# 8

# Natural obligations and unjust enrichment

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Though the term has largely fallen out of use and the underlying concept may strike some as anachronistic, it is natural to think of Michael Bryan as a *gentleman*. Cardinal Newman famously spoke of one 'mainly occupied in … removing the obstacles which hinder the free and unembarrassed action of those about him'.[1]

> He has his eyes on all his company … he can recollect to whom he is speaking; he guards against unseasonable allusions, or topics which may irritate; he is seldom prominent in conversation, and never wearisome … He makes light of favours while he does them, and seems to be receiving when he is conferring. He never speaks of himself except when compelled … he has no ears for slander or gossip, is scrupulous in imputing motives to those who interfere with him, and interprets every thing for the best. [H]e observes the maxim of the ancient sage, that we should ever conduct ourselves towards our enemy as if he were one day to be our friend.

Those words very much find their mark. I first gained an impression of Michael, as a true gentleman, shortly after my wife and I arrived in Australia in the mid 1990s. Although Michael was at a different university – indeed, in a different city – he very graciously welcomed us to our new home, while helping me adjust to the peculiarities of Antipodean private law. His kindness was as genuine and understated as it was unexpected.

The subject of this essay accordingly seems doubly appropriate to the occasion. Natural obligations occur at the intersection of two concepts that help to define Michael Bryan: unjust enrichment and honour. An additional impetus for this paper lies in the fact that, despite their increasing importance, natural obligations are not widely recognized or well understood, even amongst lawyers interested in restitutionary liability.

[1] JH Cardinal Newman, *The Idea of a University* (Longmans, London 1925) 208–9.

They 'exist at the edge of the law's frontiers … no more than a virtual requirement, a dotted line where the very concept of obligation wears thin'.[2] The topic is ignored by most of the leading texts[3] and, though the situation has begun to improve,[4] it has been the subject of few articles. Natural obligations nevertheless are important in both theory and practice.

Given the relative obscurity of the subject, it seems best to begin with a definition, an illustration and a caveat. First, the definition: a natural obligation typically is said to be a duty that, despite being juridically unenforceable in a positive sense, is binding upon the obligor's conscience and therefore is capable of explaining a transaction and defeating restitutionary liability.

Second, the illustration: for reasons of public policy, even if the parties have not committed any sort of wrong, a Commonwealth court generally will not positively enforce a gambling agreement by compelling payment.[5] As a result, it commonly is said that a wager does not generate *legal* rights and obligations. Nevertheless, it may generate *natural* rights and obligations, which are said to be binding in conscience. Consequently, to the extent that payment actually does occur, it fulfills a legitimate purpose and it can be retained with honour. Restitution is unavailable even if a transfer is undertaken in the belief that it could be compelled in law.

Finally, a caveat: although the doctrine generally is discussed in terms of a *natural* obligation that affects the party's *conscience*, such language

[2] J Cartwright and S Whittaker (trs), P Catala, *Proposals for Reform of the Law of Obligations and the Law of Prescription* (Institute of European and Comparative Law, Oxford 2005) 50.

[3] Cf P Birks, *Unjust Enrichment* (2nd edn Oxford University Press, Oxford 2005) 257–8; G Virgo, *The Principles of the Law of Restitution* (2nd edn Oxford University Press, Oxford 2006) 674.

[4] G Dannemann, 'Unjust Enrichment by Transfer: Some Comparative Remarks' (2001) 79 Texas L Rev 1837; R Sutton, 'Moral or Natural Obligation as Consideration for Contract' (2002) 98 ALR 5th 353; D Sheehan, 'The Instance and Effect of Natural Obligations in English Law, [2004] LMCLQ 170; HW Tang, 'Natural Obligations and the Common Law of Unjust Enrichment' (2006) 6 OUCLJ 133.

[5] The situation in England recently has undergone a dramatic revision. Section 335 of the Gambling Act 2005 (UK) now says that '[t]he fact that a contract relates to gambling shall not prevent its enforcement'. The example of an unenforceable wagering contract nevertheless is employed throughout this paper because: (1) it most clearly illustrates the propositions under discussion; (2) it continues to apply elsewhere in the Commonwealth; and (3) it continues to apply in England to agreements made before the legislative provisions belatedly came into force in 2007: Gambling Act 2005 (Commencement No 6 and Transitional Provisions) Order 2006 SI 2006/3272 (UK).

is dangerous insofar as it echoes the long-discredited view that unjust enrichment turns upon abstract notions of 'justice' and a broad discretion to achieve 'equitable' results. In truth, however, there is nothing 'natural' about the phenomenon in question. Nor do the applicable rules involve any sort of mystical investigation into the claimant's conscience.[6] The doctrine merely reflects the fact that, in some circumstances, the courts will allow a transfer to stand even though they would not have compelled its performance. Consequently, the distinction tentatively drawn in the preceding paragraph, between *legal* rights and *natural* rights, is somewhat misleading. A wager undoubtedly affects the parties' legal positions. The important point, however, is that whereas most transactional agreements are positively *and* negatively enforceable (so as both to compel the debtor's performance and justify the creditor's enrichment), a wager is restricted to the latter function only.

## A. History

While it may be an overstatement to say that natural obligations are inherent in any notion of unjust enrichment, it is true to say that the concept has long been an established feature of restitutionary regimes within the western tradition.

### 1. *Roman law*

For present purposes, the story begins in ancient Rome.[7] Natural obligations originated as a response to the tension that existed within Roman private law between tradition and certainty on the one hand, and fairness and flexibility on the other. The Praetors ameliorated the rigidity of the existing rules by drawing upon the *ius naturale* and by giving *limited* effect to certain types of transactions that affected the parties' conscience. Although the doctrine developed haphazardly, three situations ultimately were said to entail natural obligations: (1) promises and obligations rendered unenforceable for technical reasons, rather than for moral defects, (2) obligations assumed by parties, such as slaves, who possessed factual,

[6] That point sometimes is overlooked. The idea of conscience was taken literally in *State v Placke*, 786 So 2d 889 (La Ct App 2d Cir, 2001), where the court held that the doctrine of natural obligations could not apply to a State government which, as a legal abstraction, was incapable of consciously forming the requisite sense of moral obligation.

[7] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta-Kluwer, Cape Town 1992) 7–10; A Borkowski and P du Plessis, *Textbook on Roman Law* (3rd edn Oxford University Press, Oxford 2005) 252–3.

but not legal, capacity, and (3) obligations extinguished by the passage of time. While the precise rules varied from one situation to the next, satisfaction of a natural obligation invariably barred recourse to the *condictio indebiti* (ie the action that generally allowed recovery of enrichments that occurred without legal basis). While the affected party could not be compelled to perform, restitution was unavailable to the extent that performance nevertheless occurred.

Civilian jurisdictions, of course, continue to bear the imprint of ancient Rome. Thomas Krebs reports that while 'the concept has been abolished in name, German law still recognises'[8] the concept of natural obligations. Section 762 of the German Civil Code – the Bürgerliches Gesetzbuch ('BGB') – for example, deals with the issue of wagers in terms of both positive and negative enforcement.

