A View from the Orthodox Camp

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This is a shortened version of a talk given by Lord Burrows at a symposium held at Keble College Oxford on Saturday 28 October 2023 to review and discuss Professor Robert Stevens' new book, The Laws of Restitution (Oxford 2023). A wider review article, combining the contributions of several speakers at the symposium, will be published in the Lloyds Maritime and Commercial Law Quarterly.

I was at lunch in the Supreme Court and mentioned to Lord Reed that I had just received a copy of Stevens' book and noted that Lord Reed had written the foreword. "Before you read any further" he said, "you should pour yourself a very stiff whisky." As it happens, the heretical contents of Stevens' brilliant book were already very familiar to me from having taught with him for so many years on the BCL course.

A first general point is that, as soon as one opens the book, one encounters a fundamental paradox. Put simply, the book can only exist, and its contents only have any coherence, because it is an attack on the orthodox view. The very title "The Laws of Restitution" is, if Stevens were to be taken seriously, a misnomer. This is because if one asks "what does he mean by 'Restitution' in his title?", it would appear that there is no answer he can give that links together all the supposedly disparate areas that he is considering. He cannot say that the areas looked at are all about "giving back" (or "giving up") something because that would immediately lead to the view that one normally associates "giving back" with something that one has beneficially received. Therefore, by preserving "Restitution" in the title, the book appears to be ultimately about the laws of reversing benefits. Yet Stevens wants us to accept that the book is not about that because, for him, there is no unity at all in the subject matter being discussed. The title really should be "The Laws which other people have mistakenly called 'Restitution' or 'Unjust Enrichment'".

It follows from this that it is hard to know where, if at all, one could teach this exposition of the law within a modern university syllabus or where it would be placed on any map of the English common law. Perhaps one could just fit it in as the residue of private law claims to be considered once one has dealt with, or mapped, contracts and wrongs. But, as is said on p 3, that "negative feature has no utility". So I think the book takes us on a perilous descent into a wilderness of disparate areas that, as a matter of teaching and practice, will be hard to navigate. Splitting rather than unifying in the way that is being advocated is, I think, contrary to the way the common law is understood and develops.

One of the great features of the work of Birks was that it presented a scheme that was simple, elegant, and rational. On any view, Stevens' scheme is complex and, almost avowedly, inelegant. The usual retort to this is that one should beware simplicity and elegance. I accept that there are dangers in seeking simplicity. However, in my experience, lawyers and judges are desperately looking for clear and rational pictures of the law that can guide them. There are, therefore, problems with a scheme that I for one find difficult to understand and apply.

In overall terms, while I can accept some of the penetrating criticisms of the orthodox view of unjust enrichment or restitution, in particular those directed to an overly broad conception of "at the expense of", the need to make refinements should not lead us, as Stevens would wish, to throw out the orthodox view altogether.

There is another general point which it is important to appreciate when considering Stevens' work: he is a policy minimalist. My own view is that much of the common law cannot be properly

understood without taking account of legal policy as well as principle. But Stevens would seek to eradicate policy reasoning wherever possible and again that can lead to a distorted view of the common law as understood and developed by judges. More specifically, it means that he has difficulty accepting the mix of principle and policy that explains how the concept of "at the expense of" works. One of his favourite gambits in the BCL classes was to shout "stamps" to what I was saying. But his beloved stamps example—*C* mistakenly destroys his own stamp thereby vastly increasing the value of *D*'s stamp (making its first appearance in this book at p 32)—is straightforwardly explicable as an example of an incidental benefit that, as a matter of policy, is not treated as being at the expense of *C*. Just as legal causation and remoteness in tort rest on the policy of needing to limit the defendant's liability for factually caused loss, in order to prevent an unfair burden being placed on the defendant, so in this context there are "directness" limits drawn on "at the expense of *C*", viewed as a matter of factual causation, in order to ensure that an unfair burden is not placed on a defendant in respect of reversing benefits gained. In general, the law of unjust enrichment does not reverse an incidental benefit because it is a secondary, and therefore an indirect, consequence of the claimant's actions. Stevens finds it difficult to accommodate that type of policy reasoning.

