INCONTROVERTIBLE BENEFITS AND THE CANADIAN LAW OF RESTITUTION

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CONTENTS

1. Introduction

Historically, the common law's attitude towards one who mistakenly provided non-monetary benefits to another, who neither requested nor acquiesced in their conferment, was tight-fisted and fiercely individualistic. "*One cleans another's shoes; what can the other do but put them on?*"[1] And though they grow ever softer, the voices of jurists long since passed do still echo about in the halls of justice. Fortunately, a new school of thought is emerging which questions the merits of the traditional view and the quality of justice which flows from it; and which calls for the availability of restitutionary relief in circumstances where an "incontrovertible benefit" has been received. While at first blush many Canadian authorities appear to rather summarily reject the notion that an incontrovertible benefit can or should give rise to relief, it will be

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[1] *Taylor v. Laird* (1856), 25 L.J. Ex. 329 at p. 322, 156 E.R. 1203.

shown that the brunt of that hostility is unfounded. An analysis of the case-law reveals the incontrovertible-benefit concept to be supported by, or at least compatible with, almost all of the reported decisions in the area in both reasoning and result. An analysis of the principles involved yields the conclusion that the time has come for the concept to be accepted into the Canadian law of restitution.

The incontrovertible-benefit concept is a new player on the restitutionary stage, thrust into the spotlight by an academic debate among English scholars which began less than 20 years ago.[2] It arose because the recognized heads of recovery, limited in scope, fail to facilitate just results in all cases where one has gained a benefit through another's efforts. Clearly one *can* recover where a contractual relationship, or at least a request, can be proven. Relief is also possible if the recipient can be shown to have "freely accepted" the benefit. Thus, while some object,[3] it is well settled that one who consciously takes receipt of a benefit that was unofficiously[4] provided, in circumstances where he knows or ought to know that payment is expected, can be subject to a claim for *quantum meruit* or *quantum valebant*.[5] By definition, however, all of these situations presuppose an opportunity for the recipient to decline the benefit. Some other theory is necessary if recovery is to be available when it is impossible to satisfy the elements of contract, request or free acceptance, as, for example, when a recipient is wholly unaware that a benefit is being conferred. Enter the concept of incontrovertible benefits.

The project which lies ahead is threefold: first, to consider the various formulations of the incontrovertible-benefit concept; second,

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[2] G. Jones, "Restitutionary Claims for Services Rendered" (1977), 93 L.Q. Rev. 273; P. Matthews, "Freedom, Unrequested Improvements and Lord Denning" (1981), 40 C.L.J. 340; P. Birks, *Introduction to the Law of Restitution* (1985), pp. 116-24.

[3] See, *e.g.*, A. Burrows, "Free Acceptance and the Law of Restitution" (1988), 104 L.Q. Rev. 576; J. Beatson, "Benefit, Reliance and the Structure of Unjust Enrichment", [1987] C.L.P. 71; G. Mead, "Free Acceptance: Some Further Considerations" (1989), 105 L.Q. Rev. 460.

[4] The law of restitution does not, and should not, lend its aid to those who generously volunteer their services. Altruism is its own reward, and amorphous hopes for compensation, when it is known that the benefit was not wanted, need not be crystallized into legal relief: *Holland v. Alkemade* (1985), 19 E.T.R. 10 (Ont. C.A.); *Geldhof v. Bakai* (1987), 139 D.L.R. (3d) 527 (Ont. H.C.J.); Lord Goff and G. Jones, *The Law of Restitution*, 3rd. ed. (London, Sweet & Maxwell Ltd., 1986) p. 21; *cf.* Birks, *Introduction*, *supra*, footnote 2, at p. 266.

[5] See, *e.g.*, *Canada Steamship Lines Ltd. v. Canadian Pacific Ltd.* (1979), 7 B.L.R. 1 (Ont. H.C.J.); *Re Jacques* (1967), 66 D.L.R. (2d) 447 (N.S. Co. Ct.).

to discuss what role, if any, it has played in Canadian law and, third, to suggest guidelines as to when it should give rise to relief.

2. The Incontrovertible-Benefit Concept in Academia

Much of the important work done today in the law of restitution is being carried out by the academics rather than by the judiciary. In some respects restitution is a body of law barely advanced out of infancy,[6] and though it is increasingly being nurtured by our courts,[7] its guiding principles are still often formed or best articulated by scholars. This is especially true with respect to the incontrovertible-benefit concept. While the courts do frequently employ the principles which underlie it, they seldom recognize or acknowledge that they are dealing with the concept. In the few instances where the concept has expressly been dealt with, it has typically been dismissed with unfortunate haste, seemingly without the benefit of thorough analysis. The result is a paucity of judicial consideration as to what the concept entails and when it should ground liability. For that, the academics are the best sources.

(1) Goff and Jones

While precedential support for the idea can be traced back over at least five decades,[8] the term "incontrovertible benefit" found its way into the restitution lawyer's lexicon 13 years ago through the efforts of Professor Jones.[9] Today he argues, together with Lord Goff, that restitutionary relief should be available when:

> . . . it can be shown that the defendant has gained a financial benefit readily realisable, without detriment to himself, or has been saved an inevitable expense.[10]

Several points warrant discussion. First, what is said to be required is a financial benefit which need only be "readily realisable", although it must be capable of such realization without entailing

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[6] The law of restitution has undergone a renaissance of sorts since the seminal Supreme Court of Canada decision in *Deglman v. Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785, [1954] S.C.R. 725.

[7] See, *e.g.*, *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161, [1989] 1 S.C.R. 1161, [1989] 4 W.W.R. 97.

[8] *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K.B. 403 (C.A.).

[9] Jones, "Restitutionary Claims for Services Rendered", *supra*, footnote 2.

[10] Goff and Jones, *Restitution, supra*, footnote 4, at p. 144.

a detriment to the recipient. Since it is sufficient if the financial gain is realizable, restitution is possible where the improvement *if* realized upon, *e.g.*, through the sale of an improved chattel, would yield such a benefit. In effect, that means that the defendant may have to sell the very item which was the subject-matter of the litigation in order to satisfy the judgment. Because they are typically replaceable and of a fungible nature, the possibility of the necessity of a coerced sale of *chattels* is considered to be tolerable. It is difficult to disagree with Goff and Jones' view given that the result will simply be to restore both parties as close as possible to their original position.

Consider, by way of an example, a case in which an unremarkable car, initially worth $100, is mistakenly subject to improvements in consequence of which its value is raised to $500. If liability is imposed, and the defendant is without free funds, the judgment could be satisfied from the proceeds of the vehicle's sale. When all is said and done, from the pool of $500, the plaintiff will receive $400 for his efforts[11] and the defendant will have $100 left with which to buy a replacement vehicle.

If, however, the improved chattel is unique *and* the defendant is without disposable funds, Goff and Jones suggest that liability should be denied.[12] The latter part of that equation (*i.e.*, that the defendant is without free funds) is interesting because it would allow relief to be available potentially even if the improvement, because it is bound up in an irreplaceable item, could not be financially realized upon without detriment, as long as another source for the satisfaction of the judgment was available. The merits of allowing a claim in such circumstances are less appealing than in the earlier hypothetical because the law, assuming a more intrusive character, would infringe upon the recipient's freedom to a greater extent. He would not have the opportunity, as he did in the hypothetical, to put himself into the position he was in before the whole affair began (*i.e.*, that of owning a car worth $100). His wealth, while unchanged in its totality, would be redistributed: his chattel would be worth more because of the improvements, but his pocket-book would be thinner. Of course, it is debatable whether or not the courts would be able and

[11] The plaintiff would receive the lesser of the increase in value of the car or the reasonable value of his services. The recipient should only have to pay for the benefit he received and the improver should not be awarded more than what his efforts were worth.

[12] Goff and Jones, *Restitution*, *supra*, footnote 4, at p. 147, note 62; Jones "Restitutionary Claims for Services Rendered", *supra*, footnote 2, at p. 293.

willing to conduct the type of inquiry which would be required in order to allow or disallow claims on the basis of the availability of funds. While some cases would readily yield sufficient information (*e.g.*, because some improvements are of such limited value that a resulting judgment could be borne by all but the most destitute) others would not.

As mentioned, Goff and Jones argue that it is a different matter if there are no accessible funds. In such circumstances, Professor Jones, assuming that it would be the improved, unique chattel which would be sold in order to satisfy the judgment, has said that it would be unjust to order restitution because it would result in an intolerable detriment, the deprivation of an irreplaceable item.[13] By extension, he could argue that even if some other chattel, a common, easily replaceable item, could be liquidated to pay for the claim, it might still be unfair to insist on compensation. Once again, the defendant's wealth, while unchanged in total, would be forcibly redistributed.

When it is land which has been improved, Goff and Jones invoke principles similar to those which they apply to irreplaceable chattels and argue that the incontrovertible benefit concept should have no role to play. Restitution, in their view, should lie only if the defendant requested or freely accepted the services,[14] for land "is a very special case".[15] Noting that the common law has always recognized the unique nature of every parcel of land and has generously offered its protection accordingly, they suggest that it would be incongruous with the presumably inviolable general principles of land law to impose liability on the basis of an incontrovertible benefit. In support of their position they could also note that the potential for cripplingly large claims is greater than in the case of chattels because of the higher monetary values associated with land and because of the greater variety of improvements to which a parcel of land can be subject. The likelihood that the subject-matter of the litigation would of necessity become the means of payment may be greater, as well, in so far as land is often a person's only major asset. Consequently, a defendant whose land was the subject of an improvement would very often not be in receipt of a financial gain, readily realizable without detriment. In such circumstances, it could not be said that the equities argue in favour of compensation for the plaintiff.

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[13] Jones "Restitutionary Claims for Services Rendered", *supra*, footnote 2, at p. 293. See also Goff and Jones, *Restitution, supra*, footnote 4, at p. 147, note 62.

[14] Goff and Jones, *Restitution, supra*, footnote 4, at p. 22.

[15] *Ibid.*

In some instances, however, this line of reasoning should not preclude recovery. First, if the landowner *has* gained a financial benefit (*e.g.*, by selling or leasing his land in its improved state) the equities would appear to favour liability. Clearly, a landowner who freely chose to financially realize upon the benefit could not complain of any attendant detriment.[16] The pool of funds so generated should be available to the improver. And yet, strangely, Goff and Jones do not (expressly) recognize the merits of such a result. While a "hardship defence"[17] could be used to ensure landowners adequate protection, they speak of the inapplicability of the incontrovertible benefit concept to land in general, albeit hesitant, terms.[18] Second, if the improvement is mistakenly rendered at a time when the owner's actions evince a desire to rid himself of the property (*e.g.*, when he has entered into an agreement for purchase and sale which has fallen through)[19] would it be unreasonable to subject him to a liability which he may have to sell the land to satisfy? Any cries of detriment or hardship which might arise would, in the circumstances, be somewhat attenuated, and might pale in comparison to the improver's call for just compensation.[20] Finally, if the value of the claim is small and the defendant

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[16] *Cf.* Birks' "realization" test, discussed, *infra*, at footnote 64.

[17] Discussed, *infra*, at footnote 35.

[18] Goff and Jones, *Restitution, supra*, footnote 4, at pp. 22-3: "Whether [an improver] will then obtain restitution will depend on whether the defendant has requested or freely accepted the services, or acquiesced in what he did. [I]t is generally not enough that he has incontrovertibly benefitted the defendant by improving the defendant's property." The word "generally" in the preceding sentence appears to be explained as a reference by the authors to their discussion of the principles of acquiescence in English law and the availability of concepts similar to that of incontrovertible benefit to mistaken improvers of land in other jurisdictions: *Restitution, supra*, footnote 4, at pp. 137-43.

[19] Cases of this type are discussed, *infra*, at footnotes 124 and 128.

[20] Goff and Jones appear to be somewhat uncomfortable with the rigidity of the English law in this area. Without explicitly calling for reform, they do question whether it would in all cases be unreasonable to require an owner of land to sell or mortgage his property to recompense an improver (*Restitution, supra*, footnote 4, at p. 147), note that many consider the English law to be Draconian, and speak somewhat favourably of jurisdictions which allow such claims (Jones "Restitutionary Claims for Services Rendered", *supra*, footnote 2, at p. 288).