> No obligation is established by gaming and betting. What has been paid due to such gaming or betting may not be demanded back on the basis that no obligation existed.

The Roman legacy likewise explains why, within North America, natural obligations most often are discussed in Louisiana[9] and Quebec.[10] In Louisiana, Article 1761 of the Civil Code again addresses the twin issues of non-enforcement and non-recovery.[11]

> A natural obligation is not enforceable by judicial action. Nevertheless, whatever has been freely performed in compliance with a natural obligation may not be reclaimed.

In Quebec, the relevant provision is Article 1554 of the Civil Code.[12]

> Every payment presupposes an obligation; what has been paid where there is no obligation may be recovered. Recovery is not admitted, however, in the case of natural obligations that have been voluntarily paid.

[8] T Krebs, *Restitution at the Crossroads: A Comparative Study* (Hart Publishing, Oxford 2001) 267.

[9] F Martin, 'Natural Obligations' (1941) 15 Tulane L Rev 497; D Snyder, 'The Case of Natural Obligations' (1995) 56 La L Rev 423; *Bozeman v Louisiana*, 879 So 2d 692 (La, 2004).

[10] JL Baudouin and PG Jobin, *Les obligations* (6th edn Éditions Yvon Blais, Cowansville, 2005) 555; *Adams v Amex Bank of Canada* [2009] QJ No 5769 (Que SC).

[11] Acts 1984, No 331, § 1. The surrounding Articles explain that '[a] natural obligation arises from circumstances in which the law implies a particular moral duty to render a performance', and illustrate the concept by reference to: (1) obligations 'extinguished by prescription or discharged in bankruptcy'; (2) obligations 'incurred by a person who, although endowed with discernment, lacks legal capacity'; and (3) obligations 'to execute the donations and other dispositions made by a deceased person that are null for want of form'.

[12] RSQ, c C-1991.

### 2. *Traditional common law*

More surprisingly, the ancient Roman conception of natural obligations also has informed the common law principle of unjust enrichment. As so often is true, the primary gateway was provided by Lord Mansfield, who, in addition to being a master of the common law, had been trained in civil law.[13] *Moses v Macferlan*[14] amply illustrates that proposition. In explaining the nature of restitution, Lord Mansfield drew upon Roman law not only to analogize between the action for money had and received and the ancient category of *quasi ex contractu*, but also to delineate the scope of recovery. Before discussing the circumstances that support liability, he identified situations that do not. And with respect to the latter, he invoked the concept (though not the name) of natural obligations in explaining that restitution is available 'only for money which, *ex æquo et bono*, the defendant ought to refund'.

> [I]t does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering.

That doctrine was applied not infrequently in the years that followed.[15] In *Bize v Dickason*,[16] Lord Mansfield himself said that 'if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again'. In *Farmer v Arundel*,[17] a pauper resided in the plaintiff's parish but nevertheless received care from the defendant parish. The plaintiff complied with the defendant's demand for reimbursement, but later sought restitution on the ground that the defendant had not satisfied the formalities that would have subjected the plaintiff to an enforceable

[13] CHS Fifoot, *Lord Mansfield* (Clarendon Press, Oxford 1936) 26–30.
[14] (1760) 2 Burr 1005, 1012–13, 97 ER 676 (KB) 680–1 ('*Moses v Macferlan*'). See also P Birks, 'English and Roman Learning in *Moses v Macferlan*' (1984) 37 CLP 1, 16–17.
[15] Sir William Evans, 'An Essay on the Action for Money Had and Received' (1802) reprinted in [1998] RLR 1, 5, 8–9.
[16] (1786) 1 TR 285, 286–7, 99 ER 1097, 1098.
[17] (1772) 2 Bl W 824, 825–6, 96 ER 485, 486.

debt. De Grey CJ rejected the claim by explaining that '[m]oney due in point of honour or conscience, though a man is not compellable to pay it … shall not be recovered back'. The same principle appears to underlie *Munt v Stokes*.[18] A man borrowed money from the defendants. The plaintiffs, as the man's executors, subsequently repaid the sum, but then sought restitution on the basis that statute rendered the loan void. Anticipating an objection from the bench, plaintiffs' counsel argued that, as a result of the legislation, the loan had not been repayable as a matter of either law or conscience. Lord Kenyon CJ found for the defendants. Although the original agreement was void by statute, he believed that the claimants 'were bound in both honour and conscience to refund the money which the defendants had advanced'. In reaching that conclusion, he observed that the loan agreement 'was not *malum in se*, but *malum prohibitum*' – not evil in itself, but merely wrong because it was prohibited.

Notwithstanding the development initiated by such cases, the concept of natural obligations effectively disappeared from the common law at the beginning of the nineteenth century. The most important explanation for that development was *Bilbie v Lumley*.[19] The direct effect of Lord Ellenborough CJ's decision was to create a rule that generally denied restitution for payments made by mistakes of law (as opposed to mistakes of fact). An indirect effect of *Bilbie* was the marginalization, if not abolition, of natural obligations. The concept of natural obligations almost invariably arises in conjunction with a mistake of law. Money might be paid, for instance, in the mistaken belief that a wagering debt is enforceable in law. Although an action in unjust enrichment to recover such a payment ultimately would have failed by reason of natural obligation, *Bilbie* saw it defeated, at an earlier stage of analysis, by the rule that prohibited a restitutionary claim being founded on a mistake of law.

By the beginning of the twentieth century, judicial attitudes exacerbated the impact of the mistake of law doctrine. The concept of natural obligations was anathema to judges who regarded the principle of unjust enrichment, with its perceived reliance upon palm tree justice, as 'well-meaning sloppiness of thought'.[20]

[18] (1792) 4 TR 561, 100 ER 1176 ('*Munt*'). [19] (1802) 2 East 469, 102 ER 448 ('*Bilbie*').
[20] *Holt v Markham* [1905] 1 KB 505 (CA) 513. See also *Baylis v Bishop of London* [1913] 1 Ch 127 (CA) 140.

### 3. *Natural obligations today*

After lying dormant for nearly two centuries, natural obligations once again have become relevant within the common law world. That is true for two reasons.

#### (a) Unjust factors

The rule in *Bilbie* has been abolished. Courts no longer draw a distinction between mistakes of fact and mistakes of law. Although the precise rules remain somewhat under-developed, restitution generally is available anytime that a transfer of wealth occurs by reason of the claimant's error.[21]

The full effect of that change has not yet permeated into practice. The courts have yet to be presented with claims that previously would have been barred by the mistake of law doctrine, but now ought to be defeated, as in Lord Mansfield's day, on the basis of natural obligations. As Peter Birks anticipated, however, the fall of *Bilbie* entails the need to 'differentiate between civil [ie positively enforceable] and natural obligations'.[22] The time accordingly will come when the courts must 'cope with the question whether, if you honour a moral obligation because you believe that you are legally obliged to do so, and you are mistaken in that belief, you can recover'.[23] A person who has paid on a wager, for instance, may frame a restitutionary action in terms of a simple causative mistake. And yet, despite proof of an enrichment, a corresponding expense, and an unjust factor, the court must, unless precedent and principle are to be overhauled, deny relief. That conclusion may be framed in various ways. A judge may say that there can be no 'restitution of an enrichment which is not unjust',[24] or that liability would 'stultify'[25] the policies that rendered the wager unenforceable in a positive sense. At

[21] *Nepean (Township) Hydro Electric Commission v Ontario Hydro* (1982) 132 DLR (3d) 193 (SCC) ('*Nepean (Township) Hydro Electric Commission*'); *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 (SCC); *Canadian Pacific Airlines Ltd v British Columbia* (1989) 59 DLR (4th) 218 (SCC); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA); Judicature Act 1908 (NZ) s 94A(1).

