

—————BOOK REVIEW—————

American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment*, 2 vols (St Paul, Minn: American Law Institute, 2011), pp xxxvi, 670; pp xxxii, 745. ISBN 978-0-314-92962-4, 978-0-314-60468-2.

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The publication of the *Restatement of the Law Third: Restitution and Unjust Enrichment* is an important accomplishment.¹ Like all restatements, it will have a significant influence on the development of the law, within and without the United States. This particular restatement, moreover, has the destiny of reviving a field that has long lain dormant in the United States.

The subject of this restatement has a strange history in that country. During the nineteenth century, the common law emerged from being a science of pleading to a science of rights and obligations. Textbook writers systematized much of it, often drawing on civilian learning. The common law of unjust enrichment, however, resisted this trend, paradoxically because of the pleading history that should now have been left behind. Before the abolition of the forms of action, much of unjust enrichment was pleaded through *indebitatus assumpsit*, which was also used to enforce a great deal of what we would now call contract law. When the forms of action were abolished, it was no longer necessary for lawyers to classify grievances and claims in those outdated formal boxes.² It was, however, necessary for lawyers to classify them somehow. This is why it was so im-

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¹ *Restatement (Third) of Restitution and Unjust Enrichment* (2010) [R3RUE].

² The classic account of this important stage in the history of the common law is FW Maitland, *Equity; Also the Forms of Action at Common Law: Two Courses of Lectures*, ed by AH Chaytor & WJ Whittaker (Cambridge: Cambridge University Press, 1929). For a more concise version, see JH Baker, *An Introduction to English Legal History*, 4th ed (London: Butterworths, 2002) ch 4 at 53ff.

portant that the great textbooks were written, to order and organize thinking about the law of torts and the law of contracts. Through this systematizing period, the autonomy of unjust enrichment was ignored, and it retained its old position as a kind of supplement to the law of contract, even though obligations in unjust enrichment are imposed by operation of law.

Andrew Kull, the reporter of the *R3RUE*, has shown the role played by James Barr Ames in the process of reception into US common law of the civilian idea of unjust enrichment, in the late nineteenth century.³ This set the stage for the first *Restatement of Restitution*, which played a determinative part in the launch of restitution as an autonomous subject of study in the common law world.⁴ Many other landmarks followed and the subject is now thriving. Ironically, though, it nearly disappeared in the United States. This may have been partly because of a general loss of interest in the doctrinal study of law;⁵ although other basic fields such as contracts, torts, and trusts did not have near-death experiences during the twentieth century. In the 1980s, there was an effort to produce a *Restatement Second of Restitution*, but it was never finished.⁶ Andrew Kull has suggested that as time passed US lawyers collectively forgot about restitution.⁷

This is one of the reasons why the *R3RUE* is so important. It has the didactic burden of re-educating US lawyers about one of the crucial parts

³ See Andrew Kull, "James Barr Ames and the Early Modern History of Unjust Enrichment" (2005) 25:2 *Oxford J Legal Stud* 297. See also Lionel D Smith, "The Province of the Law of Restitution" (1992) 71:4 *Can Bar Rev* 672 at 683.

⁴ *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (1936). Lord Wright, then Master of the Rolls, immediately wrote a lengthy review ((1937) 51:2 *Harv L Rev* 369) and referred to it in an article ("*Sinclair v. Brougham*" (1938) 6:3 *Cambridge LJ* 305 at 322-23). Lord Denning later claimed that he brought it to the attention of the House of Lords in 1941: AT Denning, "The Restatement of the Law: Its Place in the English Courts" (1951) 37 *ABA J* 329 at 330-31. I am grateful to Shawn Comeau-Gallimore for this reference.

⁵ See John H Langbein, "The Later History of Restitution" in WR Cornish et al, eds, *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart, 1998) 57 at 61-62.

⁶ The only publications are *Restatement (Second) of Restitution* (Tentative Draft No 1, 1983); *Restatement (Second) of Restitution* (Tentative Draft No 2, 1984).

