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**‘Concepts and Principles in Unjust Enrichment: A
Comparative Study’.**

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**CONCEPTS AND PRINCIPLES IN UNJUST ENRICHMENT:
A COMPARATIVE STUDY**

By

**John Bede Donnelly
Bachelor of Arts, Graduate Diploma in Education,
Master of Commerical Law**

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Deakin University**

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I wish to acknowledge the patient and valued assistance of my supervisors, Ms Sharon Erbacher and Dr Michael McShane, in commenting on the drafts of my thesis.

.....

Abstract.

The Thesis was inspired by a perceived need better to understand the unique description of unjust enrichment by the Australian courts, as a *unifying legal concept*. It demonstrates that concepts and principles are essential features of the common law because they identify the character and taxonomy of rules. The comparative study, encompassing Australian and English law primarily, and law of other jurisdictions, modern and ancient, elucidates the special characteristics of the concepts and principles of Anglo/Australian unjust enrichment and of concepts and principles generally.

A like concept has had a place in the common law since its inception under several characterisations. It bears the mark of ancient Roman jurisprudence, but relates to independent principles. The jurisprudence was formed by special characteristics of its history. It is distinct from modern Roman/Dutch law but the doctrinal overtones of its foundational case law reflect the basis of reasoning which in Continental law, is found in the adopted ancient codes. It is this foundation of reasoning and the firm rejection of a normative general principle that makes Anglo/Australian law different in character and jurisprudence from unjust enrichment in USA and Canada.

Stifled for centuries by *quasi contract* misconceptions, the law of unjust enrichment entered the modern law in the 20th C through the seminal judgements of Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Coombe Barbour Ltd*,¹ and related cases and through the strong judicial and juristic following they inspired. That "...any civilised system of law is bound to provide remedies for ... unjust enrichment..."² became an imperative across the common law world: it has long held a place in the Roman Dutch jurisdictions of South Africa and Continental Europe.

¹ [1943] AC 32.

² *Id.*, 61.

The special character of unjust enrichment in Anglo/Australian law is focussed upon a unique action where-by the law imposes an obligation upon the establishment of a recognised ground. The notion of breach of a primary rule does not arise: the obligation is therefore a primary obligation imposed by law, as distinct from a remedy for a breach. Important consequences flow from the characteristic.

The juristic development of unjust enrichment in the common law has long been the sole prerogative of the superior courts. The place of historical features of the jurisprudence has however been subsumed by modern judicial methodology that is slowly assuming a unifying pattern of reasoning from case to case; from one ground to another. This is the special characteristic of the unifying legal concept and English principle of unjust enrichment.

The thesis draws widely based conclusions about concepts and principles of unjust enrichment and the actions and obligations they sponsor. It portrays them as the substance of legal reasoning and analyses underlying theory. To this end, it addresses counter juristic and historical arguments. Its central conclusion are that there are sound jurisprudential arguments for actions based upon a unifying legal concept and English principle of unjust enrichment, and that the explanation of the unjust enrichment concept as the foundation of an independent branch of the common law and taxonomy is theoretically sustainable. In this manner concepts and principles of the common law are demonstrated as critical characteristics of the common law at large.

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Chapter 1: Introduction.

The Thesis

Concepts and principles are essential elements of the common law because they identify the foundations and taxonomy of rules of law and explain their characteristics. This thesis will demonstrate this claim in the context of rules of unjust enrichment, an independent branch of the law.

The pertinence of concepts and principles is universal in the common law, but they have an especial importance in unjust enrichment. Unlike rules in contract and tort, rules in unjust enrichment impose a primary obligation that is not founded upon a breach of a right or a duty. Rules in contract and tort impose duties as remedies that are conceptually, secondary rules. A primary obligation is one imposed by law, as distinct from a duty or obligation arising from a breach of a contract, or enforced as a consequence of a tortious act, also characterised as a breach. Important consequences flow from the special characteristics of the unjust enrichment obligation.

Concepts and principles of unjust enrichment assist in defining the circumstances, ultimately defined by a rule, in which an obligation to make restitution for unjust enrichment will arise. They provide the explanations of liability and therefore they unify the variety of grounds of unjust enrichment actions. They define the jurisprudential character of the actions, set the limits of jurisdiction, and define the independent purpose of unjust enrichment law. Like principles of equity they seek to rectify rather than remedy; unlike equity, they characterise the circumstances of a case, and the benefit gained rather than the action or omission of a party and the advantage taken.

In this context, the thesis sets out to explain what was meant by Justice Deane's dictum,

...unjust enrichment is a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an

obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.¹

I will demonstrate these premises. I will argue that, they remain valid despite pressures and tendencies to follow a trend evident in some other jurisdictions toward more loosely structured actions and more general concepts of what may be deemed equitable at a philosophical level.

The analysis of concepts, principles and rules and of obligations and actions, will demonstrate that the basis of modern law in Australia and England is theoretically sound and this soundness is an essential pre-requisite to development of the law of unjust enrichment. Importantly, it follows that if there is to be change, there must be a sound understanding of the merits of what exists and of the theoretical imperatives that must govern change.

The future of unjust enrichment may well be concerned with broader definitions and some degree of exchange of concepts in common law and equity: as the exploration of this possibility is itself a major study, its treatment in this work is confined to necessary comparative observations.

The motivation for this work began with Professor Winfield's *Province of the Law of Tort*². The clarity of Winfield's treatment of the elements of the law of tort, concepts, principles and rules, suggests that study of concepts and principles in

¹ *Pavey and Matthews Pty Ltd v Paul* (1986) 162 CLR 221, 256-57.

² Sir Percy H Winfield, *Province of the Law of Tort*.

other heads or specialities of the law will be conducive to greater facility in understanding complexities in many areas. Unjust enrichment has been the focus of considerably less scholarship than contract tort and equity. Professors Birks and Burrows are two of the jurists tjay have made outstanding contributions to that scholarship; their works cited in these pages, have inspired investigation and laid foundations for exploratory research.

The thesis introduces significantly novel findings and observations about the law of unjust enrichment.

The treatment of concepts and principles in this work is novel in several important aspects. Firstly, I show that the jurisprudence of unjust enrichment has a long history in our common law. I do not assert continuity, but I demonstrate that throughout the long history of the common law, there is a significant influence of a concept of unjust enrichment that helps to shape actions and rules. It will be seen that several writers, and especially H K Lucke,³ have argued the durability of concepts in the history of the common law. It is very much because of their contributions that it is possible to assert that modern unjust enrichment has much in common with principles and actions that are found in many centuries since the foundation of the common law in Norman English times.⁴ The novelty here is in demonstrating more completely than has been attempted in other works, that the foundations of common law unjust enrichment are to be found in historical concepts and principles.

³ Horst K Lucke, Senior Lecturer in Law, University of Adelaide, later Emeritus Professor, University of Adelaide School of Law.

⁴ The 'Norman' Kings were the Norman (of Normandy region, N.W. modern France) invaders of England who established the Kingdom in 1066. They laid down a centralised system of law originally intended to govern the legal relations between the king and his vassals, which became in time, the common law of England.

Secondly, the work explains concepts and principles in relation to the law and demonstrates their place in the law. This has rarely been dealt with in legal literature in a purposeful way and it is believed to be the first time that the nature of concepts and principles has been examined extensively in relation to actions in unjust enrichment. Especially, the importance of the character of the obligation imposed by law is analysed in the context of unjust enrichment, explaining the important contributions of Lord Wright that have been accorded too little attention and appreciation.⁵ The contributions of Professor Birks are also especially acknowledged, and the theoretical treatises of Professors Hart and Dworkin which affect unjust enrichment in common with other branches of the law, are studied, in company with others, for their ability to clarify the theoretical basis of concept principle and rule and the obligation created by an unjust enrichment rule.

Thirdly, the working of concepts and principles in unjust enrichment is an especially elucidating study when done in a comparative way against concepts and principles of other areas of the law. This provides a unique insight into the, manner in which the development of the law is tied to foundational concepts and principles which, essentially, describe the limits of jurisdiction and the means of its development.

Fourthly, the thesis describes the notion of 'legal unjustness' in an historical and a modern practical context and finds a specific legal meaning of the notion of *unjust*, which has been a central juristic feature in the law of unjust enrichment, historically and in modern law. The legal meaning of unjustness is defended against theories that deny special meaning of the language of the common law. The notion of that which is *unjust* has been stated in leading texts on unjust

⁵ Esp. sub-ch. 6.3, and pp 171ff, 216-19 and 250ff

enrichment, but the thesis explains the characteristic as a defining characteristic of actions and explores its relevance to the obligation in unjust enrichment.⁶

Fifthly, the work engages in a comparative study between the working of principles in the law of negligence and in unjust enrichment. The exercise is particularly elucidating and it demonstrates the essentiality of clear, principled separation of rules and the manner in which this contributes to an orderly taxonomy. In particular, the thesis compares the basis of reasoning between unjust enrichment cases and delict and attributes the commonality to the *action on the case*.⁷ From this association of the modern actions in unjust enrichment and delict with the ancient parent action, it is possible to explain more clearly the characteristics of modern actions. There does not appear to have been a comparative study of this kind in the past.

Unjust enrichment involves concepts and principles that have proven much more difficult to define than concepts and principles in other areas of the law. There are issues that are seen to be unresolved, as to meaning and scope of this branch of the law. This thesis makes an original contribution to achievement of a principled approach to the underlying jurisprudence.⁸

The special character of *obligation* plays an important part in unjust enrichment. The obligation is imposed by the unjust enrichment rule. The law recognizes certain specific obligations arising from the juridical character of the ground of an action. This is inherent in legal philosophy and is found also in equity. The thesis makes a novel suggestion that the *obligation imposed by law* is an expression of the juridical character of the action and derives from the fundamental principle

⁶ See especially Sub-ch. 6.5 and Ch 13.

⁷ Explained at pp 22-31.

⁸ Especially in Chs 10, 11 and 13.

that every civilized system of law will mandate the restitution of unjust enrichments, rather than an arbitrary standard that cannot be explained in a unifying sense.⁹

Finally, the meaning of the dictum of Justice Deane, ‘...unjust enrichment is a unifying legal concept...’,¹⁰ is of crucial significance in Australian law. This work analyses and explains the meaning of that dictum, a first in legal literature, and it assays the relationship of the unifying concept in Australian law and English ‘general principle’ of unjust enrichment which has a comparable role.¹¹ It is shown that the Australian and English law on this point is significantly different to North American case law. This is crucial to the interpretation and application of case law across several common law jurisdictions. An explanation of the *unifying legal concept of unjust enrichment does not appear to have been attempted in other legal literature.*

⁹ A related obligation is imposed by some equitable doctrines. Chapter 7.5 is important to this aspect of the work. Throughout, this work, the word ‘juridical’ is used to describe concepts, principle, rules and doctrines in the manner that they have a unique or at least special legal character that has been attributed to them uniformly and which can be expected to characterise associated statements of principle. See ‘legally conclusive proposition’ p107. The ‘corrective’ character of the unjust enrichment obligation, p 84, is an example. See Professor Birks’ essay entitled ‘Juridical Classification of Obligations’ in Peter Birks ed *The Classification of Obligations*, 37, especially pp 37-39, for an exhibition of ‘juridical’ categorisation. Ernst Weinrib’s notion of ‘juridical’ characteristics, fn 192, carries the notion that legal usages have meaning determined by their use in a legal philosophical environment which may vary according to the particular legal philosophical views of the exponent. My use of the term ‘juridical’ involves that concepts, principles, rules and doctrines have meaning that is wholly to be found by studying cases in jurisdictions over a period of time that might be correctly described as ‘contemporary’. Another similar word, ‘juristic’, has a related meaning but may take account of the usages and uses of an element of law in a predictive sense in writings of leading jurists in the particular speciality.

¹⁰ Fn 1.

¹¹ Esp. pp 91-98, 108-110, 136, 164 and 176-79.

Structure of the Thesis.

I will pursue the objectives of the work in a five-part approach:

1. An historical appreciation designed to explain that historical roots contribute definitively to modern perceptions of what is meant by unjust enrichment, and of taxonomy and doctrine.
2. An analysis of the importance of concepts and principles as they describe the content and purpose of rules.
3. An elucidating comparative study of law in modern jurisdictions, and to a limited extent, comparison with ancient law. This comparative approach will be seen to have several aspects.
4. A theoretical study designed to augment the description of the role and purpose of principles in modern law of unjust enrichment.
5. Drawing upon each of the above, a study of definition of the key concepts and the parameters of unjust enrichment, that is of benefit, subtractive enrichment, obligation and the definitive nature of *unjust* as a central feature of the unjust enrichment action.

Some of these approaches have dedicated chapters, but all permeate the work as a whole. Each will contribute to the achievement of the major premises stated above.

Observations concerning objectives.

Modern judges and jurists do not universally treat unjust enrichment as an independent branch of the law. Certainly, it is no longer an off-shoot

of contract, but might it not be subsumed into equity and contract by making it merely a remedy? And is it not susceptible to the introduction of new grounds founded upon notions similar to those that underlie the unfair contracts legislation in the Australian states? Perhaps that 'unfairness' notion could be extended to include unconscionability. This is the way things have gone in the North American jurisdictions and a recent decision in the Australian High Court¹² provides substantial grounds for believing that some Australian judges are leaning toward this kind of outcome, albeit, not in any defined or scientific way at this stage. The thesis therefore sets out to show that unjust enrichment has a strong jurisprudence of its own and to demonstrate how this has developed.

Conclusions reached in the work may have broader application, but unjust enrichment is a special case: its principles and rules are at a crossroads and this has been so for the greater part of the past two centuries. There are issues that are seen to be unresolved, as to meaning and scope of this branch of the law. Issues of the kind have proven perplexing throughout the long history of unjust enrichment.

Principles and rules of contract and tort do not exemplify this developmental state. They are continually being reassessed and reaffirmed in incisive judgments, but they are more firmly established, a factor that might be attributed to their much older genre as integral chapters of the law. Few judgments in modern times can be seen to address their principles and rules in the manner of questioning their modern application.¹³ Unjust enrichment however, involves concepts and principles that have proven much more difficult to define and this fact underlies the anomalous 'quasi contract' nomenclature that Justinian

¹² *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516.

¹³ *Cf, Trident General Insurance Co. Ltd v McNeice Bros Pty Ltd* (1988) 165 CLR 107.

employed.¹⁴ The same anomaly has plagued neo-modern jurists. This is another aspect of the comparative study. Unjust enrichment is a complex of concepts, principles and rules that challenges lawyers to justify development in terms of legal theory and to avoid the pitfalls of unprincipled notions of unfairness and ill defined extensions of notions of unconscionable conduct found in equity.

It is impossible to assess fully, a field of jurisprudential theory in the context of a thesis that sets out to examine specific aspects of unjust enrichment law, that is, the concepts and principles that are its structure. Several theoretical approaches demand and suggest answers to particular problems perceived to be relevant to practical unjust enrichment law and it is possible to study the way that unjust enrichment is elucidated by their study. It is not proposed however that any particular approach to jurisprudence exclusively defines the analytical approach of the thesis. Especially, the scope of the work is confined to the inter-action of the elements of rules, concepts, principles and notions of obligation: it does not purport to address purpose of law in terms of control and behavior in a legal philosophical sense as a jurisprudential study, in the manner of Austin, Kelsen and others.¹⁵

A final observation on objectives of the work concerns the relevance of the issues to the practice of law in modern courts. What elements of a decision of the superior courts are binding upon lower courts? A jurisprudence that prefers a definition of law as a system of rules does not readily answer how the reasoning that underlies rules is dealt with by the doctrine of precedent: is Justice Deane's

¹⁴ In Roman Law, *The Institutes of Justinian*, an important early codification of the law.

¹⁵ Lord Lloyd of Hamstead and MDA Freeman, *Lloyd's Introduction to Jurisprudence* 17-18; John Austin, *The Province of Jurisprudence Determined*; Hans Kelsen, *General Theory of Law and State*. See however p 202 and fnn 280 and 492 below where a brief contrast is made between Kelsen's characterisation of rules and the explanation of rules by professor H L A Hart, *Concept of Law*, which is designed to demonstrate my perception of Hart's concept of rule. The contrast concerns the function of the rule of relative to other elements of law and the working of precedent in the cases.

notion of ‘unifying legal concept’¹⁶ an aspect of a rule or is it reasoning? I believe the study must assist in answering questions of this kind and assist in addressing the associated issue that Lloyd raises, that is, when and how is justification for departing from an established rule justified?¹⁷ The answer as applied to unjust enrichment in common with many other areas of law, must take a wider view than simply a capacity to apply rule: such an answer differs from justification in reason that concerns the logic and legal reasoning underlying a curial decision. It is the latter that characterizes the Justice Deane dictum.

Unjust Enrichment’ or ‘Restitution’?

I do not propose to dwell long on the issue encapsulated in this heading for it has been the subject of a treatise by Professor Birks.¹⁸ Suffice to say that the branch of the law here dealt with is commonly described as ‘restitution’. It is necessary to be precise, however: the work deals with restitution for unjust enrichment and the terminology to describe this branch of the law is described throughout, as *unjust enrichment*. It will be necessary at times to discuss it in the context of its restitutionary ‘neighbours’ in common law and equity, but this is ancillary to the main task. In the United Kingdom, the judgments and the legal literature refer most frequently to *restitution* denominating a branch of the law in

¹⁶ Above, fn 1. See below pp as to the meaning of the ‘unifying legal concept’ pp 91-98, 108-110, 136, 164 and 176-79.

¹⁷ *Lloyd’s Introduction to Jurisprudence*, above fn 15, 1377-84, esp. 1382, ‘...basic flexibility of the system is preserved, not so much by the formal limitations on the rule of *stare decisis*, but by the relative freedom with which the courts may and often do determine the scope and limits of past precedents and whether to apply them to fresh circumstances ... or to distinguish them...’.

¹⁸ Peter Birks, ‘The Independence of Restitutionary Causes of Actions’ (1991) 16, No 2, *UQLJ*, 1. See also, Peter Birks ‘Misnomer’ in W.R. Cornish et al (ed), *Restitution Past Present and Future*, 1, 4 ff, arguing that socio/political considerations played a part at the time of the first edition of *The Restatement* in the choice of restitution nomenclature in preference to unjust enrichment. In modern times too, it is essential that the law defines carefully the actions it will allow. The issues are discussed in a brief comparison with the foundations of the Continental codes in Chapters 10 and 13.

which restitution for unjust enrichment is a central and essential part. There is no firm rule, but the practice in Australia to date has been to refer to *unjust enrichment* as a branch of the law, *restitution* being the broad category that encompasses remedies for wrong as well as the taxonomic category of restitution for unjust enrichment. In this work, the focus is exclusively unjust enrichment as a taxonomic category and restitution for unjust enrichment as the juristic outcome of the actions.

Scope of the comparative study.

It is fashionable and comfortable to use the term 'Anglo/Australian' in reference to common features of our law rather than 'Australian/English'. It is not meant to imply that the work is more concerned with English law than with Australian law however much the size and extensive history of the Anglo jurisdiction would suggest otherwise. The development of unjust enrichment in Australian law has been something of a joint venture. Australian courts have relied very much upon the experience, wider and substantially longer, of the English jurisdiction. It will emerge that the modern approaches in each are not, in the final analysis, greatly different and the work of the courts in each is demonstrably complementary.

Although there is fundamental similarity between rules applied across many jurisdictions, the courts in North American jurisdictions have followed different paths to that followed under the Anglo/Australian model, in extending the law and allowing new actions in unjust enrichment. There are competing and conflicting influences at work. This work will demonstrate that the Australian law is and should remain similar to English common law of unjust enrichment, subject to some important conceptual problems. These latter affect the nature of the restitutionary action based upon unjust enrichment and may hinder, or assist its growth in Australian law, depending upon the manner of their resolution. The comparative analysis will address these areas of apparent theoretical

dissimilarity and come to some conclusions within the confines of the work.

The comparisons across jurisdictions nevertheless help to support an argument favouring a conservative approach to the future expansion of unjust enrichment jurisdiction in Anglo/Australian law which is demonstrably in the interests of a lucid taxonomy and principled development of the law in our circumstances.

Comparisons with civilian jurisdictions are made sparingly because the depth of that comparison is a substantial work in its own right and cannot be attempted without consideration of common historical influences which have helped to shape civilian Continental (European) and South African law and our own common law/equity traditions.

The learned exponents of the common law begin, in so many reasoned passages, by setting up the philosophical stance of the Roman law and addressing it, even when their purpose is to expound and defend a different rule from that which might come down from Roman jurists. This is found frequently in judicial reasoning in respect of unjust enrichment. Lord Mansfield's famous dictum in *Moses v Macferlan*¹⁹ is rich in nuances that may derive from Roman praetorian concepts of equity and the method of reasoning whereby rules were formulated in actions allowed by the praetorian edict.²⁰ The *ex aequo et bono* (out of justice and expediency)²¹ principle was at the centre of *enrichment*

¹⁹ (1760) 2 Burr. 1005: 97 ER 676. See fn 127 below; the scholarly transfer of wisdom, rather than doctrine and rules, was the Roman legacy to the common law.

²⁰ The praetor, a Roman superior court official empowered to publish a periodic list of allowable actions, including, in his sole discretion, new actions. The judges (iudex) enforced the actions so allowed. The praetor peregrinus (as distinct from the praetor, properly so called) was the significant office for this was the official who presided over actions allowable between citizens and non citizens or between non citizens inter se, and the law developed in this jurisdiction, typically Roman Byzantine law, the law of Justinian, as distinct from derivative classical law reserved for citizen and citizen where the praetor (the title reserved for this jurisdiction) presided.

²¹ W.A.Hunter, *Roman Law*, 34-36: see also Hector L MacQueen and W. David Sellar, 'Unjust Enrichment in Scots Law', in Elto J.H. Schrage ed, *Unjust Enrichment*, 291. The 'equity and expediency' is found in Kames Principles of Equity, 1788, and Sir James Dalrymple, Viscount of Stair, *Institutions*, 1.1.16. See fn 267 below where a too literal interpretation of 'expediency' is questioned.

condictio in Byzantine Roman law but this must not be taken as being of direct importance. It is the influence of Roman jurisprudence that is of importance in this comparative study. Comparison of actual rules and the legal context in which they are found is of lesser significance. We could spend much time comparing Roman concepts of equity with English rules relating to unjust enrichment, but little would be gained from that, for present purposes at least. The comparative study cannot however, ignore the origins of our jurisprudence if the relationship of principle and precedent is to be explored fruitfully.

The absence of Roman principles in the early common law does not mean that there has been no cross fertilization. In the history of western jurisprudence, there have been only two substantial systems of unwritten law, they being the Classical Roman Law and the Common Law. The lessons of the former in its transition to a law of universal application were not lost on those whose scholarship and juristic experience has modernised the common law over the centuries since Matthew Hale began his organization of the common law.²² The experience of Roman law provides a foil that assists, at many points, in understanding developments in our own law. It is especially significant that influences of Roman jurisprudence are to be found in the reasoning in the courts in developing a *concept of unjust enrichment* despite the early strictures of the formulary system, (and paradoxically, to an extent, because of this restrictive environment). Later in the work it will be demonstrated that *principle* in our law is inseparable from the concept of an *action*, a feature which has a distinct relationship to Roman experience.²³

²² See Peter Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, 154 ff.

²³ Below, pp 179 and 246.

In the context of this work, it does not assist reasoning, I believe, to argue the source of rights beyond asserting that they are recognised by law. This is so whether the right is one to enjoy unimpeded possession of land and chattels; to have one's agreement with another performed when legal prerequisites have been satisfied; or, to have restitution in circumstances where the law recognises a ground for an action in unjust enrichment. Issues concerned with the question, why the law recognises a right which gives rise to a remedy, or a right that underlies a finding of unjust enrichment, are at another level which ought not to be pursued in the present context. This means that questions concerned with why the law recognises that a particular proposed cause of action is a ground for restitution involve two lines of enquiry.

- Firstly, is it a moral question or a question concerned with communal values, or some other philosophical, or *value* reasoning?
- Secondly, does the law regard *this* ground as just one more ground that is linked or explained by a unifying concept/principle of unjust enrichment?

With one reservation, the present study does not seek to answer the first question. The second question is ultimately, answered by the superior court of the jurisdiction by resort to legal reasoning. The student of theory and the practitioner may attempt to suggest new grounds because of relationship to the purpose perceived to underlie all existing grounds, or one that is found by the superior court to underlie an existing ground in a decided case. It is with this kind of enquiry that the consideration of concepts, principles and actions is concerned. It will emerge that there are sound theoretical and practical reasons why the recognition of new grounds will be extremely rare.

I have suggested a single reservation concerned with the first question. That reservation is probably no reservation at all; it is signalled here because the law determines the juridical meaning of unjustness as the foundation of an action in unjust enrichment. Treatment of this issue in chapter 7 seeks to identify the

character of a key subordinate principle in unjust enrichment actions: that concerns the character of 'unjust'.²⁴

Finally, there has been considerable academic discussion on the issue of unjust enrichment quadrating with restitution, as two sides of the same coin. This is a complex issue that need not affect the way unjust enrichment is studied in this work. The focus is unjust enrichment: restitution, which may have relevance also as a remedy under other heads of law is not the primary concern in these pages. As an article of Andrew Burrows shows, 'in restitution for wrongs, the wrong is the cause of action'²⁵

²⁴ The character of 'unjust', it will be seen, rests upon the obligation created by law; it may seem tautologous to insist that the obligation created by law is a legal obligation, but I must ask whether the law responds to another kind of obligation. To the extent that such an obligation is an expression of communal values and morality, then it is of the same character as the issues envisaged in the first enquiry. As to obligation in modern law, see pp 169 ff and Chapter 13 below. A comment on J.C. Smith's analysis of legal obligation below, Ch. 7.5, explains the issues involved.

²⁵ 'Quadrating Resitution and Unjust Enrichment: A matter of Principle'. [2000] *RLR*, 257, 260. This is a more limited enquiry than that which may concern the jurisprudential character of a right and wrong.

Chapter 2: Historical Introduction.

Part A: Summary Exposition of the History of Unjust Enrichment.

2.1.1. Explanatory Note.

There are two parts to this chapter. Part A is a summary overview of the legal history of *unjust enrichment like* concepts and jurisprudence. Part B, which is a detailed explanation of important historical issues concerning the background to modern law of unjust enrichment, is self contained. It is unavoidably complex. It endeavours to approach the task as a scholarly treatise whilst it seeks to unravel the legal history from the history of the forms of action and the idiosyncrasies of Norman and medieval English law. It also seeks to separate the real law from fictions and misconceptions that were abundant in the early common law. Part A therefore endeavours to make it possible for the reader to use Part B simply as an historical resource by referring to sections of Part B when detail may be required. To facilitate this, footnotes are primarily contained in Part B.

2.1.2. Introduction.

History and reason have forged the structure and the taxonomy of the body of laws about unjust enrichment in English law. It will be very important for the future, to understand the foundations of unjust enrichment as an independent branch or speciality of the law along-side contract and delict. Without such an understanding, unjust enrichment will be attached to equity which will be mutually detrimental: its principles and rules will continue their clumsy

progress without contribution to reasoned development of the wider 'law of obligations'. That 'law of obligations' nomenclature will itself persist without understanding that there are important nuances that affect the *primary* kind of obligation in unjust enrichment, distinguishing it from most other obligations.

Obligations to desist from interference with another's rights, and property and to refrain from damaging another's good name, and to perform one's contract are also primary obligations that are the foundation of rights and duties that arise in the context of breach. The unjust enrichment primary obligation is imposed by law and along with some obligations in equity, it has a special quality because it is the imposing of this kind of primary obligation that is the response of the law to the particular facts that are in law, an unjust enrichment or that justify an order such as injunction or specific performance. The legal response to tort is also imposed by law; unjust enrichment and tort are by-products of the *action on the case*. In tort however, the action is a response to a breach.

The underlying jurisprudence of the *indebitatus* type of action concerns the creation of obligations by process of legal reasoning, a direct consequence of *action on the case* jurisprudence. This does not mean that the actions were either delictual or equitable even though there may have been an early jurisprudential association with each. The relationship with early delictual cases was only in the judicial method of recognising actionable cases. As the law developed from the 17thC, unjust enrichment jurisprudence has been distinct from equity. This is attributable to the manner in which the independent courts and their jurisdictions developed, as much as to the isolation of the *indebitatus* common counts as creatures of the common law with a supposed contract association.

The influences of history are absorbed into the common law through the practice, indeed doctrinal imperative, of observing rules of precedent. Many old cases, from the *forms of actions* era (that persisted to the last quarter of the 19thC), still provide the foundation of rules applied in modern cases. Modern

cases create structure, taxonomy and theoretical science at least partly, by applying these long standing judgments.

An understanding of the unjust enrichment actions as a distinct branch of legal taxonomy is essential to the integrity and predictability of decisions in an important field of common law. Indeed, the conceptual confusion that has clouded modern actions stemming from miss-interpretation of procedural devices in the era of the common counts, had frustrated the development of principled foundations of neo modern unjust enrichment until prominent judges of the mid-to-later 20thC intervened to contribute principled definition of actions.

The brief historical study will account for the manner in which an independent jurisprudence developed. It does not attempt a study of deeper historical philosophical influences apparently shared by continental jurisdictions, for which anecdotal evidence is noted in chapter 10 and 13, beyond noting opinion the possibility that such influences may have existed.²⁶

2.2. The Historical Summary.

The consequences of history that are noticed in the historical study will provide essential background to conclusions to be reached in the work as a whole. The purpose of the chapter is to demonstrate that the concepts and jurisprudence of modern unjust enrichment are as old as the common law itself and that its jurisprudence, especially the method of the law finding what is unjust on the facts of the case, is almost as old in the common law and reflects much older

²⁶ There is a lack of hard evidence for such influence and it is likely that the medium, in the 11th and 12th C's was the Canon law, which was in any event, repressed by the Norman Kings. From 1066, the invasion of Britain by the Normans (of Normandy) established a unique administration and a system of law that was reduced initially, to a system of writs that enabled actions to settle disputes between the barons of the royal court. The Crown was disposed to suppress communal and ecclesiastical/canon law.

judicial methodology. It is therefore possible to assert that the rules in modern cases are neither unrelated nor incapable of being explained by unifying concepts and principles that have characterised the law over the course of a millennium.

The detailed exposition in Part B, beginning with Chapter 2.3, argues the above premises. Those arguments are presented here in summary form.

(i) *Elementary Common Law.*

There was an elementary jurisprudence in the earliest common law of the Norman Kings. It comes from the earliest actions of *debt* and *account* that preceded development of contract.²⁷ This jurisprudence was not contractual and, as this treatment of history will demonstrate, unjust enrichment law was not an off-shoot of contract (one of the enduring myths of English legal history). Under the foundational royal *writ of right* that lay for claims of title to land between the Norman Barons, the central notion of the plaint was that ‘...*he deforceth me...*’. Other writs and especially the writs of *debt* and *account*, took their form from the parent *writ of right*, underscoring a strongly proprietorial jurisprudence. *Debt* and *account* came to be the manner of claiming, first a specific sum, and later, the (mixed) sum covered by an averment of accounting. There was no writ for informal contracts.

(ii) *Adoption of New Jurisprudential Characteristics: (a) quid pro quo.*

The Norman common law actions of *debt* and *account* were built around a doctrine called *quid pro quo*. The *quid pro quo* was the essence of the unjustness of the retention of the benefit (something was given for which a return was expected). *Account* determined the issue of what was owed. The bailiffs, were obliged to perform proper accounting under pain of forfeiture or

²⁷ Explained in Chapter 2.3.

imprisonment. Here we can see a lack of clear distinction between the civil action and the 'offence' and this is important to the development of *the action on the case* in non delictual actions that will be mentioned again shortly. Holdsworth says of *account* that it was the instrument by which the common lawyers applied the '...equitable principle which lies at the foundation of the great bulk of *quasi contracts*, that one person shall not enrich himself at the expense of another.'²⁸ Sir Henry Maine also found the jurisprudence of this kind of action 'equity like' at this stage in the development of the law;²⁹ Holdsworth was endorsing Ames' conclusion that *account* was the origin of the *principle* underlying the actions derived from *the action on the case* in the common law, which will be introduced in the next sub-chapter, as distinct from civilian influence.³⁰

Whilst this version of the history of concepts and principles developing apart from civilian influence is demonstrably sound, it cannot be denied that there was a deeper philosophical meaning and a more credible account of the origin of the concept of unjust enrichment which Jan Hallebeek finds had its origins in canon

²⁸ Holdsworth, *History of English Law*, v. III, 427, citing Ames, Lectures, 162. The reference to 'equitable principle' cannot be read in terms of modern equity: see below, p 26 and 38 and Chapter 13. '*Quasi contract*' refers to the actions that later became *indebitatus* and 'the common counts'. It appears to be an adoption of the manner in which actions of this kind were described in the Institutes of Justinian (Roman). It was an inappropriate term even in Roman law where it had nothing to do with contract. The terminology will be explained below.

²⁹ Ancient Law 15 and ch. III. See notes at fnn 44 and 106-110 below. Equity had a larger role in the 'account' type of action in the middle ages, partly because it had the power of discovery that the common law courts did not, and partly because its procedures were a great deal more flexible. See Gareth Jones, 'The Role of Equity in the English Law of Restitution' in Eltjo J H Schrage ed *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, 159 at 168-9.

³⁰ Holdsworth connects *indebitatus* with *assumpsit* rather than with *debt*. This might explain his unwillingness to go one step further and acknowledge that it was just this 'principle' in the mixed *account* and *debt* action which was, in truth, the foundation of *indebitatus assumpsit* and hence of more modern concepts. The *quasi contract* appellation is an adoption of the manner in which actions of this kind were described in the Institutes of Justinian (Roman). It was an inappropriate term even in Roman law where it had nothing to do with contract. See fnn 118-126 below and references therein. There are several points at which the study points-up issues with the views of important historians.

law.³¹ In the common law the concepts were, nevertheless, what English history and unfolding jurisprudence made of them.

A rationalisation of these perceptions is offered by Jeffrey Hackney who explained that in the 14th C, there was a marked turning away from the Roman law as a foundation of the common law principles, after which common law assumed an independent character and resemblances in common law to Roman law and Canon law were superficial. Hackney suggested that the new concern with the 'top end' of legal relations was very largely associated with commercial needs and in consequence, the common law actions became directed to rapid outcomes and lost touch with notions of conscience, trust, loyalty and good faith: in consequence, the clerical Chancellors rejuvenated these lost characteristics in equity, the foundations of the Chancellors' jurisdiction.³²

(iii) *Adoption of New Jurisprudential Characteristics: (b) Case.*

A distinction is made in the practice of pleading between a plaintiff in *debt* on the one hand, and a plaintiff who complains of an injury or wrong. The former demands what is his/her own whilst the latter claims relief and pleads in a

³¹ Jan Hallebeek 'Unjust Enrichment as a Source of Obligation: the Genesis of a Legal Concept in the European Ius Commune. [2002] RLR 92, 93-95. Hallebeek finds that in the 12C, the separation of canon law and theology was complete and the former became an independent discipline. He relates that Saint Thomas Aquinas was the first to separate unjust enrichment from restitution in *Summa Theologica* 11-11.962 art. 6, where he proposed two quite different concepts; restitution resembled redress for a past performance without consideration; the unjust enrichment doctrine was closely akin to its modern concept. But it was Grotius (1583-1645) who transformed it into a discipline of law. The time-line offers persuasive evidence of influence of these developments upon common law jurisprudence although it will have been anathema to the Norman Kings. It is a credible proposition that the education of contemporary lawyers and philosophers encompassed the legal philosophy of France and Italy and the German Barronies. See also Chapter 13 below, concerning the influence of the Natural law.

³² 'More than a Trace of the Old Philosophy' in Peter Birks ed. *The Classification of Obligations*, 123, 135-139.

complaining way'.³³ Delictual actions were of course, a separate field of development centred upon the *writ of trespass*. There were many situations however that were neither *debt* nor *trespass* related, and the courts developed an action, built upon a Roman model, that they allowed for a case of injustice where no other action lay. This was originally a *trespass* kind of action developed within the scope allowed by parliament to find a new writ where none existed even though the case is similar to another for which a writ lay (*in consimili casu*). Like the modern action in unjust enrichment, it came to be allowed on the facts of the case. Thus, it came to be called *action on the case*. This demonstrates the influence of Roman jurisprudence. In practical terms however, it was adapted to the circumstance of the exception to the general prohibition upon the issuing of new common law writs. There is a coincidence here that suited the beleaguered justices, tied as they were to the limited number of writs on the register. Under the Roman methodology, the Praetor was empowered to allow a new action in the interests of justice: in the English courts a finding *in consimili casu*, (where they found that an issue of justice demanded a case) resembled the Roman precedent. What was *just* was a legal question and it might have been conceptually related to the notion of offence to the 'commonweal'. All civil wrongs were an offence to the king who might originally have taken a personal interest beyond the pecuniary interest in later times. The coincidence of civil wrong and regnal control provided the means for development of the new *action on the case*. The plain effect of the developing jurisprudence was that the law recognised the circumstances in which, in the interests of justice, an action should be allowed.³⁴

³³ Below, p 33 and fn 65.

³⁴ See below, pp 70-71; and see also p 250 and fn 658 where it is argued that the law minimises its impact on ordinary relations, a perception that has nothing to say about those other principles of law that deal with equitable, unconscionable or tortious issues that are separate and should remain so.

(iv) *Rudiments of a Restitutionary Action.*

The rudiments of the restitutionary action are apparent. What was the reasoning that made it available? The courts of the later middle ages were not troubled by such a question because the reasoning was well recognised, if not defined in objective terms. The notion of a dispute between the King's subjects breaching the royal peace was sufficient, even if the motivation was, in truth, the perception of justice of the case. This analysis suggests the effect noted at p 257 below, where-by all instances of non contractual acquisition of money or money's worth were acceptable if legal, except those that the law reasoned as instances of that which was technically 'unjust'.

(v) *Emergence of Assumpsit.*

There had been no action on an informal contract. Gentlemen should put their undertakings in writing! Where a benefit was given in return for a promise, the new action of *assumpsit* was allowed as a special case, on the same premise as the action for a benefit governed by *debt* and *quid pro quo*. I shall not traverse the history of *assumpsit*. The action which also grew from delictual origins (the *action on the case* with its early association with the King's peace), evolved to serve a new and quite separate purpose. It lay where *debt* did not lie, upon a promise to perform an obligation which was neither given under seal nor *nudum pactum*. But an obligation might also arise independently of a promise where the important doctrine of *quid pro quo* could be invoked, that is, *pro quo* (in return for) *quid* (a benefit).³⁵

The *quid pro quo* was evidence of the existence of an obligation and is the foundation of common law obligations. After some vacillation, the courts would allow an action for a benefit given in the absence of a friend to protect his crop or other property. This was not an *assumpsit* action because there was no

³⁵ See pp 35 ff below. Writ of covenant lay for agreements under seal.

promise, but it could not be a *debt* action either, because debt could not lie for a past benefit nor upon a promise. So the law created a fiction of *promise*.³⁶ In the *indebitatus assumpsit* actions that developed after *Slade's Case*, the promise was always a fiction.³⁷ By that means, the action in *debt*, with its clumsy and probably corrupt procedures and its 'swearing of witnesses' as the modus of proof, was avoided. But the courts allowed the pleading of the benefit given. If the action were brought in the King's Bench where general pleadings were being accepted, the debt need not be specially pleaded; several debts might be involved. The tediousness and precariousness of the special pleading was avoided. The action, extended doctrinally, encompassed the debt as a benefit conferred without specially pleading the content of the debt. After *Slade's case*, the court of Common Pleas, the other great common law court, also allowed actions of this kind.

The plaintiff would plead evidence of the debt by averment of accounting (but would not plead the debt itself) to establish that the defendant '...just must have promised' and this became the general issue and went to the jury in that form. The debt was established in this complex manner and became the essence of an obligation.

In such a circumstance, the curious practices in the pleadings (which were now written) and the important *evidentiary* doctrine of *quid pro quo*, provided the necessary elements for the reasoning of the action now called, simply, *case*. In fact before *Slades Case*, the action was *case*. One of the findings in *Slade's*

³⁶ Fictions were important devices, not only in the common law, but in other systems where the regnal control was over-bearing: see below sub-ch's 2.7 and 2.8. Sir Henry Maine described fictions arising in Roman law as '...properly a term of pleading...and properly signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse.' *Ancient Law* 15 and ch. III. The similarity found in the *indebitatus* action is striking.

³⁷ *Slades case* (1602) 4 Co. Rep 92(b); 76 ER 1072, and the fictitious promise are further explained at p 50 and sub-ch. 2.9 below.

Case was that the plaintiff, in actions for a benefit given, could have *debt* or *case* at its election. The action, because of the fictitious promise, came to be called *indebitatus assumpsit*.³⁸ Its only resemblance to the main-stream *assumpsit* action was the (fictitious) promise. This point has not been well understood. Fictions, especially in the Court of King's Bench, were frequently the resort of the judges whose hands were otherwise tied by the all pervading forms of actions.

Observed from an analytical point of view, the existence of the debt asserted by the averment of accounting, is relevant as evidence of an enrichment, the giving of *quid pro quo*; and the promise, whatever form or ephemeral shape it took, was an implicit acknowledgment that the enrichment would be unjustly held if not disgorged to the benefit of the plaintiff. It seems very likely that 17thC judges of the King's Bench, were conscious of the essential 'justice of the case' issue.

(vi) *The Importance of quid pro quo.*

The *quid pro quo* doctrine did not assert ownership; it asserted obligation to restore in fact or in kind. *Quid pro quo* was fundamentally important in its influence upon the developing law where it also established the early concept that later became consideration. But it sprang from *debt* and was the jurisprudential basis of a concept that we now describe as 'benefit'. It was coupled with, and inseparable from the obligation that was claimed in *debt*. It was not an obligation to pay damages, but to give over the benefit.³⁹

The same jurisprudential influences may also explain why writs of debt and account became something more than actions for 'the sum or the thing'. They

³⁸ *Slades Case*, fn 37. *Indebitatus assumpsit* grew out of the permissible election of *debt* or *case* as the action pursued by litigants that was allowed after Slade.

³⁹ See sub-ch's 2.5, 2.7.

reflected reciprocity, or *justice of the case* jurisprudence rather than a preoccupation simply with a right. The ancient legal notion that ‘... you have what in justice ought to be mine...’ has its modern equivalent: but it has a very long history in many legal systems, a fact that would prompt Lord Wright’s dictum in the middle 20thC, ‘...every civilised system of law...’ will have rules for recovery of such benefits.⁴⁰

(vii) *‘Just’, a Judicially Reasoned Foundation of Cases.*

When the *action on the case* was reasoned into existence (the only way of describing adequately, such a response to a jurisprudential imperative), there emerged another element that becomes profound as a jurisprudential concept. This is the concept that in the *action on the case* the law reasoned in terms of what is just, the basis of actions. In *case*, the law selectively allowed actions where it found that the circumstances warranted it, as an issue of justice.⁴¹

(viii) *Principle of Justice.*

Lord Mansfield, in his several pertinent judgments⁴² was speaking, not about equity of ‘justice between man and man’,⁴³ but about equity in the ancient and enduring sense of ‘the equitable’. That is a jurisprudential concept closely linked to the judicial method of establishing principles of law concerning the meaning of

⁴⁰ *Fibrosa Spolka Arcynja v Fairbair, Lawson, Coombe Barbour Ltd* [1943] AC 32; see text accompanying fn 276 below.

⁴¹ See pp 35, and sub-ch. 2.8 below.

⁴² Especially, *Moses v Macferlan* (1760) 2 Burr. 1005; 97 ER 676.

⁴³ *Baylis v Bishop of London* [1913] 1 Ch 127, 140 pr Hamilton LJ. It is significant that the antipathy toward Lord Mansfield’s statements of principle in ‘quasi contract’, reflected the strident opposition he encountered 150 years previously, over his stated principles raising the spectre of a promise satisfying the need for consideration, in *Pillans v Van Mierop* (1765) 3 Burr 1663; 97 ER 1035 (consideration was only one form of evidence) and *Hawkes v Saunders* (1782) 1 Cowp 289 at p 290; 98 ER 1091, (...ties of conscience upon an upright mind are a sufficient consideration.’).

‘unjust’ and, importantly, the foundation of an ‘obligation imposed by law’ in cases which we would now describe as unjust enrichment.⁴⁴

(ix) *The Nature of Principle.*

The history of law and equity provides the student with a window upon relationship between law and the expectations of communities in which it developed, encompassing cultural, moral and constitutional disposition. Despite the limitations imposed by the particular environment, including by the forms of actions, English common law and equity had, in common with other civilised societies, a culture that responded, amongst other things, to obligations that went to the root of communal notions of integrity that is to be found in any civilized system of law.⁴⁵

(x) *The History and the Modern Law.*

The significant out-come of the study of the legal history of unjust enrichment is not that there has been demonstrable continuity so much as that the jurisprudence that is as old as the Roman law and the Norman English law, has worked with rudimentary concepts to create the roots of modern concepts. That jurisprudence underlay the recognition of the jurisdiction to allow an action upon the just principle of the case, a jurisdiction recognised in other systems, especially Roman law. “Just” is what the law, guided by its internal concepts and rules, says it is.⁴⁶

⁴⁴ The jurisprudence comes from the ancient action on the case, as to which see pp 31-45 below. It was augmented by the evidentiary role of the doctrine of quid pro quo; see sub-chapters 2.4 and 2.5 below, noting its significance to justice of the case. See also Blackstone’s (in *Blackstone’s Commentaries*) important conclusion at p 56 below, that such rules arise from ‘...natural reason and just construction of the law.’ As to the meaning of ‘equity’ in the dicta of Lord Mansfield, Chapter 13 demonstrates that equity has a very much older and wider history than that which we associate with common law.

⁴⁵ See pp 116 and 148ff below, as to promise and communal expectations. The culture and the law also responded to the needs of commerce: see Jeffrey Hackney’s conclusions, above p 21 and fn 32.

⁴⁶ See fn 249 and accompanying text. There is an interesting foreshadowing of the way in which modern law has developed in a manuscript by Sir William Evans, dated 1802, entitled ‘An Essay on the Action for Money Had and Received’, reprinted in [1998] *RLR* 1-33. Evans addresses the basis of the law applied by Lord Mansfield in *Moses*, fn 42 above, and describes the contemporary law in actions where one must give an account of money received, actions for mistaken payment, for failed contract, for duress and where the plaintiff waives tort. In his introduction, he explains that the basis of the action was that one who receives money to which another is entitled holds it to the latter’s use; thus, ‘...I may, in point of form consider him as my agent ...having received money for my use and made a promise to pay...’, for which the receiver might be compelled to account: at p 3.

Conclusions.

The early judges who reasoned into being the *action on the case*, were not allowing an action as a matter of discretion, where no other action (under the rigid forms of actions) applied. They found, by judicial reasoning a basis for a finding that case was available on the facts of special cases. There is no discretion, not even in the restricted sense that there may have been in equity. The role of the court was confined to principle and the courts demonstrated a capacity to follow principle. Modern law and equity is also confined or described by principle.⁴⁷

It is quite unnecessary to assert continuity from the 11thC to modern times, but the notions and concepts, principles and jurisprudential methodology observed in the early middle ages, have had typical phenomena in every decade of the subsequent history of the common law. It may be that it is most accurate to describe the influence upon later law in terms of 'lessons of jurisprudence regarding obligations in the common law'. Meanwhile, notions of 'implied contract' and *quasi contract*, based upon a so called 'promise to pay' are demonstrated as being unworthy of serious attention.

The observations of the commentators, especially those of Professor Birks, assist in understanding the significance of the developments outlined above.

⁴⁷ There never was an open ended discretion in equitable jurisdictions. It was always governed by principles and rules, and this is true of equity in other ancient jurisdictions. See the discussion of ancient equity in Ch. 13. In 'equity' of this broader kind, there is found a strong resemblance to the methodology of the early action on the case and to its successor actions for a benefit, including neo modern and modern unjust enrichment.

They are surveyed in sub-chapter 2.9 below. That completes the summary. The following sub-chapters in Part B constitute the reasoned historical text that is capable of being treated solely as reference supporting the observations made thus far in this chapter.

Historical Introduction: Part B: Important Phases in the Development of Unjust Enrichment.

2.3. Early Conceptual Development: The Rudiments of an Independent Jurisprudence.

In Bracton's time (d.1268), a universally honoured maxim,⁴⁸ meant the rejection of a place in the English common law of the Roman Law principle 'causa' which was at the root of contractual types of actions⁴⁹ (extending, in Roman law, to actions on a bare promise.).⁵⁰ Contrasting with the early common law, Roman law contractual rules were soundly developed and the concept of unjust enrichment also, was part of the codes along-side the law of contract and delict, though not equivalent in terms of developed principle. The influence of Roman

⁴⁸ 'nudum pactum non parit actionem'. No action where agreement has not been made under seal. Bracton's two volume work was amongst the earliest records of the common law.

⁴⁹ In Roman law, 'causa'. see Holdsworth, *History of English Law*, v, III, 16. The terminology has its origins in the *Institutes of Justinian* Book III, Title XXVII, Pl.1. See Moyle, *The Institutes of Justinian*, 153 et seq. and Fifoot, *History and Sources of the Common Law, Tort and Contract*, 364. In the Roman law, it was stated plainly that many relationships, described as 'causa', simply were not contracts at all, certainly so in common law terms.

⁵⁰ A party who gains a benefit at its request should not retain it unjustly, *Godwin's case*, (1219) *Notebook*, Plea 36, extracted in Fifoot, *History and Sources of the Common Law, Tort and Contract*, 260. See below sub-ch's 2.8 and 2.9; the evidence of consciousness of legal unjustness in the courts, unfolds over several centuries.

taxonomy and Roman rules upon developing continental European law, has been significant.⁵¹

A marked effect of the spasmodic development of the early common law was that for several centuries, the common law was to be without a law of promise where-by an executory promise might be enforced, unless it be under seal.⁵² In former times the ecclesiastical courts had administered rules of conscience, probably based upon Roman law and Canon law. The absence of a general promissory jurisprudential principle was to some extent ameliorated by, and again to some extent explicable in terms of a strongly proprietary character in early English jurisprudence, concerned as it was with feudal relationships under the Norman kings.⁵³ Barons might be expected to put their agreements under seal for which the writ of *covenant* might be invoked for non performance, effectively bringing the issues before the king or his justices.

The common law revolved around a small number of writs. What part these writs played in the law depended upon the inventive capacity of the courts to justify new purposes, for which they might be employed, a phenomenon that became increasingly significant.⁵⁴ For several centuries, the judiciary engaged in a jealous contest for jurisdiction which meant power and income. Major points of

⁵¹ See for example, *Hand Muss Hand Wahren*, Pollock and Maitland, vol II, 155. See Chapters 10, 12 and 13 where underlying relationship of common law jurisprudence and Continental jurisprudence is discussed.

⁵² Passages from *Glanville X* and Bracton, *Notebook*, g 99-100b especially the passage “Quid sit obligatio....” where the author referred to several Roman Law aspects of ‘contract’. The inference from this and from *Glanville*, X, is that learned persons of their time shared a considerable knowledge and respect for the Roman law. See also Jackson, *History of Quasi Contract in English Law*, 28.

⁵³ Maitland, *Constitutional History of England*, 105-106.

⁵⁴ Disputes were an affront to the king’s peace and therefore to be dealt with in the king’s courts.

conflict of legal principle between the two royal courts (King's Bench and Common Pleas) created a significant difference in potential outcomes.⁵⁵

The means whereby the King's Bench wrenched jurisdiction away from the Common Pleas involved many fictions and devices which were more or less effective. In time, jurisdiction became similar in each. This unseemly competition between the courts was not finally resolved however, until the era following Lord Coke's decision in *Slade's Case*⁵⁶ in the first decade of the 17thC. It was out of this rationalisation of the judicial approaches to the actions available to the courts that the pseudo writs that came to be known as 'common counts' began to emerge. This heralded the beginnings of the formal recognition of a branch of the 'law of obligations' based neither upon contract nor delict, and the law of restitution began in a formal sense.

The *action on the case*, which came to be called, simply, 'case', was an ingenious invention upon a Roman model which seems to have been allowed to exist on equal footing with a 'formed action'.⁵⁷ In the early 17C, the assembled judges of the Exchequer Chamber who met to resolve insuperable contradictions in the law,⁵⁸ found that *case* was as much a 'formed' action (like the forms of actions) as *debt and account*. By then however, the courts had

⁵⁵ The arrest of a defendant for a fictitious felony against the Crown was one device used for getting a defendant into the King's prison where the King's Bench had jurisdiction. The history of fictions in the King's Bench makes entertaining reading: see Marjorie Blatcher, *The Court of King's Bench 1550 – 1650*.

⁵⁶ (1602) 4 Co. Rep. 92(b); 76 ER 1072.

⁵⁷ The parliament had imposed strict limits upon the issue of new writs by the Crown, but an exception was made where cases were thought to be similar to those for which a writ was allowed, *in consimili casu*. Some historians have insisted upon a distinction between the *action on the case* and *case*. Whether there is a distinction or not is not presently relevant because I am concerned with the 'quasi delictual' work of the action rather than its delictual significance for which the distinction, if there is one, may have some relevance. The action was distinct from 'formed actions' which must identify with an originating royal writ.

⁵⁸ *Slade's Case*, fn 37. The basis of the decision of this case, promoted by Lord Coke, was agreed by the assembly of judges. The Exchequer Chamber had a jurisdiction to review decisions of the King's Bench; see below, fn 125

invented *assumpsit* from which modern contract flows, and in that century, *indebitatus assumpsit* also. *Indebitatus* became the vehicle for principles of unjust enrichment which had erstwhile resided in a clumsy assimilation of *debt* and *account* in a single action.

A more detailed treatment of some aspects of these writs will follow, but only to the extent necessary to demonstrate the rudiments of an unjust enrichment jurisprudence.

2.4. The Early Development of the Writ of Debt.

The following is a point-by-point account of significant details.

1. *Preliminary observations:*

- English courts would seek to fill gaps by ingenious curial extension of the writs, albeit in halting steps, widening the scope and meaning of the writs. *Case* was the most obvious example. All civil wrongs were also an offence⁵⁹ and therefore within the cognisance of the royal courts; thus, it will be seen that an avenue for the prosecution of an action upon an informal debt and an informal agreement emerged in a quasi-delictual context.
- Glanville⁶⁰ tells us that the *writ of debt* had the characteristics of a *writ of right* under which a plaintiff demanded the return of land occupied by another.⁶¹ A procedure whereby the defendant confesses the debt and promises to pay on a certain day is noted.⁶²

⁵⁹ Offence to the King's peace, which was the theoretical basis of all Norman laws.

⁶⁰ A treatise on rules and customs, courts and substantive law, was compiled under this name in late 12C.

⁶¹ *Glanville X*. In Cap. I, in Fifoot, *History and Sources of the Common Law, Tort and Contract*, 233-6. Glanville explains that the plea belongs to the Crown; what was at issue was the "dignity of the king", a feature strongly reminiscent of the *writ of right*. The wording of Cap 2 very closely follows the style of the *writ of right*.

⁶² Pollock & Maitland, *History of English Law*, v. II, 204. From *Glanville*, x, 2. A practice of obtaining 'judgment' or at least a recognisance even before the loan is made is also noted by Pollock & Maitland, *History of English Law*, V ii, 204. Apparently, actions were rare, because of the cost of the writ (as much as 25% of the debt for a man of substance). More frequently, an entry was made on the Chancellor's Roll confessing that one owes a certain sum (thus creating a 'contract of record') a practice consistent with the suggestion that the Chancellor's officers were frequently moneylenders.