[22] P Birks, 'Mistakes of Law' [2000] CLP 205, 215.

[23] Ibid. [24] Birks (n 3) 258.

[25] P Birks and C Mitchell, 'Unjust Enrichment' in P Birks (ed), *English Private Law* (Oxford University Press, Oxford 2000) 626–30.

root, however, the explanation for the denial of relief must be the same one that Lord Mansfield provided: the claimant acted in satisfaction of a natural obligation.

### (b) Juristic reasons

Elsewhere in the Commonwealth, natural obligations have been re-introduced into the law of unjust enrichment through the abolition of the mistake of law doctrine. Within Canadian law, in contrast, natural obligations once again have become relevant as a result of the Supreme Court of Canada's decision, in *Garland v Consumers' Gas Co (No 2)*,[26] to re-orient restitutionary liability from unjust factors to juristic reasons.

From that essentially civilian perspective, relief is available with respect to any transfer that occurs without legal basis. To that end, Iacobucci J identified four 'established categories' of juristic reason: contract, donative intent, disposition of law, and 'other valid common law, equitable or statutory obligation'.[27] Significantly, however, none of those categories easily covers a payment made in satisfaction of a natural obligation, as in the case of a wager.

- *Contract*: while payment is made pursuant to an agreement, gambling contracts are void and a void contract cannot constitute a juristic reason.
- *Donative intent*: although satisfaction of a wager sometimes is said to constitute a 'voluntary payment' (ie a gift),[28] that is an artificial statement of law that typically runs contrary to the underlying facts. Granted, there may be situations in which sophisticated gamblers honour their wagers despite knowing that payment cannot be legally compelled. Such transfers may properly be characterized as voluntary and hence irreversible as a matter of donative intent. The relevant case, however, is one in which a gambler honours a wager in the mistaken belief that the debt is positively enforceable. Assuming that a 'voluntary payment' is defined as one that occurs gratuitously and not in satisfaction of an obligation, the label is inapt. But for the erroneously perceived obligation, the defendant would not have been enriched. Moreover, it is

[26] (2004) 237 DLR (4th) 385 (SCC) ('*Garland*'). See also M McInnes, 'Making Sense of Juristic Reasons: Unjust Enrichment After *Garland v Consumers' Gas Co*' (2004) 42 Alberta L Rev 399; M McInnes, 'Juristic Reasons and Unjust Factors in the Supreme Court of Canada' (2004) 120 LQR 554.

[27] *Garland* (n 26) 403 [28] *Morgan v Ashcroft* [1938] 1 KB 49 (CA).

well-established that an apparent gift may be recovered on the basis of a causative mistake.[29]

- *Disposition of law*: although the scope of this category of juristic reason has yet to be defined, it most likely is confined to transfers occurring in satisfaction of official demands (eg court judgments and government taxes)[30] and therefore can not accommodate the concept of natural obligations.
- *Other valid common law, equitable or statutory obligation*: Iacobucci J's final category might have been conceived, more broadly, as a general miscellany of juristic reasons sufficient to defeat liability. If so, it clearly would encompass natural obligations. As actually drafted, however, *Garland*'s fourth head of juristic reason cannot accommodate that concept. Unless the phrase is to be distorted, to speak of a 'valid common law obligation' is to speak of a positively enforceable duty. It would be confusing at best to use such language in reference to a situation in which the transferee enjoys rights only if and when payment occurs.

Payment of a wager accordingly triggers a *prima facie* right to restitution on the current Canadian understanding of unjust enrichment. The *Garland* analysis, however, contains a second stage in which the defendant is entitled to resist liability by demonstrating some residual form of juristic reason. That exercise is guided by a consideration of the circumstances as a whole, but with special reference to *public policy* and the parties' *reasonable expectations*. It is at that stage that Canadian courts must re-develop the concept of natural obligations.

There is no need to re-invent the wheel, of course. The fundamental decisions already have been made and *Garland* merely requires that they be expressed appropriately. As the traditional precedents reveal, for instance, public policy dictates that while a wagering debt is not positively enforceable, it does sufficiently explain a transfer that occurs between gamblers. Although the proposition obviously is circular, it also can be said that negative enforcement accords with reasonable expectations. It need merely be added that, in the interests of clarity and cohesion, the courts should explicitly re-introduce the language

[29] *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476; *University of Canterbury v Attorney-General* [1995] 1 NZLR 78 (CA).

[30] *Reference re: Goods and Services Tax (Alta)* (1992) 94 DLR (4th) 51 (SCC) 71; *Garland v Consumers' Gas Co* (2001) 208 DLR (4th) 494 (Ont CA) 538 ('*Garland v Consumers' Gas Co*').

of 'natural obligations' as shorthand for the factors underlying such decisions.

## B. The test for natural obligations

Natural obligations sometimes may be identified simply on the basis of precedent. The common law has long accepted, for instance, that wagers, though not positively enforceable, generally can be retained once received. In other situations, however, courts will be required to reassess existing authorities or perhaps start from scratch. The parties may dispute the scope of a particular rule or, because the categories are never closed, a claimant may propose formulation of a new species of natural obligation. In either event, clear criteria will be needed.

To this point, natural obligations have been described as a sort of hybrid. For reasons that are specific to each category, the legal system is unwilling to accord the parties' juridical relationship *full* recognition. Although the operative policies preclude positive enforcement, they are not offended by performance itself. Transfers accordingly are irreversible to the extent that they actually occur. But *when* will that be true? As Birks noted, 'a moment's reflection will reveal that it is intensely difficult to say in which cases a moral obligation remains untouched despite not being legally enforceable'.[31] Several tests for identifying such cases have been proposed, some of which arguably obscure more than they clarify.[32] Duncan Sheehan, however, has helpfully suggested that a natural obligation may exist when the reason for refusing positive enforcement neither: (1) impugns the transfer itself; nor (2) exists to protect a party that has performed.[33]

Sheehan's first criterion recalls Lord Kenyon's focus on transactions that are 'not *malum in se*, but *malum prohibitum*'.[34] Some transactions are so fundamentally flawed, so 'evil in themselves', as to require complete repudiation. In such circumstances, the courts are willing neither to enforce outstanding obligations, nor to countenance completed transfers. Restitution consequently may be available with respect

[31] Birks (n 22) 215.

