

THE UNEASY POSITION OF UNJUST ENRICHMENT AFTER *ROXBOROUGH v ROTHMANS*

ABSTRACT

This article considers the role of unjust enrichment in Australian law after the case of *Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68. In particular, it explores the sort of justice which underlies unjust enrichment law using the Aristotelian division between corrective and distributive justice. The article concludes that it is necessary to have a “non-subsidiary” concept of unjust enrichment contrary to the suggestions of some academics and Gummow J in the *Roxborough* case. In so concluding, it draws a comparison between the common law and the concept of restitution in the Talmud, the Jewish code of laws.

I INTRODUCTION

The judgment of Gummow J in the recent case of *Roxborough v Rothmans of Pall Mall Australia Limited* (*Roxborough*)¹ provides a fascinating starting point for an investigation into the role of unjust enrichment law and restitutionary remedies in the law of obligations.² His Honour explicitly rejects any ‘all-embracing theory of restitutionary rights and remedies founded upon a notion of “unjust enrichment”’.³ As his Honour notes, this is in keeping with the recent trend towards scepticism for an all-embracing notion of unjust enrichment.⁴ This constitutes a rejection of the work of academic theorists

* BA, LLB (Hons), Barrister and Solicitor of the Supreme Court of Victoria, Associate to Mandie J of the Supreme Court of Victoria. The views expressed in this article are solely the views of the author and do not in any way represent the views of the Court or Mandie J. Particular thanks to Michael Bryan, Helen Barnett, Sharon and Leonard Warren, Mandie J and Osborn J for their assistance. Also thanks to the following people for their ideas and support: Natasha Tsykin, Nicole Rich, Thomas Mah, Kevin Yam and Lauren Joffe.

¹ *Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68.

² In this article, references to ‘restitution’ will connote the response to a variety of stimuli, including unjust enrichment and certain wrongs. References to ‘unjust enrichment law’ as a whole will include both ‘subtractive unjust enrichment’ (where a defendant gains at a plaintiff’s expense) and restitution for wrongs: however, it is acknowledged that the trigger for restitution for wrongs is the commission of the wrong, and thus it is ‘unjust enrichment’ in a totally different sense to subtractive unjust enrichment.

³ *Roxborough* [2001] HCA 68, 72.

⁴ *Ibid* 74. His Honour cites: S J Stoljar, ‘Unjust Enrichment and Unjust Sacrifice’ (1987) 50 *Modern Law Review* 603, 610–3; M Tilbury, *Principles of Civil Remedies*

such as Peter Birks, whose seminal work⁵ posited a doctrine of unjust enrichment law to complement the existing sources of obligation in private law. Justice Gummow's judgment seems to substantiate Steve Hedley's argument that the judiciary have shown very little liking for the all-embracing theory of unjust enrichment.⁶

The question then arises: are there any reasons why we should bother with a 'non-subsidiary' unjust enrichment law? Many commentators have suggested that restitution merely has a subsidiary 'gap-filling' role, somewhat similar to that of the auxiliary jurisdiction of equity.⁷ Indeed, in some common law and civil law jurisdictions, restitution has this role.⁸

In answering this question, it is important to step back and analyse the justice behind unjust enrichment law. As Kit Barker suggests of unjust enrichment law,

[a]uthors tend to engage in lively arguments about *what the beast should look like* (for example whether it should catch losses as well as gains and whether its regime should be strict or fault based) but they have tended to fight shy of the logically prior (and governing) question of *why it exists*.⁹

Volume 1 (1990), 4003–19; M Tilbury, 'Restitutionary Damages' in Robyn Carroll (ed), *Civil Remedies: Issues and Developments* (1996) 2, 2–6, 43–7; J Glover, *Commercial Equity: Fiduciary Relationships* (1995) 5.15–5.17; J Dietrich, *Restitution: A New Perspective* (1998) 92–100; R Grantham and C Rickett, *Enrichment and Restitution in New Zealand* (2000), 13–6; D Wright, 'Professor Birks and the Demise of the Remedial Constructive Trust' (1999) 7 *Restitution Law Review* 128, 129–126; S Doyle and D Wright, 'Restitutionary Damages – The Unnecessary Remedy?' (2001) 25 *Melbourne University Law Review* 1, 17–20; B Kremer, 'The Action for Money Had and Received' (2001) 17 *Journal of Contract Law* 93, 94–7.

⁵ P Birks, *An Introduction to the Law of Restitution* (revised ed 1989).

⁶ S Hedley, 'Unjust Enrichment' (1995) 54 *Cambridge Law Journal* 578, 579.

⁷ R Grantham and C Rickett, above n 4, 51–3; R Grantham and C Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 *Law Quarterly Review* 273, 289–293; J Dietrich, above n 4, 29–35.

⁸ See, for example, R Grantham and C Rickett, *ibid.*, 297–8, who outline the explicit subsidiary nature of restitution in France, Italy and Quebec, and the implicit subsidiary nature of restitution in Germany. It may even be arguable that restitution has taken on an implicitly subsidiary role in the US despite its presence in the *US Restatement on Restitution*, as in modern times, it has mostly been relegated into the panoply of remedies available; see also J H Langbein, 'The Later History of Restitution' in William R Cornish (ed) *Restitution: Past, Present and Future* (1998) 57–62, 61–2.

⁹ K Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 *Oxford Journal of Legal Studies* 457, 463 (emphasis added).

To analyse why the ‘beast’ of non-subsidary unjust enrichment law should exist, this article takes as a starting point the Aristotelian division between corrective justice and distributive justice. Aristotle distinguishes between the two types of justice. Corrective justice involves individual justice for the parties in a single transaction.¹⁰ Distributive justice imports a more general notion of sharing resources between people according to their just deserts.¹¹ It has been suggested that only individual justice between the parties (that is, corrective justice) is relevant to unjust enrichment.¹² However, it is important to look at both types of justice in order to establish a principled rationale for the law of unjust enrichment.

This article will have three parts:

- (a) In the first part, this article will look at the Aristotelian division between corrective and distributive justice, and also Ernest Weinrib’s gloss on Aristotle. This article will then analyse how this division works in the context of unjust enrichment law, including restitution for wrongs.
- (b) In the second part, this article will look in detail at the case of *Roxborough* itself and analyse the judgments from the standpoint of achieving both corrective justice and distributive justice.
- (c) In the third part, this article will look at why it is necessary to have a non-subsidary unjust enrichment law. First, it is necessary to establish a coherent conception of justice. This article will argue that a non-subsidary unjust enrichment law achieves two types of justice, corrective justice and distributive justice. A non-subsidary unjust enrichment law informed by principles of distributive justice promotes justice in two senses. In the broader sense of distributive justice, it ensures that judicial distribution of money and other

¹⁰ Aristotle, *Nicomachean Ethics* (1985 ed) (trans Terence Irwin), Book V, Chapter 2 [12] (manuscripts 1130b, 1131a).

¹¹ *Ibid.*

¹² K Barker, above n 9, 468–74; A Burrows, ‘Contract Tort and Restitution – A Satisfactory Division or Not?’ (1983) 99 *Law Quarterly Review* 217, 256; E Weinrib, ‘Restitutory Damages as Corrective Justice’ (2000) 1 *Theoretical Inquiries in Law* 1; L Fuller and W Perdue, ‘The Reliance Interest in Contract Damages’ (1936–37) 46 *Yale Law Journal* 52, 56; R Grantham and C Rickett, above n 4, 43–6; G Virgo, *Principles of the Law of Restitution* (1999), 5; G Bordan, ‘The Law of Construction Privileges: Corrective Justice or Distributive Justice?’ (1989) 2 *Canadian Journal of Law and Jurisprudence* 57, 66–8; L Smith, ‘Restitution: The Heart of Corrective Justice’ (Paper presented at the Texas Law Review Symposium: Restitution and Unjust Enrichment, 12–13 January 2001, Austin, Texas) (found at www.utexas.edu/law/conferences/restitution/).

property is fair. This article will use the example of the Talmud¹³ to show that a mature legal system can sustain a distributive principle underlying it. In a more specific case-by-case sense, it ensures that the law looks at all the parties involved in a situation such as *Roxborough*. Indeed, some of the more controversial areas of unjust enrichment relief already have a distributive flavour.

Secondly, a non-subsidiary unjust enrichment law requires an order placed upon the common law which ensures that common law reasoning is consistent across different causes of action. A taxonomy such as Birks' prevents distributive justice from becoming the famous 'palm tree justice'. Taxonomy will also aid distributive justice in a general societal sense, as it makes sure that like cases are decided in like ways, in a structured and logical manner.

