

# THE CONTRIBUTION INTEREST IN QUASI-MATRIMONIAL PROPERTY DISPUTES

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## I. INTRODUCTION

Legislation providing for the division of property upon the breakdown of marriage has become common place.<sup>1</sup> However legislatures have been slower to assist unmarried cohabitantes whose relationships have ended.<sup>2</sup> Often the courts have stepped into the breach.

This article examines judicial attempts to provide justice in this context. The response of different jurisdictions will be examined. The conclusion drawn is that the jurisdictions which have chosen to develop the common law to deal with the problem have justified giving relief according to different theoretical constructs but in substance have taken the same approach. The law in this area is performing a function quite different to any fulfilled by commonly recognised private law principles. Judicial intervention is given not to realise the intentions or expectations of the parties but because of the nature of the parties' relationship. Moreover, conventional measures of relief — reliance loss, expectation loss and unjust enrichment — cannot explain the way in which the law is operating in this context. Instead the courts are giving relief based upon contributions made to relationships. Orthodox doctrines, developed for different purposes, cannot provide satisfactory theoretical foundations for relief in quasi-matrimonial property disputes. Attempting to use existing principles to justify relief risks debasing established doctrine and creating unnecessary confusion. It is suggested that it is time to recognise the "contribution interest" in the law of civil obligations and develop a suitable theoretical basis for its application.

## II. A COMPARATIVE SURVEY

### 1. *England*

The recent history of the English law in this context is well documented.<sup>3</sup> In *Pettit v Pettit*<sup>4</sup> a majority of the House of Lords took a conservative approach to the area.<sup>5</sup> Plaintiffs could succeed in one of two ways. By demonstrating that they had contributed to the acquisition of the home plaintiffs could point to the existence of a resulting trust.<sup>6</sup> Alternatively, plaintiffs could prove either

1 See Gray *Reallocation of Property on Divorce* (1977) for examples.

2 With the notable exception of New South Wales and Victoria *infra* n 63.

3 See eg the articles listed in Peart "A Comparative View of Property Rights in De Facto Relationships: Are We All Driving in the Same Direction?" (1989) 7 *Otago LR* 100 at 105.

4 [1970] AC 777. The case actually involved a dispute upon separation of a married couple. It preceded the limited relief made available by s 37 of the Matrimonial Proceedings and Property Act 1970 (allowing relief for a married spouse for contributions to the improvement of a home); Cretney and Mason *Principles of Family Law*, 5th ed (1990) 269-271).

5 The decision was actually unanimous with none of the Lordships accepting the plaintiff's claim. The characterisation of judgments as majority or minority refers to the legal reasoning expressed.

6 The purchase money resulting trust was developed to deal with situations where one person bought property and transferred it into the name of another. In these circumstances the law presumes that a gift was not intended: *Re Vandervell's Trusts (No 2)* [1974] Ch 269 at 294. Unless this presumption is rebutted the legal owner holds the property for the person who purchased it. A

that the parties formed a common intention that ownership of the home was shared or that the legal owner had made a representation to the same effect, in which case the courts would declare a constructive trust to prevent defendants asserting their legal rights inconsistently with the common intention or representation.<sup>7</sup> The minority, Lords Reid and Diplock, thought that, in the absence of evidence of an actual common intention, the court could impute to the parties a shared intention which reasonable persons would have formed had they considered the matter.<sup>8</sup> In *Gissing v Gissing*<sup>9</sup> a majority once more favoured a strict approach.<sup>10</sup>

In the 1970's following *Pettit* and *Gissing* there was a succession of decisions at first instance and in the Court of Appeal, with Lord Denning MR at the helm, which were plainly inconsistent with the majority reasoning in those earlier cases.<sup>11</sup> The return to orthodoxy came with *Burns v Burns*<sup>12</sup> where the Court of Appeal took a conservative, albeit confused, approach.<sup>13</sup> The requirement of an actual common intention was confirmed recently by the House of Lords in *Lloyds Bank plc v Rosset*.<sup>14</sup>

English law is examined only in brief because it offers little guidance for those seeking an effective means of relief in this context. The case law reveals the tension between the desire to develop an approach which achieves justice and the perception that the solution adopted must be consistent with existing legal principles. In *Pettit* and *Gissing* the court was not prepared to determine the interests of the party other than on the basis of their intentions. Some comments suggest that the court thought itself unable to make any change that would alter the existing law of implied trusts.<sup>15</sup> While subsequently experiencing a period of courageous unorthodoxy, English courts have returned to a conservative position. Apart from a period when Lord Denning MR held centre stage, the English judiciary has lacked the adventurous spirit shown by other jurisdictions. This may be the result of differing philosophies regarding the ability or responsibility of the courts to develop the law to meet the needs of the society it serves. On the other hand, the history of legislative measures

resulting trust may also be presumed where more than one person contributes to the purchase of property. Here the law presumes that the beneficial interest in the property is held by the legal owner for the contributors in proportion to their contributions: *Wray v Steele* (1814) 2 V & B 388; Ford and Lee *Principles of the Law of Trusts* 2nd ed (1990) 957.

7 [1970] AC 777 at 804 per Lord Morris (referring to the need for an agreement), at 806-811 per Lord Hodson (concluding that the absence of an express agreement was fatal), at 815 per Lord Upjohn (focusing on estoppel).

8 *Ibid* at 795 per Lord Reid and at 822-825 per Lord Diplock.

9 [1971] AC 886; also a case involving a married couple.

10 *Ibid* at 898 per Lord Morris, at 900-901 per Viscount Dilhorne, at 902 per Lord Pearson; cf Lord Diplock's approach at 904-906.

11 These cases are described in Peart *op cit* n 3 at 111-114.

12 [1984] Ch 317.

13 It is not entirely clear whether the court was applying constructive or resulting trust principles. May LJ, who relied primarily on the judgment of Lord Pearson in *Gissing*, appears to have focused on the resulting trust. Mustill and Fox LJ take an approach generally consistent with the majority judgments in *Pettit* and *Gissing*. Waller LJ relies mainly on the judgments of Lord Reid from both cases and Lord Diplock from *Pettit*. Not only were these clearly minority view points but Lord Diplock in *Gissing* (at 904) accepted that the view he expressed in *Pettit* did not reflect the law.

14 [1990] AC 107.

15 See especially Lords Morris and Dilhorne in *Gissing* [1971] AC 886 at 898 and 901 respectively. The Lords appear to view property law as immutable and claim that the courts cannot alter ownership rights. Contrast this with Cooke J's dicta in *Hayward v Giordani* [1983] NZLR 140 at 148 where his Honour emphasises the flexibility of equitable doctrine and the need for the law to develop to keep pace with societal needs.

in the matrimonial area in the United Kingdom would tend to suggest that the English legislature and the judiciary do not consider reform in this area as pressing as do those of the other countries discussed herein.<sup>16</sup>

## 2. Canada

### i. The test in *Pettkus v Becker*<sup>17</sup>

Canadian courts recognised unjust enrichment as the underlying basis of restitution long before English courts did so.<sup>18</sup> However, on the whole, before the Canadian Supreme Court applied unjust enrichment to quasi-matrimonial property disputes, the substance of Canadian restitution law differed little from the English law. Generally prospective plaintiffs would not have any greater expectation of success in Canada than in England. Unjust enrichment did not become the topic of debate it now is until it was used to determine the property interests of unmarried cohabitants. In the watershed decision of *Pettkus v Becker* relief was provided pursuant to a doctrine of unjust enrichment. Dickson J concluded that to be entitled to relief a claimant had to demonstrate the following:

an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.<sup>19</sup>

The court's approach poses problems. While the test sounds clear-cut, in reality it provides little guidance. In particular it is not clear what constitutes an "enrichment", what is meant by the requirement that the deprivation be "corresponding" and what will constitute a "juristic" reason for allowing retention of the enrichment.

### ii. the meaning of "a juristic reason"

The Canadian approach is similar to that developed by Goff and Jones in three editions of their text on Restitution.<sup>20</sup> Rather than attempting to articulate a relatively concise conceptual structure of unjust enrichment,<sup>21</sup> it is simply stated that where there is an enrichment at the expense of the plaintiff restitution will be available "in the absence of a valid judicial policy militating against it."<sup>22</sup>

In *Pettkus v Becker* the plaintiff claimed relief on the basis of very significant contributions to property owned by the defendant. The court was faced with difficulties in assessing the parties' actual states of mind at relevant times. The plaintiff argued that she made these contributions in the expectation of being entitled to an interest in the property. However, it was difficult to demonstrate that the defendant ever knew of this

<sup>16</sup> Thus England has made only piecemeal reforms in this area; Cretney and Mason *Principles of Family Law* 5th ed (1990) 267-281. In contrast in New Zealand the Matrimonial Property Act 1976 provides for a strong presumption of equal sharing.

<sup>17</sup> (1980) 117 DLR (3d) 257.

