

Unjust Enrichment and De Facto Relationships

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INTRODUCTION

In the not too distant past, it was anomalous to talk of rights arising out of de facto marriages. It was generally thought that by choosing not to formalise their relationship, couples who were married de facto had chosen to distance themselves from any possible role the law could play in their relationship or its future dissolution.

The issues which will be addressed in this article arise out of two important facts. The first is that de facto marriage has become more socially acceptable, and that "the stigma of ... 'living in sin' appears to have faded, if not disappeared entirely."¹ The second is the present unwillingness of the legislature in New Zealand to reflect this change in attitudes. When the Matrimonial Property Bill was introduced into Parliament in October 1975, clause 49 provided for its extension to de facto marriages where the court was satisfied that the "parties have lived together as husband and wife for a period of not less than two years preceding the date of application".² This clause was removed before the Bill was signed into law.

The result of the absence of any relevant legislation is to leave common law and equity as the only sources of property rights for de facto partners.³

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¹ Harvey, "The Property Rights of De Facto Partners: Some Proposals for Legislative Reform" [1989] NZLJ 167.

² See Angelo and Atkin, "The Matrimonial Property Bill 1975 — Some Further Thoughts" [1976] NZLJ 424, 427.

³ On the subject of statutory reform, see Angelo and Atkin, *ibid*; Harvey, *supra* at note 1; *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988). Interestingly, before most of the cases which will be discussed in this paper had been decided, Angelo and Atkin

In *Hayward v Giordani Cooke J* stated:⁴

[A] function of the Courts must be to develop common law and equity so as to reflect the reasonable dictates of social facts, not to frustrate them.

While piecemeal solutions have been developed by courts in the common law jurisdictions, there is, as yet, no principled basis for these. In the writer's opinion, "socially just results in accordance with legal principle"⁵ can best be provided through the principles of unjust enrichment. Were counsel to make submissions based on this cause of action to courts in New Zealand, or indeed England or Australia, it is highly unlikely that their client's cause would be furthered; unjust enrichment is not as yet an accepted cause of action in these jurisdictions. It will be unhesitatingly advocated here, since academic writing is less constrained by the state of the law.

The first two parts of this article review the law, looking at the general history of unjust enrichment and the present common law. Unjust enrichment will then be applied to the issues arising out of failed domestic relationships; the probanda for a successful claim will be identified and possible remedies explored. Finally, a comparative analysis of the possible causes of action in this area will show why unjust enrichment is the most suitable.

The partners in a de facto marriage will be referred to as "A" and "B" throughout.⁶

THE HISTORICAL BASIS OF UNJUST ENRICHMENT

With each extension of existing principles, not just in law but in many different fields, there is a danger that while each movement forward is fully consistent with the principles as they stood before that progression, the end result is so far removed from the original concept that the two may not logically be read together. To eliminate that risk, and thereby ensure that development is logical and that a cohesive body of principle is maintained, it is essential to take into account not only the instant "state of the art" but also its origins. It is inadvisable, for example, to seek to further develop the law of negligence without carefully considering *Donoghue v Stevenson*,⁷ even though it is not the most recent statement of the law.

Thus the first step in advancing unjust enrichment is to trace its origins. It is almost a reflex action to begin with an analysis of *Moses v Macferlan*.⁸ Lord Mansfield's famous judgment in that case heralded the entry of unjust enrichment into the common law. But this was certainly not the birth of the concept: Lord Mansfield

already believed that because of "current developments in the common law . . . in the field of constructive trust it is at least moot whether the type of protection extended to the de facto situation in the Bill is necessary" (at 427).

⁴ [1983] NZLR 140, 148 (CA).

⁵ *Gillies v Keogh* [1989] 2 NZLR 327, 340.

⁶ In principle there is no reason why the submissions made in this paper should not apply equally to same sex relationships.

⁷ [1932] AC 562.

⁸ (1760) 2 Burr 1005; 97 ER 676.

himself acknowledged the influence of Roman law on his decision.⁹

Justinian's *Institutes* divided the law of obligations into four categories: contract, quasi-contract, tort, and quasi-tort.¹⁰ Quasi-contract comprised all those obligations which arose from acts which were neither subject to a contract nor proscribed by the law. The justification for the existence of such a category can be found in Pomponius' notion of *cum alterius detrimento et injuria*: "[i]t is fair by the law of nature that nobody should be made richer through loss and wrong to another".¹¹ The result of the combination of these two ideas is a principle of law under which even though X commits no prohibited act and has not voluntarily assumed any liability to Y, she may be compelled to account for a benefit received by her solely because such enrichment has resulted in loss and injustice to Y.

In *Moses*, the plaintiff (Moses) had endorsed to the defendant (Macferlan) four promissory notes upon assurances from Macferlan that Moses was in no way liable for non-payment on these notes by the promisor (Jacob). When Jacob failed to pay, Macferlan reneged on his promise and received judgment in a Court of Conscience against Moses for the amount of the notes. Moses paid the money, but promptly issued legal proceedings to recover it. Delivering the unanimous opinion of the Court, Lord Mansfield held that Macferlan was "obliged by the ties of the natural justice and equity to refund the money."¹² His Lordship held that where a defendant is so obliged:¹³

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).

Lord Mansfield was here clearly incorporating the aforementioned principles of Roman law into the common law.¹⁴

The precedent provided by Lord Mansfield remained largely dormant until its revival in the Court of Chancery in the early part of the 20th century in cases such as *Jacobs v Morris*¹⁵ and *Bradford Corp v Ferrand*.¹⁶ This revival was short-lived. In *Baylis v Bishop of London*, the trustees of an estate sought to recover tithes which had been paid in error to the defendant over a six-year period. The Court of Appeal held for the plaintiff, disregarding the defendant's argument that it was inequitable to require repayment. Referring to the line of cases supporting the

⁹ Ibid 1008; 678. His Lordship referred to the Roman law notion of *quasi ex contractu*.

¹⁰ *An Introduction to the Law of Restitution* (1985) 30; "English and Roman Learning in *Moses v Macferlan*" [1984] CLP 1.

¹¹ Ibid, 23. Birks points out that there are two alternative statements by Pomponius. One omits the words "*et injuria*" (and wrong), thereby focussing solely on loss to the plaintiff, not on any injustice. It is the expression in the text which most completely foreshadows the modern concept of unjust enrichment.

¹² Supra at note 8, at 1012; 681.

¹³ Ibid, 1008; 678.

¹⁴ *Moses* was actually over-ruled twenty years later by *Marriot v Hampton* (1797) 7 TR 269; 101 ER 969: "[a]fter a recovery by process by law, there must be an end of litigation" (per Lord Kenyon ChJ). The principles of *Moses* remained intact; Lord Kenyon merely precluded their application to its specific facts.

¹⁵ [1901] 1 Ch 261, 268 per Farwell J.

¹⁶ [1902] 2 Ch 655, 622 per Farwell J.

defendant's claim, including *Moses*, Hamilton LJ remarked:¹⁷

[W]e are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice as between man and man".

One year later, the same judge, now sitting on the House of Lords as Lord Sumner, emphasised the point:¹⁸

There is now no ground left for suggesting as a recognizable "equity" the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer.

In the same case, Lord Haldane LC held that quasi-contract was not a third cause of action, but rather part of contract.¹⁹

By 1943, the House of Lords had clearly changed its view, and the scales tipped back in favour of Lord Mansfield. In *Fibrosa Spolka Akcyjina v Fairbairn Lawson Combe Barbour Ltd*, the appellant entered into a contract with the respondent for supply of machinery. The appellant had made an initial payment but the outbreak of World War Two frustrated the contract. The respondent refused to refund the payment, claiming that a considerable amount of work had been done on the machinery. The House of Lords found that appellant could recover the payment because of a total failure of consideration. Near the beginning of his judgment, Lord Wright departed from Lord Sumner's words in *Sinclair*.²⁰

It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.

His Lordship also explicitly overruled Lord Haldane LC's finding in *Sinclair* that quasi-contract is not a distinct third category.²¹

Since the reinstatement of the concept of unjust enrichment into the common law, judges and academics have struggled to prescribe its precise role. Discussion has encompassed issues ranging from a correct name for the action,²² to whether it may be a cause of action on its own, and if so what the probanda for a successful claim are. The last two issues will be analysed later.

THE PRESENT REMEDIES

Except in Canada, the present common law device used to confer rights when de facto marriages fail is the law of constructive trusts, albeit based on varying principles. There is a significant amount of recent case-law on constructive trusts in

¹⁷ [1913] 1 Ch 127, 140. Even Farwell LJ, who had been promoted to the Court of Appeal, severely limited the support he had expressed for *Moses* while sitting on the High Court in *Jacobs*, supra at note 15, and *Ferrand*, *ibid*.

¹⁸ *Sinclair v Brougham* [1914] AC 398, 456 (HL).

¹⁹ Birks' disagreement is colourful: "Darwin would have discovered nothing if he had been so insensitive to observable facts". (Supra at note 10, at 38).

²⁰ [1943] AC 32, 61.

²¹ *Ibid*.

