Restitution beyond Contract and Tort: Mapping Its Autonomous Domain in Contemporary Jurisprudence

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Abstract

This paper explores the theoretical underpinning and the scope of restitution as an independent body of law. It takes a comparative look at the law of unjust enrichment in Anglo-American common law, civilian jurisdictions and argues that it is a third pillar of the law of obligations – with its very own organizing principle and internal taxonomy, as well as remedial logic. The historical story of restitutionary liability, from the Roman condictiones to quasi-contractual fictions of the common law, to the arrival of the modern analytical approach in Lipkin Gorman v Karpnale Ltd (1991) is mapped. It critically maps the four defining elements of an unjust enrichment claim enrichment, at the expense of the claimant, unjust factor, and defenses and analyses their interaction with contractual and tortious doctrines without collapse into either. The paper also interrogates the proprietary dimension of restitution, the role of subjective devaluation, the nature of enrichment by services, and the continuing controversy over the recognition of 'absence of basis' as an alternative structuring principle. Finally, the paper situates restitution within broader debates about the coherence of private law and considers its trajectory across England and Wales, the United States, Australia, Canada, and Germany.

Keywords: Unjust Enrichment · Restitution · Law of Obligations · Autonomous Private Law · Proprietary Remedies · Comparative Jurisprudence

Submission: 10/12/2025 **Acceptance:** 21/03/2026 **Publication:** 14/05/2026

1. Introduction

The law of obligations, in its classical tripartite scheme, has long been understood to rest upon three foundations: contract, which gives effect to voluntary undertakings; tort, which responds to civil wrongs causing harm; and a residual, conceptually elusive third category variously labeled as quasi-contract, implied contract. For much of the common law's history, this third category was treated as an embarrassing appendage, a collection of disparate actions that defied principled synthesis and were held together by little more than the shared fiction that the defendant had 'impliedly promised' to repay. That fiction

was always intellectually dishonest. It borrowed the vocabulary of contract to enforce obligations that arose independently of any agreement, and it masked the real normative question: when is a defendant, whose wealth has been augmented at the expense of a claimant, obligated to make restoration?

This paper delves into mapping that autonomous domain. It comes in seven stages. In Section II, the historical evolution of restitutionary doctrine from Roman law, to the common law writs and on to the present analytic advance, is charted. Section III focuses on the jurisprudential basis of the concept of unjust enrichment. In Sections IV and V, the limitations of restitution versus contract and restitution versus tort are examined, showing that while there are coherent bounds, they are nevertheless complicated in practice. Section VI considers the main types of unjust enrichment mistake, failure of basis, compulsion, necessity, and free acceptance and how they have been treated in the major countries. The proprietary aspect to restitution is considered in Section VII. In Section VIII, a consideration of the present position of the subject and of its future progress is added.

2. Historical Development of Restitutionary Doctrine

2.1. Roman Origins: The Condictiones

Roman jurists recognised several species of the "condictio" according to the particular type of unjustified receipt: the "condictio indebiti", the "condictio causa data causa non secuta", the "condictio ob turpem causam", and the "condictio sine causa generalis" (a residual action for unjustified receipts not falling within the named categories). The conceptual significance of these categories was profound: they proceeded not from agreement or wrong but from the abstract principle that a person should not retain that which was enriched them unjustly at another's expense a principle expressed in the Justinianic compilation as nemo cum alterius detrimento locupletari potest, "nobody may be enriched to another's detriment."

The Roman condictiones were personal, in persona claims for the return of a specific value. They were not dependent upon any agreement between the parties and were conceptually distinct from the actions in factum that governed tortious liability. This tripartite structure contract, delict, enrichment survived into the Corpus Juris Civilis and eventually into the major civil law codes, including the German BGB, whose Article 812contain a comprehensive code of unjust enrichment, and the French Code civil, whose enshrinement of the theory of enrichment sans cause (now codified in Articles 1303-1303-4 following the 2016 Ordinance) gives legislative expression to the same principle.

