Restitutionary Claims for the Appropriation of Property

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I. Introduction

In certain cases, when civil liability is imposed on the basis of unjust enrichment, the court will have decided, directly or indirectly either what things are property or in what way property may be acquired. At the highest level of abstraction, the law of property describes the dynamic existing between things and actions in time. At a lower level of abstraction, we can discern the outlines of two types of cases: where actions create acquisition rights and obligations in things which have the characteristics of property, and where the actions create things which themselves have the characteristics of property. Reducing that level of abstraction once again, we can distinguish two types of "property" cases which arise in the law of restitution: the *Pettkus* v. *Becker*[1] type, where the claimant who has conferred a benefit acquires (as an exchange) an interest in the defendant's property, and the *International News Service* v. *Associated Press*[2] type, where the plaintiff asserts that the defendant has appropriated a "thing" which has the characteristics of property, that the "thing" belongs to the plaintiff, and that the defendant must pay compensation for any benefit derived from his appropriation. It is at this level of abstraction that this article will analyze the relationship of property law principles and the restitutionary principle of unjust enrichment.

A. *Dispensing justice as a means of distributing property*

As a general rule, if two parties contributed to the purchase price of property and the legal title was taken in the name of one contributor then a chancery court would hold that both contributors had a beneficial interest in the property proportionate to their

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[1] At the date of printing, the judgments pronounced by the Supreme Court of Canada on December 18, 1980 had not been reported. Page references to *Pettkus* v. *Becker* are to the Reasons for Judgment issued by the Court. [The judgment is now reported at (1980) 19 R.F.L. (2d) 165.]

[2] 248 U.S. 215 (1918). The *International News Service* case was distinguished by Laskin C.J.C. in *MacDonald* v. *Vapor Canada Ltd* [1977] 2 S.C.R. 134, 149.

respective contributions.[3] It was presumed that a person did not make a gift to a stranger.[4] That presumption was reflected in the resulting trust which was imposed against the legal title-holder of the property in these circumstances. That presumption, however, was rebuttable by the legal title-holder who could prove that the claimant's contribution had been intended as a gift.[5] Thus a resulting trust was a burden-of-proof device which favoured the contributor who did not share legal title.

This traditional analysis has caused problems in matrimonial property cases.[6] The spouse's contribution has generally been an indirect financial one or in the nature of services performed.[7] In my view, the indirectness of the contribution created a causation problem which had not often appeared in the early resulting trust cases. Causation had not been a problem because it could be established that the claimant had paid money directly to the vendor who transferred the property to the defendant. The defendant did not deny the contribution of money but argued that it was intended as a gift. In the matrimonial property cases the legal title-holder of the property opposes that no contribution has been proved. The House of Lords, in *Gissing* v. *Gissing*[8] and *Pettitt* v. *Pettitt*,[9] found a solution in the "common intention" test. The test functioned primarily as a means to block the causation problem inherent in the defendant's argument. If both parties had intended that each should have a beneficial interest in the property acquired in the name of one, then the defendant could not be heard to say

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[3] See *Pettitt* v. *Pettitt* [1970] A.C. 777, 794 (H.L.) *per* Lord Reid. For a discussion of the traditional authorities, beginning with *Dyer* v. *Dyer* (1788) 2 Cox 92, 30 E.R. 42 (Ex.), see Lord Upjohn's judgment in *Pettitt* v. *Pettitt*, *supra*, 814-5.

[4] See Waters, *Law of Trusts in Canada* (1974), 277.

[5] Such presumptions were "readily rebutted by comparatively slight evidence" (*Pettitt* v. *Pettitt*, *supra*, note 3, 814 *per* Lord Upjohn).

[6] *E.g.*, the doctrine of advancement, which established a rebuttable presumption that a gift was intended when the husband transferred property to his wife, has since been questioned by the House of Lords in *Gissing* v. *Gissing* [1971] A.C. 886, 907 (H.L.) *per* Lord Diplock.

[7] For example, in *Pettitt* v. *Pettitt*, *supra*, note 3, 807, Lord Hodson said that "the husband does not become entitled to a share in the wife's property by occupying his leisure hours in the house or garden even though he enhances the value of the property." And in *Murdoch* v. *Murdoch* [1975] 1 S.C.R. 423, 436, Martland J., speaking for a majority of the Supreme Court of Canada, held that a wife who has done the work of "any ranch wife" had not acquired an interest in her husband's ranching operation.

[8] *Supra*, note 6.

[9] *Supra*, note 3.

that the claimant's "indirect" contribution had not given him or her a beneficial interest in the acquired property.[10]

Before *Pettkus* v. *Becker*,[11] the substantial weight of Anglo-Canadian law[12] would have supported the rule that acquisition rights and obligations in matrimonial property required evidence of a common intention between the parties, and in the absence of common intention the claimant was unable to establish a beneficial interest in the defendant's property.[13] In *Pettkus* v. *Becker* the six-member majority[14] held that the principle of constructive trust is to be treated as an independent acquisition device.

Miss Becker claimed a beneficial interest in real property held in the name of Mr Pettkus, the man with whom she had lived for nineteen years. During a fourteen-year period of their relationship, the real property had been acquired in Mr Pettkus's name and together the parties established a successful beekeeping operation. Dickson J. observed that during this time Mr Pettkus "freely accepted the benefits conferred upon him through [Miss Becker's] financial support and her labour."[15] The first issue was whether Mr Pettkus, as the recipient of these benefits, had intended to exchange an interest in his land for them. In light of *Murdoch* v. *Murdoch*[16] and *Rathwell* v. *Rathwell*,[17] the law had become "equivocal"[18] as

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[10] *Gissing* v. *Gissing*, *supra*, note 6, 908 *per* Lord Diplock.

[11] *Supra*, note 1.

[12] *Murdoch* v. *Murdoch*, *supra*, note 7; *Rathwell* v. *Rathwell* [1978] 2 S.C.R. 436; *Pettitt* v. *Pettitt*, *supra*, note 3; *Gissing* v. *Gissing*, *supra*, note 6. Historically, there is every indication that Chancery did not adopt an intention test in constructive trust cases: see Waters, *The Constructive Trust* (1964), 38-9.

[13] In *Gissing* v. *Gissing*, *supra*, note 6, 909, Lord Diplock said:

> Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household.

[14] The reasons for judgment given by Dickson J. were concurred in by Laskin C.J.C., Estey, McIntyre, Chouinard, Lamer JJ. The majority decided to abandon the English constructive trust which has been dominated by "the analogy-with-trust technique": see Waters, *supra*, note 12, 42.

[15] *Supra*, note 1, 13 *per* Dickson J.

[16] *Supra*, note 7.

[17] *Supra*, note 12.

[18] *Pettkus* v. *Becker*, *supra*, note 1, 5 *per* Dickson J.

to whether common intention was the exclusive test in matrimonial property cases.

Ritchie J. (Martland and Beetz JJ. concurring) avoided the problem by finding evidence of common intention and holding that Miss Becker had succeeded in establishing a resulting trust. But Dickson J. expressed the majority's dissatisfaction with the common intention test in unusually strong terms. "Fugitive",[19] "phantom"[20] and "artificiality"[21] are words used to describe common intention. Dickson J. stops short of abandoning the common intention test altogether and holds that on the evidence it was not established in this case. As a result, he concludes that "[i]f she is to succeed at all, constructive trust emerges as the sole juridical foundation for her claim."[22]

In *Gissing* v. *Gissing*[23] four Law Lords failed to distinguish between "implied, constructive or resulting trust". By contrast, the majority in *Pettkus* v. *Becker* have decided that a constructive trust may be imposed in circumstances where a resulting trust could not arise. What is the nature of this device which departs from the traditional definition of constructive trust as a substantive trust?[24] Dickson J.'s discussion of constructive trust is divided between the general nature of the device and the specific requirement for imposing one in a matrimonial property case.

A disturbing feature of the majority judgment is the high level of abstraction used to discuss the nature of constructive trust. The use of metaphors to define constructive trust may convey a visual impression but it does little to advance our understanding of the underlying legal principles. For example, Dickson J. opens his judgment on constructive trust with an anatomical metaphor: "[t]he principle of unjust enrichment lies at the heart of the constructive trust."[25] Next we are told that: "[t]he constructive trust has proven to be a useful tool in the judicial armoury."[26]

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[19] *Ibid.*, 6 *per* Dickson J.

[20] *Ibid.*

[21] *Ibid.*, 7.

[22] *Ibid.*, 11.

[23] *Supra*, note 6, 905 *per* Lord Diplock. Such a statement does not explain Chancery's remedies imposed in the form of a trust in cases where the defendant had acquired the plaintiff's property through fraud: see Waters, *supra*, note 12, 40.

[24] Waters, *supra*, note 4, 335-9.

[25] *Supra*, note 1, 11 *per* Dickson J.

[26] *Ibid.* Nonetheless, there was no Chancery decision equivalent to *Moses* v. *Macferlan*, and "there was never a theme behind the use of constructive trust by Chancery" (Waters, *supra*, note 12, 39).

We are reminded that "[t]he great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice."[27] In Martland J.'s opinion this view of constructive trust "would clothe judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guidelines."[28]

In my view, Dickson J.'s objection to the common intention test is not really that it is fugitive or phantom-like, but that it poses the wrong question. The intention of the parties is simply not the only concern in a matrimonial property dispute.[29] The central question is whether, in the circumstances, justice is served by a distribution of property acquired in a relationship "tantamount to spousal".[30] In effect, this empowers the courts to suspend traditional notions of intention and causation which underlie many common law and equitable principles. Every property owner who "freely accepts benefits" is at risk of a court deciding that fairness

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[27] *Ibid.* The gist of this view finds some support in Lord Wilberforce's judgment in *In re Baden's Deed Trust* [1971] A.C. 424, 451-2 (H.L.). In the nineteenth century the Chancery, like the common law courts, limited remedies to narrow and defined categories. But this "change of attitude, or practice", as Lord Wilberforce termed the decision in the time of Lord Eldon (*ibid.*, 452), did not affect the discretionary jurisdiction enjoyed by Chancery in the eighteenth century. In the twentieth century, judges should exercise equitable jurisdiction with less concern for technical categories established in the nineteenth century but like the "great masters of equity" who adapted "their creation [the trust] to its practical and commercial character" (*ibid.*). It might be noted that Lord Wilberforce did not sit in *Gissing* v. *Gissing* (*supra*, note 6), which was decided the same year as *In re Baden's Deed Trust.*

[28] *Supra*, note 1, 6 *per* Martland J.

[29] By contrast, in *Gissing* v. *Gissing*, *supra*, note 6, 906, Lord Diplock did not choose to distinguish the matrimonial property cases from the "many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction".

[30] *Supra*, note 1, 13 *per* Dickson J. Putting the issue in this fashion allows the court, in the words of Prof. Waters, "to think in terms of the act or event or occurrence lying behind the imposition of the constructive trust, and to cease to think (as traditionally is done in English law) of the abusing of relationships" (*supra*, note 12, 42).

In the view of the majority, the absence of a marital bond is not a proper basis to withhold the imposition of a constructive trust (*supra*, 14-5). The California Supreme Court's decision in *Marvin* v. *Marvin* 557 P. 2d 106 (Sup. Ct *in banco* 1976) was cited with approval. As for the legal rights and obligations arising out of cohabitation, *Watson* v. *Lucas* [1980] 3 All E.R. 647 (C.A.), Oliver L.J., dissenting, indicates a possible trend towards attaching enforceable rights, in limited cases, to the status of unmarried cohabitant.

demands a transfer of interest in that property to the person who conferred the benefit. Once introduced into the Canadian law of restitution, it is unlikely that constructive trust will be confined to matrimonial property cases.[31] For that reason, the *Pettkus* case was a "bad" case to make such an introduction. The parties were not married;[32] Quebec law, though possibly relevant, was not pleaded;[33] a reconciliation agreement between the parties was ignored;[34] the nature and scope of the claimant's contribution was in question;[35] and there was no promise or representation to, or suggestion by, the claimant during the fourteen-year period that she had an interest in the land.[36] Imposing a constructive trust in the face of these obstacles has major implications for a new conceptual relationship between personal and proprietary claims in restitution. For example, on the basis of *Pettkus*, it is open to argument that the nephew in *Deglman* v. *Guaranty Trust Co. of Canada & Constantineau*[37] ought to have been awarded an interest in his aunt's house rather than a personal judgment against her estate.

The specific requirement for imposing a constructive trust in *Pettkus* is explained by Dickson J.:

> where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[38]

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[31] The lower Canadian courts have already imposed constructive trusts in non-matrimonial cases. See, *e.g.*, *Goodbody* v. *Bank of Montreal & Lester* (1974) 4 O.R. (2d) 174 (H.C.); *B.C. Teachers' Credit Union* v. *Batterley* (1975) 61 D.L.R. (3d) 755 (B.C.S.C.). In a priority dispute over holdback payments the trial court judge's decision to impose a constructive trust to prevent fraud and unjust enrichment was reversed in a unanimous judgment by the Nova Scotia Supreme Court, Appeal Division: see *Re Union Construction Ltd and Nova Scotia Power Corp. Ltd* (1980) 111 D.L.R. (3d) 728, 747 (N.S.S.C., App. Div.) *per* Cooper J.A., who said: "[t]his is not a situation in which the concept of constructive trust applies." After *Pettkus* v. *Becker* it is not clear whether this traditional view of constructive trust may be doubted in the commercial priority cases.

[32] *Becker* v. *Pettkus* (1978) 20 O.R. (2d) 105 (C.A.) *per* Wilson J.A., *aff'd Pettkus* v. *Becker*, *supra*, note 1.

[33] *Supra*, note 1, 17-8 *per* Dickson J.

[34] *Ibid.*

[35] *Ibid.*

[36] *Ibid.*, 10.

[37] [1954] S.C.R. 725.

[38] *Supra*, note 1, 13 *per* Dickson J. In England a similar test has been employed by Lord Denning M.R. in *Greasley* v. *Cooke* [1980] 1 W.L.R. 1306

But the requirement presents a paradox for the Court. The terms "prejudice" and "reasonable expectation" indicate that the claimant must produce evidence of her "intentions" respecting the land. Yet earlier in Dickson J.'s judgment we find the majority's approval of the trial judge's finding that "there was no common intention, either express or implied."[39] Mr Pettkus's uncontradicted evidence was that neither he nor Miss Becker had ever suggested that she had an interest in the land. In these circumstances, the evidence suggests that Miss Becker could not have reasonably held an expectation in the property and, consequently, could not have been prejudiced by Mr Pettkus's retention of it.

