Singapore Journal of Legal Studies
[1999] 318 – 332

# THE LAW OF UNJUST ENRICHMENT: A MILLENNIAL RESOLUTION*

This article tries to say as simply as possible why we must take seriously the project of constructing a law of unjust enrichment. It answers those who might assert that the twentieth century success of the law of restitution has rendered that project redundant. It says how the law of unjust enrichment differs from the law of restitution and warns against allowing the language of unjust enrichment to be understood in a sense which would erode or eliminate those differences. The twenty-first century law of unjust enrichment will emerge from the law of restitution, but something must be left behind. The butterfly will differ from the caterpillar.

MORE than fifty years have passed since Lord Wright urged common lawyers to keep in mind that every civilized legal system must have a law of unjust enrichment.[1] A good millennial resolution will be to take that exhortation seriously. In recent years it has become more and more easy for the common law to converse with systems which do have a law of unjust enrichment, but the discussion is still handicapped by the fact that the common law even now has difficulty in admitting to the existence of any such body of law under that name. The same difficulty which impedes comparative discussion also obstructs domestic development. Those who would use the language of unjust enrichment are constantly forced on to the defensive. It is indeed difficult to modernize the language of the law in any area. Unfamiliarity breeds insecurity, tinged with hostility. One way or another, in this area that will have to change. Without this name, the analytical language dependent on the name, the language of unjust enrichment at the expense of another, will never be confidently used. And, until it can be confidently used, the huge body of case law which properly belongs under this name will remain ill-understood and unstable. It is both a symptom and a cause of this condition that no law school in the common law world yet offers a course in the law of unjust enrichment. That will have to change.

* This is the revised text of a lecture given in the Faculty of Law, National University of Singapore, on 2 December 1998.

1 *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour* [1943] AC 32, 61.

## I. RESTITUTION

There has of course been a boom in the law of restitution, and restitution is always said to be based on unjust enrichment. The American Law Institute's *Restatement of Restitution* asserts in its first article that it is about the law of unjust enrichment. That article says: 'A person who has been unjustly enriched at the expense of another is required to make restitution to that other.'[2] *Goff & Jones on Restitution* takes the same line. Every edition has opened with the words 'The law of restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment. Restitutionary claims are to be found in equity as well as at law.'[3]

It might be thought that the books and courses on the law of restitution already supply the need that Lord Wright identified. To a large but limited extent that is true. It would be almost completely true if the assumption were correct that 'restitution' and 'unjust enrichment' are functional synonyms. The statements quoted above do indeed suggest that the two words do identify the same square, the one by reference to the response and the other by reference to the event which triggers that response. In my own work that assumption has been prominent.[4] However, a day will come when all the work which has been done on restitution will seem to have been only a step on the journey to the open recognition of the law of unjust enrichment. The law of restitution helped the cases, or is helping them, to escape from quasi-contract and constructive trust, and, behind them, from 'money had and received', 'money paid', '*quantum meruit*', and '*quantum valebat*'. The journey will not be complete until we escape the law of restitution and acknowledge the law of unjust enrichment.

This paper tries to say why we cannot claim to have reached our destination. We cannot be content with having a law of restitution. The years since 1966, when *Goff & Jones* was first published, have been immensely exciting. That book set the ball rolling as the *Restatement* for some reason never quite managed to do. Huge advances have been made. But, sad as it is to have to say it, it has to be said that all is not well. Restitution turns out to suffer from a form of schizophrenia. Constant medication can keep it under control. But the effort is wasted, even retrogressive.

2 American Law Institute, *Restatement of Restitution* (St Paul, 1937) #1, at 12.
3 Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution,* (5th ed, 1998), at 13.
4 Birks, *An Introduction to the Law of Restitution* (1989) at 26.

## II. Diagnosis

The law of restitution is pursuing two very different missions.[5] The tension between the two is destructive. It is aggravated by the fact that it finds it extremely difficult to know when it is pursuing one and when the other. This condition has two causes. They are essentially very simple. It might with justice be said that they are two aspects of one problem.

### A. *Cuckoo in the Nest*

The first cause is that the name 'restitution' does not fit with other dominant categories which we use. For example, contract and tort are both categories of causative event. They are event-based categories. Sale, hire, and loan are events which happen in the world and contract is the generic name of the category of event to which they belong. Similarly, negligent injury, defamation, and conversion are events which happen and tort is the generic name of their category. These are all causative events; events which generate legal entitlements. But restitution is not an event. It is a response to events. More accurately, we ought perhaps to say that it is the entitlement to restitution which is the immediate response to the event. Restitution follows when the entitlement is realized. But it suffices for most purposes to say that restitution is the response. In the same way we say that compensation is a response to torts, meaning the entitlement to compensation.

