Unjust Enrichment, George Klippert, Toronto: Butterworths, 1983. Pp. 389, $39.00 (cloth).

The concept of unjust enrichment as a basis for legal intervention through the vehicle of restitution describes one of the more problematic of current categories of legal obligation. The classic exposition of the principle of unjust enrichment is generally conceded to be provided by the opinion of Lord Mansfield in *Moses* v. *Macferlan*:

> If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract . . . This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et 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 honour and honesty, although it could not have been recovered from him by any course of law; . . . In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.[1]

A more contemporary formulation of the rationale for recovery in those situations in which the retention by the defendant of non-donative benefits is characterized as unjust may be discovered in the opinion of Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*:

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of law, just as much as an obligation in tort.[2]

In such instances, the legal system will intervene through the imposition of liability in order to prevent unjust enrichment. The nature of the liability recognized in such instances has received a variety of definitions. That suggested by Winfield appears representative: "Liability, not exclusively referable to any other head of law, imposed upon a particular person to pay money to another person on the ground that non-payment of it would confer on the former an unjust benefit".[3]

However, general acceptance of the concept of unjust enrichment as a synthetic category of legal obligation which enjoys a juristic status independent of either contract or tort is comparatively recent and the rationale for recognition of such a basis of liability advanced by Mansfield, Wright and Winfield *inter alia* has been, to a certain degree, rivalled by a competing theory of the underlying nature of the liability—one which has emphasized the discrete nature of the classes in which restitution of non-donative benefits will be compelled. According to this latter view, restitution does not

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[1](1760), 97 E. R. 676 (K. B.) at p. 678, 680, 681.

[2][1943] A. C. 32 (H. L.) at p. 62.

[3]P. H. Winfield, *The Law of Quasi-Contracts*, London: Sweet & Maxwell Ltd., 1952, pp. 1-2.

function as an independent category of legal obligation; rather, the desire to prevent unjust enrichment is a principle informing the substantive law of tort, contract, property and salvage, *inter alia*, which is reflected in theories of mistake, compulsion and frustration, to cite several examples and which will find expression in a restitutionary award. This controversy has, on occasion, been reframed as a dispute between substantive and remedial functions of restitution.

Analytic disagreement has apparently been resolved, at least in Canada, in favour of a theory of restitutionary recovery which is synthetic, generalized and unified in the sense that restitution denotes a cause of action which is both designed to redress certain species of unjust enrichment and which will be available upon proof of unjust enrichment. In other words, whereas the remedy of restitution was always predicated upon an overt desire to preclude or correct instances of unjust enrichment, the availability of the remedy was initially dependent upon, for example, proof of an implied contract. While references to 'implied' or 'quasi' contract may still be noted, more recent cases appear to embrace the view originally espoused by Lord Mansfield: that is, the availability of restitution is not contingent upon evidence of quasi-contract but will lie whenever '*ex aequo et bono*' the defendent ought to be compelled to disgorge benefits conferred by the plaintiff. As a result, restitution now may be regarded as distinct and autonomous body of law which is integrated by a common objective: the preclusion of the unjust retention of non-donative benefits. In short, our legal system may have reached the stage in which the existence of unjust enrichment will constitute both a necessary and sufficient basis for legal intervention.

However, recognition of restitution as a generic category of legal obligation does not eliminate certain problematic features associated with recovery in such situations. As a basis for judicial intervention, the interest in prevention of unjust enrichment is clearly a compelling one. To the extent that the phenomenon of unjust enrichment presupposes impoverishment of one party coupled with a corresponding gain on the part of another in circumstances which would suggest that retention of the gain was wrongful, the arguments in favour of restoration of the *status quo ante* are obvious. Redress of unjust enrichment furthers the interests of 'corrective justice' through the recreation of a prior and presumptively fair equilibrium of distribution of resources.

But recognition of the necessity of prevention of unjust enrichment as an abstract proposition does not in itself provide a sufficient legal framework to resolve difficult questions. In what situations, outside of contract, property or tort, will the restitution of non-donative benefits be ordered? How will such enrichment be quantified—by the defendent's gain or the plaintiff's loss? What defenses exist to a claim for restitutionary recovery? What function does restitution perform in contractual actions.?

