

Unjust enrichment: the platypus of private law

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I want to start by talking about the platypus.² In 1799 George Shaw, a parson turned keeper of the Department of Natural History at the British Museum, was sent a dried skin and desiccated bill of an animal. He gave it the scientific name of *Platypus anatinus* (flat foot duck). Some three years later Göttingen anatomist, Johann Blumenbuch, gave the animal another name: *Ornithorhynchus paradoxus* (paradoxical bird-snout). It turned out that the term platypus had already been used for a type of beetle in 1793 and so, in accordance with the rules of classification, Blumenbach's name became the official one, although the name platypus has stuck.

For nearly a century, naturalists argued over the classification of the platypus. Shaw classified the creature as a mammal. Some considered it could be the missing link between reptiles and mammals. Others thought it a new and different type of animal. Still others thought it was a hoax, perpetuated perhaps by the Chinese³ (and even Shaw was not certain it was genuine).

The case for the platypus being a new type of animal would have been stronger had it been known that platypus lay eggs. That platypus are egg laying was only discovered (by Europeans at least) in 1884 by William Hay Caldwell, who has been described as an “obnoxious young Cambridge graduate”.⁴ Mammals at the end of the eighteenth century, by definition, had to have live young. Cold blooded egg layers were reptiles. Warm blooded egg layers were birds. The platypus, quite obviously, was neither a reptile nor a bird.

¹ Judge of the Supreme Court of New Zealand. This paper is based on a speech given at the 35th Annual Conference of the Banking & Financial Services Law Association on 1 to 3 September 2018 in Queenstown. Thanks to my clerk, Nichola Hodge, for her assistance with this paper and in particular with the footnoting.

² This originates from the Greek term, platypous, and so the plural is not the “rogue Latin” platypi but, as I understand it, platypodes. The English plural is either platypus or platypuses. I opt for the former.

³ The alleged involvement of the Chinese was a theory put forward by Robert Knox in 1823. He referred to the “monstrous impostures which the artful Chinese had so frequently practised on European adventurers”: cited in Brian K Hall “The Paradoxical Platypus” (1999) 49 *BioScience* 211 at 213. Although considered at the time to be a distinguished professor, Robert Knox is remembered for his role as the purchaser of the bodies from the body snatchers turned murderers Burke and Hare: see Alumni Services “Dr Robert Knox” (1791 – 1862) *The University of Edinburgh* <www.ed.ac.uk>; Ben Johnson “The Story of Burke and Hare” *Historic UK* <www.historic-uk.com>.

⁴ This quote and the history of the classification of the platypus comes from Hall, above n 3, at 215.

The platypus now resides in class *Mammalia* with about 5000 known living mammal species. Its subclass is *Prototheria*⁵ and order *Monotremata* (shared with four variety of echidna). Monotremes are the only order in the subclass *Prototheria* and they are only found in Australia and New Guinea.⁶

You are no doubt wondering why am I talking about platypus. Well, I came across an article on platypus and it started in a manner that seemed to have some resonance with the story of unjust enrichment. It said:⁷

The story of the discovery of the platypus [unjust enrichment] teaches us much that is relevant to the nature of scientific evidence [law], orthodoxy, entrenched authority, the role of personalities in science [legal community], the slow overthrow of old mores, national rivalries [eg United Kingdom and Australia], prejudices and priorities, the structures of animal [legal] classification, ... conservation, and extinction.

Like the classification of the platypus, unjust enrichment has, at least in much of the common law world,⁸ attracted strong and widely divergent views. For example, the High Court of Australia, after initial endorsement of the concept, has in recent times maintained that the notion is not unjust enrichment but unconscionability and that it is firmly grounded in equity.⁹ This view has been extensively criticised – in particular for the open-ended character of

⁵ As I understand it, this means egg-laying mammals. The other sub class of mammals is *Theria* (mammals that give birth to live young). These in turn are divided into *Metatheria* (marsupials) and *Eutheria* (placental mammals). Marsupials are largely found in Australia and surrounding islands, although opossums also live in North, Central and South America. There are more than 330 species of marsupial: see Vera Weisbecker and Robin M D Beck “Marsupial and Monotreme Evolution and Biogeography” in Athnol Klieve, Lindsay Hogan, Stephen Johnston and Peter Murray (eds) *Marsupials and Monotremes: Nature’s Enigmatic Mammals* (Nova Science Publishers, 2015) 1 at 3–10.

⁶ The Platypus is only found in Eastern Australia and Tasmania. Echidnas, also known as spiny anteater, are found in New Guinea and Australia: Weisbecker and Beck, above n 5, at 5–6.

⁷ Hall, above n 3, at 211.

⁸ This is not the case in other jurisdictions. Germany for example traces the origins of its unjust enrichment law to Roman law: see Petra Butler “Unjust Enrichment” in *Issues in Unjust Enrichment 2014* (NZLS CLE, July 2014) 7 and David A Juentgen “Unjustified enrichment in German and New Zealand law” [2002] 8 Canterbury LRev at 505.