2.2. Common Law Quasi-Contract: The Long Detour

The medieval common law knew no general writ for the recovery of unjust enrichment. Recovery of money paid was typically achieved through the action of debt, which lay for a specific liquidated sum said to be 'owed' to the plaintiff. Over time, particularly from the late seventeenth century onwards, the action of assumption originally an action on a promise was extended to cover cases where no actual promise had been made, on the fictional basis.

This naturalistic, equitable language was immediately productive: it freed the action from the constraint of an actual promise and allowed it to reach cases of mistake, failure of consideration, and money paid under compulsion. Yet Lord Mansfield's own framework

was too broad and too moralistic to serve as the foundation for a principled body of law, and it provoked the immediate counter-attack of Buller J in Shuttleworth v Garnett (1780).

3. Theoretical Foundations: Unjust Enrichment and the Law of Obligations

3.1. Unjust Enrichment as an Organizing Principle

The main idea of the modern scholarship is used to describe the odd cases in which restitution is awarded by the court, but one that represents a true principle of private law, which, at a substantive level, obligates the defendant apart from any action of will she may have taken, and apart from any wrong she may have committed. Various scholars have given different expressions to the principle. A person who receives something and is unjustly enriched in so doing at the expense of another is bound to make restitution: Birks formulated this as. The significance of this principle goes beyond a historical proven track record, but is also its normative form. On the contractual liability, one assumes an obligation but on the other hand did not cooperate. Tortious liability is based on a wrongful act being perpetrated he got into a situation where he caused some form of injury and he shouldn't. The key element of restitutionary liability is not wrongdoing (as is necessary for Tort liability), nor is it voluntariness, but merely a fall-back approach to liability.

3.2. The Relationship between Restitution and Corrective Justice

According to Ernest Weinrib's corrective justice account, the liability for restitution is a part of a bilateral system of rights and duties, such that each part has a duty to do something when and because it causes a harm to the other part, and this harm involves a deprivation in the form of a decrease in normative equality. However, according to this conception, unjust enrichment is not a roving rule of social policy, but an application of the same principle of corrective equality that informs contract and tort law, that is, Aristotle's principle.

Stephen Smith has provided another version of this, emphasizing the voluntarism aspect of unjust enrichment: The law of restitution encourages autonomy of persons, and ensures that "transfers of value which persons did not truly intend or authorize" are undone. In this account, the 'unjust' part of unjust enrichment is examined more for its deficiencies on the side of the claimant's will (mistake/ compulsion/ failure of purpose) than for any wrongdoing on the part of the defendant. The corrective and voluntarism explanations do not rule each other out and neither explains all kinds of restitutionary liability; but they, together shed light on the moral dimensions.

3.3. Unjust Factor vs. Absence of Basis

The unjust factor approach, championed by Birks in his 1985 text and by the English courts, identifies specific vitiating factors mistake, failure of consideration, compulsion, undue influence that render a particular enrichment unjust and therefore reversible. The absence of basis approach, associated with civilian systems and with Birks's later, controversial 'Unjust Enrichment' (2003) in which he repudiated the unjust factor framework in favor of civilian analysis.

The practical difference between the approaches is sometimes modest, but their structural implications are substantial. English courts have firmly declined to adopt the absence of

basis approach, preferring the unjust factor framework as more compatible with the common law's incremental method and more protective of defendants' reasonable expectations of security.

4. The Boundary between Restitution and Contract

4.1. Restitution for Failure of Basis

Perhaps the most contested borderland between restitution and contract is that occupied by claims for restitution where a contractual relationship has broken down. Where a party has conferred a benefit under a contract that has subsequently been terminated for the other party's breach he may seek restitution of the value of that benefit. It depends instead on the failure of the expected return performance that constituted the basis of the transfer.

