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# *Unjust Enrichment: A Feminist Critique of Enrichment*

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## *Abstract*

This article commences a feminist critique of the unjust enrichment liability model that is informed by a modern taxonomic approach to private law. Together with other legal categories — such as contract, tort, and equity — unjust enrichment is an independent source of rights and obligations. However, unlike areas of private law that have been the subject of sustained feminist analysis and critique, there has been little attention paid to understanding the pattern and impact of gender in unjust enrichment reasoning. This article offers some first steps towards filling that gap. We explore the concept of enrichment, evaluating from a feminist perspective how the tests of enrichment are constructed and applied, paying particular attention to the ways in which unjust enrichment responds to the provision of domestic services and care. Our tentative conclusion is that the gendered norms that operate in other areas of private law, such as torts, do not manifest in unjust enrichment in the same way(s). Further, just as there are critical benefits that flow from attention to how gendered reasoning manifests in unjust enrichment cases, so a taxonomic approach has the capacity to enhance the feminist engagement with private law.

## **I Introduction**

This article commences a feminist critique of the unjust enrichment liability model. Together with other legal categories such as contract, tort and equity, unjust enrichment is an independent source of rights and obligations.<sup>1</sup> However, unlike areas of private law that have been the subject of sustained feminist analysis and critique, there has been little attention paid by feminist scholars to understanding the pattern and impact of gender in unjust enrichment reasoning. This article offers some first steps towards filling that gap. We explore the concept of enrichment, evaluating from a feminist perspective how the tests of enrichment are constructed and applied.<sup>2</sup> Our analysis interrogates the extent to which gendered assumptions, patterns or structures are instantiated within enrichment.

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<sup>1</sup> *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340; *Pavey & Matthews v Paul* (1986) 162 CLR 217; *Deglman v Guaranty Trust Co of Canada* [1954] 3 DLR 785 (‘*Deglman*’).

<sup>2</sup> There are many different perspectives that could be brought to our analysis that are characterised as feminist, and we acknowledge that a feminist analysis can proceed at a number of different levels (see further discussion below around n 27 and following). Our intention is not to align our discussion within any specific feminist model, but rather to situate this article within the feminist

In examining the tests of enrichment, we pay particular attention to the ways in which unjust enrichment responds to the provision of domestic services and care. A paradigm concern within feminist scholarship is private law's treatment of women's work, including domestic services, and the recognition of non-financial contributions in the ownership of property within a domestic relationship. There are thus useful comparisons to be made between the treatment of such services in unjust enrichment and, for example, tort and other sources of rights and obligations in private law, which have already been the subject of feminist analysis. Research reveals cases in which these services have been the subject of claims in unjust enrichment. Our initial conclusion is that while the tests of enrichment are vulnerable to gendered assumptions and structures, they also appear to provide protections against these assumptions and their consequences. The same can be said of the methods of valuation of that enrichment, which show a strong commitment to market valuation. The obvious limit to this observation is that the market price must be attentive to embedded hierarchies, including the gendered division of labour. Nonetheless, unjust enrichment's commitment to this market measure has the potential to limit a defendant's ability to devalue women's work.

The work of this article is important for a number of interrelated reasons. First, it brings a feminist lens to a branch of private law that has yet to receive sustained feminist attention. Although it has an ancient genealogy, the existence of a modern independent law of unjust enrichment is relatively recent; with such youthful vigour comes an opportunity to avoid encrusting or to remove from the structures of liability the gendered norms and assumptions identified in other departments of the law. The opportunity also cuts the other way. Any critical approaches to the law, including feminist critiques, should be capable of accounting for all available evidence. To the extent that unjust enrichment has not been included in feminist accounts, we do not know the extent to which current feminist approaches satisfactorily explain the pattern of gender in that category. This article is a first step in that discussion.

The second, and perhaps deeper, significance of this article concerns the role of legal ordering in analysis. We introduce the possibility that in dealing with domestic services, the gendered norms that identify, construct and value such services in other areas of private law, such as torts, are not present in unjust enrichment in the same way. This is potentially a significant finding, because it suggests that private law's treatment of 'women's work' is not undifferentiated. The unjust enrichment liability model, or at least its tests of enrichment, does not in result display the same pattern in its treatment of domestic services as tort. While gender is clearly at work in unjust enrichment, the impact is perhaps particular. This observation is only available because we are able to identify the existence of a coherent category called 'unjust enrichment'.

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project more broadly. Our approach is consistent with the non-aligned approach taken by projects such as the Feminist Judgments Projects. See, eg, the discussion in Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, 2010) 3; Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, 2010) 30.

The model of private law that is implicitly accepted within most feminist critique is one that responds to the traditional categories of private law around which university curricula are often structured, including contract, land law, tort and equity.<sup>3</sup> We recognise that much feminist scholarship has been concerned to *challenge* the boundaries, relevance and deployment of these traditional categories, and many feminist accounts suggest different ways of viewing the legal landscape.<sup>4</sup> However, modern private law scholarship offers a more sophisticated model than the prevailing private law paradigm. It adopts a taxonomic approach which sees private law as an integrated landscape comprising generic events and responses to those events, allowing a deeper analysis which engages with the normative concerns of legal doctrine and has an overt commitment to transparency and rationality. This taxonomic approach is concerned with deep structures and looks *through* merely contextual or jurisdictional categories, and in this respect is consistent with a feminist reordering.<sup>5</sup> Unjust enrichment is one such deeper category. The broader significance of this article is therefore that it begins the work of exploring how the modern taxonomic approach to private law might inform the development of feminist legal scholarship in the area of private law more broadly. Such interaction offers the possibility of a more nuanced understanding of the gendered norms and structures at work, and the potential of models for judicial action which do not replicate them. But to take that step we must first say something about legal ordering.

## II Legal Ordering

This analysis starts from the position that legal ordering matters. While obviously not a sufficient condition, satisfactory implementation of the rule of law requires that like cases be treated alike. It is necessary to have a coherent legal architecture capable of determining what is and what is not alike. Legal categories and structures which unjustifiably differentiate between claims and claimants on the basis of gender or gendered norms and expectations are not only detrimental in terms of equality, but are also an impediment to the proper functioning of the legal order.<sup>6</sup> Thus, while their normative concerns or starting points might be different,

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<sup>3</sup> The recent collections published as part of the 'Feminist Perspectives' series are indicative of the continuing constraints of this historically dominant paradigm: see, eg, Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Glasshouse, 2005); Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge, 2012).

<sup>4</sup> For example, the approach represented in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002).

<sup>5</sup> See text accompanying n 25. See also Martha Chamallas, 'The Architecture of Bias: Deep Structures in Tort Law' (1998) *University of Pennsylvania Law Review* 463.

<sup>6</sup> See Regina Graycar, 'Legal Categories and Women's Work: Explorations for a Cross Doctrinal Feminist Jurisprudence' (1994) 7 *Canadian Journal of Women and the Law* 34. See also the account of the widespread discriminatory effects of race and gender within US tort law in Martha Chamallas and Jennifer B Wriggins, *The Measure of Injury: Race, Gender and Tort Law* (New York University Press, 2010). There may of course be rational bases for distinguishing between claimants on the ground of gender, but in this respect our analysis assumes that a properly functioning legal system ought to implement substantive as opposed to merely formal equality. Further, accepting the material significance of legal ordering recognises that legal categories operate constitutively as well as reactively. See, eg, Anita Bernstein, 'Restatement (Third) of Torts:

both feminist legal scholarship and a modern taxonomic approach to private law engage with this fundamental question: what is ‘like’?

Peter Birks, as is well known, articulated an influential taxonomy of private law.<sup>7</sup> As is reflected in the publication of two companion volumes, *English Private Law*<sup>8</sup> and *English Public Law*,<sup>9</sup> his starting point was to separate law into public law and private law.<sup>10</sup> In this model, private law concerns ‘the rights which, one against another, people are able to realise in courts’.<sup>11</sup> The category, ‘private law’, is then subdivided into three inquiries which concern ‘the persons who hold rights, the rights themselves, and the means of realising them’.<sup>12</sup> Of interest to this article is the Birksian treatment of the second inquiry, the rights themselves, and more particularly the question of how these rights come into existence.<sup>13</sup>

In providing a framework to understand this question, Birks identifies a relationship between generic causative events and generic legal responses to those events. Causative events are facts or circumstances that the law systematically recognises. The generic causative events are: consent, unjust enrichment, wrongs and ‘other’. ‘Consent’ is about the exercise of free will, which typically results in a contract or a disposition of property, whether for example by a declaration of trust, a conveyance or a will.<sup>14</sup> ‘Unjust enrichments’ exist when the defendant has been unjustly enriched at the expense of the plaintiff and there is no defence to the claim.<sup>15</sup> Importantly, as is amplified below, unjust enrichment is not a function of the defendant’s wrongdoing, nor is it about responding to or carrying into effect

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General Principles and the Prescription of Masculine Order’ (2001) 54 *Vanderbilt Law Review* 1367; Hunter, McGlynn and Rackley, ‘Feminist Judgments: An Introduction’ above n 2, 7.

<sup>7</sup> Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *University of Western Australia Law Review* 1; Peter Birks ‘Definitions and Divisions: A Meditation on Institutes 3:13’ in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 1; Peter Birks, ‘The Law of Restitution at the End of an Epoch’ (1999) 28 *University of Western Australia Law Review* 13; Peter Birks, ‘Introduction’ in Peter Birks (ed), *English Private Law* (Oxford University Press, 2000); Peter Birks, ‘Rights, Wrongs and Remedies’ (2000) 20 *Oxford Journal of Legal Studies* 1; Peter Birks, *Unjust Enrichment* (Oxford University Press, 2<sup>nd</sup> ed, 2005) ch 2.

<sup>8</sup> Birks, *English Private Law*, above n 7.

<sup>9</sup> David Feldman (ed), *English Public Law* (Oxford University Press, 2004).

<sup>10</sup> There are obviously difficulties with this separation. Broadly defined, ‘private law’ encompasses those parts of domestic law which concern relations between private actors or the state and private actors. Definitions of public and private law are various and the basis of the distinction often elusive. The definition adopted here focuses on the distinction between violations of ‘public’ and ‘private’ rights, not on whether the state is a party to the proceedings in which the violation is challenged.

<sup>11</sup> Birks, *English Private Law*, above n 7, xxxvi (‘Introduction’). Later in the introduction, Birks states that these are ‘rights which a claimant can *if necessary* realise through the courts’: at xliii (emphasis added).

<sup>12</sup> *Ibid* xxxvi–xxxvii.

<sup>13</sup> There are, of course, critics of the approach advocated by Birks. See, eg, Stephen Hedley, ‘Rival Taxonomies within the Law of Obligations: Is there a Problem?’ in Simone Degeling and James Edelman, *Equity in Commercial Law* (Lawbook Co, 2005) ch 4, who questions the need for a single or dominant taxonomy; Charles Rickett, ‘The Classification of Trusts’ (1999) 18 *New Zealand Universities Law Review* 305 questions the Birksian classification of trusts. Such critiques engage with the particular contours of the Birksian taxonomy. However, they do not dispute the need to have one.

<sup>14</sup> Birks, *Unjust Enrichment*, above n 7, 21.

