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## Introduction

This book is about particular three-party cases occurring at the boundary between tort and unjust enrichment. The conceptual problem to be addressed is to explain why a stranger to litigation should ever be entitled to participate in the fruits of that litigation. The paradigm example of such cases is the victim of a tortious injury and her carer. An incapacitated victim of tort may receive help from her friends and family who intervene in order to ameliorate the effects of the tortfeasor's negligence. They may give assistance in the form of services provided to the victim or payment of her debts. The victim is entitled to sue the wrongdoer in respect of the value of this assistance.<sup>1</sup> However, in general the carer has no right to sue the wrongdoer,<sup>2</sup> and it is widely assumed that she cannot compel the victim to do so on her behalf. In some cases, the victim will recover damages subject to the carer's entitlement to share in the fund. In these cases, the carer is a stranger to the victim's suit, but is nonetheless entitled to participate in the victim's judgment. The carer's entitlement to share in the fund has never been explained. In addition, the fact that in some cases the carer's right is proprietary adds to the confusion.

The same pattern is evident in the rights available to an indemnity insurer. The insurer indemnifies the insured for loss. The proper claimant in any suit against the wrongdoer is the insured.<sup>3</sup> The insured will hold any damages recovered subject to an equitable lien in favour of the insurer.<sup>4</sup> The insurer is thus a stranger to the insured's suit, but is nonetheless entitled to participate in the insured's judgment.

<sup>1</sup> *Hunt v. Severs* [1994] 2 AC 350; *Griffiths v. Kerkemeyer* (1977) 139 CLR 161; *Kars v. Kars* (1996) 187 CLR 354; *Thornton v. Board of School Trustees of School District No 57 (Prince George) et al* (1978) 83 DLR (3d) 480.

<sup>2</sup> There are exceptional cases in which the carer has sued the wrongdoer directly: *Ostapowich v. Benoit* (1982) 14 Sask R 233; *Poirier v. Dyer & Dyer* (1989) 91 NSR (2d) 119.

<sup>3</sup> *Esso Petroleum Co Ltd v. Hall Russell and Co Ltd* [1989] AC 643.

<sup>4</sup> *Lord Napier and Ettrick v. Hunter* [1993] 1 AC 713.

### **The problem stated: victims and carers**

The examples set out above reveal the core conceptual problem addressed by this book. That is to explain why a stranger to litigation should ever be entitled to participate in the fruits of that litigation. Litigation is conducted by a claimant against a defendant. One remedy which might be sought by the claimant is an award of damages. A third party, a stranger to the litigation, is not entitled in the ordinary course to the benefit of these damages. However, there are categories of case in which a different pattern emerges. In these examples, the court departs from the general position and awards damages to the claimant on terms which recognise the interest of the stranger. This book explains why such an entitlement arises. In addition, it is necessary to explain why, if ever, the stranger's right to participate is expressed via a proprietary mechanism, rather than a mere personal entitlement. Finally, the book exposes a hidden anomaly. Given that the carer's position is recognised via an entitlement to share in the fruits of the victim's claim, it is surely incongruous that the carer has no means of forcing the victim to realise this entitlement via a suit against the wrongdoer. Each of these three core questions is outlined below.

#### *The right to participate in the fund*

An incapacitated victim requires the assistance of others. This assistance may be provided by the carer who is a friend or relative of the victim. The carer may nurse the victim, assist with the day-to-day management of the victim's life and affairs or provide household help. In other cases, the carer intervenes by paying those of the victim's debts associated with her negligently inflicted injury. The carer's intervention is of great benefit to the victim but often comes at a substantial financial and personal cost to the carer. In these circumstances, the question arises as to what remedies are available to carers. *Hunt v. Severs*<sup>5</sup> confirms that in England, the proper claimant in any action against the tortfeasor is the victim, and denies the carer her own claim.<sup>6</sup> Their Lordships also held that in general, although not on the special facts of that case, the victim will recover damages calculated by reference to the carer's services and hold them in trust for the carer.<sup>7</sup>

<sup>5</sup> *Hunt v. Severs* [1994] 2 AC 350. The leading speech was delivered by Lord Bridge with whom the rest of the House agreed.

