

RESTITUTION, UNJUST ENRICHMENT AND DOMESTIC CAREGIVING

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In Gill v Garrett [2020] NSWSC 795, Slattery J considered a claim in unjust enrichment in which a domestic caregiver sought restitution for the value of caregiving services. While the claimant was unsuccessful, Slattery J's decision provides several helpful insights into the way courts approach these sorts of claims. This note explores some of these insights. Its aim is to examine the challenges that may be faced by a domestic caregiver who seeks restitution for the value of caregiving services conferred upon a domestic recipient.

I INTRODUCTION

There are an increasing number of disputes concerning the rights and entitlements of domestic caregivers in Australia. Australia's ageing population makes these types of disputes unsurprising. Curiously, although these disputes often involve scenarios ripe for restitutionary analysis, plaintiffs rarely bring claims in unjust enrichment. *Gill v Garrett*¹ is an exception to this rule. This note aims to explore and clarify the approach taken in *Gill v Garrett* to the question of whether the plaintiff, Jason Gill, could seek restitution in unjust enrichment from the estate of Dr Bill Garrett for the value of caregiving services provided by Gill to Garrett. Slattery J's judgment offers several important insights into the availability of a claim in unjust enrichment when the subject of that claim is domestic caregiving services.

II BACKGROUND

A *Unjust Enrichment and Caregiving*

It is not unusual for a loved one to take on a caregiving role when another loved one is unable to live independently. Unfortunately, disagreements over the nature and value of domestic caregiving, and over the entitlement of

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¹ *Gill v Garret & Ors* [2020] NSWSC 795. The restitutionary analysis upon which this note focuses was not the subject of appeal in *Gill v Garrett* [2021] NSWCA 117.

caregivers to financial reward, frequently end in court. As is the nature of end-of-life caregiving, these disputes typically take place after the passing of the recipient of the care. While these disputes usually raise several legal issues, one issue underexplored in Australian case law concerns whether and when a domestic caregiver has a claim in unjust enrichment to restitution of the value of care services. *Gill v Garrett* provides valuable guidance on this topic. Before turning to the facts of *Gill v Garrett*, however, it is necessary to explain the context to the analysis in this note.

A common dispute over the entitlements of a domestic caregiver involves a challenge to a disposition made by a recipient of care in favour of their caregiver.² Take *Winefield v Clarke*,³ for example, in which an ailing mother gifted her primary caregiver (one of her daughters) an interest in the mother's home. The mother's estate⁴ later brought an action seeking equitable rescission of the disposition on the grounds of undue influence. The claim was successful, though made alongside the order of rescission was an order granting the caregiver an equitable charge over the property for a sum of \$6500. This amount reflected an earlier decision of the caregiver to discharge an existing mortgage against the property. The caregiver had discharged the mortgage after gaining title to the property, believing the property was now her own.

Though the law of rescission is sometimes thought to form part of the law of contract, the decision in *Winefield v Clarke* is neatly explained by the law of unjust enrichment. The order of rescission was, fundamentally, a restitutionary award to prevent the caregiver being unjustly enriched.⁵ The caregiver's undue influence over the mother constituted an unjust factor sufficient to prove that the mother's consent to the transfer of title was impaired. Accordingly, the caregiver's enrichment (which came at the mother's expense) was reversed by an order of rescission. The grant of the charge in favour of the caregiver is also explained by unjust enrichment: upon the rescission of the gift, the basis of the mortgage discharge transaction

² For recent examples, see *Hewitt v Gardner* (2009) 3 ASTLR 407; *Gillian Fisher-Pollard by her tutor Miles Fisher-Pollard v Piers Fisher-Pollard* [2018] NSWSC 500; *Brown v Barber* (2020) 19 ASTLR 56. See also *Barkley v Barkley Brown* [2009] NSWSC 76.

³ [2008] NSWSC 882.

⁴ While the mother had not passed away, the mother was under legal incapacity at the time of trial.