⁷ "To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is. The subject is no longer taught in law schools, and the lawyer who lacks an introduction to its basic principles is unlikely to recognize them in practice. The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it" (Andrew Kull, "Rationalizing Restitution" (1995) 83:5 *Cal L Rev* 1191 at 1195 [Kull, "Restitution"] [footnotes omitted]).

of private law. It is carefully crafted to fulfill this role. Andrew Kull is the leading scholar of the law of restitution in the United States and has been working on this project since the 1990s. He deserves tremendous credit for taking an enormous body of complicated law and turning it into a series of seventy sections of clearly restated law, which, with the supporting notes, fill two substantial volumes. This is a mighty work, and the worthy fruit of many long years of careful scholarly devotion.

What is a restatement, and how is it created? The American Law Institute (ALI) was founded in 1923 for the improvement of the law. It counts some three thousand members, most of whom are practicing lawyers, but many of whom are judges and law professors. Most of the members are based in the United States, but some of them are not. The restatements are not its only publications, but they are numerous and well-known.⁸ In principle, the author of a restatement is the ALI itself, although most of the work is done by the reporter of any particular restatement. The basic structure of a restatement is a series of numbered propositions, not wholly unlike a code. The propositions are set in heavy type, and in the vernacular of the ALI, they are called the black letter. To take an example:

§ 69. Notice

- (1) As used in this Restatement, the expression “without notice” means without notice of the facts giving rise to the restitution claim against which a defense is potentially interposed.
- (2) A person has notice of a fact if the person either knows the fact or has reason to know it.
- (3) A person has reason to know a fact if
 - (a) the person has received an effective notification of the fact;
 - (b) knowledge of the fact is imputed to the person by statute (including provisions for notice by filing or recording) or by other law (including principles of agency); or
 - (c) other facts known to the person would make it reasonable to infer the existence of the fact, or prudent to conduct further inquiry that would reveal it.

⁸ The first restatement published was that of contracts, in 1932. The first round of restatements later added agency, conflict of law, judgments, property, security, torts, and trusts. The second round began in the 1950s and continued into the 1980s. The third round began to appear in the 1990s and is ongoing. Besides the restatements, other ALI projects include model laws, the most important of which is the *Uniform Commercial Code*, and sets of principles of the law relating to certain fields.

Within each section, the black letter text is followed by explanatory comments, some of which include illustrations (usually adapted from actual cases), and by a Reporter's Note, which seeks to show the basis in case law for the preceding black letter proposition. And here is a critical point: in principle a restatement *restates* the law; it summarizes and clarifies the law. It is not a legislative project, and unlike a model law, it is not intended to lead to legislation. But where there are multiple strands in the case law, a restatement usually takes a position on what is the "better view"; and in some cases, the view that it promotes may be a minority rather than a majority view.

In its relationship to the case law, then, a restatement is rather like a textbook: it purports to explain the case law, and it binds no court in any technical sense. Like a textbook, its authority rests on the persuasiveness of its arguments, and perhaps on the authority of its author. And on this point, it is important to notice that the process by which a restatement is written is not at all like that for a textbook. The reporter generates draft text (black letter and supporting commentary), called a "preliminary draft"; this text is circulated for comment among a self-selecting group of ALI members, namely the Members Consultative Group, which exists for each pending restatement. This group may also be invited to a meeting to discuss the draft. When it is ready, the draft, now designated a "council draft", is submitted to the Council of the ALI, a body of thirty senior members. The council may require amendments or revision, but when it has approved the text, it becomes a "tentative draft". This draft is available to all members and is presented and discussed at an annual meeting of the ALI. This leads to one of the most striking features of the process, which is that the whole membership of the ALI must approve this draft; the black letter will be presented, section by section, to a room of hundreds of lawyers, any one of whom has standing to intervene and raise questions on anything from the substantive rule that is proposed to the choice of words or punctuation in the draft.⁹ Not surprisingly, the production of the whole document takes years, but the result is that when it is complete, it has the authority that comes from the successful negotiation of this complex procedure.