- The writ consisted of a command to the sheriff to bid the debtor pay because the defendant 'unjustly deforces' the plaintiff (a notion borrowed from the parent writ) of a sum of money.⁶³
- The idea of a *sum* was artificially equated to *land* or *goods* in order to preserve the character of the *writ of right*.
- The Plaintiff claimed what was 'his/her own':⁶⁴ thus a distinction is made in the practice of pleading between a plaintiff in *debt* on the one hand, and on the other, a plaintiff who complains of an injury or wrong. The former demands what is his/her definitive right whilst the latter claims relief and pleads in a 'complaining way':⁶⁵
- The action of *Debt* would not lie on a partial completion of the task or partial delivery of the property or sum,⁶⁶ nor upon a *quantum meruit* (and there was no separate writ for *quantum meruit*).⁶⁷
- The action was for recovery of that which is owed, originally for a whole sum: as it was said in *Bladwell v Sleggein* (1562)⁶⁸ '...one cannot sue for a horse when one is owed a cow...' emphasising the difference for example, between a liquidated sum and the proceeds of a promise.
- One could not bring an action for *debt* upon a promise.

⁶³ *Ibid.*

⁶⁴ *ibid.*

⁶⁵ Pollock & Maitland, *History of English Law*, v. ii, 572 and see *Bracton's Notebook*, pl. 52, 177, 325, 381. Until the 14C, pleadings were oral: see Peter Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, 108, citing Sir Matthew Hale, and see J.H. Baker, *An Introduction to English Legal History*, 74.

⁶⁶ A curious resemblance to the 20C cases based upon total failure of consideration, notably, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barber* [1943] AC 32.

⁶⁷ See Fifoot, *History & Sources of English Law*...., 251.

⁶⁸ In Simpson, *History of the Common Law of Contract*, 63.

- It was essential that the obligation be supported by *quid pro quo*, as evidence of the obligation: that is, *pro quo* (in return for) *quid* (a benefit).⁶⁹

2. *Jurisprudence*:

Holdsworth says that the essence of *debt* was that ‘...the defendant was conceived of as having in ... possession something belonging to the plaintiff...’...⁷⁰

- The main premise of *debt* was that a person had received a benefit that ‘belonged to’ another.⁷¹
- The reason of an obligation to render or give up what belonged to a plaintiff in *debt* was that value had been given: it was a matter of reciprocity, but because it originally related to a sum of money, the proprietary aspect of the *writ of right* was not to be found.⁷²

The actions must not be understood in the language of later common law, however: the lack of clear, principled definition of the actions was the norm amongst early common law writs.⁷³

⁶⁹ An informative background to the doctrine is to be found in O.W. Holmes, *Common Law*, 200 ff. It was not evidentiary in the modern sense but it was essential to the existence of an obligation and hence, it being established that *quid pro quo* was given (by sufficient oath swearers in earliest Norman times, and by verdict of the court in later medieval times), the law imposed an obligation.

⁷⁰ *History of English Law*, vol. iii, 420. Holdsworth cites Ames in *Harvard Law Review*, vol. vi, 260.

⁷¹ *Id.* at 221.

⁷² See Simpson, *A History of the English Law of Contract*, 193. It was decidedly not a proprietary action of the Roman *vindicatio* type, even though it might resemble the incidents of such an action. Roman law, apparently, was anathema to the Crown and common law distinctly differed from it, even though the reasoning closely resembled that underlying Roman law actions at many points. The *vindicatio* is more fully explained in another context, below; see p 56 below.

⁷³ In the case of *debt*, the anomalous lack of clarity as to its underlying theoretical basis would remain until the advent of the common counts when its essential characteristics would undergo radical change.

2.5. Quid Pro Quo, Debt and Assumpsit.

In this section, I will show that in the context of the dominance of formal actions with fixed purposes, a doctrine of many parts, *quid pro quo*, emerged as a product of reasoning and of civilian influence;⁷⁴ the doctrine becomes the embodiment of the notion of unjust enrichment.

The influence of Roman jurisprudence is especially evident in the development of *case* where the Roman development of the concept that held ‘no injury without an action’, originating from classical Roman Statutes,⁷⁵ provides the model.

- *Case* played an important part in development of modern common law doctrines including unjust enrichment.
- The same jurisprudential influences may also explain why writs of *debt* and *account* became something more than actions for the sum or the thing, reflecting reciprocity, or *justice of the case* jurisprudence rather than a preoccupation simply with a right which the Romans would have called ‘proprietary’.⁷⁶

⁷⁴ Following the Roman, especially the Justinian precedent.

⁷⁵ *Lex Aquilia*: *damnum sine injuria datum*; approximately, ‘no injury without an action’. The Roman classical law preceded the great codifications of which Justinian’s was the most prominent. The classical law was an unwritten law, but statutes came to be the practice to extend or define certain points.

⁷⁶ See Peter Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, 159 et seq., arguing that the experience of Roman jurists in developing principles of law from the intent of a classical rule, referring to the classical unwritten Roman law which preceded the *Institutes*, has a significance for the development of the common law.

- *Debt* had a preclusive role. Where this writ lay, no other lay.
- *Assumpsit*, which grew from delictual origins (the *action on the case*), evolved to serve a new and quite separate purpose. It lay where *debt* did not lie, upon a promise to perform an obligation which was neither given under seal nor *nudum pactum*.⁷⁷
- Where an obligation arose by virtue of a duty to give what was owed, *pro quo* (in return for) *quid* (a benefit), *debt* lay and *ipso facto*, no other action lay.⁷⁸

Forming the elements of doctrine:

- *Quid pro quo* was influential in the development of the doctrine of consideration in the law of contract. It also played a unifying role in the assimilation of the actions of *debt* and *account*, and in the transition which brought into being the actions at the root of modern unjust enrichment, the *common counts*, that I have called 'quasi writs' because they were invented upon the model of *debt*.
- The *quid pro quo* doctrine underlay the early recognition by the law of an *obligation* arising from a promise supported by a 'charge' and where a benefit (*quid*) was received upon a request: the request assumed the character of *pro quo*, like the other end of the bargain.

⁷⁷ A bare promise is *nudum pactum* (no agreement).

⁷⁸ This statement is based upon the association with the doctrine of *quid pro quo*. The concepts suggest that the doctrine recognised an obligation founded upon community expectations that one should give value for what one received, unless of course, it was manifestly a gift. It is early evidence of the kind of 'obligation' associated with unjust enrichment throughout this work. Ch 7.5 concerns, this kind of obligation.

In this way the doctrine of *quid pro quo* resembled a muted concept of unjust enrichment.

Procedural issues:

- The action of *debt* was tried by *wager of law*.⁷⁹ The oath swearing was, originally, conclusive of the case; no verdict was required.
- This foreshadows the strong evidentiary role of *quid pro quo*.⁸⁰ It was the benefit given and it explained the injustice, by reason of which the law imposed an obligation.
- The notion of the law *imposing an obligation* arises from the nature of the case; there is no action or default of the defendant (no breach, to use a concept of a much later time) to which it can be attributed.⁸¹ A similar notion of *obligation* also endures to modern times as a central element of unjust enrichment.

2.6. *Account*: 'Equitable principle' of Unjust Enrichment.

Re-formulating actions, so that they contributed to a single purpose, coincided with the beginnings of unjust enrichment theory. Principles that were developing in equity, especially 'discovery', had an influence, but the early common law

⁷⁹ See Oliver Wendell Holmes *The Common Law*, 15. The method of trial probably had an Anglo Saxon origin. It required that the plaintiff find a number of reputable persons who would swear to the veracity of a claim. They waited around the court and took a fee for services. They were nevertheless, swearing an oath in the King's courts and might have had good reason for being satisfying about the justice of the case.

⁸⁰ *Ibid* .

⁸¹ Obligation flows from the primary rule in unjust enrichment. The modern jurisprudence concerned with obligation is studied in several chapters below: see sub-ch's 7.4 and 7.5, and ch 11, esp. pp191-93. It might be noted that it has a very long history and modern jurisprudence might be enriched by a consciousness of this fact.

courts were not overtly influenced by equitable doctrine.⁸² It was good for business, nevertheless, to keep a step ahead of the Chancellor's court.

- *Account* was another variant of the *writ of right*,⁸³ a fact which underlies the non-promissory character which it shared with that writ and with *debt*.
- *Account* determined the issue of what is owed. The bailiffs, and later, other receivers, were obliged to perform proper *accounting* under pain of forfeiture or imprisonment.⁸⁴ Here we can see a lack of clear distinction between the civil action and the 'offence' and this is important to the development of *the action on the case* in non delictual actions.

The writ of *account* came to be adapted to the purpose of allowing recovery of composite sums and together with *debt*, began to fill the void of available actions for ordinary commerce.

- The writ became a step in a process, at first definitive, in which the action of *debt* and later of *indebitatus assumpsit* was the end-point.⁸⁵
- Later, it became a device of pleading. *Account* made a 'debt' out of 'debts', including unlike obligations so that it satisfied the pre-requisite of a fixed sum, as in *The Bishop of Chichester's case* (1338),⁸⁶ *Anon*,⁸⁷ *Repps v Repps* (1315)⁸⁸ and *Babbe v Inge* (1315).⁸⁹ These cases plainly illustrate the process of achieving a fixed sum, even where debts of

⁸² Equity was administered by the Chancellor and progressively, by the Chancellor's court. The jurisdiction was always separate from and, until the 19C, aloof from the common law.

⁸³ C H S Fifoot, *History and Sources of the Common Law, Tort and Contract*, 268.

⁸⁴ Cf. *Statute of Marlborough* (1267).

⁸⁵ *Account*, as an independent action, disappeared about the 15C, probably because equity allowed recovery and had the capacity also, to order discovery. It was more cumbersome than the equitable procedure: See Gareth Jones, 'The Role of Equity in the English Law of Restitution', in Eltjo J.H. Schrage ed, *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, 149, 168-9.

⁸⁶ (1338) Y.B. 11 & 12 Ed. III, R.S. 489.

⁸⁷ Y.B. Pasch. 41 Ed. III, f.10, pl. 5.

⁸⁸ Y.B. 9 Ed. II, *Selden Society*, Vol. 45, 71.

⁸⁹ Y.B. 8 Ed. II, 66, and see Fifoot, *History and Sources of the Common Law, Tort and Contract*, 281.

different kinds were involved (grain and cash), or where part of the debt was traversed.⁹⁰

- *Account* lay for diverse sums and for arrears of payments (a particular sum).⁹¹ 'Accounting' determined the nature of the debt overcoming the problem that *debt* lay only for a fixed sum,⁹² and that a plaintiff in *debt* could only have the fixed sum, not the loss of profits of trading.⁹³

In these paragraphs, I have shown the existence of a rudimentary jurisprudence in which the modern restitution lawyer might recognise the roots of modern concepts and even the formative character of principles like those underlying the modern law. It is unnecessary to assert continuity, but it will emerge that the principles of modern law resemble in many ways, these ancient formulae for determining rights and duties. Methods of resolving claims differ immensely, but the underlying character of the rules bears certain similarity to modern elements of unjust enrichment. Especially, the ancient legal notion that '... you have what in justice ought to be mine...' has its modern equivalent.

⁹⁰ If there was a sum certain, it might have been better to sue in debt in the first place, and this was a permissible election: see *Anon* Y.B. 1&2 Pasch. 41 Ed. III, f.10, pl.5, in Fifoot, *History and Sources of the Common Law, Tort and Contract*, 85.

⁹¹ A.W. Simpson, *A History of the English Law of Contract*; 181. Simpson cites Rastell, *Entries*, 147b. It also seems that there is some interesting background here to the modern day law of estoppel.

⁹² A.W. Simpson, *A History of the English Law of Contract*, 173ff and 178-182. See also Jackson, *History of Quasi Contract in English Law*, 28.

⁹³ *Core's case*, (1630) 1 Dyer, 20a, 73 ER 42. Professor Simpson says that a declaration wherein accounting was averred though no formal action of account had taken place, was an 'insumil computaverunt' implying a process of professional accounting in arriving at a sum. Simpson indicates a developed system of arbitration associated with accounting in the 16C.

2.7. Debt and Assumpsit: the Enduring Significance of the Pleadings.

Here I shall develop a theme: *debt* established by *account*, and *quid pro quo*, are the essential elements of unjustness of retention. This is implicit in the nature of *quid pro quo*: it need only be associated with *what was given* in reasonable expectation that it was not given as a gift or other gratuitous act, but in circumstances where an expectation arose that the giver had a corresponding entitlement.

- An unsuccessful plaintiff in an action of *debt* committed an 'offence' which was punishable by imprisonment (usually a fine) or amercement (forfeiture).⁹⁴ The regnal control is ever present and underscores the consistency of the character of a debt with property in land. The matter of interest to the King is the debt (probably as a revenue source by way of a proportional levy).⁹⁵
- *Assumpsit*, was conceptually linked to *covenant*; it was founded upon the idea of consent, yet borrowing from *debt* the doctrine of *quid pro quo* which was formed into the rudiments of consideration.
- In *assumpsit*, the *quid pro quo* performs a somewhat similar evidentiary function to that of the *deed* in *covenant*⁹⁶ though it was not treated as evidence in any modern sense.⁹⁷

⁹⁴ *Bracton's Notebook*, Pl. 185, and Pollock & Maitland, V ii., 519 fn.1.

⁹⁵ *Glanville* X. 8. "... the King is not want to protect or warrant private agreements for the delivery and receipt of things ...if they are made outside the court..."

⁹⁶ Covenant lay for agreement under seal. Only contracts that were in writing were recognised by the king's courts.

⁹⁷ See Holmes, *The Common Law*, 15.

- In *debt*, the *quid pro quo* was the essence of the unjustness of the retention of the benefit (something was given for which a return was expected).

It is not my intention here to pursue the development of *assumpsit*, but it is necessary to observe that it was to escape the limitations of *debt* that lawyers sought, and courts allowed a preferential action in *assumpsit*.

- *Debt* presented litigants with great obstacles.
- *Debt* was not a promissory action, but if one promised marriage it could be a *quid pro quo* even for a debt owed by a third party.⁹⁸ The courts accepted this and rationalised that it involved no essential change of principle.
- This rule and the rule against past benefits were important to the way the common counts were developed. *Debt* did not lie where there was a past consideration (a past benefit was no *quid pro quo*). This was implicit in the strict correspondence of the *benefit* and the *obligation* noticed above.⁹⁹
- It was this rule which wrought the defeat of an action brought by a plaintiff who had payed bail moneys to a court to bail his absent colleague's servant to ensure that the servant's work was not left undone. In *Hunt v Bate*,¹⁰⁰ the rule against past benefits was applied rigidly despite the apparent willingness of the defendant to accept the benefit.¹⁰¹

⁹⁸ See Holdsworth, *History of English Law*, V III 422. The case referred to was untitled, referenced Hy. VI Mich.pl.18. Convoluted reasoning reflects the efforts to assimilate actions and to open new jurisprudential avenues.

⁹⁹ Above, fn 50, and see pp 34-37 above.

¹⁰⁰ (1568) 3 Dyer 272a; 73 ER 605, 606.

¹⁰¹ Lucke H.K. 'Slade's Case and the Origin of the Common Counts', Part 1, (1965) 81 *LQR* 427, at p 436; Part 2, (1965) 81 *LQR*, 539 at p 539; Part 3, (1966) 82 *LQR* 81, at p 91-93.

Hunt v Bate was decided at the onset of the great struggle for jurisdiction in civil matters in the last decades of the 16C. Lucke records that the case was followed in Dyer's reports by an anonymous case which he dubs 'the Cousins case'. In that case, a marriage was held *quid pro quo* for a later promise to pay a sum of money.¹⁰² It was different to *Hunt v Bate* because, as Lucke points out, the marriage was perceived to have created a lasting relationship with a relative of the defendant, and also because it had taken place at the defendant's request.

- In the comparison of the two cases we have two emergent principles: firstly, in *Hunt*, there was, apparently, an acceptance of the benefit by the defendant, though this was not considered to be of persuasive importance by the court.
- Secondly, in the *Cousins case*, there was the element of 'request' which had long been influential in the minds of the English judges in actions of *debt*.¹⁰³
- The cases exhibit the central concern with the correspondence of obligation and debt.
- If no such correspondence were to be shown, there was no case because it was not seen as unjust that the defendant retains what was given it: (therefore the rule in *Hunt's case*.)¹⁰⁴
- A request though, might make *quid pro quo* of what was otherwise a gift.

Lucke's and Simpson's analyses of the pleading, point to the importance of 'general pleadings' in *assumpsit* in the Court of King's Bench at the end of the

¹⁰² *Id.* Part 1, 486.

¹⁰³ *Id.* Part 1, at pp435-36. Lucke notes that the request factor was present in a case otherwise identical to *Hunt*; *Sydenham v Worlington* (1585) 2 Leo.244; 74 ER 497, 498.

¹⁰⁴ fn 100 above; and see fn 81 as to the long history of the 'unjust' concept. The relationship between the debt and the obligation is a fore-taste of the study of obligation in Ch 7.5.

16C. Lucke suggests that the significance of this is that a single issue was pleaded.¹⁰⁵

These cases were brought in *assumpsit* because debt was blocked by the past benefit rule, and there were many devices used to defeat a plea of demurrer if the defendant sought to show *assumpsit* was not the proper action.

In modern law, we find a fundamental concern to separate a claim for what is owed from damages for non performance of an obligation. This was the tension underlying the development of actions in the middle ages. The fictions and implied promises employed were ingenious devices to give life to the principles which the actions were meant to serve. The notion of an underlying issue of justice being developed into rules of law has been seen as an ‘equity like’ jurisdiction. Sir Henry Maine has suggested that this search for rules based on underlying principles, including the devices necessary to facilitate the process has been a common place development in the progression of ancient legal systems to reasoned rule based systems.¹⁰⁶ This progression to *equity* like jurisprudence conforms to Maine’s analysis.¹⁰⁷ The perception that *indebitatus* was solely a common law action prevailed, but not without leaving the evidence of relationship to contemporary equity in its wake.¹⁰⁸

¹⁰⁵ Lucke H.K. fn 101, Part 3’ 82 LQR at pp 91 ff.

¹⁰⁶ ‘...[a] general proposition of some value may be advanced with respect to the agencies by which the law is brought into harmony with society. ...Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them.’ Sir Henry Maine, *Ancient Law*, 15.

¹⁰⁷ *Ibid.* The observation does not refer to formal equity.

¹⁰⁸ A significant number of cases demonstrate that the Chancery had become a court of choice for ‘imperfect actions’, meaning those without a writ. At the end of the 16thC, the common law courts determined to cleave back jurisdiction that the Chancellor had been able to develop because of the procedural difficulties of the common law; see David Ibbetson, ‘Unjust Enrichment in England before 1600’ in E Schrage, *Unjust Enrichment*, 121, at 130. See also, Gareth Jones, above fn 85.

2.8. The Pleading of a Promise to Pay.

In the last section it was shown that the procedure observed in relation to the *non contractual assumpsit* cases relied upon the defendant being unable to do anything than traverse the implied promise so that the jury were asked to assume a promise to pay where the facts disclosed a debt. In this section I will show how the 'implied promise', which was long thought to be a central characteristic of the common counts, came into being, and I will show that it was nothing more than a device. In consequence, attempts to clothe it in principle were unsoundly based.

Some of the theatrical quality of the action of *debt* must have been lost when, in the 14C, written pleadings became the norm.¹⁰⁹ In this era, the substance of what might be pleaded came to be important, as distinct from facts orally pleaded. It was to be expected that a debtor might promise to pay and such a promise was institutionalised in oral pleadings in the time of Bracton: it became the practice in regard to the Chancery Roll.¹¹⁰

In the period proceeding the time of Lord Coke,¹¹¹ the action of *debt* was modified significantly for a variety of reasons. It would be fanciful to assume some design, some master plan in this, but pragmatic changes also wrought new jurisprudential characteristics; and the action became somewhat more theoretically based. The point-by-point summary outlines the progress.

- The King's Bench devised a means of allowing actions that satisfied the strictures of formalism and yet were effectively actions for that

¹⁰⁹ A.K. R. Kiralfy, *Potter's Historical Introduction to English Law*, 335.

¹¹⁰ Some evidence of the practice of assuming a promise to pay comes to us from Lombardy in the 8th C. See fn31 above Fifoot, *History and Sources*, 221-2, suggests that evidence of this kind of influence in Britain is to be found in *Bracton's Notebook*.

¹¹¹ Circa 1600.

group of plaintiffs for which no other action lay, and therefore *case* lay.¹¹²

- These causes for which *case* was the ultimate resort, were a grouping of cases that were conceptually ‘justice of the case’ plaintiffs; these were not *debt* cases but probably cases in which there had been a bare promise or a request, but the formalities of *quid pro quo* were not evident.
- The court adopted procedural devices to satisfy a need for this kind of action. By implying a promise, *debt* was avoided, but because the elements of *quid pro quo* were not complete (or were not pleaded), an *action on the case* was presented as necessary to do justice. The ‘implied promise’ explanation of the jurisprudence that was given credence in courts into the early 20C has been a ‘red herring’ of surprising resilience: it was a mere procedural fiction from the beginning.

The detailed reasoning behind the group of cases was this:

- The action of *debt* did not lie upon an executory promise for which no *quid pro quo* had been given.¹¹³
- But if the declaration averred ‘...not only was a debt owed but also, the defendant had promised to pay...,’ the writ of *debt* would not lie upon the executory promise unsupported by *quid pro quo*, but an *action on the case* might lie because no other action lay (the central character of *case*: no injury without a remedy).¹¹⁴
- If the plaintiff’s declaration included an averment of undertaking, remembering that the pleadings were at this time written, and

¹¹² Above, p 21-22.

¹¹³ Cf. *Jordan’s case*, (1525) Y.B. 19 Hen VIII, f 24, “... in many cases, one might have an *action sur son cas* where he could have some other remedy, and so, for this matter, it is good enough.”

¹¹⁴ *Ibid.* *Jordan’s case*, provides an illustration of the way in which *case* filled this void.

remembering too the King's Bench penchant for theatre, did it really matter that the promise was not a real one, that is, that it was simply a fictional device?

- All the defendant could do was traverse the plea of 'undertaking'. This meant that the question of whether a promise was made would be decided by the jury and it would be invited to decide upon the evidence (including an averment of accounting). But the details of the debt were not specially traversable because the action was brought, not upon the debt but upon the alleged promise. It had become accepted procedure to assume a promise to pay if an averment of accounting was made and the jury would have taken this as given.

If the action were brought in the King's Bench in *assumpsit* where general pleadings were being accepted, the debt need not be specially pleaded; several debts might be involved. The tediousness and precariousness of the special pleading was avoided. These advantages were to be had in addition to the avoidance of *wager of law* (calling of paid witnesses). The action, extended doctrinally, encompassed the debt as a benefit conferred without specially pleading the content of the debt.

Was past consideration 'good consideration' in *assumpsit*? In *Sydenham v Worlington* (1585)¹¹⁵ it was held that it was where performance had been at the request of the promisee.

The law, despite its state of disarray, was seeking explanation for liability in neither contract nor delict, but in the ancient category of unexplained actions which were grouped under *case*. *Jordan's* case demonstrated a way in which

¹¹⁵ (1585) 2 Leo.244; 74 ER 497, 498, and see Lucke, fn 101, Part 1, (1961) 81 *LQR* 436.

the law would impose an obligation.¹¹⁶The law selectively allowed actions where it found that the circumstances warranted it, as an issue of justice.

There are two significant conclusions:

1. The modern search for juristic extensions of the unjustness factor in unjust enrichment is centuries old.
2. The development of bases for liability in the succeeding centuries is the true history of unjust enrichment, but its origins are recognised in the shackled jurisprudence of the middle ages.

Meanwhile, the implied contract notion based upon a so called 'promise to pay' is demonstrated as being unworthy of serious attention.

In *Lampliegh v Brathwaite* (1616)¹¹⁷ it was held '...the promise though it follows is not naked but couples itself with the suit [request] before....' The plaintiff must prove his act was done in response to the request, '...the act must pursue the request, for it is like a case of commission for the purpose....'¹¹⁸ The courts may be seen to be enforcing payment for a benefit because of an obligation imposed by law. In *Bosden v Thinn*,¹¹⁹ P was compelled to pay as surety and sought reimbursement from D on basis of D's subsequent promise of reimbursement. The majority held that *assumpsit* would not lie upon the undertaking to act as surety, it being a nude promise, but the promise to reimburse, coming later, related back to the request and therefore the action lay on the later promise.¹²⁰

¹¹⁶ *Jordan's case*, fn 113, and see fn 114

¹¹⁷ (1585) 2 Leo.244; 74 ER 497, 498.

¹¹⁸ See Lucke, fn 101 Part 1, (1961) 81 *LQR* at pp 438-39, arguing that Holdsworth's view (*A History of English Law*, vol. 8, 15 et ff, & 38 et ff) that the subsequent promise to pay was evidence of a pre-existing contract, cannot be correct, because the bare request in *Lampliegh* created no legal relationship: the *assumpsit* was on the promise to pay which was held to relate back to the request.

¹¹⁹ Cro. Jac., 19, also reported in Yelv. 40.; 79 ER 16.

¹²⁰ Yelv, 41; 79 ER 16; Lucke, fn 101, Part 1, 81 *LQR* at 439-440, arguing, convincingly, that the decision evidenced the contemporary theories of consideration; see also *Beaucamp v Neggin* (1592) 1 Cro. Eliz 282, pl. 3; 78 ER 536.

As early as 1537, Dyer C.J. and Weston J. held in *Lord Grey's case*¹²¹ that one who discharges another at request of the defendant and upon an assurance, will have a good action in case on the surety, for '...this is good consideration to charge [the defendant], for what [the plaintiff] did for benefit of my friend is to my ease and benefit also.'¹²² In *Lord Grey's case* though, the action was in case, demonstrating once again the richness of that action as a source of development. The development of principle is becoming clearer and becomes capable of being stated in terms that are inconsistent both with contract and delict.¹²³

Audacious procedural fictions made possible by the advent of written pleadings, had served well the purpose of tearing lucrative jurisdiction away from the Common Pleas and the Chancery. They continued to have a special significance for the development of *indebitatus assumpsit*. The fiction that a debtor had promised to pay was most useful because the moment the debtor denied promising, the promise and not the debt became the general issue: the plaintiff would plead evidence of the debt by averment of accounting (but would not plead the debt itself) to establish that the defendant '...just must have promised'.

¹²¹ 3 Dyer, 374a, 73 ER 612, 613.

¹²² In this study, it is of considerable importance to recognise that the contemporary doctrine of consideration did not reflect the later rules and characteristics which make it the completion of an agreement; nor for that matter were all 'contracts' consensual relationships in the early 17C.

¹²³ The emphasis put upon the doctrine of consideration in this era by some commentators has led to a misconception of the basis of many of these actions. 'Consideration', at this point in time, is difficult to separate from quid pro quo. Holdsworth argues in terms of later theory of consideration. Cf. Lucke, Pt 1, at 437 & fnn 28 and 70 above, citing Ames *Lectures*. Lucke is not alone in accusing Holdsworth of applying the rules of a later century in an endeavour to give meaning to the law of the Slade's case era; see Fifoot, *History and Sources*, 396, and see *Brett's case* (1600) Croke, Eliz., 755; 74 ER 859-860; *The Lady Shandois v Simpson* (1602) Cro. Eliz., 880, pl. 11.

2.9. *Indebitatus Assumpsit*: Recognition of the Jurisdiction for Recovery of a 'Benefit':

In *Slade's Case*,¹²⁴ the Exchequer Chamber,¹²⁵ made certain important findings which settled the law on several points. Two are important presently:

- i) although *debt* was available, the plaintiff may have *the action on the case*, or *debt* at election;
- ii) case is as much a '...formed action and contained in the register, as an action in *debt*...'

Following this case, the courts began to allow a novel kind of action called *indebitatus assumpsit*. The new action is superficially, an *assumpsit* action for it involves a promise. The technicality of development of *indebitatus* is a demanding study, controversial amongst historians. It need not concern us here. In Simpson's analysis, all depended upon the (written) pleadings and this has been shown above. The simple distinction is made by reference to the pleading in *Edwards v Burre*¹²⁶ an *assumpsit* pleading in which the declaration read

Counted that the testator, in consideration that the plaintiff lent the testator 40s, the said testator undertook to pay him 40s.

A count in *indebitatus*, on the other hand, would have read

...the testator, being indebted to the plaintiff in a sum of 40s in consideration thereof promised to pay the debt.¹²⁷

The fact of a promise was alleged before *Slade's case*, to avoid the action of *debt* because debt would not lie upon a bare promise. After *Slade*, detailed pleading could be avoided by alleging a promise to pay. *Indebitatus* was an action on a promise to pay (by this time invariably fictitious) in which it had to be

¹²⁴ (1604) 4 Coke, 91a; 80 ER 15.

¹²⁵ Exchequer Chamber heard writs of error from the King's Bench: see Lucke, Part 1, 429.

¹²⁶ *Edwards v Burre* (1573) Dalison 104. See Fifoot, *History and Sources*, 359.

¹²⁷ Simpson, *History of the Common Law of Contract*, 306.

demonstrated that there was a sufficient basis for the implied promise, thereby proving the debt.¹²⁸ But the main reason why the pleading of the promise survived after *Slade's* case, when the earlier theoretical need for it had disappeared was that, since the action was upon the promise, the simpler general pleading was possible, encompassing the debt plus damages or interest for example, and the procedural rule was that the alleged promise could not be specially traversed. The effect of this was as has been outlined above, the debt became the general issue for decision by the jury.

Lucke says that the debt was '...the material reason for the defendant's duty to pay.'¹²⁹ The promise rests upon the duty: it is, to use Lucke's words, '... the recognition of an existing duty rather than in the nature of the foundation of an independent or added duty'.¹³⁰ It is sterile, except in relation to the procedural consequences.¹³¹

*Astley v Reynolds*¹³² offers clear evidence of the developing jurisprudence. This was an action for money had and received in the King's Bench. The plaintiff had paid excessive interest on a loan given on the pawning of a plate and claimed back a part of the interest which he had been forced to pay in order to recover his property. The court held that in actions founded upon mistake or deceit, the

¹²⁸ The practice of pleading a subsequent promise originally arose because, if the action was on the debt and a benefit had been conferred simultaneously with the making of an undertaking, debt lay: *Edwards v Burre* (1573) Dalison 104.

¹²⁹ Lucke, fn 101, Part 2, 81 LQR, 539, at p 552

¹³⁰ *ibid.*

¹³¹ What would be established in evidence would be the existence of a debt and the action turned upon its existence; this is ultimately true even if one regards the promise as giving rise to a 'contract implied by law': *Martin v Sittwell*, (1690) 1 Shower, 156; 89 ER 509, per Holt C.J. Holt held that money given as insurance for goods supposed to be on a vessel but left behind, was money '...received without any reason occasion or consideration...'. *Indebitatus* lay in Holt's judgment for it was as though the money had been given for a wager that had never taken place. A curious but meaningful analogy probably inspired by the origins of insurance contracts, which were in effect, wagers on the safe voyage of a vessel. Evidence of an unjustness principle was undeniably in the minds of at least some judges: see fnn 44 above and 193 below.

¹³² (1731) 2 Strange, 95.

action (*indebitatus*) would lie, and so too for this circumstance where the plaintiff paid by duress ‘...relying on his legal remedy to get it back again.’

Again, in *Lampleigh v Brathwait*.¹³³ Lord Hobart's own report of the case contains a clear distinction between a promise executory which ‘...need not aver performance...’ and one which is executed where the performance is ‘...past and incorporated with the promise...’ The idea of a promise (or obligation) is necessarily implied in the existence of the debt.¹³⁴ This analysis makes considerable sense of a consideration ‘...passed and incorporated and coupled with the promise...’¹³⁵

In these few cases, we begin to see the emergence of the grounds of *indebitatus* actions. The practice of general pleading was unpopular after *Slade's case* because it lacked essential definition of the nature of the individual actions (whether real, or for debts of a testator etc). It also carried with it a major jurisprudential shortcoming: it did not disclose the source of injustice! Injustice sprang from the fact of the plaintiff being 'deforced' of what was its own, or his/her entitlement, and that concept has a very long history. Looked at analytically, the existence of the debt is relevant as evidence of an enrichment, the giving of *quid pro quo*; and the promise, whatever form or ephemeral shape it took, was an implicit acknowledgment that the enrichment would be unjustly held if not disgorged to the benefit of the plaintiff. It seems very likely that 17C judges were conscious of the essential ‘justice of the case’ issue in first opposing and then modifying the practice of general pleading. Indeed, we

¹³³ (1619) 1 Brn. 7; (1615) Hobart, 105: 80 ER 255.

¹³⁴ *ibid* 555, and *Edwards v Burre* (1573) Dalison 104. See Fifoot, *History and Sources*, 359. ‘...every consideration executory implies a promise...’. The reasoning appears to be consistent with reading ‘promise’ as ‘obligation’.

¹³⁵ *Lampleigh v Brathwait* (1615) Hobart, 105: 80 ER 255.

occasionally see modern verbiage of restitution occurring in the courts¹³⁶ and in the analysis of the historians.¹³⁷

It is not without significance, I believe, that after the judges in the Exchequer Chamber (in which the elements of the decision in *Slade's case*¹³⁸ were agreed) had dispensed with the need to pretend that the action before them was not one in which debt lay, yet persisted with the 'implied promise' practice in *indebitatus*. It had a continuing function beyond the fiction by which *debt* had formerly been ousted. It was the criterion by reference to which the courts found that an obligation existed which the law ought to enforce, much simplified if the defendant actually acknowledged it (by making an actual promise), but implicit in the circumstances of the case whether it was acknowledged or not. There was no other necessity for implying a promise after *Slade's case*.

In this analysis, we see the ongoing manifestation of a conceptual unity that underlay, over the centuries,

- firstly, the requirement for proving *quid pro quo* to establish that the action was being brought to recover a benefit conferred;
- secondly, for selectively allowing *case* for non feasant to provide an action where, in justice, one ought be held to one's obligation;¹³⁹ and;
- thirdly, in developing *indebitatus* as a composite action of *assumpsit*, *debt*, and *account* to simplify the identification and enforcement of a duty imposed by law.

There was only the necessity of utilising pleading practices which bore the consequences that the executed (past) benefit had been given in such

¹³⁶ *Astley v Reynolds*, fn 133, and Anon Y.B. 7 Hen VI, 15 Pl. 9.

¹³⁷ Fifoot, fn 84, 25 and 225-6; Winfield, *The Law of Quasi Contract*, 8-9.

¹³⁸ Above fn 37

¹³⁹ See Simpson, *History of the Common Law of Contract*, 344.

circumstances as the courts would impose a duty upon the obligation and the obligation was not specially traversable.

The development of *indebitatus* marked a significant step forward in the common law because it firmly secured jurisdiction which might have developed solely as equitable remedies. Indeed, until the end of the 15C, remedies in equity existed for petitions which would later reflect grounds for unjust enrichment in common law actions.¹⁴⁰ This was another aspect to the struggle for jurisdiction, not addressed in this historical analysis.

2.10. The Commentators.

Despite the appearance of principle underlying these common law actions, it was never articulated. It is in this connection that the work of commentators becomes important: they have sought to explain and characterise elements of the law. They have not changed the law, but they have given us ideas of structure and terminology that have assisted ongoing analysis. Professor Baker holds that there was no development of legal theory that would explain actions in the centuries in which the forms of action dominated and characterised English law of obligations.¹⁴¹ Professor Birks sees this as a lack of system, a

¹⁴⁰ The petition in *Appilgarth v Sergeantson*, (1438) 1 Cal Chanc xli, a case of payment in contemplation of a marriage that never took place, illustrates the role the Chancellors had assumed. David Ibbetson found that such petitions were most commonly to be found in cases involving transfers of land, but not exclusively so: 'Unjust Enrichment in England before 1600' in Eltjo J. H. Schrage (ed) *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, 121, 129-130. Sir William Evans' description of the law illustrates this inter-relationship of common law jurisprudence and equitable notions of *use*: one who received what another was entitled to was thought of as having received to the use of the latter as though an agent, and must give an account: above fn 46.

¹⁴¹ JH Baker, 'The History of quasi Contract in English Law' in W.R. Cornish et al, *Restitution, Past present and Future*, 53. I have used the term 'law of obligations' as it is widely used in legal literature to denote, usually, contract and tort. The terminology has the potential to confuse an obligation freely assumed, such as to perform one's contract, with the special case of obligation imposed by law. The development of a practice of referring to the latter as 'primary obligations' would augment the clear articulation of taxonomy.

failure by the common law to organise its categories of thought, exacerbated by failure to adopt the Roman law as its foundation.¹⁴² Birks does not suggest an absence of jurisprudence, but rather an absence of system and taxonomy such as would have encouraged judges and jurists to explain decisions in theoretical terms.¹⁴³

Birks' approach seems consistent with the fact of a constant and unifying theme in the common law; that is the obvious concern in the cases for personal remedies that have no basis in *covenant* in the generic sense. It is impossible to ignore the influence of concepts that had a presence in the minds of the jurists and the judges. Professor Peter Stein observes that whilst Roman law is not particularly obvious in the common law as a set of rules, as it is in the Pandects and the Germanic law, the Roman jurisprudence is. The scholarly 'transfer of wisdom', is what ultimately gave the common law its basis of reason.

English scholars of the Roman law, particularly Bracton and Hale, contrived to use Justinian's structure to shape the common law into scientific and orderly rules,¹⁴⁴ but reasoning from principle to rule was an art and a science which developed under a more liberal regime of actions, just as the praetors were responsible for developing new principles of Roman law. The importance of Roman law for the comparative study is, therefore, the precedent to be found in post classical Roman law of the relationship between principle and action. When actions were essentially procedural as they were in Roman Classical Law and in the common law in the forms of actions era, principle was non-existent. Principle flourished under the Praetors, as recorded in Justinian's Institutes, when the influence of the praetorian notions of equity modified and moulded the rules of

¹⁴² Peter Birks, 'Equity in the Modern law', (1996) 26 *Western Australian Law Review*, 5, 68.

¹⁴³ Ibid.

¹⁴⁴ Peter Stein, *The Character and Influence of The Roman Civil Law*, 150 ff.

law. This is an appropriate way of describing also, Lord Mansfield's foundational contribution to unjust enrichment.¹⁴⁵ The juristic reason underlying the writs of debt and *account* was tantamount to expressions of justice of the case, and this is so even though resort to archaic methods of trial made a mockery of their jurisprudential pretensions. From these writs, other writs were to develop and other concepts were to intrude so that the writs were the foundation upon which legal doctrines were forged despite the rigid formalism and the constitutional and jurisdictional obstacles which for long periods, inhibited development.

The concept of unjust enrichment, rarely articulated (probably because the intrusion of 'Roman' doctrines was anathema to the Crown) was ever present in this sometimes tortuous process as a rationalising force, and gave life to more than one branch of the common law. That I might claim what is mine from which another 'deforces' me is a constant theme throughout more than half the millennium. The cases show a concern for benefits conferred involuntarily, benefits requested, and benefits accepted where one withholds from another (deforces) payment for a benefit received, provided that *quid pro quo* was given. Moreover, in such a right of action lies a concept that has a quite different purpose from Roman *vindicatio* which resembles a pure proprietary action of the English law sort.¹⁴⁶ The underlying purpose of writs of *debt* and *account* resembled modern personal actions, (whatever may be said of the parent *writ of right*), displaying a conceptual similarity to modern unjust enrichment.

¹⁴⁵ Cf Professor A.W. Simpson, *History of the Common Law of Contract*, 489 ff, arguing that there is a lack of contemporary evidence of consciousness of the principle of unjust enrichment in the case law of the developing English common law. Godwin's case, above fn 50, and *Astley*, fn 132, suggest that there is reason to query this assertion.

¹⁴⁶ Moyle, *Institutes* 1v, 1, 19. My own tentative view is that the writ of detinue constituted one reason why a *vindicatio* was not found necessary by early common lawyers: detinue filled the void to some extent. However that may be, it could not be said with any assurance either that it came into being to accommodate that need or that it was intentionally a device to mirror the Roman action.

The ingenious invention of procedure which would effectively broaden actions and vest them with an entirely new scope such as has been noticed above, strongly suggests the influence of principles of law of which the courts had cognisance and which under-lay the gradual development of the law. This was particularly evident in the protracted process leading to development of *indebitatus assumpsit*. The part played in this tortuous development by the *action on the case* is particularly significant.¹⁴⁷

Blackstone¹⁴⁸ begins to draw together the threads of these actions, describing the non contractual *assumpsit* actions as

...such as do not arise from the express determination of any court...but from natural reason and the just construction of law. [These actions] ...constantly arise from this general implication and intendment of the courts of judicature that every man hath engaged to perform what his duty or justice requires...¹⁴⁹

Reinhard Zimmermann attributes to Blackstone the quasi contract 'heresy' which Blackstone borrowed from the *Institutes*.¹⁵⁰

¹⁴⁷ Judicially developed from a Roman law precedent, its status was never challenged. It was recognised by 'judicial legislation' in *Slade's case* (1604) 4 Coke, 91a; 80 ER 15.

¹⁴⁸ *Commentaries*, Ch.9. pl. 3, reproduced in C.H.S. Fifoot, fn 84, 389 ff.

¹⁴⁹ Blackstone *Commentaries*, Ch 9. It is not without significance that Blackstone's work was to some degree, a reflection upon the law which gave birth to the action on the case which was the beginnings of lasting jurisprudence affecting more than one branch of the law of obligations. The law had begun to reason its own development and this was significant to the development of the *indebitatus* counts.

¹⁵⁰ *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 837. See generally Peter Birks and Grant McLeod, 'The Implied Contract Theory of Quasi Contract: Civilian Opinion Current in the Century Before Blackstone', (1986) 6 *Oxford Journal of Legal Studies*, 46 ff.

Guest describes these actions as 'empirical' until the rationale of unjust enrichment emerged.¹⁵¹ It is implicit in the quotation from Blackstone however, that the law was beginning to articulate a rationale that had long been mutely accepted. Fifoot describes it well, '...[t]he single strand running through all these decisions was the unfair advantage secured by the defendant at the plaintiff's expense...'.¹⁵²

Fifoot rejects any idea that the judges might have been unaware of this principle though he was of the opinion that it had not been recognised openly as an *a priori* concept in English law.¹⁵³ Guest maintains that the rationale that one should not be enriched at the expense of another was increasingly apparent in cases sued on the common counts and the advent of a forceful judicial personality such as Lord Mansfield, was all that was necessary in the second half of the 18C to draw the underlying theme of the cases together.¹⁵⁴

Guest's 'rationale' is particularly relevant to *quid pro quo*. The doctrine of *quid pro quo* was influential in the development of the doctrine of consideration in the law of contract. It played a unifying role in the assimilation of the actions of *debt* and *account*, and in the transition which brought into being the *common counts*. It underlay the early recognition by the law of an obligation arising from a

¹⁵¹ A.G. Guest, *Anson's Law of Contract*, 617.

¹⁵² C.H.S. Fifoot, fn 82, 366. The resemblance of Blackstone's reasoning to *The Institutes of Justinian*, Book I, Title I, is strong. See also Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 837, attributing to Blackstone the quasi contract 'heresy' which Blackstone borrowed from the *Institutes*; and see generally Peter Birks and Grant McLeod, 'The Implied Contract Theory of Quasi Contract: Civilian Opinion Current in the Century Before Blackstone', (1986) 6 *Oxford Journal of Legal Studies*, 46 ff.

¹⁵³ Fifoot fn 82, 366.

¹⁵⁴ A.G. Guest, *Anson's Law of Contract*. Lord Mansfield's method had much in common with the notions of equity administered by Roman praetors in the post Classical era of Roman law; see Peter Birks, *The Character and Influence of the Roman Civil Law*, 20-21, and 150 ff, suggesting that whilst Roman rules and doctrine are not particularly obvious in the common law, Roman jurisprudence is. See also Chapter 13 below.

promise supported by a 'charge' and where a benefit was received upon a request. It reflected in its characteristics, a muted concept of unjust enrichment.

2.11. Conclusion.

It is evident in the historical treatment that the devices employed by the English courts served several purposes. They were undoubtedly the tactics in a struggle for jurisdiction between the Common Pleas and the Kings Bench. They were focussed too upon the avoidance of the archaic appurtenances of the action of *debt*. They became the means whereby a genuine promissory jurisprudence was allowed to develop whilst the central, separate, mission of *debt* and *account*, was nurtured to survival as an unjust enrichment concept, freed of the procedural limitations.

Chapter 3: Modern Law and its Antecedents.

3.1. Contributions of the Past.

In this chapter I will argue that concepts, principles and rules of unjust enrichment deriving from the historical characteristics of the law, have produced reasoned structure, methodology and tools of modern law. These historical characteristics might have been different in a different constitutional context such as where unwritten law is not recognised. I will argue that the law of unjust enrichment developed in a context of social and constitutional history which left its stamp upon the law as we know it today. I will conclude that these

characteristics are the product of reasoned development in the particular environment and this has a special relevance for the nature of unjust enrichment in our law and its characteristic interpretation of what has been called *the inner certainties of the law*.¹⁵⁵ I will propose that this must be understood by all who seek to take a part in understanding and developing the law.

3.2. Reasoned Historical Development of Principles Defining the Law.

It would be simplistic to dismiss the legal foundations of unjust enrichment as being irrelevant. The legal foundations of contract could not be said to be irrelevant to the modern law of contract. Contract lawyers could not concur if administrators contemplated that courts and legislatures might recognise a bare promise as a basis of contract such as it might have been in ancient law.¹⁵⁶ Why shouldn't such a change be contemplated? One answer is surely, that it ought not be simply because contract and commerce have developed side by side over many centuries and consequently, the rules of contract are tried and proven and well understood.

The point of the contract analogy is that unjust enrichment, if well understood, is also tied, in a compelling way, to the concepts, principles and rules that have developed over a very long period. They have a special place in the law and their relationship to other branches of law is well defined. This much is

¹⁵⁵ Lord Radcliffe, *The Law and its Compass*, 38. Lord Radcliffe's notion used in another context, refers to a kind of 'inner conviction' of judges in successive decisions which determined when a significant new factor would be allowed. See also Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law*, vi., '...[I]nherently eclectic as it is, adjudication is far from arbitrary. What blocks arbitrariness is the presence of normative thought, that is, articulation of priorities and principles of value capable of binding law and fact together in a coordinated way.'

¹⁵⁶ *Institutes of Justinian*. IV.VI.9.

frequently recognised; and yet some would ask why modern law should not so develop as to achieve the greatest measure of simplification, allowing equitable and common law principles to work side by side. Why, they may ask, should not 'unconscientiousness' be a ground for an action in unjust enrichment? One answer is that it should not be because there is no developed jurisprudence; no established concepts and principles; no legal rules, which assist us to say what unconscientiousness is except in the specialised aspect of equity where it characterises behaviour in the context of equity's special rules.¹⁵⁷ Unjust enrichment characterises a benefit. It will take a complex course of development for it to be re-focused upon a defendant's conduct. Failure to deliver up a benefit, (the conduct of a defendant) is a concern of unjust enrichment only in a consequential way: the developed principles of unjust enrichment do not pretend to compete with equity. Were it otherwise, there would be a significant risk that the division of the law into conceptually and functionally discrete branches would be compromised.

The division and definition of branches and taxonomy in the law has been the consequence of centuries of legal reasoning in the courts and amongst commentators. This is why change ought to be the product of a significant process of logical legal reasoning. Lord Radcliffe's extra-judicial observation in regard to change in the law is pertinent here; he wrote,

...respect for [the law] will be the greater, the more imperceptible its development.¹⁵⁸

Thus far, I have argued that the history of the law is an account of sustained legal development characterised by processes of legal reason and logic. Two recognisable outcomes have been suggested. The history of inter-related

¹⁵⁷ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

¹⁵⁸ *The Law and Its Compass*, 39.

principles that we now call unjust enrichment principles, sets before the modern jurist a compelling case for recognising, firstly, consistency in taxonomy which affects the several areas of the 'law of obligations', and, secondly, that principles and rules of an *unjust enrichment* character constitute a branch of the law. I shall now examine these two compelling cases.

3.3. Consistency in taxonomy: Independent/Complementary Branches of the Law.

The first of these recognisable out-comes of legal history has a broader significance. It is this:-

- Not only has unjust enrichment retained its independence, but other branches of the law of obligations exist side-by-side with unjust enrichment in the manner of complementing each other.
- Furthermore, just as subjective fairness has no place in unjust enrichment, rules in those other branches of law are not dependent upon a judgment as to whether a transaction or legal relationship is subjectively fair and reasonable. That is to say, the principles of contract and tort do not defer to a standard of fairness under the auspices of some 'unjustness' doctrine.

These characteristics are attributable, in part at least, to the fact that notions of fairness are not a part of any field of the common law: the law does not invest the common law courts with discretion to apply idiosyncratic standards, nor in

equity where principles of unconscionability and undue influence are closely defined by the cases.¹⁵⁹

These observations become very important when the courts come to consider whether unjust enrichment ought to be found in a new case. Any new instance of an unjust enrichment is likely to have consequences for the other branches of the law.¹⁶⁰ A new case will not operate as a new form of *equity* to yield a 'just' outcome where tort and contract and existing rules of unjust enrichment are seen not to provide adequate relief. The potential for new cases and the problems they pose will be considered in a later chapter.¹⁶¹ For the present, it is important to observe that the basis of any such development of new cases has to be found in legal reasoning; otherwise it is purely a whim. Such legal reasoning is to be found in legal concepts and principles. In part at least, this is a consequence of the fact that the common law is an unwritten law, a characteristic not shared with contemporary systems in the developed world.

¹⁵⁹ *Commercial Bank of Australia v Amadio* fn 157, at p 461, per Mason CJ and 474-5 per Deane J: unconscionability looks at the conduct of a stronger party in enforcing or retaining a benefit, whilst in an undue influence case, the court looks at the quality of assent; see also *Blomley v Ryan* (1956) 99 CLR 362, 401-2 per Fullagar J; and see I. J. Hardingham 'Unconscionable Dealing' in P.D. Finn (ed) *Essays in Equity*, 3, 'The gist of the jurisdiction is ...abuse of superior bargaining position.'; cf. *Johnson v Buttress* (1936) 56 CLR 113, 134-5 per Dixon J; (1948) 76 CLR 646; 655 per Rich J (where actions of victim, though voluntary, where performed under influence of another, the circumstances created inequality, taken advantage of); *Blomley v Ryan* (1956) 99 CLR 362, 405 per Fullagar J (sickness, drunkenness etc placing one party to a bargain at a serious disadvantage); Lord Denning's attempt to state a general principle governing over bearing and incapacity in *Lloyd's Bank Ltd v Bundy*, [1975] QB 326, p 339, where His Lordship attempted to frame a general principle of unconscionability, cannot contribute to understanding of the narrow focus on unconscionability in our law.

¹⁶⁰ It is not contemplated however, that this will involve reconciliation of conflicting principles in the instant case; conflicting rulings are unlikely to be so readily resolved. Consciousness of taxonomy is an ever present requirement: see Raimo Siltala, *A Theory of Precedent*, 45, foreshadowing difficulty where conflicting principles are regarded as immutable, as rules may be; and see below, pp 73 and 76 where interaction with other fields of law and juristic experience is considered.

¹⁶¹ Sub-Ch's 7.5.

Principles and rules of the common law that are enshrined in the reports by virtue of the doctrine of precedent, are the *common law* and the process by which these decisions have been handed down in the context of a developing law is the legal history of the common law. It is true that it is of no concern for modern law that there were inhibitions or obstacles, including the forms of actions, which held back the development of the law. It is crucial however, to an understanding of some areas of modern common law, and especially to unjust enrichment, to recognise that new techniques of pleading and even an entirely new action, the *action on the case*, were developed specifically to further the development of the law in spite of obstacles, and that these developments have had a lasting influence.

Quite simply, the constitutional and social environments in which law has developed have had a very significant influence upon the character and structure of the law. It would be futile to contemplate what English law might have been without the early feudal structure of society. And whilst feudalism is irrelevant to modern law, the changes to accommodate the needs of a modern democratic state have been the product of reasoned and tested development, informed by logic and legal scholarship, progressing from one framework of norms to a new one. Were it otherwise, there must be a significant risk of chaos: a condition which might have been found in the laws of totalitarian states of recent centuries.

The legal history of unjust enrichment has consequences that must be well understood before ambitious attempts are made to expand the modern law by establishing new grounds of actions, or by introducing grounds that properly belong to other branches of the law. The consequence of this history may be shortly stated thus:

- If a new development is to occur in the law of unjust enrichment, it needs to occur only in the context of an overview of the total relationship of the several branches of the law,

- Such a development, were it to happen in a ‘piece-meal’ fashion, as a response to perceptions of immediate need, or in response to concepts of ‘justice’ or ‘fairness’ which have no true foundation and meaning in the law, will not conform to the established norms of the law.

3.4. Independence of Purpose of the Law:

That said, it is time to turn to the second recognisable outcome of legal history mentioned above. It is expressed in this conclusion, and it strongly suggests another:-

- Principles and rules of unjust enrichment are neither the out-come of, nor the off-shoot of, contract and tort, nor of equity, but exist as a body of law which has a discernible and independent purpose.
- Modern preoccupation with fusion of law and equity must be examined in this perspective.

A plaintiff may choose one or another branch of the law alternatively, to prove different kinds of liability, giving rise to different rights and obligations.

Nevertheless, the development of law by processes of legal reasoning, deduction and induction imposes certain characteristics upon which a perception that it is a ‘good law’ depends. It must be capable of being explained, in terms not merely of a remedy or a restitutionary outcome in the case at bar, but in terms of uniformly applied criteria such as will give consistency and predictability to the law as a whole.¹⁶² These are elementary ideas, but the development of a

¹⁶² Predictability of decisions is discussed below at several points, especially pp 168-70 discussing uniformly applied criteria such as will give consistency and predictability to the law as a whole, and see fn 457 citing Justice Windeyer’s dictum in *Hargrave v Goldman* (1963) 110 CLR 40, 63, ‘...concepts, pre-requisite to a finding of liability, embedded in the law, by compulsive pronouncements of the highest authority, and which give the law symmetry, consistency and the defined bounds essential to reasonable predictability.’

new branch of the law must conform to them if that new branch is to conform to the kind of reasoned relationship of principles and rules that is typical of contract and tort, remembering the special primary characteristic of common law, vis, that it is an unwritten law.

The modern interest in unjust enrichment has witnessed a unique spectacle of taxonomy and principle working together. Without the consciousness of the issues that such a spectacle enlivens, there is a risk that unprincipled development of unjust enrichment may expose it to confusion of taxonomy and principle, and that judges and legislators will seek to *unify* the principles and rules in the various jurisdictions, by a plethora of inconsistent, irreconcilable, and probably adventurous judgments or legislative enactments. It is crucial therefore, that common lawyers understand what unjust enrichment is and what its place is in the law as a whole. This is where common understanding of the lessons of the past, and in particular, common understanding of unifying characteristics which have developed in the law, will be of immense service to the law. This will be achieved if it is acknowledged that developments in the law have deeper conceptual foundations than may at first appear, and especially that several important characteristics have contributed to the formation of modern doctrine.

A key characteristic of unjust enrichment is that it defers to some other liability rules. This is not an absolute proposition, but the explanation provides evidence of the notion of concepts supporting taxonomic divisions in the law. This characteristic has particular significance for the issues that have been raised in the immediately preceding paragraphs. Unjust enrichment will not be found where an action in contract exists. Where there is a ground in tort or equity,

complex considerations apply to waiving tort or in choosing between an action in unjust enrichment or equity. In general, it may not advantage the plaintiff to bring an action preferably in unjust enrichment where an equitable action, or one in tort for damages, may be available on the facts.¹⁶³ It is a characteristic that must be remembered when it is explained that undefined notions of fairness and communal perceptions of justice are put forward as potential for development of the law.¹⁶⁴ Grantham and Ricketts explain that ‘...unjust enrichment does not seek to articulate an independent basis for restitution, one that appeals to some over-riding conception of fairness...’.¹⁶⁵ This will be seen to have consequences for doctrinal aspects of unjust enrichment.