⁵ Elise Bant, 'Rescission, Restitution and Compensation' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2010) 293, 307–8.

failed.⁶ The mother's estate would have been unjustly enriched if the estate could retain title to the house without making counter-restitution for the benefit of the mortgage discharge.⁷ In this sense, the order of rescission '[concealed] mutual cross-claims for restitution'.⁸ Notably, however, the order of rescission was not adjusted by reference to the months of caregiving provided by the daughter. This care had no value recognised by the law of unjust enrichment.⁹

The issue of whether and how the law recognises caregiving services is not limited to cases involving the attempted rescission of a transaction benefiting a caregiver. Often, an action is brought by the caregiver themselves, motivated by an absence (or failure) of a disposition in his or her favour from the recipient of the care. When dealing with these cases, in which the caregiver seeks legal recognition of the value of past caregiving services, courts display a notable preference for familiar concepts like contract and

⁶ Ibid 293, 307.

⁷ In the context of rescission, the requirement to make counter-restitution is a consequence of the principle of *restitutio in integrum*. A similar (or identical) requirement can be found within the traditional requirement in equity that a plaintiff must 'do equity' before obtaining rescission. See *Plan B Trustees Ltd v Parker (No 2)* (2013) 11 ASTLR 242, [89]–[91] (Edelman J). A similar principle arguably underlies the concept of an 'allowance' made in favour of a fiduciary who profits in breach of a fiduciary obligation. On one view, the provision of an allowance in favour of the defaulting fiduciary is to ensure that the principal is not unjustly enriched by the fiduciary's skill and labour: see, for example, Elise Bant and Peter Creighton, 'The Australian Change of Position Defence' (2002) 30 *University of Western Australia Law Review* 208, 229. This idea was hinted at in *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). This view is controversial. Professor Harding, for example, argues that the concept of an allowance made in favour of a breaching fiduciary is not counter-restitutionary, but instead reflects the law's recognition of merely what the breaching fiduciary deserves (in the sense that an allowance reflects his or her 'deserts'). See Matthew Harding, 'Justifying Fiduciary Allowances' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009), in particular page 358.

⁸ Bant (n 5) 307.

⁹ Professors Degeling and San Roque argue that, across the law, the value of domestic services (including caregiving) is often overlooked, and caregiving services are often assumed to be performed altruistically. See Simone Degeling and Mehara San Roque, 'Unjust enrichment: A Feminist critique of enrichment' (2014) 36(1) *Sydney Law Review* 69, 89. This note briefly considers this possibility in Part V.

equitable estoppel.¹⁰ This preference tends to exclude engagement with the principles of unjust enrichment. Indeed, the scant attention paid to the possibility of a claim in unjust enrichment in these cases may be the result of judicial hesitation in adopting an expansive approach to the parameters of the law of unjust enrichment itself.¹¹

Fortunately, this issue has now received direct attention by the New South Wales Supreme Court in *Gill v Garrett*. While the claim in unjust enrichment was unsuccessful, *Gill v Garrett* provides a welcome examination of the availability of a restitutionary remedy for the value of domestic care services, as well as valuable guidance as to the issues faced by such a caregiver claimant (or counter-claimant).

B *Gill v Garrett: Facts*

In 1996, Jason Gill met Dr Bill Garrett. Initially, the relationship was one of friendship. Gill and Garrett would attend trivia nights together and drink frequently at the local hotel. The relationship became strong, and in 2003 Gill moved in with Garrett. Garrett treated Gill—who had little or no income of his own—well, providing Gill with ‘food, alcohol, accommodation and facilities without charge’.¹² In 2004, as the health of the 74-year-old Garrett began to decline, Gill took on a caregiving role. By 2009, Gill was providing day-to-day care to Garrett, which involved changing Garrett’s clothes, stripping and replacing soiled linen, and cooking, cleaning and driving for Garrett. According to Gill, sometime in 2009 Garrett orally promised to transfer Gill the title to Garrett’s house (in which Gill had lived since 2003). This did not occur, either while Garrett was alive or through a bequest in Garrett’s will. Upon Garrett’s death the house was left to his children.

Gill, unhappy with his position following Garrett’s death, brought several claims against Garrett’s executors. First, Gill argued that a contract existed between himself and Garrett, by which Gill had provided his care services in exchange for Garrett’s house. This claim failed. Gill also argued that he had

¹⁰ Recent examples include *Brown v Barber* (n 2); *Hartley v Woods* [2017] NSWSC 1420.