II THE PHILOSOPHY OF RESTITUTION

A *Aristotle's Theory of Special Justice*

In his *Nicomachean Ethics*, Aristotle distinguishes between two different forms of particular justice: distributive justice (the justice which concerns the sharing of property between persons according to their particular deserts) and corrective justice (the justice which rectifies transactions between persons).¹⁴ He states:

Special justice, however, and the corresponding way of being just have one species that is found in the distribution of honours or wealth or anything else that can be divided among members of a community who share in a political system; for here it is possible for one member to have a share equal or unequal to another's. A second species concerns rectification in transactions.¹⁵

Aristotle goes on to explain that distributive justice requires a geometrical proportion — that is, a person gets property or wealth according to their 'just deserts'.¹⁶ However, corrective justice requires an arithmetical proportion — that is, the person who takes from another is required to restore the loss or the value of the

¹³ The Talmud is the ancient Jewish code of laws, comprising of the Mishnah (an oral code of laws derived from Biblical exegesis written down in about 200 C.E. by Judah ha-Nasi) and the Gemara (the discussions and elaborations by later scholars called *amoraim* on the Mishnah). It is still extant and continues to be developed by those who follow it. See further, Dr Geoffry Wigoder and Fern Seckbach (eds), *Encyclopaedia Judaica CD Rom Edition Version 1.0* (1997).

¹⁴ Aristotle, above n 10, Book V, Chapter 2 [12].

¹⁵ Ibid.

¹⁶ Ibid Chapter 3, [8]–[13] (manuscripts 1131a, 1131b).

loss to the person who has been wronged.¹⁷ While in distributive justice there is some consideration of the deserts of the individuals receiving property, there is not such a consideration in corrective justice. Aristotle says of corrective justice:

For here it does not matter if a decent person has taken from a base person, or a base person from a decent person...Rather, the law looks only at differences in the harm [inflicted], and treats the people involved as equals, if one does injustice while the other suffers it, and one has done the harm while the other has suffered it.¹⁸

There is much exegetic literature concerning Aristotle's analysis of the two types of special justice, most of it explaining the precise meaning of Aristotle's words.¹⁹ Posner, in his analysis of corrective justice in tort law, uses distributive justice to mean 'justice in the distribution by the state of money, honors and other things of value...'.²⁰ However, Aristotle's use of the term is arguably broader than this.²¹ Certainly, my use of the term is broader. It is not only the fair distribution of money and property by the state, as Posner claims, but it is also a concept which informs the fair distribution of money and property by the legal system in the context of disputes between private citizens. By *fair* in this context, it is meant that the distribution should be equitable, take account of all persons involved, and in some circumstances, seek to redress wrongs done to persons.

B *Professor Ernest Weinrib's Gloss on Corrective Justice*

Professor Weinrib has developed a further gloss on the concept of Aristotelian corrective justice, which he calls "normative corrective justice".²² He considers that normative corrective justice is the lynchpin of private law (which consists of tort,

¹⁷ Ibid Chapter 4, [2]–[4] (manuscripts 1131b, 1132a).

¹⁸ Ibid Chapter 4, [3] (manuscript 1132a).

¹⁹ Ibid; See Henry Jackson (ed), *The Fifth Book of the Nicomachean Ethics of Aristotle* (1879), 82–6; W F R Hardie, *Aristotle's Ethical Theory* (1968) 192–5; H H Joachim, in *Aristotle: Nicomachean Ethics* (1951 edition) (trans W D Ross), 136–47; D G Ritchie, 'Aristotle's Subdivisions of "Particular Justice"' (1894) 8 *Classical Review* 185; J A Stewart, *Notes on the Nicomachean Ethics of Aristotle* (1973) 430–1; E Weinrib, 'Aristotle's Forms of Justice' in Spiro Panagiotou (ed) *Justice, Law and Method in Plato and Aristotle* (1987) 133–52; c/f W J Waluchow 'Professor Weinrib on Corrective Justice' in Spiro Panagiotou (ed), *Justice, Law and Method in Plato and Aristotle* (1987) 153–7.

²⁰ R A Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 *Journal of Legal Studies* 187, 189.

²¹ H H Joachim, above n 19, 139–40.

²² E Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 *Duke Law Journal* 277; E Weinrib, *The Idea of Private Law* (1995); E Weinrib, above n 12; c/f J Gordley, 'The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib' (2000) 1 *Theoretical Inquiries in Law* 39.

contract and restitution), as it essentially reduces a transaction to a bilateral *private* transaction between two parties.²³ His theory has proved very influential with many scholars and some courts.²⁴

Normative corrective justice works in the following manner.²⁵ Aristotelian corrective justice involves a restoration of equality once there has been a gain on behalf of one party and a loss at the expense of the other. It is the *correlativity* between the parties which creates the liability: one person's gain at the other person's expense creates the legal relationship.²⁶ Weinrib argues that loss and gain should be understood in normative terms²⁷ rather than material terms, and that the trigger for corrective justice is normative wrongdoing. That is, as McInnes succinctly explains Weinrib's theory,

[f]actual gain and loss are conceptually superfluous because corrective justice responds not to the disruption of material holdings, but rather to the fact that the defendant's wrongful act disrupts the normative relationship that exists between the parties. The defendant enjoys a normative gain when he breaches a duty owed to the plaintiff; the plaintiff suffers a normative loss when she suffers the corresponding infringement of her right. And because the currency of relevant transaction between the parties is normative, rather than material, the defendant's gain invariably equals the plaintiff's loss.²⁸

Finally, Weinrib then says that equality is achieved by using the analysis of Kant — that is, the parties can be regarded as notionally equal at the beginning because of their status as 'self-determining agents'.²⁹ Weinrib feels that his notion of corrective justice is necessary for tort, contract and restitution in order to *isolate* the claims of persons in private law from the surrounding social ethos.³⁰ In this way, he hopes to establish 'a repudiation of the notion that restitutionary damages are occasions for the promotion of social purposes extrinsic to the relationship between the parties'.³¹

²³ Ibid, *The Idea of Private Law*, 43.

²⁴ For a description of Professor Weinrib's influence, see M McInnes, 'Unjust Enrichment: A Reply to Professor Weinrib' (2001) 9 *Restitution Law Review* 29, 30.

²⁵ See, apart from the works of Weinrib himself listed above at n 22, M McInnes, "'Passing On" in the Law of Restitution: A Re-Consideration' (1997) 19 *Sydney Law Review* 179, 187–92; M McInnes, *ibid*; L Smith, 'Restitution: The Heart of Corrective Justice', above n 12.

²⁶ E Weinrib, *The Idea of Private Law*, above n 22, 3–4.

²⁷ E Weinrib uses Kant to support the idea that loss and gain is normative rather than material; see *ibid* 76–83.

²⁸ M McInnes, above n 23, 35.

²⁹ E Weinrib, *The Idea of Private Law*, above n 22, 76–83.

³⁰ *Ibid* 3–14.

³¹ E Weinrib, above n 12, 48.

Correlativity is clearly necessary for a claim in subtractive unjust enrichment: that is, one person must have lost, and another must have gained at their expense.³² However, there are problems with Weinrib's concept of normative corrective justice underlying unjust enrichment law. Namely, as McInnes points out, normative corrective justice does not square with actual unjust enrichment case law, which focuses on *material* loss and gain.³³ As a consequence, when the term 'corrective justice' is subsequently used in this article, it will be used in the sense which considers material loss and gain, rather than in Weinrib's sense.

Weinrib would certainly not analyse unjust enrichment law from a distributive justice point of view; nor would he use a combination of distributive and corrective justice, as this article proposes to do. He describes distributive justice in the following manner:

An exercise in distributive justice consists of three elements: the benefit or burden being distributed, the persons among whom it is distributed, and the criterion according to which it is distributed. The criterion determines the parties' comparative merit for a particular distribution. The greater a particular party's merit under the criterion of distribution, the larger the party's share in the thing being distributed.³⁴

He contrasts the bilateral nature of corrective justice, in which parties are joined by a wrongful event which creates a loss in one party and a gain in the other party, with distributive justice, in which parties are merely joined by the fact that they are participating in a distribution, and rejects any notion of distributive justice applying to private law. He then says:

Because corrective and distributive justice are the categorically different and mutually irreducible patterns of justificatory coherence, it follows that a single external relationship cannot coherently partake of both...if the law is to be coherent, any given relationship cannot rest on a *combination* of corrective and distributive justifications. When a corrective justification is mixed with a distributive one, each necessarily undermines the justificatory force of the other, and the relationship cannot manifest either unifying structure.³⁵

He later goes on to explain that the two can never be mixed because corrective justice is intrinsically bipolar, and a distributive motive 'disassembles this unity by selecting a feature morally relevant to only one of the parties to the transaction'.³⁶

³² It may not be necessary for restitution for wrongs; however, it is beyond the scope of this article to look at this in detail.