[32] Louisiana courts recently have employed a five-part test that requires proof that the transferor: (1) owed a moral duty to a *particular person*; (2) *felt so strongly* about the moral duty as to feel obliged to act; (3) *recognized* the duty *by performing* it; (4) *fulfilled* the duty by rendering performance of a *pecuniary nature*; and (5) fulfilled the duty in a way that did not *impair the public order*: *Thomas v Bryant*, 639 So 2d 378 (La Ct App 2d Cir, 1994).

[33] Sheehan (n 4) 185. [34] *Munt* (n 18).

to benefits conferred.[35] Other transactions, however, are prohibited not because they are inherently flawed, but rather because, for some extraneous reason, the legal system refuses to lend assistance. Those transactions may entail natural obligations. While the parties' relationship does not warrant judicial intervention, it does provide a legitimate basis for acts that do occur. Executed transfers consequently are irreversible.

Sheehan's second criterion focuses on the precise nature of the reason as to why a transaction enjoys less than full effect. That reason occasionally is one sided. The legal system may be prepared to strike down a transaction in order to protect one of the parties. And, of course, such protection will be largely illusory unless the vulnerable party is entitled to both resist positive enforcement *and* resile from tainted transactions. Sometimes, however, the vulnerable party may not require *full* protection. The operative mischief may lie not in performance *per se*, but rather in its compulsion. If so, then it is enough for the courts to refuse positive enforcement. To the extent that the parties perform of their own accord, their actions are a legitimate function of the underlying relationship. Restitution is unavailable with respect to benefits received in satisfaction of an obligation that, but for the overriding mischief, would have been enforced in law.

Before considering categories of natural obligation, which is the purpose of the next section of the essay, something must be said about the relationship between natural obligations and bars to recovery. Liability in unjust enrichment sometimes is denied, notwithstanding proof of a *prima facie* claim, because some overriding policy militates against relief. That arguably may be true, for instance, in the event of illegality or officiousness. At least at first glance, the concept of natural obligations may appear to operate in a similar manner. There nevertheless is a crucial difference. A natural obligation positively justifies a transfer. It demonstrates that an enrichment was conferred pursuant to a purpose that the legal system regards as legitimate (albeit only upon execution). A bar, in contrast, operates negatively. Restitution is denied because the legal system is offended by something in the nature of the transaction or the claimant's behaviour.

[35] A prominent example is provided by the swaps saga. The agreements were rendered void by the local councils' lack of capacity: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] UKHL 12, [1996] AC 669 (HL). The evil in question, however, may itself constitute a bar to recovery.

## C. Categories of natural obligation

This section focuses on the most important heads of natural obligation, as identified by Lord Mansfield in *Moses v Macferlan*.[36] (Page restrictions require that the discussion focus on one jurisdiction – Canada – but the governing rules are much the same throughout the Commonwealth.) These heads, or categories, of natural obligation are: obligations arising from *gambling*; obligations arising under *usurious loans*; obligations extinguished by *passage of time*; and obligations arising under contracts created during *infancy*. The categories of natural obligations are never closed, however, and the doctrine should apply any time that the criteria are met. This section accordingly concludes by identifying other instances in which natural obligations have been, or might be, recognized.

### 1. *Obligations arising from gambling*

The law of wagering is complex and most of the details lie beyond the scope of this discussion. For present purposes, it is sufficient to sketch the history in outline.[37]

While wagers previously were valid and enforceable at common law,[38] the situation had changed by the eighteenth century. Some judges undoubtedly were influenced by moral considerations, but the shift primarily was due to more mundane matters. Gambling disputes were very common and it was thought that scarce judicial resources should not be wasted on trifling matters:[39] 'However laudable the sport may be', judges

[36] *Moses v Macferlan* (n 14) 1012–13; 680–1.

[37] For a discussion of the historical and legal aspects of gambling, see SP Monkcom and others (eds), *Smith & Monkcom: The Law of Betting, Gaming and Lotteries* (2nd edn Butterworths, London 2001); D Miers, *Regulating Commercial Gambling* (Oxford University Press, Oxford 2004). For a discussion of the contractual aspects of gambling, see GHL Fridman, *The Law of Contract* (4th edn Carswell, Toronto 1999) 377–8; GH Treitel, *The Law of Contract* (11th edn Sweet & Maxwell, London 2003) ch 12.

[38] As a matter of law, the concept of 'gaming' or 'wagering' applies only if each party stands to win or lose: *Tote Investors Ltd v Smoker* [1965] 1 QB 509 (CA). Moreover, even if each party stands to win or lose, a transaction will not fall within the definition of gaming or wagering if the parties' main purpose lies elsewhere: *Morgan Grenfell & Co Ltd v Welwyn Hatfield District Council* [1995] 1 All ER 1 (QB) (swaps agreement).

[39] S Smith, *Atiyah's Introduction to the Law of Contract* (6th edn Clarendon Press, Oxford 2005) 213–14.

had 'far more serious matters to attend to'[40] and courts did 'not exist for settling disputes as to who drew the winning number in the lottery'.[41] The objections, in other words, pertained to executory, rather than executed, contracts. And since wagering was not *malum in se*,[42] and since there was no concern to protect a class of vulnerable parties,[43] the legal system, though unwilling to provide an enforcement mechanism, had no objection to completed transactions.

Against that backdrop, the courts developed several informal tactics for reducing the incidence of litigation. They might, for instance, hear claims arising from wagering agreements only if and when all other categories of claim had been concluded. A more effective strategy, however, required legislative intervention. Parliament previously had intervened on several occasions, but its most important response came in 1845. Section 18 of the Gaming Act 1845 (UK) declared wagering or gaming contracts to be 'null and void', and said that no action could lie for anything won on a wager.[44]

Gambling is now heavily regulated within Canada, as elsewhere. The Criminal Code prohibits various gambling-related activities (while creating an exception for betting between private individuals)[45] and every province and territory has legislation to regulate various forms of gambling (eg lotteries, video lottery terminals). For private law purposes, however, the Gaming Act 1845 remains most significant. It is directly applicable in the four western provinces[46] and its essential provisions are legislatively reproduced in others.[47]

[40] *Graham v Pollock* (1848) 10 D 646, 648. [41] *Christinson v McBride* (1881) 9 R 34.

[42] The fact that modern Canadian courts do not regard gambling contracts as inherently immoral is evidenced by their enforcement of gambling debts incurred in jurisdictions that enforce wagering contracts: *Boardwalk Regency Corp v Maalouf* (1992) 88 DLR (4th) 612 (Ont CA); *Horseshoe Club Operating Co (cob The Horseshoe Club) v Bath* [1998] 3 WWR 128 (BCSC); cf *Saxby v Fulton* [1909] 2 KB 208 (CA).

[43] Times and attitudes have changed. In England, for instance, the Gambling Act 2005 (UK) now contains provisions aimed at protecting children and vulnerable adults.

[44] Section 334 of the Gambling Act 2005 (UK) repealed the Gaming Act 1845 (UK), along with a number of related statutes. Section 335 of the new Act further states that '[t]he fact that a contract relates to gambling shall not prevent its enforcement'.

