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WRONG AND REMEDY: A STICKY RELATIONSHIP

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This article critiques Birks' "The Law of Unjust Enrichment: A Millennial Resolution." It attempts to articulate the problems inherent in Birks' proposed taxonomy for today's legal system. It puts forward an alternative model of the relationship between wrong and remedy - allowing for flexibility and the concept of appropriateness. Wrong and remedy are not completely independent from each other. They exist in a "sticky" relationship that guides the relief granted in each situation. A hard and fast taxonomy is doomed to failure. This article presents a solution to this problem where taxonomy is based on a loose and dynamic federation of remedies.

With his characteristic fervour and analytical rigour, Professor Peter Birks set out in his article "The Law of Unjust Enrichment: A Millennial Resolution"[1] his argument that restitution is not solely triggered by a claim based on unjust enrichment but can equally well be a response to other causative events - "Consent", "Wrongs" or "Other Events". Apart from restitution, the other goals[2] Birks lists in his article are "Compensation", "Punishment", "Perfection" or "Other Goals". Therefore the taxonomy presented by Birks has causative events on one axis and goals on another axis. This is represented by the diagram by Birks.[3] The article argues for the construction of a law of unjust enrichment. Importantly, it states how the law of unjust enrichment differs from the law of restitution and warned against allowing the language of unjust enrichment to be understood in a sense which would erode or eliminate those differences.

This article attempts to examine as clearly as possible the Birks' article, and the Birksian thesis which comes from "The Law of Unjust Enrichment" (the Birksian thesis has three main parts[4]). This article states why Birks' proposed taxonomy is incorrect and seeks to provide in a very general way an alternative taxonomy.

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1 [1999] SJLS 318.

2 Or remedies.

3 *Supra*, note 1 at 322.

4 These three parts are; the focus on the law of unjust enrichment, the multi-causality of restitution and the absolute necessity of having a taxonomy for the legal system.

I. CRITIQUE OF BIRKS' ARTICLE[5]

There are three main points of criticism that can be levelled at the article.

A. Introductory Criticisms

The most important and obvious thing to note about the Birks article is that it changes the focus from restitution to unjust enrichment. This is surprising as Birks has been extremely influential in the generation of ideas concerning restitution. His name is synonymous with restitution. His critique of restitution is accurate. His criticism of this area is very persuasive but he has not proved the case for unjust enrichment. He should be applauded for this recanting of imperial restitution, but the applause must be small and qualified. If a child is asked what is 2 plus 2 and the child originally says 6 but later changes his mind and says 5, the applause should reflect the fact that the child is still wrong but not as wrong as previously.

The change from restitution being the focus to unjust enrichment being the focus is the most obvious change that Birks proposes in his article. But is this change in focus important? Clearly, Birks is in two minds on the issue. He states in the abstract to the article that the "law of unjust enrichment will emerge from the law of restitution, but something must be left behind. The butterfly will differ from the caterpillar."[6] But later that "[n]o time or energy has really been wasted. The project has given us a law of unjust enrichment".[7] Immediately it seems counter-intuitive to assert this point. If restitution is the wrong concept and unjust enrichment the right one, all those articles by Birks defending an incorrect position are surely a waste. Wouldn't his own efforts have been better spent creating the law of unjust enrichment rather than wasted on defending the law of restitution?

However, that is only the immediate reaction to Birks' assertion that time and effort has not been wasted by the restitution adventure. A deeper analysis actually examines the use of the word "restitution". It is interesting in the extreme that a person who is so precise with his language, should argue that it does not matter if it is called "restitution" or "unjust enrichment". Obviously it does matter. Tettenborn has stated[8]

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5 Birks has suggested the ideas that he presented in "The Law of Unjust Enrichment" in another article named "Misnomer" in Cornish *et al* (eds), *Restitution Past, Present and Future* (Hart Publishing, Oxford, 1998). These two articles will be treated largely as interchangeable.

6 "The Law of Unjust Enrichment: A Millennial Resolution" [1999] SJLS 318.

7 *Ibid* at 326.

8 "Misnomer - A Response to Professor Birks" in W Cornish *et al* (eds), *Restitution Past, Present and Future* (Hart Publishing, Oxford, 1998), at 31. Or, as M McInnes has observed, "Words matter", "Restitution, Unjust Enrichment and the Perfect Quadration Thesis" [1999] RLR 118.

> In particular [Birks] is (if one may say so with respect) absolutely correct in making the point that an accurate and logical nomenclature is vital … Misclassification and the making of inappropriate distinctions have bedevilled the study of unjust enrichment law in England ever since it started to be a serious subject of research.

In the Birksian thesis, restitution is a response, while unjust enrichment is an event. He states quite clearly in his article the problems caused by confusing the two. It seems like there is a schizophrenic response here, in that the naming of the concept does matter[9] and at the same time the naming of the concept does not matter.[10] The real question is which one of these two inconsistent responses is wrong. However, Burrows perceived an even more important issue with Birksian thesis contained in "The Law of Unjust Enrichment"[11] by stating "Peter Birks may have underplayed the importance of his change … [I]t is much more important than merely being a preference for one terminology rather than another".[12]

This even more significant point is contained in his article. This is his position of the multi-causality of restitution. This is a transformation from the accepted view of restitution that restitution exhibits only mono-causality. This all comes down to the question whether only unjust enrichment can give raise to restitution. The conventional answer of restitution scholars is yes,[13] while the answer of Birks in this article [14] is an empathetic no. This argument is generally carried on under the rubric of the perfect quadration thesis.[15] That is, is it about both the event and the response (the traditional view of the law of restitution) or is only about one aspect[16] of the event/ response dichotomy? In the article, Birks rejects the perfect quadration thesis. This is a fundamentally important challenge to the law of restitution. In his article dealing with the Birksian thesis

[9] This is the import of the bulk of this article.

[10] This is an attempt to say what has gone before has not been a waste.

[11] As well as in "Misnomer" in W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998), which Burrows was actually discussing.

[12] "Quadrating Restitution And Unjust Enrichment: A Matter Of Principle?" [2000] RLR 257.

[13] According to A Burrows, "Quadrating Restitution And Unjust Enrichment: A Matter Of Principle?" [2000] RLR 257 at 258 "Restitution and unjust enrichment quadrate. They are two sides of the same coin". This is a clear statement of the conventional view of restitution.

[14] He made this denouncement of the mono-causality of restitution in "Misnomer" in W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998). G Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 1999) has also stated that, like Birks, he believes restitution is not simply about unjust enrichment.

[15] Which means that unjust enrichment is the cause, and the only response is restitution. That is, there is no remedy of restitution without the cause of unjust enrichment.

[16] For Birks that one aspect of the dichotomy in the focus of his analysis is the event of unjust enrichment, while for Virgo the focus is the response of restitution.

