Joshua Williams Memorial Essay 1996

Sir Joshua Strange Williams was a resident Judge of the Supreme Court in Dunedin from 1875 to 1913 and he left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have thereform provided an annual prize for the essay written by a student enrolled in law at the University of Otago which, in the opinion of the Council, makes the most significant contribution to legal knowledge and meets all requirements of sound legal scholarship.

We publish below the winning entry for 1996.

The Principle of Unjust Enrichment in English and German Law

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I Introduction

In 1991 the House of Lords recognised that claims for restitution share a common theme — the unjust enrichment of the defendant at the expense of the plaintiff.[1] The principle of unjust enrichment is said to found the common law actions for money had and received, money paid, quantum meruit and quantum valebet.[2] Potentially unjust enrichment can also be used to explain the equitable claims of knowing receipt and breach of fiduciary duty, and the remedies of an account of profits, proprietary tracing and the constructive trust.[3] The value of rationalisation around a unifying principle has been questioned,[4] for each claim has of course originated and developed in the language and rules of equity and the common law. But the rules are far from clear, particularly in relation to the commercial rule played by equity, and an underlying principle which is capable of generating a rational and predictable set of rules is of obvious interest.

The question with which this essay is concerned is whether the principle of unjust enrichment is capable of supporting a predictable system of rules. The

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1 *Lipkin Gorman* v *Karpnale Ltd* [1991] 3 WLR 10 at 15 and 27; *Woolwich Equitable Society* v *IRC (No 2)* [1992] 3 WLR 366 at 414.

2 For quantum meruit see *Pavey and Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221.

3 For knowing receipt see *Royal Brunei Airlines* v *Philip Tan Kok Ming* [1995] 3 WLR 64 at 68. For breach of fiduciary duty involving unjust enrichment see *Canadian Aero Service Ltd* v *O'Malley* (1974) 40 DLR (3d) 373. For the basis of an account of profits see *Seager* v *Copydex Ltd (No2)* [1969] 1 WLR 809 and *My Kinda Town* v *Soll* [1982] FSR 151 at 156. For the basis of the constructive trust see *Powell* v *Thompson* [1991] 1 NZLR 597 at 606.

4 See eg Stephen Hedley, "Contract, tort and restitution: a satisfactory division?" (1988) 8 LS 137.

5 Sir Robert Goff and Gareth Jones, *The Law of Restitution* (4th ed 1993) at 16.

accepted formulation involves an enrichment, obtained at the expense of the plaintiff, in circumstances where retention would be unjust.[5] If unjust enrichment is to act as a unifying principle it must be possible to explain these concepts in a precise and intellectually satisfying way. Defences must be developed to protect the interest in security of receipts. The uncertainty inherent in the concept of unjust enrichment has left both the House of Lords and the leading academics to refuse to adopt a general action for unjust enrichment.[6]

Civil law jurisdictions have dealt with problems of unjust enrichment for a considerable period of time. In Germany, a general action for unjustified enrichment (*ungerechtfertigte Bereicherung*) has been recognised since 1900: "A person who through an act performed by another, or in an any other manner, acquires something at the expense of that other person without legal ground is bound to render restitution".[7] The principle has been academically refined and enthusiastically applied by the courts for nearly a century. It is appropriate therefore to consider in the light of a century of German experience whether fears of boundless uncertainty and limitless liability can be justified. Of particular interest are the mechanisms used by German law to analyse and refine the principle of unjust enrichment. This essay will attempt to substantiate the elements of the principle and determine the correct common law approach through a comparison of the English law of restitution with the German law of unjustified enrichment.

The comparison will proceed in three levels: theory, history and function. It is not possible to import foreign conceptions of law into our own system without an understanding of the history and function of the foreign conception. In England restitution is the product of a complicated history which remains highly influential. Links with contract and property have hindered the development of a coherent restitutionary theory. But German law has its own medieval chains. The history of unjust enrichment within each jurisdiction will be examined in order to demonstrate a common pattern of development amongst civil and common law countries.

More important is a functional approach. Different legal systems can use different conceptual tools to achieve the same policy goals. An example is the contrasting use of tort and contract in situations of pure economic loss.[8] The function of unjust enrichment cannot be understood independent of the wider legal context in which it operates and the substantive policy goals it aims to achieve. Particular importance attaches to the relationship of restitution with other areas of law. The ultimate question is whether it is appropriate to adopt a general action for unjust enrichment given the purposes and function of restitution within common law systems.

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6 *Lipkin Gorman; Woolwich* at 414, *Orakpo* v *Manson Investments Ltd* [1978] AC 95 at 104. For the academics see Goff and Jones at 12 and Peter Birks, *An Introduction to the Law of Restitution* (rev 1989) at 26-27.

7 Paragraph 812 Burgerliches Gesetzbuch (BGB): translated by Forrester et al, *German Civil Code* (New Jersey 1975). See also Reinhard Zimmeran and Jacques du Plessis, "Basic Features of the German Law of Unjustified Enrichment" [1994] RLR 14 at 14.

8 B S Markenisis, "An expanding tort law — the price of a rigid contract law?" (1987) 103 LQR 354.

II The Principle of Unjust Enrichment

Most jurisdictions accept the need to reduce the concept of unjust enrichment to some kind of organised framework. At its broadest the simple principle of Pomponius — "it is just according to the law of nature that no person shall be enriched at the expense of another"[9] — seems to be unmanageably abstract and vague. No pluralist society can countenance appeals to abstract conceptions of justice and morality.[10] There is no wealth which cannot be said to be unjustly held by reference to a particular moral or social philosophy.[11] Nor can an exchange economy function without the ordered reallocation of resources.[12]

Indeed the phenomenon of unjust enrichment can occur in such an incredibly wide range of circumstances that the natural response quickly becomes a kind of euphoric vertigo in the absence of an analytic harness that can isolate specific fact situations. As such it is necessary to limit and define the principle of unjust enrichment by imposing a structural typography that can make sense of the vast range of material covered by restitution. This is amply illustrated by the history of the German general action, which has been progressively categorised and classified throughout the twentieth century.[13]

III England

Some progress has been made toward investing the elements of unjust enrichment with the necessary degree of precision. A framework for analysis has been set, and increasingly judges are using the language of unjust enrichment. Birks has divided claims for restitution into "unjust enrichment by subtraction", where D's gain is mirrored by a corresponding loss to P, and unjust enrichment committed by a wrong against P. The former is part of autonomous unjust enrichment, but the latter depends upon the breach of an independent legal duty owed to P. The extent to which this division resembles the principal German

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9 Pomponius, Digest 50,17,206; c 200 AD" "*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*".

10 Common law judges have historically reacted strongly against legal doctrines based on natural justice which they perceive to be uncertain. In 1978 Mahon J consigned unjust enrichment to the "formless void of moral opinion". See also *Baylis* v *Bishop of London* [1913] 1 Ch 127 at 140: "Whatever may have been the case 146 years ago, we are not now free to administer that vague jurisprudence styled "justice as between man and man"; *Holl* v *Markham* [1923] 1 KB 504: "the history of the law of money had and received is the history of a well meaning sloppiness of thought"; *Re Newey* [1994] 2 NZLR 590 at 597 per Hammond J : "practising lawyers have a horror of concepts they see to be as open-ended as 'unfairness' or 'injustice' or 'unjust enrichment'. And the accepted general formula for unjust enrichment ... does not take us very far."

11 Birks, supra n 6 at 19.

12 *Muller* v *Grobbelaar* (1946) OP D 272 per Van den Heever J: "the rule against enrichment is not one of general application. If it were, all commerce would be stultified." See also the judgment of Botha JA in *Nortje en 'n Ander* v *Pool* [1966] 3 SA 96.

13 Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town, 1990) at 892.

division into claims based on performance (*Leistung*) and interference (*Eingriff*) will become clear once the elements of the principle have been identified.[14]

The aim of this section is to explore this structure, and to illustrate the kinds of problems it creates. First, the history of restitution in the common law will be referred to, for it continues to condition our understanding of unjust enrichment. The current analytic framework will then be sketched out and several difficult problems that require resolution identified.

1 *History*

The dominant characteristic of the history of the English law of restitution is the extent to which its development has occurred by analogy with the laws of contract and property. The first analogy has been discarded; but the second remains highly influential and prevents unjust enrichment from having a truly independent existence.[15]

(a) Contract

The law of restitution originated in the medieval action for assumpsit. The action alleged merely that D was under an obligation to transfer money, leaving the nature of the obligation to be substantiated at trial. If a contract could not be shown the court required a promise to repay. In *Slade's Case* (1602) this fictional promise founded indebitatus assumpsit and an action for debt.[16] The action proceeded "as if on a contract" and developed to include money had and received, quantum meruit and quantum valebet. Lord Mansfield attempted to explain these cases around the notion of natural justice or equity.[17] In the nineteenth century, however, this view was rejected and the implied contract theory reasserted. The dependence of quasi-contractual relief upon the possibility of a contract greatly limited its application.[18] The modern development of unjust enrichment has led to the rejection of the implied contract theory as invalid.[19]

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14 Peter Birks, "The Independence of Restitutionary Causes of Action" (1990) 16 Qld ULJ 1. A similar division is proposed by Goff and Jones into cases where P has conferred a benefit on D and those where D has acquired a benefit through his own wrongful act (*The Law of Restitution*). Zimmerman sees the similarity with the Wilburg/Von Caemmerer taxonomy as the starting point for a convergence of Anglo-American and civilian thought: ibid at 895.

15 For the general history of the English law of restitution, see George Palmer, "History of Restitution in Anglo-American Law, in Peter Schlechtriem (ed), *International Encyclopaedia of Comparative Law*", vol X, ch 3 at 3-3, p 9; also Jackson, *History of the Law of Quasi-Contract* (1936).

16 *Slade's Case* (1602) 4 Co Rep 92b, 76 ER 1074.

