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Duress in the Canadian and English Law of Restitution:

G HL Fridman

University of Western Ontario

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I. *Introduction*

The early history of restitution reveals that duress was relevant in two situations.¹ In the first, one party compelled another to pay him money by reason of some threat. In the second situation, one party compelled another to pay him money which was in fact owed by a third party to the one exercising the compulsion. The former situation was a straight forward one, in which the party exercising the duress falsely or legitimately (though perhaps erroneously) caused the party subjected to the duress to accept that a debt existed between the two parties, or that the party exerting pressure ought to be paid, so as to avoid undesirable consequences. The latter situation was more complex, as there was never any question of a legitimate debt existing or arising between the party exerting pressure and the party paying. Whatever debt or obligation existed, or was believed to exist on the part of the one exerting pressure, also existed or was thought to exist between some third person and the party exerting the pressure. One distinguishing feature between these two situations was, and still is, with some important consequences, that in the two-party situation the issue of duress might be intertwined with the issue of mistake (so creating two potential sources of restitutionary recovery),² whereas in the three-party situation the issue was thought to be one of bare duress, uncomplicated by questions of mistake. Another potentially vital distinction was that in the three-party situation the action of the party paying might give rise to the question whether his payment was "officious" (the term that has come to be used to mark the difference between a recoverable and a non-recoverable payment).³ In the two-party situation there could never be any question of officiousness. The sole criterion for recovery was whether the appropriate pressure had been exercised to justify recovery. These distinctions had, and still have, material effects upon the chances of restitutionary recovery. They do not detract from the fact that common to both situations was the problem of

*Professor of Law, University of Western Ontario.

1. *Astley v. Reynolds* (1732), 2 Stra. 915; *Exall v. Partridge* (1799), 8 T.R. 308.

2. This point is well taken in Posluns, *Mistake and Compulsion: A Reappraisal of Eadie v. Township of Brantford* (1981-2), 3 *Advocates' Quarterly* 342.

3. Goff & Jones, *Law of Restitution* (3rd ed. London: Sweet and Maxwell, 1986) at 309; Hope, *Officiousness* (1929), 15 *Cornell L.R.* 25, 205.

determining the nature of the duress that might form the basis for a successful action for restitution.

The more recent history of duress in relation to restitution has brought to the surface the need to discover some theoretical or jurisprudential foundation for invoking a plea of duress to substantiate recovery. Earlier cases did not concern themselves with such theoretical inquiries. It was enough that the defendant had exerted some appropriate pressure, such as the threat of physical violence to the plaintiff's person or his goods (in the nature of some actionable wrong, or criminal conduct).⁴ Developments with respect to the nature of duress, *i.e.*, the kinds of threats that may justify the use of the doctrine to permit recovery of money (or the invalidation of a contract or liability in tort), have made it necessary, in my view, to investigate the underlying basis of recovery; in other words, the true nature of the idea of restitution. As long as the courts confined the operation and scope of the plea of duress to the simplistic forms of threats of physical or legal action, there was really no need to decide whether the reason for permitting the operation of duress was that the victim's will was overborne, or his consent was lacking in volition, or it would be unjust to leave the plaintiff without a remedy, or the plaintiff's payment was not officious. Once duress was understood to extend to other forms of pressure, some deeper explanation of the rationale for judicial intervention and recovery had to be sought. The present state of the law, notably in Canada, invites attention to the fundamentals of restitution.

II. *The Development of Duress in Restitution*

1. *Two-Party Situations: Money*

There has been a gradual development from the initial elementary notion of duress to the person, in the form of physical violence or threats of physical violence, through the ideas of duress *colore officii* and duress to goods, to the more modern concept of so-called "economic duress". Even before the leading English case of *Maskell v. Horner*,⁵ a Canadian court, in *Cushen v. Hamilton*,⁶ was prepared to accept that, in appropriate circumstances, a threat to the business activities of the party threatened, which could be looked upon either as duress of goods or economic duress, might be a basis for permitting recovery of money paid in

4. Or (i) the threat of legal process jeopardizing the freedom of the plaintiff; (ii) the making of a demand by virtue of the defendant's office, with consequent hazard to the plaintiff's rights. 5. [1915] 3 K.B. 106.

6. (1902), 4 O.L.R. 265 (C.A.), followed in *Colwood Park Association Ltd. v. Oak Bay*, [1928] 3 D.L.R. 812 (B.C.S.C.); *Vancouver Growers Ltd. v. Snow Ltd.*, [1937] 4 D.L.R. 128 (B.C.C.A.).

consequence. No recovery was allowed in that case because the plaintiff had a viable alternative to submission to the threats, in contrast with the position of the plaintiff in *Maskell v. Horner*. In the *Cushen* case the plaintiff was a butcher who was informed by the City of Hamilton that he must pay a fee in order to continue his business. He protested the order, saying that it was illegal and not justified, in the sense of being *ultra vires* the Hamilton Council. But he did not go to the lengths of refusing to pay and undergoing prosecution for carrying on an unlicensed business, which might have allowed him to litigate the validity of the demand. He paid and only later sought recovery of his payments. He failed. The threat to his property was not as immediate as the threat involved in *Maskell v. Horner*. However the Canadian case did illustrate a number of matters. Firstly, the idea of duress had progressed beyond the elemental notion of violence to the person. Secondly, it required some direct, immediate threat that left the threatened party with no escape from the coercion save payment if he wished to avoid the unpleasant consequences. Thirdly, the party threatening might not knowingly be guilty of any wrongful act, since he might be acting under the mistaken belief that he was entitled to the payment in question. Fourthly, even though the demand for payment was made under a mistaken belief as to the state of the law, and the payment was therefore made under a mistake of law (which would normally preclude recovery), recovery was possible by reason of the duress. This last point is now fully accepted, and has been endorsed by decisions of the Supreme Court of Canada in more recent times.⁷

By the twentieth century courts in England and Canada permitted recovery, in what I have termed a two-party situation, where there was never any danger to the person of the party threatened or members of his family, but there was possible danger to his property. As Beatson pointed out some years ago,⁸ English courts differentiated contract cases from restitution cases where duress of goods was concerned. Such duress substantiated a claim for recovery of money, (*i.e.*, restitution) where it would not allow the party subjected to such duress to avoid a contract entered into in consequence. We now know that this is no longer the law.⁹ Nor is there any justification for any such differentiation. Duress of

7. *George (Porky) Jacobs Enterprises Ltd. v. City of Regina* (1964), 44 D.L.R. (2d) 179; *Eadie v. Township of Brantford* (1967), 63 D.L.R. (2d) 561; *Hydro Electric Commission of Nepean v. Ontario Hydro* (1982), 132 D.L.R. (3d) 193.

8. Beatson, *Duress as a Vitiating Factor in Contract* (1974), 33 C.L.J. 97.

9. *The Sibeon and The Sibotre*, [1976] 1 Lloyd's Rep. 293 (Q.B.D.); *North Ocean Shipping Co. v. Hyundai Construction Co.*, [1978] 3 All E.R. 1170 (Q.B.D.); *Pao On v. Lau Yui*, [1979] 3 All E.R. 65 (P.C.); *Universe Tankships Inc. of Monrovia v. I.T.W.F.*, [1982] 2 All E.R. 67, at 75 *per* Lord Diplock, 88 *per* Lord Scarman (H.L.); *cp.*: *Sundell & Sons Pty. Ltd. v. Emm*

goods is firmly established as a recognised type of duress for purposes of restitution and contract. In the last forty or more years it appears that courts in England and Canada have broadened the scope of duress even further in relation to two-party situations.

Courts in both countries have been taking into account the realities of commercial and economic life. What might seem to be an extension of duress beyond reasonable limits, given the original nature of the behavior that amounted to duress, is nothing more than recognition of the true reason for accepting the plea of duress of goods, namely, that if the party threatened is deprived of his goods by wrongful detention or destruction, he will suffer economically. He will lose the opportunity to take advantage of his possession of such goods. Note that duress to goods does not involve any denial of the threatened party's *ownership* of the goods. It is *possession* that is at stake. Hence the threatened party could always sue in tort for the appropriate remedy. The real point is that time is against him in this regard — he must have the goods now. It is therefore necessary to prove that deprivation of the goods would have an immediate harmful effect upon the plaintiff if a plea of duress to goods is to be successful as a basis for recovery of money paid. The natural development from this is to treat any conduct by the defendant that involves some immediate threat to the economic welfare or well-being of a plaintiff who has no chance of any alternative action in time to avoid such threat from materialising to his detriment, and where there is assertion of a rival title to anything on the part of the party threatening, as substantiating a claim for the recovery of money paid in consequence of the defendant's actions. Originally, emphasis was placed upon the nature of the threatened harm, *viz.*, whether it concerned the plaintiff's goods. Later the crucial issue was not the nature of the threatened harm, but the immediacy and effectiveness of the threat, insofar as it could place the plaintiff in a situation where he had no viable alternative but to pay, else incur irretrievable loss. If the plaintiff could forego payment, suffer the harm, and then sue for damages to compensate him for such loss, there would be no need, nor any theoretical justification, for a restitutionary action. The absence of any tortious act on the part of the defendant uttering the threats was the underlying stimulus to the evolution of duress of goods into something more, something that might be called duress to commercial opportunity (or, as it has been called in the English cases, "economic duress").