Why did the majority hold that Mr Pettkus was unjustly retaining property in which Miss Becker was entitled to an interest? Three factors emerge as underlying the decision: the length of the relationship; the circumstances surrounding the acquisition of the property; the circumstances surrounding the use of the property. These factors provide some indication for the majority's finding that it was "fair" for Miss Becker to have a beneficial interest in the property owned by Mr Pettkus. With *Pettkus* v. *Becker*, the traditional guidelines provided by trust law are suspect, and the Canadian law of restitution assumes a new remedy of unknown dimensions. Instead of a principle we find an experiment: the distribution of property rights and obligations sanctioned by judges in the name of justice and fairness.

B. *The relevance of English law*

In *Orakpo* v. *Manson Investments Ltd*, Lord Diplock observed that "no general doctrine of unjust enrichment [is] recognised in English law."[40] But that doctrine is an important part of the Canadian law of restitution.[41] Acceptance of constructive trust as an equitable

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(C.A.). In that case a "proprietary estoppel" (in contrast to a constructive trust) was raised in favour of the person claiming a right to remain in possession of a house as against the legal title-owner. But, unlike *Pettkus* v. *Becker*, the English Court of Appeal did not grant her a beneficial interest in the property but allowed "her to stay on in the house as long as she wishes" (*ibid.*, 1312).

[39] *Supra*, note 1, 11 *per* Dickson J.

[40] [1978] A.C. 95, 104 (H.L.). In *Pettitt* v. *Pettitt*, *supra*, note 3, 795, Lord Reid did not think that the doctrine of unjust enrichment was much help in cases where one party improves the property of another.

[41] In Canadian law *Deglman* v. *Guaranty Trust Co. of Canada & Constantineau*, *supra*, note 37, is the milestone decision establishing unjust enrichment as part of the law of restitution.

remedy[42] and change of position[43] as an equitable defence are consistent with the view that the Supreme Court of Canada has recognized unjust enrichment as a basis of liability.[44] In view of this doctrinal difference between Canadian and English law the question arises whether the English cases provide an accurate guide for Canadian restitution cases.

In my view, the English cases serve three major functions in the Canadian law of restitution. First, an English case may serve a symbolic function. For example, cases such as *Moses* v. *Macferlan*[45] and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd*[46] are rarely cited by a Canadian court for what they held. Instead, selected passages from Lord Mansfield's or Lord Wright's judgments are quoted to support a third head of civil liability based on the principle of unjust enrichment.[47] The Canadian courts[48] have generally capitalized on these large generalizations to impose civil liability on the grounds of enrichment.

Second, a number of nineteenth-century English cases[49] provide an escape from the principle of unjust enrichment. The Canadian

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[42] *Pettkus* v. *Becker, supra,* note 1.

[43] *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd* [1976] 2 S.C.R. 147.

[44] An elaboration of this view has been made elsewhere: see Klippert, *The Juridical Nature of Unjust Enrichment* (1980) 31 U.T.L.J. 356.

[45] (1760) 2 Burr. 1005, 97 E.R. 676 (K.B.).

[46] [1943] A.C. 32 (H.L.).

[47] The symbolic use of these two English judgments may be found in a number of Supreme Court of Canada decisions: see *Deglman* v. *Guaranty Trust Co. of Canada & Constantineau, supra,* note 37, 794 *per* Cartwright J.; *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd, supra,* note 43, 12-3 *per* Martland J.; *County of Carleton* v. *City of Ottawa* [1965] S.C.R. 663, 669 *per* Hall J.; *Pettkus* v. *Becker, supra,* note 1, 11 *per* Dickson J.

[48] Following the lead established by the Supreme Court of Canada, a number of lower Canadian courts have taken refuge in the broad statements of Lord Mansfield and Lord Wright to support the imposition of civil liability: see, *e.g., Estok* v. *Heguy* (1963) 40 D.L.R. (2d) 88, 93 (B.C.S.C.) *per* Brown J.; *Arnett & Wensley Ltd* v. *Good* (1967) 64 D.L.R. (2d) 181, 182 (B.C.S.C.) *per* Gould J.; *Re Spears & Levy* (1974) 52 D.L.R. (3d) 146, 150 (N.S.S.C., App. Div.) *per* MacKeigan C.J.N.S.: *Hink* v. *Lhenen* (1974) 52 D.L.R. (3d) 301, 314-5 (Alta S.C., App. Div.) *per* Allen J.A.

[49] See, *e.g., Aiken* v. *Short* (1856) 1 H. & N. 210; 35 L.J. Exch. 321 (though a recent judgment by Goff J. in *Barclay's Bank Ltd* v. *W.J. Simms Son & Cooke (Southern) Ltd* [1979] 3 All E.R. 522 (Q.B.) casts doubt on Bramwell B.'s influential *dictum* in *Aiken*); *Falcke* v. *Scottish Imperial Ins. Co.* (1886) 34 Ch. 234 (C.A.); *Leigh* v. *Dickeson* (1884) 15 Q.B.D. 60 (C.A.). The escape-hatch cases, however, are not limited to the nineteenth century: see, *e.g., Morgan* v. *Ashcroft* [1938] 1 K.B. 49 (C.A.).

courts often employ such cases to justify a decision denying civil liability.[50] Such cases are cited as authority even though the English courts that decided them did not accept unjust enrichment as the basis of liability in a restitution action. The use of these English cases in this fashion indicates that Canadian courts have not always accepted that liability may be *denied*, as well as supported, on the basis of unjust enrichment theory.[51] That problem is avoided by reverting to the escape-hatch technique in which Canadian courts capitalize on the narrow common law approach to liability.

Finally, the English cases may ground an alternative basis of liability.[52] The court may avoid the question of whether the claimant is entitled to recover on the basis of unjust enrichment by upholding his claim on the narrow common law or equitable principles applied in the English cases. While the claimant succeeds, he does so on a basis which would be difficult to reconcile with the large generalizations contained in the leading cases.

In *Pettkus* v. *Becker*[53] all three functions may be found. *Moses* v. *Macferlan*[54] is a touchstone in the majority's effort to expand unjust enrichment remedies so as to include the constructive trust. Of course, the money-had-and-received action considered by Lord Mansfield in the King's Bench could be distinguished on a number of grounds.[55] But to distinguish *Moses* v. *Macferlan* is to ignore

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[50] See, *e.g.*, *City of Moncton* v. *Stephen* [1956] 5 D.L.R. (2d) 722, 723 (N.B.S.C., App. Div.), where Bridges J. distinguishes both *Deglman* and *Fibrosa* on their facts, and applies principles from the nineteenth-century English cases. While the cases are not cited in Bridges J.'s judgment, those decisions are reflected in the English textbooks which are cited (*ibid.*, 723-4). See also *Arding* v. *Buckton* (1957) 6 D.L.R. (2d) 586 (B.C.C.A.) *per* Sheppard J.A.; *Ings* v. *Industrial Accept. Corp.* [1962] O.R. 454 (C.A.) *per* McGillivray J.A.; *Krebs* v. *World Finance Co. Ltd* (1958) 14 D.L.R. (2d) 405, 408-9 (B.C.C.A.) *per* O'Halloran J.A.; *Chimo Structures Ltd* v. *Canadian Pacific Ltd* [1977] 78 D.L.R. (3d) 210, 213-4 (B.C.S.C.) *per* Legg J.; *Pettkus* v. *Becker*, *supra*, note 1, 4 *per* Martland J.

[51] Compare the use of English authority by Martland J. in *Pettkus* v. *Becker*, *supra*, note 1, with his use of the same authorities in *Rural Municipality of Storthoaks* v. *Mobil Oil Ltd*, *supra*, note 43.

[52] See, *e.g.*, *Hydro Electric Commission of Nepean* v. *Ontario Hydro* (1979) 22 O.R. (2d) 137, 159 (H.C.) *per* Craig J.; *Parklane Private Hospital Ltd* v. *City of Vancouver* (1972) 33 D.L.R. (3d) 169, *aff'd* [1975] 2 S.C.R. 47 (*sub nom. A.-G. B.C.* v. *Parklane Private Hospital Ltd*).

[53] *Supra*, note 1.

[54] *Supra*, note 45.

[55] This is a favourite technique, adopted along with the English cases, which functions as an escape-hatch from unjust enrichment-based liability: see note 50, *supra*.

the special function of such a case. For the minority in *Pettkus*, the decisions of the House of Lords in *Gissing*[56] and *Pettitt*[57] gave alternative grounds for imposing liability against Mr Pettkus and allowed them not to decide whether unjust enrichment was the basis of liability. The majority held that because of evidential problems with intention, the claimant could only succeed on the basis of a constructive trust imposed to prevent unjust enrichment. Martland J. replied that the majority's approach is inconsistent with the English cases that permit an escape from liability for unjust enrichment.

The debate in *Pettkus* v. *Becker* does little to clarify the nature of unjust enrichment or constructive trust as an equitable remedy. This is the legacy of the three functions accorded to English cases in the Canadian law of restitution. The lower courts are left to decide whether to follow the large generalization or the narrow common law category approach to liability. In this climate there is a risk that unjust enrichment will be seen as a legal slogan or conclusion.

C. *The English concept of benefit*

The concept of benefit is essential to any notion of unjust enrichment. In *Pettkus* v. *Becker*, Dickson J. turns to the judgments of Lord Halsbury and Lord Macnaghten in *Ruabon S.S. Co. Ltd* v. *London Assurance*[58] to support his observation that "[t]he common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another."[59] In this there is a danger that other courts might view this approval of an English benefit case as opening the door to other English benefit cases which function as an escape-hatch.

As a control device,[60] benefit, along with voluntariness and volition, establishes the scope of civil liability available in a restitutionary action. The basic premise of all theories of benefit is that the defendant has received a benefit which he cannot justly retain, but the interpretation of this premise has raised controversy. The English courts divided over the meaning of benefit in much the

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[56] *Supra*, note 6.

[57] *Supra*, note 3.

[58] [1900] A.C. 6 (H.L.).

[59] *Supra*, note 1, 12 *per* Dickson J.

[60] The term "control device" was used by Prof. Fleming in analyzing the mechanisms which limit liability in negligence (*Remoteness and Duty: The Control Devices in Liability for Negligence* (1953) 31 Can. Bar Rev. 471, 474).

same way as they had done in the law of quasi-contract. In several respects, the definitional struggle over benefit opposes the advocates of Lord Mansfield's view of money had and received[61] and proponents of a restricted approach to quasi-contract.[62] Since this debate is often repeated in Canadian restitution cases, there is some interest in examining two influences which have shaped the English concept of benefit: the application of the maxim *actio personalis moritur cum persona* and the historical jurisdictional rivalry between the common law and chancery. To understand these influences is to gain a perspective on the limitations inherent in applying English cases in a Canadian restitution action where the issue is whether a benefit has been conferred on the defendant.

1. Actio personalis moritur cum persona

The origins of the maxim *actio personalis moritur cum persona* are unclear. Apparently, it did not come into English law from Roman or Canon law.[63] According to Winfield, "[t]he textbooks and decisions limit it to trespass or torts, and usually to trespasses of a personal character."[64] The maxim is said to reflect an early attitude that did not distinguish between civil and criminal proceedings;[65] a right to personal retribution belonged to the person who suffered the wrong and that right would have been satisfied with the wrongdoer's death. "Death pays all when the criminal has gone."[66] But a personal representative was not held *personally* culpable for the deceased's crime. The effect of the maxim was to restrict rights akin to vendetta to the lifetimes of the wrongdoer and his victim, and not to allow them to continue among their

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[61] See Wright, Comment [1938] Camb. L.J. 305; Wright, Book Review [*Restatement of the Law of Restitution*] (1937) 51 Harv. L. Rev. 369; *Brooks Wharf & Bull Wharf Ltd* v. *Goodman Brothers* [1937] 1 K.B. 534 (C.A.); *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd, supra,* note 46, 61 *per* Lord Wright. Lord Denning has continued in the same tradition: see Denning, *The Recovery of Money* (1949) 65 L.Q.R. 37; *Hussey* v. *Palmer* [1972] 3 All E.R. 744 (C.A.); and *Greenwood* v. *Bennett* [1973] Q.B. 915 (C.A.) *per* Lord Denning. Sir Robert Goff, like Lords Wright and Denning, has made a significant contribution to rehabilitate Lord Mansfield's approach in England: see Goff & Jones, *The Law of Restitution,* 2d ed. (1978), and *B.P. Exploration Co.* v. *Hunt (No. 2)* [1979] 1 W.L.R. 783, 839 (Q.B.).

[62] See, *e.g.,* Holdsworth, *Unjustifiable Enrichment* (1939) 55 L.Q.R. 37.

[63] Holdsworth, *History of English Law,* 5th ed. (1942), Vol. III, 576; Winfield, *Death as Affecting Liability in Tort* (1929) 29 Colum. L. Rev. 239, 244.

[64] Winfield, *supra,* note 4, 248.

[65] *Ibid.,* 240. See also Brickey, *The Jurisprudence of Larceny: An Historical Inquiry and Interest Analysis* (1980) 33 Vanderbilt L. Rev. 1101, 1114-5.

[66] *Ibid.,* 249.

relatives. One plausible explanation for the origin of the maxim lies in the Anglo-Saxon use of blood-feud and lynching to resolve disputes.[67] Perhaps the maxim was introduced by the Normans to contain and limit the customs of the people they had conquered. But once the judiciary had become entrenched, then it was not surprising to find pressure for limiting the types of cases covered by the maxim. Beginning in 1267 with the *Statute of Marlborough*, Parliament enacted legislation which would ultimately confine the maxim to narrow categories of cases.[68] The legislative changes reflected a distinction between tort and criminal liability and, perhaps more importantly, the institutionalization of personal retribution in damage awards which compensated the victim for his loss.

The maxim, however, did not apply to the common law action of *assumpsit*.[69] Holdsworth's view was that common law barristers excluded the maxim from their *assumpsit* action because they feared "the chancellor's growing jurisdiction".[70] But the common law barrister had to show the wrongdoer's estate had been enriched.[71] What was historically a jurisdictional dispute between common law and chancery barristers may offer one explanation for the definition of benefit and the difficulty in basing civil liability on a generalized right of action. The concept of benefit in English law was partially developed in actions begun in tort where the defendant invoked the maxim *actio personalis moritur cum persona.* The application of that maxim has had an impact on the orientation of quasi-contract law.

