defences served a similar function, albeit in a less general and, perhaps (depending on the future development of change of position), less sophisticated way.⁹⁷ It is not proposed to consider specific formulations of these previous

⁹⁵ If the money has been converted into a different form, the form in which the wealth is preserved must be one realisable in money.

⁹⁶ In Australia, the defence was expressly recognised in *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, after considerable *obiter dicta* in support of such a defence in recent times, for example, as in *National Mutual Life Association of Australasia Ltd v. Walsh* (1987) 8 N.S.W.L.R. 585. In England, the defence has been recognised in *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10. Before these judicial developments, it had been repeatedly asserted in both English and Australian law that no such defence existed. Perhaps the most categorical judicial rejection of the availability of a change of position defence can be seen in *Baylis v. The Bishop of London* [1913] 1 Ch. 127. See, however, *infra* nn. 97-9 and text thereto.

⁹⁷ Before the acceptance of a general change of position defence, there appear to have been four possible heads on which a defendant may have relied in order to defend a claim for the restitution of money paid under a mistake:

(1) The defence of *bona fide* purchaser for value of the money received (that is, as the defence is alternatively expressed, that the defendant gave good consideration), considered in both *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, and *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, to be a separate defence to change of position. Birks has argued that the gist of a good consideration defence is the same as that of change of position, which in Birks' terms, is whether an enrichment has been "cancelled out". See Birks, *supra* n. 76, 490-2.

defences: most will now have been incorporated or subsumed within a general change of position defence.⁹⁸ Although the formal common law position may have appeared harsh and oppressive, it would seem that before the express recognition of change of position the *results* of the cases were far less

Although this may well be correct, the matter is of no consequence if one recognises, as Birks does, that in cases of *bona fide* purchase, the consideration is taken to be a complete change of position, so that there is no need to determine whether the value of consideration (on a market assessment, for example), is the same as the money received in exchange. See also Millett, P., "Tracing the Proceeds of Fraud" (1991) 107 L.Q.R. 71, 82. One example of a *bona fide* purchaser is where a defendant has discharged a debt owed to him or her, such as where money is credited to an overdrawn account. See, e.g., *Thomson v. Clydesdale Bank* [1893] A.C. 282, and *Union Bank of Australia Limited v. Murray Aynsley* [1898] A.C. 693 (P.C.).

(2) A defence of "payment-over" (see Stoljar, 35-7) or "ministerial receipt" (see Birks, *Restitution: The Future*, 139-41), which arises where an agent, *prima facie* liable as the recipient of money, pays over that money to his or her principal, or in accordance with the direction of his or her principal. In other words, the defence arises wherever the recipient was a mere "conduit-pipe" for another. See *ANZ v. Westpac* (1987) 78 A.L.R. 157. For an extension of this defence to allow for a far more general change of position defence, see *Transvaal & Delagoa Bay Investment Co. Ltd v. Atkinson* [1944] 1 All E.R. 579.

(3) The defence of estoppel, the basis of which is that a defendant has detrimentally relied upon a "representation" of the plaintiff that the defendant "was entitled to treat the money as his own": Goff & Jones, 747, and generally 746-50. Significantly, such a "representation" "may be implicit in the payment itself, in light of the surrounding circumstances": Goff & Jones, 747, citing *Holt v. Markham* [1923] 1 K.B. 504, per Scrutton L.J. See also Stoljar, 37-9. Most cases of estoppel would now be subsumed within change of position—see an early statement equating the two in *Larner v. L.C.C.* [1949] 2 K.B. 683, 688, per Denning L.J.—but note Birks' view that there may still be a distinct operation for an estoppel defence: *Restitution—The Future*, 144-7. This view derives from one significant feature of estoppel distinct to that of change of position, namely that estoppel operates as a defence for recovery of the entire sum received where there has been any detrimental reliance, even if comparatively insignificant when compared with the sums received. Estoppel does not operate *pro tanto*. See *Avon County Council v. Howlett* [1983] 1 W.L.R. 605.

(4) A form of change of position defence, as perhaps recognised in *Re Diplock* [1948] 1 Ch. 458, may also have been possible. See Stoljar, 44, who appears to treat this case as recognising a general change of position defence. This view seems flawed, however, for the defence in that case was limited to the proprietary claim over money (or its substitute) surviving in the hands of the defendant (i.e., an equitable proprietary claim) and not as a defence to a personal claim. See Sutton, R.J., "'Quasi-Contract': Lost Cause or Current Issue" (1990) 7 Otago L.R. 336, 338. Cf. Goff & Jones, 698; Birks, 371, 411-2; and Maddaugh & McCamus, 141, fn. 68.

It is also important to note that two further restrictions upon recovery—now abandoned—would also have considerably limited potential claims against a recipient of money. These restrictions were (1) no recovery where the mistake was one of law (see *supra* n. 2); and (2) no recovery unless the mistake was "fundamental", or perhaps even one going to liability.

⁹⁸ Cf. Birks, *supra* n. 76, 487: "some or all of these seemingly separate defences will turn out to be no more than those fragments of the defence of change of position which were already recognised in our law."

draconian.⁹⁹ Change of position, once given substance, may prove to be no wider than these previously recognised defences. Since the scope of a change of position defence "has been deliberately left less than fully formed",¹⁰⁰ it is proposed to rely on the results of past cases, as well as *obiter dicta* from authoritative decisions, in order to provide some idea of the future operation of change of position defence.

Perhaps the essence of a change of position is the dilution or dissipation of an economic advantage received by the *bona fide* actions of a defendant able to be "ascribed to the mistaken payment".¹⁰¹ Each reliant action which *pro tanto*¹⁰² reduces the economic advantage gives rise to a change of position defence to that extent. The important factor is that defendants cannot avail themselves of the defence merely because they no longer have the actual money received.¹⁰³ For example, if money is paid into a bank account of a defendant, the normal day to day workings of that account will result in fluctuations over a period of time. At times, no money may remain in the account. Nonetheless, without more, there will not have been a change of position. A defendant who has used the mistaken payment merely to meet ordinary living expenses,¹⁰⁴ or to pay off an existing debt, cannot avail himself or herself of the defence. But the defence will be available where a defendant has changed his or her lifestyle, in the sense of changing his or her usual pattern of disbursements, in reliance upon the payment.¹⁰⁵

⁹⁹ Contrast Finn, P., "The Liability of Third Parties for Knowing Receipt or Assistance" in Waters, D.W.M., (ed.) *Equity, Fiduciaries and Trusts* (1993) 195, 210, suggesting that the recipients of money paid under mistake were treated with "little mercy" by the law. By comparison, Stoljar, 35, considered that a defence of change of position historically had been widely recognised, despite its express rejection by some courts.

¹⁰⁰ Birks, *supra* n. 76, 487, citing *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, 15A (per Lord Bridge), 23F (per Lord Ackner), 34G (per Lord Goff). Similarly, the High Court in *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, has deliberately failed to clarify the precise scope of the defence. Perhaps a general guide as to future developments of the change of position defence may be gained from the *Restatement of Restitution*, §69, §142.

¹⁰¹ *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, 81.

¹⁰² Cf. the operation of the estoppel defence, *supra* n. 97.

¹⁰³ *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, 81.

¹⁰⁴ *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57, 81.

¹⁰⁵ See *Brisbane v. Dacres* (1813) 5 Taunt. 143, 162, per Mansfield C.J. Such a change of position will more usually occur where a series of payments have been made, as in *Skyring v. Greenwood* (1825) 4 B. & C. 281.

Similarly, a defendant who has on the faith of the receipt incurred one-off extraordinary expenditure which he or she would not otherwise have incurred¹⁰⁶—such as a donation to charity¹⁰⁷—will not be liable to repay such sums. Difficulties may arise where a defendant has converted money into a form which, if required to be realised, may disadvantage the defendant: for example, having expended the money on improvements to his or her house. The problem is essentially the same as faced when considering recovery from the “recipient” of mistakenly conferred services, to be considered below. It suffices to say for now that in deciding such cases, it becomes vital for the courts to have due regard to the very specific contexts within which the cases arise so as to achieve a fair outcome.

Two specialised aspects of change of position also need to be noted. A defendant who has given good consideration for the mistaken payment, such as by discharging a debt owed by a third party to the defendant, will not be liable to make restitution.¹⁰⁸ Also, a defendant who has received the mistaken payment as an agent and who has forwarded that money to his or her principal, or paid it at the direction of his or her principal, will not be liable to repay such sum.¹⁰⁹

Provided there is a liberal development of the change of position defence, then recovery against an innocent recipient will be limited to economic advantage surviving in his or her hands—the superfluity, to use the language of Lord Dunedin. Recovery of such superfluity does not leave a defendant at a disadvantage, even if the defendant no longer has the money actually received. At the same time, recovery of the superfluity to that extent undoes the mistaken transaction and effectively returns both parties to their pre-mistaken position. Consequently, a fair outcome is achieved.

It remains only to note that in one regard, a defendant’s awareness of the plaintiff’s mistake is relevant. This is in relation to establishing that a change of position is *bona fide*. If a defendant dissipates an economic advantage in bad

¹⁰⁶ See generally cases cited under estoppel, in Goff & Jones, 699-707.

¹⁰⁷ *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, 34.

¹⁰⁸ Such circumstances will usually arise in relation to three-party transactions. See supra n. 97, (1). Perhaps, strictly speaking, in such circumstances a defendant has not dissipated or lost an economic advantage, but never received one at all.

¹⁰⁹ *ANZ v. Westpac* (1987) 78 A.L.R. 157. See supra n. 97, (2).

faith, courts will no longer protect such a defendant from the consequences of such actions. Only where the dispersal of an economic advantage was innocent can a defendant rely on a defence of change of position.¹¹⁰ The law has not as yet determined what level of knowledge is sufficient to justify a conclusion that a defendant has acted in bad faith.¹¹¹

§ 9.2.3 The Mistaken Conferral of Services

Where services have been mistakenly conferred, a plaintiff's plea (like that of the mistaken payer) is to have the transaction undone. But services present far greater difficulties. For although in some cases the end-product of a service may be returnable (as will be seen below), services as such cannot be specifically returned.¹¹² This is the crux of the problem faced by a mistaken service provider: there is no reason why the defendant should bear the costs of the plaintiff's services and the defendant does not usually retain anything which belongs to the plaintiff and which can consequently be returned.¹¹³

Despite these difficulties, the position of the mistaken service provider is not entirely hopeless, and in limited circumstances, courts have been prepared to grant remedial relief. The cases allowing relief are largely consistent with and can be rationalised on the basis of achieving fair outcomes. Relief, where granted, generally does not require defendants to "reach into their own pockets" or in any other way disadvantage them. Nonetheless, it will be argued below that courts in England and Australia could go further to achieve fair outcomes than they have been prepared to go. An unwillingness to resort to

¹¹⁰ That is, once a defendant becomes aware of the plaintiff's right to reclaim the money or at least the facts establishing such right, he or she cannot rely on subsequent actions to reduce a plaintiff's entitlement. Any dissipation of economic advantage thereafter will be considered to be in bad faith and a change of position defence will not protect such actions. Perhaps such further liability to restore a plaintiff even despite the economic advantage having been dissipated could be said to arise from the defendant's wrongdoing. But the *prima facie* liability need not be explained by reference to wrongdoing.

¹¹¹ See discussion in Goff & Jones, 744-5.

¹¹² Goff & Jones, 18.

¹¹³ Requiring innocent defendants to pay for services interferes with their freedom to choose how best to spend limited resources. This will be so even where the defendant was (by some objective test) been enriched. See Mathews, P., "Freedom, Unrequested Improvements and Lord Denning" [1981] C.L.J. 340, for a perhaps overly-strident defence of a defendant's freedom to choose. Although Mathews' arguments are based on the justifiable ground of protecting an innocent defendant, he does not consider the possibility of remedies which are consistent with the primary aim of a fair outcome, where possible, that is, one which does not disadvantage a defendant.

imaginative remedies, such as those utilised in some jurisdictions in the United States, has meant that many Anglo-Australian decisions have denied relief in circumstances in which some measure of restoration could otherwise have been achieved without disadvantaging the defendant.

In cases involving the receipt of money, a fair outcome is achieved essentially through one mechanism: the recovery of surviving economic advantage. The property analogy tells us that specific restitution of something belonging to the plaintiff (the economic advantage) is possible and thus ought to be allowed. In service cases, the service may also give rise to an economic advantage (including a negative one, such as the saving of an expense by payment of a debt) in a defendant's hands, though this is less likely. In such cases, the property analogy again proves useful. Further, the property analogy also explains the other significant category of service cases in which fair outcomes are possible, namely where some specific item of property—the end-product of a service, materials attached to land or goods and so on—can be “returned” to the plaintiff.¹¹⁴ As a generalisation, then, relief will usually be granted to a service provider, as with the mistaken payer, whenever a remedy akin to specific restitution can be formulated so that a fair outcome is possible. Such a remedy will require a defendant to “return” something received as a result of the plaintiff's mistake. To take one example, let us say P builds a shed on D's land, mistakenly believing the land to be his own. If the shed is readily removable, there appears to be no reason why P ought not be entitled to remove the shed. As Dickinson has said:

If removal is found to be feasible, an owner's argument that he or she has acquired rights in the improvement through the common law doctrine of accession becomes mere sophistry.¹¹⁵

Consequently, in some American jurisdictions, removal of such “fixtures” has been allowed.¹¹⁶ Although there is considerable contrary English authority,¹¹⁷ it ought to be possible to fashion a similar result in Australian law

¹¹⁴ Strictly speaking, the very thing received, the service, in the form of time effort and skill expended, cannot be returned.

¹¹⁵ Dickinson, K.H., “Mistaken Improvers of Real Estate” (1985) 64 N.Car. L.Rev. 37, 67. In German law, the standard remedial response to the mistaken improvement of land is to give the landowner the choice of either allowing the removal of the improvement or compensating the improver for the market increase in the value of the land. See *Bürgerliches Gesetzbuch*, Sections 997, 258.

¹¹⁶ See, e.g., *Voss v. Forgue*, 84 So. 2d. 563 (1956), discussed *infra* n. 142.

¹¹⁷ *Reynolds v. Ashley & Son* [1904] A.C. 466; *Gough v. Wood & Co* [1894] 1 Q.B. 713, and

by taking a less formalistic approach to fixtures than that displayed in those authorities.¹¹⁸ Of course, many service cases do not lend themselves so easily to remedial relief which achieves a fair outcome. This explains the courts' greater reluctance to grant relief in service cases than in money cases.

In any case, it is not possible nor, in this writer's view, desirable, to provide a single formula for arriving at a fair outcome. As will be seen, cases in which services have been mistakenly conferred arise in a variety of diverse factual contexts. It is only by taking cognisance of the individual facts of each case that a fair outcome can be achieved. To some extent, this must involve an exercise of discretion. But this is not intended to suggest that courts should resort to fairness at large. One can articulate a number of relevant factors which assist in determining whether a fair outcome is possible. It is proposed to consider such factors within the context of the different categories of service case which typically arise.

§ 9.2.3.1 Mistaken improvement of another's land

Example (1). P builds a machinery shed, specifically designed for use in his specialist business, on the edge of D's large sprawling rural allotment, believing it to be his own land. D is unaware of P's actions, due to unclearly marked boundaries. The mistake is subsequently discovered. The building is entirely useless to D, and does not enhance the market value of her property, but nor does it interfere in her grazing business. It is not practical to remove the shed without destroying it.¹¹⁹

Example (2). P contracts with TP to paint TP's house whilst she is away on vacation. As a consequence of P's mistake, he paints D's house instead (D, a

cf. the New Zealand decision of *Masefield v. Rotana* (1891) 10 N.Z.L.R. 169.

¹¹⁸ Contrast, for example, the dissenting judgment of Denniston J. in *Masefield v. Rotana* (1891) 10 N.Z.L.R. 169, to that of the majority. It has been argued that the above authorities may not be as conclusive as they at first appear. See Sutton, *supra* n. 44, 250, fn. 32. Allowing removal of fixtures mistakenly attached is consistent with notions of protecting property which might be said to underlie the rules of fixtures. In other words, a defendant landowner should not be allowed to use a rule aimed at protecting the landowner's property rights to confiscate another's personal property. Cf. *Pull v. Barnes*, 35 P. 2d 828 (1960), 829.

¹¹⁹ Cf. *Eagle Oil Corporation v. Cohasset Oil Corporation*, 248 N.W. 840 (1933), in which the "improvement" was of detriment to the landowner, rather than of benefit.

neighbour of TP, is also absent). Upon discovering his mistake, P seeks to recover the cost of his work, \$5000, from D.¹²⁰

In the absence of any statutory provision, it is often said that as a general rule a mistaken improver of land will be left without a remedy unless the owner of land has encouraged, acquiesced in, or is perhaps in some other way responsible for, the plaintiff's mistaken conduct.¹²¹ The rationale for such a stance is straightforward: the owner of the land acquires title to all fixtures thereon and this extinguishes any claim the improver may have to the improvement.¹²² In fact, the improver is technically a trespasser and is liable for damages incurred by the defendant.¹²³ This would appear to be the position in Australia and England, though there is little direct¹²⁴ authority in point.¹²⁵

¹²⁰ Cf. *Nicholson v. St. Denis* (1975) 57 D.L.R. (3d) 699

¹²¹ See *Nicholson v. St. Denis* (1975) 57 D.L.R. (3d) 699, 702, 704, and *Restatement of Restitution*, §42 (1). It is said that a defendant must be "guilty of something in the nature of fraud": *Brand v. Chris Building Co.* [1957] V.R. 625, and cf. *Fridman*, 334, *Maddaugh & McCamus*, 283-8, and *Montreuil v. Ontario Asphalt Co.* (1922) 69 D.L.R. 313, 333. Although equitable relief founded upon equitable fraud will provide the most common ground for remedy, it would appear that a plaintiff may also recover where the mistake was the result of the defendant's negligence, for example. See *Phelps v. Kuntz*, 76 A. 237 (1910), *supra* n. 5.

¹²² *Sutton*, *supra* n. 44, 242. Merryman, J.H., "Improving the Lot of the Trespassing Improver" (1959) 11 *Stanf. L.Rev.* 456, 480, has said:

For several centuries [the maxim *quicquid plant atur solo*] has been firmly embedded in the common law, and it is doubtful that any other slogan has been as troublesome as 'what is attached to the land becomes part of it'. The history of the law of fixtures can accurately be described as a long, tedious and painful series of efforts to overcome its effect.