³³ M McInnes, above n 23, 29–43.

³⁴ E Weinrib, *The Idea of Private Law*, above n 22, 62.

³⁵ *Ibid* 73.

³⁶ *Ibid* 75.

He wishes to isolate private law to two party bipolar interactions, and consequently, distributive justice destroys this isolation by bringing in considerations which are extrinsic to the concerns of the parties. He also argues that corrective justice is preferable as a justification for private law because it does not involve a political decision in deciding how to distribute wealth or property, as distributive justice does.³⁷

However, it is important to consider distributive justice *and* corrective justice in the context of unjust enrichment. Corrective justice is the basic aim of subtractive unjust enrichment, but in difficult or borderline cases, such as *Roxborough* (where the eventual party who lost was not before the court) or restitution for wrongs, distributive justice will become a factor to be considered. Otherwise we could end up with a law of unjust enrichment which is unjustly narrow in its compass, and does not consider wider issues of fairness. Private law should be totally divorced from its moral and political basis. Indeed this article echoes Stephen Smith's comment on Weinrib's *The Idea of Private Law*: 'How can one justify the law without introducing morality? What else is justification about?'³⁸

C *The Philosophy Behind Unjust Enrichment Law*

Aristotelian corrective justice is an uncontroversial aim of subtractive unjust enrichment.³⁹ This is because it seeks to restore losses which have been unjustly taken from a plaintiff, clearly embodying Aristotle's notion of arithmetical distribution (that is, the thing that has been taken wrongly will be restored). Thus, it is particularly well suited to explain instances of unjust enrichment in its simplest form, subtractive enrichment (that is, where there are only two parties, and, for example, P mistakenly pays money to D, thinking they are obliged to do so under a contract). Consequently, it will be the starting point of analysis for every unjust enrichment claim, and only in unusual cases will it be necessary to consider distributive justice as a further issue. Obviously in this article it is impossible to outline all situations in which distributive justice should be a factor, but this article will outline two of the primary situations where unjust enrichment goes beyond straightforward subtractive enrichment: cases where the loss has been 'passed on', and cases involving restitution for wrongs.

In *Moses v Macferlan*, the case which has been credited with initiating principles of unjust enrichment in English law, Lord Mansfield stated that:

³⁷ Ibid 210–23.

³⁸ S A Smith, 'The Idea of Private Law' (1996) 112 *Law Quarterly Review* 363, 365.

³⁹ See above n 12.

[i]n one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money...⁴⁰

Similarly, in a North American context, Seavey and Scott, the drafters of the American *Restatement on Restitution*, argue that the fundamental rationale of American restitution law is as follows:

A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust.⁴¹

The corollary of restoring an unjustly-gained benefit is that under principles of corrective justice, any gain by a plaintiff should also be returned, so that there is an arithmetical balance between the parties. This is why principles such as ‘counter-restitution’ have been introduced.⁴²

Justice Gummow in *Roxborough* narrows the corrective role of unjust enrichment even further when he states that restitutionary remedies merely have a ‘gap-filling and auxiliary role’, and arise to avoid unjust results in specific cases.⁴³ Other commentators have similarly limited the role of unjust enrichment law.⁴⁴

However, there is a second form of justice which may *also* be taken into account in unjust enrichment, namely, distributive justice; that is, justice concerning the distribution of quantifiable money, property or value for services between persons according to their particular deserts. In his famous analysis of US restitution law, J P Dawson calls restitution ‘one of the basic questions of distributive justice’.⁴⁵ Likewise, Hanoch Dagan has argued that distributive justice underlies restitution.⁴⁶ As Dagan states:

...[T]he rules of restitution affect the ability of each individual to make specific claims regarding resources, constituting a society-wide distribution of burdens and benefits, i.e., a distributive scheme.⁴⁷

⁴⁰ *Moses v Macferlan* 97 ER 676, 1012.

⁴¹ W Seavey and A Scott, ‘Restitution’ (1938) 54 *Law Quarterly Review* 29, 32.

⁴² P Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *Western Australian Law Review* 1, 78–9.

⁴³ *Roxborough* [2001] HCA 68, 75.

⁴⁴ See above n 7.

⁴⁵ J P Dawson, *Unjust Enrichment: A Comparative Analysis* (1951), 40.

⁴⁶ H Dagan, ‘The Distributive Foundation of Corrective Justice’ (1999) 98 *Michigan Law Review* 138; H Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* (1997) (‘*Unjust Enrichment*’). See also A Kronman, ‘Contract Law and Distributive Justice’ (1980) 89 *Yale Law Journal* 472 for an argument that distributive justice can enter contract law.

⁴⁷ *Ibid*, H Dagan, ‘The Distributive Foundation of Corrective Justice’, 141.

Thus, a secondary motive behind unjust enrichment is increased distributive fairness between parties. It *should* be taken into account in some situations in unjust enrichment law, namely:

- situations which involve the burden of a loss being passed on to a third party (such as *Roxborough*); and
- situations which involve the disgorgement of a gain rather than the mere return of what was unjustly taken. As it will be argued in Part IV of this article, distributive justice already underpins the restitutionary analysis in the controversial ‘fringe dwellers’ of unjust enrichment law, such as restitution for wrongs, and restitutionary remedies.

Corrective justice alone cannot underpin these doctrines, because they involve more than merely giving back what was lost: they involve a redistribution of assets.

III CORRECTIVE JUSTICE AND DISTRIBUTIVE JUSTICE IN *ROXBOROUGH*

First, let us use the decision in *Roxborough* to consider the operation of corrective justice and distributive justice in a specific context.

A *The Facts*

In *Roxborough*, the issue was who should be entitled to the benefit of excise taxes. Rothmans was a tobacco wholesaler from whom retailers purchased cigarettes for resale. In addition to the cost of the cigarettes, the retailers paid an amount of excise tax due under the *Business Franchise Licences (Tobacco) Act 1987* (NSW) as a separate itemised part of the contract of sale. As a matter of course, the retailers paid the tax to the wholesaler before Rothmans became liable to pay the tax. After the retailers had paid the tax but before Rothmans had purchased licences with the money, the tax was declared unconstitutional by the High Court.⁴⁸ The tobacco retailers had already passed the cost of the tax onto consumers.⁴⁹ The parties to the case were the wholesalers and the retailers: as the Court noted, in winning, the retailers received a benefit, for they had passed the cost of the tax on.⁵⁰

B *The Decision*

The majority found that as a result of a total failure of a severable part of the consideration paid to the wholesalers for the tobacco, the wholesalers had been unjustly enriched at the expense of the retailers.⁵¹ Gleeson CJ, Gaudron and Hayne JJ found that as between the parties, the wholesaler had no right to retain the

⁴⁸ See *Ha v New South Wales* (1997) 189 CLR 465.

⁴⁹ See the dissenting judgment of Kirby J in *Roxborough* [2001] HCA 68, 111–75.

⁵⁰ *Ibid*, 22 (Gleeson CJ, Gaudron and Hayne JJ); 114, 172 (Kirby J); 204 (Callinan J).

⁵¹ *Ibid*, 24 (Gleeson CJ, Gaudron and Hayne JJ); 100 (Gummow J); 202 (Callinan J).

amount in question because of the failure of the severable consideration.⁵² Justice Gummow found that an action for money had and received was established because money was paid upon a consideration which happened to fail.⁵³ There was no defence of passing on because of the defendant's unconscientious conduct in refusing to account to the plaintiff.⁵⁴ Justice Callinan found that passing on did not apply because the cause of action arose in law rather than equity.⁵⁵ Kirby J dissented. His Honour recognised a 'passing-on' defence, after looking at the position in the US, Canadian and European Union.⁵⁶ He thought that the money should be redistributed to the users of tobacco products by the legislature.⁵⁷

C *Corrective Justice in Roxborough*

Clearly, the sort of analysis used by the majority of the High Court in *Roxborough* will achieve corrective justice, whether in the ordinary sense or Weinrib's sense. The majority considered the positions of the parties in front of the court: the retailers and the wholesalers. They acknowledged that the party who won would get a 'windfall',⁵⁸ but as their only objective was to rectify the transaction as between the two parties, this did not matter. As Aristotle argued in his *Nicomachean Ethics*, in corrective justice, the law looks only at the difference in harm inflicted and does not consider the deserts of the parties.⁵⁹

D *Distributive Justice in Roxborough*

The result in *Roxborough* does *not* achieve distributive justice. It focuses only on the transaction between the parties concerned, the wholesalers and the retailers of tobacco. In actual fact, the parties who lost money were the consumers, because the cost of the tax was added to the price of cigarettes. So the money was not distributed according to all the relevant parties' 'deserts' — the retailers were

⁵² Ibid, 24 (Gleeson CJ, Gaudron and Hayne JJ).