17 *Moses* v *MacFerlan* (1760) 2 Burr 1005; *Hambly* v *Trott* (1776) 1 Cowp 371, 98 ER 1136.

18 In *Sinclair* v *Brougham* [1914] AC 398 a personal claim to recover money paid pursuant to an ultra vires banking activity failed because a loan contract would have been impossible. Ironically, the analogy with property was successful and a proprietary claim was allowed. Today, a completely opposite result would prevail: the personal claim would be permitted and the proprietary claim denied (*Westdeutsch Landesbank Girozentrale* v *Islington London Borough Council* [1996] 2 WLR 802).

(b) Property

Restitution and property share a substantially similar aim: the maintenance of an existing allocation of resources. The absence of a general restitutionary remedy prompted the courts of equity in the nineteenth century to develop the law of property in order to provide relief where an asset which should have gone to the plaintiff came into the hands of the defendant. Equity recognised the asset as belonging to the plaintiff and enforced this equity against a defendant who was not a bona fide purchaser for value without notice.[20] The trust provided an ideal mechanism for recovery with its division of legal and equitable ownership.

The concept of equitable ownership provided a basis for relief in cases elsewhere seen as third party enrichment. The result was that restitutionary relief was analogised with property law and acquired proprietary characteristics. The plaintiff is entitled to preferential recovery in the insolvency of the enrichment debtor. Tracing is conceptualised as the substitution of one physical asset for another.[21] The defence of bona fide purchase takes precedence over the change of position defence.

The unique concept of the trust, and the division between law and equity, enabled English law to provide proprietary relief in circumstances where other jurisdictions accepted that property was lost and confined the plaintiff to an enrichment remedy. The analogy with property law continues to affect restitutionary thinking in England.[22] Much work remains to be done in establishing the boundary between restitution and property and in harmonising the divergent approaches of law and equity.[23]

2 *Enrichment*

(a) Money

It is generally agreed that the receipt of money will constitute an enrichment.[24] Enrichment relates to wealth, and money is the very measure of wealth. But it

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19 See *Fibrosa Spolka Akcynja* v *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. Most quasi-contractual claims differ substantially from contractual analyses. But note *Guinness* v *Saunders* [1990] 2 AC 663 where the impossibility of a contract prompted the House of Lords to deny restitutionary relief.

20 This pattern emerges in a great variety of circumstances. An early example is its extension to cases of agency: *Foley* v *Hill* (1848) 9 ER 1002. The proceeds of sale belong in equity to the principal who can bring a proprietary (rather than restitutionary) claim against a third party. See also *Westpac Banking Corporation* v *Savin* [1985] 2 NZLR 41.

21 *Taylor* v *Plumer* (1815) 3 M & S 562.

22 Note in particular the "half-way house" position adopted in *Lipkin Gorman*, supra n 1; proprietary thinking gives way to restitution only at the moment of enrichment. The defence of bona fide purchase still applies and priority in insolvency remains possible.

23 See eg William Swadling, "A New Role for Resulting Trusts?"(1996) 16 LS 110; Steven Fennell, "Misdirected Funds: Problems of Uncertainty and Inconsistency" (1994) 57 MLR 38; Paul Key, "Bona Fide Purchase in the Law of Restitution" [1994] LMCLQ 421.

24 *British Petroleum Exploration Co (Libya) Ltd* v *Hunt (No 2)* [1979] 1 WLR 783 at 799

requires a great deal of confidence in the ability of restitutionary defences to limit liability to hold that peripheral recipients such as agents, banks or solicitors have been enriched. And until 1991 no general defence existed.[25] Accordingly, it has been held that there is no enrichment where the money had not been received for the defendant's own use and benefit. This is seen as necessary "to confine liability to those receipts relevant to the loss".[26]

This test of enrichment excludes receipts by agents, banks and solicitors.[27] Similarly it has been said that a receipt balanced by a corresponding payment does not constitute an enrichment. Thus, a bank deposit will create a chose in action and preclude any enrichment on the part of the bank.[28] These cases, however, confuse the test of an enrichment with the existence of a defence, and need to be re-examined.

The use of enrichment to protect innocent recipients creates irrational distinctions and is difficult to reconcile with the principle of unjust enrichment. It is not clear why a deposit into an overdrawn account merits less protection than credit deposits.[29] Banks depend upon both debit and credit accounts for existence and are not automatically enriched by one rather than the other. The "net receipt" test must hold that a deposit into an overdrawn account reduces the liability of the account holder and cannot constitute an enrichment.[30]

The solution is to accept that enrichment cannot adequately test the merits of recipient liability. Defences need to be developed to perform this role. The simple proposition that the receipt of money will always constitute an enrichment should be preferred.

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per Robert Goff J: "money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited". See also Goff and Jones, supra n 5 at 17, Birks, supra n 6 at 109.

25 The defence of change of position was introduced by the House of Lords in *Lipkin Gorman*. Its absence added an extra level of complexity as earlier judges attempted to limit liability on intellectually unsound bases: see *Re Montagu's Settlement Trusts* [1987] 1 Ch 270; *Selangor United Rubber Estates Ltd* v *Cradock* [1972] 1 All ER 1210; *Karak Rubber Oil Ltd* v *Burden (No 2)* [1980] 1 All ER 393.

26 *Agip (Africa) Ltd* v *Jackson* [1989] 3 WLR 1370 at 1388 per Millet J.

27 For agents see *Agip (Africa);* for banks *Savin,* supra n 20 at 69; and for solicitors *Williams* v *Williams* (1881) 17 Ch D 437.

28 *Foley* v *Hill* (1848) 9 ER 1002, *Nimmo* v *Westpac Banking Corporation* [1993] 3 NZLR 218 per Blanchard J at 224. See also *Lipkin Gorman* at 16 per Lord Templeman: "a car dealer who receives £20,000 for a car worth £20,000 and will not be enriched at all".

29 *Nimmo* is therefore inconsistent with *Westpac* v *Savin* [1985] 2 NZLR 41; *Powell* v *Thompson* [1991] 1 NZLR 597 at 613; *Agip (Africa)* at 1388; *International Sales and Agencies Ltd* v *Marcus* [1982] 3 All ER 551 at 558; *Australia and New Zealand Banking Group* v *Westpac Banking Corporation* (1988) 78 ALR 157, 162 CLR 662 and *DPC Estates Pty Ltd* v *Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443.

30 This is not to say that *Nimmo* is correct. This test will exclude enrichment and hence liability whether the recipient has acted mala fide or not. It is impossible to fit a distinction based on mala fides into the test of a corresponding payment. The status of the car dealer as regards enrichment cannot depend upon his state of mind; and yet it is clear that Lord Templeman would intend the mala fide recipient to be caught (see *Lipkin Gorman* at 16).

(b) Benefits in kind

Non-monetary benefits raise further problems. Services cannot be restored in specie. Neither can goods which have been consumed or attached to property. These kinds of goods are less obviously enriching.[31] If restitution is to occur it must take the form of a money payment. This involves the forced conversion of goods or services into money; or, in other words, the purchase of the "benefit". But the defendant may not have wanted her house painted or car serviced. She liked her house just the way it was. Why should she pay for something that she did not want and will never realise in money?

Victorian judges embraced this appeal to subjectivity of value. "One cleans another's shoes; what can the other do but put them on?"[32] In another context:[33]

> liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.

This argument is premised upon the assumption that benefits in kind have value only to the extent that the individual chooses to give them value. The problem arises when the defendant is required to convert one form of wealth (service) into another (money). Goods which can be restored intact create no problems. Restitution will be required whether the goods were valued or not.[34] It is only where conversion into a restorable form (money) would be inequitable that the defendant will be permitted to subjectively devalue the benefit.[35]

This appeal to subjectivity is not absolute. Some benefits are incontrovertibly enriching. Money is an immediate example.[36] So is the saving of necessary or inevitable expenditure. This includes the discharge of a legal debt[37] and the

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31 *BP Exploration* supra n 24 at 799: "By their nature services cannot be restored. The identity and nature of the resultant benefit to the recipient may be debatable".

32 *Taylor* v *Laird* [1856] 25 LJ Ex 329 at 332 per Pollock CB.

33 *Falcke* v *Scottish Imperial Insurance Co* (1886) 34 Ch D 234 at 248 per Bowen LJ.

34 This will not always be on the basis of a property interest. The factor calling for restitution may not have been sufficient to prevent property in the good from passing. Unjust enrichment will then found relief. Theoretically this should mean the defendant is enriched whenever objectively valuable goods are received. The later consumption or attachment of the good cannot change the fact of enrichment. If restitution in such a case (consumption or attachment) is denied it must be through a defence. This means that the argument from subjective devaluation provides the defendant with a defence to an action for restitution on the basis that the conversion of the enrichment received into restorable enrichment would be inequitable (*Lipkin Gorman*, supra n 1 at 35).

35 Birks, supra n 6 at 109.

36 Alternatively, in the case of money the inconvenience of converting one form of wealth into another does not arise. No defence exists.

37 *Exall* v *Partridge* (1799) 8 TR 308. Note that in English law debts will rarely be discharged without the consent of the debtor (*Falcke*, supra n 33; *Barclays Bank* v *WJ Simms (Southern) Ltd* [1980] QB 677; *Owen* v *Tate* [1976] 1 QB 402). This consent (free acceptance) will obviate the need to prove an incontrovertible benefit. Cf § 267 (1) of the BGB.

saving of expenditure which is factually necessary.[38] Request or acquiescence (free acceptance) in the receipt of the benefit will prevent any recourse to subjectivity of value.[39]

It is obvious that benefits in kind pose severe difficulties for the assessment of enrichment. There is little agreement amongst judges and academics as to when defendants will be permitted to subjectively devalue benefits. Nor is there any consensus as to the policy issues involved. There are three available solutions for a legal system to adopt; an objective test of enrichment based upon the existence of a market for the good or service in question; a subjective test based upon free choice; or a mixed test in which the greater perversities of subjectivity are tempered by an appeal to the reasonable person. English law appears to have adopted a mixed test, but the exact content remains obscure.

