# BOOK REVIEW

## *Restitutionary Rights to Share in Damages* by Dr Simone Degeling (Cambridge University Press, 2003)

The rational development of legal principle and satisfactory resolution of legal disputes are not easily achieved when courts are faced with three party configurations. The right of third party carers to participate in the fruits of another's litigation is no exception.

The task of elucidating both the positive and normative aspects of this issue is complicated by numerous factors. First, there is disagreement across common law countries regarding the restitutionary rights of carers. Second, the legal principle and policy negating or supporting the carers' recovery remain ambiguous. And third, the apparent basis of carers' recovery – unjust enrichment – has only recently been established as a stable cause of action. Practitioners and judges are just beginning to understand and apply it. Dr Simone Degeling's book *Restitutionary Rights to Share in Damages* is therefore timely and important.

### The central case

Before turning to the details of *Restitutionary Rights to Share in Damages*, an overview of the central issue considered in the book is necessary. The tortfeasor (TF), tort victim (TV) and carer (C) represent the three parties involved in the dispute. Each case, however, has two halves. First, TV's claim against TF. Second, C's claim against TV for the cost of care provided. The following example illustrates these claims.

Assume TF negligently runs down TV, a pedestrian. TV is treated in hospital before being discharged into the care of a close friend, C. Under doctor's orders, TV remains bed-ridden for three months. C resigns from his job and spends the next 12 weeks looking after TV. Immediately following the accident TV commences proceedings against TF. The damages sought include the cost of care provided by C.

Assuming the negligence of TF is proven, an important juncture is reached. At this point it is open to a judge to do one of three things. The first option is to deny that part of TV's claim relating to the cost of C's care. Such a decision could be justified on the basis that TV has, herself, suffered no loss in respect of C's care and therefore need not be compensated for it. Second, the judge may award TV compensatory damages including the full cost of C's care. Finally, TV may be awarded a sum of damages which includes the cost of C's care. However, that portion of damages relating to C's care is to be held on trust or simply paid over to C.

## The legal position

The Australian, English and Canadian superior courts agree on one thing. That is, a tortfeasor should be prevented from receiving a windfall by not having to pay damages in respect of a third party's voluntary care of a tort victim. Thus, the first option has been roundly eschewed.

At this point, however, the Australian High Court parts way from the House of Lords and Canadian Supreme Court. In *Kars v Kars*,[1] the High Court adopted the position that the value of any care provided should be returned to the tort victim without condition. The tort victim may then return all or some of that money to the carer as a gesture of goodwill. The obligation is purely a moral one. Alternatively, the carer could bring an action for its return.

There appear to be two explanations for the High Court's decision to return all the money to the tort victim without condition. The first is that the carer was a gift-giver. Thus, it was the carer's intention that the tort victim be permitted to accumulate in respect of the same loss. The second explanation rests on the particular circumstances of the case. It so happened in *Kars v Kars* that the tortfeasor and carer were the same person: Mr Kars.[2] To prevent the circularity of Mr Kars having to pay damages to Mrs Kars, and then have Mrs Kars hold that money on trust for Mr Kars, the High Court decided that the money should simply reside in Mrs Kars.

Similar circumstances were presented to the House of Lords in *Hunt v Severs*.[3] However, it held that the tort victim should hold the value of the carer's contribution on trust for the carer. However, because in that case the tortfeasor and the carer were the same person, recovery was denied to prevent a circuitry of action. The Supreme Court of Canada in *Thornton v Board of School Trustees of School District No 57 (Prince George)*[4] agreed. In that case the tort victim recovered the value of the carer's assistance but was required to hold the sum on trust for the carer.

## Reasons for recovery

Dr Degeling identifies the rights of a carer to share in the fruits of litigation as predicated on three possible events. First, the existence of an agreement between the carer and tort victim that the carer be compensated for services provided. Second, the carer being able to establish a cause of action in wrongs against the tortfeasor. Or third, the unjust enrichment of the tort victim at the expense of the carer.

The first two possibilities are rejected. In respect of agreements between the victim and carer, a careful review of the cases shows that 'the mere existence of the victim's promise to pay is neutral to the question of whether the court allows

1 (1996) 187 CLR 354.
2 This arose because Mr Kars was negligent in causing injuries to his wife in a motor vehicle accident. It was Mr Kars' insurer, however, which paid out the claim.
3 [1994] 2 AC 350.
4 (1978) 83 DLR (3d) 480.

the carer to participate in the fund.[5] The reason for this conclusion being that at the date of judgment (when the tortfeasor is required to pay damages to the tort victim), the tort victim will not be in breach of any obligation to pay the carer.

The second possibility concerns the effect of the tortfeasor's breach of duty in relation to the carer. While the tortfeasor's primary liability rests with the direct victim of the tort, extrapolation of the *Hedley Byrne v Heller*[6] principle shows that, in theory, a party who suffers a pure economic loss and to whom a proximate duty was owed can also recover. While this avenue is not concerned with sharing the fruits of another's claim, it provides another potential source of recovery for carers.

Again, however, Dr Degeling's assessment of this mode of redress is pessimistic. She states that while

> there are examples of cases in which the carer has sued directly, these do not accord with the mainstream authority on this point. The assertion in *Hunt v Severs* that the carer has no claim of her own appears to be correct. While there is scope for the development of a duty of care owed to the carer, such change does not seem likely...[7]

The final explanation of carers' recovery therefore rests on the tort victim's unjust enrichment. In order to establish a cause of action in unjust enrichment the plaintiff must show that the defendant has been enriched at its expense, that there is a recognised reason for recovery (the unjust factor), and if necessary, prove there are no applicable defences.