<sup>15</sup> *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn); *Benedetti v Sawiris* [2013] 3 WLR 351 [10] (Lord Clarke) (‘*Benedetti*’).

the plaintiff's consent or wishes. The third category is 'wrongs', which comprises breaches of a legal or equitable duty.<sup>16</sup> 'Wrongs' includes torts, equitable wrongs, breach of statutory duty (unless this separately constitutes a tort) and breach of contract. In this latter category, it is important to notice that breach of contract constituting a wrong is different from the primary rights of the parties arising from the contract itself.<sup>17</sup> The response is to the wrong of breaching the contract, not carrying into effect the parties' expectations, for example, via an award of expectation damages or specific performance, which would be responses to consent. The fourth and final category is 'other', which is potentially a quite large subsidiary category that must exist in order for any taxonomy to have structural integrity. Birks gave as examples in this category the obligation of a salvor to pay a reward for saving a ship or its cargo, or an obligation to pay tax.<sup>18</sup>

The generic responses to these events involves recognition of the function or goal pursued by the court remedy given, and includes compensation, which is a loss-based response, and restitution, which is about obtaining a gain made by the defendant. Restitution may sensibly be understood either as 'giving back' (in the sense of reversing enrichment) or 'giving up' (in the sense of disgorgement of a gain obtained through wrongdoing). Other generic responses include 'punishment' and 'perfection'.<sup>19</sup>

Birks unifies the events and responses to produce the scheme below.<sup>20</sup> The crucial point is that the model distinguishes between events which are a function of the defendant's wrongdoing and those which are not, between 'wrongs' and 'not wrongs', or unjust enrichment, consent and other. Additionally, the Birksian approach integrates equity.<sup>21</sup> For example, 'wrongs' includes both breach of duties imposed by the common law (such as the duty to take care recognised in the tort of negligence) and those imposed by equity (such as a fiduciary duty or equitable obligation of confidence). Similarly, restitution as a response includes both common law restitution (such as the personal remedy given in a claim for money had and received or quantum meruit) and restitution in equity such as that given via an account of profits. The model also notices when the response is in personam, as in an obligation on the defendant to pay money, and when it is in rem, for example via the recognition of some type of remedial trust such as a constructive trust or resulting trust.<sup>22</sup> Express trusts are also recognised, but are the

<sup>16</sup> Birks, *Unjust Enrichment*, above n 7, 21.

<sup>17</sup> *Attorney-General v Blake* [2001] 1 AC 268.

<sup>18</sup> Birks, *Unjust Enrichment*, above n 7, 22.

<sup>19</sup> Birks, 'The Law of Restitution', above n 7, 13.

<sup>20</sup> *Ibid* 24.

<sup>21</sup> In Australia at least, this is controversial. The High Court has rejected the explanatory force of unjust enrichment in the equitable domain, specifically in relation to equitable subrogation: *Bofinger v Kingsway Group* (2009) 239 CLR 269, 299; and equitable contribution: *Friend v Brooker* (2009) 239 CLR 129, 141. This has been accompanied by some judicial distrust of 'top down reasoning': *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; Keith Mason, 'Do Top-down and Bottom-up Reasoning Ever Meet?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) ch 1.

<sup>22</sup> There is a debate as to whether the labels 'resulting' and/or 'constructive' apply to trusts given in response to wrongs or unjust enrichment or both. However, there is no dispute that both wrongs and unjust enrichments are capable of raising some type of remedial trust. Chambers argues that resulting trusts always reverse unjust enrichment: Robert Chambers, *Resulting Trusts* (Oxford

proprietary embodiment of consent rather than a response to either unjust enrichment or wrongdoing. As noticed by Mitchell McInnes, responses to events may either take the form of a remedy or take the form of the creation of a legal relationship, such as a contract or trust.<sup>23</sup>

**Table: Birksian Events and Responses**<sup>24</sup>

Events→ ----- Responses↓	Manifestation of Consent	Wrongs	Unjust Enrichments	Other
Restitution		Yes	Yes	Yes
Compensation		Yes	No	Yes
Punishment		Yes	No	Yes
Other Goals		Yes	No	Yes

Feminist legal scholars also ask ‘what is “like”?’ and, in common with a modern taxonomic approach, ask this question at a number of levels. Feminist analysis is concerned with uncovering how conventional doctrine may exclude, trivialise or undervalue claims brought by women, alongside a challenge to the traditional categories of private law. Thus, a feminist analysis concerned with substantive equality emphasises the reality of women’s lives. It notices the disadvantages that flow from a systematic bias against women that manifests in their differential treatment as plaintiffs, defendants or carers.<sup>25</sup> As Peter Cane has observed, feminist theory includes ‘a critique of the ways in which (private) law affects the distribution of risk, wealth and power within society’.<sup>26</sup>

This attention to differential treatment is accompanied by an awareness that the effects of gender will not always play out in consistent or predictable ways; there is also a need to consider the deep architecture of private law that instantiates a gendered order.<sup>27</sup> Importantly, a feminist critique does not depend upon demonstrating that women will always ‘lose’ in a direct sense — for example through differential or overtly discriminatory damages awards. Rather, analysis may instead indicate that even apparent ‘wins’, especially if based on recognising

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University Press, 1997). This explanation is challenged in William Swadling, ‘A New Role for Resulting Trusts?’ (1996) 16 *Legal Studies* 110; William Swadling, ‘Orthodoxy’ in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004) 9. Lord Browne Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 716 suggests that constructive trusts should not be limited to the province of wrongs and proposes that proprietary restitution to reverse unjust enrichment could also be effected via the constructive trust. For the purpose of this discussion this debate is not relevant. All that must be noticed is that the Birksian taxonomy accounts for both in personam and in rem responses to events, and that the events labelled wrongs and unjust enrichment are capable of producing proprietary responses.

<sup>23</sup> Mitchell McInnes, ‘Taxonomic Lessons for the Supreme Court of Canada’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart, 2008) 77, 82. Breach of a duty imposed or created by this relationship constitutes a wrong.

<sup>24</sup> Based on the table appearing in Birks, *Unjust Enrichment*, above n 7, 24.

<sup>25</sup> Martha Chamallas, ‘Importing Feminist Theories to Change Tort Law’ (1997) 11 *Wisconsin Women’s Law Journal* 389.

<sup>26</sup> Peter Cane, ‘The Anatomy of Private Law Theory: A 25<sup>th</sup> Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 203, 205.

<sup>27</sup> See, eg, Chamallas, above n 5.

women's claims or defences as *exceptional*, may reinforce gendered structures.<sup>28</sup> Thus, in addressing this question of 'what is "like"?' a feminist analysis extends beyond identifying and correcting overt or explicitly differential treatment within conventional categories. Such analysis is directed to a more fundamental challenge to those categories.<sup>29</sup>

Feminist cartographers have argued for the recognition of novel legal categories that do not exclude arbitrarily from analysis the concerns and experiences of women. As explained by Regina Graycar:

When a court is confronted with a problem ... the issue tends to be analyzed by the reference to the doctrinal category in which the case is presented. The imperative for the court seems to be to make a decision that is consistent with the doctrine and therefore appears coherent within the particular framework used for analyzing the problem. But ... this quest for consistency within the doctrine might lead to incoherence and inconsistency in the treatment of similar fact situations commonly grounded in women's real experiences.<sup>30</sup>

So, for example, in the context of analysing the valuation of services, Graycar proposes an alternative taxonomy, and the recognition of a category she describes as 'legal recognition of women's work'.<sup>31</sup>

Similar arguments are made by Joanne Conaghan.<sup>32</sup> In discussing some of the barriers to the influence of a feminist analysis of tort law, she condemns traditional scholarship's 'excessive deference to coherence'.<sup>33</sup> The coherence she refers to comprises 'those categories and classifications with which tort law is already imbued'.<sup>34</sup> There is much to admire in Conaghan's analysis and we agree with her observation that legal categories are not neutral instruments, but rather reflect value judgments and hierarchies, often under the guise of apparent rationality and historical legitimacy.<sup>35</sup> However, as she rightly emphasises, categories are 'an aid to establishing order',<sup>36</sup> and are therefore essential to a defensible legal architecture.

The difficulty is to identify a taxonomy that provides a functional model for judicial action and *also* properly reflects the normative concerns of the legal system. These normative concerns include, or at least should include, an attention to gender bias in order where necessary to prevent it. A legal infrastructure which

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<sup>28</sup> See, eg, Prue Vines, Mehera San Roque and Emily Rumble, 'Is "Nervous Shock" Still a Feminist Issue? The Duty of Care and Psychiatric Injury in Australia' (2010) 19 *Tort Law Review* 9. This difficulty is by no means confined to tort. In relation to 'equity' see, eg, Anne Bottomley, 'Self and Subjectivities: Languages of Claim in Property Law' (1993) 20 *Journal of Law and Society* 56.

<sup>29</sup> See, eg, Graycar and Morgan, above n 4.

<sup>30</sup> Graycar, above n 6, 57; see also Joanne Conaghan, 'Introduction to the Special Issue: Legal Constructions of Unpaid Caregiving' (2007) 58 *Northern Ireland Legal Quarterly* 245.

<sup>31</sup> Graycar, above n 6, 58.

<sup>32</sup> Joanne Conaghan, 'Tort Law and Feminist Critique' (2003) 36 *Current Legal Problems* 175.

<sup>33</sup> *Ibid* 208 (emphasis in original).

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* 209; see also Bernstein, above n 6; Chamallas and Wriggins, above n 6.

<sup>36</sup> *Ibid* 208. Birks makes the same point, although more emphatically: 'There is no body of knowable data which can subsist as a jumble of mismatched categories. The search for order is indistinguishable from the search for knowledge': Birks, 'Introduction' in *English Private Law*, above n 7, xxxi-xxxii.



irrationally distorts on this basis is liable, in the language of Birks, ‘to produce mismatched categories’<sup>37</sup> that are not likely to yield defensible analysis or decisions.<sup>38</sup> In this respect, it is disappointing that Conaghan rejects the work of Birks, dismissing it as focusing only on ‘internal coherence, structure and classification’<sup>39</sup> without, perhaps, appreciating the broader potential significance of the work. As emphasised by Hanoch Dagan — who writes from the tradition of legal realism — legal taxonomies are significant:

[Legal realists] ... should reconstruct the role of taxonomy so as to incorporate their insights into the inherent dynamism of law and the important function of contextual normative analysis in the evolution of legal categories.<sup>40</sup>

It is perhaps ironic that it is in part in response to the overly formalistic and historically quagmired analysis decried by Conaghan that Birks articulated his model in the first place.

### III Unjust Enrichment and ‘Women’s Work’

Courts across the common law world recognise unjust enrichment as an independent source of rights and obligations, capable of producing both in personam and in rem responses.<sup>41</sup> Even those who are hostile to the Birksian taxonomy of private law support the existence of an independent law of unjust enrichment which stands distinct from liability, which is a function of the defendant’s wrongdoing. The elements of a claim in unjust enrichment are uncontroversial: the plaintiff must establish that the defendant is enriched, that the enrichment comes at the expense of the plaintiff, that there is a relevant unjust factor and the court must consider whether any defences apply.<sup>42</sup> Our analysis is directed to one element of the liability equation: the question of enrichment.

<sup>37</sup> Birks, ‘Introduction’ in *English Private Law*, above n 7, xxxi–xxxii.

<sup>38</sup> Or indeed legislative regimes. In the United States context, Emily Sherwin critiques the design of the *Restatement (Third) of Restitution and Unjust Enrichment*. Sherwin argues that while it ‘sets out to give the law of restitution a coherent structure that will guide and inform lawyers and courts’, the inclusion of unmarried cohabitants as a separate category of claimant in §28 ‘violates important limits on restitution ... [and] unleashes dangerous misunderstandings of the principle forbidding unjust enrichment’. Emily Sherwin, ‘Love, Money and Justice: Restitution between Cohabitants’ (2006) 77 *University of Colorado Law Review* 711, 736. See also Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press, 2004) 164–83.

