BOOK REVIEWS

Questioning the Role of Unjust Enrichment

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RESTITUTION: A NEW PERSPECTIVE

By Joachim Dietrich
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AS Professor Peter Birks has recently noted in this journal,[1] the retirements of Lord Goff and Professor Jones in September 1998 marked the end of an epoch in the development of the law of restitution. In this context, Birks asked himself: 'What four things most need to be said about the subject at this turn in its life?'[2] Importantly, each of the four questions subsequently discussed by Birks is inextricably linked to his understanding of the taxonomy of the law in general and, in particular, of the law of restitution. This is consistent with Birks' long-standing emphasis on the significance of taxonomy in legal analysis.[3] Proper understanding of the law of restitution is necessarily dependent on satisfactorily 'mapping' the law as a whole, and then locating and articulating the structure and content of the law of restitution within that wider legal framework.

1. P Birks 'The Law of Restitution at the End of an Epoch' (1999) 28 UWALR 13.
2. Ibid, 16.
3. See eg P Birks 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWALR 1; 'The Concept of a Civil Wrong' in DG Owen (ed) *Philosophical Foundations of Tort Law* (Oxford: OUP, 1995) 31; 'Property and Unjust Enrichment: Categorical Truths [1997] NZLR 623; 'Definition and Division: A Meditation on *Justinian's Institutes* 3.13' in P Birks (ed) *The Classification of Obligations* (Oxford: OUP, 1997) ch 1; 'Misnomer' in WR Cornish, R Nolan, J O'Sullivan & G Virgo (eds) *Restitution: Past, Present and Future* (Oxford: OUP, 1998) ch 1.

One of the central features in Birks' 'map' of the law of restitution is the concept of unjust enrichment. This is a concept which both unifies and explains otherwise seemingly unrelated and incoherent areas of the law. Birks' view of the relationship between restitution and unjust enrichment is now broadly accepted in academic writing both in England and Australia, to the point where it may 'fairly be said to represent academic orthodoxy in this area'.[4]

In this context, Joachim Dietrich's book *Restitution: A New Perspective*[5] is an important and challenging work for the new epoch in the law of restitution. In the first part of the book, Dietrich carefully examines and ultimately rejects the dominant taxonomy of the law of restitution; in particular, he rejects the usefulness of its central concept, unjust enrichment. In the second and positive part of the book, Dietrich offers, by way of replacement for unjust enrichment theory, 'a new perspective on restitution'.

In order to appreciate Dietrich's thesis, it is first necessary to outline the dominant taxonomy[6] of the law of restitution. In Birks' model, unjust enrichment is identified as a 'generic event' (of the same order as 'consent' and 'wrongs'), to which restitution of the relevant enrichment is the law's 'remedial response' (of the same order as 'compensation' or 'punishment'). Another way of stating this is that a goal of the law of unjust enrichment is restitution of the enrichment received.[7] Indeed, on Birks' analysis, restitution is the *only* goal of, or response to, unjust enrichment. Other goals or responses, such as compensation, are not possible. Conversely, however, restitution is not itself a 'mono-causal response'. It is not a response *limited* to unjust enrichment. Restitution can also be a response to other causative events, such as wrongs. It follows that restitution and unjust enrichment are not synonymous.

With this understanding, much of the effort of scholars, including Birks, over the last restitutionary epoch has been devoted to examining the structure and

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4. J Dietrich *Restitution: A New Perspective* (Sydney: Federation Press, 1998) 2; see also K Mason & JW Carter *Restitution Law in Australia* (Sydney: Butterworths, 1995) chs 2 and 3; R Goff & G Jones *The Law of Restitution* 5th edn (London: Sweet & Maxwell, 1998) 11-15; A Burrows *The Law of Restitution* (London: Butterworths, 1993) 1-7; G McMeel *Casebook on Restitution* (London: Blackstone Press, 1996) 1-4. Like Dietrich, IM Jackman's *The Varieties of Restitution* (Sydney: Federation Press, 1998) challenges the prevalent view. This recent and growing opposition among Australian writers to the dominant 'map' of the law of restitution would seem to have strong support from the High Court, especially Gummow and Finn JJ: see Jackman 'Foreword' and Dietrich 'Preface'.
5. Dietrich ibid.
6. Dietrich also discusses the position in Canada, where there is support for unjust enrichment as a cause of action in itself: ibid 15-17. However, to the extent that this may make any difference to the taxonomy of unjust enrichment, Dietrich's thesis as a whole is oriented towards the 'Birksian' taxonomy of unjust enrichment which is widely adopted in Australia and England.
7. Birks supra n 1, 17-27.