It is not conducive to clear thinking to mix important categories in this way. Mixed categories – that is to say, categories which are differently based – tend to intersect, and the intersections threaten confusion. We ought to try to keep our categories properly aligned. Unjust enrichment is a causative event. It is the event that consists in the receipt of an enrichment at the expense of another in circumstances which call for that enrichment to be given up to that other. A payment by mistake is an example. Hence unjust enrichment can align with contract and tort, while restitution cannot. A payment by mistake is to unjust enrichment as sale, hire and loan are to contract; and as negligent injury, defamation, and conversion are to tort.

These alignments and hierarchies make for elegance, and elegance matters whenever clear thinking matters. However, inelegance is not disastrous in itself. The misalignment of say, contract, tort and restitution is potentially dangerous, but it is not actually dangerous until it is shown that the categories do intersect. In fact, it ought not to be overlooked that this three-term series is doubly inelegant. First, 'restitution' is as we have seen a cuckoo in a

[5] This is clearly seen in Douglas Laycock's distinction between 'restitution as a source of liability' and 'restitution as a remedy': Laycock, "The Scope and Significance of Restitution" (1989) 67 Texas L Rev 1277.

nest of causative events. Secondly, no precaution is taken to show that the three terms are not exhaustive. The series should run thus: contract, tort, unjust enrichment, other causative events. Both shortcomings are potentially dangerous. Both threaten the ability of the law of restitution to understand itself. In plainer language, both make it difficult for those who use and apply it to understand exactly what it can and cannot do.

### B. *Intersecting Categories*

The second cause of the schizophrenia, or, more accurately, the fact which realizes or activates the predisposition just described, is that, on closer inspection, the categories which have differently oriented names do in fact intersect. That is to say, the law of restitution turns out not to respond to one single causative event. It is multi-causal. It is triggered by more than one kind of causative event. It does indeed have a special relationship with unjust enrichment, but it can be triggered by every event in the series. It can be triggered by contract, and it can be triggered by tort. The proposition that unjust enrichment and restitution form a simple square which can be called by either the causative event or the response turns out to be false. If restitution is multi-causal and thus really does intersect with categories of causative event, the confusions inherent in intersecting categories are not merely theoretical. This will become more clear from the diagram which will be introduced below.

The kind of problem which bent classifications of this sort produce is most easily illustrated from the animal world. Suppose that we said that every animal was carnivorous, herbivorous, yellow, or an eater of other things. If all yellow animals ate only insects, the series would be inelegant. If some yellow animals ate only insects but others ate only meat, the third category would be unstable. 'Yellow' would form a category with two missions. One mission would be to identify animals which, being insectivores, were not members of the other categories. The other would be to assemble all yellow animals, whether or not they were members of the other three categories.

## III. Displaying the Multi-causality of Restitution

This section seeks to show more clearly that the legal category 'restitution' really is like the category 'yellow' in the example which has just been given. That is, it cannot but be trying to do two different things at once. This can best be done by means of a taxonomic diagram. Unfortunately such diagrams are difficult to draw because they are horribly honest. Every attempt instantly reveals one's own shortcomings. More generally, the difficulty shows that common lawyers do not agree on the taxonomy of their subject.

This can be put in less flattering way. They have not begun the intensely difficult task of putting their subject in order.

The diagram which follows is a classification of rights. Rights can be classified in different ways. In the diagram they are divided by goal and causative event. That is to say, the diagram answers two questions. From what events do rights arise? And, what goals do rights pursue? The goal of restitution is, in this context, the surrender to the right-holder of a gain made by the defendant. The causative events are the vertical columns and the goals are the horizontal stripes. Restitution is thus a stripe, and the stripe crosses all four columns of events.