<sup>39</sup> Conaghan, above n 32, 182.

<sup>40</sup> Hanoch Dagan, ‘Legal Realism and the Taxonomy of Private Law’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart, 2008) 147, 166; see also Emily Sherwin, ‘Legal Positivism and the Taxonomy of Private Law’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart, 2008) 103; Anne Bottomley, ‘Our Property in Trust: Things to Make and Do’ in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001) 257.

<sup>41</sup> *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340; *Pavey & Matthews v Paul* (1986) 162 CLR 217; *Deglman* [1954] 3 DLR 785.

<sup>42</sup> *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 515–17 [29]–[31] (French CJ, Crennan and Kiefel JJ); *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 568, (Kirby J); *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn), 234 (Lord Hoffmann); *Benedetti* [2013] 3 WLR 351, 359 [10] (Lord Clarke). See generally Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3<sup>rd</sup> ed, 2011) 26–7; James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006) 6–8; Keith Mason,

Before commencing that discussion, a little ground-clearing is required. There are Canadian cases that rely on a claim in unjust enrichment to raise a constructive trust for the benefit of the non-legal owner of property on the breakdown of a domestic relationship. Controversially, such trusts may recognise non-financial contributions to the relationship, including services. Despite using the *language* of unjust enrichment, modern scholarship and some judicial analysis<sup>43</sup> places these cases on a separate footing: that they are about the carrying into effect of the parties' shared expectations in the context of the relationship.<sup>44</sup> To the extent that these cases are about loss-sharing and a fair division of assets, they are not 'simply about reversing transfers of wealth' in the sense of unjust enrichment.<sup>45</sup> An example is *Pettkus v Becker*<sup>46</sup> in which Mr Pettkus and Miss Becker lived as a couple almost continuously from 1955 to 1974 but never married. For five years Miss Becker performed home-making services and for 14 years she worked on Mr Pettkus's honey farm. When their relationship ended Miss Becker successfully claimed a 50 per cent share in Mr Pettkus's property. Deploying the machinery of unjust enrichment in support of a constructive trust, Dickson J held that the elements of the Canadian unjust enrichment liability equation were established — 'an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment' — and confirmed Miss Becker's 50 per cent share.<sup>47</sup> Despite earlier finding that the parties had 'no express arrangement for sharing economic gain',<sup>48</sup> this conclusion is arguably inconsistent with the majority's view that the compelling inference on the facts was that Miss Becker had a reasonable expectation of some interest in the farm and that this was recognised by Mr Pettkus's conduct in paying her a modest amount as 'compensation' in recognition of her efforts.<sup>49</sup> The majority's focus on perfecting or carrying into effect the parties' expectations is arguably the real work being done in *Pettkus*. To this extent, the case is not about reversing a transfer of value between the two parties, via a claim in unjust enrichment, which would ordinarily call for a *quantum meruit* measure of the work done by Miss Becker. Rather, we

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John W Carter and Greg J Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis, 2<sup>nd</sup> ed, 2008) 43–7.

<sup>43</sup> *Hubar v Jobling* (2000) 195 DLR (4<sup>th</sup>) 123 (BCCA) (Southin JA): 'the concept of unjust enrichment has come so far from *Pettkus v Becker* as to be well nigh unrecognisable'; see also *L (L) v B (M)* (2003) 231 DLR (4<sup>th</sup>) 665, 675 (Quebec CA) (Dalphond JA).

<sup>44</sup> Gbolahan Elias, *Explaining Constructive Trusts* (Clarendon Press, 1990) 157–8. Burrows, above n 42, 194; Craig Rotherham, *Proprietary Remedies in Context* (Hart, 2002) 202–5; Simon Gardner, 'Rethinking Family Property' (1993) 109 *Law Quarterly Review* 263. See also Matthew Harding, 'The Limits of Equity in Disputes Over Family Assets' in James Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart, 2012) ch 9, 196–9, where Harding notes that despite adopting the language of unjust enrichment, courts in Canada appear to be implementing a form of distributive rather than corrective justice, significant because the normative engine of unjust enrichment is often argued to be corrective justice: cf Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012).

<sup>45</sup> See Lionel D Smith, *The Law of Restitution in Canada* (Emond Montgomery, 2004) 361. See especially ch 8, 361–3 and the references cited therein.

<sup>46</sup> *Pettkus v Becker* [1980] 2 SCR 834.

<sup>47</sup> *Ibid* 848–9 (Dickson J, delivering the majority judgment).

<sup>48</sup> *Ibid*.

<sup>49</sup> *Pettkus v Becker* [1980] 2 SCR 834, 849. Gardner, above n 44, 271 persuasively argues that: '[i]t can ... be questioned whether the finding [that Miss Becker had an expectation and whether Mr Pettkus knew or ought to have known of it] truly reflected the facts of the case'.

can view this case as one in which the court is concerned to uphold the parties' intentions or expectations as to ownership.

In placing these family property constructive trust cases on the Birksian taxonomy, we consider that they are about carrying into effect the parties' common intentions or expectations. We allocate them either to 'consent' or, if there is a failure by one party to carry out the (non-contractual) bargain between them, such that there is, for example, unconscionability, we could place these cases in 'wrongs'. Whichever analysis is correct, the point is to realise that, properly understood, and despite their labelling, the cases do not reverse unjust enrichment. This is important because, in evaluating the role of gender in the various tests of enrichment, we have not referred to these family property cases as examples of unjust enrichment. They do not form part of the available dataset of cases in which tests of enrichment have been applied to 'women's work' in unjust enrichment claims. However, these cases, alongside other family property cases, are useful points of reference and comparison for analysis.

We now turn to consider gender within unjust enrichment, both at the point where enrichment is recognised and where that enrichment is valued. It must be conceded that research has revealed few cases that apply tests of enrichment to fact patterns which feature more prominently in other areas of private law and might ordinarily be thought susceptible to a gendered response. However, to the extent that our analysis is concerned with the *model of enrichment*, in addition to the application of this model on the facts of particular unjust enrichment cases, this limit should not be overstated.

## A *Enrichment*

Enrichments may include money, land, things and services. Not all benefits transferred to the defendant qualify as enrichments that are vulnerable to return. Instead, the benefit must meet one of the tests of enrichment.<sup>50</sup> The unjust enrichment liability model therefore protects the defendant recipient's autonomy or freedom to choose how, and on what, she will allocate her resources. Consistently with the observation that liability in unjust enrichment does not follow every time the defendant receives something of value, the recipient is permitted to argue that she did not desire the benefit in question.<sup>51</sup> Her plea is not that she does not

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<sup>50</sup> The tests of enrichment have been the subject of voluminous academic and judicial discussion and debate. Relevant contributions include: J Beatson, *The Uses and Abuses of Unjust Enrichment* (Clarendon Press, 1991) ch 2; Birks, *Unjust Enrichment*, above n 7, ch 3; Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) ch 9; James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) ch 8; Andrew Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart, 2012); Mitchell McInnes, 'Enrichment Revisited' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart, 2005) ch 8: see also Burrows, above n 42, ch 3; Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8<sup>th</sup> ed, 2011) ch 5; Edelman and Bant, above n 42, ch 5; Mason, Carter and Tolhurst, above n 42, ch 4.

<sup>51</sup> Edelman and Bant, above n 42, 108.

personally find the benefit enriching but rather that, objectively speaking or according to the external appearance of the facts,<sup>52</sup> she did not choose the benefit and therefore should not be made to pay for it. In creating room for the possibility that the defendant did not desire the benefit, and therefore that it is not enriching, the liability model objectively considers the circumstances of the case and the conduct of the defendant.<sup>53</sup> The law may conclude that, notwithstanding that the plaintiff asserts that (subjectively) she did not desire the enrichment, the evidence indicates that she ought to be held responsible for it. As stated by Birks, in such circumstances, liability ‘would not do violence to the law’s respect for the individual’s right to choose how freely to deploy available resources’.<sup>54</sup> There are various techniques adopted by unjust enrichment law to further this analysis. Each is a method by which the plaintiff may potentially overcome the defendant’s plea that she is not enriched. Instead these pleas satisfy the court that the benefit was chosen, or as good as chosen, by the defendant.

Central to the argument are two pleas said to demonstrate the defendant’s enrichment and protect the defendant’s right to ‘choose freely how to deploy available resources’:<sup>55</sup> (a) incontrovertible benefit; and (b) request and/or acceptance. As the discussion below demonstrates, the enrichment model is concerned with the autonomy of both the plaintiff and the defendant.<sup>56</sup> Lessons learned in other departments of private law tell us that the law’s concern with autonomy is often value laden. The respect and protection attributed to a party’s autonomy may be dependent on a number of factors, including gender, and this may particularly be the case when considering the provision of care or services within a domestic context.<sup>57</sup> Careful analysis therefore requires attention to the different ways in which autonomy is configured. The following conclusions are possible. First, when enrichment is demonstrated via incontrovertible enrichment — for example via necessity — this necessity trumps the plaintiff’s and perhaps also the defendant’s autonomy. Necessity acts as a lightning rod and transmits to

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<sup>52</sup> McInnes expresses this as the recipient’s ability to plead that ‘he did not freely assume financial responsibility for his gain’. See McInnes, above n 50, 175; *Benedetti* [2013] 3 WLR 351, 364 [23] (Lord Clarke), 412 [187] (Lord Neuberger). This point is further discussed below.

<sup>53</sup> *Benedetti* [2013] 3 WLR 351.

<sup>54</sup> Birks *Unjust Enrichment*, above n 7, 55.

<sup>55</sup> *Ibid.*

<sup>56</sup> Bant has similarly observed that tests of enrichment operate to protect the autonomy of both plaintiff and defendant: Elise Bant ‘Incapacity, Non Est Factum and Unjust Enrichment’ (2009) 33 *Melbourne University Law Review* 368, 375.

<sup>57</sup> The prominence of autonomy as a guiding concept in private (and indeed public and criminal) law has been criticised from a feminist perspective across many areas, including in both contract and torts. Feminist work in tort law, for example, interrogates both autonomy and duty, as well as concepts more specific to tort law, such as standards of reasonableness. See, eg, Leslie Bender, ‘An Overview of Feminist Torts Scholarship’ (1993) 78 *Cornell Law Review* 575; Joanne Conaghan, ‘Tort Law and the Feminist Critique of Reason’ in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish, 1996) 47; Janice Richardson and Erika Rackley, ‘Introduction’ in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge, 2012) 1; Linda Mulcahy, ‘The Limitations of Love and Altruism — Feminist Perspectives on Contract Law’ in Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Glasshouse, 2005) 1; see also Neil Cobb, ‘Commentary: *R v Stone and Dobinson*’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, 2010) 228.

the unjust enrichment claim the values embedded in the imperative creating the necessity. In some cases these values will include gendered assumptions about, for example, familial obligations. Where the court is involved in determining what might count as necessary, there seems to be at least the potential for gendered reasoning comparable to that seen in other areas of private law. Where enrichment is demonstrated by the defendant's conduct, for example via request or free acceptance, the picture is more complicated. The emphasis within unjust enrichment on protecting the autonomy of the defendant carries an inherent risk of a gendered response.<sup>58</sup> Conversely, however, request and free acceptance are capable of being structurally more resistant to gendered expectations (in relation to, for example, familial relationships) precisely because it is the conduct of the defendant rather than the motives or obligations of the plaintiff that are the focus of scrutiny. Irrespective of whether necessity or acceptance/request is applied, when valuing the enrichment, unjust enrichment's commitment to the market measure may give rise to important differences in the way that domestic work or care is valued, compared to, for example, family property or tort cases.