Professor G. Klippert in a recent text entitled *Unjust Enrichment*[4] attempts to address these and analogous issues. The author's objective is elucidated in the preface in the following way:

> The object of this book is to provide an alternative perspective to analyze and evaluate the law of restitution. It has been traditional in Canada, England and in the United States to organize the cases according to the historical categories such as mistake, compulsion, necessity, waiver of tort, to name just a few and the central focus becomes the operation of the unjust enrichment principle within each category. In contrast, the compass of this book is to use the law developed within these categories as illustrations of the various elements composing the principle of unjust enrichment.[5]

Klippert thus reveals himself to be an adherent of the contemporary view of the operation of restitution—namely, that which perceives restitution as a synthetic category. Therefore, his emphasis is addressed less to an identification of those situations in which restitution will be available than to an ascertainment of the elements of unjust enrichment. Accordingly, the structure of the text is organized along the following lines: a general discussion of unjust enrichment as a basis of liability coupled with, in succeeding chapters, a more specific examination of the elements of unjust enrichment: benefit, voluntariness, volition and unjust benefit. The remainder of the text focuses upon miscellaneous matters: illegality, restitution within contract, enrichment of the wrongdoer and a comparison of civilian and common law perspectives upon the problem of unjust enrichment. What distinguishes this text from others is the emphasis upon the development of what is asserted to be a distinctively Canadian jurisprudence.

The method of organization adopted by Klippert departs from the more traditional modes of analyses. According to one approach, restitution is equivalent to and confined by the ambit of quasi-contract, within which category distinctions may be drawn between pseudo-quasi contracts, pure quasi-contracts, quasi-contract as an alternative basis of liability and doubtful quasi-contracts.[6] Alternatively, restitution has been examined within the contexts in which restitutionary remedies are available, as, for example, in cases of mistake, frustration, duress, compulsion or necessity. In contrast to these particularizing approaches, Klippert adopts a generalized perspective; that is, rather than considering "the principle [of just enrichment] as providing a unifying explanation for the various classes of quasi-contractual actions",[7] Klippert hypothesizes that the principle of unjust enrichment itself comprises a substantive basis of liability. The approach adopted by the text is therefore dictated by this thesis and results in a concentration upon the components of unjust enrichment. One might compare this approach with the conventional legal appreciation of contract as

[4]Toronto: Butterworths, 1983.

[5]*Ibid.*, at p. vii.

[6]Such is the approach adopted by Winfield, *supra* footnote 3.

[7]*supra*, footnote 4 at pp. 27-28.

a generic legal label attaching to agreements exhibiting the requisite features of acceptance and consideration. An analogous effort is made by Klippert to extrapolate from diverse restitutionary actions the universal and common elements of the legal concept of unjust enrichment.

Two caveats must be mentioned prior to an evaluation of the success of Klippert's task. In the first place, I must admit to a degree of ignorance concerning the subject matter. Prior to an examination of this work, my exposure to the field of restitution had been limited to a consideration of quasi-contract in the contractual context and to a passing familiarity with the studies of Winfield[8] and Stoljar[9]. However, I am not convinced that consideration from the vantage point of comparative unenlightenment provides the worst perspective from which to assess the merits of what (I assume) is intended to serve as a basic text. Clearly an introductory text must, at the very least, provide to the uninformed reader an adequate description of the relevant law presented in a stimulating, logical and coherent fashion. Beyond that, the analytic framework within which the description is contained should be distinguished by clarity and intelligibility in relation both to the illumination of the underlying thesis and to the justification advanced in support of this thesis.