<sup>18</sup> See *Deglan v Guardian Trust Co of Canada* [1954] 3 DLR 785. The House of Lords did not accept unjust enrichment as the basis of restitution until *Lipkin Gorman v Karpnale* [1991] AC 107.

<sup>19</sup> (1980) 117 DLR (3d) 257 at 273-274.

<sup>20</sup> Goff and Jones *The Law of Restitution* 3rd ed (1986) at 30-51.

<sup>21</sup> In contrast, Birks' analysis of unjust enrichment involves a division of the area into enrichment by wrongs and by subtraction, the latter based largely on a unifying conception of non-voluntary transfers: Birks *An Introduction to the Law of Restitution* (1985). Whether Birks' approach is actually more certain in practice, given the difficulty of assessing whether an act was voluntary, is unclear. Its key attraction may be that, by providing convenient meta-principles, Birks' theory provides a useful conceptual basis for analysing the area.

<sup>22</sup> *White v Central Trust Co* (1984) 7 DLR (4th) 236 at 245 per La Forest JA.

expectation. The key issue was whether the defendant could be liable even if he had been unaware of the assumptions which motivated the plaintiff's contributions. The court held the defendant liable on the basis that he ought to have known that the plaintiff made the contributions in the expectation of an interest in the property. This represented a significant development in the law in this area. That the defendant never intended that the plaintiff should receive an interest in the property was not considered a juristic reason allowing him to retain her contributions to the property. The court obviously concluded that this consideration was outweighed by the defendant's fault in failing to advert to and give effect to the plaintiff's expectations. It was thought that, given the plaintiff's detrimental reliance on those expectations, the defendant should be required to share the fruits of the relationship.

### iii. The need for an expectation

Whether one partner ought to appreciate the other's expectation of an interest in property is a question leaving much room for subjective value judgments. It may be difficult for the courts to find the existence of an expectation of entitlement to property.<sup>23</sup> The plaintiff may have made contributions in the expectation of being able to enjoy the property as a whole in the context of the relationship. He or she may not have considered the possibility of the relationship ending and the issue of separate ownership. The Saskatchewan Court of Appeal in *Everson v Rich* was of the view that

"...no one should expect, in general, spousal services for free. They are given, in the absence of an indication to the contrary, with the expectation of something in return and should be received as such."<sup>24</sup>

Thus it appears that Canadian courts will spend little time searching for evidence of an expectation. There has developed in Canada a tacit legal presumption that an expectation of entitlement is to be inferred from the fact that substantial contributions were made in a relationship akin to marriage. Evidential difficulties are thus avoided.

In reality the approach of the Canadian courts is not based on the expectations of the parties involved. Rather it is motivated by a philosophy similar to that which underlies most matrimonial property sharing legislation. It is thought that in some circumstances a relationship may be of such a nature that it would be unreasonable to determine property rights as if the parties were legally independent persons. Thus in *Pettkus v Becker Dickson J* indicated that he saw "no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period." In this case the relief was warranted because the parties' "lives and economic well-being were fully integrated."<sup>25</sup>

23 This issue is ignored by Narev in his enthusiastic promotion of unjust enrichment as a basis for determining quasi-matrimonial property disputes in "Unjust Enrichment and De Facto Relationships" (1991) Auckland ULR 504. In a case such as *Pointon v Baines* (unreported CP 213/87, 15 August 1991) where it was found that the claimant formed no expectation of an interest, no relief would be available if the Canadian approach was taken.

24 (1988) 53 DLR (4th) 470, quoting from an annotation by McLeod to the case of *Herman v Smith* 42 RFL (2d) 74 at 154-155.

25 (1980) 117 DLR (3d) 257 at 275-276, emphasis added.

#### iv. Quantification

##### (a) Subjective or objective valuation of benefits?

Canadian courts have spent little time discussing quantification of relief. In fact the problems of quantification involved in unjust enrichment are legion. Non-monetary contributions are difficult to value. It is not clear whether and in what circumstances, the defendant ought to be liable to the extent of the market value of the services, or whether the defendant should be allowed to argue that he or she did not request the benefit and does not value it. Generally a defendant who did not expect to pay for services will be allowed to subjectively devalue them.<sup>26</sup>

However, in some circumstances an objective valuation may apply. Birks argues that those who choose freely to accept a benefit are not entitled to devalue their enrichment subjectively.<sup>27</sup> However, Birks' theories in this regard have drawn much criticism.<sup>28</sup> Even if his views were adopted, a recipient in a quasi-matrimonial property case who did not advert to the claimant's expectation of an interest could not be said to have "freely accepted" the benefit. Birks concludes that the defendant must have had actual knowledge of the expectation to be fully liable.<sup>29</sup>

Less controversially, commentators generally agree that a person can recover the market value of the benefit conferred by demonstrating that the defendant, who did not have actual knowledge of the plaintiff's expectation, was "incontrovertibly benefited".<sup>30</sup> To do this the plaintiff must prove that the defendant would have incurred the market cost of the benefit in any event. It may often be difficult to establish this requirement in regard to contributions to domestic life.<sup>31</sup> Consider the New Zealand High Court decision of *Lanyon v Fuller*.<sup>32</sup> There the plaintiff was awarded a proprietary interest in part due to her efforts in landscaping and gardening land owned by the defendant. Would the defendant have incurred this cost anyway? It will often be artificial to talk of one partner being enriched by another. Moreover, some contribu-

26 Birks *An Introduction to the Law of Restitution* (1985) 108-114. In fact "subjective devaluation" is something of a misnomer. When a defendant is allowed to argue that a benefit did not incontrovertibly benefit him and was not requested he or she is usually excused of all liability. No assessment of the value of the benefit to the defendant is made. Thus it operates as a complete defence rather than a quantification technique.

27 Birks *ibid* at 265: In a new end note in a reprint of the same book Birks notes the criticisms of his approach but nevertheless affirms his views on the matter; (1989) 465.

28 Beatson "Benefit, Reliance and the Structure of Unjust Enrichment" (1987) CLP 71; Burrows "Free Acceptance and the Law of Restitution" (1989) 104 LQR 576; Mead "Free acceptance: some further considerations" (1989) 105 LQR 576; Garner "The Role of Subjective Benefit in Unjust Enrichment" (1990) 10 Ox JLS 42.

29 Birks *An Introduction to the Law of Restitution* (1985) 282.

30 Birks *ibid* at 116; McInnes "Incontrovertible Benefits and the Canadian Law of Unjust Enrichment" (1991) 12 Advoc Q 323. Beatson takes the view that where a plaintiff is in receipt of a tangible product the "incontrovertible benefit" test does not go far enough and favours an exchange value test for enrichment. However he also argues that cases involving "pure services" should be regarded as falling outside the ambit of unjust enrichment with the plaintiff being left to recover on the grounds of injurious reliance: Beatson *op cit* n 28.

31 Cf Narev who concludes that domestic services should be treated as an incontrovertible benefit *op cit* n 23 at 521. While this approach has its attractions it sits poorly with accepted principles of unjust enrichment. Litman takes a more restrictive view arguing that such services can reasonably be regarded as an incontrovertible benefit where the parties have children: "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 Alta LR 407 at 438. However, even if a flexible approach is taken towards the issue of quantification, often the relief given could not be characterised as restitution because the plaintiff has not suffered a loss comparable to the defendant's gain, *infra* nn 37-49 and accompanying text

32 Unreported CP 184/86 Anderson J 1988.

tions would not be required if it was not for the parties' relationship. The obvious example is childcare. This demonstrates the artificiality of treating the parties as if they are strangers. Relationships of this kind involve both costs and gains. It is appropriate that the parties share these fairly.

(b) Set-off

According to Canadian unjust enrichment law the plaintiff may only recover to the extent he or she has suffered detriment.<sup>33</sup> Any benefit conferred on the defendant is supposed to be set-off against benefits the plaintiff has obtained from the relationship.<sup>34</sup> If this rule was applied strictly it would lead to unfortunate effects. Often relationships will result in a net gain because the parties will be able to share costs. If the plaintiff was only allowed to recover to the extent he or she suffered detriment the defendant would be allowed to keep the profits of the relationship.<sup>35</sup> In practice set-off is not applied with any rigour and is unlikely to have this effect.<sup>36</sup>

(c) Contributions

The actual approach of Canadian courts to quantification was described by Dickson J in *Pettkus v Becker*. He concluded that relief "must be proportionate to the contribution, direct or indirect, of the plaintiff."<sup>37</sup> If unjust enrichment theory was applied strictly, contribution would be a pre-condition of relief. This would be needed to demonstrate that any enrichment was gained "at the plaintiff's expense" or, in other words (using the *Pettkus v Becker* test) that the plaintiff was deprived. However, the existence of contributions alone is not sufficient to demonstrate enrichment. Strictly speaking, quantification should be based upon the defendant's enrichment and not the plaintiff's contributions. The desire to reward the plaintiff for services which have not necessarily resulted in an appreciation in the defendant's wealth comparable with the plaintiff's detriment has little to do with unjust enrichment.<sup>38</sup>

33 Supra text accompanying n 19. That recovery is limited to detriment suffered seems implicit in the requirement of a *corresponding* detriment.