3 *At the expense of the plaintiff*

This requirement establishes the plaintiff's right to sue. Some kind of connection with the enrichment must be shown to justify restitution to the plaintiff rather than anyone else.[40] This can be done in one of two ways. The first is to show that the enrichment was derived through a wrong committed against the plaintiff. The second is to show that the enrichment is mirrored by a corresponding loss on the part of the plaintiff.[41]

(a) By a wrong to the plaintiff

The normal remedy for a legal wrong is compensation. The plaintiff is restored to the position he or she would have occupied but for the wrong. But if damages are impossible to calculate or non-existent this may not be a sufficient remedy. Restitution for a wrong aims to remove any benefits acquired through the breach of duty. The remedy vindicates the victim's right to be free from interference.

How does this relate to restitution? Most cases of autonomous unjust enrichment involve a transfer of wealth from P to D: enrichment by subtraction. By contrast, restitution for wrongs does not seek to maintain an equilibrium of resources by correcting an improper reallocation. It is designed simply as a policy based extension of the law of damages in order to compel wrongdoers to disgorge ill-gotten gains. The analogy with exemplary damages is very strong and the plaintiff's title to sue equally tenuous. If restitutionary damages are to be differentiated from exemplary damages and linked with unjust enrichment a more compelling explanation will need to be found.[42]

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38 *Craven-Ellis* v *Canons Ltd* [1936] 2 KB 403 (the services of a managing director).

39 *Planche* v *Colbourne Ltd* (1831) 8 Bing 14; Birks, supra n 6 at 265. Cf *Phillips* v *Homfray* (1883) 24 Ch D 439 where the defendant freely chose to use the plaintiff's land and yet was not enriched.

40 *Chase Manhattan NA* v *Israel-British Bank (London) Ltd* [1980] 2 WLR 202 per Goulding J: "Unjust enrichment cannot be a complete cause of action in itself, for it does not identify the plaintiff".

41 Birks, supra n 6 at 26.

42 Birks tells us that restitution for wrongs arises through an ambiguity in the phrase "at the expense of" (supra n 6 at 23). But semantic substitution proves nothing.

A starting point is that not all wrongs will ground a restitutionary claim. Proprietary torts such as conversion or trespass are clearly sufficient.[43] Interference with intellectual property rights and breach of a proprietary restrictive covenant will also found restitution.[44] More doubtful are the torts of defamation and nuisance.[45] Interference with privacy has never been argued. Breach of contract will not found restitution;[46] but the tort of inducing a breach of contract will.[47] These categories clearly demonstrate the form-based origins of English law and the process of incremental advance by analogy with established categories.[48] This has the advantage of limiting the tendency of principle to override policy considerations attendant upon each fact situation.[49] The disadvantage is the lack of synthesis and the apparent irrationality of the distinctions drawn.[50] Excessive casuistry can create complicated diffuse and technical rules which quickly become unintelligible.[51]

The difficulty is that there is no transfer of wealth there is no reason why policy based arguments should find expression in unjust enrichment rather than anywhere else.

43 *Lamine* v *Dorrell* (1701) 2 Ld Raym 1216 (conversion of debentures); *Strand Electric and Engineering Co Ltd* v *Brisford Entertainments Ltd* [1952] 2 QB 246 (conversion to chattles); *Whitwham* v *Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 (trespass to land); cf *Phillips* v *Homfray* (1883) 24 ChD 439 where the saving of expenditure occasioned by trespass to land was held not to constitute an enrichment.

44 *Watson Laidlaw & Co Ltd* v *Potts, Cassels & Williamson* (1914) 31 RPS 104 at 120; *Seager* supra n 3; *Wrotham Park Estates Ltd* v *Parkside Homes Ltd* [1974] 1 WLR 798.

45 Defamation was rejected in *Hart* v *EP Dutton Ltd* 93 NYS (2d) 871 (1949). Exemplary damages remain the preferred mechanism for punishing wilful defamers. In *Stoke on Trent City Council* v *W&J Wass Ltd* [1989] 3 All ER 394 restitution was refused for a nuisance involving a breach of the plaintiff's exclusive market rights.

46 *Tito* v *Waddell (No 2)* [1977] Ch 106; *Surrey County Council* v *Bredero Homes Ltd* [1992] 3 All ER 302; cf *City of New Orleans* v *Fireman's Charitable Association* (1891) 9 So 486.

47 *Lightly* v *Clouston* (1808) 1 Taunt 112; *Federal Sugar Refining Co* v *United States Sugar Equalisation Board* 268 F 575 (1920).

48 *Murphy* v *Brentwood District Council* [1991] 1 AC 398.

49 Breach of contract provides a good example. This issue cannot be determined by analogy with the waiver of tort. The policy arguments differ substantially. The theory of efficient breach argues for the reallocation of inefficiently allocated resources through breach of contract and the payment of contract damages. It is better to break a losing contract and cut one's losses rather than soldier on through. The net gain of society is also improved. Furthermore restitution for breach of contract raises fundamental questions about the basis of contract: either as a promise (Fried, *Contract as Promise* (1981)) or as a means of risk allocation (Holmes, *The Path of the Law* (1931)). Restitution for breach of contract may be necessary to compel the performance of promises, but not to enforce agreed risks.

50 Compare breach of contract with the tort of inducing a breach of contract; or a nuisance breaching an exclusive market right (*Stoke City Council* v *Wass*) with which the breach of a monopoly right conferred by copyright, patent or obligation of confidence. In each of these comparisons the substance of what has occurred and the policy arguments involved are identical. One would think that the result would be the same.

51 Zimmerman, supra n 13 at 891.

Attempts to rationalise this area have been made. Those arguments that do not refer to unjust enrichment can be disregarded in an essay on unjust enrichment.[52] More appealing are approaches which regard the legal right in question as something of value which has been diverted to the benefit of the defendant. This creates the element of transfer or diversion of wealth that provides the link with unjust enrichment. But this kind of analysis has not yet been fully explored in English law.[53]

The remaining difficulty is the measure of enrichment derived from the wrong. Some cases strip the wrongdoer of all profits obtained through breach.[54] Others require the payment of a reasonable price for the unlawful activity.[55] A third option is to remove the entirety of the profit subject to an allowance for skill and labour.[56] It is unclear how a distinction premised upon conscious wrongdoing can fit in to the formula for unjust enrichment.

(b) Subtraction from the plaintiff

The most common sense in which an enrichment will occur at the expense of the plaintiff involves subtraction from the plaintiff's wealth. The necessary connection will be present if the gain to D is balanced by a corresponding loss to P or if the plus to D is mirrored by a minus to P.[57] The existence of a connection signifies an imbalance of wealth which can be rectified by restitution. In this way an equilibrium of goods can be maintained.[58]

Subtractive enrichment is easy in two-party situations. If P pays money to D the gain to D is immediately balanced by a corresponding loss to P. In one and the same transaction D becomes enriched at the expense of P. If the payment was made by mistake the enrichment will be unjust and restitution will follow.[59]

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52 Robin Jackman [1989] CLJ 302 advocates the use of restitution to protect "facilitative institutions".; Goff and Jones prefer that efficient criterion the justice of the case; and Birks the concept of "anti-enrichment wrongs" (supra n 6 at 313; "Restitution for Wrongs" [1982] CLP 53). The latter test has the merit of referring to unjust enrichment (although only vaguely), whereas the others merely represent policy arguments which might as well find expression through exemplary damages.

53 Sharpe and Waddams ("Damages for Lost Opportunity to Bargain" (1982) 2 OJLS 290) have argued that restitution for the use of another's property represents damages for loss of the opportunity to bargain with the defendant. The plaintiff therefore recovers a sum representing a licence fee. The argument aimed at bringing the area squarely within contract law; but it illustrates the kind of diversion of wealth which should be a prerequisite for a claim in unjust enrichment.

54 *Peter Pan Manufacturing Corp* v *Corsets Silhouette Ltd* [1964] 1 WLR 96; *Canadian Aero Services* v *O'Malley* (1974) 40 DLR (3d) 373.

55 *Seager* supra n 3 (reasonable price for the use of confidential information); *Strand Electric* v *Brisford Entertainments Ltd* [1952] 2 QB 246 (reasonable hireage for the use of lighting equipment); *Whitwham* v *Westminster Brymbo Coal and Coke* [1896] 2 Ch 538 at 541-542 per Lindley J: "If one person has without leave of another used that person's land for his own purpose, he ought to pay for such a user".

56 *Boardman* v *Phipps* [1967] 2 AC 46; *Guinness* v *Saunders* [1990] 2 AC 663.

57 Birks, supra n 6 at 132.

58 Aristotle, *Nichomachean Ethics*, 1132a-1132b; Lon Fuller and William Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L J 52 at 55.

It is in three-party situations that enrichment by subtraction becomes difficult.[60] When will P be able to show a sufficient connection with the enrichment of a third party with whom he or she was not in an immediate transactional relationship? One such situation has already been covered. If P discharges D's debt by paying C the necessary link will be established.[61] D's enrichment occurred because of P's loss and in the same transaction. But the wider question has become increasingly important with the deregulation of the global financial market and the growth of multinational fraud.[62] Fraudsters can misdirect funds through a number of puppet recipients. If the immediate recipient is insolvent or unlocatable the victim of the fraud will proceed against a subsequent recipient.[63] This raises the problem of third party enrichment.

The traditional solution adopted by English law is to require P to show that D received money belonging to P.[64] In other words, P must show a proprietary interest in a particular sum of money and trace that proprietary interest through to a receipt by D. P can then assert this proprietary interest in identifiable money held by D. Recovery will depend upon the normal rules of property law. In particular the bone fide purchaser of money without actual or constructive notice of P's equity will acquire good legal title.[65]

In this area the English law of restitution remains highly influenced by the law of property and by the institution of the trust. The recognition of equitable property interests in money enables P to choose between a personal claim based on D's receipt of money belonging to P and a proprietary claim based on the identifiable presence of P's property within the assets of D. But both claims depend upon proof that D received P's money. This proof requires the creation and retention of property interests to be considered and the equitable and common law rules of tracing to be applied. Neither is easy.

