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Ownership as the Proximity or Privity Principle in Unjust Enrichment Law

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Introduction: Unjust Enrichment as Australian Law

The endorsement of unjust enrichment law[1] by the High Court of Australia over the last seven years has led to a point where it is now beyond doubt that unjust enrichment is a principle of Australian law. Gone are the days when unjust enrichment was suffocated in the mire of quasi contract and equity. The Goff, Jones, Birks and Burrows inspired renaissance of unjust enrichment has settled on our shores albeit in a distinctly Australian legal landscape. The latest offering of the High Court on the topic of unjust enrichment displays another strong commitment to granting restitution for unjust enrichment.[2] The judgment of Chief Justice Mason in eloquent style introduces the Birksian formula for restitution into Australian law.

That unjust enrichment is an English aberration we are naive for embracing is a claim which will stand or fall with the success or failure of unjust enrichment as a tool of legal analysis. The anti unjust enrichment school no doubt will keep the daggers raised but ever more they are being marginalised. They are now forced into a situation where anti unjust enrichment rhetoric is seen as incongruent with the Australian common law and outdated. But there is a very important role for these sceptics to play in the development of unjust enrichment law. For as they stand firm to protect their own sacred ground they ensure that the flourishing of unjust enrichment in Australia must endure sustained criticism and hindrances that will make the path of this new area of law a stronger and more exacting one. The sceptics will ensure that this new principle of law is one of the most persuasive of Australian law. And as unjust enrichment flows around all the other civil obligations the sceptics and the territorial defenders will shape this principle from many different directions.

The immediate role for Australian academics is to educate lawyers and the public in general about unjust enrichment law. In the law schools unjust enrichment is largely ignored and most law graduates take their degree without any (or at least detailed) understanding of the topic. This situation has to be remedied in light of the acceptance of unjust enrichment by the High Court. Unjust enrichment has to flow through our law schools and journals just like any other topic of Australian law. To refuse to integrate the new principle into the law curriculum and journals will only cause confusion and uncertainty as to how the principle works and how citizens can benefit from its operation. My aim in this article is to briefly introduce the basic structure of unjust enrichment law and then to set forth an argument that ownership is the proximity or privity principle of

* I am thankful to Graeme Orr, Sharon Erbacher, Michael Bryan, Peter Birks, John Dewar, Derek Davies and most specially Peter Butler for reading and commenting upon earlier drafts of this article.

1 This follows the Birks' terminology which suggests unjust enrichment is the causative event and restitution the remedy and as other civil obligations are named after their causative events, eg contract or tort, and not their remedies, eg damages, the more appropriate title is unjust enrichment law rather than the law of restitution: P Birks, *Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) chaps 1 and 2. See also the use of the term 'unjust enrichment law' by Deane and Dawson JJ in *Baltic Shipping Co* v *Dillon* (1993) 176 CLR 344, 376, 378.

2 *Commissioner of State Revenue* v *Royal Insurance Australia Ltd* (1994) 126 ALR 1.

autonomous unjust enrichment. This is an important argument in that it seeks to explain why a plaintiff is allowed into the courts to ask for restitution; it is an argument that takes us to the touchstone of the modern law of unjust enrichment.

Part I. An introduction to unjust enrichment law

There is still much confusion over what actually amounts to unjust enrichment and when and where this new causative event will be remedied by restitution. In an approach given impetus by Seavey and Scott, substantially developed by Dawson, Goff and Jones and well refined by Palmer, Birks and Burrows, unjust enrichment is said to be a generic conception which describes the causative event of loss of value by the plaintiff and acquisition of that value by the defendant in circumstances that are unjust. Unjust enrichment is said to be a generic conception because it unifies under a general loss/gain banner disparate categories of case such as mistaken, *ultra vires* and qualified transfers of value. A classic case of unjust enrichment arises when plaintiff (P) pays $100 to defendant (D) by mistake; P loses $100 and D gains $100 in circumstances that are unjust because of the mistake. A mistaken transfer of value represents a specific category of case within the general principle of unjust loss/gain (ie, enrichment). Birks is keen to root unjust enrichment back to the cases in order to give it clarity and certainty through precedents and thus it is the category of case, eg mistaken transfer of value, that provides the legal doctrine while the concept of unjust enrichment generates the general underlying theme or principle.

The key issue in unjust enrichment law is not the actual loss to the plaintiff at the end of the day but rather the loss of value from the plaintiff to the defendant in unjust circumstances. To illustrate the point let us consider the situation where P, a pool builder, transfers $100 to D, the taxation office, mistakenly believing the money is owing as a tax payable on every swimming pool constructed but 'passes on' the loss to a third party (TP) by raising the purchase price of the pool by $100. In this case, restitution, the remedy for unjust enrichment, will be open to the plaintiff because the crux of the causative event is the loss to the plaintiff and gain by the defendant in unjust circumstances. In the passing on example, regardless of the mitigation of the loss by the plaintiff, the defendant has still acquired value in unjust circumstances at the plaintiff's expense and should be made to give restitution.[3]

Restitution, as a remedial response, is concerned with restoration to the plaintiff of the benefit received by the defendant not with compensation for loss or damage. For example, if P transfers $100 to D in unjust circumstances, eg pursuant to a mistake, then P could seek, through an *in personam* claim, the judicial remedy of restitution for unjust enrichment to the extent of $100, ie the value or benefit received by D. If $60 of the benefit received had been exhausted on food, yet $40 which had been deposited in a bank account and mixed with other funds remained or survived in an identifiable form, P could seek through an *in rem* claim proprietary restitution of the value surviving, ie $40. Such a claim, which is contingent upon the finding of a 'proprietary base' or post causative event proprietary interest, would be invaluable if D was insolvent. Under Birks' scheme first measure or value received claims must alway be *in personam* while second measure or value surviving claims can be *in personam* or *in rem*.

A general theme of unjust enrichment law is that the loss to the plaintiff equals the gain to the defendant; added together they equal zero. For instance, if the plaintiff pays across $100 to the defendant pursuant to a mistake, the plaintiff's loss and the defendant's gain is equivalent, *viz* $100. This equivalence of loss and gain means that the amount of

3 *Ibid.* Cf A Burrows, *The Law of Restitution* (London: Butterworths, 1993), 475–476; R Goff and G Jones, *The Law of Restitution* (4th ed, London: Sweet and Maxwell, 1993), 553.

restitution a plaintiff can claim is limited to the loss they have suffered as that will equal the amount the defendant has gained. It is possible for second measure claims to be higher than first measure claims because the value lost to the plaintiff, but still surviving, may have increased in worth. In summary to this point then, where a defendant is enriched at the expense of the plaintiff in unjust circumstances, the loss and gain necessarily being equivalent, the plaintiff may seek restitution for unjust enrichment.