The formative, unifying characteristics are, firstly, the lasting influence upon taxonomy of common law writs beginning in ancient times and extending to the more recent history of actions in English law. Importantly, it is the taxonomy that

¹⁶³ See Lord Robert Goff and Gareth Jones, *The Law of Restitution*, 714 ff. Whatever the modern theoretical reasons for exclusion of an action in unjust enrichment where a contractual remedy is available, the fact of *debt* deferring to *assumpsit* is an underlying cause. The action on the case also lay only where no other action lay, above pp 36 and see sub-ch. 2.9: tortious liability could be expected to take precedence if a similar historical influence prevailed. The situation as regards modern actions in tort and equity is however, more in the nature of practical limitations. Shades of old liability rules survived into the later history of the law however: as late as 1941, Viscount Simon over-ruled the finding in *Aris & Aris v Stuckley* (1677) 2 Mod 260, 262, that by pleading the implied contract a party effectively elects that its case is governed by contractual rules to the exclusion of tort, *United Australia Bank Ltd v Barclays Bank Ltd* [1941] AC 1, 11. In general, there are at least two separate issues. Firstly, a claim in unjust enrichment may well lie on the circumstances of a failed contract where the plaintiff may need to prove the elements of the failed contract, as in the case of *Fibrosa*, fn 40 above, or in tort where waiver of tort might still leave the plaintiff in need of proving the circumstances of a tort to establish a right to restitution. Secondly, where actions in defamation and libel might not yield an adequate remedy in damages, where the defendant has profited from its act, presumably, there might be circumstances where waiver of tort will allow an action for unjust enrichment. There are apparently no cases and it could be expected that establishing the benefit might be difficult in the extreme. Finally, in most instances of possible action for unjust enrichment in the circumstances of tort or an equitable claim, the establishment of benefit and subtractive enrichment will prove difficult. This does not affect the award of a restitutionary remedy for breach of tort or for equitable liability in the unusual case, but that is a separate issue from the concepts and principles of unjust enrichment per se.

¹⁶⁴ See p 125 below.

¹⁶⁵ Ross Grantham and Charles Rickett, ‘On the Subsidiarity of Unjust Enrichment’ (2001) 171 *LQR*, 273, 276; and see *Pavey* fn 1 above and *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 559, per Lord Templeman and 578, per Lord Goff.

is enduring, not the writ. The writ is long dead. But this means that the law is not a haphazard collection of unrelated rules, each set of rules, and each branch which is constituted by rules and supporting principles, has a definitive place in the whole. That is what is meant by enduring taxonomy.¹⁶⁶ If modern judges and law-makers are to redefine the content and context of unjust enrichment, they have to be prepared to assess the consequence for other branches. That is something that the judges cannot do, except by obiter dicta that might be at risk of being incoherent.

Secondly, the characteristics which I have dubbed 'formative', encompass the significant roles of writs such as *debt*, *account* and *case* which had characteristic concepts and characteristic purposes that have survived in modern rules. These characteristics are peculiar to a living unwritten law such as the common law is.¹⁶⁷

Common law unjust enrichment is not unaffected by commercial realities. Its development is nevertheless demonstrably a case by case development of legal rules by courts applying the specific legal principles that are essential to reaching individual decisions.

A significant example of the phenomenon outlined in the preceding paragraphs is to be seen in the lasting influence upon modern jurisprudence of the ancient *action on the case*. It effected a profound characterisation of actions in our law. The action for unjust enrichment was not without jurisprudential precedent, as I

¹⁶⁶ See below, p 71 ff, where the durability of taxonomy, from Roman times, is related to modern law.

¹⁶⁷ A codified law might not display these key historical characteristics. It might draw upon the past for its jurisprudence, but the development of concepts and principles in such a system has been the creature of the legislative process. Furthermore, it may have experienced interventions of a non-legal sort that will have broken the chain of legal reasoning. Typical of this is modern anti-trust and restrictive trade practices legislation which responds at least as much to economic theory as it does to legal principle. Modern enactments, covering a range of social and commercial laws might borrow from both fields.

have noticed. The theoretical foundation is that which underlies actions through which the law imposes an obligation based upon identified criteria which the law holds to justify redress. The writ of *action on the case*, is dead and seldom contemplated, but it has played a formative role in the development of the notion that there are circumstances, defined by law, which will not be allowed to pass without redress. The *action on the case* was by no means a universal cure-all. It did, however, provide rules governing circumstances which the law would not allow to go without remedy. It is the legal science, including method or technique which has survived, rather than the ancient writ and rule.

Thirdly, amongst the characteristics I have called 'formative' is another, closely linked to the jurisprudence which gave common lawyers the *action on the case*, which is more precisely a phenomenon: it is the persistence of an enduring jurisprudence of very long standing which has preserved central notions of unjust enrichment and is found in ancient and modern legal systems. This is the same basis of reasoning engaged in –

- by the ancient Roman praetor, empowered to admit a new cause of action;
- by the judges assembled in the Exchequer Chamber to deliberate upon Lord Coke's eloquent exposition of the law in *Slade's Case*,¹⁶⁸ and,
- by the judges in the Australian High Court in their deliberation upon the merits of an action for mistake of law,¹⁶⁹ and the House of Lords judging a quite novel set of overlapping and inconsistent claims in the *swaps* cases.¹⁷⁰

¹⁶⁸ *Slade's Case*, fn 37.

¹⁶⁹ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. 370 ff.

¹⁷⁰ The judgements in *Westdeutsche Landesbank Girozentrale v Council of the London Borough of Islington* [1996] AC 699, and *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, are of this kind.

These personages, jurists and judges, separated by many centuries, have in common a role that has significance for the jurisprudence of unjust enrichment: that is the work of defining what the law will regard as actionable. It is a role which recalls Sir Henry Maine's observations that ancient conceptions of the law will correspond to several modern conceptions, and in the next stage of jurisprudence, '...the older subordinate conceptions have gradually disengaged themselves and ...the old general names are giving way to special appellations.'¹⁷¹

These observations by renowned legal philosophers lend support to the point being made here: only the jurisprudence of unjust enrichment; not some communal standard of fairness, will guide the decision. This is an important area for later discussion, but I suggest that the judicial technique and the duty are akin to those which apply in equity when a judge holds that a contract ought to be avoided because of circumstances which the law holds to be grounds for upsetting the contract.¹⁷² In that circumstance too, the inner certainties of the law are the guide rather than a communal standard of fairness. I do not suggest that there is a necessary connection here between unjust enrichment and equity, only that the judicial technique of unjust enrichment does not stand alone. A serious attempt to understand the reasoning process is a prime pre-requisite for the student of unjust enrichment, the judge and the jurist alike.

¹⁷¹ *Ancient Law*, p 186. See also Lord Radcliffes' conclusions about *inner certainties of the law* that would seem to correlate to the foundational principles that stand behind several modern conceptions; *The Law and its Compass*, 38. Lord Radcliffe's notions are described in the fashion that they are enduring guides to development of the law. Maine too suggests that the ancient conception may survive but only to describe one aspect, perhaps a central one, of the modern law; *Ancient Law*, 186-7.

¹⁷² See below, pp 188 ff, where the basis of several important decisions is discussed.

3.5. Four Short Concluding Propositions.

To capture the significance of what has been said above, I shall attempt to state the relevance of the history in four short propositions. These propositions seek to draw out specific points of significance linking the historical study to modern law.

Firstly: The Ancient Common Law Writs and their Legacy.

Perhaps the strongest legacy of the ancient writs has been the shape they have given to modern actions that has survived in spite of the abolition of the writs. In the special focus of unjust enrichment actions, the writs of *debt* and *account* ameliorated the absence in the law administered by the King's courts, of laws regulating parole agreements, but they were the essence of a jurisdiction separate from *covenant* and *assumpsit* from the beginning. They provided the conceptual continuum which facilitated the development of the common counts.

The forces that formed *case* are an important aspect of the developmental process. They are not readily identifiable but they repose in 'that something else which the legal mind regards as unjust!'

Secondly: Unjust Enrichment, and Enduring Jurisprudence.

A law, if it is to be uniform and well understood must have an underlying philosophical basis in conformity with developed jurisprudence. That is to say, it needs to be capable of being explained by judges and jurists in terms of accepted jurisprudential criteria. Putative concepts of 'the unjust' and 'benefit' and 'the law imposing a duty' that are to be seen in the early common law, had a need of a recognised jurisprudence independent of delict and contract; a jurisprudence concerned with benefits gained at the expense of another which fall outside the scope of contract and delict. This was the product of a concern

amongst judges, even those who were in past centuries constrained by the forms of actions, to provide relief for the unintended transfer of money and money's worth.

The history of the writs of *debt* and *account* is clear evidence that the recovery of what was owed or what was transferred unintentionally was a significant feature of the earliest common law jurisprudence. As the jurisprudence emerged, it was as surely explained by the character of *debt* and of *quid pro quo*, as contract is explained by the jurisprudence of bargain.

Roman law had a similar need of a jurisprudence of benefit and obligation; Justinian unfortunately dubbed the area of law *quasi ex contractu*.¹⁷³ The appellation in Justinian's law was no more appropriate than it has been in the neo-modern common law.¹⁷⁴ Rather, the absence or failure of contract was a starting point for the reasoning underlying sections of the *Institutes*. We find, for example, that a person who receives what is not owed is '...bound by the dissolution rather than the existence of a contract'.¹⁷⁵ Resemblances between the *Institutes* and *indebitatus assumpsit* cases are readily identifiable.

¹⁷³ *Institutes*, fn 156, III: xxvii: see Reinhard Zimmermann, *The law of Obligation: Roman Foundations of the Civilian Traditions*, 837-8.

¹⁷⁴ *Institutes*, fn156. In the context of *Institutes*, Book III: xiii-xxvii, it may have been more appropriately styled 'exceptions to contract'; '... let us now examine those obligations also which do not originate, properly speaking, in contact, but which, as they do not arise from a delict, seem to be quasi-contractual.' vide III: xxvii. J. B. Moyle, *The Institutes of Justinian*, 153.

¹⁷⁵ *Id.*, III.xxvii vi.

The survival of elements of the Roman law and adoption into our own law is not universal, nor is it particularly important. What has been important is the survival of the method of ordering the law and of *unjust enrichment* elementary principles that have kept alive the place of this separate body of principles and rules and motivated its gradual development.¹⁷⁶ The Roman precedent is either an undisclosed blue-print, or evidence that, as Lord Wright put it, ‘..in any civilised system of law...,’ there will be a need of principles governing recovery of unjust benefits.¹⁷⁷ I suspect that this influential dictum was framed with such a blue-print in mind.¹⁷⁸

It has been the jurisprudence of unjust enrichment that has kept the body of principles alive in the common law because it seems to be an inescapable need of a modern society and of modern commerce; and this need is to be recognised in the history of the law from and including the earliest actions for *debt*. That, essentially, is the proposition.

Thirdly: Sustained Juristic Experience.

Development of more sophisticated actions, over several centuries, when judges must employ extraordinary devices to avoid procedural limitations of the forms of actions, was the product of ongoing juristic experience. It might well have been thought of in terms of *unjust enrichment* throughout the middle ages when Judges recognised this conceptual phenomenon and endeavoured to give life to it in the common law. In later centuries, the technical jurisprudence of the time made it sufficient to style them amongst, or along-side forms of actions, as the

¹⁷⁶ Roman influence was not overtly acknowledged because apparently, Roman Law was unacceptable to the Crown. It had a secondary vehicle of influence in the Ecclesiastical law which had an historical place in the early English law, though, likewise, not acceptable to the Crown.

¹⁷⁷ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barber* [1943] AC 32, 61-2, H of L.

¹⁷⁸ Indeed, obligations akin to those which our law imposes upon fiduciaries such as guardians, partners and administrators, are governed by the *Institutes* Book III, xxvii.

common counts. This is the basis of asserting an empirical character in the common law reflected in this very old legal concept, as unjust enrichment is. Asserting the role of *sustained juristic experience* is consistent with the fact that such a juristic concept has endured through the centuries from the early the middle ages. This does not mean however, that there was a sustained interaction with all other areas of the law, and a lack of such a sustained interaction with equity may be a relevant factor in relation to the characteristics of modern unjust enrichment.¹⁷⁹

Fourthly: Renovating the Taxonomy.

Finally, when the law adopts and builds a new, or a neglected field of doctrine, it is necessarily amending or renovating its taxonomy.¹⁸⁰ This becomes an important field of legal activity and legal thought. In the case of unjust enrichment in the common law, the phrase ‘the law adopts and builds’ is not historically appropriate. It is more accurate to describe it as something reluctantly admitted because it would not go away. It would not go away, however, because of the convictions and the clear-sightedness of a relatively small group of judges and jurists. Of these lawyers, it must be said that not only did they recognise that every civilised system of law ought to have such rules as unjust enrichment,¹⁸¹ but also, that they have had a keen sense of its relationship to other fields of law.

¹⁷⁹ Development of this theme is beyond the scope of the present work. Whilst it is interesting to consider what might have been, and whilst it is possible that the courts may, in future, create stronger relationship between unjust enrichment and equity, it is not easy to predict how this would occur in a structured or analytical legal environment. It is certain that bold initiatives will create more problems than they could possibly resolve: see Chapters 12 and 13.

¹⁸⁰ Professor Birks’ works have enlivened interest in taxonomy and its significance in our law: Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’, (1996) 26 *WALR* 1. The conclusions I have reached in this chapter and elsewhere in the work are consistent with the approach Birks recommends.

¹⁸¹ Paraphrasing Lord Wright’s *Fibrosa* dictum, above fn 177.

Chapter 4. Development of Key Characteristics of the Modern Law.

Arising from the consideration of sustained juristic experience and the lessons of ancient jurisprudence that were summarised at the end of the preceding chapter, it is possible to remark upon a matter of considerable and lasting significance. This involves an appreciation of the difference between, on the one hand, what is *equity* in the formal sense, and on the other, what conduct and rules are tantamount to 'the equitable' as understood by lawyers steeped in jurisprudence of broader concern than the common law. Lord Mansfield was one such lawyer and his famous dicta¹⁸² concern the latter, but they have been ignored because they were believed to concern the former. This has been so despite the context of general notions, *aequo et bono*, and comparison with Roman rules of unjust enrichment which indicate clearly that formal equity was not the basis of his rule. The point here made, necessitates a short background and analysis of some conclusions reached by a modern student of civil law of Europe and South Africa.

¹⁸² *Moses v Macferlane*, fn 42. Cf, *Rothmans* above fn 12: the judgment of Gummow J addresses, at length, the meaning of Lord Mansfield's judgments and attributes to them equitable notions rather than any concept of jurisprudence of unjust enrichment: see pp 175 ff and 244 below, where it is argued that Lord Mansfield's judgments contained specific unjust enrichment nuances as he compared common law to Roman rules of unjust enrichment. Justice Gummow's dicta are difficult to reconcile with these foundations of rules that were in any event, spelled out in a practical application of the ground of duress of goods in *Exall v Partridge* (1799) 8 Term Rep 308; 101 ER 1405, a contemporary case. See also Chapter 13 where Lord Mansfield's notions of *Equity* are explained in terms of broad jurisprudential concepts compatible with all western systems of law rather than just English common law. Lord Wright's '...any civilised system of law...', above fn 177, may be seen as similarly focused on a significant overview of law in western society. See also fn 203 where I discuss the very much wider interests of a plaintiff affected by a ground of an equitable cause of action than might be classed as unjust enrichment.

In post-classical Roman law, two apparently incompatible trends in the law were evident. The first was the actions developed from the action *stricti iuris* (strict liability) of which the early Roman classical actions were typical. They allowed for no judicial discretion and no issue for judgment. The second trend is seen in the various emanations of a ‘fairness and justice’ type of ‘principle’. Many scholars believed the bases of these two types of actions to be irreconcilable. Reinhard Zimmermann¹⁸³ reconciles them in the following way.

If the Roman praetor was willing to grant a new action in his promulgation of a periodic edict detailing allowable actions (though he rarely did so), then a judge had no discretion; it must be allowed. In Zimmermann’s view, the issue for judgment arose as to what the plaintiff must prove to satisfy the right to an action: we might call them ‘grounds’. In this way Zimmermann says, the concept of *aequitas* helped to form the restitutionary *condictio* actions.¹⁸⁴ These actions combined the strict liability concept with the apparent flexibility to develop new actions where circumstances demanded; i.e., new grounds. The historical study above, offers credible support for the proposition that a concept of unjust enrichment helped to form the rudimentary elements of the English law of restitution for unjust enrichment, a conceptual journey that has certain similarities to the Roman experience.

This is not merely of historical interest. I propose that the difference between broad discretionary justice on the one hand and the utility of strict liability in cases where the grounds are defined by precedent, yet capable of being expanded by the highest authority, is an important feature of unjust enrichment

¹⁸³ *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 852 ff.

¹⁸⁴ W A Hunter, *Roman Law*, 34-36: *aequitas* – ‘equity’ in the sense of *the equitable*, which was the basis of the *Jus Gentium*, the law affecting relations between persons other than between citizen and citizen, where *Jus Civile* pertained. *Condictio* - the procedural device whereby the wagers (which established what the winner would take) commenced.

as an independent branch of the modern law. It involves taxonomy and it involves the separate identity of principles, rules and actions, a feature of the law that will be studied in later chapters.¹⁸⁵

The English experience has resembled that of the Roman post classical law to such an extent that it might be said that the consciousness of Roman jurisprudence amongst generations of English lawyers and judges has left its distinct imprint upon our law. (Any similarity of actual principles is not presently of much importance). Such a conclusion is inescapable in the light of the historical study above. An influence upon our jurisprudence of this degree of significance is suggested in the dictum of Lord Mansfield in *Moses v Macferlan*¹⁸⁶ which might be taken as an articulation of theoretical basis of certain common law actions.

...[t]his kind of equitable¹⁸⁷ action, to recover back money which ought not in justice to be kept is very beneficial...[i]t lies only for money which *ex aequo et bono* the defendant ought to refund....[t]he gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money.¹⁸⁸

In this dictum is seen the notion of an 'obligation imposed by law'. It also has a strong flavour of Roman jurisprudence. It was from that which was equitable and expedient (*aequo et bono*) that the Roman rules were drawn and refined (as Zimmermann has suggested), which were the source of the gradual development of Roman *quasi contract* in the *jus gentium*, the law which applied

¹⁸⁵ See below, Chs. 6-8.

¹⁸⁶ (1760) 2 Burr. 1005.

¹⁸⁷ The word seems to have been used in a generic rather than a technical sense; see fn 182 and Guest, fn 151 above.

¹⁸⁸ (1760) 2 Burr. 1005, 1012.

between citizen and alien and between alien and alien (which came to be the material of Justinian's *Institutes*). Importantly, they were not, like modern equity, rules standing apart from common law, but were new rules, probably introduced by praetorian edict, permanently incorporated into the *jus gentium* to provide for the case where existing rules were judged inadequate.¹⁸⁹ Seen in this way, Lord Mansfield's dictum has a quite different meaning from either English equity or vapid perceptions of justice and fairness. It was recommending simply, the development of the law where judicial reasoning established a need for recognition of new standards or norms.

Zimmermann's insight is a useful one because it recognises in ancient law the compatibility of strict liability with a principle that identifies instances of unjustness. The issue for judgment was not a discretion to find injustice: it was a capacity vested in the highest legal authority to recognise a new case as an instance of the unjust.¹⁹⁰ Lord Mansfield's reasoning, steeped as it was in the science of jurisprudence and judicial method, reflects this ancient Roman jurisprudence.

The conceptual reasoning evident in the Roman jurisprudence has come to be of significance in modern law which makes a distinction between the action being sued upon, and the principle and rule of law being applied. In our modern law, a plaintiff's case in unjust enrichment does not seek the judgment of the court that the defendant has been unjust in its dealings; nor did it seek restitution as compensation for some unjustness; rather, the plaintiff is asserting facts which give rise to a duty imposed by the law and arguing that those facts

¹⁸⁹ Hunter, fn 21 and 184 above, 36 ff.

¹⁹⁰ Discussed below in Ch 7.3, where it is argued that the obligations imposed by law in unjust enrichment are a reflection of insistent communal standards rather than a collection of instances of arbitrary and unconnected curial decisions. See also Ch 13 where it is argued that the *Fibrosa* principle, fn 177 above, is an imperative, and that instances of particular grounds are of the nature of exceptions to the general validity of transactions freely entered into.

constitute a ground for a court to impose such an obligation.¹⁹¹ This too, is an instance of a strict liability imposed in those circumstances in which the law defines, or perhaps more accurately, recognises an unjust enrichment¹⁹²

The jurisprudence of unjust enrichment has a very long history. The conceptual characteristics and taxonomy have been enduring. In consequence, it is possible to recognise similarities between modern law of unjust enrichment in many jurisdictions and to attribute to them a common origin.

Chapter 5. Concept, Principle and Cause of Action in Modern Unjust Enrichment: Distinct parts of the Law.

Concepts and principles and rules are to be studied extensively in later chapters. At this point, it will augment clarity if the separation of concept and principles from notions of actions is observed briefly. This is necessary because in some common law jurisdictions, there is no perceptible or consistent separation. Unless this is understood, it will be difficult to describe the role of concept and principle with any clarity. It is also a salutary warning to understand the territory before making comparisons.

In many modern systems of law, including some common law jurisdictions, unjust enrichment is an action.¹⁹³ That contrasts markedly with Anglo/Australian

¹⁹¹ Ibid. See also Sub-Ch. 6.5 below, where these issues are analyzed in greater detail.

¹⁹² The method belongs to the common law but it holds a strong resemblance to the methodology of the courts in areas of equity as has been noticed above in sub-chapter where the common law and equitable principles are compared for their defining capacity for jurisdiction: See *Fry v Lane* (1888) 40 Ch. D 312; *Blomley v Ryan* (1956) 99 CLR 362.

¹⁹³ Unjust enrichment actions in systems of law that have Roman/Dutch origin usually legislated in civil Codes eg, Netherlands: A statutory general obligation for redress of unjust enrichment: Civil Code: Book 6; Title 4; Section 2, Arts6:203 – 6:211; Switzerland: A like provision *Code des Obligations* 62

law in which unjust enrichment is an informative concept and/or principle giving unity to the actions that the law allows. In these jurisdictions, *unjust enrichment* is a branch of the ‘law of obligations’; at its foundational level, it describes the basis of reasoning that judges employ to inform the scope of actions in that branch of the law. Contract and tort are similar to this extent. It is important to understand the etymology of these areas of the law, because the nomenclature is informative if the background is understood.

II and 63 I., and Austria: Civil Code: Art 1431 ff., Quebec Civil Code, 1991, Title 1 Obligations in General; Chapter IV; Section II, Reception of a thing not due Art 1491-2; Section III, Unjust Enrichment Art 1493-6., South Africa; Roman *condictiones* (based upon Justinianic actions), plus person of limited capacity; quantum meruit type action; and enrichment actions of a negotiorum gestor (the interferer without authority) Willes Principles of South African Law (1991) Ch XXXVIII., Scots law: Includes actions based upon Justinianic restitutionary actions: principally *condictio indebiti* (money); *condictio indebiti* (property); *condictio causa data non secuta* (money and property). Germany and France, see fn 551 below.

Source: Niall Whitty, ‘Rationality, Nationality and Taxonomy’, in David Johnston and Reinhard Zimmermann ed. *Unjustified Enrichment: Key Issues in Comparative Perspective*, 682 ff.

In *Pettus v Becker* [1980] 2 SCR 834:117 DLR (3d) 257, the modern foundation of actions in restitution in Canadian law was established on ‘...the general, equitable nature of restitution and its foundation in the idea of unjust enrichment ..’. Fridman says the Canadian courts have been ‘...more receptive than those in England to the “equitable” features of the law of restitution or unjust enrichment...’ G.H.L.Fridman, *Restitution*, 16. and he illustrates the point by demonstrating the close link between the law of restitution and the constructive trust, at p 17. ‘As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another...but for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment.’ per Dickson J in *Rathwell v Rathwell* (1978) 83 DLR (3d) 289, 298, approved by the Supreme Court in *Sorochan v Sorochan* [1986] 2 SCR 38.

United States: Law is founded upon the Restatement of Restitution 1937, Paragraph 1. A person who has been unjustly enriched at the expense of another is required to make restitution to the other: 2d ‘A person who receives a benefit by reason of an infringement of another person’s interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.’

In North American jurisdictions, unjust enrichment is increasingly regarded as the indicator of constructive trust in cases of fiduciary and other equitable liability in common with other instances of unjust enrichment; see The Hon. Beverley M McLachlin ‘The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective’, in Donovan M. W. Waters, *Equity, Fiduciaries and Trusts*, 37, 42; John D McCamus, ‘Unjust Enrichment’ in the same work, 129. Andrew Kull describes the restatement as evidence of a conservative approach by the American judges of the first half of the 20th C, ‘...that is thoroughly out of character for contemporary American judges, who are perfectly prepared, in most legal settings, to go ahead and make such an order as justice may seem to require.’ ‘Mistaken Improvements and Restitution Calculus’, Johnston and Zimmermann ed. *Unjustified Enrichment: Key Issues in Comparative Perspective*, 371. See also fn 201 below.

The Anglo/Australian approach to unjust enrichment contrasts with historical approaches to actions.¹⁹⁴ There are several types;

1. an action formalised by feudal writ (English medieval);¹⁹⁵
2. action on a general principle (North American unjust enrichment);
3. a legislated obligation that gives rise to an action (*Institutes* and continental civil law codes);¹⁹⁶
4. an action that defers to a principle that refers to grounds (Anglo/Australian).

The comparisons pose a question ‘...what is the jurisprudential merit of the action which relies upon a broad principle in the manner of being available as of right or as a discretionary remedy whenever it is ‘just’ by a generalised standard, to employ it?’ The problem is that a broad and variable usage of ‘just’ has no juristic meaning and an enquiry about its meaning may involve merely an evaluation of communal values.¹⁹⁷ When general principles meld the principles and the causes of actions into one, such that in relation to unjust enrichment, the general principle may be invoked where there is a finding of *unjust* or *unconscionable* behaviour, it is questionable that there is a *law of unjust enrichment* as distinct from another set of remedies.

¹⁹⁴ *Institutes of Justinian*, 111.xxvii.vi. Justinian’s *Institutes* did not describe an action, but rather, a concept of obligation giving rise to an action. Curiously, a related contrast may be made between the developing system of post classical Roman law protecting rights of Roman citizens, and a rigid system of ancient English writs which were designed to serve the interests of one (English) class. In the latter, the action subsumed principle, or, there never was a principle; only a right guaranteed by feudal relationship.

¹⁹⁵ A decree of a dictator is comparable. The principle it serves might be wholly divorced from modern legal unjustness or even communal standards.

¹⁹⁶ That may apply equally to an obligation arising from modern legislation: the principle it serves might not be discernable, offering no clear or certain guidelines for new obligations.

¹⁹⁷ See fn 193 above, specifically the observation of Andrew Kull concerning the practice in modern US courts, and below, Chapter 7, p 119 and ‘universalisation’ fn 292.

Lord Mansfield is seen by Anglo/Australian law, as a pioneer in anglicising the technique of recognising actions and explaining their conceptual basis in a manner that might be seen to have anticipated the end of the forms of actions that was formalised by legislation a century later. He was not really breaking new ground however: after all, the common lawyers had long allowed the *action on the case* where no other action was available to meet the needs of justice.¹⁹⁸ The law drew upon juristic reasoning to say in what circumstances the action would lie, just as in modern unjust enrichment.¹⁹⁹ Indeed, it might have been valid to argue at the outset, i.e., following upon *Slade's Case*,²⁰⁰ that the action which began as *indebitatus assumpsit* (to satisfy the contemporary need for a writ) was simply an extension of the *action on the case*, by another name. The reasoning underling actions in the English and Australian law has strong overtones of the *action on the case* jurisprudence. Lord Mansfield's judgments fit well with this perception, as will be seen in the next paragraph: he was addressing the basis of actions rather than attempting to introduce a 'justice of the case' principle. His endeavours were ultimately successful, two centuries later.

An over-arching unifying factor is that which Lord Mansfield described in terms of *ex aequo et bono*.²⁰¹ The concept has a very specific role to supply relief

¹⁹⁸ Ultimately to be granted full recognition by ingenious judicial legislation in the Exchequer Chamber where the assembled judges affirmed the findings which were to be the rules laid down in *Slade's case*. The action on the case was explained above, pp 21 ff.

¹⁹⁹ See Brooke's commentary on *Jordan's case*, in Brookes Abridgement (1536), *Accion sur le Case*, 5, cited and translated in Lucke, fn 101, Part 2., (1965) 81 *LQR*, 539, 548-9. Curiously, the ancient English actions were not unlike those of the Classical Roman Law which was the law of the Roman upper classes. It fell to a court official, *Praetor Peregrinus*, in the post classical era, to insinuate new actions. The *Praetor Peregrinus* had the same kind of responsibilities as the *Praetor*, but was responsible for administration of law that applied where at least one party was a non citizen: the Classical Roman law was strictly a law applying between citizens: it became an antiquity even in Roman times.

²⁰⁰ Above, fn 57.

²⁰¹ Cf, John P. Dawson, *Unjust Enrichment: A Comparative Analysis*, 24 ff. Professor Dawson describes a very different development in North American restitution where unjust enrichment remedies have a 'roving commission' to supply a need where justice demands it in cases which are not primarily unjust enrichment actions. In *aequo et bono* we begin to confront the debate over common meaning and dedicated legal usage which will arise repeatedly as the work proceeds.

where, upon the judgment of the superior courts, an action ought to be allowed because circumstances are judged to be instances where the law creates or recognises a relevant obligation.²⁰² Historically, and in terms of modern jurisprudence too, the development of principle follows channels tried and proven in both historical and modern systems of law. Neither the *action on the case* nor modern unjust enrichment pretend to allowing actions simply, or only, because no other action is available. Each defines the circumstance in which the particular action will be allowed.

In Australian law, in a range of actions, the ‘core idea’ of unjust enrichment, (Lord Mansfield’s words), is the unifying conceptual explanation of the purpose served by the actions. That purpose is to impose the obligation. The obligation is the reason of the action. This is the product of jurisprudence of long standing.

As explained in the last chapter, an inter-relationship between strict liability actions, technically named actions *stricti juris*, on the one hand, and a confined discretion to grant a new action, has the capacity to explain one aspect of the *obligation imposed by law*. It remains to be explained how concepts or principles of unjust enrichment are the overarching explanation of all the circumstances of actions where an obligation is imposed. That will arise in Chapter 6.

The *core idea* of modern unjust enrichment actions is the product of reasoning and experience over many centuries. The seeds of the modern methodology were sown with the advent of the *action on the case* from the 14thC. In contract by comparison, we might be tempted to look exclusively to conceptual continuity as the explanation for its modern jurisprudence. Tort may be somewhere

²⁰² The distinction between ‘creates’ and ‘recognises’ in this context is explained elsewhere: see Ch 7.5. Obligations of a non legal kind might be precursors to the law recognising a legal obligation.

between these two. The lack of identifiable, or certifiable continuity in development of principle leaves legal experience as the only satisfactory way of describing the stages through which the development of the law of unjust enrichment has passed.

This explains why the character of the unjust enrichment concept, principle and rule are seen to be open-ended and jurisdictions have sought to explain the law of unjust enrichment in a manner that best suits the modern developments in the law as a whole, in that jurisdiction. Whilst civilian jurisdictions have legislated an action that is interpreted and applied with regard to the jurisprudence of ancient actions from the *Institutes of Justinian*, United States and Canadian jurisdictions have chosen to view the action as a general principle and allowed its development in context with the development of the constructive trust.²⁰³

Is it possible then, to relate, in the Anglo/Australian context, actions as free acceptance, mistake, duress and failure of consideration in a conceptual fashion so as to give an over-arching explanation of actions? The key to the answer to this question is the uniform purpose served by the actions, for the purpose of the

²⁰³ See fnn 193 and 197 above. This however, is a process that recalls the manner in which courts in the early 20C were willing to describe unjust enrichment in terms of a curious and totally unconvincing contract jurisprudence, dubbed quasi contract. The connection, it is true, is that common law unjust enrichment and the equitable constructive trust (in jurisdictions where it is recognised) both characterise a payment, a sum, or the thing received in terms of its value. The special rules of equity however, relate the character of the constructive trust back to the unfair or unjust conduct of the defendant, potentially very much wider than the common law concept of the unjust enrichment. The 'underlying notion' is that equity is concerned with the quality of the conduct of the person seeking to impose strict legal rights so as to take advantage of vulnerability or misadventure, such as where by taking advantage through forfeiture, the party seeks to achieve a gain from the vulnerability or misadventure which was not envisaged in the parties' bargain. *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 417; 95 ALR 321, 334, per Mason CJ; 355 ff, per Deane J. Mason CJ would have confined the minimum equity in terms of objective economic costs whereas Deane J saw the minimum equity as necessarily encompassing the total impact of the unconscionability on the plaintiff, even including his physical well-being. Unjust enrichment is concerned with the benefit whilst the minimum equity is essentially concerned with rights which might have relevance to interests. This is an example of a relationship of parties that is characterised by equitable principles which define the foundation of rules.

action will be seen to be corrective rather than remedial or punitive. This juristic purpose is distinct from the jurisprudence of the remedial constructive trust in Anglo/Australian law, despite the fact that the latter might be seen as a corrective juristic doctrine. In part at least, the explanation is that there is no essential need to establish culpability of a defendant in unjust enrichment actions. There are issues of taxonomy and jurisprudence at work here. Seemingly, it is possible to relate *duress* and perhaps *necessitous intervention* to a kind of 'unconscionability' but why should the remedy for such 'unconscionability' be corrective?

It is readily apparent in such a question that the relationship of unjust enrichment to the constructive trust in North American jurisdictions has consequences far beyond the limits of the present study. The one conclusion to be made here, however, is that the lack of adequate and compelling jurisprudential explanation of that relationship resembles, at many points, the *quasi contract* anomaly, principally because the unjust enrichment concept is not compatible with modern equity; nor was it compatible with contract, but that was ignored in early 20C legal circles. Relationship to medieval concepts of what is 'equitable' is another matter and this will be considered in chapter 13. Consciousness of the question being asked in modern adjudication is very important.

Returning to the issue identified in the opening paragraph of this sub-chapter, modern strict liability actions in Anglo/Australian unjust enrichment co-opt the power vested by precedent in the highest courts to allow a new action in circumstances which are judged to be united by a unifying concept or principle, as was done in *David Securities Pty Ltd v Commonwealth Bank of Australia Ltd*²⁰⁴ and *Woolwich Equitable Building Society v Inland Revenue*

²⁰⁴ (1992) 175 CLR 353.

Commissioners (No 2).²⁰⁵ It is not the prospect of development of new actions that ought to be the primary focus however: we should primarily be concerned with the reasoning of unifying influences in the modern law that facilitate the reasoning of actions in a unifying way. The advancement of this focus will be a central issue in chapters 6 and 7.

The study thus far has been most useful because it has introduced the analysis of the characteristics of modern unjust enrichment, introducing the fabric of unity and purpose in the endeavours of great judges from Lord Coke, to Lord Mansfield, and Lord Wright to the great judgments of recent times in several national common law jurisdictions.²⁰⁶ It has shown too, how ancient jurisprudence has set a precedent for a correlation of actions *stricti juris* to a judicial power vested in the highest judicial authority to decide upon the creation of new actions and explain unity of existing actions. This chapter has brought together the key characteristics and explained the conceptual and practical differences between the North American action on a general principle on the one hand and the actions informed by concepts and principles of unjust enrichment as is the law in England and Australia.

²⁰⁵ (1993) 1 AC 70.

²⁰⁶ Modern unjust enrichment, is by no means the exclusive preserve of the common law: see Eltjo J. H. Schrage (ed) *Unjust enrichment: The Comparative Legal History of the Law of Restitution*, esp., 9, 26.

Chapter 6: Concepts.

6.1. Introduction.

There are rarely to be found any meaningful attempts to explain the notion of a legal concept, and they appear only sparingly in legal literature.²⁰⁷ Scott and Seavey, whose work made a strong contribution to the development of unjust enrichment law in the United States, wrote of the

fundamental conception of *restitution* [synonymous with *unjust enrichment* in the context]... [which] requires an extensive set of individual rules to spell out what is meant by 'unjust', especially since we are met with the fact that in certain situations ...a person who has obviously benefited another is not entitled to recover.²⁰⁸

²⁰⁷ Indeed, there is little discussion of the idea that there exists a 'concept of law': see Gareth Jones, 'A Topography of the Law of Restitution', in P.D. Finn (ed) *Essays on Restitution*, Ch 1; David Ibbetson, 'Implied Contracts and Restitution: History in the High Court of Australia. (1988) 8 *OJLS*, 312; Keith Mason, 'Restitution in Australian Law' in P.D. Finn (ed) *Essays on Restitution*, Ch 2; Andrew Burrows, 'Understanding the Law of Restitution: A Map Through the Thicket', (1995) 18 *UQLJ*, 149. Mitchell McInness, 'The Structure and Challenges of Unjust Enrichment' in Mitchell McInnes (ed), *Restitution: Developments in Unjust Enrichment*, 17.

²⁰⁸ Warren A. Seavey and Austin W. Scott, 'Restitution', (1938) *LQR*, CCX111, 29, 36.

The point being made by Scott and Seavey is that *unjust* is not an everyday concept and its understanding in the law requires knowledge of a considerable body of reflective judgments. This is not at all surprising if it is remembered that tort is divided up into an array of quite different actions, all of which, however, rely upon common juridical reasoning for their authority.²⁰⁹

The word *concept* has a wide range of meaning in our language: it might mean a notion, or idea at one end of the spectrum, and a hypothesis, a view, or a theory at the other. When we speak of *concept* in the law, and intend that it has a definitive or other important role, we tend toward the latter end of the spectrum of meaning. It is not necessary to be more specific about meaning: concepts are discernible experientially, identified by their functional relevance to a particular statement of the law.

I will make several leading statements or assertions to identify what must be demonstrated with respect to legal concepts. Legal concepts are:

- building blocks of legal theory;
- unifiers of like actions because they signify their character and objective;

A unifying legal concept of unjust enrichment is;

- the separator of unjust enrichment from other branches of the law because it recalls the legal experience of the courts concerned with unique origin, purpose and reasoning;

²⁰⁹ See *Province of the Law of Tort* above fn 2, esp. chs 2-5. Some limited comparisons of concepts of tort and of unjust enrichment are made in Ch 12 below. Query whether it is correct to describe such reasoning as “juridical”: see fn 9. I believe that “judicial” is adequate in this context.

- the catalyst to development because once the cause of action is established by recognition of the scope of actions recognised by law, it invites the jurist and the courts to engage in reasoning as to what is a like case, it being explicitly open to a finding of a new case.²¹⁰

Some nouns and adjectives used in our language do not invite deep reflection. They are not critical to an outcome. This is because they do not contribute to a process of reasoning. Legal concepts, on the other hand, may contribute to meaning in the law in ways that describe the context of a rule, and its purpose and relationship to other features of the law. Though the idea of a ‘legal concept’ is used sparingly, there are nevertheless many notions in legal language which are best described as such. They vary greatly in what they actually do as part of our law. Legal concepts are not exhaustively described as the indicators of principles and rules, although they may be that too. They are, importantly, tools of legal reasoning.

In the following lines taken from the dictum of Lord Mansfield, ‘...defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money...’²¹¹ there are words which can only be understood as legal concepts; ‘defendant’, ‘case’, ‘obliged’ and ‘equity’ are words that a non legally educated person might not grasp fully and accurately. Professor Hart’s approach to defining two different kinds of obligation demonstrates this point: one concept of obligation is close to common meaning though it has a place in the law: the other is wholly a legal concept, encompassing an *obligation* that is

²¹⁰ *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 257 per Deane J.

²¹¹ (1760) 2 Burr. 1005, 1012.

imposed by the law because of an unjust enrichment, a contract, or a fiduciary principle.²¹²

Is each of the words from Lord Mansfield's dictum, that is 'defendant', 'case', 'obliged' and 'equity' a concept simply because it invites the mind to explore the depth of meaning? My answer is that they might be. Do these words describe 'legal concepts'? My answer is that a legal concept is an abstract idea which describes a matter of consequence for legal reasoning. It is clear though, that 'consequence' can be of differing degree; it too is difficult to define. Nevertheless, 'consequence' has to do with progressing toward an outcome, a finding, or a decision. The outcome in a legal passage is that it tends toward some conclusion which may be a rule. If a word used in a dictum is a matter of consequence it must be that it invites reasoning about meaning. Words which do so, contribute, conceptually, to a reasoning process, by which conclusions and rules are arrived at.

This analysis of the function of the constituent elements of a legal statement helps us to understand that there are some elements that import meaning because they have a wider significance than the immediate purpose. This applies to those words like *contract* which describe something of import that we will have encountered in another legal passage, perhaps a like legal passage.

²¹² H. L. A. Hart, *The Concept of Law*, 83. Hart draws an important distinction between a concept of obligation on the one hand and the effect of being obliged on the other. Being obliged by threat of loss, or of violence or forfeiture is about compulsion that is found where the courts serve the interests of the state, primarily. Being obliged in the sense of having an obligation to repay monies received as consideration for a contract which has failed, is about a relationship of one party to another where-in one party has an entitlement or a right to have, and the other has an obligation to pay. The two concepts of obligation are very different and the latter would be unfamiliar to many. Obligation is discussed below in sub-chapters 7.4, 7.6, 9 and 11. The 'obligation' example emphasises the critical feature of context, which is partly to do with taxonomy.

They are the tools of comparisons and help toward forming a premise. In a particular context, they contribute to reasoning or describe the process of reasoning. They are especially, notions that assume and apply some predetermined premises. In this way, *contract* immediately assumes and brings to the legal passage or statement all the special rules that define what a contract is. *Unjust enrichment*, when used in the context of the law, is such a constituent of reasoning process that identifies the taxonomic characteristics of the rules that it demonstrably justifies in particular cases. This is the experience discernible in the cases.

It is not necessary to assert unerring conceptual continuity nor sustained doctrinal characteristics, nor even distinctiveness from civilian doctrine but it is very clear that a concept of unjust enrichment that found its expression in the earliest common law writs, has been a powerful catalyst to the development of legal principles in modern law.²¹³

6.2. Unifying Legal Concept: The Australian aspect.

The notion of legal concept became especially important as a feature of Australian law of unjust enrichment, and possibly, of Australian law in general as a consequence of the manner that the High Court described unjust enrichment

²¹³ A.G. Guest's view that in the period to Lord Mansfield's time, increasingly, the rationale of the cases was that one party had been unjustly enriched at the expense of another, and Fifoot's observation that there was a '...single strand running through all these decisions...' (referring to common counts cases in the era of Lord Mansfield), now appear unsurprising; see A.G. Guest, fn 151 above; C.S. Fifoot, *History and Sources of English Law* 186. See also p 92 ff below.

in a leading case. The central dictum in *Pavey & Matthews Pty Ltd v Paul*²¹⁴ explains the operation of concepts and principles of unjust enrichment. Unjust enrichment is a

‘...unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation and which assists in the determination, by ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case...’²¹⁵

Popular perceptions of unjustness and views about what the law ought to be are at the root of the predictive difficulty as to what the unifying concept might unite: but the difficulty is illusory and, I suggest, it stems in part, from an unwarranted emphasis upon the latter part of that dictum. It will make little or no difference to the nature of unjust enrichment as a branch of the law if no further instances are recognised by the courts.²¹⁶ It is true, nevertheless, that modern law has not satisfied the need for clarity of unifying concepts and principles in unjust enrichment, lacking what Professor Birks called *a stable pattern of analysis* that would augment reasoning between cases based on different grounds of unjust enrichment.²¹⁷

²¹⁴ Fn q. Treatment of the underlying legal concept is found throughout this work but especially at pp 91-98, 108-110, 136, 164 and 176-79.

²¹⁵ *Pavey*, fn 1, at p 257.

²¹⁶ This assumes of course, that there is no significant change in the basis of actions accompanying the introduction of new grounds. Some overlap in the meaning attributed to concept and principle is apparent here. This will be explained more fully as I proceed.

²¹⁷ Peter Birks, *Introduction to Restitution*, 19-20: discussed again below, pp 172-73, and 259. Perhaps the task of clarifying is partly and initially one that jurists might contribute.

The role of the 'praetor's edict' in Roman law, whereby a high official might allow new actions, was noticed above.²¹⁸ Characterisation of the modern system as one resembling the Roman form, is an instructive approach because the reasoning process draws upon a complete knowledge of available actions and developed judicial perceptions of what the law ought to achieve, and how far its reach ought to extend in a contemporary society. This exemplifies the essential character of the reasoning in the common law that explains the purpose of the unifying legal concept that Justice Dean identified. Reaching back to the method of the *action on the case*, it is the underlying rationale of the role of the superior courts whereby they will find, by common reasoning, the individual grounds of actions: this is what explains the instances of what is found selectively, to be a ground of unjust enrichment. *The action on the case* was never a *carte blanche* to provide a remedy based upon perceptions of fairness,²¹⁹ and this characteristic is present in the modern law too, where the relationship of grounds arises by reasoning from a foundation of an overview of all actions and their relationship.

Unjust enrichment is a unifying legal concept because it unites rules of law in one conceptual field, just as *contract* and *possession* do. It is however, a concept of a different kind; it's only function is to identify a number of specific grounds of actions that the law allows. That is, it identifies, describes and delineates actions. It is akin to tort to the extent that tort also describes actions.

There is an important difference between a concept or a principle, on the one hand, which explains a decision in a specified category of cases, and a uniform

²¹⁸ Above, fn 20.

²¹⁹ This was discussed above at p 67-69.

principle, on the other, that is applied in cases where-ever the court may deem it appropriate as a key to a remedy. Unjust enrichment in Australia and England is of the former type. The 'unifying legal concept' that was found in *Pavey and Matthews v Paul*²²⁰ exemplifies the principle that is active in this branch of the law. It is *legal* reasoning, not political or social or moral reasoning which will provide the nexus.

Once we take as a given proposition that the unifying concept/principle is founded in curial experience and reasoning, it also helps to explain why it has a potential to facilitate development of the law and prevent the intrusion of idiosyncratic notions of justice and fairness. It is reserved to the judges who interpret the law and apply it in our courts, to admit its extension to a new set of circumstances by reasoning from a foundation of an overview of all actions and their proper relationship.

The *concept* of unjust enrichment is, to that field of law, what the concept of tort is to the delictual field of law. Would delictual actions survive if the concept *tort* did not exist? Perhaps so: but we would be struggling to explain the relationship of the many delictual actions, and some of them might not have been developed in consequence. It can be seen immediately that legal concepts are of many different kinds, having varying degrees of pertinence to specific rules. Unjust enrichment however, is in form (but only in form) in a class like a *tort*, an *equity*, *unconscionability*, *contract* and *estoppel*.

²²⁰ Fn 1.

These concepts delineate sets of principles and rules, and in some cases are the essence of an action: they are in some circumstances, indistinguishable from principles and doctrines because they describe the limits of the field of law to which they refer. This may elucidate the difference, if there is one, between the concept of unjust enrichment in Australian law and the principle of unjust enrichment identified in judgments of the English courts. Both the unifying legal concept in Australian law and the English unjust enrichment principle connect cases in which the law allows an action. The difference between the two may be a fine conceptual point, or purely argumentative. A principle though, *does* something: a concept *is* something. When the 'something' is *making a connection*, or a *connective link*, the difference may be unimportant.

In the various common law jurisdictions, there are important differences of concepts and principles and in *place*, all of which affect the application of rules of law.²²¹ Unjust enrichment in Australian and English Law is both a unifying concept and a principle. The concept and the principle are the theoretical basis for independent actions. To the extent that the concept provides a unifying explanation of actions, just as *tort* does in delict actions, it is also cognate to, even tantamount to a unifying principle of law.

The meaning, or import of such a statement is usually well understood and yet there are those who would deny that such a unifying concept and principle are *law*. It will be instructive to examine both sides of this question.

²²¹ '*Place*' describes my own perception of the characteristics of the neighbourhood in which unjust enrichment 'grows up'; codified or common law, principled or other, coherent or other, fused here and not there, equitable but not equity.

The Unifying Legal Concept and Unifying English Principle are Law.

The English unifying principle of unjust enrichment is that which describes what is the common legal reasoning of individual cases involving a benefit had at the expense of another where the courts have identified the reasons of legal unjustness.²²² Such a principle and the Australian *unifying concept* do the same work. It is upon such a principle or unifying legal concept that the continued existence of rules of unjust enrichment depends. “X is unjustly enriched” is a statement which only has legal significance because the experience of the law tells us what unjust enrichment is in legal terms. This is because the concept invokes legal experience. Were it otherwise, the statement could simply imply a moral or social/political conclusion about X’s circumstances. The works of modern commentators on restitution and the judgments of the superior Australian and English courts are best understood in this light, that is, as that which invokes legal experience: the concept gives legal meaning to the conclusion expressed. It could be said that they are tools of methodology rather than law; but that would not describe their authority. The rules might be incomprehensible without them. This is important to rules of precedent.²²³

One very significant point lies at the basis of what has been said in this sub-chapter to this point. Actions like mistake, duress and necessitous intervention, arising in quite different circumstances, are seen as united by a common jurisprudential characteristic that involves the law imposing an obligation in certain judicially determined circumstances. Unless it is understood that such a methodology has its origins in the *action on the case*, and that this ancient action has a much older jurisprudential precedent, it will be very difficult to

²²² *Lipkin Gorman v Karpnale Ltd.* [1991] 2 AC 548, 559, per Lord Templeman and 578, per Lord Goff.

²²³ See sub-chapter 6.3 below. The doctrine of precedent might be unworkable without unifying and expository elements recognised as inseparable from the rules they relate to. See also fn 236 below. The legal character of concepts and principles is discussed again in Chapter 8, p 156.

accept and understand why such a group of quite dissimilar grounds of actions exists, as a category. If one relies upon comparisons with modern civilian jurisdictions, the point will only become obvious because there, the actions are reasoned from the actions in the Roman institutes.

This background is essential also to the issues raised in Chapter 7.5 below. The methodology of the *action on the case* is seldom contemplated in modern legal discourse, but it is an enduring phenomenon which has found a place in law, ancient and modern, including Anglo/Australian law, North American law, most European continental systems and South Africa. This fact suggests a common influence, the Roman *Institutes*, which the common lawyers of today, unlike their medieval predecessors, are free to admit.

6.3. Unifying the Theoretical Basis of Actions.

Unjust enrichment was described by Lord Wright in terms of the right arising from a judgment, which explains the duty (obligation) which the law imposes to make restitution.²²⁴ The meaning of Lord Wright's words becomes plain if one remembers the difference between the early common law writs, (formalistic and with no evident foundation in principle), on the one hand, and on the other, the judgments of the Roman *iudex* adjudicating cases on the praetor's edict²²⁵ which was formed upon notions of *aequo et bono*. Essentially, Lord Wright has posed a question, by what criterion does an issue of unjust enrichment arise? Such a question can only be answered by reference to some wider theoretical and legal philosophical basis; wider that is, than a succession of early precedents that were sometimes sterile. After all, without the explanation of an over-arching

²²⁴ 'Sinclair v. Brougham', *Legal Essays and Addresses*, 1939. 1, 18-19.

²²⁵ Fn 20 .

principle, precedents cannot be precedents at all because the cases will be unrelated, one to another.²²⁶

The dictum from *Pavey* cited above²²⁷ is perhaps the most systematic curial exposition of the unifying concept. There are two propositions –

- (a) it provides a unifying explanation of cases where the law will impose an obligation to make restitution:
- (b) it assists in the characterisation of actions, including new actions: thus, it reinforces the independence and separateness of the restitutionary strict liability from other areas of the law.

It is significant that the law imposes the obligation. It does not as in contract, merely enforce a duty arising from the parties' agreement.²²⁸

It must be doubted that these propositions are sustainable when they are made in respect of a mere concept, unless it has another character. That the dictum of Deane J described also, a principle of law, is plain once it is recognised that the characterisation of restitution as *fair and just*, serves very much the same purpose as the principles of contract which led the US Supreme Court to interpret the stringent proscription of *contracts in restraint of trade* under the *Sherman Act* as applying to *unreasonable* restraints of trade.²²⁹ One is compelled to enquire as to the basis in principle of rules that make use of such

²²⁶ See Ch. 11.4 especially p 210, where I have commented upon over-arching principle and the unifying legal concept analysing the views of commentators on this observation about precedent.

²²⁷ Fn 1..

²²⁸ The important nexus between an obligation imposed by law and the strict liability action has not been much explored. I believe that it has the potential to simplify much of the reasoning about *defining concepts* (of which the unifying legal concept of unjust enrichment is an example) and their important influence upon and the nature of rules. Much of this is considered esoteric in some quarters. Tort, if it is studied in this light, also opens up new fields for exploration, and in terms of unifying and defining concepts, becomes more readily explicable.

²²⁹ R M Dworkin, *Philosophy of Law*, 49.

powerful legal concepts, or tools of reasoning, as ‘unreasonable’, ‘fair’ and ‘just’, for they do not bear a common-place meaning: rather they import reasoning that has developed through a succession of cases. The answer as to the meaning of *unifying legal concept* lies

- in the contemplation of the characterisation of actions given us by Lord Wright,
- in the consideration of the *Sherman Act* example given above, and
- in contemplation of the character and method of the *action on the case* selectively allowing grounds of an action where reason establishes that *unjust* characterises this and other grounds.

In chapter 13, I shall show that civilian lawyers have achieved a like result through the interpretation of the institutes.

6.4. Concepts Provide Channels for Legal Enquiry.

I have commented in the introductory remarks at the beginning of this chapter, that concepts are tools of discourse. Here, I will examine an extension of that idea that is important to the treatment of the meaning of words in a legal context.

The practice of the law in explaining rules by conceptual relationship is the work of inductive reasoning. Reasoning from one case to another necessarily involves the tools of logic²³⁰ although the search for consistency and continuity in concepts can be illusory.²³¹ A careful distinction must be drawn between the tendency seen in some judgments, even in recent times, to hark back to forms of actions

²³⁰ See for example *Muschinsky v Dodds* (1985) 160 CLR 583, 615, per Deane J, which provides a useful example of the judicial technique.

²³¹ *Vide* Lord Wright’s caution about old theoretical debates where he makes it plain that the history is of mere antiquarian value ‘*Sinclair v. Brougham*’, *Legal Essays and Addresses*, 1939. 1, 18-19.

as a source of reasoning, on the one hand, and intelligent judicial structuring of the law on the other.

Lord Mansfield was perhaps bringing his predilection for equity to bear when he said ‘...[t]he law does not consist of particular cases, but of general principles, which are illustrated and explained by [the cases] ...’.²³² Controversial as this cross fertilisation of ideas might have been in Lord Mansfield’s day, it is surely not objectionable to modern jurisprudence provided the elements of the debate are clearly understood. When the modern courts enunciate doctrines in the manner of being explained and unified by legal concepts, it has to be possible to identify those concepts and to demonstrate that they are the continuing basis of contemporary legal reasoning. As such, the concepts spawn legal principles from which rules of law are drawn down in individual cases.²³³

Legal Concepts express the experience of the law.