Burrows has stated that "it is strongly arguable that [the Birksian thesis] represents a break with all that has happened to this subject since it was created in 1937".[17] The significance of this challenge to restitution should not be underestimated. It is a battle concerning the very heart and soul of this subject. Therefore, it is not surprising that the Birksian thesis has been challenged. These challenges have been mounted by Tettenborn,[18] Burrows[19] and McInnes,[20] who assert that the conventional understanding of restitution is correct. Of these defences the most detailed is the one by Burrows.

Burrows' objections to the Birksian thesis are four fold,[21] but two seem of great importance. The first is the one which Burrows considered to be the fundamental objection[22], and is premised upon the issue of categorisation. The conventional theory of restitution, according to Burrows, is categorisation according to principle, whereas the Birksian thesis is that categorisation is by event/ response. However, this assertion by Burrows is open to an observation. In his review of the book of essays which included the Birks "Misnomer" article Burrows stated that he cannot understand why Finn has referred to himself as a restitution skeptic or what is the difference between restitution and Finn.[23] In his essay in the work[24] Finn presented a theory involving a loose but dynamic confederation of obligations and remedies which is much more in tune with the Birksian thesis and completely rejects the conventional model of restitution. That, by itself, is a more than adequate explanation of why Finn describes himself as a restitution sceptic and any failure to appreciate that constitutes a complete failure to appreciate two entirely inconsistent legal views. It is very troubling that Burrows recognises the significance of the Birks change but fails to appreciate the Finn position.

The second objection that Burrows presented with the Birksian thesis is related to the fact of treating like with like. Burrows suggested[25] that

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[17] "Quadrating Restitution And Unjust Enrichment: A Matter Of Principle?" [2000] RLR 257 at 268. In his review of W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998) in (1999) 115 LQR 325 Burrows lamented the fact that Birks had not explained the practical significance of his thesis.

[18] "Misnomer - A Response to Professor Birks" in W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998).

[19] "Quadrating Restitution And Unjust Enrichment: A Matter Of Principle?" [2000] RLR 257.

[20] "Restitution, Unjust Enrichment and the Perfect Quadration Thesis" [1999] RLR 118.

[21] He made these points in his article "Quadrating Restitution And Unjust Enrichment: A Matter Of Principle?" [2000] RLR 257.

[22] "Quadrating Restitution And Unjust Enrichment: A Matter Of Principle?" [2000] RLR 257.

[23] "Review", (1999) 115 LQR 325 at 327.

[24] "Equitable Doctrine and Discretion in Remedies" in W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998).

[25] "Quadrating Restitution And Unjust Enrichment: A Matter Of Principle?" [2000] RLR 257 at 263.

restitution for wrongs and unjust enrichment by subtraction (which are placed together by the conventional theory of restitution) possess a greater affinity than restitution for wrongs and compensation (which are treated together in Birksian thesis). Burrows has indicated that there are three problems with the Birksian thesis with regard to this objection. The first is that there is a common valuation method for restitution for wrongs and unjust enrichment by subtraction.[26] Burrows, relying upon only one authority, may be in danger of over-stating his case. The second problem identified is that by dividing restitution for wrongs and unjust enrichment by subtraction no consistent approach can be adopted to proprietary remedies.[27] Having been pre-occupied with proprietary remedies,[28] all I can say to Burrows fear is, good! From my point of view, the law of restitution has not made a significant contribution to our understanding of proprietary remedies, so that the danger of separating restitution for wrongs and unjust enrichment by subtraction interfering with restitution's contribution to proprietary remedies is not a danger at all. Further, in relation to this fear, I would imagine that it would not cause Birks to lose much sleep, as he has shown consistently a great dislike of proprietary remedies.[29] The third problem concerns the use of the defence of change of position, and how it is inappropriate to compensation for a wrong.[30] The answer to this is that the Birksian thesis should not be rejected upon the basis of the availability or otherwise of a defence.

All in all, the arguments mounted by Burrows do not seem to do much damage to the Birksian thesis. However, Burrows has done a great service in clearly indicating the absolute importance of the change from the conventional view of restitution to the view encapsulated in the Birksian thesis. Restitution must follow Burrows' lead and confront the challenge posed by the Birksian thesis.

[26] *Ibid* at 263-264.

[27] *Ibid* at 264.

[28] *The Remedial Constructive Trust* (Sydney: Butterworths, 1998), "The Place of the Equitable Lien As A Remedy", in E Cooke (ed), *Modern Studies in Property Law* (Oxford: Hart Publishing, 2001), "The Remedial Constructive Trust and Insolvency", in FD Rose (ed), *Restitution and Insolvency* (London: Mansfield Press, 2000), "Remedial Aspects of Equitable Property", in Jackson and Wilde (ed), *Current Issues in Property* (London: Dartmouth Press, 1999), "Proprietary Remedies And The Role of Insolvency" (2000) 23 University of New South Wales Law Journal 143, "*Giumelli*, Estoppel and The New Law of Remedies" [1999] Cambridge Law Journal 476, "Professor Birks and the Demise of the Remedial Constructive Trust" [1999] Restitution Law Review 128, "The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility" (1999) 14 Journal of Contract Law 221, "The Rise Of Non-Consensual Subrogation" (1999) 63 The Conveyancer and Property Lawyer 113, "Polly Peck (No.2)-Getting it Right (Possibly) for the Wrong Reasons (Definitely)" (1998-1999) 9 Kings College Law Journal 140.

[29] For example, see "Proprietary Rights as Remedies" in P Birks (ed), *The Frontiers of Liability* Volume 2 (Oxford: Oxford University Press, 1994).

[30] "Quadrating Restitution And Unjust Enrichment: A Matter Of Principle?" [2000] RLR 257 at 264-266.

Why is Birks still wrong? There are two main reasons for the fact that Birks is still wrong, even with his change of mind on the overarching nature of restitution.

B. The Role of Unjust Enrichment as A Causative Event

The first main reason relates to the role that he gives to events. He treats unjust enrichment as the equal of the other categories of events, the other categories being consent, wrongs and other events[31]. There are two significant problems[32] with this construction of rights by causative events.

The first is that it can be noted that this "other events" category is ever expanding and "threatens the utility of the whole taxonomic scheme".[33] The size and the use of this miscellaneous category may destabilise the entire Birks' taxonomy.

The second significant problem relates to the role of unjust enrichment. Finn has indicated that the cause of his self-imposed title "restitution-sceptic" comes about by the "exceptionally powerful"[34] concept of unjust enrichment. He has indicated that he is worried of the allure of the concept itself.[35] There has been a strand of concern with the expansive role often given to unjust enrichment and there has been an attempt to temper this expansive approach. For example, Kit Barker in "Unjust Enrichment: Containing the Beast"[36] argued for some limitation upon unjust enrichment. Ignoring such calls for restraint, in his taxonomy Birks gives unjust enrichment equal status as consent (basically contracts) and wrongs (basically torts). However, in their powerful article Grantham and Rickett argue that unjust enrichment is not the equal of these two categories of events. They observe that "[w]hile the law of unjust enrichment is a core doctrine of the private law, it is a subsidiary doctrine".[37] They reach this conclusion by indicating that the legal system accords "primacy to individual autonomy and choice."[38] Subsequent to this they also support their contention about the subsidiarity of unjust enrichment by reference to the role that unjust enrichment plays in civil legal systems. Grantham and

[31] A Tettenborn, in "Misnomer - A Response to Professor Birks" in W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998) refers to this "other events" category as the "odds and sods" category.

