

THE PROVINCE OF THE LAW OF RESTITUTION

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Although the law of restitution is one of the most dynamic fields in the modern common law, there is still no stable analytical framework or terminology in the field. In this article, the author attempts to remedy this by providing an overview of the subject. He argues that "unjust enrichment" and "restitution" are not synonymous; rather, "restitution" is a legal response to the establishment of the cause of action in unjust enrichment. Next, the author discusses how certain other causes of action, such as the breach of a fiduciary duty, allow the plaintiff to claim any gain made by the defendant. The author argues that these "restitutionary" remedies have nothing to do with the cause of action in unjust enrichment, and further that they should not even be considered a form of restitution, since there is no requirement that the gain being stripped from the defendant came from the plaintiff. Finally, the author proposes a tripartite scheme for the classification of private law responses: compensation requires the defendant to give to the plaintiff what the plaintiff has lost, irrespective of any gain made by the defendant; disgorgement requires the defendant to give to the plaintiff what the defendant has gained, irrespective of any loss suffered by the plaintiff; and restitution, the logical combination of these two, requires the defendant to give to the plaintiff the gain which the defendant has made at the expense of the plaintiff.

Quoique le droit de restitution soit l'un des domaines les plus dynamiques de la "common law" actuelle, il n'existe encore ni structure analytique ni terminologie appropriée. Dans cet article, l'auteur tente de remédier à ce manque en donnant une vue générale du sujet. Selon l'auteur l'"enrichissement sans cause" et la "restitution" ne sont pas synonymes: la "restitution" serait la réponse légale à l'établissement d'un motif d'action en "enrichissement sans cause". L'auteur analyse ensuite comment certains autres motifs d'action, tels que l'abus de confiance, permettent au demandeur de revendiquer tous les profits faits par le défendeur. D'après l'auteur, ces "restitutions" n'ont rien à voir avec le motif d'action en enrichissement sans cause. Bien plus, elles ne devraient même pas être considérées comme des restitutions puisqu'il n'est pas nécessaire que ce qui est retiré du défendeur soit ce qui venait du demandeur. En conclusion l'auteur propose de classifier les réponses de droit privé en trois catégories: la compensation qui requiert du défendeur qu'il donne au demandeur ce que ce dernier a perdu, quel que soit le profit fait par le défendeur; le dégageement qui requiert du défendeur qu'il donne au demandeur le profit que le défendeur a tiré du demandeur, quelle que soit la perte que le demandeur a subie; et la restitution, combinaison logique des deux, qui requiert du défendeur qu'il donne au demandeur le profit que le défendeur a fait aux frais du demandeur.

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Introduction

I hope that the title of this article does not seem too presumptuous. Of course, this area of the law requires a whole book to do it justice. We are very fortunate that such books exist. The most recent contribution is by Mr. Maddaugh and Professor McCamus;¹ and it is a work of the highest order.² In this article I only hope to lay out a large-scale map of the province of the common law of restitution. Some of what I will say has been said before, although not perhaps to a great extent in Canada. Some of it has not. My goal is to provide a general framework for the structuring of the area of the law which one finds in books with "restitution" in the title.

I. Unjust Enrichment

I take it as now uncontroversial that there is an independent cause of action in unjust enrichment.³ We know that the cause of action is independent because it can arise where there is neither a contractual obligation which could create a cause of action in breach of contract, nor any legal or Equitable wrong which would create a cause of action in tort or for the breach of an Equitable duty.⁴ That is the evidence, from the results of cases, which shows that there is an independent cause of action in unjust enrichment. A simple example is the case in which I pay you money (or otherwise enrich you) under a mistake of fact. Even if we had no agreement requiring you to refund the money, and even if you have committed no recognized wrong, you have to repay the money.⁵ Similarly, if I enrich you because I am compelled by some pressing circumstance which negates my freedom of choice, I can recover the enrichment; and again, there is no requirement that you have done anything wrong, nor that there be any contractual obligation to refund the wealth.⁶

¹ P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (1990).

² Other Canadian books are G.H.L. Fridman and J.G. McLeod, *Restitution* (1982), and G.B. Klippert, *Unjust Enrichment* (1983). Both are out of print, but see G.H.L. Fridman, *Restitution* (2d ed., 1992), being a second edition of Fridman and McLeod.

³ See *Petikus v. Becker*, [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 257; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, (1989), 57 D.L.R. (4th) 321; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, (1989), 59 D.L.R. (4th) 161; *Pavey and Matthews Pty. Ltd. v. Paul* (1987), 162 C.L.R. 221, 61 A.L.J.R. 151 (H.C. Aust.); *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548, [1991] 3 W.L.R. 10 (H.L.); *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, [1992] 3 W.L.R. 366, [1992] 3 All E.R. 737 (H.L.).

⁴ Of course, the elucidation of the cause of action in unjust enrichment has been most visible in cases where there is no other claim, because then by assumption the plaintiff cannot succeed unless there is an independent cause of action in unjust enrichment. See, as one example among a host, *Degelman v. Guaranty Trust of Canada*, [1954] S.C.R. 725, [1954] 3 D.L.R. 785. See also P. Birks, *The Independence of Restitutionary Causes of Action* (1990), 16 *Queensland L.J.* 1.

⁵ A simple example is *Pearson v. Treleaven*, [1987] 3 W.W.R. 276, (1987), 47 *Man. R.* (2d) 180 (*Man. Q.B.*).

⁶ *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419, [1941] 3 D.L.R. 593.

Finally, if I enrich you with some purpose or condition in mind (such as the intention to pay the price under a contract), and that purpose is defeated (as where the contract is terminated by frustration or breach), the enrichment is recoverable.⁷ Again, you have done nothing wrong, and again (and now by hypothesis) there is no contractual obligation to refund. The cause of action in unjust enrichment is autonomous.

This conclusion is made even clearer when we consider what must be proved to establish a claim based on the cause of action in unjust enrichment. The requirements are utterly different from those for any other claim. There is no need to prove an agreement; the cause of action in unjust enrichment is not created by consent. *A fortiori*, there is no need to prove the breach of an enforceable agreement. Nor is there any need to prove the breach of any duty imposed by the legal system.⁸ What must be proved are these elements:

⁷ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, [1942] 2 All E.R. 122 (H.L.). See also *Palachik v. Kiss*, [1983] 1 S.C.R. 623, (1983), 146 D.L.R. (3d) 385, and *Clarke v. Moir* (1987), 82 N.S.R. (2d) 183, 207 A.P.R. 183 (N.S.T.D.). This type of case, where the intention of transfer of wealth was not absent (as in the cases of mistake and compulsion) but rather was conditional, is known to the common law as "total failure of consideration". In this context, "consideration" just means "reason for the transfer of wealth"; moreover, it is doubtful whether the failure needs to be total. See Maddaugh and McCamus, *op. cit.*, footnote 1, p. 423ff.

⁸ Although much of what one finds in modern books on the subject used to be called "quasi-contract" and was thought by some people to be intimately related to contract (see *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.)), it seems that the cause of action in unjust enrichment is actually much closer to tort or, more generally, to those "wrongs" which are breaches of imposed (rather than consensually assumed) duties (including those imposed by Equity and by the law of confidence). The cause of action in unjust enrichment is utterly alien to contractual obligations because a fundamental characteristic of the latter is that they are voluntarily undertaken; opposed to this are the obligations sanctioned by non-contractual "wrongs" and by unjust enrichment, imposed by law in both cases. The only difference between non-contractual "wrongs" and unjust enrichment is that a person liable in unjust enrichment is not said to have done anything "wrong". But that is a purely definitional matter, since no moral turpitude is required to commit a "wrong" as defined above. In other words, some torts can be committed in such a way that the act cannot possibly be seen as a wrong in any but the legal sense. The best example is the person who unwittingly "buys" a stolen chattel. Presto! She is a wrongdoer. If we were to carry to its logical conclusion the reasoning that calls this a wrong (simply because it creates a cause of action against the doer), then anyone liable in the cause of action in unjust enrichment should also be called a wrongdoer. Then the cause of action in unjust enrichment would be just one more tort, like the cause of action in conversion. See P.A. Butler, *Viewing Restitution at the Level of a Secondary Remedial Obligation* (1990), 16 *Queensland L.J.* 27, at p. 34: "Wrongful act here means any act or omission which elicits the redress of a court and from which the existence of a legal duty is inferred." But this has been resisted, and it is conventional to classify the cause of action in unjust enrichment as existing outside of "wrongs". This purely definitional distinction may have some unjustifiably substantive consequences if defences available to those who are liable in the cause of action in unjust enrichment are not available to the unknowing converter; see *Lipkin Gorman v. Karpnale Ltd.*, *supra*, footnote 3, per Lord Goff, at pp. 579-580 (A.C.), 34 (W.L.R.).

1. an enrichment of the defendant;
2. a corresponding deprivation on the part of the plaintiff; and
3. an absence of juristic reason for the enrichment.⁹

The elements are sometimes stated differently. In England, they tend to be stated in this way:

1. an enrichment of the defendant;
2. that the enrichment is at the expense of the plaintiff; and
3. that the enrichment is unjust.¹⁰

There are two very important differences between these statements. I will deal later with the importance of the difference in the way that the second element is stated. For now I would like to concentrate on the third element. Once the first two elements have been established, we know that there has been a transfer of wealth from the plaintiff to the defendant. Given this, all that the third element says is that there must be a legally recognized reason—such as mistake or compulsion—that the transfer should be reversible.¹¹ When all elements have been proved, the plaintiff has proven that there has been a *reversible transfer of wealth*; that is the essence of the cause of action.

Some would object that if this is so, then the elements of the cause of action in unjust enrichment simply state a conclusion.¹² And that is exactly right. So too does the cause of action in breach of contract or negligence. One might formulate the latter as comprising the defendant's breach of a duty of care owed to the plaintiff, which causes the plaintiff damage.¹³ No one would object that it is a conclusory statement which begs the question of whether a duty was owed; that is what books on tort are about. So here: books on unjust enrichment are largely about defining in what

⁹ *Pettikus v. Becker*, *supra*, footnote 3, at pp. 848 (S.C.R.), 274 (D.L.R.); *Hunter Engineering Co. v. Syncrude Canada Ltd.*, *supra*, footnote 3, at pp. 471-472 (S.C.R.), 349 (D.L.R.).