Cf. *Pull v. Barnes*, 350 P. 2d 828 (1960), 829-30. A much narrower test of fixtures would provide scope for amelioration of the effects of the general fixtures rule, and it has been suggested that the courts have been willing to ameliorate the general rule via special rules and exceptions. See *Casad R.C.*, "The Mistaken Improver: A Comparative Study" (1968) 19 *Hastings L.J.* 1039, 1039.

¹²³ Damages would normally be nominal. See, however, the Texan case of *Producers Lumber & Supplies v. Olney*, 333 S.W. 2d 619 (1960), in which an improver sought to remove the improvement, thus committing a further "*mala fides*" trespass. The improver was liable for the damages incurred by the plaintiff, including damages to the improvement. The result seems harsh, given the landowner's intransigence in coming to a fair settlement before the improver's actions in frustration. Note the vigorous dissent of Barrow J.

¹²⁴ Most Australian and English authorities which indirectly support the proposition involve some elements of request, acquiescence, or a contractual relationship. See *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129, as perhaps one of the strongest authorities for the general rule, in which none of these elements were considered to be present, so that any form of relief to the "mistaken" improvers was consequently refused. It has been pointed out, however, that the improvers in that case were not acting under a mistaken assumption, but on the basis of a misprediction. See *Birks*, 278-9. On this view, and it appears to have merit, given the improvers' belief that a lease over the land *would be* granted, the fair outcomes jurisdiction would not be appropriate and relief would only have been possible on the basis of some conduct on the

One example, however, is *Brand v. Chris Building Co. Pty Ltd*,¹²⁶ in which a building contractor was denied any relief after he mistakenly built a house on the wrong suburban allotment.

The legal position may be "overstated"¹²⁷ and more sympathetic to the plight of the mistaken improver than the above suggests. There are significant authorities allowing improvers redress by indirect (or "passive" or "defensive")¹²⁸ means. "Indirect" refers to the fact that such relief occurs in the context of a landowner who has brought an action against the improver (for damages, ejectment and so on) and that the landowner's successful claim is conditioned upon some set-off against, or accounting for, the value of the improvements.¹²⁹ Relief to a mistaken improver by such indirect means is thus consistent with achieving a fair outcome: its very distinguishing feature is that

defendant's part.

For a summary of the early history of the common law of mistaken improvement, see Merryman, *supra* n. 122, 458-60.

The common law position has been modified by statute in some jurisdiction. See, e.g., *Property Law Act 1974* (QLD), ss. 195-8; *Property Law Act 1969* (WA), s. 123; *Property Law Act 1952* (New Zealand), s. 129A. Even where such provisions exist, however, they rarely cover all possible types of mistaken improver problems. The Queensland provisions, for example, would not appear to apply to an improver who mistakenly believes he or she is a remainderman to an estate. See also Sutton, *supra* n. 44, 246-7.

¹²⁵ Compared with the situation in the United States, there is a "most remarkable absence of reported litigation on the subject in England": Merryman, *supra* n. 122, 463. Contrast the Queensland Law Reform Commission, *Report No. 16* (1973) at 105: "The incidence of building on one allotment in mistake for another is surprisingly large". However, no authorities are cited. See also Sutton, *supra* n. 44, 249. There are a number of reported cases dealing with the encroachment of buildings over the boundaries of a neighbour's land and there are legislative provisions in Australia to deal with the problem. See, e.g., *Property Law Act 1974* (QLD), s. 189; and the *Encroachment of Buildings Act 1922* (NSW). In relation to the latter Act, the High Court has reconfirmed the view that it does not apply to cases in which a mistaken improver builds entirely within the confines of another's land. See *Amatek Ltd v. Gogoorewon Pty Ltd* (1993) 67 A.L.J.R. 339. This reversed a finding of the NSW Supreme Court that the Act gave the Court jurisdiction to deal with such cases. See "The Conveyancer" (1992) 66 A.L.J. 530, for a note on the Court of Appeal decision subsequently reversed by the High Court.

¹²⁶ [1957] V.R. 625.

¹²⁷ Stoljar, S., "Mistaken Improvement of Another's Property" (1980) 14 U.W.A.L.R. 199.

¹²⁸ Stoljar, *Negotiorum Gestio*, 138, Maddaugh & McCamus, 283-4.

¹²⁹ See Stoljar, *Negotiorum Gestio*, 138; Maddaugh & McCamus, 283-4, and Birks, P. "Restitution for Services" (1974) 27 C.L.P. 13, 20 et seq.

it usually does not leave the defendant out of pocket, or if it does, it does not in all the circumstances disadvantage the defendant. Thus, a landowner who claims profits earned by an improver (the defendant) whilst in possession of the land¹³⁰ may have his or her claims set-off against the value of improvements made to the land.¹³¹ Consequently, such a landowner will only recover the actual damages suffered and not an additional windfall of the value of the improvements. Similarly, where a landowner

seeks the aid of a court of equity to establish his ownership or to recover possession of the premises, he may be required, as a condition of the granting of such relief, to compensate the defendant for improvements made thereon in good faith under a mistaken belief of ownership.¹³²

Thus, in *Mill v. Hill*,¹³³ the plaintiff owner of the fee simple of certain land sought to set aside a deed of conveyance by a third party (a life tenant) to the innocent defendant, who had taken possession. The deed was set aside, subject to an order that the plaintiff account for "any permanent improvement to the pecuniary value" of the land.¹³⁴ Similarly, equitable relief allowing an owner to recover property may be granted subject to a lien over the estate for the value of the improvements.¹³⁵

¹³⁰ Such claims are said to be for "mesne" profits, as they are known: "profits lost to the owner of land by reason of his being wrongfully dispossessed of his land." See *Osborne's Concise Law Dictionary* (7th ed.) 219.

¹³¹ Although some doubt has been expressed as to the availability of such a set-off at common law, in *Montreuil v. Ontario Asphalt Co.* (1922) 69 D.L.R. 313, 338, such a set-off was allowed in that case. In the United States, the right to such a set-off seems clear. See McCorkle, C.R., "Annotation" 57 A.L.R. 2d 263 (1955), 267-8. The set-off is limited to the value of the profits claimed.

¹³² McCorkle, *ibid*, 269. See also *Montreuil v. Ontario Asphalt Co.* (1922) 69 D.L.R. 313, 334. The rule is said to be based upon the maxim that "he who seeks equity must do equity" (McCorkle, 269), but as has been pointed out in *Neesom v. Clarkson* (1845) 4 Hare 97, 101, this is a "rule of unquestionable justice, but which decides nothing in itself."

¹³³ (1851-2) III L.R. H.L.C. 828, 869.

¹³⁴ *Id.* The requirement to account was limited to "expenditure with a view to permanent improvement", and the court excluded in that case improvements which may have been adopted as a matter of "taste" or "personal convenience".

¹³⁵ E.g., *Attorney General v. Baliol College Oxford* (1744) 9 Mod. 407; 88 E.R. 538; *Cooper v. Phibbs* (1867) II L.R. 149, 167; and *Neesom v. Clarkson* (1845) 4 Hare 97, though note that Anglin J. in *Montreuil v. Ontario Asphalt Co* (1922) 69 D.L.R. 313, 334, does not consider the last a particularly satisfactory authority.

See also Palmer, Vol. II, 436, 438. In the United States such "passive" relief in equity may take the form of an order for the removal of the fixtures, or even a requirement that the owner

Outside the United States, authorities have not tended to go beyond such indirect relief.¹³⁶ Perhaps this is a result of a lack of flexible remedial options: a blanket rejection of a mistaken improver's claim protects the landowner's position, albeit somewhat crudely. Consequently, plaintiffs have been denied relief in circumstances in which imaginative remedies may have achieved a fair outcome.¹³⁷ In contrast, courts in the United States have used a number of different remedial techniques to achieve fair outcomes. As Palmer has pointed out:

One of the striking aspects of these decisions is the flexibility sometimes shown in the form of the decree, usually with the aim of lessening the hardship on a landowner of being forced to pay for an unsolicited improvement.¹³⁸

Two examples of direct or active relief utilised in some United States jurisdictions¹³⁹ include:

relinquish title to the land to the improver, in return for its unimproved value. See McCorkle, *supra* n. 131, 271.

Stoljar, *supra* n. 127, 204, notes that the very fact that the owner of land is seeking relief suggests that the improver was on the land with the owner's approval or knowledge and perhaps even suggests the owner's consent to the improvements.

¹³⁶ See, however, *Edlin v. Battaly* (1668) 2 Lev. 152, in which the improver successfully made a direct claim against the landowner. In that case, a settlement was reached by the parties, but only after the Master of the Rolls "adjudged the [improver] should be relieved and hold the land till he be repaid his charges in building". The result achieved a fair outcome in the circumstances: the case is considered further, *infra* n. 153.

¹³⁷ *Brand v. Chris Building Co.* [1957] V.R. 625, is one example. The improvement was made on a wrong suburban lot, one amongst many in a subdivision. There was no evidence that the lot had any special qualities. In the United States, one remedy which potentially may have been utilised in such a case would be to give a landowner the choice of either replacing or swapping the improved lot with an improver's still vacant lot (this would not leave the landowners out of pocket) or alternatively, paying for the improvements. Admittedly, such an option would have been difficult in *Brand's* case, given that the builder who was seeking redress did not own the adjoining land. The neighbouring landowner, with whom the builder had contracted, was responsible for the mistake, but was not joined in the action.

¹³⁸ Palmer, Vol. II, 446-7.

¹³⁹ A significant minority of jurisdictions allow direct relief. Perhaps the classic statement in favour of relief is that of Story J. in *Bright v. Boyd* (1841) 1 Story 478. See *Jensen v. Probert*, 148 P. 2d 248 (1944). Decisions such as these overturn what in the view of one author is the "quite harsh and crude" common law on the subject: Merryman, *supra* n. 122, 466. Direct relief is not dependent upon any acquiescence or other wrongdoing on the part of the defendant. See also Dickinson, *supra* n. 115, 64-68 for some of the remedial options. Clearly, some of these remedies are not restitutionary. Other jurisdictions have maintained a common law position similar to that in Australia and England, despite the view of some (Casad, *supra* n.

(a) allowing a plaintiff to remove the improvement where that is a feasible option;¹⁴⁰ or alternatively giving the landowner the choice of either paying for the improvement or allowing its removal.¹⁴¹ Allowing removal of improvements is consistent with the very argument a defendant may raise in order to resist paying for the improvement—that it was unwanted; and

(b) ordering the exchange of adjoining lots in a subdivision where they are approximately of equal value and quality.¹⁴²

122, 1047) that there has been an almost “universal disapproval” of such a position by “writers and judges, who even while applying it often expressly deplore it.” See Palmer, Vol. II, 439-40, for the positions in the different states.

¹⁴⁰ *Shick v. Dearmore*, 442 S.W. 2d. 198 (1969).

¹⁴¹ In *Beacon Homes v. Holt*, 146 S.E. 2d 434 (1966), an order for compensation of the increased value of the land was justified on the fact that the owner had refused to allow the removal of the readily removable “shell home”. The court asked the rhetorical question:

Can the owner of a lot upon which a house has been built by another, who acted in good faith under a mistake of fact, believing he had a right to build it there, keep the house, refuse to permit the builder to remove it so as to restore the property to its former condition, enjoy the enhancement of the value of the property and pay nothing for the house? For the owner to do so is ... contrary to equity and good conscience

A similar point was made in *Jensen v. Probert*, 148 P. 2d 248 (1944), 252:

The argument, I am aware, is, that the moment the house is built, it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold, what, in a just sense, he never had the slightest title to, that is, the house.

This affirms the emphasis that the aim of the remedy is to return to the plaintiff what, in effect, belongs to him or her (though strict legal title rests with the defendant) and of which “specific restitution” ought to be granted where possible. See also Dickinson, *supra* n. 115; Palmer, §10.9; *Pull v. Barnes*, 350 P. 2d 828 (1960), 829-30, and *Producers Lumber & Supply Co. v. Olney Building Co.*, 333 S.W. 2d 619 (1960), 627, per Barrow J. (dis.). Can such a remedial response be seen as restitutionary, as reversing enrichment? It is difficult to consider it as such. To take the example of a removable shed which neither enhances the value of the land, nor is of any use to the owner. Clearly, such a land owner ought to return the shed, but to suggest that he or she should do so because he or she has been “enriched” does not ring true. The owner does have something belonging to the improver and should return it if possible; but this does not mean that the owner is necessarily enriched thereby.

¹⁴² *Voss v. Forgue*, 84 So. 2d 563 (1956). The remedy in that case was in the form of a decree ordering the exchange. Palmer, Vol. II, 449, points out that the court should have given the landowner the alternative of either paying for the improvement or allowing its removal. This seems a fair criticism, given that maximising the choice available will minimise any disadvantage or inconvenience to the defendant. It is difficult to perceive of such a remedy as restitutionary in the sense of benefit disgorgement, though it does effect a form of specific

Arguably, relief in such forms imposes no hardship upon landowners. The landowners are left in much the same position as before the mistake and are not left out of pocket unless they *choose* to pay for the improvements. A remedy which returns the end-product of a service to a plaintiff is akin to specific restitution¹⁴³ in the sense that it returns what can rightly, if somewhat loosely, be described as the plaintiff's property, even though in strict legal theory it is not.¹⁴⁴ It is quite irrelevant whether a defendant was in any way enriched by an end-product where it can be returned.¹⁴⁵ Indeed, such a remedy should be available even where a defendant has not been enriched. Consider, for example, a case in which a building of no use to the defendant, and which decreases the market value of the land, is removable.

There may be other ways in which one can effect a remedial purpose of returning property to a plaintiff. Example (1) (where P builds a machinery shed on D's rural allotment) provides a good illustration. If the end-product of P's service in that example can be restored to him without disadvantaging D, then a fair outcome will be achieved. Theoretically, at least,¹⁴⁶ one could effect such "specific restitution" by requiring D to transfer a small part of her allotment to P, in return for its unimproved value. Such a remedy does not leave D out of pocket. Unless the land has some special quality, or was being used or is intended to be used in a specific way (the facts here suggest the contrary), D is not in other ways disadvantaged. If, however, D can point to some unique quality of the improved portion of the land—its special value to her¹⁴⁷—this

restitution. The importance of this type of remedial relief is that it appears to recognise that land can at times be little different from fungible goods.

¹⁴³ It is not possible, of course, to return the very thing received: the plaintiff's services which resulted in the end-product.

¹⁴⁴ The rule of fixtures deeming it to form part of the defendant's land and therefore the defendant's property.

¹⁴⁵ Contrast *Burrows*, 7, who considers that "benefit" can be established simply by showing that a defendant has particular property which can be returned. With respect, although *Burrows* is right to conclude that a defendant retaining such property "cannot validly refuse to give up the property", this is not because such a defendant is necessarily enriched thereby.

¹⁴⁶ There may be practical difficulties in that courts may lack power to grant a particular remedy. Local government regulations against rural subdivision, for example, might preclude a remedy in such a form.

¹⁴⁷ In general, "special value" might be anything which suggests that the owner's purposes could not be satisfied by other land.

particular form of relief would be inappropriate. However, cases in which an owner of mistakenly improved land can establish its special value may, in fact, be quite rare.¹⁴⁸ Significantly, a remedy which requires a defendant to transfer for value part of his or her land to the mistaken improver—though effecting a return of the end-product of the improver's services—cannot be considered to be restitutionary in any strict sense of the term.

A defendant will not usually be disadvantaged by being required to return some end-product received as a result of the plaintiff's mistaken actions. Imaginative remedies such as those canvassed above may effect such specific restitution and thus achieve a fair outcome. Such cases may not be common, however, and often remedies akin to specific restitution may simply not be possible. As example (2) illustrates, an existing building may have been improved in a way which leaves no "removable" end-product, such as where the building is painted. Yet even in circumstances such as these, a fair outcome may be possible, though perhaps only in exceptional cases.

A number of factors appear relevant in solving a problem such as that in example (2). A precondition for liability being imposed is that the

¹⁴⁸ As Stoljar points out, *supra* n. 127, 205, where an owner was equally mistaken as to the boundaries or title of particular land, the owner "cannot really complain that the land on which the improvements take place matter to him significantly. ... [W]e now seem to be dealing with land concerning which the owner can in fact be taken to be indifferent to for the simple reason that [the owner] does not even believe that the land is his property." The facts of *Pull v. Barnes*, 35 P. 2d 828 (1960), illustrate the point. The defendants watched the plaintiffs construct a cabin, but were not aware of the fact that it was on their own land until a survey was undertaken.

Cf. Dickinson, *supra* n. 115, 53, et seq., where Dickinson traces the history of the development of the view that land is unique. At 64, he concludes that there is a "paucity" of case dealing with special values, suggesting that "there may be fewer unique pieces of land than has been supposed." At 71 he states:

Not every piece of land is cherished by its owner for the sweetness of the fruits that grow there or for the majesty of the view from the crest; therefore, some exceptions to the principle that land is unique should be made in cases where the principle obviously does not apply.

But later Dickinson stresses that:

If an owner who does not share complicity for the improver's mistake establishes that the land has special values that are lessened or destroyed by the presence of the improvement, the owner's equities are greater than those of the improver. In such a case the improver, rather than the owner, should be required to make restitution. Such cases have been extremely rare, probably because an owner with such a strong attachment to the land is likely to be in possession and thus able to object to the improvement as soon as it is begun.

improvement must have increased the market value of a defendant's land.¹⁴⁹ Such an increase is not, however, on its own sufficient to justify liability. A further inquiry needs to be made as to whether restitution of such equivalent value does not disadvantage the defendant in the circumstances.

There are a number of factors which would weigh in favour of a remedy of restitution of the value of the enhanced economic advantage. (1) If the land has no special or unique qualities, it may be little different to a fungible and be readily replaceable. Identical suburban lots may in some cases be so described.¹⁵⁰ (2) Land having special qualities may nonetheless have no special value to a defendant, such that an owner's interest in the land may be "strictly financial".¹⁵¹ The land may form part of the stock in trade of the defendant's business, where, for example, the defendant is a land developer constantly buying and selling land as if a commodity.¹⁵² Alternatively, a defendant may not have been aware of or been mistaken as to his or her right to the land, so that once the true position is established, the defendant receives not only the windfall of valuable land, but also an added bonus of valuable

¹⁴⁹ If there has been no increase in market value of land and there exists no end-product capable of being returned imposing liability in any form would not appear to be justifiable. See, e.g., *Republic Resources Ltd & Joffre Oils v. Ballem* [1982] 1 W.W.R. 692, in which the Alberta Queen's Bench court refused restitutionary relief where the improvement to the defendant's land, a gas well, was not removable, and was not of any ascertainable value, not even being in production. For a criticism of the decision in that case, however, see Percy, "The Law of Restitution and the Unexpected Termination of Petroleum and Natural Gas Leases" (1988) 27 Alb.L.R. 105, 117-21. For a case reaching a similar conclusion as *Republic Resources*, on very similar facts, see *Eagle Oil Corp. v. Cohasset Oil Corp.*, 248 N.W. 840 (1933).

