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SHORTER ARTICLE

"AT THE PLAINTIFF'S EXPENSE": QUANTIFYING RESTITUTIONARY RELIEF

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I. INTRODUCTION

CONSIDER the following scenario.

> Pam deals in second-hand cars. Dave parks his vehicle on the street opposite Pam's premises and leaves the keys in the glove box. Mistakenly believing that the car is part of her stock, Pam inspects it and discovers that it requires certain repairs. Although those repairs would cost £1000 on the market, her brother, Tom, a mechanic, provides them to Pam at a price of £250. Indeed, Tom routinely provides the same service to his sister at that reduced rate and is willing to do so as often as she asks. Dave eventually discovers what has occurred and resumes possession of his vehicle. Delighted to have the benefit of the repairs, he sells the car in its improved state and thereby obtains £1000 as a result of the work performed by Tom.

The issue addressed in this article pertains to the proper measure of relief to which Pam is entitled in an action in unjust enrichment. There is no doubting her ability to establish the constituent elements of that action. Dave was *enriched* by the receipt of an incontrovertible benefit because he realised a financial gain from the services rendered. That enrichment was derived at Pam's *expense* (at least in part) because she paid for the repairs. And Dave's enrichment was *unjust* because Pam's intention in rendering the benefit was vitiated by her mistaken belief that the car was hers. However, it is unclear whether she should be awarded £1000 (reflecting Dave's gain) or £250 (reflecting her loss). The specific question that arises is whether the second element of the principle of unjust enrichment ("at the plaintiff's expense") merely determines Pam's standing to sue or whether it also limits

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her measure of relief. It is suggested, contrary to a growing body of opinion,[1] that the latter alternative is preferable.

II. Restitution and Corrective Justice

It is clear that restitutionary relief sometimes is not limited by the extent of the plaintiff's loss. That fact flows from the ambiguity inherent in the second element of the generic principle of unjust enrichment. Typically, as in Pam and Dave's case, the defendant is enriched "at the plaintiff's expense" because he receives a benefit subtracted from her; the accretion to his wealth results from a diminution of hers.[2] In such circumstances, the plaintiff's claim lies in an autonomous action in unjust enrichment and the measure of relief (according to the arguments presented in this article) is limited to the lesser of his gain and her loss. Exceptionally, however, the defendant is enriched "at the plaintiff's expense" because he receives a benefit as a result of committing a wrong against her. In such circumstances, the applicable action lies not in unjust enrichment, but rather in some other area of civil obligations; the law of restitution is relevant only remedially in so far as it reveals that the applicable action supports a gain-based remedy. For present purposes, the significant point is that a claimant may rely upon an enrichment by wrong, and seek disgorgement in a cause of action other than unjust enrichment, even if the benefit that the defendant acquired by reason of his breach was derived from a third party and never could have been acquired by the plaintiff.[3] And because that is true, it logically follows that the plaintiff's measure of relief is limited only by the amount of the defendant's gain; the extent of her own loss, if any, simply is irrelevant.

As a matter of policy, it makes perfectly good sense to preclude the plaintiff in a subtractive enrichment case from recovering more than she lost, even though the same limitation does not apply in a case of wrongful enrichment. In the latter situation, there is a strong social value in stripping the defendant of his ill-gotten gain: no person should be able to profit from his own wrongdoing. And while the plaintiff who suffered no loss may find it difficult to adduce a positive reason why she should be the recipient of the defendant's disgorgement, the law properly allows her to reap that windfall as a means of encouraging her to bring a claim that will vindicate that

[1] See *e.g.* P. Birks, "Definition and Division: A Mediation on *Institutes* 3.13" in P. Birks, ed., *The Classification of Obligations* (Oxford 1997) 1, 26.

[2] For ease of discussion, when speaking in the abstract, this article will use female pronouns for plaintiffs and male pronouns for defendants.

[3] See *e.g. Reading* v. *Attorney-General* [1951] A.C. 507 (H.L.).

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overriding social value. There is no other party with whom an effective action might lie,[4] and as between the wrongdoer and his victim, it certainly is preferable that the innocent party enjoy the benefit.