**Diagram: Rights Classified by Goal and Causative Event**

| Rights by goal (down), and by Causative events (across) | **Consent** | **Wrongs** | **Unjust Enrichment** | **Other Events** |
|---|---|---|---|---|
| **Restitution** | 1 | 6 | 11 | 16 |
| **Compensation** | 2 | 7 | 12 | 17 |
| **Punishment** | 3 | 8 | 13 | 18 |
| **Perfection** | 4 | 9 | 14 | 19 |
| **Other Goals** | 5 | 10 | 15 | 20 |

Some explanations are essential. First, the generic event 'wrongs' is pitched at a higher level than 'tort'. Historical accident has divided our law of civil wrongs. Torts are breaches of common law duty. Abuse of confidence and breach of fiduciary duty are not usually thought of as torts, simply because they have their roots in the Chancery, not in the courts of common law. They are equitable wrongs, breaches of equitable duties. Then again breach of contract, which is an event distinct from contract, is a wrong. It is a breach of a duty created by the parties to the contract. Finally, it may or may not be necessary to contemplate some breaches of statutory duty as civil wrongs but not torts. 'Wrongs' thus comprehends four kinds of breach of duty.

Secondly, just as 'wrongs' is pitched at a higher level of generality than 'tort', so the first column is pitched at a higher level than contract. It is headed 'consent', which is short for manifestations of consent. A contract is one such. But the making of a will is another, and a conveyance is another. Express declarations of trust also belong here. The principal reason why contract is generalized to manifestations of consent is that the subject under classification is rights generally, not rights *in personam*. The analytical distinction between rights *in rem* and rights *in personam*, which divides the law of property from the law of obligations, is one of the classifications of rights which does not appear on the diagram.[6] It could be added in. It could be added by dividing every single square in half.

Rights *in personam* (personal rights) are the matter of the law of obligations. The word 'obligation' contemplates personal rights from the standpoint of the person liable. A personal right is a right that a person do something. The person correlatively liable to do that something is the person under the obligation. The law of obligations co-ordinates with the law of property. The subject-matter of the law of property is property rights (rights *in rem*). Rights are either *in personam* (obligations) or *in rem* (property). It is impossible to include property rights within the rights classified in this diagram without generalizing contract to manifestations of consent. The other categories can stay unchanged. The change from tort to wrongs is not made for any such reason. It is made only to catch all civil wrongs.

It is important to notice that the causative events can be grouped in two different ways. Wrongs can be contrasted with not-wrongs, and the not-wrongs are then manifestations of consent, unjust enrichment, and other causative events. Alternatively, manifestations of consent can be contrasted with events which operate independently of consent, in which case those

[6] Another is the historico-jurisdictional distinction between equitable and legal rights, which could also be accommodated by further dividing every square.

that operate independently of consent are wrongs, unjust enrichments, and other events.

Lastly, the response 'restitution' means the surrender to the plaintiff of a gain obtained by the defendant at his expense. There is a well-known problem which is covered here by the word 'surrender'. It concerns the difference between giving up and giving back. Every giving back is a giving up, but not *vice versa*. Many people think that 'restitution' connotes 'giving back'. Even within the law of unjust enrichment strictly so called (square 11) it is a question whether the giving up must always be a giving back. This is something which we have yet to work out. For the moment the question is best left open by using a word which can reach both. Hence the choice of 'surrender' or 'give up'. German law uses '*herausgeben*' which is free of the connotation of giving back.[7] I use 'restitution' in that sense. I do not deny that it might ultimately prove necessary to distinguish between giving back and giving up, by using the word 'restitution' for the former and 'disgorgement' for the latter.[8]

It is not asserted that all these squares have content. There are different reasons why any one of them might not. A system might choose to allow it none, or logic might require it to be empty. Jurists cannot always agree on the nature of the exclusion. For example, American law chooses to give considerable content to square 8. That is, it approves of penal damages for torts. German law by contrast does not. It chooses to give that square no content. To some minds the German position presents itself as the other kind of exclusion, not a choice made by that particular system but dictated by logic. That is a difficult position to take in view of the fact that different positions have observably been taken at different times and places. Anyone who believes that square 8 is empty as a matter of logic, not policy, has to put up with a great many 'anomalies' evidenced in legal history. On the other hand squares 12, 13, 14, 15 really cannot have content. That is to say, the proof of an unjust enrichment cannot in itself support any response other than an entitlement to restitution. If that is right, as I think it to be, the exclusion of content from these squares is dictated by logic, not policy.[9]

Our chief interest lies in squares 1, 6, 11, and 16. These are the squares created by the intersection of restitution and the four generic causative events. 1, 6, and 16 would have to be empty if it were to be true that restitution