Yamoulatos (1956), 56 S.R. (N.S.W.) 323; *R.E. Lister Ltd. v. Dunlop Canada* (1979), 27 O.R. (2d) 168 (C.A.) (reversed on other grounds (1982), 135 D.L.R. (3d) 1 (S.C.C.)); see *Ogilvie, Wrongfulness, Rights and Economic Duress* (1984), 16 Ottawa L.R. 1.

The courts have stressed the vital importance of the immediacy of the threat and nature of the pressure it placed upon the plaintiff. They have been less concerned with the nature of the duress. For example, in the Canadian case *Knutson v. Bourkes*,¹⁰ the defendant, who threatened not to complete a real estate transaction, knew that this failure might cause the plaintiffs to suffer damage through their inability to complete other transactions by which they were bound. The Supreme Court of Canada decided that money paid as a result of such threats was recoverable in restitution. But in *Twyford v. Manchester Corporation*,¹¹ a case resembling *Cushen v. Hamilton*, the threat by the defendants to prevent the plaintiff from enjoying his business at Manchester Cemetery unless he paid a license fee was not a potential source of recovery of the money paid in consequence. The plaintiff was not immediately obliged to pay or suffer loss. He could have tested the legality of the defendants' demand instead of submitting to it. Although there was no threat of seizure of the plaintiff's goods or property, as there had been in *Maskell v. Horner*, but only a threat to the business life of the plaintiff, as in *Cushen v. Hamilton*, the real issue was whether the threats in question gave rise to no possible alternative other than payment or the incursion of loss.¹² In other words, what courts have been looking for in these modern, extended varieties of duress is something very much akin, in economic or commercial terms, to the highwayman's traditional formula: "Your money or your life". In these situations it is the plaintiff's "economic" life that is the alternative to his money. But the position is the same, and so, it would seem, is the legal result. There is one difference, however. The highwayman's threat involves an illegal act. The modern economic highwayman may be guilty of no actual illegality, or threat of illegality. What he calls his justification for the payment may have no legal foundation whatsoever, as in the case of payments demanded under delegated or other legislation that is *ultra vires* or otherwise void. It does not entail the commission of any criminal or tortious act.

A threat to break a contract, as in *Knutson v. Bourkes* and a number of more recent English cases,¹³ is "illegal", as explained in *Rookes v. Barnard*.¹⁴ But "illegal" does not mean here what "illegal" means

10. [1941] S.C.R. 419.

11. [1946] Ch. 236. Contrast *Mason v. New South Wales* (1959), 102 C.L.R. 108, where there was an additional factor, *viz.*, a threat to exercise a purported power to seize the plaintiff's property (lorries not carrying permits that the defendants required the plaintiff, invalidly, to pay for in order to carry on his business).

12. *Cp. Birks, Restitution from Public Authorities* (1980), 33 Current Legal Problems 191, at 192-193. Twyford was not threatened with exclusion from the cemetery.

13. See the cases cited *supra*, note 9.

14. [1964] A.C. 1129 (H.L.); *cp. Morgan v. Fry*, [1968] 2 Q.B. 710 (C.A.); *J.T. Stratford & Sons Ltd. v. Lindley*, [1965] A.C. 269 (H.L.).

elsewhere. What we do not know, however, and what the House of Lords has left open in its latest statements on the issue,¹⁵ is the scope of the “illegality” recognised in *Rookes v. Barnard*. What kind of pressure (in particular, commercial pressure), apart from a threatened breach of contract, may be so “wrongful”, may go so far beyond the boundaries of what is acceptable, as to be capable of amounting to duress justifying the recovery of money paid in consequence? If by this question the courts intend to re-emphasise the nature of the conduct, instead of the nature of the pressure and the immediacy of the threat, the statements in the *Universe Tankships*¹⁶ case may be pointing backwards to the era when the courts were concerned with the type of contract that could support a claim for restitution on the basis of duress. If, however, the House of Lords was only reiterating the need to show that the party exerting pressure was making it impossible for the threatened party to act in any other reasonable way, for self-protection of its economic interests, than by paying the money demanded, it may still be possible to assert that the modern law of duress is less concerned with the nature of the conduct alleged to be wrongful pressure than the effect that conduct has upon the victim of the pressure in question.

The Canadian development of what has been called “practical compulsion” leads to the conclusion that it is not so much the kind of duress that is important as the kind of pressure it exerts. However, it must be observed that virtually all the cases in which this problem has arisen concerned demands for money that were thought to be valid but were founded upon *ultra vires* legislation or resolutions of governmental authorities. In other words, there was something “illegal”, in the broader (not the narrow criminal) sense underlying the demand for money and the threats that were explicit or implied in such demands. Hence, it could be said that Canadian courts have not yet had to contend with the issue raised in the *Universe Tankships* case — namely, what kind of improper, unlawful, or wrongful pressure can potentially constitute duress such as would support an action for restitution? However, it is still pertinent to consider the way in which Canadian courts have approached the problem of duress, since it at least shows that, in modern times, courts are concerned with the nature of the threat that is posed by an improper demand for money as much as, if not more than, the nature of the conduct that constitutes the threat.

The starting-point for any such discussion is the decision of the Supreme Court of Canada in *Eadie v. Brantford*.¹⁷ What is significant

15. *Universe Tankships Inc. of Monrovia v. I.T.W.F.*, *supra*, note 9 at 75-76 per Lord Diplock, 88-89 per Lord Scarman.

16. *Id.*

17. *Supra*, note 7. Note, however, the earlier case of *George (Porky) Jacobs v. Regina*, *supra*,

about this case is that, perhaps for the first time, a court took into account the personal situation of a plaintiff as well as the economic circumstances that were in the background. The *Eadie* case demonstrates what might be called the “outer limits” of the concept of duress. It involves psychological rather than economic or physical duress, and opens the door to strange possibilities, which perhaps is why it has more often been distinguished on the facts than followed.

In the *Eadie* case the plaintiff was forced to pay a severance fee to a municipality and provide the municipality with a strip of land for certain purposes as conditions for the grant of approval of the plaintiff's plan to subdivide his land. These demands were founded on a by-law which later was held to be invalid and the plaintiff sued for the return of his money. He succeeded at trial, but that decision was reversed by the Ontario Court of Appeal. However, on further appeal to the Supreme Court of Canada the plaintiff was successful. The plaintiff had originally objected to the payment, but later succumbed to the demands of the municipality. Why, then, was he able to recover his payments? The basis of the court's decision was the doctrine of “practical compulsion”, which was derived from earlier Canadian cases, and, ultimately, from *Maskell v. Horner*. In the words of Spence J., speaking for the majority of the court, the payment was “made under the compulsion of urgent and pressing necessity”.¹⁸ In this case the necessity stemmed from the situation of the plaintiff and his wife. The plaintiff had to go to the hospital for treatment. This involved leaving his wife alone in their house, which was isolated and distant from the town. Hence the plaintiff wished to sell his property and move his wife elsewhere. To achieve this he needed to subdivide the property which, in turn, required the approval of the municipality. To obtain this approval, he was obliged to accede to the municipality's demands for money and land. In his judgment, Spence J. placed more emphasis on the idea of compulsion than on the notion that the pressure was such as to leave the plaintiff with no viable alternative.

It was submitted by counsel for the respondent that in order to justify the plaintiff demanding repayment of money paid under mutual mistake in law upon the basis that he was under compulsion to do so, the plaintiff must have been faced with a situation where there was no other alternative available to him. I am of the opinion that the bar to the plaintiff's recovery is not so stringent and that a practical compulsion is alone necessary.¹⁹

note 7, where duress or compulsion outflanked the argument that money was paid under a mistake of law, which would have negated recovery. Since it was decided that the mistake was one of *fact*, not law, the remarks about compulsion are *obiter dicta*. See also: *Pillsworth v. Coburg*, [1930] D.L.R. 757 (Ont. C.A.); *City of St. John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263.