34 *Everson v Rich* (1988) 53 DLR (4th) 470, 474-475; *Herman v Smith* (1984) 34 Alta LR (2d) 90, 94. Litman op cit n 31 at 440; Narev op cit n 23 at 529.

35 Eg A and B have a 10 year relationship. A assumes a domestic role and contributes \$200,000 worth of services. B work and earns \$200,000. He spends \$25,000 on himself \$25,000 on A, \$50,000 on their two children and \$100,000 on paying a mortgage on the home in his name (a total of \$200,000). At the end of the period the equity in the property is \$50,000. A would have had to spend \$50,000 on rent in any event ( and if on her own she would have not been in a position to buy a home). If A is regarded as responsible for half of the expense of bringing up her children, if she worked, she would have had to spend \$100,000 on child care and \$25,000 on expenses in any event. The additional \$25,000 it would have cost to keep herself would mean her expenditure would have been \$200,000. Assuming she would not have been able to earn more than \$200,000 (and therefore no argument of a detriment by reference to opportunity cost is available in this regard) A has suffered no detriment. B would be free to assert total ownership of the house (despite the fact that he has gained as a result of the relationship). This result could only be avoided by showing that A had suffered a detriment as a result of uncertain opportunity costs such as the possibility of marrying another. Alternatively the children of the relationship might be regarded as a detriment (although they would seem to be a detriment equally shared by B). At this point the use of unjust enrichment becomes rather bizarre. In difficult cases, if a rigorous analysis is made, unjust enrichment simply cannot do the work that the law is actually doing in this context.

36 Consider the apparent lack of set-off in *Sorochan v Sorochan* (1986) 29 DLR (4th) 1 (see Litman op cit n 31 at 441) and the vague approach taken in *Herman v Smith* (1984) 34 Alta LR (2d) 90 at 94.

37 (1980) 117 DLR (3d) 257 at 277.

38 Stevens "Restitution, Property, and the Cause of Action in Unjust Enrichment: Getting By with Fewer Things" (1989) 39 U of Toronto LJ 258 at 282-283. Stevens concludes the co-option of private law doctrine in the matrimonial or quasi-matrimonial union cases has done a great deal

### v. Implications for the law of unjust enrichment

Unjust enrichment has been recognised as a discrete category of the Anglo-American law of civil obligations comparatively recently.<sup>39</sup> To some extent its scope remains undefined. There has been a tendency to attempt to justify decisions under the name of unjust enrichment without fully considering the appropriateness of doing so.<sup>40</sup> This is presumably motivated by the fear that if relief cannot be justified on some recognised ground no remedy will be available. The danger is that if the true basis of the courts' approach in this area remains hidden behind unrelated concepts the law will appear incoherent and inconsistencies in application may result.

The provision of justice in this area through the development of unjust enrichment law has only been achieved by the courts doing considerable violence to the integrity of the doctrine involved. While paying lip service to doctrine, the Canadian courts fudge important questions of law and draw unwarranted inferences of fact. The flexible approach taken by the courts in this area may have unfortunate consequences for the application of the relevant doctrines in the commercial sphere where certainty is of greater importance.<sup>41</sup>

Doctrine has simply become a justification for decisions instead of being an integral part of the decision-making process. Canadian unjust enrichment rules do not explain the way in which the law is in fact functioning in this context. The purported application of established principles gives the courts' decisions an aura of legitimacy. By justifying their decisions by reference to recognised doctrine they are not seen as taking a blatantly instrumentalist approach. The Canadian judiciary is attempting to be profoundly innovative by using conventional law. This has proved impossible. Existing doctrine cannot be developed to perform the role the law is serving in this area.

of substantive damage to both family law and private law ... Moreover, without a clear articulation of the point of legal intervention, more cases than should will have to go to the Supreme Court of Canada for decision, since if the rule is constantly misdirected it is likely to be consistently misunderstood. Worse sceptics will doubt the existence of a rule altogether...

39 While the Americans have regarded restitution as based on unjust enrichment at least since the appearance of the *Restatement of Restitution* in 1936, the House of Lords only reached this view in 1991; *Lipkin Gorman v Karpnale* [1991] 2 AC 548.

40 A similar comment has been made in relation to a number of decisions outside the quasi-matrimonial sphere in Australia. The courts have analysed these cases as involving restitution although in reality they appear to involve expectation or reliance loss. The best example is *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 where the plaintiff drew up plans for a proposed building project which the defendant ultimately decided that it did not wish to implement. It is difficult to accept that the defendant was enriched (a fact which Sheppard J acknowledged at 902-903) as it simply gained plans that it had no intention to use. See Carter "Contract, Restitution and Promissory Estoppel" (1989) 12 UNSW LJ 30 at 45 and 57.

Carter refers to the tendency to "fudge" the issue of the extent of the defendant's benefit. He concludes

There is cause for concern in the way in which in some of the cases unjust enrichment is bandied around without regard to the underlying concepts.

He concludes that equitable estoppel is a more appropriate basis for relief, given that the cases tend to involve unfulfilled expectations and it provides great flexibility in determining relief. Much of this criticism applies equally well to Canadian unjust enrichment law, although it might be added that the courts are not concerned with protecting any recognised interest.

41 There are already signs of this happening; Rotherham "Restitution" in Borrowdale and Rowe (eds) *Essays on Commercial Law* (1991) 213 at 224-226.

### 3. *Australia*<sup>42</sup>

#### i. The joint venture analogy

##### (a) The concept

For some time the Australian courts' approach was consistent with that of the House of Lords in *Pettit* and *Gissing*. In *Allen v Snyder* the New South Wales Court of Appeal rejected the practice of imputing intentions.<sup>43</sup> Almost a decade later, in *Muschinski v Dodds*<sup>44</sup> the Australian High Court also refused to countenance the imputation of a common intention in circumstances where none could be inferred from the evidence. Instead a different approach to the issue was formulated.

In *Muschinski v Dodds* Deane J drew together several different lines of precedent.<sup>45</sup> The authorities relied upon included contract cases where although title to goods had passed there had a complete failure of consideration and courts awarded compensation.<sup>46</sup> Also referred to were cases involving the refunding of premiums paid by a fixed term partner in circumstances where the partnership failed and it would be unconscionable for the other partner to retain all or part of the said premium.<sup>47</sup> Finally it was noted that courts in the United States developed an equitable doctrine whereby parties to a joint venture are entitled to a share of the capital held in respect of the venture in proportion to their contributions.<sup>48</sup> His Honour concluded that these classes of cases are all examples of a "more general principle of equity"<sup>49</sup> which provides that, upon the failure of a joint venture, parties are entitled to share in the property provided for the purposes of the relationship in proportion to the parties contributions.<sup>50</sup> An interest would be granted where it would be unconscionable for legal owners to rely on their legal title in order to deny their partner an interest.<sup>51</sup> Deane J described the concept in the following way:

...the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame<sup>52</sup> and where the benefit of money or property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other in circumstances in which it was not specifically intended or specifically provided that the other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit the other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.<sup>53</sup>

42 For useful accounts of Australian developments see Parkinson "Doing Equity Between De Facto Spouses: From *Calverly v Green* to *Baumgartner*" (1988) 11 *Adel LR* 370; Neave "Three Approaches to Family Property Disputes - Intention/Belief, Unjust Enrichment and Unconscionability" in Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 247.

43 [1977] 2 *NSWLR* 685 at 693-695 per Glass JA.

44 (1985) 160 *CLR* 583 at 595.

45 *Ibid* at 618-619.

46 Cited in support *Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour* [1943] *AC* 32; *Denny Mott and Dickson Ltd v James B Fraser and Co Ltd* [1944] *AC* 265. Arguably these are actually better explained as examples of relief for unjust enrichment.

47 Relying on *Atwood v Maud* (1868) 3 *Ch App* 369.

48 Citing *Allen v Kent* 136 *A 2d* 540 (1957); *Ewen v Gerofsky* 382 *NYS 2d* 651 (1976); *Legum Furniture Corporation v Levine* 232 *SE 2d* 782 (1977).

49 (1985) 160 *CLR* 583 at 619 per Deane J.

50 *Ibid* at 620. Deane J's obiter observations in *Muschinski v Dodds* were adopted by the Australian High Court in *Baumgartner v Baumgartner* (1987) 164 *CLR* 137.

51 *Ibid* at 618-623 per Deane J.

52 The phrase "without attributable blame" raises interesting questions. Will plaintiffs responsible for the relationship ending be disentitled to relief? While this consideration might well have a place in relation to commercial joint ventures, its problems in this context are obvious. The requirement is largely ignored in the cases, suggesting it will not be applied strictly; Parkinson *op cit* n 42 at 393.