<sup>6</sup> *Ibid.*, 358. <sup>7</sup> N. 5 above at 363.

Other appellate courts have also given decisions on this factual pattern. The Supreme Court of Canada in *Thornton v. Board of School Trustees of School District No 57 (Prince George)*<sup>8</sup> held that the carer has no direct claim,<sup>9</sup> but that the victim may claim the value of such assistance from the wrongdoer. Consistently with the result proposed by the House of Lords, this part of the victim's damages award was to be held in trust for the carer. The High Court of Australia has adopted a divergent position. *Kars v. Kars* confirms that the victim may '... as part of his or her damages (without joining that person [the carer] as a party to the action), recover damages in respect of the cost to a family member of fulfilling the natural obligations to attend to the injuries and disabilities caused to the plaintiff by the tort.'<sup>10</sup> However, unlike the position in Canada and England, the carer in Australia is denied any right of access to the fund.<sup>11</sup> This has led to anomalous results. This book ultimately rejects the logic of the Australian cases and proposes that, leaving aside the form of access, the carer should be entitled to share in the fund of damages recovered by the victim. Such reform would remove the injustice produced by the current position which is vividly described by Callinan J:<sup>12</sup>

Experience recalls to mind the incredulous expressions of delight of plaintiffs, and of disbelieving dismay of defendants, on being told that damages for gratuitous care and services at common law are available, and that there is no legal obligation in this country for them to be paid to the gratuitous carer and provider of services.

### *The right to force litigation against the wrongdoer*

A related mystery is that the carer has no apparent means of ensuring that the victim exercises her claim against the wrongdoer. At least in England and Canada, where the carer is indirectly recognised via an entitlement to share in the proceeds of the victim's claim, it is curious that the carer is left without any means of forcing suit against the wrongdoer. Rather, the law appears

<sup>8</sup> *Thornton v. Board of School Trustees of School District No 57 (Prince George)* (1976) 73 DLR (3d) 35 (British Columbia Court of Appeal) upheld in the Supreme Court of Canada at (1978) 83 DLR (3d) 480.

<sup>9</sup> *Thornton v. Board of School Trustees of School District No 57 (Prince George)* (1976) 73 DLR (3d) 35 at 55 PER TAGGART JA.

<sup>10</sup> *Kars v. Kars* (1996) 187 CLR 354 at 368 PER TOOHEY, MCHUGH, GUMMOW AND KIRBY JJ.

<sup>11</sup> *Ibid.*, 380. <sup>12</sup> *Grincelis v. House* (2000) 201 CLR 321 at 339 PER CALLINAN J.

to endorse the peculiar model whereby the carer's position is recognised, because she is entitled to share in the victim's damages. However, in reality the carer is not protected, because the carer has no means to ensure that these damages actually are recovered.

### *The nature of the right to participate*

The dominant position is that a carer in England and Canada is entitled to participate in the victim's damages via the mechanism of a trust. However, there are also examples in which the carer's entitlement is only ever personal.<sup>13</sup> The carer's trust has come under scrutiny and the UK Law Commission has recommended its statutory abolition.<sup>14</sup> It is therefore a relevant question to determine how, if ever, the carer's entitlement will be proprietary.

### **Solutions and structure of this book**

The primary configuration under examination is the legal relationship between the victim of a tort, her carer and the wrongdoer. However, in investigating this relationship, this book utilises a powerful conceptual tool, which is to observe that the phenomenon under investigation in the victim and carer cases is also manifest in the case of the indemnity insurer and insured. It will be shown that a structural analogy may be drawn between an indemnity insurer and the carer of a victim of tort. The insurer and the carer both intervene to assuage the loss experienced by the claimant. The carer does so by providing necessary services to the victim. The insurer does so by paying money for loss pursuant to its contractual obligations under the policy of indemnity insurance. The insurer intervenes under the constraint of legal liability founded on an antecedent contract. The constraint upon the carer arises from compassion and moral obligation.