They also note that on occasion the English courts have permitted recovery (*Restitution, supra*, footnote 4, at pp. 20, 138, note 9 and p. 383). In *Lee-Parker v. Izzet*, [1972] 1 W.L.R. 775 (Ch.D.), improvements were made to land by a "purchaser" under an agreement for sale which was later determined to be void for uncertainty. Throughout, both parties had acted in good faith and neither had consciously assumed the risks attendant on the possibility of the sale's failure. Relief was granted.

has funds available with which he could satisfy a judgment, there is an argument that he should have to recompense the plaintiff. As in the case of improvements to irreplaceable chattels, while it may be true that the improvement itself could not be realized upon without detriment, it *may* be proper to allow claims to succeed if sufficient resources are otherwise freely accessible. Theory, however, may once again be too fine for practice; it is questionable whether the courts would be willing to undertake such detailed investigations.

The second major feature of the incontrovertible-benefit concept, as formulated by Goff and Jones, is that it calls for compensation if a plaintiff, in providing a benefit, saves his defendant an expense which he otherwise would have necessarily incurred. Because a similar idea is more fully explored by Professor Birks, part of the analysis of what is involved will be postponed until our discussion turns to an examination of his theory of incontrovertible benefits. For now, a few comments will suffice. The first is that the doctrine of inevitable expense finds ample support on both sides of the Atlantic, both judicially[21] and academically.[22]

The second feature of the inevitable-expense doctrine which warrants comment is that it represents the only circumstance in which Goff and Jones would apply the incontrovertible-benefit concept despite the fact that a financial gain could not possibly be realized, either with or without detriment, from what has been received.[23] One situation in which that will be so is when "pure services" have been rendered. In many instances, the provision of services will result in an increase in the value of that to which they were applied (*e.g.*, a car's value will often increase if it is the subject of repairs). Exceptionally, however, they will leave "no marketable residuum in the hands of the recipient but an increase in his human capital (as where a teacher gives a lesson to an able pupil)" or they will leave "neither marketable residuum nor increase in human capital (as where an actor or a musician performs his art or where

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[21] See, *e.g.*, *Carleton (County) v. Ottawa (City)* (1963), 39 D.L.R. (2d) 11, [1963] 2 O.R. 214 (H.C.J.), revd 46 D.L.R. (2d) 432, [1965] 1 O.R. 7 (C.A.), revd 52 D.L.R. (2d) 220, [1965] S.C.R. 663; *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K.B. 403 (C.A.).

[22] See, *e.g.*, G.B. Klippert, *Unjust Enrichment* (1983), pp. 54-61; G.H.L. Fridman and J.G. McLeod, *Restitution* (Toronto, Carswell Co. Ltd., 1982), p. 425; Birks, *Introduction*, *supra*, footnote 2, discussed, *infra*, at footnote 52.

[23] It is, of course, possible that the discharge of an inevitable expense *could* result in a readily realizable financial gain.

the teacher's lesson falls on deaf ears)."[24] In such cases there appears to be little merit in ordering that compensation be paid by the recipient unless he was saved an inevitable expense. If he was not, then he will come away from the experience with only something as nebulous as, say, a warm memory — hardly sufficient grounds for liability, notwithstanding the fact that the renderer may have incurred actual expenses or opportunity costs in providing the service. If he *was* saved an inevitable expense, then he will have received a clear benefit, albeit perhaps one of a "negative" nature,[25] for which (subject to any defences) he should be compelled to pay. Goff and Jones, while never explicitly dealing with the matter in such terms do, by inference, accept such a position.[26] So, too, do others. Beatson has argued at length that pure services cannot constitute enrichments unless they save a necessary expense,[27] and Birks, as will be seen, adopts a similar view.[28]

A second situation in which the doctrine of inevitable expense can result in liability being based on the receipt of an incontrovertible benefit notwithstanding the impossibility of realizing a financial gain, either with or without detriment, is when goods, mistakenly provided, are consumed by the recipient in ignorance of the facts.[29] As an illustrative example, Goff and Jones offer a case in which Esso, believing it was delivering oil to the house of X. (with whom

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[24] The definition is borrowed from J. Beatson, "Benefit, Reliance and the Structure of Unjust Enrichment", *supra*, footnote 3, at p. 72.

Arguably, depending on the meaning ascribed to the notion of "marketable residuum", the increase in human capital which occurs when a teacher gives a lesson to an able pupil could be brought within it. The knowledge required to, say, replace a muffler on a car could be marketable.

[25] Goff and Jones argue that the requisite benefit can be either "positive" (*i.e.*, an accretion to the recipient's wealth), or "negative" (*i.e.*, a saved expense): *Restitution, supra*, footnote 4, at p. 16.

[26] Their general rule of liability, however formulated, admits of no other conclusion: "[If the recipient] has made thereby an immediate and realisable financial gain *or* has been saved an expense which he otherwise would necessarily have incurred" (Goff and Jones, *Restitution, supra*, footnote 4, at p. 19), "[If the recipient] has gained a financial benefit readily realisable, without detriment to himself, *or* has been saved an inevitable expense" (*Restitution*, at p. 144). Comments made in regards to restitutionary claims arising from contracts discharged through breach also lend support (*Restitution, supra*, at pp. 466-7).

[27] Beatson, "Benefit, Reliance and the Structure of Unjust Enrichment", *supra*, footnote 3. The reasoning underlying that opinion is that "exchange-value, transferability and capacity to produce income are the hallmarks of wealth", at p. 76.

[28] Discussed, *infra*, at footnote 52.

[29] See Goff and Jones, *Restitution, supra*, footnote 4, at pp. 22 and 151.

it had a contract for the supply of oil) in fact delivered it to the house of Y. Thinking that it came from Texaco (his usual supplier) Y. used the oil.[30] As in the case of some pure services, it is argued that Y. ought to be subject to Esso's claim for compensation because, in reality, he had no choice but to buy oil from *someone.* It would be otherwise, however, if the imposition of liability would amount to a detriment for Y.,[31] or if Esso supplied the oil in circumstances where it knew or ought to have known that Y. did not want oil from it.[32] Also, the situation is entirely different, of course, if it is not a necessity, such as heating fuel, which is provided, but rather a luxury, such as a tin of fruit. Conceivably, Y. could consume fruit in the belief that he would in no way be required to pay. Again, as in the case of pure services, while the transferor of the tins might suffer a financial loss, restitutionary relief should not be available because the transferee will have gained only a transitory pleasure, the enjoyment of a snack.[33]

The final point to be noted about Goff and Jones' incontrovertible-benefit concept is that the receipt of such a benefit will not inevitably result in liability. It will not if the plaintiff acted officiously,[34] providing goods or services when he was not labouring under a mistake. Similarly, it will not if liability would amount to an unfair hardship for the defendant.[35] Akin to the idea of "detriment",[36] which has already been discussed, the hardship defence would deny relief if, on the facts of any given case, it would be inequitable to order relief. In this regard, Goff and Jones lobby for the acceptance

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

[31] It would be a detriment if, for example, Y. expected to receive the oil from Texaco without having to hand over any cash because he had a right of set-off against Texaco. This illustration is based on *Boulton v. Jones* (1857), 27 L.J. Exch. 117, 2 H. & N. 564, discussed, *ibid.*, at pp. 385-6.

[32] Such a situation might arise in the following manner: Y., dissatisfied with the service he was receiving, emphatically terminated an earlier contract with Esso and began ordering oil from Texaco. Unbeknownst to Y., Esso bought Texaco. This illustration is based on *Boulton v. Jones, ibid.*, and *Boston Ice. Co. v. Potter*, 123 Mass. 28 (1877), as discussed in Goff and Jones, *Restitution, supra*, footnote 4, at pp. 385-8.

[33] In such cases, the transferor will be required to establish either a request or free acceptance.

[34] Goff and Jones, *Restitution, supra*, footnote 4, at pp. 21 and 42-4.

[35] *Ibid.*, at pp. 19 and 22.

[36] "Hardship" appears to be *akin to*, but not *identical to*, "detriment" because it is a defence to be considered after an incontrovertible benefit claim has been established. The existence of a detriment is relevant at the earlier stage during which the elements of the claim are being proved.

of the notion of "change of position" into English law,[37] a defence which is already recognized in Canada.[38]

(2) Professor Birks

Although Professor Birks also employs the concept of incontrovertible benefits, he does so in a manner which is markedly different than Goff and Jones'. The reason lies in the fact that Birks weaves the concept into the warp and weft of a complex fabric of theories he has devised in order to explain and rationalize the law of restitution. Restitution, he holds, is a "response which consists in causing one person to give up to another an enrichment received at his expense or its value in money".[39] The response is said to be triggered either by a "wrong" or by an "unjust enrichment by subtraction",[40] (although Birks at times also uses the term "unjust enrichment" ambivalently and generically to refer to *all* triggering events[41]). In the former case, a plaintiff will have a *prima facie* claim if he shows that the defendant enriched himself by committing a "wrong"[42] against him. He must then also show that the wrong in question is one for which restitution is available.[43] In the latter case, a plaintiff will have a *prima facie* claim for restitution if he shows that he has lost what the defendant has gained.[44] He must then go

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[37] Goff and Jones, *Restitution, supra*, footnote 4, at pp. 691-5.

[38] See, *e.g.*, *Rural Municipality of Storthoaks v. Mobil Oil of Canada Ltd.* (1975), 55 D.L.R. (3d) 1, [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591.

[39] Birks, *Introduction, supra*, footnote 2, at p. 13.

The description of Birks' scheme provided here is, of course, of the thumbnail variety. Its purpose is merely to set the context within which his comments can be understood.

[40] *Ibid.*, at p. 43.

[41] *Ibid.*, at p. 16.

[42] The "wrong" can be any breach of a duty, regardless of moral culpability: *ibid.*, at p. 313.

[43] *Ibid.*, at Chapter X, p. 313.

[44] In all cases, it can be said that the defendant must have been enriched "at the expense of" the plaintiff. However, it is the subtraction sense of that phrase which is more easily understood. It will be satisfied if something of value has been transferred from the plaintiff's possession to the defendant's possession or if the defendant has intercepted wealth which certainly would have otherwise accrued to the plaintiff from a third party: *ibid.*, at pp. 133-9.

In the case of restitution for wrongs, "at the expense of" refers not to a transfer of wealth from the plaintiff to the defendant, but rather to the fact that the defendant gained by committing a wrong against the plaintiff. Birks offers an example: "If somebody pays you £100 to beat me up you are enriched 'by doing me wrong' but not 'by subtraction from me'. The quantum of my wealth remains unaffected by the beating.": *ibid.*, at p. 24.

further and identify a factor which shows that the defendant's enrichment was unjust.[45] In either situation, restitution will lie only if the defendant has been enriched, and it is in regards to the notion of enrichment that the incontrovertible-benefit concept comes into play.

Birks colourfully summarizes the basis of his theory of enrichment by saying "one man's meat is another man's poison".[46] One may disagree with the opinion of most of one's neighbours who consider the receipt of a particular "benefit" to be enriching. Therefore, an objective assessment, based on the market, as to whether or not what has been received constitutes an enrichment is intolerable, says Birks, because it allows a man's neighbours to run roughshod over his ability to control his own purse-strings. Arguing from principle, and finding support in the actual structure of the law, he prefers instead an approach which confirms an individual's right to choose how to spend his resources, an approach which he terms "subjective devaluation". It allows one to answer another's call for restitutionary relief by asserting that non-monetary benefits[47] have value only in so far as one chooses to assign a value to them,[48] and by noting that he never chose to receive the benefit in question.[49] However, just as an objective method of assessment is unacceptable, so, too, is one which is purely subjective. Aside from the fact that it is inconsistent with the existing case-law, it could lead to absurdities

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[45] Birks recognizes three categories of factors capable of rendering an enrichment "unjust": (i) "non-voluntary transfers" in which the transferor's volition was either vitiated or qualified, (ii) "free acceptance", and (iii) "others", which refers to a body of anomalous, policy motivated instances of restitution: *ibid.*, at pp. 99-105.

[46] *Ibid.*, at p. 131.

[47] Generally, it will be impossible to deny the fact of enrichment if one has received money for "[it] has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited . . .": *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, [1979] 1 W.L.R. 783 (Q.B.) at p. 799, *per* Goff J., *ibid.* at p. 109. Exceptionally, it may be otherwise if the recipient changed his position in reliance of the money and, in effect, turned cash into kind: *ibid.*, at pp. 131 and 413.