²² See for example Samek, "Unjust Enrichment, Quasi-Contract and Restitution" (1969) 47 Can B Rev 1, 19, who suggests that "unjustifiable enrichment" is more appropriate nomenclature.

general and also their application to this area. It is not proposed here to deal separately with every relevant case, but rather to identify the law as manifested by the leading cases in different jurisdictions.²³

England

English courts are primarily concerned with whether the two parties had a common intention to share in the ownership of the property in question. Three House of Lords cases form the basis of the law in England: *Pettit v Pettit*,²⁴ *Gissing v Gissing*,²⁵ and *Lloyds Bank plc v Rossett*.²⁶ All three cases concern claims between married couples, but the principles are also relevant to de facto marriages.

In *Pettit v Pettit*, B claimed a share in the former matrimonial home, which was registered in A's name (he had no statutory right to an interest in the property). This claim failed because there had been no prior agreement, their Lordships holding that:²⁷

[B]eneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition.

Lord Diplock agreed with his brethren that B's claim should fail, but dissented insofar as he held that where the parties had not contemplated the specific issue, the courts could impute a constructive common intention "which is that which in the court's opinion would have been formed by reasonable spouses."²⁸

In *Gissing v Gissing* the plaintiff also failed. Lord Diplock acknowledged that because his opinion in *Pettit* had been a minority one, constructive common intention formed no part of the law.²⁹ He held that a "resulting, implied or constructive trust" (no distinction was made) may exist only:³⁰

whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

Lord Diplock's judgment in *Gissing* is widely seen as the basis of constructive trust law in this area in all jurisdictions, although in England it has been applied somewhat more conservatively than in other jurisdictions, and in the light of his Lordship's dissent in *Pettit*, probably more conservatively than he would have liked.

The House of Lord's view on this matter was confirmed by the third case, *Lloyd's*

²³ For a more thorough summary of the cases see Peart, "A Comparative View of Property Rights in De Facto Relationships: Are We All Driving in the Same Direction?" (1989) 7 Otago LR 100; Dervan, "Quasi-Matrimonial Property Division and Judicial Alchemy" (1984) 5 AULR 1.

²⁴ [1970] AC 777.

²⁵ [1971] AC 886.

²⁶ [1990] 1 All ER 1111.

²⁷ Supra at note 24, at 813 per Lord Upjohn; see also Lord Morris of Borth-y-Gest 804, Lord Hodson 810.

²⁸ Ibid, 823.

²⁹ Supra at note 25, at 904.

³⁰ Ibid, 905.

Bank plc v Rosset. Lord Bridge summarised the circumstances which must exist if a constructive trust is to be found:³¹

1. actual agreement and an act in reliance (which may also give rise to an estoppel); *or*
2. conduct which in itself may give rise to the inference of a common intention.

His Lordship remarked that where the plaintiff relied on conduct:³²

direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference... But, as I read the authorities, it is at least extremely doubtful whether anything less will do.

Among the authorities to which Lord Bridge was referring were two Court of Appeal cases: *Eves v Eves*³³ and *Grant v Edwards*.³⁴ Both were cases of actual agreement and an act in reliance, with representations in each by B that A's name would have been placed on the title but for particular circumstances.³⁵ This was an acknowledgement that A had an interest in the property.³⁶ Such a common intention, to give rise to an interest, needed to be supported only by an act in reliance; conduct which would in itself point to a common intention was unnecessary.

In neither case had the plaintiff made contributions to the purchase price. The plaintiff in *Eves* had made substantial renovations to the house and cared for the children, and in *Grant* A had contributed substantially to general household expenses. Lord Bridge made it quite clear that in both cases the plaintiff's contribution:³⁷

fell far short of such conduct as would by itself have supported the claim in the absence of an express representation by the male partner that she was to have such an interest.

This suggests that in England domestic services in themselves are incapable of giving rise to an interest unless they are acts done in reliance on an agreement between the parties. In *Burns v Burns*, there was no such agreement and the plaintiff's claim based on performance of domestic tasks failed.³⁸ It is apparently the view of English courts that such services are a labour of love, and are insufficient to entitle a claimant to an interest in property.³⁹ It is worthwhile to note that in *Maharaj*

³¹ Supra at note 26, at 1118-1119.

³² Ibid, 1119.

³³ [1975] 3 All ER 768.

³⁴ [1986] Ch 638.

³⁵ In *Eves*, B stated that A's name could not go on the title because she was under 21 years of age. In *Grant*, B advised that registration of the property under the parties' joint names could prejudice A in matrimonial property proceedings pending against her previous spouse.

³⁶ *Eves*, supra at note 33, at 772 per Lord Denning MR; 773 per Browne LJ, *Grant*, supra at note 34, at 644 per Nourse LJ, 653 per Mustill LJ, 655 per Sir Nicholas Browne-Wilkinson V-C.

³⁷ Supra at note 26, at 1119.

³⁸ [1984] Ch 317.

³⁹ The wielding by A of a 14 pound sledgehammer in *Eves* to renovate the front garden has attracted a great deal of judicial attention: *Eves*, supra at note 33, at 774; *Grant* supra at note 34, at 648; and has even found its way into the title of a case note on this subject: Ingleby, "Sledgehammer Solutions in Non-Marital Cohabitation" [1984] CLJ 227 (especially at 230).

v *Chand*, Sir Robin Cooke, sitting on the Judicial Committee of the Privy Council, commented:⁴⁰

[I]n the absence of evidence to the contrary, the right inference is that the claimant acted in the belief that she (or he) would have an interest in the house and not merely out of love and affection.

While this may seem at first to be a softening of the “labour of love” attitude, two important points must be noted. First, A was in this case the defendant in an action by B to have her removed from the house. She successfully advanced an estoppel defence, but was not seeking a proprietary interest,⁴¹ although his Honour did opine obiter that but for a Fijian statute, A “could have made out an entitlement to an equitable interest in the land.”⁴² It is clear from the judgment in *Rosset* that *Maharaj* did not alter the English position.

In summary, the focus of the English inquiry is on direct contribution to the property, which does not include domestic services unless there is agreement between the parties.⁴³ It should be noted that none of the English cases consider the relevance of unjust enrichment.

Australia

In *Muschinski v Dodds*⁴⁴ A and B registered a property paid for in full by A in their joint names, as tenants in common in equal shares. This was done pursuant to an agreement that B would subsequently make significant improvements to the property, funding these solely from his own money. The relationship dissolved when only some of the improvements had been completed, and A claimed that B held his half share on a resulting or constructive trust for her because he had not performed his part of the agreement. The High Court held unanimously that the presumption of a resulting trust which arose from A’s provision of the purchase price was rebutted by the agreement of the parties.⁴⁵

The final outcome was a ruling that each party was entitled to his or her contribution and that the residue was for both parties in equal shares, but only two judges, Mason and Deane JJ, reached this verdict on the basis of a constructive trust. Gibbs CJ held that the contract made the appellant and respondent jointly and severally liable for the price.⁴⁶

⁴⁰ [1986] AC 898, 907.

⁴¹ *Ibid.*, 908.

⁴² *Ibid.*, 907.

⁴³ Lord Denning, in cases not discussed in the text of this paper, has hinted at a wider test describing a constructive trust as “a trust imposed by law wherever justice and good conscience require it”: *Hussey v Palmer* [1972] 1 WLR 1286, 1289–1290. Not surprisingly, there has been widespread criticism of this approach: see Peart, *supra* at note 23, at 111. Peart does point out (at n 82) that Cooke P is “a notable absentee from the list of critics”.

⁴⁴ (1985) 160 CLR 583.

⁴⁵ *Ibid.*, 593 per Gibbs CJ; 607 per Brennan J; 612 per Deane J.

⁴⁶ *Ibid.*, 598. His Honour concurred (at 595) with the adoption by Glass and Samuels JJA in the New South Wales Court of Appeal in *Allen v Synder* [1977] 2 NSWLR 685 of the conservative English approach, and on that basis held that no constructive trust could be found on the facts before him, there being nothing to refute the express agreement originally made between A and B. His Honour

Brennan and Dawson JJ held in dissent that a proprietary remedy was inappropriate for what was essentially an in personam claim, and thus Deane J's judgment (in which Mason J concurred) was the only one to find for A on the basis of a constructive trust. Deane J distanced himself from any excessively broad formulation of constructive trust principles:⁴⁷

The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice . . .

He preferred instead:⁴⁸

the rule of ordered principle which is of the essence of any coherent system of rational law.

Deane J imposed a constructive trust because of:⁴⁹

the need to call in aid the principle of equity applicable to preclude the *unconscionable* assertion of legal rights in the particular class of case.

The "particular class of case" contemplated by Deane J was joint endeavours, extended to cover this domestic fact situation. As will be seen later in this article, Deane J's ratio decidendi was strikingly similar to an unjust enrichment analysis based on a failure of conditions. In fact his Honour conceded obiter that unjust enrichment may be the rationale behind the law in this area and that it may become "an established principle constituting the basis of decision of past and future cases," although he acknowledged that this was not yet the case in Australian law.⁵⁰

Because of the diversity of judicial opinion and the fact that *Muschinski* could easily be distinguished on its particular facts, the law in Australia remained somewhat unsettled until the High Court's next major decision in this area, *Baumgartner v Baumgartner*.⁵¹ A and B lived together for a period of approximately four years. They pooled their earnings and from that fund all expenses were paid, including mortgage payments on a unit registered in B's name (which was sold during the relationship) and other property subsequently bought, also in B's sole name. When A left the relationship, she sought a half interest in the second property.

