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0521808200 - Unjustified Enrichment: Key Issues in Comparative Perspective

Edited by David Johnston and Reinhard Zimmermann

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## PART I

### **Introduction**

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## 1 Unjustified enrichment: surveying the landscape

*David Johnston and Reinhard Zimmermann*

### I. Preliminary questions

'Unjustified enrichment'. The expression is mysterious. So are the other terms in use for the same subject, 'unjust enrichment' and 'restitution'. What is an enrichment and when is it unjustified? To state that something amounts to unjustified enrichment is merely a conclusion, that because the enrichment is unjustified it should be returned, restored or made over to the person properly entitled to it. That conclusion is in need of supporting normative argument.<sup>1</sup> But what sort of argument?

Some time ago the Roman jurist Pomponius wrote the now-famous words *nam hoc natura aequum est neminem cum alterius detimento et iniuria fieri locupletiorem*, 'by the law of nature it is right that nobody should be unjustly enriched at another's expense'.<sup>2</sup> Pomponius's maxim encapsulates the key elements of enrichment liability: enrichment, which is unjust, and which is at the expense of the claimant. But it exemplifies a problem that faces modern legal systems, too: formulating the principles of a law of unjustified enrichment in a way which is clear and yet not excessively broad.

There is no doubt that Pomponius's formulation is, as a matter of classical Roman law, much too broad. There were many cases in which unjustified enrichment was simply allowed to rest where it arose. A clear instance is the claim of a possessor in good faith who improved land from which he was later ejected by the true owner. He had a defence (*exceptio doli*) against the true owner's claim so long as he remained in possession, but once out of possession he had no claim at all.

<sup>1</sup> See Dagan, below, 360.

<sup>2</sup> D. 50, 17, 206, Pomp. 9 *ex variis lectionibus*; a slightly shortened version appears in D. 12, 6, 14, Pomp. 21 *ad Sabinum*.

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Similar considerations arise, for example, in relation to the general principle against unjustified enrichment set out in § 812(1), first sentence, of the German Civil Code: ‘Someone who obtains something without legal ground through performance by another or in another way at his expense is bound to make it over to him.’<sup>3</sup> This formulation too is excessively broad: it is not the case that everything that one has without a legal ground (*ohne rechtlichen Grund*) as a result of performance by some other or in another way at his expense can be recovered. The task for German jurisprudence, performed notably by Walter Wilburg and Ernst von Caemmerer, was to identify cases falling within the general principle where the claimant actually did have a cause of action. The four cases they identified from the wording of the first sentence of § 812(1) are now widely accepted: (i) the claimant rendered a performance (*Leistung*) to the defendant which was without a legal basis; (ii) the defendant encroached on the claimant’s property (*Eingriff*); (iii) the claimant incurred expense in improving the defendant’s property (*Verwendungen*); (iv) the claimant paid the defendant’s debt (*Rückgriff*). German law has therefore refined and confined its broad principle so as to cover only particular situations in which enrichment arises. Of these four cases, the first is based on the words ‘through performance’ (*durch die Leistung*), while the remaining three are sub-categories of enrichment ‘in another way’ (*in sonstiger Weise*). It is worth emphasising that category (ii) covers cases of enrichment by wrongs; clearly, different considerations may arise in that case from those that do where no wrong is involved.

The task for the common law, especially noticeable in English law, was almost the opposite. It was not a question of refining down existing principles. The question was this: from a vast accretion of cases could any principles be distilled at all? The challenge was taken up first by Robert Goff and Gareth Jones,<sup>4</sup> next (in a more theoretical manner) by Peter Birks;<sup>5</sup> and more recently by Andrew Burrows<sup>6</sup> and by Graham Virgo.<sup>7</sup> While the analyses and presentations of these authors differ on numerous points, for present purposes it is enough to consider the scheme elaborated by Birks. He makes a fundamental distinction between enrichment by wrongs (where the defendant has enriched himself by committing a wrong against

<sup>3</sup> ‘Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet.’

<sup>4</sup> R. Goff and G. H. Jones, *The Law of Restitution* (1st edn, 1966, 5th edn, 1998).

<sup>5</sup> P. Birks, *An Introduction to the Law of Restitution* (1985, revised edn, 1989).

<sup>6</sup> A. Burrows, *The Law of Restitution* (1993).