In some cases a defendant may be able to resist the claim for restitution by showing a compelling reason for her being allowed to retain the enrichment received. In this situation the defendant is said to have a defence to the claim for restitution. The significant defence emerging is that of change of position.[4] The exact nature and scope of this defence is not yet fully developed. However, at a general level, it can be said that if a defendant changes her economic circumstances in an extraordinary way because she has been enriched, then she has a defence to restitution called change of position. For example, if P mistakenly transfers $100 to D, and D uses the $100 to buy groceries, then there is no extraordinary outgoing and no detrimental reliance on the receipt of the enrichment. The issue becomes much more difficult if D spends the money on a weekend trip to Surfers Paradise which she would not have undertaken but for the enrichment. In this scenario the outgoing is extraordinary and detrimental reliance on the enrichment is arguable. A detrimental reliance approach to change of position would mean that in a situation where P pays D $100 pursuant to a mistake, and then the $100 is either stolen from D or destroyed in a house fire, D would have no defence of change of position. In this case a wider conception of change of position focusing on whether it is inequitable to order the defendant to make restitution would be required.[5]

A significant feature of Birks' schema is the distinction between autonomous/subtractive unjust enrichment and unjust enrichment arising from civil wrongs (commonly called restitution for wrongs).[6] The core of unjust enrichment law is the scenario where value in a proprietary interest or ownership is subtracted from the plaintiff and acquired by the defendant, the legal problem to be remedied, in this case by restitution, is that of loss and gain in unjust circumstances. This is what Birks terms 'subtractive unjust enrichment'. Restitution for wrongs, on the other hand, arises when the defendant makes a gain out of a civil wrong as opposed to subtractive unjust enrichment, eg where she breaches an equitable duty or commits a tort and makes a gain from the wrong. Birks contends this is another sense of unjust enrichment. The 'unjustness' and 'at the expense of' ideas are satisfied in this case by the wrong done to the plaintiff. It is important to note that restitution for wrongs rises to the fore in situations where the plaintiff has suffered no apparent loss and no compensatory damages are recoverable, or where compensatory damages are available but represent a less attractive option. In this area of unjust enrichment law there is no inquiry into the subtraction of value from the plaintiff; there is no requirement to satisfy the zero sum game as in subtractive unjust enrichment. The gist of recovery is that D has made a gain out of doing a 'wrong' to P and therefore should give it to the plaintiff. In this sense the nature of the recovery in this

4 The change of position defence was endorsed by the High Court in *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 384–386. On change of position and public authorities: see *Commissioner of State Revenue* v *Royal Insurance Australia Ltd* (1994) 126 ALR 1, 8.

5 On the notion of change of position and its narrow and wide formulations, see P Birks, 'English Recognition of Unjust Enrichment' [1991] *Lloyd's Maritime and Commercial Law Quarterly* 473, 486ff; Burrows, *supra* note 3, 421ff; M Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd* v *Commonwealth Bank of Australia*' (1993) 15 *Sydney Law Review* 461, 484–487. On its applicability in second measure or proprietary restitution, see A Oakley, O Parker and A Mellows, *The Modern Law of Trusts* (6th ed, London: Sweet and Maxwell, 1994), 628ff.

6 Birks, *supra* note 1, ch 1; Mason CJ supports this distinction in *Commissioner of State Revenue* v *Royal Insurance Australia Ltd* (1994) 126 ALR 1, 14. It is conceivable that the same set of facts could generate alternative claims for restitution for subtractive unjust enrichment and restitution for wrongs: Birks, *supra* note 1, 314; Burrows, *supra* note 3, 377.

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area appears more like a penalty than restitution and thus it is not surprising that this type of recovery, unless provided for in a statute, is much more problematical. This article is concerned primarily with subtractive unjust enrichment.

As noted above, Birks makes another significant distinction, this time between first and second measure (of value) restitution. First measure claims are always *in personam* (personal claims having no priority in insolvency situations) for the value (first) received by the defendant. Second measure claims can be personal or proprietary and seek to recover the value surviving or the property surviving respectively. All proprietary claims, which bestow priority in insolvency over unsecured creditors,[7] are second measure or value surviving claims and are conditional upon the existence of a proprietary base — a post causative event proprietary interest.[8]

What are the unjust circumstances that enliven unjust enrichment law? Birks categorises them as cases of vitiated intent to pass the value, eg mistake, qualified intent to pass the value, eg total failure of consideration, and miscellaneous categories such as transfer of value pursuant to *ultra vires* demand and free acceptance of value. In Australia the High Court has clearly accepted that mistaken — the vitiated intent, unjust circumstance or factor — payments are recovered pursuant to a principle of unjust enrichment, ie loss and gain.[9] It cannot be any clearer on this point. As for total failure of consideration, the High Court has once again clearly accepted this unjust factor as representing part of the law of unjust enrichment[10] while the unjust factor of *ultra vires*[11] has not passsed unnoticed by members of the High Court in *Mutual Pools* v *Commonwealth*[12] and *Commissioner of State Revenue* v *Royal Insurance Australia Ltd.*[13] In addition, the term 'unjust enrichment'

7 The extent to which restitutionary claims should gain priority in insolvency is a vigorously debated issue: see *In re Goldcorp Exchange* [1994] 3 WLR 199; A Oakley, 'Proprietary Claims and Their Priority in Insolvency' (1994) *Occasional Paper Series* No 2, Centre for Commercial and Property Law, Queensland University of Technology.

8 The preceding two paragraphs are a thumbnail sketch of Birks, *supra* note 1, chaps 1–3, 10–11.

9 *ANZ Banking Group Ltd* v *Westpac Banking Corporation* (1988) 164 CLR 662, 673–674; *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 378–379; *Commissioner of State Revenue* v *Royal Insurance Ltd* (1994) 126 ALR 1. A major issue arising out of the latter two cases is the role of the defence of 'voluntary submission to an honest claim' supported by the majority in *David Securities* (at 374) and the defence of 'honest receipt' (confined to cases of mistake of law) supported by Brennan J in *David Securities* (at 399) and *Royal Insurance* (at 26). Toohey and McHugh JJ, part of the majority in *David Securities*, concurred with Brennan J's judgment in *Royal Insurance*. The implementation of the defence in either formulation has been cogently criticised: Bryan, *supra* note 5, 475–484. An excellent overview of the historical development of restitution for mistake is found in Peter Butler's 'Mistaken Payments, Change of Position and Restitution' in P Finn (ed), *Essays On Restitution* (Sydney: Law Book Co Ltd, 1990), 87ff.

10 *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221; *Baltic Shipping Co* v *Dillon* (1993) 176 CLR 344; *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 388–390 per Brennan J; *Foran* v *Wight* (1989) 168 CLR 385, 438 per Deane J. It is interesting to note that the High Court refused leave to appeal in a case asking them to restate *Pavey* in a discourse of total failure of consideration rather than free acceptance: see *Independent Grocers Co-operative Ltd* v *Noble Lowndes Superannuation Consultants Ltd* (Adelaide Registry 25/8/94). However, they said the reason for refusing leave was owing to the unsuitability of the facts of the case for determining a question of general principle. *Muschinski* v *Dodds* (1986) 160 CLR 583 is explicable as an example of restitution for unjust enrichment in circumstances amounting to a total failure of consideration: 618–619 per Deane J; Birks, *supra* note 1. It is arguable the Court has not yet fully considered (cf *Muschinski*, *David Securities*, 382; *Baltic Shipping*, 389) the broader 'failure of circumstances' notion of total failure of consideration on which see Bryan, *supra* note 5, 465–466. See also P Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 47ff where common endeavour and reliance are posited as the bases of liability. The scope of Finn's approach is inexact and this suggests one should accept the cogent and exact theory of restitution for unjust enrichment where there is total failure of consideration and use Finn's theory as a supplement where necessary. It is imperative that the interaction of unjust enrichment and equity in this and other ways be explored: M Byrne, 'Restitution and Equity' LLM thesis, Queensland University of Technology (1994), *Stern* v *McArthur* (1988) 165 CLR 489, 526–527.