⁹ For initial endorsement of unjust enrichment in Australia see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 227 per Mason and Wilson J and at 256–257 per Deane J; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17, (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ. For later rejection of the concept see the concurring reasons of Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [70]–[100] and *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 at [89] where the Court chose to decide the issues on the basis of equity rather than unjust enrichment. For a discussion see also Keith Mason “Strong coherence, strong fusion, continuing categorical confusion: The High Court’s latest contributions to the law of restitution” (2015) *Aus Bar Rev* 284 at 307. See also the discussion in Andrew Burrows *The Law of Restitution* (3rd ed, Oxford University Press, 2011) at 35–43.

unconscionability.¹⁰ It has been suggested that the French court was already retreating from it.¹¹ In *Equuscorp* for example, the plurality judgment of French CJ, Crennan and Kiefel JJ embraced the taxonomical function of unjust enrichment, while noting that it did not encompass an “all-embracing theory of restitutionary rights and remedies”. They said that their approach did not, however, “exclude the emergence of novel occasions of unjust enrichment supporting claims for restitutionary relief”.¹² Whether there will be some further retreat by the Kiefel court (particularly with the addition of Justice Edelman) is of course an open question.

Another view, expressed strongly by Professor Peter Watts QC, is that a wrong turn was taken when restitution became unjust enrichment. In a New Zealand Law Society seminar in 2014 Professor Watts described himself as the patron saint for lost causes with regard to this view.¹³ In his introduction to that seminar he said that unwilling economic gains are a feature of community life.¹⁴ Labelling the cause of action unjust enrichment had the potential to cause prejudice against such enrichment and therefore an unwarranted extension of the granting of restitution. Further, he did not consider it possible to subcategorise types of enrichment into money, services etc and apply the same tests of liability to each.¹⁵

Professor Watts elaborated on these views in more detail at a 2016 lecture in London chaired by Lady Justice Arden.¹⁶ At that stage, he was very concerned that recent case law in the United Kingdom had realised all his fears of overreach.¹⁷ When discussing the English Court

¹⁰ James Edelman and Elise Bant in *Unjust Enrichment* (2nd ed, Hart, Oxford and Oregon, 2016) at 27, for example say that unconscionability is not helpful in that it is the result of factors, not the overriding principle. It is, in any event, too vague and has a connotation of fault which may often be lacking. In Peter Birks “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 *UW Austl L Rev* 1 at 16–17, Professor Birks said that “Like ‘fair’ or ‘just’, the word ‘unconscionable’ is so unspecific that it simply conceals a private and intuitive evaluation.” See also the discussion on this point in Kit Barker and Ross Grantham *Unjust Enrichment* (2nd ed, LexisNexis, Australia, 2018), at 20–27.

¹¹ See Mason, above n 8, at 310–312 for a discussion on this point.

¹² *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498 at [30].

¹³ Peter Watts “Why ‘just restitution’ is a better label than ‘unjust enrichment’ – prelude and counterpoint” in *Issues in Unjust Enrichment 2014* (NZLS CLE, July 2014) 1 at 1.

¹⁴ At 2.

¹⁵ At 1.

¹⁶ The 2016 lecture served as the basis for Professor Watt’s article: Peter G Watts “‘Unjust Enrichment’ – the Potion that Induces Well-meaning Sloppiness of Thought” (2016) 69 *Current Legal Problems* 289. All references to his speech refer to this paper [Watts “Unjust Enrichment”].

¹⁷ The cases he discussed included *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc* [2013] EWHC 208 (Ch) which “unjustifiably shrunk” restitutionary liability: at 315–317 and *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC, [2016] AC 176, a decision Professor Watts described as problematic and widening the law of restitution to “an unknowable extent” with the claim better suited to the rules of subrogation than unjust enrichment: Watts, above n 16, at 303–308. For a similar critique of the English position see Robert Stevens “The Unjust Enrichment Disaster” (2018) 134 *LQR* 574.

of Appeal decision of *TFL Management Services Ltd v Lloyds TSB Bank Plc*,¹⁸ he said that he had saved the “worst for last”.¹⁹ In his view *TFL* reversed the traditional position of English law by requiring “all benefits ... to be justified”.²⁰ Professor Watts tells me he is most heartened by the recent United Kingdom Supreme Court cases,²¹ which he sees as being back on the right track.

Professor Watts made a number of points in his 2016 lecture. The first was that only certain interests are protected at common law, with preserving and controlling the disposition of property being the most strongly protected.²² Autonomy in binding ourselves to future action is, although to a lesser extent, also protected. But mere preservation of our wealth against erosion by others is not. It follows that only the protection of a person’s interests in property can justify a strict liability restitutionary rule. The law intervenes because there are flaws in the process by which the claimant’s property ended up in the defendant’s hands, justifying a reversal.²³ The same applies to flaws in the process of binding ourselves in contract. Protection of recognised interests supplies its own basis of intervention. Enrichment, unjust or not, is neither necessary nor sufficient.²⁴

Despite Professor Watts’ valiant efforts, it is probably fair to say that the tide of opinion is with unjust enrichment as the correct terminology.²⁵ In their text Edelman and Bant say that this is

¹⁸ *TFL Management Services Ltd v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006.