### 1 *Incontrovertible Enrichment*

An incontrovertible benefit is one in which the very nature of the enrichment is such that the enrichment cannot be disputed. As stated by McLachlin J: 'An "incontrovertible benefit" is an unquestioned benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture.'<sup>59</sup> The easiest application of this test is in relation to money. Money can be readily exchanged for the goods and services that we choose. As explained by Robert Goff J: 'Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited.'<sup>60</sup> Incontrovertible enrichment does not operate as a function of the defendant's conduct in choosing to bear the responsibility of a particular enrichment. Rather, incontrovertible enrichment asserts that there is no choice to make.

Money is incontrovertibly enriching. By parity of reasoning, benefits that have been realised and converted into money are also incontrovertibly enriching. The realised benefit in the form of money stands proxy for what was originally received. There is a debate about whether this test requires that the defendant has actually realised the benefit before trial, or whether it is sufficient that the benefit is merely realisable.<sup>61</sup> This controversy does not derogate from the underlying

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<sup>58</sup> The privileging of autonomy, and of the abstracted individual associated with a (neo)liberal ideology is a recurring concern in feminist (legal) theory: see, eg. Margaret Davies, *Asking the Law Question* (Lawbook Co, 3<sup>rd</sup> ed, 2008) 228ff. See also Tang Hang Wu's analysis of the 'stock' stories that appear in unjust enrichment scholarship, particularly in the work of Birks: Tang Hang Wu, 'Storytelling in the Law of Unjust Enrichment' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart, 2009) 459. See also Adam Gearey, 'Women Lie Back Everywhere: The Symbolic Economy of Restitution' in Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Glasshouse, 2005) 91.

<sup>59</sup> *Peel (Regional Municipality) v Canada* (1992) 98 DLR (4<sup>th</sup>) 140, 159.

<sup>60</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 799.

<sup>61</sup> As to the realised/realisable debate see: Birks, *Unjust Enrichment*, above n 7, 61 (arguing for a test of realised benefit); Burrows, above n 42, 48–9 (allowing realisable benefits if the court is

premise, which is that benefits that have been converted to money are as good as money and are therefore enriching. Things become more complicated when considering benefits in the form of services, particularly the provision of services or care within a family or domestic relationship. Benefits which anticipate or remove the need for the defendant's *necessary* expenditure, such as that required to pay for *necessary* services, are also considered incontrovertibly enriching. This is because the provision of such services is regarded by the unjust enrichment liability model as inevitable. Unjust enrichment analysis separates such benefits as either being factually or legally necessary, and on some facts both are established. The conceptual point is that if necessity or such inevitability is established, the benefit is incontrovertibly enriching because the defendant has no choice to make. The benefit is commanded by the legal or factual circumstances of the case. In providing the service, the plaintiff saves the defendant an inevitable expense.

How courts approach the question of whether care or services provided within a domestic or family context are either legally or factually necessary requires judges to evaluate the significance or worth of such services. The tests of enrichment thus have the potential to engage those gendered norms and assumptions of concern to feminist scholars in their analysis of other areas of private law. An example lies in the law of torts. Courts have often characterised women's work within the home in ways that both trivialise its importance — for example by characterising housework as akin to an optional leisure activity<sup>62</sup> — while simultaneously replicating gendered norms of behaviour. Judicial analysis may rely on expectations that female family members will willingly give up their self-interest to serve the injured plaintiff, or on characterising the services and care provided as a manifestation of love and affection and thus (merely) part of the ordinary currency and *exchange* of family life.<sup>63</sup> Similar points can be made in relation to family property cases. For example claims for a share in property on the breakdown of a relationship, where the claim is based entirely or in part on a non-financial contribution.<sup>64</sup> Analysing equity's recognition of women's claims to

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reasonably certain the defendant will realise the benefit); *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2774.

<sup>62</sup> See Regina Graycar, 'Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages' (1997) 31 *University of British Columbia Law Review* 17.

<sup>63</sup> Regina Graycar, 'Women's Work: Who Cares?' (1992) 14 *Sydney Law Review* 86; Regina Graycar, 'Damaging Stereotypes: the Return of "Hoovering as a Hobby"' in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge 2012) 205. Relevant cases here include *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Kars v Kars* (1996) 187 CLR 354; *Grinzelis v House* (2000) 201 CLR 321. See also *Donnelly v Joyce* [1974] 1 QB 454; *Kovac v Kovac* [1982] 1 NSWLR 655; *Van Gervan v Fenton* (1992) 175 CLR 327. Note also the hostility to commercial arrangements between family members for services in anticipation of litigation in *Housecroft v Burnett* [1986] 1 All ER 332, 343 (O'Connor LJ): 'I am very anxious that there should be no resurrection of the practice of plaintiffs making contractual agreements with relatives to pay for what are in fact gratuitous services rendered out of love. Now that it is established that an award [of damages] can be made in the absence of such an agreement, I would regard an agreement made for the purposes of trying to increase the award as a sham.'

<sup>64</sup> While the division of property following the breakdown of relationships is now covered by a range of overlapping legislative frameworks, we are concerned here with private law's capacity to recognise the value of non-financial contributions within domestic or intimate relationships. In Australia, the legislative trend has been to extend the coverage of elements of family law to other domestic partnerships, including domestic and same-sex partnerships: see, eg, Jenni Millbank, 'De

domestic property via remedial trust has proven fertile ground for feminist scholarship. Feminist analysis points to law's failure adequately to recognise either financial contributions to household expenses or other non-financial contributions.<sup>65</sup> Equity's (non-)responsive pattern is taken by feminist scholars as evidence of equity's tendency, notwithstanding its protective posture,<sup>66</sup> to devalue or exclude from consideration the value of domestic labour, while at the same time constructing female claimants as either deserving or undeserving of protection.<sup>67</sup>

Turning to the unjust enrichment cases, incontrovertible enrichment as a test of enrichment entails the inherent risk of a gendered response, for example via devaluing or excluding the services in question. However, the evidence of the cases appears to show that this outcome is not inevitable. The anticipation of necessary expenditure, whether legally or factually necessary, requires the construction of an imperative. It is the meeting of this imperative or obligation by another that constitutes the enrichment. On many facts this will be relatively uncontroversial, for example where there is a legal necessity created by a statutory obligation and this is discharged by a third party.<sup>68</sup> Factual necessity is obviously more open-textured. On some facts, a moral obligation may be sufficient to give rise to the defendant's obligation. An example is the burial cases which raise

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Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms' (2009) 23(3) *Australian Journal of Family Law* 1; Jenni Millbank and Kathy Sant, 'A Bride in her Everyday Clothes: Same-Sex Relationship Recognition in NSW' (2000) 22 *Sydney Law Review* 181. In relation to the United Kingdom, where recognition has come later than other Commonwealth jurisdictions, see Simone Wong, 'Cohabitation and the Law Commission's Project' (2006) 14 *Feminist Legal Studies* 145; Anne Bottomley, 'From Mrs Burns to Mrs Oxley: Do Co-Habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181.

<sup>65</sup> See, eg, Claire de Than, 'Equitable Remedies: Cypher Wives, Weak Women and "Equity's Special Tenderness"' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001) 197; Bottomley, above n 64; Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 *Social and Legal Studies* 257.

<sup>66</sup> Equity is often viewed as a jurisdiction that is especially attentive to the needs and claims of the vulnerable, including relevantly, of women. This image of equity as a protective jurisdiction has been challenged at a number of levels. These include analysis pointing to the limited scope of the protections offered: for example that equity was only able to intervene to protect a very limited class of women, and other work demonstrating much of the rhetoric of protection as fiction: Maggie Conway, 'Equity's Darling?' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001) 27; Rosemary Auchmuty, 'The Fiction of Equity' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001) 1; Dianne Otto, 'A Barren Future? Equity's Conscience and Women's Inequality' (1992) 18 *Melbourne University Law Review* 808. More broadly, feminists have exposed the characterisation and effects of the law/equity divide where such divisions draw on unacknowledged gendered divisions as well as the prevalent metaphors within equity that reveal a deeply ambivalent posture in relation to the feminine: see, eg, Auchmuty in this note; Robin Mackenzie, 'Beauty and the Beastly Bank: What Should Equity's Fairy Wand Do?' in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish, 1996) 149.

<sup>67</sup> de Than, above n 65; Bottomley, above n 28. These binaries can also influence the favourable treatment of a claim by a male (ex)partner against a female defendant: see, eg, Lisa Sarmas 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701. This analysis suggests the risks attendant on expansive judicial discretion where it offers, as a consequence, greater scope to rely on stereotype and 'stock stories'. Consequently, feminist analysis has been correspondingly attentive to the risks involved in developing special categories of protection for female plaintiffs: see above n 58; Anne Bottomley and Joanne Conaghan 'Feminist Theory and Legal Strategy' (1993) 20 *Journal of Law and Society* 1.

<sup>68</sup> *Peel (Regional Municipality) v Canada* (1993) 98 DLR (4<sup>th</sup>) 140.

familial obligation. In *Jenkins v Tucker*,<sup>69</sup> a husband went to his plantation in Jamaica, leaving his wife and son behind in England. During his absence his wife died. Her father arranged for her funeral and successfully sued her husband to recover funeral expenses. Lord Loughborough emphasised that:

in discharge of a duty which ... [the husband] was under a strict legal necessity of himself performing, and which common decency required at his hands; the money therefore which ... [the father] ... paid on this account, was paid to the use of [the husband].<sup>70</sup>

In finding an obligation on the husband to bury his wife, it is not clear whether Lord Loughborough clearly distinguished the legal obligation from strong moral obligation arising from ‘common decency’. But, irrespective of the basis, it is clear that this case replicates and reinforces gender familial relations in constructing obligation. This reinforcement is also apparent in the court’s requirement that the intervener be non-officious, being satisfied on the facts by the finding that a father ‘seems to be the proper person to interfere in giving directions for his daughter’s funeral in the absence of her husband’.<sup>71</sup>

Factual necessity may also be demonstrated by strong evidence that if the plaintiff had not intervened, the defendant would have had no factual choice but to incur the expenditure. For example, in *Degelman v Guaranty Trust of Canada*,<sup>72</sup> an elderly Laura Brunet was cared for by her nephew during her life. The verbal agreement between them was that her nephew would ‘be good to her and do such services for her as she might from time request during her lifetime’<sup>73</sup> in exchange for a promise that on her death she would leave him her home. In performance of their agreement he took her on outings in his car, did odd jobs around her home and other properties owned by her, ran errands, and ‘minor services for her personal needs’.<sup>74</sup>

The agreement between the aunt and nephew was unenforceable as it was not in writing and on her death he was not mentioned in her will. The nephew successfully sued his aunt’s estate in *quantum meruit* for the value of services conferred. In dealing with the issue of enrichment, Rand J stated: ‘[the nephew] was entitled to recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the [nephew]’.<sup>75</sup>

The reasoning in this case is striking in that at no point does the Supreme Court of Canada appear to consider it helpful or relevant to construe the existence or scope of the familial obligation in question. Rather, the court baldly states the

<sup>69</sup> (1788) 1 H Bl 90; 126 ER 55; see also *Ambrose v Kerrison* (1851) 10 CB 776; 138 ER 307; *Bradshaw v Beard* (1862) 12 CB (NS) 344; 142 ER 1175; *Rogers v Price* (1829) 3 Y&J 28; 148 ER 1080.