Far from revitalising defunct and merely historical categories, which an enquiry into legal history might suggest, these concepts and the principles which are built upon them express the experience of the law. The nature of this discussion must be well understood however, because its central idea is that concepts and principles identify and express the basic propositions of legal reasoning developed and moulded in the courts over decades, and even centuries.²³⁴ They lend consistency and relationship to actions, as surely as a concept named ‘contract’ immediately tells the reader about a distinct field of principles, rules, and doctrines. A concept called ‘unjust enrichment’ is then, an expression of

²³² *R v Bembridge* (1783) 3 Dougl 331; 99 ER 679, 681.

²³³ The different treatment in US jurisdictions, of doctrines that unjust enrichment may enliven, results in US law invoking the constructive trust as a response.

²³⁴ Oliver Wendell Holmes, *The Common Law*, 5.

juristic experience (possibly akin to that of the praetor's work in declaring his edict) which enables a court to define circumstances where an obligation to make restitution for an enrichment at the expense of another arises in law.

If this explanation of *concept* is thought circuitous, then it must be contemplated that it is profoundly different from a mere remedy called 'unjust enrichment' because that has some other juristic reasoning behind it. The concept identifies the field of applicable principles and rules and channels the enquiry into the experience of the law. This is plainly true of *contract*, *tort* and *property*.

Does unjust enrichment, as a unifying concept, have centuries of accepted meaning as *contract* and *property* have? There is no ready response to such a question, but in the light of the historical background as traced in chapter 2, it could not be denied that there has been a jurisprudence, if primitive in many aspects, that has characterised cognate legal processes. The jurisprudence is the legacy of the history of unjust enrichment notions in the law. Central to this has been the concept of *quid pro quo* and the method of the *action on the case* that gave the law, at each stage, a focus upon a concept that was called *quasi contract* both in Roman law and in contemporary common law. It will also be shown in a later chapter, that the common counts produced theory, reflected in cases of Lord Mansfield's era that demonstrated a developed concept and principle of unjust enrichment.²³⁵

²³⁵ Pp 136-37: see also Ch 13.2. As explained at pp 90 and 99, I find it unnecessary to assert the continuous development of a concept of unjust enrichment in the early law. The evidence that there was considerable conceptual continuity is strong but the gradual development of defining characteristics of unjust enrichment is the main purpose here because that will support a conclusion that the modern jurisprudence of the unjust enrichment actions has been in progress for many centuries.

Concept of law or common usage.

Analysis of concepts inevitably leads to questions about the authority for claiming a special meaning of words we use to describe concepts, principles and actions. There are many who argue that legal words have no special meaning compared to common usage. The arguments for and against a special meaning of words used in legal language are endless.²³⁶ They range from the view that concepts and legal conclusions based upon them play a significant part in our law²³⁷ to the view that it is unsustainable that words commonly used by lawyers do and should have a special meaning, different from common usage.²³⁸ Much of this argument is not relevant to the present study because 'unjust enrichment' has no common-place counterpart. The problem is that 'unjust' does. The reason of course, is that persons, especially non-lawyers, but also many who are lawyers, may have profoundly different perceptions of what is unjust. It is, in clearest terms the archetype of language that fails tests of specificity. There will be agreement about the central or typical case but little certainty as the scope of meaning widens. Politics, emotion, greed and linguistic science will play a part in the manner in which it is used.

²³⁶ Cf Raimo Siltala, *A Theory of Precedent*, 43-45. Sitalya introduced competing notions of principles and the source of, and degree of their authority. Literal meaning (interpretative formality) is subjected to a number of philosophical objections, especially that words can never be 'context free'. This is a complex subject, but the import is not lost on jurists who would not deny that context might determine meaning. 'Unjust', is a significant example. Where context does not indicate a clearly accepted meaning it is clearly unhelpful however, to introduce a range of possible alternatives to interpretation (degrees of interpretative formality). Sitalya also argued that Professor Dworkin's work supports the notion that legal validity cannot embrace legal principles in the manner in which Dworkin treats legal rules. It must be disputed that such an idea can be attributed to Dworkin. Extreme cases aside, the 'validity' of principles depends upon their continued acceptance by the courts as the expression of legal reasoning.

²³⁷ H.L.A. Hart, 'Definition and Theory in Jurisprudence', 70 *LQR* 37.

²³⁸ A W Simpson 'The Analysis of Legal Concepts', (1964) 80 *LQR* 535.

Professor Hart draws parallels that assist in understanding the point being made here. Hart uses common conversation that applies to an activity that has special rules, such as cricket, as illustrative of the manner in which the use of a key expression relies upon the existence of unstated rules.²³⁹ Thus, the statement “he is out!” in a game of cricket, does not involve the speaker in a diatribe in which he/she states that *this is a game of cricket, and according to the rule about the ball leaving the bowler’s hand and striking the wicket, all other rules being satisfied, he, the batsman, is “out”*. ‘He is out’ is a conclusion about the laws or rules of cricket. So too in law, ‘...he is unjustly enriched...’ is a conclusion relying upon unstated rules of law.²⁴⁰

Professor Simpson has a different view.²⁴¹ He believes the Hart’s approach to legal concepts, that elucidate legal conclusions, is unsatisfactory. Simpson’s main thesis is that it ought not to be the approach of the lawyer that the words he/she uses have a special *legal* meaning. This is because the assumption that a word used is a legal concept cannot avoid words that also require definition; meaning is therefore inconclusive. No word, Simpson says, can be immune from definition.²⁴² In Simpson’s approach, legal concepts can therefore be less useful as parts of conclusive statements than Hart and others believe. He attributes this to “...the mistake of attempting to link an explanation of the nature of legal concept to a theory of logical function of words or sentences...’²⁴³

²³⁹ H.L.A. Hart, ‘Definition and Theory in Jurisprudence’, 70 *LQR* 37, 43.

²⁴⁰ Professor Hart’s notion of *conclusion of law* facilitates this kind of conceptual analysis because it helps us to realize that we are talking of a concept that consists of more than a single word or notion: each time unjust enrichment is used as an informative, explicit concept in a case, such as where it is asserted that “x is unjustly enriched”, the legal conclusion is that ‘[defendant] is unjustly enriched’. In unjust enrichment, as a branch of the law, ‘unjust’ by itself has no place; unjust enrichment is the critical concept. The legal conclusion is that ‘[defendant] is unjustly enriched’ which combines with the facts that constitute the ground of action.

²⁴¹ A.W.B. Simpson, ‘The Analysis of legal Concepts’, (1964) 80 *LQR* 535.

²⁴² *id.*, 547

²⁴³ *id.*, 549.

The differences as to whether ‘unjust’ should be accorded a special legal meaning arise, I suggest, because of the common perception that holds that ...the law knows what is libel, but every person knows what is unjust. The legal concept though, simply does not use the ‘unjust’ of common parlance. In the law of unjust enrichment, the concept that we call *unjust enrichment* is like *libel* in that it has a special legal meaning, albeit, libel may be different in that it may have no other meaning. It is a matter of considerable significance that such a conclusion of law as ‘defendant is unjustly enriched’, when it is a dictum of a competent court, is the expression of a juridical concept. It is the finding *ex aequo et bono*, out of justice and expediency,¹ which is at the root of unjust enrichment in each case, reflecting an authoritative finding that *this* is such a case. Such a conclusion is not so strange. It is cognate to a finding of negligence, deceit, or libel. The courts have said what is and what is not *negligence, deceit, libel* and *trespass*. It is not such a large step to contemplate that in unjust enrichment, the courts will say what *is* an instance of an actionable unjust feature. In each, there are critical premises and in each there is precedent, both ancient and neo modern, for the methodology employed by the courts.

The Hart approach is consonant with a view that the use of words and sentences in a legal context are neutral as to their meaning in another context. Theory as to their logical function cannot be constructed without cognisance of the legal context in which they are being employed to express a legal idea or legal conclusion.²⁴⁴ This was assumed in the opening paragraphs of this sub-chapter.

²⁴⁴ An assertion that “I am an Australian” uttered at an international rugby match does not necessarily carry the same implication as the same declaration to the immigration officer at the airport. The Simpson approach is valid as an argument against the usefulness of a lexicon of words that have been ‘judicially noticed’.

The short answer to Professor Simpson and others who would argue against the practice of adhering to legal concepts is that unjust enrichment has an age old connotation which really has nothing to do with communal perceptions of unjustness except perhaps in so far as they may influence current judicial reasoning as to the appropriateness of a new case.²⁴⁵ The law of unjust enrichment, is confined by reasoning and this is reflected in its concepts: ‘...[t]he law of unjust enrichment is the law of legally reversible enrichment. It does not invite the courts to remake the world.’²⁴⁶

The legal Concept of Unjust Enrichment expresses empirical characteristics.

Unjust is the critical issue. It is essential to understand what the ‘unjust’ concept (if one may call it that) means. It is like proximity in tort, to an extent: it cannot be equated to ordinary usage.²⁴⁷ Unlike proximity, it is the empirical character of unjust enrichment in Anglo/Australian law which explains that its place in the law is neither attributable to a re-interpretation of common law doctrines under the influence of civilian doctrine, nor to a perceived imperative of filling a vacuum in the law. Interpretations of concepts in the courts are the work of informed legal minds, not immutable in a changing world, but not susceptible to a proliferation of alternative shades of meaning. They are the product of what Professor

²⁴⁵ The conclusions suggested in Sub-Ch 7.3.1 below, are not inconsistent with this view. There it is suggested that an insistent communal norm might be one of those adopted by the law as an unjust enrichment. The *new case* focus, nevertheless, should not be allowed to determine the progress of the science. See p 91 above, where I have attributed conceptual difficulties perceived to exist in unjust enrichment to an unwarranted emphasis on the concern for new cases.

²⁴⁶ Peter Birks, ‘Misnomer’, W. R. Cornish et al (ed.) *Restitution Past Present and Future*, 1, 6.

²⁴⁷ It is relevant that whilst the notion of ‘concept of the law’ arises exceedingly sparingly these days, it is to be found in earlier jurisprudential works. See sub-ch’s 2.3-2.6 above.

Ronald Dworkin called 'interpretive judgment'.²⁴⁸ The outcome of such a judgment is perceived to be self-evidently correct.²⁴⁹

There are at least two quite different historical characteristics which are invoked by the courts to determine what it is that a legal concept brings to the law;

1. one is typical of unjust enrichment: the practice of the courts in the use of that concept serves to call into focus a special field of experience to identify those actions which rely upon that particular experience;²⁵⁰
2. another is that kind of concept which identifies branches of developed principles, eg contract, which assumes legal and commercial principles.

A concept that is an element of a principle and a rule assumes an enhanced significance in the law: so it is that 'unjust' is an element of the special legal

²⁴⁸ Ronald Dworkin, *A Matter of Principle*, 168; cf., fnn 362 and 495. Dworkin argues that though there may be different interpretations, they are flawed because objections to a moral argument must be moral objections; so too, he would intend, objections to a legal argument must be legal objections. If then, an interpretation of any ratio is wrong, it must be wrong for legal reasons. Does Dworkin suggest that a legal principles are not susceptible to moral critique? That view would suggest that no other communal standards are valid either, including principles by which rules might be said to be 'racist', 'sexist' and 'anti-elegitarian'. The importance presently, is that no law can be value free to be evaluated solely by 'legal' standards. The important difference is in the interpretive function that is legal and the evaluative function that is inescapably based upon communal standards. Ultimately, unjust cannot be unaffected by the latter as standards affecting or contributing to judicial reasoning.

²⁴⁹ *id.*, 272 ff. Dworkin's argument appears to have the consequence that a legally correct finding is the one that judges agree is legally correct; there can be no other correct legal interpretation, written on the wind; variations of approach must ultimately amount to the same fundamental interpretation; otherwise they are wrong! That is a view that demands further evaluation. In unjust enrichment, a well reasoned judgment may well be subject to variation by a later court that takes account of broader perceptions or differently interpreted factors. Is Lord Mansfield's 'equity to be identified with formal English equity, or is it a perception of a wider concept that embraces other civilised systems of law as well? Chapter 13 addresses that question.

²⁵⁰ Oliver Wendell Holmes, *The Common Law*, 5.

notion, that is described in “1” above,²⁵¹ that is, by virtue of its place as a special part in a principle of law. This is consistent with the meaning attributed to *unjust enrichment* in the cases that have described the grounds of actions in unjust enrichment, that which is actionable, reflecting the *action on the case* jurisprudence.²⁵²

As a for-runner to concluding observations on concepts in the next sub-chapter, I identify a number of key statements in the above text:

1. Concepts are tools of discourse; in law, the legal concepts are the tools of reasoning.
2. Concept of Unjust Enrichment expresses the experience of the law; this is consistent with Lord Mansfield’s perception that the cases interpret, explain and apply legal principles.
3. The validity of recognising special legal ideas explained by a legal concept can be demonstrated by explaining the importance of empirical factors, especially by appeal to comparisons with other related concepts of law.
4. Legal concepts express the experience of the law and draw together unstated subordinate rules that make possible the identification of applicable principles.
5. Legal concepts augment the practice of the law of explaining rules by conceptual relationship.

²⁵¹ The ideas being developed here of a *special legal notion* follows H L A Hart, *Concept of Law*, 86; and H L A Hart, ‘Definition and Theory in Jurisprudence’, 70 *LQR* 37. 43. See Ch 9 below, where the importance of Hart’s contributions to understanding the law is explained.

²⁵² See above pp 117-121 and fnn 149 and 163.

6.5. Concepts like 'Unjust Enrichment' Supply Legal Content of Principles and Rules.

What then is the essential force of a legal concept? We may speak of *unjust enrichment*, *debt* and *property*, indicating several conceptual categories in terms of legal taxonomy, but the nomenclature is much more than a concept and a category when we say '...that is my property.' So too, when we say 'defendant is unjustly enriched', there is more legal character at work than mere concept. Professor Hart describes the difference well: Hart would say of such a statement that it is not a mere statement of fact but a *conclusion of law*.²⁵³ But there is a problem here because we are contemplating legal meaning rather than accepted common usage: it seems inescapable that some legal principle must tell us what unjust enrichment is before we can comprehend the statement. By contrast, a statement like 'the ball hit the wicket' is a statement of fact; or is it? Do we need to know the rules of cricket to say conclusively that what struck the stumps is a ball in *cricket* terms and what was struck is by the same classification, a wicket?

Professor Simpson²⁵⁴ suggests that the enquiry about the meaning of legal words follows the same channels, indicating a need to define our terms. But there is a distinct difference. Hart's proposition turns upon there being some means of identifying the applicable rule, or rules that give meaning in terms of potential rights and obligations. Simpson's opinion is concerned with specialised linguistic usage. The former concerns taxonomy of rules. The latter concerns a

²⁵³ H. L. A. Hart. 'Definition and Theory in Jurisprudence', 70 *LQR* 37, 53.

²⁵⁴ A. W. B. Simpson, 'The Analysis of Legal Concepts', 80 *LQR* 535, 543-4.

lower order of taxonomy restricted to things, albeit, things which have consequence for specialised activity.

The distinction is reminiscent of the characteristics of concepts examined above.²⁵⁵ Between Professor Hart's treatment of *rule* oriented analysis, and the notion that words used in legal discourse have a specialised meaning as legal concepts do, there is a need of clarification: there must be a clear pattern of analysis (Birks²⁵⁶) that will ensure that each instance of a rule of unjust enrichment arises from judicially accepted criteria. This, in my belief, is where it becomes essential to acknowledge the significance of principles. If we return to the two propositions seen above, vis., 'that is my property' and 'defendant is unjustly enriched', all depends upon a legally conclusive proposition that says what *unjust enrichment* and *property* are. Each is a legal concept but each, is a conclusion of law if expressed in the manner, '...Jones is unjustly enriched..' or 'that chattel is my property'. Do they depend upon a rule? Surely, each time I assert that a chattel is my property I am not harking back to a successful law suit in which a judge found in those terms. But to understand either as constituting an assertion of fact and not a conclusion of law however is to miss the true significance of these unifying legal concepts.

A statement like '...Brown is unjustly enriched...' assumes that the speaker knows what the concept of unjust enrichment refers to, but it also assumes that the speaker is invoking some rule of law which could have that particular consequence if a judge, in relevant proceedings, agreed. Similarly, '...Brown is in possession...' is a presumption of fact if made by the postman who has delivered mail to Brown at that address over a long time. But the same statement might be a conclusion of law if made in consequence of a legal study

²⁵⁵ Chapter 6.

²⁵⁶ Peter Birks, Introduction to Restitution, 19-20. See p 172 ff below, and sub-ch.11.3.

of rules relevant to Brown's circumstances; and it might be a rule if made by a court where such a statement was a critical outcome of legal proceedings.

What is it that makes the difference? I propose that it is that lawyers accept that certain concepts have legal connotations and when used in a manner that asserts a legal consequence, they are conclusions about the law as it presently applies to that item or that assertion of legal right or obligation. To make assertions that amount to conclusions of law, the lawyer must share with peers, the common conceptual basis of all such statements. What links them is a unifying legal concept. That fact can only be meaningful if we acknowledge that there is a 'roadmap', which will be a set of governing principles.

In all of these circumstances, concepts such as *unjust enrichment* and *possession* are assumed as tools of legal argument in precisely the same way as a mathematician may use a proven theorem as a building block in mathematics. We know what these terms mean; we don't have to prove them by argument before proceeding with our analysis. And when the concept is equally attributable to different sets of circumstances, it assumes a unifying quality, as all adjectival phrases do; e.g. 'petrol powered', 'railway rolling stock'; and 'creatures of the sea'. The unifying quality does not rule out that items described by the phrase, or actions described by the unifying legal concept may be like *Victor mowers* and *motor launches*; *trucks* and *locomotives*; *squid* and *whales*: that is they may share common conceptual characteristics and yet be very different.

The above treatment begins to suggest what is meant by a 'unifying legal concept'.²⁵⁷ Such a concept calls up the rules adopted in the courts that define

²⁵⁷ *Pavey Matthews Pty Ltd v Paul*, fn 1. See also, pp 91-98, 108-110, 136, 164 and 176-79, and especially 205-206 and 254, for further statements on this point.

which actions are admitted under this head of law. The fact that such a concept, recognised in Australian law, is thought of as a principle in English law need not divert attention from the force of a concept.

What is unified by the concept of unjust enrichment is dependent upon an answer to a central question: what is it that the law addresses in unjust enrichment? The answer lies in the nature of the concept and English principle. The way in which the courts approach such a question in the future might be seen in terms of slavish adherence to old categories, or perhaps intelligent development of the law that would spurn unnecessary and merely historical conceptual limitations. Neither is a prescription for unprincipled reasoning. This leads into the discussion of principles that describe the grounds of potential actions.

Chapter 7: Introduction to Principles.

7.1. The Objectives of this Chapter.

Several questions should be answered by this study;

1. what is the jurisprudential nature of unjust enrichment principle? - a question which has many aspects;
2. what is the unifying factor, concept or principle adopted in a particular jurisdiction that guides or determines the outcome in terms of a rule handed down in a case?
3. are there subsidiary principles that help to identify the elements of actions based upon a larger, connective or categorising principle or principles?
4. how do the unifying legal concept and the principles of the case work together?

To achieve these objectives, it is necessary to define what principle is, and what it does in cases. Then it will be possible to say, in sub-chapter 7.4, what the

principle of unjust enrichment is as applied in cases. In 7.5 I suggest a striking comparison with the concept and principle of civilian jurisdictions.

These several levels of inquiry involve the character of the law of obligations as a whole, and the character of the law of unjust enrichment in particular. There are unwritten characterising factors at work. Two examples will suffice. Firstly, are the answers to questions such as those posed in the preceding paragraph, attributable to rules that exclusively determine the scope of a branch of the law, the limits of jurisdiction, the actions recognised? Thus far, unequivocally, these factors are determined by rules. But secondly, are there also boundaries of particular branches of law, i.e., defined ‘territories’ that the courts accept and act upon, that are not exclusively rules as laid down in cases? The courts rarely embark upon a search for delimiting rules, but there have to be such boundaries between for example,

1. unjust enrichment and resulting trusts;
2. between equitable rights which allow to a party an equity, and an unjust enrichment;
3. between a remedy and restitution;
4. between a tortious act and an undesirable act that fails the test of ‘tortious’; and,
5. between what the courts accept as *unjust* in the context of unjust enrichment, and human conduct that is over-bearing, or taking unfair advantage, that belongs to, or is defined in a different legal context.

If it be assumed that there is no theoretical or practical bar to a new action, the enquiry will be as to the meaning of *unjust* in the law, at this point in time.²⁵⁸ The

²⁵⁸ In contract and tort, enquiry about unifying principles arises sparingly; the unifying factor will be obvious in the majority of cases. In unjust enrichment, the enquiry is less readily satisfied. It requires firstly, an answer to the broader question, is there an action in contract, tort or equity, on these facts? If there is, then unjust enrichment actions frequently defer to other actions where the breach of a right establishes a cause. If the answer is ‘no’, then, and only then, can the second question arise, that is, is this set of circumstances one of those in which the law imposes an obligation for unjust enrichment? It must be recalled that there is no breach of any right that is a precursor, and a cause of action in unjust enrichment. See pp 1 and 16 above.

extension of the categorisation 'unjust' to a new set of circumstances is the archetypal case of review under principles of unjust enrichment.²⁵⁹

The study envisaged in the paragraphs above, necessitates consciousness of differences between jurisdictions. It will also involve the state of the law within a single jurisdiction when several time-frames are under consideration. It is inevitable that there will be subtle differences in the treatment and interpretation of legal precedents from one era to another. Furthermore, the reasoning in courts of several jurisdictions appears to be differentiated by very different perceptions of underlying principles, ranging from those that produce strict categories of actions to those based upon liberal general principles. This latter consideration points to a need to focus mainly upon the Australian and English cases, with reference to other jurisdictions sparingly.

7.2. What is 'Principle'?

(a) *Principles and non legal rules: a comparative illustration.*

Attributing major U.S. corporate collapses to a failure of accounting principles, London based financier George Soros told the BBC,

Rules alone are not enough...you need principles....America has a rules-based system of accounting. ...rules can lead to rules avoidance...²⁶⁰

²⁵⁹ The law is a living thing: new instances of unjustness might emerge because of developments in other areas of the law. One example is that, in the future, the rights of shareholders might become better defined as a consequence of prohibited practices under the corporations law.

²⁶⁰ Mr. George Soros, President of Soros Funds Management, New York, Australian newspaper on 2nd July, 2002.

What are these principles that are not rules? One might be that accountancy partners are not directors of client companies.²⁶¹ Such a principle, apparently adopted as an internal company norm, serves the rules concerned with conflict of interest. The company's 'internal guidelines on client conflicts' are derived from the rules of the American Bar Association. *Allens Arthur Robinson*, a law firm, practices strict control over approval of new clients. An executive partner must approve the client, and the decision is based, amongst other things, on financial criteria and reputation. A "two-partner deep" or "three-partner" policy is applied by large firms for large clients.²⁶² John Atkin, Managing partner of Blake Dawson and Waldron, was reported '...rules and procedures are one thing, but the sense of core values of the firm and their day-to-day application [are the essence of] a strong sense of integrity in the firm...'²⁶³ These examples are instances of internal practice principles which contribute to the effectiveness of formal practice rules.

These aphorisms are not readily to be compared to legal principles and rules in cases, but it may be asked, is the way in which those rules of professional practice etc, are supported by principles, relevant to legal principles and rules? It is my submission that it is, not in a direct way, but in the manner that principles describe specific practical application for rules.

(b) Principles: their legal character.

Principles are then, part of the language of the law which assists in the tasks of *defining, separating and recognising*. Conflict of principles makes for difficulties of applying rules in practice. Conflict of principles was abundantly evident in

²⁶¹ David Nathan, Baker & McKenzie Inc. as cited in *The Business Review Weekly*, Sept 5-11, 2002, 62.

²⁶² *Ibid.*

²⁶³ *Ibid.*

*Sinclair v Brougham*²⁶⁴ so that it became quite impossible to say what the case stood for.²⁶⁵

Sinclair provides a useful illustration of the choice of a court to apply rules exclusively. The House of Lords apparently dismissed the possibility that principles might find another rule emanating from the circumstances of money had and received. It is just such a primary focus on rules, at the expense of principles, which is Mr. Soros' complaint about the practice of accountancy.

A judgment in an unjust enrichment case recognises that in the circumstances of the case, the law will impose an obligation upon the party that received a benefit at the expense of another. Obligation is associated with a finding of unjustness. We call such an obligation a *primary response*. This is the jurists' explanation of the way the law works. The need of an explanation of liability is significant and equally so for the imposing of an obligation in unjust enrichment. Were damages to be argued in response to an unjust enrichment, the response would be *damages for what?* Damages is a response to a breach of a right. There is no breach in unjust enrichment.²⁶⁶

Comparatively, a principle that underlies and explains liability in delict and contract requires that a case for a remedy (usually damages) must be made out in response to a proven breach. In an action in tort, the court does not begin by asking what *delict* is. If it did, the answer might involve ancient cases, especially those brought as *actions on the case*. The answer would involve, significantly, why the law regarded actions and events as delictual. Libel is delictual, but why is public ridicule not delictual? Simply, the courts have not found it to be so. It is

²⁶⁴ [1914] AC 398. See also p 112.

²⁶⁵ See Lord Wright, 'Sinclair v. Brougham', Legal Essays and Addresses, I, 16.

²⁶⁶ Explained above at pp 1 and 16 above; and see later discussion of the point at pp 129, 133-34, and 157; sub-chapter 9.3 and fn 319.

when we get to the question as to what has guided the courts in stopping short of public ridicule that we concern ourselves with principles. The courts, by finding specific acts and events to be tortious have found that the concepts ‘tort’ and ‘delict’ describe what it is about those actions or events that qualify them to be actionable in tort. It may be that actions and events ‘A though E’, are actionable because the communal demand for redress is perceived to be insistent.²⁶⁷

The *legal interpretation* of the communal attitude is not a rule, but it is the foundation of a principle of law. The force of the principle is as it was described by Lord Reid in *Dorset Yacht Co v Home Office*, ‘...[the principle] ought to apply unless there is some justification or valid explanation for its exclusion.’²⁶⁸The importance of the dictum is that it expresses the reasoning that supports a strong taxonomy. Once applied, the principle may be wholly or partly incorporated in a rule, but that does not destroy its character as the expression of reasoning underlying the rule. In just this way, there may be a principle of law that describes, in terms of actual circumstances, what is actionable as *unjust enrichment*. Following the “Lord Reid” reasoning, in the facts of a case that exhibit characteristics that have been found to be a ground of unjust enrichment, the unjust enrichment principle must be applied.

(c) *Principle as conceptual ‘umbrella’.*

The principle that describes unjust enrichment is the conceptual umbrella that covers all cases where the court of competent jurisdiction has reasoned an

²⁶⁷ This notion was introduced above in sub-chapter 7.3: see also fnn 109 and 245; it is further explained below at pp 114 , 125-29.

²⁶⁸ [1970] AC 1004, 1027. See Ronald Dworkin, *Taking Rights Seriously*, Ch 2, ‘The Model of Rules’, 36-7, discussed below in Ch 7.4 and 7.5. See also Alastair Macadam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia*, 258; ‘...Lord Reid was finally signalling the Law Lords’ acceptance of the fact that the neighbour principle will generally have more weight than arguments based on particular precedents, or the lack of precedent for a particular case.’

obligation should arise to make restitution. It does not attempt a justification of the similarity of mistake of law and duress for example. The principle is quantifiable only in terms of judicial logic which encompasses that the communal standard that gives rise to obligation that is insistent. Similarly, contractual principle, explained by the concept of *contract*, is founded upon communal expectations that one shall perform one's formal agreement. Indeed, it can be seen in this *snap-shot*, why the courts in Australia might have chosen to call unjust enrichment a *concept*.²⁶⁹

In tort and contract, the notions of delict and consensus respectively, are the conceptual umbrella. In unjust enrichment, the judicial notion of *ex aequo et bono* ('justice and good faith': I have chosen to depart from the so-called literal interpretation) is in legal terms, the conceptual umbrella.²⁷⁰

The unifying concept and principle in unjust enrichment has been acknowledged in cases in early English law down to the present. In *Pownall v Ferrand*,²⁷¹ an endorser of a bill was compelled to pay on account of the holder. Lord Tenterdon invoked a 'general principle' that one that is compelled to pay where another is liable, is entitled to recover.²⁷² In *Dawson v Linton*²⁷³ property of a tenant was subject to distress for a tax due from a landlord. The court adopted a

²⁶⁹ See fn 214 above.

²⁷⁰ Above, fn 21. Acknowledging Hunter's sources, Kames and Stair and Dalrymple's faithful reproduction, this 'justice and expediency' interpretation does not fit the modern law particularly well. Whatever may have been the literal interpretation claimed by Kames and Stair, 'justice and good faith' is probably closer to the intention of judges and jurists who used the terminology in recent centuries, probably including Lord Mansfield. One has to make allowances too for the possible difference in interpretation, by Stair to Scots law and Kames to civilian law. It seems at least possible that there are different nuances in those disciplines, to be had from 'expediency'. See also, Ch. 13 where ancient conceptions of equity (*aequo*) are considered as possible influences upon the post medieval judiciary.

²⁷¹ 6 B & C 439;

²⁷² *Id.*, 443.

²⁷³ (1822) 5 B. & Ald. 521, 523..

similar rule and found the plaintiff had a right to repayment. This reasoning exhibits a principle which envisions inter-related cases.

In *Brookes Wharf v Goodman Bros.*,²⁷⁴ Lord Wright explained liability in terms of a general standard of justness corresponding to that of the *reasonable persons* in the law of negligence.²⁷⁵ The latter became the touchstone of standards of acceptable personal and professional behaviour demonstrating the concept of a general standard. As such, it remains as a comparative tool and helps to explain that the courts in later judgements were developing a standard of comparable significance. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Coombe Barbour Ltd*²⁷⁶ Lord Wright described the over arching concept in terms that it ‘... remains as Lord Mansfield left it. ... [t]he gist of the action is a debt or *obligation implied*, or, more accurately, *imposed, by law...*’²⁷⁷

In English law, the underlying (general) principle, which exemplifies the same broad explanation of the basis of cases, was recognised in *Lipkin Gorman v Karpnale Ltd*.²⁷⁸ The House of Lords approved Lord Wright’s dictum in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Coombe Barbour Ltd*,²⁷⁹

... [the principle focuses upon] retaining the money of, or some other benefit derived from another which it is against conscience that he should keep.²⁸⁰

²⁷⁴ [1937] 1 KB 534, 544.

²⁷⁵ At 544; ‘reasonable person’ test, *Donoghue v Stephenson* [1932] AC 562.

²⁷⁶ [1943] AC 32.

²⁷⁷ *Id.*, 63. (the italics are mine).

²⁷⁸ [1991] 2 AC 548, 559; and see Goff and Jones, fn 163, 14-15.

²⁷⁹ Fn 177 at p 61.

²⁸⁰ *Ibid.* The *Sinclair* case demonstrated that the Lords or some of them, at that time, were impatient with broad generalisations. They may have seen the notion of ‘against conscience’ as being such a generalisation. See also fn 43 reciting that Lord Mansfield’s contract jurisprudence had excited an enduring antipathy toward his concepts of unjust enrichment. Lord Wright’s *Fibrosa* judgment also included the following dictum which has not attracted the same interest in later judgments: ‘...[t]he standard of what is against conscience in this context has become more or less canalised or defined, ...[t]he gist of the action is a debt or obligation implied, or, more accurately, imposed, by law...’. fn 177 at pp 61 and 63.

Goff & Jones describe the principle thus, '...the law recognises and gives effect to in a wide variety of claims ...²⁸¹ and '... an abstract proposition of justice which is '...both an aspiration and a standard for judgment'.²⁸²

The *proposition of justice* is here regarded as one that is present in all unjust enrichment cases. It is another way of describing what Lord Wright, in the dicta above, described in terms that it is *against conscience* that a party should keep the benefit which is the concern of the action.

Through the cases, these legal concepts, *justice* and *against conscience* are accorded a special legal meaning for the purposes of the law of unjust enrichment. The 'principle of justice' encapsulates or 'canalises' (Lord Wright) the legal meaning.

(d) Looking to the cases: what the law holds to be unjust.

In *Province of the Law of Tort*,²⁸³ Professor Winfield explained that the existence of an obligation [in tort] is a question of law which must be answered inductively by reference to the cases.²⁸⁴ The application of principles by 'looking to the cases', is reflected in unjust enrichment where, the inquiry is as to what the law holds to be unjust; otherwise, unjustness falls to idiosyncratic values. This is

²⁸¹ Goff and Jones, fn 163, 12, citing A. Burrows, (1993) 99 *LQR* 217, pp 232-239.

²⁸² *Ibid*, and see John P Dawson, *Unjust Enrichment: A Comparative Analysis*, 5. See also fn 406 and Ch 12.1 below where it is noticed that Daniel Friedmann records that this notion of abstract proposition of justice was applied by German jurist Ernst von Caemmerer to unjust enrichment and tort alike.

²⁸³ Sir P.H. Winfield, *Province of the Law of Tort*, 188.

²⁸⁴ *Ibid*

comprehensible when it is remembered that we are concerned, in unjust enrichment, with a *legal notion* or standard of unjust, ('canalized', in Lord Wright's manner of explanation), not a communal standard. This reflects the methodology in tort of negligence where Lord Atkin's neighbour principle is a legal standard (as distinct from a communal standard) applied as the facts dictate.²⁸⁵ It is a principle, that has long been well defined and it '...ought to apply unless there is some justification or valid explanation for its exclusion.'²⁸⁶

The cases and commentators affirm that in unjust enrichment, the (English) general principle applies to circumstances where the subordinate elements of unjust enrichment apply, vis, (i) enrichment (ii) at the expense of a plaintiff and, (iii) in circumstances which are legally unjust,²⁸⁷ not though, in an unprincipled manner.²⁸⁸ Just as in other branches of the law, '...recourse must be had to the decided cases in order to transmute general principles into concrete rules of law.'²⁸⁹ Here can be seen the working of the English general principle as both,

- (i) The unifying principle giving definition and form in the range of decided cases which define rules of application, and
- (ii) the reason of liability drawing up the subordinate principles and concepts.

²⁸⁵ *Donoghue v Stevenson* [1932] AC 562. Lord Atkin posed the question 'Who, then in law is my neighbour?' at p 580 See Chapter 7.3-4.

²⁸⁶ *Dorset Yacht Co v Home Office* fn 268, at p 1027, per Lord Reid. See Ronald Dworkin, *Taking Rights Seriously*, Ch 2, 'The Model of Rules', 36-7, discussed below in sub-ch 7.4 and 7.5. See also Alastair Macadam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia*, 258.

²⁸⁷ See Goff & Jones, *The Law of Restitution*, 16; and see *Lipkin Gorman v Karpnale Ltd.* [1991] 2 AC 548, 559, per Lord Templeman and 578, per Lord Goff; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, [1996] 2 All E.R. 961, 980, per Lord Goff, and 998-9, per Lord Browne-Wilkinson; and see Peter Birks, *Restitution: The Future*, 1-4.

²⁸⁸ *Lipkin Gorman*, [1991] 2 AC 548, 578, per Lord Goff.

²⁸⁹ *Ibid.*

(e) *The work of principles is related to the doctrine of precedent.*

What do principles do? They are the foundations of rules which, in the absence of principles, will lack the essential relationship and identity which enables us to say to which area of the law they belong. Such relationship determines the place of a rule in the law so that it will become an element of the fabric of precedent.²⁹⁰ It will be found by reference to binding precedents going before. It may itself become a binding precedent (and therefore a rule) for new rules. Principles applying in different branches of the law co-opt a specific field of reasoning to the facts of a case that determines which precedents have application.²⁹¹

The principles may characterise mistake, as judicially defined in the cases, in such a way that it has the capacity to vitiate both a contract and an enrichment received at the expense of another. The judicial reasoning in each is specific to each branch of the law. There will be cognate ideas expressed, but in unjust enrichment cases, in the courts, in each case, the question arising from the grounds of actions is ...

Whether *this* is such a case where the law must, in justice, order the primary response of restitution (as distinct from a remedy).

In modern law, the answers to this question will turn upon the nature of critical circumstances and the meaning of unjust enrichment in each jurisdiction.

²⁹⁰ See also Chapters 10 and 13 for discussion of this issue.

²⁹¹ The relationship to precedent is discussed again in Chapter 11. The notion of ‘taxonomy in action’ captures the meaning of co-opting a specific field, though it is not a particularly attractive concept. It is in this connection that the *Sinclair* judgments conflict. It is instructive to observe how key features of the judgments have been regarded by later commentators and in judgments, especially, Lord Wright in his extra-judicial article entitled ‘*Sinclair v. Brougham*’, in *Legal Essays and Addresses* 1, 16; Professor Birks in his *Introduction to the Law of Restitution*, Ch.2 ; and the judgments of the Lords in *Westdeutsche* [1996] 2 All E.R. 961

(f) *General notions of Fairness do not characterise Anglo/Australian action.*

In Australian and English common law, the answers will not derive from generalised approaches to the law that have been described as ‘relativistic considerations’. These relativistic considerations are the foundations of judgments in some jurisdictions. They are the antithesis of those rules of unjust enrichment that make the decision according to law reasonable, predictable and justified.

MacCormick calls the relativistic considerations ‘universalisation’.²⁹² What he means by such a term is that where broad general principles are allowed, the rules are being rolled into a single universal action. It follows, where such a universal action is in being, that availability of relief depends upon a fundamentally negative construction of the action. It tends to avoid the duty on the plaintiff to establish its cause of action by appeal to principles of law and equity and it allows the plaintiff to rely instead upon the absence of defences.²⁹³ In truth, the absence of a legal explanation for a transfer, which was the basis of unjustness in several North American jurisdictions, answers only one question, *vis.*, was there a debt? Of course, if there were a debt, then in modern law, proceedings for recovery of the debt would be the proper action.

²⁹² Neil MacCormick, ‘Why Cases have Rationes and What These Are’, in Laurence Goldstein ed, *Precedent in Law*, 162. MacCormick’s distinction between **universalisation** and generalisation is an important one. The former refers to a broad ground which is satisfied by a general principle. It would be inaccurate to suppose that ‘generalisation’ also describes this legal concept.

²⁹³ See Mitchell McInnes, ‘The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution’, (1999) *Alta Law Review*, v. 37 No. 1, 1, 10-11, observing that in *Rathwell v Rathwell* (1978) 83 DLR (3d) 289, Dickson J appeared to support this reasoning, making absence of juristic reason the key to recovery, whereas, in *Pettkus v Becker* [1980] 2 SCR 834, he had found that free acceptance must be established as the ground. This dictum would have indicated the need for individual grounds as distinct from a general basis of an action.

In those jurisdictions, the question arising is as to the duty of the law to provide a *remedy*. In these cases, there can be seen to be support for the more liberal, negative construction of the action, and this must be borne in mind when examining the cases. In these circumstances, in the schema of rules of taxonomy, the action seeks a secondary response to a primary obligation.²⁹⁴ Such liberal actions are based upon the negative construct that indicates the event of an unjust enrichment by association with breach of some duty, perhaps arising under another head of law. Frequently, the reasoning will be found to involve concepts of fairness and broad ‘principles’ of unconscionability. The liberal negative construct lacks the functional organization of an independent principled action and the consequent organisational role played by precedent. It is in danger of exposing the decision making process to individual preferences and predilections. This is because the work of principles of law is avoided.

(g) Anglo/Australian law. Categories of actions unified by a guiding principle of law.

In Australian law, the absence of a general rule, or single, universalised, active principle, ties the development of the law to the recognition of new categories of case explained by unjustness factors united by the unifying concept of unjust enrichment.²⁹⁵

The compass or scope of the circumstances constituting juristic reasons for imposing an obligation is exemplified by an assessment of what was intended by the High Court in *David Securities Ltd v Commonwealth Bank of Australia Ltd*²⁹⁶ in its assertion of the need of a ‘vitiating factor’ to import a ground for an action

²⁹⁴ Discussed in Ch. 8.

²⁹⁵ *David Securities Ltd v Commonwealth Bank of Australia* fn 204, p 378. As to the term ‘universalised’, see note on Neil MacCormick’s use of the term, fn 292.

²⁹⁶ *Ibid.*

for restitution.²⁹⁷ This approach yields categories of actions for unjust enrichment which are unified by a principle of law which guides the courts when they consider extension of the categories to encompass a new kind of case.

How restrictive are the categories? In fact they seem not essentially different to the grounds of actions recognised by the English courts.²⁹⁸ There is theoretical and functional commonality in the grounds of an action in Australian and English jurisdictions. Such a thesis is not an absolute quantity. Each jurisdiction is evolutionary; each, in that process, borrows from the other at significant points; and each is very much open to influence by important judgments in other jurisdictions. Developments in the law have been preceded, moreover, by quite exceptional juristic analysis, often occurring in, or precipitated by a profound dissenting judgment which leads to a readiness of the courts to recognise the timeliness of change. Opportunity has dictated that change would occur first in one jurisdiction and be followed later, in another, but the significant building of learned opinion has been a gradual process, propelled at times by individual judgements of great significance to all jurisdictions.²⁹⁹

Australian and English courts recognise the need for discernment of grounds. The essentiality of a ground which satisfies the unifying concept or unifying principle is captured in the following dictum,

" . . . there is no general doctrine of unjust enrichment recognised in English law, [and what that law]. . . does is to provide specific remedies in particular

²⁹⁷ *Ibid.* 'Juridical', meaning 'of jurisprudence.' See fn 9.

²⁹⁸ See *United Australia Limited v Barclays Bank Limited* [1941] AC 3, 29, per Lord Atkin.

²⁹⁹ Eg, *Fibrosa* fn 173; *Pavey* fnn 1 and 203; *Lipkin* fn 217; *Air Canada v British Columbia* (1989) 59 DLR (4th) 161, esp. 191 per Wilson J.

cases of what might be classified as unjust enrichment . . . [in another system].³⁰⁰

By way of contrast Gummow J accepted in principle, counsel's argument for a *general normative principle* of unjust enrichment in *Winterton Constructions Pty Ltd v Hambros Australia Ltd*³⁰¹ an opinion that was rejected by Hill J on a re-pleading of the applicant's case where His Honour rejected an argument for subjective enrichment as the basis for an independent cause of action in unjust enrichment.³⁰²

Extension of the law of unjust enrichment in a new case has to occur by way of assessment of what the contemplated new ground has in common with other grounds of actions. If it were not so, then it would be valid to ask whether the action properly lies in contract, delict or equity.

Is compound interest a benefit had by a party which has held money belonging to the plaintiff?³⁰³ Such a subjective statement might not be accepted as a new ground. It may have to be stated in term of an existing ground or a derivative ground such as *mistake of law*. The key to the courts recognising any such new ground will be defined in terms of a common principle underlying all unjust enrichment cases. The principle would unify reasoning between the new case and established grounds. It would impose strict limitations as to the character of

³⁰⁰ *Orakpo v Manson Investments Ltd* (1978) AC 97 at 104 per Lord Diplock. In contrast, an independent action is accepted in modern law in North America jurisdictions: e.g. *State Const. Corp. v Scoggins* 229 Ore. 371, 485, P. (2d) 391 (1971), 393 and *White v Central Trust Co.* (1984) 7 DLR (4th) 236, 246-7.

³⁰¹ (1991) 101 ALR 363, 374-76.

³⁰² *Winterton Constructions Pty Ltd v Hambros Ltd* (1992) 39 FCR 97,117, citing *Pavey and Matthews v Paul*, fn 1 above, 256-7; *David Securities* fn 169 above, 378 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, and 406 per Dawson J.

³⁰³ *Westdeutsche Landesbank Girozentrale v Council of the London Borough of Islington* [1996] 2 All E.R. 961, 688 per Lord Goff.

benefit, the standing of the plaintiff, determined by diminution of personal wealth. Not all of these cases will conform: loss of profit is one thing; establishing that another has a benefit directly commensurate to the loss is quite another. Are these boundaries to be softened? The wider effect on the law as a whole, in terms of possible confusion, would be of very great concern.

For a new case to emerge, the judgment of a court in the new case would need to reason that the manner of enrichment, if it were not within an existing ground, was such as in judicial reasoning, should be recognised as unjust. At this critical juncture, the court will be guided by the reasoning underlying judgments in *Moses*,³⁰⁴ in *Fibrosa*,³⁰⁵ in *David Securities*.³⁰⁶ It is here that notions of *aequo et bono* come into play, reasoning that prompted Lord Wright to rule that ‘...in any civilised system of law...’,³⁰⁷ and in *David Securities Ltd v Commonwealth Bank*,³⁰⁸

...distinctions as to the manner of acquiring an enrichment are ...no basis for the unjust enrichment rule, except in so far as the manner of gaining the enrichment bears upon the justice of the case.³⁰⁹

Lord Wright brought the unjust enrichment actions into neo modern perspective, bridging the development from Lord Mansfield to the beginnings of modern unjust enrichment jurisprudence. He articulated the nexus between the older jurisprudence and the new in *Brookes Wharf v Goodman Brothers*³¹⁰ and in

³⁰⁴ (1760) 2 Burr, 1005, 1007.

³⁰⁵ [1943] AC 32, 61.

³⁰⁶ (1992) 175 CLR 353.

³⁰⁶ *Id.*, 375.

³⁰⁷ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barber*, fn 177.

³⁰⁸ (1992) 175 CLR 353. p 373.

³⁰⁹ *Id.*, 376

³¹⁰ [1937] 1 KB 534.

*Fibrosa Spolka Akcyjna v Fairbairn Lawson Coombe Barbour Ltd.*³¹¹ In the first of these cases, his judgment accentuates the bridging between old and new by beginning with the observation that this is a case on the principle of *money paid*, ... as in 'Leake on Contracts', where a party is compelled by law to pay a sum which another who was primarily liable to pay, obtains the benefit by discharge of its liability: under the circumstances, the defendant is held indebted to the plaintiff in the amount.³¹²

How then, does this notion of *aequo et bono* constitute a principle? I will answer that question by adopting, from the next sub-chapter, a concise statement of the nature of the unjust enrichment principle: this is more fully explained as I proceed. I describe the principle in these terms.

A failure to perform a primary obligation, (of which unjust enrichment is an archetypal example) is an issue of justice because the courts have determined that this is such a case where the demand for performance is insistent and the communal demand in such a case is recognised by the courts and becomes an aspect of a widely applied judicial standard, which is the principle of unjust enrichment.³¹³

Importantly, it is the judicial standard that is the principle. It rests upon *judicial interpretation of an insistent communal standard*, not contemporary communal perceptions of justice. A dictum of Kirby J in a tort context, applies here with equal force: '...as a matter of legal authority, [such a finding] does not grow out

³¹¹ Fn 276.

³¹² [1937] 1 KB 534, 544.

³¹³ My summation here recognises the critical issue underlying the nature of 'unjust' that is explained in 7.5 below. See Mason and Carter *Restitution Law in Australia*, [222]-[223] and [1514].

of past decisions in harmony with the methodology of the common law.³¹⁴The dictum is of first importance. A superior court may have the jurisdiction to find a new instance of unjustness, but is obligated by judicial responsibilities, to conform to the methodology of the law and have regard to its inter-dependence. Decisions must 'grow out of' past decisions. Taxonomy is not a rule but it is a path through the thicket.

In contrast to the principle of unjust enrichment, a breach of contract or tort is not a breach of a primary right, it is a wrong to be redressed between the parties. In cases of breach of such a common law right, no judgment as to the justice of the case is pertinent; indeed, in some breaches of contract, communal standards might favour the defendant, and many torts might be wholly unintended, but that is irrelevant.

The jurisprudential reasoning of rules is the foundation of principle and thus insistent communal standards of wide acceptance are recognised by the courts and thereby contribute to reasoning underlying principles and rules of law.³¹⁵ In the next sub-chapter, I will address these points from a standpoint of legal theory and show that they are supported by significant authority.

In Chapters 10 and 11, I will endeavour to expose a coherent relationship in the way that principles provide the reason and the order of rules. This is true of each branch of the modern law, and this much will be demonstrated by a comparison with tort in chapter 12. This will make possible a conclusion that principles, singularly or in concert, are the building blocks of rules, and draw their

³¹⁴ *Perre v Appand* (1999) 198 CLR 180, 274-75; the courts would be responding to a community sense of obligation.

³¹⁵ This is not always obvious, or even, not often obvious in the judgments. This is because rules relate back to previously laid down rules in consequence of stare decisis. See p 146-47 below, where I explain an old judicial finding that some obligations in community are *imperative*.

taxonomical significance and their symmetry from legal concepts. Because principles describe the foundation of rules, it follows that fundamental differences in the principles recognised by the courts in several jurisdictions, underlie the different legal outcomes. It is important therefore, to recognise that the approach to principles is a fundamental concern for students of the law who would compare unjust enrichment cases across several jurisdictions.

For the present, I conclude this part with an observation about principles which has application to other areas of the law of obligations also.

Principles are the expression of legal reason and as such, the foundation of rules. They are grown upon the legal concepts such as 'unjust enrichment', 'contract' and 'tort', from which they take their purpose.

It will be one of the tasks of succeeding sections and chapters to support and refine this statement about principle.³¹⁶

³¹⁶ Principles are discussed again in relation to *precedent and the authority of cases* in Ch 11, especially pp 190-92.

7.3. The Jurisprudential Characteristics of the Unjust Enrichment Principle.

7.3.1. Principles and Taxonomy of the Law.

It is essential to understand why unjust enrichment is not a principle capable of being understood in terms of communal perceptions of justice. To explain this, it is necessary to reiterate, summarily, some observations made above about taxonomy. It will then become plain that taxonomy reflects the relationship between this area of the law and other heads of the law in contract and tort. I am following the Hart and Birks lead in analysing rights duties and obligations in terms of primary and secondary obligations, rights and duties:³¹⁷ it is the only approach that satisfactorily explains the character of obligation and the difference between actions that result from a breach of a right and actions that are dependent upon those limited circumstances where the law will impose an obligation.

The points to be recalled are these:

- Every wrong pre-supposes a prior right which is a primary right, including contractual rights and rights that the law of tort protects. Rights, to

³¹⁷ See Sub-ch's 9.2 and 10.2 where the dichotomy of 'primary' and 'secondary' obligations, rights and duties is further explained.

- damages for example, for breach (of those primary rights) redress wrongs (the breach) and are secondary rights.³¹⁸
- Where there is a primary obligation that is satisfied by restitution of property, the obligation or duty to make restitution is itself primary. This is because there is no breach of any right and therefore no wrong.³¹⁹

In both Birks' and Hart's works is found the notion that performance of an obligation is an issue of justice. It follows that imposing a legal obligation becomes an aspect of a judicial standard; it is an issue of justice.³²⁰ The reasoning is further explained below.³²¹

These points can be explained together, in this way.

- The rule imposing an obligation to make restitution is an example of a primary 'obligation creating' rule where the demand for conformity, represented by the judicial standard established in the cases, is insistent. Such rules are supported by secondary *rules* that empower individuals (judges) to make authoritative, binding determinations (orders imposing

³¹⁸ Specific performance is available only where the common law remedy is inadequate, which will include some circumstances where there was no breach: 'Equity in the Modern Law', (1996) 26 *WALR*, 1, 11. Similarly, there is no right to restitution until the obligation is imposed; failure to pay is a separate issue.

³¹⁹ The significance of absence of breach is explained at pp 129 and 133-34, and discussed at several points above; see fn 266. The distinction between primary and secondary obligations/rights is of long standing. Birks' notes attribute it to Pothier. It has acceptance by commendable sources in the common law systems also; see Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy', (1996) 26 *WALR* 1; the article is mentioned at fn 177 above in the context of the relationship to taxonomy; see also Peter Birks 'The Concept of a Civil Wrong' in D.G. Owen (ed) *Philosophical Foundations of the Tort Law*, 31-55.

³²⁰ See 7.6 below. There are subtle and not so subtle differences in social policy in many societies. It must not be assumed lightly that standards of justice are the same in all societies. See Joseph Schumpeter, *Capitalism, Socialism and Communism*, esp. Ch 5.

³²¹ Sub-ch's 7.4-7.6 below.

obligations).³²² The secondary *rule* is the empowerment, not the imposing of the obligation.

- The grounds of actions in unjust enrichment are these issues of justice: failure to pay back money paid for a contract that never proceeded, or never came into existence, or paid mistakenly, or induced by duress, are examples of issues of justice invoking a widely applied judicial standard (i.e., the demand for conformity is insistent).

This latter point explains and is consistent with the absence of breach. The breach of contract or a tortious breach is not, *per se*, unjust; but it is a wrong. If a judicial standard underlies the redress granted the party wronged, it is hardly insistent: it is a matter between the parties. No judgment as to the justice of the case is pertinent.

The explanation offered here is also consistent with historical antecedents, especially the ancient actions of *account* and *debt* which sought not to punish, but to rectify.³²³ Recalling what was said above about Lord Mansfield's perceptions of 'equitable actions', the pieces of the jigsaw puzzle begin to fall into place. Unjust enrichment actions are distinct from those actions that redress wrongs. Unjust enrichment actions involve justice of the case because they are based upon a finding of obligation. The taxonomy issue implicit in Hart's work³²⁴ and developed as an aspect of reasoning in Birks' essay, assists in

³²² H.L.A. Hart, *The Concept of Law*, 86-99 and 167. There is also a rule of recognition which has an independent existence in Hart's schema, i.e. that which constitutes tribunals and their jurisdiction.

³²³ It is of interest that the same applies to equity jurisprudence where specific performance of a contractual obligation follows the same form, perhaps because of a long forgotten conceptual relationship. Specific performance focuses upon the unfairness of a particular person's conduct, and therefore rectifies that unfairness by ordering performance: Patrick Parkinson ed., *The Principles of Equity* 580, citing *Carnell v McLennan* (1880) 1 LR Eq (NSW).

³²⁴ H.L.A. Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *LQR* 37, esp. 46-47. See also, Peter Birks, 'Equity in the Modern Law', (1996) 26 *WALR* 1,16.

differentiating the actions, but it also assists in explaining the juristic reasoning underlying the identification of unjust enrichment actions. This will be addressed more fully in the next sub-chapter.

By way of conclusion, what can be distilled from this treatment is that principles and rules that create obligations in the law address a different field to that addressed by principles and rules that describe wrongs. *Fibrosa Spolka Arcyjna v Fairbairn Lawson Combe Barbour Ltd*³²⁵ provides an illustration. The circumstances were unusual; war prevented the fulfilment of a contract for purchase of inventory for which money had been paid. Was it unjust for defendant to retain the money? The question would not be an easy one to answer by applying popular perceptions of justice; the defendant may have suffered severe losses, but that was irrelevant. Whether the defendant had committed a wrong, also was not at issue. There was no obligation to repay the money until the court recognised the circumstances as constituting a ground of unjust enrichment. This is because the property in the money has passed to the defendant and there is no aspect of the relationship between the parties that will change that fact; no redress existed unless there was an order by a competent court to make restitution.

The order for restitution is made because of a finding that the circumstances constituted a ground, an instance of those *issues of justice*, giving rise to an order creating a primary obligation. But there is nothing, in the absence of such a finding that will upset the defendant's title, because the benefit was obtained legally. It was not a gift, but it was nevertheless legally obtained. The facts of

³²⁵ fn 177, at p 61.

Fibrosa, above, of *Exall v Partridge*,³²⁶ and of *David Securities Pty Ltd v Commonwealth Bank of Australia*,³²⁷ are examples.

The grounds of actions will be examined in the following sections of this chapter, but the cases cited and the examples here given, illustrate the method of the underlying jurisprudence. Principles and rules that describe primary obligations are distinct from principles and rules that describe wrongs. Taxonomy is much more than a rule of convenience. Without this clear division of heads of law, principles would become weakened and the uniform interpretation and application of rules would be jeopardised.

