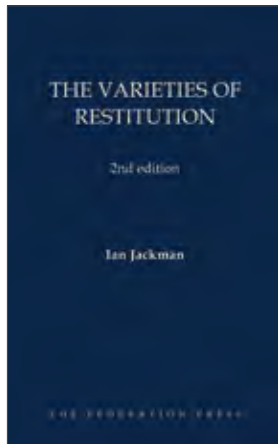


The Varieties of Restitution (2nd ed)

By Ian Jackman SC | The Federation Press | 2017



Almost two decades have passed since the publication of the first edition of this fine book. During that time the landscape of the law of restitution in Australia has substantially changed. The publication of a second edition has been long awaited.

The principal argument of the book is unchanged. It is that, contrary to the position adopted in England, the law of restitution cannot be explained by reference to the unifying principle of reversing 'unjust enrichment at the plaintiff's expense'. The author then goes on to argue that there are three 'varieties' of restitution involving different conceptions of injustice. The first involves the recovery of money or another incontrovertible benefit which has been paid by a plaintiff 'non-voluntarily' (for example, by mistake, duress, involving a total failure of consideration or by necessity). The second variety involves a plaintiff recovering money for benefits in kind provided pursuant to a genuine, but typically implicit, non-contractual promise by the defendant to pay for the benefits. The last category concerns restitution for wrongs. Recovery in this category is said to be justified by the need to protect the integrity of certain facilitative institutions of private law, such as property or fiduciary relationships.

In the first edition, the author rightly described his principal argument as

'not a currently fashionable position.' Whilst it remains heretical in England, it reflects current orthodoxy in Australia. This edition draws upon numerous decisions of the High Court of Australia in the past decade that have rejected the English doctrine by which a claim in 'unjust enrichment' can be made by direct invocation of the principle that the defendant has been 'unjustly enriched at the claimant's expense'. It provides a defence of those Australian decisions and a strong, and at times fierce, critique of the current English approach, particularly its academic proponents. The critique is principally found in Chapters 1 and 2, the latter of which is a considerably expanded section concerning the history of the law of restitution.

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One of the most significant criticisms of the English restitution academy advanced in the book is that in an attempt to do away with past 'legal fictions' it has given birth to many others. Mr Jackman highlights that in the case of recovery of a mistaken payment – commonly regarded as the central case of the law of restitution – there is no need for the plaintiff to prove loss in order to recover the payment. A plaintiff who has fully passed on the expense of the payment (say, to the plaintiff's customers) can still recover from the defendant. Mr Jackman argues, with considerable force, that as a matter of ordinary English a defendant in such a case has not received a benefit 'at the

plaintiff's expense'. Similarly, in cases awarding restitution for wrongs where the defendant obtains a benefit from using the plaintiff's property but the plaintiff does not suffer any detriment. Or, more generally, in cases where a *quantum meruit* is awarded where services are requested and performed but no benefit or 'enrichment' is obtained by the defendant at all (for example, in cases of wasted preparatory work).

However, the contribution provided by the present edition does not lie merely in providing a critique of a unifying theory of unjust enrichment. To a practising lawyer there are some rather obvious weaknesses in that theory. One weakness in that theory is that, at least for the present, the High Court of Australia has rejected it. Another weakness is the inability of the theory to assist in resolving practical legal problems. One could describe the whole of the common law of torts as compensating 'good people' for 'wrongs' done to them by 'bad people'. But that criterion, expressed at only a slightly higher level of abstraction than the unifying theory of unjust enrichment, would not assist in resolving any practical legal problem. Likewise, the contention that the law of restitution is concerned with unjust enrichment at the plaintiff's expense provides little assistance to practising lawyers. It is perhaps unsurprising that the main proponents of the English approach have been academics.

Rather, a substantial part of the value of the book lies in the author's discussion in Chapters 3 to 8 about why restitution is and should be awarded in materially different categories of case.

The discussion concerning the recovery of mistaken payments is of a high standard, although the analysis concerning awards of interest on restitutionary claims is somewhat brief.

BOOK REVIEWS

Ian Jackman SC, 'The Varieties of Restitution (2nd ed).'

Chapter 6, which deals with the voluntary provisions of benefits in kind, is particularly useful in identifying how claims for a *quantum meruit* for work done can be understood as reflecting genuine, albeit implied, promises between parties. It is also the most radical and thought-provoking chapter of the book. Deane J's reasons in *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221, which have generally been accepted in Australia, are criticised and Dawson J's reasons in that case, which have generally been forgotten, endorsed. The many cases that have recognised a *quantum meruit* claim by an innocent contractual party after the valid termination of a contract are also said to be wrong in principle.

The final two chapters of the book address what is sometimes called 'proprietary

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restitution' (that is, proprietary claims and remedies for restitution) and defences to restitutionary claims. The former chapter deals principally with tracing in equity, with less detailed discussion concerning so-called tracing at common law and proprietary claims to recover

mistaken payments.

The book is well written and easy to read. At just over 220 pages, there are necessarily areas where the analysis is more limited. However, the book does not pretend to be a text book on the law of restitution. Rather it is an extended argument on the structure and theoretical basis of one of the more controversial areas of private law. Many readers, particularly those who have been taught by the Law Faculty of the University of Oxford, will not agree with the author's arguments. However, it is an insightful and intelligent work that is essential reading for those interested in the law of restitution. It is to be hoped that the next edition does not take another two decades.

Reviewed by Tom Prince

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