This is why the restatements are cited on a daily basis in US courts. They are also influential elsewhere. Because they cover the common law of the whole United States, and because they are worded (at least in the black letter) in a relatively concise and accessible way, the restatements are often the easiest way to determine, to the extent such a thing is possi-

⁹ In some cases, the council may approve the bringing of a "discussion draft", rather than a tentative draft, to the annual meeting. This is for discussion without formal approval and adds another stage in the production.

ble, what the US law is. Another important point about the restatements is that because they are restating case law, they speak the language of the cases, and this is part of the reason that they are so often cited. They analyze the law in a doctrinal voice, which is a common voice throughout the civil law and most of the common law world, but which has all but vanished from top-tier US law journals.

The *R3RUE* shares this tradition. It is also important to signal some of its particular innovations. One of the most striking is in relation to what is often called disgorgement—that is, the possibility of a remedy for a wrongful act which is measured not by the plaintiff's loss but by the defendant's gain. In § 3, which falls in the opening subdivision that states general principles, it is simply provided: "A person is not permitted to profit by his own wrong." Although this kind of response is most closely associated with fiduciary obligations, it is a possibility that has been accepted by the common law of torts for some time, and it seems to have recently attracted new attention in Canada.¹⁰ The *R3RUE* provides, in §§ 40-44, a strong affirmation of the principle that people should not be allowed to profit by wrongdoing. More daringly, in § 39, the *R3RUE* provides that a plaintiff can in some circumstances have disgorgement of the profits of a breach of contract. This is still a relatively unexplored field in Canadian law, but there are good arguments for allowing such claims.¹¹

It was a noted feature and achievement of the first *Restatement of Restitution*, reflected in its title, to bring together as a single subject doctrines that are derived from both the common law and equity. The *R3RUE* seeks to perfect this, at least as far as possible, inasmuch as it rarely makes reference to the jurisdictional source of particular doctrines.¹² In some cases it goes even further; for example, the idea that a plaintiff must come to court with clean hands is traditionally understood not only as sourced in equity but as limited to equitable claims, in the sense that a plaintiff bringing a claim in tort or breach of contract is not subjected to any in-

¹⁰ See e.g. *Serhan (Trustee of) v Johnson & Johnson* (2006), 85 OR (3d) 665, 269 DLR (4th) 279 (Div Ct), leave to appeal to SCC refused, 31762 (April 12, 2007); *Serhan (Trustee of) v Johnson & Johnson* [Settlement Agreement], 2011 ONSC 128, 79 CCLT (3d) 272.

¹¹ See Lionel D Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1994) 24:1 Can Bus LJ 121, which was adopted by the House of Lords in allowing such a claim in *AG v Blake*, [2000] UKHL 45, [2001] 1 AC 268. In Canada, such a claim was allowed in *Amertek Inc v Canadian Commercial Corp* (2003), 229 DLR (4th) 419 at para 467, 39 BLR (3d) 163 (Ont Sup Ct). On appeal, it was held that the contract was not breached (*Amertek Inc v Canadian Commercial Corp* (2005), 76 OR (3d) 241 at paras 133-35, 256 DLR (4th) 287 (CA)).

¹² See Lionel Smith, "Common Law and Equity in R3RUE" (2011) 68:3 Wash & Lee L Rev 1185.

quiry as to his or her cleanliness. In § 63, the *R3RUE* states the doctrine as a general one, applicable to any claim for restitution.

§ 63. Equitable Disqualification (Unclean Hands)

Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability.

The overall approach inscribes itself firmly in the tradition of the restatements. The organization of the subject is largely by contextual categories. Groups of sections bear headings such as “Transfers Subject to Avoidance”, “Unrequested Intervention”, and “Restitution and Contract”, while individual sections include “Mistaken Improvements”, “Mistake in Gifts Inter Vivos”, “Duress”, “Judgment Subsequently Reversed or Avoided”, and “Illegality”. Those who know the field will understand the statement that the table of contents owes more to Goff and Jones¹³ or Maddaugh and McCamus¹⁴ than to the approach of Peter Birks¹⁵ or Andrew Burrows.¹⁶ Birks sought analytical rigour and attempted to explain all of the law of unjust enrichment according to a simple formula: the plaintiff must show that the defendant was enriched, that the enrichment was at the plaintiff's expense, and that there was some positive reason (mistake or duress being examples) that the enrichment was unjust. Due to this approach, he has had many followers. The formulation of the final element in Canadian common law is that there must be “no juristic reason” for the defendant's enrichment and the corresponding deprivation of the plaintiff. A lot of ink has been spilled on what this statement means, and whether it is better or worse than the approach based on positive reasons.¹⁷ Toward the end of his life, Birks himself changed his mind in favour of a version of the Canadian approach, describing this as a Damascene conversion.¹⁸