<sup>7</sup> G. Virgo, *The Principles of the Law of Restitution* (1999).

the claimant) and enrichment ‘by subtraction’, where the claimant has lost what the defendant has gained.<sup>8</sup> Within the area of enrichment by subtraction, what the claimant must first show is that the defendant’s enrichment is at his expense. Next he must establish that the enrichment occurred in circumstances rendering it ‘unjust’. Birks therefore sets out to establish a list of ‘unjust factors’ that support restitution. These include mistake, ignorance, duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity, ultra vires demands of public authorities, and retention of the plaintiff’s property without his consent.

It will be obvious that this is an attempt at systematisation at a quite different level from that of German law. The reason for this is plain: the two systems start out from entirely different points of view. In German law the notion is that a payment or (non-pecuniary) performance made without a legal ground is recoverable, subject to defences. In English law the notion is instead that a payment is recoverable if a ground for its recovery can be demonstrated by the claimant. For example, where money is paid to discharge a non-existent debt, German law presumes that the payment is recoverable (the debt, being non-existent, cannot represent a ground for the recipient to retain the payment). There is no legal ground and therefore the payment must be returned. By contrast, English law requires the claimant to justify why he should get the payment back, for instance because it was made by mistake. In other words, the German approach is objective, the English (mostly) subjective.<sup>9</sup>

As one would expect (perhaps hope) in mature legal systems, the theoretical underpinnings of these two different approaches have not gone unquestioned. Some have thought the German system excessively abstract and that, by making such intensive use of and investing with such juristic nuances the single concept ‘transfer’ (*Leistung*), it risks obfuscation or even distortion.<sup>10</sup> The late Professor Detlef König expressed his concern that: ‘[t]he terminology is confusing, almost each statement is disputed, the solution of trivial questions is becoming ever more complicated, and there is a grave danger of a loss of perspective’.<sup>11</sup> On the other hand, the English system of unjust factors has come under criticism for being untidy, excessively complicated, inexhaustive (since new, as-yet-unidentified

<sup>8</sup> Birks, *Introduction*, 99 ff., 313 ff.

<sup>9</sup> Recovery of payments made in response to ultra vires demands by public authorities is an instance of an objective ground for recovery.

<sup>10</sup> B. Kupisch, ‘Rechtspositivismus im Bereicherungsrecht’, 1997 *JZ* 213; cf. Visser, below, 527–8.

<sup>11</sup> *Ungerechtfertigte Bereicherung: Tatbestände und Ordnungsprobleme in rechtsvergleichender Sicht* (1985), 15–16.

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unjust factors may be recognised), and involving unnecessary duplication of other areas of the law.<sup>12</sup>

Against this background, the aim of the conference from which the present collection of papers derives was not to seek a single right answer. Nor was it to advance further on the quest towards some Holy Grail of universal significance in enrichment law. It was instead partly to see how far civil-law and common-law systems in fact arrive at the same and how far at different solutions to the same problems; and how far, even where their destination is the same, they arrive at it by the same or different doctrinal routes. In part, too, it was to see if, from their very different perspectives, the civil and common law might cast light upon one another and suggest possible solutions or approaches to recognised problems or deficiencies. An added interest derived from examining how mixed systems of law deal with these issues. This is particularly so in the case of Scotland, where there is a lively debate about how the law of unjustified enrichment is or ought to be structured.

To take stock of these various matters, it seemed necessary to embark on a treatment of the law of unjustified enrichment that was reasonably comprehensive. With this in mind, we asked two speakers to comment on the same themes, each from a comparative perspective but one as a representative of a common-law system and the other of a civil-law or mixed legal system. It was not possible to do this in any systematic way, so although we speak of ‘common’ law and ‘civil’ law, we do not mean to imply that the law of the United States of America and England are just the same, or that no relevant distinctions can be taken between French and German law. Indeed, the various Continental systems differ from one another in important respects, not least because some take an abstract and some a causal approach to the question of transfer of ownership.<sup>13</sup> All we claim is that on each of our topics we have attempted to gain a perspective from a representative of each of what are usually thought to be two different legal traditions. While the emphasis in this volume, owing to the contributors’ own backgrounds, is mainly on the laws of England, Germany and Scotland, some attention is also paid to French, Dutch and Israeli law and to the laws of United States jurisdictions.