The leading English authority is Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, where the House of Lords held that "a party who had paid an advance purchase price under a contract subsequently frustrated by the outbreak of war could recover that payment in an action for money had and received on the ground of total failure of consideration. Lord Wright's speech contains the clearest statement in the pre-modern case law of the independence of the restitutionary claim from the contractual framework: the action is not founded on any implied term of the contract, but on a principle of unjust enrichment that operates once the contractual structure has collapsed".

The modern position, confirmed in "Stocznia Gdanska SA v Latvian Shipping Company" [1998] and "Roxborough v Rothmans of Pall Mall Australia Ltd" [2001] in Australia, requires that the failure of consideration be 'total' that the claimant receive no part of the promised benefit unless the benefit can be apportioned.

4.2. Quantum Merit for Services Rendered

It is restitutionary in nature – it is made not because the defendant has contracted to pay any specific sum but rather because the defendant has received services from which it was not deprived and was thus enriched at her expense. The conflict with contract law occurs when there is an otherwise valid contract on the basis of which the parties agreed a fixed price if the claimant has done works that were outside the scope of the contract or in contradiction to the agreed contractual rate?

The tension associated with these claims was first resolved by the High Court of Australia in Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221, where it found that "a quantum meruit claim out of an unenforceable contract was based on the doctrine of unjust enrichment and therefore cannot be limited by the terms of the unenforceable contract. The decision, which can lead to recovery for the claimant that is greater with a restitutionary claim than with an action for enforcement, is controversial". The English approach has been more conservative and Miles v Wakefield Metropolitan District Council [1987] and Benedetti v Sawiris [2013] UKSC 50 have reiterated that "the objective value of services should be established by reference to market rates rather than with reference to the subjective value attributed to the services by the defendant, which expresses the subjective devaluation principle discussed below".

4.3. Restitution and the Allocation of Contractual Risk

These are the cases where the parties have responded to each other through a valid subsisting contract which expressly or impliedly shifts contractual risk and one party wishes for restitution of a benefit it provided under the contract. This idea, at times termed the 'contract as a bar to restitution', illustrates that the parties' autonomous distribution of the benefits and obligations of the contract come first. To act in a way that would enable one party to rescind a bad bargain on the grounds of restitution would have the effect of a licence for one party to recharacterise his or her contractual action as restitutionary.

The English judiciary has been adamant at this end. In MacDonald v Keeble [2002] and others, courts have made it clear that "if parties have set a price for work, the contractual framework is all that the defendant is obliged to pay where the claimant thinks she has added value".

5. The Boundary between Restitution and Tort

5.1. Restitution for Wrongs: Disgorgement vs. Compensation

The most contested borderland on the other side of restitution's autonomous domain is the relationship between restitution and tort. But in some cases, the claimant suffers no measurable loss at all, yet the defendant has made a profit from her wrongdoing. In such cases, courts have sometimes awarded a 'restitutionary' remedy an account of profits, a gain-based award, or a disgorgement remedy that requires the defendant to surrender the profit.

The theoretical status of these gain-based remedies for torts is deeply contested. Birks argued that they represent "restitution for wrongs" a category of restitutionary liability in which the event giving rise to the obligation is a wrong, not an unjust enrichment in the pure sense. Other scholars, notably Stephen Hedley, have disputed whether gain-based awards for wrongs are truly 'restitutionary' in any meaningful sense, suggesting that they are better understood as penal or deterrent remedies masquerading as civil law responses.

5.2. Autonomous Restitution vs. Restitution for Wrongs: The Birksian Taxonomy

On this taxonomy, a claim for restitution for a tort is both 'restitutionary' in the remedial sense but different in their causative event. The distinction is practically important because the defenses available in the two types of case differ: "the defense of change of position" is available in autonomous unjust enrichment cases but its availability in restitution for wrongs cases is uncertain; "the defense of bona fide purchase" operates differently in each context; and limitation periods may run from different starting points. The decision in "Sempra Metals Ltd v Inland Revenue Commissioners" [2007] revealed the persistence of uncertainty: the House of Lords recognised a restitutionary claim for the time value of money (compound interest) on tax paid under a mistake, but did so in terms that some members of the House appeared to ground in autonomous unjust enrichment while others appeared to treat as a remedy for the Inland Revenue's wrong in collecting the tax unlawfully.