53 (1985) 160 *CLR* 583 at 620.



This approach was accepted unanimously by the High Court in *Baumgartner v Baumgartner*.<sup>54</sup>

(b) Quantification

It appears that in the United States applying the doctrine results in the residue of the venture being divided proportionately to capital contributions. No compensation is provided for contributions of a different nature. If this was true of quasi-matrimonial property disputes the limitations of the doctrine would be similar to those of the purchase money resulting trust; only certain forms of contribution could be rewarded.<sup>55</sup> However the High Court of Australia appears to favour a more flexible approach. Indications are that non-financial contributions will be taken into account.<sup>56</sup> In *Muschinski* Deane J, noting that the relationship was not purely commercial, concluded that special considerations applied:

In the forefront of those special considerations there commonly lies a need to take account of a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home-making and family care.<sup>57</sup>

Generally division will depend on what the court deems fair, with the plaintiff's relief limited to the minimum needed to remove any unfairness.<sup>58</sup>

(c) The failed joint venture approach and unjust enrichment

While the majority of the High Court in *Baumgartner* preferred to deal with the case pursuant to a doctrine of unconscionability, Toohey J saw no reason why unjust enrichment could not be used. He was of the view that the doctrine simply provided another method of approaching the problem.<sup>59</sup> His Honour suggested that:

In a situation such as the present one, where two people have lived together for a time and made contributions towards the purchase of land or the building of a home on it, an approach based on unconscionable conduct or one based on unjust enrichment will inevitably bring about the same result.<sup>60</sup>

This last observation requires some qualification. Toohey J's observations were almost certainly correct if he was comparing the approach taken by the Canadian Supreme Court with that favoured by the Australian High Court. In practice in both the key consideration is the extent of contributions. However, if a more orthodox approach to unjust enrichment is taken the plaintiff will have difficulty in establishing that he or she is entitled to restitution. In addition, a more stringent process of quantification will probably result in the claimant getting a smaller award than is common in Canadian cases. Moreover, the Canadian approach requires that the claimant had an expectation of a share in the property. The Australian approach avoids problems that might result from that approach by simply demanding that there be a "joint venture" which has failed. It is likely that all that has to be shown in a case such as this is that the claimant expected to enjoy the fruits of the

54 (1987) 164 CLR 137, although Toohey J thought that unjust enrichment could have been applied to achieve the same result, *infra* text accompanying n 60.

55 *Calverley v Green* (1984) 155 CLR 242 (holding that the claimant's interest is determined solely by his or her contribution to the purchase of the property in issue).

56 *Parkinson* *op cit* n 42 at 394.

57 (1985) 160 CLR 583 at 622.

58 *Ibid* at 623.

59 (1987) 164 CLR 137 at 152.

60 *Ibid* at 154.

joint venture. No expectation of ownership would appear necessary. Rather than over-emphasising the parties' states of mind the court may look at the nature of the relationship and ask whether it was in fact a joint venture.<sup>61</sup> This approach is to be commended for its realism. The requirement of an expectation of an interest in property is likely to prove to be almost as unsatisfactory a precondition to relief as common intention.<sup>62</sup>

(d) Advantages of the Australian approach

If applied flexibly enough the joint venture approach has the potential to provide a suitable vehicle for justice in this area. The doctrine draws on disparate examples of relief based on contribution evident in case law. By not founding it upon established rules of civil liability the Australian courts avoided the risk of debasing the structure of an established legal doctrine with potentially widespread effects.<sup>63</sup>

#### 4. *New Zealand*<sup>64</sup>

##### i. Early indications

The area was first seriously considered by the Court of Appeal in *Hayward v Giordani*.<sup>65</sup> Cooke J considered Canada's doctrine of unjust enrichment "very helpful in New Zealand in working out the property rights of common law spouses."<sup>66</sup> McMullin J, while showing some enthusiasm for the Canadian approach, thought it unnecessary to decide whether a doctrine of unjust enrichment should be recognised in New Zealand.<sup>67</sup> At this point there seemed to be a very real prospect of New Zealand courts embracing unjust enrichment as the appropriate means for determining property rights in this context.<sup>68</sup>

##### ii. The reasonable claimant test

When the Court of Appeal came to reconsider the area it showed ambivalence about principles governing relief. In *Pasi v Kamana* Cooke P concluded that the various judicial approaches to the area were essentially the same. He suggested that one basis for determining relief:

61 Parkinson op cit n 42 at 404; cf Getzler op cit n 22 at 318. Getzler considers that the unconscionable conduct in question can:

be interpreted as the breach of a common intention regarding rights to wealth within a relationship, such intention being presumed or construed from the nature and the circumstances for the relationship by asking what the parties might reasonably have agreed upon had they adverted to the issue in dispute at the time of entering the relationship.

The implied intention approach may derive some support from the law of contract. However it is an artificial way of avoiding the conclusion that the courts are doing justice without recourse to intentionalistic doctrine. The result of quasi-matrimonial cases ultimately depends upon whether the court thinks intervention is just, given the nature of the parties relationship, rather than on the parties intentions. Assertions regarding what reasonable people would have intended simply disguise this fact.

62 Infra n 100.

63 The influence of the common law on quasi-matrimonial property disputes in Australia has been significantly limited by the passing of legislation in New South Wales and Victoria: De Facto Relationships Act 1984 (NSW) and the Property Law Act 1958 (as amended in 1988) (Vic). See Scutt *Women and the Law* (1990) 231-233.

64 Discussed in depth in Atkin *Living Together Without Marriage* (1991) 73-128.

65 [1983] NZLR 140.

66 Ibid at 148.

67 Ibid at 153.

68 Barker J in *Fitness v Beveridge* (1986) 4 NZFLR 243 at 251 concluded that there was no real advantage in adopting the Canadian approach as it simply amounted to "a finding of unconscionable or inequitable conduct or lack of probity...".

... is to ask whether a reasonable person in the shoes of the claimant would have understood that his or her efforts would naturally result in an interest in the property. If, but only if, the answer is Yes, the Court should decide on an appropriate interest — not necessarily by half — by way of constructive trust, as was indicated in *Gissing v Gissing*.<sup>69</sup>

The test of the “reasonable person in the shoes of the claimant” (hereafter referred to as the “reasonable claimant” test) developed in *Pasi v Kamana* has been used subsequently in a number of High Court decisions.<sup>70</sup> It was also employed by the Court of Appeal in *Oliver v Bradley*.<sup>71</sup>

Is the reasonable claimant test satisfactory? It is arguable that the average person in a claimant’s position would not actually give any thought to the legal effect of his or her contributions. Thus, it may be that the reasonable person for the purposes of the test is one who actually considers the legalities of his or her position. The approach is somewhat confusing. Why would a reasonable person expect a contribution “naturally” to result in an interest in property? If reasonable people did actually consider their own entitlement would they not raise the matter with their partner and clarify it? The real advantage of this approach is that it appears to remove the need to demonstrate that the claimant actually formed an expectation of an interest at the time of making contributions.<sup>72</sup> The test is simply a formula which allows the court to give relief on the basis of contributions. It has little to do with traditional approaches focused on actual intentions and expectations.

The function of the reasonable claimant test is best understood by examining the courts’ approach to quantification. It might have been thought that relief would have been based on an assessment of what a reasonable claimant would have expected. However the courts have avoided employing the pretence of reasonable expectations. In *Oliver v Bradley* Cooke P, having applied the reasonable claimant test, stated:

The share is not necessarily one half: it may be greater or less and should represent a fair apportionment of the contributions and efforts on both sides.<sup>73</sup>

Thus the courts’ focus is on contributions. This suggests that the test itself might be formulated differently. The language of reasonable expectations serves no real function. It is in essence fictional. Imputing expectations provides something of a link with traditional concepts. However that link is too tenuous to disguise that the approach clearly departs from established doctrine. This language might profitably be discarded in favour a doctrine

69 [1986] 1 NZLR 603 at 605.

70 *Eg Lanyon v Fuller* unreported CP 184/86 Anderson J 1988.

71 [1987] 1 NZLR 586. the court also justified relief on pursuant to the Domestic Actions Act 1975 (legislation providing for division of division of property following an agreement to marry which is subsequently terminated). The decision is discussed in Atkin “De Facto Engaging Our Interest” (1988) NZLJ 12.

72 Cooke P did not suggest that an actual expectation was needed. The conclusion that this was not a necessary element of the “reasonable claimant” test is supported by the similarity of the reasoning and language used by Cooke P’s in *Pasi v Kamana* to that used by Lord Reid in *Pettit* [1970] AC 777 and *Gissing* [1971] AC 886. In *Pettit* (at 795) Lord Reid concluded:  
... we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question  
This was confirmed in *Gillies v Keogh* [1989] 2 NZLR 327 at 330-333 where Cooke P emphasised that the court did not need to search for the parties subjective state of mind but could impute to them intentions or expectations that reasonable people in the parties position would have formed. This may be contrasted with Richardson J’s more conventional approach to estoppel in that case at 344-347, requiring an actual expectation.