⁵³ Ibid, 100 (Gummow J). Beatson and Virgo have criticised Gummow J's analysis of action for money had and received as a separate doctrine and not as part of unjust enrichment: J Beatson and G Virgo, 'Contract, Unjust Enrichment and Unconscionability' (2002) 118 *Law Quarterly Review* 352, 353–5.

⁵⁴ *Roxborough* [2001] HCA 68, 69 (Gummow J). Note that this approach has been criticised, as it 'begs the basic question as to whether or not a duty to account arises with respect to an expense that has been passed on': M McInnes, 'Enrichments, Expenses and Restitutionary Defences' (2002) 118 *Law Quarterly Review* 209, 213.

⁵⁵ *Roxborough* [2001] HCA 68, 202 (Callinan J). This approach has also been criticised, as '[t]here is nothing inherently equitable about passing on': M McInnes, *ibid* 213.

⁵⁶ *Roxborough* [2001] HCA 68, 125–36 (Kirby J).

⁵⁷ Ibid, 174 (Kirby J).

⁵⁸ Ibid, 22 (Gleeson CJ, Gaudron and Hayne JJ); 204 (Callinan J).

⁵⁹ Aristotle, above n 9, Book V, Chapter 4, [3] (manuscript 1132a).

enriched at the expense of the consumers, who received no recompense for their loss. In fact, Kirby J states somewhat acidly in his dissenting judgment:

Neither before the proceedings reached this Court, nor in answer to repeated questions asked of their counsel, did the retailers indicate the slightest interest in recovering the whole, or any part, of the windfall for the benefit of the consumers. They wanted the windfall for themselves.⁶⁰

The High Court cannot be faulted for finding it difficult to achieve distributive justice in this case, although the majority should have confronted the issue directly in their judgments. The issue is not so much the *result* of the case, which is consonant with the principles of straightforward subtractive unjust enrichment, but the lack of acknowledgment by the majority that distributive justice has not been achieved. Justice Kirby's judgment, in comparison, tackles the issue and resounds with the language of distributive justice.

McInnes makes the point that giving money back to each wronged person in a 'passing-on' dispute is an appealing and logical idea in theory, but is practically very difficult to achieve.⁶¹ However, as he notes in his later case note on the *Roxborough* case, many of the considerations which often arise in passing on cases did not arise in this case.⁶² First, the plaintiffs were not seeking restitution from the government but from another private party.⁶³ Secondly, it was unlikely that the retailer lost business for the price rise occasioned by the tax, and the court assumed that the demand for tobacco products was inelastic within the relevant price range, and the plaintiff's profits were thus unaffected.⁶⁴ Nevertheless, it is hard to see how individual consumers could be compensated for their loss, unless cigarettes were discounted for a period of time to correspond to the number of packets for which the consumers paid the illegitimate tax. This presumes that consumers would be smoking the same amount as they were at the time the illegitimate tax was imposed. The argument that the retailers should hold the money on constructive trust for each

⁶⁰ *Roxborough* [2001] HCA 68, 114 (Kirby J).

⁶¹ M McInnes, "Passing On" in the Law of Restitution: A Re-Consideration', above n 25, 192, 194, 199–203.

⁶² M McInnes, above n 54, 213.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

of the consumers cannot be practically justified.⁶⁵ It could not be substantiated on the facts, and was rejected by a majority of the Court in *Roxborough*.⁶⁶

Justice Kirby recognised a ‘passing-on’ defence, after a comprehensive summary of US, Canadian and European Union approaches to the problem.⁶⁷ In conclusion, he stated:

The “windfall” should remain with the wholesaler to await the legislative measures (if any) for disgorgement to the benefit of users of tobacco products, or otherwise, as the Federal Parliament may enact. No constructive trust, nor implied term, nor restitutionary principle requires, or permits, disturbance of this position.⁶⁸

In essence, Kirby J recognises the issues associated with distributive justice, but the mechanisms of the court are not enough to deal with the problem, and thus he calls on the legislature to achieve justice.⁶⁹ What now for the wronged consumers of tobacco products? Are they each left to claim their ‘penn’orth? The High Court could perhaps have ordered the retailers to deal with the money in a particular way for the benefit of tobacco consumers, although it would more likely have been inappropriate for a judicial body to intervene in such a political manner. One option is for governments to heed Kirby J’s call to legislate with respect to the issue. Or perhaps the retailers could be compelled to use the money for the benefit of the tobacco consumers.⁷⁰ Another alternative could be for consumers to attempt a class action recovery, much the same as some of the recent prominent tort cases.⁷¹ Two actions have been commenced in New South Wales by a former smoker against Philip Morris and British American Tobacco and tobacco retailers, and the actions

⁶⁵ This doctrine derives from *123 East Fifty-Fourth Street Inc v United States* 157 F 2d 68 (1946), 70–1 (Learned Hand J). See also *Benzoline Motor Fuel Co v Bollinger* 187 NE 657 (1933); *Indian Motorcycle Co v United States* 9 F Supp 608 (1935). See in Australia, *Commissioner of State Revenue v Royal Insurance* (1994) 182 CLR 51, 78 (Mason CJ).

⁶⁶ *Roxborough* [2001] HCA 68, 59 (Gummow J); 144–55 (Kirby J); 195–6 Callinan J. The issue was not discussed by Gleeson CJ, Gaudron and Hayne JJ.

⁶⁷ *Ibid*, 125–36 (Kirby J).

⁶⁸ *Ibid*, 174 (Kirby J).

⁶⁹ Apparently, some legislative measures were contemplated: *ibid*, 116 (Kirby J).

⁷⁰ Perhaps the retailers could be forced to give the extra money they have received to lung cancer and heart disease aid groups?

⁷¹ See, for example, *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 372 (the latest case in a string of cases involving a class action following the explosion of a gas plant); *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 (challenge to validity of rules governing a class action involving tainted aviation fuel).

seek a raft of the remedies suggested above.⁷² The question is whether these remedies achieve distributive justice, for while they achieve admirable social aims, they do not distribute any money to the persons who actually expended money on the cigarettes. Arguably, the only way distributive justice could really be achieved is to discount cigarettes for a time so that consumers pay less for the product. Perhaps unjust enrichment is not the right forum for this sort of a dispute in any case, but that is a broader question beyond the scope of this article, as it moves into the realm of public policy.

IV REASONS FOR A NON-SUBSIDIARY UNJUST ENRICHMENT LAW

There are two reasons why a non-subsidary unjust enrichment law is necessary. First, a non-subsidary unjust enrichment law promotes both particular and general justice. This is because it accommodates two different types of justice, corrective justice in the simple cases, and distributive justice in the difficult and borderline cases. The advantage of looking at unjust enrichment law through the lens of distributive justice is that it promotes justice in a broader sense than merely looking at the particular dispute between the parties which, although a very important consideration, is only part of the story. Distributive justice in the general sense — that is, the just allocation of money or property by an unjust enrichment law — is a sustainable aim. What is more, if we look to the way in which restitution has developed in the Talmud, it is clear that a mature legal system can sustain a distributive ethos in certain circumstances and achieve greater fairness. Distributive justice also works in a specific sense, ensuring the just allocation of money or property in a particular case. It is particularly important where the law of unjust enrichment is still evolving. In fact, some of the more controversial areas of unjust enrichment law have a distributive flavour.

⁷² *Myriam Cauvin v Philip Morris & Ors*, NSW Equity Proceeding No. 2625 of 2002, NSW Common Law Proceeding No. 11301 of 2002. The Equity Proceeding seeks to establish a fund comprised of the \$250 million invalid taxes to be used for the benefit of consumers of tobacco, including to aid smokers to quit. The Common Law proceeding alleges that tobacco companies have misled the Australian public about the effects of smoking. The relief sought includes: reimbursing the Health Insurance Commission for medical treatment, providing funding for medication without being a burden on the Pharmaceutical Benefits Scheme, making provision for future medical expenses and providing compensation so persons with smoking related illness do not have to rely on taxpayer funded welfare benefits. See *Action on Smoking and Health, 'Two New Legal Actions Against Australian Tobacco Companies'*, (Press Release, 16 May 2002). Available at: www.ashaust.org.au/mediareleases/mr_20020516.htm Note also that tobacco retailers have formed a company, Feesback, to head a class action to get the licence fees back: see *What is Feesback?* (1997), www.feesback.com.au (at 4 December 2002).