11 On which see B Fitzgerald, 'Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment' (1993) 2 *Griffith Law Review* 1.

12 (1994) 179 CLR 155, 176.

13 (1994) 126 ALR 1, 9–10 (Mason CJ), 27 n 74 (Brennan J).

has been used in a variety of ways by the High Court[14] and lower courts.[15]

At this point in time there is little doubt that the two key unjust factors of the law of unjust enrichment *viz*, mistake[16] and total failure of consideration, have been introduced into Australian law by the High Court in a discourse of loss and gain, unjust enrichment and restitution.[17] These two unjust factors are the very essence of unjust enrichment law and generate the majority of cases. Therefore it is time to start looking more closely at how this new area of law will develop in Australia and at what actually motivates it.[18]

The rapid (re)development of the law of unjust enrichment in Australia[19] and the United Kingdom[20] raises the fundamental issue of what is the touchstone of this new legal doctrine? For subtractive unjust enrichment the basic premise is that: '*You have taken the value of my property (including services) in unjust circumstances and I should have it back*'.

Unjust enrichment in its role as an organising principle[21] of the common law aims to explain topics/precedents in the law of civil obligations emanating from both law and equity, and topics in the law of property, namely the restitutionary proprietary interest.

At bottom, the law of unjust enrichment is profoundly liberal. It is motivated by a concern for the individual's liberty, freedom and autonomy predominantly in the context of commercial transactions. A more specific way of expressing this is to say that unjust enrichment is all about the liberal institution of private property and the way it can be protected. Protection of this right to hold private property is fundamental (in liberal theory) to individual autonomy, rights or happiness.[22] This is not to say that unjust enrichment law single-mindedly protects the right to private property above all other interests. The plaintiff's action for restitution is conditional upon showing that the property was affected in unjust circumstances while the defendant may raise notions such as change of position. Thus it is clear that the protection of the right to private property and individual liberty is carried out in a context[23] which seeks to resolve competing claims. Unless the transfer of

14 *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107, 174–176 per Gaudron J. See discussion justifying this use of unjust enrichment in L Proksch, 'Restitution and Privity' (1994) 68 *Australian Law Journal* 188; *Baumgartner* v *Baumgartner* (1987) 164 CLR 137, 153 per Toohey J; *Mason* v *New South Wales* (1959) 102 CLR 108, 146 per Windeyer J.

15 For example: *Winterton Constructions* v *Hambros* (1992) 101 ALR 363, 373–376 per Gummow J; *Bryson* v *Bryant* (1992) 29 NSWLR 188, 205ff per Kirby P. and 222–223 per Sheller JA.

16 Subsumed under, or allied with, this unjust factor is the very important area of ignorance: see *Lipkin Gorman* v *Karpnale Ltd* [1991] 2 AC 548; B Fitzgerald, 'Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment' (1994) 13 *University of Tasmania Law Review* 116, 120ff; Birks, *supra* note 5, 482–483.

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18 Key issues facing the law concern the ambit of recovery. The change of position defence will have an important role to play here.

19 *ANZ Banking Group Ltd* v *Westpac Banking Corporation* (1988) 164 CLR 662; *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221; *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353; *Baltic Shipping Co* v *Dillon* (1993) 176 CLR 344; *Commissioner of State Revenue* v *Royal Insurance Ltd* (1994) 126 ALR 1.

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22 B Ziff, *Principles of Property Law* (Toronto: Carswell, 1993), 6–27.

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value is legitimate/just as dictated by the case law the right to private property is protected by unjust enrichment law saying:

> P holds property to the exclusion of all others for the purpose of generating liberty freedom and autonomy and this property holding cannot be affected (reduced in value) by any other person or entity unless the transfer is legitimate/just as dictated by the cases.

The balance between competing interests struck by the cases is begging modern re-appraisal and this is something that will be considered later in this article. The main purpose of this article is to highlight how the developing doctrine of unjust enrichment exhibits a strong concern for the right to private property and to argue that ownership of property is the privity or proximity principle of unjust enrichment. While 'unjust enrichment' completes the equation it is the ownership of property that creates the relationship between the plaintiff and defendant and defines 'unjust enrichment'. Before this argument is developed it is useful to outline just where unjust enrichment law fits into the law of civil obligations.

Part II. Where does unjust enrichment fit into the law of obligations?

In large part interferences (especially in the nature of stealing) with proprietary interests are remedied in the civil jurisdiction of the courts through the law of torts, and in particular, conversion and trespass. Both these actions require the plaintiff to have possession or an immediate right to possession to the chattel, which prerequisite is easily satisfied by someone who holds a proprietary interest in the chattel.

Unjust enrichment rises to prominence (especially in scenarios like stealing or misdirecting) when the interference is unjustly enriching and involves money.[24] This is because money (due to its function as currency) is transferred much more easily by a wrongdoer than say a cow or car. In the case of the cow or the car the general rule is that a thief cannot transfer title to the chattel, while in the case of money a recipient from a thief can take a lawful title to the notes so long as they have given good consideration.

When money is transferred there is no proprietary interest currently held in the bank notes (the chattels) and there is no possession, thus there is no action in tort. However a claim in unjust enrichment rises to give the plaintiff a remedy called restitution if the money has been transferred in unjust circumstances. In many cases the requirement for money to pass (besides a valid intent to give), namely, a bona fida purchaser for value, will activate the defence of change of position.

Unjust enrichment will have greater scope for operation where the property interfered with in an unjustly enriching manner is a chose in action. A (pure intangible) chose in action, which is property the law of torts says cannot be subject to possession and thus cannot be protected by actions in trespass or conversion, is the substance of many financial transactions of the modern day. The personal property at the heart of the banking industry is not the notes deposited but the chose in action the depositor has against the bank to recover the debt due from the bank to the depositor created by the deposit of the notes. Accordingly, remedying interference with choses in action is a significant part of the law of restitution.

Furthermore, unjustly enriching interference with the ownership of services a person is capable of supplying is something which has traditionally not been covered by the law of torts. This is an area which unjust enrichment law has embraced.

Lastly are situations where ownership in the money or other property passes through

24 Note, however, that the misdirecting cases in equity will also embrace non-monetary chattels as title has passed at law (see P Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 296).

transactions in which the plaintiff has been involved. For example, these could be gift or commercial situations involving mistaken transfers of property, or situations where property is transferred in circumstances which fail (total failure of consideration). In these scenarios, which make up a large portion of restitution cases, the proprietary interest is protected not by returning the plaintiff to full enjoyment of the property but by awarding a court sanctioned monetary substitute.

In all of these situations if one asks why restitution was given, the answer will be because there has been enrichment by subtraction of the value of the plaintiff's ownership in unjust circumstances.