¹⁵⁰ This appears to have been recognised in the United States. See, e.g., *supra* n. 142.

¹⁵¹ Dickinson, *supra* n. 115, 72. Contrast, however, land owned as a commodity, for example, that is, for its existing market value, with land owned for its income-producing capacity. Although a defendant's interest in the land in the latter case could still be described as strictly financial, the value of that interest would depend on the land's special qualities and the defendant's intended use of that land.

¹⁵² The defendant may be a corporation with numerous vacant lots to be sold. As Dickinson has pointed out, *supra* n. 115, 72, in such circumstances, the sale of the land in order to pay for the value of the improvements is "just to both parties ... the improver is compensated, and the owner received what he or she wanted from the land—its value in money."

improvements.¹⁵³ Perhaps many of the cases of indirect relief noted above share this feature.

Considerations such as these may suggest that any increase in the market value of the improved land equates with the receipt by the defendant of an economic advantage of that value, and which economic advantage can and thus should be returned. This contrasts with any case in which land is held by its owner for its inherent or unique qualities,¹⁵⁴ such as where the defendant uses the land or intends to use it for a specific purpose, for example, as a domestic dwelling. In such a case, the increased market value of the land does not represent any economic advantage to that defendant and further, he or she might be forced to sell the "special" land in order to meet an obligation to pay for the improvement.¹⁵⁵ The defendant may legitimately argue: "I would not have utilised my limited resources in such a way."¹⁵⁶ Consequently, any relief in such circumstances would leave the defendant "distinctly worse off".¹⁵⁷

¹⁵³ One of the few English examples of direct relief for a mistaken improver, *Edlin v. Battaly* (1668) 2 Lev. 152, (see supra n. 136), is of this type. In that case, the owner of the land had been away overseas for many years and was not made aware of his interest until his return. Consequently, he suddenly and quite unexpectedly found himself in possession of an extremely valuable estate, valuable to him purely in terms of its market worth, rather than because of any personal attachment to the land. Consequently, requiring the owner to pay for substantial improvements made by the dispossessed improver would not have disadvantaged him or left him out of pocket (though note the actual settlement reached in that case). He would still have received the net economic advantage (in the form of money) which the land represented to him.

¹⁵⁴ See Rudden, B., "Things as Thing and Things as Wealth" (1994) 14 O.J.L.S. 81, who draws a distinction in relation to all property between the situation in which such property is treated as something unique or special, compared with those situations in which it is treated as merely a member of a class, totally convertible or replaceable. In the latter situation, the property is valued for its "opportunity cost", that is, the wealth it represents (86). The distinction Rudden draws is one which cuts across existing divisions in property law, such as those between fungibles and non-fungibles or real and personal property. In other words, property which in law, at least, is said to be unique, such as real estate, may form merely part of an investment portfolio or stock in trade. Alternatively, even fungibles may be owned and used for their unique qualities; for example, flour which is to be used to make a special bread.

¹⁵⁵ Cf. Palmer, Vol. II, 449-50. Cf. Dickinson, supra n. 115, 72.

¹⁵⁶ The Canadian case of *Nicholson v. St. Denis* (1975) 57 D.L.R. (3d) 699, 704, provides a good example. The court pointed out that:

St. Denis neither sought nor desired the work to be carried out on the property, and was given no opportunity to express his position until long after the work was completed. He has been guilty of no wrongdoing, nor of encouraging the plaintiff in his work. I can see no grounds, under the circumstances of this case, for extending the doctrine of unjust enrichment or of restitution to the circumstances of this case.

¹⁵⁷ Stoljar, supra n. 127, 206.

Consistently with this view, the authorities generally refuse any relief and the losses of the mistaken conduct are thus left to lie with the plaintiff.¹⁵⁸

By taking into account relevant factors such as those noted above and by utilising imaginative remedies tailored to the specific contexts of each case, it will often be possible to at least partially restore a plaintiff to his or her pre-mistaken position. Recovery will only be allowed, however, where it is consistent with the principle that "[i]f the landowner was not at fault the primary obligation of the court would be to protect him against loss."¹⁵⁹ This is the essence of a fair outcome, which ensures that

any supposed hardship to the owner of the improved land can be swiftly assessed and dealt with by an order which is appropriate to the particular facts of the case, and it will be unusual for such hardship to preclude each one of the several forms of relief which are available.¹⁶⁰

By way of contrast, unjust enrichment theory is not particularly suited to balancing the differing considerations which need to be taken into account to ensure that a defendant is not disadvantaged. This is because of such theory's focus on the issue of enrichment. For example, where the market value of a building has increased by \$5000, different formulations of incontrovertible benefit support different conclusions as to whether or not a defendant has been enriched. On one view, such increase in value must have been realised in money in order to be enriching, on another view, such increase must merely be realisable. Yet neither view can be consistently applied to achieve a fair outcome. For neither view encapsulates the essential idea that the issue is whether it is fair in all the circumstances to require a defendant to make restitution of the increase in value.

§ 9.2.3.2 Mistaken improvement of another's goods

The position of the mistaken improver of another's goods is very similar to that of the mistaken improver of land. Again, at first blush, there appears to

¹⁵⁸ *Nicholson v. St. Denis* (1975) 57 D.L.R. (3d) 699. Cf. *Svenson v. Payne* (1945) 71 C.L.R. 531, although the court's finding in that case that the owner had not acquiesced in the improver's actions is open to question.

¹⁵⁹ Merryman, *supra* n. 122, 494. Similarly, Dickinson, *supra* n. 115, 75, concludes that "an owner should be held harmless so that any loss that must be borne by one of the parties will fall on the improver, whose mistake occasioned the loss."

¹⁶⁰ Sutton, *supra* n. 44, 264, (footnotes omitted). See also Casad, *supra* n. 122, 1049. Note that statutory provisions in Australian states dealing with encroachment have given courts wide remedial powers. See, e.g., *Haddams Pty Ltd v. Nesbitt* [1962] Q.W.N. 44.

be little scope for recovery. An improver of goods, even where acting under a *bona fide* mistake (as to his or her title to the goods, for example), is nevertheless a tortfeasor and can be sued in conversion or detinue.¹⁶¹ Given the doctrine of accession, whereby an accessory annexed to a principal object¹⁶² becomes part of that object and *prima facie* belongs to the owner of the principal object,¹⁶³ such an improver would appear to be left with few remedial options.¹⁶⁴ The owner of the improved goods, not having acquiesced in or requested the improvements, may echo the words of Pollock C.B. in *Taylor v. Laird*: "One cleans another's shoes; what can the other do but put them on."¹⁶⁵ Yet the law's indifference to the mistaken improver of goods is more apparent than real. Again, most relief is in an indirect form.

Where an owner of goods sues in conversion for their value, he or she will only be entitled to recover their unimproved value,¹⁶⁶ provided the converter has acted in good faith.¹⁶⁷ This effectively compensates a converting

¹⁶¹ See Mathews, P., "Proprietary Claims at Common law for Mixed and Improved Goods" [1981] C.L.P. 159.

¹⁶² The "principal object" is that which is the greater in value. See Guest, A.G., "Accession and Confusion in the Law of Hire Purchase" (1964) 27 M.L.R. 505, 507, fn. 11. Cf. *McKeown v. Cavalier Yachts Pty Ltd* (1988) 13 N.S.W.L.R. 303, 311f-g, per Young J.

¹⁶³ "Accession" is based on principles of Roman law—*accessio cedit principali*. See generally, Guest, supra n. 162; Mathews, supra n. 161; and *Appleby v. Myers* (1867) L.R. 2 C.P. 651, 659-60. It is debateable whether the owner of the principal object has title to the goods, or whether the improver merely forfeits the right to possession of the improvements. *McKeown v. Cavalier Yachts* (1988) 13 N.S.W.L.R. 303, particularly at 312, and *Rendell v. Associated Finance* [1957] V.R. 604, at 610 ("property is deemed to pass by operation of law") clearly suggest the former; whereas Mathews, supra n. 161, 175-6, has argued that the latter is the correct position, so long as the improvements are still separately identifiable. Rules of accession apply even where a third party is responsible for the accession.

Of far lesser significance is the concept of confusion: the mixing of goods belonging to different owners so that separate identification is no longer possible. See Guest, 518. This concept will not be considered separately here.

¹⁶⁴ See, for example, counsel's concession in *Walker v. Mathews* (1881) 8 Q.B.D. 109, 110-1, despite the fact that the expenditure there was necessary to preserve the property.

¹⁶⁵ (1856) 25 L.J. Ex. 329, 332. Cf. *Stocker v. Planet Bld Soc.* (1879) 27 W.R. 793, 794, per Jessel M.R.: "Let me put the case of a man who would like to see clean windows, cleaning his neighbour's windows without consent. The same reason might apply to washing his neighbour's face. A man has a right to enjoy his property in his own way."

¹⁶⁶ See *Peruvian Guano Co. v. Dreyfus Brothers & Co.* [1892] A.C. 166, 174; *Wood v. Morewood* (1841) 3 Q.B. 440n; 114 E.R. 575n; *Maddaugh & McCamus*, 302; and Mathews, supra n. 113, generally. As to the position in relation to hire purchase, see *Yeoman Credit Ltd v. Waragowski* [1961] 1 W.L.R. 1124.

¹⁶⁷ See Mathews, supra n. 113, 342-5, and *Martin v. Porter* (1839) 5 M. & W. 351; 151

improver both for improvements taking the form of added parts or materials and also labour.¹⁶⁸ The improver will either have sold the goods at their improved value or still have possession of them. If the improver still has possession of the goods, and the owner alternatively claims in detinue, the authorities favour the view, despite some doubt, that damages will be reduced by the value of the improvements.¹⁶⁹ Similarly, an order for specific restitution of the goods may be made conditional upon the owner compensating the improver for the increase in the value of the property.¹⁷⁰

Where, however, the owner of goods has retaken possession of them, the improver's position is less hopeful, though not without any possibility of relief. One circumstance in which the improver may at least partially be restored to his or her original position is if the improvements have not been sufficiently

E.R. 149. Contrast, however, *Munro v. Willmott* [1949] 1 K.B. 295, in which a deliberate converter of the plaintiff's goods nevertheless was entitled to have the value of his improvements taken into account in reducing the amount of damages payable. Mathews considers that this "slightly odd case" may be explicable on the basis of which act of conversion was considered to be the relevant one (the improvements to the goods, rather than the subsequent sale). But this seems an arbitrary distinction, since presumably in that case the plaintiff could have relied on either act of conversion. Perhaps the most significant factor in the decision was the plaintiff's quite unusual and unreasonable behaviour which led the defendant to convert the goods.

Query the situation where the trespasser has acted in good faith, but negligently. Mathews considers that this would preclude damages being limited to the unimproved value, citing *Wood v. Morewood* (1841) 3 Q.B. 440; 114 E.R. 575n. Contrast the cases cited by Maddaugh & McCamus, 302, fn. 123, as authorities rejecting the view that negligence precludes indirect relief to the defendant improver, but of these, only the last, *Kirkland v. McNamee* (1905) 36 S.C.R. 152, 157, appears to conclusively support the proposition.

¹⁶⁸ Many of the early cases in which the damages rule was applied concerned conversion of the plaintiff's coal, so that the defendant was effectively receiving compensation for the hewing, cutting and carrying of the coal.

¹⁶⁹ See *Peruvian Guano Co. v. Dreyfus Brothers & Co.* [1892] A.C. 166, 176. Were it otherwise, the question would need to be answered as to why the owner of goods should be in a worse position where the trespasser has completed the wrong and sold the goods than if he or she has not yet done so.

¹⁷⁰ See *Greenwood v. Bennett* [1973] 1 Q.B. 195, and the judgments of Phillimore and Cairns L.JJ., and authorities cited. Cf. the judgment of Denning L.J., and the interpretation of this decision by Young J. in *McKeown v. Cavalier Yachts* (1988) 13 N.S.W.L.R. 303. Contrast, however, the decision in *Greenwood* with that in *Walker v. Mathews* (1881) 8 Q.B.D. 109. Note that in *Greenwood*, the increase in value was taken to be the money expended by the improver. The case is discussed further, *infra* n. 181.

Of course, an order for specific restitution will only exceptionally be made. See *supra* n. 52.

annexed to the defendant's goods so as to form a "joint product".¹⁷¹ This is a question of degree and various alternative tests have been adopted in different jurisdictions.¹⁷² But if the plaintiff can show that the applicable test of accession has not been satisfied, he or she will be able to reclaim the actual parts or for their conversion.¹⁷³ Thus, the narrower the test of accession adopted, the more considerable the scope for offering an improver redress.¹⁷⁴ Mistake negatives any intention that the property should pass to the defendant,¹⁷⁵ and a fair outcome—specific restitution of the plaintiff's property—is clearly possible.¹⁷⁶

To this point, a mistaken improver's rights appear to have been exhausted. A plaintiff whose work has largely taken the form of labour (for example, painting a vehicle), is left in a particularly vulnerable position. The generally stated preclusion against recovery for unrequested services would appear to apply.¹⁷⁷

This raises the important question: why are the courts more readily prepared to grant relief to a mistaken improver of goods, as with land, simply

¹⁷¹ Guest, *supra* n. 162, 507.

¹⁷² *Ibid*, 507-10; Maddaugh & McCamus, 111-3.

¹⁷³ *Thomas v. Robinson* [1977] 1 N.Z.L.R. 385.

¹⁷⁴ Consider, for example, the narrow test of accession adopted in *Rendell v. Associated Finance* [1957] V.R. 604, concerning improvements to a car, in which the Supreme Court of Victoria considered that the accessories only passed to the defendant where it was a necessity of the case; if, "as a matter of practicability, they cannot be identified, or if identified, they have been incorporated to such an extent that they cannot be detached from the vehicle" (610). Thus, a car engine was considered to remain the property of the owner of the engine. Note that in that case, the parts had been installed by a third party. In *Thomas v. Robinson* [1977] 1 N.Z.L.R. 385, spare parts, including an engine exhaust system, clutch, and carburettor, were not considered to form part of the vehicle. Where an accessory is removable, the improver must account for any damage which results from the removal of the parts.

These decisions contrast with the much wider test of accession adopted in some Canadian cases. One case even held that car tyres became part of a vehicle. See Guest, *supra* n. 162, 508-9. See also *Bergougnan v. British Motors Ltd* (1929) 30 N.S.W.S.R. 61.

¹⁷⁵ *Rendell v. Associated Finance* [1957] V.R. 604, 607: "fundamentally the transfer of property in chattels in English law depends upon intention and consent." See also at 610.

¹⁷⁶ This is provided that the goods are removable without serious damage to the principal chattel.

¹⁷⁷ Goff & Jones, 166. Cf. Cairns L.J. in *Greenwood v. Bennett* [1973] 1 Q.B. 195. Palmer, Vol. II, 454, has stated that "[n]o American case seems to have given relief to one who mistakenly repairs or improves the chattel of another." Presumably, Palmer is referring to cases where plaintiffs are seeking direct relief. See, e.g., *Winney v. Leuci*, 74 N.Y.S. 2d 585 (1947).

because he or she happens to be a defendant in the action? Why should outcomes be so significantly affected by whether the owner is plaintiff or whether the improver is plaintiff?

In this writer's view, the answer lies in the fact that an owner of goods taking legal action to assert his or her right to the goods will in all but the most exceptional case only be entitled to damages. Irrespective of any special value goods may have to the owner, such goods are treated in law as having only one relevant characteristic: their monetary value. If an award of damages went beyond the unimproved value of the goods, the owner would be advantaged as a result of the plaintiff's mistake, receiving a money equivalent for the goods' increase in value.¹⁷⁸

Although this may explain why indirect relief is usually granted to a mistaken improver, it does not explain why there should be a blanket rejection of direct claims where the improver is the plaintiff.¹⁷⁹ Where the market value of goods has been increased, a fair outcome may often be possible. Recovery of the increase in value may not disadvantage the owner of the goods in some cases, and similar factors as those considered in relation to improvements to land would be relevant in determining whether this was the case. For example, the goods may be fungibles,¹⁸⁰ or the goods may form part of the stock in trade

¹⁷⁸ The increase in market value may not equate with the costs incurred by the improver in performing such services. Should such costs be less than the increase in market value of the property resulting from the improvements, then theoretically the improver should be limited to relief measured by the costs incurred. But it is difficult to see how this could be achieved in cases of indirect relief.

¹⁷⁹ This presumes that some form of specific restitution, of removable spare parts, for example, is not possible.

¹⁸⁰ A Canadian case, *Mayne v. Kidd* [1951] 2 D.L.R. 652, suggests a more liberal approach whereby active relief is possible if the improved goods were fungibles of no special value to the defendant. (Although it has been queried whether in fact the improver in that case was acting under a mistake in that case—*Maddaugh & McCamus*, 303, suggest not and the report does not indicate as such—the existence of a mistake seems evident from the assumption which led the improver to act as he did.) The improver had cleaned another's wheat, thereby increasing its value, and subsequently claimed for the cost of doing so after the owner had repossessed the cleaned wheat. The court noted, at 654-5, that if the owner had not seized the wheat and instead sued in detinue, any remedy would have compensated the improver for the increased value. Since there was no reason why the owner "should be allowed to obtain more by retaking the goods than he would have obtained had he taken the other remedy" (655), the court upheld the improver's claim for the cost of cleaning the wheat. The court treated the cost of cleaning the wheat to be the same as the increase in its value. This does not, of course, necessarily follow. Presumably, there would exist distinct market prices for both cleaned and uncleaned wheat. The difference between such price, it is suggested, ought to have been the appropriate measure of recovery. Leaving this aside, however, the important factor in *Mayne v. Kidd* appears to be that the more valuable wheat in the owner's hands effectively represented money. Wheat is a fungible commodity to be sold on the market and was not in this case

of the owner's business,¹⁸¹ so that the owner's interest in the goods is strictly financial. The goods may have no special value to the owner and readily be replaceable. Where goods are of this type, the difference in the market price between their unimproved value and improved value is thus an economic advantage, just as money is, and whether or not that economic advantage has already been converted into money ought not be relevant.¹⁸² To require the "return" of such economic advantage would not disadvantage the owner, who would not be required to reach into his or her own pockets to pay its equivalent value.¹⁸³

§ 9.2.3.3 Mistaken payment of another's debt

Where a person pays the debt of another under a mistaken belief that the

property of personal value to its owner.