¹⁹ Watts “Unjust Enrichment”, above n 16, at 322.

²⁰ At 323.

²¹ These cases include the decision of *Prudential Assurance Co Ltd v Revenue & Customs Comrs (SC(E))* [2018] UKSC 39, [2018] 3 WLR 652 which overruled *TLF* also effectively overruled the earlier decision of *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561. *Prudential Assurance* concerned whether compound interest could be awarded on a claim of unjust enrichment that arose for tax levied on dividends from companies based outside of the United Kingdom. Overriding the effect of the earlier decision of *Sempra Metals*, the Court held that compound interest was not available on the basis that such a remedy was compensatory not restitutionary and thus fell outside of the scope of unjust enrichment: see at [71]–[75].

²² Watts “Unjust Enrichment”, above n 16, at 292.

²³ At 293.

²⁴ At 293–294. Professor Watts does however accept that some cases are suited to the concept of unjust enrichment, above n 13, at 6: citing the example of a guarantor who has honoured the guarantee suing a guarantor who would otherwise be enriched.

²⁵ For example, in Goff & Jones’ eighth edition, the title *The Law of Restitution* was changed to *The Law of Unjust Enrichment*: Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, 2011). See the discussion of this at 1-01–1-05 of the 8th ed. The terminology has also been widely accepted and reflected across other texts, which to name a few include: Edelman and Bant’s text *Unjust Enrichment*, above n 10, who discuss this point at 29–30; See also Barker and Ross Grantham *Unjust Enrichment* (2nd ed, LexisNexis, Australia, 2018), and Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds) *Defences in Unjust Enrichment* (Hart, Oxford and Oregon, 2018). Even the United States now uses the term unjust enrichment with the third restatement being called: The American Law Institute *Restatement of the Law Third: Restitution and Unjust Enrichment* (American

because it is the cause of action that we need to concentrate on, being unjust enrichment, and not the remedy of restitution.²⁶ And in any event, they say, not all restitutionary remedies result from unjust enrichment.²⁷ Meeting the criticism that concentration on enrichment could mislead, they would say that the phrase has to be read as a whole; it is not mere enrichment that triggers the cause of action but *unjust* enrichment. They would also say that the recognised four-stage inquiry²⁸ (properly nuanced) provides the necessary structure and discipline and, in a valiant effort to achieve universality, say that this structure also underlies the Australia unconscionability test.²⁹ To meet their test, what is required is:

- (a) enrichment, which they say requires a benefit and one that is chosen by the defendant;³⁰
- (b) enrichment at the expense of the claimant, which requires a transactional link to the claimant;³¹
- (c) the enrichment must be unjust, with the particular unjust factor being identified.³² Taking a bob each way, they also say that there must be no juristic

Law Institute Publishers, Washington DC, 2011), although this kept restitution in its title. This change was also echoed in commentary: for example, Charles Mitchell and William Swadling *The Restatement Third: Restitution and Unjust Enrichment* (Hart, Oxford and Portland, Oregon, 2013).

²⁶ Professor Watts accepts that restitution denotes “a response not an event” but he says that “it is a response so closely tied to defective property dispositions as a class of events that it can be said to be the other side of the coin”: Watts “Unjust Enrichment”, above n 16, at 297.

²⁷ Edelman and Bant, above n 10, at 33–35 say that the disgorgement of profits of wrongdoing is not restitution for unjust enrichment. Nor is restitution in criminal law or restoring a person to a position before loss was suffered.

²⁸ See, for example, the discussion in Jessica Palmer *Restitution* [2016] NZLR 435 at 436–348 on the benefits of adopting a four-part analysis.

²⁹ Edelman and Bant, above n 10, at 7–8 and 13–15.

³⁰ Chapter 4. The terminology of “chosen” was adopted to align the test with issues that arise with services. This, however, may be thought somewhat artificial with mistaken payments where, as the defendant is often unaware of the enrichment, they have to be presumed to have chosen the benefit: see at 62–80.

³¹ Chapter 5. A transaction is defined by Edelman and Bant as including “any action” between the persons involved. The recent English decision of *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 at [43], [46]–[52] affirmed that a direct transactional link is normally required.