Part III. The basic premise of unjust enrichment expanded

Professor Peter Birks describes the modern law of unjust enrichment in terms of the following formula.[25] There must be:

a) Unjust;
b) Enrichment of the defendant;
c) At the expense of the plaintiff:
   i) by subtraction from the plaintiff; or
   ii) by doing wrong to the plaintiff;
d) Where no defences are applicable.[26]

Professor Birks sees the underlying rationale of restitution for (autonomous or subtractive) unjust enrichment as the loss of wealth or value by the plaintiff and correlative gain (of the loss) by the defendant in unjust circumstances. The operation of this principle, however, becomes somewhat complex when one moves on to ask 'how is value of the plaintiff evidenced?' A general answer to this question might be: by a pre-causative event, proprietary interest or ownership; and thus as a consequence and as things stand,[27] unjust enrichment law is all about unjustly enriching interference with proprietary interests in property or services.[28] In other words, unjust enrichment law in its subtractive sense is all about interfering with the ownership of property in circumstances which are unacceptable to our legal system (including the plaintiff) which wishes to see liberty and autonomy facilitated by private property. As Professor Ziff (building on the work of Professor Honore) has pointed out, ownership of property is made up of a bundle of rights or incidents of property.[29] To take away just one incident may in some cases ruin/interfere with/subtract from, the value of ownership to such an extent that an acquisition of value (a gain) must be said to have taken place. This is very much the premise of Birksian unjust enrichment; the loss of value or incidents of ownership in unjust circumstances. Accordingly, what unjust enrichment law focuses on is the transfer of value not the transfer of ownership of property. The claim made here is that value is a meaningless term unless one links it to pre-causative event ownership. That is, if the plaintiff did not own the property in which the value inhered and emanated before the unjust enriching event, then it is incomprehensible at this stage of the development of our legal system to say value

25 The Birks' formula owes much to the groundbreaking work of W Seavey and A Scott in the American Law Institute's *Restatement on the Law of Restitution: Quasi Contracts and Constructive Trusts* (1937), and of Robert Goff and Gareth Jones in their landmark text the *Law of Restitution* (London: Sweet and Maxwell, 1966).

26 P Birks, 'Definition' in *An Introduction To The Law Of Restitution* (Oxford: Clarendon Press, 1989).

27 Contrast this with Birks, *supra* note 5, 481 where he suggests a non proprietary theory of 'enrichment caused in fact'. See also, Fitzgerald, *supra* note 16.

28 At this stage proprietary interests predominate in the law of unjust enrichment. However, it is conceivable that possessory interests could underpin unjust enrichment and restitution in some cases, yet most of these instances would be adequately covered by tort law. Cf *Rowland* v *Divall* [1923] 2 KB 500; Burrows, *supra* note 3, 19.

29 Ziff, *supra* note 22, 1–5.

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29 Ziff, *supra* note 22, 1–5.

has been subtracted from P and transferred to D. Ownership then is the starting point of any claim in unjust enrichment because it tells us who holds value at the start and in turn who can come into the courts and claim loss of value.

It is important to point out that ownership is not the only ingredient needed to launch a successful action for restitution. Ownership is not the thing that defines when unjust interference has occurred although it may in a philosophical sense underpin the definition of such unjustness.[30] Ownership or the proprietary interest is not an unjust factor; it does not define at a doctrinal level why the transfer of value has been unjust. Circumstances like vitiated intent or qualified intent to transfer value define when the unjustly enriching interference with ownership is unacceptable in our legal system. Ownership is not an unjust factor. The approach to restitution of the late Professor Stoljar has moved some to suggest that he saw 'property' as an unjust factor.[31] Such claims too easily dismiss the subtleties of the Stoljar approach and themselves pay too little attention to the notion of ownership as the relational factor in unjust enrichment law. Owing to the fact that English restitutionary lawyers are extremely critical of Stoljar's theory, any claim that ownership is the touchstone of unjust enrichment law must sensibly explain his theory. Before doing so, it is appropriate to clarify the terminology used in this article.

Property is normally something that is capable of being owned,[32] and ownership is normally evidenced by a proprietary interest in the property. In *Minister of State for the Army* v *Dalziel*[33] Latham CJ explained:

> [T]he term 'property' is ambiguous. As applied to land it may mean the land itself in relation to which rights of ownership exist, or it may refer to the rights of ownership which exists in relation to the land . . . I can see no reason why, so far as land is concerned, 'property' in s 51(xxxi) of the Constitution should not be interpreted so as to include land itself and also proprietary rights in respect of land.[34]

In this article the terms 'ownership' and 'proprietary interest' are used to describe interests/rights in 'property' which term is meant to describe the object in which the rights of ownership exist. It must be pointed out though that in the discussion of Stoljar's theory that follows 'property' is used to describe ownership because this is how Stoljar used the word.

Part IV. The touchstone of unjust enrichment

The debate over why a particular plaintiff should be able to raise the unjustness of a transaction in the courts has been significant. In unjust circumstances Z, why can plaintiff X gain restitution? The first and obvious response is that plaintiff X gains restitution because she has lost something to the defendant in unjust circumstances; 'your loss my gain'. But what has she lost? A proprietary interest? Well not in every case. An opportunity to use property and enjoy it — the value of the property or of one of its incidents? That is perhaps closer to the mark. What then provides the proximity or privity principle in unjust enrichment — what is the touchstone of recovery? Why this particular plaintiff? One must chart the recent history of unjust enrichment to fully appreciate the answer.

(a) Professor Stoljar and property

The best place to start is with the writings of the late Professor Stoljar who approached the event of loss/gain in relation to money by saying that the rationale for recovery, even after the causative event, was that the money remained the plaintiff's property and therefore

30 Fitzgerald, *supra* note 16, 120ff.

31 See E McKendrick, 'Restitution, Misdirected Funds and Change of Position' (1992) 55 *Modern Law Review* 377, 382; Bryan, *supra* note 5, 462; McCamus, *supra* note 21, 142; Burrows, *supra* note 3, 4.

32 Ziff, *supra* note 22, 4–5; K Gray, 'Property in Thin Air' [1991] *Cambridge Law Journal* 252.

33 (1944) 68 CLR 261.

34 *Id* 276.

should be returned. Stoljar wrote about this topic under the rubric of 'quasi contract' and directed his attention primarily to the recovery of money. The right to recover money he said was of two kinds: contractual or proprietary.[35] Quasi contract actions for money had and received he explained were premised on the fact that the money received by the defendant was not D's property and therefore P should have it back. He suggested that D could not show a better title to the money than P because it had not passed with P's full transactional or transmissive consent.[36] He said:

> Indeed a basic theme running through our law is that, things or money cannot validly pass from one person to another without the former's sufficient consent either before or after the event.[37]

In essence then Stoljar said quasi contractual claims described a situation where P said to D: '*I want the money back because it is still mine; it has not passed through a valid transaction*'.[38] With this Stoljar seems to be suggesting that title to money will not pass where there is vitiated intent to transfer. Such a view *apparently* contradicts the orthodox approach that if there is consideration title to the money passes, although in the case of a gift the Stoljarian approach would be in line with the orthodoxy. The great advantage of quasi contract for Stoljar was that it provided a remedy for the interference of P's retained property right that tort did not. But tort law was only deficient to the extent that it did not provide a remedy for conversion of the notes if the money passed as currency or became unidentifiable as P's before the receipt by D. Both of these situations are conceivable but on the orthodox view leave no residue of a proprietary interest after the unjust event and thus no right to possession. This suggests that Stoljar's 'property' must be seen as something different from a proprietary interest in the bank notes but rather as an abstract notion which could found an *in personam* action in unjust enrichment (for money had and received) but not the right to possession to support an action for conversion.