The Court held unanimously for A. Mason CJ and Wilson and Deane JJ reinforced Deane J's judgment in *Muschinski*, holding that in this "joint relationship", B's assertion that he was the sole owner of the property to the exclusion of any interest on A's part:⁵²

amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of [A].

Gauldron and Toohey JJ substantially concurred, but the latter made some

expressly preferred this to the wider interpretation of common intention used by Cooke P in *Hayward v Giordani*, supra at note 4: see text, infra.

⁴⁷ Supra at note 45, at 615.

⁴⁸ Ibid, 616.

⁴⁹ Ibid, 622 (emphasis added).

⁵⁰ Ibid, 617.

⁵¹ (1987) 164 CLR 137.

⁵² Ibid, 149.

interesting comments about the applicability of unjust enrichment:⁵³

The notion of unjust enrichment...is as much at ease with the authorities and is capable of ready and certain application as is the notion of unconscionable conduct.

In summary, the Australians, like the English, are conservative on the subject of common intention, but this is tempered by the idea that it may be unconscionable for one party to a failed relationship to retain full ownership of the products of that relationship. A's contribution to the mortgage payments in *Baumgartner* was relatively direct, and it is difficult to foresee how this notion of unconscionability would be applied if the only contribution was domestic services. However, the recognition of unjust enrichment principles in Australia suggests that domestic services may be treated more favourably than in England.

New Zealand

*Hayward v Giordani*⁵⁴ was the New Zealand Court of Appeal's first major statement on constructive trusts and domestic relationships. A had died leaving an invalid will devising the house in question to B. Under her valid will, the house went to an old friend. B sought a declaration that there was a resulting or constructive trust in his favour, based on his contribution, in labour and monetary resources, to the property. Cooke P, Richardson and McMullin JJ all found a common intention to share the property giving rise to a trust in B's favour as to a half share. The case is notable, however, not for the rationes decidendi of the judges but rather for their dicta relating to constructive trusts. Cooke P held that it would be only a small progression from *Gissing* to impose a constructive trust:⁵⁵

flowing from the joint efforts of the parties and reasonable expectations, even if they had not applied their minds to the precise question.

Richardson J agreed that there should be room for a constructive trust even where there was no express common intention,⁵⁶ while McMullin J outlined the arguments for and against the imposition of a constructive trust where common intention was absent, and concluded that there was no compelling reason against it.⁵⁷

These principles were tested shortly afterwards in *Pasi v Kamana*.⁵⁸ This time there was no express common intention and the plaintiff relied on inferred common intention.

Cooke P reviewed the authorities in different jurisdictions and came to the conclusion that "we are all driving in the same direction".⁵⁹ His Honour's summary

⁵³ Ibid, 153.

⁵⁴ Supra at note 4.

⁵⁵ Ibid, 148.

⁵⁶ Ibid, 149.

⁵⁷ Ibid, 153.

⁵⁸ For a High Court interpretation of the dicta in *Hayward* prior to *Pasi* see *Fitness v Berridge* (1986) 4 NZFLR 243, per Barker J.

⁵⁹ [1986] 1 NZLR 603, 605. The purpose of Peart's article, supra at note 23, is to assess the accuracy of the President's statement.

of this common direction was phrased in reliance language:⁶⁰

One way of putting the test is to ask 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.

McMullin J was less sure about the parameters of the test, but hinted that equitable principles somewhat more generous than the English approach could be invoked in New Zealand to impose a constructive trust.⁶¹ In this case, however, the observations remained undeveloped, since A's contribution was clearly insufficient to warrant a proprietary interest.

Only in *Oliver v Bradley*⁶² did the New Zealand position become clear. A's income had been used for domestic expenses and B's substantially greater income covered the outgoings on the property, which was registered in A's name (she had paid the deposit). These outgoings included mortgage payments. B subsequently sought an interest in the property under either a constructive trust or the Domestic Actions Act 1975 (the parties had been engaged). It was accepted that the result would be the same under each head of action.

Cooke P echoed the "reasonable person in the plaintiff's shoes" test which he had coined in *Pasi*, but this time the principle formed part of the ratio decidendi.⁶³ The contributions made by B were so intrinsically linked with the property that the same result would have been reached even under the conservative English test. Cooke P made it clear, however, that he took a wider view of contributions than his English colleagues:⁶⁴

Contributions may include housekeeping or looking after children, if the other party has been enabled to earn or acquire assets. In principle I would not exclude anything that has formed part of the consortium provided by one or other partner.

The Court found unanimously in B's favour, and awarded him a 70% share in the proceeds of the sale of the house.

In another Court of Appeal decision, *Gillies v Keogh*, B sought a 40% share in the net equity of a property registered in A's sole name on the ground that monies from a joint account had been used on outgoings for the property. Cooke P reiterated his previous opinions regarding the basis of the constructive trust action:⁶⁵

[R]easonable expectations in the light of the conduct of the parties are at the heart of the matter.

Discussing *Attorney General of Hong Kong v Humphreys Estate (Queens Gardens) Ltd*,⁶⁶ in which it was held that the plaintiff had not encouraged a belief in the defendant that a commercial property contract would be executed and was therefore not estopped from failing to execute the contract, the President identified

⁶⁰ Ibid.

⁶¹ Ibid, 607.

⁶² [1987] 1 NZLR 586 (CA).

⁶³ Ibid, 589.

⁶⁴ Ibid, 590.

⁶⁵ Supra at note 5, at 331.

⁶⁶ [1987] AC 114 (PC).

a general principle asserting the unfairness or injustice of resiling from underlying assumptions that have been acted upon.⁶⁷

On the facts of the case, his Honour found for A as she had expressly represented to B throughout the relationship that she regarded the house to be hers.

Richardson J was more cautious about a broad test based on unfairness, preferring a two step test. The plaintiff had first to show that he had made a direct or indirect contribution to the property which he understood would “naturally result in an interest in the property”. If he succeeded then:⁶⁸

I would be inclined to answer in terms of the well settled principles of estoppel which preclude the legal owner from denying the existence of an equitable interest in the property.

By means of this approach, his Honour also found for the defendant, as did Casey and Bisson JJ.

Two High Court decisions subsequent to *Gillies* are worthy of note. In *Partridge v Moller*, A’s claim to an interest in a farmlet registered in B’s name rested on contributions to general outgoings, child care and work on the farmlet.⁶⁹ Tipping J found that such indirect contributions could give rise to an interest and there was also a disguised reference to the unjust enrichment principle of incontrovertible benefit.⁷⁰ Also, Tipping J made an obiter statement agreeing with Richardson J’s comments in *Gillies*:⁷¹

[T]his is a special field and general concepts of fairness, unjust enrichment, and unconscionability should not necessarily be the foundation for the creation of property rights in the other fields.

In *Bryenton v Toon*⁷² Anderson J made use of the “consortium” approach coined by Cooke P in *Gillies*, when awarding a proprietary interest of approximately 50% to the plaintiff A. The relevant contributions by A in this case were domestic services and selling of personal assets for the benefit of the “consortium”. Several actions by B including the opening of a joint bank account also pointed to a constructive trust.

The New Zealand law is clearly in a state of flux. There is as yet no united statement by the Court of Appeal of the correct principles to be applied in these cases. However, Cooke P referred to unjust enrichment many times in *Gillies*. In particular, upon observing that Toohey J had accepted unjust enrichment in *Baumgartner* in Australia, the President remarked:⁷³

It is heartening that the law on both sides of the Tasman seems to have reached virtually the same point.

⁶⁷ Supra at note 5, at 331.

⁶⁸ Ibid, 344. Richardson J’s preference for estoppel highlights an interesting contrast. While English and Australian courts have adopted a very conservative approach to the law of constructive trusts, Richardson J here expressed implicit support for a widening of estoppel. This point will be developed later in this paper: see text infra at p530.

⁶⁹ [1990] 6 FRNZ 147.

⁷⁰ Tipping J referred to expenses which B would but for A’s services “have had to incur”: *ibid*, 154. The principle of incontrovertible benefit is discussed fully in this paper, *infra* at p.518.

⁷¹ *Ibid*, 153.

⁷² High Court, Rotorua, 21 August 1990 (CP 83/87), Anderson J. Noted in 13 TCL No 36, 12. See also *Clarkson v Clarkson*, High Court, Auckland, 13 June 1990 (M1637/88), Thorp J. Noted in 13 TCL No 27, 8.

⁷³ Supra at note 5, at 332.

Bisson J also made several references to unjust enrichment, stating as part of his conclusion that “[t]here was no unjust enrichment of the appellant”.⁷⁴ This indicates the increasing judicial recognition of unjust enrichment in New Zealand.