[32] These simply constitute the main reasons. Other reasons include the role of property as an event. Birks does not include property in his taxonomy, however, in the taxonomy suggested by R Grantham and C Rickett in "On The Subsidiarity of Unjust Enrichment" (2001) 117 LQR 273 property is perceived as an event.

[33] Bryan, Review of W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998) in (1999) 21 Adel LR 151 at 154.

[34] "Equitable Doctrine and Discretion in Remedies" in Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998), at 251.

[35] *Ibid* at 252.

[36] (1995) 15 OJLS 457.

[37] "On The Subsidiarity of Unjust Enrichment" (2001) 117 LQR 273 at 273.

[38] *Ibid* at 274. It is not clear what role is given to torts by this statement.

Rickett also quote Lord Goff to support their argument that unjust enrichment is not the equal of the consent category.[39] Therefore, they conclude that unjust enrichment "is and must be a gap-filler".[40] In Birks' taxonomy, the category of causative event — unjust enrichment — is presented as being the equal of the other causative events. The article of Grantham and Rickett indicates quite clearly why Birks' portrayal is inaccurate.[41]

C. The Tyranny of Taxonomy

The tyranny of taxonomy constitutes the second main point of criticism of the Birksian thesis. There has been much, if not too much, attention to taxonomy of recent years. The legal system is ever changing. As Lord Goff put it in his Maccabean lecture, the legal system should be understood as a mosaic in a constant state of change.[42] And, further, this is how it should be. The legal system, which is a creation of society, changes with society. Sometimes it changes too slowly, sometimes it changes too quickly. But it does change. Having a permanent taxonomy like the one suggested by Birks can impact adversely upon the responsive nature of the legal system.

It needs to be noted that classification and taxonomy are interchangeable terms. Birks has observed that "[t]axonomy is classification".[43] By way of criticism he states that "the common law has not attended to its taxonomy".[44] In "Equity in the Modern Law: An Exercise in Taxonomy"[45] and *The Classification of Obligations*[46] Birks attracts attention to the fact of the lack of classification in the legal system. In "The Law of Unjust Enrichment: A Millennial Resolution"[47] he has proposed a system of classification. Classification is extremely important for numerous reasons, but perhaps the most important is that it permits the comprehension of various legal doctrines by placing different doctrines together. Additionally, classification prevents the application of loose logic. Finally, another benefit of classification according to Birks is the reduction in

[39] *Ibid* at 296.
[40] "On The Subsidiarity of Unjust Enrichment" (2001) 117 LQR 273 at 296.
[41] By placing Birks' division into unjust enrichment and restitution together with the argument by Grantham and Rickett of the subsidiarity of unjust enrichment, it would seem that unjust enrichment only has a relatively minor role to play in the legal system.
[42] This essay "The Search for Principle" is in W Swadling and G Jones, *The Search for Principles* (Oxford: Oxford University Press, 1999) at 328. This is a reprint. Originally this article was published in (1983) 59 Proc. Brit. Acad 169.
[43] "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 WALR 1 at 3.
[44] In *Editor's Preface,* in P Birks (ed), *The Classification of Obligations* (Oxford: Clarendon Press, Oxford, 1997), at v.
[45] (1996) 26 WALR 1.
[46] (Oxford: Clarendon Press, 1997).
[47] *Supra* note 1.

litigation, which would be beneficial to the community.[48] With the allure of such benefits it is not surprising that there is a great temptation to rigidly classify the legal system. Complete classification[49] would make the legal process appear to be more mechanical and objective. Predictability is said to be the great virtue of complete classification. Classification is useful when employed as a servant. However, it constitutes a great danger when it becomes the master of the legal system. Useful legal tools include definitions, classification and metaphors. All three are of assistance to the legal process, but are recognised to contain great dangers if they are relied upon too heavily. It should be recognised that the complete classification recommended by Birks does have attendant problems.[50] As Gummow J said in *Marks* v *GIO Australia Holdings Ltd*[51] "[a]nalogy, like the rules of procedure, is a servant not a master". The same thing could be said of taxonomy, that is, taxonomy, like the rules of procedure, is a servant not a master. Frequently Birks' taxonomy appears to be the master, not the servant. Fundamentally, there are six main problems with this extreme form of classification advocated by Birks.

The first problem is that complete classification fails to take into account the observation by Holmes that "[t]he life of the law has not been logic, it has been experience".[52] Obviously, a legal system based purely upon experience cannot operate fairly. Neither can it operate fairly as a system based purely upon logic. A fair or just system must be a composite of the two. Complete classification based upon pure logic does not guarantee a just legal system. The second problem was recognised by Davies. He observed that "[c]lassification can so easily produce artificiality".[53] The third problem involves the rigidity caused by complete classification. Such a strict approach to classification is at odds with the tradition in the common law world of judges looking for the answers to legal problems in the circumstances of the case, viewed in the context of previous decisions.[54] The difficulties caused by the effects of permanent classifications were part

48 "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 WALR 1.

49 Accompanied by a rigid form of predictability.

50 This is not to suggest that classification is not useful. Classification is extremely relevant, particularly when various obligations intersect. It is simply suggesting that complete classification can be applied too rigidly. Exactly the same points can be made about overly enthusiastic use of definitions.

51 (1998) 196 CLR 494 at 529.

52 *The Common Law* (Boston: Little, Brown, 1881), 1. As Lord Wright pointed out *Liesboch Dredger (Owners of)* v *Owners of SS Edison* [1933] AC 449 at 460 "The law cannot take account of everything that follows a wrongful act .... In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons."

53 "Restitution and Equitable Wrongs" in FD Rose (ed), *Consensus ad Idem* (London: Sweet & Maxwell, 1996) at 176.

54 It can certainly be argued that complete classification is counter to the entire Common Law tradition, and is more consistent with a Code based system. It should be remembered that Birks background as a Romanist lawyer is in a system built upon the Codes.

of the reason for the development of the doctrines and remedies of equity.[55] Maitland's comment on the relationship between the two is still relevant to any calls for rigid, permanent classifications:[56]

> We ought not think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short Act saying 'Equity is hereby abolished', we might have got fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and possession would have been decently protected and contract would have been enforced. On the other hand, had the legislature said, 'Common law is hereby abolished', this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of common law.

Equity has had the role to "temper and mitigate the rigour of the law".[57] Any system of complete classification and pure reliance upon strict definitions[58] of words is going to produce a desire for another system of law that is to complement and lessen the ill effects of such a rigid system.

Another problem involved with complete classification is that it may introduce a new version of the forms of action in the form of taxonomy. As Birks has acknowledged "[t]he forms of action gave the common law a kind of classification".[59] This is not to suggest that Birks is advocating a return to the old forms of action. It is simply that it should be acknowledged that the tendency to employ complete classification as a proxy for the forms of actions constitutes a very real risk. A return to anything like the forms of action is totally inconsistent with the abolition of the old forms of action, and what was devised to replace them.