¹⁸¹ *Greenwood v. Bennett* [1973] 1 Q.B. 195, might be considered an example. The legal owner of a car (Bennett) had recovered the vehicle by court order and the order had not granted one Harper any allowance for improvements mistakenly made by him. (The original trial involved a number of claimants, including Greenwood, but the dispute resolved itself to one between Harper and Bennett.) Harper appealed, claiming the costs of the improvements, and succeeded. The reasoning of the majority rested on the view that conditions can be, and ought to have been, attached to the order for specific restitution. Consequently, the court made such an order, conditioning specific restitution upon the payment of the value of the improvements, even though the car was already in the hands of the owner. The order was thus one rectifying the error of the court below in failing to apply such a condition on specific restitution. See per Phillimore and Cairns, L.J.J.; and Mathews, *supra* n. 113, 353. Lord Denning reasoned differently and would have allowed even direct recovery, in wide restitutionary terms (see at 202). Perhaps the factor of greatest significance was one not stressed by the court, namely that Bennett was a motor dealer who regularly bought and sold cars as commodities, and who had already sold the subject vehicle at its improved value. See argument by counsel, *ibid*, 198. The defendant had thereby realised the economic advantage which those improvements represented. The point was that the car was never an item having any personal value to the defendant. The owner was thus not being required to pay for unwanted (or at least unrequested) improvements of a chattel of personal value. If, conversely, the vehicle had been for private use, the result would almost certainly have been otherwise. Cf. Birks, 124-5, and see also Goff & Jones, 172-4, for their discussion of the case.

¹⁸² Consequently, it should not be necessary that the goods and their increase in value have been realised in money, for example, as Birks would require as part of his test of incontrovertible benefit. Cf. Goff & Jones, 172, who suggest recovery should be allowed wherever a defendant has gained a "financial benefit, readily realisable without detriment to himself". The qualifier, "without detriment", is clearly consistent with this writer's own view, but seems removed from any aim of disgorging enrichment.

¹⁸³ This is because the increased value will be realised by the sale of the goods. If one considers the example of *Mayne v. Kidd* [1951] 2 D.L.R. 652, the case of the cleaned wheat, one could aptly misquote Pollock C.B. in *Taylor v. Laird* (1856) 25 L.J. Ex. 329, (text to n. 164, *supra*): "One cleans another's wheat; what can the other do but what one always does, sell it at the market rate."

debt is owed by the payer, then the payer may have a remedy against the payee (creditor) for restitution of money paid under a mistake.¹⁸⁴ Restitution from the creditor, however, may not be possible for a number of reasons, as where the payee can raise some defence to the claim.¹⁸⁵ The payer will then be limited in his or her remedial rights to seeking recovery from the debtor, who has not received money, but who can be said to have received the value of the payer's service. In which circumstances will such a claim succeed? The authorities are divided on the issue of whether as a general rule the mistaken payer can recover, but the weight of both English and Australian law tends against a right to recover,¹⁸⁶ whilst United States authorities generally favour such a right.¹⁸⁷

Speaking very generally, the basis of the English and Australian position seems an excessively formalistic one:¹⁸⁸ unless a debtor ratifies the payment of the debt, such debt will not be discharged by a mistaken (as opposed to a

184 The scope of such potential recovery appears to have been expanded by the decision of *Barclays Bank v. Simms* [1980] Q.B. 677. See Friedmann, D., "Payment of Another's Debt" (1983) 99 L.Q.R. 534, 545, et seq. In *Barclays Bank v. Simms*, Goff L.J. concluded that a mistaken payment by a third party does not discharge the debt and is thus recoverable from the payee/creditor. See further, *infra* nn. 188-94 and text thereto, for a criticism of this view.

185 The debtor may have ratified the payment of the debt and thus discharged it. In such a case, the creditor has given good consideration for the payment and no recovery from the creditor will be possible. But recovery from the debtor follows as of course. Even if the debtor has not ratified the debt, the creditor may still argue a change of position, or that the payment was received in good faith, in discharge of the debt owed, so that consideration has been given for the payment. See Friedmann, *ibid*, 547-8. The difficulty raised by *Barclays Bank v. Simms* [1980] Q.B. 677, in relation to the latter defence, is that if one argues that the debt is not discharged then no consideration has flowed from the creditor. But arguably, a creditor merely treating the debt as discharged can be said to have given consideration even if, legally, the debt is not discharged: the creditor may no longer pursue the debtor, rights may lapse, the creditor's position may in other ways be prejudiced. At the very least, such conduct may amount to a change of position. Consequently, the payment should not and presumably will not be recoverable from the creditor: cf. Friedmann, *ibid*, 539.

186 See, e.g., *Hill v. Zymack* (1908) 7 C.L.R. 353.

187 See the *Restatement of Restitution*, §43, §54, and Palmer, Vol. III, §14.17, §14.18. See also Friedmann, *supra* n. 184, 547-8. Where the payment is of taxes or government charges on land, some jurisdictions generally refuse reimbursement. See, e.g., *McMillan v. O'Brien*, 29 P. 2d 183, 91 A.L.R. 383 (1934), and the annotation thereto, which cites conflicting views from different jurisdictions. Contrast *Brookfield v. Rock Island Improvement Co.*, 169 S.W. 2d 662 (1943). See Palmer, Vol. III, §14.19, for a discussion of the divergent authorities.

188 The position at times is justified by reference to the need to protect a defendant's choice as to his or her creditors. There are at least two difficulties with this view. First, the ready assignability of debts makes this protection in any case limited. If a creditor accepts a payment in discharge of the debt, one can see such acceptance as little different to a valid assignment of the debt. Secondly, a debt may be discharged even without a debtor's ratification where the payer has paid the debt under compulsion, legal or practical.

compelled) payment of it.¹⁸⁹ In strict legal theory, the debtor is thus still liable to pay the debt. But since the debt is not discharged, it is argued, recovery can be had from the creditor, the recipient of the money.¹⁹⁰ But with respect, this need not necessarily be the case. A payer may not be able to recover from the creditor even if the debt is not legally discharged. For example, the creditor may have treated the debt as discharged and thus may have changed his or her position, such as by allowing rights to lapse or by no longer pursuing the debtor.¹⁹¹ Where this has occurred, the creditor will almost certainly be able to raise a change of position defence. Yet according to the "orthodox"¹⁹² view, recovery from the debtor will also be precluded because the debt is not discharged. This will be despite the fact that the payer, being mistaken, will not be an intermeddler seeking to impose himself or herself on the defendant.

Such reasoning is "unhelpful".¹⁹³ In this writer's view, the preferable approach is that advocated by Friedmann, which is consistent with the approach adopted by courts in the United States: a debt is treated as discharged whenever the payment is not recoverable from the creditor. This will be so whenever a debt is received by a creditor "in good faith in discharge of a valid claim."¹⁹⁴ Consequently, a mistaken payer will *prima facie* have a right to

¹⁸⁹ In support of the orthodox position, see Birks, P., & Beatson, J., "Unrequested Payment of Another's Debt" (1976) 92 L.Q.R. 188, 200-1, (also in Beatson, 177, 189-90), and a postscript to this article in Beatson, 200; and *Barclays Bank v. Simms* [1980] Q.B. 677. Goff & Jones, 310 et seq., suggest that recovery for payment of another's debt will only be available where such payment was made under compulsion. See also Watts, P., [1993] N.Z. Recent L.R. 248. In Canada, it is similarly stated that in order to found recovery, a plaintiff must have been under some legal obligation or practical compulsion to make the payment. But in the view of Fridman, 299, and on the authority of *County of Carleton v. City of Ottawa* (1963) 39 D.L.R. (2d) 11, a *mistaken belief* that the plaintiff is under an obligation to pay may be sufficient to amount to compulsion. However, strictly speaking, the *County of Carleton* case did not concern payment of another's existing debt. The case will be considered further, text to n. 204, et seq.

¹⁹⁰ See *Barclays Bank v. Simms* [1980] Q.B. 677.

¹⁹¹ See supra n. 185.

¹⁹² See Watts, supra n. 189.

¹⁹³ Friedmann, supra n. 184, 537.

¹⁹⁴ Palmer, Vol. III, 233. See generally §14.17 and §14.18. Friedmann, supra n. 184, 537, argues the point persuasively:

It is obvious that payment does not discharge the debt if the payor is entitled to recover it from the creditor and, in fact, does so. But this reasoning is, at best, circular and does not reveal the actual ground for recovery. It is clear that the mere fact that the payor acted without the debtor's authority does not entitle him to restitution from the creditor. There may, of course, be instances of mistake, fraud or duress in which recovery from the creditor is allowed. In these circumstances, the original debt remains

recover from the debtor in all cases in which no claim subsists against the creditor.

In the United States, the remedial technique usually employed to allow recovery by the mistaken payer of another's debt is subrogation of the payer to the creditor's rights against the defendant. This is a quintessential fair outcome. The plaintiff has no greater rights to recovery from the defendant than the creditor would have had, so that the plaintiff's claim may be defeated by any defences the defendant could have raised against the creditor.¹⁹⁵ The defendant is in no way disadvantaged by such remedy. The defendant is placed in the same position as before the mistake, with only one inconsequential exception: the identity of the party to whom the obligation is owed has changed. This is inconsequential precisely because the plaintiff must have been a *mistaken* payer and this requirement precludes claims by intermeddlers seeking to impose themselves upon the defendant.¹⁹⁶ Subrogation thus ought to be accepted in Anglo-Australian law as the standard remedial response so that "the mistaken discharge of another's debt ought to be assimilated to a mistaken payment made directly ... to the debtor."¹⁹⁷ Although recent decisions may be leaning

outstanding. But to treat this as the ground for recovery is to put the proposition the wrong way round. Rather it is because recovery is allowed that the debt cannot be treated as having been extinguished.

... It is submitted that whenever the creditor is entitled to keep the payment, which he received in discharge of the debt, the debt must be treated as having been discharged, even if the creditor was not entitled to demand the payment from the person who made it. (footnotes omitted).

See the *Restatement of Restitution*, §43, §54, and Palmer, Vol. III, §14.17, §14.18. See also Scott, S.R., "Mistaken Payment of Another's Debt—is there an equitable solution?" [1993] N.Z. Recent L.R. 232, and contrast the reply by Watts, P., [1993] N.Z. Recent L.R. 248.

¹⁹⁵ The debt may be doubtful, or the defendant may have a valid counterclaim or set-off available against the creditor. Watts, *supra* n. 189, 249, has defended the orthodox rule that recovery should not be allowed against a debtor unless payment is made under compulsion, by pointing to such possible defences which the debtor may have. Such arguments are not relevant where the remedy is one of subrogation, as recovery from the debtor is "subject to any defence which was available to the debtor against the original creditor" to reduce or defeat the claim: Friedmann, *supra* n. 184, 546. See also Palmer, Vol. III, 227-8.

¹⁹⁶ This thus overcomes the fear expressed in *Exall v. Partridge* (1799) 8 T.R. 308, 310, that an "enemy" "might convert himself into my debtor, nolens volens."

¹⁹⁷ Friedmann, *supra* n. 184, 546.

toward such an approach and toward rejection of the orthodox position,¹⁹⁸ until this occurs, a plaintiff may be refused relief even though a fair outcome is possible.

§ 9.2.3.4 Other mistakenly conferred services

Where mistakenly conferred services do not create any end-product, result in an increase in the value of existing property, or "discharge" a debt, the only possible remedy which a plaintiff may pursue is payment for the reasonable value of the services rendered.¹⁹⁹ Examples of such services being mistakenly conferred are rare; recovery even rarer.²⁰⁰ Even in the United States, there are few reported examples and even fewer in which plaintiffs have successfully claimed for the value of their services.²⁰¹

Requiring a defendant to pay for the reasonable value of services would in most cases leave that defendant out of pocket and thus at a disadvantage compared with his or her pre-mistaken position. Consequently, given that a fair outcome is not generally possible, relief will be denied, for the innocent

¹⁹⁸ See Scott, *supra* n. 194, and his discussion of *Westpac v. Rae* [1992] 1 N.Z.L.R. 338. Contrast *Watts, P., "Restitution"* [1991] N.Z. Recent L.R. 419, 441.

¹⁹⁹ Subrogation, restitution of the enhanced value of property or relief akin to specific restitution are not available remedial options.

²⁰⁰ One English example where services of such a kind were performed and recovery was refused, is *Macclesfield Corp. v. Great Central Railway* [1911] 2 K.B. 528, discussed Chapter 8. In that case, the defendant repaired a bridge in circumstances where there was a necessity to perform the work, but the plaintiff council also acted under a mistaken belief that it was obliged to perform the service. Nevertheless, it failed to recover for the work done. It has already been argued previously that the plaintiff ought to have recovered, given the circumstances of necessity. The logical consequence of the plaintiff's failure to do so is that if it had only acted under a mistake (i.e., where there was no necessity), then it is even less likely that the plaintiff would have succeeded. One case in which a plaintiff recovered for the reasonable value of services rendered under a mistake is *Upton-on-Severn R.D.C. v. Powell* [1942] 1 All E.R. 220. The plaintiff provided fire-fighting services to the defendant, under the mistaken belief that the defendant was in the Upton fire district and thus entitled to the services gratuitously. In fact, the defendant lived outside the district. The plaintiff would thus have been entitled to contract for payment for its services. It subsequently sought such payment. The plaintiff was held to be entitled to recover on the basis of an implied contract despite the fact that both parties believed that the services were freely provided. Too much should not be made of the decision, however, for arguably it falls outside the boundaries of spontaneous mistake cases. The defendant also believed he was in the Upton district and it was this initial mistake which led to the plaintiff being called. But for the defendant's mistake, the plaintiffs would either not have performed the services, or performed them with the intent to charge therefor. The plaintiff's mistaken belief was thus caused by the defendant's request for the services in the circumstances. Cf. *In re Agnew's Will*, 230 N.Y.S. 519, 526 (1928). Contrast *Merritt v. American Docks*, 13 N.Y.S. 234 (1891), and *Town of Durham v. Carlisle* (1975) 63 D.L.R. (3d) 88.

²⁰¹ Note, however, the cases cited below.

defendant ought not be forced to bear the plaintiff's losses. For example, in *Cahill v. Hall*,²⁰² the plaintiff mistakenly kept and trained the defendant's horse, but was held not to be entitled to recover for such services.

Perhaps the only circumstance in which a fair outcome may be possible is where a plaintiff has fulfilled an obligation of the defendant, such as a statutory duty or contractual obligation (other than a debt). In the United States and Canada, a few exceptional cases have allowed recovery (though even in those jurisdictions, many if not most of the few authorities deny relief).²⁰³ It is difficult to draw any general conclusions from these few authorities, but perhaps a fair outcome will be possible where a defendant would have had to incur a debt to fulfil the obligation. For example, in *County of Carleton v. City of Ottawa*,²⁰⁴ the plaintiff mistakenly fulfilled the defendant's statutory duty to maintain an indigent, by providing board, lodging and medical assistance.²⁰⁵ The important factor in the case is that both parties, being local authorities, could only meet the obligation by paying an agent to fulfil the requisite duty and perform the services. In fact, the plaintiff's "services" simply took the form of payments made to a third party (to whom the work was contracted out)

²⁰² 37 N.E. 573 (1894).

²⁰³ A number of United States cases have dealt with essentially the same problem. These cases concerned the transport of mail. Typically, the plaintiff owes a contractual duty to a third party to transport goods (mail) between two places (let us say from A to B). The defendant also has a contractual obligation to the same third party, to transport the same goods further (let us say from B to C to D). The plaintiff, for considerable periods of time, mistakenly transports the goods partly along the route the defendant is obliged to serve (from point A to B to C); yet the defendant has received payment from the third party for the work it is obliged to do. The plaintiff seeks reasonable payment for the service of transporting the goods beyond its obligated route. One case, *McClary v. Michigan Central Ry Co.*, 60 N.W. 695 (1894), allowed recovery in essentially these circumstances on the basis of implied contract. Cf. *Blowers v. Southern Ry*, 54 S.E. 368 (1906), and *Blackwood v. Southern Ry Co.*, 100 S.E. 610 (1918), in both of which the defendant companies were aware of the plaintiffs' mistake. Such acquiescence of itself provides a sufficient basis upon which to grant recovery and takes the latter two authorities outside the sphere of spontaneous mistakes. There was no knowledge by the defendant of the plaintiff's mistake in *McClary's* case. See Palmer, §17.7, however, who ignores this significant factual distinction and treats all three decisions as one. In other cases in which the defendants were unaware of the plaintiffs' mistakes, again in the context of similar facts, relief was denied. See *Johnson v. Boston & M. R. Co.*, 38 A. 267 (1897), and *Columbus v. Goffney*, 61 N.E. 152 (1901). The inconsistency of the decisions (the essential problem in all the cases being the same) reflects competing legal motivations: on the one hand, to undo the mistake and thus relieve the plaintiff of the unintended consequences of its actions; on the other hand, to not impose a burden upon the defendant to pay for the services. Outside the context of the mail cases, see *Rohr v. Baker*, 10 P 627 (1886), the result of which is inconsistent with *McClary's* case.

²⁰⁴ (1965) 52 D.L.R. (2d) 220.

²⁰⁵ The particular indigent had been omitted inadvertently from a list of persons resident in the defendant's area.

which, but for the mistake, would have had to have been made by the defendant. In effect, the plaintiff met the defendant's "debt", especially given that the defendant would apparently have paid the same third party to perform the services. A subrogation-like remedy of recoupment of the expenditure incurred was appropriate.²⁰⁶

A subrogation-like remedy, where the plaintiff is subrogated to the rights of some hypothetical "creditor" with whom the defendant would have had to enter into a contract to fulfil the obligation, may in some circumstances achieve a fair outcome.²⁰⁷ But this suggests only a very limited scope for achieving fair outcomes, and recovery has been and will almost certainly continue to be exceptional.²⁰⁸

As our discussion of service cases suggests, it is not possible to achieve a fair outcome by applying specific rules formulistically. A detailed consideration of the individual facts of each case is necessary in order to determine whether any remedy can be found which does not leave a defendant at a disadvantage, but which restores (as nearly as practicably possible) the plaintiff to his or her pre-mistaken position. In most mistaken transactions, this may still be a

²⁰⁶ Contrast *Fridman*, 249, and *Maddaugh & McCamus*, 731-4, where the case is subsumed under the category of compulsory discharge of another's liability. To suggest that payment in the circumstances was "compelled" seems seriously misconceived. It is true that the plaintiff was under a contractual obligation to the third party to make the payments, but only because it assumed such an obligation as a result of its mistake.