Canada

The Canadian approach to property rights in domestic relationships is the most progressive of those surveyed here. The New Zealand and Australia cases use unjust enrichment principles only spasmodically, but these principles form a cause of action which underlies this whole area of Canadian case-law.

In *Pettkus v Becker*, A sought a half-interest in all assets acquired by herself and B in a relationship which had spanned nearly 20 years. In the Supreme Court of Canada, Maitland and Ritchie JJ found for A on the basis of a resulting trust.⁷⁵

Dickson J disagreed that the requisite common intention could be found on the facts. His Honour, with whom five other judges concurred,⁷⁶ ventured into equity in search of the correct result, and opened that section of his inquiry by stating:⁷⁷

The principle of unjust enrichment lies at the heart of the constructive trust.

His Honour noted that for the plaintiff to succeed in this case she would have to establish an enrichment of B, a corresponding deprivation to herself and absence of any juristic reason for the enrichment. In respect of the last requirement, Dickson J held:⁷⁸

[W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

It should be noted that this is strikingly similar to the summary by Tipping J in *Partridge* of the ratio decidendi of *Gillies*.⁷⁹

The next major Supreme Court ruling was *Sorochan v Sorochan*. This case confirmed the judgment of Dickson J in *Pettkus*, and this time the judgment of Dickson CJC was the unanimous holding of the full Supreme Court. His Honour emphasised that the “primary” consideration is “whether or not the services rendered have a ‘clear proprietary relationship’”,⁸⁰ and found on the facts that such a link was present.

⁷⁴ Ibid, 352.

⁷⁵ (1980) 117 DLR (3d) 257, 262; 265–266. The resulting trust point is developed by McClean, “Constructive and Resulting Trusts — Unjust Enrichment in A Common Law Relationship — *Pettkus v Becker*” (1982) 16 UBCLR 155, 157–166.

⁷⁶ Laskin CJC and Estey, McIntyre, Chouinard and Lamer JJ.

⁷⁷ Supra at note 75 at 273.

⁷⁸ Ibid, 274. A useful summary of the facts of the case, Dickson J’s judgment, and the effects thereof, is Bala, “*Pettkus v Becker*: Equity Aiding the Common Law Spouse” (1981) 6 Queens Law Journal 514, especially at 519ff. The same author summarised the pre-*Pettkus* Canadian position in “Consequences of Separation for Unmarried Couples: Canadian Developments” (1980) 6 Queens LJ 72.

⁷⁹ See text, supra at p.514.

⁸⁰ (1986) 29 DLR (4th) 1, 10.

Dickson J also noted that the constructive trust is an important remedy for unjust enrichment, but not the only remedy: “[o]ther remedies, such as monetary damages, may also be available.”⁸¹ This point was developed by the Saskatchewan Court of Appeal in *Everson v Rich*. Sherstobitoff JA delivering the judgment of the Court held that there was no sufficient nexus between A’s contribution to household expenses and domestic services and the property in question to support the imposition of a constructive trust. But he did hold that A was entitled to monetary damages, which could be measured by the market price of the services she provided or an increase in the value of B’s assets.⁸² A was awarded \$10,000.

Recently in *Rawluk v Rawluk*, the Supreme Court considered the relationship between unjust enrichment and constructive trusts, and the Family Law Act 1986. In the course of his dissenting judgment, McLauchlin J, with whom La Forest and Sopinka JJ concurred, noted that the constructive trust is not a property *right*, but a *remedy* available where the probanda of unjust enrichment are met.⁸³ His Honour added that:⁸⁴

[I]t may be wise to insist that a plaintiff has exhausted his or her personal remedies before imposing the remedy of constructive trust.

This highlights the difference between the Canadian approach and the others discussed above: they treat the constructive trust as essentially a cause of action rather than a remedy. This will be examined later in this article.

UNJUST ENRICHMENT IN DOMESTIC RELATIONSHIPS

There are many reasons why people may choose to live in de facto marriages, ranging from personal preference to absence of a legal option.⁸⁵ Richardson J’s quoting of census figures at the beginning of his judgment in *Gillies*⁸⁶ indicates that the key issue is not *why* couples choose to live together without marrying, but the *fact* that they do so.

Richardson J stated that the aim of the courts in this area was to “achieve socially just results in accordance with legal principle”.⁸⁷ It is essential that in striving for the

⁸¹ *Ibid*, 7.

⁸² (1988) 53 DLR (4th) 470, 475. The factors relevant to assessing the damages are closely examined later in this paper: see text, *infra* at p.527.

⁸³ (1990) 65 DLR (4th) 161, 187.

⁸⁴ *Ibid*, 188.

⁸⁵ For an interesting example of legal impediments to marriage in an overseas jurisdiction see Shava “The Property Rights of Spouses Cohabiting Without Marriage in Israel — A Comparative Commentary” (1983) 13 Georgia Journal of Intl and Comp Law 465, 467–468. Shava points out that owing to the fact that marriage in Israel is governed by “halachic” law (Jewish law), couples who are precluded from marrying by Jewish law (for example where one spouse is not of the Jewish faith) have no choice but to live in a de facto marriage. In New Zealand, examples include couples who choose to live together before one partner is legally divorced from a previous marriage, and homosexual couples.

⁸⁶ *Supra* at note 5, at 340. His Honour noted that in the 1986 Census over 115,000 New Zealanders said they were living in de facto relationships.

⁸⁷ *Ibid*.

result, courts do not overlook the principle. Reynolds points out that:⁸⁸

Law is surely more likely to convince its subjects if it appears logically coherent and persuasive as well as flexible . . . Fluid notions such as “just and reasonable” (tort) and “inequitable” or “unconscionable” (equity) are powerful forces for development and change, but provide unstable pillars for the basic fabric of law.

This article will justify the application of the principles developed in Canada by reference to unjust enrichment theory, and show that unjust enrichment is a “stable pillar for the basic fabric of law.”

The Cause of Action

As a developing area of the law, unjust enrichment is still somewhat unsettled. The basic probanda are accepted as being detriment to the plaintiff, enrichment of the defendant, and absence of juristic reason for the defendant’s retention of the benefit. However, the Canadian Supreme Court’s decisions do not explore the scope and underlying rationale of unjust enrichment. It is this writer’s aim to fill that void.

DETRIMENT TO THE PLAINTIFF

Conceptually, detriment to the plaintiff is the least difficult of the three probanda. Goff and Jones talk of the enrichment element as enrichment at the plaintiff’s expense.⁸⁹

A plaintiff must normally show that it was he or someone whom he authorised who conferred the benefit on the defendant.

Birks’ view is similar.⁹⁰ Hence the actual fact of a *detriment* is *res ipsa loquitur* once enrichment is established. It is essentially a question of causation: did A’s act cause B’s enrichment? If so, then A suffered detriment.⁹¹

This inquiry is fundamentally different from that made when a de facto spouse’s claim is based on proprietary estoppel, where an actual detriment must be proved. The issue in such a case is whether services, for example, constitute a detriment to the plaintiff.⁹² In unjust enrichment, the correct inquiry is whether they have enriched the defendant.⁹³

⁸⁸ “Near Contracts”, Commonwealth Law Conference (9th: 1990: Auckland) 467, 471.

⁸⁹ *The Law of Restitution* (3rd ed 1986) 23.

⁹⁰ *Introduction*, supra at note 10, at 132–139.

⁹¹ The use of the word “detriment” can be somewhat misleading. Take the case where A greatly enjoys gardening and cultivates a vegetable garden for her own enjoyment, which results in the provision of fresh, cheap, quality vegetables to B. Even though A has done the gardening out of enjoyment, she still suffers “detriment” by use of her labour which will be recoverable as long as the other elements of the cause of action are made out.

⁹² Supra at note 23, at 107.

⁹³ The only situation in which deprivation becomes anything other than a straightforward issue is where A pays C to benefit B. This need not be considered in this paper. In a two party set of facts such as domestic relationship cases, the plaintiff need only prove that he provided the services of resources in order to fulfil the requirement of detriment: a causal link between his act and the enrichment.

ENRICHMENT OF THE DEFENDANT

The concept of unjust enrichment was developed in the context of the loss and receipt of money, where enrichment is readily identifiable. The inquiry is more complex where what has been received is services. This issue needs to be carefully considered, as services are the basis of a significant proportion of claims arising out of domestic relationships.⁹⁴ In what circumstances can there be an enrichment through the provision of services?

Possible scenarios that may arise are:

1. Where A owns the property and B:
 - (a) makes improvements with his own money;
 - (b) makes improvements with his own labour;
 - (c) makes financial contributions to outgoings such as mortgage payments; or
 - (d) pays living expenses, while A's income goes to outgoings on the property.

2. Where B attends to domestic duties, including child-care, and possibly foregoes opportunities for career advancement, enabling A to advance in her career.

The starting point of many discussions on this issue is the famous quote of Pollock CB in *Taylor v Laird*:⁹⁵

One cleans another's shoes; what can the other do but put them on?

This succinct statement is a self-contained argument against any notion that all services which objectively benefit the recipient enrich her. In Pollock CB's example "the other" does not indicate her approval of "one's" services merely by putting on the shoes. She would have done so in any case. The fact that they are clean is incidental, and she should not have to pay for that service which was forced on her.