A different set of considerations applies with respect to claims arising from subtractive enrichments. Thus, in the scenario provided at the beginning of this article, Pam makes no allegation of wrongdoing against Dave; rather, she simply seeks restoration of the enrichment that passed from her to him. It is consequently more difficult to justify judicial redistribution of the £750 windfall that arose from Tom's agreement to provide work to Pam at a reduced price.[5] Indeed, as between two innocents, there is no apparent reason why the party who did not lose the disputed enrichment should receive disgorgement from the party who acquired it fortuitously.

That point is illustrated best through an examination of the principle of corrective justice that underlies an action in unjust enrichment.[6] The Aristotelian conception is premised upon a notion of correlativity. As a result of a single event, the plaintiff suffers a loss and the defendant reaps a gain.[7] Those two effects inextricably are tied: the plaintiff suffers the loss only because the defendant enjoys the gain and vice versa. The same correlation recurs in the legal response to the triggering event: the plaintiff is entitled to recover her loss and the defendant is compelled to give up his gain. Moreover, the nexus forged by the triggering event uniquely identifies each party as the proper object of the other's remedial response. Thus, the mere fact that the plaintiff suffered an unjustifiable loss may indicate that she should enjoy recompense, but in isolation it

[4] It might be thought desirable to allow the state to claim the benefit of the wrongdoer's disgorgement. In practical terms, however, the state often would have neither the wherewithal to discover the wrong nor the motivation to prosecute an action. (In contrast, precisely the same considerations identify the victim of the wrong as a suitable recipient of disgorgement.) Moreover, the third party from whom the defendant directly received his enrichment generally will be an inappropriate object of his disgorgement because either: (i) she suffered no wrong and can not establish an unjust factor (if, for example, she innocently provided the enrichment to the defendant in exchange for a taxi ride in a car that he had stolen from the plaintiff), or (ii) she is equally guilty of wrongdoing: *Reading* v. *Attorney-General*, note 3 above.

[5] While Tom may seem an appealing candidate for restitutionary relief from Dave, he should not be entitled to succeed in a claim in unjust enrichment. By agreeing to provide the repair services to Pam at a reduced price, Tom assumed a contractual risk of error. It would be undesirable to allow him subsequently to reallocate that risk through an action against Dave: Goff & Jones: *The Law of Restitution*, 4th ed. (London 1993) pp. 56, 176–177.

[6] *Peel* v. *Canada* (1992) 98 D.L.R. (4th) 140, 165 (S.C.C.).

[7] Although the Aristotelian conception of corrective justice is said to turn on a "wrongful" event, it does not require proof of a cause of action in some area of civil obligations other than unjust enrichment. As Aristotle sought merely to explain a form of justice, he left the triggering event of "wrong" undefined: H. Kelsen, *What is Justice: Justice, Law and Politics in the Mirror of Science* (Berkeley 1957) pp. 125–136. Consequently, the requisite "wrong" can be equated with the unjust factors that support restitutionary relief, many of which involve no culpability on the defendant's part: K. Barker, "Unjust Enrichment: Containing the Beast" (1995) 15 O.J.L.S. 457, 469–470.

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cannot reveal the defendant to be the appropriate source of such relief. The remedy equally might come from the state or from some third party who is considered to possess more than he deserves. However, by proving that the defendant acquired a benefit correlative to her loss, the plaintiff justifiably is able to point the remedial arrow at him. Similarly, the mere fact that the defendant holds more than he ought to possess may indicate that he should give up the unjustified wealth, but in isolation it cannot reveal the plaintiff to be the appropriate beneficiary of his divestment. He might equally pay the value of the enrichment over to the state or to some needy third party. It is only by proving that the defendant's enrichment was subtracted from her that the plaintiff can establish herself as the appropriate recipient.

In most instances, that analysis provides a simple and complete explanation for an award of restitutionary relief.[8] However, a difficulty arises when, as in Pam and Dave's case, the value of the plaintiff's loss and the defendant's gain do not coincide. Given the corrective justice goal of restoring the status quo of both parties, how should the law respond when the disequilibrium created by the triggering event affects the two parties differently? While Dave's acquisition of a mistakenly conferred benefit reveals that he perhaps should be required to give it up, can Pam establish a connection that would justify her receipt of the full measure of his enrichment? Or does her participation in the triggering event justify her recovery of only so much as she actually lost?