2. Jurisdictional rivalry

Lord Mansfield's view of benefit allowed that a restitutionary action could be established apart from actions in contract or tort. In *Hambly* v. *Trott*[72] the plaintiff brought an action in trover against a tortfeasor's estate to recover damage for the conversion of the plaintiff's property. The defendant pleaded the old maxim of law *actio personalis.* Thus, because trover was an action in tort, the plaintiff's claim could not succeed against the administrator. Lord Mansfield viewed trover as only in the form of a tort action. The substance of trover was, in his Lordship's view, an action

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[67] Rembar, *The Law of The Land* (1980), 92.
[68] Holdsworth, *supra,* note 63, 578-9.
[69] Winfield, *supra,* note 63, 249.
[70] Holdsworth, *supra,* note 63, 579.
[71] *Sherrington's Case* (1583) Savile 40, 123 E.R. 1000 (C.P.).
[72] (1776) 1 Cowp. 371, 98 E.R. 1136 (K.B.) [hereinafter cited to E.R.].

to try property and akin to money had and received.[73] Lord Mansfield defined the distinction between an action in tort and one in quasi-contract:

> Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc. there, the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, *property* is acquired which benefits the testator, there an action for the value of the property shall survive the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.[74]

Hambly v. *Trott* was an attempt to rationalize the conceptual boundaries between tort and quasi-contract. But during the nineteenth century Lord Mansfield's views were not to prevail in English courts.[75] In *Phillips* v. *Homfray*,[76] the Court of Appeal applied technical restraints to the definition of benefit, and by the end of the nineteenth century a general theme emerged from the English cases that quasi-contract was an appendage to the law of contract and tort.[77] Indeed, this philosophical disposition to cannibalize unjust enrichment for contract or tort has profoundly influenced the development of English law. Lord Mansfield's vision of unjust enrichment as an independent basis of liability requires a theory of benefit consistent with that ideal. There is, however, a practical consideration raised by Lord Mansfield's approach which is not expressed in the cases: does the solicitor brief a chancery or common law barrister? Such a theory does not address the potential jurisdictional dispute between the chancery and the common law courts after *Slade's Case*.[78] By contrast, as the wayleave cases

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[73] *Ibid.*, 1137.

[74] *Ibid.*, 1139.

[75] See *Utterson* v. *Vernon* (1792) 4 T.R. 570, 100 E.R. 721 (K.B.); *Walker* v. *Constable* (1798) 1 Bos. & Pul. 306, 126 E.R. 919 (C.P.); *Sanders* v. *Vanzellar* (1843) 4 Q.B. 260, 114 E.R. 897. Yet other early decisions questioned the authority of *Moses* v. *Macferlan, supra,* note 45; see *Cooth* v. *Jackson* (1801) 6 Ves. Jun. 12, 39, 31 E.R. 913 (Ch.); *Johnson* v. *Johnson* (1802) 3 Bos. & Pul. 162, 169, 127 E.R. 89 (C.P.); *Miller* v. *Atles* (1849) 3 Ex. 799, 154 E.R. 1068. Moreover, in the nineteenth century there was a considerable decline in the Chancery's willingness to exercise the broad discretionary jurisdiction asserted in the eighteenth century: compare *Warburton* v. *Warburton* (1702) 4 Bro. P.C. 1, 2 E.R. 1 (H.L.) with *Kemp* v. *Kemp* (1801) 5 Ves. Jun. 849, 31 E.R. 891 (Ch.).

[76] (1883) 24 Ch.D. 439 (C.A.).

[77] See, *e.g.*, *Sinclair* v. *Brougham* [1914] A.C. 398 (H.L.).

[78] (1602) 4 Co. Rep. 912, 76 E.R. 1072 (K.B.). See also Baker, *An Introduction to English Legal History*, 2d ed. (1979), 98; Waters, *supra,* note 12, 9.

illustrate,[79] the English courts willingly absorbed the principle of unjust enrichment into a theory of damage in trespass actions. Ironically, in so far as the concept of benefit operated within the confines of a tort action, the English courts encompassed a broader definition than would have been the case if the action had sounded in quasi-contract. Thus, a claimant was likely to use reasoning similar to unjust enrichment (although he would not necessarily employ those words) as a means of defining and measuring damages. But damages were compensation for a tort, not a quasi-contractual remedy. Because the courts were divided into chancery and common law, the litigant might face a double bind. For example, the claimant who elected to pursue a quasi-contractual remedy in the common law courts would face the rule that a contract would not be implied against a trespasser.[80] If he tried to bring a bill in equity on the basis of money had and received or *quantum meruit*, he would have been non-suited.[81] For the claimant who wanted an accounting of profits for the thing appropriated, he was required to invoke the jurisdiction of chancery. Thus, the claimant would have avoided the common law *assumpsit* and brought his action in conversion, detinue or trespass in the chancery.

Like American courts,[82] it appears likely that Canadian courts will develop a concept of benefit which recognizes the status of unjust enrichment as a basis of liability independent of contract and tort. There have been few Canadian cases[83] which have addressed the issue of benefit. But after *Deglman* we can expect the Canadian

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[79] Confusion in the state of land titles produced a number of the so-called wayleave or mesne profit decisions. See, *e.g.*, *Whitwham* v. *Westminster Brymbo Coal & Coke Company* [1896] 2 Ch. 538 (C.A.); and *Jegon* v. *Vivian*, (1871) 6 L.R. 742 (L.C.). In *Strand Electric & Engineering Co. Ltd* v. *Brisford Entertainments Ltd* [1952] 2 Q.B. 246, 254, Lord Denning extended the principle from the wayleave cases to cases involving the detention of goods.

[80] *Phillips* v. *Homfray, supra,* note 76, 461-2 *per* Bowen L.J.

[81] See *Lamb* v. *Cranfield* (1874) 43 L.J.N.S. 408 (Ch.) *per* Jessel M.R.

[82] The classic American case is *Raven Red Ash Coal Co.* v. *Ball* 39 S.E. 2d 231 (Va 1946), which Prof. Palmer characterizes as "one of the most important modern cases which has allowed quasi-contractual recovery" (*Law of Restitution* (1978), Vol. I, 77-8). See text at note 109, *infra,* for a discussion of *Raven Red.* There are, however, American decisions which have adopted the restrictive interpretation found in *Phillips* v. *Homfray*: see *Schillinger* v. *United States* 155 U.S. 163 (1894).

[83] See *Estok* v. *Heguy, supra,* note 48; *McCarthy Milling Co. Ltd* v. *Elder Packing Co. Ltd* [1973] 2 O.R. 96 (H.C.); *Hazlewood* v. *West Coast Securities Ltd* (1975) 49 D.L.R. (3d) 46 (B.C.S.C.), *aff'd* (1976) 68 D.L.R. (3d) 172 (B.C.C.A.), which are cases where the scope of benefit has been considered.

courts to establish the scope of liability, in part, by identifying what is meant by benefit. While there are many possible meanings for the term benefit,[84] three major theories provide a range of the potential meanings: strict liability, volitional liability and incontrovertible liability.[85] This article will analyze the first of these theories. The focus will be on benefits acquired by the wrongful appropriation of the plaintiff's property, and in these circumstances the principle of unjust enrichment takes on the nature of strict liability. Since strict liability is generally the exception rather than the rule, this type of restitutionary action demands careful attention in an area that touches upon fundamental ideas in the notion of civil liability.

Under the general heading of strict liability, we will consider the types of restitution cases which share a theoretical and historical heritage with the law of torts. The notion of strict liability allows the plaintiff to dispense with the burden of showing that the defendant had a particular motive or knowledge in obtaining a benefit.[86] An expansive application of strict liability would make restitution substantially more coercive for defendants than either contract or tort liability. Therefore, in defining the scope of benefit, the challenge in the law of restitution has been to develop a distinct basis of liability which will not subvert the principles of civil liability in contract and tort. Whether a defendant is strictly liable for a benefit raises a crucial question: what role ought the defendant's conduct play in determining civil liability in restitution?

II. The concept of benefit in tort damages

As a general rule, where a defendant, regardless of motive or knowledge appropriates the property of the plaintiff, the principle of unjust enrichment will make the defendant strictly liable on the basis that he has received a benefit.[87] While the property-interest theory represents the orthodox explanation for imposing unjust enrichment, the scope of the theory has been unsettled in

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[84] See Sullivan, *The Concept of Benefit in the Law of Quasi-Contract* (1975) 64 Geo. L.J. 1, 25; Palmer, *supra*, note 82, 44; Goff & Jones, *supra*, note 61, 14-6.

[85] See Jones, *Restitutionary Claims for Services Rendered* (1978) 93 L.Q.R. 273.

[86] Fleming, *The Law of Torts*, 5th ed. (1977), 38; and *Winfield and Jolowicz on Tort*, 11th ed. (1979), 335; Fridman, *Introduction to the Law of Torts* (1978), 91-4.

[87] Yet it will be open for the defendant in certain cases to contend that the "thing" appropriated was not property: see *International News Service* v. *Associated Press*, *supra*, note 2.

English law. The terms "appropriation" and "property" have invited debates about the relationship between modern liability in torts and restitution.[88] Historically, the property-interest theory has been used to accommodate a widely divergent approach to the issue of benefit.

Phillips v. *Homfray*[89] is a classic case of the hindered development of restitution as a distinct area of English law.[90] The case itself spans a generation of lawyers and judges over the twenty-five year period it was before the English courts. In 1866 the plaintiffs, owners of a farm, brought suit against three defendants, Homfray, Fothergill and Forman. The form of the action was in trespass. The defendants, who were in the coal-mining business, had removed coal and ironstone from under the plaintiffs' land and had used roads and passages under that land to transport minerals. By 1871 the plaintiffs had obtained a decree which declared *inter alia* that Homfray and Fothergill (Forman having died in 1869) were liable to compensate the plaintiffs for the use of all the roads and passages under the farm. The decree ordered inquiries to determine the amount for wayleave and royalty. The inquiry had apparently not been completed ten years later when Fothergill died. The plaintiffs sought to continue action against Fothergill's executrix in 1881. Clearly, if there had been final judgment for an ascertained amount against Fothergill, it would have been enforceable against his estate. Because the inquiries were outstanding under the decree of 1871, at the date of Fothergill's death, the judgment was only interlocutory. Since the plaintiffs sought to continue their original action against the estate rather than enforce a final judgment, the executrix relied on the maxim *actio personalis moritur cum persona*; that is, the trespass action for wayleave and royalty compensation lapsed at the time of Fothergill's death. In 1883, the executrix brought a motion to have all proceedings under the inquiries stayed. In resisting that motion, the plaintiffs asserted that the maxim relied upon by the defendant's estate applied only to simple tort. Moreover, citing *Hambly* v. *Trott* for support, the plaintiffs stated: "The law is well settled that where

[88] The nineteenth-century view of "appropriation" and "property" has been criticized by a number of academic writers. See, *e.g.*, Beatson, *The Nature of Waiver of Tort* (1979) U.W.O. L. Rev. 1, 19; Sullivan, *supra*, note 84, 8; Goff & Jones, *supra*, note 61, 474-8; Palmer, *supra*, note 82, 78-80.

[89] *Supra*, note 76. *Phillips* v. *Homfray* is generally regarded as the leading case on "waiver of tort".

[90] See *Sinclair* v. *Brougham*, *supra*, note 77, which is consistent in principle with the restrictive view of quasi-contract taken by the Court of Appeal in *Phillips* v. *Homfray*.

the estate of the deceased wrongdoer had derived a profit from the wrong done, the rule does not apply. The right to recover the profit made as damages survives as against the executor of the wrongdoer."[91]

Pearson J. refused the motion and ordered that inquiries respecting the deceased tortfeasor's use of the roads and passages under the farm continue against his estate. Like Lord Mansfield before him, Pearson J. was not prepared to allow the plaintiffs' substantive right to be determined by the form of action.[92] The inconsistency in the defendant's case was considered in the following passage:

> [the executrix] ... admits that she is properly brought here, and is properly liable ... for the value of the coal dug out of the property, and if she is liable for that I cannot understand how she can escape liability for compensation for the use of wayleave across the Plaintiff's property. It seems to me to stand on exactly the same footing, and to be governed by the same principle: it is not damages in the ordinary sense for personal injuries inflicted, but simply compensation which has to be paid out of the estate of the testator, because that estate, in one way or another derived profit from the use of the wayleave ... .[93]

Several points raised in Pearson J.'s judgment deserve emphasis. First, by using the land of another the tortfeasor acquires a benefit, and compensation of such a benefit rests on a principle independent of tort. Second, it must not be overlooked that the plaintiffs had obtained a decree making the tortfeasor liable to compensate for wayleave and royalty. Third, if the use of the underground passages had been a benefit during the tortfeasor's lifetime, how can it be said the tortfeasor's estate derived no benefit? In effect, to put Pearson J.'s judgment in modern perspective, Fothergill's estate had been unjustly enriched by the receipt of a benefit. The Vice-Chancellor's decree of 1871 in favour of the plaintiffs is compatible with liability for unjust enrichment. Therefore, seventeen years into the lawsuit, why make the plaintiffs bring a new form of action (*i.e.*, money had and received)? Two of the three original defendants had died during this period, and certainly requiring a new action would have caused evidential problems for the plaintiffs.

The Court of Appeal allowed the executrix's appeal from Pearson J.'s judgment. The following two passages from Bowen L.J.'s judgment indicate a considerably different view of what is a benefit in a quasi-contractual action:

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[91] *Supra*, note 76, 443.
[92] *Ibid.*, 448.
[93] *Ibid.*, 446-7.

> The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys.[94]

In applying that principle to the case, Bowen L.J. observed:

> The deceased, ... by carrying his coal and ironstone in secret over the Plaintiffs' roads took nothing from the Plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased Defendant been necessarily swollen by what he has done. He saved his estate expense, but he did not bring into it any additional property or value belonging to another person.[95]

In dissent, Baggallay L.J. stated that "nothing in the language used by Lord Mansfield [in *Hambly* v. *Trott*] ... can support this view."[96] In his view the gain or acquisition by the defendant does not depend upon a showing that the plaintiffs' property has been diminished in order to be classified as a benefit.[97] For example, if the wrongdoer, before his death, had stolen a sheep from the plaintiff and resold it, the wrongdoer's estate, according to Bowen L.J.'s analysis of benefit, would be liable to pay compensation because the estate was swollen by the wrongful act. On the other hand, if the wrongdoer had eaten the sheep, his estate would not be liable even though savings on the butcher's bill could be proved. Such a distinction requires some explanation.