6. Principal Categories of Autonomous Unjust Enrichment

6.1. Mistake

Mistake is perhaps the most widely recognised unjust factor: whether as to the existence of an obligation to make the transfer, the identity of the recipient, or some fundamental fact relating to the transaction the mistake vitiates the consent that would otherwise justify the defendant's retention of the benefit, and restitution lies. The Kleinwort Benson decision did not, however, resolve all difficulties. The scope of the requirement that the mistake be 'causative' that it must have induced the payment remains contested, as does the question whether a mistake as to the legal effect of a transaction suffices, and whether mere ignorance (as distinct from a positive misapprehension) can constitute a sufficient unjust factor. The High Court of Australia addressed the ignorance question in "Equuscorp Pty Ltd v Haxton" (2012), holding that ignorance of a relevant right can, in appropriate circumstances, constitute a basis for restitution, though this position has not been adopted in England.

6.2. Failure of Basis (Failure of Consideration)

The "unjust factor of failure of basis" arises where a benefit is transferred under an anticipated exchange that does not materialize. The critical distinction from mistake is that in failure of basis cases, the claimant knows the true facts at the time of the transfer he pays money in anticipation of receiving goods or services but those anticipated facts do not come to pass.

The courts have mitigated the harshness of the rule by, inter alia; treating separate and distinct parts of a contract's consideration separately a technique deployed in Goss v Chilcott [1996] AC 788 and by allowing recovery of money paid on a distinct basis from other elements of the contract.

6.3. Compulsion: Duress, Undue Influence, and Exploitation

Over time, compulsions of any type have been identified as unfair. Clear: Where a payment is extracted by duress (legitimate pressure that causes the claimant's will to be overcome), the payment is recoverable in restitution. So, the question of undue influence is somewhat more complicated, since it incorporates, at least in part, law of equity, which was not a part of the law of contracts, but dealt a doctrine relating to setting aside of transactions procured by undue influence. The relationship between these two aspects, namely the equitable doctrine of undue influence and common law unjust enrichment, has not been fully worked out. While both doctrines reflect the identical normative concern, protection of persons who, in essence, are not fully free in the transaction to which they are subject, they rely on differing mechanisms and different remedies are attracted by them.

6.4. Necessitous Intervention and the Doctrine of Necessity

The doctrine of necessity in restitution addresses cases where a person acts in an emergency to protect the life, health, or property of another without that other person's request or consent, and seeks compensation for the expense incurred. The restitutionary basis of the claim is controversial he has instead incurred costs in conferring a benefit on the defendant (typically saving her property or life), and she seeks restitution of those costs. The unjust factor analysis must therefore grapple with the question of what makes

the defendant's enrichment 'unjust' in circumstances where she neither requested the benefit nor committed any wrong.

English law has historically been reluctant to recognize a general doctrine of necessitous intervention, preferring instead to confine restitutionary recovery to specific analogical categories: the agent of necessity in maritime law (who may claim salvage or reimbursement for general average), the law of agency of necessity in commercial law, and the limited circumstances in which a person may recover for rendering emergency medical or other assistance.

6.5. Free Acceptance and Incontrovertible Benefit

The evolution of "free acceptance" is a way developed by Birks to ascertaining restitutionary liability in respect to cases of unsolicited services. The doctrine is controversial because it has the potential to lose out on its requirement to respect the defendant's autonomy in refusing benefits that he or she does not want. Courts have mostly limited its use to situations where the defendant has a genuine opportunity to refuse the benefit received and has awareness that the claimant expects them to pay, as have some writers, including Hedley, who doubted whether it was a separate unjust factor or whether it was more correctly given as a factor establishing enrichment.