¹³ Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution*, 7th ed by Gareth Jones (London, UK: Sweet & Maxwell, 2007).

¹⁴ Peter D Maddaugh & John D McCamus, *The Law of Restitution*, loose-leaf (consulted on 25 January 2012), (Toronto: Canada Law Book, 2011).

¹⁵ Peter Birks, *An Introduction to the Law of Restitution*, revised ed (Oxford: Clarendon Press, 1989); Peter Birks, *Unjust Enrichment*, 2d ed (Oxford: Oxford University Press, 2005) [Birks, *Unjust Enrichment*].

¹⁶ Andrew Burrows, *The Law of Restitution*, 3d ed (Oxford: Oxford University Press, 2011).

¹⁷ See e.g. Mitchell McInnes, “Making Sense of Juristic Reasons: Unjust Enrichment After *Garland v. Consumers' Gas*” (2004) 42:2 *Alta L Rev* 399; Lionel Smith, “Demystifying Juristic Reasons” (2007) 45:2 *Can Bus LJ* 281.

¹⁸ Birks, *Unjust Enrichment*, *supra* note 15 at xii.

The *R3RUE* will have none of this approach. The opening proposition in § 1 states that “[a] person who is unjustly enriched at the expense of another is subject to liability in restitution.” There is no general analytical formula for the elements of a claim in unjust enrichment; there are only the manifold, context-specific statements of liability conditions. Kull sets out one such formula and makes his view plain: “Formulas of this kind are not helpful, and they can lead to serious errors. They lend a specious precision to an analysis that may be simple or complicated but which at any rate is not susceptible of this form of statement.”¹⁹

This pragmatic approach runs through the whole work. Another example relates to a subject already mentioned—gain-based remedies for wrongdoing. It is very difficult to understand how these can be seen as cases of unjust enrichment, and most of the literature rejects such a view. The plaintiff’s claim is founded on the wrong; the claim does not get off the ground without showing the wrong. But unjust enrichment is an autonomous source of liability *precisely because* it does not require the plaintiff to show any wrongdoing. It does not depend on the breach or infringement of a prior entitlement; if it did, it would itself be a tort. Thus, the cases of gain-based remedies for wrongdoing are part of the law of wrongs, including, perhaps, the wrong of breaching a contract. They raise a purely remedial question as to whether the plaintiff should be allowed to demand the defendant’s gain. In such a case, the elements of the “not-wrong” of unjust enrichment are immaterial.²⁰ Indeed, as noted above, it is increasingly common to also reject the word “restitution” for cases of gain-based remedies for wrongdoing; the plaintiff is not seeking a giving back but a giving up of a gain that generally did not come from the plaintiff but from a third party. Hence the trend toward the word “disgorgement”, which even the *R3RUE* adopts in this context.²¹ But even those who reject this word tend to agree on the fundamental analytical distinc-

¹⁹ *R3RUE*, *supra* note 1, § 1 cmt d.

²⁰ The same facts may give rise to both kinds of liability, as where the plaintiff transfers money to the defendant due to the defendant’s fraud; this example is both a tort and an unjust enrichment. I am concerned with cases where the plaintiff is the victim of a wrong but did not transfer wealth to the defendant.

