Reviews

The Varieties of Restitution

I.M. Jackman; The Federation Press, 1998; 186 pp; $45 softcover.

There is little doubt that the law of restitution is sometimes difficult to grasp. I wake up some mornings sympathising with one of the great common law thinkers, Professor Patrick Atiyah. To him, where a party receives money pursuant to a contract that later turns out to be void, the money could be recovered under a restitutionary claim to recover on a total failure of consideration, but there is no reason why it could not be formulated under a contractual claim to restitutionary damages. It bears marks of contractual action to much the same degree as restitutionary ones. Atiyah argues that the law of restitution deals with a heterogeneous collection of cases which have little more in common than the fact that one person should restore a benefit received from another to avoid being unjustly enriched; something that could be dealt with almost entirely in the sphere of contract law.

On other mornings, I wake up convinced of the validity of the law of restitution, ready to follow proponents such as Lord Goff and Professors Jones and Birks. They seem to understand that there is a need for a separate category of civil obligations, as first mapped out by the Americans in their Restatement of Restitution. To them, restitution has no well-defined boundaries because it is concerned with unjust enrichment, and that can appear in many places over almost the entire body of private law as well as some parts of public law.

In my dreams, however, I believe that any one of contract, tort or restitution, as human constructed categories, could really be reformulated and manipulated to cover the entire area of private law and civil liability. For example, an environmental spill might well be characterised as a breach of a contractual agreement with the public at large to maintain the quality of the world, if only we could see our way through to dispensing with such formalistic contractual inventions as privity, offer and consideration. Or a potential purchaser of land who terminates a contract of sale, should be entitled to reimbursement for any improvements, since a vendor retaining such benefits without paying breaches a duty of good faith dealing giving rise to a claim in negligence. And so on ...

While my dream-state is no more than a utopian fool's paradise, an attempt to reformulate the law from without, restitution scholars have developed a corpus of work by reformulating the law from within — by examining cases where unjust enrichment has arisen and reclassifying decisions according to new criteria that judges themselves may not have been aware of until recently. For over 50 years this taxonomic project has proceeded apace. In Anglocentric jurisprudence it really began with Goff and Jones, who in turn were critiqued, refined and sometimes superseded by Birks, who also, in turn, faced his own upstart Andrew Burrows. Now we have I.M. Jackman in *The Varieties of Restitution* attempting to construct a whole new body of restitution. Unfortunately, he has missed the boat.

At first, all looks right. The table of contents plays across familiar territory, as the first four parts cover the major areas of mistaken payments, duress, undue influence and unconscionable bargains and total failure of consideration. Most of these areas were set out in Goff and Jones' original work.

But the similarity ends there. Unlike Professor Peter Birks, whose disagreement on restitutionary theory with Goff and Jones is legendary, but who at least speaks a common language, Jackman's restitutionary language is, to say the least, novel. Jackman has created a model of restitution that, on its surface, is common with all the others, but after some digging, is found not to be the same thing at all. It is a little like pulling at a root that turns out to be a snake.

Part of the problem is Jackman's refusal to accept the basic elements of a restitutionary claim for unjust enrichment. The very essence of restitution law depends on a defendant being enriched. It is not necessary for a plaintiff to have a corresponding loss, but Jackman seems to conflate these two conditions. And this gets him into great difficulty when he discusses his concepts of restitution for wrongs, which should not form part of the law of restitution for unjust enrichment. Of course, a wrong committed, such as a breach of fiduciary duty, may give rise to a claim for unjust enrichment where there is such an enrichment, but the same act can also give rise to a claim for breach of fiduciary duty. The underlying act may be the same; the legal consequences, however, are conceptually different. (It should be noted that Jackman's discussion on the rationale for always protecting breach of fiduciary duty — on the grounds of institutional harm — is a cogent and important analysis, but it belongs in the legal realm of equity, not in the area of restitution for unjust enrichment.)

Another example lies in Jackman's confusion between mistaken benefits in kind and realisation of the benefit. For example, an oft-cited authority for allowing restitution where a person renders services under a mistake is *Greenwood v Bennett*. Lord Denning found a general principle of law that allows someone who mistakenly believes they are the owner of property to recover the value of improvements done to a chattel from the true owner, where the true owner later realises the value of the asset. No restitution scholars, of whom I am aware, argue with the result of this case because the owner clearly realised a benefit — the only controversy between commentators arises in a situation where the true owner either does not realise any added benefit, or does not wish to do so. Jackman's view, although not expressly stated, seems to be that mistaken benefits in kind should not give rise to a right in restitution because of subjective devaluation. There is no mention of the fact that both free acceptance *and incontrovertible benefit* are conditions placed on subjective devaluation. In fact, a perusal of the index shows that there is no mention of incontrovertible benefit at all.

What Jackson has done is to revitalise the debate surrounding the basic need for a theory of unjust enrichment in modern legal systems. He provokes us to re-evaluate the core elements of unjust enrichment, and to test them against our beliefs in the validity of this still immature and growing area of law. While I remain cynical of his approach, only time will tell if his vision is simply misguided or truly revolutionary.

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