(i) The creation and retention of property interests

The general rule in English law is that property passes when it is intended to pass.[66] This poses great difficulties for restitutionary claimants. Very often they will have intended to pass title. The mistake may not have been fundamental. The invalidity of the contract may not prevent the passing of title. That a claim based on total failure of consideration will face even greater difficulties is

59 *Kelly* v *Solari* (1841) 11 LJ Ex 10, 9 M & W 54, 6 Jur 107.

60 Third party enrichment has been described as the "nightmare of enrichment law" (Peter Schlechtriem, *Schuldrect, Besonderer Teil,* 1987, marg n 685) and as an "impenetrable jungle of dispute and uncertainty" (Zimmerman and du Plessis, supra n 7 at 31). Even Peter Birks regards the problem as "fiendishly difficult": [1991] LMCLQ 473 at 492.

61 *Exall* v *Partridge* (1799) 8 LT 308. See fn 36.

62 Peter Millet, "Tracing the Proceeds of Fraud" (1991) 107 LQR 71. Note that these cases will usually involve money; but benefits in kind should not raise different considerations.

63 Exactly the facts of *Agip (Africa)*, supra n 26. See text to n 64.

64 *Lipkin Gorman* at 27 per Lord Goff.

65 *Miller* v *Race* (1758) 1 Burr 452; *Clarke* v *Shee and Johnson* (1774) 1 Cowp 197; *Lipkin Gorman* at 27.

66 Section 19 Sale of Goods Act 1908 (NZ).

exemplified by *Re Goldcorp Exchange Ltd.*[67] The claimants purchased bullion. It was intended that property in the purchase money would pass. The failure of the vendor to complete the sale could not affect this. A finding that equitable property had been retained in the money was inconsistent with basic rules of property law. An enrichment claim against a third party would therefore have been precluded.[68]

Even the successful third party enrichment cases show cracks. In *Lipkin Gorman* v *Karpnale* the defendant received money drawn on the plaintiff solicitor's client account by an errant partner. Legal title to the withdrawn money passed to the partner.[69] This might mean that the defendant had received money belonging to the partner. But the solicitors were permitted to trace their chose in action against the bank through to the proceeds in the hands of the partner. This right to trace is really a power to vest. In other words the receipt of money which might vest in the plaintiff was held to create a sufficient connection.[70]

Agip (Africa) extends this even further. The rogue who drew money on Agip's Tunisian bank account had no authority to do so. The bank paid without the mandate of its client and could not debit Agip's account. The money in the hands of the rogue belonged to the bank. But it was held as a matter of fact that the rogue had been enriched at the expense of Agip.[71]

To summarise, the rules governing the retention of a property interest will not help the great majority of restitutionary claimants. This places pressure on judges to stretch the traditional rules or create a property interest to meet the justice of the case.[72] But this merely begs the question of the kind of connection that will he sufficient to justify a third party claim.

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67 [1995] 1 AC 74; W J Swadling, "Restitution for No Consideration" [1994] RLR 73 at 80-81.

68 The plaintiff's brought a proprietary claim against Goldcorp. But a claim against a third party recipient (such as the bank to whom the moneys were paid in discharge of the overdraft) which would have faced the same initial barrier.

69 Supra n 1 . The House of Lords accepted an earlier Privy Council authority on the transfer of title; see *Union Bank of Australia Ltd* v *McClintock* [1922] 1 AC 240; *Commercial Banking Co of Sydney Ltd* v *Mann* [1961] AC 1.

70 Roy Goode describes the power to vest as an ad rem right: "Property and Unjust Enrichment" in Burrows (ed), *Essays on the Law of Restitution* (Oxford, 1991). See also Peter Birks, "The English Recognition of Unjust Enrichment" [1991] LMCLQ 473. In *Lipkin Gorman* Lord Goff relied upon *Taylor* v *Plumer* (1815) 3 M&S 562. Lord Templeman refused to involve himself in the technicalities of title. In doing so he impliedly rejected the proprietary approach.

71 *Agip (Africa)*, supra n 26. The relationship with the bank parallels *Barclays Bank* v *WJ Simms* [1980] QB 677. The case may have been influenced by Agip's inability to recover from the bank in a Tunisian court; but the problems of a proprietary approach remain clear.

72 *Chase Manhattan* [1980] 2 WLR 202 provides a good example. The payer appreciated the identity of the other side and its mistake and could not be described as fundamental. This pressure has also encouraged the growth of the remedial constructive trust.

(ii) Tracing

It is not enough to show that P retained title to the money. It must also be shown that D received that money rather than another sum. This evidential exercise is further confused by the fact that the common law and equity use different rules of evidence. In the common law tracing is linked with the substitution of one physical, corporeal asset for another.[73] This analogy poses difficulties even where simple bank accounts are involved. Financial clearing centres create insuperable barriers.[74]

Equity's rules are more flexible but they require the existence of a fiduciary relationship to be invoked.[75] Furthermore tracing presupposes the continued existence of the asset. This means that money cannot be traced through an overdrawn bank account.[76] Attempts to circumnavigate this limitation abandon a proprietary approach by departing from the image of a physical substitution of one asset for another.[77]

(iii) The analogy with property

It might well be asked why all this confusion is necessary. If the law of property cannot identify the circumstances to which an enrichment will be at the expense of the plaintiff with a reasonable degree of certainty it should be disregarded. There is no necessary reason why property law must be involved. It is in fact questionable whether property provides the correct mechanism for relief in third party enrichment cases. The fictional creation of property interests does not conduce to commercial certainty. The analogy with property brings with it preferential recovery in the insolvency of the defendant. It is not clear that this priority is in every case deserved.[78] Framing relief in terms of a constructive trust suggests that the defendant will be placed under obligations as a constructive trustee.[79]

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73 *Taylor* v *Plumer* (1815) 3 M & S 562

74 *Re Diplock* [1948] Ch 265; *Agip (Africa)* per Millet J at 1389: "nothing passed from New York to London but a stream of electrons." The common law has however traced through bank accounts in *Lipkin Gorman* and *Banque Belge pour L'Etranger* v *Hambrouck* [1921] 1 KB 321; but needless to say not without difficulty.

75 A meaningless rule circumvented in practice by the finding of fiduciary relationships in every conceivable situation. *Elders Pastoral* v *Bank of New Zealand* [1989] 2 NZLR 180 probably abolishes the requirement in New Zealand.

76 *Re Diplock* [1948] Ch 465; *Re Goldcorp Exchange*, supra n 67.

77 *Bishopsgate Investment Management Ltd (In Liq)* v *Homan* [1994] 3 WLR 1270. Establishing a link between a deposit into an overdrawn account and a subsequent withdrawal fits better into a causative test of enrichment rather than a proprietary analysis. See n 156; Birks, "The English Condition of Unjust Enrichment" [1992] Acta Juridica 1 at 21.

78 Both the Privy Council and the House of Lords have recently indicated concern at the tendency to award preferential recovery in conjunction with claims for unjust enrichment. See *Re Goldcorp Exchange* supra n 67; and the appeal from *Westdeutsche Landesbank Gironzentrale* v *Islington LBC* [1994] 1 WLR 938 released by the House of Lords on 25 May 1996.

79 This impression has led judges to deny relief altogether: see *Re Montagu's Settlement*, supra n 25 and *Carl Zeiss Stiftung* v *Herbert Smith & Co (No 2)* [1969] 2 Ch 276.

A further difficulty is that the analogy removes third-party enrichment from enrichment theory altogether. If P retains equitable property in money paid by mistake P has not lost anything at all. P began and finished the story as the equitable owner of the money. Nothing has occurred at P's expense. Unjust enrichment cannot apply.[80] Millet LJ has described the relationship between unjust enrichment and property as "the most difficult question" to be solved in the law of restitution.[81] If property law cannot adequately deal with the connection between enrichment and impoverishment English law will need an alternative approach. The question is ultimately simple: what kind of connection will justify relief?

4 *Unjust*

Not all transfers of wealth can be reversible. An exchange economy is based upon the ordered reallocation of wealth. The purpose of commercial law is to regulate these transfers. In this sense restitution is supplementary. The function of restitution must be to maintain an equilibrium of resources by reversing transfers of which the law does not approve. Under this approach the question would be whether the transfer can be justified by an established rule.

English law differs from this ideal. The circumstances in which an enrichment will be unjust are contained within the law of restitution.[82] The type of mistake for which restitution will be allowed differs from that which will justify setting aside a contract.[83] The casuistical origins of English law are here clearly evident. The law is primarily concerned to avoid any kind of appeal to abstract justice. It does this by categorising very precisely the circumstances in which an enrichment will be unjust. The plaintiff must point to a specific factor which justifies restitution. If a pre-established category does not exist the claim will fail.

The result is a list of "unjust factors". Burrows specifies 11: mistake, ignorance, duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity, ultra vires demands by public authorities, and the retention of the property without the consent of the owner.[84] Birks unites mistake, pressure and failure of consideration under the rubric of an involuntary transfer, adds the ground of "free acceptance", and leaves the remaining grounds to carry the

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But note Peter Birks, "Trust in the Recovery of Misapplied Money" in McKendrick (ed),*Commercial Aspects of Trusts and Fiduciaries* (Oxford, 1992) at 48: the language of trust is confusing and misleading and should be disregarded in favour of a personal obligation to make restitution.

80 Joanna Bird, "Restitution's uncertain progress" [1994] LMCLQ 308

81 Sir Peter Millet (1995) 111 LQR 517. See also William Swadling, "A New Role for Resulting Trusts?" (1996) 16 LS 110.

82 Izhak Englard, "Restitution of Benefits Conferred Without Obligation" in Peter Schlechtriem (ed), *International Encyclopaedia of Comparative Law* vol X at 5-9.