18. *Id.* at 570.

19. *Id.* at 571.

Spence J. then referred to the course of action the plaintiff might have taken to establish the invalidity of the municipality's demand. But that course, and the alternative courses in earlier Canadian cases in which *Maskell v. Horner* was approved and followed, "were time-consuming and impractical". The possible alternative course "...would, of necessity, have been so fraught with delays that the sale of the property would have been lost. In the meantime the appellant was languishing in hospital. It was at that very time that he had the paramount need of selling the property and establishing his wife into other habitation more suitable to their circumstances, not months or even years later".²⁰

The *Eadie* case seems to concentrate on (a) the practicality of the payment as compared with other alternatives; and (b) the possible harm the plaintiff may immediately suffer if he does not pay. It de-emphasises the element of duress, in the sense of both the wrongfulness of the defendant's conduct and the lack of any choice open to the plaintiff. What seems to emerge from the *Eadie* case is a greater importance of the plaintiff's *motives* for making the disputed payment, rather than the question whether his intention to pay was produced by some improper conduct by the defendant that resulted in a denuding of the plaintiff's assent to the transaction of any real legal value.

It has been said that the concept of practical compulsion as it appears from the *Eadie* case is not easy to understand.²¹ The Law Reform Commission of British Columbia, when considering the recovery of benefits conferred under a mistake of law, was obliged to take into account the various cases where the defence of mistake of law was overcome by a plea of duress, or, in the post-*Eadie* world, practical compulsion.²² After referring to the fact that the development in *Eadie* indicates a lesser relevance of a plaintiff's will and a growth in importance of the idea of "voluntariness", the Report mentions that different cases have come to different conclusions on whether a plaintiff was acting under a practical compulsion. "This uncertainty", says the Commission,²³ "reflects a certain amount of confusion respecting the principles on which this exception (to the mistake of law doctrine) is based".

There can be little doubt that more recent Canadian cases in which this issue has been raised present a confusing and conflicting array of decisions and reasons, making it difficult, if not impossible, to point with

20. *Id.* at 571-572.

21. *A.J. Severson Inc. v. Village of Qualicum Beach* (1982), 135 D.L.R. (3d) 122, at 126 per Hutcheon J.A. (B.C.C.A.).

22. Law Reform Commission of British Columbia, *Benefits Obtained Under a Mistake of Law* (1981), at 41-48.

23. *Id.* at 43.

any degree of accuracy and certainty to the true scope and application of the *Eadie* decision. The prevailing view, I suggest, is that the courts should look at the motive behind the plaintiff's ultimate assent to the making of the payment, despite his protests or objections to its validity. If there never was any real need for the plaintiff to pay the money in order to protect his property or economic interests;²⁴ if there never was any real protest at the time the demand was made;²⁵ or if the reason for the payment was "commercial expediency" rather than the kind of psychological, sentimental, and ultimately economic compulsion that was present in the *Eadie* case;²⁶ then courts will not allow recovery. Moreover, if the plaintiff has not unjustly enriched the defendant at the plaintiff's expense, but has, in fact, obtained a benefit from the payment, recovery will not follow, even though there was some element of compulsion present in the circumstances.²⁷

These cases reveal that the Canadian attitude is more flexible and liberal than that of the English. English courts are still largely concerned with the wrongfulness of the pressure and the legitimacy of the demands, rather than the motivation that underlies the plaintiff's submission and payment or the immediacy of the danger to the plaintiff. Canadian courts are more concerned with the notion of restitution. The underlying principle of unjust enrichment does not emphasise the "wrongfulness" of the defendant's conduct, even though the enrichment that might support a claim for recovery is supposed to be "unjust". But "unjust" here does not perforce entail any wrongful acts on the part of the defendant. It relates more to the inequality or imbalance of the positions of the parties.

24. *J.R.S. Holdings Ltd. v. District of Maple Ridge* (1981), 122 D.L.R. (3d) 398, at 405-407 (B.C.S.C.).

25. *Ronell Devs. Ltd. v. Duncan* (1981), 25 B.C.L.R. 123 (Cty. Ct.). But payment under protest is not enough to show compulsion: *Glidurray Holdings Ltd. v. Village of Qualicum Beach* (1982), 129 D.L.R. (3d) 599, at 601-603 *per* Nemetz C.J.B.C. (B.C.C.A.).

26. *Glidurray Holdings Ltd. v. Village of Qualicum Beach*, *supra*, note 25 at 607-409 *per* Seaton J.A.; *G. Gordon Foster Devs. Ltd. v. Township of Langley* (1980), 102 D.L.R. (3d) 730, at 740 *per* Atkins J.A. (B.C.C.A.).

Could it not be argued however that all cases of "economic duress" or practical compulsion involve some kind of commercial expediency? If so, what is the true distinction between cases where the plea is successful and those where it is not? The courts have not yet resolved the issue of the difference between desires or objects that could support a claim for recovery and those that will permit the court to hold that the plaintiff was not acting out of duress at all, but was seeking to attain a certain object which would have been frustrated by the denial of the licence, *etc.*, if he had not paid.

27. *Glidurray Holdings Ltd. v. Village of Qualicum Beach*, *supra*, note 25 at 615-616 *per* Anderson J.A.; *A.J. Severson Inc. v. Village of Qualicum Beach*, *supra*, note 21 at 127-128 *per* Hutcheon J.A.

But it could be argued that the money paid by the plaintiff was paid to obtain a *totally different* benefit, which the plaintiff did not get; therefore he was not really benefited from his payment and the defendant has been enriched when he would otherwise not have been.

If seems to point to the inherent injustice that would follow if the parties were left in the situation that resulted from the plaintiff's payment to the defendant.²⁸ Since *Degman v. Guaranty Trust Co. of Canada*,²⁹ if not before, Canadian courts have taken a different approach from that found in England. They took as the source of their jurisdiction in restitution cases the idea found in the *Fibrosa* case³⁰ that civilised systems of law were bound to provide remedies for unjust enrichment or unjust benefit to prevent a man from unfairly retaining money or some benefit derived from another.

2. Two-Party Situations: Services

Canadian courts have also had to contend with situations where the plaintiff's claim is for services rendered under what has been characterised as duress or compulsion. The typical situation, which arose about twenty-five years ago, is as follows. Under a contract between plaintiff and defendant, the former is bound to do certain work for the latter. This is done, but the defendant alleges that it has been done badly or improperly and requires the plaintiff to make good the deficiencies. What makes the situation a potential claim for recovery based on duress, or something similar, is that the defendant makes threats to the plaintiff to persuade the plaintiff to do the work. Such threats take the form of blacklisting the plaintiff, so that he will not get further work, or alleging faulty workmanship that may provide the foundation for an action against the plaintiff for breach of contract. In response to such threats the plaintiff performs the work and now sues in *quantum meruit* for payment. Claims in several such situations ultimately met with no success in the courts. The plea of duress or coercion was not accepted. The work was held to have been done voluntarily, and not under compulsion.³¹ Only in the dissenting judgment of Cartwright J. of the Supreme Court of Canada in *Peter Kiewit Sons' Co. of Canada Ltd. v. Eakins Const. Ltd.*³² has the

28. Klippert, *Unjust Enrichment*, (Toronto: Butterworths, 1983), c. 2.

29. [1954] S.C.R. 725; see also Angus, *Restitution in Canada Since the Degman Case* (1964), 42 Can. B.R. 529.

30. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, at 61-62 per Lord Wright (H.L.).

31. *City of Moncton v. Stephen* (1956), 5 D.L.R. (2d) (N.B.C.A.) (*but see: Terminal Warehouses Ltd. v. J.H. Lock & Sons Ltd.* (1957), 9 D.L.R. (2d) 490 (Ont. H.C.), decided differently on other grounds, viz., the negligence of the party doing the extra work; *Morton Construction Co. Ltd. v. City of Hamilton* (1962), 31 D.L.R. (2d) 323 (Ont. C.A.)). In contrast, more recently, the extra work could be compensated in *Re Municipal Spraying & Contracting Ltd.* (1982), 15 B.L.R. 39, where Goodridge J. of the trial division of the Newfoundland Supreme Court preferred to follow the approach in *Maskell v. Horner* rather than the approach in *Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd.*, *infra*, note 32.