²⁰⁷ Once the obligation owed by the defendant can only be fulfilled by incurring a debt, than recovery should ensue, on the same terms as which the defendant would have had to fulfil its obligation. Perhaps the sort of problem raised by the "mail" cases, discussed *supra* n. 203, might be resolved by inquiring whether a defendant in a particular case could have fulfilled the obligation other than by incurring a debt. For example, a defendant may have been capable of doing the work personally, or may already have had employed staff who could have performed the extra work within the scope of their duties, at no extra cost to the defendant. In such a case, the defendant would not have had to incur a debt to meet its obligation. Alternatively, a defendant may only have been able to fulfil its contractual obligation by sub-contracting out for the work.

²⁰⁸ As an interesting aside, even if one were to except an unjust enrichment explanation of mistake cases, recovery will never be had for mistakenly conferred "pure" services, that is, ones which do not create an end-product, improve existing property or fulfil a debt or other legal obligation. Cf. *Beatson's* definition of pure services (*Beatson*, 23). Consequently, this suggests that in the one category in which unjust enrichment may have a role to play, pure services will never give rise to recovery and can thus never be said to be enriching. This makes *Beatson's* argument particularly compelling, that, generally speaking, only a receipt of wealth (including the saving of necessary expenses) can be considered as enriching. In mistake cases, courts generally will not require payment of the reasonable value of services rendered. Liability rules which do give rise to a right to recover the reasonable value of services, such as those considered in Chapter 6, are triggered by particular conduct of the defendants justifying recovery of reliance losses.

relatively straightforward determination. Three-party transactions raise far more complex factual problems.

§ 9.3 THREE-PARTY TRANSACTIONS

§ 9.3.1 Introduction

Let us turn our attention to transactions which, at their simplest, involve three parties. A plaintiff seeks to maintain a claim against the defendant in circumstances where a third party has misdirected the plaintiff's property (in these cases, our concern is almost invariably with money, in the wide sense of the term),²⁰⁹ or property substituted for the plaintiff's property²¹⁰ to the defendant.²¹¹ Although the "third party" is the principal wrongdoer (which term includes one who breaches a duty even innocently), nonetheless the claim is made against the defendant recipient of property who, if not involved in the wrongdoing,²¹² is an innocent defendant in the same way as a recipient of mistaken money or services. A simple example is where TP steals \$5000 cash from P and transfers that sum to D, who places that money into a bank account.²¹³ TP, of course, is liable to repay P, but as is often the case in such

²⁰⁹ See *supra* n. 26.

²¹⁰ At times, the defendant will have received property such as shares or gold bullion or similar items which have been substituted for money misdirected from the plaintiff. For purposes of simplification, however, references will often be made merely to the misdirection and receipt of money. Where a plaintiff has legal title to property other than money, which has been stolen or converted, title to that property, unlike title to money, will remain with the plaintiff even if transferred to a *bona fide* purchaser (*nemo dat quod non habet*). Since the plaintiff can then simply assert title to the property which, moreover, will often be relatively easy to identify, recovery of such property from someone in possession of it will be a relatively straightforward process. Such cases are not considered here.

²¹¹ Many cases involve complex commercial dealings in which any number of parties and transactions may be interposed between the third party wrongdoer and the defendant recipient. Often, these parties may be interconnected via intricate corporate structures, so that, for example, one party may be fully or partially owned by another party to a transaction, or parties to a transaction may share common agents. Factors such as these, of course, may complicate the factual context within which a claim is made against a given party.

²¹² Although the defendant here is a third party to another's wrongdoing or breach of duty, and liability of such defendant is often described in terms of "third party" liability, where references here are made to a "third party", they are intended to refer to the wrongdoer.

²¹³ Cf. *Black v. Freedman* (1910) 12 C.L.R. 105; *Banque Belge pour l'Etranger v. Hambrouck* [1921] 1 K.B. 321.

circumstances, TP may be insolvent or may have absconded. Consequently, P seeks to impose liability on D.

The problem thus raised is essentially the same as arises in a mistaken transfer made directly by a plaintiff to the defendant. Speaking very loosely, one can say that the defendant has received money (or substituted property) "belonging" to the plaintiff which the defendant was never intended or entitled to have.²¹⁴

Although the problem to be addressed in three-party transactions can be stated in such relatively simple terms, its solution is not by any means a simple matter. Indeed, potentially there are a number of legal doctrines which may apply to the three-party problem outlined above, each of which have developed separately and on the basis of quite distinct underlying ideas, involve their own detailed rules and raise considerable complexities and uncertainties as to their exact scope and operation. Although each doctrine has its own sphere of operation, there are points of overlap between the doctrines and, unacceptably, the conclusion reached in a given case will depend fortuitously upon which doctrines are applicable. To put it bluntly, the law in this area is a mess.

Although our concern is chiefly with determining the liability of an innocent defendant (that is, one not involved in the third party's wrong), nonetheless it is also necessary to refer to rules in equity concerned with liability of a participant in another's wrongdoing.²¹⁵ The reason for this is that such rules form part of the overall, considerably complex position governing three-party transaction. Indeed, in some cases the only possible basis for liability of a defendant may be by an application of equity's participatory liability rules, so that an entirely innocent defendant will be absolutely protected from liability.

To simplify the matter considerably, there appear to be three main types of claim which are potentially available to a plaintiff seeking to impose liability on a defendant who has received property²¹⁶ from a third party.

²¹⁴ See supra n. 16.

²¹⁵ See further, § 9.3.2.2.

²¹⁶ Where a defendant has received personal property, other than money, to which the plaintiff has title, then such property is recoverable on the basis of the plaintiff's continuing legal title to that property, even if the defendant was a *bona fide* purchaser. See supra n. 210. However, the defendant may have received personal property to which the plaintiff never had

First, the plaintiff may be able to pursue a personal claim seeking the imposition of strict liability (that is, liability independent of any wrongdoing), upon the defendant for the value of property received by the defendant which can be said to belong to the plaintiff. Such strict liability will most likely be imposed in an action in Restitution, for money had and received, for the recovery of misdirected money to which the plaintiff had *legal* title. Alternatively, there exists the possibility of strict liability being imposed on the basis of the albeit narrow equitable rule applied in *Re Diplock*.²¹⁷

Secondly, the plaintiff may be able to pursue a personal claim on equitable principles, where he or she can establish that the defendant "knowingly" assisted in a breach of trust or fiduciary duty,²¹⁸ or "knowingly" received trust property. Liability founded on these formulations is dependent on some involvement in wrongdoing or, more accurately, since mere negligence may suffice,²¹⁹ at least some fault on the part of the defendant. Consequently, where these equitable rules apply, personal liability may be limited to recovery from defendants who are wrongdoers so that innocent defendants, even if volunteer recipients of property, may be protected absolutely.

Thirdly, the plaintiff may be able to establish a tracing claim at common

any legal title, such as property substituted for money stolen from the plaintiff, of which the plaintiff nonetheless is seeking recovery. Such recovery cannot be on the straightforward basis of continuing legal title to that property.

²¹⁷ [1948] Ch. 465, on appeal, *Ministry of Health v. Simpson* [1951] A.C. 251.

²¹⁸ The "classic" formulation of the basis of liability upon parties implicated in a breach of trust or other fiduciary duty, other than the principal wrongdoer, is that of Lord Selborne L.C. in *Barnes v. Addy* (1874) L.R. 9 Ch. App. 244. Subsequent applications of the rule in *Barnes v. Addy* led to the currently widely accepted view (in English and Australian law, at least) that there are two separate classes of liability: "knowing assistance" and "knowing receipt". See Finn, *supra* n. 99, 197-8, 201-2. Under the "knowing assistance" category of Lord Selborne's formulation, participants must have "knowingly assisted" in a "dishonest and fraudulent design", and in England, the courts appear to continue to adhere to such a requirement, although this is sometimes couched in the language of a "want of probity": cf. *Belmont Finance Corporation Ltd v. Williams Furniture Ltd* [1979] Ch. 250; *In re Montagu's Settlements Trusts* [1987] Ch. 264; and *Competitive Insurance Co. v. Davies Investments* [1975] 1 W.L.R. 1240; and contrast *Selangor United Rubber Estates Ltd v. Craddock (No. 3)* [1968] 2 All E.R. 1073, 1105. In Australia, however, there is support for the view that knowingly assisting in a mere breach of duty, rather than a "dishonest or fraudulent" design, may be sufficient to found liability under this head. See *Consul Development Pty Ltd v. D.P.C. Estates Pty Ltd* (1975) 132 C.L.R. 373, 396 per Gibb J., and 411-2, per Stephen J; Austin R.P., "Constructive Trusts" in Finn, P.D., *Essays in Equity* (1985), 233; and Finn, *supra* n. 99, 206.

²¹⁹ See *infra* n. 258.

law or, more likely, in equity, to property subsisting in a defendant's hands. Liability is not here *in personam* and is limited to recovery of identifiable, "traceable" property which can be said to belong in law or in equity to the plaintiff.²²⁰

Each of these very different types of claim will be outlined below, though the uncertainty as to the details of specific doctrines and their application necessitates only a general overview of the current legal position. The divergent results of the application of different doctrines, specifically in relation to the imposition of personal liability, either strictly or on the basis of fault, is sometimes stated in terms of a divergence between common law and equity, respectively.²²¹ Although this is not entirely accurate, as the possibility of "*Re Diplock*" strict liability demonstrates,²²² nonetheless the law/equity divide is a factor of continuing significance in determining, ultimately, the liability of a defendant.

There is one important feature common to all cases irrespective of the type of claim pursued: if a defendant in his or her transaction with the third party has given good consideration and has no notice of the third party's wrong (that is, the misdirection) or the plaintiff's interest, then such defendant will be entitled to raise a defence of *bona fide* purchaser for value without notice and will in all cases be protected from any liability. In the first type of claim, this is because of the operation of a *bona fide* purchaser defence; in the second type of claim this is because a *bona fide* purchaser, not having notice of the wrong, will not satisfy the requirement of knowledge needed to trigger

²²⁰ The plaintiff will have had legal title to, or an equitable interest in, or be a beneficiary of a fiduciary relationship owed in respect of, the subsisting property or property for which it was substituted.

²²¹ See, e.g., Burrows, 143.

²²² [1948] Ch. 465. See Birks, *supra* n. 16, 310-6. In *Restitution—The Future*, 39, Birks states "this conflict is not a clash between law and equity." It is true, however, that but for the (it is suggested) narrow rule in *Re Diplock*, equity has shunned strict liability so that there is some validity in perceiving the divide in equity/common law terms. Although Birks considers fault-based liability cases as the exception, as Burrows, A., "Misdirected Funds: A Reply" (1990) 106 L.Q.R. 20, 23, has concluded:

Birks argues that the trend of the cases towards fault-based liability for third party recipients turns the law and decided cases upside down. The picture of the law I present sees no such upheaval. On the contrary it is Birks' approach that would constitute a revolution. After years of argument as to whether an intermeddling stranger's equitable liability for "knowing receipt and dealing" should be based on mere negligence or dishonesty ... it comes as an abrupt shock to hear a call for neither of these but for strict liability.

equitable liability;²²³ and in the third type of claim, this is because a plaintiff's right to trace money or property substituted for it is extinguished once it has been transferred for valuable consideration to a *bona fide* defendant, who does not take subject to the plaintiff's prior interest.

The *bona fide* purchaser being in all cases protected, the critical difference in the operation of different doctrines can be seen in relation to recipients who are volunteers, that is, who have not given consideration in exchange for the property received.²²⁴ Hence, in what follows, the emphasis is on volunteers. If a volunteer is innocent of any fault, then achieving fair outcomes would appear to be the appropriate rationale for determining the scope of liability.²²⁵ It is in relation to volunteers that the difference between strict and fault-based personal liability is brought out most sharply: in the former case, a volunteer will be liable whenever he or she has received any of plaintiff's property, subject to available defences, whereas in the latter case, the volunteer will be protected from personal liability if he or she is not imbued with the requisite knowledge, though such a volunteer may still be liable to give up traceable property which can be identified as surviving in his or her hands (the

²²³ This will be so even though there may be a difference between the degree of knowledge which constitutes "notice" of a prior interest for the purposes of the *bona fide* purchase defence protecting a defendant taking property the subject of a plaintiff's prior interest, and the degree of knowledge which constitutes "knowing receipt". "Notice" and "knowledge" are "not necessarily the same thing". See Sachs L.J., in *Carl-Zeiss Stiftung v. Herbert Smith & Co. (No. 2)* [1969] 2 Ch. at 296. Contrast *Baden, Delvaux and Lecuit v. Societe Generale* [1982] 4 All E.R. 161, per Peter Gibson J. Since "knowing receipt" gives rise to full personal liability as a constructive trustee, any divergence between knowingly receiving and notice should favour a higher degree of knowledge in the former case. Liability where a purchaser has "notice" is limited to returning property received with such notice and thus is not as wide as liability for "knowing receipt". See *In re Montagu's Settlement Trusts* [1987] 1 Ch. 264, 278, where Megarry V.C. considered that:

The cold calculus of constructive and imputed notice does not seem to be an appropriate instrument for deciding whether a man's conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee.

Consequently, if a defendant does not have notice of the plaintiff's interest he or she certainly will not be liable under equity's "knowing receipt" rule. The converse, however, does not necessarily hold true: a defendant not having knowledge sufficient to be a knowing recipient of trust property might be held to have notice of the plaintiff's interest.

²²⁴ Alternatively, the "volunteer" may be one who has given consideration which the law does not recognise as valid, such as entry into a void contract. See *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, though the decision in that case, it is respectively suggested, is wrong. See *infra* n. 244.

²²⁵ If a defendant is an innocent *purchaser*, a remedy which does not disadvantage the defendant is not possible and the plaintiff will be restricted to recovery against the wrongdoer.

proprietary/third type of claim). It is the possibility of a tracing claim which will be seen to provide the possibility for bridging the seemingly wide gap between strict (usually common law) and fault-based (equitable) personal liability. The underlying rationale for bridging this gap will be argued to be that of achieving fair outcomes.

§ 9.3.1.1 The technique of tracing property

Before we turn to the three main types of claims potentially applicable to three-party transactions, a little further needs to be said about the technique of tracing property. The technique by which property is followed from the hands of one person into those of another, or from one type of property into another, is by way of the rules of tracing. These rules—developed at common law and in equity—provide the means by which a plaintiff maintains the link between property dealt with by a wrongdoer²²⁶ and property which a defendant has received. These rules do not of themselves establish liability. Rather, they are techniques which allow a party to draw factual conclusions about the transfer of property to another, or the continued subsistence of property in another's hands. As Burrows has pointed out, tracing provides merely a "means of getting to particular remedies".²²⁷

Tracing rules can serve at least two quite distinct purposes. First, the rules may establish that the defendant has indeed received something which can be said to belong to the plaintiff. As such, the rules are relevant even to establishing *personal* liability for value received. Thus, irrespective of whether a defendant must have knowingly received the property or is strictly liable as a result of its receipt, in both cases, it is the receipt of something to which the plaintiff can lay claim that is the necessary precondition for liability. The second purpose which tracing rules can serve is to establish some proprietary

²²⁶ The tracing rules presuppose, as does this discussion, that there is some extant proprietary right against the third party initially misdirecting the property the subject of such right, though see *infra* n. 229. Such right may merely arise because a constructive trust exists in relation to the property. In some cases, whether the particular wrong or breach of duty by a third party should give rise to a constructive trust over property subsequently misdirected, may be controversial. It may depend on policy considerations of particular relevance to the type of case under consideration. For example, should an equitable claim to property owned by an ex-de facto spouse necessarily give rise to a constructive trust, so that a transferral of such property by the ex-de facto is a misdirection of that property? The policy concerns which would need to be considered to answer this question are not within the scope of this thesis.

²²⁷ Burrows, 57. See also Birks, P., "Persistent Problems in Misdirected Money: A Quintet" [1993] L.M.C.L.Q. 218, and Glover, *supra* n. 76, 272-3.

claim over an identifiable asset which still subsists in a defendant's hands.²²⁸ Once such assets have been identified, the defendant may be liable to account for them. The plaintiff's claim to the surviving property derives not from the tracing rules themselves, but from the legal or, more usually, the equitable right²²⁹ to that property or a previous substitute.²³⁰

It is the second purpose of tracing rules that will be discussed below, when we consider the possibility of a proprietary claim. But the first purpose is relevant in establishing a necessary precondition for liability in all three types of claim (two personal and one proprietary), as in all three the defendant must have at least *received* the plaintiff's property. To establish a proprietary claim, a plaintiff then has to go further to identify traceable property which is retained by the defendant.

The tracing rules themselves, specifically those concerned with tracing money, are complex. Inconsistencies exist between those rules of equitable origin and those of common law origin.²³¹ What is clear is that in the past, the

²²⁸ Consequently, if a claim is in a proprietary form, the claimant will gain priority ahead of unsecured creditors. The circumstances in which a plaintiff should be entitled to priority is an interesting issue, but not one which will be pursued in this thesis.

²²⁹ It need not be an equitable interest and although generally a requirement of some initial equitable *proprietary* right is stated as a prerequisite, it is difficult to see how this is met in some cases. A beneficiary of a deceased estate, for example, merely has a personal right against the executors to have the estate duly administered. See *Commr of Stamp Duties v. Livingstone* [1965] A.C. 694. Nevertheless, should the executors breach their duties, a right to trace may arise: see *Re Diplock* [1948] Ch. 458.

²³⁰ See Millett, *supra* n. 97, 80: "The tracing claim in equity gives rise to a proprietary remedy which depends on the continued existence of the trust property in the hands of the defendant." In other words, the recipient takes the property subject to a prior equitable interest: cf. Finn, *supra* n. 99, 202.

Strictly speaking, even if the property in the defendant's hands is a substitute for the plaintiff's original property, tracing is only possible on the basis of a continuing legal or equitable right. But this will often be via the quite technical tracing rules, so that rather than saying the plaintiff's right continues into the substitute property, it is perhaps more accurate to say that "the owner of the original property exercises a power to transfer his title, retrospectively, from the original property to the substitute product": Burrows, 58, and see also at 65-9.