In drawing this analogy, it is apparent that the questions arising from the victim and carer configuration also require explanation in the case of the indemnity insurer and insured. Where possible, the book therefore places

<sup>13</sup> *Coderre v. Ethier* (1978) 85 DLR (3d) 621 at 632 PER LERNER J; *Turnbull v. Hsieh* (1990) 269 APR 33 at 42 PER HOYT JA who delivered the judgment of the court; *Rawson v. Kasman* (1956) 3 DLR (2d) 376 at 381 PER SCHROEDER JA with whom Hogg and MacKay JJA agreed.

<sup>14</sup> UK Law Commission, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (Law Com No 262, 1999), para. 3.62.

in parallel each of these paradigm cases, and attempts to make sense of both as constituent parts of a larger pattern. It will be argued that the rights of the carer to share in the victim's damages mirror those of the insurer to claw back the value of any indemnity provided to the insured. Similarly, it will be argued that although not visible on the present state of the law, those rules which allow the insurer to compel the insured to bring litigation against the wrongdoer should be reflected in a right for the carer to force the victim to sue. The proprietary nature of the insurer's and the carer's entitlement will also be addressed.

An important caveat must be given about the approach that has been taken in drawing this analogy. Reference is made to other contextual categories of law, such as the law of negligence, the law of trusts and the law of unjust enrichment. The position is complicated further by the fact that the evidence for this study, the victim and carer cases, have been drawn from England, Australia and Canada. The point must be made that it is not the purpose of this book to conduct a detailed analysis of the relevant rules in each jurisdiction. Rather, the focus is on a higher level of principle, dealing with what seem to be the common structural tendencies. To this extent, the analysis attempts to draw out the underlying pattern of the victim and carer cases. A more elaborate analysis would not only require a much larger piece of work, but might also be hindered by the myopic focus of greater detail. We will now briefly return to the three core questions posed in this book and outline the arguments to be presented.

### *The right to participate in the fund*

The carer's entitlement is given to reverse the unjust enrichment of the victim which would otherwise remain. The insurer's entitlement is likewise given to reverse unjust enrichment. The difficulty in revealing the juridical basis of these rights to share is twofold. The first is that there are apparently many grounds upon which we might justify the right to share in the fund. For example, the carer's right may on some facts be given in response to a contract, and has erroneously been attributed to the law of tort.<sup>15</sup> The second is that there appears to be no relevant unjust factor. Unjust enrichment is a likely explanation for the carer's right to share. However, the utility of this analysis is hampered by the fact that the existing unjust

<sup>15</sup> R. Williams, 'Preventing Unjust Enrichment' [2000] *Restitution Law Review* 492 at 510.

factors fail adequately to account for the carer's entitlements. The solution suggested by this book is that the law of unjust enrichment discloses a novel policy motivated unjust factor called the policy against accumulation. This unjust factor convincingly accounts for both the insurer's and also the carer's right to participate.

In order to advance these arguments, some ground clearing is therefore essential. Part I (chapters 1–5) commences with a short exposition of the leading victim and carer cases in England, Australia and Canada in order to provide a basis for analysis in the remainder of the book (chapter 2). The discussion then explores the possibility that the carer might hold a right to sue for her own loss directly. Such a right might exist against either the victim or the tortfeasor. Against the victim, the carer may allege an obligation in either contract or unjust enrichment. These possible claims are the concern of chapters 3 and 4, which will show that, superficially at least, an obligation may bind the victim to pay the carer. However, as will be explored more fully in part II, these claims are of themselves incapable of explaining the carer's right to share in the fund. Chapter 5 will briefly survey the possible claim by the carer against the victim in tort. While some cases adopt this route, there is very little scope for this type of claim.