The majority judgment in *Phillips* v. *Homfray* raises an important problem: clearly, in the original action for trespass, the Vice-Chancellor, by ordering an account and injunction, held that the defendants, including Fothergill, had acquired a benefit by using passages under the plaintiffs' farm; the only remaining issue to be resolved on inquiry was the quantification of compensation for the wayleave and privilege.[98] As Pearson J. later observed, and nothing in Bowen L.J.'s judgment contradicts that observation, liability for wayleave under the decree of 1871 was not based on quantifying the injuries suffered by the wrongful act but an accounting of the benefit acquired by the defendants. How, then, can the death of the tortfeasor suddenly provide the estate with a defence based on benefit which had been implicitly rejected by the Vice-Chancellor during the tortfeasor's lifetime?

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[94] *Ibid.*, 454.
[95] *Ibid.*, 462-3.
[96] *Ibid.*, 471.
[97] *Ibid.*, 471-2.
[98] (1871) 6 L.R. 770 (L.C.).

Goff and Jones have suggested that the answer lies in a confusion of personal and proprietary claims in restitution.[99] There is, however, another criticism to Bowen L.J's approach in *Phillips* v. *Homfray*. In my view, the nature of quasi-contractual liability was the central, though unstated issue in the Court of Appeal. In modern terms the plaintiffs had asked the Court to treat the original action in trespass as a restitutionary claim, a step that Bowen L.J. was unwilling to take. In effect the plaintiffs were seeking to impose strict liability against a tortfeasor's estate on a quasi-contractual basis. At this period, quasi-contract was linked to implied contract, and that connection was bound to view such liability as arising only in circumstances where the defendant "meant to pay for it".

Bowen L.J. was undoubtedly aware of the inconsistency raised in Baggallay L.J.'s dissenting judgment. Therefore, his Lordship must have had some important reasons to sacrifice consistency which were not expressly stated in his judgment. The first explanation already discussed relies upon a particular nineteenth-century judicial attitude towards civil liability. But there is another possible view of the majority position. We will look beyond the controversy over the application of the abatement maxim to the trespass action. That requires us to address a difficult question: what is the basis of an action continuing in chancery? It would have been expected that a chancery barrister would have argued the right survives because of some proprietary right enforceable against the wrongdoer's estate. But the Court of Appeal rejected this argument.

The remaining possibility was a right in quasi-contract in the broad sense urged by Lord Mansfield, a generalized right of action. Bowen L.J., who was formerly a common law barrister,[100] might have viewed such an argument as an attempt to expand the chancery barristers' jurisdiction at the expense of the common law bar. Historically, the common law barristers had a monopoly over quasi-contractual actions which evolved out of *assumpsit*. Perhaps *Phillips* v. *Homfray*, then, is another example of English cases, such as *Slade's Case*, which disguise the practical reality of one group of barristers seeking to seize jurisdiction from their traditional rivals. Certainly the consequences of allowing the action in *Phillips* v. *Homfray* to continue on the basis of quasi-contract would have expanded the chancery barristers' jurisdiction at the

[99] Goff & Jones, *supra*, note 61, 475.

[100] Graham, *Fifty Years of Famous Judges* (1930), 108-25.

expense of the common law bar. In this respect the result of Bowen L.J.'s reasoning was to preserve the professional *status quo* between two competing groups of barristers.

Support for this interpretation is found in the following passage of Bowen L.J.'s judgment:

> We do not believe that the principle of waiving a tort and suing in contract can be carried further than this — that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief.[101]

The notion of waiver of tort[102] is perfectly consistent with the nineteenth-century English view of quasi-contract. It reinforces the principle of implied contract. Unjust enrichment could not operate as an independent basis of civil liability if Bowen L.J.'s views were accepted. Quasi-contract was an appendage to the law of contract, and unless tangible property[103] could be shown to be in the hands of the defendant, the defendant had received nothing for which a contract in fact might be implied. Moreover, he said that a contract could not be implied against a trespasser.[104]

III. Restitution against tortfeasors

A. *Benefit as an element of unjust enrichment*

In my opinion, the Canadian courts would no more follow *Phillips* v. *Homfray* than *Sinclair* v. *Brougham*,[105] and for the same reason: the theoretical underpinnings of unjust enrichment are incompatible with the Canadian notion of independent liability. While Lord Mansfield was not infallible in all of his early judg-

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[101] *Supra*, note 76, 461.

[102] The term "waiver of tort" has been criticized by most academic writers as a misnomer: see Fridman, *Waiver of Tort* (1955) 18 M.L.R. 1, 2 *et seq.*; Beatson, supra, note 88, 22; Goff & Jones, *supra*, note 61, 469; Palmer, *supra*, note 82, 51-3.

[103] The requirement of some concrete gain which adds to the defendant's wealth excludes the type of benefit which, while not tangible in nature, has clearly saved the defendant from an expense he would have otherwise incurred: see Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong* (1980) 80 Colum. L. Rev. 504, 506-10.

[104] *Supra*, note 80, 461: "actions for use and occupation, according to the better opinion, have been confined to the class of cases where the defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract."

[105] *Supra*, note 77.

ments,[106] it seems unlikely that after *Pettkus* the Canadian courts would embrace *Moses* v. *MacFerlan*[107] without adopting the views of *Hambly* v. *Trott*[108] expressed by Pearson J. and Baggallay L.J.

American courts, which share a similar view of unjust enrichment, have rejected the majority judgment in *Phillips* v. *Homfray*. The facts in the leading American case are remarkably similar to *Phillips* v. *Homfray*. In *Raven Red Ash Coal Co.* v. *Ball*[109] the plaintiff landowner brought an action of trespass on the case in *assumpsit* against the defendant coal company. The defendant had transported coal across the plaintiff's land. The plaintiff was unable to prove specific damages, but claimed entitlement to compensation for the defendant's use and occupation of an easement over the plaintiff's land. As to the narrow view of property expressed in the majority judgments in *Phillips* v. *Homfray*, Hudgins J., on behalf of the Supreme Court of Appeals of Virginia, observed:

> The logic of the dissenting opinion in *Phillips* v. *Homfray, supra,* is irresistible. To hold that a trespasser who benefits himself by cutting and removing trees from another's land is liable on an implied contract, and that another trespasser who benefits himself by the illegal use of another's land is not liable on an implied contract is illogical. The only distinction is that in one case the benefit he received is the diminution of another's property. In the other case, he still receives the benefit but does not thereby diminish the value of the owner's property. In both cases, he has received substantial benefit by his own wrong. As the gist of the action is to prevent the unjust enrichment of a wrongdoer from the illegal use of another's property, such wrongdoer should be held on an implied promise in both cases.[110]

Raven Red Ash Coal has significance for the Canadian courts. The case illustrates an instance where liability for unjust enrichment resembles tort liability. It has been generally accepted that this third distinct area of the common law resembles contract,[111] but *Raven Red Ash Coal* indicates that may not always be the case. This possibly expands the scope of unjust enrichment in the direction of strict liability where wrongful use of another's property

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[106] *E.g.,* it is doubtful that a modern court would agree that a master has a property interest in his apprentice: see *Lightly* v. *Clouston* (1808) 1 Taunt, 112, 127 E.R. 774 (C.P.).

[107] *Supra,* note 45.

[108] *Supra,* note 72.

[109] *Supra,* note 82.

[110] *Ibid.,* 237.

[111] In *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd, supra,* note 46, 62, Lord Wright observed that "[t]he obligation '[derived from unjust enrichment] belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort."

has been established. As a result, the courts might be expected to focus increasing attention on the meaning of property. In the following discussion we will consider a number of the problems that arise for the restitution lawyer who seeks a property definition.

B. *Distinguishing the basis of civil liability*

Unjust enrichment liability, like certain tort actions,[112] operates to reinforce the traditional notion that a property owner's right takes its value from the power to exclude others from using or interfering with that right. Historically, the action of trespass evolved as a means of protecting the property owner's right to exclude others.[113] In an article published in 1938, Seavey and Scott wrote that:

> The law of torts is based upon the premise that a person has a right not to be harmed by another, either with respect to his personality or with respect to his interests in things and in other persons. The law protects this right by requiring a wrongdoer to give such compensation to the person harmed as will be substantially equivalent to the harm done. The accent is upon wrong and harm.[114]

Conversely, in an unjust enrichment case, the accent is upon wrong and benefit. As *Phillips* v. *Homfray* indicates, in a system based on quasi-contractual categories of liability, the emphasis is on promise and benefit. But with liability based on unjust enrichment the defendant's wrongful conduct becomes an element in establishing a *prima facie* case in either tort or restitution.[115] Consequently, the "property owner" has the advantage of an expanded system of compensation. He has the choice of using the wrong to establish either loss based on harm or enrichment based on benefit.[116]

C. *The definition of property*

The scope of unjust enrichment (or tort) liability depends upon the definition of "property" adopted by the court,[117] and

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[112] *E.g.*, actions of trespass, ejectment, trover, conversion, and detinue: see Brickey, *supra*, note 65, 1129-40.

[113] Fleming, *supra*, note 86, 37.

[114] Seavey & Scott, *Restitution* (1938) 54 L.Q.R. 29, 32. See also Green, *The Study and Teaching of Tort Law* (1955) 33 Texas L. Rev. 1, 4.

[115] Palmer, *supra*, note 82, 51.

[116] Prof. Palmer includes the following as potential advantages in using quasi-contract: procedural advantages, *e.g.*, counter-claim, joinder, attachment, and bankruptcy; survival of actions; statutes of limitations; and suits against the government (*ibid.*, 60-7).

[117] Friedmann, *supra*, note 103, 510.

the acts of the defendant in relation to that property provide for further controversy in interpretation. While it is beyond the ambit of this article to analyze the complexities of property law, we can illustrate the importance of establishing a property interest for the restitutionary claimant. For example, in *Kelsen* v. *Imperial Tobacco Co.*[118] a commercial tenant obtained a mandatory injunction ordering the defendant to remove a sign which protruded eight inches into the airspace above the tenant's shop. The action in trespass required the plaintiff to establish a "property" interest in the airspace. On analogy with *Raven Red Ash Coal Co.*, in Canada it would presumably be open to argue that the tenant in *Kelsen* was entitled to recover the benefit (*i.e.*, the fair rental value) from the defendant as well.

On the other hand, an owner of land may not have a property interest in the airspace for purposes of imposing liability against an airline company even though the airplanes operated by the company pass through the airspace of the owner.[119] An action for unjust enrichment, like an action in trepass, would fail because the claimant could not establish that the defendant had used something which belonged to the plaintiff. While the airline company might benefit by using the airspace, they did not benefit at the landowner's expense. On the other hand, equitable relief may be withheld even though the property owner can demonstrate an actionable trespass which benefits the wrongdoer.

In *Woolerton & Wilson* v. *Costain Ltd*[120] the defendant building contractors had brought a tower crane onto the construction site for a post office in Leicester. It was conceded that the jib of the crane passed through the airspace fifty feet above the claimant's shop.[121] Moreover, the uncontradicted evidence showed that the defendants' tower crane could not have been relocated without halting the project and redesigning the building. Significantly, the defendants had offered £250 for the right to use the airspace above the plaintiffs' shop but that offer was refused. Stamp J. thought that the defendants had put themselves in a position where they could be held up for ransom.[122] The invasion of the

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[118] [1957] 2 Q.B. 334.

[119] See *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd* [1978] Q.B. 479; *Lacroix* v. *The Queen* [1954] Ex. C.R. 69; *Re Air Canada and The Queen In Right of Manitoba* (1977) 77 D.L.R. (3d) 68 (Man. Q.B.), *aff'd* (1978) 86 D.L.R. (3d) 631 (Man. C.A.), *aff'd* on other grounds (1980) 111 D.L.R. (3d) 513 (S.C.C.).

[120] [1970] 1 W.L.R. 411 (Ch.) *per* Stamp J.

[121] *Ibid.*, 413.

[122] *Ibid.*, 416.

plaintiffs' proprietary rights was the result of "inadvertence" and not carried out in "flagrant disregard" of those rights.[123] Such a distinction would make no difference in the plaintiffs' right to injunctive relief but Stamp J. decided that the timing of such injunction was a different matter. The judge granted the injunction but delayed its effect until a day after which the plaintiffs would have finished construction. He observed that "I am conscious that by so doing I am giving with one hand and taking away with the other."[124]

As we have seen, an unjust enrichment has been considered equitable in nature.[125] Does *Woolerton & Wilson* v. *Costain Ltd* sanction a discretionary jurisdiction in quantifying the benefit which the defendant has "inadvertently" appropriated? Unlike an injunction, in most restitution cases the flexibility is not in the timing of the remedy but in deciding whether the defendant ought to account for his profit derived from using the plaintiff's property or merely account to the plaintiff for a reasonable value which the marketplace would have attached to the use. In my view, Stamp J.'s approach is compatible with a system of benefit assessment designed to discourage the flagrant transgressor of proprietary rights.[126] Restitutionary relief, in these circumstances, follows a theory of deterrence, as is reflected, for example, in the jurisdiction to award punitive or exemplary damages based on general equitable principles;[127] to substitute damages for an account or injunctive relief against an innocent converter;[128] or to reduce damages in equity "due to such factors as delay or acquiescence".[129] Similarly, the innocent fiduciary who profits from confidential information will be allowed payment "on a liberal scale in respect of the work and skill employed in obtaining the... profits therefrom."[130]

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[123] *Ibid.*

[124] *Ibid.* The decision of Stamp J. was doubted by the Court of Appeal in *Charrington* v. *Simons & Co.* [1971] 1 W.L.R. 598, 603 (C.A.). But there has been academic support for the exercise of the discretion suggested by Stamp J.: see *Winfield & Jolowicz on Tort, supra,* note 86, 341.

[125] *E.g., Dominion Bank* v. *Union Bank of Canada* (1908) 40 S.C.R. 366, 381 *per* Duff J. and *Rural Municipality of Storthoaks* v. *Mobil Oil Ltd, supra,* note 43, *per* Martland J.; *Pettkus* v. *Becker, supra,* note 1, 11 *per* Dickson J.

[126] Friedmann, *supra,* note 103, 509 argues that the plaintiffs in *Woolerton* ought to have been limited to value of the use and not to the profit. To have held otherwise would have allowed the claimants to obtain the same result as an injunction.

[127] See Spry, *Equitable Remedies,* 2d ed. (1980), 554-5.

[128] *Seager* v. *Copydex Ltd* [1967] 1 W.L.R. 923, 932 (C.A.) *per* Lord Denning M.R.

[129] *Elsley* v. *J.G. Collins Insurance Agencies Ltd* [1978] 2 S.C.R. 916, 935.

[130] *Boardman* v. *Phipps* [1967] 2 A.C. 46, 112 (H.L.) *per* Lord Hodson.