²³¹ See generally Sutton, R., "Tracing" [1982] N.Z.L.J. 67, and Burrows, Chp. 2. It seems fair to conclude that the equitable rules are generally wider in their potential scope. In equity, the right to trace generally is said to be dependent upon the existence of a fiduciary relationship between the plaintiff and the wrongdoer or at least arising upon the receipt of property, but such a relationship is often quite artificially discovered. See, e.g., *Chase Manhattan Bank v. Israel-British Bank* [1979] 3 All E.R. 1025. In Australia, an existing fiduciary relationship may not be a prerequisite to an equitable tracing claim. See Glover, *supra* n. 76, 272-3, and *Black v. Freedman* (1910) 12 C.L.R. 105; cf. Goff & Jones, 83-6, as to the English position. Common law tracing is limited to circumstances in which a plaintiff can show a continuing legal title to the property, which title, in the case of money, is readily lost. Consequently, at common law there

right to trace via these obscure, highly technical and perhaps "arbitrary"²³² rules²³³ was extremely limited. These limitations are not surprising given that the rules originated from a conception of wealth taking the form of banknotes. It will be suggested below that there is much to be said for a liberalisation of the tracing rules.

§ 9.3.2 Three Types of Claim

§ 9.3.2.1 Strict personal liability

At common law, a plaintiff will be able to maintain a claim against the defendant for recovery of the value of money had and *received* by the defendant, to which money the plaintiff can show a continuing legal title up until the time of receipt.²³⁴ It is not necessary to show that the defendant knew of or was in anyway involved in the wrong which deprived the plaintiff of his or her money. Consequently, liability can be said to be strict, though it is

exists a restriction on tracing into "mixed" funds; that is, where money of the party seeking to trace is mixed with money belonging to someone else. Although, common law tracing rules appear to have been liberalised in *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, it must be noted, however, that there were a number of concessions by counsel in that case without which the plaintiffs' claim may have failed. See Birks, *supra* n. 76, 479. Many commentators perceive at best only a limited operation of the common law rules. See, e.g., Millett, *supra* n. 97; and Sutton, *ibid.* See also Stoljar, Chp. 5, for discussion of the historical development of tracing rules. The division between equitable and common law tracing seems to serve no purpose and will become redundant if the approach canvassed below is adopted. Many see the desirability of the fusion of the common law and equitable rules. Cf. Burrows, 76. For judicial opinion to this effect, see, e.g., *Elders Pastoral Ltd v. Bank of New Zealand* [1989] 2 N.Z.L.R. 180, 185-6, per Cooke P., and 193, per Somers J.; *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, suggests that the House of Lords may be leaning in the same direction. See also Watts, P. "Unjust Enrichment and Misdirected Funds" (1991) 107 L.Q.R. 521, generally, and at 526.

²³² Glover, *supra* n. 76, 271.

²³³ Cf. Goff & Jones, 86, in relation to equitable tracing rules. For an example of the considerable complexities which can arise in applying common law tracing rules, see the detailed discussion in Birks, *supra* n. 76, in relation to tracing in *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10.

²³⁴ This simplifies the matter somewhat. The money received could also be the traceable substitute of property to which the plaintiff had legal title. Although strictly speaking, the plaintiff needs to show continuing title, this does not mean the plaintiff needs to identify the very notes transferred: it is sufficient to show a continuing legal title to the value the money represents. For example, in *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, the money received by the defendant was in substitute for a chose in action to which the plaintiffs had legal title. See particularly at 28-9, per Lord Goff. See also Birks, *supra* n. 76, 478-9, and cf. Burrows, 65-9. See also *supra* n. 231. Although a plaintiff can trace property substituted for money, recovery of that substituted property could not be in an action for money had and received, but would have to be on the basis of a proprietary claim.

always subject to any available defences. There are in fact few authorities allowing recovery of money from a recipient who has not received it from the plaintiff²³⁵ (or his or her agent),²³⁶ but the availability of such a claim is now clearly beyond doubt after the decision of the House of Lords in *Lipkin Gorman v. Karpnale*.²³⁷ Unlike liability founded on tracing to be considered below, the

235 As Goff & Jones, 78, explain:

The claim can only succeed if the plaintiff can demonstrate that the defendant received his money and that he did not, as a result of that receipt, obtain good title to it. Given the defence of bona fide purchase, successful claims are rare (emphasis in original, footnote omitted).

Consequently, innocent purchasers will be protected from such a claim. But there are surprisingly few authorities in which innocent volunteers have been held liable. Of the earlier authorities, three of the most significant cases are all consistent with the claim to traceable assets still *surviving* in the defendant's hands (see below), rather than full liability for recovery of money *received*. Indeed, it is notable that in two of these three cases (*Black v. Freedman* (1910) C.L.R. 105, *Banque Belge pour l'Etranger v. Hambrouck* [1921] 1 K.B. 321), the plaintiffs' claims were limited to sums of money still in the defendants' accounts, although unjust enrichment advocates are quick to point out that the plaintiff could have claimed more. See Birks, *supra* n. 16, 311-2, and Burrows, 145-6. In the third case, *Transvaal & Delagoa Bay Investments Co. v. Atkinson* [1944] 1 All E.R. 579, despite the plaintiff claiming for the value of all money received, the court allowed a defence of "ministerial receipt" (see *supra* n. 97, (2)) so that the innocent defendant was not held liable beyond that sum which she retained. The applicability of the defence has been doubted (Birks, *supra* n. 16, 313, fn. 61, considers that the innocent defendant "was undeniably lucky to be given the advantage of this defence") and one commentator treats the case as an example of a general change of position defence (see Stoljar, 122). Cf. also *Calland v. Lloyd* (1840) 6 M. & W. 26, in which money in an account had been deposited by a third party with the defendant bank. The bank had given value in the form of a contract for the money received, but the court considered the contract a nullity, so that the defendant was in effect as a volunteer. Recovery was allowed for money held in the account. See Birks, *supra* n. 16, 317-8.

236 A defendant may have received money from the plaintiff's agent, in which case the receipt is treated the same as if it came directly from the plaintiff. Similarly, where money is received by a defendant's agent, the receipt is again treated as if it had gone directly to the defendant.

237 [1991] 3 W.L.R. 10. In essence, the facts of the case were these. A solicitor, Cass, withdrew funds from his firm's account, without the consent of his partners. He proceeded to use the money to gamble at the defendant club, where he lost a *net* sum of £174,745, of which it was agreed by the parties at least £154,695 was derived from money obtained from the plaintiffs' account. The plaintiffs successfully recovered this latter sum in an action for money had and received against the defendant club, who it was accepted had at all times been unaware of Cass's source of funds and his dishonest acquisition thereof. The House of Lords considered that the club had been enriched to the extent of the money gambled by Cass, which belonged to the plaintiffs; that the club had not given valuable consideration for Cass's bets, since the gaming contracts were void (though not illegal); but that the club was entitled to raise a defence of change of position to the value of winnings paid to Cass. Hence, the solicitors were entitled to recover Cass's net losses.

The imposition of strict liability has been championed with particular vigour by Birks. See, e.g., Birks, *supra* n. 16; *supra* n. 76; *supra* n. 227; "Misdirected Funds" (1989) 105 L.Q.R. 352; and *Restitution: The Future*, Chp. 2. Birks argues that the logic of unjust enrichment requires that recovery lie on the same terms as in two-party mistaken transactions. In both types of case, the intention to transfer is vitiated. Birks appears to be at pains to deny the proprietary nature of

personal claim for money had and received is not dependent upon any traceable property being identifiable and subsisting in the hands of the defendant. It is the *receipt* of the plaintiff's money which is the crux of the liability rules. Interestingly, although the House of Lords in *Lipkin Gorman* considered unjust enrichment to be the underlying basis of the plaintiffs' claim, the language of property featured prominently in the judgments: the unjust enrichment arose because the defendant had received the plaintiffs' property.²³⁸

The scope of the operation of the common law money had and received claim may be very limited. One significant limitation upon recovery is that a plaintiff must show that he or she had legal title to money²³⁹ at the time it was misdirected, and that the money must be traceable to the point of its receipt²⁴⁰ by a defendant. This requires the plaintiff to show a continuing legal title which survives any transactions or substitutions which have occurred. This may be difficult. For example, any mixing of funds precludes tracing at common law into such mixed funds (ones in which a plaintiff's money is mixed with money of another), so that the defendant in question must not have received money from a mixed fund.²⁴¹ Similarly, the transaction may be such as to make it difficult to show continuing legal title, as illustrated by *Lipkin Gorman* itself. In that case, the third party rogue was authorised to draw money from the plaintiffs' account. Hence, he had legal title to the cash withdrawn (that is, the money substituted for the plaintiff's property in the chose in action) which he then used for an unauthorised purpose (gambling). Consequently, Lord Goff

the claim, but it is difficult to deny the analogy with property: that the aim of recovery is to protect the plaintiff's "property" whenever it has been received by a defendant, whether innocent of any wrongdoing or not. Cf. discussion in Finn, *supra* n. 99, 210-12.

²³⁸ See *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, e.g., at 27. See also *supra* n. 91.

²³⁹ Included within the meaning of money is like property, such as a chose in action: *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10 (debtor/creditor relationship subsisting between bank and depositor).

²⁴⁰ Again, money received is given a wide definition. For example, in *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, a banker's draft was equated with money. See at 23B, per Lord Templeman. If property other than money is received, the claim could not be for money had and received. See *supra* n. 234.

²⁴¹ *Agip (Africa) Ltd v. Jackson* [1991] 3 W.L.R. 116, discussed and criticised by Burrows, 63-5, and cf. *Banque Belge pour l'Etranger v. Hambrouck* [1921] 1 K.B. 321.

relied on the *power* of the plaintiffs to vest the money in themselves as sufficient an interest to be traced.²⁴²

As has already been mentioned, although common law liability is strict, it is also subject to available defences. For one, a *bona fide* purchaser is absolutely protected against liability and the courts do not inquire into the adequacy of the consideration given.²⁴³ Thus, if X steals \$5000 from P and uses it to purchase land from D, then D is absolutely protected unless he or she had notice of P's right to the money. It is not relevant to the operation of the defence that D's land has a market value, say, of only \$3500, at the time of the exchange.²⁴⁴

The *bona fide* purchaser defence does not, of course, assist the volunteer. The most important defence potentially available to a volunteer defendant is that in reliance upon the receipt, the volunteer changed his or her position. If it is accepted, as was argued previously, that change of position is concerned with the loss of economic advantage by a defendant, then a liberal application of the defence would preclude recovery of any economic advantage innocently dissipated. A volunteer defendant will only be liable if he or she retains some economic advantage as a result of the receipt of money. Even though personally liable, such liability would in effect only require a defendant to make "specific restitution" of any economic advantage retained. If such a view is correct—it depends on the future development of the change of position defence—then "strict" liability imposed on the innocent volunteer on such

²⁴² See discussion, Birks, *supra* n. 76, 477-9.

²⁴³ The separate operation of a *bona fide* purchase defence to that of change of position is discussed *supra* n. 97.

²⁴⁴ Consequently, despite the considerable winnings of the club in *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10 (for the facts, see *supra* n. 237), the club should have been entitled to a *bona fide* purchase defence. Not only did the club enter into wagering contracts with Cass, it also provided the venue and facilities, staff, and other services which form part and parcel of gambling contracts. The fact that the club won considerable sums from Cass does not mean that value was not given. It is submitted that the club gave value and ought not have been held liable. Birks, *supra* n. 76, 492-6, agrees that the club gave value and that *prima facie*, should have been able to raise a defence, but proceeds to argue that the policy of the statutory provisions nullifying the gambling contracts barred the defendants "bringing into account the value" given (495). This argument is unpersuasive, as it extends the operation of the nineteenth century *Gaming Act 1845* on the basis of its supposed "policy" in a way which is detrimental to an innocent defendant.

It should be noted, however, that although there is generally no need to inquire as to the value of consideration, an extreme disparity between such value given by a defendant and the wealth transferred by the wrongdoer may of itself be evidence of a lack of *bona fides* on the defendant's part.

terms does not disadvantage a volunteer and achieves a fair outcome.

The return of subsisting economic advantage appears to be the gist of the money had and received claim in three-party transactions as in mistaken transactions. It is questionable, however, whether the at-present highly technical tracing rules (specifically here, at common law and for the purpose of establishing a *receipt* of the plaintiff's property) adequately allow economic advantage to be followed. Perhaps more liberal tracing rules can be utilised to establish that a defendant has in fact received an economic advantage which belongs to the plaintiff. Even if a plaintiff cannot trace a continuing legal title through forms of property previously substituted for money received (for example, choses in action, goods, cash, cheques), but which represent the same economic advantage that economic advantage may still be traceable. We will return to this below.

In equity as at common law, the possibility exists for strict liability to be imposed on an innocent volunteer, on the basis of the authority of *Re Diplock*²⁴⁵ (on appeal, *Ministry of Health v. Simpson*),²⁴⁶ and a number of cases which have applied it.²⁴⁷

The rule in *Re Diplock* allows for actions by the beneficiaries of estates, *in personam*, against overpaid beneficiaries of that estate.²⁴⁸ In *Re Diplock* itself, executors of an estate, acting under a mistake of law, paid out money to certain charities. The next of kin of the testator were able successfully to maintain personal claims against those recipient (volunteer) charities. However, the exact scope of the operation of the liability rule in *Re Diplock* is uncertain. The case itself was expressly confined to the distribution of funds in the administration of a deceased's estate.²⁴⁹ Although some cases have suggested that its authority may extend beyond those specific facts, for example, to include trustees of *inter vivos* trusts,²⁵⁰ the rule in *Re Diplock* certainly does not apply to all fiduciaries

²⁴⁵ [1948] Ch. 458.

²⁴⁶ [1951] A.C. 251.

²⁴⁷ See cases cited in Birks, *supra* n. 16, 313-6.

²⁴⁸ Cf. Meagher, Gummow & Lehane, 365.

²⁴⁹ [1948] Ch. 458, 476-8.

²⁵⁰ Cf. *G.L. Baker Ltd v. Medway Building & Supplies Ltd* [1958] 1 W.L.R. 1216, and see other cases cited by Birks, *supra* n. 16, 313-6.

dealing with beneficiaries' interests.²⁵¹ In any case, unless the rule is interpreted *sui generis* to only cover deceased estates, it is inconsistent with and has been largely ignored by equitable cases (considered below) concerned with the "knowing receipt" of trust property. As Burrows has pointed out, the decision

has had no influence on those cases—indeed it has rarely been cited—and the conventional view is that it belongs to a specialised pocket of law principally concerned with the administration of estates.²⁵²

Strict liability in equity on the basis of *Re Diplock* may thus be no more than an anomaly, though one which certainly adds to the complexity of the state of the law governing three-party transactions.

One of the difficulties created by the rule in *Re Diplock* is that it is inconsistent with protecting innocent defendants, for in that case, no change of position defence was allowed to mitigate the seemingly harsh consequences²⁵³ of allowing the personal claims. Some of the charities in question had made alterations and improvements to buildings which they may not have made but for the receipts, but such expenditure was not considered to reduce the personal liability.²⁵⁴

§ 9.3.2.2 Fault-based personal liability

If a plaintiff merely has an equitable interest in money or property or is a beneficiary of a trust or some other fiduciary relationship under which the property is held, personal liability may be imposed upon a defendant

²⁵¹ Cf. Austin, *supra* n. 218, 213-7.

²⁵² Burrows, 156-7. See also Burrows, *supra* n. 222, 23-4. Those few cases which appear to have extended *Re Diplock* [1948] Ch. 458, beyond its facts appear contrary to the whole tenor of the equitable decisions relating to the "knowing receipt" of trust property.

²⁵³ There was one significant qualification made to the personal liability imposed, namely that the personal claims against the charities were subject to the plaintiffs exhausting their personal remedies against the executors. For an explanation of this qualification in unjust enrichment terms, see Smith, L.D., "Three Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991) 11 O.J.L.S. 481. See also Burrows, 51-3.

²⁵⁴ In the House of Lords, see [1951] A.C. 251, 276, per Lord Simonds. To the extent that the money was expended on improvements to land the charities were themselves using, such expenditure would appear to have dissipated the economic advantage received. See the discussion in relation to services, § 9.2.3.1, particularly as to the question of when an improvement to land may amount to a surviving economic advantage capable of being returned.

"implicated in another's breach of fiduciary duty or breach of trust."²⁵⁵ Recovery is generally said to be on the basis of one of two classes of liability: that the defendant has "knowingly" assisted in a breach of trust or fiduciary duty²⁵⁶ or has "knowingly" received trust property. A defendant involved in the wrong in either of these two ways becomes subject to the full rigours of personal liability attaching to a constructive trustee of property. If a defendant has not received any trust property, liability can only be under the first class of liability, which need not concern us, having no consequences for innocent recipients of property.²⁵⁷

If a defendant has received trust property, liability rests firmly on that defendant's conduct: he or she must have "knowingly" received the property. Although there is considerable debate as to the requisite degree of knowledge sufficient to justify liability—broadly speaking, between those who consider constructive knowledge and thus carelessness as sufficient and those who consider that actual knowledge, described by some as dishonesty, is required²⁵⁸—whichever view prevails, it is clear that liability under the

²⁵⁵ Finn, *supra* n. 99, 196.

²⁵⁶ See *supra* n. 218, as to whether the involvement need be in a dishonest and fraudulent design, or merely in a breach of duty.

²⁵⁷ The only possible basis for liability for "knowing assistance" is the defendant's involvement in the wrong. Cf. Birks, *supra* n. 16, 334: "The equitable liability for assisting fraud is virtually unintelligible without fault." The requisite degree of involvement in the wrong, however, is the subject of some debate. This debate centres on the degree of knowledge which a defendant must have in order to be caught by equity's liability rule. Authorities range from those requiring actual knowledge in order to establish a sufficient degree of dishonesty (e.g., *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2)* [1962] 2 Ch. 276, 301 per Edmund-Davies L.J.), to those authorities which have considered constructive knowledge ("a negligent failure to inquire") as sufficient (e.g., *Selangor United Rubber Estates Ltd v. Craddock (No. 3)* [1968] 2 All E.R. 1073). In Australia, the position may be midway between these two views. Liability for a "negligent failure to inquire" has been rejected (e.g., *Consul Development Pty Ltd v. D.P.C. Estates Pty Ltd* [1974] 1 N.S.W.L.R. 443; (1975) C.L.R. 373) but there is support for the view that knowledge of the circumstances which would indicate a breach of duty to a reasonable and honest person is sufficient (see *Consul Development Pty Ltd v. D.P.C. Estates Pty Ltd*, and Austin, *supra* n. 218, 234-40).