Part II (chapters 6–8) concentrates on the argument that in order to understand the carer's right to share in the fund, it is helpful to look at the position of the indemnity insurer. Chapter 6 documents the fact that, even if the carer does hold any one of the direct rights of claim identified in part I, none provides an adequate explanation for the carer's right to share in the victim's damages. The analysis then returns to the observation that the relevant rules regulating the carer and the indemnity insurer may be closely related. Chapter 7 draws a detailed analogy between the position of the carer and the indemnity insurer, drawing on the groundbreaking work of Mitchell, and adopting the nomenclature described in his model of subrogation.<sup>16</sup> This analogy reveals the similar position of the carer and the indemnity insurer. One consequence of this similarity is that our understanding of the rules which regulate the position of one may be used to inform our understanding of the rules regulating the position of the other.

Chapter 8 contains a more sophisticated unjust enrichment analysis. As has been said, chapter 4 demonstrates that the victim is enriched at the

<sup>16</sup> Mitchell, pp. 4–8.

expense of the carer. However, chapter 4 cannot convincingly advance an unjust enrichment explanation for the carer's entitlement, because the existing unjust factors do not sit well with the victim and carer cases. Chapter 8 successfully completes the unjust enrichment analysis. It demonstrates the existence of a novel policy motivated unjust factor called the policy against accumulation. The policy against accumulation applies whenever a claimant (RH) receives a benefit, or has the right to recover damages, from another party such as the wrongdoer (PL) and receives, or has the right to receive in respect of the same debt or damage from a third party (S). The policy against accumulation dictates that RH may not accumulate in respect of the same debt or damage. To the extent that RH has accumulated, she must return value. In the configurations investigated in this book, RH returns value to the carer and the indemnity insurer (S) in order to reverse her enrichment which would otherwise remain. Chapter 8 therefore applies the policy against accumulation to explain the right of both the carer, and also the insurer, to participate in the fund of damages recovered. There are broader ramifications flowing from the identification of this unjust factor. Chapter 8 identifies other factual configurations which appear to invite the application of the policy against accumulation. One of the great merits of a detailed analysis of the victim and carer relationship is to disclose the existence of this novel unjust factor.

*The right to force litigation against the wrongdoer*

The analogy in chapter 7 does not only assist in explaining the stranger's right to participate in the fruits of the litigation. If correct, it shows how the anomaly by which the carer is not able fully to protect her position is removed. The rights of the insurer form a template for the law's future development. Chapter 7 argues that the carer should enjoy a right similar to the indemnity insurer's ability to compel litigation against the wrongdoer. Following the work of Mitchell, it is easy to see how these rights to force litigation work to reverse unjust enrichment.

*The nature of the right to participate*

Part III (chapter 9) explains why in some cases the carer's right to share in the victim's damages is proprietary, and in others is merely personal. It will be argued that on the current structure of the law of unjust enrichment,

it is very difficult to explain why the carer is a beneficiary of a trust. The task is not impossible. Although controversial, it will be suggested that the policy against accumulation itself triggers the proprietary nature of the carer's entitlement. The key to understanding the proprietary claim is that the carer's intervention increases the victim's patrimony. The valuation of the victim's claim is in part a direct function of the assistance provided by the carer. This assistance creates new value in the hands of the victim, by increasing the worth of the victim's chose in action against the wrongdoer. Arguably, it is this contribution which justifies a proprietary response to unjust enrichment.

The insurer's equitable lien has likewise been difficult to reconcile with accepted principles. Chapter 9 ventures an explanation of the proprietary quality of the insurer's entitlement which is likewise linked to policy against accumulation. However, it is conceded that this analysis is not wholly convincing. Rather, the insurer's entitlement, while understood as resting on the reversal of the insured's unjust enrichment by accumulation, should be understood only as triggering a personal claim. Chapter 10 is a brief conclusion.