Those questions have received insufficient attention within the law of restitution. However, an emerging view appears to proceed largely on normative grounds and to give remedial priority to the defendant's gain over the plaintiff's loss.[9] On that approach, the claimant simply is required, at a threshold level, to prove a nexus (in the form of an unjust factor) between the fact that she suffered a subtractive deprivation and the fact that the defendant received an enrichment. More specifically, she need not prove that she suffered a loss equivalent to his gain; while there must be a causally related plus and minus, the sum of the two need not be zero. If able to establish that, at least initially, the defendant had more than he ought to have had and that she had less than she ought to have had, the plaintiff is entitled (subject to defences) to *all* of his enrichment on the ground that she suffered *some* expense. [10]

[8] Suppose that the plaintiff mistakenly pays £500 to the defendant. The single event of subtractive enrichment reveals why the plaintiff is entitled to recover £500, why the defendant is liable to pay £500, and how those remedial responses are interdependent.

[9] Below at Section III.

[10] *Cf.* E. Weinrib, *The Idea of Private Law* (London 1995) pp. 140–142; E. Weinrib, "The Gains and Losses of Corrective Justice" (1994) *Duke Law Journal* 277 (arguing that the notions of

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That approach is open to several objections. Most significantly, contrary to general principles,[11] it allows the autonomous action in unjust enrichment to generate relief that is not truly restitutionary. The legal response of restitution consists of requiring the defendant to "give back" to the plaintiff that which he unjustly gained at her expense. Of course, the logical corollary of the defendant's "giving back" is the plaintiff's "getting back". And the notion of "getting back" presupposes that the claimant previously held that to which she judicially is entitled. If she did not, then her entitlement is not restitutionary.[12] The point is illustrated by the hypothetical. The value of Dave's enrichment, as realised through the sale of the vehicle in its enhanced condition, was £1000. However, because she acquired the services from Tom at a reduced cost, and because she never was in a position to sell Dave's car and thereby to realise the market value of the repairs for herself, Pam's corresponding expense was only £250. Consequently, to award her the full measure of Dave's enrichment (£1000) would allow her to "get back" that which he gained and that which she previously held (£250), but it also would allow her simply to "get" that which she never previously held (£750). [13] The latter result would not be restitutionary.

To award relief in excess of the plaintiff's loss in a case of subtractive enrichment also is objectionable in so far as it leads to public cost without concomitant public benefit. Given that neither Dave nor Pam positively deserves the £750 surplus resulting from the reduced rate that Tom gave to his sister, why should the community be forced to pay to transfer that wealth from the defendant to the plaintiff? Why should Pam be encouraged to activate the legal process, and to generate societal expense, in order to achieve the socially neutral effect of redistributing the windfall from Dave to herself?[14] Granted, in a case of enrichment of wrong, the promise of

"gain" and "loss" contained in the principle of unjust enrichment should be understood in normative, rather than material, terms).

[11] P. Birks, *An Introduction to the Law of Restitution*, revd. ed. (Oxford 1989) pp. 16–18.

[12] The analysis is only slightly different in a case of interceptive subtraction: *ibid.*, at pp. 133–139. By contrast, in a case of enrichment by wrong, in which the defendant acquires a benefit from a third party as a result of breaching a duty owed to the plaintiff, the claimant is awarded that which she never previously held. Because the defendant therefore is required to "give up" rather than "give back" his enrichment, the legal response more accurately is classified as "disgorgement" than as "restitution": *ibid.*, p. 12.

[13] That point illustrates the significance of the fact that Pam paid Tom to repair Dave's vehicle. Suppose, instead, that Pam operated a repair shop as part of her business and that she had rendered the services herself. In that case, she might be entitled to the full measure of Dave's enrichment on the ground that she is entitled to "get back" that which she actually gave up. While the positive economic expense involved in rendering the services (*e.g.* materials consumed) may have been only (say) £250, Pam nevertheless might be entitled to £1000 on the ground that her professional efforts and expertise carry a value of £750: *Matheson* v. *Smiley* [1932] 2 D.L.R. 787 (Manitoba C.A.).

[14] Pam admittedly enjoys an action in unjust enrichment even if her relief is limited by the extent of her loss. However, she is more likely to institute legal proceedings, and Dave less likely to settle her claim, if she stands to receive £1000, rather than £250.

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such redistribution is held out as a means of encouraging the claimant to effectuate the social goals of deterrence and condemnation. In a case of subtractive enrichment, however, those concepts are attenuated, if not entirely absent.