83 Any mistake which caused the payment to be made will justify restitution; *Barclays Bank* v *Simms* [1980] QB 677; *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353. Compare with the Contractual Mistakes Act 1977.

84 Andrew Burrows, *The Law of Restitution* (London, 1993) at 21. Ignorance has not yet been recognised by English courts; but see Birks [1989] LMCLQ 297. Others (incapacity, necessity, legal compulsion and illegality) are recognised only rarely.

burden of demonstrating what "miscellaneous policy grounds" really means. The status of free acceptance in particular is unclear.[85]

5 Defences

The current tendency within restitution is to widen the application of the elements of unjust enrichment. This focuses attention upon the development of defences to liability. We have already seen how the absence of an effective defence prompted judicial constraint in the use of enrichment theory.[86] The wider use of enrichment law can only be justified if sophisticated and coherent defences can be developed to confine liability to cases where it is truly merited.

The House of Lords took the first step in this process in *Lipkin Gorman* when it recognised the defence of change of position. In the words of Lord Goff: [87]

> The defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution.

This formulation raises questions as to the nature and scope of the defence. Is it available on a discretionary basis to meet the justice of the case? Such an approach would contrast strongly with the familiar concern to avoid appeals to abstract conceptions of justice and morality. Alternatively the defence might be confined to cases where the defendant has detrimentally relied upon the security of the receipt. This would reflect an important policy objective and create consistency with an existing statutory formulation of the defence.[88] Finally the defence could be related back to the principle of unjust enrichment itself by referring to the disposal of the enrichment. As yet it is unclear which approach English law will take. The choice will assume principal importance in cases where the defendant has been the victim of bad luck, theft or financial imprudence.

A further issue concerns the relationship between change of position and the existing defence of bona fide purchase.[89] The defences are similar but diverge in important respects. Bona fide purchase provides a complete defence in that it refuses to inquire into the adequacy of the defendant's consideration. Change of position has the potential to test the merits of the transaction. The defence of bona fide purchase will be precluded by constructive notice of the plaintiff's claim. This reference to negligence is difficult to apply and has been criticised as

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85 Birks, supra n 77 at 8. For the debate over free acceptance compare Birks, supra n 6 at 265 and Birks, "In Defence of Free Acceptance" in Burrows (ed), supra n 70 at 105; with Burrows, "Free Acceptance and the Law of Restitution" (1988) 104 LQR 576 and Stoljar, *The Law of Quasi-Contract* (2nd ed 1989) at 185-244.

86 See text to n 25.

87 *Lipkin Gorman* v *Karpnale Ltd* [1991] 3 WLR 10 per Lord Goff at 35.

88 Section 94B Judicature Act 1908. Birks comments that the defence forms "part of Lord Goff's strategy for a better reconciliation between the interest in obtaining restitution and the interest of the recipient in the security of his receipt." [1991] LMCLQ 473 at 489-490.

89 There are four lines of academic thought. Millet, supra n 62 at 82 and Birks [1991] LMCLQ 473 at 491 prefer to subsume bona fide purchase within change of position; Lord Goff in *Lipkin Gorman* at 35 prefers a separate restitutionary existence

inappropriate in commercial situations.[90] The development of the change of position defence might provide a timely opportunity to reassess the obligations imposed upon participants in commercial transactions. It is clear that the defence will not be available to a wrongdoer; but there is no reason why a person who has acted honestly should not be entitled to rely upon the security of his or her receipt. Negligence would then be immaterial.[91]

The possibility exists therefore that change of position will be very closely concerned with enrichment, and bona fide purchase confined to its traditional role of prioritising competing property interests.[92] Finally there is the relationship of change of position with the defences of ministerial receipt and counter-restitution essential. Synthesis is again possible. But these questions are all in the air. The defence of change of position is currently in a state of development. The experience of a foreign jurisdiction may be of real assistance.

6 *Conclusion*

The foregoing represents only a brief overview of the English law of restitution. The basic structure of unjust enrichment has been established. But several difficult questions remain. The concept of enrichment needs to be defined and the status of benefits in kind dealt with. Restitution for wrongs needs to be synthesised and its connection with unjust enrichment explained. The relationship of restitution with the law of property requires much attention. In particular it is clear that a proprietary approach to third-party enrichment is greatly problematic. Alternatives need to be considered. Finally, the parameters of the defence of change of position must be established.

IV Germany

Section 812 of the German Civil Code recognises a general action for unjustified enrichment. "A person who without legal ground obtains something from another and at the other's expense, through the other's performance or in any other way, is bound to render restitution."[93] The principle of unjust enrichment exists however on such an abstract level that a certain degree of refinement is

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for each; Key, supra n 23 sees bona fide purchase as belonging wholly to the law of property. By contrast, Fennell would not only recognise the independence of change of position but would extend its application into the general field of property law (Stephen Fennell (1994) 57 MLR 38).

90 *Eagle Trust Plc* v *SBS Securities Ltd* [1992] 4 All ER 363. In this context note the five-pronged scale of knowledge developed in *Baden Delvaux and Lecuit* v *Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1983] BCLC 325 sensibly discarded by the Privy Council in *Royal Brunei Airlines* v *Philip Tan Kok Ming* [1995] 3 WLR 64.

91 *Lipkin Gorman*, supra n 1 at 34: bad faith refers to actual knowledge of the facts. See *Royal Brunei Airlines* [1995] 3 All ER 64 for the concept of "honesty". Note also that a mistaken payment may be recovered whether the payer was negligent or not (*Kelly* v *Solari* (1841) 11 LJ Ex 10). If the plaintiff is entitled to be careless it is hard to see why the defendant should not be.

92 Key, supra n 23.

93 § 812 Burgerliches Gesetzbutch (BGB) (1900): "*Wer durch die Liestung eines anderen*

necessary before a general action can be widely applied. This is amply illustrated by the German experience. The century since codification has kept the principle under tight analytic control. Theoretical disagreement remains a feature of the law of unjustified enrichment; but fears of uncertain or indeterminate liability have been largely allayed. In practice the solution to individual cases are not normally in dispute.[94]

This achievement is principally due to three main factors: the taxonomy developed by Wilburg and von Caemmerer of enrichment by transfer (*Leistungkondiktion*) and enrichment by interference (*Eingriffskondiktion*), the broad change of position defence recognised in § 818 (3) and applied "with an unrelieved vigour and disregard of consequences that would be hard to find elsewhere in modern German law",[95] and finally the BGB's refusal to recognise the Roman *actio de in rem verso* in cases of third party enrichment.

1 *History*

The origins of the German action for unjustified enrichment lie in the Roman procedure of the *condictio*.[96] Like the writ of assumpsit, this involved a general allegation to be substantiated at trial. The development of the law of contract led to a distinction between *condictiones* based on mutuum (loan) and unjustified retention (*obligationes quasi ex contractu*).[97] That category included the *condictio ex causa furtive* for a theft or other wrong which encroached upon the plaintiff's property. The *condictio ob turpem causam* permitted recovery for illegal or immoral transactions. The *condictio causa data non secutum* provided relief where the purpose for which a transfer was made failed. This *condictio* was given special prominence by the limitations of the Roman law of contract and equates with the English action for total failure of consideration.[98] Finally, the *condictio sine causa* lay where wealth was transferred without cause and the *condictio indebiti* for payments fulfilling a non-existent obligation.[99] In addition the *negotiorum*

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oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet".

94 Zimmerman, supra n 13 at 892; Karl Larenz, *Lehrbuch des Schuldrects, Besonderer Teil* (11th ed, 1977) at 466; Detlef Konig, *Ungerechtfertigte Bereicherung, Tatbestande und Ordnungsprobleme in rechtsvergleichender Sicht* (1985) at 225.

95 John Dawson, "Erasable Enrichment in German Law" (1981) 61 Boston ULR 271 at 272.

96 For the German and Roman history of unjustified enrichment see generally Reinhard Zimmerman, supra n 13 at 834-901; A M Honore "Third Party Enrichment" [1960] Acta Juridica 236; DH Van Zyl, "The General Enrichment Action is Alive and Well" [1992] Acta Juridica 115; Zimmerman and du Plessis, supra n 7; Brice Dickson, "The Law of Restitution in the FRG; A Comparison with English Law" (1987) 36 ICLQ 751.

97 Justinian, *Institutes*, III, 27,6.

98 Peter Birks. "No Consideration: Restitution after Void Contracts" (1993) 23 WALR 195 at 209. See also *Cantiare San Rocco SA* v *Clyde Shipbuilding & Engineering Co Ltd* [1924] AC 226. The Romans recognised only four kinds of contract; sale, hire, partnership and mandate. This left considerable scope for a remedy designed to mop up void or unenforceable contracts. See Zimmerman, supra n 13 at 843-844.