32. [1960] S.C.R. 361, criticized by Goff & Jones, *supra*, note 3 at 232-233. The learned

idea of “practical compulsion” been accepted in a similar situation. The plaintiffs in that case entered into a contract to drive timber piles for piers for the purpose of constructing a bridge across Vancouver Harbour, on the basis of the plans and specifications in the main contract (the plaintiffs being subcontractors dealing with the general contractor). A month later, the engineer for the Bridge Authority added a requirement to the plans that certain piers had to be driven further than originally required. The plaintiffs objected to this addition, saying that it entailed considerable “overdriving” not called for in the original plans on which its successful tender had been founded. The engineer insisted that his instructions be followed, without additional payment. Although this disagreement persisted, the plaintiffs performed the work and then sued for the value of the “overdriving”. They were unsuccessful in the Supreme Court of Canada. In later decisions the *Kiewit* case was followed, and recovery was permitted, or not permitted on a *contractual* (not restitutionary) basis, on the ground that the contract itself could be construed so as to allow for the additional work.³³

Judging by these cases, the extension of the scope of duress or compulsion outside the payment of money situation would appear to be limited. Courts do not seem to be prepared to regard threats that induce the performance of extra work as the kind of threats that justify a subsequent restitutionary claim. One reason for this is that the kind of threats made are regarded as legitimate, not illegal. Perhaps the municipalities which were the defendants in these cases did not act with the highest degree of commercial morality. But they were not guilty of any illegal conduct when they exerted pressure on the plaintiffs to perform the extra work, unlike the various defendants in the payment of money cases, in which *ultra vires* legislation was relied on as the foundation for the claims to be paid.³⁴ Furthermore, it might have been thought that the plaintiffs in the “service rendered” cases did have viable alternatives. They could have refused to do the additional work and allowed themselves to be sued, just as the butcher in the *Cushen* case

authors prefer the pragmatic approach of the Australian courts in *Sundell & Sons Pty. Ltd. v. Emm Yamoulatos*, *supra*, note 9; *Mason v. New South Wales*, *supra*, note 11; *Deacon v. Transport Regulation Board*, [1958] V.R. 458; *Re Hooper and Grass' Contract*, [1949] V.R. 269; and that of United States' courts.

33. *Swanson Const. Co. Ltd. v. Government of Manitoba* (1963), 40 D.L.R. (2d) 162 (Man. C.A.); *Electric Power Equipment Ltd. v. R.C.A. Victor Co. Ltd.* (1964), 41 D.L.R. (2d) 727 (B.C.S.C.).

It is significant that the Law Reform Commission of British Columbia has recently recommended that the law as stated in the *Kiewit* case be changed so as to permit recovery of compensation in such instances: *Performance Under Protest* (Working Paper No. 46, 1984).

34. *Cp.: Angus, Restitution in Canada Since the Deglman Case* (1964), 42 Can. B.R. 529, at 533.

could have refused payment and allowed the municipality to prosecute him for the alleged offence. Perhaps, therefore, these cases provide very weak examples of duress or compulsion bringing about the performance of work, and cannot afford much support for the argument that the duress or compulsion doctrine can apply equally well and forcefully to a "services rendered" situation as it does, or can do, to a "payment of money" one. But more recent Canadian developments with respect to unjust enrichment, or restitution, have led at least one court in Canada to take a very different view.³⁵ This would indicate that the performance of work under pressure can substantiate a claim for payment (in the absence of a contract). The fact-situations giving rise to such a claim can involve the sort of "urgent and pressing necessity", to quote from *Eadie*, that supports any such action. Both the successful and unsuccessful cases are indicative of the Canadian insistence upon an investigation of the motives or reasons for the plaintiff's response to the threats, either by paying the money demanded or performing the work required. The reference in one case³⁶ to the lawfulness of the threat by the municipality may suggest the court was looking at the nature of the threat, as English courts have done and continue to do. At the same time, however, the Canadian decisions, which stress the contractual aspects of the situation, seem to be differentiating "voluntary" from "involuntary" conduct on the part of the plaintiff,³⁷ which seems to be more connected with the plaintiff's state of mind and rationale for his behaviour than the defendant's legality or illegality in making the demand.

The fact that the *Kiewit* case was recently distinguished by a Newfoundland court³⁸ and strongly criticised by the Law Reform Commission of British Columbia³⁹ suggests that there may be some movement towards enlarging the scope of duress in relation to the provision of services in some commercial situations. In the Newfoundland case the court held that extra work performed under protest by a contracting party accused of improper performance was compensable because it had not been provided freely or voluntarily. In the Working Paper of the British Columbia Law Reform Commission it was pointed out that the present state of the law, as represented by the *Kiewit* case, made matters very difficult for contractors. If they did not perform the extra work they might be sued for misperformance. If they performed the

35. *Cp.: Re Municipal Spraying & Contracting Ltd. Construction Co. Ltd. v. Hamilton, supra*, note 31.

36. *Morton Construction Co. Ltd. v. Hamilton, supra*, note 31.

37. *Re Municipal Spraying & Contracting Ltd., supra*, note 31 at 56-57.

38. *Id.* at 48-53.

39. *Performance Under Protest* (Working Paper No. 46, 1984), at 13-19.

extra work they might not obtain additional remuneration despite the argument that such work was performed under protest, *i.e.*, under duress. The Commission suggested that legislation should make payment for such services possible.

In conformity with the broader approach to restitution or unjust enrichment to which reference has been made, Canadian courts are more inclined to accept the invocation of duress in appropriate circumstances. In the context of the present discussion the reason for this is the greater awareness of the realities of business life, notably in the construction industry with which these cases were concerned. There are signs in England that judges are prepared to consider what actually happens in a commercial or industrial situation, despite the technicalities of the law of the contract.⁴⁰ Canadian judges and lawyers have anticipated such developments, and have been amenable to the adaptation of, and the remedies provided by, the law in order to accommodate the reasonable expectations and requirements of the community, especially, but not exclusively the commercial or business community. Perhaps this is the product of a society that is organised differently from that in England, in which the values are not necessarily the same. Perhaps it is the result of the earlier fusion in Canada of legal and equitable jurisdictions and the absence of any marked distinction between courts of law and courts of equity. Perhaps it is the greater influence on Canadian judges of the legal system of the United States, where business, economic, and social factors resemble those which operate north of the border. Whatever the reason, there can be little, if any doubt that the law in Canada is much less strictly doctrinal in its attitude. There is greater willingness to experiment and to develop along new lines of thought. Admittedly such an approach has its disadvantages, but it enables the Canadian courts to deal with new problems more flexibly than in England. So, in respect to the matter now under discussion, there may be more use for the concept of duress in two-party situations in Canada than in England.

3. *Three-Party Situations*

The typical three-party situation involves a payment by P of money which is owed by D to T. subsequently, P sues D to recover the payment made on the latter's behalf. What distinguishes the restitutionary situation from analogous cases of assignment or surety is the issue of duress or compulsion. In the restitution situation P has discharged D's debt because

40. *Br. Steel Corp. v. Cleveland Bridge & Engineering Co.*, [1984] 1 All. E.R. 504 (Q.B.D.); on which see Ball, *Work Carried Out in Pursuance of Letters of Intent — Contract or Restitution?* (1983), 99 L.Q.R. 572.

of pressure put on P by T. Were it not for that pressure, the payment by P might not discharge D's debt (it might still not, according to some writers). Nor might it give rise to any form of recovery by P against D (although it might be possible for P to recover his payment from T).⁴¹ In such situations, what is the test of recovery?

In *Owen v. Tate*⁴² the English Court of Appeal adopted with approval the summary of the law given by Goff and Jones,⁴³ which reads as follows:

To succeed in his claim for recoupment, the plaintiff must satisfy certain conditions. He must show (1) that he has been compelled by law to make the payment; (2) that he did not officiously expose himself to the liability to make the payment; and (3) that his payment discharged a liability of the defendant.