³² Edelman and Bant, above n 10, ch 6. Edelman and Bant note that it is the academic and judicial consensus that “unjust” is not, quoting *Pavey v Matthews Pty Ltd v Paul* [1987] HCA 5, (1987) 162 CLR 221 at [14] per Deane J, an invitation to “assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate”: at 119. Rather unjust refers to the factors that favour ordering restitution. This principle was also encapsulated by Lord Mansfield in one of the earliest judicial recognitions of unjust enrichment in *Moses v Macferlan* (1760) 2 Burr 1005 at 1012 where he said the action “...lies only for money which ex æquo bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty ... it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff’s situation, contrary to laws made for the protection of persons under those circumstances”. Issues of policy for restitution are, however, argued

reason to retain the benefit.³³ There may have been a juristic reason to receive an enrichment but if there is no longer a juristic reason to retain it, the recipient's enrichment becomes unjust.³⁴

- (d) there must be no defences available to the defendant. Recognised³⁵ defences include: change of position,³⁶ estoppel,³⁷ and delay.³⁸

It has been suggested that there should be a fifth step to this exercise, one which enquires into the available remedies in restitution.³⁹

by Edelman and Bant, above n 10, not to be part of unjust enrichment: see at 138–139 and ch 13 for a general discussion on this point.

³³ Edelman and Bant, above n 10, at 125. Continental European jurisdictions avoid issues of unjust enrichment by slotting the claim into another area of law in cases where there is a juristic reason allowing the defendant to retain the benefit. Edelman and Bant disagree with this approach as they argue that it “conceals the operation of unjust factors in the law of unjust enrichment and makes it appear as if the law of unjust enrichment is concerned only with the defendant’s juristic reason to retain the enrichment”. This approach they argue “simply pushes difficult issues arising as a result of the unjust factor into other areas of law where they do not belong”: at 126.

³⁴ Edelman and Bant, above n 10, ch 7. See also 130–138. Situations where the recipient has a juristic reason to receive the enrichment, but not to retain it can arise in contractual relationships normally from failure of consideration. This can occur, for example, where a contract, for which partial payment has been made, is frustrated. In this type of situation, although there was a juristic reason to receive the original enrichment (the clause agreeing to the partial payment), this does not mean that the recipient has a juristic reason under the contract to retain it. Upon the contract becoming frustrated, retaining the payment, despite having received it legitimately, becomes unjust: see Edelman and Bant at: 135–137.

³⁵ There remain controversial defences such as the defence of passing on. The defence of passing on is an inquiry into whether the loss is actually at the “claimant’s expense” or whether they claimant has passed on the loss. The existence of this defence is contentious: see Burrows, above n 9, at 614–616, see also Palmer, above n 27, at 326–328. The defence has only been accepted in Canada with Barker noting that it has been “roundly rejected elsewhere in the Commonwealth”: see Barker and Grantham, above n 10, at 550–553. It is noted, however, that forms of a passing on defence can exist in statute see Bant, above n 10, at 401 and Burrows, above n 9, at 617–618.

³⁶ The elements of a defence of change of position are generally accepted to require defendants to have changed their position to their detriment so that it would be inequitable, unconscionable or unjust to require full restitution: see Edelman and Bant, above n 10, 332–333. The defence has been adopted, in various forms, in Australia, New Zealand and England see Barker and Grantham, above n 10, at 462–520. See also Dennis Klimchuk “What Kind of Defence is Change of Position?” in Andrew Dyson, James Goudkamp and Federick Wilmost-Smith (eds) *Defences in Unjust Enrichment* (Oxford and Portland, Oregon, Hart, 2018) 69 and Elise Bant “Change of Position: Outstanding issues” in Dyson and others *Defences in Unjust Enrichment* 133 for a discussion on the nature of and issues with the defence.

³⁷ Although similar to the change of position defence, with some suggesting that the defences should be merged, estoppel differs in the key respect that it requires a representation to be made by the claimant to the defendant which the defendant relies on to his or her detriment. The representation can be either words or conduct, and, in cases of mistaken payment, has to be something other than payment itself: see Barker and Grantham, above n 10, at 523–532. Burrows, above n 10, has endorsed the merits of keeping a separate estoppel defence noting that it allows a better defence, advancing an “all or nothing” approach rather than a pro tanto defence, see at 550–558.

³⁸ This defence is governed by statutory limitation periods if applicable or generally through common law and equitable principles that examine the circumstances of the particular case: see Barker and Grantham, above n 10, at 553–558. For a general discussion on the operation of the defence see Edelman and Bant, above n 10, at 385–394.

³⁹ See for example Justice Keith Mason “Where has Australian restitution law got to and where is it going?” (2003) 77 ALJ 358 at 362–363.

I will, from now on, use the term unjust enrichment. While I have some sympathy for Professor Watts' concerns about the use of this term, it is not the label that is important but the underlying reasoning and the ability to recognise when there is a danger of overreach,⁴⁰ as well as being aware that different considerations may apply to different subclasses of unjust enrichment. The story of the platypus seemed to me to illustrate that, in a broad class (like mammals), there is a need for subclasses and a recognition that, even if there is a general similarity, there may also be important differences.