¹⁰ *B.P. Exploration Co. (Libya) v. Hunt (No. 2)*, [1979] 1 W.L.R. 783, at p. 839 (Q.B.D.), *aff'd*, [1981] 1 W.L.R. 232 (C.A.), *aff'd*, [1983] 2 A.C. 352, [1982] 1 All E.R. 925 (H.L.); Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (3d ed., 1986), p. 16; P. Birks, *An Introduction to the Law of Restitution* (rev. ed., 1989), p. 21.

¹¹ I will argue below that what the third element does not say is that the enrichment must be unfair, unconscionable, or unjust.

¹² The objection was stated very early on: E.V. Abbot, *Keener on Quasi-Contracts* (1896-97), 10 Harv. L.R. 209 and 479, especially at pp. 221-226. It was also answered early on: see L. Hand, *Restitution or Unjust Enrichment* (1897), 11 Harv. L.R. 249. See also American Law Institute, *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* (1937), p. 13: "The Restatement of this Subject states the rules by which it is determined whether or not it is considered to be just to require restitution." And see W.A. Seavey and A.W. Scott, *Restitution* (1938), 54 Law Q. Rev. 29, at p. 36.

¹³ A more sophisticated statement imports considerations of remoteness and so on; but the detail is immaterial here.

circumstances the law will command that an enrichment be reversed.¹⁴ Since the cause of action in unjust enrichment is unabashedly conclusory, it might as well be called "reversible enrichment" or "unjustified enrichment" to make this clear. Indeed, the latter term has been used.¹⁵

Using such terminology would also solve a related problem. Some judges have been extremely wary of the cause of action in unjust enrichment. This concern is created by the perception that the cause of action purports to rectify "unjust" enrichment. Some judges have seen this as nothing more than an unstructured invitation to administer an idiosyncratic impression of justice in each case.¹⁶ This is based on the misunderstanding that "unjust enrichment" means "unfair enrichment". It does not; it means "reversible enrichment". The conclusion that the enrichment is reversible is not based directly on what is fair, any more than is a conclusion that there must be compensation for a breach of contract. Only at the highest level of generality can such a conclusion be said to be based on what is fair; and even at that level some would disagree. In a book on contracts one will find various principles, extracted from the results of cases but with critical commentary, for deciding whether a contract was formed, whether it was breached, and what the consequences of such a breach might be for the contract. One will also find some discussion of remedies for breach of contract. In a book on unjust enrichment one will find various principles, extracted from the results of cases but with critical commentary, for deciding whether the defendant received an enrichment, whether the plaintiff suffered a deprivation, and whether the enrichment is reversible. One will also find some discussion of remedies for the cause of action in unjust enrichment.

Why did Dickson C.J.C. choose to formulate the third element of the cause of action in unjust enrichment as "absence of juristic reason for the enrichment" instead of saying that the enrichment must be "unjust"? It has been suggested that once the first two elements are established, the onus shifts to the defendant to show that there is a reason that the enrichment should not be reversed.¹⁷ I would argue that the better view is that the

¹⁴ Of course, the other elements can raise issues as well. Whether the defendant has been enriched is sometimes difficult to say, especially where the transaction involved the unrequested conferral of a service. Whether any such enrichment was at the plaintiff's expense can raise issues as well, but this is even rarer. By far the most difficult issues in this area of the law are about whether an enrichment is reversible.

¹⁵ *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347, at p. 367, (1982), 132 D.L.R. (3d) 193, at p. 209; *Air Canada v. British Columbia*, *supra*, footnote 3, at pp. 1200, 1201 (S.C.R.), 191, 192 (D.L.R.); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 670, (1989), 61 D.L.R. (4th) 14, at p. 45.

¹⁶ See *Pettkus v. Becker*, *supra*, footnote 3, at pp. 859 (S.C.R.), 262 (D.L.R.); *Nicholson v. St. Denis* (1975), 57 D.L.R. (3d) 699, 8 O.R. (2d) 315 (Ont. C.A.).

¹⁷ M. Litman, *The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust* (1988), 26 Alta. L.R. 407, at pp. 431-434.

plaintiff must establish all elements of the cause of action.¹⁸ This would include establishing some reason why the enrichment should be reversed. Examples would be that the wealth was transferred under a mistake¹⁹ or under compulsion.²⁰ Why, then, did Dickson C.J.C. formulate this element as he did? In my view the most likely reason is related to the points made above. He wanted to state the element in a way that made it clear that it relates to matters which can be analyzed in a principled way. In other words, he wanted to allay the fears of those who thought that "unjust enrichment" meant "unfair enrichment".²¹

The general statement of the elements of the cause of action in unjust enrichment will have a liberating effect. It allows us to see unities in the subject matter which will remain hidden so long as we see each restitutionary claim as a discrete object of study. For example, discharging someone else's liability is one way of enriching that person and so satisfying the first element of the cause of action in unjust enrichment; but this generality is obscured if we proceed on the basis that there is some fundamental difference between a claim based on my having paid your debt²² and a claim based on my having suffered expense in doing an act which you were legally bound to do.²³ Similarly, the fact that wealth was transferred under some form of

¹⁸ Admittedly, this general rule does not always prevail; see *Rainbow Industrial Caterers Ltd. v. C.N.R. Co.*, [1991] 3 S.C.R. 3, at p. 15, (1991), 84 D.L.R. (4th) 291, at p. 297.

¹⁹ *Air Canada v. British Columbia*, *supra*, footnote 3.

²⁰ *Knutson v. Bourkes Syndicate*, *supra*, footnote 6.

²¹ There might have been another reason: the influence of the civil law doctrine of unjustified enrichment (*l'enrichissement sans cause*) which was definitively recognized in *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, (1976), 10 N.R. 277. Dickson C.J.C. was on the panel, and shortly thereafter introduced the elements of the cause of action in unjust enrichment in a minority judgment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, (1978), 83 D.L.R. (3d) 289. In *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236, 54 N.B.R. (2d) 293 (N.B.C.A.), La Forest J.A. considered *Petkus* and *Cie Immobilière Viger Ltée* (and other cases) and said (at pp. 245-246 (D.L.R.)), 307-308 (N.B.R.): "... a universal principle such as we are dealing with here affords an excellent opportunity for cross-fertilization between Canada's two legal systems." The civil law statement of the doctrine is also phrased negatively, to require that there is no justification for the enrichment: see *Cie Immobilière Viger Ltée*, *ibid.*, at p. 77 (S.C.R.), 286-287 (N.R.); J. Pineau et D. Burman, *Théorie des obligations* (2d ed., 1988), pp. 255-257; J.-L. Baudouin, *Les obligations* (1983), pp. 318-319. But this formulation of the doctrine is probably also preferred in the civil law for the reason mentioned in the text, that is, to make it clear that the issue is not simply one of fairness: see G.S. Challies, *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec* (2d ed., 1952), pp. 91-93; J.D. Fine, *Cause in the Quebec Law of Enrichment Without Cause* (1973), 19 McGill L.J. 453, esp. at pp. 475-476. Interestingly, though, in *Cie Immobilière Viger Ltée*, Beetz J. (writing for the court) said (at p. 79 (S.C.R.)), 289 (N.R.): "The impoverished party looks to the one who profited from its impoverishment. It is then for the enriched party to find a legal justification for its enrichment." This supports Litman's view, *loc. cit.*, footnote 17.

²² *Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.*, [1937] 1 K.B. 534, [1936] 3 All E.R. 696 (C.A.); see Maddaugh and McCamus, *op. cit.*, footnote 1, p. 713ff.

²³ *Davey v. Cornwallis*, [1931] 2 D.L.R. 80, [1931] 1 W.W.R. 1, (1931), 39 Man. R. 259 (Man. C.A.); see Maddaugh and McCamus, *ibid.*, p. 703ff.

compulsion is a matter which can go to whether the enrichment is reversible; that is, whether there was a juristic reason for the enrichment. But we can lose sight of this as a unifying principle if we do not see that it is relevant in all of these matters:

- (a) a claim based on my having been forced in some way to pay your debt;²⁴
- (b) a claim based on my having been forced in some way to pay you money;²⁵ and
- (c) a claim based on my having been forced in some way to act in order to preserve life, health or property.²⁶

But there are other reasons, too, to retain the old pigeonhole categories of restitutionary claims. One of these is based on the conservatism of the law generally and of judges in particular. In *White v. Central Trust Co.*,²⁷ La Forest J.A. said:

For many years restitutionary claims had to be accommodated within the confines of well-known common law classifications such as “money had and received”, *quantum meruit*, duress and so on, as well as a number of equitable remedies such as undue influence, unconscionable transactions, constructive trusts and others. . . . Courts will not venture far onto an uncharted sea when they can administer justice from a safe berth.

But later he said:²⁸

As I have tried to indicate the well recognized categories of unjust enrichment must be regarded as clear examples of the more general principle that transcends them. We are currently in a similar position with regard to unjust enrichment as we are in relation to negligence where we have for some time been abandoning recourse to particularized duties in favour of a generalized duty to one's neighbour, although the process has not yet proceeded as far in the case of restitution.

Another reason to pay heed to the established categories is that the formulation of the traditional requirements for recovery in a particular fact pattern may have developed in such a way as to take account of difficulties inherent in that fact pattern. We must not allow hubris, induced by our new-found cause of action in unjust enrichment, to lead us to ignore accumulated judicial wisdom. Consider one example of a traditional basis of recovery: “money paid as on the compulsory discharge of another's

²⁴ *Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros*, *supra*, footnote 22; see Maddaugh and McCamus, *ibid.*, p. 713ff.

²⁵ *George (Porky) Jacobs Enterprises Ltd. v. Regina*, [1964] S.C.R. 326, (1964), 44 D.L.R. (2d) 179; see Maddaugh and McCamus, *ibid.*, p. 531ff.