content of the event 'unjust enrichment'. The analysis that has been most widely adopted to date can be reduced to the following questions:[8] (i) Has the defendant been *enriched?* (ii) If so, has the enrichment been *at the plaintiff's expense?* (iii) If yes, are the circumstances such as to render retention of the enrichment by the defendant *unjust*? If the answer to each of these questions is yes, then, defences apart, the plaintiff is entitled to restitution of the particular enrichment (or benefit) received by the defendant.

The legal event, unjust enrichment, is therefore built around the concepts of 'enrichment', 'at the plaintiff's expense' and 'unjust factors'.[9] Of these, the most vociferously debated are 'enrichment' (what types of enrichment or benefit count?) and the 'unjust factors' (what circumstances call for restitution of benefits obtained at the plaintiff's expense?). In recent times, the debate has focused on the 'unjust factors'. Thus Birks states: 'The primary mission of the law of unjust enrichment is to create a typology of the facts which turn an enrichment into an *unjust* enrichment'.[10]

With this background, it is now possible to turn to Dietrich's thesis. Dietrich's main argument is that, when stripped down to its essentials, the event 'unjust enrichment' is without content. Far from providing a useful analytical tool for solving problems in restitution, unjust enrichment is simply a description of a conclusion reached after applying separate processes of reasoning. In seeking to build a coherent body of law, theorists like Birks have fallen into the trap of deducing the reason for, or cause of, a restitutionary response from the fact of the response itself. Dietrich asserts that the process of 'reasoning backwards from remedy' has led many, including Birks, to believe, wrongly, that 'a defendant who has been required to disgorge a benefit must have been unjustly enriched and that it is such unjust enrichment which justifies and explains the remedy'.[11]

Dietrich devotes the first part of his book to arguing this negative case. The argument is developed in a number of stages. First, he states that the historical basis for identifying unjust enrichment as a generic event is weak. Essentially, unjust enrichment has been formulated by academics chiefly as a tool to impose order on a series of unruly and unrelated areas of law and equity. Dietrich argues that while 'some *notion* of unjust enrichment has an undoubted historical pedigree, in much recent writing unjust enrichment purports to provide a theoretical construct for the law. In this regard, it is being asked to perform an essentially a-historical role'.[12]

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8. See eg Mason & Carter supra n 4, 203; Burrows supra n 4, 7; Goff & Jones supra n 4, 15.
9. Burrows supra n 4, 7.
10. Birks supra n 1, 24-25 (emphasis added).
11. Dietrich supra n 4, 92.
12. Ibid, 27 (emphasis in original).

The artificial birth of the doctrine becomes apparent, according to Dietrich, once closer attention is paid to the actual case law said to comprise and, importantly, said to be outside, the law of unjust enrichment. In Dietrich's view, the 'use of historical decisions to establish the "pedigree" of unjust enrichment theory is very selective: almost reverential status is given to ... *Moses v Macferlan*,[13] whereas cases referring to and relying upon other notions or concepts are largely ignored'.[14] Conversely, cases which do not fit unjust enrichment theory are criticised by unjust enrichment supporters as wrong. For Dietrich, this is 'a startling conclusion. The theory which supposedly explains a body of law is being used to sideline as inconsistent those "past" cases and rules which threaten the integrity of that theory and, particularly, its unifying and exclusive status'.[15]

In addition to this historical argument, Dietrich asserts that the purpose of many of the rules and doctrines now said to be encompassed within the law of unjust enrichment is to 'fill gaps' in the law and ameliorate the operation of rules and doctrines which might otherwise operate in a harsh or unfair way. This is an important and acceptable role in the legal process, one that is shared by equity. On this view, there is no reason why there should be one, single concept underlying the various rules and doctrines. Dietrich argues further that the sheer variety of ameliorative functions actually performed, and gaps filled, by restitutionary doctrines militates against the existence of one unifying theory.