The related doctrine of 'incontrovertible benefit' provides that a defendant will not be able to allege enrichment if she was going to be employed by someone who would have incurred a sacrifice that the claimant prevented her from having to bear, such as payment of a debt by a creditor to which the defendant was under a legal obligation to contribute. The incontrovertible benefit concept is significant with regard to contribution among co-debtors, and it reflects the level of sensitivity enrichment analysis needs to be in a particular economic context.

7. The Proprietary Dimension: Trusts, Liens, and Charges

7.1. Personal vs. Proprietary Restitutionary Claims

In certain situations, however, the Claimant can accept a proprietary remedy as an alternative such as a declaration that the Defendant holds specific property on a constructive trust or an equitable lien or charge over certain assets, where the Defendant is bankrupt / insolvent, where the benefit is still perceivable in the hands of the Defendant, or where the original asset has been converted into another asset. One of the most disputed and least-developed fields of the law is that of proprietary restitutionary remedies.

There has been considerable debate on the theoretical bases of proprietary restitution. At the other extreme, and championed by Birks, proprietary remedies in unjust enrichment do not require proof of intention to bestow a trust or impose a lien since the trust/lien is merely the proprietary manifestation of a personal obligation to give back. A second school (linked to William Swadling) suggests that in this context the proprietary claim arises not from some kind of unjust enrichment, but on the basis of a pre-existing proprietary right in the claimant, a fiduciary relationship or a specific statute.

7.2. Tracing and the Persistence of Value

Proprietary restitutionary claims are highly dependent on the law of tracing, the method by which a proprietary claimant is able to trace the value of her original asset through

various exercises or mixes. Tracing is a technique of evidence and not a remedy itself; it only serves to show that in economic terms, a specific asset acquired by the defendant is of the value of another asset to whose claim the Plaintiff had an original claim. The House of Lords has rationalised the principles of tracing in Foskett v McKeown [2001] 1 AC 102, finding that tracing is a right in property and can be done both at common law and in equity by the same principles; tracing can be done to the traceable value of an asset.

The significance of the practical tracing for restitution is enormous. If the claimant has received some of the funds and the money can still be traced to the defendant, the claimant may be able to claim a share of the amount, by a form of tracing, in the position of a preferent creditor if the defendant is wound up in liquidation. This priority is a key element of proprietary restitutionary remedies that has engendered substantial debate: firstly, because the proprietary remedies may distribute value between creditors in a manner that is not justifiable by the strength of the rival claims, and secondly because it poses a challenge to the doctrines and fabric of insolvency with which it is only partially dealt.

8. Conclusion

The autonomy of restitution is never an absolute one. Frontiers with contract and tort are not walls, but membranes: they allow doctrine, concept and analogy to cross back and forth, but not to the extent that it loses its distinctive normative character in each category. Restitution is the response to another type of event that is not a voluntary benefit but rather a civil wrong, namely, receiving value at the expense of others, which creates a different specific set of rights, obligations and defences not covered by a purely contractual or tortious analysis.

That which still lies ahead is a lot of work. The principles of unjust factor and lack of basis have yet to be satisfactorily resolved under the law in England. The proprietary nature of unreasoned enrichment is still under a cloud of doubt, and its workability is in question. The concepts of autonomous unjust enrichment and restitution of wrongs have indistinctly defined lines of demarcation. The aspects of the offences, especially change of position, need to be defined. But the contrast between common law jurisdictions and between common law and civilian jurisdictions makes the danger of fragmenting the common law in a growing transnational commercial world a permanent possibility. The problems which should guide the forthcoming generation of scholarship and adjudication in this marvelous and yet unsynthesized sphere.

It can be said with confidence, however, that the free space of restitution has defined itself, and not been incorporated into artistic canon. It has solid bases and sacrificed its body of doctrine and role in the implementation of private law is indisputable. The project begun by Lord Goff and Gareth Jones in 1966 and continued by Birks, Burrows, Edelman, Kull, and a generation of scholars across the common law world is incomplete but irreversible. The law of unjust enrichment is here to stay.

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