7.3.2. Principles and Actions: How Principles Describe Actions.

Professor Hart suggests that in finding a unifying rule which assists in answering which types of rules make up a legal system, a given rule may unify different types of rules.³²⁸ Unjust enrichment does not conform to this pattern: the work of *defining* is achieved by resort to accumulated precedent. No single rule describes the variety of actions. Unjust enrichment is not alone in this: some other important heads of law cannot adequately be described only by rules.

³²⁶ (1799) 8 Term Rep 308; 101 ER 1405. This case is discussed again below, where it is shown that the judgment of Lawrence J was an important conceptual bridge between the era of the common counts and modern law, which went un-noticed for two centuries: see fnn 337 and 632 and accompanying text

³²⁷ (1992) 175 CLR 353. In this case, mistake of law was recognised as a ground in Australian law, for the first time. In an important obiter dictum, the High Court recognised the jurisdiction of the court includes the power to find that the prima facie right to restitution fails because of other circumstances, which mean the defendant no longer has the money (benefit): at 385 ff; and see *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673, and *Lipkin Gorman v Karpnale Ltd* [1991] 2AC 584, 579. See p 215-16 below, noting a related finding in *Exall*, fnn 178, some two centuries earlier.

³²⁸ *Concept of Law*, ch. III. The issues here are reminiscent of Hart's treatment of the pitfalls of defining law itself. See also Mason and Carter fn 313, [1514]; in circumstances, plaintiff may have an election.

There is a way of classifying rules and groups of rules that affect persons individually that distinguishes between

1. those varied rules that assure us of rights, that crime and tort respond to; and,
2. those inter-connected rules, of which contract, property, testamentary rules, including the making of wills, are the most obvious examples.

Hart discusses the former in terms of those rules like crimes and delicts that are susceptible of a breach. He discusses rules like contract, that are of the second class, in the manner of being rules that provide a social facility which participants may engage in at their election. The former are sanctions; the latter are facilitating and empowering rules in the sense of conferring capacity to self-regulate and participate.³²⁹ The distinction is incomplete however: this is because it becomes progressively more difficult to sustain that these categories, and types within categories, are exclusively and adequately described as 'rules'.

What is the conceptual difference between these two classes of rules identified here. I suggest, that the question can only be answered adequately by appeal to principles.

There is no clear over-arching rule or set of rules to which all torts are subordinate: rather there is a notion of the purpose served by the rules of tort which might succinctly be described as 'redress of civil wrongs'. It would not be difficult to find expressions of that notion in the cases, as *principles*. Contract is different because what it unifies is the rules of contract; here is a set of well defined rules collectively called *contract* that defines exclusively what a contract is, or more correctly, what is a contract. The rules of contract have no other life: they are conceptually, the rules of a system. Tort, on the other hand is defined

³²⁹ *Id.* pp 27-28, and see Chapter 9 and fn 319 as to primary and secondary rules.

in terms of concepts, principles and rules, which are nevertheless precise, but frequently require some evaluative process.³³⁰ There may be an over-arching principle served by all rules that describe tort: ‘...you must not injure your neighbour...’³³¹ might approximate such an over-arching principle.

It is the distinction that is drawn here, between categories defined by concept and principle, and the categories, like contract defined mainly by rules, that is at the root of the difficulty of defining a unifying factor in unjust enrichment: a factor that explains all cases. In chapter 10, it will be shown that it is informative to analyse unjust enrichment and tort as categories of rules that inform broad general ‘abstractions’. This is demonstrably valid. Rules of various kinds may be supported by common reasoning; this, however, is where principle comes into the equation. The principle is that which justifies rules in unjust enrichment cases where the circumstances are an instance of an unjust enrichment recognised by a rule of law.

Hart also suggests that several instances of a rule may be different instances of related rules that are ‘... linked by different relationships to a central element’.³³² I suggest that these observations have a clear relevance for unjust enrichment. Several instances of rules that co-opt different circumstances as grounds of unjust enrichment, may be instances of an *obligation imposing* rule where unjust

³³⁰ The ability of a superior court to find a new tort exists in the concepts and principles, albeit rarely exercised. The notion of ‘over-arching principle’ is again discussed in Chapter 11.

³³¹ *Donoghue v Stevenson* fn 275, p 580, per Lord Atkin. It may not be valid to draw analogies too closely between tort and unjust enrichment. It is not the intention in this work to analyse tort jurisprudence.

³³² *Concept of Law* 15-16. Hart treats subordinate elements of a rule as rules in their own right, which accords with other jurists, but he also treats the formative ideas that most would call principles, as rules: *Concept of Law* 9-17. Hart’s foremost concern is with such areas as crime and contract where rules, even minor rules like the answer to ‘what is theft?’ are comparatively crisp and clear-cut. It is easier to demonstrate his theses in such an environment. His notions are equally applicable to the strongly *concept oriented* groups of rules such as unjust enrichment where, however, a much more convincing argument for principles can be made. Hart’s analyses are nevertheless elucidating, whether or not one adopts his definitions universally.

enrichment, as an independent head of the law is a 'single complex activity'.³³³ I suggest that Hart's notion of *complex activity* as indicative of a working system of rules is another way of describing the *broad general abstraction*. Conceptually unjust enrichment is a complex of rules, explained by common reasoning processes, that serve an identifiable principle. This is why Deane J described it as a unifying legal concept.³³⁴

The English *unifying general principle* does the same work as the concept described by Deane J. Just like Lord Atkin's broad proposition of reasoning in tort, *I must not injure my neighbour*³³⁵ so too, there is in unjust enrichment a broad generalisation which is capable of being understood as an overarching principle that helps to define the obligation imposed by law. The rule that derives from an overarching principle is coupled with and inseparable from each rule in cases where unjust enrichment is found.

Acknowledging an over-arching principle does not change our perception of the case by case development of the law, conforming to its early jurisprudence. This is apparent in old cases as is shown where a plaintiff was obliged to pay to get its property in *Astley v Reynolds*,³³⁶ and *Exall v Partridge*.³³⁷ Justice Lawrence's finding in the latter case that the prima facie right to restitution failed because of circumstances which meant the defendant no longer has the money (benefit),

³³³ It is the dissimilarity of the issues dealt with by the rules that distracts us from this otherwise obvious conclusion.

³³⁴ (1985) 160 CLR 583, 619.

³³⁵ *Donoghue v Stevenson* [1932] AC 532, 580, per Lord Atkin.

³³⁶ (1731) 2 Strange, 95; 93 ER 939. This was an action for money had and received in the King's Bench. The plaintiff had paid excessive interest on a loan given on the pawning of a plate and claimed back a part of the interest which he had been forced to pay in order to recover his property. The court held that in actions founded upon mistake or deceit, the action (*indebitatus*) would lie, and so too for this circumstance where the plaintiff paid by duress '...relying on his legal remedy to get it back again.'

³³⁷ (1799) 8 Term Rep 308; 101 ER 1405 at 311 (Term Rep.). '...[t]he justice of the case...' demanded that all three parties to a debt had a joint obligation to pay the amount of the debt of which they had been relieved by forfeiture of the property of one.

and in describing the obligation in terms of 'justice of the case', suggests contemporary consciousness of the reasoning underlying the common counts but seldom articulated. Clearly, it prefigures modern English law where the cases also illustrate the case by case development of a category of rules that are explained by the principle of unjust enrichment that I have called an overarching principle.³³⁸

In the next chapter, I will endeavour to expose a coherent relationship in the way that principles provide the reason and the order of rules. This will make possible a conclusion that principles, singularly or in concert, are the substance of rules, and draw their taxonomical significance and their symmetry from concepts.

7.4. The Cases, and the Primary Obligation Creating Factor.

Each of the circumstances underlying individual actions, including money had and received, free acceptance, duress, total failure of consideration, mistake, and one or two others, which constitute grounds of unjust enrichment, has been the centre-piece of a new rule of law. By its nature, the rule of law of unjust enrichment defers to other rules of common law. That might seem to have been an issue of convenience, but it is much more than that; it is the consequence of the distinction between primary and secondary obligations and duties.

If Mrs. Pavey held the fruits of a wrong by reason of having not paid for work performed under a valid contract, the contract would describe the wrong done to the builder. This is because in that circumstance, the money could not be characterised as a benefit that plaintiff was entitled to have. It is simply a debt

³³⁸ *Lipkin Gorman*, fn 327 above, is a modern example and the reasoning of rules in that case reflects reasoning in *Astley* and *Exall*, fnn 145 and 178.

owing under the contract. It might be several things including wages owed to an employee. But in this hypothetical situation, the work is not a benefit retained at the expense of the builder: money owed in consequence of contract could not be so described. In that assumed situation, the question of an instance of *unjust* does not arise. The distinction between primary obligations and secondary duties is fundamental to this reasoning.

What then is the source of 'unjustness' in unjust enrichment? The simple answer is that none is necessary other than the finding of a superior court characterising the particular circumstances of an action: precedent is the origin of the unjustness. Such an answer is mechanical, however, because it fails to recognise the judicial process of reasoning from case to case in establishing the precedent.³³⁹ It is not suggested that this is readily apparent in judgments, rather that it is the underlying reasoning which is significant when the judgments address the nature of the case. In this process of reasoning from case to case, the superior court resembles the Roman praetor who had a sole discretion to allow a new action where the officer found by deliberation on the circumstances of the case, and on the praetorian edict listing all available actions, that there was an instance of unjustness of the kind outlined here.³⁴⁰ It also resembles the juristic method underlying the reasons for the courts granting the medieval *action on the case*. This too has been outlined above.³⁴¹

It is instructive to return briefly, to Lord Wright's judgments to observe the emergence of reasoning that yields juristic notions of principles in unjust enrichment. In his judgment in *Brookes Wharf*, Lord Wright dispenses with the

³³⁹ Below, pp 123-24, where judicial method is described in the dicta of Lord Wright and Justice Deane, and the explanation of the development of principle at pp 124-25. See also the dictum of Kirby J at fn 314.

³⁴⁰ See fn 20 and accompanying text.

³⁴¹ Above, pp 17, 26-33 and 45.

purely formalistic³⁴² approach to reasoning and explains liability in terms of a general standard of justness,³⁴³ That a standard of comparable significance to the *reasonable person* concept in *Donoghue v Stevenson* was contemplated, became especially plain in the second of the two cases, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Coombe Barbour Ltd.*³⁴⁴ There, he proceeded to characterise the actions in unjust enrichment in the following way:

...[t]he standard of what is against conscience in this context has become more or less canalised or defined, but in substance, the concept remains as Lord Mansfield left it. ...[t]he gist of the action is a debt or *obligation imposed by law*, in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost.³⁴⁵

Lord Wright, in this judgment, turned toward a ‘canalised’ standard of what is against conscience, as the standard applicable in unjust enrichment actions, a break from the standard which he seemed to suggest in *Brookes Wharf*, founded upon the notion of ‘reasonable man’.³⁴⁶ Nevertheless, the legal concept of *what is against conscience* is a tool of like, or comparable purpose, and the reasoning is otherwise unchanged as he describes a *general standard of*

³⁴² As in ‘forms of actions’.

³⁴³ That is, that the parties as reasonable persons, ought have decided on a course which is in conformity with an accepted standard of justness. If we recall that the notion of a reasonable man had already found a place in the common law, as found in *Donoghue v Stephenson* (fn 275), in a variety of cases where it became the touchstone of standards of acceptable personal and professional behaviour, then the dictum is recognised for its suggestion of such a standard in this area of law. In fact, the notion of reasonable person was not persisted with in later judgments in unjust enrichment, but it remains as a comparative tool and helps to explain that the courts in later judgments, were developing a standard of comparable significance.

³⁴⁴ *Fibrosa*, fn 177

³⁴⁵ *Id.*, at p 63. (the italics are mine). *Fibrosa* is rightly thought of as the true foundation of modern unjust enrichment. It marks the end of one era and the beginning of the next. See Chapter 13.

³⁴⁶ [1937] 1 KB 534, p 544.

unjustness, that is of ‘... what the court decides is just and reasonable having regard to the relationship of the parties.’³⁴⁷

That is an unsatisfactory explanation of legal principle if taken alone. The matter of lasting significance, however, is that Lord Wright, in *Fibrosa*, set the standard which was to have a profound influence in English and Australian law and in several other jurisdictions. He defined the central issue, and in his ‘Any civilised system of law ...’ dictum, set a standard which becomes a challenge which all jurisdictions were bound to take up. The dictum clearly states the central notion of obligation imposed by law, an approach to reasoning that is distinct from obligation or duty founded in a relationship agreed by the parties, as in contract.

Justice Deane, in *Muschinsky v Dodds*,³⁴⁸ drew a parallel between Lord Mansfield’s dictum which has been noticed in the previous chapter, and the ‘...general equitable notions...’ underlying the action for money had and received,³⁴⁹ indicating the common law concern for justice of the case. His choice of words ‘...concern of the common law for *justice of the case*...’³⁵⁰ is a manner of expressing what the underlying principle is. It has been seen that Lord Mansfield used a legal concept of profound genre. It is simply that; like the praetor’s exercise of limited discretion, it is the common law’s concern for the justice of the case in each instance of a ground recognised by the law. Professor Dworkin’s work on principles in the law, which is studied in Chapters 9 and 10, will reinforce this perception.

³⁴⁷ *Ibid.* This, like the action on the case and the praetorian discretion, is limited by the scope and purpose of the action. Professor Dworkin describes the discretion well: like the ‘hole in the doughnut’, an area of discretion surrounded by a band of restriction: Ronald Dworkin, *Taking Rights Seriously*, 31-33.

³⁴⁸ (1985) 160 CLR 583.

³⁴⁹ (1985) 160 CLR 583, 619.

³⁵⁰ *Ibid.* I have introduced the italics.

Another principle of general application (though not commonly referred to as a general principle) is the principle or doctrine of precedent. This principle (for it is a principle, drawing upon the doctrine, as it is applied in individual decisions) is the rationale and unifying source in all heads of the common law. Precedent, properly characterised as both accumulative and inductive, is an essential tool of the law in augmenting the uniformity of actions. It is the method of the law in reasoning from one to another set of circumstances in a fashion that establishes the relationship of a new case to existing grounds of actions. It will be seen that breaking the chain of reasoning, because it is not universally well understood, can lead to profound confusion of reasoning that can offer little hope that the law will be predictable and certain.³⁵¹

The development of unjust enrichment depends upon accumulated precedent that, by inductive reasoning, provides the basis for justifying extension of actions to new circumstances. An unjust enrichment principle or concept of law (depending upon one's starting point) underlies and explains these precedents. They unite them in a fashion such as to provide the connective logic, the syllogisms, which help the reasoning from one case to another. They are the basis of finding of existing primary obligations, and occasionally, new primary obligations which rely on legal reasoning, not a wrong or a breach.

The statements in the last paragraph, as simple as they seem, pose something fundamental about unjust enrichment actions. Primary obligations in the law of obligations are relatively rare because the jurisprudence and methodology of contract and delict assume certain rights which underlie actions when another party has acted to deny or impede those rights, by way of a breach. Primary

³⁵¹ In Ch. 12, a comparison is made between unjust enrichment methodology and modern developments in the Australian courts in negligence cases. The underlying concepts in the law can prove crucial to common understanding of principles and therefore, to predictability of rules.

obligations do not arise as a response to a breach of a right. Where the primary obligation does arise because of the character of a benefit, there has to be a tightly reasoned set of criteria acknowledged by a superior court as an instance of a *primary obligation creating factor*. There is a limited number of circumstances where what is had by A from B can be characterised as a benefit. It is not characterised by a debt. It is not voluntarily given by B. There is no legal process at work, nor reasoning established which gives the possessor, A, a claim valid against all the world such as a contract or a game of chance. It is indeed, a narrow field of benefits that are capable of being subject to the primary obligation. But there are even greater limitations. Plaintiff “B” is qualified to claim the product of the primary obligation only if B can establish that A has the benefit at B’s expense. The rules characterising benefit and ‘at the expense of B’ are stringent and further limit the category of possible unjust enrichments. What is left is a very small number of sets of *qualifying* circumstances. It is then up to the law, by its processes of inductive and deductive reasoning to say which circumstances, amongst the very limited sets of circumstances that satisfy the criteria I have outlined, is *unjust* in law: that is, unjust according to legal reasoning as distinct from unfair by communal standards.

The law must rely on precedent. Where there is none, it must rely on secondary authority, such as a decision of a court in another jurisdiction, extant or long dead. It is not surprising then that the long history of the notion which Lord Mansfield called *aequo et bono*, out of justice and expediency,³⁵² was found to be a characterising concept, by which I mean, a concept which explains the character of particular principles and rules. Such a concept is inevitably an active force in the law rather than just a latent idea. Because of its ‘activity’ in characterising particular principles and rules, it is valid to regard it (this unjust

³⁵² Above, fn 20. See also fn 270 where the interpretation of *aequo et bono* in terms of ‘justice’ and ‘expediency’ is questioned.

enrichment legal tool), as being itself a principle of law. It is very much a matter of looking at it from cause to effect in saying whether it is a concept or a principle. Whichever it is, it provides the precedent, the reasoning, the logic of finding a set of circumstances which the law will say is an instance of the 'unjust', the inequitable, in the sense in which Lord Mansfield used the notion of 'equity' in his famous dictum.³⁵³ That, in turn, was a finding strongly influenced by the notion of 'the equitable' in Roman law, which has been noticed above.³⁵⁴

The law chooses which sets of circumstances are unjust by legal definition. The 'unjust' may refer to the manner of the enrichment, but it is not the 'manner' which is at issue; nor is it the character of the party who has it; nor that party's actions. The circumstances of the case are found to be united by a '... legal concept that explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff ...'.³⁵⁵ The passage identifies what the law does in a case. The immediately following passage explains the legal reasoning in such a decision: '...determination, by the ordinary processes of legal reasoning, of the question, whether the law should in justice, recognise such an obligation in a new or developing category of case.'³⁵⁶ The passages warrant close attention: it is submitted that each word is significant. The focus is enrichment that is not gratuitous, and has neither contractual nor philanthropic basis. It might be expected that new grounds will be exceptionally rare, and the law clearly intends that it should be so.

³⁵³ *Moses v Macferlane*, fn 42, at p 1007; see also Ch. 13 where the ancient notion of *the equitable* is examined.

³⁵⁴ Above p 74. See below Chapter 13: the 'scholarly transfer of wisdom' is the legacy for the common law, rather than direct transfer of doctrine and rules.

³⁵⁵ *Pavey and Matthews Pty Ltd v Paul*, fn 1, p 257 per Deane J.

³⁵⁶ *Ibid.* In an established action, a rule will be applied in accordance with precedent which may be acknowledged as based upon a key principle. Reasoning of unjust enrichment from principles will be the course for new actions.

Reasoning from the notion of ‘the unjust’, has few parallels in the law. It is like the adjective when we speak of the *royal* prerogative, *crown* jewels, or *parliamentary* procedure; almost primitive conceptually because it refers to a single simple and closely limited category. It categorises, or more correctly, it creates a branch of taxonomy by applying a very specific ‘name’ that identifies a concept of specific meaning. It speaks very specifically about that item to which it attaches. That is a consequence of its history and its isolation in the scheme of developing concepts and principles of law. The reasoning of the ancient *action on the case* was similar.

Is the concept/principle akin to equity? The answer must be “no!” despite superficial resemblances of principles. Equity acts in personam, characterising the quality of a person’s acts. It does however, create obligations and in this respect, the method of unjust enrichment is akin to the methods of equity.³⁵⁷ The ‘unjust’ in unjust enrichment is the reason of a chose, giving a right to judgment of a court to the person at whose expense another person has become the holder of a benefit. It does not, moreover, create an equity as has been argued by counsel in a foundational case.³⁵⁸ Lord Goff’s reasoning in *Westdeutsche Landesbank Girozentrale v Council of the London Borough of Islington*³⁵⁹ comes to mind. There he reasoned, in a minority judgment as to the issue of interest, that the common law might adopt an equity rule that a party might incur a liability for compound interest arising from holding money of another. But the change of focus from equity to unjust enrichment also involves the change of focus from conduct to object.

³⁵⁷ It would be fruitless to pursue the point however, because in doing so we will be contemplating jurisprudence in the early centuries of the last millennium.

³⁵⁸ *Sinclair v Brougham* 1914 AC 398, 454-5. Lord Sumner dismissed the argument for a personal claim in equity as a mere confusion as to what Lord Mansfield’s findings in *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676, concerned; it was never so intended by Lord Mansfield.

³⁵⁹ [1996] AC 699.

Lord Goff must have been conscious of this dichotomy between liability for conduct of a defendant and liability that attaches to the character of a benefit: there is a sense that the proceeds of inequity and the focus of the rules of unjust enrichment must have something in common. The difference is fundamental, however. Liability for compound interest in equity would arise because the defendant is alleged to have property or the proceeds of property in which plaintiff has an equity or an equitable interest. This is not so in unjust enrichment particularly because it is not supposed that the plaintiff has more than a chose before judgment.

The issue observed above is close to the borderline of two very different fields of jurisprudence. It is easy to say that the interest which plaintiff might have had but for the unjustness, becomes inseparable conceptually from the loss of advantage in being denied a benefit that is quantifiable only in terms of damages. Again the conundrum of altering the taxonomic boundaries arises so that we would soon be asking what rules of law properly apply to the issues.

I conclude this part of the work with these observations.

1. The Australian unifying legal concept or English unifying general principle of unjust enrichment (which I have described as achieving a like purpose) imports a special meaning for the actions which it supports.
2. It is very different from principles which explain other actions in the law of obligations and from doctrines of equity because the principle of unjust enrichment attaches to an inanimate thing, a sum of money or money's worth, and imposes an obligation upon the party acquiring or possessing that sum or potential sum (in the sense of realisable property) at the expense of the plaintiff.
3. It is the concept (or principle) which vests in another (a plaintiff) a chose in action without a breach.

4. It does not create an *equity* nor invoke equitable remedies.
5. It is responsive to unjustness defined by precedent that establishes obligation, in absence of a breach, rectifying respective rights rather than remedying a wrong.
6. It is like the ancient *writ of right* or *debt*, vesting in a plaintiff a chose, a right to the judgment of a court, to impose upon another, the holder of the particular benefit, an obligation to make restitution.

May not modern courts modernise the character of the action? An answer to this question must be tempered by these two considerations.

1. It must be asked, where stands the demarcation, the separation of powers between the courts and the legislature if courts may make such fundamental change as overturning centuries of development of the law and its jurisprudence?
2. If a court changes the boundaries in the course of a judgment, it has neither jurisdiction, nor even opportunity in that case nor perhaps in the next decade, to explain and adjust the consequences for other branches of the law. The prospect of confusion becomes patent³⁶⁰

³⁶⁰ A related issue is discussed above, at p 59-60; '... it is important to observe that the basis of any such development of new cases has to be found in legal reasoning; otherwise it is purely a whim. Such legal reasoning is to be found in legal concepts and principles.'

7.5. Unjustness: Instances of Obligation Imposed By Law.

This section addresses a novel view of the nature of *unjustness*.³⁶¹ Each new ground of unjust enrichment, as it has developed, is another instance of unjustness, not because of a breach of a right, but because a notion of *obligation imposed by law* is a judicial response to the circumstances of the particular ground.

It has been said at several points, that in unjust enrichment, the law creates or imposes a legal obligation. That however, does not mean that there are not other kinds of obligation that might have arisen from the same circumstances; nor does it follow that such other kinds of obligation are irrelevant to the obligation imposed by law. Legal obligations are not by any means an essential coincidence with moral obligations or compulsive forces of cultural origin.³⁶² Those other obligations may arise out of communal acceptance of standards of moral and/or ethical behaviour. They may arise out of codes of acceptable conduct in employment, in sport or in communal life. Such other obligations are seldom of universal application or universally observed in community. There

³⁶¹ The issue has been raised in several areas of this work and it is true that this section could be located at several other places. It's relevance to this section lies in the relevance to the nature of the unjust enrichment concept and principle.

³⁶² See fn 248 above where a related issue is considered. Hart maintained that morality does not explain law. That does not preclude however, that a judge, in reasoning a decision in an unjust enrichment case, might employ tools of reasoning that have some commonality with reasoning that describes human perceptions of morality. H.L.A. Hart, 'Positivism and the Separation of Law and Morals', in R.M. Dworkin ed. *The Philosophy of Law*, Essay 1, 17, at 21-22; H L A Hart *Concept of Law*, 167, and ch. 9, pp 208-212; See also Neil MacCormick, *HLA Hart*, 24-5. If law is morality then all that is law is moral. Morality though, is a set of standards by reference to which law might be critically analysed: see Hart, *Concept of Law*, 211.

may be, nevertheless, some obligations arising out of communal standards that are central in importance to community as a whole. An obligation to be truthful in one's dealings may be an example. The care of the aged, of children and of the disabled, and animals also, in a community-wide sense, may be examples of such obligations. If, in a perfect society, none of these kind of obligations had been left unfulfilled, then there might be no cases arising in the courts and therefore no obligations might have been recognised by law.

A funeral of a kind that is in keeping with the deceased's station in life would be a *community* obligation resting upon an executor with funds, because it is central to the interests of community that the dead be buried. Such an obligation was recognised as an element of a ground of restitution in *Rogers v Price*³⁶³ where expenses were paid by another out of necessity. Baron Vaughan in that case, described the obligation upon the executor to pay, as '...not an imperfect obligation, but [an] imperative obligation.'³⁶⁴ That does not mean that the legal obligation was an imperative one, but the *communal* obligation to pay was imperative.³⁶⁵ The communal obligation thereby became also, an obligation recognised by law: it was a legal obligation: it was imposed by law.

*In Re Rhodes*³⁶⁶ was a case in which the court recognised that money spent on the necessities of an intellectually disabled person, might in circumstances, be a benefit conferred upon a person who was primarily responsible to pay (although for a different reason described below, it did not impose the obligation). The *communal* obligation thereby became an obligation imposed by law. This was another instance that may well be understood in terms of *core of community*. A somewhat different instance was where an owner of a horse left it in the care of

³⁶³ (1829) 3 Y & J 28; 148 ER 1080.

³⁶⁴ *Id.* 37.

³⁶⁵ It may be considered fortunate that there are no degrees of legal obligation in unjust enrichment.

³⁶⁶ (1890) 44 Ch D 94.

an agent under an expired contract. The court imposed an obligation to pay the bailee upon the bailor/owner.³⁶⁷ The care of the animal was an imperative obligation owed to the community, for its keeper must not turn it out and, thereby cause public risk, or let it suffer distress.

Obligation, in a communal sense, stands in sharp relief in the necessitous intervention cases: it is readily apparent that an obligation would be imposed by law. In *In Re Rhodes*, the court stopped short of imposing an obligation on the basis that it was not shown that the payor had expected repayment at time of paying.³⁶⁸ The *community* obligation might not have been diminished by such reasoning but the reason of the failure of the plaintiff's case is consistent with the need for absence of voluntariness. *Communal* obligations are not limited to necessitous intervention cases. Lord Mansfield, in *Moses*, found, '...[if] the defendant be under an obligation, from ties of natural justice...'³⁶⁹ a dictum that might be read as recognising some particular kind of communal obligation as a pre-determinant of circumstances where the law will recognise and impose legal obligations.

This perception of origin of legal obligations does not open the doors to notions of duties and obligations, drawn from non legal contexts, being recognised by the courts as though they were law. Such a development would represent a failure of system and an abandonment of the judicial methodology that the doctrine of precedent represents. Decisions about communal values are not decisions about law and cannot be correct in law.³⁷⁰ Therefore such a decision, if one were taken, cannot be authoritative. The approach outlined above does

³⁶⁷ *The Great northern Railway Company v Swaffield* (1874) LR 9 Ex 132.

³⁶⁸ Fn 366 above, at 105-106 per Cotton LJ.

³⁶⁹ Fn 177 at p 1008.

³⁷⁰ A dictum in a modern case on negligence is pertinent: Such a decision is not founded in authority of '... past decisions in harmony with the methodology of the common law.' Above, fn 314.

not advocate the development of rules in that manner; but it does postulate that the law might adopt a standard that reflects notions of imperative obligation, imperative in the society in which it is expressed. The doctrine of *reasonable man [person]*³⁷¹ in the law of negligence is such a standard. The important characteristic of such a standard is that it is a legal standard whereby the law adopts communal experience as the essence of a legal proposition. By its nature as a tool of legal precedent, it cannot consist of considerations drawn from non-legal contexts that have no consistent meaning in the law.³⁷²

JC Smith argues the existence of what I have called a *community* obligation.³⁷³ As distinct from *obliged* that can mean responding to self interest, Smith argues that *obligation* can only be used to express a necessity based on protection of the interests of others.³⁷⁴ This, he says, reflects the existence of ‘...obligation creating practices and institutions.’³⁷⁵

Smith asserts that the ‘...classic example of an obligation creating social practice is that of promising...’.³⁷⁶ I would understand promise as a social practice in the sense that it relates to veracity and to self assumed obligation that in a general sense, society has an expectation of being reliable and

³⁷¹ *Donoghue v Stephenson*, above fn 275.

³⁷² See I M Jackman, *Primissory Obligations in the Law of Restitution*, (1995) 69 ALJ 614. Imperative obligation: subjective benefit and promissory obligations that subsist outside the law of contract.

³⁷³ *Legal Obligation*, 51.

³⁷⁴ *Ibid.* Smith's reasoning is independent of case law.

³⁷⁵ *Id.* 52.

³⁷⁶ *Id.* 20. Smith cites Hart, *Concept of Law*, 43 ‘...when we promise, we ...[are] imposing obligations on ourselves and conferring rights upon others...in lawyers parlance, we exercise a power conferred by rules...’. Grotius argued that there were two sources of obligation emanating from the natural law, i.e., promise and inequality: Robert Feenstra ‘Grotius’ Doctrine of Unjust Enrichment as a Source of obligation; its Origin and its Influence in Roman-Dutch Law’ in Eltjo J.H. Schrage (ed.) *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* 197, 201. Curiously, it was in the late medieval cases in debt and *assumpsit* that promise without consideration, implied and fictional, had a strong bearing upon the circumstances wherein *indebitatus assumpsit*, the fore-runner of unjust enrichment, emerged.

predictable. In a purely common law sense, bidding at auction is capable of being construed as a promise even though it may be imperfect because of some supervening contractual or statutory rule. Similarly, accepting is another case of promising. Recognising that one acted under the influence of mistake, or per force of duress can be reasoned along similar lines: just as one should be obligated by one's promise, one should also be released from one's obligation if the basis of the assumed obligation falls away or is unsound, or indeed fails to eventuate. Obligation is removed to one who benefited from the mistake, the failure of consideration or the acting under duress. Smith's explanation of *the social institution of promise* will do also for these other instances of modern grounds: the grounds are such as is necessary for the existence and well-being of community in the sense that if community cannot rely upon outcomes, it is at risk of being destabilised. 'Obligation...' says Smith, '...involves community because obligation practices are ...[a] necessity for existence and well-being of the community'.³⁷⁷

It may be argued that such a theory of *obligation practices* is unreal in modern society. This is perhaps because law has, to a great extent, replaced the *communal* obligations so that a lower order of philosophy obtains, *if it is not illegal, I have no obligation*; but that is not new. It is pertinent that the origin of *the action on the case* that prefigured tort and unjust enrichment jurisprudence was motivated by the need to maintain *the King's peace*, an obligation which all citizens shared.³⁷⁸

The fact that in modern cases, the court goes directly to the obligation imposed by law without pausing to consider the *communal* obligation, does not detract

³⁷⁷ *Id.* 83. The reasoning also extends to freedom of promising, accepting etc. as would explain some of these grounds.

³⁷⁸ See fnn 54, 55 and 61 above.

from what has been observed here. The task of the court is to find whether or not a ground of unjust enrichment has been shown. In a potentially new case, the court could simplify its deliberations greatly by considering whether there was an imperative obligation of another kind that the law might adopt as an instance of legal obligation because of unjust enrichment.

Brief as this treatment of obligation has been,³⁷⁹ it suffices to demonstrate that the emergence of new instances of unjustness that found the actions in contemporary and modern unjust enrichment, have been much more conceptually motivated than would be the case if they were simply, instances of the arbitrary emergence of grounds.

Significantly, this treatment of the basis of obligation offers credible explanation for the reasoning of Lord Mansfield in *Moses*³⁸⁰ that has been the subject of unreflective criticism from the bench.³⁸¹ It is relevant that judges who have adjudicated upon grounds of unjust enrichment have been guided by many reflections, over many centuries, upon communal obligation including influences from non common law jurisdictions and ancient law.³⁸²

It is my thesis that many of the modern grounds have, in origin, communal perceptions of imperative obligation as their basis. Plainly, these developments are not adequately explained in terms of rules. Many kinds of principles have

³⁷⁹ Smith makes a useful correlation between ‘oblige’ and ‘ought’ which is not dealt with here in the interests of brevity.

³⁸⁰ Fn 42 above.

³⁸¹ *Ibid.*

³⁸² Lord Mansfield’s reasoning is an instance of this and see Robert Feenstra ‘Grotius Doctrine of Unjust Enrichment as a Source of obligation; its Origin and its Influence in Roman-Dutch Law’ in Eltjo J.H. Schrage (ed.) *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* 197, esp. 201-204.

contributed to the reasoning processes that ultimately formed the rules in individual cases.

Chapter 8: Selected Works of Jurisprudence Augment Clarity of Concepts and Principles.

In the introductory sections of this work,³⁸³ I have claimed that it is possible to demonstrate the manner in which several theoretical approaches demand and suggest answers to particular problems perceived to be relevant to practical unjust enrichment law. This short chapter addresses the reason for selective use of theoretical works to augment the study.

In this work, I have made particular use of works by H.L.A. Hart; Neil MacCormick, Ronald Dworkin, Lord Lloyd of Hampstead; M.D.A. Freeman and Sir Frederick Pollock. Freeman's and Pollock's works that are presently relevant, are 'introductions' to jurisprudence.

It is not essential to attach one's analysis wholly to one or the other theoretical approach. The effect of each is elucidating. To view principles and obligations from the viewpoints of the parties and the adjudicator can yield enhanced understanding. The special attention given to concepts and principles is also elucidating. This doesn't preclude the employment of Professor Hart's juristic analysis of law in terms of interacting rules: rather, it recognises the merits of Hart's characterisation of primary and secondary rules³⁸⁴ and observes the

³⁸³ Pp 3 & 4 above. It is significant that Smith holds that obligation is causally related to action (in the physical sense). This, in medieval times, might have related to the need of keeping the baron's swords in their scabbards.

³⁸⁴ *Concept of Law*, 96-98.

manner in which policy, conventions, habits and usages prepare the way for new rules.

Hart's notion of *primary obligation* is a significant example of the manner in which his theories do two important things:

- firstly, they adopt and characterise existing rules; and
- secondly, they move the analysis forward toward new rules that may emerge from a significant obiter dictum that constitutes a central thesis for an emerging rule.

An example of the first of these observations is the manner in which Hart's characterisation of primary 'obligation creating rules', sets unjust enrichments apart from orders for damages arising from a breach of contract or tort.

Obligations stemming from *obligation creating* rules can come into existence apart from any act of a defendant: they may be found to be arising from the circumstances of a case, including where a party is benefited by a non voluntary act of a third party, or where incontrovertibly benefited. *Craven Ellis v Cannons*³⁸⁵ is a good example of a benefit arising simply from the circumstances of a case. A person performing unpaid overtime to meet a critical deadline, is another: it is outside the contract but undoubtedly beneficial to the employer if it was within the parameters of the employment contract, and in the absence of voluntariness.

An obligation in unjust enrichment is a paradigm of a primary obligation. The unpaid over-time example might be fruitful of considerable expansion of the role of unjust enrichment if pursued: simply, by analogy, it is open to the courts to

³⁸⁵ [1936] 2 KB 403.

recognise a new case. Hart's notion of primary obligation well describes the new source of obligation in what might prove to be an emerging case.³⁸⁶

Obligations don't arise at every cross-road; there must be circumstances that provide the basis of reasoning. The theoretical works argue the manner in which critical circumstances are integrated into the rule-making process.³⁸⁷ It is this central idea that rules fall into one or other of these two categories, primary and secondary, that is most informative. Rules are not well categorised as orders of an authoritative institution. Separation of rules into classes that assume underlying jurisprudential factors is the first key to an understanding of obligations and duties imposed by law.

Many rules assert or protect rights by creating obligations. Others establish or authorise the structures and powers and authority that make the rights and obligations a reality. Without the secondary kind of rules, the obligation creating rules would be an esoteric expression of hopes and aspirations. The primary kind of rules provides an essential foundation by recognising that a given set of circumstances creates an obligation. The secondary rules recognise the source of authority and of the duties of individuals who act in authoritative roles.

Professor Dworkin's thesis does not appear to pre-empt the Hart notion of primary and secondary rules. It does however find that there are concepts that demand a particular uniformity in understanding. And it does recognise that certain preambles that might be relevant to several rules, act together with other

³⁸⁶ The obiter of Chief Justice Mason in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 69-70, provides an example of an imputed obligation arising from an enrichment which may, in a future case, be recognised as an obligation arising from an unjust enrichment within the scope of cases that the courts recognise as instances of unjustness. Mason CJ opined that ignorance might be a ground of restitution.

³⁸⁷ That Dworkin's approach to this is significantly different to Hart's thesis is readily understood, but that fact does not preclude the one informing the other. Professor Dworkin's work will be examined below and in chapter 9.

preliminary issues to create a climate of legal culture in which rules exist. Unjust enrichment, negligence, proprietary and fiduciary relationships depend for their meaning on a culture and a climate of understood meaning that gives life to these principles. Hart's *Concept of Law* does not deny this, though it might define only the *rules* as law. Apples are fruit but apple trees are not.

Pursuing the limits of the rules/principles debate does not augment the overall purpose to offer clarity to legal rules, actions and discourse; it is essential nevertheless, to understand that, even if one does not regard the principles and the concepts as law, it will prove impossible to work with law without acknowledging their existence. Taxonomy is not law but the question that arises in this connection is, can the law work without an educated approach to its separate fields of rules and supportive theory? Tort and contract have quite different conceptual bases, the one delictual and the other consensual. That is a fundamental illustration of taxonomy at work. Inducement to breach a contract is concerned centrally with contract, but it is a delict and belongs to tort³⁸⁸ though one might have to prove the contract to make one's case in delict. This is a very basic illustration of taxonomy at work. In the present work, such a consciousness of taxonomy becomes critical to the separation of notions of unjustness and unconscionability; rules of unjust enrichment and of equity; concepts of *benefit* from concepts of proprietary rights and of *an equity*.³⁸⁹

³⁸⁸ *Lumley v Gye* (1853) 2 E & B; 118 ER 749; *McKernan v Fraser* (1931) 46 CLR 343, 358-9 per Dixon J. Overlapping of concepts and its consequences in individual cases is the focus of several chapters in Stephen Waddams' *Dimensions of Private Law*, esp. pp 28-30 and 43-47. Waddams analyses historical and recent cases in which there might be no single concept to which the decision might be attributed, but rather to interaction of two or several concepts. See also *Emerald Construction Co Ltd v Lowthian* [1966] 1 All ER 1013.

³⁸⁹ Waddams, fn 388, finds an element of what he believes is 'unjust enrichment' in cases where there may be a lack of rules to respond to perceived unjustness. *Tulk v Moxhay* (1884) 2 Ph 774; 41 ER 1143 was cited as an instance of overlapping concepts underlying a decision. There a plaintiff successfully claimed in respect of a failure to observe a covenant regarding a common square garden when the covenant bound the former owner, but not the defendant. Waddams cites the case as an illustration of 'an element of unjust enrichment.' In fact the case was decided in equity upon a principle of express covenant: see Patrick Parkinson, *The Principles of Equity*, 64. The instance demonstrates that it is important to be clear about taxonomic boundaries. It is one thing to recognise that equity acts upon injustice, usually attributable to a wrong, but quite another use 'unjust enrichment' as a broad category of instances of perceived unjustness.

Though the paragraphs above describe ideas that are basic, or even very preliminary and general, they introduce the possibility that the study of the meaning of key foundational features, including meaning of *law*, of rules, and principles, augments the work of clarifying the role of concepts and principles in relation to rules of unjust enrichment.

Chapter 9: Principles, Rules and Theory.

9.1. Legal Philosophical stance of Hart and Dworkin.

It becomes plain that there is little that can be compared between the legal philosophical approaches of these renowned jurists, Professors Hart and Dworkin, of the mid 20th C and latter half thereof. Their approaches are important for the fact that each attempts a fundamental theoretical approach, or overview of the law as distinct from commentary on specialised branches. But they are very different overviews, the former insisting upon a 'rules' approach such that everything that *is* law is a rule.³⁹⁰ The latter adopts a 'principles and rules' approach. In the final analysis, the differences are not as stark as the student might have expected them to be.

The works of Hart and Dworkin represent two conceptual windows (or different windows on concept) that allow the student to view doctrinal law from different perspectives. Neither had unjust enrichment specifically in mind, but the

³⁹⁰ That might be more readily applied to contract in the sense that everything that is contract is a rule, but it is not readily applicable to unjust enrichment, which was relatively unresearched in terms of juristic analysis in Hart's time.

'windows' are an especially useful approach to understanding unjust enrichment. Each approach offers an explanation of why the legal concept 'unjust' gives rise to an obligation. Each is innovative in the sense that the reader is seeing concepts, principles and obligation differently than might have been the case before studying their approaches, and therein lies the merit of developmental analysis. Despite their differences, and in many respects because of the theoretical issues that their works demonstrate, their works together describe critical features of modern law.

9.2. Professor Hart's characterisation of Rules and Professor Dworkin's Analysis of Principle and Rule.

The differing Hart and Dworkin approaches to the theory of principles and rules, coming from different philosophical view-points, contribute insights that help one to understand the development of modern concepts and principles and sometimes, to explain the underlying reasoning of important judgments. This section identifies two theoretical issues which suggest a theoretical basis for unjust enrichment, an entirely new approach to the task of identifying principles and the way they work, specifically in unjust enrichment.

The first theoretical issue is Hart's enabling characterisation of rules.³⁹¹ Hart's primary rules are those that establish obligations and duties and those which proscribe certain human actions. He cites crimes, offences, and delicts. Rules which do not themselves constitute binding standards of obligatory conduct are secondary rules, not in the sense of being lesser rules, but because they follow

³⁹¹ H.L.A. Hart, *Concept of Law*, ch. 5 V: see also, Peter Birks 'Equity in the Modern law' (1996) 26 *WALR*, 1, 10-12.

upon or are consequential upon a juristic act, or legal event, such as a breach of contract.

Hart thought of primary rules in terms that they expound the law. He did not have unjust enrichment specifically in mind and he might have regarded primary rules of common law that give rise to an action as exceptionally rare. The primary rules are those that interpose or interject upon a state of affairs where there was no illegality, no wrong, and no case for compensatory ruling: that is there was no foregoing juristic act to which a *breach* response is the ordinary consequence: the rule in unjust enrichment is not a response to such an act in any event.³⁹²

If the criteria of a primary rule are that it imposes binding standards of obligatory conduct, and that it owes its origin to law,³⁹³ then unjust enrichment must be so categorised. The binding standard is usually that which describes rights and obligations, and proscribes actions in contravention. An obligation arising from the circumstances of the case that owes its origin to law is primary in this sense. The function of the actions is to impose the obligation, as Neil MacCormick explains, is the first and only juristic act.³⁹⁴ Distinct from this is a remedial action

³⁹² H L A Hart, *Concept of Law*, 96-98. Neil MacCormick, *HLA Hart*, 105-6 explains this method of differentiating a action in tort or contract that responds to a breach, a foregoing juristic act, (or a foregoing act of juristic significance. MacCormick suggests that primary rules, as Hart intended were ‘...all those categorical requirements which govern natural acts and other acts which are not themselves always or necessarily rule-invoking acts...’, at 106.

³⁹³ *Ibid.* As distinct from those that co-opt the law to enforce an agreement.

³⁹⁴ Delictual actions, by contrast, define the breach and fix the remedy. Unjust enrichment, which does not rely upon breach and is unconcerned with fault, simply imposes the obligation to make restitution of the unjust enrichment gained at the plaintiff’s expense. That is what MacCormick means by its ‘first and only juristic act’. It is as simple, in juristic terms, as a statutory liability to pay a tax. See *The Great Northern Railway Company v Swaffield* (1874) LR 9 Ex 132, 136, per Piggot B, where His Lordship rejects the notion of culpability as a relevant consideration in a case where the issues are the rights and obligations of the parties arising out of measures taken in a case of necessity. See also, Peter Birks ‘Equity in the Modern law’ (1996) 26 *WALR*, 1, 11-20. There is however, an historical association which is noticed presently.

that acts upon a breach of a right (to be free from tortious interference, or to have one's contract performed).

Why is this important? It is, because it assists the conceptual character of the unjust enrichment which, unlike a breach of contract, is a 'non-event' in juristic terms, because it does not respond to a foregoing juristic act. It is important because it assists the conceptual explanation of the obligation to make restitution in the absence of a remedial rule: there is nothing to be remedied because there is no wrong. It is important also, because it helps to explain that *rarity of the common law*, the action for interjecting a right to have money or proceeds of money that was legally acquired.

The second theoretical issue is identified by Professor Dworkin who illustrated the dependence of the law upon principle with an example drawn from the US anti-trust legislation concerning *unreasonable* restraints of trade.³⁹⁵ The United States court in the particular case to which he referred, ruled that the statutory provision is a rule of law, not a principle which might have required of the courts that they formulate rules in conformity with it. As a rule in its literal form, proscribing contracts in restraint of trade, it would have proscribed a great many contracts and the court reasoned that it was not the intention of the legislature to make such an invasive law concerning commercial agreements. The exercise is one of statutory interpretation but the process is one in which the effect of an important principle of contract law, i.e. one affecting the capacity of parties freely to contract, posed a need to read the statutory rule more narrowly than its literal interpretation, *avoiding the mischief*.³⁹⁶ By this means, Professor Dworkin

³⁹⁵ R M Dworkin, *Philosophy of Law*, 48 - 49. See above, p 96 where the comparison is used to help explain the characteristics of the Australian unifying legal concept.

³⁹⁶ *Maunsell v Olins* [1975] AC 373; *Anstee v Jennings* [1935] VLR 144.

demonstrates the essential relationship of principle and rule which exists even where the rule is a statutory one.

Highlighting the distinction between *rule* and *principle*, Dworkin makes the further observation that many rules can be reduced from a principle by stating them in conjunction with words such as ‘unreasonable’, ‘negligent’ or ‘unjust’, the words making the rule rely on some principle beyond the scope of the particular rule.³⁹⁷ The outcome, proscription, is plainly found in the rule. The broader principle might be seen, in Dworkin’s example, as one upholding contract: the rule then becomes an exception to, or a special case of that principle.³⁹⁸ The several exceptions will also need to be defined by some principle; otherwise, it will be impossible to predict the outcome. Dworkin points out that the principles enable counsel to argue the plaintiff’s case.³⁹⁹

9.3. Some Conclusions thus far, about Unjust Enrichment and Legal Theory.

The relevance of these theoretical diversions is that they introduce a method of classifying and describing rules, especially empowering rules and obligation creating rules, in a manner that facilitates analysis. Firstly, Hart’s *obligation*

³⁹⁷ Above, fn 395, p 49.

³⁹⁸ Contrastingly, North American unjust enrichment jurisprudence operates as a rule in its own right. It is more difficult to state the principle to which the rule is cognate but, because the remedy in US and Canadian law is the constructive trust, the rule stems from the inequity of the unjust enrichment and the principle enunciated by Lord Mansfield in *Moses v Macferlan* might well be seen as sufficient: above, fn 182 and p 74. See also Chapter 13 below, where it is argued that unjust enrichment rules are properly classed as exceptions to the general policy of the law to protect payments.

³⁹⁹ Above fn 397. See also the reasoning pages, pp 39, 51-53 above, on the developing character of principle: principles are binding on judges who, subject to the rules of precedent, must apply them if the case requires. Dworkin poses the question whether a judge imposes pre-existing rights and obligations. This is an interesting issue for unjust enrichment because the court imposes an obligation: the obligation was not pre-existing; nevertheless, the position of the plaintiff is surely defined by a principle that would, in the circumstances of the case, give plaintiff a right to the judgment of the court, resembling a chose-in-action.

creating primary rule takes its authority from its character; in unjust enrichment, the right which the rule seeks to restore is a primary right, i.e. to have what is justly, one's own, which compares to a right to have one's property unhindered or one's contract performed. Such primary rules operate on the facts such that, in the case of the unjust enrichment rule, if A has from B what the law recognises should, by reason of justice as defined in the cases, belong to B, a restitutionary obligation will be imposed by the law to *rectify* or *correct* the cause of the unjustness. The imposition of the obligation that corrects the unjustness is an imperative by reason of rules that Hart calls 'rules of recognition', that empower a court in the given circumstances of the case, and require it to decide according to law. They are simply the recognition of circumstance in which an action arises. Hart gives a name to laws, common law or statutory, which empower courts to hear a case and make an order. Such a thesis does not purport to change or prioritise rules of law; it simply addresses methods of analysis. A unique obligation is at issue; no other obligation in the common law 'law of obligations' is sued upon without establishing a breach.

Summarising the above, the different character of obligations in unjust enrichment is consistent with Professor Hart's notion of primary obligation, such that we are able to characterise a rule in an unjust enrichment case as a 'primary obligation creating rule'. Such a rule imposes a binding obligation that addresses the correction of existing rights rather than the remedying of a breach of rights. This addresses the difference of the circumstances of the rule that might otherwise be seen as lacking a place in jurisprudence. It does not introduce a discretionary power in the adjudicator: the imposing of the obligation is a legal imperative where the grounds of an action are proven. The rule binds the party to which it is directed upon the circumstances of the case, to make restitution.

The next point is that Professor Dworkin's reasoning demonstrates the power of a principle that categorises an action according to what it achieves. In the case of unjust enrichment, what is characterised is *an enrichment* in the hands of the

recipient or its holder. The principle interposes the character of 'unjust' in the circumstances of the case. So too, in the example noticed above, 'unreasonable' characterises a contract as one that will be proscribed under the US Anti-Trust law, as described by Dworkin.⁴⁰⁰ The notion of a categorising principle assists analysis and is well described as an 'analytical tool'.

Dworkin has demonstrated the power of principle, not simply to soften or rectify an unreasonable rule, but to enable two apparently conflicting principles to work together. The application of Dworkin's example in the context of unjust enrichment is especially informative. The unjust enrichment principle is a powerful principle after-all, because the rule it sponsors negates the right to property in the money at issue. A similarity of its method to several doctrines of equity is immediately recognisable. Equity however, is concerned with the character of a person's act or neglect, whilst throughout the long history of unjust enrichment its principles and rules have concerned the character of *benefit*.

Bringing these two theoretical approaches together in the specific context of unjust enrichment, which may not have been contemplated by either jurist, provides nevertheless, a clear exposition of the conceptual characteristics of the unjust enrichment action. It provides a language and a concept of methodology that will help to contrast the action to other concepts and principles of the law. Indeed, it becomes clearer, in the light of Hart's and Dworkin's theories, why it is appropriate, and necessary to characterise unjust enrichment, not as an independent action, but as a concept that explains many instances or sets of circumstances that the law holds unjust. Simply, *unjust like illegal, delictual and inequitable* is not itself the cause of action.

⁴⁰⁰ R. Dworkin, *Philosophy of Law*, 48 – 49; see above, p 96; and again at p158 in a somewhat different connection.

The concept/principle may characterise the circumstances of *mistake*, and *duress* for example. It will therefore be possible to deduce the elements from the rule in the case that it concludes. Such elements might be those that describe the essential characteristics of subtractive enrichment that will describe a *duress* case. They may describe the essential features of *free acceptance*. A finding of *unjust enrichment*, has a single purpose in the law, that being to describe or to apply an instance of a ground of action disclosed by the facts of the case. That purpose is inherent in the unifying concept, or in its English counterpart, the unifying legal principle. So understood, it will be essential that the grounds of actions and other subordinate principles can be described objectively.

The facility to explain the *obligation creating primary rules* in theoretical terms, is an important new development in the work. These rules are not concerned with a breach but have a justification that is capable of being explained in a way that unites all such actions. The unifying legal concept or English unifying legal principle invoked in the circumstances of a case, introduces the character of efficacious legal principles and rules that exist because the law defines circumstances of what it holds unjust. These efficacious rules are those that empower the imposition of an obligation and vest a chose, a right to judgment, in the plaintiff to correct or rectify and enrichment by restitution: just as surely the victim of a breach in contract or delict has a right to sue for redress as a direct consequence of the breach that is objectively defined. The latter however, is not adequately or accurately described as a *correction*.

At a theoretical level, the unifying concept is also the key to the *enabling* and *adjudicatory* secondary rules that Hart described as 'rules of recognition' and 'rules of adjudication.' These rules introduced by Hart's theories are, in the common law, the ordinary consequence of precedent. Therefore;

1. when subsidiary principles are understood to describe the nature of benefit, of subtractive enrichment, and the legal meaning of unjust, and,

2. those subsidiary rules also include the enabling and power conferring rules that are the ordinary rules of appointment, of adjudication, of jurisdiction and judicial powers and responsibilities, that is, rules that Hart called rules of recognition and adjudication, assumed to be present in a civilised and developed system of law, and,
3. the elements of an action are present, because an established ground of an action is recognisable on the facts and,
4. therefore, the law acts upon the plaintiff's case in a predictable way.

That is an instance of the court acting according to law by imposing upon a party that has obtained a benefit from the plaintiff in circumstances that are unjust by legal standard, an obligation to make restitution. This describes the effect that every civilised system of law should have rules that oblige one who is unjustly enriched, to make restitution of the benefit thus received.

The correspondence of practical and theoretical characteristics is, I believe, the foundation of that stable pattern of analysis that Professor Birks strongly recommends.⁴⁰¹ This is important background to questions and doubts that arise in chapter 12 about the efficacy of legal reasoning that is not founded upon doctrinal elements of law, which are principles tried and proven in a succession of leading cases. Dworkin alludes to such a thing: can it be said that prior to trial, a party is suing for recovery of rightful property or enforcement of a right when the basis of the decision cannot reasonably be assumed by counsel?⁴⁰²

Applying Dworkin's analysis, the concept described by Lord Mansfield as *natural justice and equity* is not a rule of law; it is the principle upon which rules will be founded, and it becomes inseparable from rules which are reasoned from it. The

⁴⁰¹ Above fn 217, p 92

⁴⁰² RM Dworkin, above fn 400, 50-53.

words operate in the same way as ‘unreasonable’, ‘negligent’, and ‘unjust’ operate in the anti-trust example given above. They apply principle to a rule concerning the circumstances of a case. It will be shown in chapter 11 that Justice Windeyer thought defined principles of this stature become embedded in the law and contribute very significantly to its meaning and consistency.⁴⁰³

The Dworkin approach to principle and rule well describes the manner in which the common law draws upon a fountain-head of precedent contained in judgments handed-down over many centuries, to establish the principle that will be the basis of a rule in a case. This perception is important background to the correlation to be made in chapter 10 between the common law which draws upon the rich source of principle that is organised by the doctrine of precedent, and the Continental systems of law that draw upon the rich resource of the Justinianic Roman codes as a source of principle.

Chapter 10: Principles of Unjust Enrichment; Understanding their Unique Features and Objectives.

10.1. Introduction.

A number of important statements emerge in this chapter. The following are the highlights.

- The decisions of superior courts establish that as a matter of precedent, principles of unjust enrichment support a finite list of actions in unjust enrichment, even though they have not closed the list.

⁴⁰³ *Hargrave v Goldman* (1963) 110 CLR 40, 63. The dictum is presented below at pp 189-90. See fn 370 *asto* Lord Mansfield’s dictum.