¹¹ Though unjust enrichment is broadly accepted as a body of law within Australia, the boundaries of unjust enrichment remain controversial. For example, one popular view is that unjust enrichment is a ‘subsidiary’ doctrine of law that operates within the gaps of other, established legal doctrines. This view has divided the High Court. For a recent example of this controversy, compare the decisions of the majority-plurality and the minority-plurality in *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560.

¹² *Gill v Garrett* (n 1) [56].

detrimentally relied upon Garrett's promise to transfer Gill the house and that it would be inequitable for Garrett's estate to resile from this promise. This claim also failed. Gill's third claim was a claim in unjust enrichment. Gill argued that Garrett had been unjustly enriched by the receipt of Gill's care services and that Gill was therefore entitled to a restitutionary award to recognise the value of those care services conferred upon Garrett. As we will see, Slattery J concluded that Gill could not make out the 'enrichment', 'at the expense of', and 'unjust factor' elements of a claim in unjust enrichment.¹³ It is to the first of these elements we now turn.

III 'ENRICHMENT'

Slattery J concluded that the care Gill provided to Garrett did not, for the purposes of a claim in unjust enrichment, constitute an 'enrichment'. This conclusion was based on two factors. The first was forensic in nature: while his Honour was certain Gill's claim overstated the quantum of the services, there was no way to determine just how much care Gill had actually provided.¹⁴ The second factor, however, went to the heart of the meaning of an 'enrichment' in the law of unjust enrichment. Slattery J concluded that, owing to serious deficiencies in Gill's care routine, the care services conferred upon Garrett by Gill had no legally recognisable value.¹⁵ Gill often used cocaine while caring for Garrett, frequently left Garrett alone in the house, and encouraged Garrett to overconsume alcohol. This meant the court could not value Gill's services: not only was it inappropriate to value Gill's services by reference to the market rate for professional care, but '[Gill's services could not be valued] at some lesser rate ... because it was not demonstrated that there was any market place for less competent carers'.¹⁶ It is upon this consideration that this section focuses.

It is notable at the outset that Slattery J recognised that care services provided to an acceptable standard *could* have constituted an enrichment.¹⁷ Not only

¹³ These elements cut across the causes of action within unjust enrichment, and accordingly are treated in this case note as the elements of a claim in unjust enrichment. See generally *Mann v Paterson Constructions Pty Ltd* (n 11) 56 [199] (Nettle, Gordon and Edelman JJ); *Pavey v Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256–7 (Deane J).

¹⁴ *Gill v Garrett* (n 1) [448]–[448]. Unfortunately, Gill had not kept any reliable records of his care services.

¹⁵ *Ibid* [437]–[447].

¹⁶ *Ibid* [444].

¹⁷ See, eg, *ibid* [437].

does this immediately cast doubt over decisions like *Winefield v Clarke*, in which (as noted above) the enriching status of caregiving was ignored, but this also provides welcome support for the notion that ‘pure’ services can be enriching. One possible roadblock to a claim in unjust enrichment for the value of caregiving services is the fact that caregiving services are pure services, in that they do not leave a marketable residue or (usually) affect the wealth of the recipient.¹⁸ There is some debate about pure services in unjust enrichment: one view, championed by Sir Jack Beatson, is that pure services are not enriching.¹⁹ This view is counterintuitive, however, because it ignores the fact that, as Slattery J noted,²⁰ pure services such as caregiving often have a clear market value.²¹ If a service has an independent market value, as a matter of both logic and principle it must surely be possible for the receipt of that service to be enriching.²² The decision in *Gill v Garrett* provides support for the view that pure services *can* constitute an enrichment for the purposes of a restitutionary claim in unjust enrichment.

As mentioned, Slattery J concluded that the absence of an independent market for the type of caregiving services provided by Gill (owing to his lack of qualifications and the deficiencies in his caregiving) prevented those services

¹⁸ It is at least arguable that caregiving services are not always ‘pure’ services. This is because caregiving services would often save a defendant from incurring a necessary expense. The care services would thus preserve the wealth of the defendant. See Jack Beatson, ‘Benefit, Reliance and the Structure of Unjust Enrichment’ (1987) 40(1) *Current Legal Problems* 71, 72; Charles Spillane, ‘Unjust Enrichment and De Facto Relationships: The End of a Marriage of Convenience’ (1997) 8(2) *Auckland University Law Review* 301, 312.