[45] Criminal Code, RSC 1985, c C-46, s 204(b).

[46] *DeJardin v Roy* (1910) 12 WLR 704 (Sask DC); *Lyman v Kuzik* (1965) 57 WWR 110 (Alta SC AD); *Osorio v Cardona* (1984) 15 DLR (4th) 619 (BCSC); *Red River Forest Products Inc v Ferguson* [1991] 1 WWR 749 (Man QB), aff'd [1993] 2 WWR 1 (Man CA).

[47] Gaming Control Act, SO 1992, c 24, s 47.1. Cf *Young v Blaikie* (1822) 1 Nfld LR 277 (Nfld SC); *Velensky v Hache* (1981) 121 DLR (3d) 747 (NBQB) (relevant English statutes not received law in New Brunswick).

The governing rules follow the scheme suggested earlier in this chapter. The winning party has no legal right to enforce the satisfaction of a debt,[48] but if payment does occur, then it generally is irrecoverable.[49] Although the gaming contract itself is invalid, the parties' relationship creates a moral obligation that constitutes a legal basis for the transfer and thereby bars restitution.[50] The essence of that analysis sometimes is obscured. In *Lipkin Gorman (a firm) v Karpnale Ltd*,[51] for instance, Lord Templeman explained that 'a gaming loss, whenever paid, is a completed voluntary gift from the loser to the winner'.[52] The payment is 'voluntary', however, not in the sense that it is entirely gratuitous, but rather only in the sense that it was not compellable in law. Semantics aside, the crucial point is that since the losing party, in honouring a wager, makes payment in order to fulfill a purpose, the winner's enrichment is not without basis.

The same regime extends to a stakeholder (ie a trusted third party who holds the prize pending the outcome of the bet). The stakes are irrecoverable from either the winning party or the stakeholder as long as they are paid over before the losing party objects.[53] In contrast, if either party demands restitution from the stakeholder before the winnings are paid out, the third party is liable for reimbursement.[54]

### 2. *Obligations arising under usurious contracts*

Usury is an ideal candidate for the recognition of a natural obligation. Whereas early courts regarded interest upon money as sinful, 'medieval conceptions began gradually to give way before the impulse of commercial and industrial activity [and] the sin of avarice turned into the offence

[48] *Breitmeir v Batke* (1966) 56 WWR 678 (Alta Dist Ct). Nor, perhaps, is the winning party entitled to enforce a new contract, supported by fresh consideration, in which the losing party reiterates the promise to pay the gambling debt: *Hill v William Hill (Park Lane) Ltd* [1949] AC 530 (HL).

[49] Restitution may be available, however, if the winning party cheated: *Dufour v Ackland* (1830) 9 LJ 3; *Berman v Riverside Casino Corp*, 323 F 2d 977 (9th Cir, 1963).

[50] *Bridger v Savage* (1884) 15 QBD 363 (CA) 367.

[51] [1991] 2 AC 548 (HL) ('*Lipkin Gorman*').

[52] Ibid 562. Restitution was available in *Lipkin Gorman* not because money was paid pursuant to a gambling debt, but rather because a gambling debt was paid with money stolen from the claimant. See also *Clarke v Shee & Johnson* (1774) 1 Cowp 197, 98 ER 1041 (KB).

[53] *Diggle v Higgs* (1877) 2 Ex D 422 (CA); *Davis v Hewitt* (1885) 9 OR 435 (Ont HC); *Walsh v Trebilcock* (1894) 23 SCR 695 (SCC).

[54] *Anderson v Galbraith* (1858) 15 UCQB 57 (CA).

of usury'.[55] The offence in question came to consist not in 'the lending of money at profit but the lending of money at a rate of profit greater than that permitted by the statute'.[56] The underlying policy of preventing the exploitation of vulnerable borrowers obviously precludes positive enforcement of a usurious agreement. As always in the current context, however, the more interesting question arises if a borrower does repay the loan according to its terms. There is much to be said in favour of relief. While the contract is void, the parties are not *in pari delicto* and the claim is brought by a member of the protected class. But *how much* is available for recovery: the entire payment or something less?

### (a) The historical position

In *Moses v Macferlan*, Lord Mansfield said that restitution 'does not lie for money paid by the plaintiff … *to the extent of* principal and legal interest upon an usurious contract'.[57] Such a payment, he explained, 'is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law'.[58] Lord Mansfield's recognition of a natural obligation in such circumstances is not surprising.[59] Though reluctantly respectful of usury statutes,[60] he favoured free trade and was eager to salvage as much of the invalidated transactions as possible.

The clearest statement of Lord Mansfield's position appears in *Browning v Morris*.[61] After explaining that the action for money had and received was unavailable if an illegal contract was performed by parties *in pari delicto*, he cited the Usury Act 1660 (UK)[62] in reference to a different category of case in which 'transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men'. The operative policies in that category, he explained, dictate that while 'the party injured

[55] *Kasumu v Baba-Egbe* [1956] 1 AC 539 (PC West Africa CA) 551. [56] Ibid.
[57] *Moses v Macferlan* (n 14) 1012–13; 680–1 (emphasis added). [58] Ibid.
[59] Lord Mansfield, appearing prior to his elevation to the bench as William Murray, Solicitor-General, forcefully argued the position in *Chesterfield v Janssen* (1750) 1 Atk 301, 26 ER 191. See also J Oldham, *The Mansfield Manuscripts* (Vol 1) (University of North Carolina Press, Chapel Hill 1992) ch 9.
[60] *Lowe v Waller* (1781) 2 Doug 736, 99 ER 470 (in holding that a bill of exchange given upon a usurious security was void, Lord Mansfield said, 'I own, with a great leaning and wish on my part, that the law should turn out to be [otherwise]. But the words of the Act are too strong').
[61] (1778) 2 Cowp 790, 98 ER 1364 ('*Browning v Morris*'). Lord Mansfield's discussion was cited with approval in *Nepean (Township) Hydro Electric Commission* (n 21).
[62] 12 Car 2, c 13.

may bring an action for the *excess* of interest … there is no penalty upon the party' responsible for the usury.[63] The contract is statutorily void, but the execution of the invalid loan (ie the credit extended by the defendant to the claimant) gives rise to a natural obligation that governs the parties' relationship. The policy of protection entitles the borrower to restitution of the usurious component of interest, but by the same token, receipt of the initial benefit obligates the borrower, as a matter of conscience, to repay the loan.[64]

### (b) *Garland* revisited

Though not previously recognized, either judicially or academically, it appears that essentially the same analysis may explain the result in *Garland*.[65] The defendant sold natural gas under terms that were approved by a regulatory board. The resulting contract imposed a 'late payment penalty' ('LPP'), calculated as 5 per cent of an outstanding bill, upon a tardy customer. Over the course of 20 years, that provision generated something in the vicinity of CA$150,000,000. Halfway through that period, the claimant began class action proceedings based on an allegation that the LPP violated section 347 of the Criminal Code, which prohibited interest in excess of 60 per cent per annum. The Supreme Court of Canada accepted that argument[66] and sent the case back to trial for a determination of the defendant's restitutionary liability. When the case returned to the court, Iacobucci J held that since the regulatory board's order was inconsistent with the Criminal Code provision, there was no juristic reason for the defendant's enrichment. He nevertheless restricted recovery to: (1) payments received *after* the plaintiff first raised the allegation of illegality; and (2) the value received *in excess* of the permissible rate of interest.