It is concluded that while unjust enrichment best explains what is (and should be) occurring in carer cases, the established list of unjust factors is inadequate. The most likely explanation, that the carer's intent was impaired by the necessitous circumstances in which assistance was called for, does not cover all the cases. In particular, it fails to explain why restitutionary recovery is possible when the emergency demanding the carer's attention has subsided. In the long-term, one cannot maintain that a carer's intention is impaired by necessity.

Dr Degeling therefore reaches the conclusion that a novel explanation for restitutionary recovery underlies the cases. This explanation, rather than focusing on the impaired or vitiated intent of the carer, is policy-motivated. Its operation concerns the prevention of tort victims accumulating in respect of a single claim for damages. In other words, the intention and effect of the 'policy against accumulation' is to avoid double recovery.

The policy against accumulation is used to not only explain why a carer may recover in respect of compensatory damages awarded to a tort victim. It is also used to substantiate the claim that carers should be permitted to compel tort victims to recover from tortfeasors the value of care provided. The need for this development is obvious. If the policy against accumulation will automatically

5 Simone Degeling, *Restitutionary Rights to Share in Damages* (2003) 40.
6 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
7 Degeling, above n 5, 146.

'divest' tort victims of any damages paid in respect of care provided, tort victims have no incentive to seek their recovery in the first place. To ensure a windfall does not remain with the tortfeasor and to guarantee that the tortfeasor's debt to the tort victim is discharged, the carer must be able to compel the tort victim to bring an action for compensation.

While unable to draw direct support from the existing cases for these conclusions, Dr Degeling relies on an analogy with insurance subrogation to assist her argument. She maintains that the true reason why indemnity insurers may compel insured tort victims to proceed against tortfeasors is to ensure that tort victims are not actually, or never have the potential to be, more than fully compensated for losses sustained.

The argument presented is both attractive and compelling. Thorough and detailed research of existing cases is combined with an incisive account of what is actually occurring in examples of carer recovery. The end result is the development of a policy against accumulation. It is an extrapolation of rational legal principle which not only fits the important English and Canadian cases but demands the close attention of future Australian courts faced with situations of this kind.

## A cautionary observation

That being said, there is one point made by Dr Degeling which must be approached with caution. It concerns the extrapolation of the policy against accumulation. It is suggested that in all cases where a plaintiff is awarded restitution despite having passed on the cost of a defendant's unjust enrichment to a third party, that third party should be able to recover from the plaintiff based on the policy against accumulation.

This point is more easily understood by way of an example. Suppose P mistakenly pays D $10 000. Before P realises his mistake (that the basis of his payment did not exist), he makes good his $10 000 loss. He does this by increasing his hourly charge out rate to a certain client (X) by $100. P works 100 hours for X over the next month and makes good the $10 000 loss.

The questions which arise in such circumstances are: (1) whether P can recover the $10 000 mistakenly paid to D if his loss has already been made good by X, and (2) if so, whether X can recover the $10 000 of extra charges from P. In England and Australia the first question is answered in the affirmative.[8] The fact that P passed on his loss to X is of no business to D. The answer to the second question cannot be simply stated. X has to be able to establish a reason for recovery.

Dr Degeling maintains that the main reason why X should be able to recover in these circumstances is to prevent P's accumulation. That is, P should not be allowed to recover twice in respect of the same loss. While this view appears to

[8] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; *Kleinwort Benson v Birmingham City Council* [1997] QB 380.

follow logically from her conclusion in respect to carers' claims, there are unforeseen difficulties with this approach.

Unlike most cases in which a carer *voluntarily* provides benefits to a tort victim, X in the above example provided P with a benefit pursuant to a *contractual* arrangement. Thus, for X to recover from P in unjust enrichment, their contract (or the relevant portion of it) must first be set aside. It is a long-established principle that unjust enrichment claims cannot upset the parties' allocation of risks while their relations remain regulated by a valid agreement.[9]

Interestingly, Dr Degeling is fully aware of this issue having stated that:

> It is generally true that, if the contract between the carer and victim remains effective, there is no room for an unjust enrichment claim unless it arises independently from the contract. Prima facie, the parties have allocated risks according to their agreement, and these will not be disturbed.[10]

Unless Dr Degeling, in her discussion of passing on in unjust enrichment cases, assumes that the contractual relations between X and P no longer exist, she appears to fall into the very trap which her readers are advised to avoid. Of course, if the contract, or relevant part of it, no longer exists it remains open to a court to grant an award of restitution to X. However, in these circumstances it is arguably the failure of consideration, not the policy against accumulation, which better explains the reason for recovery.[11]

## Conclusion

Aside from this late and short excursion, the author succeeds in presenting a powerful case for recognition of the policy against accumulation. This is assisted by a style of writing which is clear and concise and presentation of argument which is logical and rational. In drawing together the laws of Australia, England and Canada, explaining and reviewing them in light of a novel reason for recovery, Dr Degeling has made an important contribution to this difficult, little understood but very interesting area of the law.

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9 *Weston v Downes* (1778) 1 Doug 23; *Toussaint v Martinnant* (1787) 2 TR 100; *Thomas v Brown* (1876) 1 QBD 714; cf *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) CLR 516.
10 Degeling, above n 5, 74.
11 Dr Degeling does allow for this alternate analysis.