I agree that classification is useful. It does go some way to ensuring like cases are decided in a similar manner and it can draw attention to inconsistencies in the law.⁴¹ But it should be a tool and not a straightjacket. Justice Edelman said in *Lampson* that in his view the taxonomic category of unjust enrichment serves a useful function similar to that of “torts” in that it “directs attention to a common legal foundation shared by a number of instances of liability formerly concealed within the forms of action or within bills in equity”.⁴² Lord Toulson (with Baroness Hale, Lord Kerr, Lord Wilson and Lord Hughes agreeing) made a similar point in *Eastenders Cash and Carry*,⁴³ quoting *Goff & Jones*:

... the ‘unjust’ element in ‘unjust enrichment’ is simply a ‘generalisation of all the factors which the law recognises as calling for restitution’ [a citation from the judgment of Campbell J in *Wasada Pty Ltd v State Rail Authority of New South Wales* (No 2) [2003] NSWSC 987, para 16, quoting Mason & Carter, *Restitution Law in Australia* (1995), paras 59–60]. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases; it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled).

⁴⁰ This concern has been echoed by commentators. Kelvin F K Low “The Use and Abuse of Taxonomy” (2009) 29 *Legal Stud* 355 at 359 who noted “Whereas we should be careful not to ignore completely legal taxonomy in developing the common law, the distinct features of legal classification require us to be extremely cautious about any 'logical' developments that legal taxonomy may 'demand'. Indeed, it is important to recognise that the taxonomy is not fully revealing (indeed, sometimes not at all) of the normative values inherent in the law's responses.”

⁴¹ Barker and Grantham, above n 10, at 10.

⁴² *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* [No 3] [2014] WASC 162 at [51].

⁴³ *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] AC 1 at [102] citing the 8th edition of *Goff & Jones*, above n 25, at 1-08.

This leads to another important point about unjust enrichment: that there is no consensus on what should be contained within it. Edelman and Bant, for example, have a relatively narrow view.⁴⁴ Others would narrow it even further, excluding services.⁴⁵ Some take an expansive view by including unjust enrichment by wrongdoing.⁴⁶ Some would have it encompass, and to a degree transform, tracing,⁴⁷ knowing receipt,⁴⁸ subrogation⁴⁹ and equitable contribution.⁵⁰ The exact relationship of unjust enrichment to other parts of the law, such as contract or property, remains controversial.⁵¹ For example, is it an equal partner with tort or contract or is it subsidiary? If it is not subsidiary, issues of priority will arise where there is a concurrence of liability.⁵²

⁴⁴ Edelman and Bant, above n 10, ch 13 for example would exclude policy-based restitution claims such as illegality and incapacity from falling under the umbrella of unjust enrichment. They argue that an imperfect intention is irrelevant to an independent right of restitution.

⁴⁵ Academic discussion revolves around the position of services which result in a product and those which do not, the latter labelled pure services. Some commentators dispute whether pure services can constitute an enrichment as the labour cannot be restored: see for example R Grantham and C E F Rickett *Enrichment and Restitution in New Zealand* (Oxford, Hart, 2000) at 165–166 and 172–175. They argue that services are better dealt with under remuneration. For a brief discussion on the issues that arise with claims of unjust enrichment for services see Rohan Havelock “The Enrichment Requirement” in *Issues in Unjust Enrichment 2014* (NZLS CLE, July 2014) 37 at 39–40.

⁴⁶ Claims involving civil wrongs include trespass and gains made via breach of confidence. These wrongs also have other avenues of redress available to them other than restitution see Barker and Grantham, above n 10, at 395–444 for a discussion on wrongs in claims of unjust enrichment.

⁴⁷ Barker and Grantham, above n 10, at 567 say “tracing is a legal process by which one asset is permitted to stand in the place of another for the purposes of whatever rights or claims the plaintiff may have had in respect of the first asset”. For their full discussion on the relationship between unjust enrichment and tracing see: 567–596.

⁴⁸ There is contention as to whether a strict liability approach should be taken to recipients of property in unjust enrichment claims, an approach that would effectively overtake knowing receipt. This position is controversial and, although supported by some commentators, it has not found favour with others: see the editors of *Goff and Jones*, above n 25, at 8–196 to 8–203. See also Barker and Grantham, above n 10, at 206–213; Jonathan Moore “‘Knowing receipt’ in Australia” (2006) 1 J Eq 9 and David Salmons “Claims Against Third-Party Recipients of Trust Property” [2017] 76 CLJ 399.

⁴⁹ See for example *Banque Financiere de la Cité v Paré (Battersea) Ltd* [1999] 1 AC 221, a case that has been extensively criticised by Professor Watts: see for example Peter Watts “Subrogation – a step too far?” (1998) 114 LQR 341. *Banque Financiere* allowed the benefit of a security even where none was intended, with Watts “Unjust Enrichment”, above n 16, at 304 describing the case as a “commercial law travesty”. The *Banque Financiere* approach was rejected in Australia in *Bofinger*, above n 9, at [97]. See also the discussion on subrogation in Barker and Grantham, above n 10, at 648–667, and Daniel Friedman “Payment under mistake – tracing and subrogation” (1999) 115 LQR 195 at 197.

⁵⁰ Edelman and Bant, above n 10, at 48–49 and 293–298, for example argue that the principles of equitable contribution are in line with unjust enrichment. For a discussion on the general position of equitable contribution in English law: see Mitchell, above n 25, at 20–02–20–10. See also Victoria Stace “The Law of Contribution – An Equitable Doctrine or Part of the Law of Unjust Enrichment?” (2017) VUWLR 471.