99 This might apply to the payment of ultra vires tax (*Woolwich*, supra n 1 aside from the issue of voluntariness.

gestio applied to the management of another's affairs and the *actio de in rem verso* for the application of one person's property for the benefit of a third party.[100]

It is questionable whether the Romans made any attempt to synthesise these remedies. In the second century Pomponius asserted that "it is just according to the law of nature that no person shall be enriched at the expense of another":[101] but this was never elevated to the status of a rule of law. Synthesis was left for medieval commentators on the *ius commune*. The first was Hugo Grotius who in 1631 asserted that natural law requires imbalances resulting from the wrongful diversion of wealth to be corrected.[102] Huber applied the *actio de in rem verso* to cases of indirect enrichment where D is enriched by a contract between P and a third party. P's enrichment claim is subsidiary to the primary claim against the third party in contract.[103]

In 1825 von Savigny argued that the essential characteristic of the enrichment remedies of the *ius commune* was an increase in one person's estate through a decrease in the estate of another (*Vermogensverschiebung*).[104] Such a shift of wealth could only be justified by the consent of the losing party. The lucidity of von Savigny's approach paved the way for the recognition in 1900 of a general enrichment action in the BGB, together with several specifically recognised *condictiones*. But the *actio de in rem verso* was perceived to impose unwarranted liability on third parties and was dropped.[105]

The general enrichment action was first perceived as being based on equity and justice, designed to correct legal anomalies. Van Gierke said that in viewing the law of unjustified enrichment one stood "at the threshold of the most holy".[106] But this kind of animalism was soon rejected and the task of imposing a typographical structure embarked upon. In 1934 Wilburg argued that § 812 reflected cases where the shift of wealth occurred by another's transfer (*leistung*) and where it occurred by any other means.[107] Later, von Caemmerer rationalised those other means as involving an interference or encroachment (*eingriff*). This taxonomy has met with a great degree of judicial and academic support and can now be regarded as settled.[108]

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100 C 4,26,7,3 (Dioc, et Max): "If A has loaned money to B, A will be restricted to his remedy in contract except where C has ratified the loan or where the money has been converted to his account." The latter exception recognises the indirect enrichment of C at A's expense.

101 Pomponius, Digest 50,17,206; c 200 AD: "*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*".

102 Grotius,. *Inleiding tot de hollandsche rechts-geleerdheid* 3. 14-30.

103 Ulrich Huber, *Prealectiones juris civilis* 15.3. The Hodge Raad applied this theory in the seventeenth century; van Bynkershoek, *Observationes tumultuariae* 303. See generally Van Zyl, supra n 96.

104 von Savigny, *System des heutigen romischen Rechts*, vol 5, at 525.

105 Dickson, supra n 96.

106 John Dawson, supra n 95 at 276. The natural law view resembles both Lord Mansfield's conception of quasi-contract and the "supplementary" role of equity in English Law.

107 Walter Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach osterreichischem und deutschem Recht*, 1934.

108 Zimmerman, supra n 1 at 891.

2 Bereicherung

The general tendency of German law is to treat enrichment as a simple issue. The subjective issues which have bedevilled English law are to a large extent ignored. The Federal Supreme Court has equated enrichment (*Bereicherung*) with "the enlargement of another's estate".[109] This includes intangible advantages, such as an improved trading position. If that position was obtained through unfair competition § 812 may apply.[110] The obligation to make restitution extends to profits and emoluments derived from the original receipt.[111]

The normal rules of agency apply to a receipt by an agent. An authorised receipt will be attributed to the principal who will be liable to an enrichment action. The agent without authority will be personally enriched.[112] The analysis is not ideal but may be unavoidable in the absence of an *in rem verso* claim for third party enrichment.[113]

German defendants are not permitted to subjectively devalue benefits. Section 812 (2) requires the defendant to make good the value of an enrichment if it cannot be restored in specie. This suggests a simple and defensible solution to the problem of benefits in kind. Enrichments should be valued objectively by reference to the existence of a market for the good or service in question. The defendant will be enriched by the objective value of the benefit received. If that benefit exists in a restorable form there will (in the absence of a change of position defence) be no objection to its restoration.

The weakness of the German approach is that if the benefit exists in an irrestorable form (such as a service or goods which have been consumed or attached) a forced conversion of wealth may be unfair. An enrichment-based change of position defence may not apply. Accordingly, an independent defence should be recognised based upon the inequity of requiring the defendant to convert one form of wealth into another in order to make restitution.[114]

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109 BGHZ 58, 184 (188). Such an enlargement may be negative in the sense of freely chosen or inevitable expenditure. This includes the obtainment of an international airline ticket without payment: NJW 1971, 609.

110 Dickson, supra n 96 at 783. Such a case would bear a strong similarity with the classical English action for passing off which is based on the direct diversion of trade from the plaintiff to the defendant.

111 Section 812 (1): "The obligation to return extends to emoluments derived, and to whatever the recipient acquires either by virtue of a right obtained by him, or as compensation for the destruction, damage or deprivation of the object obtained".

112 65 RGZ 292 (1907); John Dawson, supra n 95 at 279. The Dutch position is substantially the same (Eltjo Schrage, "Restitution in the New Dutch Civil Code" [1994] RLR 208 at 211).

113 See *ANZ* v *Westpac* (1988) 78 ALR 157. The correct analysis may be to follow the enrichment to the principal through the agent's change of position defence. This kind of third party enrichment requires an *actio de in rem verso*. See Honore, supra n 96.

114 This limited kind or "hardship" defence could be based on Lord Goff's broad formulation in *Lipkin Gorman* at 35: restitution will be denied where it would be inequitable in all the circumstances. This may be what is meant by Birks in [1991] LMCLQ 173 at 490: "it is rather doubtful whether the enrichment- based version of the defence will go far enough to realilse the new strategy".

3 *Unjustified*

The common law and civilian approaches to the reversibility of an enrichment differ in emphasis. In Germany a transfer of wealth that cannot be justified by reference to any legal rule will be subject to restitution. It might be thought that placing the onus on the defendant to justify an enrichment would lead to an unwarrantable extension of liability. But in fact the German approach has created a more settled and stable pattern of analysis.

The reference in § 812 to an absence of legal cause stems from the *condictio sine causa* and enables enrichment theory to be isolated from the substantive rules that govern the transfer of wealth.[115] It is for the law of contract to determine whether a contractual relationship has sufficiently broken down for restitution to become involved. Similarly the rules of property law are to determine whether a transfer has occurred. This can be favourably compared with the English tendency to duplicate problems by developing different rules relating to breach of contract and total failure of consideration. Another example concerns the kind of mistake that will ground restitutionary relief, avoid a contract, and prevent the passing of title.[116]

There is very little sense in dealing with the same issue in a number of different contexts. Nor is it obvious that restitution is the appropriate place to determine the rules relating to transfers of wealth. Reinhard Zimmerman puts it well: [117]

> It is difficult to see why the law of unjustified enrichment should be saddled with the task of sorting out the fate of the contractual relationship.

In combination with the concept of *leistung* the *sine causa* approach has the great advantage of synchronising unjust enrichment with the laws of contract and property.[118]

4 *Leistungkondiktion*

The principal mechanism by which German law brings the concept of unjust enrichment under analytic control is the division between enrichment by transfer (*Leistungkondiktion*) and enrichment by interference (*Eingriffskondiktion*). *Leistung* requires the conscious enlargement of another's estate with a specific purpose in mind. The transfer must be intentional and it must be performed for a purpose.[119] If that purpose fails the enrichment will be without legal cause and will be recoverable.

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115 Izhak Englard, supra n 82 at ch 5, 5-8 at 5.

116 Confusion between three sets of rules is unavoidable. See *Chase Manhatten* [1980] 2 WLR 202.

117 Zimmerman, "Unjustified Enrichment: The Modern Civilian Approach" (1995) 15 OJLS 403 at 416.

118 Ibid at 408.

119 BGHZ 58, 784 (1988); Englard, "Restitution of Benefits Conferred Without Obligation", *International Encyclopaedia*, vol X, 5-8; Reuter and Martinek, *Ungerectfertigte Bereicherung* at 81

Leistung identifies parties to the litigation and eliminates the need for an inquiry into "at the expense of". The proper defendant is the person to whom the plaintiff intended to transfer wealth. That may not be the immediate recipient. If a bank pays out to a third party on a cheque it is making a transfer to its client rather than the third party.[120] The debt will be discharged and the client enriched at the expense of the bank.[121] If the purpose fails (the bank cannot then debit the customer's account) the enrichment will be reversed. By contrast the English approach requires the bank to look to the payee for relief where it has paid a cheque without its customer's mandate.[122]

The failure of the transfer's purpose provides the absence of legal cause required by § 812. This lends certainty to the concept of *sine causa.* A voluntary transfer or gift will have a valid legal causa: the perfected will of the transferor. "Unjustified" could not be incorporated into English law without an appreciation of the interrelation of *leistung* and *sine causa.*[123]

Leistung is not without its problems. Chief among those is the choice between a subjective and an objective test of purpose.[124] But the analogy with the English purpose loan is instructive. German transferors whose plans backfire are not permitted preferential recovery. They have accepted the risk of their debtor's insolvency and are confined to a personal claim.[125]

5 *Eingriffskondiktion*

German enrichment theory is essentially concerned with the proper distribution of resources. In theory an enrichment claim should be granted whenever something lies in the estate of the defendant which according to the correct method of allocating resources (*die rechtliche Guterordnung*) should not

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120 Zimmerman and du Plessis, supra n7.

121 § 267 (1) BGB.

122 *Barclays Bank* v *Simms*, supra n 37. The difference results from the different attitudes adopted by English and German law towards the discharge of a debt without consent of the debtor. In Germany the debt will be automatically discharged and a *Ruckgriffskondiktion* available against the debtor (Medicus, *Schuldrect*, vol 2, 238; Zimmerman and du Plessis, supra n 7 at 30). In English law the debt will not be discharged unless the payer has a sufficient connection with the debt (see *Butler* v *Rice* [1910] 2 Ch 277; *Owen* v *Tate* [1976] 1 QB 402). The rule discourages officious behaviour. But it is questionable whether banks lack a sufficient connection in relation to debts owed customers. The payee will certainly rely upon the bank's authority to bind the debtor.

123 Birks, supra n 98 at 231-232.

124 The current preference is for subjectivity (Reuter and Martinek, *Ungerectfertigte Bereicherung* at 125); but see Lieb, *Munchener Kommentar*, n 137; referred to in Zimmerman [1994] RLR 14 at 26.

125 Canaris, "Bereicherungsausgleich im Dreipersonenverhaltnis": in *Festschrift fur Larenz*, 802. Compare *Barclays Bank* v *Quistclose Investments Ltd* [1970] AC 567; *Space Investments Ltd* v *Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1987] 1 WLR 1072. But English law may be rethinking its attitude on insolvency: see *Re Goldcorp Exchange*, supra n 67. In *Martin* v *Pont* [1993] 3 NZLR 25 a personal claim was preferred over the proprietary approach available under *Quistclose.*

be there.[126] This restorative aim is crucial to a proper understanding of the *Eingriffskondiktion* or enrichment by interference.