To characterize the claimant's interest as "property" makes the transgression of that interest actionable *per se*. Thus, a claimant may obtain injunctive relief against another without proving actual harm.[131] But the law of tort would require a showing of actual harm before imposing civil liability by way of damages against the defendant. "The purpose of the law of torts is to adjust these losses and afford compensation for injuries sustained by one person as the result of the conduct of another."[132] Restitutionary recovery would have a distinct advantage if liability could be established solely on the basis of the defendant's benefit. Unjust enrichment would thus sanction civil liability *in personam* against a defendant in circumstances resembling tort liability but without requiring that the claimant demonstrate any loss.[133] To impose the tort concept of actual harm as a preliminary condition for restitutionary recovery is to repeat errors of "implying contracts" and presumes that the law of restitution is the converse of tort law.

Problems emerge in defining private property in a realistic and meaningful manner and in defining liability based on principles of restitution as protecting an interest other than harm. As to the first problem, it has been said that "[p]roperty essentially involves relations between people."[134] The property owner is entitled to employ the force of the state to exclude others *and* to make others compensate him for any benefit received through an unauthorized use.[135] Thus we must be mindful as to the things which courts have held to be property, including, for example, confidential information,[136] airspace,[137] identity,[138] profession,[139] and news.[140]

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131 See *Kelsen* v. *Imperial Tobacco Co., supra,* note 118.

132 Wright, *Introduction to the Law of Torts* [1942] Camb. L.J. 238, quoted by Fleming, *supra,* note 86, 4.

133 It has been suggested that restitution is limited by a plus-minus requirement: see Irvine, "The Appropriation of Personality" in Gibson, *Aspects of Privacy Law* (1980), 201-9.

134 Cohen, *Dialogue on Private Property* (1954) 9 Rutgers L. Rev. 357, 380-1.

135 See Kennedy & Michelman, *Are Property and Contract Efficient?* (1980) 8 Hofstra L. Rev. 711.

136 *Boardman* v. *Phipps, supra,* note 130, 107 *per* Lord Hodson, 115 *per* Lord Guest: but see Lord Cohen, who observed that "[i]nformation is, of course, not property in the strict sense of the word" (*ibid.,* 102). Lord Upjohn was more blunt in his dissenting judgment: "In general, information is not property at all" (*ibid.,* 127).

137 *Kelsen* v. *Imperial Tobacco Co., supra,* note 118.

138 See *Krouse* v. *Chrysler Canada Ltd* (1973) 1 O.R. (2d) 225 (C.A.); *Athans* v. *Canadian Adventure Camps Ltd* (1977) 17 O.R. (2d) 425 (H.C.).

139 *Nagle* v. *Feilden* [1966] 2 Q.B. 633 (C.A.); *Lightly* v. *Clouston, supra,* note 106, *per* Lord Mansfield.

140 *International News Service* v. *Associated Press, supra,* note 2.

Having established an appropriation of the claimant's property, we then turn to the next problem: is there a balance of convenience requirement to be considered in a restitution case?

American[141] and Canadian[142] writers have argued that a claimant in a restitution action must show that the defendant's appropriation resulted in an actual harm to the claimant as well as a benefit to the defendant. In most restitution cases such a requirement would not make any difference.[143] That is, the defendant's enrichment will be *at the plaintiff's expense.*[144] On the other hand, it does not follow that the plaintiff's failure to demonstrate an economic loss corresponding to the defendant's gain will defeat his claim based on unjust enrichment. This is the position adopted by the Restatement[145] and has the support of courts in England[146] and Australia,[147] as well as the United States.[148] Nonetheless, the issue of remoteness arises in restitution as well as in contract and tort. Professor Palmer has observed:

> Perhaps the most useful generalization is simply that restitution of benefits obtained through tort usually will be limited to benefits that can fairly be regarded as the product of the legally protected interest of the plaintiff which was invaded.[149]

Essentially, the "plus-minus" requirement ought to be recognized for what it is: an evasive technique. By putting the plaintiff in a restitution case under the onus of proving economic loss, difficult problems of remoteness as well as the quantification of benefit[150] are avoided rather than addressed directly.

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[141] Woodward, *The Law of Quasi-Contract* (1913), 274; Keener, *The Law of Quasi-Contract* (1893), 163.

[142] Irvine, *supra*, note 133, 209.

[143] Palmer, *supra*, note 82, 133; Goff & Jones, *supra*, note 61, 18-19.

[144] *Restatement of Restitution* (1937), § 1 provides: "A person who has been unjustly enriched *at the expense of another* is required to make restitution" (emphasis added).

[145] *Ibid.*, Comment e.

[146] See Goff & Jones, *supra*, note 61, 18-9. *Strand Electric & Engineering Co. Ltd* v. *Brisford Entertainments Co.*, *supra*, note 79; *Wrotham Park Estate Co.* v. *Parkside Homes Ltd* [1974] 2 All E.R. 321 (Ch.); *Swordheath Properties Ltd* v. *Tabet* [1979] 1 W.L.R. 285 (C.A.).

[147] See *Bilambil-Terranora Pty Ltd* v. *Tweed Shire Council* [1980] N.S.W. L.R. 465, 477 (C.A.) *per* Reynolds J.A.

[148] Palmer, *supra*, note 82, 133; *Olwell* v. *Nye & Nissen Co.* 173 P. 2d 652 (Wash. 1946); *Edwards* v. *Lee's Administrator* 96 S.W. 2d 1028 (Ky Ct App. 1936).

[149] Palmer, *supra*, note 82, 135.

[150] Sullivan, *supra*, note 84, 24-5 has defended the plus-minus requirement:

> Once a plaintiff's recovery can exceed the amount of his loss, courts become free to apply a variety of tests in the calculation of recovery .... The field appears open to wide-ranging judicial subjectivity in measuring

It ought to be re-emphasized that the plus-minus requirement is often raised in the following circumstances: the plaintiff has established a property interest; that property interest has been transgressed by the defendant; the defendant obtained a benefit by reason of that transgression; but there is no evidence that the transgression caused the plaintiff any economic loss. A leading American case, *Olwell* v. *Nye & Nissen Co.*,[151] may be used to illustrate the solution generally accepted in the United States.[152] In that case, the plaintiff sold his interest in an egg-packing business but retained ownership of an egg-washing machine. The machine was placed in storage at the plaintiff's instruction on premises adjacent to those occupied by the defendant. Facing a shortage of labour, the defendant removed the egg-washing machine from storage without the plaintiff's consent or knowledge and used it over a three-year period.[153] The plaintiff elected to waive the tort of conversion and sue in quasi-contract for the profits made by the defendant in using the machine. By way of defence, it was argued that the plaintiff had no present use for the machine and the operation by the defendant had not injured the plaintiff.[154] This restrictive concept of benefit was rejected as inconsistent with the nature of property rights: "However plausible, the appellant cannot be heard to say that his wrongful invasion of the respondent's property right to exclusive use is not a loss compensable in law. To hold otherwise would be subversive of all property rights since his use was admittedly wrongful and without claim of right."[155] The wilful conversion of an unused chattel does not, by inference from *Olwell,* create a remoteness problem in a restitutionary action commenced against the wrongdoer.

In *Olwell* the plaintiff had it within his power to exploit the egg-washing machine in order to realize some economic gain. Nonetheless, the plaintiff chose to do nothing. Taking the next step of analysis, had the plaintiff's property interest been of such a nature

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a plaintiff's proper recovery. Since no firmly fixed standards guide either the definition of benefit or application of the plus-minus formula, the risks of injustice and unpredictability are great.

This argument confuses the concept of benefit with the valuation of a benefit: see Palmer, *supra,* note 82, 161.

[151] *Supra,* note 148.

[152] Palmer, *supra,* note 82, 133.

[153] *Supra,* note 148, 653.

[154] *Ibid.,* 654.

[155] *Ibid.* The case has been persuasively criticized by Prof. Palmer (*supra,* note 82, 161) in his comparison of the concept of benefit with the appropriate method of quantifying the benefit.

that any economic exploitation would have been intrinsically impossible, does this alter the argument concerning benefit in favour of the defendant? The American case of *Edwards* v. *Lee's Administrator*[156] illustrates the problem. The defendants successfully exploited a cave which was accessible only by using an entrance on land they owned. However, the "Great Onyx Cave", as it became known, extended below the surface of the plaintiff's land. In the quasi-contractual action, the defendants contended that the cave was of no practical use to the plaintiff since he had no access to it, and the plaintiff had not suffered any injury by reason of the trespass.[157] Nevertheless, the Court of Appeals of Kentucky concluded that the plaintiff was entitled to "one-third of the net profits received alone from the exhibition of the cave [as] a fair determination of the direct benefit accruing to the appellants from the use of the appellees' property."[158] The fact that the plaintiff's property interest was economically useless did not prevent him from successfully invoking the equitable maxim "that a wrongdoer shall not be permitted to make a profit from his own wrong."[159]

While there have not been Canadian restitution cases similar to *Olwell* and *Edwards,* the concept of benefit applied in those cases presupposes a notion of property rights which has long been accepted in Canadian and English law. In *McKie* v. *The K.V.P. Co.*[160] McRuer C.J.H.C. recognized the distinction between invasion of a property right and economic loss arising from such an invasion. He quoted with approval the following passage by Fry J. contained in *Pennington* v. *Brinsop Hall Coal Co.*:

> I may observe in passing that the case of a stream affords a very clear illustration of the difference between injury and damage: for the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions.[161]

The invasion of the plaintiff's property right was itself a sufficient ground for granting a request for injunctive relief. However, caution must be exercised in assuming that the English courts would carry this distinction into a restitution case where the

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[156] *Supra,* note 148.

[157] *Ibid.,* 1030.

[158] *Ibid.,* 1033.

[159] *Ibid.,* 1032.

[160] [1948] 3 D.L.R. 201, 212-3 (Ont. H.C.).

[161] (1877) 5 Ch.D. 769, 772.

claimant seeks a money judgment.[162] For example, *Pennington* might be distinguished on the ground that injunctive relief serves the purpose of preventing the transgressor from gaining prescriptive rights of use, but the transgressor is not liable to disgorge any gain where the property right invaded is valueless.[163] The American law of restitution does not recognize such a distinction for purposes of defining benefit. As we have already seen in the discussion of *Phillips* v. *Homfray*,[164] in a quasi-contractual case the concept of benefit was divorced from the generally accepted notion of property rights. The great irony of English law has been the development of a restitutionary concept of benefit in the guise of damages in tort. In these cases the English courts have rejected a plus-minus requirement. *Strand Electric & Engineering Co. Ltd* v. *Brisford Entertainments Co.*[165] illustrates an approach to damages in tort which closely resembles the approach used in *Olwell.* In *Strand Electric,* the plaintiff, who owned certain portable switchboards,[166] brought an action in detinue against the defendant. Damages were sought for the period of forty-three weeks during which the defendant had retained possession of the switchboards. But the plaintiffs in *Strand Electric* were not able to establish a direct link between their own economic loss and the defendant's gain. The issue was not whether the defendant had received a benefit but the method of quantification employed.

Lord Denning observed that "[i]n assessing damages, whether for a breach of contract or for a tort, the general rule is that the plaintiff recovers the loss he has suffered, no more and no less."[167] This general rule was applied at trial with the result that the benefit gained by the defendant was assessed by, among other things, the economic loss to the plaintiff. The Court of Appeal held that the economic loss was not a relevant consideration in assessing the value of the benefit gained by the defendant. Lord Denning found an analogy with the detention of land cases which

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[162] *Phillips* v. *Homfray, supra,* note 76, illustrates the danger that a general notion of property is acceptable without reference to the type of action launched by the property owner.

[163] The law of property has been associated with economic value by English scholars. See Nicholas, *An Introduction to Roman Law* (1962), 98: *cf.* Cohen, *supra,* note 134, 378, who contends that the legal concept of property ought not to be confused with the "economic or ethical concept of value."

[164] See text at note 146, *supra.*

[165] *Supra,* note 79.

[166] In the words of Somervell L.J. (*ibid.,* 249), "a profit-earning chattel" and the egg-washing machine in *Olwell* are in the same category.

[167] *Ibid.,* 253.

established that "a wrongdoer, who keeps the owner out of his land, must pay a fair rental value for it, even though the owner would not have been able to use it himself or to let it to anyone else."[168] Lord Denning then concludes by observing:

> It may be that the owner would not have used the goods himself, or that he had a substitute readily available, which he used without extra cost to himself. Nevertheless the owner is entitled to a reasonable hire.[169]

The quantification of benefit draws upon a restitutionary principle even though the action is brought in detinue for damages.[170] But three years later Lord Keith of Avonholm in *Government of India* v. *Taylor* observed that "[n]o case has been brought to our notice of the application of the rule where there has been no enrichment of one party with corresponding loss to the other."[171] The problem in English law is finding the principle buried in rules of damages created in the law of torts. As a result, counsel apparently did not cite a decision by the House of Lords in 1914 which clearly established that corresponding loss to the plaintiff was not a requirement.[172] The plus-minus requirement was most recently rejected by Brightman J. in *Wrotham Park Estate* v. *Parkside Homes*[173] in a judgment which relies upon the earlier decision of the Law Lords:

> A like principle was applied by the House of Lords in a Scottish case, *Watson, Laidlaw & Co. Ltd* v. *Pott, Cassels and Williamson* [(1914) 31 R.P.C. 104 (H.L.)]. A patentee elected to sue an infringer for damages rather than for an account of profits. Part of the infringement had taken place in Java. There was evidence that the patentee could not have competed successfully in that island. It was submitted that no damages ought to be awarded in respect of the Java infringement. Lord Shaw said:
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> > 'It is at this stage of the case ... that a second principle comes into play. It is not exactly the principle of restoration, either directly

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[168] *Ibid.*: see also *Penarth Dock Engineering Co.* v. *Pounds* [1963] 1 Lloyd's Rep. 359 (Q.B.) *per* Lord Denning.

[169] *Ibid.*, 254. This is also the usual basis of quasi-contractual recovery in the United States (Palmer, *supra*, note 82, 136).

[170] Lord Denning acknowledged the connection with restitution: "It is an action against him because he has the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort. But it is unnecessary to place it into any formal category. The plaintiffs are entitled to a hiring charge for the period of detention, and that is all that matters" (*ibid.*, 255).

[171] [1955] A.C. 491, 513 (P.C.): see also *In Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097, 1105-6 (Ch.) *per* Templeman J.

[172] *Watson, Laidlaw & Co. Ltd* v. *Pott, Cassels & Williamson* (1914) 31 R.P.C. 104 (H.L.). Perhaps the obscure report of this decision contributed to this omission.