7 BGB pararaphs 812 ff.

8 Smith, *The Law of Tracing* (1997) at 297-298; Smith, "The Province of the Law of Tracing" (1992) 71 CBR 672.

9 Another view: Charles Mitchell (1998) 12 Trust Law International 191, 197-8. I do not deny measures ancillary to restitution (Mareva injunctions, for example) but that which is ancillary is included in the principal.

and unjust enrichment formed a perfect square.[10] They are not empty. Square 6 is restitution for wrongs. Even in my own book, which insisted on the perfect square, I argued for a distinction between restitution for autonomous unjust enrichment and restitution for wrongs. The big square supposedly made by unjust enrichment and restitution was divided to reveal restitution for autonomous unjust enrichment and restitution for wrongs.[11] I failed to see it at the time, but that was already an assertion of multi-causality. In the terms of this diagram it was an assertion that squares 6 and 11 both had content.

In terms of causative events, square 6 belongs in the law of wrongs. Suppose P is beaten up by D, who has been paid $20 000 to do the job. The question whether P could recover the gain D made through the battery would be a question for the law of wrongs. Battery being a wrong which is a tort, the question whether battery as such is a restitution-yielding wrong is part of the law of tort. It could only arise in column three – the law of unjust enrichment, if P could rely on the facts other than in their character as a wrong – that is, if he could establish that D had been unjustly enriched at his, P's, expense without at any point characterising the conduct of D as a wrong. Subject to that last possibility – the possibility of alternative analysis, which will be discussed below – we must learn to see square 6 as belonging to the books and courses on wrongs. We know that some wrongs give rise to gain-based awards. It is elementary that breaches of fiduciary duty do so, so also abuses of confidence. It is elementary that the torts which protect intellectual property do so.

There is thus no possibility of arguing that square 6 is empty. The famous *Kentucky Cave* case belongs there.[12] A man finds on his land the entrance of a scenic cave containing beautiful stalagmites and stalactites. He exploits his find. He invites tourists to view the cave for a price. He does very well. Unfortunately, although he has the only entrance, the cave extends under and into his neighbour's land. Every party of tourists spends some of its time trespassing in the neighbour's space. Deep below the ground, they inflict no loss, but they do commit trespass. In the end the neighbour sues for this trespass and recovers a proportion of the profits commensurate with that part of the cave belonging to him.

It may be many years before the law of wrongs has worked out exactly which wrongs do trigger restitutionary entitlements and which do not.

[10] Graham Virgo may be the first to have seen this: see most recently his 'What is Restitution about?' in WR Cornish *et al*, ed, *Restitution, Past, Present and Future* (1998), at 305. See also Jackman, *The Varieties of Restitution* (1998).

[11] *Supra*, note 4, at 26-27.

[12] *Edwards* v *Lee's Administrators* 96 SW 2d 1028 (1936).

However, it cannot be argued that no wrongs do so. Since the category of restitution for wrongs (square 6) really does have content, it follows that restitution is not mono-causal. If there were no more multi-causality than only this duo-causality, to say that a plaintiff was asserting a right to restitution would not necessarily indicate a right arising from unjust enrichment; it would leave open the question whether the action arose in the law of wrongs or in the law of unjust enrichment. This shows how dangerous it is to mix categories. To say that an action arises in the law of restitution is already ambiguous in terms of categories of causative event. It is ambiguous between square 6 and square 11. That danger is enough to condemn the law of restitution as schizophrenic. It has a divided mission.

However, the multi-causality goes further than that. There are also examples of restitution in 1 and 16. 'Restitution' here means the surrender to P of a gain received by D. A right to restitution in that sense can be born of a contract (square 1). Every loan entails a restitutionary obligation. One can also agree, by deed or for good consideration, as for instance by way of compromise of a dispute, to give up money which one might otherwise keep or might otherwise resist surrendering. Again a judgment may impose an obligation to return or surrender a sum of money or the value of a thing (square 16).