It is tempting to see the Wilburg/von Caemmerer taxonomy as the exact equivalent of the English distinction between restitution for wrongs and enrichment by subtraction.[127] But all German enrichment cases insist upon a direct transfer of wealth from P to D. It is essential that D has acquired something that ought to belong to P. If that acquisition took the form of a conscious transfer by P, *leistung* will apply. But if it resulted from an interference by D or a third party the remedy will be an *Eingriff*. Either way it is crucial that P has lost something which D has gained; even if what P has lost is only the potential for gain.[128]

In England the restitution for wrongs reflects the principle that no person should profit from their own wrong. Unjust enrichment is used as a pretext for the imposition of exemplary damages upon a conscious wrongdoer and the removal of ill-gotten gains.[129] It does not matter that P has lost nothing. It is sufficient that P's rights have been violated. The concept of a transfer of wealth never arises.[130] In contrast, the concept of fault is irrelevant to the *Eingriff*. The use of another's property (*Sachverbrauch*) is conceived as involving a direct transfer of "wealth" in the broad sense of control over productive property. The German taxonomy takes place within the English category of enrichment by subtraction. Punitive or deterrent policies are left to other areas of law.[131]

This simplifies the measure of enrichment. The wealth inherent in property comes from the right to its exclusive use. That provides the ability to license the use of the asset by others and exploit its profit-making potential. The measure of enrichment will be the measure of wealth diverted to the use of D. If the asset is unique the profit-making potential will exist and an account of profits should be ordered. Monopolies conferred by intellectual property rights fit in here. If

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126 Larenz, *Lehrbuch des Schuldrechts*, vol II, 1981. See also Reuter and Martinek, *Ungerecifertigte Beretcherung* at 56-62; Dickson, supra n 96 at 780.

127 Zimmerman sees the similarity as the starting point for a closer understanding between English and German law (supra n 13 at 895). This observation neglects however the punitive element of wrong-based restitution in England. Birks notes the distinction but supports the use of restitution for exemplary purposes. For him it is the German typology which is "not unequivocally sound' (see (1993) Legal History 311 at 313).

128 Zimmerman, supra n 117 at 418: "In every legal system there are a number of legal positions that are "assigned" to a specific person ... the *Eingriff* skims off the benefit that the defendant acquired by encroaching or interfering with a position assigned to the plaintiff".

129 See *A-G for Hong Kong* v *Reid* [1994] 1 NZLR 3; *Riggs* v *Palmer*, 115 NY 506, 22 NE 188 (1889); Andrew Burrows, *The Law of Restitution* (1993) at 376.

130 For examples of restitution in the absence of loss see *Edwards* v *Lee's Administrator* (1936) 236 Ky 418 and *Raven Red Ash Coal* v *Ball* (1946) 85 Va 534. Dawson argues that the availability of a restitutionary remedy in the absence of loss provides the chief distinction between German and American law: supra n 95.

131 Cf the natural law approach originally adopted in relation to § 812. Schulz, *System dur Rechte auf den Eingriffserwerb*, (1909) 105 Archiv fur die civilistische Praxis 1. Also note Von Caemmerer, *Bereicherung und unerlaubte Handlung*, Festschrift fur Rabel, I 333 at 359-362.

the asset is commonplace the measure of enrichment will be a reasonable hireage rate. *Strand Electric* is a good example.[132] This distinction does not depend upon wrongdoing and fits directly in to the principle of unjust enrichment.

The critical requirement for the *Eingriff* is "at the expense of". The proper plaintiff is the person entitled to the right or benefit appropriated to the use of the defendant. This analysis avoids the need for a list of sufficient wrongs. The right invaded must merely be valuable so as to create a diversion of wealth. Thus the use in advertising of an unauthorised photograph of a famous actor constitutes an *Eingriff*. This actor's right to privacy is a valuable commodity which can be sold. The defendants were required to pay a reasonable license fee for the use of the photograph.[133]

6 *Third Party Enrichment*

The German law of property provides no mechanism for a proprietary approach to third party enrichment. This is because of the "principle of abstraction" developed by von Savigny. A contract for disposition of property must be kept distinct from the disposition itself. The transfer of property will occur independently of the contract. Accordingly property will still pass even if the underlying transaction is for some reason void. The lack of an institution as flexible as the trust has forced German law to develop a highly systemised enrichment law in place of proprietary remedies that can confer preferential recovery in the insolvency of the debtor. The German plaintiff will be restricted to a personal enrichment claim.[134]

The BGB's enrichment action was deliberately drafted to exclude the *actio de in rem verso* which was seen as imposing over-onerous obligations on third parties. Enrichment by transfer (*leistung*) can only apply to an immediate recipient.[135] The nature of the *Eingriff* defines both plaintiff and defendant. The courts originally interpreted the general action to require a directness of transfer (*Unmittelbarkeit der Vermogensverschiebung*). The gain to D and the loss to P must result from one and the same transaction.[136]

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132 *Strand Electric* [1952] 2 QB 246; see text to fn 68. *Seager*, supra n 3 provides an excellent discussion of this kind of approach in valuing a "reasonable licence." In circumstances of bilateral monopoly a reasonable market price may be impossible to assess and an account of profits the only alternative.

133 20 BGHZ 345 (1956); John Dawson, supra n 95 at 308. *Stoke on Trent City Council* [1989] 3 All ER 394 would certainly have been decided differently in Germany. The plaintiff's exclusive market right was a valuable legal position which the defendant ought not to have appropriated to its own use.

134 The weakness of German property law prompted Heinrich Dernburg to describe unjustified enrichment as "healing the wounds which the law itself inflicts"; *Burgerliches Recht*, vol II, 3rd ed 1906 at 677, see also Zimmerman, supra n 13 at 866-867.

135 See § 812: "A person who obtains something *from another and at the other's expense...*"

136 Zweigert and Kotz, *An Introduction to Comparative Law*, vol II, 1977 (transl Tony Weir) at 235. See also John Dawson, "Indirect Enrichment", *Ius Privatum Gentium*, vol 2, at 793.

The policy arguments behind the restriction are well summarised by Canaris.[137] They sound suprisingly similar to English ears attuned to concurrent liability in tort and contract. Three party enrichment cases usually arise in the context of a surrounding contractual relationship. The obligations involved in those relationships should be respected. Parties should bear the risk of insolvency of the party with whom they have chosen to contract. The "building in" cases (*Einbaufalle*) provide a good example.[138] In each of them a sub-contractor (C) who repairs property belonging to an owner (A) is restricted to a contractual claim against the head-contractor (B) even if B has become insolvent.[139]

Does this argument justify a complete prohibition of third party enrichment? There may be no claim against the immediate recipient of the enrichment. If the recipient of a mistaken payment has gifted money to a third party he or she will have a change of position defence. The sensible solution must be to allow the plaintiff to proceed against the third party who has been enriched as a result of the mistaken payment.[140] As a donee the third party will have no reason to object to restitution. The BGB provides for this situation in § 822 but only as a limited exception.[141] The same reasoning should apply to a mala fide third party who cannot rely upon a change of position defence. In other words, a general right of recovery for indirect enrichment at the expense of another should be recognised subject to the protection afforded to the interest in security of receipts by the change of position defence.

Should the existence of a claim against the immediate recipient preclude this action? English law has at times shown scant regard for Canaris' policy arguments.[142] A proprietary approach to tracing runs roughshod over intermediate claims. It is more efficient to permit a direct action than to set in process a chain of claims.[143] If the immediate recipient is a thief the plaintiff may have accepted no insolvency risk and should be entitled to preference over the thief's general creditors (if permitting an indirect enrichment claim amounts to that).

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137 Claus-Wilhelm Canaris, "Bereicherungsausgleich im Dreipersonenverhaltnis" *Festschrift fur Karl Larenz* (1973) at 799. See also Zimmerman and du Plessis, supra n 7 at 32.

138 BGHZ 40, 272; BGHZ 56, 228.

139 Compare with *Junior Books Ltd* v *Veitchi and Co Ltd* [1983] 1 AC 520 and *Henderson* v *Merrett Syndicates Ltd* [1994] 3 WLR 761.

140 English academics are beginning to pursue this argument: Peter Birks, "The Condition of the English law of Unjust Enrichment" [1992] Acta Juridica 1 at 19-22; Steven Fennell, "Misdirected Funds: Problems of Uncertainty and Inconsistency".

141 § 822: "If the recipient transfers the thing acquired gratuitously to a third party, and if in consequence of this the obligation of the recipient for return of the enrichment is excluded, the third party is bound to return the enrichment as if he had received it from the creditor without legal ground."

142 Indeed one wonders whether the very concept of an insolvency risk is known to English law: see for example *Barclays Bank* v *Quistclose Investments Ltd* [1970] AC 567; *Foley* v *Hill* (1848) 9 ER 1002; *Liggett* v *Kensington* [1993] 1 NZLR 257; *Chase Manhatten NA* v *Isreal-British Bank* [1980] 2 WLR 202; *Neste Oy* v *Lloyds Bank Plc* [1983] 2 Lloyds LR 658; *Henderson* v *Merrett Syndicates* [1994] 3 WLR 761.

143 *Agip (Africa)* provides a good example. Forcing litigation againmst the bank would simply result in the bank suing the defendants. If there is no hint of insolvency

In addition, most third parties will have a defence. The owner in the building case can rely upon his or her contract with the head contractor as providing a change of position defence.[144] If a defence does not exist it will be for good reason. The third party will then have no right to complain when called on to make restitution.[145] Suppose the owner was a family friend to whom the head contractor had donated the improvements to the property. Why should the sub-contractor not supplement his or her contractual remedy against the head contractor with a restitutionary remedy against the owner?[146]

Jurisdictions which recognise the *actio de in rem verso* limit its application through the principle of subsidiarity. The plaintiff's other remedies must be exhausted before the indirect enrichment action can be resorted to. The question whether insolvency of the primary defendant amounts to exhaustion is a moot point.[147] Policy arguments either way can be enforced through subsidiarity.