What Stoljar was advocating was that no tortious action arose because there was no right to possession but there was a response in quasi contract. How could this be the situation? Stoljar's articulation of his theory is full of *apparent* contradictions. At one point he says P can recover in quasi contract because the money (after the causative event) *belongs* to P; P has better *title to the money* than D.[39] At other points he says that 'property retained in P', means that the transfer of property has been without P's consent, and that P's 'right to the money is proprietary but the action by which to enforce it is personal'.[40] In essence, while Stoljar was arguing that P still owned the money he was clearly acknowledging the fact that title to the specific notes had passed, albeit unfairly, and while P could not claim it back *in specie* P could claim a court sanctioned monetary substitute namely restitution.[41] For Stoljar the only way to protect a claim for money as opposed to specific notes was through this *in personam* claim in quasi contract.[42] This may have been an oversimplification because even though an *in rem* claim may not give you back the specific notes, it will give ownership of what the notes have been exchanged for if tracing is possible, which is usually not the case at law. With the idea that tracing would be very

35 S Stoljar, *The Law of Quasi Contract* (2nd ed, Sydney: Law Book Co, 1989), 5. It should be noted that in the first edition of *The Law of Quasi Contract* (Sydney: Law Book Co, 1964) Stoljar seemed to reject the notion of unjust enrichment in favour of his proprietary theory (at 6) while in the second edition unjust enrichment is embraced and seen to be evidenced by the proprietary theory (at 6–7). This change appears to be more a matter of form (terminology) than substance and thus the analysis of Stoljar that follows, while focused on the second edition of his book, is (with a few terminological adjustments) equally applicable to his first edition.

36 *Id* 6.

37 *Ibid*

38 *Id* 7.

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difficult he seems to have established an elaborate though vaguely articulated theory that P still owned an unidentifiable part of D's estate (could we call this value?) and that this should be recoverable through an *in personam* action for a court sanctioned direction for D to give P money from her estate. This claim of course had no priority in insolvency.

Stoljar's approach is made clearer if one contrasts the tortious actions which related to interference with currently existing or post causative event proprietary interests in specific chattels (excluding choses in action) with Stoljar's quasi contract action which pertained exclusively to money and was premised not so much on a specific existing or post causative event proprietary interest but on a more generalised conception of ownership. Stoljar while acknowledging that the incompetence of rules of tracing at law would make it hard for P to establish ownership in a specific chattel, argued that P's original ownership had been unfairly taken away and this should be remedied. He claimed that money could have no 'ear mark' and therefore, like wine, if it is given to someone and they use it or it becomes unidentifiable, the only way to remedy the interference with your original ownership is to ask the court to order D to give P an equivalent amount of wine or money in substitution or restitution.[43]

A contextualised summary of Stoljar's approach might read:

1. P owns money;
2. P pays the money by mistake to D;
3. Assume specific ownership of the money passes to D;
4. The specific money paid across becomes unidentifiable.

At this point Stoljar says:

5. P still retains property;
6. Property is retained because of transactional inequities (unjust circumstances);
7. P cannot recover the original money *in specie*;
8. P can recover by way of restitution a sum equivalent to that originally paid across.

The main criticism of Stoljar's theory centres on point 5. At that point P does not retain any specific ownership in the money originally transferred and Stoljar acknowledges that, so what was he saying? He was saying that P had a *sui generis* form of ownership, not to specific chattels in D's estate, but to a value/share, equalling the amount of the money transferred, of D's estate. And as this *sui generis* ownership was of property undefined or unspecified it could only be recovered through an *in personam* as opposed to an *in rem* action. The more one looks at Stoljar's approach the more one realises that point 5 could be redrafted to read:

5. P still retains ownership (Stoljar's word was property) in the value of the money originally transferred.

Once we put Stoljar's theory in these terms it is no different from Birks. Admittedly, Stoljar's views that unjust enrichment is purely concerned with chattels with no 'ear mark', primarily money, and that unjust enrichment actions are all *in personam*, are unacceptable to Birks but the basic theme of Stoljar's approach accords with Birks' theory. But let us not cloud the issue. Birks' theory is a magnificent road map that has and will continue to define Australian unjust enrichment law. The point made here though, is that Stoljar's theory very clearly highlights the role of the pre-causative event specific ownership.[44] For

43 *Ibid*

44 In actual fact Stoljar was suggesting that while the law of property may no longer have recognised P's original proprietary interest, the law of quasi contract supplied an *in personam* claim to redress unjustly enriching interference with the pre causative event ownership and enforce a *sui generis* form of ownership in the value of the original ownership. Quasi contract in this sense was concerned with law pertaining to the ownership of value of previously held proprietary interests as opposed to law pertaining to the current holding of proprietary interests which is the law of property.

Stoljar 'property (retained)' which seems to equate with Birks' notion of (ownership of) 'value (retained)', exists and is recoverable because the original ownership has been taken away in a transactionally unfair manner. Stoljar hits right upon the notion of ownership as the touchstone while Birks avoids mentioning it, probably to distance himself from the *apparently* misconceived Stoljarian approach. It is suggested that if we can re-interpret Stoljar's theory in the way put forward here, then it is imperative for the current advocates of unjust enrichment law to acknowledge the role of ownership in this developing area of law.

The difficulty with Stoljar's sole focus on money was that it failed to adequately explain the rationale for recovery in situations other than money, eg where a chose in action is concerned, although it was probably (with some imagination) capable of explaining those events in much the same way as we do today. The claim of the English restitution lawyers is that Stoljar did not acknowledge the fact that a proprietary interest in property did in some circumstances pass through the causative event. This seems to be what has motivated Birks in his resort to the concept of value. With value as the touchstone of unjust enrichment one can easily explain the cases where proprietary interests do pass along with cases where proprietary interests do not pass through the causative event. Unfortunately the criticism of Stoljar has been far too simplistic and, as argued above, there is really little difference between Birks' concept of value and Stoljar's *sui generis* concept of ownership of money after the causative event.

What have the critics of Stoljar said?

The following examples will help to explain the position of English and Canadian restitution lawyers who dismiss the Stoljarian approach:

(1) P gives D $500 pursuant to a mistake so significant that a proprietary interest does not pass (per *Illich* v *Queen*[45]).

(2) P gives D $500 pursuant to a mistake sufficiently insignificant for the proprietary interest to pass to D.

In example (1) Stoljar (as the majority of his critics interpret him) would say the money is recoverable through an *in personam* action because the proprietary interest in the money is still retained by the plaintiff after the causative event. The transfer of the proprietary interest would be transactionally unfair because of the mistake and therefore P should retain property. In actual fact Stoljar did not allude to this situation.