The temptation to deny content to these two squares – square 1 (consent-based restitution) and square 16 (other-event-based restitution) – is rooted in the dogma of mono-causality. I myself still feel awkward in contemplating the idea of contractual restitution. That is because the whole twentieth-century project of restitution, which was begun by the American Law Institute with the *Restatement of Restitution*, was really directed to the law of unjust enrichment properly so-called. The habit of mind which learned so to confine it survives the demonstration that the dogma of mono-causality is false. Once one is prepared to define restitution independently of its cause, its multi-causality becomes readily acceptable. There is no choice but to go down that route, because the dogma of mono-causality is false. It is falsified by restitution for wrongs. Once one accepts that the phenomenon of restitution for wrongs has nothing to do with the law of unjust enrichment strictly so called, the only rational course is to accept that restitution can be triggered within any one of the categories of causative event and to cultivate the original project under its proper name. No time or energy has really been wasted. The project has given us a law of unjust enrichment. All we have to do now is teach it, write about it, and index it as the law of unjust enrichment.

## IV. Unjust Enrichment

There is an enormous complication. In the previous sections we have rejected the notion that unjust enrichment and restitution form a perfect square. The

complication derives from the fact that it is nonetheless true that the perfect square can be so constructed as to be true. And the complication is, not that it can be so constructed, but that when it is so constructed, unjust enrichment forms as sick a category as restitution. This follows from the nature of a perfect square. Whatever is wrong with it is wrong with it, not with one or other of its names.

When the perfect square is constructed it is useless, but it is not false. Tautologies cannot be false. The tautologous square is constructed in this way. We can plausibly affirm that every time the law insists on restitution of an enrichment the event which triggers that response must be called an unjust enrichment. Restitution is the yielding up of enrichment to the person at whose expense it was obtained. If the law orders restitution, it must be treating the enrichment as one that ought not to be retained, hence as an unjust enrichment. The tautology is easily constructed. Once again, it has to be admitted that this perfect square is prominent in my own book.

This tautologous unjust enrichment includes all the causative events which trigger restitution. That is what it is meant to do. Let us go back to the *Kentucky Cave* case. The action was for the profits of underground trespass. It succeeded. That is restitution, a gain is given up to the person at whose expense it was made. It follows, tautologously, that the event in question is unjust enrichment. But, if the cause of action was trespass, trespass is perfectly familiar as a tort. Hence, our generic event appears to be as bad as 'restitution' and as bad as 'yellow animals' in the example given above. It includes not only, for example, mistaken payments, which are not contracts or torts, but also trespasses, which are torts. Far from aligning with other causative events, this version of the event – 'unjust enrichment' – appears to take large bites out of them. It is itself plural. It is not one event but many, and the plurality is not hierarchical. It does not consist in the relation between genus and species.

The previous paragraph shows that the tautologous version of unjust enrichment – the version created so as to make a perfect square with restitution – is perfectly useless. It does not achieve the goals which classification are designed to achieve. Overlapping categories are no less confusing than intersecting categories. In order to ensure that the categories of causative events do not overlap with each other, we have to insist on the basic principle of classification, namely the principle of exclusivity. The principle of exclusivity ordains that no entity can simultaneously be a member of more than one category in one series. A barnacle cannot be a crustacean and a mollusc. Until the categories are refined to make overlaps impossible, the classification remains flawed. The principle of exclusivity must be satisfied.

The task is to catch all the causative events which are like mistaken payments (and, as such, different from contracts and torts) without the overlap which leads to the inclusion of events which are contracts and torts. The

category which includes mistaken payments must exclude, for example, the trespass in the *Kentucky Cave* case. The obvious way of satisfying the principle of exclusivity is to find a generic name for mistaken payment and other events of the same kind which cannot reach acquisitive torts. This turns out to be very difficult. Indeed it turns out to be impossible. There is therefore no choice but to have recourse to a second technique, which is admittedly less satisfactory.

This technique merely imposes an invisible restriction on the natural meaning of the words used, as though one would say of 'yellow animals' that by that phrase one meant only yellow animals which were not carnivores or herbivores. So here 'unjust enrichment', which does naturally reach acquisitive torts, has to be artificially restricted. An 'unjust enrichment' is in this context 'an enrichment at the expense of another in circumstances which require that enrichment to be given up to that other'. The 'unjust' element has to be cut down by the addition of a negative proposition. The circumstances must be such as to call for the enrichment to be given up in their character as an unjust enrichment and *not* in their character as a wrong or a contract or by virtue of any other characterization.

The negative limb now allows the generic causative event – 'unjust enrichment' – to satisfy the principle of exclusivity. Thus circumscribed, it will gather together all events which are like mistaken payments. It will not catch loans, which are contracts. It will not catch profitable torts, which are wrongs. And it will not catch, say, taxable events, which operate through a non-tortious, non-contractual characterization other than that of 'unjust enrichment'. A 100% income tax is not unthinkable. Suppose a person earning more than $x$ has to pay such a tax. The earning of $x + y$ could not be characterized as an unjust enrichment at the expense of the government's taxing agency. A taxable event of that kind is not a contract, not a tort and not an unjust enrichment. It stands for the existence of a fourth residual category.