To focus attention on unjustified enrichment in this way seemed to us appropriate not least because of current interest in the possible emergence

<sup>12</sup> See, e.g., R. Zimmermann, ‘Unjustified Enrichment: The Modern Civilian Approach’, (1995) 15 *Oxford JLS* 403, 416.

<sup>13</sup> See Du Plessis, below, 194–5.

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of a European private law.<sup>14</sup> While there is an ‘institutional’ dimension to this – notably emerging from directives of the Council of the European Union, decisions of the Court of Justice of the European Communities, and also from conventions such as the United Nations Convention on Contracts for the International Sale of Goods – it remains important to remember that law in Europe has always been shaped by the combined work of judges, legislators and professors.<sup>15</sup>

Within a Community inspired in the first place by the idea of a common market, the law of contract was bound to be the first area of private law to be affected by the quest for transnational legal rules. This is reflected not only in a recent textbook that deals with the rules of modern national legal systems as local variations on a common European theme, but also in the *Principles of European Contract Law*, in effect a restatement of European contract law, and in the concerns of the Trento Common Core project.<sup>16</sup> Contractual liability, however, can be closely interlinked with delictual liability: both regimes can apply to one and the same set of facts; their rules must be well co-ordinated with one another. It was logical, therefore, that attention should soon turn to the attempt to identify common rules and principles and a common framework within the law of delict (or tort).<sup>17</sup>

Since, alongside contract and delict, unjustified enrichment is nowadays recognised as an independent source of rights and obligations,<sup>18</sup> and since it is closely related to the law both of contract and delict, it makes sense to start thinking about common principles of the law of unjustified enrichment. There have been earlier attempts to do this.<sup>19</sup> Equally, the first volume of Peter Schlechtriem’s comparative treatise on the law

<sup>14</sup> See, e.g., Arthur Hartkamp, Martijn Hesselink et al. (eds.), *Towards a European Civil Code* (2nd edn, 1998); Peter-Christian Müller-Graff (ed.), *Gemeinsames Privatrecht in den Europäischen Gemeinschaften* (2nd edn, 1999).

<sup>15</sup> See R. C. van Caenegem, *Judges, Legislators and Professors* (1987).

<sup>16</sup> H. Kötz, *European Contract Law* (trans. T. Weir, 1997), vol. I; O. Lando and H. Beale (eds.), *Principles of European Contract Law: Parts I and II* (2000). Cf. also the *Unidroit Principles of International Commercial Contracts* (1994). From the Trento Common Core project, see R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (2000); J. Gordley (ed.), *The Enforceability of Promises in European Contract Law* (2001).

<sup>17</sup> C. von Bar, *The Common European Law of Torts*, vol. I (1998), vol. II (2000); J. Spier and O. A. Haazen, ‘The European Group on Tort Law (“Tilburg Group”) and the European Principles of Tort Law’, (1999) 7 ZEuP 469, with references to volumes already published within the scope of that project.

<sup>18</sup> See section II, below.

<sup>19</sup> P. Russell (ed.), *Unjustified Enrichment: A Comparative Study of the Law of Restitution* (1996); E. Clive, ‘Restitution and Unjustified Enrichment’, in: Hartkamp and Hesselink, *European Civil Code*, 383 ff.

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of restitution and unjustified enrichment in Europe is about to appear; and unjustified enrichment is to be included in Christian von Bar's ambitious European civil code project.<sup>20</sup> None the less, in the conference from which the present volume derives the aim was to present a more systematic comparative discussion of the law of unjustified enrichment than had yet been offered. That is also the aim of this book.

The conference began as it ended, with general questions: can the law best be understood by focusing on a general ground for restitution or on a series of specific factors? What is the most illuminating way of structuring the subject-matter of unjustified enrichment? Between these two extremes, for two days attention was directed to the main contexts in which issues of enrichment arise: failure of consideration; fraud and duress; improvements; payment of another's debt; infringement of another's right; cases involving three parties; then to the defences of change of position and illegality; and finally to the question of redressing unjustified enrichment by means of a proprietary remedy. In this introductory chapter little more is attempted than the merest sketch of the main issues, with some accompanying observations about what they may point to.