[48] *Ibid.* at p. 108. Goff and Jones' concept of incontrovertible benefits also contains a subjective element, *i.e.*, the "without detriment" proviso.

[49] An illustrative example: While X. is away on holidays, Y., a builder, labouring under a mistake, improves X.'s home in an objective sense by adding on to it a beautiful solarium. As a result, the home is capable of fetching a higher price on the market. Nevertheless, because he did not choose to receive the improvement, Y. can deny that there has, in fact, been an enrichment, saying that he wanted the house to be just as it was before the work was done: *ibid.*, at p. 110.

Goff and Jones would deny liability on the basis that the improvement related to land, as discussed, *supra*, at footnote 14.

as recipients of benefits could deny the fact of enrichment in every case other than those involving the receipt of money. Therefore, there are circumstances, three sets of which are discussed by Birks, in which recourse to subjective devaluation is not permitted and in which enrichment can not be denied.

Birks' three tests of enrichment are: (a) "free acceptance", (b) "incontrovertible benefits", and (c) "others", a residual category accommodating cases which do not properly fit into either of the other categories. It is the second, of course, which is relevant to the present discussion. Birks refers to it as the "no reasonable man test" — although the recipient did not choose the benefit, he can not subjectively devalue it for no reasonable man would do so. There are few things which all reasonable men would regard as an enrichment, however, and consequently the role assigned to the incontrovertible-benefit concept is, in practice, quite restricted. From the case-law Birks has distilled two groups of cases in which it is found.[50] Beyond those cases he declines to elaborate, stating merely that there are undoubtedly "many different situations in which no reasonable man would deny that the defendant has been enriched by his non-money benefit".[51]

One of the situations in which the incontrovertible benefit/ "no reasonable man" test will preclude the operation of subjective devaluation is when the plaintiff obtains for the defendant a necessary benefit, one which the defendant had to, or would have had to, seek out for himself. Birks describes such scenarios as the "anticipation of a necessary expenditure".[52] Because the plaintiff will simply have done that which was incumbent on the defendant to do, no reasonable man could complain of an infringement on his freedom; nor could he deny the existence of an enrichment. That that incumbency may be based on a legal obligation is clear from the case-law. Unofficious undertakers who bury the dead at their own expense can claim compensation from the deceaseds' personal representatives, who are expected in law to see to such matters.[53] When the true owners of chattels distrained upon by a defendant's

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[50] He concedes that he does not know of any case in which the "no reasonable man" test, formulated as such, has been used. However, he argues that it does explain what the courts have done in practice: *ibid.*, at p. 117.

[51] *Ibid.*

[52] *Ibid.*

[53] Although Birks does not cite any authorities on this point, there are many precedents. See, *e.g.*, *Jenkins v. Tucker* (1788), 1 Hy. Bl. 90, 126 E.R. 55 (C.P.); *Ambrose v. Kerrison* (1851), 10 C.B. 776, 138 E.R. 307 (C.P.); *Davey v. Cornwallis (Rural Municipality)*, [1931]

landlord pay the rental arrears, they can look to the offending tenant for compensation.[54] Restitutionary relief has been granted to a county which mistakenly discharged a neighbouring municipality's statutory duty to care for an indigent person.[55]

The necessity may also be factual in nature. Thus, a managing director who rendered "necessary" services to a company in the mistaken belief that he was acting pursuant to a valid contract was able to claim remuneration on a *quantum meruit* basis.[56] How far this aspect of the incontrovertible benefit can be pushed will turn on how broadly the idea of necessity is defined. Involuntary bodily functions aside, no activity is absolutely necessary. It is true, however, that the motivating forces which lie beneath some instances of practical necessity are different and much stronger than in other instances. For example, when the "necessity" is based on factual compulsion there is likely to be a greater scope of *actual* choice than when the "necessity" is based on legal compulsion. In the latter case, the manner and time frame within which one acts will often be prescribed. Further, because of the enforcement apparatus which lies behind a legal necessity, a failure to act will almost always result in some form of unpleasantness. Such consequences do not follow upon the neglect of a factual necessity with the same degree of inevitability. Birks recognizes this and concedes that a factual necessity need not be absolute.[57] Beyond excluding "unrealistic or fanciful possibilities of . . . doing without",[58] the question of where one is to draw the line of the continuum of practical necessities depends largely on the relative values assigned to concepts such as freedom of choice and just compensation. Birks advocates a rather generous approach, noting that modern man has lost the rougher edges of 19th-century individualism, and in reality typically has little

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2 D.L.R. 80, [1931] 1 W.W.R. 1, 39 Man. R. 259 (C.A.); *Pearce v. Diensthuber* (1977), 81 D.L.R. (3d) 286, 17 O.R. (2d) 401, 1 E.T.R. 257 (C.A.).

[54] *Exall v. Partridge* (1799), 8 T.R. 308.

[55] *Carleton (County) v. Ottawa (City)* (1963), 39 D.L.R. (2d) 11, [1963] 2 O.R. 214 (H.C.J.), revd 46 D.L.R. (2d) 432, [1965] 1 O.R. 7 (C.A.), revd 52 D.L.R. (2d) 220, [1965] S.C.R. 663. Birks makes no reference to this seminal decision.

[56] *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K.B. 403 (C.A.). Also cited are the line of cases involving the supply of food and lodging to one who lacks the mental capacity to contract (*Re Rhodes* (1889), 44 Ch. D. 94 (C.A.)), and the continually perplexing decision in *Upton-on-Severn Rural District Council v. Powell*, [1942] 1 All E.R. 220 (C.A.) (*cf.* Goff and Jones, *Restitution*, *supra*, footnote 4, at p. 148, note 64).

[57] Birks, *Introduction*, *supra*, footnote 2, at p. 120.

[58] *Ibid.*

in the way of genuine choice as to how he is to spend his limited resources.[59]

A final word on the anticipation of necessary expenditures: While Birks does chip away at the degree of inevitability required in so far as the *existence* of a factual necessity is concerned, there is some uncertainty as to exactly what it is that must be anticipated. With both factual and legal necessities one must ask whether it is an expenditure or whether it is the completion of a task which is relevant, for the latter may involve an element of choice which the former can not. An expenditure can be discharged in only one way (*i.e.*, by payment of money) but a task can be discharged in at least two ways (*i.e.*, by personal involvement or by paying another to do the job). Therefore, even if it is satisfactorily established that a task *had* to be done, one perhaps should further inquire as to *how* it would be fulfilled. Birks is equivocal on this issue. On the one hand, he speaks of a plaintiff who has conferred a *benefit* which the defendant would have been forced to seek out for himself.[60] An example would be the *physical* activity involved in burying the dead.[61] On the other hand, he more frequently speaks of a plaintiff saving the defendant a necessary *expenditure*, *i.e.*, of money. An example of an expenditure would be *paying* someone to bury the dead *if* there was a legal obligation to hire an undertaker.[62] (Goff and Jones appear to employ the latter idea in their discussion of incontrovertible benefits.[63]) Admittedly, in most instances, the one will be the same as the other. Logically, however, there is no necessary quadration between the two ideas, for it is possible that a particularly morbid and industrious personal representative could undertake the physical act of burial himself, in which case there

[59] *Ibid.*, at p. 121.

[60] Birks, *Introduction, supra*, footnote 2, at p. 117.

[61] Another example, perhaps, is the securing of managerial services in *Craven-Ellis v. Canons Ltd., supra*, footnote 8, at p. 412. The facts of the case are discussed *infra*, text at footnote 115. In his judgment Greer L.J. said that if the services had not been performed by the plaintiff, the company "would have had to get some other agent to carry [them] out". Conceivably, at least, given that the position had to, by the company's own rules, be filled by a shareholder, the functions of the managing director could have been fulfilled in-house and *gratis*. Birks treats the case as one involving a necessary expenditure: *Introduction, supra*, footnote 2, at p. 120.

[62] Such an *expenditure* is, in fact, not *necessary*. The example is offered hypothetically to keep the discussion rolling along. An actual example of a necessary expenditure would be found in the situation exemplified by *Exall v. Partridge, supra*, footnote 54.

[63] They speak of expenses which would have been inevitably or necessarily incurred: Goff and Jones, *Restitution, supra*, footnote 4, at pp. 19, 148, 151 and 388.

would be no question of expenses. The obligation is to ensure burial, not to contract for it. While the argument is a fine one, it is not necessarily an insignificant tempest in an insignificant teapot. First, if the theoretical boundaries of claims are not established, then it will be more difficult to construct a principled model for use in practice. Second, in an area fraught with fears of infringements on freedom, differing scenarios ought to be identified and dealt with individually. While the courts may feel comfortable in ordering restitution from one who has truly been saved an *expense*, they may feel some trepidation in ordering restitution if they are asked to *assume* that a particular task would have been farmed out to a third party for pay. The easiest solution would be to have the courts assess the likelihood that a particular task would be contracted out, just as they assess whether or not a necessity existed in the first place.

The second situation in which the incontrovertible benefit/"no reasonable man" test will preclude the operation of subjective devaluation is when the defendant has turned the benefit into cash, *i.e.*, when there has been a "realization in money".[64] For example, if in the hypothetical discussed in footnote 49, X. did sell the house in its improved state, thereby reaping what Y. had sown, then no reasonable man could deny that he had been enriched. By selling, X. would have put himself into the position of one who received not a benefit in kind but rather money, which, as will be recalled, is invariably enriching.

There is certainly merit in this view, striking a balance as it does between X.'s freedom of choice and Y.'s call for compensation. Nevertheless, it is open to criticism on the basis that it may allow the recipient of a benefit to deny enrichment and avoid liability simply by hanging on to his improved property. Admittedly, particularly if land is involved, compromises are to be expected when courts are asked to strike a balance between competing values. However, if, for example, a landowner has already demonstrated a desire to sell his property, should he be able to keep the benefit free of charge by retaining it and invoking the notion of subjective devaluation?[65] Further, is the realization test justifiable when chattels are involved? First, they are, typically, not unique and irreplaceable. Second, it is unlikely that the value of an improvement, if crystallized into a judgment, would be burdensome. It is arguably more just

[64] Discussed in Birks, *Introduction*, *supra*, footnote 2, at pp. 121-4.

[65] Such would be the case if the improver, although he could establish an "unjust" factor, could not prove the landowner's enrichment on some other basis.

to impose liability; if need be, the recipient of the benefit could sell the improved item, pay his plaintiff and purchase a replacement for himself. For these reasons, it may be that Birks is intolerably insensitive to some improvers[66] in shrugging off the "obvious practical difficulties in the event of a long delay before realization" as being "not insuperable".[67] Even if their limitation period was generously enlarged, they might still forever be improperly frustrated by obstinate or retentive defendants.

(3) Professor Klippert

Professor Klippert denies that the receipt of an incontrovertible benefit does, or should be able to, ground restitutionary relief.[68] Examining the concept of unjust enrichment as a distinct basis of liability (as opposed to a unifying principle for the existing heads of *quasi*-contract[69]), he has distilled from the comments of the judiciary and the academics four "control devices" which are the constituent elements of a *prima facie* claim:[70]

(i) the defendant received a benefit at the plaintiff's expense;[71]
(ii) evidence of volition in the receipt or retention of the benefit;
(iii) the benefit was not voluntarily conferred;[72] and
(iv) the benefit is unjustly retained by the defendant.

While Klippert discusses the content of each of the four requirements at length, for present purposes it will be necessary to analyze only two of the included concepts: benefit and volition.

A benefit is, of course, an essential element in a claim. To have any hope of success, Klippert says, a claimant must establish that some thing or service was conferred upon him which, given the circumstances, not only *could* have constituted a benefit, but, in fact,

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[66] *I.e.*, those who, because they could establish an "unjust" factor, might otherwise succeed in their claim.

[67] Birks, *Introduction, supra*, footnote 2, at p. 121.

[68] Klippert, *Unjust Enrichment, supra*, footnote 22, at pp. 95-8.

[69] *Cf.* Fridman and McLeod, *Restitution, supra*, footnote 22, at pp. 34-8, where the notion of a unifying principle is rejected.