Birks on the other hand would explain example (1) by saying the defendant has received the plaintiff's value and therefore the plaintiff has an *in personam* action to recover the value lost to the defendant. The fact that a proprietary interest was retained is only important for Birks in explaining whether second measure proprietary restitution is available. In example (1) Birks sees the shell/form of the property, the proprietary interest, remaining with the plaintiff, but its substance or value having gone to the defendant.

Example (2) highlights where the Stoljar thesis was found wanting in the eyes of English and Canadian restitution lawyers. In this example the proprietary interest has passed to the defendant and therefore the justification for the plaintiff's recovery, property retained, is non-existent. Stoljar, the critics say, can hardly claim for the money to be given back, on the basis of property retained, if the proprietary interest in the money has lawfully passed to the defendant. On the other hand, Birks can easily explain the justification for the plaintiff's recovery by saying the defendant took the plaintiff's value in unjust circumstances. This value can be sheeted back to the plaintiff because the plaintiff held before the causative event a proprietary interest in property from which the value emanated.

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interpreted by the majority of his critics) it is only the first example that allows the claim that the defendant interfered with the plaintiff's existing proprietary interest in property, ie retains P's property. Birks resort to value then produces a refinement to the unjust enrichment formula that expunges the *alleged* difficulties of Stoljar's approach and more easily caters for the intricacies created by the *Illich* principle.

As suggested earlier, it is arguable that Stoljar saw the property that was retained as only enforceable through the *in personam* action and unique to money had and received.[46] It appears that the critics have missed the subtlety of Stoljar's approach. He, like Birks, could explain both examples quite persuasively because in essence he and Birks are using the same theory. Stoljar, as re-interpreted, would say P has a *sui generis* form of ownership not of the specific notes transferred but of a value or share of D's estate equalling the amount originally transferred — this is what property retained meant for Stoljar. P had a claim to own part of D's estate because D had taken P's money in a transactionally unfair manner. As the original notes were no longer identifiable the claim became enforceable through an *in personam* action.[47] If this is what Stoljar was advocating then the criticisms of his approach seem unfounded. Admittedly there are many valid criticisms that can be levelled at Stoljar's approach but this particular one seems ill-conceived.

Why did modern proponents of unjust enrichment not seek to rationalise Stoljar's thesis as one with respect to the transfer of property in unjust circumstances: '*you have taken my proprietary interest in unjust circumstances and I should have an in personam action for its recovery in debt, money*'. Tentative answers might be, first, there were cases where property did not pass so the Stoljar thesis could not usefully be re-interpreted this way, and secondly, it was hard to conceptualise services as being the subject of a vitiated transfer of property, they were something unique. Birks' approach was instead to resort to the notion of loss and gain of value. The term 'value' acts to avoid the difficulties with the rules of transfer of property and the notion of services as property capable of ownership. Value rises as a vague and neutral term which explains the basis of recovery in unjust circumstances and as value always passes whether it is a retained title or services case it easily explains all types of cases. But we still need to hang onto the notion of the proprietary interest to explain who owns value. In addition, with the notion of value more emphasis was placed on the unjustness of the transfer and the unjust factor than on who owned the property. Stoljar had always purported to take into account the unjust factor, eg mistake, but only as an indicia of the lack of transmissive consent which in turn proved property was retained.[48] Birks, on the other hand, uses mistake (the unjust factor) to show that the value has passed in unjust circumstances and that it should be recoverable through restitution. Is there a difference? Some suggest that Stoljar's unjust factor was property, but this is an oversimplification. He believed property was the touchstone of recovery but property was not retained unless there was an unjust event.[49] Likewise with Birks, the value cannot be recovered unless there are unjust circumstances. Accordingly, although quite different in terminology, Stoljar and Birks are very similar in locating their justification for recovery in unjustness.

The illuminating aspect of Stoljar's theory is that it openly declares the plaintiff's pre-causative event proprietary interest as the proximity or privity principle between the plaintiff and defendant while Birks declares it is the plaintiff's value. The curious thing is that value (at least at this point in time) can only persuasively be sheeted back to the plaintiff if the plaintiff held a pre-causative event proprietary interest in the money. The conclusion then is that the notion of ownership is integral to the approach of both theorists.

46 Stoljar, *supra* note 35, 7–8.
47 *Id* 7–9.
48 *Id* 6.
49 *Ibid*

In summary, Stoljar's 'property retained' when considered in the light of the foregoing analysis may have meant no more than that P retained ownership of the value of the property transferred, because that property had been taken away in a transactionally unfair manner. To this extent he was showing us very clearly the private property basis of unjust enrichment law. The right to private property was to be protected from transactional unfairness to the point that even if a proprietary interest was transferred an *in personam* action arose to restore by way of monetary substitute the plaintiff's property. This approach exemplified what the subject was about — private property and transactional fairness. It is not suggested that we revert to Stoljar's theory since Birks' approach is far clearer and more persuasive. However, the point being made is that Stoljar's theory is useful in providing an insight to the theoretical understanding of the subject and that Stoljar did not simply posit ownership as an unjust factor — he conceived of it as the very basis of the subject. This said one must remember that Stoljar talked primarily about restitution in the context of payments of money and that in the area of services he believed the doctrine of unjust enrichment was not easily applicable.

(b) Services as property

The second significant issue to broach in moving towards a theoretical understanding of unjust enrichment law is that if unjust enriching interference with proprietary interests is the touchstone, where do services, not traditionally thought of as being held by the plaintiff pursuant to a proprietary interest in property, fit in?

Stoljar in fact saw services as belonging to a separate organising concept, namely, unjust sacrifice because the benefit received by the defendant did not always seem to equate with the cost of the plaintiff's services.[50] Beatson takes a similar view on services excepting the situation where an end product arises,[51] Burrows an in-between view asking that services be received,[52] and Birks a more liberal view suggesting that services are beneficial from the time of commencement.[53] In the Burrows' or Birks' approach it must be an underlying premise that the link between the value of the services and P is some notion of ownership of the services. This being the case, a general claim can be made to the effect that unjust enrichment is concerned with unjustly enriching interference with the proprietary interest of P (in chattels or services) which causes transfer of value from P to D. Birks' and Burrows' approach certainly fits with viewing services as property capable of ownership.[54]

Whether the transfer of the value of services in all unjust circumstances permits restitution is something the High Court has not clearly addressed, although *Pavey* is fair

50 *Id* 9–10; S Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) *50 Modern Law Review* 603; G Muir, 'Unjust Sacrifice and the Officious Intervener' in P Finn (ed), *supra* note 9, 297.

51 J Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1991), 21ff.

52 Burrows, *supra* note 3, 8.

53 Birks, *supra* note 1, 126ff.

54 It might be suggested that such a conclusion could have considerable ramifications for matters such as taxation or priority in insolvency. The answer to drastic ramifications (if they exist?) may be to say that services are not owned as property but rather that they inhere in the provider in a similar or analogous way to ownership (call it personal dominion or exclusive use of that which inheres in a person), and that it is this analogous concept that is protected. Perhaps the correct view and ultimate distinction is that services are a property inherent in the body and owned invisibly, while physical objects such as chattels are external to the body and are owned explicitly. When we give across our services we in essence give across/interfere with part of our body. Services then seem to be property or part of the body and capable of ownership if not dominion, but can be treated differently in taxation or insolvency matters if needs be (?), on the distinction that they come from the body. Cf the conceptualising of information as property: R Meagher, W Gummow and J Lehane J, *Equity: Doctrines and Remedies* (3rd ed, Sydney: Butterworths, 1992), 877–880; Birks, *supra* note 1, 343ff. This in turn leads to the conclusion that the use of confidential information can be subject to restitution for subtractive unjust enrichment: Birks, *supra* note 1, 346. If information (a product of the body) is property capable of ownership then the argument for services as property capable of ownership is much stronger. In fact the provision of information may be a service.