²¹ The *R3RUE* frequently uses the word “disgorgement” to refer to gain-based remedies for wrongdoing, and this even appears in the black letter of § 51(4): “The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. Restitution remedies that pursue this object are often called ‘disgorgement’ or ‘accounting’.” However, the term is not used in opposition to “restitution”, to mean giving up rather than giving back. Rather, in the *R3RUE* it is used as a subset of the wider idea of “restitution”. “Restitution” means “any remedy that takes away the defendant’s gain” and “disgorgement” appears to refer to restitution in those cases where the defendant has committed a wrong, even though these cases are also considered cases of restitution for unjust enrichment in the *R3RUE*.

tion between restitution for wrongs, which does not depend on the cause of action in unjust enrichment, and restitution for unjust enrichment, which does so depend.²²

The *R3RUE* will have none of this either. Kull, of course, is perfectly aware of the debates but takes the view that they are irrelevant in practical terms. He notes that “[n]othing practical turns on this disagreement except the identification of the applicable period of limitations Ordinarily, a complaint that alleges profitable wrongdoing by the defendant states a claim for restitution of unjust enrichment as well as a claim for damages in tort.”²³ This argument is at least doubtful; many scholars (not to mention the Supreme Court of Canada) believe that unjust enrichment depends on an unjust *transfer* from plaintiff to defendant. Why should it? In unjust enrichment, the defendant is being made liable without having done anything wrong; this needs justification. The justification is that the defendant is only being required to *return* some enrichment that, for some reason or other, he should not have got. He is not, like a typical tort defendant, being required to reach into his own pocket. It follows from this distinction that in a case in which the defendant has committed a profitable wrong, but the profit was *not* acquired from the plaintiff, there is no unjust enrichment in the technical sense. This scenario includes the very typical case in which the defendant misappropriates the plaintiff’s property and makes some profitable or expense-saving use of it. The only claim is the claim based on the wrong.

The *R3RUE* does not view unjust enrichment as a body of law characterized by liability without wrongdoing. It characterizes the law of restitution as the law of liability for gains:

Restitution is the law of nonconsensual and nonbargained benefits in the same way that torts is the law of nonconsensual and nonlicensed harms. Both subjects deal with the consequences of transactions in which the parties have not specified for themselves what the consequences of their interaction should be. The law of torts identifies those circumstances in which a person is liable for injury inflicted, measuring liability by the extent of the harm; the law of restitution identifies those circumstances in which a person is lia-

²² See e.g. Peter BH Birks, “A Letter to America: The New Restatement of Restitution”, online: (2003) 3:2 Global Jurist Frontiers 2 <<http://www.bepress.com/gj/frontiers>>. In this text that sought unsuccessfully to influence the drafting of the *R3RUE*, Birks rejected the word “disgorgement” but continued to insist that restitution claims that are based on wrongs cannot be understood as based on unjust enrichment. See also Douglas Laycock, “The Scope and Significance of Restitution” (1989) 67 Tex L Rev 1277. Laycock, the leading scholar of remedies in the US, was closely involved in the development of the *R3RUE*. Kull set out his disagreement with Laycock on this point in Kull, “Restitution”, *supra* note 7 at 1222-26.

²³ *R3RUE*, *supra* note 1, § 1 cmt e.

ble for benefits received, measuring liability by the extent of the benefit.²⁴

I would describe this characterization as a minority view, and one difficult to defend. The law of torts is not only concerned with harm and loss; it is concerned with the infringement of rights. We know this because it reacts to infringements of rights even if they do not lead to harm. This particularity is why torts sometimes lead to nominal damages, to injunctions, and to the disgorgement of wrongful gains. But this passage is important because it suggests that the basic organizational categories, restitution and tort, are built on *remedies*, and not on causes of action or sources of obligation. This difference is why, in the *R3RUE*, any case involving a gain-based remedy is a case of restitution, and, it seems to follow, any case of restitution is a case of unjust enrichment. The *R3RUE* states that

there are significant instances of liability based on unjust enrichment that do not involve the restoration of anything the claimant previously possessed. The most notable examples are cases involving the disgorgement of profits, or other benefits wrongfully obtained, in excess of the plaintiff's loss. ...