¹⁹ Beatson (n 18) 74–82; Jack Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Clarendon Press, 1991) 32. Professors Grantham and Rickett take the same view in Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2002) 61. The High Court of Australia has not conclusively ruled on this issue. However, for Australian cases in which pure services were held to be enriching, see *Brenner v First Artist’s Management Pty Ltd* [1993] 2 VR 221; *Damberg v Damberg* (2001) 52 NSWLR 492; *Andrew Shelton & Co Pty Ltd v Alpha Healthcare Ltd* (2002) 5 VR 577.

²⁰ *Gill v Garrett* (n 1) [444]–[445].

²¹ On this point, see Peter Birks, ‘In Defence of Free Acceptance’ in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press, 1991) 133. See also James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 56.

²² Of course, pure services will not always be enriching. Like all benefits the subject of a claim in unjust enrichment, a defendant is only enriched by services that he or she chose (or can be presumed to have chosen). We return to this point shortly.

having value. This appears to set a high bar for the recognition of the value of caregiving services: only professional caregiving, or caregiving provided to a standard comparable with professional caregiving, could constitute an enrichment. The difficulty here is that when valuing an enrichment, the law of unjust enrichment is concerned to objectively measure the value, if any, that was received *by the defendant*.²³ Accordingly, the absence of a market for a type of service should not itself prevent the service having value. As there is ample evidence suggesting Garrett objectively desired the care provided by Gill,²⁴ in principle the care *did* have measurable value. Its value was whatever a person in Garrett's position would have had to pay someone to perform the services Gill performed.²⁵

The conclusion that the caregiving provided by Gill was not enriching, however, can be understood in light of the unique facts of *Gill v Garrett*. Reflecting a concern to protect defendant autonomy,²⁶ in the law of unjust enrichment a recipient of services is not enriched unless the recipient objectively chooses those services.²⁷ Liability is not 'forced upon people behind their backs'.²⁸ Moreover, even if a defendant chooses a service, the nature of that choice informs the law's subsequent valuation of that service. If a defendant chooses a service on an understanding the service is offered gratuitously, that service is treated by the law as having no value.²⁹ Arguably, this is what occurred in *Gill v Garrett*. Not only was Gill's caregiving markedly below the level that would be expected of a paid caregiver, but Gill

²³ *Gondal v Dillon Newsagents Ltd* [2001] RLR 221, 228 (Simon Brown LJ); *Sempre Metals Limited v HM Inland Revenue Commissioners* [2008] 1 AC 561, 606 [119] (Lord Nicholls); Andrew Burrows, *The Law of Restitution* (Oxford University Press, 2nd ed, 2002) 18.

²⁴ See, eg, *Gill v Garrett* (n 1) [79], [109], [111]–[115].

²⁵ *Benedetti v Sawiris* [2014] AC 938, 956–7 [17] (Lord Clarke JSC), 982–3 [100] (Lord Reed JSC).

²⁶ Elise Bant, 'Incapacity, Non Est Factum and Unjust Enrichment' (2009) 33(2) *Melbourne University Law Review* 368, 374; Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis Butterworths, 2nd ed, 2018) 89; James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 225–9.

²⁷ *Taylor v Laird* (1856) 25 LJ Ex 329, 332 (Pollock CB); Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1989) 109–11.

²⁸ *Falcke v Imperial Insurance Co* (1886) 34 Ch D 234, 248 (Bowen LJ).