[173] *Supra*, note 146.

> or expressed through compensation, but it is the principle underlying price or hire. It plainly extends — and I am inclined to think not infrequently extends — to Patent cases. But, indeed, it is not confined to them. For wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire. If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise." I confess to your Lordships that this seems to me to be precisely in principle the kind of question and retort which underlay the argument of the learned Counsel for the Appellants about the Java trade.'

He continued:

> '... in such cases it appears to me that the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorised sale or use of every one of the infringing machines in a market which the infringer, if left to himself, might not have reached. Otherwise, that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstractor to go free.'[174]

Restitution in Canada is in the early stages of developing a concept of benefit, and as it takes shape there are three major points to be drawn from the decisions in *Olwell, Edwards, Strand Electric* and *Watson, Laidlaw & Co. Ltd*: the concept of benefit is inextricably connected with the legal nature of property rights; the concept of benefit may be a separate issue from the quantification of the benefit; and the concept of benefit, and especially the plus-minus requirement, disguises questions of remoteness and quantification, which should be addressed directly.[175]

The principle of unjust enrichment has aroused some controversy in certain recent Canadian cases[176] which have found a proprietary interest in the plaintiff's exclusive right to market his personality, image and name. Intellectual property has become a new setting for old controversies, but the basic issue remains familiar: whether

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[174] *Ibid.*, 339-40.

[175] There are encouraging signs that Canadian courts recognize the concept of benefit that may arise in either a tort or restitution case, and that the nature of the action ought not to result in a different approach to the question of quantification: see *Borden Chemical Co. (Canada) Ltd* v. *J.G. Beukers Ltd* (1973) 29 D.L.R. (3d) 337, 344 (B.C.S.C.).

[176] See *Krouse* v. *Chrysler Canada Ltd, supra,* note 138; *Athans* v. *Canadian Adventure Camps Ltd, supra,* note 138; Irvine, *supra,* note 133, 201-9.

the courts adequately consider the policy implications of expanded civil liability.[177] To describe something as property may be an attractive, even facile, substitute for that consideration. It has been suggested that courts have used this technique to disguise a usurpation of legislative authority.[178] Historically, the term "property" has been used as a legal conclusion which puts an end to the debate over liability. For the law of restitution, the finding that property has been appropriated allows the plaintiff to invoke the principle of unjust enrichment.[179]

IV. Equitable remedies to prevent unjust enrichment

The property label assists the claimant in achieving three important goals: relieving him from the burden of demonstrating actual loss or damage,[180] allowing him a tracing order at equity or obtaining an order for an accounting for profits.[181]

A. *Tracing orders*

Entitlement to a tracing order at equity[182] required that the claimant demonstrate a proprietary interest in money,[183] land,[184] or shares.[185] In the English law of constructive trust[186] the equitable proprietary interest is retained in breach of a fiduciary relationship,[187] but is not a remedy in unjust enrichment.[188] The proprietary

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[177] *Irvine, supra,* note 133, 209.

[178] See Cohen, *supra,* note 134, 380-1.

[179] See text accompanying note 110, *supra.*

[180] The traditional description of damages was set forth by Lord Holt, C.J., in *Savile* v. *Roberts* (1698) 1 Ld Raym. 374, 9 E.R. 1151; 1 Salk. 13, 91 E.R. 14; 3 Salk. 16, 91 E.R. 664 (K.B.): see also the report in [1558-1774] All E.R. Rep. 456.

[181] See York, *Extension of Restitutional Remedies* (1957) 4 U.C.L.A. L. Rev. 499.

[182] See Maudsley, *Hanbury's Modern Equity,* 9th ed. (1969), 418-31; Goff & Jones, *supra,* note 61, 53-60; Pettit, *Equity and the Law of Trusts,* 4th ed. (1979), 486-93; see also Waters, *supra,* note 12, 15: "the constructive trust, as a term, contains two elements — relationship and tracing. The two are surely inseparable; relationship without tracing points nowhere, and tracing without relationship is a random remedy."

[183] *Sinclair* v. *Brougham, supra,* note 77.

[184] See *Pettkus* v. *Becker, supra,* note 1; *Re Tilley's Will Trust* [1967] 1 Ch. 1179.

[185] *Goodbody* v. *Bank of Montreal & Lester, supra,* note 31.

[186] See Maudsley, *supra,* note 182, 218-36; Pettit, *supra,* note 182, 44-6.

[187] In many instances the "fiduciary relationship" resembles the "implied contract" with the courts imposing an obligation which was not based upon *actual* consent or promise. In *Chase Manhattan Bank N.A.* v. *Israel-British*

interest at equity flowed directly from the fiduciary relationship, and failure to establish such a relationship[189] might have prejudiced the plaintiff in several ways in that an *in personam* claim might not lie;[190] the defendant might be insolvent[191] or the value of property might have appreciated in the hands of the defendant.[192] Thus, we find a number of Canadian and English cases where the claimant's equitable proprietary interest exists because the court has willingly invented a fiduciary relationship. For example, a fiduciary relationship has been found to exist between the Crown and a British Army sergeant, who had amassed a small fortune in bribes,[193] between depositor and directors of an *ultra vires* banking operation,[194] between the owner of share warrants and the apparent thief of the warrants,[195] and between a bank that mistakenly paid a large sum of money to another bank.[196] In these cases, equity concerned itself with protecting the claimant's continuing proprietary interest[197] by granting a tracing order. By denying any link with the principle of unjust enrichment, the English courts' decision, which has found some favour with lower courts in Canada, to find a "proprietary interest" and a "fiduciary relationship" begs a fundamental question as to the juridical basis of that decision.[198]

Bank (London) Ltd [1980] 2 W.L.R. 202, 210 (Ch.), Goulding J., referring to *Re Diplock* [1948] 1 Ch. 465, 520, observed that the Court was looking for either "a fiduciary or quasi-fiduciary relationship". Moreover, his Lordship continued: "At the same time they recognised that exactly what relationships were sufficient for the purpose had not yet been precisely laid down."

188 Goff & Jones, *supra,* note 61, 60-3 argue that unjust enrichment *ought* to be based on restitutionary principles. This has long been the legal position in the United States: see Pound, *The Progress of the Law 1918-1919* [,] *Equity* (1920) 33 Harv. L. Rev. 420, 421; Scott, *The Law of Trusts,* 3d ed. (1967), Vol. 5, 462.2, pp. 3412-3.

189 The categories of fiduciaries recognized in English law may be found in Goff & Jones, *supra,* note 61, 55, n. 68.

190 *Sinclair* v. *Brougham, supra,* note 77, 413-21 *per* Lord Haldane.

191 Waters, *supra,* note 4, 337.

192 Maudsley, *supra,* note 182, 414.

193 *Reading* v. *Attorney-General* [1951] A.C. 507, 516 (H.L.) *per* Lord Porter; Goff & Jones, *supra,* note 61, 508-10.

194 *Sinclair* v. *Brougham, supra,* note 77.

195 *Goodbody* v. *Bank of Montreal & Lester, supra,* note 31.

196 *Chase Manhattan Bank N.A.* v. *Israel-British Bank (London) Ltd, supra,* note 187, 209.

197 *Ibid.,* 210.

198 The "quasi-fiduciary relationship" device allows the English courts to circumvent the controversial issue of whether restitution includes a civil obligation independent of tort and contract and enforces that obligation by employing both *in personam* and *in rem* remedies.

In *Pettkus* v. *Becker*[199] a majority of the Supreme Court of Canada held that a claimant is entitled to a constructive trust in order to prevent unjust enrichment of the defendant. By holding the defendant a constructive trustee, the claimant is enabled to trace his or her beneficial interest into the hands of the legal title-holder. It is no longer possible to confine a tracing order to circumstances where common intention has been established or the defendant has retained property acquired in breach of a fiduciary relationship. As an *in rem* order, tracing is the legal consequence of imposing a constructive trust. As an equitable remedy, tracing now forms part of a fused system of common law and equitable principles.

B. *Quantification of benefit*

Once a court determines that the defendant has usurped the plaintiff's proprietary interest, the next issue is one of valuation or quantification of the benefit acquired by the defendant. As a general rule, the court will assess damages in tort or benefit in restitution according to the reasonable fair-market value of the property appropriated by the defendant. This rule has been applied in Canada and England where the defendant appropriated copyrighted architectural drawings and plans,[200] a customer list,[201] the image of a sports celebrity,[202] residential premises,[203] and portable switchboards.[204] In the United States the rule has been considered "the normal measure of recovery in quasi-contract."[205] Canadian law is still developing on this point. Nevertheless, as a matter of principle, it seems likely that Canadian courts will recognize that the crux of quantification in such cases is unjust enrichment;[206] that is, once the plaintiff elects to recover the gain acquired through

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[199] *Supra,* note 1.

[200] *Stovin-Bradford* v. *Volpoint Properties Ltd* [1971] Ch. 1007 (C.A.).

[201] *Borden Chemical Co. (Canada) Ltd* v. *J.G. Beukers Ltd, supra,* note 175.

[202] *Athans* v. *Canadian Adventure Camps Ltd, supra,* note 138, 438.

[203] *Swordheath Properties Ltd* v. *Tabet, supra,* note 146, 288.

[204] *Strand Electric & Engineering Co. Ltd* v. *Brisford Entertainments Co., supra,* note 79.

[205] Palmer, *supra,* note 82, 122.

[206] *Ibid.,* 51. See also *Restatement of Restitution, supra,* note 82, § 128. Even in jurisdictions where there is doubt whether unjust enrichment forms part of the law, that principle is recognized as having an effect on the quantification issues arising in a case concerning misappropriation of property: see *Bilambil-Terranora Pty Ltd* v. *Tweed Shire Council, supra,* note 147, 495 *per* Mahoney J.A.

the wrongful appropriation, the basis of assessment remains the same whether the action is brought in tort or restitution.[207]

In Canadian and English law the right to an accounting of profits on the basis of unjust enrichment is far less certain than in the United States, where "restitution of profits always will be granted against an intentional wrongdoer, provided the profits are the product of a wrongful taking or other interference with the injured party's legally protected interest."[208] In English law an action for account would be considered a "tool in equity".[209] There is little support in English law for the use of an accounting of profits as an equitable remedy invoked to prevent unjust enrichment.[210] In most cases, the English litigant has been satisfied with an award for damages arising from the defendant's tortious acts.[211]

As I have observed elsewhere,[212] the Canadian courts have indicated a willingness to adopt equitable remedies along the lines proposed by the *Restatement of Restitution.*[213] It is likely, therefore, that a Canadian court would reject the argument that accounting for profits is narrowly confined to the established categories worked out by chancery.[214] While an account for profits might be described as the most fruitful manifestation of unjust enrichment,[215] it must be remembered that English decisions recognize no generalized right based on unjust enrichment. The notion of implied contract appeared in one English case[216] as justification for refusing to order an accounting for profits in a quasi-contract case. That approach is no longer acceptable in Canada.[217] A claimant seeking an accounting should not be required to establish that a bill for an accounting would lie. On the other hand, the remedy for accounting

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[207] See, *e.g., Borden Chemical Co. (Canada) Ltd* v. *J.G. Beukers Ltd, supra,* note 175, 344.

[208] Palmer, *supra,* note 82, 164-5.

[209] *McGregor on Damages,* 14th ed. (1980), § 5.

[210] Goff & Jones, *supra,* note 61, 479-80.

[211] *Ibid.,* 481.

[212] See Klippert, *The Juridical Nature of Unjust Enrichment, supra,* note 44, 407-14.

[213] See *Rathwell* v. *Rathwell, supra,* note 12, 454 *per* Dickson J.

[214] See Megarry, *Snell's Principles of Equity,* 27th ed. (1973), 620-2.

[215] This was the view of Profs Ames (*The History of Assumpsit* (1889) 2 Harv. L. Rev. 53, 66) and Belsheim (*The Old Action of Account* (1931) 45 Harv. L. Rev. 466).

[216] See *Re Simms* [1934] 1 Ch. 1 (C.A.). This line of argument was advanced in some of the early American writings: see Keener, *supra,* note 141, 166 and Woodward, *supra,* note 141, § 274. Prof. Palmer states: (*supra,* note 82, 159) that the implied contract reason "does not bear examination."

[217] See, *e.g., Deglman* v. *Guaranty Trust Co., supra,* note 37.

for profits will probably occur more frequently in the abuse of fiduciary relation cases.[218]

As a method of quantification, recovery of profits will not always increase the amount calculated on the basis of the reasonable fair market value.[219] For example, in *Athans* v. *Canadian Adventure Camps Ltd*[220] the plaintiff recovered for the appropriation of his "trademark" image on the basis of "a percentage of the gross receipts of the camp."[221] In effect, the quantification was based on an accounting for profits because of the difficulty in determining a reasonable fair-market value. In that case there were no net profits. The boys' camp incurred a substantial loss for the defendant. Assessing the benefit of using the plaintiff's image on the basis of ten cents *per* copy of the brochure distributed or ten *per cent* of the gross receipts produced the same figure: five hundred dollars. But the wrongdoer whose act of appropriation can be characterized as wilful,[222] deliberate,[223] or conscious[224] may make millions from his wrong and would quite happily pay what is effectively a licence fee to the plaintiff according to the reasonable fair-market value notion of quantification.[225] The innocent converter is not held accountable for profits under the Restatement[226] but in practice the American courts have made the innocent account as well as the wilful.[227] In most cases, however, the nature of the wrong will be just one factor for the court to consider on the issue of method of quantification. From the American experience, it seems probable that the Canadian courts will find "no easy formulas" to resolve the quantification problems.[228] The major obstacle in establishing the value of benefit according to the profit obtained is simply one of causation. On what basis does the court

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[218] See, *e.g., Canadian Aero Service Ltd* v. *O'Malley* [1974] S.C.R. 592, and *Chevron* v. *Home Oil Co.* (1980) 22 A.R. 451 (Q.B.).

[219] Palmer, *supra,* note 82, 160.

[220] *Supra,* note 138.

[221] *Ibid.,* 438.

[222] See Palmer, *supra,* note 82, 158.

[223] See Douthwaite, *The Tortfeasor's Profits — A Brief Survey* (1968) 19 Hastings L.J. 1071.

[224] See *Restatement of Restitution, supra,* note 144, § 151.

[225] Prof. Palmer has argued (*supra,* note 82, 161) that even in the case of a wilful wrongdoer the courts should not ignore the value of the thing appropriated, and that any recovery which has a "wide discrepancy" from reasonable value is suspect. *Olwell* v. *Nye & Nissen Co., supra,* note 148, is given as an example of a "suspect" case.