In summary, Stoljar's 'property retained' when considered in the light of the foregoing analysis may have meant no more than that P retained ownership of the value of the property transferred, because that property had been taken away in a transactionally unfair manner. To this extent he was showing us very clearly the private property basis of unjust enrichment law. The right to private property was to be protected from transactional unfairness to the point that even if a proprietary interest was transferred an *in personam* action arose to restore by way of monetary substitute the plaintiff's property. This approach exemplified what the subject was about — private property and transactional fairness. It is not suggested that we revert to Stoljar's theory since Birks' approach is far clearer and more persuasive. However, the point being made is that Stoljar's theory is useful in providing an insight to the theoretical understanding of the subject and that Stoljar did not simply posit ownership as an unjust factor — he conceived of it as the very basis of the subject. This said one must remember that Stoljar talked primarily about restitution in the context of payments of money and that in the area of services he believed the doctrine of unjust enrichment was not easily applicable.

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indication that value can emanate from chattels or services. If the Court follows the Birksian line and accepts that all the unjust factors permit restitution of the value of services, then it will be important to conceive of services as property capable of ownership. The key issue in cases of services will be whether D has been enriched by the receipt of the services and whether the defendant can subjectively revalue the services.[55]

(c) The proprietary interest as a proximity or privity principle

In summary, the proprietary interest in property or services is used to evidence the plaintiff's ownership of the wealth or value that is lost and gained by the defendant and proves the 'at the expense of element' of Birks' formula: this could be termed the subtractive proprietary paradigm.[56] It is clear, however, that the proprietary interest does not have to pass to the defendant through the causative event for there to be unjust enrichment at the plaintiff's expense. In some cases the proprietary interest will not pass, although the defendant will through possession or control of the property have subtracted/received its value at the plaintiff's expense; in this scenario conversion will play a dominant but not exclusive role. The situation becomes more complex where the original property is exchanged by a third party (thief) for other property prior to transfer to the defendant for in that case under the Birks' scheme the exchange product must be vested in the plaintiff through a *power in rem*.[57]

The proprietary interest then becomes the proximity[58] or the privity[59] principle for restitution. Those two doctrines seem to be the appropriate analogies as they in tort (negligence) and contract respectively map out the relational boundaries of the civil obligation if not to some extent, indirectly, the substantive duty. Privity tells us that contract law is concerned with parties to the contract[60] while proximity tells us that negligence is all about reasonable care between proximate parties. Likewise ownership, while not telling us why restitution will be given, sets the parameters of the field in which restitution can operate. It tells us unjust enrichment law is focused on owners, their private property and legitimate alienation of the value of the property, not contract or negligence. It is the unjust factor that takes the matter further and the enrichment that attaches liability to the particular defendant.

Burrows' insightful treatment of this issue is a useful starting point.[61] He clearly enunciates the view that 'at the expense of' is the inbuilt privity principle of unjust enrichment and sets about working out the parameters of 'at the expense of'. In doing so, he finds that there are instances where P and D are not privy yet it can be said D is enriched at the expense of P. These cases are justified by 'exceptions to the privity principle' of which ownership is the prime example. He explains that in these three party

55 Burrows, *supra* note 3, 7ff.

56 See Fitzgerald, *supra* note 16, 125; *Commissioner of State Revenue* v *Royal Insurance Australia Ltd* (1994) 126 ALR 1, 14, 18 per Mason CJ.

57 See Birks, *supra* note 5; Fitzgerald, *supra* note 16.

58 On this notion, see *Jaensch* v *Coffey* (1984) 155 CLR 549; *Hawkins* v *Clayton* (1988) 164 CLR 539; *Gala* v *Preston* (1991) 172 CLR 243.

59 On this concept, see *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107. Privity has been the subject of cogent criticism in recent years and its role in Australian law after *Trident Insurance* is unclear: see P Kincaid, 'The Trident Insurance Case: Death of Contract?' (1990) 2 *Journal of Contract Law* 160. The primary criticism of privity is that it prevents third party beneficiaries suing on the contract. Even if third parties not privy to the contract are allowed to sue, a general limitation of proximity or privity in an extended sense is demanded: see R Flannigan, 'Privity — The End of an Era (Error)' (1987) 103 *Law Quarterly Review* 564, 573, 583–4. Lord Denning described this notion as 'sufficient interest to entitle . . . [enforcement]': *Smith and Snipes Hall Farm LD* v *River Douglas Catchment Board* [1949] 2 KB 500, 514. On reform in the United Kingdom, see P Kincaid, 'The UK Law Commission's Proposals and Contract Theory' (1994) 8 *Journal of Contract Law* 51.

60 Cf *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107.

61 Burrows, *supra* note 3, 45–54.

situations if the property received by D had up to the point of receipt been owned by P, then privity is not required. But why is ownership important here and not in the cases where privity exists?

Burrows' work is a starting point but realistically there is no reason why unjust enrichment should bother itself with privity, a notion meaning parties to the same transaction. As long as it is the plaintiff's ownership that is interfered with in an unjustly enriching way the fact that P and D are parties to the same transaction is irrelevant. In some cases, for example, where a thief steals P's property and gives it to D, P and D are only privy because of ownership not because they are parties to the same transaction. Burrows could have more usefully analysed the area by saying that ownership played the same role in unjust enrichment law as privity does in contract. If we are to take this area of law on board for development in our Australian landscape we have to push towards a deeper understanding of why a particular plaintiff can sue, why is he or she privy or proximate? The answer given here is that a plaintiff can sue for restitution when they have had the value of their ownership of property lost to the defendant in unjust circumstances. Why? This area of law is based on a (liberal?) notion that private property generates individual happiness and should not be interfered with other than by legitimate transfer or government acquisition.

Interestingly, Burrows comes to the conclusion that ownership is not the only exception to the privity principle and supports this argument by reference to cases on what Birks calls interceptive subtractive unjust enrichment and *Re Diplock*.[62] This is a significant conclusion for if interference with ownership is not the justification for recovery what is the privity or proximity principle at play?