Essentially, what we have said is that 'restitution' is unsatisfactory because it cannot align with other important categories in which we usually do our legal thinking and because, on close inspection, it does indeed cut across those other categories. However, 'unjust enrichment' is no better, unless it is artificially cut down. It overlaps with other event-based categories, and overlaps are as bad as intersections. We might look for a more precise name, one that will not be able to include alien events. We cannot find one. We therefore satisfy the principle of exclusivity by imposing an artificial restriction on this term in the classification. It is a semantic artificiality, not a substantive artificiality. Our substantive intention was, all along, that the category should be exclusive and should contain, and only contain, every set of facts which ought to be treated as being of the same kind as mistaken payment. In more homely terms, we are not moving the goalposts. Their

location has to be described in words. We are only refining the language which describes the reality.

## V. Alternative Analysis

The central message of this paper is the need to send square 6 back to the law of wrongs. Restitution for wrongs belongs in the law of wrongs. Squares 1 and 16 are relatively unimportant. The real trouble with running the law of restitution, successful as that project has proved to be, has been that its mission in square 6 is wholly different from its mission in square 11.

In square 6 the law of restitution is not concerned with defining a cause of action or the sub-forms of a cause of actions. It simply takes the definition of the wrongs for granted and attempts to answer the question whether this wrong or that wrong does or does not trigger a restitutionary entitlement. Can you get the wrongdoer's gains? 'Remedy' is a terribly dangerous word, as ambiguous as any that lawyer's use. But in this context it is intelligible to say that the only job for the law of restitution in square 6 is a remedial inquiry.

In square 11 the task is entirely different. There, the mission is to define and document the cause of action of which a mistaken payment is the commonest species. It is impossible to keep confusion at bay when two completely different missions conspire to conceal their differences beneath a common name and, because of the common name, in shared literature. So the message is that we must keep the law of unjust enrichment and the law of wrongs apart.[13]

Over every hill there is another complication. This time the complication is alternative analysis. An animal cannot be a mammal and a bird. There are difficult cases. The duck-billed platypus is one. But definitions have to be refined and a choice has to be made. The platypus is a mammal. The categories are exclusive. The principle of the exclusivity of categories dictates that it cannot simultaneously be a mammal and a bird, and the nature of the matter assigned to those categories is such that it cannot mutate from time to time, so as to be now a bird and now a mammal.

A classification which does not respect the principle of exclusivity is unsound. It does not achieve what classifications have to achieve. Hence, in the law, the principle of exclusivity applies to the categories, just as

[13] *Supra,* note 5. Andrew Kull resists splitting the two, though at the same time he insists on the unifying role of unjust enrichment. It may be that he is thinking in terms of alternative analysis or in German terms in which unjust enrichment properly so called has more work to do because there is no restitution for wrongs in that system: A Kull, "Rationalizing Restitution" (1995) 83 Calif L Rev 1191.

it does in biology. But the nature of the subject-matter to which those categories are applied is not so stable. The subject-matter to be assigned to the exclusive categories consists of raw combinations of facts. 'Alternative analysis' is familiar to all lawyers. It refers to the fact that one story can disclose two or more causes of action. It often happens that a plaintiff can frame alternative causes of action in tort and breach of contract. That is to say, a set of raw facts can be selectively analysed so as to reveal a tort and then, on the basis of a different selection and emphasis, reanalysed to reveal a breach of contract.[14] Similarly, there are sets of raw facts which can be alternatively analysed to reveal an unjust enrichment and a tort. Nothing we have said is weakened by admitting the possibility of alternative analysis, nor is alternative analysis made more difficult or more rare by anything which we have said.