Iacobucci J's first restriction is difficult to justify. As he himself had insisted a few years earlier,[67] liability for unjust enrichment generally is strict. And since the defendant's fault or knowledge ought to be irrelevant, there is no principled basis for saying that, despite criminally extracting

[63] *Browning v Morris* (n 61) 792–3; 1365 (emphasis added).

[64] Again, in *Smith v Bromley* (1760) 2 Doug 696, 697; 99 ER 441, 443, Lord Mansfield said that while restitution 'would not lie, for so far as principal and legal interest went, the debtor was obliged, in natural justice, to pay, therefore he could not recover it back. But for all above legal interest equity will assist the debtor … to recover back the surplus'. See also *Lowry v Bourdieu* (1780) 2 Doug 468, 99 ER 299; *Bosanquett v Dashwood* (1734) Cas T Talbot 38, 40; 25 ER 648, 649.

[65] *Garland* (n 26). [66] *Garland v Consumers' Gas Co* (n 30).

[67] *Air Canada v Ontario (Liquor Control Board)* (1997) 148 DLR (4th) 193 (SCC).

its enrichment, the defendant should be entitled to retain benefits that it reasonably expected to keep. Iacobucci J's second restriction, in contrast, arguably is consistent with the concept of natural obligations. Following Lord Mansfield, it might be said that while the claimants, as the objects of the Criminal Code's protective provisions regarding usury, were entitled to restitution of the illegal component of the LPP, they had no claim insofar as their payments represented a legal rate of interest. The restitutionary goal is not to punish the defendant, but rather to reverse a transaction insofar as it ought not to have occurred.[68] Having enjoyed an extended credit period, the claimants were conscience-bound to pay for that benefit.[69]

### 3. *Obligations extinguished by passage of time*

A third category of natural obligation arises when a debt becomes unenforceable through the passage of time. As Lord Mansfield explained in *Moses v Macferlan*,[70] the creditor is entitled, in good conscience, to retain money received after that time, even though payment could not have been extracted through legal action. The policy concerns associated with the passage of time (ie the unfairness of indefinitely subjecting a debtor to the threat of litigation, the risks inherent in old evidence, the desire to encourage prompt action[71]) pertain not to the validity of the debt, but rather to its enforcement. Consequently, since late payment continues to fulfill the legitimate purpose of discharging a debt, a creditor's enrichment is not

[68] See also *Kilroy v A OK Payday Loans Inc* (2007) 278 DLR (4th) 193 (BCCA); *Tracy (representative ad litem of) v Instaloans Financial Solution Centres (BC) Ltd* (2008) 293 DLR (4th) 60 (BCSC), aff'd [2009] BCCA 110.

[69] Although *Garland* generally fits within the concept of natural obligations, it does encounter one obstacle. A natural obligation justifies a transfer, but is not otherwise enforceable. In the context of usurious agreements, however, the Supreme Court of Canada has held that positive enforcement of a legal rate of interest *sometimes* is available: *New Solutions Financial Corp v Transport North American Express Inc* (2004) 235 DLR (4th) 385 (SCC). The court was split on the appropriate response to an unexecuted contractual provision requiring an illegal rate of interest. The dissenting judges favoured the 'blue-pencil' doctrine that entirely excises an offending provision. Combined with *Garland*, that approach would fully respect the concept of natural obligations. Although there would be no question of enforcing the interest provision, the creditor would be entitled to retain a legal rate of interest if payment did occur. The majority of the court, however, devised a four-part test for applying the doctrine of 'notional severance', which allows a criminal rate of interest to be re-written, reduced to the permitted maximum, and enforced.

[70] *Moses v Macferlan* (n 14) 1012–13; 680–1.

[71] *M(K) v M(H)* (1993) 96 DLR (4th) 289 (SCC).

without juristic reason and restitution is not warranted. Indeed, the same policy considerations that preclude enforcement of a debt similarly militate (albeit to a lesser extent) against restitution. An action to reclaim a late payment would require the court to rely upon dated evidence and long memories in order to investigate the account between the parties.

The current category of natural obligation, however, is anomalous in one potentially significant respect. Debts arising from a wagering contract or a usurious agreement are void from the outset. The transferor is never bound to a payment unless and until it actually occurs. And since there is no legally recognized debt to explain a transfer, restitution must be denied on the basis of a natural obligation. The expiration of a limitation period, in contrast, bars recovery on a debt that previously was positively enforceable. Moreover, according to the traditional common law approach, the effect of a lapsed limitation period is procedural.[72] Though no longer open to action, the underlying debt continues to exist. As a result, if late payment does occur, a debate arises regarding the basis upon which restitution is denied. While the concept of natural obligations may be invoked, it is simpler to say that payment is received in discharge of the original debt. That analysis generally appears to hold true in England, for instance, where the Limitation Act 1980 (UK), with certain exceptions,[73] merely bars action on a subsisting debt.

That explanation cannot be maintained, however, if the passage of time extinguishes the underlying obligation, instead of merely barring action. That approach historically was employed in civil law,[74] and it has been adopted by legislation in several Canadian provinces, including British Columbia[75] and Newfoundland.[76] In those jurisdictions, a late payment is irrecoverable not because it discharges an existing legal debt, but rather because it satisfies a natural obligation.

[72] *Huber v Steiner* (1835) 2 Bing NC 202, 132 ER 80; *Leroux v Brown* (1852) 12 CB 801, 138 ER 1119; *Phillips v Eyre* (1870) LR 6 QB 1 (Exch) 29; *Black Clawson v Papierwerke* [1975] AC 591 (HL) 630; *Tolofson v Jensen* (1994) 120 DLR (4th) 289 (SCC) ('*Tolofson v Jensen*') 317–22.

[73] Limitation Act 1980 (UK) ss 3(2), 17, and 25(3), which respectively deal with actions regarding converted chattels, title to land and the enforcement of advowsons, state that the underlying rights are extinguished upon the expiration of time.

[74] JL Beaudoin and P Deslauriers, *La Responsabilité Civile* (6th edn Éditions Yves Blais, Cowansville 2003) 1330.

[75] Limitation Act, RSBC 1996, c 266, s 9 ('the right and title of the person formerly having the cause of action … is … extinguished').

[76] Limitation Act, SNL 1995, c L-16.1, s 17(1) ('A cause of action and the right or title on which it is based are extinguished upon the expiration of the limitation period for that cause of action').