²⁶ *Matheson v. Smiley*, [1932] 2 D.L.R. 787, [1932] 1 W.W.R. 758, (1932), 40 Man. R. 247 (Man. C.A.); see Maddaugh and McCamus, *ibid.*, p. 692ff.

²⁷ *Supra*, footnote 21, at pp. 241 (D.L.R.), 300 (N.B.R.).

²⁸ *Ibid.*, at pp. 246-247 (D.L.R.), 309 (N.B.R.).

liability".²⁹ This claim is also sometimes identified by the code word "recoupment". It is said to have four elements:

- (a) the plaintiff was compelled or compellable by law to make the payment;
- (b) the plaintiff did not officiously expose himself to the liability to make the payment;
- (c) the payment discharged a liability of the defendant;
- (d) as between the plaintiff and the defendant, the defendant was primarily liable.

Putting this formulation into the matrix of the cause of action in unjust enrichment as currently understood, it can be seen that elements (c) and (d) are relevant to the question of whether the defendant was enriched. Since the plaintiff did not pay money to the defendant directly, the enrichment must be sought in the fact that the plaintiff's act has saved the defendant from having to pay a debt (element (c)). Moreover, if the plaintiff's payment discharged an obligation on which the plaintiff was primarily liable, then the plaintiff has in fact made a payment which enriches himself, and so there has been no enrichment of the defendant. This is a twist which is to some extent peculiar to this fact pattern; by assumption, the plaintiff was legally compelled to pay—he was liable—so it is important to be sure that his payment constituted an enrichment of the defendant.

Elements (a) and (b) can be seen to go to whether the enrichment is reversible (the third component of the cause of action in unjust enrichment). The main ground for reversibility is compulsion. Moreover, as in other contexts, recovery may be denied where the plaintiff acted officiously; to discourage the imposition of unwanted liabilities, the law will not consider an enrichment to be reversible if it was conferred officiously.³⁰ To put it another way, the officious plaintiff can hardly rely on compulsion as making the enrichment reversible; no one is compelled to be officious.

But this example also illustrates the potential weakness of relying on the old fashioned, pigeonhole descriptions of claims for restitution. First, the four elements include some generalization (such as the denial of recovery for officious conduct), but not all: why should not the *mistaken* discharge of another's liability lead to recovery? For we know that mistaken payments are recoverable. But such a payment perhaps falls into another pigeonhole. Similarly, the formulation omits the requirement that the defendant's enrichment be at the plaintiff's expense (that is, that there be a corresponding deprivation on the part of the plaintiff).³¹

²⁹ As it is called in Fridman and McLeod, *op. cit.*, footnote 2, ch. 11.

³⁰ *Owen v. Tate*, [1976] Q.B. 402, [1975] 2 All E.R. 129 (C.A.).

³¹ L.D. Smith, *Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction* (1991), 11 *Oxford J. of Leg. Studies* 481.

Far more seriously, this formulation obscures difficult issues which must be resolved in order for the law to develop coherently.³² First, consider the element of compulsion, which is the ground for reversibility satisfying the third component of the cause of action in unjust enrichment. This traditional formulation of the "recoupment" claim suggests that there can be recovery only where there was a legal obligation on the plaintiff to pay. It is of course untrue as a general proposition that only this sort of compulsion will allow restitution;³³ moreover, looking at this particular fact pattern, it has been the law for many years that a plaintiff can recover for discharging the defendant's debt even where there was no legal obligation on the plaintiff to make the payment in question.³⁴ It may be enough that the plaintiff acted under a sort of moral compulsion.³⁵ So the formulation obscures the simple, general and very important question: where a plaintiff is relying on compulsion as the ground for reversibility, what sort of compulsion will suffice?³⁶

Another question unposed and so necessarily unanswered by this traditional formulation is: the plaintiff can recover for discharging what sort of obligation? This is a question going to the first element of the cause of action in unjust enrichment: whether the defendant was enriched. It is clear that discharging a debt (a legal obligation to pay money) will suffice;

³² Birks, *op. cit.*, footnote 10, p. 20, refers to this problem as "... the fragmentation of the subject which comes from not being able to detect important structural similarities between fact situations which are only superficially dissimilar".

³³ See, for example, *Maskell v. Horner*, [1915] 3 K.B. 106, [1914-15] All E.R. Rep. 595 (C.A.); *Matheson v. Smiley*, *supra*, footnote 26; *Fuller v. Stoltze*, [1939] S.C.R. 235, [1939] 1 D.L.R. 1; *Knutson v. Bourkes Syndicate*, *supra*, footnote 6; *George (Porky) Jacobs Enterprises Ltd. v. Regina*, *supra*, footnote 25; *Eadie v. Brantford*, [1967] S.C.R. 573, (1967), 63 D.L.R. (2d) 561.

³⁴ *Exall v. Partridge* (1799), 8 T.R. 308, 101 E.R. 1405, 4 R.R. 656 (K.B.); *Johnson v. Royal Mail Steam Packet Co.* (1867), L.R. 3 C.P. 38.

³⁵ In *Carleton v. Ottawa*, [1965] S.C.R. 663, (1965), 52 D.L.R. (2d) 220, the plaintiff recovered expenses incurred in caring for an indigent woman for whom the defendant was legally obliged to care. Looking at the expenses incurred before the action, it is arguable that the plaintiff incurred some of them under legal compulsion, when the woman was at a home and the plaintiff was contractually bound to pay the home. But after she left the home, the plaintiff's expenses were incurred either under a mistake as to liability (for which recovery was thought to be unavailable) or under the moral compulsion to care for the woman. Since a mistake as to liability did not permit recovery, the recovery of these expenses must have been based on the compulsion. More telling is that the court ordered that the defendant be liable to pay the plaintiff's past and future expenses of caring for the woman: it having been decided by the court that the plaintiff had no legal obligation to pay for the woman, any future expenses could only have been incurred under a perceived moral obligation; and the court ordered that they be recoverable. See also *Davey v. Cornwallis*, *supra*, footnote 23; *Matheson v. Smiley*, *supra*, footnote 26, in which the only compulsion that could have been found was not legal compulsion.

³⁶ A specious answer is that the payment is recoverable when it was not voluntarily made. This merely restates the question.

it is just like paying money to the defendant. But what of discharging another legal obligation of the defendant, such as an obligation to do something? This will permit recovery as well.³⁷ Then there is the most extreme position: can the defendant be said to be enriched when the plaintiff has discharged a moral obligation of the defendant? Will we allow the plaintiff to make moral choices for the defendant?³⁸

We must be respectful of the wisdom inherent in the traditional formulations; but we must also regard them with a critical eye, as they may reveal inconsistencies and illogicalities. The "mistake of law" doctrine may be a good example;³⁹ others were noted in the judgment of Robert Goff J. in *Barclays Bank Ltd. v. W.J. Simms, Son and Cooke (Southern) Ltd.*,⁴⁰ wherein a number of long-lived misconceptions regarding the payment of money under a mistake of fact were finally laid to rest.

One final point: what is the response to the successful invocation of the cause of action in unjust enrichment? There appears to be only one: restitution. It is very important that we take care to respect the fact that "unjust enrichment" and "restitution" are not synonymous. Far from it. Restitution is the response to the cause of action in unjust enrichment.⁴¹ "Unjust enrichment" is a cause of action, like breach of contract, tort, breach of confidence, breach of trust, or crime. "Restitution" is a response, like "compensation" or "punishment". These are things which the legal system does once it has decided that something must be done.

It might be well to explain the terminology I am using. A "cause of action" is established by the proof of a series of constituent elements. The establishment of a cause of action leads the legal system to conclude that something must be done; that some response is required. A "response" is a statement, at a very general level, of the goals which are to be fulfilled. Punishment is a response with a number of aims, usually including one or more of rehabilitation, deterrence and retribution. Compensation is a response

³⁷ In *Carleton v. Ottawa*, *supra*, footnote 35, the plaintiff discharged an obligation of the defendant to support an indigent. Similarly, in *Hastings v. Semans*, [1946] 4 D.L.R. 695, [1946] 3 W.W.R. 449 (Sask. C.A.), the plaintiff discharged an obligation of the defendant to provide medical care to an indigent person. In *Greenspan v. Slate*, 97 A. 2d 390 (N.J.S.C., 1953), the plaintiff discharged the defendants' obligation to take care of their child. In *Davey v. Cornwallis*, *supra*, footnote 23, the plaintiff discharged the defendant's obligation to inter corpses.

³⁸ See *Peel v. Ontario* (1990), 75 D.L.R. (4th) 523, 1 O.R. (3d) 97, 2 M.P.L.R. (2d) 121 (Ont. C.A.); *Peel v. Canada*, [1989] 2 F.C. 562, (1988), 55 D.L.R. (4th) 618, 41 M.P.L.R. 113 (C.A.); leave to appeal to S.C.C. granted in both cases, [1991] 1 S.C.R. xiii.

³⁹ *Air Canada v. British Columbia*, *supra*, footnote 3; see also *Hydro Electric Commission of Nepean v. Ontario Hydro*, *supra*, footnote 15, and *David Securities Pty. Ltd. v. Commonwealth Bank of Australia*, unreported, 7 Oct. 1992 (H.C.A.).

⁴⁰ [1980] 1 Q.B. 677, [1979] 3 All E.R. 522 (Q.B.D.).

⁴¹ *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, (1986), 29 D.L.R. (4th) 1; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, *supra*, footnote 3.

aimed at restoring to the plaintiff what was lost as a result of the defendant's wrong. Restitution is a response said to be based on taking away what the defendant gained at the expense of the plaintiff. It makes sense that the only response for the cause of action in unjust enrichment is restitution. Proof of the cause of action entails that there has been a *reversible transfer of wealth*, and so the response of restitution is provided to effect that reversal.