73 [1987] 1 NZLR 586 at 589.

framed in a way which clearly discloses its purpose and the manner in which it is to be applied.

Recently there have been suggestions that the test might be superseded by a new approach to estoppel.<sup>74</sup> It appears that the courts are disinclined to accept estoppel as the basis for relief. The reasonable claimant test is still favoured.<sup>75</sup> It is easy to see why. Estoppel may be regarded as a step backwards in that it is likely to make relief more difficult to obtain. The difference between actual expectations and expectations that would have been reasonable if they were formed is a significant one. It can be bridged only by the courts making unwarranted assumptions about peoples' states of mind.<sup>76</sup>

### 5. *The United States*

It is dangerous to speak of United States common law developments as representative. Different states are liable to take widely differing approaches. This is particularly so in an area such as this which is not dealt with specifically by any of the Restatements by the American Law Institute. To some extent though the development of the law in this area has been stifled by archaic laws prohibiting unmarried sexual relations (fornication) and unmarried cohabitation<sup>77</sup> and arguments that contracts between unmarried cohabitantes are immoral and illegal for public policy.<sup>78</sup> However it may safely be said that certain states have shown innovative tendencies similar to those favoured in various commonwealth jurisdictions.<sup>79</sup>

It suffices to mention two cases. In *Marvin v Marvin*<sup>80</sup> the California Supreme court granted a woman an interest in property on the basis of an express contract whilst noting that it relief might also have been possible on the basis of "an implied agreement of partnership or joint venture or some other tacit understanding between the parties."<sup>81</sup> Subsequently in *Pickens v Pickens*<sup>82</sup> the Mississippi Supreme Court ordered an equitable division of property accumulated in the course of a relationship in the nature of a quasi-matrimonial relationship without searching for any implied agreement to that effect.<sup>83</sup> Such an outcome was said to be appropriate in circumstances

74 *Gillies v Keogh* [1989] 2 NZLR 327 at 344-347 per Richardson J

75 *Pointon v Baines* unreported, CP 213/87, 15 August 1991, Thorp J (relief given despite expressly recognising an absence of an actual expectation).

76 In *Gillies v Keogh* [1989] 2 NZLR 327 at 347 Richardson J was apparently satisfied that estoppel could provide an adequate remedy for this area because he believed that expectations as to property rights are generally formed. Thus he commented:

Whatever the position in other countries, it seems to me that social attitudes in New Zealand readily lead to expectations, by those within apparently stable and enduring de facto relationships, that family assets are ordinarily shared, ... unless it is agreed or otherwise made plain. Whether such an assumption is valid is dubious infra n 101 and accompanying text.

77 *Marvin v Marvin* 557 P 2d 106 at 112 (1976). See note "Fornication, Cohabitation and the Constitution" (1978) 77 Mich LR 252 at 254; at the time of this note fornication was illegal in 15 states and unmarried cohabitation in 16.

78 This reasoning was rejected in *Marvin v Marvin* but accepted in *Hewitt v Hewitt* 349 NE 2d 1204 (1979).

79 The area is discussed briefly in Singer "The Reliance Interest in Property" (1988) 40 Stan LR 614, 694-695.

80 557 P 2d 106 (1976). For a discussion of the case see comment "Property Rights upon Termination of Unmarried Cohabitation" (1977) 90 Harv LR 1708 and Casad "Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?" (1978) 77 Mich LR 47.

81 *Ibid* at 122. Five members of the court concurred fully with Trobiner J's judgement. The seventh member, Clark J, concurred in relation to the enforcement of an actual agreement but rejected the possibility of equitable division on some other basis (at 123).

82 490 So 2d 872 (1986).

83 *Ibid* at 876.

where parties "live together in what must at least be acknowledged to be a partnership and where, through their joint efforts ... property [is] accumulated."<sup>84</sup> In quantifying the parties' respective interests the court assessed the extent of the parties' contributions. The case has subsequently been followed in Mississippi.<sup>85</sup>

### III. SOME REALISM ABOUT JUDICIAL INTERVENTION IN QUASI-MATRIMONIAL PROPERTY DISPUTES

#### 1. *The law's function in this context*

##### i. The theory of interests

Roscoe Pound, the renowned American jurist, pioneered the study of law by reference to the different interests competing for protection.<sup>86</sup> Pound's "sociological jurisprudence" involved the systematic analysis of these interests. This process included: (i) identifying the interests which the law ought to acknowledge; (ii) determining the extent to which the interests merit protection; and (iii) resolving how the law can provide protection effectively.<sup>87</sup> Pound's jurisprudence has lost much of its appeal and his theory of interests has not been applied widely. However, thanks largely to a seminal article by Lon Fuller,<sup>88</sup> this approach has had a lasting influence in relation to private law remedies.<sup>89</sup> It is an instrumentalist approach concentrating on the function fulfilled by a particular law, rather than judicial rationalisation of its operation. Interest theory offers a potentially valuable method of analysing judicial practices in this context and a basis for comparing them with established legal doctrine.

Traditionally, in the private law, the courts have protected certain interests. In contract remedies are given to uphold plaintiffs' expectations.<sup>90</sup> In torts relief is designed to restore the plaintiffs' status quo.<sup>91</sup> In restitution the law provides remedies against defendants who are unjustly enriched at the expense of plaintiffs.<sup>92</sup> The interest protected provides a basis for predicting the extent

<sup>84</sup> *Idem.*

<sup>85</sup> *White v White* 557 So 2d 485 (1989). The case involved distribution of property following a divorce (Mississippi not yet having a community property regime).

<sup>86</sup> Pound: "My Philosophy of Law" in Julius Rosenthal Foundation (1941) 249-262. See Cotterrell *The Politics of Jurisprudence* (1989) 159.

<sup>87</sup> Cotterrell *ibid* at 161.

<sup>88</sup> Fuller and Purdue "The Reliance Interest in Contract Damages" (1936-1937) 46 *Yale LJ* 52 and 373.

<sup>89</sup> Eg Burrows "Contract, Tort and Restitution - A Satisfactory Distinction?" (1983) 99 *LQR* 217. Trietel *Remedies for Breach of Contract* (1988); Kercher and Noone *Remedies* 2nd ed (1990).

<sup>90</sup> Although in some circumstances the court limits or extends relief to protection of the plaintiff's status quo: Fuller and Purdue *op cit* n 88.

<sup>91</sup> Burrows "Contract, Tort and Restitution - A Satisfactory Distinction?" (1983) 99 *LQR* 217. Following Burrows, I prefer the term status quo to reliance when referring to the interest protected by the law of torts. Status quo loss better describes the measure of the damage in issue in these cases than does the alternative term "reliance loss" (that favoured by Fuller *ibid*). In many tort cases the defendant simply causes damage to the plaintiff without any element of reliance on the plaintiff's part.

<sup>92</sup> It is important to acknowledge that the different interests "do present equal claims to judicial intervention." Fuller and Purdue *ibid* at 56.

The restitution interest identified by Fuller is something of a misconception. He assumes that this interest is the most compelling because the plaintiff's loss is matched by the defendant's gain. However this is not always so. Unjust enrichment may be divided into two types (see Birks *Introduction to Restitution* 26): the first, enrichment by subtraction, also involves protection of the plaintiff's status quo. In this case the enrichment feature simply provides an additional, though very compelling justification for relief. In addition restitution may be given for profits made by

of relief. The remedy given will ensure that the plaintiff is placed in a certain position depending on the interest at issue. Relief which cannot be explained in terms of protecting a specific interest, but is at large, may be characterised as distributive justice.<sup>93</sup> Distributive justice involves an essentially ad hoc approach to distributing wealth and is generally considered to be the preserve of the legislature.

## ii. Differences in quantification

The discussion of different doctrines indicates potential differences in quantification between them. This is because they function to protect different interests. The common intention constructive trust apparently designed to safeguard plaintiffs' expectations, giving plaintiffs the interest to which they assumed they were entitled.<sup>94</sup> Estoppel may operate to protect the expectation interest or it may uphold the status quo or perhaps on some other basis.<sup>95</sup> Unjust enrichment provides relief to the extent to which the defendant was enriched at the plaintiff's expense.

The following example illustrates the implications of interest analysis in this context. Suppose plaintiff A went into a relationship with defendant B who was the owner of a home. Over a 5 year period A contributed to the renovation of the house, increasing its value by \$5,000. A left a job to care for B's child from a previous relationship, contributing services which would otherwise have cost the defendant \$40,000 (enrichment of \$45,000). By staying out of the workforce A lost the opportunity to earn \$100,000. A also spent \$10,000 on renovating the house. However A saved \$50,000 by living in B's home (loss to status quo of \$60,000). A went into the relationship with an expectation of owning the home in equal shares with B. B dashed those hopes, bringing the relationship to an end and insisting that the property belongs to B alone. The home is now worth \$150,000 (expectation loss of \$75,000). The figures in brackets demonstrate the different measures of relief possible, depending on which interest the court chooses to protect. Apologists for the courts' widely varying treatment of this area suggest that there is no significant difference in theory between the different approaches.<sup>96</sup> This is

the defendant by committing a wrong although the plaintiff has suffered no loss (enrichment by a wrong). This may be regarded as protecting the plaintiff's rights and deterring breaches of obligations (contract, property, fiduciary etc); Jackman "Restitution for Wrongs" (1989) CLJ 302.