[70] Klippert, *Unjust Enrichment, supra*, footnote 22, at pp. 38-9.

[71] Klippert does not, of course, require a rigid plus-minus equation of the plaintiff in which he establishes an economic loss mirroring the defendant's economic gain: *ibid.*, Chapter 3, and p. 37, note 58.

[72] The plaintiff must show that his intention to confer a benefit was vitiated by some factor, such as mistake or compulsion: *ibid.*, Chapter 4, and p. 38, note 60.

did constitute a benefit.[73] Nevertheless, the process of assessment used to determine whether or not a benefit has been conferred is objective; the recipient's subjective intentions or wishes are (generally) to be ignored in this regard.[74] However, even if a satisfactory benefit is found to exist, relief can still be denied if, *inter alia*, volition is not established, for it, too, is an essential element in a claim. The requirement, generally, is for proof that the defendant either requested the benefit, or that he received or retained it, notwithstanding an opportunity to reject it, in circumstances where he knew or ought to have known[75] that is was to be paid for.[76]

In some instances the volition and benefit elements begin to merge. "Where the defendant requested or freely accepted goods or services, a benefit is presumed,"[77] for it is "unlikely" that one would freely accept that which was not a benefit.[78] When money is conferred, benefit and volition are both automatically satisfied because of its invariably enriching nature[79] and because if unwanted, it can, unlike services and sometimes goods, be returned.[80] Finally, by conferring an "*irrebuttable* benefit"[81] one, by definition, satisfies both requirements. An irrebuttable benefit, narrowly defined,[82] occurs when a claimant, through a factor negativing voluntariness, pays a third party to render services which discharge a statutory obligation owed by the defendant.[83] Possibly, however, suggests Klippert, the idea could be expanded within the volition element to impose liability on one who received that which he chose (by request or by free acceptance) or that which by statute, or otherwise,[84]

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[73] *Ibid.*, at p. 70.

[74] *Ibid.*, at p. 72.

[75] *Ibid.*, at pp. 135-7.

[76] *Ibid.*, at p. 72. This, of course, is the test of "free acceptance".

[77] *Ibid.*

[78] *Ibid.*, at p. 76. Professor Burrows has argued rather persuasively against the validity of that presumption: "Free Acceptance and the Law of Restitution", *supra*, footnote 3.

[79] Klippert, *Unjust Enrichment*, *supra*, footnote 22, at p. 72.

[80] *Ibid.*, at p. 124. If the recipient spent the money before becoming aware of all the facts, then his answer to the claim is to invoke, if he can, a defence such as change of position.

[81] Klippert coined the new term to avoid confusion between the ideas it represents and those represented by the term "incontrovertible benefit".

[82] The narrow definition is based restrictively on the facts of *Carleton (County) v. Ottawa (City)*, *supra*, footnote 55.

[83] Klippert, *Unjust Enrichment*, *supra*, footnote 22, at p. 55.

[84] *Craven-Ellis v. Canons, Ltd.*, *supra*, footnote 56, is cited as an example.

he was compelled to acquire.[85] In determining whether or not that was the case, he advocates a robust approach, an approach which would preclude attempts to thwart a claimant's efforts through recourse to mere technical rules by asking generally if the benefit conferred "recognized and discharged some pre-existing obligation to acquire it".[86] Thus, where an oral contract for the transfer of land is held to be unenforceable under the *Statute of Frauds* for want of written memorandum, restitution can still be ordered if the transferor received that for which she had bargained.[87] Similarly, a contract of employment can yield a restitutionary award for compensation even though it was entered into pursuant to a company's void by-law if the employee honoured his end of the deal.[88] For cases falling within the broader definition, the benefit element will inevitably be satisfied, either presumptively as result of the recipient's request or free acceptance, or because he will have received that which he had no choice but to obtain. The volition element will inevitably be satisfied, too, for the very essence of the irrebuttable benefit idea concerns the recipient's freedom to decline. Either that freedom will have been exercised in favour of receiving or retaining the benefit, or it will have been rendered inoperative by the fact that the recipient was under a legal or factual compulsion to acquire it.

The difficult cases, therefore, are those involving the beneficial receipt of goods[89] or services which can not be characterized as requested, freely accepted or "irrebuttably" beneficial. Klippert, arguing from a libertarian perspective, resolves the problematic question of whether or not liability should be available in such cases by simply granting the volition factor a power of veto. Subject to the dictates of public policy, which may exceptionally allow a claimant to succeed without proof of volition,[90] he demands that compensation always be denied if the recipient was not allowed

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[85] Klippert, *Unjust Enrichment, supra*, footnote 22, at p. 59. "Irrebuttable benefit", therefore, would appear to cover much the same ground as Goff and Jones' notions of request, free acceptance, and the inevitable expense branch of the incontrovertible benefit concept.

[86] *Ibid.*, at p. 58, discussing *Deglman v. Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785, [1954] S.C.R. 725.

[87] *Craven-Ellis v. Canons, Ltd., supra*, footnote 56.

[88] Klippert, *Unjust Enrichment, supra*, footnote 22, at p. 57, discussing *Craven-Ellis v. Canons Ltd., ibid.*

[89] If property in the goods did not pass to the recipient, then the plaintiff's claim lies in tort, not unjust enrichment: Klippert, *Unjust Enrichment, supra*, footnote 22, at p. 75.

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

the freedom to choose or reject the benefit.[91] Even while expressing sympathy for those whose claims for unofficiously conferred benefits are consequently frustrated, he insists on according a pre-eminent status to the recipient's liberty to choose the fate of his own resources, and refuses to crystallize sentiment into restitutionary relief.[92] Klippert's position is, of course, inimical to the operation of the concept of incontrovertible benefits, the very essence of which is the facility to impose liability notwithstanding the non-satisfaction of any volitional requirement. He supports his opposition to the concept by reference to arguably archaic[93] and flawed[94] cases and by an attack on what he perceives to be the concept's underlying principles. The former will be dealt with below where it will be shown that the weight of the case-law is reconcilable with, and at times supportive of, the use of the concept in unjust enrichment claims. The latter can be rebutted at once.

Drawing upon the thoughts of Goff and Jones, Klippert explains the incontrovertible benefit concept as being a theory of strict liability in which the receipt of an *actual* benefit displaces the volitional requirement.[95] His use of the word "actual" may be unfortunately misleading in so far as it fails to capture the complexities of their "readily realisable without detriment" test. The cause of that ambiguity is his fixation on Professor Jones' discussion of the vexatious decision in *Estok v. Heguy*,[96] a fixation which leads him to assert another, more questionable, proposition. In *Estok v. Heguy*, the plaintiff, acting under what both parties believed was a valid contract for the sale of the defendant's land, went into possession and spread about a considerable amount of manure, thereby converting pasture land into arable soil. Because there was, in fact, no contract, the defendant resumed possession and resisted,

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[91] Klippert does recognize, however, that the courts in some recent cases have ignored the issue of volition: *Estok v. Heguy* (1963), 40 D.L.R. (2d) 88, 43 W.W.R. 167 (B.C.S.C.); *T. & E. Developments Ltd. v. Hoornaert* (1977), 78 D.L.R. (3d) 606; *Preeper v. Preeper* (1978), 84 D.L.R. (3d) 74, 27 N.S.R. (2d) 82, 2 R.P.R. 282 (N.S.S.C.). *Ibid.*, at p. 79. All of those cases are discussed below.

[92] Klippert, *Unjust Enrichment, supra*, footnote 22, at p. 79.

[93] *Falcke v. Scottish Imperial Ins. Co.* (1886), 34 Ch. D. 234 (C.A.); *Taylor v. Laird* (1856), 25 L.J. Ex. 329.

[94] *Nicholson v. St Denis* (1974), 48 D.L.R. (3d) 344, 4 O.R. (2d) 480 (Dist. Ct.), revd 57 D.L.R. (3d) 699, 8 O.R. (2d) 315 (C.A.), leave to appeal to S.C.C. refused D.L.R. & O.R., *loc. cit.*

[95] Klippert, *Unjust Enrichment, supra*, footnote 22, at pp. 95-8.

[96] *Supra*, footnote 91, as discussed in Jones, "Restitutionary Claims for Services Rendered", *supra*, footnote 2, at pp. 293-4.

unsuccessfully, the plaintiff's claim for compensation, arguing that since he intended to end his pursuit as a dairy farmer and become a developer, the manure did not benefit him. Professor Jones disagreed with the court's finding of liability on the basis that a benefit was not and could not have been established, unless it was also established that the defendant intended to become a crop farmer and therefore had a need for manure. Jones' very narrow view is attributable to the unique facts of *Estok v. Heguy* which bring to the forefront his ambiguously reluctant stance against compensation for improvements to land.[97] That narrow view is not, of course, characteristic of the general position formulated by him and Lord Goff.

On the basis of *Estok v. Heguy* and Jones' reaction to it, Klippert asserts that the incontrovertible-benefit concept operates on the assumptions that the recipient "would have or ought to have voluntarily contracted with someone" for the benefit received and that "he was willing to pay someone"[98] for it. If that were so, he argues, the recipient would already have contracted for, or decided to contract for, the benefit. Only in the exceptional case when the claimant can prove as much, Klippert concludes, should recovery be permitted, for then it will be clear that the purported benefit was actually regarded by the recipient as being a benefit. The argument is flawed in at least two ways. First, to conclude that a recipient who was willing to pay for a benefit would already have contracted with a third party for it involves an untenable leap in logic. Second, and more importantly, Klippert imputes to the incontrovertible-benefit concept an assumption which, in fact, exists only in his understanding of it, *i.e.*, that the recipient would have or ought to have contracted for the benefit. True, as regards the "inevitable expenditure" branch of the concept, the benefit is taken to be one which the recipient would have arranged for in any event. The same is not true of the other class of incontrovertible benefits, those from which a financial gain can be readily realized without detriment. In such cases the concept operates, *regardless* of what the recipient would or ought to have done, on the basis that he would otherwise retain that for which, when the equities of the case are weighed, it is clear that he should pay.

At bottom, of course, Klippert's objection to the concept lies in his philosophical opposition to infringements on freedom of choice

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[97] Discussed, *supra*, at footnote 20.

[98] Klippert, *Unjust Enrichment*, *supra*, footnote 22, at p. 97.

and to judicial coercion of non-contractual payments.[99] Undeniably, such a stance is not altogether indefensible. It is, however, assailable on the bases that it can often result in unnecessarily harsh judgments and, as will be seen, it is increasingly incongruous with a general trend in the law.

(4) Fridman and McLeod

The incontrovertible-benefit concept is rejected by Fridman and McLeod as being unjustifiable except, perhaps, in regards to those cases involving the delivery of money or goods.[100] In such cases the benefit, if unwanted, can be returned.[101] Not so with services which by their very nature are invariably non-returnable. Consequently, they contend that even if the recipient of services is undeniably enriched, compensation should be denied because it will not necessarily be unjust as between the parties that he retain the benefit free of charge.

> To force a man to retain and pay for services rendered or work done which he did not want *and could not afford* seems *as unjust* as to deprive a plaintiff recovery for work done or services rendered which confer a clear benefit on the defendant.[102]

To a large extent, Fridman and McLeod's position can be easily rebutted, and their concerns assuaged. First, if one truly cannot afford to pay for an enrichment, then the incontrovertible benefit concept, even at its broadest in the Goff and Jones formulation, may not impose liability, either because the "without detriment" proviso would be operable or because the hardship defence would provide protection. That being so, it is at the very least arguable that it would be *less* unjust to generally order payment from a recipient than to deprive a plaintiff of recovery. As has been explained, if a claim is allowed both parties will usually be restored as close as possible to their original position.[103] If a claim is denied, the recipient will enjoy a windfall and the plaintiff will be deprived.

Fridman and McLeod do not, however, totally abandon the

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[99] See also P. Matthews, "Freedom, Unrequested Improvements and Lord Denning", *supra*, footnote 2.

[100] Fridman and McLeod, *Restitution*, *supra*, footnote 22, at p. 421.

[101] The change of position defence is available where the goods or money have been irreversibly dealt with: *ibid.*, at p. 422, footnote 52.

[102] *Ibid.* (emphasis added).