- The finite list of actions reflects the number principles which define instances where the law recognises a legal imperative that it imposes a binding standard of obligatory conduct in response to an unjust enrichment.
- In approaching this finite list established by the superior courts over time, it is helpful to view the actions in a specific unjust enrichment context;
 - i.e., where principles of the law of unjust enrichment apply, there can have been no breach such as would set up a secondary rule and a concomitant right to damages or another remedy, for a breach of a right.

If these issues are understood, it is not difficult to see that the actions are necessarily linked by a common exemplifying principle, or are described by a characterising concept.⁴⁰⁴

10.2. Finite List of Actions and the Singular Objectives.

Ultimately, the principles upon which rules are based, travel with the rule. The rule cannot be a meaningful part of a system of law without the underlying principles that describe its etymology and taxonomy. Similarly, principle is nothing until recognised by superior courts in the process of laying down a rule. Legislatures can make rules that might have no evident basis in principle, but a modern court, freed from procedural tram-lines of the forms of actions, must reason its decision in an unjust enrichment case by following the established precedents and applying the reasoning. The lower court could not be following a precedent if it applied reasoning unrepresentative of the higher court's decision. Applying a rule according to its obligation under the rules of *stare decisis* must

⁴⁰⁴ The end result, whether concept or principle, in the present context, is the same.

involve applying the principle upon which it is based. These issues are further discussed in chapter 13.

Making the same statements about limits of jurisdiction, in a slightly different way, will help to clarify what is achieved by the unifying concept or English principle of unjust enrichment operating in a variety of cases. The decisions of the superior courts

- that recognize that particular grounds of unjust enrichment are the determinants of what will be subject to judicial intervention by imposing an obligation in unjust enrichment;
- that state these grounds in rules that must be observed in accordance with the doctrine of *stare decisis*;
- that assume rules of recognition governing a judicial officer deciding a case according to law;
- at *this* point in time; and
- in *these* social and commercial circumstances,

will be fundamental in a legal system functioning according to law. The doctrine of precedent will bind lower courts to go no further. The effect of such rules is to state in each case of a ground that *this* is such a case to which any legal system that fulfils the criteria of a legal system, would respond by creating and imposing an obligation upon a party to make restitution. That reflects the foundational *Fibrosa* principle.⁴⁰⁵

The notion that there is a law enshrined in precedent that governs the extent of jurisdiction, is not restricted to unjust enrichment in modern law. The legislature and the courts determine what behaviours are acceptable in modern commerce, corporations law and business. These laws specify offences and characterise

⁴⁰⁵ *Fibrosa Spolka Akcynja v Fairbairn Lawson Combe Barber* fn 177.

particular conduct as unconscionable, misleading etc. This modern regulation of business and contractual fairness responds to social and commercial imperatives, which may not have justified such intervention of the law and the courts in previous decades.⁴⁰⁶ They do however, have their limits defined by the limits of a particular legislative instrument and judicial interpretation of the law. In the same way, in unjust enrichment, at any particular juncture there will be a finite list of allowable actions which reflects the circumstances that the law recognises as instances of unjust enrichment. The rules that establish such a system are founded upon a central principle of unjust enrichment that describes for the various actions, a unity of purpose. The *Fibrosa* principle is a broad statement of that principle.

It has been shown that there are ancient precedents for the method whereby a supervising official (in the common law, a judge of a superior court) will from time to time, be found to be contemplating social and commercial imperatives and the scope of allowable actions.⁴⁰⁷ In this ancient principle and in modern practice also, there will be a defined frame-of-reference or jurisdiction, and a defined purpose, vis., to answer whether a new action is required, or more specifically, whether the limits of jurisdiction ought to be extended.

⁴⁰⁶There may have been a time when insider trading was regulated by ordinary good faith and conscience. The notion of social and commercial imperatives justifying development in the law is rarely discussed in modern law especially because the rationale of extension of a law to a new case is argued in legal terms. Cf Daniel Friedmann 'Unjust Enrichment, Pursuance of Self Interest, and the Limits of Free-riding' *Loyola of Los Angeles Law Review*, v. 36, 830, 839ff, surveying social and commercial forces that underlie development of the law of unjust enrichment. Perceived social and commercial imperatives have been a significant influence in US law where the law envisaged in the Restatement is '...broad, flexible and open ended...', See Friedman, above, 838. In civilian systems of law the justification for a rule in unjust enrichment might be expected to be more visible in public discourse on new and prospective legislative developments in the law. Friedmann explains that the role of the courts in curtailing too wide an interpretation is nevertheless an important factor: at 837-8, citing John P Dawson, 'Indirect Enrichment', 2 *Ius Privatum Gentium*, Ernst von Caemmerer (ed), 1969, 789.

⁴⁰⁷Fn 20 above.

The impact of this complex of principles and rules is that it governs actions; binds a judiciary to function according to law; and sets the limits from time to time, of the jurisdiction. Thereby, it defines unjust enrichment and the jurisdiction in which it is applied by the courts. That complex of principles and rules is what Professor Hart described in terms of rules of recognition and rules of adjudication,

‘...the ultimate rule of recognition ... must be regarded from the internal point of view as a public, common, standard of correct judicial decision.’⁴⁰⁸

These instances of allowable actions that constitute the limits of jurisdiction, are as a matter of law and logic, linked or explained by a common principle.⁴⁰⁹ Modern unjust enrichment in Anglo/Australian jurisdictions is symptomatic of a system of law,

- that provides the conceptual foundation of each action.
- that recognises and enables the superior courts, as a matter of rule of recognition, to declare new cases.

and in which,

- reasoning and logic are founded upon historical notions of *aequo et bono*, (*equity* and expediency) such that the courts rely on many centuries of learned opinion and upon practices in other jurisdictions, ancient and contemporary, that contribute reason,

⁴⁰⁸ *Concept of Law*, 116. ‘Internal point of view...’, from the aspect of a participant in the particular legal system.

⁴⁰⁹ At p 94 above, I have shown how the Australian ‘unifying legal concept’ and the English style of general principle do the same work. The present discussion encompasses both as principle.

consistency and predictability by establishing the foundations of doctrine of unjust enrichment.

That there is such a recognition of underlying principle is an imperative: without the explanation of an underlying principle, precedents cannot be precedents at all because the cases will be unrelated, one to another.⁴¹⁰

The underlying principle is one that explains that the superior courts evaluate the scope of jurisdiction, adhering to judicial notions of legal logic. What it amounts to, in the simplest terms, is a decision that *these* circumstances are some of those contemplated by Lord Wright in his *Fibrosa* dictum,

...[a]ny civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which is against conscience that he should keep.⁴¹¹

The dictum amply states the principle of all modern cases; but whose *conscience* is at issue? This can only be answered in terms of 'conscience explaining the succession of precedents'. It is incapable of being adjudicated upon except by a court of adequate jurisdiction, usually the superior court in a jurisdiction. Lord Wright's use of 'conscience' must then, refer to *legal conscience* which is tantamount to the legal meaning of *unjust*.

This applies also to the application of legally determined meanings of concepts such as mistake, free acceptance, total failure of consideration and other grounds of unjust enrichment. The recognition of the criteria essential to a decision to impose an obligation to make restitution is a critical structure in the

⁴¹⁰ See above, p 97 and Chapter 13, where I have described the same phenomenon.

⁴¹¹ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barber*, fn 177.

law, and is critical to the nature of ‘conscience’ just as it is to the legal meaning of ‘unjust’.

These criteria include;

- common acceptance of the structure of the law;
- common criteria of an action,
- common recognition of a judicial duty to apply the law,
- consistency with the doctrine of precedent,
- consistent finding of a universal legal conscience.

All of these essential features are the outcome of an intricate web of applicable principles.⁴¹² Conscience becomes conceptually akin to *reasonableness* as a standard in tort: that amounts simply to a similarity of methodology.⁴¹³

Principles nevertheless, are the expression of legal reason and are grown upon the concepts from which they take their purpose. They are not a-priori truths having independent justification in a jurisdiction where the judges pursue reason and logic in stating the law. These are important issues when we come to say what elements of a finding of unjust enrichment are *law* and are therefore binding under the doctrine of precedent.

The High Court of Australia, in its judgments defining unjust enrichment in Australian law, has ruled that the categories of case in which the law will impose an obligation to make restitution are not closed.⁴¹⁴ The judgments did not add ‘...as tended to be the case where the common counts were accepted as

⁴¹² See Chapter 5, p 84-5 above. A notion of general principle of the Canadian kind has no place in such an interaction of principles because the underlying principle in Canadian law is expressed as a consequence of equitable doctrines applying in that jurisdiction.

⁴¹³ Not as some would have it, i.e., that there is a direct correlation; eg, R.F.V. Heuston and R.S. Chambers, *Salmond and Heuston on the Law of Torts*, 13.

⁴¹⁴ See *Pavey & Matthews v Paul* (1986-87) CLR 221, 257, per Deane J.

defining the territory...’,⁴¹⁵ although the experience of the law shows us that such a degree of formalism had characterised actions in the relatively recent past when courts in all common law jurisdictions were disposed to regard the common counts as the de-facto *shape* of unjust enrichment actions.⁴¹⁶ In *Australia & New Zealand Banking Group v Westpac Banking Corporation*, the High Court indicated a distinct change,

The basis of the common law action ...should now be recognised as lying ...in restitution or unjust enrichment ...⁴¹⁷

The dictum adopts the complex of concepts principles and rules discussed above, including the *Fibrosa* principle. It could have no other meaning but that expressed or encompassed by that *complex*.

For some lawyers, these dicta may pose more questions than they answer. They may question what it is about unjust enrichment that determines the scope of unjust enrichment actions? Is there an underlying principle which is assumed in such a dictum, and what is its nature. Is it a general principle of unjust enrichment by reference to which the courts will impose a rule? Are there several, or indeed many principles (as distinct from rules), each one of which is explained by unjust enrichment? If there is a general principle which explains all rules, is it impossible to say what it is? The answers to these questions involve the capacity of the courts to adopt the stable pattern of analysis which Professor Birks proposes, such as will allow them to reason from one action to another in a

⁴¹⁵ Above p 73.

⁴¹⁶ See Lord Wright’s observations on the point as regards English law, above pp 126, 138-39 and 171 and fn 231.

⁴¹⁷ (1987) 164 CLR 662, 673.

fashion which presents the law as unified. Indeed, recent trends in the Australian High Court suggests that no progress is being made in this respect⁴¹⁸

Professor Birks observed that the courts have not made inroads upon the development of such a 'stable pattern of analysis' as would assist in the reasoning of a unity of this branch of the law.⁴¹⁹The 'vacuum' which Keeton observed following upon the abolition of the common counts⁴²⁰ is a reality to the extent that the jurisprudence has not yet been fully developed and uniformly explained. It is potentially more significant in the Australian context because of the limitations imposed by the size of the jurisdictions.

A significant issue in relation to the pattern of analysis is the disparity between Australian law and English law in regard to the unifying legal concept and the unifying principle of English law. The concept and the English general principle are not well understood and little or no effort has been made to explain that there is little practical difference. Australian law will continue to need the broader frame of jurisprudence which is offered by the English jurisdiction at least in unjust enrichment, and whilst it need not follow slavishly, the capacity for comparative jurisprudence offered by a much larger jurisdiction is the key to internal Australian uniformity. English and Australian law are nevertheless, similar in their treatment of the elements of unjust enrichment. The key is the

⁴¹⁸ Fn 217 above. *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 demonstrates that the Australian High Court may not be progressing toward a stable pattern of analysis. See J Beatson and GT Virgo 'Deferability Principle in Unjust Enrichment' (2002) 118 *LQR* 352 at 353, '...the lack of clarity in the majority judgments as to the nature of the claim and what must be established emphasizes the need for clear, well defined principles such as the unjust enrichment principle...'; Beatson and Virgo questioned Justice Gummow's dismissal of Lord Mansfield's (Para 70-74) *aequo et bono* concept in *Moses*, saying that he omitted to analyse positive opinions including those of Professor Winfield, at p 353 and queried Gummow J's preferred analysis (para 84) in terms of unconscionability rather than unjust enrichment; '... "unjust" is not a cipher for a general investigation into justice...It is a concept that can be defined with some degree of precision by reference to the cases.', Beatson and Virgo, at 354.

⁴¹⁹ *Ibid.*

⁴²⁰ G W Keeton, *The Elementary Principles of Jurisprudence*, 414ff.

inductive judicial process that explains why the law answers the question as to when the obligation will be imposed, that is 'injustice' in a primary sense rather than a wrong as a secondary question; the former is characteristic of unjust enrichment; the latter is exemplified by a breach in contract and tort.

Each of the jurisdictions (English and Australian) acknowledges that the law is open to further development. If we characterise the development of unjust enrichment law as evolutionary, it can mean two things: firstly, the unity of conceptual foundation (because nothing can otherwise evolve); and secondly an emergence from, or breaking free from procedural constraints (which, in their day, made a jurisprudential explanation of the unity of actions unnecessary). There is no contradiction here: Lord Mansfield could look at the law, within the rigid confines of the forms of action, and recognise unifying factors that continue to explain development in modern cases in the superior courts.⁴²¹ What is needed to perpetuate what Lord Mansfield began is a conscious development of unjust enrichment jurisprudence encompassing and filling out the need for a unified, stable pattern of analysis proposed by Professor Birks.⁴²²

These sections have achieved the objectives listed at the beginning of the chapter, by demonstrating that the nature of grounds and of actions determine the extent of jurisdiction of the courts and therefore the actions depend upon principles that define clearly the character and the limits of jurisdiction. It has been explained also that linking the theoretical character of principles and rules to common reasoning when compelling communal standards are reflected in compulsive findings of legal principle, avoids the anomalous constraints upon

⁴²¹ This perception is at the root of the conclusion which I shall later arrive at, that it is essential that the law recognises and develops a jurisprudence of unjust enrichment, which will inevitably begin, as a modern science, with Lord Mansfield: see below, p 244-45, and the observations made on the judgments in *Roxborough* fn 12 in fnn 182, 418, and 617.

⁴²² Fn 217 above.

reasoning that has been seen as reminiscent of the forms of actions. It also offers the opportunity of developing sounder reasoning from case to case such as will achieve an explanation of what Lord Wright may have meant by universal conscience, that is, the correspondence of legal principle with compelling, universal communal standards of which honesty, truthfulness and good faith describe the paradigm of acceptable conduct.

10.3. Comparison with Structure of Continental Systems of Law and a Significant Conclusion.

Conceptual comparisons with some aspects of continental law in this sub-chapter will provide a background to an important conclusion about the structure of English and Australian law. A useful contribution to knowledge of jurisprudence in modern unjust enrichment is found in this study. Essentially, this concerns special characteristics of concepts and principles in both Australian and English common Law, and many Continental systems, that are the foundations of law.

The sub-chapter will also introduce the comparison between fundamental character of unjust enrichment and tort. This brief topic notices the conclusions reached by a leading German jurist about a common feature of unjust enrichment and tort in common law and German jurisdictions. The comparison is limited to a fundamental structural consideration.

In Chapter 12 it will be noted that the comparison between tort and unjust enrichment has a precedent related to the German law. Eltjo Schrage and Barry Nicholas cite the commentary on jurisprudence of Ernst von Caemmerer who

drew a parallel between ‘general forms’ in tort and in restitution.⁴²³ Von Caemmerer considered both to rest upon fundamental abstractions, i.e., that a person should be compensated for injury by unlawful acts on the one hand, and nobody should be permitted to retain an unjust enrichment, on the other. Von Caemmerer explained that these are general propositions of the law: it is for the codes, the precedents and the contemporary courts to ‘fill them out’ especially by curial interpretations.⁴²⁴

Von Caemmerer supposed that in either of these abstractions, the ‘filling out’ might take the form either of a general statement or of specific cases: both methods are in theory, compatible with each system. This recalls the oldest jurisprudential debates on the Continent about the nature of the unjust enrichment principle which, in the 12th C, focussed upon attempts to make general statements of law: ultimately they were abandoned, to revert, in the German and French codes initially, to the instances of cases allowed under the Justinian’s codes.⁴²⁵

Schrage and Nicholas comment that the ‘filling out’ only becomes sensible when the critical questions as to when liability arises are answered by one or another juristic method. In the case of the German legislation, the task must be completed by ‘legal practice’. Von Caemmerer says courts and the practitioners have then to resolve the issues concerning critical concepts including ‘unlawful’, ‘unjustified’, ‘without due cause’ etc.⁴²⁶

⁴²³ See Eltjo Schrage and Barry Nicholas ‘Unjust Enrichment and the Law of Restitution: A Comparison’, in Eltjo J. H. Schrage ed *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, 9, 26. The comparison here is not part of the comparison between principles and rules that is addressed in Chapter 12. It does however, explain the choice of tort for that comparative study.

⁴²⁴ *Ibid.*

⁴²⁵ The jurisprudential perceptions about the concept and principle are discussed again in Ch 13.

⁴²⁶ Fn 423 above, at pp 26-7. It is not suggested that any of those concepts accurately reflects ‘unjust’: ‘Unjustified’ in the English idiom implies that there is no legal justification. In the Anglo/Australian law, the party enriched has a good title until the disgorgement is effected by order of the court: up until that point, the party holds the benefit legally. Cf Daniel Friedmann ‘Unjust Enrichment, Pursuance of Self Interest, and the Limits of Free-riding’ *Loyola of Los Angeles Law Review*, v. 36, 830, 837-8. Friedmann explains this phenemon in relation to the German law where the notion of ‘unjust’ is avoided in favour of a notion that reflects ‘absence of justifiable reason’ which coincides with early continental jurisprudence.

The critical process of development of concepts principles and rules from these 'abstractions' follows one or other of two forms, that is a specific case-by-case finding of an instance of liability or obligation on the one hand, and on the other, the interpretation of a general statement of principle in legislation in the work of defining the rule in particular cases.⁴²⁷ In Anglo/Australian unjust enrichment, the reasoning from fundamental abstraction to rule follows the form, '*are the circumstances of this case an instance of what has been found legally unjust?*' Such a question does not explicitly acknowledge the abstraction.

This 'categories of case' approach is not to be confused with that specie of 'case-by-case' approach that is strictly a process of accretion without unifying conceptual explanation: some jurists might have perceived the latter phenomenon to be 'justice between man and man' without understanding the depth of jurisprudential method that was developing or has developed.⁴²⁸ The *circumstances of case* approach is very much more finely focussed on principle because it is built upon concepts and principles that define the obligation imposed by law, the nature of benefit, the circumstances of subtractive enrichment and the nature of 'unjust'. On the other hand, the final step of reasoning from abstraction to general principle envisaged by von Caemmerer is not the broad general principle approach of North American jurisdictions. It is rather more reflective of the English principle of unjust enrichment which has

⁴²⁷ In the German system, there is an analogy: von Caemmerer pointed out that it is '...a matter of legislative technique whether one codifies a general statement or rather specific cases'. Schrage, fn 423 above, 26.

⁴²⁸ Fn 42.

been perceived to fulfil a generalised unifying role.⁴²⁹As I have explained in Chapter 7, the English principle nevertheless essentially does the same work as the Australian unifying legal concept: indeed in practice, it is difficult to separate the two as *concepts*. That fact makes the observation that follow equally applicable to Australian law.

In previous chapters, I have sought to give meaning to the notion of a unifying legal concept and its counterpart unifying principle in English law. In Chapter 6, the key statement of principle in *Pavey* was examined.⁴³⁰This has provided a definition of concept and principle in a manner that is unique amongst common law jurisdictions although the English principle of unjust enrichment achieves the same purpose. The special contribution of the judgment is its achievement of an understanding of ‘concept of law’ that has seldom been articulated in the common law. This facility of *foundation* and *categorisation* of actions introduced by the unjust enrichment unifying legal concept establishes a clear and focussed jurisprudence. This is further explained in chapter 11. For the present, its importance is the clarity about unjust enrichment jurisprudence which it sponsors.

To explain this point, it is necessary to take advance notice of a conclusion to be reached in chapters 11 and 12. In the Continental and South African Roman Dutch law, the rules of unjust enrichment are legislated but their conceptual basis is predominantly the actions of the Roman *Institutes*. The interpretation of instruments by the courts freely and usually acknowledges this conceptual basis.⁴³¹ In the Anglo/Australian common law, the progression of judgments that

⁴²⁹ See Goff and Jones, fn 163, 16. ‘...recourse must be had to the decided cases in order to transfer general into concrete rules of law’. Goff and Jones, fn 163, cite Lord Wright’s analysis of Lord Mansfield’s famous dictum.

⁴³⁰ Above p 91, sub-ch. 6.2.Pp 87 and 92 and fn 215.

⁴³¹ Some detail of the basis of many Continental systems is set out in fn 193 above.

define actions in unjust enrichment fulfils the need of developed conceptual foundation upon which the grounds of actions are established by rules. This is after-all, what the unifying legal concept and the English principle of unjust enrichment achieve. The *Pavey* judgment is not the first, but it is the most central of these judgments in Australian law. In English common law, the judgments in *Lipkin Gorman* and *Orakpo*⁴³² again, not by any means the first, but the most central, fulfil the same need of conceptual focus. In civilian law, that basis is supplied by the *Institutes*. Each in its own way, supplies the conceptual basis of actions.

That is an important conclusion because it demonstrates conceptual factors in Continental law that are present, albeit in a very different form, in the English and Australian common law: that is, each relies upon a doctrinal conceptual basis, which is foundational law in the *condictiones* on the one hand, and foundational doctrines established in leading common law cases that are the land-mark cases for modern common lawyers. Each then relies upon development and application of principles by the modern courts in a manner that is true to the doctrinal basis of unjust enrichment and tort.⁴³³

In von Caemmerer's analysis, each system has, both in unjust enrichment and tort, a fundamental abstraction that is the concept of a tort and an unjust enrichment, and each relies on the superior courts to 'fill them out'. Von

⁴³² Above fnn 222 and 300 respectively.

⁴³³ See fn 406 above. The north American approach differs significantly, at least as far as unjust enrichment is concerned, because the action of unjust enrichment as described in the Restatement, is the theoretical foundation of the jurisprudence. The cases, old and new, refine and interpret the general principle but they do not define it in the same sense as English case law does. The action embodied in the general principle is akin to a legislated action. The Continental law is also legislated but the legislation adopts and interprets the ancient codes, the *condictiones*, to achieve a consistent application of age old jurisprudence. See fn 435 below: the essay of Evans-Jones and Kruse there cited characterises the Continental codes as 'systematic' systems of laws, an epithet which does not fit the English and Australian common law well and the North American law not at all.

Caemmerer's notion of *fundamental abstraction* does not quadrature with the individual *condictiones* and the doctrinal case law of Anglo/Australian law: rather, it is the statement of general objectives of the law which determines which *condictiones* and which foundational cases belonging to the head of law described by the fundamental abstraction. In fact, it may augment the work of superior courts in modern common law if the key decisions they make, for example, as to the critical elements of the general principle in negligence, and the unifying legal concept of Australian unjust enrichment, were to be characterised in the manner of being crucial or fundamental characteristics of the law. More specifically, when the Australian High Court comes to making a critical examination of what has been called "mirror loss" and "subsidiarity",⁴³⁴ as it inevitably will, it will do so in full consciousness that it is perhaps making landmark change, not just to unjust enrichment, but to the other specialities of the law that will inevitably undergo some doctrinal change in the result.

Von Caemmer's perceptions and the tentative conclusion I have drawn about similarity between the structure of German law and Anglo/Australian common law do not suggest an historical or jurisprudential convergence,⁴³⁵ nor does it offer particular benefit to be had by the comparison, but it demonstrates that in

⁴³⁴ See Niall R. Whitty, 'Rationality, Nationality and Taxonomy' in Johnston and Zimmermann ed, *Unjustified Enrichment: Key issues in Comparative Perspective*, fn 193 above, essay 23, 658 at p 705. Whitty suggests that dispensing with 'mirror loss', the exactness of the at the expense of principle, and 'subsidiarity', the rule that unjust enrichment defers to most other forms of liability, explains the vitality of German and Anglo-American law. His reference to 'Anglo-American' law can be taken to refer to parts of North America other than Quebec and Louisiana.

⁴³⁵ See also Professor Ronald Dworkin's treatment of rules and principles, above fn 399 and p 152. The comparison between the two foundations of principle is there explained, simply as a somewhat similar methodology. In comparing the *condictiones* of civilian law with the causes of actions in the English common law, Evans-Jones and Kruse did not assert convergence; rather, they found the *condictiones* systematic, in contrast to potential overlap and internal exchangeability in the English grounds, a characteristic that suggests the absence of a convergent trend: Robin Evans-Jones and Katrin Kruse, 'Failure of Consideration', David Johnston and Reinhard Zimmerman, fn 193, 129, pp 135-6. It is doubtful however, that they have understood accurately, the English actions to which they attribute over-lapping. Schrage and Nicholas, above fn 423, point out that German jurist Martinek specifically discounted a suggestion that it does suggest such a thing.

addition to rules in the cases, there is a need of recognition of the doctrinal features of a head of law in English/Australian and Continental systems alike. A doctrine-like perception of the law would explain the character of rules that are the basis of actions, separate them in terms of taxonomy, and define them in terms of purpose. Whether such rules are truly *doctrine* does not diminish this need. In the alternative “embedded” might do.⁴³⁶ That is simply an acknowledgment of the efficacy of taxonomy and clarity of jurisprudential objectives. It is a clear message to those who favour in the alternative, an active general principle and normalisation of a generally stated ground of action. This is a suitable introduction to Chapter 11. A short reassessment of unifying concept in unjust enrichment will also provide a suitable introduction to Chapters 11 and 12.

10.4. Returning to the ‘Unifying Concept’.

This sub-chapter makes a brief assessment of the possibility that juristic classification might assist toward the objective of defining a uniform pattern of analysis. The issues are demonstrated by Ernst J. Weinrib; ‘...[j]uridical classification presupposes that private law is a juridical phenomenon.’⁴³⁷ Weinrib was writing of contract, especially the fundamentals of contract theory. Such elements of contract derive, he says, not from commercial or constitutional convenience or necessity but from the juridical character of *contract*.

Categories, says Weinrib, ‘...are isolated when they are not systematically connected to one another.’⁴³⁸ The conclusion he leads us to, descending from accepted principles and rules, is that the characteristic unity of a discreet branch

⁴³⁶ Fnn 162 and 457.

⁴³⁷ ‘Juridical Classification of Obligations’ in Peter Birks (ed) *The Classification of Obligations*, 37, pp 37-39, citing G W F Hegel, *The Philosophy of Right*, s. 77R.

⁴³⁸ *Id.* p 39.

of the law also characterises the subordinate classifications it contains.⁴³⁹ The dilemma however, is whether one regards the juridical nature of contract as stemming from the juridical character of *agreement* or alternatively, from *promise*: the difference might be significant.⁴⁴⁰

A juridical concept of unjust enrichment will be differently analysed depending upon fundamental characteristics that vary with the jurisdiction, for example, whether it is a unifying legal concept or an active normative general principle. The character of 'unjust', whether or not it is regarded as a juridical question, is to be determined upon a complete overview of actions.

In the end, it will be essential that the juristic classification agrees in all respects with the fundamental requirements that rules must be united by principle stated in the cases if they can be truly regarded as instances of the application of precedent; and secondly, a decision making new law would properly require a judgment of extraordinary quality; a profound treatment of authority and of principles.⁴⁴¹ It is doubtful that juridical analysis, the opinions of legal scholars, can contribute more than this in terms of practical application of principles especially because, in the final analysis, reasoning is plainly the work of the courts rather than the commentators.

⁴³⁹ This, as regards unjust enrichment, is because in juristic terms, the law does not extend to categories of commercial losses or unanticipated expenses which defy explanation in terms of 'benefit' and subtractive enrichment. Indeed, it might be said that that Weinrib's presentation suggests that the doctrine-like character of unjust enrichment will itself determine that the circumstances that we call 'grounds' are the rational imperative of unjust enrichment.

⁴⁴⁰ *Ibid.* Weinrib claims that restitution is a 'notorious example' of the frustrating influence of history upon the development of juridical categories of law. I demur. I believe that one of the great benefits of having Lord Mansfield in the middle of common law unjust enrichment history is that he has provided the stimulation that has allowed modern juristic character of the law to survive the stultifying effects of the quasi contract misconception on the underlying jurisprudence. Weinrib's statement however, might have intended a comparison with the North American law of restitution.

⁴⁴¹ See p 188, below.

A clear understanding of juridical classification may nevertheless, provide a safeguard against unprincipled developments. Problems about whether an action is truly, taxonomically within the sphere of unjust enrichment are what this consciousness might seek to avoid. Such a question is a rarely encountered in unjust enrichment however, because unjust enrichment actions cannot arise unless there is a benefit had at the expense of a party in circumstances that are a ground of an action.

Alternatively, there may be a different approach to analysing actions simply according to content, and the principles they serve. A broad general principle may be so described. In this kind of action, which is dubiously representative of Anglo/Australian law, it could be asked are the offending actions formed upon a foundation of external policy or quasi constitutional factors that do not derive from the juridical characteristics of *unjust enrichment*? The use of legislated actions of unjust enrichment for recovery of benefits of a broader classification might be an example.⁴⁴² This might become a reality if the *at the expense of or* “minor loss” rules, as they are sometimes called, are softened.

Whatever the merits of claims made for adoption of juristic character of rules, actions and principles in general, I do not favour pursuit of the re-interpretation of unjust enrichment under the banner of juridical or juristic analysis, especially because I believe that the reasoning that characterises the fundamentals of unjust enrichment is adequately described, either as doctrine or doctrine-like principle, or as ‘concepts and principles embedded in the law’⁴⁴³ which achieves the same effect as attributing doctrinal characteristics to the elements of the

⁴⁴² See fn 18, especially the article of Professor Birks’ in which he argues the influence of socio/political factors in the drafting of the original *Restatement*. It is just this kind of influence that, in Weinrib’s argument, sets up a rationale of actions that is at odds with the grounds determined by innate doctrinal characteristics. See fn 435 suggesting that Weinrib had North American restitution in mind when he asserted a frustration of the doctrinal development of modern grounds.

⁴⁴³ Fn 162 above and below 457.

actions. The doctrine-like character of unjust enrichment rules entails a similar characterisation of concepts and principles. This will achieve precise and predictable classification of grounds.⁴⁴⁴

The fundamental rules of unjust enrichment assume a significant unifying potential because together, the rules which we could categorise as Professor Hart did, that is, as *primary, secondary, rules of recognition* and *rules of adjudication*,⁴⁴⁵ describe the character and extent of the law. They define instances of rights and obligations. This, however, depends upon analysis of the leading cases and follows from the nature of the considerations that are unjust in law, rationally, self-determining.⁴⁴⁶

The significance of the discussion of classification from a juristic standpoint is that Weinrib's notions are focused upon a special extension of classification; taxonomy, but with a more specifically descending order of classification that introduces notions of juristic concepts such as the inherent purpose of rules. The question 'what is justice?' can be seen to be as significant as what the law says is an instance of unjust enrichment. This I believe, is an interesting approach. An adequate enquiry is nevertheless achieved by attention to taxonomy that, if followed according to the principles of the cases and in terms of parameters that satisfy the test of concepts and notions elucidated by methods properly adapted to their character.⁴⁴⁷ This will defend the law against definition of rules according to new and unpredictable parameters.

⁴⁴⁴ Fn 442 above.

⁴⁴⁵ Chapters 9 and 11.

⁴⁴⁶ Above, sub-chapter 10.2.

⁴⁴⁷ See Professor Hart, fn 571, and see *Hill v Van Erp* (1997) 188 CLR 159, 190, per Toohey J, making a cognate assessment of the proximity principle in tort; see pp 233-34.

Chapter 11: Jurisprudence of Unjust Enrichment.

11.1. Introduction.

In this chapter, I will explain further the importance of a clear and focused jurisprudence of unjust enrichment.

Over the course of eight hundred years, the common law of unjust enrichment has been isolated from developing principles and rules and from the kind of influences that were the foundation of legal taxonomy. The Crown, through the official policy of the courts, tried relentlessly to isolate the common law from outside influences so that at least officially, Roman law and ecclesiastical Canon law would play no part in the development of jurisprudence. Unjust enrichment, from the time of its earliest manifestation in common law, experienced several mutations driven by fundamental changes in the common law as a whole. These mutations were not all positive for the development of principle and its early association with *assumpsit* and the persistent *quasi contract* perception stultified the growth of jurisprudence.

Such was the impact of the forms of actions and the residual fixation upon stereotypes as principles and rules, that the jurisprudence was, in any case, thought to be unnecessary or irrelevant. It is indeed ironic that at the end of the journey, the English common law of unjust enrichment has limited, and yet fundamental similarities to Roman law and to Roman-Dutch law of Continental Europe and South Africa. The extent of similarity is outlined in the previous chapter.

In spite of the durability of the underlying concept and principle, there exists a conviction amongst some members of the profession that Anglo/Australian law of unjust enrichment has yet to embark upon its natural journey, hand-in-hand with equity; there is a belief that *unjust* can be rationalised by merging it with concepts of *unconscionable* and *inequitable*.⁴⁴⁸ It is true that North American common law has gone down this path, but the North American unjust enrichment has probably been influenced by just one aspect of civilian jurisprudence of Continental Europe: German law has avoided the word ‘unjust’ in favour of ‘unjustified’ that has a wholly different connotation.⁴⁴⁹ The comments in the previous chapter make it plain that a law of unjust enrichment that depends upon absence of juridical reason for transfer, does not represent Continental law: indeed it resembles only one of many aspects of the Continental actions. There is an urgent need of clarity about jurisprudence if the courts are to continue to develop a law of unjust enrichment that is internally consistent, predictable and soundly argued and explained in the courts. As the development of arguments will show, the conceptual character of unjust enrichment is the key to unity of actions.

⁴⁴⁸ The Australian High Court has exhibited the influence of this line of thinking without explaining how the fundamental differences of purpose and focus can be assimilated; see fnn 536 and 537 below. In an obiter dictum in *Dart Industries Inc v Décor Corp Ltd* (1993) 179 CLR 101, 111, Deane and Dawson JJ expressed an opinion that, in a context of a fused law and equity, principles of fairness and justice underlying earlier decisions were to be seen as at least cognate to equitable standards of unconscionability, or lack of good conscience. The dictum may have been rather more directed to equity informing the concept of unjust in unjust enrichment than to promoting assimilation of principles and rules. The US law is considerably more open-ended: see fn 412 above.

⁴⁴⁹ Above, fn 426 and accompanying text. See also fn 293 and accompanying text. The notion of ‘lack of juristic explanation for transfer’ which may be considered a satisfactory approach to jurisprudence in some North American jurisdictions appears to debunk principled explanation of the actions: In this respect, see above p 88; the lack of jurisprudential relationship between the unjust enrichment principle and the constructive trust resembles the quasi contract enigma because unjust enrichment as compared to equity has a completely different focus: and p 121; the enquiry as to whether there is a justiciable reason for transfer ‘...answers only one question...’: and see also 170 and 174; without recognition of an underlying principle, rules cannot be precedents because they are not capable of being uniformly explained. See Daniel Friedmann ‘Unjust Enrichment, Pursuance of Self Interest, and the Limits of Free-riding’ *Loyola of Los Angeles Law Review*, v. 36, 830, 838, where he comments upon the difference between ‘unjust’ and ‘unjustified’ in relation to German law.

Every civilised system of law should have rules of unjust enrichment⁴⁵⁰ and its development, in the common law, is the task of the courts. That is not to say that decisions by courts of ultimate authority will be *good law* in the practical sense and in terms of jurisprudence, when the decisions fail to recognise the theoretical issues and take account of the relationship to the common law as a whole. These are issues of theory and taxonomy: they are not rules of law: nevertheless, it will be shown that internal consistency in the law cannot be sustained if they are ignored as issues.

The questions to be answered in this chapter are these:

1. How do the works of theory analysed in previous chapters, assist analysis of concept, principle and rule?
2. What elements of a decision, of concepts, principles and rules, form part of the rule and might therefore constitute precedent for later cases?

The latter question is important: there must be clarity about what is law, and therefore, as to how the courts are to explain a law of unjust enrichment that is internally consistent.

11.2. Theory, and Decisions in the Courts.

Rules must be united by principle. When a superior court makes a decision effectively breaking new ground, a great deal depends upon its interpretation of concepts principles and rules. The finality of the superior courts' decisions is a determinant of the direction that the law will take because of the obligation of inferior courts to follow binding precedents. A significant question is this,

⁴⁵⁰ The passage is meant to recall *Fibrosa*, above, fnn 476 and 411 and accompanying text.

what does theory offer as guidance to the courts on issues of jurisprudence when a fundamental change in the law is contemplated?⁴⁵¹

A starting point will be a recognition that a decision making new law would properly require a judgment of extraordinary quality; a profound treatment of authority and of principles; and, extraordinary foresight as to what will be the effect of a new decision upon the existing grounds. Of equal importance is the compatibility of the new ground and its incidents, with other branches of the law. Such was the quality of decisions in *Fibrosa*,⁴⁵² *Pavey*,⁴⁵³ *Lipkin Gorman*,⁴⁵⁴ and *David Securities*,⁴⁵⁵ to mention but a few examples.⁴⁵⁶ Rules governing what a superior court may do and what its decisions must do are the standard by which a learned opinion might be formed that a decision is law: I will treat this topic under several headings and suggest conclusions that can be drawn.

(a) The rudiments of jurisprudence of unjust enrichment.

It is in this context that rules that Hart calls rules of adjudication and rules of recognition are perceived to be the product of concepts and principles that promise consistency, predictability and efficacy in theoretical terms.⁴⁵⁷ In this light, the choice of approach by which one will be guided, i.e. of Hart or Dworkin or others, is not crucial, and much can be learned from each of them. Of crucial

⁴⁵¹ Cf Sir Frederick Pollock, *A First Book of Jurisprudence*, 17, pointing out that a rule of procedure made by a judge is a law even though it is habitually called 'a rule of court'.

⁴⁵² *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barber* fn 177.

⁴⁵³ *Pavey and Matthew's Pty Ltd v Paul*. fn 1.

⁴⁵⁴ *Lipkin Gorman v Karpnale Ltd*. [1991] 2 AC 548.

⁴⁵⁵ *David Securities Ltd v Commonwealth Bank of Australia* fn 204

⁴⁵⁶ This line of reasoning might suggest that there are issues that might eventually see the High Court revisit its decision in *Dart Industries*, fn448, at least to explain perceived anomalies. The nature of the theoretical problem is noticed by *Mason and Carter*, 1995, [1711]. A part of equity is not '...excised to become part of the law of restitution.'

⁴⁵⁷ See Windeyer J in *Hargrave v Goldman* (1963) 110 CLR 40, 63, describing important concepts as '...concepts, pre-requisite to a finding of liability, embedded in the law, by compulsive pronouncements of the highest authority, and which give the law symmetry, consistency and the defined bounds essential to reasonable predictability.' See fn 467 below.

importance though, is the character of the primary obligation that is imposed by a court in response to an action for unjust enrichment. That was argued in Ch 7 as the central characteristic of unjust enrichment.⁴⁵⁸ This highlights a need for understanding of the jurisprudence that encompasses the structure of concepts, principles and rules of unjust enrichment. The rules must be understood as inter-related and this needs to be explained.

It has been seen in Chapter 6 that Hart proposed that several instances of a rule may be different constituents of the same complex activity.⁴⁵⁹ To view the notion in a modern relevant context, it could be explained that a company limited by shares, and a company limited by guarantee are instances of a corporate legal entity that can be seen as a 'complex activity'. Hart's notion of 'complex activity', in a given context, captures the interaction of the many subsidiary rules, and in unjust enrichment, it refers to subsidiary rules that uphold and defend a primary right and a complementary primary obligation. It is a tool of language and has no legal significance except in the manner that it borrows ideas from everyday usage to help explain what is happening in unjust enrichment.

In the unjust enrichment context, a notion of 'complex activity' has served its purpose if it contributes to understanding that the rule in an unjust enrichment case relies upon a complex of contributing rules. These contributing rules reflect the manner in which other groups of rules work together such as 'rules of the law of negligence', 'rules of equity' or 'rules of contract'. Each group will be important to the foundation of rules in cases that draw upon these foundational and subsidiary rules. The character of these contributing rules becomes important when it is considered that they may be critical to the rule in a particular

⁴⁵⁸ pp 126-27 and 132-33.

⁴⁵⁹ Above p 135-6, and see fn 333. The notion employs the Hart notion of complex activity which combines reasoning from several sources of principle; H.L.A. Hart, *The Concept of Law*, 15-16; see also Neil MacCormick, *H.L.A. Hart*, 20 et seq.

case. In unjust enrichment, the character of *benefit* is defined by such subsidiary rules.

Comparison with other fields of law is elucidating. It will augment my purpose to look briefly at comparative experience in chapter 12 where a comparison of concepts, principles and rules is made with especial focus on the law of tort. Some aspects of the tort comparison however, have immediate relevance. One might ask, is the 'neighbour principle'⁴⁶⁰ which has had such a profound influence on the law of tort, a principle of law, or is it a rule, or an element of a rule? If it is a principle, the next enquiry is this: is it now, as it was in Lord Atkin's 1932 judgment, an underlying concept upon which a narrower precedent was built?

In suggesting answers to these questions, it is pertinent to consider the relationship of principle and precedent (itself a legal doctrine) in the following way:

- Is it so that in Lord Atkin's day, the *neighbour* principle was not part of binding precedent? and
- might it therefore have been departed from by a court of lower or equal jurisdiction even though, in doing so, the rule in *Donoghue*⁴⁶¹ might have been rendered artificial, or uncontrolled by governing principle, or devoid of substance without it.

⁴⁶⁰ fnn 344, at p 582 per Lord Atkin.

⁴⁶¹ *Ibid.*

As though to answer this very question, in a 1963 dictum, Windeyer J described the *neighbour* principle as

...a concept of a duty of care ... a prerequisite of liability in negligence ... embedded in our law by compulsive pronouncements of the highest authority.

He continued,

...and it may well be that it could not be otherwise, if the law of negligence is to have symmetry, consistency and defined bounds and its application in particular cases is to be reasonably predictable.⁴⁶²

Consideration of *Donoghue's* case will reveal the rationale of Justice Windeyer's conclusion. Without the concept of duty of care, there was no uniform, reasonable basis for distinguishing between a case where a duty might be owed and one where no such duty could reasonably be imputed.

Such is the nature of the theoretical issue which underlies the description of unjust enrichment and its function in the law. Justice Windeyer's dictum, if we may apply it to unjust enrichment, would hold the subsidiary elements of the primary obligation, to be embedded in the law. This reasoning entails that when we refer to the obligation that arises from a demonstrated ground of unjust enrichment, we refer also to those subsidiary elements of the unjust enrichment concept which are 'embedded' in the law, that is, firstly, the obligation relates to a 'benefit' defined in the cases; secondly, a plaintiff will only have standing if the enrichment is at her/his expense;^{463a} and thirdly, it is founded upon a ground of legal unjustness recognised by the superior court of the jurisdiction.

⁴⁶²*Hargrave v Goldman* (1963) 110 CLR 40, 63.

^{462a} See Mason and Carter, fn 313, [205], negating one of the elements of unjust enrichment.

There are other subsidiary rules that are embedded in *unjust enrichment* or that are assumed by its central features. One is that voluntariness vitiates the ground of the action, but others define the elements of grounds such as the meaning of free acceptance, failure of consideration etc. All of these subsidiary rules, principles and concepts are contemplated in the concept of unjust enrichment.

Explaining unjust enrichment in this way assists in analysing the jurisprudence. At the heart of the *complex activity* (unjust enrichment) are special primary and secondary rules. The primary obligation of restitution reflects a primary rule of the kind that defines the curial response to an unjust enrichment ground, by its interaction with secondary rules of adjudication and rules of recognition that Hart described as 'the heart of a legal system'.⁴⁶³ Hart's 'primary rules' are those that establish obligations and duties and define crimes, delicts and contract. The obligation in unjust enrichment, being the direct consequence of the enrichment is primary. His secondary rules include those that establish the jurisdiction of courts to deal with primary rules. Rules of recognition that I have explained are really a consequence of precedent, are part of these secondary empowering rules because they relate to the *manner of recognising obligations* rather than the obligation to make restitution itself.

⁴⁶³ *The Concept of Law*, Ch 5, esp. pp 96-98. See above Ch 9.2, pp 142 ff. The distinction between primary obligation and obligations perceived to arise under other areas of law can only be explained adequately in terms of Hart's notion of primary and secondary rules. Obligations under other heads of law, with the exception of some rules in equity, are secondary in the sense that they derive from an order to abide by a judgment, so that they are responses to secondary rules under Hart's scheme of primary and secondary obligations, rules, rights and duties. Cf fn 280 above. See also fn 319 above, concerning the long history of the distinction between primary and secondary obligations. Professor Birks advocates a similar approach to that of Hart, in this respect: Peter Birks, 'Equity in the Modern Law', (1996) 26 *WALR* 1, 11-20; and, Mason and Carter, fn 313.

Neil MacCormick's commentary on *Hart*, observes that Hart intended by *rules of recognition*, that they describe the obligation of the official, *qua* judge, to apply rules and adjudicate according to law. This is consistent with the doctrine of precedent in the common law.⁴⁶⁴ Such obligation to apply the rules authoritatively stated by a superior court, involves both the application of primary rules imposing a primary obligation such as to make restitution, and secondary rules, 'finding tort', 'ordering damages'. Unjust enrichment is quite different to tort in this respect. In unjust enrichment, what is required is the rule of recognition inherent in precedent, binding the court to impose the primary obligation according to law. It is simply a rule familiar to lawyers that bears a special characterisation to enhance explanation of the innate characteristics. Each speciality of the law will be found, to some degree, to exhibit its own special characteristics.

MacCormick envisages that many of these rules will be found in the intent of the legislative rules that establish the office of judge and the institution of the court. He explains that Professor Hart's subordinate rules and the rule defining the ground of a particular action, are *law*. That primary obligation extended to '...all those other rules which are "valid" [Hart] because they satisfy the criteria of recognition.'⁴⁶⁵ In this way, unjust enrichment is a primary rule because it identifies an obligation; but it is also a rule of recognition because it joins with the statutes establishing the judiciary requiring a judge to impose, through enforceable orders of the court, an obligation to make restitution.⁴⁶⁶

⁴⁶⁴ See A. MacAdam and J. Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia*, esp. ch 16, for their treatment of principles and rules in the context of modern doctrine of precedent. I do not however adhere to their conceptual compartmentalisation of rules and principles in the law, which I believe is highly artificial in some circumstances, a fact which is borne out by this study of unjust enrichment. Other leading texts consulted have included Rupert Cross and JW Harris, *Precedent in English Law*; Melvin Aron Eisenberg, *The Nature of the Common Law* ('Eisenberg'), Laurence Goldstein, *Precedent in Law* ('Goldstein'), and R. Dworkin, 'The Model of Rules' in Ronald Dworkin ed. *The Philosophy of Law*, Ch 11, ('Dworkin').

⁴⁶⁵ Neil MacCormick, H L A Hart, 22.

⁴⁶⁶ Judicial duties and the powers that they imply are reflected in Professor Hart's rules of adjudication and rules of recognition. Characterising rules in this way does not suggest anything about the authority of the rule: it is simply a matter of categorizing the rules to assist analysis. Hart did not have unjust enrichment specifically in mind, but the notion of a 'primary rule' becomes particularly useful in unjust enrichment in describing the differences between rules that are founded on breach of a primary rule, e.g. contract, where the primary rule is an obligation to perform ones contract, and secondary rules, ordering compensation for the breaches of contract, that do not arise in unjust enrichment because the imposing the obligation to make restitution is a primary response to a primary rule, that which holds that in circumstances identified by the superior court, one is obliged to make restitution for unjust enrichment.

Thus far, the work of this chapter has been to analyse the complex of rules that serve to define the rudiments of unjust enrichment jurisprudence. This will facilitate one of the conclusions to be drawn at the end of this chapter in these terms:

- without a predictable jurisprudence of its own, unjust enrichment is at risk of being defined in terms of doctrines of other branches of the law, to the mutual disadvantage of taxonomy and principle in each.

(b) The work of concepts in relation to jurisprudence.

In negligence, the principles determine the circumstances that give rise to a duty of care resting upon a particular person in a specific case. A host of concepts are invoked in a rule of this kind. In unjust enrichment, the principle or concept that unifies cases tells us what is essential to the action. Concepts of *benefit* or *enrichment*, and *at the expense of*, and *legal unjustness*, establish the criteria of recognition: these rules address issues, especially, the standing of the plaintiff, the character of the benefit in dispute, and the reason of legal unjustness: 'recognition' gathers together several different kinds of rules that affect a plaintiff's ability to make its case. The concepts like *benefit* and *unjust*, make it possible to articulate the rule. Thus legal concepts are '...concepts, pre-requisite to a finding of liability, embedded in the law, by compulsive pronouncements of

the highest authority, and which give the law symmetry, consistency and the defined bounds essential to reasonable predictability.⁴⁶⁷

It becomes clear then that to say what is *law* and what is mere legal concept or a supporting principle, is a task fraught with some complexity. It can be concluded though, that analysed in this way, concepts of unjust enrichment, express essential characteristics of secondary rules, (defining rights to legal redress and the obligation on judges to apply the primary rules of law). It is therefore possible to assert that the subsidiary concept of *at the expense of*, for example, is an essential part of a rule of law and therefore of the rationii of relevant cases. It could not be contemplated than an action existed without it.

The negligence general principle and unjust enrichment concept/principle, whilst expressed as principles underlying the rule in the case, are in fact also rules of recognition in the sense in which Hart uses that categorisation. The enabling principle and the obligating rule of recognition, work together, establishing the rule and obliging the court to apply it according to law. If one follows Justice Windeyer's dicta cited above,⁴⁶⁸ they are inseparable from the rule laid down by a court in a finding ordering damages for negligence or restitution for unjust enrichment. That conclusion follows Hart's reasoning also. These concepts, principles and rules are the tools by which the courts 'fill out' the broad propositions, or 'fundamental abstractions' that will be commented upon in the next chapter.

It is now possible to say how the principle of unjust enrichment is related to a unifying concept. This is because the reasoning in both the English general principle and the Australian unifying legal concept, informs both the primary

⁴⁶⁷ *Hargrave v Goldman*, per Windeyer J, above fn 462.

⁴⁶⁸ *Ibid.* The dictum is quoted at p 191.

rules and the secondary rules, depending on which purpose one has when referring to the principle. And when it is asked, does the concept, or the principle or both, form part of any decision of the superior courts which is binding upon a court below, it can be answered that

- as an essential part of the primary rule, the source of the obligation imposed by law, and
- as an essential part of the secondary rules, empowering and obliging a court to order restitution,

both concept and principle are inseparable from the decision of the court.

These paragraphs contribute to a second conclusion to be drawn below. Thus, The function of the unifying legal concept is to draw together the characteristics of an action. Concepts are seen to be central reference points which assist in defining the factors which draw the law to a unity of purpose.

(c) Theoretical contribution to underlying jurisprudence.

The merit of following Hart has been that his work makes Justice Windeyer's dicta that much more specific in terms of what is authoritatively 'embedded in the law'. The principles of unjust enrichment are made more comprehensible by analysing them in terms of primary and secondary rules; they take on this character of 'rules' in the authoritative finding of the court.

Two summary points may be made at this juncture:

1. The *concept* and *principle* of unjust enrichment are inseparable from the law when they are found in the decision of a court. The concept of unjust enrichment is important to taxonomy when used in other contexts; that is, it informs about the nature of the obligation imposed by law and about the role of the court in a relevant case.
2. 'unjust enrichment' is not mere conceptual, contextual background to the reasons for the decision; it does not cease to be *law* in an actual decision

simply because it is seen to be a mere concept. Indeed, it assumes the character of doctrine.⁴⁶⁹

These conclusions help us to understand what Hart intended in his thesis when he wrote ‘...a distinguishing, if not the distinguishing characteristic of law lies in its fusion of different types of rules.’⁴⁷⁰ The conclusion describes well the reasoning of the Justice Windeyer dictum.⁴⁷¹

11.3. Hart and Kelson: Theory Augmenting Reasoning in the Cases.

In unjust enrichment, the character of subordinate rules as essential elements of a judgment, is well illustrated by the reasoning of Lord Goff in *Kleinwort Benson Ltd v Lincoln City Council*.⁴⁷² Lord Goff observed that the action in restitution for mistake accrues at the time of payment.⁴⁷³ Lord Goff found that the action arose independently of whether the parties or one of them, believed reasonably, on an established view of the law, (or even because of a previous curial decision) that there was no mistake of law. It could be said, at the time of payment of the money, that no one was mistaken. (This was because other litigation on the *swaps* cases had found the swaps agreements ultra-vires). But that was not the issue if in the eyes of the law, the money was received at the expense of the plaintiff in a circumstance that the law holds to be unjust. The actual consciousness of mistake, at the time of payment (under the supposedly valid

⁴⁶⁹ Compare the juristic meaning of an ‘account’ in the ancient action: unjust enrichment is not mere quantum: see above, p 38 and fnn 78 and 93. As to the meaning of this reference to doctrine, see pp 179-80 above describing the doctrinal foundations of rules in the common law to be found in the leading cases, specifically the conclusion that a ‘...doctrine-like perception of the law would explain the character of rules that are the basis of actions.’

⁴⁷⁰ Concept of Law, Ch 5.

⁴⁷¹ See also Sir William Anson, Principles of the English Law of Contract, 195, 471 for related comment on the character of mistake in contract.

⁴⁷² [1998] 4 All ER 513.

⁴⁷³ *Id.* at 542.

pre-existing agreement) was irrelevant.⁴⁷⁴ This illustrates the complex system of different rules that conforms to Hart's pre-requisite of *law*. Lord Goff's dictum employs a rule descending by virtue of precedent, from authoritative cases, that mistake is a ground of an action in unjust enrichment, rather than an event. Hart would have expected that the law of unjust enrichment would comply with a fundamental characteristic in that it is "...a fusion of different types of rules...", and the law of negligence likewise.⁴⁷⁵ This assumes, I believe, that rules may be developed by analogy with another field of law⁴⁷⁶ or another action in the same legal field, which resembles the complex activity that Birks referred to as a *pattern of analysis*.⁴⁷⁷

A theme pursued by Hart in his *Concept of Law*, explains that the union of two elements of the law, that is, the coercive rules and the obligation creating rules,⁴⁷⁸ has the power to explain or elucidate 'the concepts that constitute the frame-work of legal thought'.⁴⁷⁹ If applied to concepts upon which unjust enrichment is built, the statement might be seen to be relevant to the dependence of obligation upon the tripartite elements,

⁴⁷⁴ It follows that honest receipt cannot operate as a defence in point of principle. If one interposes that the law will not impose an obligation because of honest receipt, it must be that there is something by way of a qualifying factor which forms no part of the syllogism; see *Kleinwort Benson* fn 472, 540-1, per Lord Goff. Cf., *David Securities Ltd v Commonwealth Banking Corporation* fn 204, p 399, per Brennan J.

⁴⁷⁵ *Concept of Law*, Ch 5. In *Kleinwort Benson*, fnn 472 and 474, the payment was in any event, not the focus of mistake. The mistake was the belief of the parties in the particular case, that the swaps agreement was valid.

⁴⁷⁶ I perceive Hart's notion of 'fusion' however, as rules working together in the manner of equitable estoppel working together with rules of contract in *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387, esp. 428-429 per Brennan J, rather than some degree of melding in which rules lose their identity and taxonomy of the law is compromised. See also *Austotel Pty Ltd v Franklins Self Service Pty Ltd* (1989) 16 NSWLR 582, 602-603, per Priestly JA, dissenting. See also Rupert Cross and J W Harris, *Precedent in English Law*, p 26, stating that reasoning from case to like case by analogy is consistent with *Stare Decisis*; the authors cite Parke B in *Mirehouse v Renell*, (1833) 1 Cl. & F. 527, 546. 'Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of obtaining uniformity, consistency and certainty, we must apply [them] where they are not plainly unreasonable and inconvenient, to all cases which arise:...'.