Secondly, I must confess to a certain degree of skepticism as to the inherent validity of Klippert's premise. While the desire to generalize and to synthesize is an understandable impulse, the legal result of such activity is too often the promulgation of an unduly static and rigid view of the law which either fails to acknowledge or often minimizes significant distinctions. The stultifying effects of the subordination of empirical reality to legal rules is most evident in certain phases of contract. It is not clear whether Klippert's view avoids parallel distortions. Further, even if one were convinced that the effort to synthesize and abstract from the range of restitutionary cases the components of unjust enrichment was a correct or preferable approach, the activity, at least in a Canadian context, might be somewhat premature given the fairly recent date of judicial acceptance of the principle. In order to be successful in this enterprise, a high degree of analytic sophistication coupled with an intensive familiarity with contract and tort is demanded.

Klippert's work is disappointing on both counts. As a descriptive exercise intended to convey the rudiments of an unjust enrichment action it is simplistic, trite and repetitious. As a philosophical argument favouring a syntheticly viewed restitutionary recovery it is shallow, ill-conceived and inadequately elucidated. I am uncertain as to the potential beneficiaries of this exercise: it clearly would not serve the interests of the law student since it does not comprehensively elaborate conventional theory but instead presupposes a passing acquaintance with the traditional view. At the same

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[8] *supra*, footnote 3.

[9] S. J. Stoljar, *The Law of Quasi-Contract*, Australia: The Law Book Co. of Australasia Pty Ltd., 1964.

time, the analytic perspective is so slight, unsophisticated and obscure that it would not be of much interest to either a law teacher or practitioner.

Part of the problem I believe lies in Klippert's unwillingness to fully commit himself to either a descriptive recounting of unjust enrichment in Canada or to the advocacy of a novel thesis. Instead, Klippert attempts an uneasy compromise between description and analysis and fails to achieve either. In fairness, it must be conceded that the descriptive elements of the work are slightly better presented. However, even if this text constituted a perfect and encyclopedic recounting of Canadian restitutionary cases, I am not sure that this in itself would be sufficient to redeem the text since as Gilmore so perceptively remarked:

> Describing what you see is undoubtedly a useful exercise. It trains the mind in habits of close observation, precise analysis and lucid statements. It is not every lawyer who can state a complicated case accurately and well. However, when you have finished describing something, all you really have is a list. In itself the list is meaningless—a lot of trees waiting for someone to assemble them into a forest.[10]

Fortunately, one is spared the task of counting Klippert's trees to ensure comprehensiveness since it is very evident that these trees can never constitute a forest. The failure to develop a synthetic philosophy which would unify current categories of delict permitting recovery for injurious reliance and restoration of non-donative benefits ensures a fundamental incoherence in exegesis. This fault is most apparent in the introductory chapters which address the background of restitution and unjust enrichment as a basis for liability. While the former reproduces with only insignificant variations the factual substance of, for example, Winfield, it does not address what surely ought to have been the preliminary inquiry: that is, why quasi-contract? What were the characteristics of the institution of contract which generally precluded direct restitutionary recovery in instances of unjust enrichment? At the same time, what was significant about the character of factual instances of unjust enrichment which encouraged the partial assimilation of principles of restitutionary recovery to those of contractual liability through the vehicle of the implied-contract or quasi-contract? While one learns, very briefly, of the procedural elements of account, debt, *indebitatus assumpsit* and quasi-contract no thematic context is provided which would infuse facts with intelligibility. While it may be now trite to observe that our legal system is gradually embracing a generalized theory of obligation, such was not always the perception and appreciation of the historical function served by quasi-contract. It must surely entail not only a procedural understanding of the origins of the action but even more importantly, an appreciation of historical conceptual distinctions between contract and tort. The development of quasi-contractual recovery is not explained merely on the basis that "[T]he law of tort generally places negative duties; contract law is accustomed to enforcing a positive or af-

[10]G. Gilmore, *The Death of Contract*, Columbus: Ohio State University Press, 1974, at p. 3.

firmative obligation".[11] To draw an analogy, one cannot speak with any degree of insight about fusion of contractual and tortious liability without knowledge of tort and contract anymore than one can address restitution as a unified category of liability without first comprehending the interrelationship of tort, contract and unjust enrichment. Even within the category of unjust enrichment itself, little effort is made to differentiate between competing theories of recovery. The distinctions between implied-contract, on the one hand, and considerations of justice and equity on the other are not simply the product of temporal progression as Klippert implicitly suggests but represent profoundly divergent views as to the source and operation of legal obligations.