[103] *Supra*, footnote 11.

mistaken renderer of services. While the incontrovertible-benefit idea is rejected as an appropriate basis for liability, they do accept that the concept of "prejudicial conduct"[104] should have a role to play. Broader than request and free acceptance, narrower than incontrovertible benefit the concept would give rise to restitutionary relief "whenever the defendant has, by his words or conduct, prejudiced the position of the plaintiff".[105] To succeed, a plaintiff would have to establish a proximate causal nexus between the defendant's receipt of the benefit and some act, representation or omission by the defendant which reasonably and foreseeably could have been expected to result in the plaintiff's efforts. He would also be required to prove that in the final analysis he was not primarily responsible for the fact that he was unpaid.

Such a test is open to criticism on the basis that, in so far as it requires a pre-existing relationship of sorts, its scope of applicability is unduly restricted. While such a requirement is consistent with the reasoning found in *some* Canadian decisions, it will be shown below that those precedents are flawed and that a better mode of analysis is available. Further, not only would a test based on prejudicial conduct do little to advance the development of the law of restitution, it would in some instances deny liability where the courts have in fact found for the claimant.[106] Finally, the authors' efforts to maintain the integrity of their concept and at the same time reconcile it with the leading decisions, such as *Carleton (County) v. Ottawa, (City)*[107] are assailable.

The dispute in that case arose after the City of Ottawa annexed parts of the County of Carleton. Prior to the annexation, the county had come under a statutory obligation to care for an indigent resident, Norah Baker. Because it had no institution of its own in which Ms. Baker could be looked after, it entered into an agreement with the County of Lanark under which it paid Lanark to house and care for her. Upon annexation, the city became legally obligated to care for its newly acquired citizens, one of whom was Ms. Baker. However, by inadvertence, the county continued, notwithstanding the annexation, to see to the care for Ms. Baker for over a decade. When it finally awoke to its error, the county commenced an action

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[104] Fridman and McLeod, *Restitution, supra*, footnote 22, at p. 422.

[105] *Ibid.*

[106] Lord Denning's famous judgment in *Greenwood v. Bennett*, [1973] 1 Q.B. 195 (C.A.) (discussed, *infra*, at footnote 120) could not stand in the face of such a test.

[107] *Supra*, footnote 55.

against the city for reimbursement. The Supreme Court of Canada allowed the claim, citing the leading English and Canadian cases in the area of unjust enrichment, and holding that it would be against conscience to allow the city to escape liability.[108]

Clearly there was not any prejudicial conduct by the city which induced the county to act as it did, and Fridman and McLeod do concede that the decision "at first blush appears to represent the acceptance of [the idea of] incontrovertible benefit".[109] They attempt to avoid that conclusion, however. First, they note that the plaintiff was a public authority, funded by taxpayers, and that the misallocated resources came from public coffers. While it is plausible that a court could be influenced by those facts to some degree, the judgment of Mr. Justice Hall does not offer any support for such a theory, and the precedents he relied upon involved private parties.[110] Second, they assert that the parties had entered into a valid and enforceable contract under which the city agreed to assume responsibility for indigent residents in the annexed areas. That assertion is somewhat misleading. As the order of the Ontario Municipal Board allowing the annexation did not deal with an adjustment of assets and liabilities between the city and the county, the parties informally came to their own agreement. A list of indigents was drawn up by the solicitor for the county and adjustments were made on a case-by-case basis. Ms. Baker's name, through oversight, was left off that list. Further, while the matter received no mention from the Supreme Court of Canada, the Ontario Court of Appeal expressly overruled the trial judge's finding that there existed an implied contract upon which liability could be

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[108] While the facts technically involve a plaintiff who paid money, rather than rendered services, the reasoning used by Fridman and McLeod compels the conclusion that it is the concept of prejudicial conduct, and not the concept of incontrovertible benefit, which is operative. First, the fact that the county contracted with a third party to provide the service is irrelevant. From the city's point of view, it was the provision of services which was crucial. Further, the county's position would not have been materially different if it had cared for Ms. Baker itself rather than contracting the work out to the County of Lanark. Second, Fridman and McLeod contemplate the use of the incontrovertible benefit concept where the recipient has the opportunity to return that which it directly received (*e.g.*., money for money, goods for goods).

[109] Fridman and McLeod, *Restitution, supra*, footnote 22, at p. 424.

[110] *Brook's Wharf & Bull Wharf Ltd. v. Goodman Bros.*, [1937] 1 K.B. 534, [1936] 3 All E.R. 696 (C.A.); *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, [1942] 2 All. E.R. 122 (C.A.); *Deglman v. Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785, [1954] S.C.R. 725.

based.[111] Finally, Fridman and McLeod point out that the county discharged the city's legal obligation to support its indigents, and surrender some ground to the concept of incontrovertible benefit by conceding that in such circumstances, an exception may be made to their general rule which would deny relief for services which were not requested or induced by prejudicial conduct.[112] This, of course, approaches the adoption of the entire second branch of the incontrovertible-benefit test which allows recovery for the anticipation of necessary expenditures.

(5) Summary

Although Henri Bergson once said that "time given to refutation . . . is usually lost time . . . [and] that which endures is the modicum of positive truth which each contributes",[113] the preceding critique of the leading academics in the field of restitution was both necessary and beneficial. "Necessary" because given the law's conservative bent, change is typically possible only if the familiar is broken down into its constituent parts, modified and reconstituted; progress is more comfortably received when it is known what has become of the past. "Beneficial" because while much of what has been written by the academics is open to debate, much is also sound in principle and in no need of reform. A comparative critique, by illustrating which is which, provides a springboard for further analysis.

On the basis of the discussion to this point, it is submitted that the core of the incontrovertible-benefit concept should be based on the following propositions:

(1) restitutionary relief should be available to one who has saved another an inevitable or necessary expense (whether factually or legally based) or, arguably, has discharged an obligation which the obligee would likely have paid another to discharge;
(2) restitutionary relief should be available to one who has conferred a benefit with respect to land or a chattel from which the recipient has *realized* a financial gain;

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[111] (1964), 46 D.L.R. (2d) 432 (C.A.) at p. 436. The reason was that the city, as a municipal corporation, could undertake such obligations only by enacting a by-law. It had not done so, the issue of adjustments on annexation being dealt with informally by solicitors.

[112] Fridman and McLeod, *Restitution, supra*, footnote 22, at p. 425.

[113] W. Durant, *The Story of Philosophy* (1961), at p. 462.

(3) restitutionary relief should be available to one who has conferred a benefit with respect to a replaceable chattel if a financial gain is readily realizable without detriment;
(4) restitutionary relief should be available to one who has conferred a benefit with respect to an irreplaceable chattel if the recipient has at his disposal funds with which he could satisfy a judgment;
(5) restitutionary relief should be available to one who has conferred a benefit with respect to land if the recipient has by his actions evinced a desire to part with his property and if a financial gain is readily realizable without detriment; and
(6) although otherwise warranted, restitutionary relief should be denied if the benefit was conferred officiously, or if liability would amount to a hardship for the recipient of the benefit.

While the preceding list of propositions provides the basic outline as to when relief should be granted, the test for liability based on incontrovertible benefits must be further refined. For that, an examination of the case-law is necessary.

3. The Incontrovertible-Benefit Concept in the Courts

While it is clear from what has been said to this point that the incontrovertible-benefit concept has been treated to a generous amount of academic attention, it has been afforded far less consideration by the judiciary. It does not appear that it has been *expressly* used by any court to impose liability, although the results and reasoning used in several decisions do provide precedential support for its adoption. There are other decisions which are not so hospitable, some of which explicitly criticize, some of which are relied upon for criticism. As will be seen, however, the opposition that they provide to the concept is largely specious, for those decisions are almost invariably compatible with a modified formulation of the incontrovertible benefit concept.

(1) Supportive Cases

It will be recalled that the incontrovertible-benefit concept is composed of two related ideas. One is that relief should be granted if a necessary or inevitable expense has been anticipated by an unofficious claimant. There are not any principled, persuasive reasons why the law should be otherwise. It cannot be said that a defendant in such circumstances would be deprived of his freedom

to choose how to allocate his resources because by definition he had no choice to make. To deny relief would allow him to reap a windfall in circumstances where the factors militating against the equities of the plaintiff's claim are few. The courts have, in fact, accepted that compensation must be made in such situations. The Supreme Court of Canada's decision in *Carleton (County) v. Ottawa (City)*[114] has already been discussed at length. The English Court of Appeal's decision in *Craven-Ellis v. Canons, Ltd.*,[115] after some initial confusion, is also now recognized as illustrating the concept in action. The plaintiff performed the services of a managing director for the defendant company pursuant to an agreement between the parties. Later, when the plaintiff brought an action for remuneration, the company resisted on the basis that the agreement was void because the resolution which authorized it was not properly passed and because the plaintiff, since he was not a shareholder, was ineligible to hold the position. Although Goff and Jones originally cited the case in support of the idea of free acceptance,[116] they now use it as authority for the concept of incontrovertible benefit.[117] The change came about as a result of an article by Professor Birks in which it was shown that the directors, lacking the authority to pass a resolution, also lacked the authority to accept the plaintiff's services freely, on behalf of the company.[118] Nevertheless, it was undeniable that a benefit had been conferred for if the plaintiff had not rendered the services, the company, practically speaking, would have had little choice but to hire someone else to do the same thing. Finally, as has already been discussed, there are several other classes of cases in which liability has been imposed in favour of one who anticipated another's expenses.[119]

The other branch of the incontrovertible-benefit concept, that which calls for compensation when a claimant has unofficiously conferred upon his defendant a benefit which is readily realizable,

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[114] *Supra*, at footnote 107.

[115] *Supra*, footnote 56.

[116] Goff and Jones, *The Law of Restitution*, 1st ed. (London, Sweet & Maxwell Ltd., 1966), at pp. 31 and 278.

[117] Goff and Jones, *The Law of Restitution*, 3rd ed., *supra*, footnote 4, at p. 20. Professor Birks agrees: *Introduction, supra*, footnote 2, at p. 118.

[118] "Negotiorum Gestio and the Common Law", [1971] C.L.P. 110 at p. 120.

[119] See, *e.g.*, the burial cases (discussed, *supra*, at footnote 53) and the distraint cases (discussed, *supra*, at footnote 54). Similar are the cases dealing with the supply of necessaries to persons suffering from a legal incapacity: see Goff and Jones, *Restitution, supra*, footnote 4, at pp. 344-6.

also finds support in the case-law. In *Greenwood v. Bennett*[120] the defendant contracted with a rogue to repair his Jaguar, which was worth £450 to £500. Quite to the contrary the rogue caused extensive damage to the vehicle while on a frolic, and then unloaded it on the unsuspecting Harper for £75. Harper, using his own labour and materials, put the car back into a good state of repair before selling it to a finance company for £450. Although the vehicle passed through several other hands before being recovered by its true owner, the dispute eventually resolved itself into a contest between the owner and Harper. While Cairns and Phillimore L.JJ. allowed Harper to recover on rather narrow grounds,[121] Lord Denning M.R. held that he had a direct cause of action against the owner for the services mistakenly rendered, notwithstanding the absence of a request or of acquiescence. The result is just. Against the argument that the owner should have been free to choose which repairs he wanted done are the equities in Harper's favour. He repaired the vehicle believing it to be his own and did not assume a "risk" (the importance of which will be examined in the next section) that he would be deprived of the fruits of his efforts.[122] In such a situation, as between two innocents there is no compelling reason to allow one to be enriched while the other is deprived. It would speak poorly of a legal system which refused to restore both parties to their former position if that could easily be done.[123]

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[120] [1973] 1 Q.B. 195 (C.A.).

[121] Cairns L.J. discerned similarities between the case before him and actions for detinue. Because Harper would have been able to recover his expenses in that form of action, it was held that he should recover. Phillimore L.J. considered the dispute to involve an action for specific restitution of the vehicle. Although the owner was, in fact, in possession of the Jaguar, Phillimore L.J. felt that on such facts, specific restitution should have been refused "on equitable principles". Since it was not, he held that Harper should be given credit for his efforts.

[122] Discussed, *infra*, at footnote 143.

[123] The owner's former position was that he owned a car worth £75, not £450-500. The damage sustained by the vehicle was not the fault or responsibility of Harper.