<sup>70</sup> *Jenkins v Tucker* (1788) 1 H Bl 90; 126 ER 55, 57.

<sup>71</sup> *Ibid.* The requirement that the intervener not be officious is relevant to necessity in its other role as an unjust factor.

<sup>72</sup> [1954] SCR 725.

<sup>73</sup> *Ibid.* 726.

<sup>74</sup> *Ibid.* 727.

<sup>75</sup> *Ibid.* 729. It is important to realise that the claim by the nephew was for the value of services conferred. It was not for enforcement of the (unenforceable) bargain which would have involved the nephew’s claim on her estate for an interest in her home.



scope of the bargain and then identifies the services that fall within it. Obviously, there are limits to this observation. One wonders whether the reasoning would have been different had the nephew been a niece and, indeed, the aunt been an uncle. Nevertheless, even on the existing facts it would have easily been open to the Court to limit the nephew's claim. For example, the Court could have divided the services of the nephew into personal familial services and commercial services, and distinguished between his care for her personal needs and the odd jobs he performed in relation to her non-residential property. In conformity with the judicial approaches in the family property and torts cases discussed above, the court could have limited his claim by characterising the personal services as either unnecessary, or alternatively, as the natural incidence of their familial relationship, and not, in this respect, services at all.

This possibility is hinted at, although not ultimately realised, in *Schneider v Kastenmacher*.<sup>76</sup> Brigitte Schneider sued her mother for the value of personal care and improvements to property made when Brigitte and her husband sold their home to move in with Inge Kastenmacher (Brigitte's mother). Inge was aged in her late seventies, in ill health and had recently left an abusive marriage. There was conflicting evidence about the arrangement between the parties. Brigitte alleged a promise that Inge would leave real estate to her in return for this care but Ramsay J did not find this arrangement supported by the evidence. There was no contract between the parties, nor any misrepresentation by Inge. On a breakdown in their relationship, Brigitte pursued a claim in unjust enrichment against her mother for the value of the care and the improvements. Both claims failed. Of interest to this analysis is the claim for care.

Brigitte conceded in argument that 'natural love and affection were part of [her] motivations for taking care of her mother'.<sup>77</sup> The fact that her motives were mixed in the sense that they were motivated by love and affection, yet also the subject of an unjust enrichment claim, accords with the complex reality of family relationships. However, the Canadian unjust enrichment liability model required the plaintiff to suffer a deprivation corresponding to the plaintiff's benefit, and it is in considering this element that a gender-based devaluation could have entered the analysis. On the basis that Brigitte and her husband had not, for example, given up paid employment to take care of Inge, this element of corresponding deprivation was held not to be made out. Additionally, later analysis by Ramsay J reveals the evidence in respect of the care claims was not reliable since the rate at which the Schneiders claimed the value of care was above the evidence of the market rate,<sup>78</sup> and the number of hours was exaggerated.<sup>79</sup> In construing the boundary between detriment suffered as a result of 'love and affection' (not counted) and detriment for the purposes of an unjust enrichment (counted), the liability model is vulnerable to a gender-based devaluation of these services. Thus, the boundary between personal/familial services and commercial services will potentially shift according to gendered norms and expectations. On the facts of *Schneider*, this risk

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<sup>76</sup> [2010] ONSC 5329 (Ontario Supreme Court of Justice) ('*Schneider*').

<sup>77</sup> *Ibid* [18].

<sup>78</sup> *Ibid* [19/3], comparing the hourly rate for care given by 'two arms' length care givers who actually worked for the defendant' to the rate claimed by the plaintiff.

<sup>79</sup> *Ibid* [19/4].

never came home because there was no deprivation corresponding to Inge's enrichment.

## 2 Request and/or Acceptance

The plaintiff may have requested the benefit conferred by the defendant. To this extent, imposing liability will not infringe the defendant's freedom or autonomy to choose how and when to allocate her resources. By her conduct in requesting the benefit, the evidence indicates objectively that the defendant chose it.<sup>80</sup> In evidential terms, the easiest case is when the defendant expressly requests the benefit, but request may also be evidenced by the defendant's conduct.<sup>81</sup>

Alternatively, request plus true acceptance, or so-called 'free acceptance', will demonstrate enrichment. Free acceptance is a test of enrichment which is analytically distinct from request, although the same set of facts may contain evidence of both. Either will suffice to establish enrichment. Free acceptance is made out when the benefit is conferred on the defendant in circumstances where a reasonable person should have realised that the person in the plaintiff's position would expect to be paid for the service or other alleged enrichment. Importantly, it is necessary to establish that the defendant had a reasonable opportunity to reject the provision of the service and did not do so.<sup>82</sup>

One of the most difficult aspects of free acceptance is working out what constitutes acceptance — in particular, the extent to which so called *passive* acceptance will constitute *free* acceptance and thus suffice to demonstrate enrichment. As discussed, the reason why we rely on *free* acceptance to demonstrate enrichment turns on our ability to say that, as a consequence of the acceptance, the autonomy of the defendant has not been infringed. The benefit is

<sup>80</sup> *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 215. Request is also recognised in *ABB Power Generation Ltd v Chapple* (2001) 25 WAR 158, 163 (Murray J); *Cadorange Pty Ltd (in Liq) v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26, 35 (Young J); *Concrete Constructions Group v Litevale Pty Ltd (No2)* [2003] NSWSC 411 (21 May 2012) [72] (Mason P); *Damberg v Damberg* (2001) 52 NSWLR 492, 528 (Heydon JA, Spigelman CJ and Sheller JA agreeing); *Monks v Poynice* (1987) 8 NSWLR 662, 664 (Young J); *Vivian Fraser & Associates Pty Ltd v Shipton* [1999] FCA 60 [326] (Lindgren J); *Lumbers v W Cook Builders Pty Ltd (in Liq)* (2008) 232 CLR 635, 665–6 (Gummow, Hayne, Crennan and Kiefel JJ).

<sup>81</sup> *Lumbers v W Cook Builders Pty Ltd (in Liq)* (2008) 232 CLR 635, 666 (Gummow, Hayne, Crennan and Kiefel JJ). See also *ABB Power Generation Ltd v Chapple* (2001) 25 WAR 158, 167 (Murray J), in which there was no express request made directly by the party benefited by the work (ABB). Nonetheless, enrichment was found, in part on the ground that in general terms the work was requested, and that ABB should pay.

<sup>82</sup> *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406, 423 [82], citing Keith Mason and J W Carter, *Restitution Law in Australia* (Butterworths, 1995) [217]; *Lumbers v W Cook Builders Pty Ltd (in Liq)* (2008) 232 CLR 635, 661 (especially n 72) (Gummow, Hayne, Crennan and Kiefel JJ). See also *ABB Power Generation v Chapple* (2001) 25 WAR 158, 163, 167 (Murray J); *Andrew Shelton & Co Pty Ltd v Alpha Healthcare Ltd* (2002) 5 VR 577, 600–5, [98]–[117] (Warren J); *Angelopoulos v Sabatino* (1995) 65 SASR 1, 12–13 (Doyle CJ); *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, 260 (Byrne J); *Damberg v Damberg* (2001) 52 NSWLR 492, 528–30 (Heydon JA, Spigelman CJ and Sheller JA agreeing); *Oliver v Lakeside Property Trust Pty Ltd* [2005] NSWSC 1040 (18 October 2005) [80] (Barrett J); *Rowe v Vale of White Horse District Council* [2003] 1 Lloyd's Rep 418 [12] (Lightman J); *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2009] 1 WLR 1580, 1597 [47]; *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775.

chosen, or as good as chosen, by the defendant. For example, in *Angelopoulos v Sabatino*, Doyle CJ examined the conduct of the defendant owner of the Britannia Hotel in relation to the work done and expenses incurred by the prospective tenant plaintiffs. Arguably the defendant did not accept the benefits since he did not actively accept or choose them. However, on the facts, Doyle CJ held that ‘there was more than passive acceptance’.<sup>83</sup> The plaintiffs acted not only with the knowledge of the defendant but also with his approval. His positive acts of encouragement (which might equally have established enrichment on the ground of request)<sup>84</sup> meant that in the circumstances the defendant’s acceptance of the benefit was not truly passive and therefore that free acceptance could be established.<sup>85</sup> The allegedly passive acceptance must be evaluated in all the circumstances of the case to discover whether it is truly passive or will count as free acceptance.

Andrew Burrows criticised free acceptance as a test of enrichment, arguing that ‘it is a rational indication of nothing more than indifference to the objective benefit being rendered’.<sup>86</sup> This must be right. On this version of the test, free acceptance does not assist in protecting the defendant’s autonomy, since indifference is not persuasive evidence that, objectively speaking, the defendant has chosen to receive the benefit. Birks went on to argue that free acceptance does not operate to indicate that the defendant values the benefit in question.<sup>87</sup> Rather, the defendant’s unconscientious *conduct* in freely accepting the benefit precludes her from denying that it is enriching. However, even if this unconscientious conduct rationale is adopted the autonomy point remains. Although on this version free acceptance is not used as a proxy for the defendant’s actual choice, it nonetheless attributes consequences to conduct through which the defendant *is taken* to signal choice.

A feminist lens observes greater complexity in the phenomenon of free acceptance. Notions of acceptance and consent can easily be aligned with parallel concepts in the law of contract that have already been subject to a sustained feminist critique, itself part of the more wide ranging analysis of consent and the privileging of the autonomous legal person in law.<sup>88</sup> Feminists have argued

<sup>83</sup> *Angelopoulos v Sabatino* (1995) 65 SASR 1, 13 (Doyle CJ). Similarly, in *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406, 423 [82] Sulan and Layton JJ held that ‘more than simple acceptance of a benefit is involved’ (emphasis added).

<sup>84</sup> *Angelopoulos v Sabatino* (1995) 65 SASR 1, 13 (Doyle CJ): ‘[W]ere it necessary to do so I would be prepared to conclude that there was an implied request’. See *Lumbers v W Cook Builders Pty Ltd (in Liq)* (2008) 232 CLR 635, 666 (Gummow, Hayne, Crennan and Kiefel JJ).

<sup>85</sup> *Angelopoulos v Sabatino* (1995) 65 SASR 1, 13 (Doyle CJ).

<sup>86</sup> Burrows, above n 42, 57; see also Andrew Burrows, ‘Free Acceptance and the Law of Restitution’ (1988) 104 *Law Quarterly Review* 576. There have been many other critics of free acceptance as a test of enrichment: J Beatson, ‘Benefit, Reliance and Unjust Enrichment’ (1987) 40 *Current Legal Problems* 71, revised and expanded in Beatson, above n 50; Michael Garner ‘The Role of Subjective Benefit in the Law of Unjust Enrichment’ (1990) 10 *Oxford Journal of Legal Studies* 42; Michael Garner, ‘Benefits for Services Rendered: Commentary’ in Mitchell McInnes (ed), *Restitution: Developments in Unjust Enrichment* (Lawbook Co, 1996) 109.

<sup>87</sup> Peter Birks, ‘In Defence of Free Acceptance’ in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, 1991) 105.