## II. A little history

Roman law, and systems that have adopted its general principles, have never been in any doubt that within the law of obligations there was an area quite separate from contract and from delict (or tort), part of which was occupied by the law of unjustified enrichment. This goes back at least to the second-century jurist Gaius, who categorised obligations as arising from contract, delict or in another manner.<sup>21</sup> Almost four centuries later, Justinian's *Institutes* recognised a division of all obligations into those arising from contract, from delict, as if from contract (*quasi ex contractu*), and as if from delict (*quasi ex maleficio*).<sup>22</sup> Obligations arising from unjustified enrichment were among those arising 'as if from contract', on the basis no doubt that they involved nothing resembling a wrong, while some of them closely resembled contract.<sup>23</sup> While this categorisation goes back to

<sup>20</sup> P. Schlechtriem, *Restitution und Bereicherungsausgleich in Europa: Eine rechtsvergleichende Darstellung* (2000). On the European civil code project, see Christian von Bar, 'The Study Group on a European Civil Code', in: P. Gottwald, E. Jayme and D. Schwab (eds.), *Festschrift für Dieter Henrich* (2000), 1.

<sup>21</sup> Gaius, D. 44, 7, 1 pr. The Latin is rather obscure: '*proprio quodam iure ex variis causarum figuris*'.

<sup>22</sup> Justinian, *Institutes*, III, 13, 2.

<sup>23</sup> Notably loans of money and payments made in error: see Gaius, *Institutions*, III, 91.

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Roman times, it is right to give some credit for further analytical effort in elevating unjustified enrichment into a legal category of obligations on the same level as contract and delict to the late scholastics of the sixteenth century.<sup>24</sup>

By contrast, it is well known that until comparatively recently English law regarded the notion of a law relating to unjustified enrichment as foreign. In *Orakpo v. Manson Investments Ltd*,<sup>25</sup> Lord Diplock intoned that 'there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law.' But matters have moved on a good deal since then: witness the speech of Lord Steyn in *Banque Financière de la Cité v. Parc (Battersea) Ltd*.<sup>26</sup> 'Unjust enrichment ranks next to contract and tort as part of the law of obligations [as] an independent source of rights and obligations.'

### III. Demarcation disputes

If the position of unjustified enrichment as an autonomous area of the law of obligations is now secure, what exactly is the extent of that area? The issue is one of demarcating the area as against other areas of the law of obligations, as well as against property law.<sup>27</sup> Two main questions seem to arise: first, which issues properly fall within each of these areas of the law, it being understood that at least in some systems there is no barrier to concurrent claims based on different principles of law;<sup>28</sup> secondly, the significance of the measure of recovery.

On the second question, the position seems to be this: what remedies based on unjustified enrichment have in common is that they seek recovery from the defendant of the amount by which he has been enriched, rather than the amount which the claimant may have lost. The converse does not necessarily follow. That is, it does not follow that any remedy

<sup>24</sup> See, esp., the work of J. Gordley, e.g. 'The Purpose of Awarding Restitutionary Damages', (2000) 1 *Theoretical Inquiries in Law* 39, 40; also his 'The Principle against Unjustified Enrichment', in: H. Schack (ed.), *Gedächtnisschrift für Alexander Lüderitz* (2000), 213, 215 ff.

<sup>25</sup> [1978] AC 95 at 104.    <sup>26</sup> [1999] AC 221 at 227.

<sup>27</sup> For valuable comments on this, see the essays collected in *Acta Juridica* 1997, also published as D. Visser (ed.), *The Limits of the Law of Obligations* (1997).

<sup>28</sup> For example, in English law concurrent claims in contract and tort: *Henderson v. Merrett Syndicates* [1995] 2 AC 145; for Germany, see Max Vollkommer in: Othmar Jauernig (ed.), *Bürgerliches Gesetzbuch* (9th edn, 1999), § 241, nn. 14 ff.

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whose measure is the quantum of the defendant's enrichment must be based on unjustified enrichment. There are some (probably exceptional) cases in other areas of the law where the measure of the claim is the defendant's enrichment.