The decision of the Ontario Court of Appeal in *Ings v. Industrial Acceptance Corp. Ltd.* (1962) 32 D.L.R. (2d) 211, [1962] O.R. 454 (C.A.), seems harsh. On facts similar to those in *Greenwood v. Bennett* relief was denied on the basis that the plaintiff had "voluntarily" made the repairs as a result of his own negligence in not conducting a search into the vehicle's title. The reasoning of the court involved evinces an attitude of rugged individualism commonly associated with 19th-century ideals, but perhaps incongruous with modern views. The merits of the decision have been called into question by Judge Gautreau of the District Court of Ontario: "When Are Enrichments Unjust?" (1988-89), 10 Adv. Q. 258 at p. 270.

The much maligned decision in *Estok v. Heguy*[124] also supports the incontrovertible-benefit concept. Estok, acting under what both parties thought was a valid contract for the sale of Heguy's property, went into possession and spread about $350 worth of manure, thereby increasing the land's crop-bearing potential. In fact there was no contract because the parties were never *ad idem* on its terms. When Heguy resumed possession, Estok brought an action for the value of his efforts. Mr. Justice Brown of the British Columbia Supreme Court drew an analogy between the case before him and the cases which allow recovery of money paid under a mistake of fact, and granted relief. As had been pointed out by Professor McCamus,[125] however, the analogy is not perfect, for while the receipt of money is inevitably enriching, the receipt of manure is not. The defendant had, indeed, argued that he had decided to use the land as development property, in which case the fertilizer would not be a benefit.[126] Nevertheless, Brown J. did find that the plaintiff's services did enhance the value of the land in an objective sense.[127] Further, against the general argument that improvements to land should not give rise to relief, it can be noted that the very facts which gave rise to the dispute rebut any suggestion that liability could amount to a detriment for Heguy. Even if the judgment had to be satisfied out of the proceeds of the land's sale, it would not be open to Heguy to complain that his freedom had been intolerably infringed upon for he had already attempted to rid himself of the property.

Estok v. Heguy was applied in *T & E Development Ltd. v. Hoornaert.*[128] Once again a purchaser went into possession of a parcel of land pursuant to a contract for sale which was subsequently found to be void. In this case, fill, not manure, was deposited onto the land, but once again the owner protested, despite the materials' less offensive odour, that the value of the land was not increased for the purposes for which he intended to use the land. The court, while recognizing that there may be merit in such an argument, felt compelled to order restitution.

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[124] Discussed, *supra*, at footnote 96.

[125] J.D. McCamus "Restitutionary Remedies" in L.S.U.C. *Special Lectures* (Toronto, DeBoo, 1975), pp. 255 and 287.

[126] If the improvement does add value to the land for the purpose which the owner intends, then Goff and Jones, citing *Lee-Parker v. Izett (No. 2)* (discussed, *infra*, at footnote 20) agree that restitutionary relief should be ordered: *Restitution, supra*, footnote 4, at p. 383.

[127] *Estok v. Heguy, supra*, footnote 91, at p. 89.

[128] *Supra*, footnote 91.

Arguably, at least, *Daniel v. O'Leary*[129] offers some measure of support. The plaintiff installed a sewerage system on a parcel of land which was sub-divided into lots, one of which eventually came to be owned by the defendant. The defendant hooked into the system when building his house. In the absence of a covenant on the deed or of an agreement applicable to the dispute, the defendant refused to pay for his use of the system. Mr. Justice Barry allowed the claim, stating that "if I take advantage of somebody else's service, it would be unjust enrichment to assume that I didn't have to pay for it".[130] Conceivably, the case *could* have been one of free acceptance. However, there is nothing in the judgment which establishes that the defendant accepted the service in circumstances where he knew or ought to have known that payment was expected. Consequently, the decision can perhaps be better explained as being illustrative of the incontrovertible-benefit concept.

(2) Special Relationships and Risks

Although it does not even mention it by name, the judgment most frequently used in opposition to the incontrovertible-benefit concept is that of the Ontario Court of Appeal in *Nicholson v. St. Denis.*[131] Labelle, having purchased a parcel of land from St. Denis, contracted with Nicholson to renovate the exterior of a building situated on the land. Labelle's financial situation then took a turn for the worse causing him to fail to pay for the work done, and to default under his agreement for purchase and sale with St. Denis, in consequence of which he had his interest forfeited. St. Denis became aware of the plaintiff and his services only when he was served with a statement of claim in which Nicholson prayed for judgment on the basis that St. Denis had received the benefit of his work. A contractual claim against Labelle for the same work culminated in default judgment.

At trial, Gould Dist. Ct. J. consulted the leading Supreme Court of Canada decision in *Deglman v. Guaranty Trust Co. of Canada and Constantineau,*[132] concluded that its extremely broad and

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[129] (1976), 14 N.B.R. (2d) 564 (Q.B.).

[130] *Ibid.*, at p. 565.

[131] (1975), 57 D.L.R. (3d) 699, 8 O.R. (2d) 315, revg 48 D.L.R. (3d) 344, 4 O.R. (2d) 480, leave to appeal to S.C.C. refused D.L.R., O.R. *loc. cit.*

[132] *Supra*, footnote 6. The case involved a nephew who had entered into an oral agreement with his aunt pursuant to which she would leave certain property to him when she passed

general view of the law pertaining to unjust enrichment ought not to be whittled down, and ordered that restitution be made on the ground that St. Denis was retaining a benefit conferred by the plaintiff which it was against conscience to keep.[133] The Ontario Court of Appeal took a much less robust view of the matter. In allowing St. Denis' appeal, it recoiled at the plaintiff's untenable suggestion that the decision as to whether or not a remedy for unjust enrichment was called for turned wholly upon the conscience of the presiding judge. With frightful images dancing in his head of judges roaming willy-nilly over the restitutionary landscape with only their inner voices to guide them, MacKinnon J.A. scrambled to sketch a map for future use:[134]

> It is difficult to rationalize all of the authorities . . . It can be said, however, that in almost all of the cases [of unjust enrichment] the facts established that there was a *special relationship* between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff . . . This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the defendant, and secondly, either an express or implied request by the defendant for the benefit, or acquiescence in its performance.

The most notable feature of the quote is its lack of precision. Aside from the prefatory admission that the authorities in the area do not uniformly lend themselves to such an analysis, the quoted material is riddled with qualifications: "in almost all cases", "frequently", "usually, but not always". Further, the precedential support for the "special relationship test" drawn from the Supreme Court of Canada decisions in *Carleton (County) v. Ottawa (City)*[135] and *Deglman v. Guaranty Trust of Canada*[136] is somewhat misleading. As to the latter, MacKinnon J.A. noted that there was a "special and direct relationship between the parties" involved. While that is certainly true, it is also true that neither Rand J. nor Cartwright J., who delivered opinions, put any emphasis on that fact. Rather, both spoke of the availability of restitutionary relief in broad terms,

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away in exchange for chores and services he was to perform for her during her lifetime. The aunt died without leaving the property to her nephew. Because of the *Statute of Frauds* the contract was unenforceable. The nephew succeeded, however, in his claim based on unjust enrichment.

[133] (1974), 48 D.L.R. (3d) 344, 4 O.R. (2d) 480 (Dist. Ct.).

[134] (1975), 57 D.L.R. (3d) 699 at pp. 701-2, 8 O.R. (2d) 315 at pp. 317-8 (C.A.).

[135] *Supra*, footnote 55.

[136] *Supra*, footnote 110.

Mr. Justice Cartwright quoting[137] Lord Wright's comments in the seminal decision of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*:[138]

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.

From the judgment of Mr. Justice Hall in *Carleton (County) v. Ottawa (City)* MacKinnon J.A. selectively extracted more support for his view. Hall J. had quoted approvingly from Lord Wright's decisions in *Fibrosa* and in *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros.*[139] Although the material drawn from the latter was extensive, MacKinnon J.A. chose to reproduce only one sentence of the adopted passages, and then added his own emphasis:[140]

> "The obligation [to make restitution] is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, *having regard to the relationship of the parties.*"

Even when taken out of context, the emphasized portion of the quote appears to hold only that courts should give some special attention to the nature of the parties' relationship, if any, when deciding the question of liability. Placed into its original context in *Brook's Wharf* or into the context of Mr. Justice Hall's judgment, it seems even less significant. True, a "special relationship" did exist in both *Brooks' Wharf* and *County of Carleton.* However, the portion of the decision in *Brook's Wharf* from which the quotation was drawn flows from a favourable consideration of a principle stated in *Leake on Contracts*, a principle unfettered by an insistence on a pre-existing relationship between the parties:[141]

> "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

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[137] [1954] 3 D.L.R. 785 at p. 794, [1954] S.C.R. 725.

[138] [1943] A.C. 32 at p. 61, [1942] 2 All E.R. 122.

[139] *Supra*, footnote 110.

[140] *Nicholson v. St. Denis* (1975), 57 D.L.R. (3d) 699 at p. 702, 8 O.R. (2d) 315 at p. 318.

[141] *Supra*, footnote 110, at pp. 543-4 K.B., quoting from *Moule v. Garrett* (1872), L.R. 7 Ex. 101, which quoted at p. 104 *Leake on Contracts*, 8th ed., at p. 46.

Lord Wright M.R. felt that his judgment was but an application of that principle.[142] In so far as it relies upon the reasoning of Lord Wright, the decision in *Carleton (County) v. Ottawa (City)* is similarly touched by the broad principle. Further, when considered together with the other materials quoted by Hall J., the emphasized portion of the sentence quoted by MacKinnon J.A., if read to require a "special relationship", appears anomalous.

Given the foregoing, the reaction to Mr. Justice MacKinnon's comments is rather surprising. Despite their relatively innocuous nature and their dubious origin, they have been seized upon by many as though they were etched in stone by some divine legislator, and have been used to sully unnecessarily the name of the concept of incontrovertible benefit. Clearly, if accepted as being determinative of liability, the special relationship test is inimical to the operation of the incontrovertible benefit concept. The essence of the one is that it allows relief to be granted only if a plaintiff can establish a pre-existing nexus to his defendant, whereas an essence of the other is that it allows relief to be granted in the absence of such a nexus. It must be questioned, however, whether the special relationship test is needed, and if so, whether it employs the appropriate criteria and produces just results.

Admittedly, if the incontrovertible-benefit concept is to find widespread and express acceptance in Canadian law it must be subject to some control device lest it become an unruly horse in the restitutionary stable. Undeniably, the special relationship test does keep a firm rein on the availability of relief — but at what cost? Too often the cost is an unjustifiable result; more often the cost is a judgment which, while defensible in result, is based on less than satisfactory reasoning. The cause of the problem lies in the fact that the test is too blunt an instrument brought to bear on the facts and issues before it from a wrong angle. The existence or non-existence of a nexus, by itself, can contribute little that is useful to the exercise of deciding whether or not compensation is warranted. It is suggested that the best approach for determining the parameters of liability in the area is to weigh those factors which favour and those factors which militate against relief. Within that approach a control device, preferable to the special relationship test, which should overlay the basic elements of the incontrovertible

[142] *Ibid.*, at p. 545.

benefit formula listed at the end of the last chapter, would be that of *risk*. (In fact, as will be seen, just such a device has been employed by the courts with some regularity.)

In each case the court should strike a balance between two competing values: the recipient's freedom to choose whether or not he wants to pay for a particular benefit on the one hand, and the just compensation of the claimant on the other. Unless there has been free acceptance or a request, the strength of the former generally remains constant.[143] Whether or not the party conferring the benefit should be granted relief should largely depend on the weight of the equities which argue in his favour. If he assumed a risk that he would not be paid for his efforts, as where he rendered the services at the request of a person, other than the ultimate beneficiary, with whom he had an enforceable contract,[144] or where he insisted on acting under an agreement for the sale of a parcel of land which he knew might not be finalized,[145] then it is not unfair to let the loss remain where it fell. In such circumstances, the claimant's ground for complaint is simply that a risk he knowingly assumed eventuated. It may be true that the defendant may consequently reap a windfall, but that merely goes to enrichment. There is nothing which should so bother the court's conscience that it should be moved to override that which the common law has always vigilantly protected: the freedom to choose how to spend one's money.