The situation elsewhere in Canada is more complicated. Until recently, limitation statutes generally followed the traditional common law approach. The passage of time left the underlying debt intact, but prevented the creditor from taking action upon it. In 1994, however, the Supreme Court of Canada revisited the interpretation of such provisions in *Tolofson v Jensen*.[77] La Forest J questioned the feasibility of distinguishing between 'substance' and 'procedure', and denigrated the 'rather mystical view that a common law cause of action [gives] the plaintiff a right that endure[s] forever'.[78] He much preferred a rule that, upon the passage of time, provided the debtor with an indefeasible right to be free of liability.[79] He accordingly held that, even though the provision before him was phrased in terms of non-actionability,[80] the debt was extinguished once the period lapsed.[81]

The preceding discussion is largely theoretical. Following Lord Mansfield's statement of the proposition in *Moses v Macferlan*, few cases have explored the recipient's right to retain payment received after the expiration of a limitation period. That lack of precedent is not surprising. A person who fails to pay within a prescribed period is even less likely to do so afterwards. If late payment does occur, it is apt to be the result of an erroneous belief that payment must be made, but since that mistake is one of law, restitution traditionally was denied on the basis of *Bilbie*.[82] Alternatively, late payment may be made, as an informed choice, for the purpose of settling a dispute. If so, the payment will fulfill its purpose and restitution again will be denied.

Leaving those possibilities aside, the authorities do indicate that restitution is unavailable with respect to payments made after the lapse of time. That certainly was true under the traditional civilian model that now informs *Garland*,[83] and it generally remains true in modern civilian jurisdictions as well.[84] Although it operates on the basis of unjust factors, rather than juristic reasons, American law similarly denies recovery of

[77] *Tolofson v Jensen* (n 72). [78] Ibid 319.

[79] Cf *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC Malay); *Martin v Perrie* (1986) 24 DLR (4th) 1 (SCC).

[80] Vehicles Act, RSS 1978, c V-3, s 180(1) ('no action shall be brought').

[81] See also *Castillo v Castillo* (2005) 260 DLR (4th) 439 (SCC).

[82] Discussed above at n 19.

[83] WW Buckland and P Stein, *A Textbook of Roman Law* (Cambridge University Press, Cambridge 1963) 554.

[84] The German Civil Code is explicit on that point: BGB § 222. See also Civil Code, RSQ, c C-1991, art 1554; La Civil Code art 1760; Zimmermann (n 7) 8.

money mistakenly paid following the expiration of time. Section 61 of the *Restatement of the Law of Restitution* attributes that outcome to the 'Existence of a Moral Duty by Transferor'.[85]

> A person who, in the mistaken belief that he is subject to a duty to another, has conferred a benefit upon such other intending to confer … the benefit as the performance of such duty, is not entitled to restitution … if the existence of an enforceable duty was prevented only by the Statute of Limitations.

George Palmer states the same view[86] and on those few occasions when the issue has been litigated, American courts have denied relief. *Clifton Manufacturing Co v United States*[87] is illustrative. Sharing the government's belief that a levy remained enforceable, the taxpayer paid money in discharge of the tax. When it subsequently discovered that the claim previously had become time-barred, the taxpayer sought restitution. The court rejected the claim on the basis that the plaintiff 'in truth was indebted to the United States'.[88]

### 4. *Obligations arising under contracts created during infancy*

The law of infants' contracts is notoriously complex, but for present purposes, broad strokes will suffice. To begin, the general topic can be sub-divided into three categories, depending upon the nature of the benefit for which the infant contracts.[89]

- *Enforceable*: a minor is capable of incurring immediate liability for the necessities of life, as well as beneficial employment and training contracts.

[85] American Law Institute, *Restatement of the Law of Restitution* (American Law Institute Publishers, St Paul 1937) ('*Restatement*') § 61. That section also precludes recovery of payments made in discharge of debts that are rendered unenforceable by the Statute of Frauds, a discharge from bankruptcy, infancy or coverture. Relief nevertheless is available if payment is induced by fraud, misrepresentation or duress.

[86] GE Palmer, *The Law of Restitution* (Little Brown & Co, Boston 1978) § 14.28.

[87] 76 F 2d 577 (4th Cir, 1935) ('*Clifton Manufacturing*'). See also *Re South Shore Co-Op Association*, 103 F 2d 336 (2d Cir, 1939); *Hubbard v City of Hickman*, 67 Ky 204 (1868); *Kelly Asphalt Block Co v Brooklyn Alcatraz Asphalt Co*, 133 NE 899 (1922).

[88] *Clifton Manufacturing* (n 87) 581.

[89] Fridman (n 37) 152–70; Treitel (n 37) 539–57. A fourth category, consisting of contracts that are invariably prejudicial and hence inescapably void, sometimes is identified. It is unclear, however, which (if any) contracts fall within that description.

- *Enforceable unless avoided*: contracts concerning the acquisition of 'permanent' assets (eg land, shares in companies, partnerships and marriage settlements) generally are valid and enforceable unless the minor elects to avoid them during infancy or within a reasonable time of reaching the age of majority.
- *Unenforceable unless ratified*: all remaining contracts presumptively bind the counterparty, but not the minor. The minor becomes bound only by ratifying the agreement upon reaching the age of majority.

Although the details of that scheme are complicated, the underlying principles are clear enough. While encouraging people to provide the essentials of life to infants (first category), the law is prepared, in differing degrees depending upon the circumstances, to protect minors from the follies of youth (second and third categories). That protection, of course, must in principle entail not only immunity from enforcement, but also the recovery by infants of benefits conferred upon the counterparty.

The first category presents no difficulty in the current context. Since a contract for the necessities of life is enforceable, there is no question of restitution on the grounds of infancy and, if need be, the counterparty's right of retention can be justified by the agreement itself. The second category requires only slightly more work. If restitution is unavailable because the infant has failed to avoid the contract, then the contract once again explains the counterparty's right of retention. There is no need to invoke the concept of natural obligations.

The interesting cases arise within the third category. Although the minor immediately is entitled to enforcement,[90] the counterparty enjoys a reciprocal right only if and when the infant ratifies the agreement upon becoming an adult. But what if a minor voluntarily performs in the interim? If the minor ultimately refuses to ratify, then recovery certainly is available, although there is some debate as to whether, in addition to infancy and non-ratification, a *total* failure of consideration must be shown.[91] For present purposes, however, the relevant situation occurs if a minor voluntarily performs during infancy and then ratifies the agreement upon reaching the age of majority. Having chosen to

[90] The doctrine of mutuality, however, bars specific enforcement. Since a minor is not subject to such relief, neither is he or she entitled to its benefits: *Flight v Bolland* (1828) 4 Russ 298, 38 ER 817 (Ch).

[91] *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452 (CA); *Pearce v* Brain [1929] 2 KB 310; *Coull v Kolbuc* (1968) 78 WWR 76 (Alta DC); *Fannon v Dobranski* (1970) 73 WWR 371 (Alta DC); cf *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71 (CA); *Bo-Lassen v Josiassen* [1973] 4 WWR 317 (Alta DC).

stand by the agreement, the erstwhile infant obviously cannot recover benefits previously conferred. But what is the explanation for the fact that the counterparty enjoyed that benefit during the period of infancy? The answer appears to lie in the concept of natural obligations. Although the counterparty could not have enforced the contract during the operative time, the minor was bound in conscience to pay for the counter-benefits received.[92]

### 5. *Other obligations*

The list of natural obligations remains open. The courts may recognize new situations in which some mischief pertains to enforcement rather than performance, and in which a transfer may be irreversible even though it could not have been compelled.