The next step in the process of deconstructing the law of unjust enrichment comes through a sustained attack on the most hotly debated components of unjust enrichment theory, namely the concepts of 'enrichment' and 'unjust factors'. Here Dietrich identifies the crux of unjust enrichment theory as the reversal of enrichment: '[I]t seeks to unite liability rules which are said to have the uniform purpose of the reversal of benefits or enrichments unjustly gained'.[16] Identification of 'benefit or enrichment' is therefore crucial to working out when those liability rules operate. Dietrich argues that, given the importance of the concept of enrichment, it is significant that no unified approach to identifying it has been agreed among unjust enrichment theorists. Money apart, it is almost impossible for any of the tests of enrichment that have thus far been formulated to explain liability in all restitution cases. For Dietrich, this strikes at the heart of unjust enrichment as a useful analytical tool.

Dietrich goes on to argue that even cases involving restitution of monetary benefits do not necessarily support unjust enrichment theory. This theory assumes that any money benefits received by a defendant must have been obtained *at the*

13. (1760) 2 Burr 1005.
14. Dietrich supra n 4, 28.
15. Ibid, 29.
16. Ibid, 38.

expense of the plaintiff. It follows that restitution of a money *benefit* will generally equal the *loss* to the plaintiff. Dietrich argues that, given this equation between benefit and loss, liability rules which give rise to a remedy in the amount of the money received by the defendant may have either a restitutionary or compensatory purpose. Either is possible on the facts and neither is dictated by the form of the remedy.

The next target in Dietrich's thesis is the 'unjust factors'. Here he has two main complaints. The first is that, because unjust enrichment theorists have 'reasoned backwards' from remedy to identify the so-called unjust factors, the consequence is that unalike cases are treated alike. Unjust enrichment theorists assume that, because in particular circumstances a restitutionary remedy is given, the liability rule involved *must* have a restitutionary purpose. Dietrich claims this is fundamentally misconceived. Rules giving rise to apparently restitutionary remedies may have 'fundamentally different concerns',[17] such as remedying the plaintiff's loss.

The second complaint Dietrich makes again arises out of the problem he identifies with unjust enrichment theorists 'reasoning backwards' from remedy to unjust factor. He argues that this approach splits previously comprehensible and discrete doctrines into two, simply on the basis of 'different remedial outcomes'.[18] One of the new doctrines (identified on the basis that it gives rise to a restitutionary remedy) will be explicable on the basis of, and thus 'belong to', the law of unjust enrichment. The other doctrine will not so belong because it gives rise to, say, a compensatory response and so will have to find a home elsewhere in the legal landscape. Dietrich's point is that this unhelpfully destroys the original doctrine's coherent explanation, which recognised the possibility of a number of remedial responses (including restitution) to fulfil the doctrine's purpose. Dietrich calls this process 'the problem of doctrine excision'.[19]

A short book review does not permit Dietrich's negative thesis the detailed analysis and criticism that it deserves. On a general level, however, it is an intriguing blend of argument and analysis. In the course of substantiating his negative thesis, Dietrich gives not only a broad overview of the law of unjust enrichment, but also examines in more detail some of its elements. This discussion will prove useful for academic and practitioner alike.

Dietrich puts his negative thesis well. Despite the difficult subject matter, it is relatively easy to follow his arguments through his combination of explanation,

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17. Ibid, 77.
18. The example given is proprietary estoppel: ibid, 84-87.
19. Ibid, 82. Another consequence of this process is that separate doctrines operating in the one subject area are given disparate treatment, again on the basis of their remedial response (eg, pre-contractual dealings): ibid 83, 87-88.

analysis and illustration. This is no small achievement. Also, while admittedly polemical in nature, the work does generally identify and deal with opposing arguments in a considered way. This makes Dietrich's negative thesis all the more persuasive.

Against this largely positive background, the reviewer maintains a number of reservations. Dietrich's work 'started its "life" as a PhD thesis',[20] and understandably, in that context, it deals with some areas in rather less detail than would otherwise be desirable. The result is that much of his argument cannot, on its own terms, be more than a springboard for further research. For instance, Dietrich's historical analysis of unjust enrichment theory reflects in its brevity the fact that no one to date has completed a detailed historical analysis of this branch of the law. This lack of historical analysis means that Dietrich's argument that the event unjust enrichment is an 'a-historical academic construct' lacks weight. [21]

There are similar problems with Dietrich's argument that unjust enrichment theory treats unalike cases alike. Dietrich does not analyse Birks' breakdown of unjust factors into 'non-voluntary transfer', 'unconscientious receipt' and 'policy-motivated factors', an analysis which affords an argument that Birks' typology does indeed treat like cases alike. Rather, Dietrich takes 'a brief excursus into the law of duress'[22] to illustrate his argument that 'treating duress and mistake as essentially similar doctrines is but one example of a false unity created by an unjust enrichment theory'.[23] This approach is understandable in a polemical work, but it illustrates that much still needs to be done to fill the gaps in Dietrich's own account.