[226] *Supra,* note 144, § 154, Comment (a).

[227] Palmer, *supra,* note 82, 158.

[228] *Ibid.,* 161.

separate the defendant's contribution from the thing appropriated from the plaintiff? The American response is to suggest that "the court must resort to general considerations of fairness",[229] but this approach simply attempts to avoid the problem of causation by leaving the matter to the judge's discretion. Nevertheless, after *Pettkus* v. *Becker*[230] such an approach may be open to the Canadian courts.

Once the plaintiff establishes that the defendant has obtained a gain from an appropriation of the plaintiff's property, relief should not be denied because assessment of the benefit is difficult. This has happened in some American cases.[231] In Canada, the problem of quantification may be drawn from principles governing the law of damages in contract: "[t]he law is clear that a party should not be deprived of a damage award on the ground that the exact quantum of the loss is difficult or mathematically impossible to ascertain."[232] The policy behind the contract rule has been set forth by the Supreme Court of Canada in *Wood* v. *Grand Valley Railway Company*:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot 'relieve the wrongdoer of the necessity of paying damages for his breach of contract' and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do 'the best it can' and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.[233]

Surely a similar principle should apply *mutatis mutandis* to quantification of benefit, and for the same policy reason, that is, the wrongdoer should not be relieved of the burden to pay for the gain acquired through his wrongful appropriation because the benefit is not arithmetically certain. But this policy does not tell us whether the court ought to be making its "best guess" on the basis of the benefit's market value or its profit value. In my view, the contract rule would apply in cases such as *Athans* where the

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[229] *Ibid.*

[230] *Supra*, note 1.

[231] *Cason* v. *Baskin* 20 So. 2d 243 (Fla *in banco* 1944); and *Hart* v. *E.P. Dutton & Co.* 93 N.Y.S. 2d 871 (Sup. Ct 1949), *aff'd* 98 N.Y.S. 2d 773 (App. Div. 1949).

[232] *McCain Produce Co.* v. *Can. Pac. Ltd* (1980) 30 N.B.R. (2d) 476, 529 (N.B.C.A.) *per* Richard J.A.

[233] (1915) 51 S.C.R. 283, 289 *per* Davies J., cited with approval by Spence J. in *Penvidic Contracting Co. Ltd* v. *International Nickel Co. of Canada Ltd* [1976] 1 S.C.R. 267, 279-80.

reasonable market value of the benefit is difficult to assess, but where the plaintiff seeks the profit value of the gain he must establish a causal connection between the benefit and the defendant's profit. To destroy that causation requirement and award the plaintiff an amount based on "profits" would be a disguised award of punitive or exemplary damages, which would be outside the scope of nnjust enrichment liability.

In summary, where the defendant has appropriated the property of another without consent, the gain will generally be assessed on the basis of the reasonable fair-market value of the thing appropriated. In exceptional cases, to deter particular types of wrongful acts, an accounting for profits will be an appropriate alternative method of quantification. The factors which may influence the court in selecting the appropriate method of quantification include: the nature of the property appropriated, the motive of the defendant, the relationship between the parties, the contribution of the defendant to the profit, and the value of the thing appropriated.

V. Problems of remoteness in restitution

A. *The third factor*

Little specific attention has been focused on causation problems in restitution.[234] As an aspect of remoteness, the analysis of causation has been limited traditionally to a discussion of damage rules in contract and tort.[235] The requirement that the defendant must be enriched at the plaintiff's expense is the expression which might be seen as incorporating the principle of causation in restitution. As we have seen, some scholars[236] have interpreted the expense requirement to mean that a plus-minus test exists. The better view is that the plus-minus test misconceives the meaning of benefit. But the rejection of that test is not a repudiation of causa-

[234] In *Pettkus* v. *Becker*, *supra*, note 1, 16, Dickson J. observed that "[f]or the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation." The question remains as to whether the broad discretionary jurisdiction inherited from "ancient principles of equity" justifies finding a causal connection because the final result is fair. That is, if a constructive trust is imposed on the basis of good conscience notions why not adapt the same approach to causation?

[235] See *McGregor on Damages*, *supra*, note 209, §§ 176-179. See also Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts* (1980) 13 J. of Leg. Studies 43.

[236] See *supra*, note 150.

tion. On the contrary, enrichment at the plaintiff's expense[237] embodies an idea similar to McGregor's definition of causation in tort and contract:

> The total formulation, therefore, of what falls to be decided in these questions of causation is whether given a third factor, the plaintiff's damage results from the defendant's act, a formulation which has the great merit of a common-sense approach.[238]

The notion of a third factor cuts across all three areas of civil liability.[239] But neither restitution scholars nor the courts have expressly asked themselves whether the bulk of the case law in tort and contract ought to be applicable *mutatis mutandis* to causation problems in restitution. In my view, whether the plaintiff seeks to recover a benefit or compensation for a loss, the existence of a third factor may preclude imposition of civil liability. Several examples will serve to illustrate the so-called third factor where unjust enrichment is the basis of civil liability.

James Moore & Sons Ltd v. *University of Ottawa*[240] is an excellent example of a causation problem. The plaintiff, a building contractor, executed a written construction contract with the University of Ottawa for the construction of a building. Under the terms of the contract, a reduction in taxes imposed on building materials was to be passed on for the University's benefit. But the contract was silent as to the allocation of tax increases. This omission worked against the contractor because the provincial sales tax was removed but at the same time an additional federal tax was levied on building materials. By contract the contractor was required to pass on the three *per cent* reduction in provincial tax. The additional federal tax was claimed on the basis of unjust enrichment. The federal government compelled the contractor to pay the additional tax. Under the *Excise Tax Act*[241] the University applied for and received from the federal government a tax refund based on the added tax paid by the contractor. Clearly, the contractor suffered an economic loss and the University received a corresponding benefit. But was the benefit the result of the plaintiff's loss or a third factor? Morden J. held that the contractor was entitled to recover the benefit on two grounds. The first suggested that restitutionary recovery may be allowed where benefit is the result of the third factor. The emphasis is on stripping a defendant of windfall

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237 See *supra*, note 144.

238 *McGregor on Damages*, *supra*, note 209, § 101.

239 The Supreme Court of Canada has recognized restitution as a third distinct category of civil liability (*e.g.*, *Deglman* v. *Guaranty Trust Co.*, *supra*, note 37 and *Pettkus* v. *Becker*, *supra*, note 1).

240 (1974) 5 O.R. (2d) 162 (H.C.).

241 Now R.S.C. 1970, c. E-13, s. 46.

profits.[242] It is submitted, however, that to negate the principle of causation in restitution is alien to long-established concerns over the extent of civil liability. But the alternative ground assumes a causal connection between loss and benefit: "[t]he plaintiff paid this tax. But for this payment the defendant would not have received the moneys from the Government."[243] That is, there was no third factor breaking the causal chain. Of course, Morden J.'s view would open up liability for unjust enrichment to all taxpayers seeking to recover against recipients of governmental largesse. With respect, the federal government, or the omission from the contract regarding increases of taxes, was the third factor. The compulsion to pay the federal tax could not be attributed to the University. The plaintiff paid a tax. But it was not paid to the defendant. The benefit in the form of a refund also came from the government. Certainly there might be a windfall for the University but to say that a benefit is unearned is not the same as saying it was conferred by the plaintiff. The defendant's benefit was the result of using refund provisions enacted by the federal government for educational institutions. But for those provisions the University would have not received a refund, yet the contractor would still have had to pay the tax.

Another example is afforded in the New Zealand case of *Carly* v. *Farrelly*,[244] where a plaintiff, purchaser of land, sought relief based on unjust enrichment against the defendant vendor. The contract of sale provided that risk for the property would lie with the plaintiff pending completion. The plaintiff failed to purchase insurance to cover his risks and before completion the house on the land burned down. It was assumed that the vendor retained an insurable interest which would have entitled him to recover on his own policy for the damage. The purchaser suffered a loss and the vendor stood to recover a gain. Once again it was open to argue that a third factor was the cause of the benefit and not the plaintiff's loss. As in *James Moore & Sons Ltd,* it appears that the defendant has obtained a windfall, that is he collects the insurance proceeds for the destroyed house and the full purchase price from the purchaser on completion. The plaintiff's loss was the result of his failure to follow accepted conveyancing practice.[245] The defendant's benefit was the result of payments under an insurance contract with another party. In the absence of a causal

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[242] *Supra,* note 174, 172-3.

[243] *Ibid.*

[244] [1975] 1 N.Z.L.R. 356 (S.C.).

[245] See also *Avondale Printers & Stationers* v. *Haggie* [1979] 2 N.Z.L.R. 124 (S.C.).

connection between the loss and benefit, the New Zealand Supreme Court refused the claimant's restitutionary action.

American restitution cases must be carefully examined for causation problems. The decision of the New York Court of Appeals in *Simonds* v. *Simonds*[246] indicates a willingness to free civil liability in unjust enrichment from the problems of causation if the result would prevent injustice. In that case the plaintiff, the first wife of the deceased, sought a constructive trust[247] against certain insurance-policy proceeds received by the deceased's second wife and daughter. The first wife and her husband at the time signed a separation agreement which required the husband to maintain an existing life insurance policy naming the first wife as beneficiary or, in the event that policy was cancelled or lapsed, he would purchase another policy in his first wife's favour. The husband defaulted on that agreement by allowing the insurance policy covered by the separation agreement to lapse. The husband purchased new life insurance policies, naming his second wife and their daughter as beneficiaries.

As in the previous two decisions from Ontario and New Zealand, the plaintiff has suffered an economic loss and the defendant has received a benefit. But the benefit received by the second wife and daughter was paid by an insurance company, thus introducing the third factor, which intervenes to destroy the causal link between loss and benefit. The cause of the first wife's loss was the failure of her former husband to fulfil his contractual obligation to maintain an insurance policy naming her as beneficiary. But the second wife's benefit does not come from that failure. The first wife did not pay the insurance proceeds to the second wife. Moreover, it is doubtful that the policies were purchased with the first wife's property. When the insurance company paid the proceeds under the policies purchased by the deceased they did not cause the plaintiff's loss. Her loss occurred during her former husband's lifetime and was caused by his *inter vivos* act. Nevertheless, on these facts the New York Court of Appeals held that the first wife was entitled to impress a constructive trust on the insurance proceeds received by the second wife.[248]

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[246] 408 N.Y.S. (2d) 359 (N.Y. 1978). See Gegan, *Constructive Trusts: A New Way for Tracing Equities* (1979) 55 St. John's L. Rev. 593, 599 where the author characterizes the *Simonds* "notion of a floating equity ... [as] an unprecedented and dubious doctrine."

[247] Since the deceased's estate was insolvent a suit based on the husband's breach of the separation agreement would not have yielded any practical benefit.

In restitution, the third factor arises where the defendant has received a money payment from a person who is legally a stranger to the plaintiff. While in contract and tort the third factor raises a causation question concerning the plaintiff's loss, the causation question in claims for restitution is directed to the defendant's benefit. Canadian courts, among others, have not adequately discussed the implications of applying, or indeed not applying, principles of causation in restitution.[249] The result of this silence is to leave an inference that restitution, unlike tort and contract, may ignore the third factor. Thus, a plaintiff may, in effect, recover windfall profits because rough justice is served by taking away the unearned profit and giving it (as opposed to restoring it) to a person who has suffered a loss. Such an approach has more in common with simple compassion than a workable judicial principle of civil liability. In my view, it is more likely that Canadian courts would adopt reasons similar to those in *Carly* v. *Farrelly* to justify the retention of causation in restitution:

> I must say that on the facts of this case I think I am being asked to apply a supposed rule of equity which is not only vague in its outline but which must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result. It cannot be sufficient to say that wide and varying notions of fairness and conscience shall be the legal determinant. No stable system of jurisprudence could permit a litigant's claim to justice to be consigned to the formless void of individual moral opinion.[250]

Yet, for purposes of determining civil liability, problems of causation will arise less frequently, in cases such as *Strand Electric* or *Olwell.* In these cases the defendant's benefit was caused by his transgression of the plaintiff's proprietary interest. But causation may function in some cases to restrict the scope of that interest.[251]

B. *Generating new grounds of civil liability*

There is another aspect of remoteness, which has been defined by McGregor in terms of scope of protection.[252] Assuming that the plaintiff can satisfy the causation requirement by showing that he

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[248] In *Chase Manhattan Bank of N.A.* v. *Israel-British Bank (London) Ltd, supra,* note 187, 216, Goulding J. said of *Simonds* that "the opinion proceeds on the classical foundation of a persistent equitable interest in this plaintiff...".

[249] See *supra,* note 234.

[250] *Supra,* note 244, 367.

[251] *E.g.,* compare *Cleland* v. *Berberick* (1915) 34 O.L.R. 636 (H.C.), *aff'd* (1916) 36 O.L.R. 357 (C.A.) with *Bremner* v. *Bleakley* (1923) 54 O.L.R. 233 (C.A.).

[252] *McGregor on Damages, supra,* note 209, § 144.

conferred a benefit on the defendant, he must demonstrate that his interest in the return of the benefit is recognized under the principle of unjust enrichment. The issue of remoteness becomes one of policy.[253] The court asks whether the scope of unjust enrichment ought to be expanded to impose liability for this class of benefits. The courts are required to determine what enrichments are unjust from a large and expanding number of enrichments.[254] For example, where Jones spends $3,000 to renovate his house, it may be possible to prove that the neighbouring house owned by Smith increased in value by $1,000. While the defendant derived a benefit from the plaintiff's expenditure, as a general rule, Jones's interest would not be recognized in Smith's benefit.[255]

In *County of Carleton* v. *City of Ottawa*[256] the Supreme Court of Canada used the principle of unjust enrichment to expand civil liability beyond previously recognized boundaries. But there was no discussion of policy reasons supporting the expansion of liability to recover a benefit, which the Ontario Court of Appeal[257] considered too remote. Without such reasons, it becomes difficult to predict future expansions of liability for unjust enrichment because we do not know the criteria relied upon by the Court to justify the creation of "irrebuttable benefit" as a new category of liability.[258]

The most recent illustration is the majority judgment in *Pettkus* v. *Becker*.[259] As already explained,[260] the Supreme Court of Canada held that Miss Becker was entitled to a proportionate interest in the real property acquired in the name of the man with whom she had lived for nineteen years. While liability is based on unjust enrichment, *Pettkus* v. *Becker* expands the range of equitable remedies available to prevent unjust enrichment. This view of constructive trust was not accepted by a majority of the Supreme Court of Canada in the earlier cases of *Murdoch*[261] and *Rathwell*.[262]

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253 As is the case in tort: *ibid.*

254 It would be impossible from a practical point of view to impose liability for every case of enrichment: see Dawson, *The Self-Serving Intermeddler* (1974) 87 Harv. L. Rev. 1409, 1418.