Interceptive subtractive unjust enrichment relates to the situation where a third party directs value to the plaintiff but that value is intercepted by the defendant. In this case Birks says the defendant has been enriched at the plaintiff's expense; there has been interceptive subtractive unjust enrichment.[63] Knowing, however, that no proprietary interest has yet lodged with the plaintiff, Birks acts so very delicately in introducing this scenario into unjust enrichment law. His attempt to justify interceptive subtractive unjust enrichment whether we accept that analysis or not,[64] is a fine example of how the boundaries of unjust enrichment law may be expanded beyond the ownership privity or proximity principle in unique areas through persuasive analogising.[65]

Ironically, the re-analysis of the usurpation of office interceptive subtractive unjust enrichment cases by Burrows and Smith allows them to fit into the traditional subtractive proprietary paradigm. For in the re-analysis the right to sue the third party in debt, the chose in action is extinguished on payment of the money to the defendant. The extinguishment of the chose in action (which the plaintiff owns and is of value) represents a subtraction of the value of that property from the plaintiff to the defendant. The right to sue the third party being extinguished on payment the plaintiff loses and the defendant gains. That unjust enriching interference with the plaintiff's proprietary interest in the chose in action is unacceptable and will be remedied by restitution. To put it in simple and imaginary terms, the plaintiff hands over the chose in action to the third party, while the third party gives money to the defendant as payment for the chose in action. In that situation the defendant pure and simple receives the value of the plaintiff's chose in action

62 [1948] Ch 465; [1951] AC 251.

63 Birks, *supra* note 1, 133 ff.

64 L Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 *Oxford Journal of Legal Studies* 481.

65 On the role of such a concept in common law adjudication, see Brennan J in *Dietrich* v *Queen* (1992) 177 CLR 292.

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in unjust circumstances at the expense of the plaintiff. If the debt were not extinguished in this situation the proprietary analysis would fall down.

As for *Re Diplock*, a case where the executor of a will mistakenly paid money to charities instead of to the rightful beneficiaries, Birks considers that the beneficiaries could have held a proprietary interest[66] while Burrows suggests that they held something less than a proprietary interest.[67] There can be little doubt that the rightful beneficiaries held an equitable proprietary interest that could be traced.[68] What Burrows seems to suggest is that while they held equitable ownership this could not generate an *in personam* claim based (in my terminology) on unjust enriching interference with that ownership because the Court of Appeal conditioned *in personam* restitution on first suing the executors. This analysis is difficult to accept and would suggest that reconsideration of this case in the modern era might find more persuasive reasoning if not a different result.[69] Nevertheless, even if the condition were invoked regarding *in personam* restitutionary claims,[70] it could be rationalised as a judicial resolution of competing interests which does not give all the protection to the right to hold private property. Therefore Burrows' interpretation would have been more persuasive if he had said ownership lay at the basis of recovery but its normally privileged status was qualified in this case for certain policy reasons.

The way Birks rationalises interceptive unjust enrichment cases suggests that unjust enrichment law will protect interests which though not traditionally classified as proprietary, are so closely aligned or analogous to a proprietary interest justice would be defeated if they were not protected.

The view put forward here is that interceptive cases (as analysed by Burrows and Smith) and *Re Diplock* can fit the subtractive proprietary paradigm. Commonsense and common experience dictates that the beneficiary in *Re Diplock* was all but the owner of the property mistakenly disposed of. If one wants to argue the fine detail of whether a proprietary interest existed and concludes that none did, it is open to the law of unjust enrichment to say it will remedy interference with this inchoate interest which is destined to be, but for unjust circumstances, a full proprietary interest. How far one goes along this path is a question for the future development of the law.

Birks advocated a significant departure from the subtractive proprietary paradigm when he suggested the *power in rem* in *Lipkin Gorman* v *Karpnale Ltd*[71] was a sufficient link to the value subtracted, though yet not a proprietary interest.[72] Furthermore, in the context of *Lipkin Gorman* he advocated an even more extreme causative approach,[73] which may be a thing of the future but what will be its basis? That is a key issue — will it still be protection of individual liberty? Can one say at this more abstract level they have a right to hold value or generate value and if anyone takes this away they should be protected?

At the moment the proprietary interest is the proximity or privity principle[74] and to push it wider demands much closer theoretical analysis. It is not impossible to conceive how such an argument might run but the case law certainly has not yet developed to that point. It must be remembered too that second measure or proprietary relief will be harder to justify if a plaintiff starts out with something less than ownership. In that case is second

66 Birks, *supra* note 1, 143.
67 Burrows, *supra* note 3, 52.
68 Oakley *et al*, *supra* note 5, 612ff especially at 627.
69 See Birks, *supra* note 24. Some jurisdictions have legislation adopting this rule: Oakley, *supra* note 7, 49.
70 On whether the condition could apply to second measure proprietary or *in rem* claims, see Oakley *et al*, *supra* note 5, 631.
71 [1991] 2 AC 548.
72 Birks, *supra* note 1, 394, and *supra* note 5, 483; Fitzgerald, *supra* note 16, 120ff.
73 Birks, *supra* note 5, 483.
74 See, eg, *Commissioner of State Revenue* v *Royal Insurance Australia Ltd* (1994) 126 ALR 1, 14 per Mason CJ who refers to subtractive unjust enrichment arising where the 'defendant receives the plaintiff's money or property'.

measure proprietary restitution available — can there be a proprietary base?

As things stand, the paradigm unjust enrichment case will involve subtraction of the value of a proprietary interest (subtractive proprietary paradigm) in unjust circumstances. There will inevitably be situations where although there is no proprietary interest involved there is a subtraction of value in something which is almost a proprietary interest. The outer edges are difficult spaces and the debates over interceptive subtractive unjust enrichment and *Re Diplock* will fill the tutorial rooms of unjust enrichment for many a day. For a legal landscape just embracing unjust enrichment it is imperative to understand the easy scenario first. The norm is that of subtraction of value of a proprietary interest. If academics wish to justify restitution other than through this subtractive proprietary paradigm then they will need to look closer at the theoretical underpinning of their anomalous or exceptional cases.

At the core, unjust enrichment promotes individual liberty and autonomy by promoting the right to hold private property with all the prejudices and inequalities that causes other individuals, although mechanisms such as change of position modify this to some extent. The extent to which unjust enrichment portrays an affinity with 'property entitlement preserving' libertarian/Nozickian philosophy is something the academics and the courts need to consider in the future.[75] In the Australian legal landscape communitarian or moralistic notions such as unconscionability suggest that Australian unjust enrichment law will pay close attention to how far one person's right to private property is privileged over the broader values that underpin our community.

Conclusion: refining the theory of unjust enrichment

This article has attempted to outline the basic structure of unjust enrichment law and to probe the touchstone of recovery in an action for unjust enrichment. It has been suggested that ownership acts as a privity or proximity principle for recovery and that this is a product of the underlying rationale of unjust enrichment law which is to protect individual liberty and more specifically the right to private property. It is ownership that tells us which plaintiff can think about suing, it is loss in unjust circumstances that consolidates this and it is the correlative gain by the defendant which completes the action. Clearly ownership acts to define and restrict unjust enrichment actions the way privity and proximity define and restrict contract and tort actions. Ownership provides the link between the value subtracted and the plaintiff. If that link were non-existent then a very persuasive argument as to why the value should be considered the plaintiff's would be demanded. At this stage of development of the common law ownership appears as the most logical link although the ever changing nature of property may well cause a different approach in the future.

The success of unjust enrichment law at a doctrinal level depends very much on academics and judges clearly articulating the theoretical basis of this new area of law and what it promises to do for our Australian community. This article has been but one step along that road.

75 R Nozick, *Anarchy State and Utopia* (New York: Basic Books, 1974).