On the subject of gap-filling, the reviewer is not certain how much significance can be placed on this alleged role of the doctrines and rules discussed by Dietrich. In a sense, the identification of those doctrines and rules as 'ad hoc gap-fillers' presupposes the very thing that it is supposed to prove — namely, that there is no unifying doctrine of unjust enrichment which helps to explain the disparate rules and doctrines. It is here that the lack of any discussion of Birks' further breakdown of unjust factors into non-voluntary transfer, unconscientious receipt and policy-motivated factors is most keenly felt.

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20. Ibid, v.
21. A thorough critique of unjust enrichment theory would also require an historical and contemporary comparative analysis, given the firm historical and contemporary support for a law of unjust enrichment in many civilian jurisdictions. For a taste of contemporary civilian law on this issue: see B Dickson, 'Unjust Enrichment Claims: A Comparative Overview' in W Swadling (ed) *The Limits of Restitutionary Claims: A Comparative Analysis* (London: UKNCCL, 1997) 1-35.
22. Dietrich supra n 4, 78, where the author takes a view of duress which supports his thesis — a view which is by no means uncontroversial.
23. Ibid, 82.

These are relatively small criticisms of what is overall an extremely well argued position. Of more concern is a potential taxonomical criticism, which goes to the heart of Dietrich's thesis. As mentioned, Dietrich's chief criticism of the prevailing taxonomy of unjust enrichment theory is that unjust enrichment theorists have 'reasoned backwards' from remedy to identify the cause of restitution. Disappointingly, however, there is no exploration of why such theorists have managed to avoid that trap in relation to restitution for wrongs. Many unjust enrichment theorists recognise that restitution is multi-causal.[24] It would be surprising if, given that understanding, they were to make the elementary mistake of believing that the fact of restitution itself necessarily indicates that unjust enrichment was involved. This is an area which could have been more carefully explored by Dietrich as part of his negative thesis. As things stand, there is a lingering impression that Dietrich himself has not fully grasped the distinction between unjust enrichment (the event) and restitution (the response).

Notwithstanding these criticisms, the first part of Dietrich's thesis is a serious critique of prevailing unjust enrichment theory which deserves respect and sustained critical attention. In the second and positive part of his thesis, he offers an 'alternative framework for restitution'[25] which can be used instead of unjust enrichment theory in all but (perhaps) 'spontaneous mistake cases'. Dietrich states that, instead of 'reasoning backwards from remedy, [he] has sought to identify in the case law those events or causes, such as particular conduct of a defendant or plaintiff, or the relationship of the parties, or some external factor, which activate individual liability rules'.[26] This 'new perspective on restitution' has resulted 'in the identification of four broad categories within which liability rules claimed for restitution can be grouped'.[27]

Again, space does not permit a detailed discussion of the content of these categories. There does, however, seem to be a taxonomical problem with Dietrich's positive thesis which can be discussed without going into the detail of the new

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24. As Birks notes in relation to his own conversion to this view, all commentators must do so who accept the distinction between autonomous unjust enrichment and restitution for wrongs: see Birks supra n 1, 19.
25. Dietrich supra n 4, 92.
26. Ibid.
27. Ibid, 92-93. The categories are: (1) Fault-based liability: breach of contract-like duties (where legal obligations have been voluntarily assumed by the parties) or tort-like duties (where parties infringe standards of acceptable conduct). (2) The principle of just sharing: this applies where an unforseen (or unprovided for) contingency affects parties sharing a common interest. (3) Justifiable sacrifice: this principle applies to allow recovery in some circumstances where a party provides unsolicited services. (4) Innocent recipients: this is a residual category in which the concept of unjust enrichment may play a role. However, Dietrich prefers the notion that this category is concerned with achieving fair outcomes and does so through the operation of a property principle.

categories. As we have seen, Dietrich's negative thesis attacks the dominant taxonomy of the law of restitution and the role within it of the event 'unjust enrichment'. It follows, of course, that if unjust enrichment is removed as the relevant legal event in relation to particular rules and doctrines, those rules and doctrines have to be re-located within the law by reference to some other legal event(s). This is what Dietrich's positive thesis purports to do through the identification of his new legal categories.