93 Admittedly this characterisation is not consistent with Aristotle's use of the phrase. He would have classified anything going beyond protection of the status quo as distributive, as opposed to corrective justice; McKeon (ed) "Nichomachean Ethics" in *The Basic Works of Aristotle* (1941) 1008; see Stevens op cit n 38 at 264. However, taking a broad approach, relief given in order to safeguard the different interests may be regarded as corrective in that it is designed to put the plaintiff in a particular position with reference to the interest that it being protected, rather than simply giving such relief as is needed to effect a fair distribution of wealth.

94 Supra n 7.

95 Infra n 99.

96 *Pasi v Kamana* [1986] NZLR 603 at 605 per Cooke P. Peart op cit n 3 at 135, discussing Cooke P's dicta, concludes "at heart they are all different formulae for the same idea which is to prevent equitable fraud." She argues that an approach holding defendants liable when they ought to have been aware of plaintiffs' expectations is consistent with principles of equitable fraud. Yet, the notion of equitable fraud is an imprecise one, unlike "contract" or "negligence", it does little to explain the nature of the causes of action associated with it. Rather it describes a broad category of obligations, linked by history rather than firm principle.

To support her contention Peart relies on *Nocton v Lord Ashburton* [1914] AC 392 at 954 for the proposition that equitable fraud "does not require evidence of an intention to cheat, but rather proof of breach of an obligation which the defendant ought in good conscience to have been aware of." This is a rather misleading summary of Lord Haldane's conclusions. His Lordship stated was referring to obligations of trust, in particular he mentioned fiduciary relationships and the

certainly wrong. The doctrines in question perform fundamentally dissimilar functions.

## 2. The contribution interest

### i. The utility of orthodox doctrines

The relief given in quasi-matrimonial property cases is difficult to reconcile with interests traditionally recognised and protected by the civil law. The Australian joint venture approach explicitly seeks to apportion property according to the parties contributions.<sup>97</sup> This is inconsistent with interests recognised traditionally. This is apparent in this instance because the Australian courts have not attempted to disguise the relief given by making reference to any existing doctrine of civil obligation. However it is equally true of most other jurisdictions that the relief given does not involve conventional interests. The "reasonable claimant" test is a good example. Relief depends on reasonable expectations which the plaintiff might not necessarily have formed.<sup>98</sup> Thus it may be that no actual expectation loss occurs. Moreover, relief is not based on any actual or hypothetical expectation but on contribution. The Canadian doctrine of unjust enrichment, by ignoring quantification problems, is effectively giving relief, not on the basis of the defendant's enrichment, but to reflect the plaintiff's contributions. The equitable estoppel doctrine is said to give such relief as is needed to achieve justice.<sup>99</sup> Presumably in practice this will be used to give the plaintiff an interest on the basis of contributions.<sup>100</sup>

The interests acknowledged traditionally protect plaintiffs as individuals. Plaintiffs and defendants are analysed for all relevant purposes as legally independent. The relief to which the plaintiff is entitled may be measured with reference to the extent that the defendant has acted inconsistently with one of the plaintiff's interests. However such an analysis is artificial in quasi-matrimonial property cases.

presumption of undue influence (the case involved a fiduciary relationship - a solicitor acting in conflict of interest). If defendants in such a relationships break their duties fraud is not a pre-condition for liability. The perceived importance of the fiduciary institution and the need to provide protection for those in disadvantaged positions is thought to justify strict liability. This duty is designed to ensure exemplary behaviour from those in a position of trust. What is required is a pre-existing obligation recognised by equity, a relationship of trust. However this situation is rather different from one where one party forms an expectation in relation to which the other party, while ignorant of, ought to have known. That expectation cannot, of itself, establish a relationship of trust. A situation giving rise to estoppel or unjust enrichment might establish an obligation in the sense of giving the plaintiff a right to a remedy correlative with a duty upon the defendant to provide relief. However, this does not involve the breach of a pre-existing obligation as discussed by Lord Haldane. Thus, the results in this context cannot be said to be explained by the principles of equitable fraud.

<sup>97</sup> *Supra* nn 50-57 and accompanying text.

<sup>98</sup> *Supra* n 72 and accompanying text.

<sup>99</sup> *Crabb v Arun District Council* [1976] 1 Ch 179, 188. In *Stratoulos v Stratoulos* [1988] 2 NZLR 424 at 437-438 McGechan J viewed the flexibility of estoppel as an advantage and suggested that it would be unwise to attempt to formulate principles to control the extent of relief given. Carter also notes the advantages of the courts approach to relief *op cit* n 40 at 45. There has been suggestions in the Australian High Court that relief should be limited to the extent of the detriment suffered by the plaintiff eg *Waltons Stores v Maher* (1987) 76 ALR 513 at 540 per Brennan J. However Deane J appears to favour a less rigid approach *Commonwealth v Verwayen* (1990) 95 ALR 321 at 347-349. The debate concerning proper object of estoppel is likely to continue for some time to come.

<sup>100</sup> Although in cases where the defendant had actual knowledge of the plaintiff's expectations before inducing acts of reliance the court might be disposed to give relief to give effect to those expectations; eg *Grant v Edwards* [1986] Ch 638.

Doctrines which are based on the state of mind of the parties (intentions and/or expectations) cannot satisfactorily achieve the objectives of the courts in this context. Such doctrines emphasise individual autonomy and will only provide satisfactory results if the parties are truly autonomous. An intentionalistic approach may offer a satisfactory legal framework to resolve commercial disputes because the parties have separate interests and can be expected to act to promote their own welfare. However, the situation is altogether different in a domestic situation. The parties' relationship is symbiotic in nature. It is artificial for the courts to analyse them as independent actors. The parties cannot be expected to safeguard their own interests against each other, because their interests are inextricably linked. The parties are more likely to have regard to their collective interests and, because of this, the legalities of individual property interest may appear irrelevant. For this reason it will often be spurious to search for intentions or expectations as to the parties' individual interests.<sup>101</sup>

Traditional doctrines are well established and serve relatively well defined function. If used in this context to perform functions for which they were not developed there is a risk that they will cease to perform distinct roles and consequently the principles governing them will become confused. This could have unfortunate consequences for the certainty of application. What is needed in this context is recognition of a new interest designed to operate in the manner in which the law is presently functioning in those jurisdictions which have chosen to innovate in this area.

## ii. A new interest?

Ideally the new interest should take account of the parties' relationship instead of being based upon intentions or expectations. In addition it would provide for quantification of remedies on the basis of contributions rather than according to traditional measures of relief. The Australian "joint venture" approach suggests a solution. Where parties have made contributions for the common good of the relationship then it would be unfair to allow one to rely on his or her strict legal rights to lay claim to the benefit of those efforts. The law ought to recognise parties to relationships in the nature of a joint venture ought to be entitled to share in proportion to their contributions on the breakdown of that relationship. This right could be characterised as protecting the parties "contribution" interest. This would avoid the convoluted exercises often performed by courts, attempting to give a just result by purporting to give effect to expectations or enrichment which often appear non-existent.

The analysis of the courts' treatment of quasi-matrimonial property disputes suggests that we can do more than assert that it is appropriate for the law to recognise the contribution interest. While theory lags behind, a change has taken place in judicial practice. The manner in which the law is functioning

101 This raises issues recently discussed by scholars of critical legal theory and feminist jurisprudence. The developments in quasi-matrimonial law in recent years reflect a conflict between an individualistic approach favoured by the courts in most areas and a desire to intervene altruistically, influenced by a more deterministic view of human conduct; Kennedy "Form and Substance in Private Law Adjudication" (1986) 89 Harv LR 1685; Kelman *Critical Legal Studies* (1987) 15-64 and 86-114. Approaches based on intentionalism may reflect a particularly male individualist philosophy which is generally not shared by women. There is reason to believe that men and women vary in their tendency to form self serving intentions and expectations: Gilligan *In a Different Voice* (1982); West "Gender and Jurisprudence" (1988) 55 U of Chic LR 1. For this reason it may be unrealistic to expect women in quasi-matrimonial relationships to have formed an expectation as to their individual interest in jointly used property. Unfortunately a meaningful consideration of these issues is beyond the scope of this article.



in this context indicates that the courts are already protecting the contribution interest.