The key requirement here is that the payment was "compelled by law". In these situations, in contrast with the two-party situations previously considered, the compulsion that amounts to duress or its equivalent is not a "practical" compulsion, or, as Goff and Jones put it, a "moral" compulsion, but a *legal* compulsion. They instance three groups of cases:⁴⁴ relief of property from distress, assignment of leases, and abatement of nuisances. But they state that these categories are not exclusive. What emerges from their discussion, as well as the way the problem was handled in *Owen v. Tate*, would seem to be that, to qualify for recovery, the payment must have been made because of some actual liability of a legal kind on the part of the plaintiff. The cases they cite and analyse deal with situations where the successful plaintiff was legally obliged to pay the amount in question, but the consequence of that payment was the release of the defendant from liability to the party demanding payment from the plaintiff. Notwithstanding the characterisation of Goff and Jones, it may be said that such instances are not examples of compulsion at all, certainly not of duress. There is a valid, legal obligation to pay, not merely a demand for payment that is totally unfounded in law, as well as fact. What Goff and Jones, and the Court of Appeal in *Owen v. Tate*, are doing is distinguishing between payments which are not "voluntary", because there was a debt to be discharged by the plaintiff (as well as the defendant), from those which are completely voluntary, in the sense that the plaintiff acted "officiously", *i.e.*, to do

41. This is discussed in Birks and Beatson, *Unrequested Payment of Another's Debt* (1976), 92 L.Q.R. 188; Friedmann, *Payment of Another's Debt* (1983), 99 L.Q.R. 534.

42. [1976] 1 Q.B. 402.

43. *Supra*, note 3 at 309.

44. *Id.* at 310-315.

someone a favour, or to fulfil some moral or sentimental obligation (which was the case with the plaintiff in *Owen v. Tate*).

What happens in circumstances where there was no legal obligation to pay, or the plaintiff believed he was obliged to pay? What happens if his motive for paying was to benefit himself, rather than the defendant, and it turns out that the latter derived the advantage? On the analogy with the two-party situation, one would deduce that the payment is irrecoverable, since there was no threat of unwelcome or undesirable consequences if payments were not made. However, there are decisions where, in circumstances without any duress or compulsion as earlier discussed, a payment or an expenditure of money was recoverable from the party who ultimately benefited. These cases really involve mistakes of fact rather than compulsion. However, the circumstances are also consistent with the possibility of some form of compulsion. What makes them most interesting, in the present context, is that the compulsion did not always involve some kind of threat of the sort that might have justified recovery on the basis of duress in its original or extended version.

For example, in *Canadian Mortgage Association v. Regina*,⁴⁵ A mortgaged Lots 36 and 40 to C. Subsequently C discharged Lot 36 from the mortgage. C, the plaintiff in the action, mistakenly paid taxes on Lot 36, on the belief that it was still included in the mortgage, since the Lot was advertised for sale by the City of Regina under the provisions of the Saskatchewan *Arrears of Taxes Act*. When the taxes were paid, the city removed Lot 36 from the list of lots for sale. On discovering the truth, C sued for the return of the tax money, and was successful. The judgment of Edwards J. proceeded on the basis of money paid under a mistake (but was this a mistake of fact or of law?). The judgment of Lamont J. was founded on the idea of compulsion, in that C believed that if the taxes were not paid, C would lose title to Lot 36 under the provisions of the statute. Looked at in this light the case resembles later decisions involving *ultra vires* demands. The only difference is that the demands were based on a mistaken view of the true facts, not a mistaken belief in the validity of the demand for payment. But C was really discharging A's liability to the city because of C's fear that, by not paying, he would incur some liability (namely, the forfeiture of his title). C might have relieved his anxiety much more easily than the plaintiffs in the *Eadie* or the *Jacobs* cases since he did not have to engage in any costly or prolonged litigation, but simply had to verify the facts. Nevertheless Lamont J. was prepared to apply the doctrine of compulsion to permit recovery.

45. [1917] 1 W.W.R. 1130 (Sask. S.C.).

In a more recent case, *Carleton v. Ottawa*,⁴⁶ the Supreme Court of Canada applied general restitutionary principles, culled from Lord Wright's speech in the *Fibrosa* case,⁴⁷ as utilised by the Supreme Court in *Degelman v. Guaranty Trust Co. of Canada*,⁴⁸ to allow the local government authority, which had paid the cost of an indigent's stay in a home for several years when that liability really fell on another local government, to recover from the latter. The relationship between the two governments was founded on a contract, but there was a fundamental mistake as to the extent of each government's territorial jurisdiction. It was believed the indigent came within the plaintiff's sphere when in fact she fell under the jurisdiction of the defendant. Was this a case of recovery of money paid under a mistakenly believed compulsion of a valid and operative contractual obligation? The answer is not clear. But if this can be treated as a "compulsion" case, rather than a "mistake" case, it would appear to throw some doubt on the formulation of Goff and Jones and the English Court of Appeal in *Owen v. Tate*. The legal compulsion of which they speak would not actually have to exist, as long as it is mistakenly believed to exist. The real test, then, would be not legal compulsion but the absence of "officiousness". On that basis, any payment on behalf of another that was made, to refer to the *Eadie* formula, out of some "pressing and urgent necessity" would be recoverable, even where it was not a payment to the defendant.

The matter is more complicated by two cases, one Canadian and the other English, where a payment to a third party was not made out of any pressing need comparable to the situation in the cases just discussed, but was made for the payer's own purposes under the mistaken belief that, by spending the money, the payer was advancing his own interests. In *Krebs v. World Finance Co.*,⁴⁹ the British Columbia Court of Appeal did not allow recovery of this money from the party who ultimately reaped the benefit of the payment. The plaintiff bought a car subject to a chattel mortgage, which he discharged. Later he discovered that he had acquired no title to the vehicle, which belonged to the defendant. He tried to recover from the true owner the money paid to the chattel mortgagee, but he failed. But in *Greenwood v. Burnett*,⁵⁰ the improver of the motor car was able to recover from the true owner of the car the money spent in improvements. There are other cases, notably in Canada, where

46. [1965] S.C.R. 633; *cp.* *Macfarlane & Wellington Hotel (Barrie) Ltd. v. Kennedy* (1956), 3 D.L.R. (2d) 757 (Ont. H.C.).

47. *Supra*, note 30 at 61.

48. [1954] S.C.R. 725.

49. [1958] 14 D.L.R. (3d) 405 (B.C.C.A.)

50. [1973] 1 Q.B. 195 (C.A.).

improvers of land who, believing that they had or would in the future have title to the land in question, spent money on the land or property.⁵¹ In those cases, which have been criticised,⁵² it was held that the improver was able to recover from the true owner, even though the latter could validly assert that the alterations or expenditures concerned did not benefit him. While it is true that these cases proceeded on the ground of mistake rather than compulsion, they may aid to support the proposition that a payment that was mistakenly believed to be compelled might be recoverable from the party who benefited from such payment. The difference between such cases and true instances of compulsion or duress lies in the absence of any emergency, necessity or threat to the economic welfare of the party paying. On the other hand, the mistaken non-owner in *Krebs* (who failed), the similar party in *Greenwood* (who succeeded), and the mistaken non-owners of land in the other Canadian cases were presumably purporting to improve their economic situations by their expenditures. They had a good reason for doing what they did, as good a reason, in their various ways, as the plaintiff in *Eadie* (although, perhaps, not under circumstances of such stringency from the personal, psychological, or even economic point of view).

What differentiates such instances from so-called cases of “officiousness” would seem to be the element of mistake. In all other respects, however, they are prime illustrations of payments made in the absence of any compelling need to make them. If mistake can make such a difference, why can it not also make a difference in true three-party “compulsion” cases? That would certainly explain *Canadian Mortgage Association v. Regina* and *Carleton v. Ottawa*. In this respect perhaps it should be noted that, as the Supreme Court of Canada has suggested may be possible in cases of mistaken payments,^{52a} a payment made under

51. *Reeve v. Abraham* (1957), 22 W.W.R. 429 (Alta. S.C.); *Estok v. Heguy* (1963), 40 D.L.R. (2d) 58 (B.C.S.C.); *Preeper v. Preeper* (1978), 84 D.L.R. (3d) 74 (N.S.S.C.). Contrast *Nicholson v. St. Denis* (1976), 57 D.L.R. (3d) 699 (Ont. C.A.), where the improver had no actual or misconceived claim to the property on which the work was done. A different principle was applied. The plaintiff, who provided the improvements, acted at the request and under a contract with a party who did have a claim on the property that was improved, by virtue of an agreement of purchase and sale made with the defendant, the vendor of the property. Because the party who engaged the services of the plaintiff later defaulted in his payments under the agreement of purchase and sale, he forfeited his interest in the property. The Ontario Court of Appeal, reversing the trial judge, held that the defendant was without any knowledge of what was going on, had not requested the improvements and was completely innocent of any wrongdoing that should make him liable to the plaintiff (who, in any event, had sued the intended purchaser of the property and recovered judgment against him and had not pursued his rights under the *Mechanics' Lien Act*).