The problem is that at least some of the new categories identified by Dietrich appear to belong to different categorical orders from unjust enrichment. In other words, Dietrich takes away the category of legal event known as 'unjust enrichment' without replacing it — and without finding new homes within other legal events (such as consent or wrongs) for the rules and doctrines once found within it.

For instance, in cases involving liability of innocent recipients of money or services (new category four: see supra n 27), Dietrich identifies 'the principle of achieving fair outcomes' as an important informing idea in the law. What, however, is the role of this principle? Dietrich stresses that it is not an 'operative principle which provides a means of analysis for determining liability in a given case'.[28] Rather, it is intended to operate only as an ideal, an informing idea of the law,[29] which operates at the point of determining the extent of the appropriate remedy.

The principle of achieving fair outcomes, therefore, operates as a *goal* of the law,[30] as part of the law that dictates the appropriate *response* to legal events. But what is the relevant *event*, now that we have cast aside unjust enrichment as a likely contender? Dietrich goes on to identify, in money cases, 'a *property principle* at work, which principle suggests that if it is possible to restore the plaintiff's "property" retained by the defendant, then ... the defendant clearly is not disadvantaged'[31] — and so, presumably, the goal of achieving fair outcomes has been met. He then states:

> Since the recovery of 'property' [in money cases] almost invariably takes the form of the restitution of its value ... unjust enrichment as an explanatory principle seemingly has an equally valid claim [to the property principle] to explaining money cases at least.[32]

It seems, therefore, that Dietrich views the property principle as being of the same order as, and thus a possible substitute for, unjust enrichment.[33] It is suggested,

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28. Ibid, 208.
29. Ibid.
30. Ibid. Dietrich argues that '[a]chieving "fair outcomes" and preventing "unjust enrichment" are *subtly different remedial aims*' (emphasis added).
31. Ibid.
32. Ibid.
33. Contrast this with P Watts 'Property and "Unjust Enrichment": Cognate Conservators' [1998] NZLR 151, 153, 157-159.

however, that this cannot be the case. Legal events, like unjust enrichment, can give rise to either personal or proprietary rights, or both. As Birks states:

> Rights can also be classified as personal (in personam) or proprietary (in rem). The latter are the subject of the law of property, the former of the law of obligation. An obligation is a personal right contemplated from the other end.[34]

'Property' belongs to the same category, it is of the same order, as 'obligations'. As a type of legal response, property belongs to a different legal category altogether from unjust enrichment. This is an example of category confusion.

The problem of category confusion may stem from the fact that, rather than simply confining himself to identifying new or alternative legal *events* to replace unjust enrichment, Dietrich also attempts to offer, as part of his positive thesis, a new perspective on the law of restitution (a legal *response*). In the reviewer's opinion, these tasks are neither synonymous nor co-extensive. It is not always obvious, however, that Dietrich is aware of the distinction and his discussion at times seems to slide between event and response (or remedy). The resulting category confusions make it difficult to use Dietrich's positive thesis as a replacement map for the one that he so successfully attacks in the first part of his book.

This is not to say that Dietrich's positive thesis is not interesting and useful. Rather, the criticism is that it does not consistently address the question left by the successful work done in the first part of the thesis — namely, if unjust enrichment is not the relevant event in relation to certain rules and doctrines, what is?

To sum up: Dietrich's work contains much which will be of value to academics and practitioners. It will no doubt serve as the starting point for further research and vigorous debate about the law of restitution as well as the law of unjust enrichment. If, however, the burden of the first part of Dietrich's thesis is accepted, the 'primary mission of the law of restitution' in this new epoch will be to embark on a new taxonomical enterprise. It is already widely accepted that restitution is multi-causal (that is, it responds to more than one legal event). If Dietrich's negative thesis is accepted, the project for the next epoch will be to identify the legal events which replace unjust enrichment in the new legal landscape.

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34. Birks supra n 1, 54-55.