Secondly, a non-subsidary unjust enrichment law promotes a more comprehensive form of legal organization than the usual common law style of reasoning. I argue that a taxonomy such as Birks' prevents distributive justice from becoming the infamous 'palm tree justice'. Taxonomy will also aid distributive justice in a general societal sense, as it makes sure that like cases are decided in like ways in a structured and logical manner.

A A Non-Subsidary Unjust Enrichment Law Promotes Justice in a Broader Sense

A non-subsidary unjust enrichment law uses both corrective and distributive justice. In fact, in some senses, every correction of a transaction involves a redistribution of assets. Distributive justice produces just results in two ways. In a general societal sense, distributive justice deals with the just allocation of money or property by the legal system. Secondly, in a more specific sense within actual cases, distributive justice requires an inquiry as to whether the person got their 'just deserts', such as the analysis by Kirby J in the *Roxborough* case.

1 *Distributive Justice In The General Sense — The Just Allocation of Money or Property By A Legal System*

It is difficult to find a legal system in which there is a general societal recognition that corrective justice interlaces with distributive justice concerns as a matter of course. This is because unjust enrichment was only recognised comparatively recently in both Anglo-American and Continental European law. John Langbein suggests that unjust enrichment and restitutionary remedies are contingent upon the full development of contract law in a legal system, because it is not until then that the shortcomings of contract law can be seen.⁷³ Unjust enrichment and restitutionary remedies are still really in their 'formative' stages in many jurisdictions.

By contrast, the Talmud (the Jewish civil law) developed a notion of restitution between 1000 and 1500 CE, and it works in a distributive sense on a societal level.⁷⁴ The Talmud was originally the oral law of Judaism, and it stood side by side with the Torah or Old Testament of the Bible. However, it was recorded in written form in about 200 CE. It collects the discussions of scholars on the laws of Judaism (called the *halakhah*). The *Mishnah*, the first part of the Jewish law to be codified, consists of recordings of the oral law, which is made up of rabbinical statements or debates on the law. The *Gemara* is the explanation by certain scholars (the *amoraim*) of the *Mishnah* in the 300 years after codification.

⁷³ H Langbein, above n 8, 59.

⁷⁴ H Dagan, *Unjust Enrichment*, above n 46, 111.

The discussion which gives rise to Talmudic restitution law describes a situation as to whether a squatter who illegitimately lives on his neighbour's land should pay rent when he is discovered.⁷⁵

Rab Hisda said to Rami bar Hama — What a pity that you were not with us last evening within the study hall when we inquired about some excellent things. [Rami bar Hama] said to him: What were the excellent things? [Rab Hisda] said to him: The inquiry was, if one lives in the yard of his fellow without [the latter's] knowledge, does he have to pay him rent or does he not have to? The Gemara interjects: What are the circumstances in which there is room for such an inquiry? If you say that the inquiry is made in regard to a yard that is not for rent and a person who does not usually rent, then this one does not benefit and this one does not lose anything. — Will you say rather that the inquiry is made in regard to a yard that is for rent and a person who usually rents? — But in such a case, this one benefits and this one loses. The Gemara concludes: there is no difficulty. [The inquiry] is necessary in regard to a yard that is not for rent but a person who usually rents. — In such a case, we inquire: What is the law? — Can [the squatter] say to [the owner], “What loss have I caused you?” — Or perhaps [the owner] can say to him, “Why you have benefited!” as the squatter would have had to rent different quarters.⁷⁶

The Talmud assumes that if the defendant derived no benefit, and the plaintiff suffered no loss, no liability attaches. Similarly, if the defendant derived a benefit and the plaintiff suffered a loss, then the plaintiff should be compensated accordingly. However, Rabbi Hisda raises the question of what happens where the plaintiff is in the habit of hiring out his land, but the land is not for hire and the defendant is in need of shelter. The conclusion seems to be that if the plaintiff suffers no actual loss and the defendant is in need, then the defendant should be exempted from restitution.⁷⁷ Thus, a more distributive analysis is taken because the denial of a benefit to a fellow human being where a person suffers no appreciable loss is unfair.⁷⁸ This is an aspect of the principle of *zedakah* (‘charity’),⁷⁹ meaning the duty to give the needy in society their due.⁸⁰ However, in instances where the plaintiff does suffer a loss, where the plaintiff protests against the defendant, where the defendant is positively enriched or where the defendant is happy to pay, the

⁷⁵ See R Yehezkel Danziger (ed) *Babylonian Talmud, Baba Kamma* (2nd ed, 2001) 20a–21a). Later adopted in Maimonides, *Torts, Robbery and Lost Articles* 3:9; *Shulhan Arukh, Hoshen Mishpat* 363:6. (I have chosen to anglicise using ‘H’ rather than ‘Ch’ and ‘B’ rather than ‘V’ as in the version of the Talmud which I used).

⁷⁶ R Y Danziger (ed), *Baba Kamma*, *ibid* 20a.

⁷⁷ H Dagan, *Unjust Enrichment*, above n 46, 114.

⁷⁸ *Ibid* 115.

⁷⁹ K Kahana Kahan, *Three Great Systems of Jurisprudence* (1955) 180–1: Kahan states that a further meaning of *zedakah* is ‘justice and righteousness’.

⁸⁰ *Ibid* 58.

defendant will be liable.⁸¹ It is interesting in this context to note that the Israeli Unjust Enrichment Law is one of the broadest unjust enrichment statutes,⁸² perhaps Talmudic familiarity with the concept of unjust enrichment has allowed the Israeli legislature to feel comfortable with a broad definition.⁸³

However, the common law of unjust enrichment does not contain a concept whereby society allocates resources according to need. It does not require a scrutiny of circumstances which may mean that a defendant's gain is allowable for reasons of charity or fairness, although the honest defendant may be able to establish defences such as change of position or *bona fide* purchase.⁸⁴ In fact, unjust enrichment is generally free of any value judgment of the conduct of the defendant.⁸⁵ A further difference lies in that restitution for wrongs does not require a consideration of whether the plaintiff has actually lost anything, in contrast to the Talmudic doctrine, and thus it is arguably wider.

There are, however, definite similarities between the two doctrines, which can be seen in the *Kentucky Cave* case, a common law case that sustains a distributive analysis, and outlines a situation very similar to the one considered by Rabbi Hisda.⁸⁶ In the case, a man found an entrance to a cave on his land. The cave had beautiful stalactites and stalagmites, and consequently, the man was able to sell tickets to tourists wishing to visit the cave. Unfortunately, the cave extended beyond the man's land and into his neighbour's land, so that every time the tourists went to that part of the cave, they were trespassing on the neighbour's land without his permission. The neighbour received no part of the profits, and sued for his share. The court awarded the neighbour profits corresponding to that part of the cave which belonged to him. This is clearly a distributive decision in that the neighbour gets that part of the profits which correspond to his part of the cave. However, the distinction between the distributive justice in this case and the Talmudic reasoning is that there is no consideration of the relative *needs* of the parties, because this does

⁸¹ Ibid 115–29.

⁸² B Dickson, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54 *Cambridge Law Journal* 100, 125.

⁸³ Note also that the Supreme Court of Israel has held that the keeping of promises is more important to society than the pursuit of wealth in breach of contract: see *Adras v Harlow and Jones GmbH* (1995) *Restitution Law Review* 235, 272. See also H Dagan, 'Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory' (2000) 1 *Theoretical Inquiries in Law* 115, for comment on this case.

⁸⁴ See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 559 (Lord Templeman); 574–83 (Lord Goff) which outlines the defences of change of position and *bona fide* purchase.

⁸⁵ J Glover, 'Equity and Restitution' in Parkinson (ed), *The Principles of Equity* (1996) 103–6.

⁸⁶ *Edwards v Lee's Administrators* (1936) 96 SW 2d 1028. See H Dagan, *Unjust Enrichment*, above n 46, 76–8.

not play a part in Anglo-American restitution law. The Talmud looks at the needs of the parties as one of the things which will establish who deserves what. Thus, for example, if the defendant had been starving and needed the cave entrance fee to feed his hungry family, and the plaintiff showed no appreciable loss, it might have been that Rabbi Hisda would have allowed the man to keep using the cave because of the general distributive principle pervading Talmudic analysis. However, if the plaintiff then protested, the Talmud would also allow restitution.