It is not that services will never be an enrichment, simply that if they are to be so considered, this must be within well defined parameters. Discussion of services as an enrichment has concentrated on what these parameters are; an attempt to find the correct formula under which enriching services can be distinguished from non-enriching services.

Goff and Jones have identified a formula comprising an objective test, incontrovertible benefit, and a subjective test, free acceptance.⁹⁶ Where either can be proved, there is an enrichment. The former and less controversial of the two will be considered first.

A defendant will have been incontrovertibly benefited by the plaintiff's services (and therefore enriched) if:⁹⁷

[H]e has made thereby an immediate and realisable⁹⁸ financial gain or has been saved an expense which he otherwise would necessarily have incurred.

⁹⁴ Other money based enrichments will be considered later.

⁹⁵ (1856) 25 LJEx 329, 332.

⁹⁶ Supra at note 89, at 18–19.

⁹⁷ Ibid, 19.

⁹⁸ Note that Birks, supra at note 10, at 121–124, writes in terms of a *realised* gain.

The rationale behind this approach appears to be that where a party has received such a clear benefit, it is just that she should account to the person who facilitated that benefit. Jones considers various instances of incontrovertible benefit, such as necessitous intervention (where doctor X renders medical services to unconscious patient Y and performs a life saving operation⁹⁹) and mistaken improvements to land.¹⁰⁰

The paradigm case of necessary expenditure is the discharge of another's contractual or statutory duty without her knowledge.¹⁰¹ Such a fact situation might arise in domestic relationships with respect to mortgage payments, or through the provision by the plaintiff of something which the defendant might otherwise have had to pay for. The difficulty here is whether the defendant would in fact have had to provide this service or perform the action. Birks identifies reasonableness as the key factor; there will be incontrovertible benefit where "no reasonable man will say that the defendant was not enriched".¹⁰²

Free acceptance is the more complex part of the Goff and Jones formula. The common law's original conclusion was that a defendant could only be said to have benefited where the services were requested by him or he freely accepted them having had an opportunity to reject them and knowing that they were to be paid for.¹⁰³

The first part of this presents no difficulty: where there has been a request the common law will usually bind the maker of that request in contract. In domestic relationships, however, the courts are reluctant to find intention to create legal relations, and there will seldom be a contract.¹⁰⁴ Thus a request will only be relevant insofar as it relates to the second part.¹⁰⁵

The rationale behind enrichment by free acceptance can be ascertained using an example provided by Birks.¹⁰⁶ Y sees X begin to clean the windows of Y's house, and knows that X expects to be paid. Y remains hidden until X has completed the job, and then emerges and claims that she never ordered the work and will not pay.

⁹⁹ "Restitutionary Claims for Services Rendered" (1977) 93 LQR 273, 284-285.

¹⁰⁰ See text, *infra* at p.523.

¹⁰¹ Kos and Watts, *Unjust Enrichment - The New Cause of Action* (New Zealand Law Society Seminar, February 1990) 109-110.

¹⁰² *Introduction*, *supra* at note 10, at 116. His approach has received judicial support in Australia in *Monks v Poyntice Pty Ltd* (1987) 8 NSWLR 662, 665 per Young J (NSWSC).

¹⁰³ *Supra* at note 89, at 18.

¹⁰⁴ *Balfour v Balfour* [1919] 2 KB 571, 575 per Warrington LJ; 579 per Atkin LJ (CA); *Buchmaier v Buchmaier* (1971) 6 RFL 382 (BCCA).

¹⁰⁵ In support of free acceptance Goff and Jones cite *Ellis v Hamlen* (1810) 3 Taunt 52; 128 ER 21, where a builder, having contracted to build a house for the defendant, claimed a quantum valebat on the ground that the value of the house was more than the stipulated contractual price, and the defendant received that benefit. Mansfield CJ held against the plaintiff, but his judgment did not expressly make the point deduced by Goff and Jones. His Honour did note at p 53 (22) that a verdict for the plaintiff would have the unsatisfactory result of making the defendant "obliged to pay for any thing, how far soever distant from what the contract stipulated for." Certainly where a defendant may only be liable where he has freely accepted the services, this danger is not present, and to this extent Goff and Jones' point is consistent with *Ellis*. However it is somewhat of an overstatement to cite *Ellis* as authority for that proposition.

¹⁰⁶ *Introduction*, *supra* at note 10, at 265.

There has been enrichment according to the criteria of both Birks and Goff and Jones:

1. Y had the opportunity to reject X's services and did not; and
2. Y knew that X expected to be paid.

Birk's theory, and the notion of free acceptance as an enrichment generally, has been criticised. Beatson's principal qualm with free acceptance is that the end result need not be an actual enrichment:¹⁰⁷

There is no concern with the utility of the intervention (i.e. objective benefit) or with its realizability . . . the opportunity-loss of the unrequested renderer of services [is] the source of the obligation.

However, opportunity loss is not the source of the benefit. Free acceptance is simply conclusive proof that the recipient of the services has benefited, and is precluded from subjectively devaluing the service, that is, claiming that it is of no value to him.¹⁰⁸ So, if Y considers herself benefited by the window cleaning services of X, she is in fact enriched, the focus being on enrichment, not X's opportunity loss.¹⁰⁹

Other criticisms of free acceptance also concentrate on the acquiescence aspect of free acceptance rather than what that acquiescence is seen to imply. This is manifest in the approach of Mead:¹¹⁰

[I]t is inconsistent with authority to argue that an individual can be made liable to pay for a service merely by acquiescing in its conferral. The concept sits uneasily with important principles in the law of contract, tort and crime.

It should first be noted that unjust enrichment as a cause of action is not supposed to come within all the principles of tort and contract: it is a third cause of action based on its own unique principles. While acquiescence may not constitute acceptance of an offer in contract¹¹¹ this does not mean it cannot be evidence of enrichment in unjust enrichment. Further, the source of the obligation is not acquiescence; it is the enrichment it points to.

The next question is whether it can be inferred from Y's free acceptance of the window cleaning that she is receiving a benefit.

A logical starting point is that Y is unlikely to acquiesce to services that are detrimental to her. But she may simply be indifferent to the window cleaning, and

¹⁰⁷ "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] CLP 71, 77-78.

¹⁰⁸ Birks' *Introduction*, supra at note 10, at 266.

¹⁰⁹ Beatson's inquiry is based on the concept of exchange-value, wherein wealth and "marketable residuum" are central. Unfortunately, this reinforces the minimalist attitude of society to domestic services, one of the focuses of this paper, and this point will be developed further below. Thus where Beatson would apparently dispatch claims made on the basis of such services to the area of injurious reliance (see, eg. *Riches v Hogben* [1986] 1 Qld R.315) because there is no exchange-value benefit, it is submitted here that the enrichment of the recipient of such services should be recognised and that such a claim should fall within the ambit of unjust enrichment. For an interesting critique of the issues pertaining to economic theory and domestic labour see Riseley, "Sex, Housework and the Law" (1981) 7 Adelaide LR 421, 451-456.

¹¹⁰ "Free Acceptance: Some Further Considerations" (1989) 105 LQR 460, 466-467.

¹¹¹ *Ibid*, 461. Mead cites *Felthouse v Bindley* (1862) 11 CB (NS) 869 in support of this principle.

see it as neither beneficial nor detrimental.¹¹² The concept of free acceptance makes no allowance for this possibility.

An investigation of both support for and criticism of free acceptance makes it readily apparent that this principle is suited primarily to commercial disputes. Academics have rightly advocated a concept of enrichment which protects a defendant from services he does not want. Freelance service providers are precluded from expecting restitution where they have effectively forced their services onto others, and the fundamental freedom of the individual to choose the services she requires is protected.¹¹³

Personal relationships are intrinsically different to commercial relationships. The provider of domestic services is manifestly different from "commercial risk takers".¹¹⁴ Risk-taking is fundamental to commerce and the player cannot expect another will bear the legal (and therefore financial) burden of a failed risk. While cynics might claim that the same can be said of any modern domestic relationship, pointing to an increase in failed de jure and de facto marriages and the possibility under matrimonial property legislation of contracting out of legal intervention through a pre-nuptial agreement¹¹⁵ it is undesirable to reduce domestic relationships to the status of commercial joint ventures. At the same time spouses must accept that there may be *some* financial loss in a relationship; they cannot be indemnified against all loss.

Because of the unique nature of a domestic relationship, which has no commercial parallel, enrichment must be looked at from a non-commercial perspective, and thus free acceptance is inapplicable. For example, the requirement in the Goff and Jones test that the recipient of services must know that the provider expects to be paid could be satisfied in a domestic relationship by a reasonable expectation on the plaintiff's part that she would receive an interest in the property; this is the cornerstone of Cooke P's approach to constructive trusts. But in a great number of cases the party providing the domestic services will not have considered the question. Should this preclude him from recovering when the relationship ends? To hold that B should have known that A expected payment is straining principle unnecessarily; the same result could be reached more simply.

If free acceptance is not the answer, what is?