²⁵⁸ In support of the former view, see, e.g., *Consul Development Pty Ltd v. D.P.C. Estates Pty Ltd* [1974] 1 N.S.W.L.R. 443, 459, per Jacobs P.; in support of the latter, see Finn, *supra* n. 99. Finn considers that an innocent (that is, merely careless) defendant ought not be subjected to the full range of equitable personal remedies and argues that participation in the wrong ought to be the minimum requirement for personal liability arising. This does not preclude the possibility of a proprietary claim to recover traceable assets, as to which see below. If negligence is not considered sufficient to justify imposing the full range of equitable personal remedies against an otherwise innocent defendant, than the question of liability of such a defendant would need to be determined on the same basis as a totally innocent defendant. It will be argued below that this ought to be on a fair outcomes basis. See also Birks, *supra* n. 16, 327-34, for a summary of English authorities in support of each of these views. Birks considers

equitable formulation is not strict. Either actual knowledge or at least some fault is required before the defendant is asked to compensate the plaintiff for the losses incurred as a result of another's wrong. In the words of Burrows:

The controversy raging in the 'knowing receipt' cases ... is whether the standard of liability includes negligence (ie constructive knowledge) as well as dishonesty. ... The possibility of being strictly liable, as at common law, for having received property that was transferred without the equitable owner's knowledge has not been on the agenda.²⁵⁹

Consequently, an innocent defendant, *even if a volunteer*, will be protected from the imposition of personal liability for the full value of money received.²⁶⁰

The approach of equity in these cases is consistent with the paramount concern in cases of spontaneous mistake of protecting innocent defendants from disadvantage,²⁶¹ although in cases where the equitable formulations govern, this protection is absolute. But this appears to preclude the possibility of a fair outcome which restores a plaintiff without disadvantaging the defendant, and unless there exists the possibility of a concurrent common law claim, is inconsistent with the result arrived at in cases where the liability rule applied is strict.²⁶²

Equity's position towards a plaintiff claiming from an innocent defendant may not be as adverse as this would suggest. For the possibility may exist of an equitable tracing claim to assert a proprietary right to property

these equitable authorities to be in "disarray": Birks, *supra* n. 76, 485.

²⁵⁹ Burrows, 150. See also Burrows, *supra* n. 222.

²⁶⁰ Cf. Finn, *supra* n. 99, 211. Such personal liability will either be in the form of an award in damages or an accounting for profits made from the use of the plaintiff's property.

²⁶¹ The point is reiterated by Finn, *supra* n. 99, 209:

One would have thought, as a matter of basic justice to the [defendant], compelling reasons bearing on his or her own conduct would need to be found before that person was to be subjected, potentially, to the full range of personal liabilities that equity can impose on a defaulting fiduciary.

Should the cases move in the direction of excluding liability for the knowing receipt of trust property on the basis of mere negligence, then we can include careless defendants within the category of innocent defendants.

²⁶² In the case of strict liability, this will usually be at common law. Birks, *supra* n. 76, 485, has said in the context of discussing liability as fault-based or strict: "[I]t is hard to see how there can be rational room for a disagreement on this issue between equity and law."

subsisting in the defendant's hands. Tracing claims generally thus need to be considered.

§ 9.3.2.3 Tracing property: proprietary claims

Tracing rules at common law and in equity allow a plaintiff to follow property to which the plaintiff has a legal or equitable right, through a number of transactions and substitutions. If the plaintiff can identify property in the defendant's hands in which the plaintiff's right subsists, he or she can assert a proprietary claim for recovery of it. The plaintiff's claim to the surviving property derives not from the tracing rules themselves, but from the pre-existing legal or equitable right to that property or a previous substitute. To the extent that it is possible to trace property, requiring a defendant to return such property achieves a fair outcome. The defendant in effect is ordered to make "specific restitution" of the property. Such a remedy clearly does not disadvantage a defendant.

Where a plaintiff successfully traces in equity, a proprietary claim will lie even against a defendant who holds such property as an innocent volunteer²⁶³ and is thus protected from personal liability. It must be stressed, however, that the potential for such a proprietary claim is, at best, limited. For although generally speaking it is fair to conclude that equity's tracing rules provide a greater potential for following property than the corresponding rules at common law,²⁶⁴ nonetheless, the possibility of successfully tracing property are still very limited. This is because tracing rules, even in equity, are highly technical and complex and may not necessarily reflect modern day conditions.

There is much to be said for more liberal, less-technical tracing rules.²⁶⁵ As was emphasised in two-party transactions, the receipt of money is essentially about the receipt of economic advantage, and the recovery of that

²⁶³ If the defendant is an innocent purchaser, the right to trace will disappear, the defendant not taking the property received subject to the plaintiff's prior right to the property.

²⁶⁴ See *supra* n. 231. Common law tracing is restricted by the requirement that the plaintiff can show a continuing legal title in identifiable property held by the plaintiff. Even if one can establish such title at the point of receipt, it is far less likely that the property will still be identifiable as surviving in the defendant's hands. *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. 10, demonstrates the point. The plaintiffs in that case successfully traced money to establish that the defendant had *received* the plaintiffs' money, but almost certainly would have been unable to identify any surviving property in the defendant's hands.

²⁶⁵ This should be so both at common law or in equity, it matters not, for there is also much to be said for the fusion of the rules. Cf. the widespread calls for equity's more liberal rules to be available at common law: *supra* n. 231.

economic advantage is justifiable where it has not been dissipated. If this is so, then tracing money should likewise be about tracing the economic advantage which that money represents.

There is some judicial support for a liberalisation of the tracing rules.²⁶⁶ One of the earliest examples of a liberal approach to tracing can be seen in the judgment of Lord Dunedin in *Sinclair v. Brougham*, who spoke of following a "superfluity" into another's hands.²⁶⁷ In the writer's view, such an approach is to be preferred. If the tracing rules are to have any relevance to modern conditions, then they ought to be both a realistic and flexible means of identifying the transfer of an economic advantage from one party to another and from one type of property into another.²⁶⁸ As Finn has concluded:

²⁶⁶ See, for example, the approach of Lord Templeman, in *Lipkin Gorman v. Karpnale* [1991] 3 W.L.R. particularly at 16, who takes a fairly impressionistic approach, but which approach nevertheless appears to lead to quite accurate conclusions in the circumstances. Such an approach may be necessary where complex transactions are at issue. The notion of tracing economic advantage suggests a certain flexibility, perhaps even a "common sense" approach. Contrast this with the still highly technical approach of Lord Goff and the refined distinctions which need to be drawn as a result. See, e.g., Birks, *supra* n. 76, 476-81, and the detailed discussion therein. The arguments can become so complex as to be incomprehensible, to this writer at least; see, e.g., Fitzgerald, B., "Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment" (1994) 13 Tas. Univ. L. Rev. 116. A number of commentators also support such a liberal approach to tracing. See, e.g., Goff & Jones (3rd ed., 1986), 80, who consider that a defendant should be considered to retain what the plaintiff seeks to recover wherever the defendant's assets are "swollen". Cf. 4th ed., 1993, at 98-102. Burrows, 45, points out that the difficulty with this approach is that it does not indicate the specific assets over which the proprietary claim extends. He suggests that perhaps a floating charge over all of the defendant's assets may be one solution. But it need not necessarily follow that more liberal tracing rules for the purpose of allowing a plaintiff to identify a surviving economic advantage need be a proprietary claim. The rights of other parties, such as creditors, still need to be taken into account. It is suggested below that a liberalisation of tracing rules need not necessarily give rise to proprietary rights.

²⁶⁷ See [1914] A.C. 393, 437, and *supra* nn. 88-90 and text thereto.

²⁶⁸ One of the conceptual problems arising as a result of the current tracing rules, with their emphasis on specific property and the ownership thereof, is that where the property is substituted (for example, money is used to buy a car), the potential of a plaintiff to claim against two or more parties for the "return" of the property or its substitutes leads to a "geometric multiplication of the plaintiff's property": Birks, 394. The economic advantage approach avoids this difficulty, as there can only ever be one economic advantage subsisting at the one time, although it may of course have been divided between parties, or increased in value such as where a profitable investment is made. Other claims against parties who no longer have the economic advantage must be based upon some form of wrongdoing, though these claims may take a proprietary form. For example, TP steals \$1000 from P, uses it to buy a car from D₁. TP proceeds to give the car to D₂. The economic advantage stolen from P in these circumstances rests with D₂, and may be recoverable where D₂ still has that economic advantage. Since D₁ has not received any economic advantage, having given consideration for the money, any remedy against D₂ must be based on him or her having notice of the right to the money, so that a *bona fide* purchaser defence cannot be raised. And of course, the liability of TP is not for the return of the economic advantage, but is based on his or her wrong and is one

Given that money provides an economic advantage or benefit to a recipient, the tracing rules ... should focus upon whether and to what extent the recipient retains that advantage or benefit and not upon the destination and/or use of the actual money received. On this view expenditure of the actual money would not of itself result necessarily in the loss of any of the benefit the receipt provided²⁶⁹

One cannot, of course, take an entirely impressionistic approach. Many issues would need to be addressed before tracing economic advantage becomes a workable notion. This discussion does not purport to set out the detail of specific tracing rules. But a liberalisation of the tracing rules will be seen to provide the basis for rationalising or bringing together strict and fault-based personal liability into a coherent approach to resolving three-party transaction problems, consistent with the general orientation of the law to achieve fair outcomes.

§ 9.3.3 Rationalising the Existing Legal Position

Ideally, perhaps, the accumulated jumble of doctrine considered above should be swept aside. One need not go so far, however, in order to attain a coherent legal position which is consistent with fundamental principles relating to the liability of innocent defendants. Three important points need to be made. First, where a defendant is innocent, the paramount concern of any liability rule must be to protect such a defendant from any disadvantage which may flow from imposing liability. In three-party transactions this is as important a concern, and perhaps even more so, as in mistaken transactions. The defendant will have relied on the integrity of his or her independent transaction with the wrongdoer and if completely unaware of the wrong, has no reason to suspect the receipt of the property or to safeguard the position of the plaintiff.²⁷⁰ Secondly, a fair outcome—one which restores, as near as possible, a plaintiff to his or her position as before the third party's wrong, and which does not disadvantage an innocent defendant—may be possible where the defendant has received and still retains an economic advantage which can rightfully be

to compensate P for harm suffered.

²⁶⁹ Finn, *supra* n. 99, 211, fn. 87. Cf. *Scott on Trusts* (4th ed., 1989) paragraph 292.2.

²⁷⁰ Contrast the recipient of a mistaken payment who, once becoming aware of the receipt, would arguably in many cases have reason to suspect the mistake. This would be so in all cases where there is no apparent reason for the payment, such as where a debt is paid twice. A change of position in such circumstances is unlikely to be *bona fide*.

said to belong to the plaintiff. Requiring the return of such economic advantage is not a disadvantage to the defendant. Thirdly, doctrines and rules both at common law and in equity go some way toward recognising these two fundamental points and can be rationalised to achieve fair outcomes, consistently with the position governing two-party mistaken transactions. This last point needs further explanation.

For its part, equity's largely fault-based personal liability rules²⁷¹ emphasise the protection of *innocent* defendants. It seems appropriate that any inquiry as to liability should commence with a determination of whether a defendant was in any way culpably involved in the third party's wrong. Such a starting point does suggest a fundamental difference in attitude to that displayed by advocates of strict liability, such as that championed by Birks under the rubric of unjust enrichment. Such strict liability is *prima facie* triggered by satisfaction of the precondition (irrespective of whether a defendant is innocent or not) that a defendant has received property (a benefit) at the expense of the plaintiff.²⁷² As *Re Diplock* perhaps harshly demonstrates,²⁷³ the danger of such an approach is the potential for onerous burdens to be imposed upon innocent defendants *unless* defences to the liability rules are well-developed and generous.

Conversely, if strict liability is subject to well-developed and generous defences, such liability will achieve a fair outcome if remedies restoring the plaintiff do not disadvantage an innocent defendant. The common law has recognised the need for such defences, specifically accepting a change of position defence which potentially protects a defendant to the extent he or she has innocently dissipated any economic advantage received. Liability is then limited to requiring a defendant to return the economic advantage he or she retains.

Although equity's fault-based personal liability appears to preclude such a fair outcome, it must be recalled that there is always the further possibility of a tracing, proprietary claim. It is at this point that liberal tracing rules become

²⁷¹ The exception being ignored is *Re Diplock* [1948] Ch. 458. In this writer's view, if the suggested approach is accepted, there is probably no meaningful role which that authority can play.

²⁷² A positive answer to this inquiry may trigger *prima facie* liability as "ignorance", on the approach of many theorists, is sufficient to satisfy the unjust element. See *supra* n. 16.

²⁷³ Ironically, the case is a decision in equity, which has generally set itself against strict liability.

important. If the tracing rules focus on following economic advantage, where it is possible to identify the economic advantage the plaintiff lost and which is *surviving* in the defendant's hands, a claim for "specific restitution"²⁷⁴ of that economic advantage is little different to the current strict liability (subject to change of position) at common law. An innocent volunteer may then be liable by either of two paths, each leading to the same result. The volunteer is either liable to return any traceable surviving economic advantage identifiable in his or her hands; or alternatively, the volunteer is liable for the full amount of any economic advantage *received*, less any economic advantage lost or dissipated (change of position). This equates with the surviving economic advantage.²⁷⁵ In either case the defendant is only required to return the identifiable surviving economic advantage to the plaintiff, and any further liability must be on the basis of either some participation in another's wrong, or perhaps negligent conduct. Such a development would be consistent with achieving fair outcomes, as in cases of mistake.

There is one significant difference between these two pathways to recovery.²⁷⁶ Allowing a plaintiff to trace in order to establish a right to surviving economic advantage in a defendant's hands is a proprietary claim. There are difficulties with formulating a proprietary right in such loose terms. The fact that a defendant can be said to retain an economic advantage does not mean it is possible to point to *specific* property which belongs to the plaintiff. If the law were to accept liberal tracing rules which follow economic advantage or wealth, it may not be perceived as necessarily desirable that these liberal tracing rules give rise to an equally liberal proprietary claim, with the consequent advantages of such a claim, such as priority over other creditors. The law may not wish to take such a step and the absence of specific identifiable property may provide the basis for such a choice.²⁷⁷ The traceable

²⁷⁴ The claim is to the effect, you have my economic advantage and I have priority because you are not a *bona fide* purchaser.

²⁷⁵ Contrast Birks, *supra* n. 16, 304. Birks' views are predicated upon the current technical and narrow tracing rules. Interestingly, despite the seemingly different attitude of the common law and equity to the innocent recipient, of the few common law cases which have held innocent volunteers liable, most only allowed recovery of traceable property surviving in defendants' hands, usually retained in bank accounts. See cases cited *supra* n. 235.

²⁷⁶ Another difference between the two pathways to recovery is in relation to the onus of proof: should a plaintiff be required to prove that an economic advantage received is still retained, or should the onus be on the defendant to prove that an economic advantage received has been dissipated? However, there may be little practical difference in the outcomes in either case.

²⁷⁷ There is evidence to suggest that the courts may well be reluctant to extend

economic advantage could thus be held to be only recoverable in a personal claim unless *specific* property can be identified as belonging to a plaintiff.

However, the logic of the cogent property analogy which underpins the notion of the retention of economic advantage does suggest that a plaintiff should be entitled to a proprietary claim against the defendant (and priority in a case of insolvency to recover what could otherwise be considered a windfall in the hands of the creditors). Since no specific property need be identifiable, the proprietary claim could be in the form of a lien over a defendant's assets. The issue is one for the future, though it can only be added that the availability of proprietary claims generally is an issue of great complexity and perhaps one of the most important to be addressed in the future development of Restitution.

Should they emerge, more liberal tracing rules which give an accurate or realistic answer to the question, "has the defendant received something which 'belongs' to the plaintiff?" would further enhance the prospect of being able to restore a plaintiff to his or her previous position via a claim (personal or proprietary) for the value of an economic advantage received and surviving in the defendant's hands. The common law and equitable position could thus be rationalised in the way indicated above. It is suggested, however, that the equitable approach of protecting an innocent defendant, subject to a claim for traceable economic advantage retained, suggests a legal orientation more in tune with the fair outcomes approach, than does the strict liability subject to available defences approach of the common law.

One final point needs to be made. Even if the law does proceed down the path of imposing liability upon an innocent defendant who has received the plaintiff's economic advantage, subject to a generous change of position defence, equity's rules concerned with knowing receipt of trust property and knowing assistance in a breach of fiduciary duty or trust still have a relevant field of operation. These rules impose liability on the basis of involvement in another's wrong and the potential scope of such liability will often be wider than a fair outcome. For example, a defendant who no longer retains an economic advantage received may nonetheless be liable to repay the full value of what he or she knowingly received. In other words, a change of position defence would not be available to reduce the liability of the knowing recipient. The scope of knowing receipt and knowing assistance liability needs to be

proprietary notions to give rise to proprietary rights. See *Re Goldcorp Exchange Ltd* [1994] 2 All E.R. 806, and *supra* n. 92.

clarified. For example, should a negligent recipient of property (that is, one having constructive notice) be subject to the full extent of personal liability that follows from being deemed a constructive trustee of such property? Given the possibility of a fair outcome remedy, even against an entirely innocent defendant, it is arguable that equity's reach in knowing receipt cases ought not extend to negligent defendants, who should be protected, subject, however, to any remedial relief achieving a fair outcome.

CONCLUSION

*All names of good and evil are images; they do not speak out, they only hint. He is a fool who seeks knowledge from them.*¹

Despite its description as an “abstract proposition of justice”,² unjust enrichment is being asked to fulfil a pre-eminent role within the law of Restitution. Unjust enrichment is perceived by many as a means of rationalising past decisions, solving future problems and shaping liability rules, and moreover, it is argued by many to perform such a role in Restitution to the exclusion of other informing ideas or concepts. As such, unjust enrichment becomes the only explanation and means of analysis of the liability rules in Restitution. The vital role assigned to unjust enrichment is highlighted all the more by the perception of Restitution as a “large” subject. Since unjust enrichment is said to shape the very subject-matter of Restitution, its perceived pre-eminence and pervasive reach is said to sustain a large and important subject, the third arm of a tripartite division of the law of obligations, rightfully taking its place alongside contract and tort. It need only be added that if one goes further and considers unjust enrichment to be a cause of action, as in Canada, then that concept is being asked to fulfil an even more demanding role in the law.

In the first part of this thesis, a critical appraisal of attempts to convert unjust enrichment into a workable concept capable of fulfilling the role asked of it concluded that unjust enrichment is not a concept which provides an appropriate analytical tool for all or even most of Restitution. It is not proposed to summarise arguments considered earlier, but the difficulties appear to stem from the very process of reasoning which drives unjust enrichment thinking. A restitutionary response to a given liability rule is said to suggest that the *purpose* of that rule is the reversal of enrichment. Such process of reasoning backwards

¹ Nietzsche, F., *Thus Spake Zarathustra* (Hollingdale, Trans. 1969), 101.