Analogous complaints may be made in regard to chapter two which addresses "Unjust Enrichment as the Basis of Liability". While I assume that the principal theme of this chapter concerns the convergence of claims evidencing the requisite relationship of detrimental reliance on the part of one individual coupled with gain on the part of another under the rubric of unjust enrichment and the parallel assimilation of claims of detrimental reliance to the residual category of negligence, both developments at the expense of the expansion of contract law, this point is obscured by the explanatory discussion. Instead of an examination of the contemporary relationship between contract, tort and restitution, the chapter commences with an elaboration of the five stages of the evolution of the legal concept of unjust enrichment. Since the stages identified by Klippert may be noted (arguably) in most, if not all, areas of substantive law, I am not convinced that the initial portion of this chapter serves any useful purpose, particularly when it consists of little more than extended factual descriptions of cases and analysis of the calibre exemplified by these representative passages:

> The early English concept of implied contract as the basis of liability in a restitution case has gone by the boards. The result has been to shift the Canadian law of restitution away from the less coercive nineteenth-century means of imposing liability towards a far more pragmatic, flexible basis. The principle of unjust enrichment has been the driving force behind this restructuring of restitutionary obligations.[12]

and

> The principle of unjust enrichment, like that of negligence, often masks a deeper concern not voiced in many cases. The method by which judges decide cases has distinguished their judicial function of Parliament. The charge has been made that the courts are enacting statutes when they adopt broad principles such as unjust enrichment, negligence or substantive fusion as the basis for their decision.[13]

The latter portion of the chapter, concerning the extension of delict is, similarly, either shallow or confusing. The reader may be forgiven for

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[11] Klippert, *supra*, footnote 4 at p. 2.

[12] *Ibid.*, at p. 28.

[13] *Ibid.*, at p. 31.

uncertainty as to the meaning to be derived from the conceptual *non sequiturs* by which Klippert attempts to develop his thesis. What is one to make of the following passage?

> The standard for negligence and unjust enrichment becomes an issue as to whether there is a "sufficient relationship of proximity", and then whether there are "any considerations negativing, reducing or limiting the scope of the duty or the class of person to whom it is owed or the damages (or benefit) to which a breach of duty (or conferring of a benefit) may give rise. What is likely to emerge in negligence . . . and in unjust enrichment . . . is a special relationship best which turns upon "some degree of reliance" between parties who occupy a close proximity. Thus the case of reliance-loss liability where damages is at issue has been overtaken by the law of tort. On the question of reliance-benefit liability, the case is resolved in restitution. The promise based shelter will not be as readily available.
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> The developments in American law have been enormously influenced by section 90 of the Restatement of Contracts. It has been argued that American contract law has recognized reliance liability as creating a contractual obligation on the part of the promisor to perform.[14]

Does this mean that reliance is not significant in contract law? That contract is dead? That negligence and unjust enrichment are alternative labels attached to the same process? That recent cases support the fusion of unjust enrichment and negligence? Or does the reference to contemporary developments in negligence law merely function as a strained conceit? It is difficult to discern the precise meaning to be attached to such passages. While at times Klippert appears to be advocating what has, in another context, been described as 'syncretism',[15] on other occasions he appears, in contrast, to be asserting the development of a substantive body of restitutionary law, independent of either contract or tort. Lack of clarity can be attributed to a number of factors: failure to define terms such as reliance and proximity, reliance upon cases which do not support the propositions advanced and a general absence of continuity and logic in discussion. One would like to be able to evaluate the substance of the author's argument but absent any explication of the argument, and definition of terms, and any intellectual illumination, it is impossible to understand, at even preliminary level, the essence of the thesis which is advanced. The confused and confusing nature of Klippert's analysis of the development of unjust enrichment significantly diminishes the force of his discussion. Unsophisticated declarations as to the desirability of judicial review, banal and dated observations concerning contemporary tort and contract law, fragmentation and incoherence in explanation, and tenuous and unsupported assertions seriously impair the value of this work and render the reader hesitant to proceed any further.