The answer may lie in an expanded objective incontrovertible benefit test, based on the axiom that domestic services do enrich.¹¹⁶

¹¹² This scenario troubles Burrows, "Free Acceptance and the Law of Restitution" (1988) 104 LQR 576, 580. His solution is a "bargained-for" principle whereby the recipient must have requested the services, and therefore indifference is not a possibility.

¹¹³ In New Zealand the Unsolicited Goods and Services Act 1975 gives statutory protection against unwanted services. Birks' window cleaner would in fact commit an offence under s 9(3) of the Act if he were to demand payment for his services.

¹¹⁴ Supra at note 112, at 578.

¹¹⁵ Matrimonial Property Act 1976, s 21.

¹¹⁶ Canadian courts appear to be at ease with this approach. In *Pettikus v Becker*, supra at note 75, Dickson J referred to the defendant freely accepting benefits when he should have known of the plaintiff's reasonable expectation (at p.274). This was in fact in the context of a discussion of "unjust". With

On first analysis this approach may appear over simplified. But a plaintiff should not have to prove that spousal services per se do enrich, and risk failing in his claim because of his inability to justify this in academic and commercial terms. Domestic labour may not bring to another spouse any realisable financial gain, but it is incontestable that where B has cooked meals for A, attended to shopping and cleaning and possibly looked after children, A has benefited from those services.

In essence this is an extension of the incontrovertible benefit category, in the domestic context, to include gains which are not financially realisable and which may not have saved A inevitable expenses: A may have done all these duties herself after work and paid in leisure time and relaxation rather than in money. It is possible that A will choose to stay home and perform domestic duties even though B has no objection to her working and would be happy to share the duties. But in such a case B will still benefit, and he may have no subsequent obligation to make recompense for services he would have been happy to provide for himself because it is likely that his contribution to the property of the relationship by way of earnings has more than matched that of A and therefore no award against him would be justified; this will depend on the facts of the case. Domestic relationships invariably include giving and receiving by both parties, whereas when X cleans Y's shoes in a commercial context, there is no benefit for X unless he can force Y to pay for the service.

On this analysis, therefore, there should be an irrebuttable presumption based on a concept of objective benefit that spousal services do enrich. As a result domestic services will not be subject to commercial criteria, and will be elevated to their deserved status.¹¹⁷

With respect to enrichment other than by services there is little difficulty regarding enrichment. Financial contributions by B to outgoings on property owned by A are a clear example of incontrovertible benefit: expenses which A would have necessarily incurred (and in the case of mortgage payments, the performance of A's contractual duty). Payment of household expenses such as food and utilities is similarly an incontrovertible benefit.

Less certain is funding by B of improvements to A's house. As mentioned before, this is not really an incontrovertible benefit. The realisable gain criterion is inapplicable to land improvements.¹¹⁸ Where the improvements are necessary, for example where the house is in dire need of re-roofing, A has been saved an inevitable expense and is incontrovertibly benefited, using Birk's test of reasonableness. However, B may simply have chosen to pay for an interior decorator or a landscape gardener because of his own particular tastes. It is submitted that where the value of the property is actually increased, A should be regarded as enriched.¹¹⁹ Again special allowances are made for the domestic situation, but this is an equitable and

regard to enrichment, Sherstobitoff JA in *Everson v Rich*, supra at note 82, concluded (at 474) "The spousal services provided by the appellant were valuable services and did constitute a benefit".

¹¹⁷ A high status for spousal services certainly has judicial support; see *Gillies*, supra at note 5, at 332 per Cooke P; *Everson*, supra at note 82, at 474; *Lanyon v Fuller*, noted in [1988] BCL 1309.

¹¹⁸ See text, supra at p.519.

¹¹⁹ This is a limited application of Beatson's exchange value test.

principled result. Even where A claims that she would never have paid to make these improvements, the fact is that this was a contribution to the relationship by B which improved the value of A's land. In a commercial context, this would impinge upon the individual's freedom with regard to her own property and her dominion over it. But as suggested above, the principles recommended here are to be confined to the realm of domestic relationships, and their inapplicability to other spheres is not an indication of their weakness in the domestic context.

In summary, A is enriched:

1. where B has provided spousal services;
2. where B has paid daily expenses or contributed to outgoings on the land;
3. where B improves A's property, thereby increasing its value.

The matter of how enrichment should be quantified will be addressed later.

Absence of Juristic Reason

Hitherto, the burden on the plaintiff under the approach suggested has appeared strikingly light. But it will be considerably more difficult to show absence of juristic reason to retain the enrichments in question, or "unjustness".

When unjust enrichment was in its embryonic stage the notion of "unjust" was very wide. Pomponius wrote only of "wrong to another",¹²⁰ while Lord Mansfield in *Moses*, spoke of money which "ex aequo et bono, the defendant ought to refund."¹²¹ Clearly, the question of what is unjust must be assessed against more certain criteria. Garner pertinently states:¹²²

The doctrine of unjust enrichment should not be too greedy lest it leave itself open to the familiar attack that it is based on nothing more than broad and uncertain considerations of "fairness" and "justice", a charge that threatens its status as a legitimate legal event having a place in the framework of English law alongside contract and tort.

Birks and Goff and Jones have differing approaches to the burden of proof in establishing an absence of juristic reason. Under Birks' formulation, the burden is on the plaintiff to point to one of three sets of circumstances to show that the enrichment is unjust.¹²³ Goff and Jones opine that unless the defendant can establish the presence of certain facts, then any enrichment is *prima facie* unjust.¹²⁴

¹²⁰ As quoted in Birks *Introduction*, supra at note 10, at 322.

¹²¹ Supra at note 8, at 680.

¹²² "The Role of Subjective Benefit in Unjust Enrichment" (1990) 10 *Ox JLS* 42, 65.

¹²³ These are: non-voluntary transfer, which will be discussed below, free acceptance, as discussed above, and other public policy concerns such as discouragement of unlawful conduct, encouragement of rescue at sea and protection of creditors. Birks *Introduction* supra at note 10 at 99–108, 140–312.

¹²⁴ The factors they give are: (1) the enrichment was a valid gift or in pursuance of an obligation owed to the defendant under common law, statute or equity; (2) the plaintiff submitted to or comprised the defendant's honest claim; (3) the plaintiff conferred the benefit while performing an obligation owed to a third party or was acting voluntarily in her own self-interest; (4) the plaintiff acted officiously in conferring the benefit; (5) the defendant cannot be restored to his original position or is a bona fide purchaser; and (6) public policy precludes restitution (for example, statutes of limitation, laches and illegality). *Restitution*, supra at note 89, 30.

In domestic relationships claims, the first probanda will be satisfied with relative ease under the approach suggested in this article. It is submitted that Birks' approach is more suitable as it places the burden of proof on the plaintiff to establish absence of juristic reason.¹²⁵

Thus only qualified non-voluntary transfers need to be considered. The essence of qualification is that the plaintiff has taken pains to qualify the transfer, making clear that although he wanted the defendant to have the enrichment, his intent to that effect was not absolute but conditional.¹²⁶

This is analogous to the doctrine of consideration in contract.¹²⁷ Under a contract, where benefit is conferred with the proviso that some benefit will be received in return, and the reciprocal benefit is not forthcoming, an action may be brought on the contract. By analogy, where an enrichment is conferred non-contractually but subject to certain conditions, and the conditions are unfulfilled, it will usually be unjust for the recipient to retain the benefit, and thus the conferrer may seek restitution of the benefit in unjust enrichment.

Birks acknowledges that the consideration analogy is not wholly applicable. The common law concept of total failure of consideration suggests that where the plaintiff has received anything in return for his services any claim is blocked, even though it is considerably less than the worth of the services or less than the benefits expected in return.¹²⁸ This is not the case in unjust enrichment:¹²⁹

[P]rovided it can be said that the consideration for which the plaintiff stipulated has failed, the fact that he has received something of what he wanted will not defeat his claim to restitution so long as nothing prevents his off-setting or returning that benefit.

Since there will seldom if ever be an express qualification for the provision of services in a domestic relationship, the qualification must be inferred. One possibility is to imply a qualification that the benefit is provided in the expectation that the parties will remain together permanently. The principal problem with this approach is that it provides no guidance as to the extent of the failure of consideration. What proportion of the expected benefit has A received if the relationship ends after five years, or after ten? The better inference is that the giver of the enrichment simply expected to receive comparable benefits from the relationship.¹³⁰ So generally it will be unjust for B to retain an enrichment when A has received less than she contributed.

Will a claim in unjust enrichment brought by A fail because he ended the

¹²⁵ See Watts, *Unjust Enrichment*, supra at note 101, at 28 for an expansion of Birks' approach that presents a principled approach to the "unjust" enquiry.

¹²⁶ *Introduction*, supra at note 10, at 219.

¹²⁷ But not identical to that doctrine; Birks notes the difference between the two: *ibid*, 223.

¹²⁸ *Ibid*, 219–249.

¹²⁹ *Ibid*, 242.