In conclusion, an *actio in de rem verso* for third party enrichment can be harmonised with the Canaris assertion of the primacy of freely chosen insolvency risks through the principle of subsidiarity. A well developed change of position defence can protect the interest in security of receipts. No risk therefore exists that indirect enrichment will lead to an unwarrantable extension of liability. The growing trend towards third party enrichment in Germany should be encouraged and the possibilities for application in England seriously considered.[148]

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the expense of litigation is greatly reduced by permitting A to sue D rather than A v B, B v C, C v D ... See *Lord Napier and Ettrick* v *Hunter* [1993] 2 WLR 42 and *Henderson* v *Merrett Syndicate* for situations in which immediate claims would have been administratively unworkable.

144 This is the true rationale for the refusal of relief in *Pan Ocean Shipping Co Ltd* v *Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161. Creditcorp had purchased the enrichment derived from Pan Ocean innocently and for value. See Andrew Burrows [1994] RLR 16.

145 *David* v *Frowd* (1833) 1 Myl & K 200 per Sir John Leach MR at 211.

146 This action was recognised by the Hoge Raad in the seventeenth century. B agreed to buy a house from A and contracted C to effect repairs to it. When B failed to complete the purchase A reclaimed the improved house. Upon B's insolvency C successfully reclaimed his expenses from A (van Bynkershoek, *Observationes tumultuariae* 303; van Zyl [1992] Acta Juridica 115 at 127). More recently similar facts existed in *Investors Protection Co Ltd* v *Ray Courtney Architects Ltd* (1993) 7 PRNZ 1. Watts argues [1994] NZLR 424 at 430 that recovery should not be permitted because as against the owner the sub-contractor is a volunteer and cannot establish a ground for restitution. But if the purpose for which the improvements were made (the payment of wages) is not satisfied any enrichment will be unjustified both in Germany (sine causa) and in England (total failure of consideration).

147 Compare the French *enrichessement sans cause* (permissable if the immediate recipient is insolvent and the primary action worthless) with the Austrian action for indirect enrichment which is merely a "supplementary remedy only to be used where there is no contract or analogous relationship between the plaintiff and the intermediary which could be used for the decision of the case" (OGHZ 16.1.52, SZXXV 13; Zweigert and Kotz, *Introduction to Comparative Law* at 235).

148 For the growing German trend see Zimmerman and du Plessis, supra n 7 at 31-36.

7 Wegfall

The consistent theme throughout this essay is of a steady extension of enrichment liability. This extension places a great deal of pressure upon the ability of a well developed change of position defence to maintain the general interest in security of receipts. In attempting to develop a comprehensive defence we need look no further than Germany. Section 818 (3) provides that the obligation to make restitution is excluded to the extent that the recipient has ceased to be enriched. This provision means that a defendant cannot be required to surrender more than his or her surviving net gain. No one must be forced by the action for unjust enrichment to reach into their own pocket or to reduce their estate by more than the original enrichment.[149]

The interpretation given to § 818 (3) by the German courts requires the enrichment creditor to assume the risk of every activity the recipient undertakes. If the enrichment is injected into the defendant's business and lost a defence will be available. If the recipient is mugged and the enrichment stolen § 818 (3) will apply. *Wegfall* even served to protect recipients against post-First World War hyperinflation and the risks attendant upon the continued possession of money.[150] Fire, invasion, apocalypse or Armageddon, it matters not. The plaintiff will be required to insure the defendant against the loss of the enrichment.

This preoccupation with the innocent defendant is the characteristic "weakness" of German enrichment law.[151] It denies the legitimacy of the plaintiff's claim for recovery more than can be warranted by reference to any policy ground.[152] But the German approach does have several salutary characteristics. Linking the change of position defence explicitly with the disposal of the enrichment provides an intellectually sound rationale for the defence. The flaw lies in applying this test as if, as is usually the case in unjustified enrichment, there is no loss. But the *Wegfall* creates a loss which must be borne by one of the parties.

This should bring in normal considerations of assumption of risk and the allocation of loss. Tort theory is applicable. The solution is to take into account normal assumptions of risk in ascertaining the circumstances in which an enrichment will have been disposed of. For example, if I mistakenly pay someone who is then mugged in the street no defence should be available. There was no connection between my payment and the theft. The theft would have occurred in any event. The defendant must bear personal risks of this kind. The result might be very different if the burglary occurred because of my payment. If a well-publicised lottery payment caused thieves to break into the recipient's house

149 See Dawson, supra n 95, for a comprehensive and highly critical analysis of the German change of position (*Wegfall*) defence.

150 Warneyer, 1935, 127; JW 1925, 465; Warneyer, 1927, 91; 114 RGZ 342 (1926); Dawson, ibid at 280.

151 Zimmerman, supra n 13 at 896; Axel Flessner, *Wegfall der Bereicherung*, 1970 at 26, referring to Wilberg and Flume as the main critics. See also Peter Birks [1993] Legal History 310 at 313: the German experience should warn us to rein the English defence in.

152 Dawson at 314; the approach is "one-sided because it takes no account of what has for centuries been conceived of as a two-sided relation - enrichment acquired at the expense of *another*".

the mistaken lottery board should accept the consequence of its actions. Similarly the plaintiff should not bear the ordinary business risks of the defendant. But if the receipt of the money prompted a high risk investment a defence should be available. In other words there must be a causal connection between the enrichment and the event relied upon by the defendant as constituting the *Wegfall*.[153]

The German defence will only be precluded by knowledge of the absence of legal ground.[154] Negligence or constructive notice will not be sufficient. The additional protection this affords the security of the receipt is a welcome improvement on the common law test of bona fide purchase developed in the context of nineteenth century conveyancing transactions. Similarly it should not matter if the event said to erase the enrichment precedes the actual receipt. The inequity of requiring restitution to be made remains.[155] The question whether a pre-existing change of position can dispose of an enrichment may have some bearing on the question whether an enrichment can be traced through a pre-existing purchase.[156]

Finally, the German change of position defence exists independently of a property-based bona fide purchaser defence. Nor is the defence subdivided into categories of ministerial receipt, counter-restitution and illegality. It simply asserts that defendants who are no longer enriched should not make restitution. There is much sense in this.

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153 See Birks [1991] LMCLQ 473 at 489: "The condition of having been enriched is undone by causally related outlay, not by the casual onset of poverty". This causal connection might be similar to the test proposed for the tracing of wealth/enrichment instead of a substitutional property-based approach: see [1992] Acta Juridica 1 at 18-21

154 Section 819 (1): If the recipient knows of the absence of legal ground at the time of the receipt, or if he subsequently learns of it, he is bound to return from the time of the receipt or of the acquisition of knowledge as if an action on the claim for return were pending at that time".

155 *Lipkin Gorman* at 35. This is the German position; Dawson at 289; compare *South Tyneside MBC* v *Svenska International Plc* [1995] 1 All ER 545.

156 See *Bishopgate Investment Management* v *Homan* [1994] 3 WLR 1270 where the plaintiff sought to trace a deposit into an overdrawn account into assets earlier purchased from the account. The similarity of the issue can be seen by phrasing *Bishopgate* in reverse: would the (innocent!) company have a defence if it had earlier purchased assets in reliance on the payment? Yes, because of the causal connection between the purchase and the receipt. Dillon J searched for the same causal connection in the case itself. If it had existed the plaintiff would have been entitled to trace the enrichment through the change of position to the purchase of the assets (or to a third party). Subject to the principle of subsidiarity (and to the existence of a defence on the part of the third party) an *actio de in rem verso* would then lie.

V Conclusion

In 1983 Martinek argued that the assertion of a historical convergence in relation to the principle of unjust enrichment amongst civil and common law jurisdictions would be an over-simplification.[157] Since then England (1991) and the Netherlands (1992) have joined France (1892), Germany (1900), the United States (1937), Italy (1942), Canada (1954), Israel (1979) and Australia (1988) in recognising that the principle of unjust enrichment founds claims for restitution. This comparison of English and German law demonstrates that each jurisdiction will particularise the principle in a different fashion. But undoubtedly the principle itself is beginning to assume a core or essential form. Perhaps the most widespread formulation is that adopted in Quebec:[158]

> Most authorities, but not all, recognise that an action for unjustified enrichment is subject to the following conditions:
>
> 1 An enrichment;
> 2 An impoverishment;
> 3 A correlation between the enrichment and the impoverishment;
> 4 The absence of justification;
> 5 The absence of any other remedy;
> 6 The absence of evasion of the law.

The common law has much to learn form the German civilian tradition in developing an understanding of this framework. Insisting upon a shift of wealth illustrates the difficulties involved in restitution for wrongs. The German experience with *Wegfall* illustrated the way ahead for the change of position defence. But more important is the gradual elimination of the casuistical legacies of history. Both the division between law and equity and the traditional analogy with the law of property require much attention. A consistent theory of tracing needs to be developed, and insolvency principles agreed upon and applied. In a sense, unjust enrichment remains a concept foreign to the common law. It is general, abstract, all-embracing and universal: each a quality the common law prides itself on contradicting. But the uncertain nature of our own solutions, and the multiplicity of rules and remedies created by a diversity of origins, hardly provide a preferable alternative.

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157 Reuter and Martinek, *Ungerechtfertigte Bereicherung*, 23-38; Eltjo Schrage, "Restitution in the New Dutch Civil Code" [1994] RLR 208

158 *Cie Immobiliere Viger Ltee* v *Laureat Giguere Inc* [1977] 2 SCR 67 at 77 per Beetz J. This substantially represents the law in France, Austria, Canada and the Netherlands.