In many cases, the result produced by the application of the special relationship test would have also have been produced, with greater analytic clarity, by the application of the incontrovertible benefit concept as it has been refined to include the "risk factor". *Nicholson v. St. Denis* itself serves as an apt example. Admittedly, Nicholson, the improver, should not have recovered on the basis that St. Denis, the owner, had been incontrovertibly benefited. After disgressing into his discussion of special relationships, MacKinnon J.A. eventually came around to a very good reason why the improved property could be retained without payment. "[T]he plaintiff had an enforceable contract with Labelle . . .".[146] As with many plaintiffs in the

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[143] As has been discussed, a greater degree of freedom should be recognized when the benefit conferred relates to unique chattels or land: *supra*, at footnotes 12 and 14.

[144] Discussed, *infra*, at footnote 146.

[145] Discussed, *infra*, at footnote 152.

[146] (1975), 57 D.L.R. (3d) 699 at p. 704, 8 O.R. (2d) 315 at p. 320.

area,[147] Nicholson should have been denied recovery from the ultimate beneficiary of his labours because there was another party with whom he had assumed the risk of non-payment which is attendant on any contractual venture. His recourse was properly to Labelle, and Labelle alone.

The Federal Court decision in *McLaren v. The Queen*[148] lends itself to the same analysis. A rancher defaulted on his mortgage payments and was foreclosed upon, title thereby being acquired by the defendant. The rancher brought an action seeking a further redemption period and was permitted, pending the action's outcome, to remain in adverse possession. During that time he contracted with the plaintiff, who probably knew that the rancher was in unlawful possession, for seed and services. When a court order was finally granted allowing the defendant to evict the rancher, the plaintiff brought an action against the defendant based on unjust enrichment. Reviewing the case-law in the area, and focusing on the statements of MacKinnon J.A. in *Nicholson v. St. Denis*, Mr. Justice Muldoon concluded that a special relationship "seems to be the *sine qua non* of success".[149] Because there was no such nexus on the facts before him, he dismissed the plaintiff's claim. For good measure, and without the apparent aid of very much analysis, he echoed Professor Klippert's rejection of the incontrovertible-benefit concept and cast aspersions upon the decision in *Greenwood v. Bennett*. Of course, if the approach presently being advocated is accepted, that hostility is seen to be unwarranted. If the risk factor is integrated into the formula, the plaintiff's failure is easily explained. Because he contracted with the rancher his recourse, in the event of difficulties, was to contractual, not restitutionary remedies.[150]

Even when a special relationship is found to exist, liability is on occasion denied. In such cases the importance of the risk element

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[147] See, *e.g.*, *Ledoux v. Inkman and Inkman*, [1976] 3 W.W.R. 430 (B.C. Co. Ct.); *Holly Homes Ltd. v. Euchner Estate*, [1989] N.W.T.R. 289, 35 C.L.R. 286 (S.C.).

[148] [1984] 2 F.C. 899.

[149] *Ibid.*, at p. 905.

[150] In *Knysh Construction (1978) Ltd. v. Canadian Cellulose Insulation Manitoba Inc.* (1984), 27 Man. R. (2d) 250 (Q.B.), Mr. Justice Scollin, in a similar judgment, denied relief, noting that there was not a special relationship between the parties, but emphasizing as well that the boundaries of the relations which did exist were contractually defined. The facts before him involved a plaintiff, who had agreed with a third party to remove some rubbish, suing the person on whose land the garbage was located.

comes to the forefront in the judgments. An illustrative comparison can be made between *Farquhar v. Sherk*[151] and *Preeper v. Preeper*.[152] In both cases the parties attempted to arrange a sale of land between themselves, and in both cases the "purchaser" went into possession prior to the deal's finalization and made improvements which were known to the owner. Also common between them was the fact that the deal fell through. The courts in each relied on *Nicholson v. St. Denis* and held that a special relationship did exist between the parties.[153] However, only in *Preeper* did the claim for compensation succeed. In *Farquhar* the improver's call for relief was deemed unworthy because the sale's failure was attributable to something for which he bore the risk: the need to secure financing. *His* inability to fulfil that condition meant that it would not be against conscience for the owner of the land to retain the benefit without paying for it. In *Preeper* the events leading up to the deal's ultimate collapse were decidedly different. Following initial negotiations, which the parties believed constituted an agreement, the "purchasers" applied for a mortgage and in the process discovered a cloud on the title. Notwithstanding that problem, they went into possession and made valuable improvements under a belief, shared by the owners, that the sale would be completed once the title was cleared. Although the owners cautioned them against doing so while the problem persisted, the "purchasers" pressed on with their efforts and also began to make payments on an existing mortgage on the land. While they viewed those payments as going towards the purchase price, the owners believed they were receiving rent. In time, after title was cleared, the misunderstanding came to light when the parties found themselves in disagreement over the actual price. The "purchasers" claimed in unjust enrichment for the value of their efforts and succeeded. Clearly, they had not knowingly acted under a risk; at all times they felt that their actions were referable to a deal which they were sure would come to fruition. Conversely, the court found, the owners were wrong in allowing the repairs while at the same time failing to communicate their view of the situation to the "purchasers".[154]

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[151] (1979), 14 R.P.R. 18 (Ont. Dist. Ct.).

[152] (1978), 84 D.L.R. (3d) 74, 27 N.S.R. (2d) 82, 2 R.P.R. 282 (S.C.T.D.).

[153] *Farquhar v. Sherk*, *supra*, footnote 151, at p. 26; *Preeper v. Preeper*, *supra*, footnote 152, at p. 79 D.L.R., p. 289 R.P.R.

[154] A third case with similar facts seems to have been decided wrongly. In *Small v. Stanford*, [1977] 6 W.W.R. 185 (B.C. Co. Ct.) the intrepid "purchaser" charged ahead with major

The use of the special-relationship test has led to the imposition of liability where relief should have been denied. In *Harbourview Electric Ltd. v. Stylex Interiors Ltd.*,[155] the defendant, O.M.D., had contracted with S. to do certain work on its premises. S. in turn subcontracted part of the job to the plaintiff. The project was marred by strikes, delays, and disputes in consequence of which the principals of the plaintiff and the defendant met to discuss their shared dissatisfaction with S. The plaintiff's grievance stemmed from the fact that it had not received all the money due to it from S., O.M.D.'s from its growing suspicions as to the inability of S. to complete the project properly. Subsequent to the meeting the plaintiff wrote to the defendant requesting that it be paid directly from funds which were owing to S. from O.M.D., and followed that with a letter acceding to O.M.D.'s request for extra work to be done at a cost of $1,671.90, but also agreeing that the obligation for the payment for the work done prior to the meeting rested solely with S. At some date subsequent to the meeting O.M.D. fired S. from the job and oversaw the completion of the project, including the plaintiff's work, itself. Notwithstanding the plaintiff's second letter the court accepted the evidence of its president that his company did not intend to waive any claims it had against O.M.D., and held that it was settled "at least in the mind of [the president]" that money would be forthcoming from out of the funds owed to S. by O.M.D. Relying upon *Nicholson v. St. Denis*, and finding that a special relationship existed between the parties, the court held O.M.D. liable for *all* of the money owing to the plaintiff. The decision is questionable in several respects. Clearly, the call for compensation was proper in regards to the "extra work" because it was requested, and in regards to the work done after S. was let go because O.M.D. freely accepted it knowing that payment was expected of it. However, in regard to the work performed prior to the termination of S. it is not at all clear why O.M.D. should have been liable. The relations between the parties were contractually defined, and within the boundaries of the relationship between the plaintiff and S. the plaintiff accepted the risk of non-payment. To allow sub-contractors in the position of the plaintiff to cut across their contractual boundaries and seek

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repairs despite the owners' accurate prediction that the intended sale might be scuttled by the government's refusal to permit a subdivision and their consequent advice that the "purchasers" "take it easy". Remarkably, the court awarded relief, noting that it would be against conscience for the benefit to be retained.

[155] (1989), 34 C.L.R. 237 (B.C. Co. Ct.).

restitutionary relief from owners in the position of O.M.D. is to improperly open up a Pandora's box of litigation.[156] Further, while it may seem convenient and economical to have allowed the plaintiff to collect from O.M.D. in circumstances where O.M.D. was indebted to S. and S. was indebted to the plaintiff, the situation was complicated by the fact that S. had gone into bankruptcy. Consequently, one result of the decision is that it allowed the plaintiff to scoop out of the bankruptcy the entire amount of its claim to the prejudice of other creditors of S.

The insistence on a special relationship has also resulted in the denial of liability where, arguably, it should have been imposed. The judgment in *Hawley v. Skerry*[157] is illustrative. Francis Hawley was seriously injured in an automobile accident caused by the gross negligence of the defendant, Skerry. Francis' mother claimed against the defendant on a *quantum meruit* basis for the services she provided to her son during his convalescence, noting that if she had not, a nurse would have been engaged at a cost which would have been tacked on to Francis' claim as special damages. The decision of Mr. Justice Hallett started out well for Mrs. Hawley as he recognized that plaintiffs should not be encouraged to incur expenses and that their parents or relations should not be discouraged from performing services. Continuing on in the same hopeful vein, Hallett J. stated that the defendant should not benefit from Mrs. Hawley's kindly efforts and admitted that he was tempted to make a *quantum meruit* award. Regrettably, on the basis of *Nicholson v. St. Denis*, he felt compelled to allow the defendant to escape liability, there being no special relationship between Skerry and Mrs. Hawley. If the relief sought was otherwise warranted it is suggested that Hallet J. was unfortunately and unnecessarily deferential to the authority of Mr. Justice MacKinnon's test. As hinted at in other decisions arising from

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[156] It is, of course, a well-settled rule that the absence of a privity of contract between the owner and a subcontractor means the the subcontractor can look only to his contractor for payment: *Standing v. London Gas Co.* (1861), 21 U.C.Q.B. 209 (C.A.); *Craig v. Matheson* (1900), 32 N.S.R. 452 (C.A.). While an owner can expressly or impliedly agree to pay a subcontractor (*John C. Love Lumber Co. v. Moore* (1962), 36 D.L.R. (2d) 609, [1963] 1 O.R. 245 (C.A.); *Conrad v. Kaplan* (1914), 18 D.L.R. 37, 24 Man. R. 368, 28 W.L.R. 464, 6 W.W.R. 1061 (C.A.)) the court merely held that "it was settled, at least in the mind of [the plaintiff's president] that his company would be paid direct from the defendant". Surely there was no valid agreement.

To award restitutionary relief in such circumstances allows a subcontractor to improperly evade a firmly established principle.

[157] (1983), 61 N.S.R. (2d) 195 (S.C.T.D.).

similar facts,[158] one means of analyzing the situation is to consider it as belonging to that branch of the incontrovertible-benefit concept which deals with the anticipation of necessary expenditures. From Skerry's perspective, the care of his victim was a task which he had to rely on someone to do.[159] The need to become involved in the most obvious and most costly means of satisfying that requirement, *i.e.*, hiring a private nurse, was obviated by Mrs. Hawley's intervention. On such an analysis, the facts as they presented themselves perhaps should have been sufficient to ground liability. There is surely no principled reason why a claimant such as Mrs. Hawley should be required to also establish the existence of some nexus. The insistence on proof of a special relationship contributes little to the exercise of determining liability other than an element of uncertainty and confusion. Further, while the facts of the leading cases on the inevitable expense branch of the incontrovertible-benefit concept would satisfy the special relationship test, the courts in those decisions did not overtly refer to any such requirement.[160]

The utility of the risk factor is evident in a host of decisions which pre-date the Ontario Court of Appeal decision in *Nicholson v. St. Denis* and the subsequent judicial fixation on special relationships. In *Estok v. Heguy* and in *T & E Development Ltd. v. Hoornaert*, which have been discussed,[161] the improvers, who did not knowingly act pursuant to a risk, succeeded in their actions. So, too, did the claimant in *Greenwood v. Bennett* who believed he was repairing his *own* vehicle.[162] By contrast, in *McGrath v. Hazlett*,[163] the plaintiff purchased land at a municipal tax sale and, despite being told of the previous owner's intention to redeem within the allotted time

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[158] See, *e.g.*, *Cavanaugh v. MacQuarrie* (1980), 35 N.S.R. (2d) 681, 62 A.P.R. 687, 9 C.C.L.T. 113 (S.C.T.D.).