Finally, each response can be implemented in different ways, which I will call "remedies". Punishment can be effected by the remedies of fine, probation, imprisonment, or even death.⁴² Compensation can be achieved through the remedies of money award, specific performance, and injunction. Restitution can be implemented by money award or declaration of constructive trust,⁴³ by an accounting of profits,⁴⁴ and possibly by even more exotic mechanisms.⁴⁵

It is because there are different ways of achieving each response that we must view them as existing at a higher level of generality than the remedies. In other words, it is not helpful to talk of the "remedy of restitution" if we also talk about "the remedy of constructive trust" (or "the remedial constructive trust") and "the remedy of an accounting of profits". The reason is that talking in this way implies that restitution, constructive trust and accounting of profits are all on the same level of generality; but they are not: constructive trust and accounting of profits are two of several ways of achieving the response of restitution. We could call them "restitutionary remedies" as a shorthand for "remedies which can effect the response of restitution". But this is potentially misleading, because different responses may be attained through similar remedies: for example, both compensation and restitution may be achieved via a money award. Hence, a money award can be a "restitutionary remedy", but a money award (an award of damages) can also be a "compensatory remedy".⁴⁶

⁴² The term "remedies" is not particularly appropriate for punitive techniques, but it is helpful in my goal of illustrating certain generalities among legal responses.

⁴³ *Sorochan v. Sorochan*, *supra*, footnote 41.

⁴⁴ *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 15.

⁴⁵ Such as the Equitable lien: see *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *ibid.*

⁴⁶ This scheme may put some readers in mind of the classification of the "interests" protected by contract damages in L.L. Fuller and W.R. Perdue, *The Reliance Interest in Contract Damages* (1936-37), 46 *Yale L.J.* 52 and 373. But the schema are not commensurable. What Fuller and Perdue call the "expectation interest" and the "reliance interest" are both forms of the response of compensation; they are different ways of compensating, resulting from different ways of describing the position in which we seek to put the plaintiff. Traditionally, a claim in contract is compensated by putting the plaintiff in the position he would have been in if the contract had been performed (expectation interest); Fuller and Perdue were concerned to argue that contract should also protect the reliance interest, so that compensation could be measured by putting the plaintiff into his pre-contractual position. What they call the "restitution interest" is protected by the response of restitution.

II. Restitution for Wrongs

So far, so good. We have discussed the cause of action in unjust enrichment and the response of restitution. It seems clear, however, that the response of restitution can be invoked upon the establishment of certain other causes of action. It is my view that "restitution for wrongs" has nothing to do with the cause of action in unjust enrichment. As with so many things, it is easier to understand this assertion in the context of some history.

The theory that unjust enrichment was part of the common law was apparently first formulated by J.B. Ames⁴⁷ and first set out in detail by A.W. Keener.⁴⁸ The idea appeared in certain United States cases⁴⁹ and then the American Law Institute produced the Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts.⁵⁰ Section 1 of this work reads: "A person who has been unjustly enriched at the expense of another is required to make restitution to that other." Lord Wright was impressed by the ideas in the Restatement,⁵¹ and subsequently the first edition of Goff and Jones, *The Law of Restitution*,⁵² appeared in 1966, establishing the standard by which other works are judged. Although it was reformulated

⁴⁷ See J.B. Ames, *The History of Assumpsit* (1888), 2 Harv. L.R. 1, and 53, at p. 64. A.W. Keener published a casebook on quasi-contracts in 1888 but it is not available to me. In a period of exiguous legal literature, it may be that the only bridge joining *Moses v. McFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) to Dean Ames' view is an essay by W.D. Evans, published in 1802, titled *The Action for Money Had and Received*: see J.H. Wade, *The Literature of the Law of Restitution* (1968), 19 Hastings L.J. 1087.

⁴⁸ A.W. Keener, *A Treatise on the Law of Quasi-Contracts* (1893). Keener, p. 16, recited three bases for quasi-contractual liability: this tripartite division reflects that in Ames' article, *ibid.* G.H. Wald, *The Law of Quasi-Contract* (1898), 14 L.Q.R. 253, at p. 257, expressed the opinion that Keener adopted Ames' view; and the same opinion is expressed in J.B. Scott, *Cases on Quasi-Contracts* (1905), p. 18, n1. Keener went on to say (p. 19): "By far the most important and most numerous illustrations of the scope of quasi-contract are found in those cases where the plaintiff's right to recover rests upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another." The theory is invoked throughout the work: see pp. 26, 160, 214, 279, 286, 363-364.

⁴⁹ Such as *Miller v. Schloss*, 218 N.Y. 400, 113 N.E. 337 (C.A., 1916); *Re Wilson*, 252 F. 631 (Dist. Ct., S.D.N.Y., 1917); *Schall v. Camors*, 251 U.S. 239 (1920); *Eastern Extension, Australasia & China Telegraph Co. v. U.S.*, 251 U.S. 355 (1920); *Federal Sugar Refining Co. v. U.S. Equalization Board*, 268 F. 575 (Dist. Ct., S.D.N.Y. 1920); *Schwansnick v. Blandin*, 65 F. 2d 354 (2nd C.C.A., 1922). The idea of "unjust benefits" appears in P.H. Winfield, *The Province of the Law of Tort* (1931), p. 122. See also H.C. Gutteridge and R.J.A. David, *The Doctrine of Unjustified Enrichment* (1934), 5 C.L.J. 204, esp. Part III, *Does English Law Recognize a Doctrine of Unjustified Enrichment?*, at p. 223ff.

⁵⁰ (1937).

⁵¹ He wrote a glowing review of it (1937), 51 Harv. L.R. 369, and referred to it again in *Sinclair v. Brougham* (1938), 6 C.L.J. 305, at pp. 322-323. He utilized the concept of unjust enrichment in *Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.*, *supra*, footnote 22, and in his famous speech in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, *supra*, footnote 7.

⁵² Robert G. Goff and Gareth Jones, *The Law of Restitution* (1966).

to some extent by other authors, the principle stated in paragraph 1 of the Restatement was taken as a *Grundnorm*. But what went unnoticed in all of this was a crucial ambiguity in this general statement of “unjust enrichment”. It was noticed by Professor Birks.⁵³ The point is that there are two sets of events described by paragraph 1 of the Restatement:

1. The imposition of the response of restitution, pursuant to the conclusion that the plaintiff has established the elements of the cause of action in unjust enrichment.
2. The imposition of the response of restitution, pursuant to the conclusion that the plaintiff has established (i) that the defendant committed a wrong against the plaintiff and (ii) that the defendant procured some profit thereby.

The second set of events has been called “restitution for wrongs”.⁵⁴ The most important point of this article is this: the cause of action in unjust enrichment plays absolutely no role in the second set of events. It is not required and it is just not there. There is only one response for the cause of action in unjust enrichment, and that is restitution; but a gain-based response, usually called restitution, is available for causes of action other than the cause of action in unjust enrichment.

Usually when the defendant has committed a wrong against the plaintiff, the plaintiff seeks the response of compensation. Sometimes, though, the defendant has made a profit via the wrong; and in at least some of such cases, the plaintiff can forego the response of compensation and instead seek a response based not on the plaintiff’s loss but on the defendant’s gain.⁵⁵ This gain-based response for wrongs—for causes of action other than the cause of action in unjust enrichment—has been called restitution. It is like restitution for the cause of action in unjust enrichment in one way: it takes away the defendant’s gain. But it is unlike restitution for the cause of action in unjust enrichment in two ways. First, and by hypothesis, it does not require the proof of the cause of action in unjust enrichment, because by hypothesis the plaintiff has proved some other cause of action. Second, it is not about the reversal of a past transfer of wealth from the plaintiff to the defendant; rather, it is about the appropriation to the plaintiff of wealth which the defendant received from some other source. In restitution for wrongs, there is no requirement that the plaintiff have suffered a loss. The point of restitution for wrongs is solely to take away the defendant’s gain, which in all likelihood came not from the plaintiff but from others. The plaintiff’s connection to the defendant’s gain is not that the gain came from the plaintiff; in the language of the second element of the cause of action in unjust enrichment, there need not have been a “corresponding deprivation”. The plaintiff’s connection to the defendant’s

⁵³ *Op. cit.*, footnote 10, pp. 23-24.

⁵⁴ The word “wrong” is used here to include breaches of contract, and torts and all other breaches of imposed duties such as those imposed by Equity and by the law of confidence.

⁵⁵ See, generally, I.M. Jackman, *Restitution for Wrongs* (1989), 48 C.L.J. 302.

gain is that the gain was realized via a wrong done by the defendant to the plaintiff.

The business of the law in this area has been unification: the unification within a general principle of what were previously thought of as a variegated set of independent claims. But the authors of the Restatement went too far; they unified too much. It took almost fifty years before someone saw what they had done; and even now the point is not widely understood.⁵⁶ When we say that "a person who has been unjustly enriched at the expense of another is required to make restitution to that other", the ambiguity is in the words "at the expense of". They can mean "by a transfer of wealth from", or, as Birks puts it, "by subtraction".⁵⁷ Then we are talking about restitution for the cause of action in unjust enrichment. But the words "at the expense of" can also mean "by doing wrong to"; then we are talking about restitution for wrongs, and the cause of action in unjust enrichment has no bearing on the matter.

Near the beginning of this article,⁵⁸ I noted that there are two differences between the way in which the elements of the cause of action in unjust enrichment have been formulated in Canada by Dickson C.J.C. and the way in which they have been formulated in England. I discussed the difference in the formulation of the third element. Now I want to discuss the difference in the formulation of the second element. Because it was so brilliantly formulated we in Canada should never have been drawn into the confusion between restitution for the cause of action in unjust enrichment and restitution for wrongs. That confusion arose from the ambiguity in the words requiring that the defendant's enrichment be "at the expense of" the plaintiff. But recall that the cause of action in Canada has been formulated to require these elements:

1. an enrichment of the defendant;
2. a corresponding deprivation on the part of the plaintiff; and
3. an absence of juristic reason for the enrichment.⁵⁹

The words "at the expense of" do not appear. This set of elements—the elements of the cause of action in unjust enrichment—clearly has no

⁵⁶ It is interesting to consider paragraph 1 in Tentative Draft No. 1 (now abandoned) of the Restatement of the Law, Second, Restitution (1984): "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". This arguably recognizes the two distinct bases of liability: a reversible transfer of wealth and a profitable wrong. Unfortunately, they are still both conflated under the rubric of "unjust enrichment".