It is interesting to note in this context that Jewish law is not dualistic like the English common law or Roman law: that is, it does not have a doctrine which steps in to ameliorate the harshness of over-exacting application of the letter of the law.⁸⁷ This is in contrast to the dual systems of common law and equity and Roman civil law and praetorian law.⁸⁸ It has been theorised that this is because equity and fairness in both a community-wide and specific sense was always seen to be an aim of Jewish law, whereas it was not necessarily an aim of the common law and of Roman civil law.⁸⁹ As a consequence, in Jewish law there was never an overly strict application of the law as in the common law and the Roman civil law,⁹⁰ and thus there was never a need for another system to vitiate the hardships of an overly rigid law. It has been argued that the common law countries are moving in a direction where the barriers between common law and equity are breaking down.⁹¹ Ian Spry has argued that equitable rules have a ‘distinctive ethical quality’.⁹² As a consequence, if equity and common law move together, it may be that the common law is infused with equity’s distinctive ethical quality, and thus our law is moving more towards the position of Jewish law. Thus, it would be appropriate for our law to take into account distributive justice as part of a broader consideration of justice.

⁸⁷ K K Kahan, above n 79, 66.

⁸⁸ Ibid.

⁸⁹ Ibid 25, 66.

⁹⁰ Ibid 25–6.

⁹¹ See, for example, A Burrows, ‘We Do This At Common Law But That in Equity’ (2002) 22(1) *Oxford Journal of Legal Studies* 1.

⁹² It has been argued by Spry that equity generally seeks to prevent unconscionability: I C F Spry, *The Principles of Equitable Remedies* (6th ed, 2001) 1: ‘Equitable principles have above all a distinctive ethical quality reflecting as they do the prevention of unconscionable conduct.’ It has been suggested that in some circumstances, unjust enrichment is a better method for the prevention of unconscionability than cases such as *Baumgartner v Baumgartner* (1987) 164 CLR 137: see S E K Hulme QC, ‘We Have Ways To Make Some Of You Happy’ (Paper presented at Leo Cussen Institute on ‘Current Developments in Equity’, March 1995, Series P95/6, 2.3).

2 *Distributive Justice in a Specific Sense — The Just Allocation of Money or Property in a Particular Case*

As the analysis of *Roxborough* above in Part II of this article shows, although the dispute in question often merely concerns the two parties before the court, it is also important to look at other parties affected by the decision. The starting point in a simple two party subtractive enrichment situation will be that the court will only have to consider corrective justice. But in cases such as *Roxborough*, which involve the passing on of wealth to other parties, judges should consider how other persons will be affected by the decision. Kirby J's dissenting judgment in *Roxborough* takes this position. His Honour asks the following rhetorical question:

Must part of the windfall to the wholesaler, who is undeserving, be passed to the retailers, equally undeserving, without any provision, sought or offered, to recompense the consumers, who are deserving because they ultimately paid amounts towards the unrecovered licence fees?⁹³

Justice Kirby's statement is redolent with the language of distributive justice, in the way that it consistently considers the question of who *deserves* the money. By way of contrast, as I have already argued, the majority judgments in *Roxborough* do not take into account distributive considerations, and are content to let the winning party receive what is conceded to be a 'windfall'.

Distributive justice in this specific sense already plays a part in some of the more controversial areas of unjust enrichment law. It can be seen to underlie restitution for wrongs.⁹⁴ As Birks explains of the more contentious areas of restitution:

⁹³ *Roxborough* [2001] HCA 68, 115 (Kirby J).

⁹⁴ See also H Dagan, *Unjust Enrichment*, above n 46, 12–22; H Dagan, 'The Distributive Foundation of Corrective Justice', above n 46, 149, who makes this point about what he calls 'profits remedies'.

Note that it has become controversial as to whether restitutionary damages are in fact part of restitution law at all: see R Grantham and C Rickett, above n 4, 469–87. In this analysis, restitutionary damages are properly seen as being part of a non-subsidiary scheme of restitution.

See G Virgo, above n 12, 11, 14–5, 106, 108, 601, 656, who makes a distinction between unjust enrichment cases (where unjust enrichment is sought to be reversed) and restitution for wrongs (which he sees as vindicating property rights). He does not see restitutionary remedies or unjust enrichment as subsidiary.

There are other areas where restitutionary remedies may have a distributive flavour: for example restitutionary remedies in cases where a volunteer receives money: see *Black v S Freedman & Co* (1910) 12 CLR 105; *Banque Belge Pour l'Etranger v Hambrouk* [1921] 1 KB 321, 326; *Lipkin Gorman v Karpnale* [1991] 2 AC 548. However, for reasons of space these cannot be fully explored.

There is a well known-problem which...concerns the difference between giving up and giving back. Every giving back is a giving up, but not *vice versa*. Many people think that 'restitution' connotes 'giving back'. Even within the law of unjust enrichment strictly so called...it is a question whether the giving up must always be a giving back.⁹⁵

That is, if we look at unjust enrichment as merely 'giving back', it will just be about making good a loss. However, there is a strong argument that unjust enrichment is not simply about looking at the transaction between the parties and making good the loss; a broader and secondary motive is to ensure that people get the property, money or value for services that they deserve to have.⁹⁶ Restitution for wrongs is part of unjust enrichment law not because the defendant gains at the plaintiff's expense in the subtractive sense. Instead a defendant is unjustly enriched because they have profited by committing a wrong against another, and there need not be any loss suffered by the plaintiff.⁹⁷ Restitution for wrongs should thus be distinguished from subtractive unjust enrichment, in which unjust enrichment is the trigger for the restitutionary remedy.⁹⁸

Let us investigate the facts, for example, of *Attorney General v Blake*,⁹⁹ which deals with restitution for wrongs, namely, restitutionary damages for breach of contract. The defendant, Blake, worked as a spy for the British government during the 1950s, and signed a contract which forbade him from disclosing details of his work. In fact, Blake was a double-agent for the Russians. He was discovered and imprisoned for 42 years. He subsequently escaped to Moscow, and, at the end of the Cold War, he published his memoirs. The British government then sought an injunction preventing Blake from getting the profits of his book. The majority of the House of Lords indicated that where positive enrichment arose as a result of a breach of contract, an account of profits should be awarded where the defendant had profited from precisely the thing which the contract said they should not do.¹⁰⁰ The reason why we do not want a person such as Blake to get the profits of their wrongdoing is because of distributive justice: Blake does not *deserve* to get the money. The rationale behind this, as stated by Lord Goff, is that 'there are groups of

⁹⁵ P Birks, 'The Law of Unjust Enrichment: A Millennial Resolution' [1999] *Singapore Journal of Legal Studies* 318, 324.

⁹⁶ See G P Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 567 for a discussion of these two competing values in the context of tort law.

⁹⁷ S Erbacher, *Restitution Law: Text, Cases and Materials* (1998) 463.

⁹⁸ P Birks, above n 42, 31–2.

⁹⁹ [2001] 1 AC 268.

¹⁰⁰ [2001] 1 AC 268, 288 (Lord Nicholls with whom Lord Goff and Lord Browne-Wilkinson agreed), 292 (Lord Steyn), 295 (Lord Hobhouse dissenting). See also Deane J's dissent in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 124–5, in which he raises the possibility of awarding an account of profits for a deliberate breach of contract.

cases where a man is not allowed to profit from his own wrong...'.¹⁰¹ As a part of the state, the Court can ensure the just distribution of assets accordingly. At this stage of the development of the law of restitution, the categories of restitution for wrongs are not fixed, although a number of theories have been developed as to when restitution for wrongs will be allowed.¹⁰²

In addition, distributive justice underpins the use of certain proprietary remedies such as constructive trusts or resulting trusts which, in some of their applications, are arguably part of the armoury of unjust enrichment law.¹⁰³ North American restitution law emphasises the use of constructive trusts as restitutionary remedies.¹⁰⁴ Resulting trusts have been argued to be a better vehicle for restitutionary proprietary remedies because they operate to 'spring back'¹⁰⁵ property to the original party who handed it over.¹⁰⁶ But in England, proprietary remedies have also been used in a way that some have argued is 'closet-restitution'.¹⁰⁷ Here, let us consider the case of *Foskett v McKeown*,¹⁰⁸ a case which the House of Lords insisted was not about restitution at all, but about the enforcement of property rights. However, it has been argued that the case would, in fact, be better looked at under the banner of unjust enrichment.¹⁰⁹ For present purposes, it will be assumed that it is a case of unjust enrichment.

The facts are as follows. Mr Murphy, a property developer, took out a £1 million insurance policy. For the first three payments, it seems that he used his own money, but for the last two payments, he used money which he had wrongfully appropriated

¹⁰¹ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 286.