III. Precedents and Defences

While judicial opinion appears to be turning against the suggestion that relief in cases of subtractive enrichment should be limited by the extent of the plaintiff's loss, the debate effectively remains open. Certainly, the position favoured in this paper finds some support in the case law. Lord Denning M.R.'s judgment in *Greenwood* v. *Bennett*[15] is a leading, if equivocal, precedent. The claimant expended £226 repairing a stolen vehicle that he innocently had purchased for £75. The owner subsequently resumed possession of the car and sold it for £400. Although he thereby reaped a financial gain of £325 on the basis of the claimant's services, the owner was liable only for the amount of the improver's actual loss (£226). The same result undoubtedly would obtain in Canada,[16] where the second element of the action in unjust enrichment is formulated to require proof of a "corresponding deprivation to the plaintiff".[17] In *Air Canada* v. *British Columbia*, LaForest J. stated that:

> [t]he law of restitution is not intended to confer windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued to his benefit, it is restored to him.[18]

On that basis, he supported the "passing on" defence: if a plaintiff is entitled to recover no more than it actually lost, it cannot claim relief with respect to expenses that it shifted onto a third party.

The opposite view, however, prevails in Australia. In *Commissioner of State Revenue* v. *Royal Insurance Australia Ltd.*,[19] an insurance company paid money to a government in the mistaken belief that it was obliged to do so. The government attempted to resist a subsequent action for restitution by pleading that the insurer had shifted the expense of the apparent tax onto its customers by raising

[15] [1973] Q.B. 195 (C.A.). The judgment is complicated by several factors, most notably the claimant's decision to seek recovery of only £226 and the fact that the car may have been sold for £400 partly because of the plaintiff's repairs and partly because of the defendant's skills as a salesman.
[16] *Cf. Gidney* v. *Shank* [1996] 2 W.W.R. 383 (Manitoba C.A.).
[17] *Pettkus* v. *Becker* (1980) 117 D.L.R. (3d) 257, 274 (S.C.C.).
[18] (1989) 59 D.L.R. (4th) 161, 194 (S.C.C.).
[19] (1994) 182 C.L.R. 51 (H.C.A.).

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the premiums that it charged. Mason C.J. rejected that argument on the ground that:

> the basis of restitutionary relief is not compensation for loss or damage sustained but restoration to the plaintiff of what has been taken or received from the plaintiff without justification. . . . The subtraction from the plaintiff's wealth enables one to say that the defendant's unjust enrichment has been "at the expense of the plaintiff" notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties. On this approach, it would not matter that the plaintiff is or will be over-compensated because she has passed on the tax or charge to someone else.[20]

Recent English decisions have adopted the same line. In *Kleinwort Benson* v. *South Tyneside B.C.*,[21] a bank and a local authority entered into a series of "swaps" transactions. When those agreements subsequently were declared to be ultra vires the authority, the bank sought restitutionary relief with respect to the difference between what it had paid and what it had received under the "swaps". The claim was allowed despite the fact that, as part of its overall "swaps" strategy, the bank had entered into "hedging arrangements" with other institutions as a means of protecting itself against the possibility of incurring a net liability to the local authority. Hobhouse J. held that:

> [t]he essential feature of what the defendants are asking the court to do . . . is to make an assessment of the loss suffered by the relevant plaintiff as if one were investigating a right to compensation. . . . What contracts or other transactions or engagements the plaintiffs may have entered into with third parties have nothing to do with the principle of restitution. Therefore it suffices in the present case for the plaintiffs to show that they were the payers of the relevant money, and that the defendants were unjustly enriched by the payments. . . .[22]

On similar facts, those comments were affirmed by the Court of Appeal in *Kleinwort Benson* v. *Birmingham Council*.[23] Saville L.J. explained that:

> [t]he expression "at the payer's expense" is a convenient way of describing the need for the payer to show that his money was used to pay the payee. . . . What this expression does not justify is the importation of concepts of loss or damage with their attendant concepts of mitigation, for these concepts have nothing

[20] *Ibid.*, at p. 75. See also *Mason* v. *N.S.W.* (1959) 102 C.L.R. 108, 146 *per* Windeyer J. ("The concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to ours.")
[21] [1994] 4 All E.R. 972 (Q.B.).
[22] *Ibid.*, at p. 985.
[23] [1996] 4 All E.R. 733 (C.A.).