⁵⁷ Birks, *op. cit.*, footnote 10, pp. 23-24.

⁵⁸ *Supra*, at pp. 674-675.

⁵⁹ *Pettkus v. Becker*, *supra*, footnote 3; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, *supra*, footnote 3.

application to restitution for wrongs (where there is already, by assumption, another cause of action present). The reason is that in restitution for wrongs, there is no requirement that the plaintiff have suffered any loss. The point is to take away the gain realized by the defendant via the wrong. Nowhere in that idea is there any requirement that the plaintiff have lost anything (although he must have been the victim of a wrong). But in the absence of a wrong, where the claim is in the cause of action in unjust enrichment, the essence of the claim is that there has been a reversible transfer of wealth from the plaintiff to the defendant; and inherent in that idea (and in the second element of the cause of action in unjust enrichment) is the idea that the plaintiff have suffered a loss.

Both the existence and the importance of the distinction can be clarified by examples. Consider first an Equitable wrong such as a breach of a fiduciary obligation. Two responses are available to the plaintiff beneficiary. It is clear that the beneficiary can recover compensation for any loss caused by the breach.⁶⁰ But it is just as clear that the beneficiary can recover any gain realized by the wrongdoer. That rule has been around for a long time. Every law student knows about *Keech v. Sandford*.⁶¹ And the interesting point about that case is that the beneficiary suffered no loss, because the value acquired by the trustee was not available to the trust. But no loss had to be proved.⁶² That is because this was not a claim in the cause of action in unjust enrichment, and the cause of action in unjust enrichment had nothing to do with it. It was a claim for the breach of a fiduciary obligation, and it is not a requirement of such a claim that the defendant was enriched and that there was a corresponding deprivation of the plaintiff. But once the claim in breach of fiduciary obligation—the wrong—is made out, the plaintiff can either have compensation for any loss suffered, or restitution to capture any gain made by the defendant. Again, there need not be any deprivation of the plaintiff corresponding to that gain, because we are not dealing with a claim in the cause of action in unjust enrichment. Another example: a fiduciary takes a bribe.

⁶⁰ *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, (1991), 85 D.L.R. (4th) 129; *Toronto Dominion Bank v. Uhren* (1960), 24 D.L.R. (2d) 203, 32 W.W.R. 61 (Sask. C.A.).

⁶¹ (1726), Sel. Cas. T. King 61, 25 E.R. 223, 2 Eq. Cas. Abr. 741, 22 E.R. 629 (L.C.). *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (H.L.), or *Boardman v. Phipps*, [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.) would illustrate the point just as well.

⁶² In fact, it has been suggested that evidence that the beneficiary of the fiduciary obligation suffered no loss is inadmissible: *Parker v. McKenna* (1874), L.R. 10 Ch. App. 96 (L.C. and L.J.J.), at p. 124, per Sir W.M. James L.J. Whether this is the case or not, it is clear that such evidence is irrelevant: *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at pp. 621-622 (1973), 40 D.L.R. (3d) 371, at pp. 391-392.

Of course, the beneficiary can take it away.⁶³ It makes no difference that the beneficiary would never have received that wealth, and so suffered no loss.

Or consider the wrong of breach of confidence. Again, two responses are available. Obviously, the plaintiff can demand compensation when this cause of action is made out. But he can have restitution as well; that is, he can recover any gain which the defendant made via the breach of confidence.⁶⁴ And this without regard to how or whether the plaintiff would have used the information, or whether the plaintiff would have earned anything from it.⁶⁵ In *Lac Minerals Ltd. v. International Corona Resources Ltd.*,⁶⁶ Sopinka J. said that “[t]he conventional remedies for breach of confidence are an accounting of profits or damages”. That is, the plaintiff can either have the response of compensation (via the remedy of damages) or the response of restitution (via the remedy of an accounting of profits). If an accounting of profits is sought,⁶⁷ it will lead to the plaintiff’s being awarded the gain that the defendant realized via the wrongful breach of confidence. And there is no need to show that there was a corresponding deprivation on the part of the plaintiff, because the remedy is not for the cause of action in unjust enrichment; it is for breach of confidence, and a deprivation of the plaintiff is not one of the elements of the action for breach of confidence.⁶⁸ Again, the cause of action in unjust enrichment has nothing to do with the matter.

In the same case, La Forest J. stated that a constructive trust was an appropriate remedy for breach of confidence.⁶⁹ Indeed this was the majority holding, since three of five judges⁷⁰ said that there was a breach of confidence but no breach of fiduciary obligations, while three of five judges⁷¹ said that the appropriate remedy was a constructive trust. I am not going to venture

⁶³ *Lavigne v. Robern* (1984), 18 D.L.R. (4th) 759, 51 O.R. (2d) 60 (Ont. C.A.). See also *Williams v. Barton*, [1927] 2 Ch. 9 (Ch. D.); *Reading v. A.-G.*, [1951] A.C. 507, [1951] 1 All E.R. Rep. 405 (H.L.); and generally C.A. Needham, *Recovering the Profits of Bribery* (1979), 95 Law Q.Rev. 536.

⁶⁴ There may be an issue as to whether the defendant’s gain by the breach of confidence is to be measured by her actual gain (as in *Peter Pan Manufacturing Co. v. Corsets Silhouette Ltd.*, [1964] 1 W.L.R. 96, [1963] 3 All E.R. 402 (Ch. D.)), or rather by what she would have had to pay the plaintiff in the market for the use of the confidential information (as in *Seager v. Copydex Ltd.*, [1967] 1 W.L.R. 923, [1967] 2 All E.R. 415 (C.A.); *Seager v. Copydex Ltd. (No. 2)*, [1969] 1 W.L.R. 809, [1969] 2 All E.R. 718 (C.A.)). See Goff and Jones, *op. cit.*, footnote 10, p. 673. It may be that this depends upon whether the defendant was consciously breaching a confidence.

⁶⁵ See *A.-G. v. Guardian Newspapers Ltd. (No. 2)*, [1990] 1 A.C. 109, [1988] 3 All E.R. 545 (H.L.).

⁶⁶ *Supra*, footnote 15, at pp. 618 (S.C.R.), 76 (D.L.R.).

⁶⁷ As it was not in *Lac Minerals*, *ibid.*, at pp. 619 (S.C.R.), 77 (D.L.R.).

⁶⁸ These are set out, *ibid.*, at pp. 608, 635 (S.C.R.), 69-70, 19 (D.L.R.).

⁶⁹ *Ibid.*, at pp. 671 (S.C.R.), 46 (D.L.R.).

⁷⁰ McIntyre, Lamer and Sopinka JJ.

⁷¹ Lamer, Wilson and La Forest JJ.

an opinion on whether a constructive trust was appropriate; that would require a whole article.⁷² The important point for present purposes is that the constructive trust is just one remedy for achieving the response of restitution, along with the remedies of an accounting of profits or a simple monetary award which is based on the measure of the defendant's gain. And none of these restitutionary remedies requires the presence of the cause of action in unjust enrichment. As I have said: the only response for the cause of action in unjust enrichment is restitution; but the response of restitution is available for other causes of action as well as the cause of action in unjust enrichment. Among these are breaches of confidence and breaches of fiduciary obligations. La Forest J. said, "[b]reaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate".⁷³ That is exactly right; but when restitution is granted for these causes of action, there is no need to have regard for the cause of action in unjust enrichment. It is irrelevant. There is no need to find that for the defendant's gain, there was a corresponding deprivation on the part of the plaintiff; that requirement is part of the cause of action in unjust enrichment, which is not the only path to a restitutionary remedy. When restitution is granted for a wrong, then there is no need to satisfy the elements of the cause of action in unjust enrichment.⁷⁴

Now consider a tort. It does not require any authority to show that the victim of a tort is entitled to the response of compensation. But at least

⁷² See D.W.M. Waters, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1990), 69 Can. Bar Rev. 455.

⁷³ *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 15, at pp. 670 (S.C.R.), 45 (D.L.R.).

⁷⁴ With respect, this is where the judgment of La Forest J. in *Lac Minerals* went off-track. He stated that restitution is available for the wrongs of breach of confidence and breach of fiduciary duty, with which I agree. But given that he concluded that such breaches had occurred, the availability of the response of restitution was established. There was no need to consider the elements of a third cause of action: the cause of action in unjust enrichment. Hence, there was no need to find that the plaintiff, Corona, had suffered any deprivation. But La Forest J. apparently thought that it was: see, *supra*, footnote 15, at pp. 669-670 (S.C.R.), 44-45 (D.L.R.). Moreover, in order to find that the elements of the cause of action in unjust enrichment were satisfied, La Forest J. had to find a deprivation on the part of Corona, which he could only do by relying on the factual finding that, but for Lac's interference, Corona would have acquired the property in issue. That this reasoning was unnecessary is shown by *Canadian Aero Service Ltd. v. O'Malley*, *supra*, footnote 62, at pp. 621-622 (S.C.R.), 391-392 (D.L.R.). Moreover, this reasoning of La Forest J. was explicitly based on Birks' theory of "interceptive subtraction" (at pp. 670 (S.C.R.), 45 (D.L.R.)), which I have criticized elsewhere ((1991), 11 Oxford J. Leg. Studies 481). Corona never had the property; Lac acquired it. If this acquisition had not been wrongful, then generally we would not want to interfere with it. But it was wrongful; there was a breach of confidence and (according to the minority) a breach of fiduciary obligations. Those are wrongs for which the remedy of restitution is available. There was no need to have recourse to the cause of action in unjust enrichment in order to award the remedy of restitution, and so there was no need to find that Corona had suffered a deprivation.

for some torts, where the defendant has been enriched via the commission of the tort, the plaintiff can elect the response of restitution instead of compensation. Imagine that you convert my car to your use by borrowing it without permission, and I suffer a loss of \$100 because you scratch it. I can sue in conversion and claim \$100 in compensation. Now imagine that you convert my car and use it to run a taxi service, earning \$500. You have not damaged it and I did not need it. I can sue in conversion and claim \$500 in restitution. At the plaintiff's election, the plaintiff's remedy is measured not by the plaintiff's loss, but by the defendant's gain.⁷⁵ That is, the plaintiff can elect the response of restitution instead of the response of compensation. This election is sometimes referred to by the unhelpful label "waiver of tort".⁷⁶ Keener noted early in the game that this was just a question of alternative responses for the tort;⁷⁷ and this point was also made in the Restatement.⁷⁸ It was imported into English law in *United Australia Ltd. v. Barclays Bank Ltd.*⁷⁹ But when analyzing this idea, there is no need to have reference to the elements of the cause of action in unjust enrichment, because that cause of action plays no part. The cause of action is the tort. There is no requirement that the plaintiff have suffered a loss which corresponds to the defendant's gain,⁸⁰ because such a requirement

⁷⁵ There may be an issue as to whether your gain by the tort is to be measured by your actual gain (as in *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P. 2d 652 (S.C., 1946), and in *Austin v. Rescon Construction (1984) Ltd.* (1989), 57 D.L.R. (4th) 591, 36 B.C.L.R. (2d) 21 (B.C.C.A.), on punitive damages reasoning); or rather by what you would have had to pay me in the market for the use of the car (as in *Strand Electric and Engineering Co. v. Brisford Entertainments*, [1952] 2 Q.B. 246, [1952] 1 All E.R. 796 (C.A.)). See Goff and Jones, *op. cit.*, footnote 10, p. 613. It may be that this depends upon whether you were consciously committing the tort.