In short, most of the law of restitution might more helpfully be called the law of unjust or unjustified enrichment. ... When used in this Restatement to refer to a theory of liability or a body of legal doctrine, the terms "restitution" and "unjust enrichment" will generally be treated as synonymous.²⁵

But liabilities need justification. Some arise from wrongdoing; those in unjust enrichment do not. Where a defendant has made a gain that has not come from the plaintiff, why should he give it to the plaintiff? He can only be made to give it up if he has gained it by wronging the plaintiff. Kull's approach seems to be that this scenario is a case in which the gain

²⁴ *Ibid.*, § 1 cmt d.

²⁵ *Ibid.*, § 1 cmt c. This suggests that there is *some* part of restitution that is not about unjust enrichment, but it is not clear from this passage what that part might be. However, the answer may lie in § 38(2)(b). This deals with the case where a plaintiff performs his part of a contract, or some of it, and then finds that the other party commits a breach of contract that allows the plaintiff to treat the contract as discharged. The usual view is that this plaintiff can sue for damages based on the value of the contract, or (perhaps subject to some limitations) ignore the contract and sue in unjust enrichment for the value of the enrichment conferred. Treating that second claim as one in unjust enrichment means that it lines up conceptually with what would happen even if the contract had been void or unenforceable, so that no claim for contract damages could possibly lie (see e.g. *Degelman v Guaranty Trust Co of Canada*, [1954] SCR 725, [1954] 3 DLR 785). The *R3RUE*, however, takes the view that in the case of the breached contract, the second claim is a contractual claim for a special measure of damages, not a claim in unjust enrichment. See the introductory note before § 37 and also § 38, cmt a. The claim, therefore, is classified as a claim for restitution arising from contract.

must be given up. As such, it is a case of liability in restitution, and thus a case of unjust enrichment, and thus we can understand it as arising outside of the law of wrongs. But this seems to be lifting one up by one's bootstraps; where does the liability come from if not from the wrong? At least, Kull's approach is inconsistent with one that separates torts from unjust enrichment by saying that the law of torts is about wrongs, while the law of unjust enrichment does not depend upon wrongdoing. Kull, of course, is perfectly aware that on his approach the majority of unjust enrichment cases do not involve wrongdoing; but his categories make it impossible for him to identify this as a defining feature of unjust enrichment, as the very thing that separates it from the law of torts. And as we have seen, if one is interested in unjust enrichment as an autonomous source of obligations, one cannot define it as the law of restitution. That only ducks the definitional or justificatory question of where obligations to make restitution come from.

Not that he minds. This, it seems, is exactly why he does not need an analytical formula that will delineate the shape of liability in unjust enrichment. The subject is defined and delineated by the availability of restitution. The availability of restitution is explored casuistically, via the examination of a range of contextual factors that differ from situation to situation. It is not the role of the *R3RUE* to develop a theory of unjust enrichment—of why it exists and what are its precise boundaries—but rather to help lawyers and courts grapple with cases and to provide a set of principles to guide them.²⁶ Those who seek an overarching theory will not find it here. This, after all, is a restatement. Its mission is to restate this enormous body of law in a way that fits it together logically and accessibly. Without any doubt, in this mission it succeeds.

²⁶ In other words, Kull is not interested in theoretical debates except to the extent that they have practical implications. We have already seen that in speaking of the question whether a claim for a gain-based remedy for wrongdoing is a claim based on the wrong or a claim in unjust enrichment, Kull writes, "Nothing practical turns on this disagreement except the identification of the applicable period of limitations" (*R3RUE*, *supra* note 1, § 1 cmt e). One might also ask about rules relating to private international law, and perhaps substantive defences such as change of position, which may also differ between causes of action. More broadly, it is in the situation of the brand new case, which does not quite fit any previous category or which raises a novel permutation, that an overall theory of unjust enrichment may be of great practical use. See e.g. the discussion in *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 at 789, 98 DLR (4th) 140, where McLachlin J. said, for the majority, "[N]ew situations can arise which do not fit into an established category of recovery but nevertheless merit recognition on the basis of the general rule." Although he was speaking of applied psychology, I believe that Kurt Lewin's observation also applies to law: "[T]here is nothing so practical as a good theory" (*Field Theory in Social Science: Selected Theoretical Papers* (New York: Harper & Row, 1951) at 169).