<sup>88</sup> The complicated history of the inclusion and exclusion of women from the realm of contracts has been well documented: see, eg, Peter Goodrich, ‘Gender and Contracts’ in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish, 1996) in which Goodrich points to a history of cases where obligations arising from affective relationships or moral

convincingly that notions of (free) consent relied on in much of private law are deeply imbued with gendered norms, and thus fail to account for the complexity of social relationships as well as other forms of agreement.<sup>89</sup> In theorising tests of request and free acceptance, the paradigm examples in unjust enrichment literature, such as the famed window washer, are all atomistic public relationships. However, where potential enrichments occur in the domestic sphere, these tests of enrichment may fail to account for familial or domestic relationships with their attendant network of social and familial obligations. This is significant, not only in terms of considering the pressure that might be brought to bear in terms of the *provision* of services or care, but also in considering whether the defendant had a genuine opportunity to accept or reject the service.

Although the nephew in *Deglman* did not establish enrichment via free acceptance reasoning, the facts nonetheless provide a useful illustration of such a possibility. The services provided by the nephew were clearly requested and accepted and on this basis alone would have been enriching. However, even if the nephew had intervened without request, so long as his aunt had had an opportunity to reject those benefits and did not take that opportunity, especially the benefits of a commercial as opposed to domestic or personal character, then free acceptance arguably would be satisfied and enrichment demonstrated. A deeper analysis might, however, have asked whether in reality the aunt had had an opportunity to reject. On slightly altered facts, it is not difficult to imagine an aunt who by, the ties of family obligation is forced to accept such services. This is insinuated in *Schneider*. Although the unjust enrichment claim failed, Ramsay J notes that despite finding that the defendant Inge ‘accepted the personal care given by her daughter ... it is not at all clear to me that she asked for it’.<sup>90</sup> When Brigitte and her husband moved in with Inge, the latter was quite feeble but gradually improved

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obligations, often within the private sphere, have been recognised as giving rise to enforceable agreements. As in other areas of private law however, the analysis problematises this recognition to the extent that obligations are most likely to be recognised where the plaintiff conforms with gendered constructions of agency and capacity, and addresses foundational concepts and structures of contract law such as the reliance on the ‘rational’ autonomous bargain, within or alongside the critiques of liberalism, or on dualities such as the public–private divide. See, eg, Clare Dalton, ‘An Essay in the Deconstruction of Contract Doctrine’ (1985) 94 *Yale Law Journal* 997, 1114; Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1992) chs 5–6, 60–110; Beverley Brown, ‘Contracting Out/Contracting In: Some Feminist Considerations’ in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish, 1996) 5.

<sup>89</sup> See, eg, Maria Drakopoulou, ‘Feminism and Consent: A Genealogical Inquiry’ in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge–Cavendish, 2007). See also Linda Mulcahy, ‘The Limitations of Love and Altruism — Feminist Perspectives on Contract Law’ in Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Glasshouse, 2005) 1, who aligns feminist critique of contract with the developing area of relational contract theory. The correspondence between a feminist critique and analysis that, while not of specifically feminist orientation, also exposes the inadequacy of the formal contract model when considering the actual nature and operation of commercial relationships, is discussed in Goodrich, above n 88. See also John Wightman, ‘Commentary: *Baird Textile Holdings v Marks & Spencer Plc*’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, 2010) 185; Linda Mulcahy and Cathy Andrews, ‘Judgment: *Baird Textile Holdings v Marks & Spencer Plc*’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, 2010) 189.

<sup>90</sup> *Schneider* [2010] ONSC 5329 (Ontario Supreme Court of Justice) [18].

and after a several months ‘her natural independence re-emerged’.<sup>91</sup> In fact, the dynamic in the mother daughter relationship shifted such that by the time Brigitte moved out, there was conflict. The police were called on one occasion<sup>92</sup> and there was evidence that Brigitte was attempting (unsuccessfully) to ‘exert an unhealthy degree of control’.<sup>93</sup> At the commencement of the intervention, Inge clearly could not have said to have freely accepted. She may, in a technical sense, have lacked the capacity to accept, and we would argue that even beyond this, the familial pressure on her at that point would eliminate any realistic opportunity to reject.

It is also necessary to consider the risks of the model from the position of the plaintiff who provides the services. Perhaps counterintuitively, free acceptance has the potential to be relatively structurally impervious to a gendered analysis, which makes the provision of domestic care in this realm so susceptible to marginalisation. Precisely because the enrichment model is not solely concerned with the motivations of the plaintiff and focuses strongly on the acceptance of the defendant and whether or not there was an opportunity to reject the benefit, greater recognition may be available for ‘women’s work’. The reasons and motivations of the plaintiff are still relevant — for example, it must be clear that the benefit is being offered non-gratuitously. However, this is not necessarily inconsistent with the plaintiff who provides services out of love and duty, and in this respect free acceptance has the scope to be sensitive to the ebbs and flows of social and domestic relationships.

Mixed motivations reflect the complexity of real life. It is possible for a plaintiff to designate interventions as being provided out of love and affection and also seek restitution in respect of their value, or at least some of them. For example in *Schneider*, although the unjust enrichment claim failed, Ramsay J distinguished between the personal services provided to Inge and driving her to see Niagara-on-the-Lake or taking her on holidays.<sup>94</sup> On his hypothetical analysis, the value of personal services would be recoverable but perhaps not the holidays. On the other hand, in *Foreman Estate v Reid*,<sup>95</sup> Mr Reid (a friend) provided care and assistance to Mrs Foreman over almost a 10-year period. There were also transfers of money by Foreman to Reid. Despite her age and infirmity (Foreman was 88 years old on death, 30 years older than Reid) the court found there was no undue influence. Reid successfully sued her estate in unjust enrichment for the value of care provided. Although not related, their relationship evolved into a deep friendship of love, affection and devotion. Reid’s decisions to care for Foreman were based on her (ultimately unfulfilled) promises to transfer half her title to her home to him and other promises of recompense. However, Davies J also held:

[I]n addition to acting upon promises of further recompense, Mr Reid cared deeply for Mrs Foreman and her well-being, and did his best to care for her as she wished. His obvious distress and emotion when testifying about his removal from ... [her home] ... by the police [following an unfounded

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<sup>91</sup> Ibid [15].

<sup>92</sup> Ibid [9].

<sup>93</sup> Ibid [15].

<sup>94</sup> Ibid [19/4].

<sup>95</sup> *Foreman Estate v Reid* [2010] BCSC 228 (‘Foreman’); [2011] BCCA 394 (application to appeal denied).

allegation of abuse of her estate by her family] ... and his loss of contact with Mrs Foreman that followed that removal, convince me of the genuineness of his affection for and devotion to her.<sup>96</sup>

The mixed motive did not derogate from the claim.

## B *Valuation of Enrichment*

Once enrichment is established, it is necessary for the court to value the enrichment. The dominant measure is the market price for the service.<sup>97</sup> When applying incontrovertible enrichment, this is the inevitable expense the defendant has been saved in not having had to pay a commercial provider. Similarly, when enrichment is established via acceptance or request, the court will accept a valuation reflecting the reasonable value of the service, which will typically be market value. The *construction* of market value needs to be viewed with caution. The limits on a defendant's entitlement to assert a lower valuation are a matter for debate.

Feminist scholarship has demonstrated a significant undervaluation of domestic labour or contributions in areas such as torts and equity. These categories provide useful points of comparison in understanding the mechanism employed by unjust enrichment to place a monetary worth on women's work. Graycar and others have shown that claims for compensatory damages tend to trivialise women's work within the home. Recognising the value of domestic care or service is often compromised by assumptions that it is either intrinsically less valuable, or is performed altruistically, or for pleasure. This reflects, not only stereotypical notions of women's work, but also (arguably) the deep structures of tort law that tends to devalue and minimise those losses that are more likely to be suffered by women.<sup>98</sup> In this sense, domestic work, performed by women, is not being treated seriously as equivalent to, or 'like', work performed outside of the home (by men).<sup>99</sup> For example, when considering a (female) plaintiff's loss of capacity to work in the home, Graycar argues the judicial technique has been to characterise this loss as non-economic, akin to a loss of capacity to engage in other leisure activities. In result, awards will likely be lower, as well as more vulnerable to restrictions in an environment that seeks to limit the awards for such non-economic losses.<sup>100</sup> The cases where the courts evaluate the loss of capacity to perform paid

<sup>96</sup> *Foreman* [2010] BCSC 228 [96].

<sup>97</sup> *Benedetti* [2013] 3 WLR 351; *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221; *Brenner v First Artists Management Pty Ltd* [1993] 2 VR 215.

<sup>98</sup> Critical work addresses the range of strategies employed to contain claims, whether it is through carving out areas that are seen to be 'non-core' of a particular field of law, or by applying ostensibly gender neutral rules that in fact play out so as to disadvantage female plaintiffs (and/or their family members). See also Chamallas and Wriggins, above n 6.

<sup>99</sup> We are not advocating for a simple formal equality or equivalence in terms of the valuation. Rather, at the very least, inequality that is based on a systematic devaluing of 'women's work' — work that is either primarily performed by women, or which is gendered 'feminine' — is unacceptable. See also the discussion below on market valuation.

<sup>100</sup> Graycar, above n 62; Regina Graycar, 'Compensation for Loss of Capacity to Work in the Home' (1985) 10 *Sydney Law Review* 528. Related to this category are cases discussed in Regina Graycar, 'Sex, Golf and Stereotypes: Measuring, Valuing and Imagining the Body in Court' (2002) 10 *Torts Law Journal* 1, which similarly regard women's loss of capacity in other areas of their lives as less significant or of lower value. Graycar points out that the picture is complicated by legislative

work display a parallel tendency. While these cases are not directly about the provision of care or domestic services, they are nevertheless relevant to considering the valuation of both care services (provided by women) and women's work more generally. These loss-of-capacity cases also treat women's attachment to the workforce as contingent on their familial role. Where such damages awards are reduced because of assumptions about workforce attachment, they are the complement to those cases that see care as about something other than work with a corresponding economic value.<sup>101</sup> There is a parallel gendered valuation of gratuitous care provided to a victim of tort.<sup>102</sup>

Similarly, within the family property cases, feminist analysis points to the inadequate recognition of the value of 'women's work' and the valuation of domestic services including care. Notwithstanding the introduction of more contemporary competing legislative frameworks, the domestic contributions of women, via the provision of care or other services, continue to be reified through equitable concepts and doctrines. While equity recognises non-financial contributions as a foundation for an interest in family property,<sup>103</sup> it has been argued that the valuation of those contributions remains problematic.<sup>104</sup>

One of the strengths of the unjust enrichment model is that it may offer less opportunity for courts (and defendants) to engage in the same strategies of devaluation identified in other areas of private law. An example is *Degelman*. Just as the court did not separate out the services, in the form of care provided by the nephew, into those provided out of love or familial obligation and those provided

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amendments that ameliorate the effect of decisions such as *CSR v Eddy* (2005) 226 CLR 1, but at the same time impose caps on the recovery of general damages. See Graycar, 'Damaging Stereotypes', above n 63.

<sup>101</sup> Graycar, 'Damaged Awards: the Vicissitudes of Life as a Woman' (1995) 3 *Torts Law Journal* 1; Regina Graycar 'Putting Gender on the Damages Agenda: Michael Chesterman's Contribution to Accident Compensation' (Sydney Law School Research Paper 08/68, University of Sydney, 2003) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1170056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1170056)>. See Chamallas and Wriggins, above n 6, ch 6.