[159] In relation to the earlier discussion of the two types of inevitable "expenses" — *i.e.*, those necessarily involving an expenditure on the one hand, and those which could be taken care of through personal action on the other — it is all but totally inconceivable that the facts here involved the latter.

[160] See, *e.g.*, *Craven-Ellis v. Canons, Ltd.*, *supra*, footnote 56; *Carleton (County) v. Ottawa (City)* discussed, *supra*, at footnote 107.

[161] *Supra*, footnotes 124 and 128.

[162] *Supra*, at footnote 106. In the entire episode the only "risk" touching upon Harper was the contractual risk he assumed that the rogue did not have good title to pass. However, as had been noted elsewhere, that risk is irrelevant. The claim was for the repairs, and was independent of, and not governed by, the contract of sale. Goff and Jones, *Restitution*, *supra*, footnote 117, at p. 147.

[163] (1973), 13 N.S.R. (2d) 567 (S.C.T.D.).

period, forged ahead with repairs. His actions were considered reckless by the court and his prayer for relief went unanswered.

Finally, there are post-*Nicholson v. St. Denis* cases in which disputes were governed primarily by an examination of the risks involved rather than by a search for a special relationship. In *Republic Resources Ltd. v. Ballem*[164] the plaintiffs completed drilling a well on land leased from the defendant only after the term of the lease had expired. If they had done so prior to the term's expiration, they would have been entitled to hold the lands as long as the well was producing. They brought a claim for relief, contending that they had conferred upon the owners an incontrovertible benefit, notwithstanding the fact that there was not at the time a market for natural gas.[165] Mr. Justice Holmes, referring only briefly to "special relationships", canvassed the authorities in the area, noted the paucity of case-law, and concluded rather inconclusively that "[w]hether restitutionary relief in Canada will be extended to cases of services rendered under mistake where the recipient has had no opportunity to object will likely be the subject of future litigation".[166] His would not be the judgment which would be in the vanguard of Canada restitution law. Aside from the fact that the plaintiffs had only established that they had conferred an "unascertained benefit",[167] they had "[assumed] certain calculated risks by commencing to drill".[168] The lease did not require any drilling to be done and the lessor was not made aware of the plaintiffs' activities until the well had virtually been completed. Nevertheless, the plaintiffs knowingly engaged themselves in a high-risk venture despite being aware from the outset of the possibility that they would fail to complete their project within the term of the lease. In *Norda Woodwork & Interiors Ltd. v. Scotia Centre Ltd.*[169] the plaintiff compounded one gamble with another and inevitably lost. Pursuant to a contract with a fast-food outlet which was leasing space in the defendant's mall, the plaintiff made significant improvements to the premises. The first

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[164] [1982] 1 W.W.R. 692, 33 A.R. 385, 17 Alta. L.R. (2d) 235 (Q.B.).

[165] The plaintiffs' also sought, unsuccessfully, a declaration that the lease was subsisting, and, in the alternative, an order allowing them to exercise their expired renewal option.

[166] *Supra*, footnote 164, at p. 707.

[167] "Unascertained" because of the abundance of other capped wells nearby, the lack of a current market and the uncertainty as to when a market might be developed: *ibid.*, at p. 708.

[168] *Ibid.*, at p. 709.

[169] (1980), 109 D.L.R. (3d) 736, [1980] 3 W.W.R. 749, 27 A.R. 605 (Q.B.).

risk it assumed, therefore, was the one attendant on any contractual venture relating to the receipt of payment. The potential consequences of that risk were worsened when the plaintiff failed to avail itself of the notice provisions of the Alberta *Builders' Lien Act*, which might have allowed it to fix the defendant, as the holder of the land in fee simple, with responsibility for payment.[170] Mr. Justice Moore referred to *Nicholson v. St. Denis* and its special relationship test, but emphasized in his judgment that the plaintiff should have taken advantage of the legislation. "Instead, [it] chose to gamble and lost".[171] Regardless of what type of relationship the plaintiff had with the defendant (short of contractual), any other result would surely be wrong. Where one is willing to forgo the statutory protection which is available, and to throw the dice there can be little merit in a call for compensation. Liability based on incontrovertible benefits (whether or not that term is used) *is* somewhat extraordinary and therefore should not be imposed unless the equities of the circumstances demand it.[172]

4. Balancing the Equities

Although the incontrovertible benefit concept is reconcilable with, and even supported by, the reasoning and results found in almost all of the case-law, the debate is admittedly unresolved. Voices of dissent are heard from time to time, and the concept still lacks explicit judicial support. The question, therefore, remains: Should the law, as a perceptive and socially responsive body, grant relief against one who has been enriched by the receipt of an incontrovertible benefit? The answer ought to turn on the relative weight

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[170] Section 12 of the *Builders' Lien Act*, R.S.A. 1970, c. 35 (now R.S.A. 1980, c. B-12, s. 12), read in part:

> 12(1) Where the estate upon which a lien attaches is a . . . leasehold estate then, if the person doing the work or furnishing the material gives to the person holding the fee simple, or his agent, notice in writing of the work to be done or materials to be furnished, the lien also attaches to the estate in fee simple unless the person holding that estate, or his agent, within five days after the receipt of the notice, gives notice that he will not be responsible for the doing of the work or the furnishing of the materials.

[171] *Norda Woodwork & Interiors Ltd. v. Scotia Centre Ltd.*, *supra*, footnote 169 at p. 742 D.L.R., p. 756 W.W.R.

[172] The same combination of gambles is seen frequently. See, *e.g.*, *Nicholson v. St. Denis*, *supra*, footnote 131, *Ledoux v. Inkman and Inkman*, *supra*, footnote 147.

assigned to the various interests and values at play. Recovery should lie when the sum total of the equities and arguments in favour of compensation are greater than those which militate against it.

For many years, the ethos of individualism was the overwhelmingly dominant factor in that equation. Not surprisingly, then, opponents of the incontrovertible-benefit concept are often heard to repeat damning statements of jurists from bygone eras:[173]

> Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.[174]
>
> . . . . .
>
> One cleans another's shoes; what can the other do but put them on?

The strength of those statements, however, is continually diminishing. While the denial of liability was inevitable during an era intoxicated by notions of self-autonomy and independence, it seems increasingly incongruous today. Rules born of 19th century ideals should not be allowed to govern on the eve of the 21st century unless they are justifiable by modern standards. Undeniably, individual freedom of choice is still one of the underlying values upon which the superstructure of Canadian society stands. As the cornerstone of the political and legal institutions around which life is ordered, it is certainly worthy of vigilant protection. Individual freedom, however, was absolute only for that brief moment in history between the time when man dragged himself out of the primordial swamp and the time when he entered into primitive society. Concomitant on that unbridled freedom was a life "solitary, poor, nasty, brutish and short";[175] subsequently, humans awoke to the fact that it was better to forgo some measure of autonomy in exchange for peaceful and fruitful co-existence.

The degree to which infringements on individual freedoms are permissible is reflective of the *Zeitgeist*. Does society so covet other values that one aspect of those freedoms should be overridden? Descending to the topic at hand, the common law traditionally gave a blanket response in the negative. A different answer is appropriate today. The law, though it cautiously lags behind the currents of social change, has increasingly recognized and promoted a shift away from

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[173] *Taylor v. Laird* (1856), 25 L.J. Ex. 329, 156 E.R. 1203.

[174] *Falcke v. Scottish Imperial Ins. Co.* (1886), 34 Ch. D. 234 at p. 248, 56 L.J. Ch. 707 at p. 713 (*per* Bowen L.J.).

[175] T. Hobbes, *Leviathan* (Penguin Books, 1982), Ch. xii, p. 186.

individualism and towards just compensation. In the restitution field, the acceptance of generalized principles of liability has resulted in strikingly illustrative decisions.[176] Elsewhere, for example, signs of an emerging "duty to rescue" in tort law are similarly explained.[177] Contemporary attitudes are not hostile to the incontrovertible-benefit concept. Where the equities in favour of relief are of sufficient strength, the pre-eminent status formerly granted to the recipient's freedom of choice should be displaced. And certainly, there can be no doubt that restitution should lie when the facts give rise to a "Hobson's choice". If the recipient had no real alternative as to whether or not he would incur the expenditure in question, then it cannot be said that liability to the claimant would result in an infringement upon his freedom.

The theoretical availability of relief based on the receipt of an incontrovertible benefit should provide the basic framework for the resolution of every dispute. In determining the outcome of any given case, however, the courts must be attuned to its particular facts for it is those facts which will dictate whether or not compensation will be crystallized from the theoretical to the actual. Several classes of relevant facts have already been discussed: the presence of an element of risk, the involvement of land or of irreplaceable chattels, officiousness, etc. Others, of a less general nature, may also be crucial. For example, a motive of self-interest may demand that compensation be denied even if another is incidentally benefited. In *Ulmer v. Farnsworth*[178] the claimant pumped his own quarry dry and in the process did the same for his neighbour. Compensation was properly denied for he had already reaped where he had sown. Because liability would result in a "double recovery" of sorts, it cannot be said that the equities called for the displacement of the

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[176] *Deglman v. Guaranty Trust Co. of Canada*, [1954] 3 D.L.R. 785, [1954] S.C.R. 725; *Carleton (County) v. Ottawa (City)* (1963), 39 D.L.R. (2d) 11, [1963] 2 O.R. 214 (H.C.J.), revd 46 D.L.R. (2d) 432, [1965] 1 O.R. 7 (C.A.), revd 52 D.L.R. (2d) 220, [1965] S.C.R. 663; *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165.

[177] *Jordan House Ltd. v. Menow and Honsberger* (1973), 38 D.L.R. (3d) 105, [1974] 1 S.C.R. 239, affg 14 D.L.R. (3d) 545, [1971] 1 O.R. 129, *sub nom. Menow v. Honsberger* (C.A.), which affirmed 7 D.L.R. (3d) 494, [1970] 1 O.R. 54, *sub nom. Menow v. Honsberger* (H.C.J.); *Crocker v. Sundance Northwest Resorts Ltd.* (1988), 51 D.L.R. (4th) 321, [1988] 1 S.C.R. 1186, 44 C.C.L.T. 225, revg 20 D.L.R. (4th) 552, 51 O.R. (2d) 608, 33 C.C.L.T. 73 (C.A.), which reversed 150 D.L.R. (3d) 478, 43 O.R. (2d) 145, 25 C.C.L.T. 201 (H.C.J.).

[178] (1888), 15 A. 65.

incidentally benefited party's freedom of choice. On the other hand, the call for restitution may be stronger if the recipient of a benefit, though he neither requested nor freely accepted it, contributed to the facts which gave rise to its conferral.

5. Conclusion

We live in a world of finite resources. Each of us order our daily affairs on the basis of that regrettable, but unavoidable, truism, allocating our energy and money in accordance with a personalized list of priorities. Ideally, those allocations would invariably produce the results anticipated. Resources expended with a view to bringing about event x. would always bring about event x. Unfortunately, we not only live in a world of finite resources, we also live in a world of finite insight, awareness and understanding. Consequently, mistakes happen.

An auto enthusiast pours time and money into a car which he mistakenly believes he owns. Two responses are possible. The first is to do nothing. With that response, one effect of the innocent error is that the resources of the recipient of the benefit are suddenly increased in an unanticipated way. Although he has expended neither effort nor money, a happy event has occurred: he has enjoyed a windfall. A second effect of the innocent error is that the party conferring the benefit has irretrievably spent resources and will never reap the anticipated reward. An unhappy event has occurred: he has unwittingly squandered his precious resources. The second possible response is to compel the recipient to pay. The result is that he experiences neither an increase nor a decrease to his pool of resources. He retains the equivalent of the sum paid in the form of an improved vehicle which, if desired, can be realized upon. A pool of cash can thereby be generated, part of which can be used to purchase another vehicle which is in the same state of repairs that his was in before the services were mistakenly rendered, and part of which can be held as cash. So, too, the claimant will be restored to his former position, or something close to it.[179] Of the two possible responses, it is clearly the latter which should generally find favour among fallible people seeking to balance freedom of

[179] He should receive as compensation the lesser of his loss or the recipient's gain. The two sums may not be equal, and the recipient should only be forced to pay for what he, in fact, did receive.

choice with principles of just compensation. If relief is denied, today's winner of the mistake lottery could easily be tomorrow's loser. It seems preferable to allow the rectification of errors than to force everyone to gamble.