⁴⁷⁷ Above p 173-4 and fn 418.

⁴⁷⁸ Hart's notion of obligation has been noticed in the explanation of obligation above in sub-ch's. 7.3 to 7.5 inclusive.

⁴⁷⁹ *Concept of Law*, 81.

- (i) the concept of benefit,
- (ii) the exclusiveness of the subtractive enrichment, and
- (iii) the juridical nature of unjustness.

Indeed, it is the interaction of rules which Hart has characterised as coercive for one part, and obligation creating for the other that gives life and momentum to these concepts. Here can be seen an explanation of the role of *unifying concept* which draws together subordinate concepts into the kind of unity Hart refers to.⁴⁸⁰

These paragraphs contribute to the conclusions below in this manner:

- in regard to the notion of *unifying legal concept*, the words refer to the conceptual structure of the action, combining as it does the rules that provide the characterisation of obligation and the rules that determine a legal standard of unjustness.

Just as tort provided the conceptual framework within which the courts were able to find new economic torts, it was possible too for the courts to find, as in *David Securities Ltd v Commonwealth Banking Corporation*,⁴⁸¹ adopting the decision of the Supreme Court of Canada in *Air Canada v British Columbia*,⁴⁸² that mistake of law was a new ground in unjust enrichment. The reasoning that once mistake was a ground, there is no point in distinguishing one mistake from

⁴⁸⁰ Contrast the reasoning Hans Kelsen, *General Theory of Law and State*, 50 ff. Kelsen inverts the notions of rule and sanction to propose that the reason of the *rule*, which Hart would equate with principle, is mere justification for the primary aspect of law, vis the order which must be complied with. There is no apparent scope for interaction of concept and principle in a Kelsen like approach. This will become pertinent to a later conclusion in this work.

⁴⁸¹ (1992) 175 CLR 353.

⁴⁸² (1989) 59 DLR (4th) 161, p 191. Schrage and Nicholas, above fnn 423 and 435 point out that German jurist Martinek specifically discounted a suggestion that it does suggest such a thing.

another,⁴⁸³ indicates resort to a wider concept. That wider concept has no intrinsic legal authority, however. It belongs to taxonomy. It is useful for present purposes to reflect that the example illustrates that there is a principle of unjust enrichment being relied upon that is broader than mere inert concept and broader than the immediate 'mistake' rule: so too with the development of tort.

It is conducive to understanding of the unjust enrichment *unifying legal concept*, in the mean time, to examine a finding in the judgments in *Burnie Port Authority v General Jones Pty Ltd*⁴⁸⁴ which remains a masterful description of judicial methodology, even though the Australian High Court has adopted another view of the concept of proximity (at least in some cases).⁴⁸⁵

In *Burnie Port Authority* the High Court explained the place of the authorities on the tort of negligence in the Australian law, to that point in time. As there analysed, the concept of proximity explains the difference between the dicta of Brett MR firstly in *Heaven v Pender*⁴⁸⁶ and then in *Le Lievre v Gould*⁴⁸⁷ (then Lord Esher) where his reasons for judgment drew upon analogy of physical nearness on the one hand, and the principle enunciated by Lord Atkin in *Donoghue v Stephenson*⁴⁸⁸ on the other. The majority judgment in *Burnie Port Authority* included this conclusion:

...that common element of proximity ... remains the general conceptual determinant and the unifying theme of the categories of case [of negligence]⁴⁸⁹ ... [w]ithout it, the tort of negligence would be reduced to

⁴⁸³ *Hydro Electric Commission of Nepean v Ontario Hydro* (1982) 132 DLR 3d. 193, 209, per Dickson J, applied by the majorities in *Air Canada v British Columbia* (1989) 59 DLR (4th) 161, 191, and *David Securities Ltd v Commonwealth Banking Corporation* (1992) 175 CLR 353, 375.

⁴⁸⁴ (1994) 179 CLR 520, 541-3.

⁴⁸⁵ This phenomenon is described in Chapter 12.

⁴⁸⁶ (1883) 11 QBD 503 (CA), 509.

⁴⁸⁷ [1893] 1QB 491 (CA), 497.

⁴⁸⁸ [1932] AC 562,

⁴⁸⁹ Citing Deane J in *Stevens and Co. v Brodribb Sawmilling Pty Ltd*, (1986) 160 CLR 16, 53.

a miscellany of disparate categories among which reasoning by the legal processes of induction and deduction would rest upon questionable foundations since the validity of such reasoning essentially depends upon the assumption of underlying unity and consistency.⁴⁹⁰

This dictum if applied to the unifying legal concept of unjust enrichment, *mutatis mutandis*, captures the notion of function and purpose of the unifying concept. It is not that tort jurisprudence and unjust enrichment jurisdiction are identical, but the judicial methodology is as applicable to unjust enrichment as it is, or was then seen to be, to tort.

The concept is the catalyst for the elements of rules that will be developed with reference to it. It describes the scope and the focus or purpose for the elements of a rule in a specific action. Hart's words attributing elucidating power to the concepts are particularly meaningful if contemplated here. Concepts that elucidate jurisprudential reasoning by giving it a framework and a place, are inseparable from law. Whether they are *law* is a matter of semantics because it will not make a difference either way. A judgment which is explained in terms of such concepts inevitably attaches them to the rule it lays down.⁴⁹¹ The concept in the circumstances of a case, drawing the applicable precedent into harmony, with notions of primary obligation imposed by law, describes the complex legal methodology in which concept principle and facts become the rule. These observations contribute to the conclusions below in the following particular way.

⁴⁹⁰ (1994) 179 CLR 520, 543. The dictum may have been received with some reservation in United Kingdom. In *Peabody Fund v Sir Lindsay Parkinson Ltd*, [1985] AC 210, Lord Bridge had denied any precision about proximity that would make it a practical test rather than a convenient label 'to attach to the different features of specific situations'. at 240. Perhaps renewed emphasis on case-by-case analysis means that both jurisdictions are arriving at the same end point.

⁴⁹¹ *Concept of Law* p 79.

The function of a unifying concept or other unifying influence, is centrally important to the efficacy of precedent. If a law is to be a sustainable rule, it must be justifiable in terms of a legal principle. Rules must be united by principle.

An instructive contrast, necessarily described in briefest outline, can be made between the method demonstrated in the *Burnie Port* dictum above, which is consonant with Hart's theories of interacting concepts and rules, on the one hand, and Hans Kelsen's theory of law on the other. Kelsen's theory is, I believe, the theoretical foundation of a system where the actions, in contract tort and unjust enrichment are explained as a selected group of like actions that take their authority from the power of the court to impose them where it reasons that precedent and the circumstances justify an action. So described, the difference between that and modern unjust enrichment is not plain except that the Kelson approach might be taken to assume the validity of employing concepts developed in tort for example, to the development of rules in contract or unjust enrichment, without really assessing their appropriateness individually. Under Kelson's theory, each rule is a separate legal sanction.⁴⁹² The approach, regards rules as emanations of an objective general order so that the legal sanction or order of a judge is law rather than a rule that has a specific theoretical and taxonomic relationship to the delict or malevolent event it addresses. This would lead to the conclusion that there is no unifying factor other than the character of law as authoritative orders of an official (qua judge) empowered by the particular

⁴⁹² Hans Kelsen, *General Theory of Law and State*, 63-67; analysing John Austin, *The Province of Jurisprudence Determined*, esp. lecture 1. Kelsen's theory of law recognised a 'pure' original norm and individual norms are manifestations of it. Therefore, he argued that law consists of a singular conception of norms instructing officials to apply sanctions in given circumstances; the content of the rule was the key to what circumstances and by whom an action ought to be sanctioned. See also Theodore Benditt, *Law as Principle and Rule*, 54 ff and ch 7.

norm. Concepts and unifying principles are unnecessary to such a theory.⁴⁹³ It can only apply to unjust enrichment if it be assumed that the unjustness factor is nothing else than a grouping of relevant cases of enrichment. This would seem to be more mechanical than theoretical; it is wholly lacking in the essential basis for judicial reasoning that establishes likeness between cases of enrichment found to be unjust in law. Indeed, it would seem to be explicable, if at all, as an interpretation of codified law. It is incongruous in the context of common law.

The point of the comparison is that the perception held by some judges and commentators that the grounds of unjust enrichment are arbitrary rules would seem to have a philosophical basis which may apply in some jurisdictions and which might be seen to explain codified systems of law. In the latter, the legislature responds to perceived communal need and there might be no unified jurisprudential process of judicial reasoning leading up to the establishment of a new ground. In the forms of actions era, the issuing of a new writ (though, in fact, it was never done) might have been tantamount to legislating a new ground. In modern common law, this line of theory has not been influential and demonstrably, it is not reflected in the case law of Australia and United Kingdom. Furthermore, it can be concluded that the 'arbitrary grounds' theory is unlikely ever to have been associated with English common law, when it is remembered that *quid pro quo* was the most important of many concepts that had a prominent role in more than one branch of the common law, as a unifying concept.⁴⁹⁴

⁴⁹³ *General Theory of Law and State*, 63-67. The term 'fragments' is referred to by H.L.A. Hart, *Concept of Law*, 35, to show how endeavours have been made to distinguish legal material from its context. Both Kelsen and Hart were engaged in critical analysis of Austin's theories of law: John Austin, *The Province of Jurisprudence Determined*, esp. lecture 1.

⁴⁹⁴ Above p 58. Other important ancient concepts were those that underlay actions of debt, account and assumpsit. Admittedly, these examples are taken from an era when jurisprudence of individual actions was not well defined. See fn 658 below; the work of the jurisprudence is to limit the scope of grounds to allow as fully as possible, the validity of ordinary relations. 'Inequitable', 'unconscionable' and 'tortious' issues are dealt with by different principles and should remain so.

Hart's theory of law is essentially based upon the character of concepts and their capacity to inform and shape the law. The judge is applying perceptions of justice which he/she reasons to be concordant with standards accepted by the community as binding standards of obligatory conduct.⁴⁹⁵ The explanation of this is that the conceptual character of the *unjust* factor is the key to understanding the unity of rules and the reasoned development of actions based upon the *unjust* concept. Justice Deane's dictum in *Burnie Port* is again relevant: '...the validity of such reasoning essentially depends upon the assumption of underlying unity and consistency.'⁴⁹⁶

The role of concept recognised in Hart's theories and illustrated by the ancient concept of *quid pro quo* and the *Burnie Port* dictum has played a central part in development of the common law and not least, in the development of unjust enrichment.

11.4. Unifying Legal Concept/Principle and "over-arching principle."

The issue to be addressed in this part of the chapter concerns the notion of an over-arching principle that might explain liability in all cases of unjust enrichment. It will conclude that there is substantial authority recognising the essentiality of legal principles as foundations of rules. It follows that unjust enrichment, as well as tort, is not well or adequately described as a system of rules. Is there one principle that explains liability across all actions for unjust enrichment?

⁴⁹⁵ Above sub-ch. 7.5 and 9.2, and fn 362. Hart's main reason for separating law and morality was that the natural law philosophies that strongly connect law and morality have the unintended effect that 'whatever is law, is moral.' Whilst law and morality over-lap, morality ought to be a standard by reference to which law can be critically analysed; see also Neil MacCormick, HLA Hart, 24-5. See also fn 406 where the foundation of obligation in 'social and commercial imperatives' is discussed.

⁴⁹⁶ (1994) 179 CLR 520, 543.

Neil MacCormick's commentary reflects the same conclusion about the conceptual significance of *proximity* as did the High Court in *Burnie Port Authority*.⁴⁹⁷ Rules of law apparently within the same field of liability, are capable of being 'incoherent' without some external, over-arching explanation.⁴⁹⁸ The absence of such over-arching explanation would deliver a jurisprudence of a 'Kelsen' kind in which the legal issue for a court is the instances of rules rather than the context of fact and principle which together support a rule. If law consists only in responses to a given sets of facts, taxonomy becomes a mere grouping of different kinds of events. No longer is it properly described as *legal taxonomy*; rather it is taxonomy *for* law: that is to say, the sphere of legal thought will be limited to the characterisation of remedies as types of responses. Such a classification of remedies calls for much less conceptual acumen.⁴⁹⁹ In such a scene, there is no place for principles and unifying concepts; only for rules.

MacCormick explains his point by supposing different speed laws for differently coloured cars; the laws are comprehensible and capable of being observed by various motorists, but the rules lack any underlying cohesiveness. So too, a rule of liability impugning a producer of a soft drink that markets it's product in an opaque bottle is comprehensible; but how is the law to anticipate the scope of such a rule? And what other instances of liability might be explained by the same reasoning? Similar questions can be asked about the actions for

⁴⁹⁷ Above fn 484.

⁴⁹⁸ *Legal Reason and Legal Theory*, 160. The Kelsen approach is a development of the lower extreme that von Caemmerer recognised, above fn 282, in which, at one end of the spectrum, rules are specific cases, and at the other, they are an instance of application of a general principle. In addition to being an instance of a case, rules are seen to call upon the authority of a central rule making power as compared to a reasoned jurisprudence wherein the rule is shown to be as an instance of the application of an overarching principle that explains common reasoning in all such cases.

⁴⁹⁹ Contrast Hart's words attributing elucidating power to the concepts, above p 201. It is pertinent that this observation was made in connection with the contemplation of the 'unifying' characteristic of the concept explained in the *Burnie Port* dictum, above fn 490.

restitution of a benefit gained by unjust enrichment where the grounds might be total failure of consideration, mistake and duress.

An explanation of the law, in unifying terms, is required, even if not articulated by judges, where-ever obligations to make restitution arise. A general principle (of the English unjust enrichment persuasion) ensures that each rule is comprehensible within a context of related rules, and so ensures that the finding in a particular case is coherent in its context, rather than absolute regardless of incoherence relative to other rules.⁵⁰⁰

The function of a unifying concept or other unifying influence, is centrally important to the efficacy of precedent as a doctrine in common law, and thereby, to the courts deciding cases according to law. This is because, as has been explained above, it provides the over-arching principle that allows that a judgment in one unjust enrichment case is authority, *mutatis mutandis*, in another such case under the same branch of the law, though the grounds are different. *Pavey*⁵⁰¹ provides a good example of this because the nature of unjust enrichment as enunciated in the majority judgment in that case has been cited extensively in Australian cases⁵⁰² The function of the English general principle of unjust enrichment is the same.⁵⁰³ It follows that the Australian unifying legal concept and English unifying principle make the doctrine of precedent

⁵⁰⁰ See Neil MacCormick, 'Why Cases Have Rationes and What they Are', in Laurence Goldstein ed, *Precedent in Law* 155, 162.

⁵⁰¹ *Pavey and Matthew's Pty Ltd v Paul*, fn 1.

⁵⁰² *Id.*, 256. See for example the subsequent Australian cases: *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* fn 193, p 370-2; *Baltic Shipping Co v Dillon* (The Mikhail Lermontov) (1993) 176 CLR 344, 376; *Brenner v First Artists Management Pty Ltd* [1993] 2 VR 221.259, per Byrne J; and *Angelopolous v Sabatino* (1995) 65 SASR 1, 11.

⁵⁰³ Above, p109-10. The English general principle of unjust enrichment is unlike the general principle of negligence. Its work is co-opting specific reasoning to the facts of a case that determines which precedents have application. The comparison is indeed interesting but it cannot be made in this work.

unequivocally available to unjust enrichment where it will act as a force for certainty and predictability in decisions.

Dworkin has explained that a rule might not be a binding precedent without the over-arching principle that explains actions that have a common purpose.⁵⁰⁴ Such a position becomes comprehensible in the context of unjust enrichment. Professor Burrows' approach supports this assertion: he wrote of the four stages of enquiry in establishing a restitutionary claim as '...the fundamental ingredients of the claim...' and he said, they are '...the equivalent of the duty of care, breach of duty, non-remote damage, and defences in the conceptual structure of a tort claim.'⁵⁰⁵ What this observation entails is not that unjust enrichment is supported by the same type of principle as is the tort of negligence, but that each is described, circumscribed, by the succession of cases which determine its character. Indeed, in Burrows' observation, there is to be seen the best clue as to what Deane J in *Pavey* meant by the terminology '*unifying legal concept*': the words refer to the conceptual structure of the action which is the product of judicial rulings.⁵⁰⁶

In tort, the *duty of care* has come to be recognised as an element of the rule in particular cases and to be explained by a wider conception of legal structure, that is, the concept of *proximity*.⁵⁰⁷ Lord Reid in *Dorsett Yacht Co. v The Home Office*⁵⁰⁸ recognised, not a new principle about borstal boys and yachts, but the more general application of the neighbour principle in a manner which makes it

⁵⁰⁴ Ronald Dworkin, *Taking Rights Seriously*, Ch 2, 'The Model of Rules', p 30 ff.

⁵⁰⁵ Andrew Burrows, 'Understanding the Law of Restitution: A Map Through the Thicket' (1995) 18 *UQLJ* 149, 158-9.

⁵⁰⁶ (1987) 162 CLR 221, 256-7; See sub-ch. 6.5.

⁵⁰⁷ For purposes of analogy, I assume for the moment that the apparent abandonment of 'proximity' as a unifying concept in *Roxborough*, above fn 12, could be confined to the facts of the case in future decisions of the High Court.

⁵⁰⁸ Fn 268.

much more difficult to separate principle and rule when concluding what the binding decision of the case was.

Despite the role of over-arching principle in tort, in *Candler v Crane Christmas & Co*⁵⁰⁹ the majority was unwilling to find that negligent mis-statement was within the scope of the principle. Such a decision leans toward a *Kelsen* view of law⁵¹⁰ because the distinction seems artificial. Presumably, the court was unwilling to see negligent misstatement as being in any way unified by a unifying principle with negligence in preparation of foodstuffs.⁵¹¹ A question arises, what is the nature of the law on this particular point? This is a question which must *hang in the air* in each and every discussion about the nature of a rule, because to ignore it is to risk arriving at conclusions which address *what, by way of a remedy, is a fair outcome* instead. It may well be that the law needs to be changed or updated, but the driving forces of change need to be understood in terms of legal reasoning rather than simply in terms of practical necessity: the latter will produce law of practical necessities rather than law unified by jurisprudential methodology.⁵¹²

Tort is not the only source of useful analogy. Equity would have no difficulty in recognising that a principle of unconscionability, defined in the circumstances

⁵⁰⁹ [1951] 2 KB 164.

⁵¹⁰ Hans Kelsen, *General Theory of Law and State*, esp. 63-67. Kelsen's theories are explained briefly above, sub-ch 11.3. Kelsen regarded the grounds of actions to be determined by necessity of official sanction rather than united by overarching principle.

⁵¹¹ The ratio of *Candler*, above fn 509, is conceptually incomprehensible in the context of the reasoning in *Donoghue v Stephenson* fn 275, at 580, per Lord Atkin; so too, the ratio of *Searle v Wallbank* [1947] AC 341, and that in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 are conceptually incompatible with *Dorset Yacht* (fn 508), a difference between a responsibility to fence in borstal boys in proximity to yachts and the absence of such a responsibility in respect of cattle adjacent to a roadway. Rules may have different origins and attach to principles more appropriate to a by-gone age, yet the economic reality of the need of keeping in cattle in the modern circumstance of fast travelling vehicles and super highways is at least as arguable as the necessity of restraining adventurous young state detainees.

⁵¹² David Stevens and Jason W. Neyers, 'What is Wrong With Restitution' (1999) 37 *Alta. L. R.* 221, 226-7, address this mistake in reasoning in the context of a critical analysis of a seminal article, L. Fuller and W.R. Perdue 'The Reliance Interest in Contract' (1937) 46 *Yale L J*, 52. Stevens and Neyers succinctly state the problem 'The remedial response is inadequate as an organising principle...', at 226. See also Birks, Introduction..., 9-12.

and findings of the cases,⁵¹³ was the articulation of developing principle which led the High Court to overturn the Amadio's surety.⁵¹⁴ Related reasoning enabled the finding of an institutional constructive trust in *Muschinsky v Dodds*,⁵¹⁵ *Baumgartner v Baumgartner*⁵¹⁶ and *Louth v Diprose*.⁵¹⁷ In Australian jurisdictions, a principle of unconscionability will be an inseparable element of future cases in fact situations analogous to *Amadio*, and the basis of constructive trust in appropriate cases, but then as a consideration of the older authorities shows,⁵¹⁸ it has been in the minds of judges, in the English law also, for a very long time. These instances of principle demonstrate the over-arching character of unifying concepts and principles in equity.⁵¹⁹

The argument approaches a proposition that,

...if a rule of law is to be sustainable as a precedent for like cases, it must be justifiable in terms of a legal principle.⁵²⁰

Rules must be united by principle.⁵²¹ My argument is that in modern law, this is demonstrably the case. It is suggested that when the separation of principle and

⁵¹³ *Fry v Lane* (1888) 40 Ch. D 312; *Blomley v Ryan* (1956) 99 CLR 362.

⁵¹⁴ *Commercial Bank of Australia Ltd. v Amadio* (1983) 151 CLR 447.

⁵¹⁵ (1985) 160 CLR 583.

⁵¹⁶ (1987) 164 CLR 137.

⁵¹⁷ (1992) 175 CLR 621.

⁵¹⁸ *Fry v Lane* (1888) 40 Ch. D 312 and *Blomley v Ryan* (1956) 99 CLR 362 illustrate this well.

⁵¹⁹ Ernst Weinrib cautions against what he calls the 'idiosyncrasies of jurisdiction', by which he describes the exclusion of categories of remedies for instance, because they cross over the boundaries of law and equity. It is in this compartment however, that the truly difficult conceptual rationalisation of law and equity is to be found lurking: when, for example, is the benefit to be categorised as a resulting trust? If the characteristics of trust law enter into the equation, the response to unjust enrichment will become a considerably different outcome. In the succeeding section of his essay, Weinrib appears to gloss over this conceptual difficulty by describing remedies in several fields of law as 'remedies for injustice'. As I have noticed above, a remedy for a tort or a breach of contract might not always or often quadrate with unjustness. This confusion of different kinds of principles and rules is, I believe, a consequence of the failure to differentiate between remedial rules and corrective justice rules. An order of restitution in unjust enrichment is the latter: it has no connection with a wrong, at least so far as restitution for unjust enrichment is concerned. Rules in equity will normally have a corrective quality but because they are *in personam*, and the cause centres upon the defendant's act or omission, they are directed toward relief of one party against another and in this sense they are remedial: 'Juridical Classification of Obligations' in Peter Birks (ed) *The Classification of Obligations*, 37, pp 37-39.

⁵²⁰ This is my own formulation, reflecting the position especially of Dworkin, fn 504.

⁵²¹ Dworkin illustrates the point by proposing that the rule from *Riggs v Palmer* 32 NJ 358, 161, would have encompassed the exception to the succession rule under a will arising from the fact of the beneficiaries' guilt of murdering the testator: but the rule would have been incoherent (MacCormick's descriptor, above fn 500) in the absence of a principle that no one may benefit from his/her wrong. R.M. Dworkin 'Is Law a System of Rules?' in R. M. Dworkin ed. *The Philosophy of Law*, 38, 49.

binding rule is justifiable only in terms of policy considerations, which in the broader jurisdictional perspective and longer time frame, make nonsense of the practice of precedent, (though not of its theoretical place in the law) then we have an inarticulate law which Kelsen himself would surely have shunned. In Dworkin's argument against Hart's proposition that only *rules* are law, he concludes

... unless at least some principles are acknowledged to be binding upon judges, requiring them as a set, to reach particular decisions, then no rules, or very few rules, can be said to be binding upon them either.⁵²²

Dworkin's point is that judges must apply a principle which they believe governs the case before them and must weigh competing principles, to apply that which they believe strongest in the context. Keith Mason illustrates the point well in his analysis of *Pavey & Matthews Pty Ltd v Paul*⁵²³ where he analyses arguments that competing principles, including those underlying the *building* legislation, contribute to the finding that the benefit for which restitution must be made is the actual value of work done rather than its cost.⁵²⁴ A telling distinction between unjust enrichment and contractual and legislative principles is being applied here.

Dworkin argues that judges have no discretion to ignore principles that have been adopted and applied especially by the superior courts.⁵²⁵ This line of

⁵²² Ronald Dworkin, *Taking Rights Seriously*, Ch 2, 'The Model of Rules I', 36-7. The conclusion I have reached above, p 97, that without principles, rules cannot be precedents for other rules because they will be unrelated, is in agreement with Dworkin's perception.

⁵²³ [1987] 162 CLR 221.

⁵²⁴ 'Restitution in Australian Law', in P. D. Finn ed., *Essays on Restitution*, 20, 29.

⁵²⁵ Ronald Dworkin, *Taking Rights Seriously*, Ch 2, 'The Model of Rules'. The discretion to apply a principle, Dworkin argues, is one that, distinct from license, is closely confined by its context, '...like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction.' *id.*, 31-33.

reasoning leads to a logical imperative: to say that principles are not binding as a rule is, is not to say that the principle can be set aside or ignored when in fact it does have application to the case. The court is not free to find that a principle applied in all such cases as the one before it, is not, in its view, one that ought to be applied.⁵²⁶ Dworkin's argument would point to the conclusion that in very many, if not all cases, the application of a rule is so much dependent upon the context of principle that the latter is indispensable to the decision reached.⁵²⁷

It follows from Dworkin's argument that the force of the principle is as it was described by Lord Reid in *Dorset Yacht Co. v Home Office*, '[the principle] ought to apply unless there is some justification or valid explanation for its exclusion.'⁵²⁸ Lord Reid's dictum concerned a principle of central significance in negligence cases. Alistair MacAdam sums up the impact of the dictum in these words,

...Lord Reid was finally signalling the Law Lords' acceptance of the fact that the neighbour principle will *generally* have more weight than arguments based on particular precedents, or the lack of precedent for a particular case.⁵²⁹

The context of Lord Reid's dictum was the application of general principles in tort, but he referred specifically to the neighbour principle, proposing that it ought to apply unless there was good juridical reason for it to be excluded. His dictum

⁵²⁶ *Ibid.*

⁵²⁷ *Id.* 40. Dworkin acknowledges however that judges, when they deal with principle, are dealing with standards which may be subject to change due to differing policy and social imperatives.

⁵²⁸ [1970] AC 1004, 1027. The dictum really addresses the weight of principles which is not an issue that can be studied meaningfully in the present context. It is though, a powerful admonition that principles ought to be sought out and evaluated for their pertinence to a prospective decision.

⁵²⁹ Alastair Macadam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia*, 258.

was directed to a principle of general application, not to a general principle of liability such as the North American general principle of unjust enrichment is.

Dworkin's reasoning would lead to the conclusion that in the case of an important principle, and the neighbour principle is central to the law of negligence, a court is not at liberty to apply it at its discretion: a judge who found that such a principle did not apply in a particular case would be obliged to distinguish the facts of the case at bar from the grounds of relevant actions.

The applicability of such a conclusion to unjust enrichment is centrally important. In *Mason v The State of New South Wales*,⁵³⁰ Windeyer J thought it '... not inapt to describe [this branch of the law] as a *law of unjust enrichment*'.⁵³¹

Justice Windeyer's dictum is reflected in the later judgments of the High Court and it might be taken as the first notable articulation of a unifying concept of unjust enrichment. The *concept* explanation of unjust enrichment was adopted in the reasoning of Mason and Wilson JJ who approved Justice Deane's reasoning in *Pavey*.⁵³² It forms part of the important analysis of the meaning of unjust enrichment in *David Securities Pty Ltd v Commonwealth Banking Corporation*⁵³³ where the majority cited the relevant passage from Justice Deane's *Pavey*

⁵³⁰ (1959) 102 CLR 108.

⁵³¹ *Id.*, p 146. The italics are mine.

⁵³² (1987) 162 CLR 221, 227. Related reasoning underlay the decision in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, where the reason of equity over-riding the strict contractual rules was the enunciation by the court of a concept of transactional unconscionability. Principles of much older genre were recognised and articulated as catalysts to unity, explaining actions, obligations and rights. This is true of many leading cases on unjust enrichment also. Until relatively recently, unjust enrichment cases in Australia have illustrated well Dworkin's doughnut analogy: the enunciation of grounds of unjust enrichment in the cases invariably calls up the catalyst which Deane J in *Muschinsky v Dodds* (1985) 160 CLR 583, described as '...a notion underlying a variety of distinct categories of case...', at p 617, and in *Pavey and Matthews Pty Ltd v Paul*, above, fn 1, as '...a unifying legal concept which explains why the law recognises in a variety of distinct categories of case, an obligation...'. at pp 256-7.

⁵³³ (1992) 175 CLR 353,

judgment, and distinguished unjust enrichment from a 'definitive legal principle', insisting that it is '... just a concept'.⁵³⁴

What can be the status of this dictum? One thing is plain; the High Court meant to rule decisively that unjust enrichment was not a cause of action. It was not a *definitive legal principle*. This could be taken as *not definitive of a cause of action*, and the precisely stated reasoning of the court in *David Securities*, i.e. *there is no need to prove unjustness independently of mistake*,⁵³⁵ supports this conclusion.

A law of unjust enrichment has as its central feature, a principle that is the basis of the rule in each case. That principle has common reasoning that determines that an obligation is imposed by the law upon the facts of each instance of a ground. This is a significant feature of unjust enrichment in United Kingdom law. It is also the basis of each rule unified by the unifying legal concept in Australian law where a prima facie ground of an action exists: that is the intention of the dictum in *David Securities*.⁵³⁶

The reasoning inevitably involves different kinds of principles encompassing the juridical meaning that the courts have held *unjust* to have in cases. The principles involve the scope and purpose of the action such that it lies for subtractive enrichment distinct from loss or injury; that it is a strict liability, admitting of no judicial discretion; it is not therefore akin to equity where idiosyncratic factors may have an impact upon the plaintiff's ability to make out its case; it is subject to defences, especially that of change of position which is conceptually aligned to the notion that one party *has* a benefit from another. Its

⁵³⁴ *Id.*, 378.

⁵³⁵ *Ibid.*

⁵³⁶ Above fn 533

character is distinguished from tort and requires neither proof of fault such as fraud or deceit nor proof of specific unjustness.

Deane and Dawson JJ took the reasoning a stage further in *Baltic Shipping Co. v Dillon (The Mikhail Lermontov)*⁵³⁷ in a dictum which was approved by the majority in *Dart Industries Inc v Decor Corp Pty Ltd.*⁵³⁸ The rationale of the restitutionary rule was viewed by their Honours in context of a fused law and equity with the result that principles of fairness and justice underlying earlier decisions were to be seen as at least cognate to equitable standards of unconscionability, or lack of good conscience.

It is my submission that this further development adds little to the basis of principle of earlier decisions except that equitable principles are recognised as analogous to and informative of the principle of unjust enrichment. It does not introduce fault as an element of the decision and it does not infer a discretion to grant or not grant a remedy governed by equitable doctrines. Nor does it infer that the judicial discretion is broadened or made less principled. The courts must still look down to the cases, as Professor Birks puts it, to reach decisions on rules to be applied in particular cases.⁵³⁹ It does perhaps widen and enrich the scope of judicial experience which may be relied on in identifying the underlying principles which are drawn together in unjust enrichment.

My thesis is that the law of unjust enrichment in Australian and the United Kingdom jurisdictions are described uniformly by legal reasoning and precedent that establish rules of obligation that will be imposed by law where grounds of

⁵³⁷ (1993) 176 CLR 344, 376.

⁵³⁸ (1993) 179 CLR 101, 111.

⁵³⁹ Peter Birks, *Introduction to the Law of Restitution*, 22-23. Cf, Gareth Jones, 'A Topography of the Law of Restitution' in P.D. Finn ed. *Essays in Restitution*, 2-3, arguing that a broader doctrine of unjust enrichment may be developed in English jurisprudence. See also, Mason & Carter, *Restitution Law in Australia*, 75.

actions are established by recognition in cases in the superior courts. If the central unifying catalyst is a legal concept as it is under Australian law, that fact does not detract from the effect that has been acknowledged by the courts, uniformly to all intents and purposes, across these jurisdictions. The Australian unifying legal concept is as a sign-post to the sets of principles that define the elements of actions, including, but not limited to duress, free acceptance, failure of consideration and mistake. Principles such as these, in all Australian and UK jurisdictions, have to be considered as authoritative in accordance with the ordinary rule of precedent because if they are not, as Dworkin has indicated, the rules themselves to which the principles relate in an authoritative judgment, might not be binding either.

Considerable development of jurisprudence over the decades and centuries is evident in the cases, not in a rule narrowly based upon specific facts, but upon the experience in many courts, condensed into the principle. In Australian law, the focus will be upon the principle or principles invoked or indicated by a unifying concept. The concept of unjust enrichment brings together the leading judgments in the jurisdiction. This is true also of contract and tort although the sheer volume of cases and the variety of principles make it more apt to describe the law simply as *contract* or *tort*: every lawyer will be familiar with the substantial volumes of principles and rules that such concepts indicate. In contrast, unjust enrichment could not be described except by reference to the leading judgments: and the single central idea that is the meaning of the concept of unjust enrichment, that which indicates the law imposing an obligation on the facts that are recognised as grounds, to make restitution of a benefit gained at expense of the plaintiff.⁵⁴⁰

⁵⁴⁰ Concepts Tort and Contract have at least as much work to do.

The dictum of Lord Wright in *Brookes Wharf*⁵⁴¹

...obligation imposed by the court simply on the circumstances of the case...

suggests that the rule has to do with the nature of the ground and the obligation to be imposed, i.e., the experience that condenses the decided law on this point into a strong principle. In point of fact, there is no scope for discussion of whether the precedent is wholly contained in rules or partly in rules and partly in applicable principle because, as Dworkin has shown, the rule co-opts principle and the decision applying the rule is the binding precedent.⁵⁴²

Conclusions.

Adopting the minor conclusions set out above, and applying the analysis in the fore-going sub-chapters of the forces that define the jurisprudence of unjust enrichment, I would conclude the chapter in the following way:

1. The history of unjust enrichment exemplifies that without a predictable jurisprudence of its own, unjust enrichment is at risk of being defined in terms of doctrines of other branches of the law, to the mutual disadvantage of taxonomy and principle in each. Were this to occur, it would be the consequence of a failure of jurisprudence to define a recognised unifying agent capable of drawing reasoning into a collective whole which will make it a decision according to law in terms of concept, principle and taxonomy.

⁵⁴¹ [1937] 1 KB 534, 544, 545.

⁵⁴² Above, fn 525.

2. The function of the unifying legal concept and the English general principle can be explained, by analogy with other areas of the law. Concepts are seen to be central reference points which assist in defining the factors which draw the law to a unity of purpose.
3. Concepts direct the enquiry of the law to the existence of a ground of an action for the imposition by the law of a primary obligation to make restitution of a benefit had from a plaintiff under circumstances that are unjust by a legal standard. This enquiry is the arbitration of binding standards of obligatory conduct.
4. As to *unifying legal concept*, the words refer to the conceptual structure of the action which is the product of judicial rulings.⁵⁴³
5. Whilst the courts have asserted that there is a unity, such as a unifying concept or principle would achieve, they have done little which would help us to describe it, not even in terms of what it ought to do. The development of a jurisprudence of primary obligation is the answer, but it is the work of jurists, only indirectly recognised by the courts.
6. Dworkin's reasoning would lead to the conclusion that a court is not at liberty to apply a principle of unjust enrichment at its discretion : a judge who found that such a principle did not apply in a particular case where a prima facie ground of an action exists, would be obliged to distinguish the facts of his or her case from those of cases where the principle had been applied.
7. If a law is to be a sustainable rule, it must be justifiable in terms of a legal principle. Rules must be united by principle.
8. The function of a unifying concept or other unifying influence, is centrally important to the efficacy of precedent as a doctrine in

⁵⁴³ *Pavey*, above fnn 1 and 523.

common law, and thereby, to the courts deciding cases according to law. This is because, as has been explained above, it facilitates, by common reasoning, the over-arching principle that allows that a judgment in one unjust enrichment case is authority, *mutatis mutandis*, in another such case though the grounds are different.

Chapter 12. Concepts and Principles: The Instructive ‘Tort’ Comparison.

12.1. Introduction.

Perhaps the most foundational legal concepts and principles find their origin in general propositions of law that are ‘fundamental abstractions’, rather than in edicts or enactments or emanations from historical principles of law. Ernst von Caemmerer’s parallel between ‘general forms’ in tort and in restitution illustrate this perception proposing that both rest upon fundamental abstractions, that is that a person should be compensated for injury by unlawful acts on the one hand, and nobody should be permitted to retain an unjust enrichment, on the other.⁵⁴⁴ Such fundamental *abstractions* as that of Lord Wright’s ‘...any civilised system of law...’ dictum, and Lord Atkin’s neighbour dictum are ‘filled out’ in the cases in the Anglo/Australian common law systems.⁵⁴⁵

The comparison suggests the possibility that both the common law jurisprudence and German jurisprudence are illustrative of an important judicial technique of reasoning from broad underlying abstractions and concepts and

⁵⁴⁴ See Eltjo Schrage and Barry Nicholas ‘Unjust Enrichment and the Law of Restitution: A Comparison’, in Eltjo J. H. Schrage ed. *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, pp 9, 26. The von Caemmerer thesis was discussed in sub-chapter 10.3 above.

⁵⁴⁵ Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barber* fn 177 above: Lord Atkin in *Donoghue v Stevenson* fn 275, p 580. These observations recall the discussion of characterising concepts in Chapter 6, and von Caemmerer’s notion of broad abstractions in sub-chapter 10.3.

identifying instances of a rule, as compared to accretion of new cases unexplained in jurisprudential terms.⁵⁴⁶

It also marks the difference between reasoning of grounds on the one hand and applying a broad general principle of the kind that Friedman associates with the 'Restatement' general principle of unjust enrichment on the other.⁵⁴⁷ The former applies a rule defined upon a ground that is an instance of unjust enrichment: the latter applies the abstract rule to particular cases and draws upon a category of responses.

It is not crucial for this work to describe the general principle of negligence in these terms, a task that would demand significant enquiry. The question as to the similarity of the negligence general principle and the English principle of unjust enrichment is not one that can be answered in this context. Andrew Burrows expresses the opinion that the generalised approach of the principle of negligence has given way to a significant retreat towards incrementalism⁵⁴⁸ (that had characterised negligence in the early 20C), culminating in adoption of a more case-by-case approach in *Murphy v Brentwood District Council*.⁵⁴⁹ Perhaps that development has the potential to bring the methodology of the negligence principle and the unjust enrichment principle closer together.

Burrows remarks upon this phenomenon.⁵⁵⁰ Whether or not that is a positive development for the law of negligence, it is disconcerting to observe a trend that

⁵⁴⁶ There is a crucial difference however, in the common law jurisprudence from that of the German law to which von Caemmerer, fn 544, refers. The German jurist speaks of 'unjustified enrichment' which is conceptually different from the common law 'unjust enrichment'. See fn 449 above.

⁵⁴⁷ Fn 449, at p 838: and see fn 546 above.

⁵⁴⁸ *Understanding the Law of Obligations*, 111.

⁵⁴⁹ [1991] 1 AC 398. In that case, the House of Lords adopted the approach described by Deane J in the Australian case, *Sutherland Shire Council v Heyman* (1985) 157, 495-96 per Deane J regarding pure economic damage.

⁵⁵⁰ Fn 505, at pp 111-12.

in unjust enrichment, might mean reversal of steps toward a unifying jurisprudence with its capacity to explain cases as unified by conceptual characteristics.

An appeal to the von Caemmerer perception of filling out a broad abstraction might prompt reassessment. It may prove to be advantageous to re-focus upon the methodology of reasoning from accepted doctrinal foundations. The jurisprudence and methodology of Continental law may prove to be more instructive than the seductive 'fusion' jurisprudence that has no definable goal. What is to follow is by no means an exhaustive study but it is sufficient to demonstrate the validity of arguments made elsewhere in this work for the maintenance of conceptual analysis that respects independence of actions and taxonomic boundaries (not as impenetrable for there is scope for comparison).

The study of tort jurisprudence, specifically negligence, will show that negligence has also enjoyed principled separation as a distinct doctrine of tort. The tendency in Australian courts to entertain the possibility that concepts that have been developed in other areas of law, or none at all, are informative of negligence jurisprudence, is at odds with that perception of characterising principle. The study that follows focuses upon the proximity principle in negligence which has been held in the United Kingdom and until recently, in Australia, to be the key concept in differentiating categories of cases for the purpose of rules in negligence cases.⁵⁵¹ For the purposes of the comparative

⁵⁵¹ It is probably correct to assume that proximity has had the character of a unifying legal concept but it is impossible to argue that thesis here: that would require a profound treatment of the cases and a dedicated historical study, bearing in mind that the case law is very significantly more voluminous than in unjust enrichment, and that the cases have witnessed idiosyncratic mile-stones and turning points.

study I would read the dictum of Deane J in *Burnie Port*,⁵⁵² as meaning that proximity is simply *unifying in character*. It must be emphasized nevertheless, that this work is not primarily about tort jurisprudence. Observations are limited to instructive comparisons of the reasoning in key dicta rather than proposing that as regards tort, those key dicta may be interpreted as establishing unifying principles or concepts.

The following brief statements express succinctly, what the issues to be addressed in this chapter are:

- As understood in the foundational cases, *unjust enrichment* is a doctrinal element of law: proximity may similarly have been a doctrinal concept. In the past decade, the developments in Australian law of negligence may have been sponsored by a misconception that proximity is structural, contextual, rather than doctrinal.
- Statements that proximity (in jurisdictions where this concept is still a feature of tort) characterises a category of cases of which the instant case is one, or that ‘...John has a benefit at the expense of another in circumstances that the law holds unjust...’ indicate critical principles and rules and draw upon the legal reasoning by which jurisprudence of the particular field of law describes obligations and rights.
- Since the apparent abandonment of the proximity concept in Australia, the absence of defined concepts and principles of tort that had described the various instances of liability for negligence in a unifying way, portends conceptual difficulties at least as difficult for prediction of legal outcomes

⁵⁵² Fn 485 and 496 and sub-ch. 11.3. The proximity concept applies only to the United Kingdom at this stage, so that the force of the comparison is simply that the development of rules in particular cases from broad propositions of law requires unifying influences.

as would be the case if the *unjust* concept were to be defined in terms of less specific concepts.⁵⁵³

12.2. The Tort Comparison.

Development of the Proximity Principle in Australian Law.

The *Burnie Port* case discussed above provides a starting point for examination of the progress of principle in the Australian law⁵⁵⁴ The court approved the ‘general conception of relationship’ called ‘proximity’ as the law in Australia. This concept of ‘proximity’ describes Lord Atkin’s ‘neighbour’ principle in *Donoghue v Stephenson*⁵⁵⁵ that qualified the foreseeability rule.⁵⁵⁶

The court in *Burnie Port* identified ‘a general unifying proposition’ which explained why the law recognised a duty of care to avoid injury. Deane J, with the agreement of the majority, had said in *Stevens v Brodribb Sawmilling Company*

...[that common element of relationship of] *proximity* remains the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognises

⁵⁵³ There is an important difference between a development in unjust enrichment whereby, on the one hand, unconscionability is defined as a ground, which is an issue of relationship to equity to which the present work does not extend, and on the other, the defining of unjust as an unconscionability-like concept.

⁵⁵⁴ Fn 552.

⁵⁵⁵ [1932] AC 562 (HL).

⁵⁵⁶ The ‘neighbour’ dictum in *Donoghue* fn 275, which qualified the ‘foreseeability’ principle first enunciated by Brett MR in a minority judgment in *Heaven v Pender* (1883) 11 QBD 503 (CA) became a ‘proximity’ principle in *Le lievre v Gould* [1893] 1QB 491 (CA).

the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another....⁵⁵⁷

This dictum was adopted in subsequent High Court judgments as reflecting the law in Australia. Deane J went on to say that proximity was never intended as a 'logical definition' or 'complete criterion'. Its relevance as a 'general conception' was though, in '...understanding and identifying the categories of case...' in which a duty of care arises '...rather than a test for determining whether the circumstances of a particular case bring that case within such a category, either established or developing.'⁵⁵⁸

Justice Deane went on to say what proximity does in terms that it is, '...the basic function performed by general principles or conceptions in ascertainment or development of the common law.'⁵⁵⁹ To explain further what was intended, he cited Scott LJ in *Haseldine v C. A. Daw and Son Ltd*⁵⁶⁰ where his Lordship commented upon the criticism of Lord Atkin's principle, '...the error ...of assuming that Lord Atkin was intending to formulate a complete criterion ...[and failing to appreciate] the real value of attempts to get at legal principle'.

It is essential to recall Lord Atkin's own words of caution in *Donoghue*,
 ...if proximity be not confined to physical proximity, but ... as I think [Lord Esher in *Heaven* and A L Smith LJ in *Le Lievre*] intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act....⁵⁶¹

⁵⁵⁷ (1986) 160 CLR 16, 53. Italics introduced.

⁵⁵⁸ *Id.*, 53-4

⁵⁵⁹ *Id.*, 56

⁵⁶⁰ [1941] 2 KB 343, 362-3.

⁵⁶¹ [1932] AC 562, 580, per Lord Atkin.

The dictum contains two separate ideas, that is, firstly that the foreseeability principle of *Heaven v Pender* is intended to be limited by Lord Esher's 'notion of proximity'; and secondly, it is not a physical proximity but one that implies direct effect upon a person who the defendant would know would be affected.

I would understand the principle of proximity at its inception, to identify cases of foreseeability where this direct effect could reasonably be anticipated and, that the person who becomes the plaintiff is one that the defendant should reasonably know would be affected. When the principle is so dissected, as Lord Atkin intended it should be, it is plain that there is too much conceptual work to be done for it to be assumed that its parts can faithfully be put into effect without the proximity principle being invoked.

When it comes to negligent misstatement and economic loss, it must always have been obvious that an additional element or additional principle would be required because a principle concerned with directness and knowledge of the plaintiff is insufficient as a qualifier and quantifier of foreseeability. The elements of directness and of knowledge of a person in the position of the plaintiff, is no less essential. The point recalls Lord Justice Scott's admonition, above,⁵⁶² that Lord Atkin did not formulate a complete criterion. Something additional may be required for some cases.

The passages from *Stevens v Brodribb Sawmilling*⁵⁶³ cited above seem consistent with this. It would also seem consistent with the *Stevens* dictum to reiterate Lord Atkin's concern with 'directness' as the key to what proximity does. So then, at this juncture, proximity in Australian law was a general conception employed in the reasoning of the courts in understanding and

⁵⁶² Fn 560 above.

⁵⁶³ Fn 557.

identifying categories of case in which a duty of care to avoid foreseeable injury or damage arises. Directness may be part of the conceptual material of this concept of proximity, linking it to related concepts and principles including causation and remoteness, and qualified by the factor that defendant knew or ought to have known that a person such as the plaintiff would be affected by the act.

The strong majority judgment in *San Sebastian Pty Ltd v The Minister Administering the Environmental Planning and Assessment Act 1979*,⁵⁶⁴ seems not to have influenced later decisions especially *Perre v Apand Pty Ltd*.⁵⁶⁵ In *San Sebastian*, their Honours held that despite the special problems in defining the circumstances which give rise to a duty of care in mis-statement cases,

... the correct view is that, just as liability for negligent misstatement is but an instance of liability for negligent acts and omissions generally, so the treatment of the duty of care in the context of misstatements is but an instance of the application of the principles governing the duty of care in negligence generally.⁵⁶⁶

Their Honours went on to say, ‘... proximity is an integral constituent of the duty of care concept ... in its broader sense ... embracing a general limitation on the test of reasonable foreseeability... [and] ...is of vital importance when the plaintiff’s claim is for pure economic loss.’⁵⁶⁷ The court in a significant dictum, discussed the place of *reliance* in the context of the negligence principles, and concluded that it has an important role, especially in pure economic loss cases. But especially in such cases, it was treated as the key indicator of proximity, that ‘integral constituent of a duty of care’. Directness and knowledge of a person in

⁵⁶⁴ (1986) 162 CLR 340, 353-8, per Gibbs CJ, Mason, Wilson and Dawson JJ.

⁵⁶⁵ (1999) 198 CLR 180.

⁵⁶⁶ Fn 564 above, at p 353.

⁵⁶⁷ *Id.*, pp 354 and 409.

the position of the plaintiff are what is imported by the proximity principle. Thus reliance is an indicator of proximity and directness an integral factor but reliance and directness alone have not been independently defined in relation to foreseeability in negligence. This is the problem foreseen in relation to Lord Diplock's dictum in *Dorset Yacht v Home Office*⁵⁶⁸ that might have created the impression that Lord Atkin's *Neighbour* doctrine might manage without the help of principles.

The dictum in *Stevens v Brodribb* cited above⁵⁶⁹ and the clarifying dictum in that case of Deane J, describing the purpose of the proximity principle such that it is, '...the basic function performed by general principles or conceptions in ascertainment or development of the common law...',⁵⁷⁰ is of immense importance and yet it appears to have been disregarded and perhaps very much misunderstood. This is so regardless of the strong judgments in a succession of cases that have not simply agreed with English jurisprudence but have taken the reasoning to another level.

Proximity and other Principles.

The difference between these principled concepts, whether *proximity* or some other formula well understood as a legal concept, on the one hand and concepts in common usage on the other, calls to mind Professor Herbert Hart's view that insistence on definition of concepts in common language terms was at odds with jurisprudence and drove a division between jurisprudence and the study of the law at work.⁵⁷¹ Hart disagreed with those who committed jurisprudential theory to

⁵⁶⁸ Fnn 268 and 508, at a 1060; see below p 230, fn 583. The concern is that if a defined concept like proximity is unavailable, the reach of the doctrine might be defined in terms of notions that are undefined in the relevant area of law.

⁵⁶⁹ fn 557 (1986) 160 CLR 16, 53. Italics introduced.

⁵⁷⁰ *Ibid.* See also pp 53-54.

⁵⁷¹ H L A Hart, 'Definition and Theory in Jurisprudence', (1954) 70 *LQR* 37, at 37.

‘...the forbidding jungle of philosophical argument...’, insisting that ‘...legal notions however fundamental, can be elucidated by methods properly adapted to their character’.⁵⁷²

Properly understood, the concept of proximity as applied in negligence cases until the recent changes in Australia, categorised instances of foreseeability by introducing considerations of directness and causation as part of the conceptual material of the concept of proximity. It does not follow from what has been observed above however, that there could be no other principle that assists in defining circumstances in which the law will impose a duty. As the cases have demonstrated, a principle is not less a statement of jurisprudential import because, in the circumstances of later cases, it is necessary to qualify it, or to state other principles which modify its application to given circumstances.⁵⁷³ A principle designed to categorise cases of ‘direct impact of a positive act’⁵⁷⁴ will have qualified application to miss-statements and other cases where the injury caused was pure economic loss. Foreseeability and the proximity principle should not operate in such a way as to restrict trade or cramp commerce by indeterminate and unreasonable extension of liability. The content of proximity must develop. The House of Lords in *Hedley Byrne v Heller and Partners Ltd*⁵⁷⁵ found that proximity was exemplified in reliance in circumstances where, in the words of Lord Reid,

...the party seeking information or advice was trusting the other to exercise such degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the

⁵⁷² *Ibid.*

⁵⁷³ See *Voli v Inglewood Shire Council* (1963) 110 CLR 74, p 90, per Windeyer J.

⁵⁷⁴ *Sutherland Shire Council v Heyman* (1985) 157, 495-96 per Deane J.

⁵⁷⁵ [1964] AC 465.

information or advice when he knew, or ought to have known that the inquirer was relying on him.⁵⁷⁶

Lord Devlin's analysis in the same case, covered different types of relationships which might potentially exemplify proximity, but he prefaced his remarks by saying that it was not '...a sensible application of what Lord Atkin was saying [in *Donoghue*] for a judge to be invited on the facts of any particular case to say whether or not there was "proximity"...[which would be] a misuse of a general conception...'.⁵⁷⁷ He noticed that Lord Atkin's judgment had referred to a '...general conception of relations...' which is proximity, and he concluded, '...I do not understand any of Your Lordships to hold that it is a responsibility imposed by law on certain types of persons in certain sorts of situations...'.⁵⁷⁸

Stephen J, in a somewhat earlier case than the leading cases of the 1980's and 90's, found a need of an additional 'mechanism' to augment the work done by *foreseeability* and the *proximity* general conception of cases;

...[t]he need is for some control mechanism based upon notions of proximity between tortious act and resultant detriment to take the place of the nexus [in physical injury cases].⁵⁷⁹

The place and the meaning of *proximity* in the Australian law had nevertheless been assumed to operate in terms as later described in *Stephens v Brodribb*⁵⁸⁰ and *San Sebastian*.⁵⁸¹

⁵⁷⁶ [1964] AC 465, pp 486 ff.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ [1932] AC 562, 580 ff.

⁵⁷⁹ *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, at 555-6. Cf Brennan J, in *Hill v Van Erp* (1997) 188 CLR 159, 171, in economic loss cases, reasonable foreseeability is an inadequate control mechanism, citing Stephen J.

⁵⁸⁰ Fn 558 and 563 above.

⁵⁸¹ Fn 564 above.

An apparent regression toward dysfunctional notions of limiting factors in Australian law.

It is plain that Lord Atkin in *Donoghue*⁵⁸² was pronouncing on principle developed through a succession of cases, rather than stating a rule. His dictum has been so interpreted in both English and Australian cases. Lord Diplock's complaint in *Dorsett Yacht Co Ltd v Home Office*⁵⁸³ that the neighbour '...aphorism marks a milestone...[b]ut misused as a universal it is manifestly false...', was more than an admonition to regard the principle in its correct light; it perhaps created an impression that the doctrine could manage without the principle and the consequence might be that future courts would attempt to define the reach of the rule in terms of other or undefined notions. Whether this is so or not, it is just that approach to reasoning which now appears to characterise the modern Australian law.

Justice Brennan's reasoning in *Gala v Preston*⁵⁸⁴ appears to take a contrary view to that of the leading judgments, employing proximity as a test of the circumstances of a case to fit a category, rather than '...understanding and identifying the categories of case ...'.⁵⁸⁵ Though it appears that he is less committed to the Justice Dean interpretation of the concept of proximity, it does not appear that he contemplated abandonment of principled concepts. Brennan J suggested other considerations than proximity, including causation, as confines upon the reach of foreseeability⁵⁸⁶ But causation after all, had been treated in the cases as one aspect of proximity. Newly stated confining factors

⁵⁸² Fn 275 above.

⁵⁸³ Fnn 268 and 508, p 1060.

⁵⁸⁴ (1991) 172 CLR 243, 254-261.

⁵⁸⁵ *Stevens v Brodribb Sawmilling Company* fn 557 at p 53.

⁵⁸⁶ For example, causation, *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at p 508.

would need a defining principle which would have the capacity to link them to other instances of negligence.

McHugh J in *Perre v Appand* analysed several alternative approaches to proximity which he directly dismissed as a principle to be followed in Australian law.⁵⁸⁷ His belief was that proximity is a '...category of indeterminate reference par excellence...'.⁵⁸⁸ What is it then that the court would have in place of the proximity principle, for none of the devices used appear to achieve a like purpose as has been established in a proximity principle.

Seemingly remote from unjust enrichment, it is in the treatment of principles of tort in this crisis of acceptance for the principle of proximity that the relevance of the experience may be recognised. What must be developed is an approach which avoids the problems identified by Jacobs J in *H.C. Sleigh Ltd v South Australia*⁵⁸⁹ called '...individual predilections ungoverned by authority...'. The introduction of reasoning of concepts that have no definitive meaning in tort exemplifies the concern expressed by Jacobs J.