⁷⁶ See P. Birks, *Restitution and Wrongs*, [1982] *Curr. Leg. Prob.* 53; J. Beatson, *The Nature of Waiver of Tort* (1979), 17 *U.W.O.L.R.* 1.

⁷⁷ Keener, *op. cit.*, footnote 50, p. 159. See also A.W. Keener, *Waiver of Tort* (1892), 6 *Harv. L. Rev.* 223.

⁷⁸ *Op. cit.*, footnote 51, p. 525. See also Goff and Jones, *op. cit.*, footnote 10, p. 605 (in Chapter 32, "Waiver of Tort"): "Waiver of tort" is a misnomer".

⁷⁹ [1941] A.C. 1, [1940] 4 All E.R. 20 (H.L.).

⁸⁰ This question was muddled in *Phillips v. Homfray* (1883), 24 Ch. D. 439 (C.A.), and English law has yet to recover. It was better handled in *Olwell v. Nye & Nissen Co.*, *supra*, footnote 75. In response to an argument that the plaintiff had suffered no loss because the converted chattel had been stored away by the plaintiff, the court said that there is a loss whenever there is an invasion of property. A better analysis would have been that no loss need be proved. The issue was also properly dealt with in *Raven Red Ash Coal Co. v. Ball*, 39 S.E. 2d 231 (Va. C.A., 1946), and *Edwards v. Lee's Administrators*, 265 Ky. 418, 96 S.W. 2d 1028 (C.A., 1936); these were cases of profitable trespass to land (like *Phillips*), but it was properly held by the U.S. courts that the restitutionary remedy to strip the trespasser of his gain was available even though no loss by the plaintiff had been shown. That there is still misunderstanding on this point is shown by this comment of McLachlin J. in *Canson Enterprises Ltd. v. Boughton & Co.*, *supra*, footnote 60, at pp. 545 (S.C.R.), 156 (D.L.R.): "And it is clear that tort law is incompatible with the well developed doctrine that a fiduciary must disgorge profits gained through a breach of duty, even though such profits are not made at the expense of the person to whom the duty is owed." But such gain-based remedies are available for at least some torts.

forms no part of any cause of action in tort. True, it is part of the cause of action in unjust enrichment; but that is not relevant to a claim in tort. In the case in which you earn \$500 by tortiously using my car as a taxi, I can have that \$500 whether I suffered damage or not. It may be that I suffered no damage because you returned the car unscathed and I was out of town with no need for it; or, it may be that I suffered a loss of \$100 because you scratched it. Either way, I can have the \$500 as restitution for the tort. I need not have suffered a loss; and even if I did, it need not have "corresponded" to your gain. That is part of the cause of action in unjust enrichment, which is about reversible transfers of wealth; but my cause of action is conversion. I am not trying to reverse a transfer a wealth from me to you; rather, I am trying to appropriate from you a gain which you received from someone else, via a wrong done to me.

Finally, consider the wrong of breach of contract. Imagine that we have a contract of sale: I am obliged to transfer to you possession and ownership of 1,000 pounds of iron; you are obliged to transfer to me possession and ownership of \$1,000. Then I find someone else who is willing to give me \$2,000 for the iron, and I sell it to her for that amount. The day arrives for my delivery to you; the market price has returned to \$1 per pound; and I tell you that I must breach the contract as I have no iron. Now you are angry with me and sue in contract. What have you lost? According to our normal rules for compensation, I must pay you the value of the goods, measured at the time of the breach. Of course, the unpaid purchase price would be set off. The result is that you have lost nothing by my breach of contract. But I have made a gain thereby. By analogy to the cases on fiduciary obligations, breaches of confidence and torts, can you sue in contract, not for compensation, but for restitution? Can you claim the \$1,000 profit I made by my breach?

When the question is stated in this way, the very idea is perhaps enough to make most common lawyers laugh. But the matter is not entirely risible.⁸¹ We know that a breach of contract is wrong, in that at least compensatory

⁸¹ See *Adras Construction Co. v. Harlow & Jones GmbH* (1988), 42(i) P.D. 221 (S.C. of Israel); summarized in (1990), 24 Israel L. Rev. 150; commented upon by D. Friedmann, *Restitution of Profits Gained by Party in Breach of Contract* (1988), 104 Law Q. Rev. 383. There are certain problems with this example stemming from the different views of contract taken by the common law and Israeli law. For example, since the contract was for unascertained goods, the seller could have sold at the higher price and then bought more iron in the market at the lower price just before delivery was due. In this way, the contract could be performed and yet the same profit made. See also *Hospital Products Ltd. v. U.S. Surgical Corporation* (1984), 156 C.L.R. 41, 58 A.L.J.R. 587, 55 A.L.R. 417 (H.C. Aust.), per Deane J., dissenting; and see generally Hon. J. Gauthier, *Breach of Contract and Unjust Enrichment* (1991), 12 Adv. Q. 1; G. Jones, *The Recovery of Benefits Gained From Breach of Contract* (1983), 99 Law Q. Rev. 443; P. Birks, *Restitutionary Damages for Breach of Contract: Snapp and the Fusion of Law and Equity*, [1987] Lloyd's Maritime and Commercial L.Q. 421; E.A. Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract* (1984-85), 94 Yale L.J. 1339.

damages are recoverable; and it has been said to be a wrong in a more fundamental sense.⁸² But this is a complicated area for the developing common law and it would not be profitable for me to say any more here. Whether or not breach of contract is a restitution-yielding wrong is not the most important question for current purposes.⁸³

The most important point of this part of the article is that there are some restitution-yielding wrongs. In other words, the response of restitution can be granted for causes of action other than the cause of action in unjust enrichment. People tend to assume that "unjust enrichment" and "restitution" are so closely linked that one cannot be present without the other; and this is not the case. It is true that the only response for the cause of action in unjust enrichment appears to be restitution; but it is *not* true that restitution can only be had where one has established the cause of action in unjust enrichment. Restitution for wrongs is the granting of a restitutionary remedy⁸⁴ for a cause of action other than the cause of action in unjust enrichment; as a result, there is no need in restitution for wrongs to have any regard for the elements of the cause of action in unjust enrichment. In particular, there is no need in restitution for wrongs to find that the plaintiff has suffered a "corresponding deprivation", or any loss at all for that matter.⁸⁵ This point has been misunderstood by those who assume that where there is the response

⁸² *Ahmed Anguillia bin Hadjee Mohamed Salleh Anguillia v. Estate and Trust Agencies (1927) Ltd.*, [1938] A.C. 624 (P.C.). At p. 635, Lord Romer said that "... the breaking of an enforceable contract is an unlawful act, and ... it can never be the duty of an executor or an administrator to commit such an act"; and this, even where the estate would be benefited thereby.

⁸³ There can be restitution in the context of a breached contract where the non-breaching party makes a claim in "total failure of consideration" and asks to be put, not in the position she would be in if the contract had been performed, but rather in her pre-contractual position. But in this case the claim is not based on breach of contract; if it were, the correct response would be aimed at putting the plaintiff in the position she would be in if the contract had been performed. Rather, the claim of "total failure of consideration" is a species of the cause of action in unjust enrichment: see *supra*, the text at footnote 7. Similarly, the restitutionary response which can follow the rescission of a contract for misrepresentation is clearly not based on breach of contract, since a misrepresentation is not a term of the contract. Such a response is based either on the cause of action in unjust enrichment or on the breach of an Equitable duty.

⁸⁴ That is, a remedy which effects the response of restitution.

⁸⁵ This was spotted early on by A.J. McClean, *Constructive and Resulting Trusts—Unjust Enrichment in a Common Law Relationship—Pettkus v. Becker* (1982), 16 U.B.C.L.R. 155. The author observed (at pp. 168-169) that in some situations where constructive trusts have been imposed, the plaintiff cannot be said to have suffered a loss. He added, "[u]njust enrichment may not, therefore, satisfactorily explain all types of restitutionary claims". This is exactly my point: some claims to restitution are founded on wrongful conduct, not on the cause of action in unjust enrichment; and some claims to restitution founded upon wrongful conduct (like some claims to restitution founded upon the cause of action in unjust enrichment) are remedied by the imposition of a constructive trust.

of restitution, there must be the elements of the cause of action in unjust enrichment.⁸⁶

In fact, in restitution for wrongs, the only element of the cause of action in unjust enrichment that must be present is the first: there must have been an enrichment of the defendant, or else there would be no point in asking for *restitution* for wrongs.⁸⁷ As I have been stressing, there is no need that the plaintiff have suffered a loss. Moreover, there is no need for the third element. In the cause of action in unjust enrichment, the presence of the first two elements shows that there has been a transfer of wealth from the plaintiff to the defendant; the third element is the presence of a ground (such as compulsion or mistake) that makes the transfer reversible. In restitution for wrongs, there need not have been any transfer of wealth from the plaintiff to the defendant, so to ask whether there is a ground for its reversal is nonsense. I am not suggesting that the response of restitution must be available for all profit-yielding wrongs; as I have said, there are some difficult questions to be resolved. But they are very different questions, as a matter of principle, from questions about what is required to satisfy the third element of the cause of action in unjust enrichment. Questions of the latter sort arise in a different context and raise different issues. It would be very much for the best if we resisted our inclination always to talk of “restitution” and “unjust enrichment” in the same breath. We must realize that the cause of action in unjust enrichment has nothing to do with restitution for wrongs, and we should cease talking about “unjust enrichment” at all in the context of restitution for wrongs.