<sup>102</sup> Regina Graycar, 'Women's Work', above n 63; Graycar, 'Damaging Stereotypes', above n 63. 'Gratuitous' here means not given in exchange for an agreed return, whether that be money or non-money (eg free rent and board, property, or other valuable thing). It is not necessary that such an exchange have the formal status, for example, of contract.

<sup>103</sup> *Allen v Snyder* [1977] 2 NSWLR 685 (common intention constructive trust); *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137 (unconscionability constructive trust); *Stack v Dowden* [2007] 2 AC 432; *Jones v Kernott* [2011] 2 WLR 1121 (common intention constructive trust). However, even with these trusts, protection is not universal. Sometimes services and/or household expenses are recognised and sometimes they are not.

<sup>104</sup> See, eg, Bottomley, above n 28; Joellen Riley, 'The Property Rights of Home-Makers under General Law: *Bryson v Bryant*' (1994) 16 *Sydney Law Review* 412; Nathaniel Y Khang 'S v W: The Potential Discrimination in the Quantification of Interests under the New Constructive Trust' (2006) 12 *Australian Property Law Journal* 267; Rebecca Probert, 'Equality in the Family Home' (2007) 15 *Feminist Legal Studies* 341; Conaghan, above n 30; see also Lisa Sarmas, 'Trusts, Third parties and the Family Home: Six Years Since *Cummins* and Confusion Still Reigns' (2012) 36 *Melbourne University Law Review* 216. This article is concerned with private law, but we acknowledge the range of overlapping legislative frameworks that now cover the division of property following the breakdown of relationships. It is important to note that many of the same difficulties of valuation of non-financial contributions have persisted within legislative schemes, but may also have been ameliorated by more explicit policies that recognise domestic work and care for children in assessing contributions to family assets, including superannuation.

‘on the footing of a contractual relation’,<sup>105</sup> the court approached the task of evaluating the services provided on a ‘purely business basis to any other person in the position of the respondent’.<sup>106</sup> There is no hint in the court’s reasoning that the familial relationship ought to detract from the nephew’s capacity to recover the ‘fair value of the services rendered to [the aunt]’.<sup>107</sup> Similarly, in *Foreman*, despite the acknowledgment of the mixed motives of the plaintiff, insofar as the court recognised the relationship of affection between the plaintiff and defendant, the court did not use this as a factor in determining (or diminishing) the claim.

We note that both of these cases involve claims where the services were provided by male family members or friends. There is thus a need to be cautious and to acknowledge that this apparent pattern of neutrality may not be borne out if the services had been provided by a female friend or family member. However, in *Schneider*<sup>108</sup> the carer *was* a daughter. Ramsay J concluded that the defendant Inge Kastenmacher (the mother) was not enriched.<sup>109</sup> The evidence is mixed. *Schneider* confirms the commitment to the market approach insofar as the court is suspicious of the inflation by the daughter of the value of her care,<sup>110</sup> but also offers a hypothetical example where it is more inclined to differentiate between services that are attendant on the family relationship and services that are provided non-gratuitously.<sup>111</sup>

Unjust enrichment’s adherence to the market measure is beguiling in its asserted simplicity. Market value is not neutral, giving rise to the following conceptual questions: (a) how does unjust enrichment law construct the relevant market value of services? and (b) to what extent does the liability model accommodate the defendant’s personal valuations of this enrichment in derogation of this initial market valuation? Gender is instantiated in both, either within the construction of the market valuation of those services, or within a defendant’s personal valuation of the enrichment.

## 1 Construction of Market Value

In *Benedetti*,<sup>112</sup> the Supreme Court of the United Kingdom has recently brought judicial scrutiny to the concept of market value in unjust enrichment. In deciding that market value is ‘the price which a reasonable person in the defendant’s position would have had to pay for the services’,<sup>113</sup> *Benedetti* arguably takes English law on a subtly different path from that in Australia, and in doing so some of the inherent tensions in the market construct are revealed.

<sup>105</sup> *Deglan* [1954] 3 DLR 725, 728 (Rand J).

<sup>106</sup> *Ibid* 729 (Rand J).

<sup>107</sup> *Ibid* 735 (Cartwright J).

<sup>108</sup> *Schneider* [2010] ONSC 5329 (Ontario Supreme Court of Justice) [18].

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* [19].

<sup>111</sup> *Ibid* [19/4] (Ramsay J): ‘I do not think that the Schneiders seriously expected to be compensated for driving the defendant to see Niagara-on-the Lake or taking her on holidays.’

<sup>112</sup> [2013] 3 WLR 351.

<sup>113</sup> *Ibid* 361 [17] (Lord Clarke quoting *Benedetti v Sawiris* [2010] EWCA Civ 1427 (16 December 2010) [140]; 380 [100] (Lord Reed)).



*Benedetti* concerned an informal agreement for the provision of commercial advice between a sophisticated businessman (Benedetti) and a commercial party (Sawiris and his associated companies). Because there was no enforceable contract for payment, Benedetti brought a claim in unjust enrichment against Sawiris. The trial judge valued the ordinary market value of these services to be €36.3 million. On the facts, enrichment was demonstrated<sup>114</sup> but Sawiris was found already to have returned this value to Benedetti through other payments so the claim ultimately was dismissed.<sup>115</sup> Despite agreeing that their analysis should commence with the price that a reasonable person in the position of the defendant would pay, the Justices of the Supreme Court divided on precisely how unjust enrichment constructs market value and the extent to which a particular defendant's freedom of choice is accommodated in the valuation exercise.

Lord Reed's model takes account of both the plaintiff as supplier and defendant as consumer of the service. It looks to what a reasonable person in the position of the defendant would be prepared to pay elsewhere in the market for a substitute service.<sup>116</sup> In this way the plaintiff is said to obtain the price she could have sold her service to another 'recipient in the same position' and the defendant will pay the amount he would have had to pay to acquire the same service from a different supplier.<sup>117</sup> The price agreed at between buyer and seller in reaching, in Lord Reed's model, this 'ordinary market value'<sup>118</sup> will take account of those factors which are ascertainable to the market on the basis of objective evidence,<sup>119</sup> including those characteristics of *both* the plaintiff and defendant, which will affect market price. These factors are said to inform the 'objective approach to valuation ... as the normal measure of a restitutionary award'.<sup>120</sup> Personal factors will relevantly include the defendant's 'age, gender, occupation ... if they bear on the price at which such a person could obtain the services in question in the market'.<sup>121</sup> Factors on the supply side include the 'availability and cost of similar services provided by alternative suppliers ... and prevailing rates and practices in the relevant market'.<sup>122</sup>

A slightly different framework is suggested by Lord Clarke who similarly interrogates the position of the defendant. However, Lord Clarke does not specifically direct us to the position of the plaintiff. The starting point for analysis is also that market value must be ascertained and that in making this determination 'the general test, or prima facie position, is that the court should apply an objective

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<sup>114</sup> The case went on appeal only on the question of valuation of enrichment. It was common ground between the parties that the other elements of the claim were satisfied: 'It is not disputed that Mr Benedetti did render services to Mr Sawiris which conferred a benefit on him and thus enriched him. The enrichment was unjust, or would have been if Mr Sawiris did not pay for the relevant services': *Benedetti* [2013] 3 WLR 351, 359 [11] (Lord Clarke).

<sup>115</sup> *Ibid* 380 [82] (Lord Clarke), 400–2 [143]–[150] (Lord Reed), 419 [221], 421 [229] (Lord Neuberger).

<sup>116</sup> *Ibid* 387 [100] (Lord Reed).

<sup>117</sup> *Ibid* 388 [101].

<sup>118</sup> *Ibid* 390 [108].

<sup>119</sup> *Ibid* 388 [102].

<sup>120</sup> *Ibid* 389 [103].

<sup>121</sup> *Ibid* 388 [101].

<sup>122</sup> *Ibid*.

test to the issue of market value'.<sup>123</sup> Lord Clarke expressed agreement with Etherton LJ in the Court of Appeal phase of the case<sup>124</sup> that this value will be 'the price which a reasonable person in the defendant's position would have had to pay for the services'.<sup>125</sup> In applying this test, a court is directed to look to the objective value of the benefit to any reasonable person in the same (fact specific) position as the defendant, and to this extent must apparently 'ignore a defendant's 'generous or parsimonious personality'.<sup>126</sup>

Australian unjust enrichment law does not draw these distinctions. In valuing the enrichment a court views its task as a straightforward exercise in determining the market value of the benefit.<sup>127</sup> As stated by Byrne J in *Brenner v First Artists' Management Ltd* (a case involving public relations and marketing services provided in the absence of a binding contract):

[T]he fair value of the work of the party will ordinarily be the remuneration calculated at a reasonable rate for the work actually done ... The assessment ... must have regard to what the defendant would have had to pay had the benefits been conferred under a normal commercial arrangement.<sup>128</sup>

This is a relatively un-nuanced inquiry. Unlike both models presented in *Benedetti*, which require some inquiry into the price a reasonable person *in the position of the defendant* might have to pay, Australian unjust enrichment law is relatively silent on this issue. There is a hint of this type of reasoning in *Brenner* where Byrne J emphasises that the overarching inquiry is to 'assess the sum which represents a fair and reasonable value of the benefit of the services performed'.<sup>129</sup> In constructing a test of *enrichment* (free acceptance), as distinct from the *valuation* of that enrichment, Byrne J recognises the position of the reasonable person as the recipient of services, the extent to which that person did or did not take available steps to reject the services in question and whether that reasonable person (ie the defendant) 'should have realised that a person in the position of the provider of the services would expect to be paid for them'.<sup>130</sup> However, market value is not developed further.

The acknowledgment in *Benedetti* of the complexities of determining 'market value' is welcome. At least three observations are possible. First, Lord Reed's recognition of those characteristics of the defendant, such as 'age, gender, occupation or state of health',<sup>131</sup> and those factors influencing the supplier,<sup>132</sup> makes explicit that a market price will be a function of many factors, including gender. Making explicit those variables which influence market value and

<sup>123</sup> Ibid 361 [16].

<sup>124</sup> Ibid 361 [17].

<sup>125</sup> [2010] EWCA Civ 1427 (16 December 2010) [140].

<sup>126</sup> [2013] 3 WLR 351, 361 [17] (Lord Clarke quoting Etherton LJ in *Benedetti v Sawiris* [2010] EWCA Civ 1427 (16 December 2010) [145]).

<sup>127</sup> *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221, 257, 263 (Deane J); *Brenner v First Artists Management Pty Ltd* [1993] 2 VR 215, 262–5 (Byrne J).

<sup>128</sup> *Brenner v First Artists Management Pty Ltd* [1993] 2 VR 215, 263 (Byrne J).

<sup>129</sup> Ibid 265.

<sup>130</sup> Ibid 260.

<sup>131</sup> *Benedetti* [2013] 3 WLR 351, 388 [101].

<sup>132</sup> Ibid.

therefore feed necessarily into the judicial valuation of services can only be a positive development. However, the examples given by Lord Reed of the potential impact of gender in valuation include a film star who purchases a designer dress at a discount and a costume designed for a pop artist.<sup>133</sup> The lessons of tort and equity cases<sup>134</sup> suggest these are far from the paradigm examples of risk. The hard cases are those where services are provided in a domestic setting.