The understanding that proximity is a '...category of indeterminate reference...' furthermore, is at odds with leading judgments in Australia and the United Kingdom, at least as proximity has developed in Anglo/Australian law. As a conception of relationships governing and limiting the circumstances in which foreseeability will create or give rise to a duty, proximity is not a category of cases. Rather, as cases involving the spectrum of proximities, physical, temporal, circumstantial and causal, (*Donoghue*,⁵⁹⁰ *Hedley Byrne*,⁵⁹¹

⁵⁸⁷ *Perre v Appand* fn 314, pp 209 ff.

⁵⁸⁸ *Id.*, 209-210, citing McHugh J, "Neighbourhood, Proximity and Reliance", in Finn ed, *Essays on Torts* (1989) 5 at p 13, also 36-39.

⁵⁸⁹ (1977) 136 CLR 475, 514.

⁵⁹⁰ Fn 275 above.

⁵⁹¹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

Jaenesch,⁵⁹² *Hill*⁵⁹³ and *Perre*⁵⁹⁴) demonstrate, it is a *conception* of categories of case that have been found to exemplify a limitation to be imposed upon foreseeability. It is to the law of negligence what a conception of varieties is to the humble apple. It acknowledges a structure of taxonomy and a methodology for enquiry, but it also imposes definitional parameters.

The Broader Consequences.

Lord Atkin's neighbour principle⁵⁹⁵ was a reflection of development of the law in the cases, not a new notion unsupported by authority. Where there are such new notions unsupported by authority however, they may pose problems that defy resolution by ordinary legal reasoning. It has been noticed above that in a succession of prominent cases, proximity has inferred directness and knowledge of a person in the place of the plaintiff. Proximity is what has defined the structure and taxonomy of negligence law and held its principles apart from fiduciary rules and contract. Without a conceptual determinacy that the proximity principle offered, there is a distinct danger that the important distinction between common law negligence and equity will be compromised in some kinds of cases. Indeed, the lack of recognised factor explaining categories of cases uniformly, introduces the kind of concurrent liability difficulties that Burrows envisages when negligence claims become seen as alternatives to actions in contract on the same grounds because of indiscreet conceptual foundation.⁵⁹⁶ This is not that a party has two actions but reliance, for example, in its contractual garb, becomes a concept in tort. The concepts may be wider in one head of law than in the other.

⁵⁹² *Jaenesch v Coffey* (1984) 155 CLR 594.

⁵⁹³ *Hill v Van Erp*, (1997) 188 CLR 159.

⁵⁹⁴ *Perre v Apand* (1999) 198 CLR 180.

⁵⁹⁵ Fn 275 above.

⁵⁹⁶ Andrew Burrows, *Understanding the Law of Obligations*, 26 ff.

It may happen that the law of negligence can find nothing coherent to put in the place of the proximity concept that will support a uniform approach to jurisprudence across the range of categories of cases. A new approach may require the support of major courts in other much larger common law jurisdictions, simply because of the sparseness of the 'traffic'. A related problem is that a quest for terms of common language to express adequately the varied and developing characteristics of legal principles is a formidable task, especially in a small jurisdiction. Professor Hart's comment is again pertinent, '...legal notions however fundamental can be elucidated by methods properly adapted to their character'.⁵⁹⁷ Such methods have to be developed over time.

The need for the courts to persist with development of jurisprudence related to legal concepts in negligence, and also in unjust enrichment, is demonstrated by the tort law comparison. In unjust enrichment, if a modernised and popular meaning were to be attached to 'unjust', the Australian Courts would have difficulty in developing a satisfactory alternative jurisprudence, especially because the very long standing notion of 'obligation imposed by the law' might also be up-rooted. Unjust enrichment cases are rare in the High Court. It seems likely that the Australian law of negligence faces a crisis of jurisprudence, not exactly similar but at least as complex.

In *Hill v Van Erp*, Justice Dawson's speech, with which Toohey J was in general agreement, acknowledged concern about the difficulty of finding any conceptual continuity or identified common element through the proximity principle, yet he favoured the principle as the continuing mode of capturing the "something else"

⁵⁹⁷ *Ibid.*

than foreseeability.⁵⁹⁸ Toohey J, who commented only on this aspect of the case, emphasised that it was the category of case with which proximity is concerned rather than the question as to proximity on the facts of a particular case. Citing the Lord Devlin dictum in *Hedley Byrne*⁵⁹⁹ he concluded, ‘...used in that way, there is no difficulty in treating proximity as the general conceptual determinant and the unifying theme...’⁶⁰⁰ Justice Toohey’s concerns reflect Hart’s ‘...legal notions ...elucidated by methods properly adapted to their character.’⁶⁰¹

The Dawson and Toohey JJ dicta are relevant to other concepts of law that are directed to elucidation of principles and rules, and uniformity in their interpretation and application. The concept of unjust enrichment is so described by Justice Toohey’s words. This is the meaning assigned to the unjust enrichment concept, even though the High Court has declined to accord it the status of a general principle.⁶⁰²

Can Justice Toohey be understood as saying that proximity concerns an overview of categories? I think he can. If so, his analysis contributes to understanding proximity as a legal concept rather than an accident of the facts.⁶⁰³

⁵⁹⁸ *Hill v Van Erp*, fn 447, pp 198-9, Dawson J considered that the principle assisted the case by case development of the law. Regard for the original Lord Atkin reasoning would however concentrate attention on the capacity of ‘directness’, ‘causation’ and ‘foreseeable party injured or damaged’ as the underlying issues of proximity principle, assisted where appropriate by other principles. Dawson J identified these auxiliary principles in *Hill*, as those rules and policies governing relationship between solicitor and client, operating within and contributing to the concept of proximity.

⁵⁹⁹ Fn 575.

⁶⁰⁰ *Hill v Van Erp* fn 447 at p 190 per Toohey J; see text accompanying fn 577 as to Lord Devlin.

⁶⁰¹ ‘Definition and Theory in Jurisprudence’, (1954) 70 *LQR* 3, at 37.

⁶⁰² *Pavey & Matthews Pty Ltd v Paul*, fn 1, 256-257, per Deane J.

⁶⁰³ Fn 600. Gummow J in *Perre v. Apand* fn 314, at pp 260-261, Gleeson CJ agreeing, at 190, whilst avoiding direct appeal to a proximity principle, returned in his reasoning to an approach defined in terms of close and direct relations, an approach which strongly suggested the manner in which Lord Atkin defined ‘neighbour’ in *Donoghue* fn 275. This approach affirms that of Stephen J in *The Willemstaad*, fn 579. There are nevertheless, a host of competing conceptual standards arising in the cases.

It is difficult to transpose this experience into concrete methodology in unjust enrichment. The courts have not yet done so. It might simply be that the intrusion of new notions into established law in tort, offer an illustration of the need for clear conceptual approaches in attempting that difficult task. What we are witnessing in modern Australian negligence law is the abandonment of principle in favour of notions which have not developed strongly in this field of law. They may import meaning from other branches of the law which may be appropriate for one set of circumstances but not for others. They have no demonstrable capacity for development as concepts and principles of negligence. The propositions that *control* and the *impairment of legal rights* as well as the broader meaning advocated for *reliance*, and *vulnerability*, may stand in the place of proximity and do its work, appear to be premised upon assumptions which raise questions as to the authority of these factors as indicators of a limitation upon foreseeability.

That is to say,

- whilst the objective from the beginning, was to define reasoned limits of the *foreseeability* concept, and
- *control*, *impairment of legal rights*, *reliance* and *vulnerability* are undeveloped in tort as indicators of a limitation upon foreseeability, and
- have no demonstrable capacity for development as concepts and principles of tort,

they and other creatures of other specialities of the law, have at least as little potential to help define the unifying legal concept of unjust enrichment.

There is sound reason in the view of Kirby J who (in dicta concerning tort) expressed the concern that these propositions and notions are being elevated to

the status of 'preconditions of the existence of a duty of care in negligence... (or what is worse) 'principles to be applied' in negligence cases.⁶⁰⁴ This is especially so because the courts have not defined them either as concepts in negligence law, nor as putative principles. They remain issues of fact which could operate quite differently from case to case. Control for example, where absent, might infer absence of negligence. Reliance and vulnerability are likely to take on meanings attributed to them in other areas of law, especially in equity. As issues of fact which might be applied in like cases, their usefulness would be limited and their capacity for misleading, significant. Plainly, what *proximity* offered was the potential to be a principle of variable content rather than control, vulnerability and reliance, mere notions of variable meaning and significance.

Justice Kirby's inclination to follow the three stage English rule in *Caparo Industries Plc. v Dickman*,⁶⁰⁵ foreseeability, proximity and fairness, is his concern overall, to ensure that development in the law remains explicable in terms of principles. In *Cattanach v Melchior*⁶⁰⁶ however, Kirby J decided the case, not on the basis of the analysis of legal issues that had been identified in the minority judgment of Gleeson CJ, but on an assumption that the common law

does not exist in a vacuum...[I]t is expressed by judges to respond to their perceptions of the requirement of justice, fairness and reasonableness in their society.

He did not argue the meaning of these perceptions of justice, fairness and reasonableness.⁶⁰⁷

⁶⁰⁴ *Perre v Apand* fn 314, 290 ff.

⁶⁰⁵ [1990] 2 AC 605 at 618. '...[they] ...are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but [they] attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.', per Lord Bridge.

⁶⁰⁶ (2003) 199 ALR 131, p 132 per Gleeson CJ; 160 & 164 para 106, per Kirby J.

⁶⁰⁷ The alternative to conceptual basis of the law is an incremental approach that Gummow J considered the following passage: 'The case law will advance from one precedent to the next. Yet the making of a new precedent will not be determined merely by seeking the comfort of an earlier decision of which the case at bar may be seen as an incremental development, with an analogy to an established category. ...The emergence of a coherent body of precedents will be impeded, not assisted, by the imposition of a fixed system of categories in which damages in negligence for economic loss may be recovered.' *Perre v Apand* fn 314 at pp 253-254. Kirby J too, was unpersuaded of the merits of the incremental approach without some uniform principles and methodology; p593 ff.

Some insight into the correct approach to be adopted when reasoning such complex issues as the relevance of particular principles to rules, (and this applies to tort and unjust enrichment alike), might be had by contemplating an observation on *reason* of Ludwig Wittgenstein. Contemplating the paradox that pre-conditions of a rule can be made out both to affirm it and to conflict with it, Wittgenstein says

It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of another one standing behind it. What this shows is that there is a way of grasping a rule which is *not* an interpretation. Hence there is an inclination to say ‘...every action according to the rule is an interpretation’. But we ought to restrict the term *interpretation* to the substitution of one expression of the rule for another.⁶⁰⁸

The substitution of the ‘pre-conditions’ noticed by Kirby J for unifying factors explaining categories of cases, appears to reflect Wittgenstein’s concern. The pre-conditions pull the rule this way and that in the guise of offering interpretations of its purpose.

True interpretations begin with the rule rather than with the nuances which the preconditions suggest as to its true meaning. Unjust enrichment is not truly to be understood as a fault based principle or as a means of redressing

⁶⁰⁸ Philosophical Investigations 1, 81e, 201.

unconscionability. Likewise, negligence might be differently construed when its premises are held to be concerned with 'reliance', with 'vulnerability' and 'control'.

The situation of the law in modern negligence cases, especially in *Hill*⁶⁰⁹ and *Perre*,⁶¹⁰ poses a crisis of lack of development of concepts and principles of the law. This might be addressed in some degree by the majority judgements in *Tepko v Water Board*,⁶¹¹ a negligent misstatement case, in which the majority followed the dicta of Barwick CJ in *Mutual Life and Citizens' Assurance Co Ltd v Evatt*,⁶¹² in finding that in cases of that kind at least, the foreseeability principle is limited by considerations of relationship. *Tepko*⁶¹³ is however, a special case of economic loss through negligent misstatement.⁶¹⁴

Whether, in Australian law, proximity has survived as a principle of the law or as a principle under some other name, remains unclear.⁶¹⁵ In tort, judges whose dicta have stood the test of time, have returned repeatedly to basic principles enunciated in *Donoghue* and significant cases which followed it, to explain, by inference at least, the content of duty of care, foreseeability of injury or damage and the qualifying 'proximity' concept or principle. The unjust enrichment concept/principle is not the same. The concept of *unjust* is a conceptual comparative test and quantifier of categories of cases that have been identified

⁶¹² (1968) 122 CLR 556 at 569-572.

⁶¹³ Above fn 611.

⁶¹⁴ Cf. Kirby J in *Perre v. Apand* fn 587, 421, arguing that once a duty of care exists, an action lies for a proved breach which results in damage irrespective of the type of damage.

⁶¹⁵ The following dictum supports that view. 'With the demise of proximity as the touchstone by which a duty of care was to be established the Tribunal is left in something of a legal vacuum in the present case.' *Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co. Pty Ltd; Re Hay (No. 4)* 1999 NSWDDT 5, para 240, per Curtis J.

by the law. There is a comparison to be drawn however between the manner in which unjust enrichment for one part, and the foreseeability doctrine coupled with proximity for the other, have demonstrated methodology of reducing rules from the abstract propositions that are their foundation. This may have a counterpart in German law.⁶¹⁶

The differences in approach are to some extent, historical and to an extent theoretical. Like the ancient actions before it, the unjust enrichment action defers to many other actions where available. This gives to tort the character of a dominant set of doctrines and rules.⁶¹⁷ Both the obligation in unjust enrichment and the remedy in tort are imposed by law. Both depend upon critical subordinate principles that have become so much a part of the actions that their removal would lead to confusion and even unwarranted liability.

Negligence without a 'proximity' type of concept/principle is foreseeability unlimited by principles that have demonstrable relevance to negligence law. It debunks principled law and looks instead for notions of justness and fairness inherent in *reliance* and *vulnerability* that have not been juristically defined in the common law of tort. Unjust enrichment without the limiting factor of *subtractive enrichment* might be comparable.⁶¹⁸ Neither have the essential controls on the scope of the action. Neither is an effective rationalisation of the broad abstraction from which the analysis began.

⁶¹⁶ See sub-chapter 12.1.

⁶¹⁷ See J Beatson and GT Virgo 'Deferability Principle in Unjust Enrichment' (2002) 118 *LQR* 352 at 353, commenting that in *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516, the High Court of Australia '...ignored the fact that unjust enrichment is subordinate to contract, a fact that contributed to the confusion of principle in the judgments:...[the case] illustrates the danger of a shift away from recognized principles'.

⁶¹⁸ See fn 429 above. Niall R. Whitty suggests the 'mirror loss' of the German and American law has certain advantages. The perception that unjust enrichment underlying principles should be 'loosened-up' is in the mind of some schools of jurists.

Phillip Bobbitt's possibilities of a rule that Jefferson and White considered a useful analytical tool are set out below: Bobbitt calls them 'modalities'⁶¹⁹

1. They may be founded in argument which is historical where one looks to intention of a competent legislator;
2. They may be textual, where the foundation of a rule is inherent in the words whereby it is articulated. 'trespass' and 'unconscionable' can be such textual indicators.
3. Thirdly, the foundational context may be structural, which considers the relationship of one part of the law to another: contract illustrates this well.
4. Fourthly, the foundation might be doctrinal, relying on authoritative precedent. Most rules of the common law have this fourth characteristic which is usually regarded as the *sine qua non* of a rule of common law.
5. They may be ethical.
6. They may be prudential.

The ethical and prudential, might be seen to describe the policy aspects of principles which support a rule; it must be doubted whether in common law (as distinct from statute) they can stand alone without the pre-eminent foundation of doctrine.

This framework is a handy approach to analysing the judgments in individual cases since several of these foundations of rules might be regarded as critical to efficacious adoption of a rule. Judgments in cases such as *Perre* and *McNeice*,⁶²⁰ examined against this framework of Bobbitt's criteria, produce no satisfactory answer as to basis in principle. The members of the courts differed in their analysis to such an extent such that it is uncertain in what context a

⁶¹⁹ Philip Bobbitt, *Constitutional Interpretation*, Bobbitt's constitutional orientation has been thought by others to be useful in other areas of the law; see Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law*, vii.

⁶²⁰ Fn 13; also *Perre v Apand* above, fn 587; and *Hill v Van Erp*, above, fn 593.

subsequent court would be obliged to apply findings of the High Court. Only a clear statement of principle underlying a rule will assist a later court to resolve this matter.

The treatment of proximity in the leading cases over nearly half a century in both United Kingdom and Australian jurisdictions, as a limiting factor on foreseeability that could only be replaced in the law by a concept or principle of equal standing and effect compares to the development of unjust enrichment over a like period. If it be assumed that Bobbitt's categories are an accurate classification of the foundations of rules, a question arises as to when it is accurate to describe the foundation of common law rules in unjust enrichment and tort as 'doctrine', an appellation usually reserved in common law, for narrow rules that have long been applied in the courts.⁶²¹ There are rules of contract that are unmistakably doctrine, 'consideration' for example. How then does the law describe the essential elements of consideration such as the rule that consideration must be valuable? Such a rule is then an essential element of doctrine. Is foreseeability a doctrine in tort? If so, is, or was proximity a characterising element of a doctrinal rule. This is not to be answered here but the comparison demonstrates that rules are in varying degrees, embedded in our law by compulsive pronouncements of the highest authority.⁶²²

Is the *unifying legal concept of unjust enrichment* doctrine? If the answer be no, what then *is* doctrine in unjust enrichment? Is it sufficient from a jurisprudential point of view that such a concept be perceived to be a concept embedded in the law by compulsive dicta, in the manner that Justice Dixon intended?⁶²³ The questions posed here recall the discussion of the desirability of developing

⁶²¹ In the common law, consideration in contract, laches and estoppel are sometimes described as doctrine.

⁶²² See fn 462 above and the related conclusion drawn at pp191-93.

⁶²³ *Hargrave v Goldman*, Fn 462, at p 63.

statements of the law that characterise some principles and rules as ‘crucial’ or ‘fundamental’ as envisaged in sub-chapter 10.3.⁶²⁴ Perhaps ‘doctrinal’ and ‘element of doctrine’ would be adequate. The discussion is simply designed to answer the questions posed in sub-chapter 10.3 about the need for characterising pronouncements or dicta in a manner that recognises their importance, not just to the immediate head of law, but to related heads of law that are inevitably affected by change.⁶²⁵

If Bobbitt’s classification of foundations is a reasonable one, the only alternative would be that a rule is merely structural or contextual. Unjust enrichment is neither structural nor contextual: the grounds of actions and the subordinate concepts/principles are so much an indispensable aspect of unjust enrichment that itself has characteristics like doctrine, having been treated by successive judgments of the highest courts as an imperative case for an order for restitution. Absent any one of these subordinate elements of grounds, there is no basis for the ‘doctrine-like’ rule of unjust enrichment to apply.

Conclusions:

The conclusions here stated, are in several respects conclusions also to other sections of the work, especially sub-chapters 10.3 and 10.4.

The unifying elements that perform the role of isolating governing principles are ‘...concepts, pre-requisite to a finding of liability, embedded in the law, by compulsive pronouncements of the highest authority, and which give the law symmetry, consistency and the defined boundaries essential to reasonable

⁶²⁴ See pp 175 ff.

⁶²⁵ *Ibid.*

predictability.⁶²⁶ The existence of such concepts/principles to bridge the conceptual links between the cases has been shown to be an essential prerequisite to the working of precedent. Whether they are doctrinal in character is less important than is the contribution they make to predictability and unity of actions and the enabling of precedent. Their characteristics of rules established by successive judgments at the highest level and that resemble doctrinal law, are the factor that would properly require a judgment of extraordinary quality; a profound treatment of authority and of principles; and, extraordinary foresight as to what will be the effect of a new decision upon the existing concepts, principles and rules. These conclusions reached after examining the possible consequences concerning a significant change to the common law doctrine of negligence, are at least a foreshadowing of conceptual difficulties that might arise from new developments affecting the subsidiary concepts and principles that support unjust enrichment in the law.

Chapter 13: 'Unjust', a Classifying Factor; Abstract Principle and the Particular Case.

13.1. Introduction.

There are several issues that could be an appropriate focus of this final chapter, most of which have been addressed in one way or another in the foregoing chapters. I have chosen one which I believe to be the issue of major and enduring significance for the law of unjust enrichment: this is the jurisprudence of modern unjust enrichment in Anglo/Australian law. In order to stay within my

⁶²⁶ *Hargrave v Goldman*, Fn 462, at p 63, per Windeyer J.

‘concepts and principles’ parameters, the jurisprudence will be interpreted for its relevance to concepts and principles.

The elucidation of fundamental notions, is not simply about language of the law; it also involves those other methods specially adapted to their character.⁶²⁷

These latter phenomena have been dealt with in the chapters above but require final comment or concluding observations: they are important to the jurisprudence.

13.2. Unjust Enrichment’s Core Characteristics.

What is the authority for unjust enrichment jurisprudence?

There has been no sustained attempt in later law to give meaning to Lord Mansfield’s guiding principles of ‘equity’, so that it is difficult to describe it adequately. Lord Mansfield’s notion of ‘equity’ is not to be identified with modern equity, but what other concepts and notions had he in mind? If we can answer this, then like *Donoghue*⁶²⁸ and the tort of negligence, and like *Eastwood v Kenyon*⁶²⁹ and consideration in contract, *Moses* may truly be seen as a foundational case. That would provide a suitable conclusion to several aspects of this work, especially as to the doctrine-like dicta that refer to notions of *aequo et bono* and *equity* of a different persuasion than modern equity.

Whilst Lord Mansfield’s judgment in *Moses*,⁶³⁰ suggests characteristics of the jurisprudence of unjust enrichment, another case stands out for its clear statement of contemporary jurisprudence, that is, of the late 18thC. Justice

⁶²⁷ The expression recalls Hart, fn 562 above, ‘...the forbidding jungle of philosophical argument...’, insisting that ‘...legal notions however fundamental can be elucidated by methods properly adapted to their character’.

⁶²⁸ Fn 275.

⁶²⁹ (1840) 11 Ad & El 438; 113 ER 432.

⁶³⁰ *Moses v Macferlan* above, fn 182. The accompanying text explains Lord Mansfield’s contribution.

Lawrence's judgment in *Exall v Partridge*⁶³¹ explained that '...[t]he justice of the case...' demanded that all three parties to a debt had a joint obligation to pay the amount of the debt of which they had been relieved by forfeiture of the property of one. The judgment is an important conceptual bridge between the law in the era of *Moses*⁶³² and modern law. It also applies jurisprudence that began with the *action on the case*. This conceptual 'bridge' is not unlike that referred to at the end of the last chapter; that is, concepts assisting the progress of reasoning from one principle to another. In Justice Lawrence's dictum, is to be found the enduring appeal to 'justice of the case.' That will be mundane to modern ears until the significance of the dictum for the development of legal science is explained.

We must ask then, what is the foundation of this perception of justice of the case? To answer that question I propose to show that the formative jurisprudence of unjust enrichment has been shaped by enduring ancient perceptions that explain many aspects of modern law. This will involve consideration of broad abstractions and particular principles working together in the modern law. To show how that is possible, a brief reflection on the origins of legal scientific enquiry is required. This will show that the methodology of western legal scientific enquiry in so far as it shapes our law of unjust enrichment, has been constant for a very long time and is relevant to modern law.

⁶³¹ (1799) 8 Term Rep 308; 101 ER 1405 at 311 (Term Rep.) fn 178 The case was cited above at fn 337 for it's relevance to early statement of grounds and the reasoning of justice of the case.

⁶³² Fnn 19, 42 and 186 refer. Clearly, such an important dictum ought to have had a stronger influence, but in the subsequent two centuries, the quasi contract preoccupation prevailed. From another perspective what has been argued in these pages contrasts with approaches in the judgements in *Roxborough* fn 12, as to which, see fnn 182, 418 and 617.

Lord Mansfield's Perception of Equity.

Peter Stein observes that the Romans learned from Greek philosophy the art and merit of making a science out of the law. The lesson was a long time in the learning in the common law world.⁶³³ Nevertheless, the Aristotelian logic of developing a science from a body of rules found its place in common law jurisprudence and principles of law emerged, albeit almost imperceptibly, from functional procedure. Pragmatic adherence to rigid formulae did not mean that there was an absence of concept and principle in the minds of the judiciary, or those of them, at any rate, whose contributions ultimately made a difference. Lord Mansfield was one who, ultimately, left a profound impression on our law of unjust enrichment. The best way of describing his achievement is that it was an endeavour to introduce scientific enquiry into the elaboration of grounds for the action for money had and received, for that surely, was his purpose in *Moses*.⁶³⁴

Several philosophical treatises offer some insight on the jurisprudence evident in the reasoning of judges of Lord Mansfield's era. Two channels of philosophy recommend themselves as foundations of notions of informal equity. Firstly, from Aristotle's *Nichomachean Ethics*,⁶³⁵ we find that the ancient Greek philosopher offered the following observation upon *equity and the equitable and their respective relations to justice and the just*.

These are the considerations that give rise to the problem about the equitable ...The equitable is just, but it is not legally just – [it is rather] a correction of justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall

⁶²⁹ Peter Stein, *The Character and Influence of the Roman Civil Law*, 40.

⁶³⁴ Above, fn 632.

⁶³⁵ Book V Ch 6.

be correct. In those cases then, [when] a case arises in which it is not covered by the universal statement, it is right ...to correct...⁶³⁶

The passage develops the theme that the legislator would have corrected had it known of the circumstance and this is the reason of the making of the exception.

It continues,

...this is the nature of the equitable: a correction of law where it is defective owing to its universality.⁶³⁷

It is explained that the rule adapts itself to the facts. Modern unjust enrichment theory has a curious resemblance to that explanation: indeed, Lord Mansfield's key dicta had at least one thing in common with formal equity, and that is that the purpose of his rules was to *correct* where reasonableness and justice demanded that there be correction.⁶³⁸

The theme is taken up again in the Aristotelian *Rhetoric*⁶³⁹ where the ancient author held that equity is partly concerned with legislative intent (an allusion to the codified law) and partly not. The latter is to cover situations where individual facts are so many and various that it is impossible to make a universal rule.⁶⁴⁰

This describes the jurisprudence of modern Continental law. White and Patterson, in their *Introduction*,⁶⁴¹ relate that the observations in *Rhetoric* refer to the central jurisprudential problem of stating general rules abstractly, a problem

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.* The notion of 'universality' recalls the 'fundamental abstraction' discussed in chapter 10. The comparison suggests that the technical meaning is reflected in the terminology of modern jurisprudence: see fn 292 where Neil MacCormick is cited on a related point; Neil MacCormick 'Why Cases have Rationes and What These Are', in Laurence Goldstein ed, *Precedent in Law*, 162. MacCormick's distinction between universalisation and generalisation is an important one. The former refers to a broad ground which is satisfied by a general principle. It would be inaccurate to suppose that 'generalisation' also describes this legal concept.

⁶³⁸ The same juristic reason seems plain in the doctrine of *quid pro quo*, and the combined action of *debt* and *account*. Formal equity too, aspires to correcting the short-comings of common law, not as primitively as the ancient actions, however: see for example, the cases cited at p 209 above.

⁶³⁹ W Roberts trans. Aristotle, *Rhetoric, The Oxford Translation of Aristotle*, Bk 1 Ch. 13, 1374a. 29-33.

⁶⁴⁰ This recalls Dworkin's comments on the *Sherman Act* above, p 98 and fn 229.

⁶⁴¹ Jefferson White, Jefferson and Dennis Patterson, *Introduction to the Philosophy of Law*.

to which Von Caemmerer's observations noticed above, have an especial relevance.⁶⁴² In such cases, the authors ask, how is *'the something' that should be added to the general proposition to effect justness*, to be determined? The question recalls the similar enquiry as to the 'something else' that refines the notion of foreseeability in negligence'.⁶⁴³ Is it to be arbitrary or can it be objectively determined? They point out that Aristotle affirms that it can be objectively determined by practical (rather than theoretical) reasoning and judgment.⁶⁴⁴ Von Caemmerer's perception of 'filling out' the abstraction in the courts in practical situations is similarly reasoned.⁶⁴⁵ Significantly, this describes the role of neo-modern 'proximity'.

The second channel of enquiry is associated with Thomas Aquinas, who like Aristotle, a proponent of the natural law, observed that some outcomes from the law may occur firstly, as a conclusion from general principles, and secondly as a 'determination from general principles'.⁶⁴⁶

The first way is close to the scientific method, by which demonstrative conclusions are derived from first principles. The second way ...[is that] in which some common form is determined to a particular instance ...⁶⁴⁷

These citations point to a perception of jurisprudential methodology which has demonstrably survived in classical and neo-modern legal systems; but it has not emerged what is the source of meaning of ... *that something that should be added* What is the standard or principle from which the special rule draws its

⁶⁴² Above sub-chs 10.1 and 12.1, especially, p 177 ff; where the Von Caemmerer perception of the courts 'filling out' the characteristic that transform the general abstraction into principle and rule.

⁶⁴³ Above, p 233.

⁶⁴⁴ Above, p 247.

⁶⁴⁵ Above, p 177.

⁶⁴⁶ Saint Thomas Aquinas, *Summa Theologica*, Q.95.

⁶⁴⁷ *Ibid.*

meaning? An answer must have regard, not to general principles but to universal standards.

It was the same concepts of equity of the kind to which the Aristotelian documents refer which appear in civilian law of the middle-ages. Azo reveals a general prohibition against unjust enrichment⁶⁴⁸ in which the general proposition was qualified by a 'fine equitable rule' which is reminiscent of von Caemmerer's idea of *broad abstraction*, filled-out by curial rules.⁶⁴⁹ The reasoning is instructive, and the Roman precedent is plain. The rule was not generally applied, because it could not be applied where the enrichment was not unjust.⁶⁵⁰ Related to our perceptions of unjust enrichment, this reasoning is like the reverse side of the same coin: the 'fine equitable rule' is the exception to the finality of transactions or the security of payments. The exception cannot be applied if the reason (ground) asserted by the plaintiff is not an instance of *unjust*.

The philosophical literature surveyed above points to learning of which a prominent judge at the end of the middle ages might have been aware. It has not been my intention to demonstrate continuity of principles from the ancient past; such an endeavour might be futile: but the literature to which I have

⁶⁴⁸ *Accursian Gloss*, 'Nam Hoc Natura' D. 12.6.14. Jan Hallebeek notices that the 'main stream' of jurisprudential thought in Continental Europe adopted this measure in the middle ages after debating for centuries the Martinus (c. 1160) proposition for a very widely applied principle; the main stream favouring restricting availability to the limits of the Justinianic codes. 'Unjust Enrichment as a Source of Obligation: the Genesis of a Legal Concept in the European IUS Commune. [2002] RLR 92, 95. See also Sir Henry Maine, *Ancient Law*, above fn 37, pp 15 ff, describing a thesis that there are agencies or instrumentalities, being 'fictions, equity, and legislation,' through which law in professive societies is 'brought into harmony with society'.

⁶⁴⁹ Chapter 10 above, p 177.

⁶⁵⁰ See Hallebeek's comments on the codes, above, fn 644. If a party permits another to acquire title by usucaption (tolerated, uninterrupted occupation or possession), then it was his/her own fault and could not therefore claim unjustness. It was, moreover, a legal process and therefore could not be the iniuria which was central to unjustness. The notion of 'iniuria', in this context, seems to imply some loss not capable of being explained by a legal process.

referred indicates unequivocally, a very old and durable jurisprudence associated with the expression of rules founded upon broad abstractions. It was this jurisprudence that will have been well known to judges and jurists of the Lord Mansfield era and it helps to understand his use of broad abstractions such as *aequo et bono* and *equity*.⁶⁵¹

Inculcation of these standards in neo-contemporary law.

Lord Mansfield's jurisprudential perceptions are better understood when it is appreciated that there were very significant foundations for statements of principle that described 'that something' that explained the difference between broad abstractions on the one hand and principles and rules by means of which the courts 'filled them out' on the other. Demonstrably the concepts that were significant to the law and legal philosophy relate to the ancient perceptions of equity that empower the judicial officer, praetor or judge, to interpret the facts of the case, and to find an instance of inequity or criteria of unjust benefit.

Most of this background was lost to the common law in recent centuries. It is the attempt to interpret Lord Mansfield's dicta without consciousness of this background that made *quasi contract* a poorly understood set of quasi rules explained supposedly by contract jurisprudence, focussed upon implied

⁶⁵¹ I have noticed above that David Ibbetson's essay 'Unjust Enrichment in England before 1600', in Schrage, *The Comparative Legal History of the Law of Restitution*, 121, identifies petitions in equity in the 15th & 16thC's which seek recovery of sums paid in absence of contract, to a ploughman who had failed to plough, *AppilGarth v. Sergeantson* (1438) 1 Cal Chanc xli (a marriage case); a builder who had failed to build, and for goods which had not been delivered, *Essex County Record Office D/DP M207* (St Martin, 1403); *D/DP M224* (SS Simon and Jude, 1419); *DDD/DP M251* (1445). I am indebted to Ibbetson's sources for these citations. The action derived from the Institutes of Justinian and lay for recovery of personal items, to force restitution of money or property passed for a purpose which has not occurred. Ibbetson concludes an apparent connection with the Roman Law *condictio causa data causa non secuta*, Schrage, *The Comparative Legal History of the Law of Restitution*, 121, 129. Such actions ceased in the 16thC corresponding with the advent of *indebitatus* in the common law courts. *Id.*, 129-130. The cases are nevertheless, evidence that the early English law did 'fill out' principles and rules founded upon the broad abstractons.

promise. To erase the gap between the early 18th C and the mid 20th C, it is quite unnecessary to establish a continuity of principle or rule from the ancient past, but it is useful to notice that reasoning closely resembling that which underlies a finding of unjust enrichment in modern courts has prompted the imposition of obligations to make restitution over the course of a millennium, and perhaps throughout the long legal history of western civilisation. To see and recognise this, however, it is sometimes necessary that we take a philosopher's view of what the law set out to do then and now, rather than attempt to draw an explanation from the very confusing explanations of the legal process in individual judgments. The clarity of defining principles was achieved nevertheless, by Lawrence J in *Exall v Partridge*,⁶⁵² and the next renowned event in which we can recognise the resumption of scientific thought is the advent of Lord Wright's judgment in *Fibrosa*.⁶⁵³

It might be asserted that to this day, the common law courts have not defined the content of *that something* which makes the difference between stating general rules abstractly and a finding of unjust enrichment: yet that supposed fact needs to be examined in two quite different ways.

- Firstly, the broad abstraction, *a party shall not be permitted a benefit so as to be unjustly enriched at the expense of another*, is essentially the *Fibrosa*⁶⁵⁴ principle.
- As such, it is an explanation of rules that create obligations in particular cases, in specific circumstances that are recognised as a ground of unjust enrichment.

⁶⁵² Above, fn 178 and see above p 248

⁶⁵³ Fn 40 and see p 248

⁶⁵⁴ *Ibid.*

- Those rules must be recognised as an instance of the broad general (*Fibrosa*) principle.

Secondly, the law that permits or enables security of receipts can be seen as one kind of expression of the general abstraction, and the ground of unjust enrichment is the 'fine equitable rule' as Azo described it, an instance of an exception.

It is not easy however, to recognise the *abstract* and the *particular* in modern common law unjust enrichment because common lawyers have understood the *quasi contract* actions and even the modern grounds of actions, as stand-alone rules, and attempts to explain their common conceptual basis have not been developed adequately. The unstated abstract proposition is nevertheless achieved in practice by the policy of the law to protect security of receipts.⁶⁵⁵

The problem with understanding this second style of definition of the unjust enrichment rules is that a party's non specific wealth is not usually thought of as being protected by legal abstractions. The first approach might be preferred and indeed, it is conceptually closer to the Australian law. The persistent problem is that the specific cases are rarely reasoned as instances of the *broad Fibrosa abstraction* that has nevertheless been regarded as a universal legal standard in successive leading cases. If that were done, the *Fibrosa* principle might be recognised as the kind of broad general abstraction that explains all specific instances of unjust enrichment.⁶⁵⁶

⁶⁵⁵ See the reasoning in the dissenting judgment of Brennan J in *David Securities* fn 204 above, at pp 397 ff, citing *Hydro Electric Commission of Nepean v Ontario Hydro* [1982] 1 SCR 347 at p 412, per Eastey J, arguing that the reason for introducing limitations on recovery for mistake of law is '...to achieve a degree of certainty in past transactions'.

⁶⁵⁶ Above, fn 652.

The *Fibrosa* principle is an imperative for ‘...any civilized system of law...’.⁶⁵⁷

This fact accentuates the role of the courts in finding allowable grounds: it is precisely because of the imperative character of the parent principle that the articulation of that principle in finding specific grounds is an issue of justice.⁶⁵⁸

That conclusion confirms the essential role of the broad abstraction (*Fibrosa*) as a central issue in the law of unjust enrichment, as the over-arching principle.⁶⁵⁹ This conclusion is compatible with the role of the unifying legal concept as ‘sign-post’ to principles as described in arguments developing the significance of the concept in chapter 11. It is also compatible with the Hart and Birks view that the imposition of an obligation is a legally imposed standard of justice.⁶⁶⁰

These conclusions are the complete answer to any assertion that grounds of unjust enrichment are an arbitrary selection of allowable actions. It will nevertheless remain difficult to sustain if one looks exclusively to the modern judgments without ‘factoring in’ the history and philosophy that helps to explain concepts of *equity* and *the equitable* and *abstractions* which are quite unknown to modern common law jurisprudence. It will also be difficult to sustain if the legal profession fails to adopt an enquiring approach regarding the lessons for our jurisprudence of civilian legal systems. Nevertheless, the *Fibrosa* principle

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Viewed in this light, the actions in unjust enrichment affirm the validity of ordinary transactions by singling out the grounds which shall be exclusions from the validity of normal relations. Such a perception turns the notion of arbitrary grounds on its head because the ‘arbitrary grounds’ argument depends on a perception that there is no rational basis for allowing one ground and not another. In fact, the law goes as far as it might to protect ordinary transactions and the security of receipts by limiting, to a minimum, the instances of unjust.

⁶⁵⁹ *Ibid.* This is not inconsistent with the view stated by Grantham and Ricketts, above fn 165, who explained that ‘...unjust enrichment does not seek to articulate an independent basis for restitution, one that appeals to some over-riding conception of fairness...’. The specific instances of unjust enrichment in the cases are not emanations of a fairness or general justice principle. They are instances of the standard set by the *Fibrosa* principle.

⁶⁶⁰ Above p 128, noting both Birks’ and Hart’s belief that performance of an obligation is an issue of justice. It may be deduced that imposing a legal obligation becomes an aspect of a judicial standard; it is an issue of justice.

is widely accepted in common law jurisdictions as a foundational statement of unjust enrichment; what needs to be acknowledged is that cases of specific grounds draw a conceptual unity from that principle.

The two approaches, that is the filling out of the abstract principle, and the exception to security of receipts, studied in the paragraphs above are not mutually exclusive and indeed both could be reasoned as an explanation of the phenomenon of *the abstract rule and the specific instances*. It has been a misconception that the first and more familiar approach is founded upon a conception of unrelated grounds that has brought about the survival of *quasi contract* notions into the 20th C. At the same time, unjust enrichment jurisprudence continued to be reasoned and developed in the European Continental systems of law in the manner described in Chapter 10, upon the basis of a unifying source of principle.

There would seem to be considerable merit in studying each approach and exploring the lessons of some aspects of Continental/civilian law of unjust enrichment. The latter will be possible if it is recognised that the Continental and South African civilian systems of law are conceptually more closely related to our own than North American general principle and concomitant jurisprudence. In spite of the very significant differences, both Anglo/Australian law and Continental law appeal to a wealth of jurisprudence as the basis upon which the courts will develop or 'fill-in' the concept, principles and rules from the fundamental abstraction that a party shall not retain the fruits of enrichment that the law holds to be unjust.⁶⁶¹ Broadly, the role of the unifying legal concept of Australian law and the unifying principle in English law, as described in Chapter 11, and the instances of cases which the unifying legal concept/rule identify,

⁶⁶¹ Explained in Chapter 10.

corresponds with the organising function of the adopted codes in the civilian systems of law.⁶⁶²

Observations Concerning Common Law Systems.

Jurisprudence obtaining in Canada and the USA undoubtedly appeals to some judges and jurists, especially in Australia. If that appeal is to be a rational influence, it will be essential that the overview be complete so that it is appreciated that the differences are more fundamental than may have been recognised in the past.

Finally, there will be different points of focus in English and Australian jurisprudence. I believe, nevertheless, that there is neither need nor justification in theoretical terms for pursuit of differing paths of future development. From an Australian perspective, the unity with traditional sources of persuasive authority is imperative: a significant change will take decades to be completed in a manner that is coherent in company with contract, tort and equity. This is simply a consequence of the limited number of cases that might come before the courts, a factor that will be exacerbated, if a different course is pursued, by confusion of concept, principle and rule. There are strong arguments for reasonably parallel development.

⁶⁶² Studying the law of unjust enrichment in these terms may very well provide an answer to the need described by Professor Birks, *Introduction to the Law of Restitution*, pp 19- 23, as a uniform pattern of analysis.

CONCLUSIONS OF THE THESIS.

Conclusions are stated at several points throughout this work and especially in Chapter 9.3 and at pp 217-19 and 242. The following are broader conclusions, especially reflecting the objectives of the thesis (pp1-2). They are supplementary to those more specific conclusions in the text although they adopt some features as conclusions about broader issues. I have identified key chapters and pages where possible. Some conclusions however, draw upon many aspects of the thesis.

1. As to Concepts. (Chs. 6 & 9.)

Without a predictable jurisprudence of its own, unjust enrichment is at risk of being defined in terms of doctrines of other branches of the law, to the mutual disadvantage of taxonomy and principle in each. This mode of definition will be the consequence of the absence of a unifying legal agent capable of drawing reasoning into a collective whole that will make it a decision according to law in terms of taxonomy and principle. It is that *unifying* of actions and of reasoning that the legal concept of unjust enrichment in Australian law and the functionally similar general principle recognised in UK jurisdictions, achieve. Other legal concepts, notably 'tort' have a similar unifying mission that identifies their purpose and separates them, functionally, from other branches of law.

Ancient legal actions that had an unjust enrichment role, especially *debt*, and *account*, from the 13th C, were characterised by their reasoned availability in the absence of availability of a remedy. They were conceptually separate from promissory actions and their purpose was correction; that is, the payment or return of a sum of money or money's worth as compared to the remedying of a wrongful act or failure to act. Other influences that shaped the way actions became available in early history of the common law were the doctrine of *quid pro quo* which shaped the central notion of 'benefit' that is still a characteristic of modern law; and the *action on the case*, quasi delictual in character, and available in circumstances where the law reasoned that an

action was justified because of lack of a remedy in the delictual or promissory branches of the law. In theoretical terms, it was absence of a specific action because general rules were abstract. There is no essential need to demonstrate continuity: nevertheless, the influence of jurisprudence from several ancient sources is readily apparent and the reasoning in each is cognate, one to the other.

The obligation imposed in response to an instance of unjust enrichment is the natural response to the primary rule: the response is imposition by law of a primary obligation. That contrasts with the finding of a breach which evokes a secondary response that is a remedy, such as in tort and contract. The nature of primary and secondary rules is the jurist's reasoning of the difference between 'breach of right' jurisprudence and 'primary obligation' jurisprudence, especially unjust enrichment jurisprudence. The latter response is fundamentally corrective because there is no breach warranting a remedy: (p 157.)

The jurists' division of rules and obligations between primary and secondary classifications offer an approach to the jurisprudence of the broader law of obligations which is both clarifying and facilitating. Its recognition by the profession and the courts will enhance understanding of an important conceptual division of obligations and rights; and, of obligations and remedies.

2. Any civilised system of law will need principles about unjust enrichment.

(Chs. 9-11.)

English cases of the 18th C and especially *Moses v Macferlan* and *Exall v Partridge*, demonstrated the enduring jurisprudence of unjust enrichment. Lord Mansfield's dicta in *Moses* and other contemporary cases, would be cited over the centuries to justify or dismiss conflicting perceptions of principle and rule. His words '...the law implies a debt and gives this action founded in the equity of the plaintiff's case...' cannot be taken to refer to formal equity but must be read in the context of the other very general

descriptions of law he used in the same passage. There is considerable evidence of general notions of equity in the works of philosophers from Aristotle's time to Azo, to suggest that Lord Mansfield meant the 'justice of the case'. That conclusion would suggest that, *ex aequo et bono* and *quasi ex contractu*, comparing the notions to the unjust enrichment rules of Roman law, that Lord Mansfield was using the concepts of ancient jurisprudence to describe his decision. It was though, an ancient jurisprudence that was and is alive today in civilian law. He was not advocating resort to formal equity rules in a 'common counts' context. Progressively, the courts have recognised grounds, and modern courts have refined the statements of concept and principle and determined the character of the unifying explanation of all cases.

The modern law is reasoned in the cases that have come to be called unjust enrichment cases. Lord Wright in the United Kingdom and Justice Windeyer in the Australian High Court were prominent amongst the judges that recognised these actions in the mid 20th C. The abundant evidence of such jurisdiction, ancient and modern, and in civilian law as well as common law, underlies the important dictum of Lord Wright; 'every civilised system of law' requires a law of unjust enrichment; that is a law that will give effect to the incidents of the concept that recognises that the law must respond to instances of enrichment at the expense of another that are, by legal reasoning, unjust.

Anglo/Australian common law does not recognise unjust enrichment as a general principle that founds an action. Rather, unjust enrichment is a unifying legal concept (Australia) or unifying principle (UK) that defines what the law does in response to a ground recognised by superior courts. In all unjust enrichment cases, the uniform elements of the actions are critical and although sometimes drawn from cases of the late middle ages, they are stated firmly as the keys to the jurisprudence of the modern law: there has to be a *benefit, at the expense of the plaintiff* and the circumstances of the benefit being had or received must correspond to one of the recognised grounds.

The courts have closely defined these notions of *benefit, at the expense of*, and have found progressively, that the recognised circumstances that are the foundation of a ground of an action are, subject to the superior courts adjudicating a new ground, the instances and the only instances of what the courts will find is legally unjust. That is the exercise of the primary rule: that finding of unjust enrichment is a strict law (*stricti iuris*) ruling; if the elements of an action are present, the court must impose the obligation to make restitution. It is less obvious and apparently rarely discussed, but ‘tort’ has some similar characteristics. The jurisprudence of both is traceable to the ancient *action on the case*, to which the judicial methodology is attributable.

3. Fundamental Abstraction. (Chs. 10 and 12.)

The fundamental abstraction, as a proposition of legal taxonomy, has the effect of affirming juridical actions and relations that are within the scope of the *Fibosa* principle, characterised as unjust. The *Fibrosa* principle is an imperative for ‘...any civilized system of law...’ This fact accentuates the role of the courts in finding allowable grounds: it is precisely because of the imperative character of the parent principle that the articulation of that principle in finding specific grounds is an issue of justice. That conclusion confirms the essential role of the broad abstraction (*Fibrosa*) as a central issue in the law of unjust enrichment, the over-arching principle. This conclusion is compatible with the role of the unifying legal concept as ‘sign-post’ to principles, and with the Hart and Birks’ view that the imposition of a legal obligation is about a standard of justice.

The perception that unjust enrichment and tort jurisprudence are built upon fundamental abstractions (Chapter 10 and 12) is an elucidating proposition that fits well with the notion of primary obligation and the corrective mission of unjust enrichment jurisprudence; what needs to be acknowledged is that cases of specific grounds draw a conceptual unity from that *Fibrosa*

fundamental abstraction. A similar assertion might be made concerning central doctrines in tort.

That such a proposition is made about common law and civilian German law (Chs. 10 & 12) is enlightening and suggests a need to explore the fundamental similarities of common law and civilian law, especially the notion that both draw upon a wealth of jurisprudence, that is, in common law, the centuries of decided cases, organised by the doctrine of precedent, and in civilian law, the legislated ancient codes. Despite obvious dissimilarity, there is a fundamental similarity of the role of the courts in interpreting and applying their respective resource of principles and rules. These perceptions also suggest that the Australian and English common law may have a more fundamental juridical resemblance to civilian law of unjust enrichment than they have with North American jurisprudence. The depth and extent of such similarities and dissimilarities warrants further study which has the potential, not for convergence, but for enhanced understanding of Australian and English jurisprudence.

4. Unifying legal concept and legal taxonomy. (Ch 7.3.)

The conclusion of law (Hart) in a curial statement such as 'x is unjustly enriched' reflects the method of the *action on the case*. This turns upon there being some means of identifying the applicable rule, or rules that give meaning in terms of potential rights and obligations because each instance of a rule of unjust enrichment arises from judicially accepted criteria; correspondence of (a) circumstance, and (b) legal notions of obligation, that the law holds to be actionable. (Ch 6.5; p85.)

5. Primary Obligation and Justice. (Ch 7.5.)

Existence of a primary obligation, (of which unjust enrichment is an archetypal example) is an issue of justice. This is so because the courts have determined that *this* (set of circumstances) is such a case where the demand for performance is insistent and the imperative and universal communal standard in such a case is recognised by the courts and becomes an aspect of a widely applied judicial standard, which is the principle of unjust enrichment.

It is the judicial standard that is the principle, a proposition that acknowledges the primary role of the courts in defining principles and rules. It rests upon judicial adoption of an insistent communal standard, an imperative obligation (contrasted to contemporary communal perceptions of justice) that is imposed by the rule. Necessitous intervention cases illustrate the point well. The rules are supported by secondary *rules* that empower individuals (judges) to make authoritative, binding orders imposing obligations upon the circumstances of the cases. (pp 105-7). They are the ordinary constitutional powers and rules of court that we take for granted in democratic societies.

Performance of an obligation is another way of expressing the issue of justice. It follows that imposing a legal obligation becomes an aspect of a judicial standard that is itself a manifestation of that issue of justice. The rule imposing an obligation to make restitution is an example of a primary 'obligation creating' rule. The issue of justice contrasts with a breach of contract or a tortious breach which are not, *per se*, unjust; they are wrongs. In a broader spectrum, it cannot be forgotten that it contrasts also with the society where the rule of law fails the test of '...every civilised system....'

Where the primary obligation does arise because of the character of a benefit, there has to be a tightly reasoned set of criteria acknowledged by a superior court, as an instance of a *primary obligation creating factor*. There is a limited number of circumstances where what is had by A from B can be characterised as a benefit obtained at the expense of another: (p 120.) So too, there is a limited number of circumstances that are torts. That suggests

something common about the underlying methodology which calls to mind the von Caemmerer notion of broad general abstraction applying to each.

The Australian unifying legal concept or English unifying general principle of unjust enrichment imports a special meaning for the actions which they support. The principle underlying the action is very different from principles that explain other actions in the law of obligations and from most principles of equity because the principle of unjust enrichment attaches to an inanimate thing (resembling trust property) a sum of money or its value in a chattel or in work.

It is the law identified by the concept (or English general principle) which vests in another (a plaintiff) a right to restitution, without a breach. It does not create *an equity* nor invoke equitable remedies. It is responsive to the legal concept of 'unjust' defined by legal precedent, rectifying what is unjust rather than remedying a wrong. It is like the ancient *writ of right* or *debt*, vesting in a plaintiff a chose, a right to the judgment of a court, to impose upon another, the holder of the particular benefit, an obligation to make restitution. (There may be scope for developing new rules associated with equities and trusts, but this is another field of study).

6. Based in imperative universal notions of obligations. (Chs. 7.5, 10 & 13).

It is my thesis that the rules establishing grounds in unjust enrichment are properly regarded as exceptions to the finality of juridical acts and the security of receipts. This is not expressed in judgments because the courts are not passing judgment on instances where unjustness does not arise: it is consistent nevertheless, with the manner in which the courts define actions. Taking a broad view of jurisprudence, broader than the confines of the common law, the proposition of exception to legally justified relations is also consistent with the ancient philosophy of the issue of justice that the law does not specifically address because the general proposition is abstract. It is consistent with the methodology of civilian law that legislates the ancient

codes that take their character from the praetorian edict based upon a complete overview of all available actions.

7. Stable Pattern of Analysis.

The essence of a judicial system acting according to law is to be found in the existence of a unifying legal concept/English principle of unjust enrichment that indicates both the content of subsidiary principles applicable to a given case, and their capacity to help to define rules in that case. The correspondence of practical and theoretical characteristics is, I believe, the foundation of that stable pattern of analysis that Professor Birks strongly recommends, so that reasoning from case to case is facilitated.

8. Law: and "Not Law".

Concepts that are inseparable from rules laid down in a succession of authoritative judgments necessarily share the doctrinal characteristic of the rule. What is *not* law cannot constitute legal reasoning and therefore cannot be precedent. Individual predilections ungoverned by authority; concepts that have no definitive meaning, are not law. None of these are legal notions elucidated by methods properly adapted to their character. (Professor Hart, Kirby J and Jacobs J.) It follows that they cannot be elements of principles and rules in unjust enrichment, and perhaps not in any other speciality of law.

9. As to Principles and Rules.

Principles of law are the essential context of rules and become inseparable from the rule in instances, in the sense that the rules have no coherence unless explained by principles. Principles may also provide the unity and consistency in the law, explaining the relationship of particular rules, one to another. Rules inevitably depend upon principles when they are to be seen

as precedent: the rule is binding, and the principle upon which it depends will apply to a set of circumstances unless good judicial reason can be shown for departing from it.

A new rule cannot come into existence in a vacuum of lack of principle, except by legislation. The judicial logic, by induction and deduction calls down principles and adopts them as essential elements, premises of the rule.

The key common characteristic of principles is coherence: principles govern the circumstances of an action, the nature of a *benefit* and the subtractive character of enrichment that does not admit substitution of fault based grounds.

Actions serve a common principle of reasoned unjustness, like the ground of duress or the duty of care principle of negligence, adopted in a manner such as to become united with and inseparable from the rule in each individual case. An inferior court must follow the reasoning of the superior court's decision as to the ground that is available. The ratio of such a case encompasses the judicial reasoning: if it did not, there would be no reason, as Dworkin has pointed out, why such a decision can be binding on another court.

10. Concepts: The methodology of a unifying legal concept in unjust enrichment.

Precedent would be an ineffectual doctrine without over-arching principles which explain relationship and provide the nexus between actions and rules which is essential to authority. In consequence, the nexus is definable in terms of a unifying legal concept that identifies the characteristics of unjust enrichment and provides the common explanation of actions. Drawing upon Professor Burrows' analogy, the unifying legal concept is simply the recognition or conceptualisation of the fundamental ingredients of a claim.

(pp 117- and 208). Justice Deane's choice of the notion of unifying legal concept seems most appropriate as a description of the method of differentiating those actions the law allows in the absence of applicable or sufficient abstract rules. (pp 109, 113 and 218).

Concepts and principles in unjust enrichment and their subsidiary concepts and principles must be defined by the law in terms appropriate to their legal purpose. Tendencies to redefine concepts, principles and rules in colloquial terms present great problems for failure of consistency and the intrusion of idiosyncratic standards, and the effectual working of precedent which is the critical characteristic of a common law based upon widely accepted, reasoned analysis, uniformly interpreted.

The need for a law of unjust enrichment that is responsive to communal perceptions of acceptable standards of justice is reflected in the capacity to find new grounds. Integrity of new grounds must be the product of conformity to judicial interpretation of the unifying legal concept/principle of unjust enrichment based upon a succession of very significant precedents.

The need for universally understood legal characteristics is paramount. Rules that have been accepted and applied consistently, by the highest courts and the inseparable conceptual content and methodology of those rules, have the characteristics of doctrine and ought not to be altered or replaced except by judgments of exceptional quality; a profound treatment of authority and of principles; and, extraordinary foresight as to what will be the effect of a new decision upon the existing concepts, principles and rules.

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