²⁹ *Benedetti v Sawiris* (n 25) 986 [113] (Lord Reed JSC); Edelman and Bant (n 21) 82. Arguably, the joint judgment of Nettle, Gordon and Edelman JJ in *Mann v Paterson Constructions Pty Ltd* (n 11) at 57–62 [201]–[215] confirms the correctness of this approach.

himself had given Garrett (and Garrett's family) the impression he did not expect any reward for his services.³⁰ Indeed, while alive Garrett had displayed alarm at the possibility that Gill might seek financial reward after Garrett's death.³¹ On the available evidence, therefore, Garrett had only manifested a desire for Gill's services *on the basis they were gratuitously offered*.³² Thus, for the purposes of the claim in unjust enrichment, the caregiving provided by Gill to Garrett was properly valued at zero. Slattery J's conclusion that Garrett had not been enriched by Gill's caregiving can be understood as a reflection of this fact.

IV 'AT THE CLAIMANT'S EXPENSE'

Slattery J also concluded that Garrett was not enriched at Gill's expense.³³ His Honour reasoned that, even assuming Gill's care services were enriching, Gill had received benefits from Garrett that exceeded the value of any benefit Gill provided to Garrett. As Slattery J noted, 'it is most unlikely that the value of the claim for [care] services would exceed the very substantial benefits Jason Gill has already received from his association with Dr Garrett'.³⁴

Though this area is underdeveloped,³⁵ in the Australian law of unjust enrichment a claimant is not required to argue that they suffered some loss or impoverishment corresponding to the defendant's gain.³⁶ All that is required is that the defendant's gain came from the claimant, in the sense that there was a 'transactional link'³⁷ or a 'nexus'³⁸ between the two parties.³⁹ In other words, the requirement that the defendant's gain be 'at the claimant's expense' is directional. Only gains flowing from the claimant to the defendant can constitute an unjust enrichment. The position in Australia can be

³⁰ *Gill v Garrett* (n 1) [140], [464].

³¹ *Ibid* [90].

³² See generally *ibid* [87]–[92].

³³ *Ibid* [451]–[460].

³⁴ *Ibid* [460].

³⁵ Edelman and Bant (n 21) 89.

³⁶ *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 74 (Mason CJ).

³⁷ Edelman and Bant (n 21) 92.

³⁸ *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176, [27] (Lord Clarke JSC).

³⁹ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 512, 529 [26] (Gleeson CJ, Gaudron and Hayne JJ); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 657 [54] (Gleeson CJ).

contrasted with the position elsewhere—in Canada, for example, the ‘at the expense of’ requirement (termed a requirement of ‘corresponding deprivation’) does require the claimant to demonstrate loss corresponding to the gain of the defendant.⁴⁰ By concluding that the benefits received from Garrett prevented Gill from showing that Garrett’s enrichment was at Gill’s expense, Slattery J might be thought to have displayed a preference for a requirement of corresponding deprivation. With respect, it is not clear that this approach is supported by Australian law. In principle, the fact a caregiver benefited from their role as caregiver (and thus suffered no loss by the provision of the care) does not prevent them showing that the recipient of the care was enriched at the caregiver’s expense.

This does not mean, however, that benefits conferred upon a caregiver by a recipient of care are irrelevant to a subsequent claim by the caregiver in unjust enrichment. Slattery J’s conclusion that the benefits Gill received from Garrett operated to defeat Gill’s claim is readily explicable as a conclusion about counter-restitution. In the law of unjust enrichment, a plaintiff ‘cannot usually obtain restitution while at the same time retaining a benefit received from the defendant by virtue of the same event’.⁴¹ The reason for this requirement is simple: as appears from *Winefield v Clarke*, courts are wary of making orders for restitution if to do so would result in unjust enrichment.⁴² Thus, Gill’s claim was subject to a requirement to make counter-restitution to Garrett’s estate for the value of the benefits Gill received while caring for Garrett. On the facts, that meant Gill had no claim at all: Slattery J found that the value of the benefits Gill received from Garrett was at least equal to the value of the care Gill provided to Garrett (even if that care *was* valued at some discounted commercial rate).⁴³

Gill v Garrett provides an important insight into a hurdle faced by a domestic caregiver who argues that a defendant’s enrichment was at the caregiver’s expense. If the caregiver has benefited from the provision of the care (say, by

⁴⁰ *Garland v Consumers’ Gas Co.* [2004] 1 SCR 629, [30] (Iacobucci J). See generally Mitchell McInnes, ‘The Canadian Principle of Unjust Enrichment: Comparative Insights Into the Law of Restitution’ (1999) 37(1) *Alberta Law Review* 1, 20–3.