¹³⁰ It should be noted that the approach suggested here is subject to any express agreement between the parties as to the extent of the interest. These propositions are intended to provide a minimum remedy for a party who has not protected himself. Assessment of damages may appear to be a more logical heading under which to consider these points, but they are also central to the question of "unjust", because it would be futile to find that B has been unjustly enriched because A's services were provided with a subsequently unfulfilled qualification, and then hold that there should be no remedy because on balance A has received sufficient benefit.

relationship? It is submitted that it should not. Certainly the Matrimonial Property Act is unconcerned with blame; only the fact of dissolution is relevant. The reason for this is pragmatic: an inquiry into blame would aggravate an already stressful situation, and the effect on behaviour while the relationship still subsists would also be negative. A party who is suffering emotional and possibly physical stress may remain in the relationship in the hope that the other party will leave first and therefore that his property rights will be protected. Alternatively, there may arise a situation akin to constructive dismissal in employment law whereby A makes B so uncomfortable in the relationship that B's only option is to leave, but by doing so he forfeits his property rights. Apportionment of blame is irrelevant.

What is a De Facto Relationship?

The creation of a specialised action in unjust enrichment begs the question: what will qualify as a de facto relationship? On a strict application of unjust enrichment theory the *length* of the relationship is irrelevant: if B has been unjustly enriched to the detriment of A, that benefit should be returned regardless of how long a time the two lived together. However, the approach advocated here is based on the special circumstances of a domestic relationship. Should the length of the relationship therefore be a relevant factor?

Canadian courts have not really been faced with this question; the relationships in *Pettkus*, *Sorochan* and *Everson* lasted approximately 20, 42 and seven years respectively, although in *Pettkus*, Dickson J did refer to "informal relationships which subsist for a lengthy period".¹³¹ In New Zealand, Cooke P opined in *Gillies* that the length of a relationship will usually be an indicator of the degree of sacrifice by the parties. But he dispelled any possibility of a fixed threshold:¹³²

How long the relationship has lasted is a factor not to be used in any arbitrary way. One cannot say that X years is enough for a good claim, or less than X years not enough.

He then continued:¹³³

The longer a union, the more likely that one or other partner will have foregone other opportunities in life. This can be highly relevant, I think, in assessing . . . unjust enrichment.

Cooke P's approach does present a difficulty; the length of the relationship is important, but how should it properly be taken into account? The Matrimonial Property Act 1976 labels any marriage of less than three years as a marriage of "short duration".¹³⁴ And under s17(1) of the De Facto Relationships Act 1984 in New South Wales, the courts may only apply Pt III of the Act (the re-division of property provisions) where the parties have lived together for three years. But this is precisely what Cooke P advised against. The New South Wales legislature was apparently aware of the deficiencies of the threshold approach, and in s17(2) provided that Part

¹³¹ *Supra* at note 75, at 275.

¹³² *Supra* at note 5, at 334.

¹³³ *Ibid.*

¹³⁴ Section 13.

Three may be applied notwithstanding the fact that the parties were together for less than three years if the couple had a child, or if the applicant had care and control of a child of the respondent's or had made substantial contributions for which she would not be compensated, and failure to make such an order "would result in serious injustice to the applicant."

It is submitted that it is most appropriate to consider whether the couple in question were in a *stable de facto* relationship. Under what guidelines could such an assessment be made? In *Lichtenstein v Lichtenstein* the plaintiff's deceased husband left to her half the residue of his estate "for so long as she shall not enter into a de facto relationship". She sought a declaration that this condition was void for uncertainty. Tompkins J upheld the claim, but in the course of his judgment he made some comments which are useful for the present study regarding the criteria against which a de facto relationship should be assessed to ascertain whether it is a relationship in the nature of marriage. These included:¹³⁵

1. cohabitation;
2. sexual relations;
3. some degree of permanence;
4. a sharing of assets and income;
5. joint ownership;
6. the use of a common surname; and
7. ("possibly most importantly") intention to regard themselves as married.

These are relevant considerations, not *sine qua non* probanda.

In *D v McA Powell* J in the New South Wales Supreme Court had to consider the meaning of "de facto relationship" under a statute. His Honour held that in each case, a value judgment is made by the Court having regard to a variety of factors, including (but not limited to) duration, common residence, sexual relationship, financial interdependence and support agreements, ownership and use of property, procreation of and care and support for children, performance of household duties, mutual commitment and support, and "reputation and 'public aspects' of the relationship".¹³⁶

From a different perspective, the *Legal Resource Manual* in New Zealand, which is aimed at informing lay people as to their rights, surveys several High Court and Social Security Appeal Authority decisions and provides a list of guidelines as to what is a "relationship in the nature of marriage" for the purpose of Social Welfare benefits. The list includes most of what has been detailed above, and some extra considerations such as whether leisure time is shared, and whether there is "natural caring in times of ill-health or other difficulty".¹³⁷

It is apparent that the characteristics of a de facto marriage are generally agreed upon, and an inquiry based on these lines is preferable to a threshold duration

¹³⁵ (1986) 2 FRNZ 58, 62.

¹³⁶ Noted [1986] Australian Current Law 35193.

¹³⁷ Legal Information Service (1990) para 3.513.

approach. If having considered the factors listed here a judge is satisfied that the two parties were living in a stable de facto relationship, any enrichment which satisfies all the other criteria should be considered unjust.

Remedies

Once unjust enrichment has been established, the questions before the Court are:

1. Should the remedy be *in rem* or *in personam*?¹³⁸
2. How should the remedy be quantified?

SHOULD THE REMEDY BE IN REM?

The significance of the choice between an *in rem*¹³⁹ or *in personam* remedy is mainly the effect in the case of the defendant's bankruptcy. An *in rem* remedy fully compensates the plaintiff, whereas an *in personam* remedy merely entitles the plaintiff to become another unsecured creditor.

The first circumstance in which an *in rem* remedy will be appropriate is where the courts would have been prepared to find for the plaintiff in a constructive trust action. Thus an *in rem* remedy should be awarded in the following situations:

1. where there is actual agreement between the parties and an act in reliance — this is part of the *Gissing* test and may also give rise to an estoppel. Examples of this are *Edwards* and *Eves*, discussed earlier;¹⁴⁰
2. where a specific contribution gives rise to the inference of common intention — this is the second part of the *Gissing* test. The most obvious example is a financial contribution to the purchase of the property, be that a contribution to the deposit or to subsequent mortgage payments; and
3. where, notwithstanding the absence of common intention, there is a link between the asset in question and the contribution.

The difficulty with the third of these is establishing how indirect a contribution may be while still maintaining a causal link between the acquisition of the property and the corresponding deprivation.¹⁴¹

While spousal services and contribution to household costs may indirectly contribute to a property, they are too far removed to establish such a link. Thus, in *Everson*, it was held that domestic services and contribution to household expenses were insufficiently tied to the property to entitle the plaintiff to *in rem* relief.¹⁴² In

¹³⁸ The obvious willingness of the courts to award proprietary remedies in domestic relationships under the law of constructive trusts or unjust enrichment renders unnecessary an inquiry as to whether such remedies are in fact available here.

¹³⁹ I.e., granting A an actual interest in B's property.

¹⁴⁰ See text, *supra* at p.509.

¹⁴¹ *Supra* at note 75, at 277 per Dickson J.

¹⁴² *Supra* at note 82, at 475. Cf *Cooke v Head* [1972] 1 WLR 518, 521, and *Eves*, *supra* at note 33, at 772, both per Lord Denning.

such cases *in personam* relief is appropriate. To hold otherwise would extend the availability of *in rem* remedies to a logically unsupportable extent. But as will be seen presently it may be appropriate to use the increase in value of the defendant's property as a guide in assessing a monetary award.

Where the parties agree (either expressly or inferentially) that B's income should be used to attend to daily expenses so that A's income is free for mortgage payments and other such outgoings, B should be recognised as having made an indirect contribution to the property capable of giving rise to *in rem* relief. There is a sufficient link between the property and the deprivation.¹⁴³

Where the plaintiff's claim in unjust enrichment is based on several contributions, some direct and others indirect, it will be open to the Court to award a combined remedy, whereby the plaintiff receives a proprietary interest and monetary damages.¹⁴⁴

QUANTIFYING THE REMEDY

In Rem

The equitable proprietary remedies of lien, constructive trust and full conveyance are all available in unjust enrichment.¹⁴⁵ This section will concentrate on the constructive trust. How will the courts decide how great a share of the property the plaintiff is entitled to under a constructive trust? In *Pettkus*, Dickson J said:¹⁴⁶

Although equity is said to favour equality . . . it is not every contribution which will entitle a spouse to a one-half interest in the property.

This approach finds support in the English law of constructive trusts.¹⁴⁷ The correct approach to quantum is to assess the relative contributions of the parties to the asset in question, and make an award accordingly. The plaintiff and defendant become tenants in common in the property as to their respective shares.¹⁴⁸ In addition to the plaintiff's contributions, the courts should consider set-off, which will be discussed presently.

In Personam

The general quantum meruit rule is that the plaintiff will receive the reasonable value of the services as at the date they were rendered.¹⁴⁹ In *Everson*, Sherstobitoff

¹⁴³ It is apparent from the words of Lord Diplock in *Gissing*, supra at note 25, at 907-908 and 909 that unless there is evidence of common intention at the time of conveyance, payment by B of all household expenses while A continues to make required payments on the house will not be covered under categories 1 and 2. That scenario is therefore emphasised here.