52. Jones, *Restitutionary Claims for Services Rendered* (1977), 93 L.Q.R. 273 at 293-294.

52a. *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.* (1975) 55 D.L.R. (3d) 1; Fridman and McLeod, *Restitution*, (Toronto: Carswell, 1982) at 112-123.

duress or compulsion might be irrecoverable on the ground that the innocent payee has changed his position in reliance on the payment.^{52b} So in an *Owen v. Tate* situation, if the bank, having received satisfaction of the debt from the plaintiff, released the original debtor at his request or with his consent, recovery might be denied. Of course in any such situation it would have to be proved that the defendant, whose debt has been discharged, has behaved innocently. This means that the defendant must not have been a party to the compulsion, must have received the benefit in good faith, and must have acted in consequence in a way that indicates he has done something he would not have done, and would not have been able to do, if the debt had not been discharged on his behalf by the plaintiff.^{52c} It might be difficult, although not impossible, for all this to be established. In cases of mistake, the plea of change of position does not appear to have been very successful so far, no more so than a plea of estoppel. In theory, however, there is no reason why such a plea might not be a complete defence to an action for restitution in three-party duress situations as it can be in mistake cases.

The possibility that this might be the eventual result of the development of the law lies once again in the evolution in Canada of a much broader concept of "unjust enrichment" than in England. For example, in *More v. University of Ottawa*,⁵³ the decision appears to be founded on *dicta* of Lord Wright in *Brooks Wharf v. Goodman Ltd.*⁵⁴ The situation was one in which the parties failed to clarify in their contract what was to happen on a change of circumstances, as in the *Kiewit* case. But there was no duress. In *More* the plaintiff paid extra sales tax on materials used in constructing a building for the University. The University was able to obtain the benefit of a tax refund which the court held had to be passed on to the builder, although the strict terms of the contract only dealt with the tax situation at the time of contracting, and did not provide for what was to happen if more or less tax became exigible. This was not a true case of mistake or compulsion, in the traditional senses. It appears to be a decision based exclusively on the idea that to allow the University to hide behind its tax shelter as a charitable institution at the expense of the builder would result in the University's unjust enrichment at the builder's expense, a conclusion that was unacceptable to the court.

52b. This may be regarded as a variation of estoppel or as a distinct equitable plea.

52c. The facts in *Owen v. Tate* would have negated this, because the debtor did not want the plaintiff to deal with his, the debtor's, debt in any way.

53. (1974), 49 D.L.R. (3d) 666 (Ont. H.C.).

54. [1937] 1 K.B. 534 (C.A.).

4. *Necessity or Emergency*

At first sight, what is sometimes referred to as “necessitous intervention”⁵⁵ may not appear to have any connection with the classical duress situation, or even with the more extended notion of duress which has been described earlier. Whatever dangers might provide the impetus for the payment or expenditure of the plaintiff’s money, or the performance of some service by the plaintiff for the defendant, cannot be regarded as creating any threat to the physical or economic well-being of the plaintiff. But the connecting factor between “necessitous intervention” cases and instances of duress or compulsion is the existence of a “pressing and urgent necessity” which exerts pressure on the plaintiff to act in the absence of any prior authorisation or consent on the part of the defendant. The plaintiff acts as he does because there is no other viable alternative to his intervention. The various possibilities have been examined in detail and depth elsewhere.⁵⁶ Suffice it to say that they all seem to involve the lack of any opportunity to seek instruction or approval in advance, and the existence of some operative emergency that threatens the physical safety of the defendant or his property (or, in certain instances, the necessity for discharging some obligation that is placed on the defendant by the law, such as the duty to bury a deceased person). The parenthesised circumstances resemble the cases of three-party compulsion discussed above. Other situations more closely approximate the typical two-party situation. In both, however, the gravamen of the plaintiff’s claim for reimbursement or recovery is that he was forced to act as he did out of what might legitimately be termed “practical compulsion”.

English courts have been reluctant to extend the scope of such situations of emergency or necessity, whether by denying the application of the doctrine of agency of necessity or otherwise.⁵⁷ Canadian courts, on the other hand, have been more amenable to the idea that, if it can truly be said that the defendant has benefited at the expense of the plaintiff, there is a juridical basis for recovery.⁵⁸ This was held to be the case even

55. See, e.g., McCamus, *Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution* (1979), 11 Ottawa Law R. 297.

56. *Id.*; Goff and Jones, *supra*, note 3, c. 15; Fridman and McLeod, *supra*, note 52a, c. 16.

57. Fridman, *Law of Agency*, (5th ed. London: Butterworths, 1983) at 117-126. For a contrary view see Birks, *Negotiorum Gestio and the Common Law*, [1971] Current Legal Problems 110. See also: *China Pacific S.A. v. Food Corp of India*, [1981] 3 All E.R. 688 (H.L.).

58. *Hastings v. Semans*, [1946] 4 D.L.R. 695 (Sask. C.A.); *Samilo v. Phillips* (1968), 69 D.L.R. (2d) 411 (B.C.S.C.) (affirmed on appeal on different grounds (1971), 70 D.L.R. (3d) 283 (S.C.C.)); and see the curious case of *Sherrin v. Hagerty*, [1953] O.W.N. 962 (Cty. Ct.).

when the defendant did not really benefit, as in *Matheson v. Smiley*,⁵⁹ where despite the valiant efforts of the plaintiff, the defendant died. Indeed, in that instance, it might be argued that the defendant would have rejected the plaintiff's proffered aid, since the defendant was attempting to commit suicide, and would not have desired to be saved from death. Clearly, in such cases the basis for recovery is not what the defendant would have wished the plaintiff to do should the plaintiff have sought instructions from the defendant, but the court's attitude that the efforts of the plaintiff merited some recompense or reimbursement. Once again a deeper consideration of the situation leads straight back to the question: What is the underlying basis for restitutionary recovery? It is not just necessity or an emergency. Nor is it any belief that there would have been an agreement of some kind had the parties discussed the situation in advance.⁶⁰ It must be that situations of this kind, involving as they do some commendable behaviour on the part of the plaintiff, coupled with his desire to avoid some disastrous consequence (in these instances to another, not to himself), entitle the court to conclude that recovery ought to be permitted on general grounds of restitution or unjust enrichment.

III. *The Basis of Restitutionary Recovery*

There are potentially two ways of investigating the juridical nature of duress in relation to restitutionary claims. The first is to look at duress, however it may ultimately be defined or described, in conjunction with duress in other contexts, namely, contract, tort and the criminal law, with a view to propounding some generalised concept that will explain the operation of the plea in all of them. The second is to discuss restitutionary claims founded on some conception of duress in terms of the law of restitution generally. This entails adopting the attitude that whatever duress may mean or involve in relation to tort liability, the validity of contracts, or criminal responsibility, it must be understood in the context of restitution in a way that is consistent with the fundamental nature of restitutionary recovery. These conflicting approaches have been exemplified in a recent exchange.⁶¹

Atiyah, in criticising the "overborne will" theory of duress in relation to the modern English "economic duress" cases, takes into account the

59. [1932] 2 D.L.R. 787 (Man. C.A.).

60. But see the theory of "hypothetical contract" considered in Long, *A Theory of Hypothetical Contract* (1984), 94 Yale L.J. 415. For another explanation of why the law does not compensate "rescuers", see Levmore, *Explaining Restitution* (1985), 71 Virginia L.R. 65 at 102-104.

61. Atiyah (1982), 98 L.Q.R. 197; Tiplady (1983), 99 L.Q.R. 188; Atiyah (1983), 99 L.Q.R. 353.

decision of the House of Lords in *Lynch v. D.P.P. of Northern Ireland*,⁶² with a view to arguing that the criminal law connotation of duress should be applicable in other legal contexts. Tiplady supports the “overborne will” theory, and attacks what might be termed the “unitary” or, to borrow a phrase from another context,⁶³ the “lump” theory of duress. He prefers the view that what amounts to an “overborne will” may differ according to the context in which the relevant questions are asked. It is interesting to note that neither author appears to have considered cases of restitution. Their language suggests, however, that their arguments should also apply to such instances.

This difference of opinion, even though it only tangentially affects the law of restitution, reveals something of the nature of the problem that confronts anyone considering the nature of restitutionary recovery for duress. From what has been suggested earlier, there seem to be various potential claimants for the role of guiding principle in such cases. One is the concept of “overborne will”. Another is the more contractual idea of lack of consent. A third is an amalgam of equitable ideas such as injustice, inequality, unconscionability and the like. A fourth is the notion of “officiousness”, as previously explained.