255 Such a limitation was recognized in *City of Moncton* v. *Stephen, supra,* note 50.

256 *Supra,* note 47.

257 [1965] 1 O.R. 7 (C.A.).

258 I have discussed the concept of "irrebuttable benefit" elsewhere: *The Judicial Nature of Unjust Enrichment supra,* note 44, 384-93.

259 *Supra,* note 1.

260 See text accompanying note 11, *supra.*

261 *Supra,* note 7.

262 *Supra,* note 12.

But we do not know in what circumstances a Canadian court will impose a constructive trust as an alternative to a personal judgment based on the value of the benefit conferred. Not all benefits are unjustly retained.[263] But this observation must be read with Dickson J.'s view that the courts are to invoke the "ancient principles of equity [in order] to accommodate the changing needs and mores of society. . . ."[264]

The question of public policy may have wider implications. There is no clearer example than recent Canadian cases which have considered the right of a plaintiff to prevent the commercial exploitation of his "personality by use of his image, voice or otherwise".[265] These decisions are consistent with the American view, expressed by Professor Palmer,[266] "that there is an economic interest that is entitled to protection against unauthorized commercial exploitation by another". The notion of personality in Canadian and American cases generally involves some degree of celebrity status. The American courts have taken judicial notice of the celebrity status of Muhammad Ali[267] and Cary Grant[268] in actions commenced to seek relief for intended or actual commercial exploitation of their personality. Whether we call this right one of property[269] or publicity,[270] the plaintiff's right of "exclusive marketing"[271] may entitle him to a restitutionary claim based on the principle of unjust enrichment.[272]

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[263] *Pettkus* v. *Becker, supra,* note 1, 12 *per* Dickson J.

[264] *Ibid.*, 11.

[265] *Krouse* v. *Chrysler Canada Ltd, supra,* note 138, 241. See also *Athans* v. *Canadian Adventure Camps Ltd, supra,* note 138.

[266] Palmer, *supra,* note 82, 125.

[267] *Ali* v. *Playgirl, Inc.* 447 F. Supp. 723 (S.D.N.Y. 1978). In that case, Muhammad Ali obtained an injunction against *Playgirl* magazine precluding them from printing and distributing an objectionable portrait of the former champion.

[268] *Grant* v. *Esquire, Inc.* 367 F. Supp. 876 (S.D.N.Y. 1973).

[269] Irvine, *supra,* note 133, 205-7 insists that liability for commercial exploitation of personality requires a showing of economic loss by the claimant. A number of American cases have held that the claimant is enforcing a property right: see *Cepeda* v. *Swift & Co.* 415 F. 2d 1205 (8th cir. 1969); *Price* v. *Hal Roach Studios, Inc.* 400 F. Supp. 836 (S.D.N.Y. 1975); *Uhlaender* v. *Henricksen,* 316 F. Supp. 1277 (D. Minn. 1970).

[270] Prof. Palmer (*supra,* note 82, 125) does not put much emphasis on the label used, equating right of publicity as an alternative label to a right of property.

[271] *Athans* v. *Canadian Adventure Camps Ltd, supra,* note 138, 434.

[272] Civil liability based on unjust enrichment for the commercial appropriation of personality was established in the United States in the so-called "human cannonball" case: see *Zacchini* v. *Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977).

In *Athans* v. *Canadian Adventure Camps Ltd*[273] the plaintiff was a champion water-skier of national and international fame. The defendant, as part of a promotional campaign to launch a boys' camp, prepared and published a camp brochure with a drawing which depicted the plaintiff skiing. This drawing of a water-skier in action bore a "striking similarity" to the plaintiff's " 'trademark' photograph".[274] It should also be noted that the boys' camp planned to feature water-skiing as a major programme, and the efforts by the defendant to gain the plaintiff's agreement to lend his name, image and endorsement to the project failed.[275] A passing-off action did not succeed,[276] but a new category of protected interest emerges, and that expansion has important implications for both the law of tort and restitution. Henry J. explains the basis of civil liability as follows:

> I turn now to the second head of claim, namely, wrongful appropriation of the plaintiff's personality. I say at once that, on the basis of recent authority, it is clear that Mr. Athans has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right, if it is invaded: see *Krouse* v. *Chrysler Canada Ltd. et al.* (1973), 1 O.R. (2d) 225, 40 D.L.R. (3d) 15, 13 C.P.R. (2d) 28. If a case for wrongful invasion of this right is made out, then the plaintiff is entitled, in appropriate circumstances, to an injunction and to damages, if proved. It is only in recent years that the concept of appropriation of personality has moved from its place in the tort of defamation, as exemplified by *Tolley* v. *J.S. Fry and Sons, Ltd.*, [1931] A.C. 333, to a more broadly based common law tort.[277]

The *Athans* case does not explain the criteria applied to a thing before the court attaches a proprietary right to it. But when proprietary rights are attached to personality in this way, we know the probable legal consequence of such an invasion. While it has been argued that *Krouse* v. *Chrysler Canada Ltd*[278] requires the plaintiff to show actual economic loss corresponding to the defendant's gain from the invasion,[279] such an analysis ignores English cases[280] which have employed the principle of unjust enrichment to make an award of damages in tort based exclusively on the defendant's benefit. Further, such an argument relies upon a plus-minus requirement which has found little judicial support in the

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[273] *Supra*, note 138, 431.
[274] *Ibid.*, 430.
[275] *Ibid.*, 429.
[276] *Ibid.*, 433.
[277] *Ibid.*, 434.
[278] *Supra*, note 138.
[279] Irvine, *supra*, note 133, 209.
[280] See *supra*, note 146.

cases.[281] Therefore, Henry J.'s conclusion that the defendant had invaded "Mr. Athans' exclusive right to market his personality"[282] is akin to a finding of trespass in the land cases,[283] or conversion in the case of a chattel.[284] The tort is actionable *per se*.[285] And the measure of damages in these so-called tort cases is based on a notion of benefit obtained.[286]

The Ontario Court of Appeal in *Krouse* has shown a willingness to consider the public-policy implications in developing guidelines for what is "an appropriation" of the plaintiff's exclusive right to exploit his personality. The following passages from the judgment by Estey J.A. illustrate the Court's sensitivity to the broader policy concerns.

> It is clear from the evidence and by the slightest exercise of judicial notice that our community to date recognizes by contract the right of the professional athlete and persons otherwise in the public eye to commercialize on their notoriety. The law of contract is regularly invoked to make the personal attributes which are attached to such people by the community, the subject of commerce. On the other hand, it is equally clear that professional sport, either at the entrepreneurial or

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[281] Irvine, *supra*, note 133, 209.

[282] *Supra*, note 138, 437.

[283] *Swordheath Properties Ltd* v. *Tabet*, *supra*, note 146. See also *Bilambil-Terranora Pty Ltd* v. *Tweed Shire Council*, *supra*, note 147, for an excellent analysis of the English cases.

[284] *Strand Electric & Engineering Co. Ltd* v. *Brisford Entertainments Co.*, *supra*, note 146.

[285] Prof. Irving (*supra*, note 133, 207) takes the point of view that such a conclusion is not supported by the Ontario Court of Appeal in *Krouse*, and goes so far as to say it is "indeed flatly denied by that case." However, the *Krouse* case acknowledges that "the Courts would be justified in holding a defendant liable in damages for appropriation of a plaintiff's personality, amounting to an invasion of his rights to exploit his personality by use of this image, voice or otherwise with damage to the plaintiff" (*supra*, note 138, 241). English and American authorities clearly establish that these "so-called damages" are based solely on the defendant's gain without any corresponding burden to establish the plaintiff's "loss" in an economic sense from such an invasion of right. Nothing in the *Krouse* case suggests that this orthodox view of damages would not apply in the appropriation of personality case. See generally *Meikle* v. *Maufe* [1941] 3 All E.R. 144, 153 (Ch.) *per* Uthwatt J.; *Chabot* v. *Davies* [1936] 3 All E.R. 221 (Ch.) *per* Crossman, J.; *Stovin-Bradford* v. *Volpoint Ltd*, *supra*, note 200, 266 *per* Lord Denning; *Netupsky* v. *Dominion Bridge Co. Ltd* (1969) 5 D.L.R. (3d) 195, 226 (B.C.C.A.) *per* Taggart J.A., *rev'd* on other grounds [1972] S.C.R. 368.

[286] In *Bilambil-Terranora Pty Ltd* v. *Tweed Shire Council*, *supra*, note 147, 477, Reynolds J.A. observed that "[i]f A deprives B of his chattel, and it has a value on the open market, it is impossible to contend that the damages should be less than that sum, whoever converted it, and to whatever use B was putting it or intending to put it."

> participant's level, invites the widest possible coverage and publicity from the communications media.[287]

Clearly, the availability of restitutionary relief in these cases will turn on what amounts to an appropriation of the plaintiff's rights. This amounts to an indirect way of defining the nature of the property right which the court will protect.

> The danger of extending the law of torts to cover every such exposure in public not expressly authorized is obvious. Progress in the law is not served by the recognition of a right which, while helpful to some persons or classes of persons, turns out to be unreasonable disruption to the community at large and to the conduct of its commerce. Much of this publicity will in reality be a mixed blessing involving the promotion of the game itself, but at the same time resulting in some minor or theoretical invasion of a player's individual potential for gainful exploitation. By way of illustration, a sports report on television might expose a motion or still picture of one or more well-known players immediately before or after the telecasting of a commercial message by an enterprise not associated with the telecasting of football games. The public in our community would not consider any players so represented on the screen as thereby endorsing the products advertised on the same programme, nor would a viewer reasonably associate in any other way the players so depicted and the product mentioned in the programme's commercial messages. Thus, it would be a gross exaggeration to say that the usefulness of the player's name or image in some form of commercial exploitation in the advertising world was thereby diminished. The use by the appellants of the respondent's image in this case is in no way parallel to the use of a hockey player's signature on a hockey stick, or of a photograph of a professional athlete driving an automobile of the advertisers. Aside from the laws of defamation, the Courts have not heretofore found it appropriate to bring acts of the kind complained of in the particular facts of this proceeding within the purview of the law of torts.[288]

In order for a claimant to recover on the basis of unjust enrichment in cases like *Athans* or *Krouse*, an analysis of complex issues of policy, property law, and tort law is required. As these cases illustrate, restitution is not a self-contained body of law. Instead, when a thing is vested with a proprietary nature, this designation cuts across the law of tort, contract and restitution. In particular, restitutionary liability should force those who would appropriate property rights to make contractual arrangements with the owner of those rights. While the "property", "restitution", and "tort", among others, are frequently employed terms in such cases, the principal issue for a court is still whether it should force one person to pay for a thing to which another claims some

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[287] *Supra*, note 138, 28.
[288] *Ibid.*, 30.

exclusive right of control.[289] Neither *Phillips* v. *Homfray* nor *Sinclair* v. *Brougham* have found favour in Canadian cases. It is hoped that Dickson J.'s approval of certain passages in *Ruabon S. S. Co.*[290] will not be construed as a general approval of the English concept of benefit.

VI. Conclusion

The English view of benefit reflects, in my view, certain institutional biases and the custom and training of the English judges. Before becoming decision-makers the English judges would generally have practised at the Bar. The English cases indicate that the judges have been sensitive to the professional interests of barristers. This is not to suggest a single explanation for the English cases. But landmark cases such as *Sinclair* v. *Brougham* and *Phillips* v. *Homfray* reveal certain traits which suggest a jurisdictional dispute of sorts is simmering quietly through the actual judgments. For example, in *Sinclair* v. *Brougham* Lord Sumner's judgment is divided into two major sections. In the first Lord Sumner addresses the common law barristers by considering a quasi-contractual argument which would have resulted in expanding their jurisdiction.[291] Lord Sumner, with the majority of the House of Lords, was unwilling to allow a common law remedy. That is to say, the English common law barrister failed to expand jurisdiction in the traditional manner, which was based upon promise or contract-related fictions. In the second part of Lord Sumner's judgment, he appears to turn his attention to the chancery Bar.[292] In *Phillips* v. *Homfray* the English Court of Appeal had protected the common law barristers from possible chancery expansions, but the House of Lords in *Sinclair* v. *Brougham,* faced with the question of expanding jurisdiction, elected to allow that expansion on the chancery side. Consequently, taking into account historical jurisdictional conflicts, there was nothing inconsistent in denying quasi-contractual recovery while at the same time inventing a fiduciary relationship as a basis on which to justify a proprietary remedy. This is not to suggest that *Phillips* v. *Homfray* was eclipsed by *Sinclair* v. *Brougham.* In both cases, jurisdictional battles between common law and chancery barristers were fought on both quasi-contractual and property theories. The House of Lords in *Sinclair* v. *Brougham* did not

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[289] *Cf. International News Services* v. *Associated Press, supra,* note 2.
[290] *Supra,* note 58.
[291] *Supra,* note 77, 451-6.
[292] *Ibid.,* 456-60.

sanction chancery jurisdiction over quasi-contractual actions. But, nevertheless, the House of Lords in that case did expand chancery jurisdiction in a predictable fashion. The Law Lords simply found that a fiduciary relationship existed between the claimants and the defendant and allowed the claimants to trace their proprietary interests, subject, of course, to the competing claims of the outside creditors.

The Canadian law of restitution has developed along different lines from the English law.[293] But the temptation remains to fall back on certain English principles without considering their origin.[294] The tendency to use English cases for their symbolic value,[295] or as an escape-hatch from unjust enrichment liability,[296] or simply as an alternative basis of liability to unjust enrichment,[297] causes uncertainty in the Canadian law of restitution. There is much in the English law which lends itself to acceptance in other jurisdictions. At the same time there is a realization that engrafting some English principles, such as those governing constructive trust,[298] onto the Canadian law of restitution has been a mistake. Similarly, with the concept of benefit, we have seen that blood-feuds and jurisdictional battles have left their scars, and it is appropriate for Canadian courts to ask whether our system of restitution calls for a different notion of benefit.

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293 Since 1954, when the Supreme Court of Canada decided *Deglman* v. *Guaranty Trust Co., supra,* note 37.

294 See text at note 40, *supra.*

295 See text at note 45, *supra.*

296 See text at note 49, *supra.*

297 See text at note 52, *supra.*

298 See text at note 22, *supra.*