#### (a) A common law illustration

Though not traditionally recognized as such, certain cases within the law of unjust enrichment may be explained in terms of natural obligations. That may be true of *Larner v London County Council*.[93] When its employees went off to war, the defendant gratuitously promised to make up any difference between their civil pay and their military pay. The former employees were required to disclose any changes in military remuneration, but the claimant failed to do so and consequently was overpaid. When the claimant returned to his civil position, the defendant believed that it was entitled to reverse the overpayment by taking deductions from his weekly pay. A dispute then arose between the parties. Denning LJ sided with the defendant on the ground that the *excess* payment was caused by mistake. Significantly, however, it is clear that the defendant could not have recovered to the extent that it simply honoured its initial undertaking. The explanation did not lie in contract because, 'as the men were legally bound to go to war, there was in strictness no consideration for the promise'.[94] The explanation might involve donative intent since the defendant intended to give a gift of sorts. Interestingly, however, Denning LJ stressed that 'there was no question here of enforcing the promise by action'[95] and found that the defendant 'made a promise to the men which they were bound in honour to fulfil'.[96]

[92] Sheehan (n 4). [93] [1949] 2 KB 683 (CA). [94] Ibid 688.
[95] Ibid. [96] Ibid.

### (b) Civil law illustrations

Additional guidance might be obtained from civilian jurisdictions that have considerable experience with natural obligations. Caution is required, however. Natural obligations occupy an anomalous position somewhere between law and morality, and as such, invariably mediate a compromise between competing values and interests. There is an obvious danger in blindly transplanting policy decisions from one jurisdiction to another. Having said that, it remains instructive to see how natural obligations have been employed in the civilian world.

German law, for example, has recognized a natural obligation in connection with marriage-broker services.[97] A marriage broker, though not entitled positively to enforce a demand for payment, is entitled to retain any payments that are received. Within the common law, such agreements initially were given full force, but eighteenth-century Chancellors adopted a dimmer view of the matter, and money paid to a marriage broker has been recoverable ever since.[98] With the recent growth of 'dating services', however, it may be time to re-consider the issue. A natural obligation would constitute a compromise – condonation without assistance. While unable to compel payment, a marriage broker could retain any payments received.

Louisiana constitutes an especially fertile source of suggestions. State courts have relied upon natural obligations in developing a wide-ranging, and sometimes quite surprising, body of law. That concept was invoked, for instance, against an employer who long paid his workers unusually low wages. When the employer overpaid one employee and sought restitution of the excess, the court denied liability on the ground that the payment was binding in conscience.[99] Less controversially, a natural obligation arose in connection with the enjoyment of low rent and household services. Restitution consequently was denied with respect to a payment made by the recipient of those benefits.[100] *Gray v McCormick*[101] follows the same pattern. Until an inter-generational squabble resulted in eviction, a young couple resided in a house owned by the wife's parents. The young couple then unsuccessfully sued in unjust enrichment with respect to mortgage payments they had made while in possession. Though they could not have been forced by law to make those payments, the claimants

[97] Zimmermann (n 7) 8. [98] *Hermann v Charlesworth* [1905] 2 KB 123 (CA).
[99] *Barthe v Succession of Lacroix*, 29 La Ann 326 (1877).
[100] *Succession of Jones*, 505 So 2d 841 (La Ct App 2d Cir, 1987).
[101] 663 So 2d 480 (La Ct App 2d Cir, 1995).

were morally indebted for the housing they enjoyed. *Muse v St Paul Fire & Marine Insurance Co*[102] involved a slight variation on the same theme. A State-owned charity hospital provided care to a tort victim who was indigent and consequently not liable for his own medical bills. The man's lawyer received a settlement from the tortfeasor and, in the mistaken belief that he was required by law to do so, paid an appropriate sum to the hospital. Once again, the circumstances triggered a right to retain in good conscience.

In another important line of authority, Louisiana's courts also have denied restitution of payments made in satisfaction of debts already discharged through bankruptcy.[103] Interestingly, America's common law jurisdictions have arrived at the same conclusion. The *Restatement* does not refer directly to natural obligations, but it does deny restitution of a benefit conferred pursuant to a 'moral duty'.[104] A debt discharged through bankruptcy is said to entail such a duty. Surprisingly, the same issue apparently has not been settled in Canada's common law jurisdictions.[105] It is clear that a post-discharge promise to pay an old debt is not positively enforceable unless it is supported by fresh consideration.[106] It appears, however, that a bankrupt has not yet sought restitution of money (mistakenly) paid in discharge of an extinguished debt.[107]

## D. Conclusion

To say that Michael Bryan is a gentleman is, of course, to tell only part of the story. He also is, amongst many other things, a scholar. And just as his quiet dignity evokes values that sadly tend to be associated with earlier eras, so too his scholarship may be said to be 'old-school' or 'traditional' in the best possible sense. His style of analysis is firmly rooted in the classical model of the common law. His knowledge is encyclopedic, his research is exhaustive, his arguments are firmly rooted in precedent. That approach is too seldom emulated, but only because it is awfully hard to achieve. This paper is presented in honour of the man and his work.

[102] 328 So 2d 698 (La Ct App 1st Cir, 1976).

[103] *Irwin v Hunnewell*, 21 So 2d 485, 488 (La, 1945).

[104] *Restatement* (n 85) § 61.

[105] LW Houlden, GB Morawetz and J Sarra, *Bankruptcy and Insolvency Law of Canada* (3rd edn Carswell, Toronto 2005) § 24(5).

[106] *Jakeman v Cook* (1878) 4 Ex D 26 (Div Ct); *Halliday Estate v Kennedy* (1997) 50 CBR (3d) 281 (Ont Div Ct); *Engels v Merit Insurance Brokers Ltd* (2000) 17 CBR (4th) 209 (Ont SCJ); cf *Gagné v Duval* (1946) 28 CBR 43 (Que SC) (promise to pay supported by 'moral consideration', and hence enforceable, under Quebec's civil law).

[107] Cf *Talbot v Moquin Ménard Giroux Du Temple Inc* (1996) 41 CBR (3d) 160 (Que SC).

Although the common law historically had little regard for natural obligations, recent developments within the action for unjust enrichment require a re-consideration of the concept. And the key to that exercise, it has been suggested, lies in a careful analysis of the various potential categories of natural obligation. Though not positively enforceable, a debt may constitute a juristic reason for a transfer, and thereby bar restitution, if the reason for refusing enforcement neither impugns the transfer itself, nor aims to protect the party that has performed. As Lord Mansfield indicated 250 years ago, those criteria may be met in the context of obligations arising from wagers, usurious loans and infants' contracts, as well as obligations extinguished by the passage of time. Other categories, yet to be identified, await further development of the concept of natural obligations.