However the remainder of the work is slightly better if only because, contrary to Klippert's initial objective, the framework of the discussion adheres to the traditional pattern of organization. Less opportunity is there-

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[14] *Ibid.*, at pp. 64-65

[15] Gilmore, *supra*, footnote 10, at pp. 89-90 in which syncretism is defined as "the reconciliation or union of conflicting beliefs."

fore presented for originality and correspondingly Klippert generally refrains from the interjection of philosophical arguments of the type contained in the preliminary chapters. One might wish for a more critical evaluation of many of the areas, such as the notion of benefit and its relationship to gain and loss and the function served by restitution as an alternative to an action for damages for breach of contract. One might also have suggested greater precision in terminology and consciseness in explication. However in undertaking description, Klippert is on safe,[since] well-established ground; when description shades into analysis, the criticisms advanced in connection with the first two chapters apply. His discussion is either trivial and simplistic, obscure or merely inaccurate. While the body of the text might be of some use to students, as Klippert himself notes, for any one seriously interested in the subject, it will not replace the more authoritative studies.

Lack of analytic coherence is reflected in and aggravated by the style and manner of expression, the second area of deficiency. Trite phraseology, clichéd expressions, linguistic infelicities, awkward syntax and grammatical solecisms abound. A random slection of passages reveals the following:

> This is the root matter lying behind estoppel, and, in my view, it also reconciles the right to restitutionary relief even though no contract was made.[16]
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> . . . these decisions serve to illustrate the badly engrafted common law monster which the courts have refused to place in a legal museum.[17]
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> We will trace the jurisdictional battles between the courts where the language of the writs became a major battleground.[18]
>
> *Carleton* v. *Ottawa* is explicable to a similar analysis.[19]
>
> If a fundamental breach of contract is formed . . . [20]

While detection of meaning in many of the passages is rendered difficult by failure to obey conventional rules governing grammar and syntax, on occasion sentences generate no meaning. Personal favourites in this regard are the following:

> Much like *Donaghue* v. *Stevenson* this Scottish case arose out of the respondents' pleading.[21]

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[16]Klippert, *supra*, footnote 4 at p. 323.

[17]*Ibid.*, at p. 151.

[18]*Ibid.*, at p. 2.

[19]*Ibid.*, at p. 59.

[20]*Ibid.*, at p. 300.

[21]*Ibid.*, at p. 61.

> Certainty is placed in formalistic legal reasoning and all legal choices are deduced in this manner.[22]

The above examples are not isolated instances; they constitute a representative sample of a manner of exposition that would be unacceptable in a student paper and should not be tolerated in a published text. A more rigorous standard of editing would, no doubt, have prevented more flagrant examples of linguistic abuse although even stringent editing would have been powerless to eliminate a uniformly pedestrian style and descriptive coyness.

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[22] *Ibid.*, at p. 63. What renders this sentence doubly obscure is the paragraph immediately preceding:

> "The main exponent of the intent school [undefined by Klippert] was Lord Brandon who argued that the majority in *Junior Books Ltd.* has left the entire matter of liability in negligence to the judge's discretion. Since *Anns* v. *Merton London Borough* the process of decision-making has become *ad hoc*; the control devices have collapsed, allowing judges to dispense justice in a fashion which defies prediction."

Nor is any clarity provided by the explanation which follows the objectionable passage:

> "... The broader implication of this approach is to self-contain negligence and unjust enrichment principles through a system of formal and rigid rule. The result of this approach is to self-contain negligence and unjust enrichment principles through a system of formal and rigid rules. The result posed by both negligence and unjust enrichment is the final assault on the nineteenth century definition of legal proximity in contract terms. It may not be the death of contract but the end of an era where legal formalism protected recipients of benefits and wrongdoers behind a wall of consideration, intent and promise."

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