There is one last point to address in this section. It is the possibility of what Birks calls “alternative analysis”,⁸⁸ and what we might call concurrent liability. Consider concurrent liability in contract and in tort: given a set of facts, some of the facts may establish a cause of action in tort, while

⁸⁶ This was the error made by La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 15, which is discussed *supra*, footnote 74. See also the Honourable J.R.M. Gauthier, *When Are Enrichments Unjust?* (1989), 10 *Adv. Q.* 258. At p. 259, after reciting the elements of the cause of action in unjust enrichment, the author states that there are some types of unjust enrichment where the second element of the cause of action in unjust enrichment is not present; namely, cases where the defendant's enrichment is the result of the defendant's wrongful act. Surely we are better off understanding such claims as the granting of the response of restitution for a wrong, than as a special sub-classification of the cause of action in unjust enrichment. The author's misunderstanding leads to a later muddle: at p. 262, he states that “[t]he enrichment of the defendant does not have to correspond to the loss of the plaintiff”. This cannot be a statement about the cause of action in unjust enrichment, of which the second element is “a corresponding deprivation on the part of the plaintiff”; but it makes perfect sense in the context of restitution for wrongs, where the cause of action in unjust enrichment plays no part and so there is no need that the plaintiff have suffered a loss.

⁸⁷ But note that such an enrichment is not a required element of the wrong which is the cause of action for which the remedy is claimed.

⁸⁸ *Op. cit.*, footnote 10, pp. 314-315.

others establish a cause of action in breach of contract.⁸⁹ So it is with restitution for wrongs and restitution for the cause of action in unjust enrichment. The factual setting of a case may obscure the distinction between restitution for wrongs and restitution for the cause of action in unjust enrichment, because the elements to support both are present in the facts. We should be careful that our analysis is not muddied by such cases. Imagine that a director of a corporation is a member of a committee of directors; the committee includes some but not all of the directors of the corporation. The committee agrees that the individual director should be paid \$10,000,000 to run a "take-over bid" being made by the corporation. The bid succeeds and the money is paid. Then it turns out that the constitution of the corporation does not allow committees to authorize such remuneration. The corporation sues the individual director for \$10,000,000. There are two ways to look at this case. First, there is restitution for wrongs. The individual director owed a fiduciary obligation to the corporation, and he breached it by getting involved in a transaction by which he stood to gain, without making a complete disclosure to the corporation. So that is the wrong which is the cause of action: the breach of the fiduciary obligation. Breach of fiduciary obligation is clearly a restitution-yielding wrong.⁹⁰ Because of this, and since the director earned a profit through his wrongful act, the corporation could choose the remedy of restitution for this wrong and take from him the \$10,000,000 he earned. Note that on this "restitution for wrongs" analysis, it is immaterial that the wealth came from the corporation. Even if the \$10,000,000 had come from someone other than the corporation, and so the corporation had suffered no loss, the corporation could capture it in restitution for wrongs. Why? Because the breach of fiduciary obligation is a restitution-yielding wrong. There is no requirement in restitution for wrongs that the plaintiff have suffered a deprivation.⁹¹

The second analysis leads to the same ultimate result, but bases liability on different elements among the facts. This analysis is based on the cause of action in unjust enrichment. There has been (1) an enrichment of the defendant (by the receipt of \$10,000,000) and (2) a corresponding deprivation on the part of the plaintiff (by paying that same amount). Finally,

⁸⁹ *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, (1986), 31 D.L.R. (4th) 481, varied, [1988] 1 S.C.R. 1026, 44 C.C.L.T. xxxiv.

⁹⁰ *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 15.

⁹¹ Of course, the wrong of breach of fiduciary obligation is, like most wrongs, also a compensation-yielding wrong. The corporation could choose the response of compensation for the wrong if it had suffered a loss as a result of it. On the facts as given, it could probably not get the full \$10,000,000 on a compensation analysis, as it derived some benefit from the deal and so its loss would have been somewhat less. But it is important to note that when the problem is looked at in this way—*compensation* for wrongs—the relevant factors are (1) the wrong and (2) the corporation's loss. Whether there was any enrichment of the defendant is immaterial on this approach, as most tort cases show. Hence, the claim seeking compensation would be available even if none of the money had gone to the defendant.

there is (3) no juristic reason for the enrichment, because the agreement to pay the individual \$10,000,000 was unenforceable against the corporation; the committee had no authority to make such an agreement on the corporation's behalf. In other words, the only reason for the payment no longer exists.⁹² So the company can recover the money.⁹³ Note that on this second analysis, it is the breach of fiduciary obligation which is irrelevant.⁹⁴ The cause of action is the cause of action in unjust enrichment, and that does not require that any wrong have been committed.

To summarize: clarity abhors ambiguity.⁹⁵ To avoid ambiguity, the term "unjust enrichment" should be restricted to discourse about the cause of action in unjust enrichment. The term "unjust enrichment" will make an acceptable shorthand for "the cause of action in unjust enrichment" only when we are sure that no one is using it to mean anything else. The primary source of confusion is the use of "unjust enrichment" in the context or restitution for wrongs. Such claims have nothing to do with the cause of action in unjust enrichment because they are based on other causes of action which amount to wrongs. We confuse ourselves when we go looking for the elements of the cause of action in unjust enrichment every time we talk of restitution; for, while restitution is the only response to the cause of action in unjust enrichment, the cause of action in unjust enrichment is not the only cause of action for which the response of restitution is available.

III. *Restitution for Wrongs?*

So far, so good. Now I must reveal that I have been disingenuous. I have been using terminology which I am now about to deprecate. The reason why I have been disingenuous is this: I think that if some of the suggestions in the first two parts of this article are followed and this third part is completely ignored, there will still be an increase in the clarity of discourse relating to this area of the law. Also, it would have been very difficult to explain what I see as serious problems with the use of the current

⁹² See the text at footnote 7.

⁹³ The example is closely based on *Guinness PLC v. Saunders*, [1990] 2 A.C. 663, [1990] 1 All E.R. 652 (H.L.). The Court of Appeal, ([1988] 1 W.L.R. 863, [1980] 2 All E.R. 940) used the restitution for wrongs analysis, basing liability on the breach of fiduciary obligation; the House of Lords used the unjust enrichment analysis, saying that there was no contract and so there was a total failure of consideration. There was also a claim for counter-restitution: the individual director claimed that he should receive an allowance based on what his services were worth to the company. In the circumstances of this case, this claim failed because, in the light of the principle that a fiduciary should not profit from his position, the court would not make such an allowance in the face of the corporation's constitution. The constitution provided for the remuneration of directors only as authorized by the whole board of directors.

⁹⁴ Except to the claim for counter-restitution, *ibid.*

⁹⁵ The feeling may be mutual for all I know.

terminology, while contemporaneously trying to introduce, explain and justify new terminology.

I have been trying to show that "restitution for wrongs", seen as a whole, is different from "restitution for the cause of action in unjust enrichment", seen as a whole. The result is that in restitution for wrongs, there is no need to seek elements of the cause of action in unjust enrichment; conversely, in restitution for the cause of action in unjust enrichment, there need be no wrong. The assumption until now, though, has been that the response of restitution is the same in each case. I am now going to abandon that position for this one: while the only response for the cause of action in unjust enrichment is restitution, the response which is available for certain wrongs, and which operates by taking away the gain which the defendant made via a wrong to the plaintiff, should not be called restitution. It is a different juristic response and needs a different name. In other words, "restitution" for wrongs is different in an important way from *restitution* for the cause of action in unjust enrichment.

What does "restitution" mean? Most people would say, "giving back". In The Oxford English Dictionary,⁹⁶ the entries for "restitution" include:

- 1.a. The action of giving back something to its proper owner, or of making reparation to one for loss or injury previously inflicted.
2. . . . A restoration of something taken from another.
3. Reparation of hurt or loss. *Obs. rare.*
- 4.a. The action of restoring a person or persons to a previous status or position; the fact of being thus restored or reinstated. . . .

All of these senses connote a return to an earlier state. They are about giving something back, or at least giving back its value, so that a person who has been deprived of something is put back to where she was. The word "restitution", then, is an ideal label for the response provided for the cause of action in unjust enrichment. That cause of action, by the nature of its component elements, arises when there has been a transfer of wealth which the law makes into a reversible transfer of wealth. The wealth must be returned, given back; the plaintiff's wealth must be restored to him so that he will be restored to his earlier position. That is the response of restitution.

But the gain-based response which is available for some wrongs is different from this. Imagine that you have converted to your use an egg-washing machine which I had stored away.⁹⁷ You are enriched by the free use of something that does not belong to you. But I have not suffered any deprivation, because I was not intending to use the machine. The law will allow me to recover from you the gain which you made by your tort. But

⁹⁶ J.A. Simpson and E.S.C. Weiner (eds.), *The Oxford English Dictionary* (2d ed., 1989), 20 volumes.

⁹⁷ *Olwell v. Nye & Nissen Co.*, *supra*, footnote 75.

this is not a case of a reversible transfer of wealth. It is not a matter of restoring to me something which I lost. I end up better off than when I started, in order that we reach the desired end of stripping you ill-gotten gain from you. So it is with breaches of fiduciary obligations. In *Boardman v. Phipps*,⁹⁸ the fiduciaries had to give up the gains they had earned through the breach of their fiduciary duties; but the beneficiaries had suffered no corresponding deprivation. The gain had come from elsewhere. The beneficiaries ended up better off than if the fiduciaries had never breached their duties. So where there is a response to a wrong which involves an award measured by the defendant's gain, the wealth is not being given *back*; it is being given *up*. The word "restitution" is inappropriate.