⁵¹ Barker and Grantham, above n 10, ch 2.

⁵² How unjust enrichment is categorised, and whether it sits as an equal partner to the other core limbs of private law, affects the development of other limbs of the common law: see for example the discussion of the potential issues in Peter Jaffey “The Unjust Enrichment Fallacy and Private Law” (2013) 26 Can J L & Jurisprudence 115. See also Dennis Kilmchuk “The Scope and Structure of Unjust Enrichment” (2007) 57 U Toronto LJ 795 and Low, above n 40, for a discussion on the nature of, and issues with, the Birksian taxonomic classification.

The operation of the defence of change of position is also contentious.⁵³ There is for example, disagreement as to whether disenrichment is required or whether the change needs to be irreversible for defendants to establish that they have acted to their disadvantage.⁵⁴ In Australia, the High Court has rejected the requirement of disenrichment in favour of the irreversibility approach.⁵⁵ Although unsettled, the English approach by contrast, seems to be a broader consideration of whether an alteration in the position of the defendant means that it would be inequitable to require restitution.⁵⁶ This in turn can be contrasted with the balancing the equities approach in New Zealand, which is discussed below.⁵⁷

All of this controversy makes it somewhat difficult for judges at the coal face, I venture to say. Whatever you do, you are likely to fall foul of some commentator. And no doubt lawyers are in an even worse position when they are advising clients.

Some of those differences of view come down to different conceptions of the underlying basis of unjust enrichment. While most legal systems have some notion of the maxim attributed to Pomponius that “by the law of nature it is fair that no one should become richer by the loss and injury of another”,⁵⁸ the underlying reasons for this differ, which can lead to differences in operation.⁵⁹

Nahel Asfour, in a recent book on the cultural underpinnings of enrichment law, suggests that the European concept is based on the private domain of the disadvantaged person and an

⁵³ See, for example, the discussion in Barker and Grantham, above n 10, at 458–462 who note that the recognition of a change of position defence in England and Australia is relatively recent and that the exact scope of the defence, especially in Australia, is uncertain. This can be contrasted to the position taken in Germany, which as Butler noted, sees the change of position defence “as central to enrichment law”: Butler, above n 8, at 10–12.

⁵⁴ Edelman and Bant, above n 10, at 332–338.

⁵⁵ *Australian Financial Services and leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, (2014) 253 CLR 560. See also Edelman and Bant, above n 10, at 335–338.

⁵⁶ *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580 where Lord Goff said, “I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full”. See also Mindy Chen-Wishart “Unjust Factors and the Restitutionary Response” (2000) 20 Oxford J Legal Studies 557 for a discussion on the operation of the unjust factor on this approach and John Burrows “Change of Position: The View from England” (2003) 36 Loy LAL Rev 803.

⁵⁷ For a discussion on the approach taken in New Zealand see Ross Grantham and Charles Rickett “Change of Position and Balancing Equities” (1999) 6 RLR 158 and Scott “Mistaken Payments and the Change of Position Defence: Rare Cases and Elegance” (2012) 12 Otago LR 645.

⁵⁸ Edelman and Bant, above n 10, at 9.

⁵⁹ Barker and Grantham, above n 10, at 10–14.

attachment to property.⁶⁰ In the United States, by contrast, the concentration is on the cause of action.⁶¹ This is because of the American hesitation to inhibit the transfer of wealth unless a particular problem arises.⁶² The third system Asfour studied was the late Ottoman Empire, where enrichment law was based on the notion of socio-religious accountability.⁶³

Turning closer to home, the concept of *utu* in Māori custom, while commonly thought of as revenge, is in fact a much wider concept and could include some form of unjust enrichment.⁶⁴ The basis of *utu*, as I understand it, is the need to restore balance, with a view to achieving equilibrium in long-term relationships and particularly those based on kinship. Usually *utu* would be designed to leave the other party in a better position than before and this would create a cycle of reciprocity.⁶⁵ I make these comments on the basis that customary law, to the extent not extinguished by statute, may well be part of the common law in New Zealand or at least be relevant to its development.⁶⁶

This leads to the next issue I would like to discuss: the role of statute. This is particularly relevant to New Zealand because of our (at least partial) codification of a large part of contract

⁶⁰ Natel Asfour *Unjust Enrichment: A Study in Comparative Law and Culture* (Hart, Oxford and Portland, Oregon, 2017) at 47-68.

⁶¹ For a general discussion on the influence of the American culture see at 95–115.

⁶² At 114–115.

⁶³ At 115–156. The socio-political framework of the Ottoman Empire was built around the religious philosophy that underpinned the role of the Sultan and central powers. As Asfour notes, restitution in the Ottoman Empire was “an issue of trust, of social and religious expectations and of aligning to potent rules of religion and society”: at 156.