² Goff & Jones, 13.

from remedy can have and has had the consequence of falsely uniting unlike cases in which liability is triggered by very different causative events, simply because of the common restitutionary remedial responses to those events. Even apart from the fact that many so called restitutionary responses are not even measured by a defendant's enrichment (*quantum meruit* is the obvious example), an individual liability rule which principally or perhaps even exclusively gives rise to restitutionary responses need not have a purpose of reversing enrichment. As our discussion of topics such as duress and precontractual liability demonstrated,³ such liability rules may gain their explanatory force from the common causative events triggering a number of related liability rules to which responses other than restitution may give effect to the underlying purposes.

Unlike unjust enrichment reasoning, in seeking a new perspective on Restitution, the four categories identified in this thesis have not been fashioned by a process of working backwards from a particular remedial response in order to unite liability rules according to a common remedial response. Indeed, in each category, a number of remedial responses may follow from the triggering events which give rise to liability. It is the *common causative* events which justify treating particular liability rules together within each category. It is important to remind ourselves of the diversity of the remedial responses to the liability rules in each category.

In the first category of cases (conduct-based liability) the liability rules can be said to expand notions of what amounts to "wrongful", liability-creating conduct beyond the type of conduct encompassed within mainstream contract and tort law. Although some detriment to a plaintiff as a result of the defendant's conduct is a prerequisite for any liability, remedial relief is not limited to returning a plaintiff to his or her *status quo ante*, that is, to compensation for the detriment incurred or transaction avoidance. More extensive remedial rights may arise, so that at times a plaintiff may even receive remedial relief measured by what he or she is reasonably entitled to expect, or even his or her actual (often "contractual") expectations. Of course, if a defendant has received an enrichment which equates with the plaintiff's losses, then restitution will effect a restoration of the *status quo ante*.

In the second category of cases (parties sharing common interests) the liability rules give rise to an obligation to share gains and losses, but such

³ See generally § 4.4.3.

obligation can be effected by a number of remedial responses. Again, if a plaintiff's losses equate with the defendant's benefit, then restitution will be an appropriate remedial response, equalising each party's losses and gains. Alternatively, if only one party has suffered a loss, contribution toward that loss effects a sharing of that loss. In the context of frustration of contracts, traditionally there has existed a reluctance to go beyond restitutionary remedies, but statutory reforms have in some jurisdictions at least accepted an underlying philosophy of loss and gain sharing and provided remedial mechanisms for achieving this.

In the third category of cases (unsolicited interventions) remedial relief is characteristically limited to recompense for the "costs" of a justifiable intervention in the form of expenses incurred and perhaps time and effort expended. Yet even in this category, the causative events giving rise to liability do not result in an exclusive remedial response. For example, in maritime salvage cases, rewards may be awarded, perhaps to encourage what is perceived to be particularly socially useful or necessary conduct.

The fourth, residual category of liability rules in this regard is different. It is the only category in which liability is explicable in terms of and limited by the appropriate remedial response to the liability rules. In other words, the liability rules are largely explicable in terms of their remedial *purpose*, that of achieving fair outcomes which do not leave a defendant at a disadvantage. Although for the most part, this remedial purpose is achieved by restitution or "specific" restitution, it was argued that a description of the rules in terms of unjust enrichment does not accurately capture the subtlety of the fair outcomes orientation of the liability rules.

As this brief summary shows, the liability rules encompassed within the subject of Restitution (either historically or on the basis of wide claims made for unjust enrichment), are largely not explicable in terms of any particular remedial purpose, let alone in terms of a restitutionary purpose. A number of remedial responses may give effect to the underlying purpose or purposes of the rules, and a focus on remedy consequently is not of much assistance in explaining liability. Unlike unjust enrichment theory would suggest, it is not possible to draw a simplistic equation between the liability-creating events and one specific remedial response to them. Consequently, in discussing the four categories of liability rules, this writer has sought to outline more specifically than simply "unjust enrichment" the ideas and principles which may be at work in the law. It is suggested that these ideas and principles provide us with a better means of ordering our law than does the abstraction, unjust

enrichment.⁴ This is particularly so given that the abstraction is given "content" by theories which are little more than restatements of the abstraction. Thus, unjust enrichment becomes "was the defendant enriched at the plaintiff's expense, which enrichment is for some reason unjust?".

Perhaps, ultimately, the "traditional" criticism of unjust enrichment as vague and uncertain and no more than an appeal to individual moral opinion remains as valid today as ever. Can we ever intelligibly seek to identify the underlying ideas and principles at work in given liability rules by describing such rules simply as having a purpose of reversing *unjust* enrichment? In this writer's view, such liability rules become far more intelligible if, for example, one describes them as activated by disproportionate gains and losses arising as a result of unprovided for contingencies affecting parties sharing a common interest; or as activated by a plaintiff's detrimental reliance on the defendant's clearly expressed intention to assume an obligation, albeit one, as it turns out, which does not have contractual force; and so on.

If the liability rules considered in this thesis cannot be simplistically explained in terms of a purpose of reversing unjust enrichment, where does this leave the subject of Restitution, the very name of which reflects the supposedly restitutionary purpose (in the sense of benefit disgorgement) of the liability rules encompassed therein? Of course, the term "restitution" need not necessarily be limited in its meaning to benefit disgorgement. Restoration, specific restitution, and compensation are all notions within the dictionary meaning of the term.⁵ If used so widely, however, it is doubtful whether a subject entitled "Restitution" casts much light on the nature of the subject-matter gathered under its head.⁶ So what are the consequences for the subject of "Restitution" of accepting the burden of the four categories suggested in Part II of this thesis?

Before an attempt is made to answer this question, it is perhaps first appropriate to consider what possible role unjust enrichment could play in the subject-matter encompassed within Restitution, given this writer's rejection of

⁴ In any case, unlike unjust enrichment theory with its claim to exclusivity, the ideas and principles identified within each category do not necessarily represent the only concerns addressed by the cases considered in each category.

⁵ See § 1.3.2.2.

⁶ For example, much of property and tort law could be considered to fall within the scope of such a subject.

the concept as a unifying and exclusive explanatory principle and as an analytical tool dictating our approach to problems in Restitution. Can unjust enrichment usefully serve any other role in our law?

To say that someone has been "unjustly enriched" has an obvious visceral appeal if circumstances are such that a seemingly unearned or undeserved windfall has been received. For example, a person may have built a house on another's land where there is no contractual obligation to pay for such work and no donative intent. The landowner's "unjust enrichment" in such a case may activate or excite legal interest in the matter, or suggest a need to inquire further. But in this sense, unjust enrichment operates no differently as when a serious injury sustained by a person immediately activates us to inquire "Is anyone responsible?". Unjust enrichment does not take us any further, to enable us to determine whether liability in any form should be imposed. In the improvement of another's land example, such liability would depend on factors such as whether the builder acted on the basis of any expectations created or allowed to continue by the landowner; whether the builder was mistaken; whether the landowner acquiesced in such mistake; whether the building is removable; and so on. The liability rules which determine whether any liability is appropriate are far more sophisticated than any inquiry as to whether a defendant was unjustly enriched.

Once our sense of justice is activated to commence more detailed legal inquiry by a seemingly undue benefit, the value of unjust enrichment would appear to have been exhausted.

Unjust enrichment may also arguably serve as a descriptive conclusion after a particular process of reasoning has been finalised, such that it could be said that a defendant would be unjustly enriched *if liability in some form* were not imposed upon him or her. For example, as was noted in Chapter 9, we may well say that if a particular recipient of a mistaken payment is not required to disgorge it, he or she would be unjustly enriched. Such a conclusion activates our sense of justice and gives further weight to a process of legal reasoning which has determined, for example, that the mistake was sufficient to vitiate an intention to transfer the money and that the defendant retains the economic advantage which the money represents. But such reasoning is not dictated or enlightened by the concept of "unjust enrichment" itself. Consequently, even as a description which gives further weight to a conclusion reached by a far more complex process of reasoning, unjust enrichment may not be particularly useful. For such a conclusory label may be equally applicable to a defendant who refuses to either return or pay for the plaintiff's goods; or perhaps even a

contract-breaker if not required to pay damages. When used in this sense, unjust enrichment follows the liability rules and does not explain them; and further, a conclusion that a defendant is unjustly enriched could be said to follow such a diverse range of liability rules that we could say much of our law is about unjust enrichment; or that, consequently, none of it is.

For this reason, there does not appear to be any advantage in persisting in the use of the language of unjust enrichment as an explanation of liability rules or even as a description of conclusions reached after the applications of liability rules. There is a further reason for avoiding the language of unjust enrichment as an explanation or description of liability rules. Since much of unjust enrichment theory, in England at least, is gaining the status of orthodoxy, the language of unjust enrichment may somehow always suggest an approach which seeks to straitjacket Restitution within the confines of the very specific processes of analysis such theory encompasses. In other words, "unjust enrichment" may lead, for example, to Birks' "phases of inquiry" dictating our analysis of problems in Restitution.

Let us return, then, to the issue of how one conceives the "large" subject of Restitution (as currently perceived), if one accepts the four categories and their suggested burden outlined in Part II and accepts that unjust enrichment has no useful explanatory role to play.

The historical sources of Restitution are diverse and address a wide variety of legal problems. The only real link between those diverse liability rules, it was suggested, is the gap-filling and ameliorative functions such liability rules performed and still perform. Both the common law and equitable liability rules now claimed for Restitution originated much like the rules and doctrines of equity as a whole. In seeking to reconsider liability rules claimed for unjust enrichment from a new perspective, this writer has allowed the widest claims as to the reach of unjust enrichment to set the agenda of the liability rules and doctrines to be considered. Consequently, some equitable doctrines have been considered in this thesis.

If this writer's views are correct, liability rules in Restitution other than those of equitable origin have performed ameliorative and gap-filling functions, much like equity as a whole. This is not intended to suggest that equity or Restitution can be seen as merely "appendices or glosses to different parts of the common law".⁷ Instead, each addresses substantive problems in

⁷ Beatson, 246

our law in often unique and interesting ways. Given their common ameliorative origins, however, equity and the non-equitable parts of Restitution may be seen to share considerable common ground.

It has been said that one of the challenges facing equity lawyers is "to explore more systematically the unities and dissonances in equity's doctrines".⁸ This writer has attempted some such exploration of the liability rules in Restitution. Those equitable doctrines considered in this thesis can be fitted into the four categories outlined above, but this leaves unaddressed the issue of how other equitable doctrines not considered in this thesis relate to the four suggested categories. Perhaps much of equity conforms with the broad concerns addressed by each of the categories. Alternatively, equitable doctrines may also address other concerns altogether, concerns not specifically addressed by the four suggested categories. Certainly, there is much work to be done on the inter-relationship of the liability rules in equity and Restitution and such work offers considerable challenges for the future.⁹

In this writer's view, perhaps the best way forward is to conceive of Restitution as a much smaller subject, encompassing essentially category four-type cases (that is, in which liability is imposed on recipients despite their being "innocent"). Such a subject of Restitution would be largely concerned with the restoration of plaintiffs, usually by means of restoration of their "property" in a manner which achieves fair outcomes. This, of course, leaves three outstanding categories without a "home". It is proposed to consider some of the options for each of these categories by outlining some of the issues which would need to be addressed in the future. Each category raises very distinct issues, and in this writer's view, the best way forward is to accentuate the very differences between each of the four categories, in order to allow for the unifying and organising ideas within each to be more fully explored and developed. The ideas developed in this thesis are merely a starting point for a new conceptualisation of the law of Restitution. It is time for a reconsideration of liability rules which previously either were treated together with unlike rules

⁸ Finn, P., "Mr. Beatson's 'Unfinished Business'" Paper delivered to the Restitution Group, Society of Public Law Teachers Conference, Aberdeen, (1991), at 8

⁹ For an attempt to commence the task of exploring the inter-relationship of equity and Restitution, albeit from an unjust enrichment perspective, see Beatson, Chp. 9, "Unfinished Business: Integrating Equity". For a reply, see Finn, *ibid.*

or separately from alike rules because of historical or other divisions in the law.¹⁰ Let us consider each category in turn.

Category (1): conduct-based liability. Perhaps the most significant feature of the liability rules considered in this category is their affinity with contract and tort. The conceptual development of each sub-category within this category (contract-like and tort-like liability) would seem to be closely tied to the essential concerns of contract and tort, respectively. The obvious question which needs to be addressed is the exact nature of the relationship of contract-like and tort-like liability rules with liability rules in contract and tort respectively. One possible way forward would be to expand the existing boundaries of contract and tort in order to incorporate the cases of contract-like and tort-like liability. For example, Stoljar's less formal, more inclusive views of contract could readily encompass much of what now falls outside of contract, but is clearly contract-like.¹¹ An expansive view of contract or tort, however, would not necessarily resolve the difficulties in categorising cases near the newly drawn boundaries.

Alternatively, one need not necessarily greatly expand contract and tort. Perhaps one can see individual doctrines and rules giving rise to, say, contract-like liability, as "satellites" orbiting the core ideas and concerns of contract. Such a conception would emphasise the obvious link between contract-like liability and contract, but is sufficiently flexible to avoid the difficulties of drawing the boundaries of any expanded categories of contract (and tort). Liability rules could be said to "orbit" a central body of core concerns, even if that central body is itself defined formulistically. Such a conception also recognises that some liability rules are closer to a central body than others; and that further, some "orbiting" liability rules may come under the influence of several central bodies (for example, both contract and tort).

Category (2): common interests and the consequences of unprovided for

¹⁰ For example, the distinction between common law and equity has meant that liability rules whose essential burden is similar have historically been treated separately. Similarly, the distinction between money had and received and claims for services in *quantum meruit* has precluded alike cases being treated together. Conversely, treating all claims for the reasonable value of services as one, purely because of the historical antecedents of the *quantum meruit* common count, has meant that very different types of claims have been treated together. For example, a claim for reasonable value of services may be contractual, contract-like, or arise on the basis of an entirely non-consensual transaction such as a necessitous intervention. More recently, the false unity imposed on the basis of unjust enrichment has led to unlike cases being treated together.

¹¹ See § 6.2.4.

contingencies. Liability rules considered here do not draw their justification from ideas forming a central part of any established category of law and consequently cannot draw on such other established categories of law for their conceptual development. Rather than perceive of these liability rules as a separate and distinct category of law, however, it may perhaps be best to emphasise the underlying principle of liability, the principle of just sharing, as one which manifests itself in a wide variety of contexts. Clearly, some principles informing our law do arise in many different contexts.¹² The principle of just sharing can thus be seen as ameliorating the strict outcomes dictated by other rules applicable in very different contexts.

The underlying notions justifying the principle of just sharing can be clearly articulated and provide a cogent philosophical basis for liability. Parties sharing a community of interest owe a duty to share gains and losses caused by unprovided for contingencies, which gain and losses as between strangers would be left to lie where they fall. Of course, what amounts to a sufficient community of interest to give rise to the operation of the principle of just sharing is the preliminary inquiry for the potential operation of the principle, perhaps even in response to new problems. Applications of a principle of sharing in the context of domestic property disputes illustrates that the principle, though an ancient one, may well be utilised in new and imaginative ways.

Category (3): allocating the costs of justifiable conduct. This category is small and perhaps will always only be of marginal significance, offering solutions to only a narrow and exceptional class of case. Yet unlike the previous category, the liability rules here do not appear so much ameliorative, as instead filling a very specific and distinct gap in our law.¹³ Conceptually, this category of cases is very distinct from other established categories of law, though it has not been recognised at common law (unlike in civil law jurisdictions) as forming part of a distinct, coherent doctrine or principle. Perhaps in seeking a rubric which can encompass cases in this category, resort may be had to civil law notions of *negotiorum gestio*, at least in relation to cases concerning the

¹² It is important to note, however, that this category of cases may in any case be fairly small, and only operates if no conduct, in breach of a tort or tort-like duty, or amounting to a contractual or contract-like assumption of risk, does not justify a greater right to have losses or gains shifted, rather than merely shared.

¹³ And this is despite the fact that many of the liability rules within this category are actually "mainstream" rules utilised in new ways. For example, agency rules have been expanded to impose liability even on strangers on the basis of "agency of necessity".

altruistic intervener. The essence of *negotiorum gestio* is the taking over or management of another's affairs without his or her consent, albeit which actions are justifiable only within very narrow confines. Although the common law has traditionally denied the existence of any general doctrine of *negotiorum gestio*, there exist sufficient individual instances of its application arguably to justify acceptance of a general doctrine in some such terms.

Negotiorum gestio, however, does not readily extend to cover cases of intervention in another's affairs by self-serving interveners. The self-serving intervener, acting from a need to protect himself or herself from a defendant's failure to fulfil a duty, must be dealt with in conceptually distinct ways to the altruistic intervener. The idea which links the two types of cases is the fact that the costs of the intervention are allocated to defendants because social policy concerns warrant such allocation. Social policy concerns allow a defendant's actual choices in the matter to be overridden. Perhaps the two sub-categories of claims could thus be brought together under a distinct rubric of "justifiable sacrifice", highlighting the deliberate incursion of costs by a plaintiff, for reasons which social policy deems to be justifiable and appropriately borne by the defendant.

Category (4): innocent recipients. Finally, the last group of cases, large and at the core of Restitution, may perhaps best continue to be considered under some such heading. Restitution here, however, is meant in the sense of restoration of a plaintiff to a previous position in a manner which achieves a fair outcome, characteristically by means of "specific" restitution or a remedy which effects a form of specific restitution. Liability in these cases is not dependent upon establishing any reason for a defendant to bear in or share in any losses incurred by the plaintiff (hence, "innocent" defendants). Typically, the plaintiff is simply seeking restoration of his or her "property" which the defendant still retains and was not intended or is not now intended to have. Consequently, this category may be seen as a residual source of liability, able to be resorted to even as against defendants who are not innocent as such, but where a plaintiff does not seek to make anything of the defendant's conduct, for example, but merely seeks restoration of his or her "property".

This category shares considerable proximity with both property law and those parts of tort concerned with the protection of property. Arguably, much of the law in this area expands common law and equitable notions of what is a plaintiff's "property", that is, what can be said to "belong" to a plaintiff, specifically in many cases by expanding our ideas of what may negate or vitiate an intention to divulge oneself of property. The issues are raised most

sharply in relation to money given its status as personal property which is also a means of exchange. Claims for money, irrespective of the basis for such claims, must of necessity be in a personal form for an equivalent sum. This will be so even where the basis of liability is distinctly akin to a claim for the recovery of one's property. The proximity of this category to property law notions is borne out by the considerable difficulties surrounding the issue of the potential availability of proprietary remedies. The question of the inter-relationship of property and Restitution is one which will pose considerable challenges for the future development of the law of Restitution.

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