A further possibility, which, at first sight, seems to be a reference back to the now discredited idea that restitution is founded on “implied contracts”, is contained, in different versions, in some recent American writing on restitution. Although the authors in question do not directly deal with the problem of duress, but with other restitutionary situations such as unsolicited benefits, improvement of property, payments made under mistake, substitute performers (the three-party situation previously discussed), rescuers and other volunteers (the necessitous intervention situation), it could be argued that their explanations of restitution are applicable to the duress situation.

One author suggests a theory of “hypothetical contract”, *i.e.* a contract “that a court writes for the parties because it is convinced that both parties would have agreed to its terms at the time the unsolicited benefit was conferred”.⁶⁴ Although this theory is stated with reference to a particular instance of restitutionary recovery,⁶⁵ it might be argued that, in

62. [1975] A.C. 653.

63. *Viz.*, sale of goods: see Llewellyn, *Through Title to Contract and a Bit Beyond* (1937-38), 15 N.Y.U.L.R. 159; Ontario Law Reform Commission, *Report on Sale of Goods, Vol. 1* (1979), at 259, 262.

64. Long, *A Theory of Hypothetical Contract* (1984), 94 Yale L.J. 415 at 415.

65. *Viz.*, restitution for unsolicited benefits. See also Birks, *Negotiorum Gestio and the Common Law*, [1971] Current Legal Problems 110; Jones, *Restitutionary Claims for Services Rendered* (1977), 93 L.Q.R. 273; McCamus, *Necessitous Intervention: The Altruistic Intermeddler and the Law of Restitution* (1979), 11 Ottawa L.R. 297.

view of the discussion of the situations where the plaintiff acts to save life or property, there is something in this theory, which is founded on an economic approach to law, that could be used in the more general context of duress.

Another theoretical approach to restitution discusses the question of whether courts should create bargains where the parties have not done so.⁶⁶

The first, or hypothetical contract theory is described as “a logical extension of the law of contract”.⁶⁷ But the theory does not conflate contract and tort: it explicitly distinguishes cases decided by extending contractual principles from cases decided on non-contractual principles. The second, or “bargain” theory of restitution, as it may be called, is said to illuminate the “assymetrical structure of private law”.⁶⁸ Restitution is distinguished from “its much-studied neighbours”, tort and contract, on the basis that restitution deals with non-bargained benefits, tort law with non-bargained harms, and contract with bargained benefits and harms.

Whereas the law of torts regularly “creates” bargains by assigning liability where the parties would have exacted payment if able to bargain, the law of contract (and restitution) does not obviously intervene and create bargains among strangers who might be expected to wish for such agreements. The law of benefits is apparently not the counterpart of the law of harms.⁶⁹

Such theories may not be attractive to English (or Canadian) lawyers who, historically, have adopted very different attitudes from those embraced by lawyers in the United States with respect to restitution. Moreover, the American emphasis on the economic analysis of law as a means of “explaining restitution” may not convince judges, particularly in Canada, where the underlying approach, as evidenced in recent decisions, notably of the Supreme Court of Canada,⁷⁰ seems to be one of remedying unjust enrichment. This is rejected as a competing analysis by the protagonist of the “hypothetical contract” theory.⁷¹

These writings indicate attempts are being made in the United States to move away from traditional explanations of restitution arising from duress. It is unlikely that such theories will find favour in the courts of England or Canada, where whatever explanation of the duress cases

66. Levmore, *Explaining Restitution* (1985), 71 Virginia L.R. 65.

67. Long, *supra*, note 64 at 434.

68. Levmore, *supra*, note 66 at 67.

69. *Id.*

70. See *Pettkus v. Becker*, [1980] 2 S.C.R. 831; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Palachik v. Kiss* (1983), 146 D.L.R. (3d) 385; see also Klippert, *supra*, note 28, c. 2.

71. Long, *supra*, note 64 at 417-418.

ultimately emerges will probably be based upon the ideas found in the precedents rather than in the views of economics-oriented theorists. Moreover, so far as the “hypothetical contract” theory is concerned, courts that have slowly, but surely shed the accumulated detritus of history, and now eschew any theory of restitution that savours its original historical foundations, are unlikely to adopt a view of restitution that seems to require a return to something like a contractual view of restitution.

The problem with the “overborne will” theory, as argued by Atiyah with some justification,⁷² is that it appears to negate the fact that the payer of money, or provider of services, acts with the intention of paying or providing. In all the various duress situations there is no doubt that the plaintiff who is seeking recovery or reimbursement always intended to pay the money or provide the services. The issue is not whether he intended to do so, but whether his intention was arrived at freely. Fear of consequences, lack of alternative, and pressure of circumstances may all operate on the plaintiff’s mind to produce the necessary intention. He ultimately reaches a stage when, for whatever reason or motive, he intends to pay or act. In the various kinds of duress situations the real issue is the plaintiff’s motive or rationale for paying or acting, not his intention to pay or act.⁷³ As recently pointed out by the Supreme Court of Canada,⁷⁴ in the context of criminal responsibility in a situation of alleged necessity, there is a difference between “justifying” and “excusing” certain conduct. Necessity, in the criminal context, may excuse the behavior in question: it does not justify it. So, too, in the present context, the fact that there was some relevant kind of duress, compulsion, or pressure on the plaintiff may explain (*i.e.* excuse) his payment or provision of services: it does not justify it, in the sense of making it valid, thereby precluding a court from upsetting the transaction and ordering recovery or reimbursement. As in cases of restitution for duress, there is a distinction between the intent to make the payment, and the reason why the payment occurred.

Lack of consent as a ground for restitutionary recovery is equally unsatisfactory. In the first place, it seems to invoke contractual principles in a non-contractual context. Secondly, it points to the involuntary nature of the payment, distinguishing true cases of recovery from those where the plaintiff’s act was voluntary. It does not carry the analysis much further to rely on a voluntary/involuntary dichotomy,⁷⁵ because it

72. *Supra*, note 61.

73. *Cp.* Philips, *Are Coerced Agreements Involuntary?* (1984), 3 *Law & Philosophy* 133.

74. *Perka v. The Queen* (1985), 13 D.L.R. (4th) 1.

75. *Fridman & McLeod, supra*, note 52a, at 61-62.

becomes necessary to determine what is voluntary and what is involuntary. Moreover, as with the “overborne will” theory, an explanation founded on lack of consent seems to overlook that the plaintiff’s conduct, for whatever reason, was intentional. What occurs in restitution cases is much the same as what happens in contract cases where some vitiating element such as mistake or fraud is alleged. The apparent consent of the plaintiff is set aside because his intention to contract was the product of some misconduct by the defendant or some aberration of his own. This permits a court to upset an apparently valid contract because the policy of the law is not to hold parties to bargains that are entered into under dubious circumstances, such that suspicion is thrown on the genuineness of a party’s reasons for entering into it. In certain circumstances justice may require that a transaction be upset, even if it involves risk to third parties, and, *a fortiori*, if no third party is likely to be affected by the decision. Whatever theoretical or doctrinal explanation is given of the technical principles of law applied by courts in reaching a decision, the underlying explanation is that the contract in question was not justifiable, and it would be unfair to hold the parties to such a bargain. To do so would create an imbalance. One party would be prejudiced to the advantage of the other, or, to put it differently, one party would be unjustly enriched at the expense of the other.

The notion of “officiousness” is more appropriate and relevant in certain situations than in others. Although it could be utilised to explain all the different varieties of duress, according to the explanation offered earlier, it can only be explained and understood by analysing the cases where a party has or has not been held to be “officious”. Any such analysis forces a court to consider more deeply the motives of the plaintiff, to discover whether or not he is entitled to recover.

Perhaps the only valid explanation of the duress cases, linking restitution with other areas of the law, and providing a consistent theoretical basis for the various instances of restitutionary recovery for duress or analogous conduct, is what might be termed “the injustice of the transaction”. Restitutionary recovery for duress is founded upon the principle of unjust enrichment, which provides a juristic basis for all forms of restitutionary recovery. Underlying this traditional notion of unjust enrichment is another fundamental proposition that has recently been suggested, though not for the first time,⁷⁶ as lying at the root of restitution. “The appropriation by one person of another’s property ought to give rise to a right of restitution”.⁷⁷ Admittedly, this suggestion was

76. Stoljar, *Law of Quasi-Contract*, (Sydney: The Law Book Co. of Australasia, 1964) at 5-9.

77. Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the*

made in relation to other instances of restitutionary recovery, notably those concerned with what is referred to as “waiver of tort”. However, this analysis can have relevance to the duress cases. Certainly in those that involve the payment of money to, or on behalf of the defendant, it may be argued that the defendant, in effect, has misappropriated the plaintiff’s money and thereby obtained a benefit. In cases of “necessitous intervention” the defendant may have obtained either the plaintiff’s money or property, or their equivalent in services. Even if the “property” approach or theory is not acceptable, there remains the basic notion of unjust enrichment at the expense of the plaintiff as a valid explanation for the granting of recovery or reimbursement.