### Conclusion

The task of this book is to explain how and why the carer, a stranger to the victim's litigation, is entitled to share in the fruits of that litigation. In addition, it attempts to shed some light on the issue of why in some cases this right is proprietary and in others it is not. In answering these questions, we observe that the indemnity insurer and the carer are in an equivalent position. The crucial similarity between them is that each intervenes to make good or indemnify the loss of another, yet has no claim of her own against the wrongdoer who caused that loss. An argument may be made that there are two methods which the law gives to protect the position of a person who intervenes in circumstances such as these.

The first is that the stranger is entitled to share in the fruits of the claimant's litigation. This right is given to reverse the unjust enrichment which would otherwise remain. The unjust factor supporting the entitlement is the policy against accumulation. As outlined in chapter 8, the law discloses a novel policy motivated unjust factor called the policy against accumulation. This applies whenever the claimant (RH) receives a benefit, or has the right to recover damages, from another party such as the wrongdoer



(PL) and receives, or has the right to receive, in respect of the same debt or damage from a third party (S). The policy against accumulation dictates that RH may not accumulate in respect of the same debt or damage. To the extent that RH has accumulated, she must return value. The configurations investigated in this book are of the indemnity insurer and insured and the carer and victim. RH returns value to the carer and the indemnity insurer (S) in order to reverse her enrichment which would otherwise remain.

It is immediately obvious that these examples concern the ability of a claimant to sue a wrongdoer in respect of loss already made good by the intervention of the carer and the insurer. However, the operation of the policy against accumulation is not confined to these categories. Chapter 8 discusses additional configurations which appear to invite the application of the policy. One of these is typified by *Dimond v. Lovell*,<sup>17</sup> and is similar to the victim and carer cases in that it involves a claimant who has received a loss ameliorating benefit. The other is *Roxborough v. Rothmans of Pall Mall Australia Limited*,<sup>18</sup> which concerns accumulation by a claimant who is entitled to recover from the revenue money paid on account of an unconstitutional tax. Difficulty was caused by the fact that the claimant had passed the burden of the tax onto a third party. Recognition of the policy against accumulation allows us better to solve these configurations. The role of the policy against accumulation as an unjust factor is not limited to explaining the rights of the carer and the indemnity insurer to share in the fund. Rather, it is an unjust factor of wider application.

The second method of protection given to an intervener, most obviously present in the case of the indemnity insurer, is to allow the intervener to force the claimant to sue the wrongdoer. This book argues that a carer occupies an equivalent position, and should likewise be given the right to force litigation against the wrongdoer. The novel right suggested for the carer, the right to compel suit by the victim against the wrongdoer, is simply the corollary of the carer's existing right to share in the fund. The award of subrogation, literally the right to be substituted as claimant, is an equitable remedy and is thus discretionary. The parallel right for the carer should be exercised only if it is just and equitable to do so.

<sup>17</sup> *Dimond v. Lovell* [2002] 1 AC 384.

<sup>18</sup> *Roxborough v. Rothmans of Pall Mall Australia Limited* [2001] HCA 68, 185 ALR 335. *Roxborough* was reported as this book went to press. References in the remaining footnotes are to neutral citation.

On the facts of the core configurations in this book, there are two rights available: the right to share in the fund, irrespective of the nature of that right, and the right to compel suit against the wrongdoer. These rights work in tandem to protect the position of the intervener. However, it is not necessarily the case that these rights will co-exist. For example, let us take the facts of a case such as *Roxborough*, in which the claimant paid to the revenue tax pursuant to a liability which turned out to be unconstitutional. The claimant had already passed the cost of the tax onto tobacco consumers. Chapter 8 shows that the claimant is thereby unjustly enriched by accumulating in respect of the same debt or damage. The claimant is obligated to return value to these consumers on the basis of the policy against accumulation. It is the author's own view that the additional right available to the intervener, the right to force litigation, may also be available to these consumers. This argument is not fully explored in this book and is no doubt controversial. However, irrespective of the right to force litigation, it remains the case that the right to recover value from the claimant is available.