### iii. the nature of the contribution interest

The contribution interest may be readily distinguished from conventionally recognised interests. First the circumstances in which the contribution interest will be safeguarded are unique. Unlike the expectation interest no agreement or expectation of an interest is needed. In comparison with the reliance interest, it is not necessary that the defendant has committed a wrong. In contrast with the restitution interest it is not required that the defendant has been enriched at the plaintiff's expense. In the case of the contribution interest relief will be available where the parties were in a relationship in the nature of a joint venture so that it would be artificial to treat them as independent actors.

Second the contribution interest may be distinguished from established interests on the measure of relief provided. A plaintiff's contribution to a relationship is likely to bear some resemblance to his or her reliance loss. However, it may be greater or lesser, depending on how the relationship has fared in financial terms. If the plaintiff actually formed an expectation as to his or her independent entitlement the contribution loss will necessarily equate to expectation loss only if the plaintiff expected an interest in proportion to his or her contributions. Otherwise the two measures need not coincide. Again the plaintiff's contributions are likely to bear some relation to the defendant's enrichment. However contributions will be assessed according to what is objectively valuable to the relationship as opposed to what is subjectively valuable to the defendant. The contribution interest may exceed the extent to which the plaintiff was deprived which sets the limit on recovery for unjust enrichment.<sup>102</sup>

The nature of the different interests safeguarded by the law of civil obligations may be portrayed in the following table:

Category of Obligation	Basis of the Cause of Action	Interest Protected
Contract	Breach of Promise	Expectation
Tort	Wrong Causing Harm	Status Quo
Unjust Enrichment	Enrichment at the Expense of Another	Restitution
Joint Venture	Failure of Common Endeavour	Contribution

### iv. Pre-conditions for relief

The courts have used different phrases to refer to situations in which it is appropriate to recognise the contribution interest. Partnership<sup>103</sup>, consortium<sup>104</sup>, joint venture<sup>105</sup> or endeavour<sup>106</sup> are a few. All of these encapsulate the

<sup>102</sup> *Supra* n 33 and accompanying text.

<sup>103</sup> *Pickens v Pickens* 490 So 2d 872 (1986) at 876.

<sup>104</sup> *Oliver v Bradley* [1987] 1 NZLR 586 at 590.

<sup>105</sup> *Muschinski v Dodds* (1985) 160 CLR 583 at 618.

<sup>106</sup> *Pettkus v Becker* (1980) 117 DLR (3d) 257 at 277.

notion of a relationship in which risks are shared and those involved are leading their lives as a co-operative endeavour rather than acting as individuals. It has to be asked whether the parties conducted their lives in such a way that it would be unreasonable for the purposes of their relationship and assets accumulated in the course to treat them as independent actors protecting their own self interest.

This really depends on an overall evaluation of the parties relationship. However some indications that a relationship might properly be treated as a joint venture are

- (a) Pooling of income.<sup>107</sup> This factor suggests that the parties view their lives as integrated.
- (b) Substantial contributions by the one spouse to assets legally owned by the other.<sup>108</sup> Raises the inference that he or she is expecting the asset to be used for their mutual benefit.
- (c) Sharing risks eg one spouse guaranteeing loans used to purchase property legally owned by the other.<sup>109</sup>
- (d) One spouse assuming the bulk of domestic responsibilities instead of earning a wage. Often this involves primary care giving responsibilities in relation to children of the relationship<sup>110</sup> or children of the other spouse,<sup>111</sup> but it may simply involve one accepting role of home-maker where there are no children of the relationship, particularly when one partner sacrifices a career.<sup>112</sup>
- (e) Contribution to a business endeavour. Where one spouse has made extensive contributions to a business legally owned by the other without being paid the courts are likely to provide compensation in the form of a property interest. This is particularly applicable in cases where the couple live on a farm.<sup>113</sup>
- (f) Longevity of relationship. The longer the relationship the more likely it is that a court will be prepared to infer that it is akin to marriage and should be dealt with on a similar basis.<sup>114</sup>
- (g) Evidence that parties regarded their relationship as akin marriage<sup>115</sup> or actually intended getting married.<sup>116</sup> This may strengthen conclusion that relationship in the nature of a joint venture.
- (h) One spouse caring for another through a lengthy illness. This suggests that care giving spouse feels under a moral duty to provide for the other.<sup>117</sup>
- (i) One spouse making sacrifices allowing the other to increase earning capacity. This suggests an assumption that the parties would enjoy the benefit of that increase in the context of their relationship.<sup>118</sup>

107 *Hayward v Giordani* [1983] NZLR 140; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

108 *Hayward v Giordani*; *Oliver v Bradley* [1987] 1 NZLR 590; *Palachik v Kiss* (1983) 146 DLR (3d) 385.

109 *Muschinski v Dodds* (1985) 160 CLR 583.

110 *Rosenich v Rosenich* (1989) 75 Alta LR (2d) 327.

111 *Herman v Smith* (1984) 34 Alta LR (2d) 90.

112 *Marvin v Marvin* 557 P 2d 106 (1976).

113 *Pettkus v Becker* (1980) 117 DLR (3d) 257; *Sorochan v Sorochan* (1986) 29 DLR (4th) 1.

114 *Pettkus v Becker* at 275-276; *Murray v Roty* (1982) 134 DLR (3d) 507.

115 *Pickens v Pickens* 490 So 2d 872 (1986) at 873. There the parties recommenced cohabiting one year after a divorce. While they discussed remarriage and applied for a licence the defendant declined to remarry because he did not wish to undergo a required blood test.

116 *Edwards v Prewett* (1988) 4 FRNZ 351.

117 *Palachik v Kiss* (1983) 146 DLR (3d) 385; but cf *Pasi v Kamana* [1986] 1 NZLR 603.

118 *Eg Re Sullivan* 127 Cal App 3d 656 (1982); *Hubbard v Hubbard* 603 P 2d 747 (1979); see Glover

- (j) Analogies with local legislation. The courts have shown a willingness to put de facto spouses on a similar footing to the legally married.<sup>119</sup> Particular statutory regimes for redistribution of property following marriage<sup>120</sup> or the breakdown of a relationship akin to marriage<sup>121</sup> in a jurisdiction may be used as an analogy to guide the courts in setting parameters for relief.

#### v. Quantification of contributions

##### (a) Approach to division

The process of assessing relative contributions is inevitably an impressionistic one. Courts have not attempted to develop a precise method of calculating the extent to which each spouse's efforts resulted in a benefit to the relationship. Such an approach would be likely to provide evidential difficulties for the court and promote unnecessary tension between the parties. Within limits the courts are likely to presume that the parties have contributed equally to the relationship. Thus in *Pettkus v Becker* Dickson J was not impressed by arguments that because the defendant was physically bigger and stronger his contribution to the running of the farming enterprise must have been proportionately greater than that of the plaintiff. This approach is similar to that taken pursuant to the Matrimonial Property Act 1976, which provided for a presumption that contributions were equal. Of course it will often be the case that one party contributed more by bringing property into the relationship. Consequently, unequal division of property will be common.

##### (b) Calculation of non-monetary contributions

There is much dicta to the effect that there is a presumption that non-monetary contributions should be valued less than monetary ones. In practice, however, the courts are readier to conclude that contributions were unequal because of uneven financial contributions than they are to make a similar judgement on the basis of non-monetary contributions. If both parties are working and one is earning a higher wage than the other than the court may conclude that the higher wage earner contributed more to the relationship. This was the case in *Baumgartner*<sup>122</sup> There the male had earned more than the woman. This result may have been unfair as working women often carry a heavier share of domestic responsibilities. It may have been that the woman's contribution was actually equal to that of her partner. The courts should be slow to divide on the basis of disproportionate financial contributions if they are not prepared to enter into a careful assessment of non-monetary contributions.

It has been suggested that services should be assessed according to their market value.<sup>123</sup> However it has been pointed out that this might cause injustice

"Professional Education as Matrimonial Property" (1983) NZLJ 180. The courts in these cases tend to claim that relief is based on unjust enrichment principles. However, for much the same reason as the Canadian cases it may be more plausible to regard the relief given as protecting the contribution interest.

<sup>119</sup> See Dickson J's dicta in text accompanying n 25.

<sup>120</sup> Eg in *Gillies v Keogh* [1989] 2 NZLR 327 at 334 the actions of one partner in making it to the other clear that she regarded the property as her's alone was compared with the contracting out provisions of the Matrimonial Property Act 1976.

<sup>121</sup> In *Murray v Roty* (1982) 134 DLR (3d) 507 at 515 the fact that partners qualified for maintenance after five years of a common law marriage was regarded as a useful guide to courts considering whether a relationship was long enough to qualify for relief at the common law.

<sup>122</sup> (1987) 164 CLR 137.

<sup>123</sup> *Pickens v Pickens* 490 So 2d 872 (1986).

because work commonly performed by women is poorly remunerated in comparison with work generally performed by men.<sup>124</sup> If the courts are not prepared to make a detailed assessment of all contributions it may be that assumption of equal contributions will generally result in the contributions made in the course of the relationship being assessed as equal.