The sixth and final problem with this extreme form of classification comes from Bryan, in his review of a book of essays to mark the retirement of Gareth Jones.[60] Bryan accurately observed:[61]

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[55] Restitution lawyers have much difficulty of incorporating equitable doctrines into the law of restitution.

[56] J Brunyate (ed), *Maitland's Equity* (Cambridge: Cambridge University Press, 1936), 18-19.

[57] Plucknett and Barton (eds), "St German's Doctor and Student" 91 *Selden Society* (London, 1974), p97.

[58] Such as Birks seems to be attracted to.

[59] In *Editor's Preface* in P Birks (ed), *The Classification of Obligations* (Oxford: Clarendon Press, 1997) at v.

[60] Review of W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, Oxford, 1998) in (1999) 21 *Adel LR* 151.

[61] *Ibid* at 154-55.

> Perhaps of greater concern is Professor Birks' concern with classifying legal phenomena while paying little regard, at this stage in his enterprise, to the substantive material to be included in his categories. Restitution is a response to a variety of events, including unjust enrichment, but so far what ought to be included in the events of 'consent', 'wrong', 'unjust enrichment' or 'other' for the purpose of this taxonomic scheme has been sketched out in only a few suggestive lines. It is an article of faith for Professor Birks, as for most restitution writers, that the anatomy or skeleton of the subject must be clearly established before the detail can be examined.[62] Conceptual disorder is of course the enemy of accurate analysis, but it is also arguable that this abiding preoccupation with categorising material can be taken to extremes. Fifty years ago Edward Levi famously remarked that 'in the legal process … the classification changes as the classification is made'.[63] Professor Birks stresses the static aspects of classification; in contrast Levi drew attention to the dynamic character of legal categories, which are themselves altered, often imperceptibly, by the processes of judicial application. It is the dynamic process of changing legal categories through the inductive processes of applying them which is in danger of being overlooked in the quest for a neo-Darwinian scheme of private law classification.

With all those caveats in place, an alternative taxonomy will be proposed. It is very important for law to address its taxonomy. Certainty is the greatest benefit of having a focus upon taxonomy. But any proposed taxonomy must not be the rigid kind advocated by Birks. The alternative taxonomy should be understood that it must be extremely flexible, so as to be as responsive as possible. But the proposed taxonomy just cannot be flexible. That is not enough. Also it must take into account statutes, as this is the Age of Statutes.[64] Ignoring statutes is to ignore large parts of the legal system. The fatal nature of the omission of statutes is like the captain of the Titanic saying that 95% of the hull of his ship was not effected by the iceberg.[65]

Such a taxonomy is one that is based on the law of remedies as such the structure of such a taxonomy is perfectly consistent with important

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62 P Birks, *An Introduction to the Law of Restitution* (1985) 1-3.

63 E Levi, *An Introduction to Legal Reasoning* (1948) 3. For a contemporary reassessment of Levi, see, D Hunter, 'No Wilderness of Single Instances: Inductive Inferences in Law' (1998) 48 Journal of Legal Education 365.

64 This expression was first used by G Calaresi in *A Common Law for the Age of Statutes* (Cambridge, Massachusetts: Harvard University Press, 1982).

65 Many works on the law of obligations make the error of excluding from their taxonomies such a consideration. One example of this is the book by A Burrows, *Understanding the Law of Obligations* (Oxford: Hart Publishing, 1998).

legislation such as Part VI of the *Trade Practices Act* 1974 (Cth), and legislation provides a model for the alternative taxonomy.

II. ALTERNATIVE TAXONOMY BASED ON REMEDIAL LAW

A. Introduction to the Taxonomy

An alternative to the taxonomy that Birks has proposed is as follows.

This taxonomy is based upon the new law of remedies. In an extremely limited context [66] I suggested the use of the terms "obligations continuum"[67] and "remedies continuum".[68] In many ways, these concepts are relied upon in much larger contexts. Indeed, it is to apply to all judicial remedies awarded in what has been traditionally referred to as private law.[69] The wrongs continuum is still important. The proper understanding of wrongs recognises that the wrong that has been committed and the remedy awarded are very strongly connected. An essential part of the award of a remedy selected from the remedies continuum is the determination of the wrong that has been committed.

Fundamentally the legal process as it involves court matters is as follows:

STAGE ONE **WRONG (consisting of the obligation + cause of action)**

STAGE TWO **SELECTING THE APPROPRIATE REMEDY**
Step One **Available Remedies**
Step Two **Judicial Considerations**
Primary Factors
i Precedent
ii The Nature of the Wrong
iii Goals of the Law of Remedies
- Remedial Structure
- Remedial Consequences
iv Context
v Indirect Parties To The Litigation- Third Parties

[66] Discussing the proprietary remedy of the constructive trust.
[67] Perhaps it would be better to refer to this as a wrongs continuum.
[68] *The Remedial Constructive Trust* (Sydney: Butterworths, 1998).
[69] The impact of remedies may be a unifying factor between private and public law. This may well be a consequence of the High Court's decision in *Truth About Motorways Pty Limited* v *Macquarie Infrastructure Management Limited* (2000) 169 ALR 616. For more of a discussion of this, see D Wright, "The Role of Equitable Remedies in the Merging of Private and Public Law" (2001) 12 Public Law Review 40.

Secondary Factors

i Direct Parties To The Litigation (continued)
- The Plaintiff's Conduct
- The Defendant's Conduct

ii Property

iii Difficulty in Utilizing A Particular Remedy
- Difficulty of Valuation
- Practicability of Relief

iv Legislation

Step Three **Election-The Plaintiff's Role in Remedy Selection**

STAGE THREE REMEDY AWARDED

What is the prime importance in this alternative taxonomy is the emergence of the new law of remedies. Logically, prior to the design of a new law of remedies it is imperative that the old law of remedies be discussed. The traditional law of remedies is best understood as being constituted by a remedial hierarchy.

Rhetorically there exists a remedial hierarchy with legal remedies at the apex, equitable remedies only being available when the legal remedies prove inadequate. The rhetoric of this remedial hierarchy is constantly repeated, constituting the "surface linguistic behaviour"[70] of both judges and practitioners. There are two main difficulties generated by this rhetoric. The first is the gulf between theory and practice. Another difficulty is that it fails to allow judges, practitioners and academics to properly conceptualise the law of remedies, thereby hindering the coherent development of the law. This remedial hierarchy is alleged to be a rule of universal application. Two alleged features create this hierarchy of remedies. The first is that before a party has access to equitable remedies common law remedies must be inadequate. The second is that equitable remedies are supposed to be discretionary, whereas common law remedies are as of a right.[71] Both of these pillars of the remedial hierarchy have shortcomings.