Turning now to some specific points on the central themes in Chapter 1, Stevens divides much of the law, and indeed most of what was originally called the law of quasi-contract, into "unjustified performance" and "conditional performance". We are told (at p 9) that unjustified performance is the largest category and that it is concerned with a performance rendered by the claimant to the defendant for "no reason". The classic example is a mistaken payment. Then moving on to conditional performance, we are told (at p 10) that this is the next largest category but that it has a quite different justification. This category is concerned with a performance rendered under an agreement where the parties have stipulated that the performance is conditional and that condition has failed. The condition must have been agreed between the parties but the right to restitution is not itself contractual.

Clearly these two categories of case are what, on the orthodox view, constitute unjust enrichment where the unjust factors are based on, respectively, impaired consent or a failure of basis (traditionally referred to as failure of consideration). The principal difference between the formulation in this book and the orthodox view is Stevens' emphasis on "performance" and his view that it is irrelevant whether the defendant is enriched or not.

I find the stress on "performance" difficult. What does performance mean? Certainly we speak of performance of a contract where one has agreed to do something and the performance is then assessed according to what has been agreed. But if one takes the insurance company's payment to the widow by mistake (thinking that there was a contractual obligation to do so) in the leading case of *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24, it seems an odd use of language to describe that payment as a performance by the company to the widow when it was mistaken in thinking that there was any contractual obligation to pay. On the contrary, the company by paying has precisely not performed in any way that it agreed to do because it had not agreed to pay in the particular circumstances. Similarly, it seems odd to describe the restitution or repayment of the money as the objective valuation of that performance. Certainly there has been a mistaken payment by the company to the widow but this does not seem to be helpfully captured by the word "performance". When later in the book Stevens comes to expand on this, he is forced to accept that performance is a term of art which has three necessary elements: action, towards the defendant, that is accepted by the defendant (at p 37). But this then adds a further complication as to why acceptance of the performance is necessary and what is meant by that.

Of course, what Stevens is anxious to do is to find a concept that avoids referring to the defendant as having been enriched by the mistaken payment. He reinforces this by saying (at p 9) that there is no need for any *consequent* enrichment of the defendant as a result of the payment or services. However, the orthodox view does not require there to be a consequential enrichment separate from the payment or services. The payment is, or the services are, the enrichment. The objective enrichment may be subjectively devalued but that is a question going to enrichment and is not a question of whether there has been a performance.

The reason why it is realistic to talk about enrichment may be explained by asking what the following have in common: payments to *D*, the rendering of services to *D*, the transfer of goods or land to *D*, giving *D* the opportunity to use money, goods, or land, or discharging a liability of *D*. It is surely an obvious answer that those are all examples of objective benefits to *D* (albeit that they may be subjectively devalued by *D*). And it is with those situations that the cases on the law of unjust enrichment have principally been concerned.

At a normative level, Stevens relies on an acceptance of performance because, as he explains at pp 19–21, he believes that the necessary correlativity for rights (that is the need for bilateral reasons) requires some conduct by the defendant as well as by the claimant. However, as I see it, the necessary correlativity in the law of unjust enrichment is uniquely supplied by the fact that the defendant's enrichment has been at the expense of the claimant. The two are tied together and, assuming an unjust factor, provide the bilateral reason for restitution. There is no need to turn to the notion of an acceptance of performance.

Therefore, looking across the two main categories articulated by Stevens I see nothing to persuade me that one is dealing with the law on valuing accepted performances rather than the law on restitution of unjust enrichments.

The rejection of an enrichment analysis is further problematic when one comes to consider Stevens' approach to the leading defence of change of position. That is essentially an enrichment-based defence and, on the orthodox approach, is applicable only to claims for unjust enrichment. Yet we are told (at p 15) that "[i]ts central justification is to ensure that an innocent person is left no worse off by a claim to reverse an unjustified performance between the parties". But if one is not concerned with enrichment, why should one be concerned with protecting the defendant? Stevens provides no convincing answer.

To conclude, the book is a very stimulating read and one that all of us in the orthodox camp need to think carefully about. I therefore end by congratulating my dear and long-standing friend, and former student, on a great achievement.

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