### 1. Contract

English law traditionally contains remedies given for unjustified enrichment to parties in contractual relationships by requiring that, for any such remedy to be available, the contract must be at an end.<sup>29</sup> Where a party to a contract fails to perform his obligations as required, the injured party's remedy is generally a contractual one: so a breach of contract will generally be redressed by damages assessed according to the particular contract. In short, breach of contract is a wrong, and one that is redressed outside the law of unjustified enrichment. The same will apply also to cases where a person has been wrongfully induced to enter into a contract or to do so on unfair terms: these are matters which will be addressed where appropriate by setting the contract aside or by rendering certain of its terms unenforceable. Likewise, where a contract has failed or been frustrated, the consequences are matters best resolved by reference to the contract.<sup>30</sup> In general it makes good sense to say that, where parties have entered into a contract that distributes the risks of various events between them, it is just to them to apply the contractual allocation, and that it would be wrong to reallocate the risks on the basis of the law of unjustified enrichment. That is why it makes sense to speak of the remedy in unjustified enrichment as being in this context subsidiary.<sup>31</sup>

The measure of damages is itself a question of contract. Usually the remedy will be the amount of compensation which would put the party wronged by a breach in the position as if the breach had not occurred. Sometimes other measures of damages may be suggested. To ask whether a contracting party should be entitled against a contract breaker to an award of money representing the contract breaker's gain is still to ask a question about the proper scope of the law on damages for breach of contract, even though some would describe this as 'restitutionary damages'. At the time of the conference, *Attorney-General v. Blake* was under appeal

<sup>29</sup> See, e.g., Virgo, below, 109.

<sup>30</sup> Recoverability of any transfers or deposits may involve the law of unjustified enrichment: see, e.g., *Dies v. British and International Mining and Finance Corporation Ltd* [1939] 1 KB 724; *Zemhunt (Holdings) Ltd v. Control Securities plc* 1992 SLT 151.

<sup>31</sup> See Smith, below, 599 ff.

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to the House of Lords. Since the papers were submitted for publication, judgment has been given.<sup>32</sup> The case concerned publication of a volume of memoirs by the former British secret service agent and Russian double-agent George Blake, in which he breached his undertaking to the Crown not to divulge any official information gained by him as a result of his employment, either during it or afterwards. The Court was concerned with the Crown's right to royalties due to be paid to Blake. The Crown had suffered no financial loss, so the question was whether it could seek to deprive Blake of his enrichment. The House of Lords disapproved the Court of Appeal's attempt to identify general situations in which restitutionary damages might be available.<sup>33</sup> 'Exceptions to the general principle that there is no remedy for disgorgement of profits against a contract breaker are best hammered out on the anvil of concrete cases.'<sup>34</sup> On the rather special facts of *Blake*, a majority of the House recognised the Crown's right to restitutionary damages, although Lord Nicholls preferred to describe it as an 'account of profits'. (The description of the remedy indicates that much significance was attached by the majority to the fact that the undertaking given by Blake was akin to a fiduciary obligation, breach of which is conventionally recognised as being capable of resulting in an account for profits.) Lord Hobhouse, who dissented, rejected the Crown's entitlement to restitutionary damages. He accepted that Blake had made a gain but held that this was not at the expense of the Crown or by making use of any property or commercial interest of the Crown either in law or equity. These seem to be considerations arising under the law of unjustified enrichment: conventionally, they would provide grounds for seeking a remedy within that area of the law. But it may be doubtful whether they strictly arise where the question before the court is the measure of damages for breach of contract.

<sup>32</sup> [2000] 4 All ER 385. The speeches of Lords Nicholls (at 390) and Steyn (at 403) both refer to the paper in the present volume by O'Sullivan, then unpublished. (It is the same paper that is referred to by Lord Goff in *Panatown Ltd v. Alfred McAlpine Construction Ltd* [2000] 4 All ER 97 at 124.)

<sup>33</sup> Cf. the criticisms made by O'Sullivan, below, 340 ff., 343 ff.

<sup>34</sup> At 403 *per* Lord Steyn. German law does recognise a remedy for the disgorgement of gains in certain cases of breach of contract (§ 281 BGB) but it is now increasingly debated whether the rule might have to be extended. See, on the one hand, Johannes Köndgen, 'Immaterialschadensersatz, Gewinnabschöpfung oder Privatstrafen als Sanktion für Vertragsbruch? Eine rechtsvergleichende Analyse', (1992) 56 *RabelZ* 696; on the other hand Raimund Bollenberger, *Das stellvertretende Commodum: Die Ersatzherausgabe im österreichischen und deutschen Schuldrecht unter Berücksichtigung weiterer Rechtsordnungen* (1999).