¹⁰² Graham Virgo has argued that vindication of property rights is the basis for restitution for wrongs: see G Virgo, above n 12, 11, 14, 106, 108, 601, 656; c/f A Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 *Law Quarterly Review* 412.

¹⁰³ See, for example, P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623.

¹⁰⁴ See, for example, Canada: *Peters v Beblow* (1993) 101 DLR (4th) 521; *Pettkus v Becker* (1980) 117 DLR (3d) 257; US: see ss 160 of *Restatement on Restitution*, G E Palmer, *The Law of Restitution*, Vol I (1978) 16–20.

¹⁰⁵ Birks argues that the origin of 'resulting' comes from the Latin '*resalire*' – to 'spring back': P Birks, above n 5, 60.

¹⁰⁶ See esp R Chambers, *Resulting Trusts* (1997).

¹⁰⁷ See P Birks, above n 103.

¹⁰⁸ *Foskett v McKeown* (2001) 1 AC 102. See also *Scott v Scott* (1963) 109 CLR 649; c/f *Paul A Davies Pty Ltd v Davies* (1983) 1 NSWLR 440.

¹⁰⁹ A Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' above n 102; C Cato, 'Foskett v McKeown' [2001] *New Zealand Law Journal* 276; c/f C Rickett, 'Updates to Your Materials – Equity – Foskett v Keown' [2000] *New Zealand Law Journal* 209; T H Wu, 'Foskett v McKeown: Hard-nosed Property Rights or Unjust Enrichment?' (2001) 25 *Melbourne University Law Review* 295.

from investors in a property development in Portugal. He then committed suicide and his wife and children were paid out on the life insurance policy. The wife and children were innocent of any fraud. The dispute arose when the investors tried to claim a proportion of the life insurance payment to the children. The majority of the House of Lords held (3:2) that the investors were entitled to a proportionate share of the policy payment.¹¹⁰ They did so on the basis that the investors' money could be traced into the policy, and thus the investors were entitled to a share of the proceeds of the policy.¹¹¹ The claim to a proportionate interest through tracing was held to be founded in property law, and not in restitution.¹¹² The amount gained was an increase on the original sums stolen from the investors: the court did more than merely restore what was lost. Before, the Court of Appeal¹¹³ majority merely awarded an equitable lien, which restored the investors' original money stolen by Mr Murphy. Investors were awarded a proportionate share of the life insurance pay-out according to how much money they invested with Mr Murphy. This points towards a distributive analysis by the House of Lords because it divides up a rateable proportion of the whole. However, the majority insisted that the investors were entitled to a 'windfall' not as part of the distributive justice of restitutionary disgorgement remedies, but as part of the 'hard-nosed' doctrine of property rights. Principles of distributive justice could also be used in a more nuanced way to argue that the innocent children of Mr Murphy did not deserve to have such a large proportion of the insurance pay-out taken from them, and a windfall given to the investors. It would be more honest to openly analyse the case from a distributive standpoint, so that future litigants could get an idea of what motives drove the court to make their decision, rather than to pretend the decision was driven by the mere machinery of property law. It does not necessarily matter from a theoretical point of view which basis for distribution would have been chosen by the court, as the Aristotelian concept of distributive justice does not specify what criteria needs to be used to govern a distribution. However, courts must choose a consistent basis for distribution for the purposes of litigants who await the outcome of cases.

¹¹⁰ *Foskett v McKeown* (2001) 1 AC 102. Majority: 99–104 (Lord Brown-Wilkinson), 108 (Lord Hoffman), 125–9 (Lord Millett); Minority: 106–7 (Lord Steyn), 113 (Lord Hope).

¹¹¹ *Ibid*, 99–104 (Lord Brown-Wilkinson), 108 (Lord Hoffman), 125–9 (Lord Millett).

¹¹² *Ibid*, 101 (Lord Brown-Wilkinson), 108 (Lord Hoffman), 121 (Lord Millett).

¹¹³ See *Foskett v McKeown* (1997) 3 All ER 392.

B *A Non-Subsidiary Unjust Enrichment Law Promotes A Clearer Kind Of Legal Organisation*

Austin distinguishes between two different sorts of legal reasoning.¹¹⁴ ‘Generic’ analogy is a resemblance between species which are members of a genus.¹¹⁵ ‘Specific’ analogy is a resemblance between the individuals as parts of any species.¹¹⁶ Ordinarily, the common law uses analogy in the ‘specific’ sense — that is, it requires the lawyer to look at cases which fall within a particular category of analogous factual situations. I call this common law style reasoning ‘vertical’ reasoning, as it requires a lawyer to look back in time down a line of authority to see if anything similar has occurred. So for example, if I fall over on a squashed grape on the floor of a shopping centre and break my leg, my lawyer will look at previous similar factual situations. Hopefully she will look in her Torts textbook and find *Safeway Stores v Zaluzna*,¹¹⁷ where the plaintiff slipped on a damp tile floor in a supermarket and recovered damages from the supermarket for her injuries. She will then argue to the Court that I should also recover damages for *my* injuries in tort, as it was a generally similar injury occurring in a similar situation.

However, a non-subsidiary restitution law requires to us to categorise cases in a ‘generic’ sense, *as well as* analysing them in the specific sense. Birks and some others have suggested that the law of obligations should be organised in a taxonomy according to ‘source’: that is, by consent, by wrongs, by unjust enrichment and by other events.¹¹⁸ We look at whether different species within the law of obligation have generic similarity. This sort of reasoning is ‘horizontal’ reasoning, as it requires us to look across categories (eg, ‘property’, ‘equity’ and ‘restitution’). This ensures that like cases arising out of similar sorts of obligations are treated in a like manner, even if the cases do not apply precisely the same legal principle.¹¹⁹ In essence, this also establishes a form of distributive justice in the broader sense as well, as it makes sure that people are treated equally.

¹¹⁴ J Austin, *Lectures on Jurisprudence*, Vol 2 (4th ed, 1873), ‘Excursus on Analogy’, 1036–55. See, for an excellent overview as to different theories of legal reasoning, J H Farrar, ‘Reasoning by Analogy in the Law’ (1997) 9 *Bond Law Review* 149.

¹¹⁵ J Austin; *ibid* 1036–38, 1041.

¹¹⁶ *Ibid* 1036, 1041.

¹¹⁷ (1986) 162 CLR 479.

¹¹⁸ P Birks, ‘Misnomer’ in *Restitution, Past Present and Future – Essays in Honour of Gareth Jones* (1998), 1–29, 9; P Birks, *above n 42*; P Birks, *above n 103*; P Birks, ‘The Law of Restitution at the End of an Epoch’ (1999) 28 *Western Australian Law Review* 13; P Birks, ‘Annual Miegunyah Lecture: Equity Conscience and Unjust Enrichment’ (1999) 23 *Melbourne University Law Review* 1; P Birks, ‘The Law of Unjust Enrichment: A Millennial Resolution’ [1999] *Singapore Journal of Legal Studies* 318; R Chambers, *above n 106*, 5 – Chambers explains that the idea is derived from G Elias, *Explaining Constructive Trusts* (1990).

¹¹⁹ See P Birks, *above n 42*, 16–7.

‘Distributive justice’ is all very well in the abstract, but for any consistency in its application, there must be some sort of structure which will guide the public and the judiciary in what sort of decisions will be made.¹²⁰ Birks is of the opinion that having a basic notion of fairness and justice is not enough to prevent injustice occurring, and uses the example of Nazi Germany to illustrate this.¹²¹ He sets out three principles.¹²² First, like cases must be decided alike. Secondly, the law cannot respond to every grievance for which an argument can be constructed. Thirdly, Birks argues that ‘it is not in the end the business of interpreters to take the big decisions of social policy which draw the lines between that which the law shall insist on and that which shall be left to private morality’.¹²³ Actually, it is inevitable that judges end up having to make decisions which will greatly affect social policy,¹²⁴ but there is greater consistency in decision-making if there is some sort of structure.

Courts must make sure that people are getting what they deserve by comparison to other cases, both vertically and horizontally. Only then can it be ascertained whether a person has received their share of money, property or quantifiable value for services according to their just deserts.

It can be seen that a choice of a non-subsidiary unjust enrichment law may have important implications for the organisation of legal doctrine in this country. It goes without saying that the method of legal reasoning can have profound implications on the outcome of the case.¹²⁵

In *Roxborough*, Gummow J approvingly cites the example of Lord Mansfield in *Ringsted v Lady Laneshorough*, in which his Lordship stated:

General rules are, however, varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law.¹²⁶

Thus, a more narrow doctrine of restitution also means that the sort of analogy used in the law is more likely to be ‘vertical’. This is still the primary method of common law development, and it should not be otherwise. However, ‘horizontal’ analogy also has a valuable place in the common law as an organisational principle.