What shall we call this response? A word is needed which conveys the idea that someone is being forced to give something up, but not to give it back. The word is "disgorgement". It is hardly new. It is used a lot in the context of gain-based recovery for wrongs,⁹⁹ which I think reflects the fact that it is intuitively more suitable in this context than is "restitution". Here are some of the definitions given by the Oxford English Dictionary for "disgorge":¹⁰⁰

1. To eject or throw out from, or as from, the gorge or throat . . .
- b. *fig. . . . esp.* to give up what has been wrongfully appropriated . . .

The sense in 1.b. is exactly the sense required. It does not connote that the wealth being claimed ever came from the plaintiff.

It is instructive to break down what actually occurs when the response of restitution for the cause of action in unjust enrichment is awarded. In my view at least four elements are present:

1. take from the defendant;
2. the amount of the defendant's gain;
3. give to the plaintiff;
4. the amount that the plaintiff has lost.

⁹⁸ *Supra*, footnote 61.

⁹⁹ See, for example, *Canson Enterprises Ltd. v. Boughton & Co.*, *supra*, footnote 60, at pp. 545, 578, 589-590 (S.C.R.), 146, 156, 165 (D.L.R.); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 15, at p. 618 (S.C.R.), 76 (D.L.R.); *Hawreluk v. Edmonton*, [1976] 1 S.C.R. 387, at p. 408, [1975] 4 W.W.R. 561, at p. 573, (1975), 54 D.L.R. (3d) 45, at p. 61; *Canadian Aero Service Ltd. v. O'Malley*, *supra*, footnote 62, at pp. 609 (S.C.R.), 383 (D.L.R.); *Lavigne v. Robern*, *supra*, footnote 63, at p. 761 (D.L.R.), 63 (O.R.); *Snepp v. U.S.*, 444 U.S. 507 (1980); Goff and Jones, *op. cit.*, footnote 10; Maddaugh and McCamus, *op. cit.*, footnote 1, pp. 432-438; Jackman, *loc. cit.*, footnote 55, at p. 303; Gautreau, *loc. cit.*, footnote 81, at p. 16; Farnsworth, *loc. cit.*, footnote 81, at p. 1339.

¹⁰⁰ *Op. cit.*, footnote 96. I must admit that when I first thought that the word "disgorgement" might be useful in this context I fed it into the "thesaurus" feature of my word processor (WordPerfect 5.1) to see whether a better word might present itself. I had a nasty shock when the following synonyms for "disgorge" were returned from the electronic maw: "heave", "regurgitate", "retch", "throw up". I was glad to have the Oxford English Dictionary confirm that the word is usable in a figurative sense as well.

The cause of action in unjust enrichment is about a reversible transfer of wealth. When it is proved, the amount of the defendant's gain (the enrichment) is equal to the amount that the plaintiff lost (the corresponding deprivation), because they are two sides of the same coin. The coin is the transfer of wealth which is, by hypothesis, reversible.

But consider the response of compensation. It is effected by elements (1), (3) and (4) of the four elements of the response of restitution. Any gain of the defendant is immaterial. Now think about the response of disgorgement: it is effected by elements (1), (2) and (3) of the four elements of the response of restitution. Any loss the plaintiff may have suffered is immaterial. There are other possibilities outside the realm of private law. A public scheme for the compensation of people who have lost wealth—perhaps as the victims of crime—would be effected by elements (3) and (4). The difference from private law compensation would simply be that the wealth would not come from a defendant. Similarly, a public law scheme for confiscating the profits of crime, but not necessarily returning them to their sources, would be effected with elements (1) and (2).

But we are concerned with compensation, disgorgement and restitution. This breakdown of the constituent elements of these various responses shows an interesting truth: there is no closer relation between disgorgement and restitution than there is between compensation and restitution. It is generally assumed that "restitution for wrongs", which I would call disgorgement, is like restitution for the cause of action in unjust enrichment because in each case the response is equal to the defendant's gain. But so what? In both restitution for the cause of action in unjust enrichment and compensation for wrongs, the response is measured by the plaintiff's loss.¹⁰¹

The truth is that compensation and disgorgement are each only part of restitution. Disgorgement requires that the defendant have received a gain; it makes no sense otherwise. And the plaintiff's position is immaterial. Compensation requires that the plaintiff have suffered a loss; it makes no sense otherwise. And the defendant's position is immaterial. Restitution—the union of compensation and disgorgement—requires that the defendant

¹⁰¹ Because both disgorgement and restitution target a gain that the defendant has made, there may be remedies common to both; that is, there may be common means of securing each of these responses. For example, the remedy of remedial constructive trust may be used to effect restitution as the response to the cause of action in unjust enrichment, as in *Pettus v. Becker*, *supra*, footnote 3; and similarly, the remedy of remedial constructive trust may be used to effect disgorgement as the response to the action for breach of confidence (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, *supra*, footnote 15) or as the response to the action for breach of fiduciary obligation (*Keach v. Sandford*, *supra*, footnote 61). But the fact that the same remedy can be used to achieve different responses is not surprising; after all, each of the responses of restitution, compensation and disgorgement can be effected through the remedy of a money award. See the text *supra*, at footnotes 42-46.

have received a gain *and* that the plaintiff have suffered a corresponding loss. In no other circumstances would it make sense to have a response the essence of which is "giving back". And that is why restitution comes about only through the cause of action in unjust enrichment. It is only invoked where the defendant's gain and the plaintiff's corresponding loss are two sides of the same coin: the reversible transfer of wealth that constitutes the unjust enrichment.

Disgorgement and compensation are responses for other causes of action, none of which guarantee that there will be both an enrichment of the defendant and a corresponding deprivation of the plaintiff. None of them is about reversible transfers of wealth. Restitution, as "giving back", is not a response for those causes of action because those causes of action do not create circumstances in which it would be logical to have a response which requires the defendant to "give back" what he got.

So restitution is only available for the cause of action in unjust enrichment. What is more, there is no other response for the cause of action in unjust enrichment. All of the logical elements are already built into restitution. It is a composite of disgorgement and compensation. It reverses both the defendant's gain and the plaintiff's loss. What more could a remedy do?¹⁰²

Shortly after the Restatement of Restitution was published, its reporters, W.A. Seavey and A.W. Scott, were asked by Professor A.L. Goodhart to write an article for the Law Quarterly Review explaining what it was all about.¹⁰³ They wrote:¹⁰⁴

Although it is a rule of the Institute that no new word should be coined, it is consistent with its practices to use an old word with either a more precise or a more generalized meaning. With this in mind, the word 'restitution' was chosen, a word which has a connotation of the right to recover back something which one once had.

As I have pointed out in Part I, when the reporters drafted paragraph 1, they unified too much; they gave a single name to two disparate matters. So too when they chose the word "restitution": they used it to refer not only to the right to recover something which one once had, but to the right to take something away from a wrongdoer so that he would not profit from his wrong. It is being used to do too much.¹⁰⁵

¹⁰² It could be punitive, but that possibility is outside the current discussion as it involves a private law remedy for a public law purpose.

¹⁰³ *Loc. cit.*, footnote 12.

¹⁰⁴ *Ibid.*, at p. 29.

¹⁰⁵ That there is a long way still to go in finding a secure and common language for discourse on these remedial matters is shown by some of the language in *Canson Enterprises Ltd. v. Boughton & Co.*, *supra*, footnote 60. McLachlin J. (with whom Lamer C.J.C. and L'Heureux-Dubé J. concurred) used the word "restitution" throughout her reasons in a way that apparently meant the return of a specific thing inappropriately acquired. In this sense it seems to cover part of the ground more conventionally covered by "restitution", part

Professor Birks writes:¹⁰⁶

There is a counter-principle of 'Occam's razor' though I am not aware that it has a name. It is that, as you must not have too many entities, so also you cannot do with too few.

That is exactly right. Trying to get by with too few entities confuses matters because it obscures the individuality of concepts. It is Procrustean: it leads us to force ideas into ill-fitting beds because we have no others to offer.

IV. *The Province of the Law of Restitution*

So what is the bottom line? First, we must distinguish the cause of action in unjust enrichment from gain-based remedies for wrongs. The term "unjust enrichment" should be confined to discussion about the cause of action in unjust enrichment. If we use it to refer to gain-based remedies for wrongs, we deserve all of the confusion that will follow.

Second, we should realize that gain-based remedies for wrongs are not the same as the response of restitution for the cause of action in unjust enrichment. The latter is about giving back; it is about reversing a reversible transfer of wealth. Disgorgement—the gain-based response for wrongs—is about giving up; it is about taking away an ill-gotten gain from the defendant, without regard to whether the plaintiff had it or ever would have got it.

The result of these admonitions is that if someone asked me what subject matter is covered by books with "restitution" in their names,¹⁰⁷ I would have to say: the cause of action in unjust enrichment and the response of restitution therefor; and, the response of disgorgement which is available for certain wrongs. This, of course, is far from elegant, and I do not expect to see any major title changes. But that is not the point. The point is that clarity in analysis requires a technical language of sufficient power to distinguish and describe all relevant ideas. And that is what is missing from the province of the law of restitution.

of the ground covered by "compensation", and indeed part of the ground I would set aside for "disgorgement". Rather than using the word functionally, to describe the effect of a type of interference by the legal system (whether to take away a gain (disgorgement), make good a loss (compensation), or reverse a transfer of wealth (restitution)), McLachlin J. used "restitution" factually, to refer to the legal system's response to a certain factual pattern. The most helpful terminological statement in the whole case is this pithy comment of Stevenson J. (at pp. 590 (S.C.R.), 165 (D.L.R.)): "This case is not one of profit making and restitutionary concepts do not fit."

¹⁰⁶ *Op. cit.*, footnote 10, p. 91. I have corrected a typographical error (the book reads "two few").

¹⁰⁷ And by Klippert, *op. cit.*, footnote 2.