¹⁴⁴ *Sorochan*, supra at note 80, at 13.

¹⁴⁵ Klipert, *Unjust Enrichment* (1983) 77.

¹⁴⁶ Supra at note 75, at 277.

¹⁴⁷ *Gissing*, supra at note 25, at 909 per Lord Diplock; *Eves*, supra at note 33 (where the share granted to the plaintiff was one quarter).

¹⁴⁸ *Baumgartner*, supra at note 51, at 157 per Gaudron J.

¹⁴⁹ Goff and Jones, supra at note 89, at 26-27.

JA held that an alternative to this is "a suitable proportion of the increase in value of the assets of the person who had been unjustly enriched."¹⁵⁰ In *Gillies*, considering this point in *Everson Cooke P* stated:¹⁵¹

I can see no reason why the Canadian approach in awarding monetary compensation cannot be applied in New Zealand in suitable cases.

Awarding the plaintiff a share in the increase in value of the defendant's assets is fully consistent with the reality that rather than being treated as a paid employee, the provider of the services should be treated as part of a relationship, and reap the benefits thereof.¹⁵² In general the award of a half share is a fair reflection of nature of the relationship. This can of course be adjusted in any given case. Where a partnership fails and there is no profit to share, the claimant should at least be awarded, as a minimum, a quantum meruit for his services.

SET-OFF

In an unjust enrichment action the defendant must be able to have the plaintiff's quantum reduced by the amount that the plaintiff received from the defendant in return for the benefits provided. In a domestic relationship case, under the formulation of qualification previously identified, the defendant is only unjustly enriched to the extent that the benefits received by her were greater than the benefits she bestowed on the plaintiff. Thus set-off is first relevant under the "unjust" inquiry, but even where there is a discrepancy between benefits given and benefits received and the action stands, set-off has to be considered again under the heading of quantum.¹⁵³

In *Everson*, counsel for the defendant emphasised that the plaintiff and her daughter enjoyed a standard of living higher than that which they had had prior to the relationship. Where after a relationship ends the plaintiff is held to be entitled to compensation for spousal services the defendant may counter-claim for the rent the plaintiff did not have to pay during the relationship, or for the provision of a motor vehicle or other such benefit.

The courts must therefore assess from the evidence before them the resources which each party devoted to and derived from the relationship. Where one party has contributed more than she has received, and therefore there is a cause of action, the quantum granted to the plaintiff by way of a constructive trust or a monetary award should only represent the proportion of her contribution to the relationship which was not compensated for by benefits which she received.

WHY UNJUST ENRICHMENT?

In the introduction to this article, the author suggested that unjust enrichment is the cause of action most suited to property claims based on domestic relationships.

¹⁵⁰ *Supra* at note 82, at 475.

¹⁵¹ *Supra* at note 5, at 332.

¹⁵² Charlesworth, "Domestic Contributions to Matrimonial Property" (1989) 3 *AJ Family Law* 147, 148.

¹⁵³ In *Everson*, *supra* at note 82, at 474, Sherstobitoff JA also reached this conclusion.

That assertion was not developed previously because only after a detailed study of the mechanics of this cause of action can any comparative analysis be successfully undertaken. That groundwork has now been laid.

It may appear unusual that unjust enrichment be advocated in a study written in a country where little more than a decade ago, a prominent High Court judge definitively held:¹⁵⁴

a general doctrine of unjust enrichment is not part of the law of New Zealand.

Since that time, the Court of Appeal has resiled from that position in a guarded manner, without ever establishing unjust enrichment as a cause of action or even a fundamental legal principle.¹⁵⁵ In its most recent statement on this issue, the Court of Appeal was apparently divided; Cooke P and Bisson J recognised some role for unjust enrichment and Richardson and Casey JJ were more hesitant. And outside New Zealand, with the obvious exception of Canada, unjust enrichment as a cause of action is scarcely further advanced.¹⁵⁶

Despite these obstacles, unjust enrichment is advanced here for two reasons: philosophically, it meets the need for principled development of the law and practically, it meets the need for a comprehensive judicial treatment of de facto relationship property rights generally and in particular the value of domestic services.

In *Gillies*, Richardson J preferred “the well settled principles of estoppel, which preclude the legal owner from denying the existence of an equitable interest in the property” to Cooke P’s broader approach based on fairness.¹⁵⁷ Two criticisms can be made of Richardson J’s approach. First, estoppel is likely to encompass only a small proportion of the claims which should be addressed by a cause of action in this area. And the second criticism is also the explanation for the use of the words “likely to” in the preceding sentence: the principles of estoppel are anything but well settled.¹⁵⁸

Richardson J noted that there has been a “trend away from the strict application [of the probanda of proprietary estoppel] to a more flexible test of unconscionability”¹⁵⁹ although he felt it possible to resolve the case before him on more traditional grounds.

In light of the above, Watts’ opinion that unjust enrichment is more principled for this area than estoppel is supportable.¹⁶⁰ The trend towards the expansion of estoppel

¹⁵⁴ *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124, 155 per Mahon J. His Honour referred to unjust enrichment as being based on “the formless void of individual moral opinion”.

¹⁵⁵ *Pasi*, supra at note 59, at 607 per McMullin J; 605 per Cooke P.

¹⁵⁶ See Kos and Watts, supra at note 101, at 4.

¹⁵⁷ Supra at note 5, at 344.

¹⁵⁸ In *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co* [1982] 1 QB 133, 153, Oliver J (as he then was) noted that there had been a “virtual equation of promissory estoppel and proprietary estoppel or estoppel by acquiescence as mere facets of the same principle.” And in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 the High Court of Australia saw fit to dispense with the distinction completely.

¹⁵⁹ Supra at note 5, at 345.

¹⁶⁰ Kos and Watts, supra at note 101, at 135–137.

principles contrasts sharply with the desire of English courts in particular to restrict the ambit of the constructive trust, manifest most recently in the *Rossett*¹⁶¹ decision. This process of alternate expansion and restriction, often at the expense of principle, arises out of the view that domestic relationships cases must be categorised either as constructive trust actions, or as estoppel cases, or a combination of the two, in which either the constructive trust is a remedy in an estoppel case, or estoppel is part of the constructive trust cause of action. It is submitted that, as Watts suggests, it is better to adopt a third cause of action.

Watts also cites the greater suitability of an approach which concentrates on enrichment rather than reliance and detriment. In most cases in this area:¹⁶²

the substance of the plaintiff's complaint that the defendant is in legal control of identified assets to which, by reason of the relationship between them, both have made a contribution, or otherwise the defendant is the net benefiter financially from the contributions, in cash and kind, made by the parties during the relationship.

Where there is no enrichment (which will be very rare in cases in this area), Watts advocates a justified detrimental reliance principle.¹⁶³

While the third criterion in an unjust enrichment action, the need for the benefit to be unjustly retained, may at first appear to be equally as wide a concept as unconscionability and fairness, the guidelines suggested in this paper for the resolution of that question are clearly drawn, and are conducive to certainty and confidence in the law. The common intention approach to constructive trusts is also well principled but it excludes claims which ought to be allowed. Unjust enrichment is very much an umbrella action in this respect. The questions of unconscionability, reasonableness and common intention are all relevant, but the basis is factual inquiry, not broad judicial assessment of the behaviour of the parties.

Moreover, the unjust enrichment analysis makes a strong and overdue statement regarding the value of domestic services. By recognising these services as irrebuttably benefiting their recipient and awarding generous remedies to the provider of such services, society would be abandoning its anachronistic attitude towards domestic services:¹⁶⁴

Domestic services are normally regarded as "gifts"... Changing social conditions may make it inappropriate to apply old presumptions.

There may be scope for recognition of domestic services in the other causes of action discussed here, but there is less potential for a strong statement of their value. In fact common intention reinforces the old views regarding spousal services; they are apparently undertaken out of love and affection only.

¹⁶¹ *Supra* at note 26.

¹⁶² *Supra* at note 101, at 137.

¹⁶³ This has already been mentioned in this paper when Beatson's thesis for enrichment was considered: see text, *supra* at p.520.

¹⁶⁴ Neave, "Approaches to Family Property Disputes" in Youdan (ed), *Equity, Fiduciaries and Trust* (1989) 247, 254. The author also acknowledged Neave's unpublished paper: "Living Together — The Legal Effects of the Sexual Division of Labour in Four Common Law Countries".

Some may contend that if such a bold social statement is to be made, it should come from the legislature rather than the judiciary. But the elevation of the status of domestic services is not the primary objective of an unjust enrichment action, and all the judiciary is required to do is in fact recognise that domestic services do enrich and therefore can be brought within the ambit of unjust enrichment. The judiciary is not creating an entirely new legal concept with domestic relationships as its focus, but bringing this area within principles which have existed at least on a theoretical level for several hundred years. This action is not only available for claims based on domestic services; all the property claims likely to come out of a de facto marriage can be resolved by recourse to this one cause of action, without the need to over-extend its existing parameters. Thus claimants and their counsel benefit from a greater simplicity and certainty in the law.

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