However, an examination of the shortcomings of the remedial hierarchy does not construct an alternative taxonomy. There is, and there should be,

[70] This term was employed by R Dworkin, "No Right Answer" in PMS Hacker and J Raz (eds), *Law, Morality and Society* (Oxford: Clarendon Press, 1977) at 59 and 71.

[71] In other words, a plaintiff has a right to a Common Law remedy, but has no right to an equitable remedy.

an emerging new law of remedies.[72] This new law is present within the current transformation of the traditional law of remedies.[73] Detailed legislative schemes, as well as general judicial and academic statements concerning the place of remedies within the legal system, will assist in this examination, leading to the conclusion that the law of remedies is moving towards a process where the most appropriate remedy is awarded. When considering which remedy is the most appropriate, a court must consider a range of factors which will assist in the decision making process. Also important to that decision-making process are various legal theories. In addition, the contentious place of proprietary remedies must be considered as the court, if it is to make judgments concerning the most appropriate remedy, must know all the remedies available to it.

There are three key features emerging in the new law of remedies. The term "the new law of remedies" constitutes an umbrella term, which covers these key features. These key features are;

1. the search for the most appropriate remedy,
2. the expansion of the number of remedies available[74] and
3. the "tailorability"[75] of available remedies.[76]

All of these are not equally important. The first, the search for the most appropriate remedy, is the most important development for the new law of remedies. The second and third features, while important, are subsidiary to the first.

There are many challenges for the new law of remedies. However, they assist in determining the contours of the new law of remedies. Many of the challenges to the new law of remedies have been put by Birks.

Fundamentally, this article is advocating a cautious development in the law of remedies. In the vast majority of cases the traditional remedial response will not be altered by the new law of remedies. The new law of remedies is not suggesting a radical departure from the remedial response that would be expected in the vast majority of cases. The result reached under the traditional law of remedies will usually be the result reached under the new law of remedies. The doctrine of precedent has a vital role to

[72] J Austin in his *Lectures on Jurisprudence*, edited by Campbell, Volume II, 5th ed (London: John Murray, 1885), at 767-768 indicated that a separation between right and remedy, which is vital to the new law of remedies, provides "clearness and compactness". S Waddams in his "Remedies as a Legal Subject" (1983) 3 OJLS 121 also supports this division because of its illuminating and education role.

[73] Such as the transformation which is occurring within the remedy of equitable compensation.

[74] The best examples of this are equitable compensation and Mareva injunctions.

[75] This term means the tailoring or minor modification of an existing remedy.

[76] The best examples of this concept are provided by proprietary remedies.

play in the new law of remedies, carrying with it the desirable characteristic of certainty.

Even though the vast majority of results will remain the same under the new law of remedies as what prevailed under the traditional law of remedies, this is not to suggest that the new law of remedies is devoid of impact. The destination may be the same under the two remedial systems but their processes are completely different. The new law of remedies, while encapsulating the best parts of the old law of remedies, is much more in tune with the legal system as it has developed and is continuing to develop.

B. Separating Wrong and Remedy[77]

A vitally important element of the legal system which permits the drafting of this alternative taxonomy involves the separation of wrong[78] and remedy. Accompanying this has been a clearer definition and understanding of the obligation that has been breached. For example, in *Maguire* the High Court maintained a very strict approach to the existence of the fiduciary relationship[79], which is consistent with the High Court decision in *Breen* v *Williams*.[80] Gaudron and McHugh JJ held that[81]

> [h]owever, Australian courts recognise only proscriptive fiduciary duties. This is not the place to explore the differences between the law of Canada and the law of Australia on this topic. With great respect to the Canadian Courts, however, many cases in that jurisdiction pay insufficient regard to the effect that the imposition of fiduciary duties on particular relationships has on the law of negligence, contract, agency, trusts and companies in their application to those relationships. Further, many of the Canadian cases pay insufficient, if any, regard to the fact that the imposition of fiduciary duties often gives rise to proprietary remedies that affect the distribution of assets in bankruptcies and insolvencies.

Indicating the symbiotic relationship between the wrong and the remedy, is the statement by the joint judgment in *Maguire* that "Equity intervenes … not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary

[77] A leading Canadian academic, Professor Donovan Waters, has proposed a similar model regarding the separation of wrong and remedy, see "Liability and Remedy: An Adjustable Relationship" (2001) 64 Saskatchewan Law Review 429.

[78] It is important to remember that the wrong consists of the obligation plus the cause of action.

[79] At 793.

[80] (1996) 186 CLR 71. Also evident in *Pilmer* v *Duke*, a recent decision of the High Court of Australia. See also, *Bristol and West Building Society* v *Mothew* [1996] 4 All ER 698 at 710.

[81] At 113.

to, and vindicate, the high duty owed the plaintiff".[82] The High Court in *Maguire* supported this conclusion by reference to its judgment in *Warman International Ltd* v *Dwyer*.[83] The fiduciary wrong is being treated as a very special wrong, which will have only limited and rare application.

In the legal system, there has been a move from the focus being on whether a relationship is or is not of a certain variety, to a concentration upon the wrong[84]. Further, this has permitted a separation between the wrong and the remedy. This has lead to the search for the "appropriate" remedy.

B(i). Separation of Wrong and Remedy in Case Law

The concept of the "appropriate" remedy has been emerging in cases recently. This has been very explicit in New Zealand cases. Perhaps the clearest exposition of the "appropriate" remedy principle was stated by Hammond J in *Butler* v *Countrywide Finance Ltd*.[85] His Honour held that;[86]

> All this leads to a conclusion that what is involved in the allocation of the 'appropriate' remedy in a given case is a matter of informed choice, bearing in mind the general compensation principle and the factors that I have listed above. Those considerations do not lead to a wholesale abandonment of much of the traditional learning. They simply point to a more open remedial system; and a requirement for articulation and candour as to why the relevant choices are made, rather than the formalistic applications of (in many cases) somewhat arid doctrinal rules drawn from some distant time.

In *Brown* v *Poura*[87] Hammond J returned to this issue when his Honour observed:

> Whether these English authorities are entirely compatible with contemporary New Zealand jurisprudence on remedies is open to question. Essentially, English legal theory and practice on remedies is monistic. That is, right and remedy are perceived to be congruent. But, in the United States, and increasingly in Canada and New Zealand, our courts proceed on a dualistic basis. The court first makes enquiries as to the wrong the court is asked to uphold; it then (and only then) makes a context-specific evaluation of that remedy which will best support or advance that wrong.

[82] At 787.
[83] (1995) 182 CLR 544 at 557-558.
[84] For example, L Sealy, "Fiduciary Wrongs, Forty Years On" (1995) 9 JCL 37.
[85] [1993] 3 NZLR 623.
[86] *Ibid* at 633.
[87] [1995] 1 NZLR 352 at 368.