The second point is to realise that much still depends on the factors that unjust enrichment is capable of taking into account when determining market value. Lord Reed notes in *Benedetti* that factors on the supply side including the ‘prevailing rates and practices in the relevant market [for substitute services]’ must be considered.<sup>135</sup> Deferring to or relying on the market to provide an appropriate valuation of domestic and caring work unavoidably replicates structural labour market inequalities. In noticing how women’s work might be valued in unjust enrichment, it would be naïve for commentary to acknowledge any benefits flowing from a market measure without taking into account the discursive and material configuration of the public and private spheres. In particular, feminist analysis would account for the ways in which the devaluation of domestic and caring services are reproduced *within* the market itself, as well as the ways that the gendered division of labour within the home is, at least in part, productive of this devaluation.<sup>136</sup> Perceptions about women’s weaker attachment to the workforce and the eliding of work and care that underpin the devaluation of women’s work in damages awards are of course implicated in the lack of parity in wages across sectors that are notionally gendered.<sup>137</sup>

Third, both Lord Reed and Lord Clarke identify particular characteristics of the parties, Lord Clarke going so far as to exclude the relative generosity or parsimony of the defendant.<sup>138</sup> Independent of the extent to which such factors feed into market value, and thus the valuation exercise, there is perhaps a risk that, in

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<sup>133</sup> *Ibid* 388 [101]–[102], 390 [108]. It would also be necessary to identify a service in the purchase of a dress.

<sup>134</sup> See, eg, *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

<sup>135</sup> *Benedetti* [2013] 3 WLR 351, 388 [101].

<sup>136</sup> The significance of the gendered division of labour within the home and its relationship to the valuation of work in the market has been a recurring feature of feminist scholarship, which explores the effects of discursive and actual oppositions such as those between public and private, family and market, and the implications for the valuing and commodification of care (including the intersection with analysis of neoliberal privatisation of care and other services). See, eg, Frances E Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983) 96 *Harvard Law Review* 1497. See also Marcia Neave, ‘Living Together — The Legal Effects of the Sexual Division of Labour in Four Common Law Countries’ (1991) 17 *Monash Law Review* 14; Marcia Neave, ‘From Difference to Sameness — Law and Women’s Work’ (1991–92) 18 *Melbourne University Law Review* 768; Susan B Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, 1997). See also Anne Barlow, ‘Configurations of Unpaid Caregiving within Current Legal Discourse in and Around the Family’ (2007) 58 *Northern Ireland Legal Quarterly* 251.

<sup>137</sup> See, in relation to Australia, Meg Smith and Andrew Stewart, ‘A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the Fair Work Act’ (2010) 23 *Australian Journal of Labour Law* 152; Patricia Todd and Alison Preston, ‘Gender Pay Equity in Australia: Where Are We Now and Where Are We Heading?’ (2012) 38 *Australian Bulletin of Labour Law* 251.

<sup>138</sup> *Benedetti* [2013] 3 WLR 351, 361 [17].

cataloguing these personal characteristics, a back door may be opened for an incorporation of gendered expectations and stereotypes.

## 2 *Valuation in derogation of market valuation*

Having arrived at a determination of the market valuation, the question arises as to what extent a defendant is permitted to reduce the valuation of the service received below market in order to reflect her own preferences? It is on this question that the starkest division occurred in *Benedetti*.

Lord Clarke invoked the language of subjective devaluation, holding that a defendant is entitled to ‘prove that he valued the relevant services ... at less than the market value’<sup>139</sup> in order to protect the defendant’s autonomy. Lord Clarke states that this is ‘not about the defendants’ intentions or expectations but is an ex post facto analysis of the subjective value of the services to the defendant at the relevant time’.<sup>140</sup> A defendant wishing to devalue a benefit received in this way could simply assert a lower valuation but this would in Lord Clarke’s view not be persuasive unless there has been evidence demonstrating ‘some objective manifestation of the defendant’s subjective views’.<sup>141</sup> It is up to the court to decide whether or not this lower figure is justified.<sup>142</sup>

The use of the label ‘subjective devaluation’ in this context is unfortunate. As commentators have noted,<sup>143</sup> properly understood the activity labelled ‘subjective devaluation’ is not a subjective inquiry into the personal preferences of the defendant. We are not, or at least, should not be, interrogating the subjective views and preferences of the defendant. All that the liability model can be attempting to ascertain is whether or not the defendant has in some way *indicated or signalled* that the service is valuable, not whether *it is* personally of value.

Lord Reed similarly acknowledges that it is possible that a particular defendant nonetheless might assert a valuation which is below market where that is necessary to protect the defendant’s ‘autonomy or freedom of choice’.<sup>144</sup> Lord Reed’s treatment of this issue is, with respect, to be preferred. He adopts an integrated approach, which ‘concentrates on whether the defendant was in some way responsible for the conferment of the benefit, and deals with the question of value as part of a holistic question of enrichment’.<sup>145</sup> The question of enrichment and the valuation of that enrichment are therefore to be dealt with in tandem. Lord Reed explicitly rejects the subjective devaluation approach taken by Lord Clarke, explaining that in his view the authorities do not support a principle by which enrichment is (de)valued according to the defendant’s ‘personal opinion of its value’.<sup>146</sup> Rather, in line with his approach of being even-handed to both plaintiff and defendant, services should not be valued on a basis which ‘depends on the

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<sup>139</sup> Ibid 361 [18].

<sup>140</sup> Ibid.

<sup>141</sup> Ibid 363 [23].

<sup>142</sup> Ibid 411 [187] (Lord Neuberger).

<sup>143</sup> Edelman and Bant, above n 42, 107–8; Bant above n 56, 374.

<sup>144</sup> *Benedetti* [2013] 3 WLR 351, 398 [138].

<sup>145</sup> Ibid 411 [187] (Lord Neuberger).

<sup>146</sup> Ibid 398 [137].

idiosyncrasies of one party'<sup>147</sup> (here the defendant). In Lord Reed's model therefore, a court will take into account the defendant's interest through the court's determination of what a reasonable person *in the position of the defendant* would have had to pay for a substitute service.

To the extent that the parties may have bargained for the service and reached a price perhaps, as in *Benedetti*, pursuant to a contract for services which is void or unenforceable, that putative contract price will have relevance only in the evidential sense. The price which the defendant would have been willing to pay and the plaintiff willing to provide the service are evidence of market value, but not determinative of it. There is of course the possibility that, contrary to the above discussion, the evidence indicates the defendant places a valuation on the services *above* market value. In the jargon of unjust enrichment, this has variously been described 'subjective overvaluation'<sup>148</sup> or 'subjective revaluation'.<sup>149</sup> That the liability model might admit such a possibility was rejected by all members of the Court in *Benedetti*,<sup>150</sup> and this must be right. The court is reversing the unjust enrichment of the defendant, not protecting the plaintiff's expectation interest. Unless the higher value signalled by the defendant's conduct is, for example, in some way relevant to a construction and valuation of market value, it should be irrelevant to the valuation of enrichment.

From a feminist perspective, Lord Reed's approach, which takes into account the position of both the plaintiff and defendant, and notes that valuation should not '[depend] on the idiosyncrasies of one party',<sup>151</sup> is preferable for a number of reasons. Most obviously, rejecting the possibility that a defendant can rely on their personal opinion of the value of the services seems to offer greater protection to a plaintiff who has provided care or services in a domestic context. Further, Lord Reed's holistic approach strongly resonates with one of unjust enrichment's potential strengths, which is its capacity to resist devaluing or excluding domestic services by reference to the imputed motives of the plaintiff. The commitment to, or preference for, a market model, in combination with the emphasis on the *conduct* of the defendant within unjust enrichment, *may* mean that services provided in a domestic context are less susceptible to marginalisation or devaluation by courts in such cases.

## IV Conclusions

This article commences a feminist critique of enrichment and seeks to enhance feminist engagement with private law. Our analysis is informed by a modern taxonomic approach to private law which looks through jurisdictional and

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<sup>147</sup> *Ibid* 394 [123].

<sup>148</sup> Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012) 158. See also Mitchell, Mitchell and Watterson, above n 50, 4–11.

<sup>149</sup> Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 88–9; *Benedetti* [2013] 3 WLR 351, 365 [27], 367 [34] (Lord Clarke) (save in 'exceptional circumstances'), 393 [120] (Lord Reid), 413 [193] (Lord Neuberger).

<sup>150</sup> *Benedetti* [2013] 3 WLR 351 [29] (Lord Clarke), 394 [121] (Lord Reed), 414 [195] (Lord Neuberger).

<sup>151</sup> *Ibid* 394 [123].

contextual categories to identify deeper structures as sources of rights and obligations. Unjust enrichment is one such deeper structure. To the extent that gendered forms and assumptions are instantiated in the four events — wrongs, unjust enrichment, consent and other — the consequences of gender may appear and operate differently. This observation is only possible because we are able coherently to separate liability in unjust enrichment from that which flows from wrongdoing and the other events. Ordering matters.

Bringing a feminist sensibility to the tests of enrichment reveals both strengths and weaknesses in the enrichment model. The possible protections offered against any tendency to devalue women's work lie in the model's focus on the conduct of the defendant. Notwithstanding the acknowledged limitations of market approaches, these protections are reinforced by the dominance of market measure as a method of valuation. There are, however, inherent risks in the enrichment model. The potential levers to devaluation and marginalisation of women's work include the model's reliance on such open textured constructs as necessity, request and (free) acceptance. Additionally, the tests of enrichment are capable of responding to the ebbs and flows of interpersonal relationships.<sup>152</sup> However, the very fact of this responsiveness paradoxically renders these tests vulnerable to the importation of gendered norms and expectations.<sup>153</sup> Judicial analysis of market value in unjust enrichment is only just beginning and, as shown by the decision of the Supreme Court of the United Kingdom in *Benedetti*, care is required.

Our analysis suggests the gendered norms that identify, construct and value such services in other areas of private law, such as torts, may not be present in unjust enrichment in the same way. This is a finding that demands further investigation, because it suggests that private law's treatment of 'women's work' is not undifferentiated. This in turn raises much deeper questions about the pre-conditions for a gendered response, and why some law does and other law does not deal with women's work in this way. One of the consequences of this finding is to offer to feminist scholarship another way of engaging with private law: one that is attentive to a deeper taxonomic ordering. There are also consequences for the unjust enrichment liability model. A feminist critique has the potential to offer valuable insights to the development of unjust enrichment. The critical lens offered by attention to legal taxonomy hopefully also includes a commitment to avoiding where possible gendered norms and structures. As noted by Lord Reed: '[unjust enrichment] law is at an early stage in its development, and ... it remains to be

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<sup>152</sup> A parallel observation is made by Bant when considering autonomy as an instrument in the case of a cognitively impaired defendant: 'autonomy-based enrichment concepts such as incontrovertible benefit (and corresponding assumptions about the character of money as enrichment) are unhelpful because they are premised on inapplicable assumptions regarding the defendants' capacities for independent action': Bant, above n 56, 377.

<sup>153</sup> Some scholars have argued that framing claims in unjust enrichment may offer strategic benefits for home-sharers seeking an interest in family property. See, eg, Simone Wong, 'Property Rights for Home-Sharers: Equity Versus a Legislative Framework' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001) 133, 138–9; Sarah Nield, 'Testamentary Promises: A Test Bed for Legal Frameworks of Unpaid Caregiving' (2007) 58 *Northern Ireland Legal Quarterly* 287. However, such arguments would need to be attentive to both the proper ordering of claims and the risks that may be present within the unjust enrichment model itself.

seen whether we have yet found the most suitable analytical scheme'.<sup>154</sup> To the extent that unjust enrichment is open to future development, this should include a desire to avoid replicating the errors manifest in other parts of the landscape.

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<sup>154</sup> *Benedetti* [2013] 3 WLR 351, 393 [119].