English courts have not been too enthusiastic about any such explanation. Canadian courts, notably in recent years, have increasingly accepted this idea as the fundamental juridical principle upon which courts permit or disallow restitutionary recovery. They constantly refer to the principle of unjust enrichment as providing the basis for recovery of money, division of acquisitions, and reimbursement for services provided.⁷⁸ As Morden J. said in *More v. University of Ottawa*:⁷⁹ “The categories of restitution are never closed”. There may be some well-accepted, historical instances of restitutionary recovery in which the plaintiff’s success is unquestionable. Those instances do not form a closed list to which new situations can never be added. On the contrary, the underlying principle of unjust enrichment justifies new applications in appropriate circumstances. For example, the Supreme Court of Canada has used the principle of unjust enrichment to permit apportionment of property or money acquired by a party who made such acquisitions through the combined efforts of himself and someone with whom he was cohabiting, whether or not the parties were married.⁸⁰ Although the tool employed by some judges to achieve such apportionment was the constructive trust, the motivation for employment of that tool was the idea of preventing the unjust enrichment of the male party at the expense of the female. The same fundamental principle has been applied by Canadian courts in cases of duress, or “practical compulsion”. For example, in *Glidurry Holdings Ltd. v. Village of Qualicum Beach*,⁸¹

Commission of a Wrong (1980), 80 Col. L.R. 504 at 510. For a different view see Klippert, *Restitutionary Claims for the Appropriation of Property* (1981), 26 McGill L.J. 506; and for another view of waiver of tort see Hedley, *The Myth of Waiver of Tort* (1984), 100 L.Q.R. 561.

78. Fridman, *Reflections on Restitution* (1976), 8 Ottawa L.R. 156 at 163-174.

79. (1974), 49 D.L.R. (3d) 666 at 676 (Ont. H.C.).

80. *Rathwell v. Rathwell*, *supra*, note 70; *Petkus v. Becker*, *supra*, note 82; and see: *Murray v. Roty* (1983), 41 O.R. (2d) 705.

81. *Supra*, note 25.

where recovery was denied by the British Columbia Court of Appeal, one judge, Anderson J.A., held against a claim for recovery on the ground that the plaintiff had received a benefit for the payment of the fee that was being claimed back in the action. (In return for such payment the plaintiff had received the benefit of the installation of off-site water services that improved the quality of his land, and were the monetary equivalent of the fees paid by the plaintiff.⁸²) In *Hydro Electric Commission of Nepean v. Ontario Hydro*,⁸³ another leading case, the plea of money paid under mistake of law was alleged to be outflanked by the plea of compulsion. The Supreme Court, along with the trial judge and the Ontario Court of Appeal, paid close attention to what might be called the “competing equities” of the case to determine whether recovery should be allowed. The plaintiff had paid too much money to the defendant under the belief that legislation justified such payments for power supplied by Ontario Hydro. Although the case was largely concerned with the effects of a mistake of law, and the lower courts did not consider the plaintiff’s equitable right to recover, the case is instructive in the present context as it reveals the attitude adopted by Canadian judges to cases of restitutionary recovery. Actions of this kind are considered “equitable” in character; not in the strict, historical meaning of equity, but in accordance with the broader, more fundamental sense in which the term is used.

There appears to be considerable scope for the application of such ideas in cases in which the newer varieties of duress are claimed (*i.e.* those not involving actual or threatened violence to the person or property of the plaintiff). Similarly, in three-party situations, the test for recovery may legitimately and appropriately be framed in terms of the conflicting equitable claims of the parties, with a view to discerning whether or not the defendant has been unjustly enriched by the plaintiff’s act of paying the money involved. Even in the “necessitous intervention” cases it can be argued that whether or not recovery or reimbursement should be permitted ought to depend on the equities of the case, the balancing of the benefit to the defendant against the wisdom of recognising the type of intervention with which the particular case is concerned. Should the policy of the law be to encourage such intervention or deter it? In the context of “waiver of tort”, or appropriation of another’s property, one author has recently referred to deterrence as a basis for restitution.⁸⁴ It might be said that the granting or denial of recovery in cases of

82. Note, however, the point made *supra* note 27.

83. (1979), 92 D.L.R. (3d) 481; (1980), 107 D.L.R. (3d) 257; (1982), 132 D.L.R. (3d) 194, on which *see* McCamus, 17 U.B.C.L.R. 233.

84. Friedmann, *supra*, note 77 at 509-510, 551-556.

necessitous intervention could also operate either as an acceptance of certain conduct as being desirable and laudatory, or as a deterrent of conduct that is considered to be unacceptable because it thrusts unwanted burdens on a party behind his back, or encourages the creation of obligations when it is obvious that the party alleged to be under the obligation would never willingly have undertaken such an obligation had he been given the opportunity to accept or reject it.

The idea of unjust enrichment can be regarded as a vital *principle*, in the Dworkinian sense, which itself enshrines a *policy* (again in the Dworkinian sense).⁸⁵ Indeed, this may be an excellent example of the merging or lack of distinction between these two notions. Where does principle end and policy begin? The goal of the law is presumably to achieve a just and equitable result through the mechanisms of legal doctrine. In this respect perhaps the law has not altered since Roman times, when it was categorically affirmed that “no one be made richer through another’s loss”.⁸⁶ Cases of duress, in whatever form, are prime illustrations of this idea. The tenor of restitution in modern Canadian, if not English, law reveals the extent to which judges in the various Canadian jurisdictions have been imbued with this principle and have utilised it to provide for restitutionary recovery.

English courts, when faced with restitutionary issues, or cases which might call for a solution based on restitution, appear to be much more controlled by earlier precedents. If the circumstances can legitimately fall within the scope of an existing type of restitutionary recovery, the court will be prepared to grant recovery. From time to time this involves some reconsideration of the essentials of a successful action or the limits of a defence to an otherwise successful action. Such decisions are not founded upon any generalised concept of restitution, but upon the detailed examination of the prior case law and reflection upon its scope or meaning.⁸⁷ In Canada, however, although earlier decisions are of value and must be considered, the courts appear to be more willing to abandon the stereotyped instances of restitutionary recovery and to embrace a broad principle that is capable of infinite, or almost infinite expansion.⁸⁸

85. Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1978) at 22-31. For criticisms of Dworkin's view, see Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute* (1977), 75 Mich. L.R. 473; Donnelly, *Principles, Persons and Horizons: A Friendly Analysis of What Dworkin has Overlooked* (1982), 26 St. Louis U.L.J. 217. See also Umama, *Dworkin's "Rights Thesis"* (1976), 74 Mich. L.R. 1167.

86. Pomponius, *Digest*, 12.6.14. Note, however, the suggestion that restitution does not necessarily involve the defendant's enrichment at the expense of the plaintiff; see Dawson, *Restitution Without Enrichment* (1981), 61 Boston U.L.R. 563.

87. See, e.g., *Barclay's Bank v. Simms*, [1979] 3 All E.R. 522 (Q.B.D.).

88. Cf. Morden J. in *More and Sons v. University of Ottawa*, *supra*, note 79 at 676. “The principles take precedence over the illustrations and examples of their application.”

Restitution has ceased to be a collection of isolated instances where recovery is possible and permitted in the light of previous decisions. Instead, Canadian courts treat restitution as a cause of action in itself, and investigate the circumstances to discover whether the fundamental notion of restitution is applicable to the particular facts. The possible reasons for this, as mentioned earlier, may include a more flexible attitude in Canada to precedent; a desire to achieve substantial justice without overmuch regard for the technical niceties of the legal system, an extension, as it were, of the nineteenth century rejection of the old forms of action in favour of a more basic substantive law approach to legal remedies; and a more populist attitude of Canadian courts compared with their English counterparts, as evidenced by their greater willingness or ability to look beyond the strict legal principles that may apply to an individual case and at the rationale of those principles. Whatever the cause, the final consequence is that Canadian courts have arrogated to themselves a greater freedom of action in restitution cases.