Finally, in *Dickie* v *Torbay Pharmacy (1986) Ltd*[88] Hammond J discussed the use of proprietary remedies in this new remedial scheme. His Honour held;[89]

> As to the nature of a constructive trust, there has been a great deal of juristic debate as to whether such is a substantive institution, or a remedial device. And, is such declaratory of something that has always existed-and hence is more like an express trust? Or, it is 'constituted', and hence essentially a remedial vehicle? Or, is there more than one kind of constructive trust? My own view is that, functionally, constructive trusts can (and do) serve a variety of purposes and whether such should be decreed must turn less on abstract theory than on the facts of a given case; the nature of the 'wrong' committed; whether proprietary relief is appropriate; and the variety of discretionary considerations which routinely attend an exercise of this kind.

A similar approach has been adopted in Canada with the decision in *LAC Minerals Ltd* v *International Corona Resources Ltd.*[90] The separation of legal wrong and remedy in Canada was continued in *Cadbury Schweppes Inc* v *FBI Foods Inc*.[91] The case involved a breach of confidence claim concerning a drink made from clams and tomatoes. The case eventually arrived at the Supreme Court where Binnie J delivered the unanimous judgment of the court.[92] The appeal concerned the remedy, as the breach of confidence was accepted.

The approach of the Supreme Court is not simply confined to breach of confidence cases as the court noted;[93]

> The equitable doctrine, which is the basis on which the courts below granted relief, potentially runs alongside a number of other causes of action for unauthorised use or disclosure of confidential information, including actions sounding in contract, tort and property.

Binnie J quoted,[94] with apparent approval, the statement by Sopinka J in *International Corona Resources Ltd* v *LAC Minerals Ltd*[95] that;

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88 [1995] 3 NZLR 429.
89 *Ibid* at 441.
90 (1989) 61 DLR (4th) 14.
91 (1999) 167 DLR (4th) 577.
92 The bench consisted of L'Heureux-Dubé, Gonthier, McLachlin, Iaobucci, Major, Bastarache and Binnie JJ.
93 *Supra*, note 91 at 588, para [20].
94 *Ibid* at 588, para [22].
95 (1989) 61 DLR (4th) 14.

> This multi-faceted jurisdictional basis for [breach of confidence] provides the Court with considerable flexibility in fashioning a remedy. *The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy*. [Emphasis added]

Thus, the case was stressing remedial flexibility and indicating that the basis of the wrong is important in determining the appropriate remedy. Further to this, Binnie J held that;[96]

> In short, whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the *appropriateness* of a particular equitable remedy

The Court quoted[97] the approach advocated by Davies of the cross-fertilization of remedies across doctrinal boundaries. Binnie J had quoted from Davies' review of *LAC Minerals*, where Davies had stated[98]

> There is much to be said for the majority view [in *LAC Minerals*] that, if a ground of liability is established, then the remedy that follows should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization.

It was held that the appropriate remedy that the court could award included equitable compensation[99] and Binnie J observed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation".[100] This indicates that a full appreciation of all the available remedies is necessary in such a system.

The Supreme Court's decision in *Cadbury Schweppes* is important for four reasons. The first is that it constitutes a clear and unanimous direction in Canadian law. The second is that the question of remedy is not circumscribed by the cause of action relied upon by the plaintiff. The Supreme Court clearly made the remedial issue the "appropriate" remedy. The approach involves the search for the "appropriate" remedy. The third is that the legal obligation that is breached, and how it was breached, are very relevant factors to deciding the "appropriate" remedy. The final one is the close parallel between the approach adopted in *Cadbury Schweppes* to the

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96 *Supra*, note 91 at 590, para [26].
97 *Ibid* at 589, para [24].
98 "Duties of Confidence and Loyalty" [1990] Lloyd's Mar & Com LQ 4 at 5. See also JD Davies, "Restitution and Equitable Wrongs" in Rose (ed), *Consensus ad Idem* (London: Sweet & Maxwell, 1996).
99 *Supra*, note 91 at 604, para [61].
100 *Ibid* at 604, para [61].

approach adopted by the High Court of Australia in *Warman International Ltd* v *Dwyer*.[101]

It should not be thought that this is only a phenomenon that is occurring in New Zealand, Canada and the United States. It is also occurring in England. Birks has noted "the useful practice in intellectual property disputes of splitting the trial between liability and remedy."[102] But this process in England is not restricted to intellectual property cases. The House of Lords decision in *Lord Napier and Ettrick* v *Hunter*[103] constitutes a very good example of both the process of separating wrong and remedy, and that this process is not limited to intellectual property cases.

In Australia, the movement towards the most appropriate remedy approach is also occurring. The High Court in *Maguire* v *Makaronios*[104] was attuned to this concept of remedial flexibility. Perhaps this was most clearly apparent in the judgment of Kirby J. His Honour held that;[105]

> it remains open to a court, in fashioning the remedies which it is apt for equity to provide, to consider most, if not all, of the matters which would otherwise be urged as a reason for excluding relief altogether on the ground of the alleged absence of a causal connection between the breach and the loss ... The wide variety of remedies available to a court of equity following proof of a breach of fiduciary duty permit the court to exercise very large powers to fashion orders apt to a full consideration of all the facts.

The joint judgment in *Maguire*, citing *Spence* v *Crawford*,[106] held that "[t]he nature of the case will determine the *appropriate* remedy available for selection by a plaintiff".[107]

The High Court decision in *Bathurst City Council* v *PWC Developments*[108] also indicates that there is a transformation in the law of remedies. The decision involved the High Court rejecting the idea of some variety of direct link between the wrong and remedy. The High Court

[101] (1995) 182 CLR 544. This comparison between the two cases was discussed by Aedit Abdullah and Tey, "To Make The Remedy Fit The Wrong" (1999) 115 LQR 376 at 379-380.

[102] "Inconsistency Between Compensation and Restitution" (1996) 112 LQR 375 at 375, where he was commenting upon the Privy Council in *Tang Man Sit* and the English decision of *Island Records.*

[103] [1993] 2 WLR 42. See, M Mitchell, "Subrogation and Insurance Law: Proprietary Claims and Excess Clauses" [1993] LMCLQ 192, especially 199-201.

[104] (1998) 188 CLR 449.

[105] *Ibid* at 493.

[106] [1939] 3 All ER 271 at 288.

[107] *Supra*, note 104 at 493, citing *Spence* v *Crawford* [1939] 3 All ER 271, at 288 (emphasis added).

[108] (1998) 157 ALR 414. See D Wright, "The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility" (1999) 14 Journal of Contract Law 221 for a discussion of this case.

endorsed a separation of wrong and remedy.[109] This disassociation of wrong from remedy permits an explicit examination of the spectrum of remedies that are available and requires a discussion of the appropriateness of one remedial response over another. This leads to a discussion of the nature of wrongs and remedies, as well as the relationship between various remedies.

This "appropriate remedy" approach is also evident in the High Court's decision in *Bathurst* where the court held that:[110]

> An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over equally deserving creditors of the defendant.