⁶⁴ For a discussion on the concepts *utu* encompasses and the difficulty in settling on a single definition see Tai Ahu, Rachael Hoare and Māmari Stephens “*Utu: Finding a Balance for the Legal Māori Dictionary*” (2011) 42 VUWLR 20.

⁶⁵ Waitangi Tribunal Report *Muriwhenua Land Report* (Wai 45, 1997) at 26; Law Commission *Māori Custom and Values in New Zealand Law* (Study Paper 9, Wellington, 2011) at [156]–[157]; Nathan Kennedy and Richard Jefferies *Kaupapa Māori Framework and Literature Review of Key Principles* (PUCM Māori Report 4, 2009) at 71–74 and John Patterson *Exploring Māori Values* (Dunmore Press, Palmerston North, 1992) at 122 as cited in Ahu, Hoare and Stephens, above n 64, at 201.

⁶⁶ *Takamore v Clarke* [2013] 2 NZLR 733, [2012] NZSC 116 at [164] McGrath J on behalf of the majority (Tipping and Blanchard JJ) said in the context of customary burial practises that “...the common law of New Zealand requires reference to the tikanga [of the relevant iwi], along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation”. A similar view was expressed by Elias CJ who noted that “[v]alues and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case”: at [94]. For a general discussion on the position of customary law after *Takamore* see Laura Lincoln “*Takamore v Clarke: An appropriate approach to the recognition of Māori custom in New Zealand law?*” (2013) 44 VUWLR 141. For a brief analysis on the different approaches to tikanga Māori see Rebecca Walsh “*Takamore v Clarke: A Missed Opportunity to Recognise Tikanga Māori?*” (2013) 19 Auckland UL Rev 246 at 248–251. See also Justice Joe Williams “*Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law*” (2013) 21 Waikato Law Review 1 at 15–16 and Natalie Coates “*The Recognition of Tikanga in the Common Law of New Zealand*” (2017) 5 Journal of Māori and Indigenous Issues 25 at 36.

law such as the law relating to mistake, misrepresentation and illegality.⁶⁷ Although limited to situations where there is a contractual relationship, the Contract and Commercial Law Act 2017 provides for relief in a wide range of circumstances that concern issues of restitution. For example, where a mistake of law or fact has resulted in an unequal exchange of values or conferment of benefits that is substantially disproportionate to the consideration,⁶⁸ the courts have a wide discretion to grant relief such as compensation, variation of the contract or restitution.⁶⁹ How unjust enrichment fits within the framework of those statutes is an issue the courts have not yet considered in depth.⁷⁰

Possible difficulties with the relationship between common law and statute are illustrated by the New Zealand Court of Appeal decision in *National Bank v Waitaki*.⁷¹ In that case the defendant had tried to unsuccessfully convince the Bank that it was not owed money but in the end agreed to take it.⁷² It was then invested. By the time the Bank accepted that the payment was mistaken, the investment had become worthless.⁷³ The Court of Appeal held that the statutory change of position defence was unavailable as the defendant had been aware that the bank would eventually claim the money back. When Waitaki had altered its position, it had not done so in reliance of the bank's validation of the payment.⁷⁴ However, the Court held that the common law defence had survived the implementation of the statutory defence and that Waitaki had acted in good faith, despite knowing the Bank was mistaken.⁷⁵ The Court ordered only partial repayment of the sum mistakenly paid on the basis both parties had been negligent.⁷⁶

⁶⁷ Originally contained in the Illegal Contracts Act 1970, Contractual Mistakes Act 1975 and the Contractual Remedies Act 1979 these Acts have been consolidated into the Contract and Commercial Law Act 2017. For a brief discussion on the statutory codification of the common law see Matthew Barber "Influences" in Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis NZ, Wellington, 2018) 13 at 20-21.

⁶⁸ See ss 75 and 24(1)(b).

⁶⁹ Sections 75 and 76.

⁷⁰ Barber, above n 67, at 28–30. For a brief discussion on the current position in New Zealand see Jessica Palmer "Unjust Enrichment: What is it all about?" in *Issues in Unjust Enrichment 2014* (NZLS CLE, July 2014) 21 at 32–34.

⁷¹ *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (Henry, Thomas and Tipping JJ).

⁷² At 213–214.

⁷³ At 214–215.

⁷⁴ At 227 per Thomas J, 231–232 per Tipping J, Henry J dissented on this point at 218.

⁷⁵ At 219 per Henry J, 227–228 per Thomas J and 232 per Tipping J.

⁷⁶ At 225 per Henry J, 231 per Thomas J and 233 per Tipping J.

The Court's balancing of the equities approach has been much criticised.⁷⁷ I think this criticism may be a bit unfair in that this was a decision that confirmed the continuation of the common law defence of change of position alongside the statutory defence. The statutory defence gives a broad discretion, applying where it is inequitable to grant relief. It arguably would not have done much for coherence in the law if there were two different tests, depending on whether the statutory test or the common law or both applied.