(c) Contributions in the nature of sacrifice.

It ought to be acknowledged that some contributions assume a special significance not only because they not only result in a benefit to the relationship but also involve one partner making a sacrifice for the good of the relationship. The most obvious example is child care. Partners who remain at home are not only contributing by performing domestic tasks. They may also be sacrificing their future earning capacity. This may be compensated for by regarding the sacrifice as a contribution. The alternative is to regard the other partner's earning capacity as property which is subject to division. Those who have contributed to the their partners' earning capacity by freeing them from responsibilities which might have impeded their potential to develop their earning capacity could be held to be entitled to a proportionate share of this.<sup>125</sup>

(d) Property subject to division.

There are two approaches that could be taken to determining what property should be divided. First, it could be said that only property acquired in the course of a relationship is to be available for division. Second, all property used in the relationship might be taken into account. It is submitted that the latter approach is to be preferred. If the parties lives are integrated than it is likely that previously acquired property is used for the benefit of the relationship. Decisions will be made on the basis of the parties having the property at their disposal. All the property should be treated as capital contributed to the joint venture. This will entail no injustice to parties who had acquired large amounts of property before their relationships commenced because this property will be regarded as a contribution and is likely to mean that the legal owner is regarded as having a proportionately greater contribution interest. This approach appears consistent with the cases.<sup>126</sup> If the alternative method was adopted a partner could never receive a share in a home that was wholly owned before the relationship commenced.<sup>127</sup>

There is much dicta indicating that any contributions must be referable to the property in issue to entitle the plaintiff to an interest in it.<sup>128</sup> This

<sup>124</sup> Singer op cit n 79 at 694.

<sup>125</sup> See the approach taken in the United States to this matter supra n 118.

<sup>126</sup> Eg *Herman v Smith* (1984) 34 Alta LR (2d) 90. In that case property was owned by the defendant before marriage but the plaintiff still received a proprietary interest in it.

<sup>127</sup> Consider an example. A and B go into a relationship and for ten years live in a house inherited by B. A is the primary care giver and works as well while B does little at all. A is able to maintain the parties standard of living but no property is acquired. If the only property available for distribution was that acquired in the course of the relationship, A would not be entitled to an interest in the house.

<sup>128</sup> Eg Canada: *Pettikus v Becker* (1980) 117 DLR (3d) 257; New Zealand *Pasi v Kamana* [1986] 1 NZLR 603. In Canada the requirement is seen as necessary for the plaintiff to obtain relief by way of constructive trust. Personal relief may still be available for contributions not referable to property; *Litman* op cit n 31 at 426. In *Pasi v Kamana* the lack of a "nexus" was apparently regarded as fatal to the proprietary claim. The requirement seems out of place in New Zealand law which is said to be based on reasonable expectations. The question ought simply be whether a reasonable claimant would have expected an interest in property as a result of his or her efforts. A direct contribution to the property is not logically necessary. Such an expectation might equally arise from child care or other domestic contributions.

requirement has been applied unpredictably.<sup>129</sup> Ultimately it may be that the rule has little effect. First, almost any contribution can be said to be referable to property eg domestic contributions contribute indirectly to the maintenance of the home<sup>130</sup> or the defendant's material wealth.<sup>131</sup> Second, any connection between the contributions and the asset in question appears sufficient to give the plaintiff a remedy to the full extent of his or her contributions. The courts do not restrict proprietary relief to the extent that the plaintiffs' contributions increased or maintained the value of the defendant's assets.<sup>132</sup> The requirement of a causal connection between contributions and the property in question has not been adopted in Australia or in Mississippi. In the writer's opinion it is best abandoned. If it was strictly applied it would simply have the effect of discriminating against non-financial contributions.<sup>133</sup>

### 3. *Uncertainty in the allocation of property rights*

A common criticism in relation to the determination of property rights on some basis other than the parties' intentions is that the law will become unacceptably uncertain.<sup>134</sup> It may be argued in relation to the commercial environment that parties enter into relationships on the basis of a calculation of the risks, including legal ones, and readily predictable legal rules are required so as to allow businessmen to assess the merits of a transaction. However this view probably exaggerates both the extent of lay persons' legal knowledge and the predictability of firm rules.<sup>135</sup> Moreover, while there are advantages in restricting judicial discretion, rigid rules have a heavy cost in limiting a court's ability to do justice on the merits of a case.<sup>136</sup> In any event arguments for certainty do not carry as much weight in this context as in commerce. As we have seen a great difficulty in providing relief in this context is caused because those going into relationships do not plan for the eventuality of breakup.<sup>137</sup> This precludes rules based on intent providing adequate relief. It also suggests that a change in law is unlikely to lead to major changes in

<sup>129</sup> The rule was invoked to deny a proprietary interest in *Davidson v Worthing* (1987) 26 ETR (BCSC) 26 and *Everson v Rich* (1988) 53 DLR (4th) 470 at 475. Yet there is no sound basis distinguish the contributions made in those cases (substantial domestic contributions) from those made in *Herman v Smith* (1984) 34 Alta LR (2d) 90; *Rosenich v Rosenich* (1989) 75 Alta LR (2d) 327 and *Sorochan v Sorochan* (1986) 29 DLR (4th) 1.

<sup>130</sup> *Herman v Smith* *ibid* at 93.

<sup>131</sup> *Rosenich v Rosenich* *supra* (1989) 75 Alta LR (2d) 327 at 337.

<sup>132</sup> Consequently it is difficult to accept that the approach is consistent with traditional tracing principles *Casad* op cit n 80 at 61 cf *Paciocco* "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) 68 Can Bar Rev 333.

<sup>133</sup> This article does not attempt to formulate an argument supporting the award of proprietary remedies in this context. It will often be difficult to determine whether a case involves recognition of an existing proprietary entitlement or a redistribution of property; Thompson "Judicial Takings" (1990) 76 Va LR 1449, 1540. It is admitted that the use of the constructive trust in this context involves a substantial development in property law and is inconsistent with traditional English views on that device's proper scope eg *Birks An Introduction to the Law of Restitution* (1985) at 378; *Goode Ownership and Obligation* (1987) 103 LQR 433. In this context the remedy at least in some circumstances appears to involve a redistributing of property. In essence a form of common law community property is being recognised. Whether this is justified as matter of principle is debatable. All I wish to argue for the purposes of this article is that in reality the present approach produces this effect and such restrictions as supposedly apply are artificial, arbitrary and not rigorously applied. It would be more realistic to recognise that a proprietary remedy may be given in respect of any contribution.

<sup>134</sup> See eg *Oakley Constructive Trusts* 2nd ed (1987) 13.

<sup>135</sup> *Posner The Problems of Jurisprudence* (1990) 42-61. *Kelman A Guide to Critical Legal Studies* 15-64.

<sup>136</sup> See *Trubek "Max Weber on the Rise of Capitalism"* (1972) *Wisconsin LR* 720 at 749.

<sup>137</sup> *Supra* n 101 and accompanying text.

practice in non marital relationships. Generally, parties in this situation will not alter their behaviour in response to the change in law because they do not generally consider the possibility of separation or at least are ignorant of its legal ramifications. Those who are concerned with legal implications may react by making clear that property is to be divided on a certain basis.<sup>138</sup> This may be viewed as similar to contracting out of Matrimonial Property legislation.<sup>139</sup> While uncertainty in determining rights once a relationship breaks up will cause difficulties, it is unlikely the resulting problems outweigh the benefits of a system which provides relief in this context.

#### IV. CONCLUSION

The courts are grasping for an appropriate solution. Traditional doctrines do not offer the key. Because people do not adequately plan for the contingencies in question rules based on intentions and expectations cannot provide justice in this area.

In different ways English and Canadian case law demonstrate the inadequacy of traditional doctrine. In England orthodox application of established concepts has left *de factos* without effective property rights. In Canada the courts have applied the doctrine of unjust enrichment in a flexible manner, often ignoring its apparent constraints. There is a danger that if the application of different doctrines are extended beyond their proper scope they will cease to protect distinct interests. As the function of these doctrines becomes less certain the effect of their application will come to be less predictable.

The comparative analysis undertaken in this paper suggests that the courts in Canada, Australia and New Zealand and in at least some parts of the United States agree on the role the courts should be performing in this area. These jurisdictions have recognised that it is artificial to treat parties to a relationship akin to marriage as truly autonomous self-serving individuals. Rather it is thought just that they share the fruits of their relationship. The most appropriate way of doing this is seen to be division on the basis of contribution. It is desirable that the courts explicitly recognise the contribution interest and define the conditions for its protection. In this way a new interest and a new category of civil obligation will be added to the law. The alternative is allowing conventional interests and doctrines to lose much of their capability for describing the law as it exists and predicting the effect of its application to particular circumstances.

<sup>138</sup> *Eg Gillies v Keogh* [1989] 2 NZLR 327.

<sup>139</sup> S 21 Matrimonial Property Act 1976.