In *Bridgewater* v *Leahy*[111] the majority[112] observed that[113]

> In the course of argument on this appeal, there was discussion as to the *appropriate* form of equitable relief if the appeal was successful. In accordance with the authority referred to above, counsel for the respondents stressed the requirements of "practical justice". Reference was made to *Vadasz* v *Pioneer Concrete (SA) Pty Ltd*[114] to emphasise the importance of the consideration that in the particular circumstances of a case the equity may be satisfied by orders having the effect of setting aside no more than so much of a disposition as prevents the moving party "obtaining an unwarranted benefit at the expense of the other"[115] …
>
> Once a court has determined upon the existence of the necessary equity to attract relief, the framing, or, as it often expressed, the moulding, of relief may produce a final result not exactly representing what either side would have wished. However, that is a consequence of the balancing of competing interests to which, in the particular circumstances, weight is to be given.

It is interesting to note that the minority[116] disagreed with this flexible approach.[117]

[109] (1998) 157 ALR 414, para [42].
[110] *Ibid*.
[111] (1998) 158 ALR 66.
[112] Which consisted of Gaudron, Gummow and Kirby JJ.
[113] *Supra*, note 111, paras [126]-[127] (emphasis added).
[114] (1995) 184 CLR 102.
[115] *Vadasz* v *Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 114.
[116] Which consisted of Gleeson CJ and Callinan J.
[117] *Supra*, note 111, para [55].

In *Giumelli* v *Giumelli*[118] the process adopted by the High Court was extremely important. The court divided the case into two parts; the examination of the wrong, and the remedy. The High Court held that "the court should first decide whether, having regard to the issues in the litigation, there is an *appropriate* equitable remedy which falls short of the imposition of a trust."[119] In support of this proposition the High Court referred to *Bathurst City Council*[120] and *Lord Napier* v *Hunter*.[121] Therefore, the High Court awarded in *Giumelli* an equitable lien rather than a constructive trust.

Fundamentally, the High Court in *Giumelli* adopted the following approach. First, it examined the obligation that had been breached. Secondly, it examined the available remedies. The High Court then selected the appropriate remedy after examining various factors. It is this aspect which is now of interest.

What is apparent in all of these cases in these various jurisdictions, as well as in important legislation,[122] is a separation of wrong and remedy. However, it must be stressed that the separation neither should nor can be complete.

B(ii). The Separation of Wrong[123] *and Remedy In Theory*

A major theoretical point is the ability to separate the wrong and the remedy. Fundamentally there have been two differing approaches adopted to this issue. The first extreme approach is that advocated by those referred to as monists. This approach perceives a complete congruence of wrong and remedy. It can be said that this has represented the traditional concept of adjudication. Goulding J summarised the position by stating that wrong and remedy are "indissolubly connected and correlated".[124] Asserting this position, Schuck has stated that "any gap between the right and remedy, any lacuna in the remedial regime, disturbs the moral and logical symmetry of the legal order and profoundly disturbs its authority".[125] The second extreme view of the relationship can be referred to as the Dualist school of jurisprudence. This school asserts that there is a valid distinction between wrong and remedy. Schuck has observed[126]

> [t]he truth of the matter is that rights and remedies are utterly different legal phenomena - products of distinct reasoning processes employing

[118] (1999) 161 ALR 473.
[119] *Ibid* at 476, para 10 (emphasis added).
[120] (1998) 157 ALR 414 at 425-426.
[121] [1993] AC 713 at 738, 744-745 and 752.
[122] Such as the Trade Practices Act Cth (1975) and Fair Trading Act NZ (1986).
[123] Frequently the term "right" is used by commentators.
[124] *Chase Manhattan Bank NA Ltd* v *Israel-British Bank (London) Ltd* [1981] Ch 105 at 124.
[125] *Suing Government* (Yale University Press, New Haven, 1983), at 26.
[126] *Ibid* at 26-28.

> different sources, methodologies, and decision criteria. Concepts of justice that deny this disjunction are likely to be deeply flawed … The unity of right and remedy fractures on the hard rocks of implementation … Most … rights are conceived in abstract language of absolute entitlement, a visionary vocabulary purified of limiting, qualifying, or prudential impurities … [P]recisely because these rights are based upon universalizing principles … they enjoy a distinctive moral status. In contrast, remedies are highly particularized, requiring specific defendants to discharge certain wrongs to specific plaintiffs and thus giving rights palpable, substantive meaning. Remedies are rooted in the here-and-now, rights in the world-to-be. Rights condemn the status quo and are invoked to initiate its transformation; remedies mobilize the status quo in order to complete it. Rights preoccupy Don Quixote; remedies are the work of a Sancho Panza.

It would be fair to say that Birks[127] is a monist,[128] while Hammond, a representative of the dualist school.[129] Hammond has supplied three reasons to support the dualist approach.[130] The first is the recognition that historically the legal system evolved around remedies, and so the monist position was appropriate to that time period. But that today new rights are rarely created by the judiciary; instead they are generally created by

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[127] This is certainly true with regard to what he refers to as autonomous unjust enrichment. He has implicitly accepted a non-monist position with regard to restitution for wrongs, see his cynical wrong-doing thesis as the basis for non compensatory damages in a breach of contract case.

[128] Also, J Stapleton in "A New 'Seascape' for Wrongs: Reclassification on the Basis of Measure of Damages" in P Birks (ed) *The Classification of Wrongs* (Oxford: Clarendon Press, 1997) and "The Normal Expectancies Measure in Tort Damages" (1997) 113 LQR 257 adopts a monist position. Her position is attacked by D Friedmann "Rights and Remedies" (1997) 113 LQR 424 and R Smith "Rights, Remedies and Normal Expectancies in Tort and Contract" (1997) 113 LQR 426. Really her position is the reverse of the traditional monist approach, in that she initially identifies the remedy and then the right follows automatically. This is made clearest in her essay "A New 'Seascape' for Wrongs: Reclassification on the Basis of Measure of Damages" in P Birks (ed) *The Classification of Wrongs* (Oxford: Clarendon Press, 1997).

[129] See, G Hammond's articles "Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies" in J Berryman (ed), *Remedies: Issues And Perspectives* (Toronto: Carswell, 1991) and "The Place of Damages in the Scheme of Remedies" in PD Finn (ed), *Essays on Damages* (Sydney: Law Book Co, 1992), which he has applied in decisions such *Butler* v *Countrywide Finance Ltd*[1993] 3 NZLR 623 at 631-632 and *Dickie* v *Torbay Pharmacy (1986) Ltd* [1995] 3 NZLR 429 at 441. See also, Thomas "An Endorsement of a More Flexible Law of Civil Remedies" (1999) 7 Waikato Law Review 23, where his Honour endorsed Hammond's dualist approach.