⁴¹ Peter Birks, ‘Restitution Without Counter-Restitution’ (1990) 3 *Lloyd’s Maritime and Commercial Law Quarterly* 330, 330.

⁴² See, eg, *Spence v Crawford* [1939] 3 All ER 271, 288–9 (Lord Wright). As noted earlier, this was also the reasoning behind the grant of the charge in favour of the defendant in *Winefield v Clarke*.

⁴³ *Gill v Garrett* (n 1) [460]. Slattery J left open whether Garrett’s estate had a viable counter-claim in unjust enrichment against Gill (at least in relation to some interest-free loans made by Garrett to Gill) at [461].

receiving free accommodation), this fact may bear upon (or even preclude) the caregiver's claim. Does this therefore mean that where a caregiver lives without charge in the home of the recipient of the care, the caregiver will always have an award of restitution reduced (or denied entirely)? As explained above, this issue is best understood as one of counter-restitution. Consider a variation of the facts of *Gill v Garrett*: Garrett accepted Gill's care knowing Gill expected financial reward, whereas Gill accepted the accommodation provided by Garrett only because it was offered gratuitously. Indeed, suppose that Gill already had his own accommodation, and thus would only have lived with Garrett on the assumption the accommodation was provided gratuitously.⁴⁴ In this hypothetical scenario, it is at least arguable that Gill's claim for restitution in unjust enrichment would *not* be subject to a requirement of counter-restitution.⁴⁵ This is because, as noted above, the nature of a recipient's choice of an enrichment informs the subsequent valuation of that enrichment.⁴⁶ The upshot of this point is that it cannot be simply assumed that the value of caregiving provided to a defendant will always be neatly set-off against any reciprocal benefits provided to the claimant. The issue will turn upon a precise examination of the terms on which each party accepted the relevant benefits from one another.

V FAILURE OF BASIS AS AN UNJUST FACTOR?

One further, interesting aspect of *Gill v Garrett* is Slattery J's conclusion that Gill could not make out an unjust factor for the purposes of a claim in unjust enrichment.⁴⁷ For reasons of space, what follows is a brief examination of why Gill was unable to show that the transaction in question (the conferral of caregiving services) was vitiated by a 'failure of basis'.

⁴⁴ This would prevent Garrett arguing that Gill was saved a 'necessary expense'. When a defendant's enrichment comes in the form of the saving of a necessary expense, the law will presume the defendant chose the enrichment (even absent any objective manifestation of choice). On this, see *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17. See also Edelman (n 26) 228–9.

⁴⁵ See also Mindy Chen-Wishart, 'Unjust Factors and the Restitutionary Response' (2000) 20(4) *Oxford Journal of Legal Studies* 557, 572.

⁴⁶ This argument assumes that the principles of unjust enrichment applicable to a primary claim for restitution apply equally to a cross-claim for counter-restitution. For a recent example of this assumption, see *Akierman Holdings Pty Ltd v Akierman (No 2)* (2020) 147 ACSR 63, 88–92 [160]–[188] (Parker J).

⁴⁷ *Gill v Garrett* (n 1) [463]–[466].

In a claim in unjust enrichment involving caregiving, it will commonly be argued that the unjust factor is failure of basis. A failure of basis occurs when a plaintiff performs a service in contemplation of a certain state of affairs and that state of affairs fails to materialise.⁴⁸ The condition of the plaintiff's consent to the transaction having failed, the plaintiff can seek restitution from the defendant. In determining the basis of the conferral of caregiving, courts are necessarily required to consider whether the caregiving was offered gratuitously—if a plaintiff and defendant have (objectively⁴⁹) considered that the caregiving was provided on gratuitous terms, the basis of the caregiving cannot fail when the plaintiff fails to receive a reward from the defendant. The problem for caregivers seeking to rely upon the unjust factor of failure of basis, however, is that courts appear vulnerable to broad assumptions that caregiving services are usually performed altruistically.⁵⁰