We have a long way to go before we know whether alternative analysis between restitution for wrongs and restitution of unjust enrichment is rarely or frequently possible. Our law has not explored that question. In German law there is no alternative analysis between civil wrongs and unjust enrichment, for the simple reason that the law does not give gain-based awards for acquisitive wrongs. In short, there is no restitution for wrongs. German law holds that wrongs give rise only to compensation for loss, not to recovery of the wrongdoer's gains. But it then has a broad notion of unjust enrichment which can reach instances in which the defendant has encroached upon wealth which the law is understood to attribute to the plaintiff. In that way, through this encroachment claim (the '*Eingriffskondiktion*'), the German law of unjust enrichment can cover some of the ground which might otherwise be covered by allowing restitution for wrongs as such. The reach of the encroachment claim is all the greater because the German law does not require the plaintiff in unjust enrichment to show that he has suffered a loss corresponding to the defendant's gain. In other words, claims in autonomous unjust enrichment claims are not in German law restricted by a strictly subtractive notion of 'at the expense of the plaintiff'.

In a system which does allow restitution for wrongs as such, there are bound to be some cases of alternative analysis. Whether such cases are common or rare will depend in large measure on whether the system, despite giving restitution for wrongs as such, opts for a broad law of unjust enrichment on the German pattern. It may possibly be that the common law countries' concept of unjust enrichment will turn out to be broader than has hitherto

[14] *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145 (HL). The phenomenon of concurrent alternative analyses is brilliantly discussed by AS Burrows, "Solving the Problem of Concurrent Liability in idem" *Understanding the Law of Obligations* (1998), at 17.

been suspected.[15] If it does become a broader category than was thought, it is obvious that, although the analytical distinctness of restitution for wrongs and restitution for unjust enrichment will remain untouched, the number of fact situations which will disclose both a wrong and an unjust enrichment will increase. The meaning of 'at the expense of' will be crucial. A strictly subtractive interpretation of that phrase will narrow the class of plaintiffs who can sue in unjust enrichment. A relaxed interpretation on the German model will enlarge their number.

It goes almost without saying that a system does not really need both a vigorous law of restitution for wrongs and a broad conception of unjust enrichment at the expense of another.[16] On the other hand, the German experience suggests that a restrictive attitude to restitution for wrongs will produce a broad law of unjust enrichment. And it is not impossible that a system might go for a broad version of both.

None of this touches in any degree the essential proposition that restitution for wrongs as such is part of the law of wrongs. It is that part of the law of wrongs in which the law makes up its mind whether the victims of wrongs shall be allowed to claim the gains made by wrongdoers *qua* wrongdoers. That inquiry has nothing to do with the law of unjust enrichment. The law of unjust enrichment is that part of the law which endeavours to identify the circumstances in which, in the absence of any manifestation of consent and of any wrong and of any other characterization, an enrichment obtained at the expense of another generates an entitlement to restitution in that other.

## VI. Conclusion

Lastly, nothing that has been said has any necessary bearing on the size of the law of wrongs or the law of unjust enrichment. Size is anyhow unimportant. It is important to notice that the law of unjust enrichment, strictly so called, differs from the law of restitution in having nothing to say about the restitution by consent, restitution for wrongs as such, or restitution triggered in the miscellaneous fourth category of causative events. However, it might yet be decided that many cases of restitution for wrongs can indeed be alternatively analysed as cases of restitution of unjust enrichment

[15] *Commissioner of State Revenue* v *Royal Insurance (Australia) Ltd* (1994) 126 ALR 1 *per* Mason ACJ; *Kleinwort Benson* v *Birmingham CC* [1996] 4 All ER 733 (CA). In considering the defence of 'passing on', these cases have indicated that there may be no requirement of an impoverishment corresponding to the plaintiff's enrichment, which is indeed the German position.

[16] This is well captured by Christian von Bar, *The Common European Law of Torts* (1998), vol 1, paras 517-525.

strictly so called. If that were to happen, the sheer size of the law of unjust enrichment, strictly so called, would hardly differ at all from the present size of the law of restitution. But this is not an argument about size. It is an argument about the integrity of the taxonomy of rights by causative events.

The series defended runs as follows. (1) Every right arises from a causative event. (2) Every causative event is either a manifestation of consent, a wrong, an unjust enrichment, or some other event. It helps, sometimes, to re-order the second of these propositions, so as to draw the distinction between wrongs and not-wrongs: every causative event is either a wrong or a not-wrong, and, where it is a not-wrong, it is a manifestation of consent, an unjust enrichment, or a some other event. In whichever order, these propositions are nothing less than the foundation of private law. If they are incorrectly stated, they must be corrected. The building has to have a sound foundation.

PETER BIRKS**

** QC, FBA, Regius Professor of Civil Law in the University of Oxford, Fellow of All Souls College, Oxford.