[130] "Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies" in J Berryman (ed), *Remedies: Issues And Perspectives* (Toronto: Carswell, 1991) at 91. In addition to his own three justification he referred to the justifications provided by Derham in Derham (ed), *Paton Jurisprudence,* 3rd ed (Oxford: Clarendon Press, 1964) at 261-262.

legislation and the dualist approach is frequently adopted by legislation. The judicial methodology is important here. Historically, the rights were created by the fact that in a certain number of cases with extremely similar facts the same remedy was ordered. Therefore, the link between wrong and remedy was imperative in this legal environment. The remedy could not be separated from the wrong. However, Hammond correctly observed "[b]ut that is yesterday's technique of legal development."[131] Today, statute is the main source of new law. In addition, Hammond correctly supported this by his second reason, which is that this is the approach adopted by American constitutional documents and the litigation which surrounds them. A good example of this is *Brown* v *Board of Education*[132] where a breach of a legal wrong was made out and the remedy was left to later litigation. However, this is not only true of constitutional jurisprudence. The approach adopted in *Brown* is very similar to the approach adopted frequently in intellectual property cases, where the wrong and the remedy are separated.[133] In addition, the United States has had a divide between the breach of a legal obligation and the remedy in its restitutionary jurisprudence since 1937 with the *Restatement of the Law of Restitution*.[134] The division is made explicit in this document by the separation of Part 1 ("The Right to Restitution") and Part 2 ("Constructive Trusts and Analogous Equitable Remedies"). Within Part 1, the separation is also made between s 1 ("Unjust Enrichment") and s 4 ("Remedies"). The 1983 tentative draft of the second edition of the *Restatement* reinforced this separation by according remedies its own chapter.[135] Hammond's third argument to support the dualist approach is that it already exists in judge made law. The example that he used was limitation acts, where the remedy is barred but not the action caused by the breach of the legal wrong.[136] There has been a tradition of writings concerning remedies for the breach of discrete wrongs, such as torts and breach of contract.[137] In these areas, the separation of wrong and remedy has been condoned. It would be strange if this approach was not applied universally. One area that it has been argued to be inappropriate is cases of "autonomous" unjust enrichment.

[131] "Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies" in J Berryman (ed), *supra* note 130 at 91.

[132] 349 US 294 (1955).

[133] For example, *Island Records Ltd* v *Tring International Plc* [1995] 3 All ER 444.

[134] (American Law Institute 1937).

[135] Chapter 2.

[136] Cf *Georgiadis* v *Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 and *Commonwealth* v *Mewett* (1997) 191 CLR 471.

[137] For example, A Burrows, *Remedies for Torts and Breach of Contract* (London: Butterworths, 1994) and D Harris *Remedies in Contract and Tort* (London: Weidenfeld and Nicolson, 1988).

B(iii). The Moderate Position

However, the discussion of this issue does not need to be conducted at the extremes. There is the middle path. In an important article Gewirtz has articulated this position.[138] He has stated that[139]

> All dimensions of law are affected by the world of the practical, the real, the subjective, the political - in short, "the world" as we know it. The duality of the real and the ideal exists, but it pervades the judicial function. The two-sidedness is not conveniently deposited in the separate categories of right and remedy. The practicalities cannot be cordoned off into a separate domain to keep rights-declaring purely "ideal". There is a permeable wall between rights and remedies. The prospect of actualizing rights through a remedy - the recognition that rights are for actual people in an actual world - makes it inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.

This position, which will be referred to as the moderate position,[140] was also articulated by Friedmann[141] when he stated

> Rights and remedies are inter-related, though the relationship is subtle and complex. The type and extent of remedies available shed some light on the nature of the legal right, though they cannot explain everything.

This moderate position is correct. This is not to deny the accuracy of Hammond's points supporting the dualist school. These points should be considered in the light of the final comment in the Gewirtz' quotation "judges' minds will shuttle back and forth between right and remedy". Not only is this an accurate statement of the way that the judiciary does approach a legal problem but it is also correct in principle. The courts should consider the legal obligation that has been breached when awarding a remedy. Some legal obligations are more important than others. There is a connection between the wrong and the remedy. It is a "sticky"

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[138] "Remedies and Resistance" (1983) 92 *Yale LJ* 585.

[139] *Ibid* at 678-679.

[140] Not only does Gewitz adopt this moderate position and also Cooper-Stephenson "Principle and Pragmatism in the Law of Remedies" in J Berrymen (ed), *Remedies: Issues And Perspectives,* (Toronto: Carswell, 1991).

[141] "Rights and Remedies" (1997) 113 *LQR* 424 at 425. This note answers some of J Stapleton's points in "The Normal Expectancies Measure in Tort Damages" (1997) 113 LQR 257. Stapleton has made similar points in "A New 'Seascape' for Wrongs: Reclassification on the Basis of Measure of Damages" in Birks (ed) *The Classification of Wrongs* (Oxford: Clarendon Press, 1997). See also, R Smith "Rights, Remedies and Normal Expectancies in Tort and Contract" (1997) 113 LQR 426 for another article that attacks Stapleton's monist approach.

relationship. That is, the wrong does not mechanically determine the remedy, nor are they completely separate. The legal obligation that has been breached does provide relevant information on the remedy that is awarded. Barker has stated that "we judge the nature and power of a primary right by observing the way courts react to its violation in their selection of remedy or - which is the same thing - in their allocation of secondary rights."[142] In addition, Barker has alerted the legal world to the fact that the process works in reverse by observing "[r]ights bear upon remedies and remedies bear upon our understanding of rights."[143] The moderate position is correct. There is a limited separation between wrong and remedy.

Nor can the separation between wrong and remedy be total, as case law has clearly indicated. For example, in *Halifax Building Society* v *Thomas*[144] the English Court of Appeal refused to grant a particular remedy when a particular legal obligation[145] that was breached was not present. *Giumelli* is perfectly consistent with this approach. The wrong and the remedy are still relevant to each other. Neither are they completely separate from each other, nor are the completely linked. There is middle or moderate position between these two extreme views.[146] This moderate position, which recognises the "sticky" relationship between wrong and remedy, is correct.

Once the breach of the legal obligation has been identified and examined, the court must then consider the "appropriate" remedy. It is relatively easy to say that the court should search for the most appropriate remedy.

III. CONCLUSION

Birks' article "The Law of Unjust Enrichment: A Millennial Resolution"[147] does have positive aspects to it. The greatest of these is that it correctly identifies the shortcomings of the law of restitution. However, it still does have problems with it. Many of these problems come from the attempt by Birks to present a hard and fast taxonomy. This extreme form of taxonomy is doomed to failure. However, having a taxonomy for law is an important endeavour. There are adverse consequences for the legal system if a taxonomy is not constructed. But it cannot be the extreme form that

[142] "Rescuing Remedialism in Unjust Enrichment: Why Remedies are Rights" (1998) 57 CLJ 301 at 323.

[143] *Ibid*.

[144] [1996] 2 WLR 63.

[145] Breach of fiduciary obligation.

[146] This moderate position has been well articulated by P Gewirtz in "Remedies and Resistance" (1983) 92 *Yale LJ* 585. Additionally, it has been accepted by Cooper-Stephenson in "Principle and Pragmatism in the Law of Remedies" in J Berrymen (ed), *Remedies: Issues And Perspectives,* (Toronto: Carswell, 1991).

[147] *Supra*, note 1, which is dealt with here with its twin, "Misnomer" in W Cornish *et al* (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998).

Birks has suggested in his article. A taxonomy based upon a loose and dynamic federation of re medies, which is outlined in this article, offers a solution to this problem.