¹²⁰ P Birks, ‘Annual Miegunyah Lecture: Equity Conscience and Unjust Enrichment’ above n 118, 20–2.

¹²¹ Ibid.

¹²² Ibid 17.

¹²³ Ibid 17.

¹²⁴ See, for example, *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1.

¹²⁵ See, for example, *Scott v Davis* (2000) 204 CLR 333, a personal injury case in which all judgments use strikingly different methods of analysis.

¹²⁶ 99 ER 610, 613.

Both Gummow J and Finn J (writing extrajudicially) are correct when they say that lawyers have to be careful in imposing structures on the living, somewhat chaotic body of the law.¹²⁷ As Justice Cardozo stated of the common law, it is a somewhat frustrating mechanism:

Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization until we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside.¹²⁸

The common law is an organic beast and tentacles of reasoning sometimes grow in strange but useful directions which do not fit in with any taxonomy. Clearly there is a risk, in imposing too rigid a taxonomy, that these tentacles will be lopped or twisted to say other than they mean so that they fit in with the general scheme. Birks's division of the law of obligations caters for the anomalous, strange and useful lines of reasoning by putting them into category of obligations which arise from an 'other' source. The 'other' category is somewhat unsatisfactory from the point of neatness, but it is necessary so that the taxonomy does not become unduly rigid.¹²⁹

However, not only do lawyers have to be wary in imposing structures on the law which do not fit, but likewise, they have to be careful in dividing law up into categories. It may truly be said that 'the Devil is in the details',¹³⁰ but when we create legal intricacies ourselves, we invite him in to create confusion for lawyers and laypersons alike. J P Dawson, when looking at why an English law of unjust enrichment was so slow to develop in comparison to the US, states disapprovingly:

English law is riddled with distinctions, not only between law and equity, but between money and goods and other types of interests, between *jura in re* and *jura in personam*, between money in bags or stockings and money in bank accounts. The old forms of action have greater influence now than before their abolition in 1873.¹³¹

Both Gummow J and Callinan J's judgments contain a tinge of this malaise. Gummow J does not consider that relief arises from any notion of unjust

¹²⁷ *Roxborough* [2001] HCA 68, 72–5 (Gummow J); P Finn, 'Equitable Doctrine and Discretion in Remedies', in William R Cornish et al (eds), *Restitution: Past, Present and Future*, above n 8, 251–2.

¹²⁸ Justice Cardozo, *The Common Law* (1882) 1.

¹²⁹ P Birks, above n 42, 9–10.

¹³⁰ Derived from a German saying, 'Der Teufel steckt im Detail'.

¹³¹ J P Dawson, above n 45, 16.

enrichment. Instead, his Honour refers to the basis of liability as the common law doctrine of an action for money had and received. He states:

Nevertheless, reflection will demonstrate that the notion of unjust enrichment cannot be accepted as a modern synonym for a refusal “against conscience” to pay the money in question. This is because...the action for money had and received lies against defendants who fail to account but who, on any sensible understanding of the term have not been enriched.¹³²

Thus, in this analysis, there is no non-subsidary principle, merely a raft of different actions in both equity and common law. This sort of approach to the law is confusing for students, lawyers and the general public.¹³³ It may lead to the general obfuscation of the law, as well as to lawyers overlooking actions which are hidden in the general heap of equitable and legal actions.¹³⁴

It is evident from his judgment in *Roxborough* that Gummow J is not a supporter of a ‘Birksian’ approach. His Honour firmly states:

To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of that theory may be the writing of jurists not the decision of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.¹³⁵

This is an implied rejection of Birks, who, apart from being a strong advocate for unjust enrichment as a third source of legal obligation, also considers that academics must inform the development of case law,¹³⁶ and that unjust enrichment is informed by the development of the civil law.¹³⁷ In actual fact, Birks’ theory of unjust enrichment is far too detailed and particularised to be considered a civil law theory *per se*,¹³⁸ it is merely influenced in some important respects by Roman and German law. Further, the relationship of the judiciary and academia is more circular than either Birks or Gummow J concede — the judiciary affect what academics can legitimately write, and academics will affect the reception of a judgment in the legal and the wider community.

¹³² *Roxborough* [2001] HCA 68, 71 (Gummow J).

¹³³ P Birks, above n 42, 6–7; P Birks, ‘Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment, above n 118, 20–1. See also J Beatson and G Virgo, above n 53: they talk about the confusion generated by the fact that the contract in the case was not set aside before restitution was awarded.

¹³⁴ P Birks, above n 42, 16–7.

¹³⁵ *Roxborough* [2001] HCA 68, 72 (Gummow J).

¹³⁶ P Birks, above n 5, 1–2.

¹³⁷ *Ibid* 22.

¹³⁸ See B Dickson, above n 82, 126: in many respects, the role of restitution in a legal system is not linked to whether it is in a civilian or a common law system.

Another aspect of the over-categorisation of the law can be seen in the way in which both Gummow and Callinan JJ dedicate a portion of their judgments to assessing whether the action for money had and received is an equitable or common law action, which in turn affects their analyses of the dispute.¹³⁹ This is unsurprising, particularly from Gummow J, who is one of the famous triumvirate against ‘fusion fallacy’: Meagher, Gummow and Lehane.¹⁴⁰ Although it is beyond the scope of this article to enter into the debate in earnest, the breaking down of old categories and the merger between equity and common law doctrines is necessary to make the law consistent and understandable.¹⁴¹

V CONCLUSION

The common money counts, particularly after the decisions of Lord Mansfield, have occupied an uneasy position in the legal system between the three great sources of obligation in private law, tort, contract and trust.¹⁴²

In this article, it has been established that the position of an action for money had and received is not uneasy at all: it can be placed within a non-subsidary unjust enrichment law. This is despite the recent tide of detractors for the ‘all-embracing’ doctrine, culminating in the decision of Gummow J in *Roxborough*. An unjust enrichment law is necessary and important for the development of the law as a whole. First, I have sought to establish the reasons why a non-subsidary unjust enrichment law should exist. Unjust enrichment law exists not only to achieve corrective justice (as in simple cases of subtractive enrichment); it also exists to achieve distributive justice in certain cases. Distributive justice in unjust enrichment law operates on a number of levels. On a general level, the way in which the rules of unjust enrichment are formulated will affect the ability of litigants to make claims to have money or value for services restored. On a more specific level,

¹³⁹ *Roxborough* [2001] HCA 68, 83–4, 96–100 (Gummow J), 202 (Callinan J). For a criticism of Callinan J’s judgment for the fallacious assumption that change of position is an equitable defence, see M McInnes, above n 54, 213.

¹⁴⁰ R P Meagher, W M C Gummow and J R F Lehane, *Equity, Doctrines and Remedies* (3rd ed, 1992), Chapter 2. See esp [220]–[222].

¹⁴¹ For an excellent recent article on this topic, see A Burrows, above n 91. See also P Birks, ‘Annual Miegunyah Lecture: Equity Conscience and Unjust Enrichment’ above n 118. See C Cato, above n 109, 278:

One suspects a reason why Restitution was so slow to gain recognition in Australia was because law and equity were fused in New South Wales only in the latter part of last century with the result that amongst some lawyers and academics there was a reluctance to take seriously a subject which embodied a fusion of common law and equitable remedies.

¹⁴² *Roxborough* [2001] HCA 68, 64 (Gummow J).

distributive justice enters into the individual claims of litigants. The *Roxborough* case indicates the importance of this. *Roxborough* is unfair because the ultimate persons who expended money did not receive the money back, and the appellant received a windfall at their expense. The idea of distributive justice entering into unjust enrichment law is not as radical as it may seem. It already enters into the more contentious areas of unjust enrichment, proprietary restitution and restitution for wrongs. Furthermore the example of the Talmud shows how distributive justice can work as a general ethos in an established restitution law. An overarching scheme of unjust enrichment such as that suggested by Birks can also help achieve distributive justice in a structural sense; that is, a system such as Birks' ensures that like cases are decided in like ways. A firm structure ensures that distributive justice is not just another form of 'palm tree justice'.

Finally, not only is a non-subsidary unjust enrichment law important for establishing justice for litigants, it is also linked to the sort of legal organisation we prefer in Australia today. If we reject overarching systems of law, we are in essence rejecting a systematisation of our law. It becomes a divided and difficult pile of different actions. This will make the law less accessible for both for lawyers and laypersons alike. And that would be a pity.