In some cases, statute may occupy the ground. An example this is the recent Supreme Court case of *McIntosh v Fisk* which related to a large-scale Ponzi scheme.⁷⁸ The perpetrator had purported to invest in the share market during the Global Financial Crisis, achieving returns that, unfortunately for investors, turned out to be too good to be true.⁷⁹ The issue was whether Mr McIntosh, who had been paid out prior to the collapse of the scheme, was entitled to keep his capital and the fictitious profits that had been paid to him.⁸⁰ This was either on the basis he had given value for those or on the basis of change of position.⁸¹ The case was argued and decided on the basis of the Companies Act 1993⁸² and the Property Law Act 2007⁸³ and not on the basis of unjust enrichment.⁸⁴

⁷⁷ The approach taken in *Waitaki* was not adopted by the Privy Council in *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) at [45]. Lord Bingham and Lord Goff said they were “most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so”. They also noted, quoting Professor Birks, that “that the New Zealand courts have shown how hopelessly unstable the defence [of change of position] becomes when it is used to reflect relative fault”. For a general discussion on these cases see Grantham and Rickett, above n 57; Scott, above n 57, and Palmer, above n 27, at 449. Australia has also taken a different position to New Zealand: see for example Keith Mason, J W Carter and G J Tolhurst *Mason & Carter's Restitution Law in Australia* (3rd ed, LexisNexis Butterworths, 2016) at 880–881.

⁷⁸ *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863.

⁷⁹ At [3]–[5].

⁸⁰ At [9].

⁸¹ At [9].

⁸² See at [9], [47]–[69] and [137]–[184] per Arnold, O'Regan, Ellen France JJ (the majority). The issue under the Companies Act was whether the disposition was an insolvent transaction for the purposes of s 292(1), and if so, whether the change of position defence in s 296(3) was available.

⁸³ See at [9], [19]–[46] and [192]–[198]. The issue under the Property Law Act was whether the requirements of s 346 (that a disposition of property by an insolvent debtor was made to prejudice a creditor) were established, which, subject to any defences available under s 349, would allow the liquidators to seek repayment of the disposition through an order under s 348 via s 347 of the Act.

⁸⁴ It is noted that there was a suggestion that *McIntosh* could be decided in terms of equitable principles, with the Court requesting submissions on the point: see at [15]. The money in dispute had been held on trust which it was argued meant that it did not fall under s 292 of the Companies Act. This argument was rejected on policy grounds see [57]–[60]. The majority also noted at [138]–[140] that the sections in the Companies Act are similar to restitution principles.

Change of position was rejected on the facts.⁸⁵ The “profits” Mr McIntosh had received on his investment were required to be repaid, basically on the grounds that they were fictitious.⁸⁶ By majority, Mr McIntosh was allowed to keep his capital.⁸⁷ I dissented, in part on the basis that an accident of timing should not favour one investor over another, particularly as the very essence of a Ponzi scheme is that investment by new investors is used to pay out those investors who wish to withdraw their funds.⁸⁸

Incidentally, the issue of the appropriate treatment of Ponzi schemes has been the subject of a discussion document by the Ministry of Business, Innovation and Employment which has suggested equal sharing of loss between all defrauded investors.⁸⁹ Submissions have closed on the document but there has been no further report yet as far as I am aware.

Now you could well be feeling slightly dissatisfied that I have so far raised a number of questions without attempting to be definitive on classifying unjust enrichment (my platypus). Unfortunately, my time is up and it would probably be unwise for me to anticipate where the New Zealand courts might go to from here. So for now I adjourn for further argument.

⁸⁵ The defence under the Property Law Act, s 349(2)(b) was rejected at [192]–[198], and under the Companies Act, s 296(3)(c) at [137]–[191].

⁸⁶ At [121]–[129] and [199] per the majority and at [226] with William Young J in agreement.

⁸⁷ *McIntosh*, above n 78, at [199] with William Young J in agreement at [225]–[226]. The majority distinguished Mr McIntosh’s position from the Privy Council decision of *Fairfield Sentry Ltd v Migani* [2014] UKPC 9, [2014] 1 CLC 611 which concerned an investment fund that had lost money because of the Madoff Ponzi scheme. The majority in *McIntosh* held the investments in the two cases to be materially different. *McIntosh* concerned a direct investment, where the appellant hired the fraudulent investment company to invest on his behalf, whereas *Fairfield* concerned a situation where investors indirectly invested into the fraudulent company by subscribing for shares in the fund at a price that supposedly reflected the fund’s net asset value per share: see [108]–[112] and [246]–[247]. In *Fairfield* the particular contractual arrangements of the investment prevented the claim in that case qualifying as unjust enrichment.

⁸⁸ At [261]–[282] per Glazebrook J.

⁸⁹ Ministry of Business, *Innovation and Employment Discussion paper: A New Regime for Unravelling Ponzi Schemes* (May 2018) at [279]. See also Andrew Kull “Defences to Restitution Between Victims of a Common Fraud” in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds) *Defences in Unjust Enrichment* (Hart, Oxford and Oregon, 2018) 229 at 250–254 for a discussion of equal sharing in these types of circumstances.