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> whatever to do with the reason why our law imposes an obligation on the payee to repay to the payer what he has no right to retain.[24]

While the comments made in the "swaps" cases and in *Royal Insurance* may appear to decide, at least for Anglo-Australian purposes, that the measure of relief available under an action in unjust enrichment should not be limited by the extent of the plaintiff's loss, they actually are weak authority for that proposition. The problem is that those decisions provide a poor forum within which to address the issue. Because the enrichment in each instance took the form of a payment of money, the immediate gain to the payee necessarily was matched by an immediate loss of equal value to the payer. Money cannot be subjectively devalued; for legal purposes, it is worth the same to everybody.[25] Consequently, the debate as to the quantum of relief did not turn squarely upon the limiting effect, if any, of the second element of the action of unjust enrichment. Rather, it turned upon the desirability of recognising a "passing on" defence. Granted, if accepted, that defence proceeds upon the basis that a claimant is not entitled to recover more than she actually lost. However, the converse is not necessarily true; rejection of the defence need not entail rejection of the proposition that relief should be limited by the extent of the plaintiff's loss. Indeed, while maintaining the theoretical necessity of that limitation, this paper concedes that the "passing on" defence should be rejected in practice. The reason is twofold. First, given the immeasurability of elasticity of demand, the effect of an enterprise's attempt to pass on an expense to its customers cannot be determined with sufficient accuracy. Even if initially successful in shifting a cost, an enterprise ultimately will bear a burden when, to some unknowable extent, its increased prices result in decreased trade.[26] Consequently, if permitted, a plea of "passing on" would contribute little but confusion, expense and delay to legal proceedings.[27] Second, many purported acts of "passing on" simply are too remote to be taken into consideration. Thus, in the context of "swaps" litigation, a bank surely should be entitled to enter into "hedging arrangements" as part of its ordinary

[24] *Ibid.*, at p. 744 *per* Saville L.J. See also p. 749 *per* Morritt L.J. ("the words 'at the expense of the plaintiff" . . . do no more than point to the requirement that the immediate source of the unjust enrichment must be the plaintiff"), and p. 742 *per* Evans L.J.

[25] See *e.g. B.P. Exploration Co. (Libya) Ltd.* v. *Hunt (No. 2)* [1979] 1 W.L.R. 783, 799 *per* Robert Goff J.

[26] Curiously, LaForest J. applied the defence despite recognition of that fact: *Air Canada* v. *British Columbia* (1989) 59 D.L.R. (4th) 161, 193.

[27] M. McInnes, "Passing On in the Law of Restitution: A Reconsideration" (1997) 19 *Sydney Law Review* 179.

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course of business, without having to account to a local authority for having done so.[28]

The dispute between Dave and Pam is more instructive than the Anglo-Australian cases because it involves a situation in which, aside from complications created by a purported act of "passing on", the value of the defendant's enrichment exceeds the value of the plaintiff's expense. That disparity is possible because services have no inherent worth and are valued differently by different parties; although the automotive repairs represented a benefit of £1000 to Dave, they were achieved by Pam at a cost of only £250. And in such circumstances, as Dave and Pam's case reveals, liability should be limited to the lesser of the defendant's gain and the plaintiff's loss. Arguably, however, the same principle should govern the quantification of relief in all cases. Generally speaking, it is undesirable to apply different rules depending upon whether an enrichment takes the form of services or money.[29] And if that is correct, then the situation represented by the "swaps" cases and by *Royal Insurance* perhaps should be re-analysed simply as an instance in which, having rejected the implications of the "passing on" defence, a court allows recovery of the full measure of the defendant's enrichment on the ground that, money being of equal value to payer and payee, the plaintiff suffered a loss of equal value.

[28] *Kleinwort Benson* v. *South Tyneside B.C.* [1994] 4 All E.R. 972, 985 *per* Hobhouse J. *Kleinwort Benson* v. *Birmingham Council* [1996] 4 All E.R. 733, 743 *per* Evans L.J., 748 *per* Morritt L.J.

[29] See *e.g.* P. Birks, *Restitution—The Future* (Sydney 1992), ch. 4. *Cf. Kleinwort Benson* v. *South Tyneside B.C.* [1994] 4 All E.R. 972, 985 *per* Hobhouse J.

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