At first glance, *Gill v Garrett* appears to involve this sort of assumption. Slattery J's remark that the facts of *Gill v Garrett* are 'not the territory of restitution'⁵¹ might be thought to reflect a judicial preference for viewing domestic caregiving as the product of familial bonds or the ties of companionship.⁵² This preference would essentially constitute a preference for viewing domestic caregiving as gratuitously conferred, and would thus prevent reliance upon the unjust factor of failure of basis: if the care was conferred gratuitously, the absence or unwinding of a disposition in the plaintiff's favour can hardly result in a failure of basis. Arguably, though, Slattery J's conclusion that a failure of basis could not be made out once again reflected the unique facts of *Gill v Garrett*. As noted earlier, despite Gill's claims to the contrary, the objective evidence suggested that Gill had provided Garrett with the caregiving on a gratuitous basis. Accordingly, in concluding that Gill could not make out a failure of basis, Slattery J did not need to rely upon any general or pre-conceived view about the motives of domestic caregivers.

This being so, the decision in *Gill v Garrett* implicitly raises a further issue. Can the rescission or failure of a disposition to a caregiver cause the objective basis of caregiving to fail, *regardless of the apparent gratuitous intent of the*

⁴⁸ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 382 (Mason CJ, Deane, Doohey, Gaudron and McHugh JJ).

⁴⁹ *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, [226]–[227] (Mason P, Sheller and Hodgson JJA).

⁵⁰ See Degeling and San Roque (n 9) 69. See also Bant (n 5) 307–8.

⁵¹ *Gill v Garrett* (n 1) [465].

⁵² Similar comments can be found elsewhere. See, for example, *Walsh v Singh & Ors* [2009] EWHC 3219, [67] (Purle J).

caregiver? Suppose a plaintiff continues to provide caregiving services to a defendant after a gift in favour of the caregiver is made by the defendant, only for that gift to be later rescinded or otherwise set aside. Here, there appears to be an argument that the basis of the conferral of the caregiving has failed. Logically, even if the caregiving was *initially* provided by the plaintiff gratuitously, it seems unlikely that, upon receiving the gift, its retention was not at least *one* basis⁵³ for the continued caregiving. As *Gill v Garrett* demonstrates, however, the situation is different when a plaintiff continues to care for a defendant despite the absence of a disposition in the plaintiff's favour. In this scenario, it may be harder for the plaintiff to counter evidence that the plaintiff conferred the care gratuitously. This will be particularly so if the plaintiff initially communicated a gratuitous intent to the defendant—after all, it is the objective and *mutual* basis of the caregiving, not the plaintiff's subjective condition for providing the care, that must fail.⁵⁴

Nonetheless, there remains a difficult question of whether, perhaps for reasons of policy,⁵⁵ the basis of the conferral of caregiving services should be presumed to have failed if the caregiver does not end up benefiting from the provision of the caregiving. This issue requires greater attention than this note can provide. All that can be said with certainty is that the realities of full-time care, and the significant disadvantages incurred by devoted caregivers, should mean that courts are wary of finding without strong evidence that the objective basis of the provision of such caregiving services is gratuitous.

VI CONCLUSION

Gill v Garrett is a significant decision, confirming the view of private law scholars that caregiving can be the proper subject of a claim seeking restitution in unjust enrichment. More importantly, however, *Gill v Garrett* provides a useful examination of the issues that such a claim will need to overcome. As we have seen, these issues arise not only in relation to each of the three primary elements of a claim in unjust enrichment, but also in connection with the requirement of counter-restitution. Sitting behind these

⁵³ A transaction can have more than one basis: Edelman and Bant (n 21) ch 11.

⁵⁴ See Felicity Maher, 'A New Conception of Failure of Basis' (2004) 12 *Restitution Law Review* 96, 100–1. See also the result in *Gilbert & Partners v Knight* [1968] 2 All ER 248, discussed at *ibid* 254.

⁵⁵ As Professor Bant notes, this would go some way towards 'detering unmeritorious actions by relatives of the elderly or deceased, whose own actions have been characterised by a history of neglect': Bant (n 5) 308.

issues are important assumptions about the nature and value of domestic caregiving. It is hoped that future decisions will build upon *Gill v Garrett* to develop a principled approach to claims in unjust enrichment involving domestic caregiving.