Cambridge Law Journal, **82(3)**, November 2023, pp. 563–590 © The Author(s), 2023. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge
doi:10.1017/S0008197323000545

BOOK REVIEWS

The Laws of Restitution. By Robert Stevens. [Oxford University Press, 2023. xlviii + 433 pp. Hardback £90.00. ISBN 978-0-19288-502-9.]

In *The Laws of Restitution* Robert Stevens has taken a sledgehammer to smash the Law of Restitution into pieces and rebuilt the shards into a number of distinct claims which he considers have nothing important in common with each other, eliminating the Law of Unjust Enrichment in the process. He accepts, however, that, although the justifications for these claims differ, they are connected by a restitutionary response. He does not define what "restitution" means, although he appears to consider that it embraces reversals of transactions, the giving back and giving up of gains and even, where the claimant has discharged the defendant's obligation, a carrying forward to ensure that the correct person bears the cost. This is, therefore, not so a much a book about the Laws of Restitution but one about the Laws of "Restitutions" (*sic*). The aims of the book are ambitious. Its strength lies in the challenging questions which Stevens ask about restitutionary claims; its weakness is that his answers do not always convince.

As an author in the field who has long been critical of the exclusive equation of unjust enrichment with the restitutionary response, I should be aligned with Stevens's broad aims. I welcome his carefully articulated exclusion of unjust enrichment in respect of claims relating to property and trusts, and likewise his impressive analysis of the generally limited role for the gain-based response in respect of wrongdoing. But I have also long advocated for the continued recognition of (and refinement to) unjust enrichment, which has a vital role in private law as a means of procuring justice in a clear, rational and defensible way. Despite Stevens's best efforts I remain of that view, and find it even more convincing after reading this book.

How should a book such as this be fairly judged? It does not purport to be a textbook, although Stevens considers that for many topics it could be used as one. I agree that for some topics it should be used as a definitive exposition of the law. A textbook approach is one involving description and analysis of the law, with a focus on identifying the underlying rationale of that law and criticising wrong moves in the process. Stevens achieves this very successfully in his chapter on claims to recover tangible things or their value, which is a model of clear exposition and convincing analysis. His critique of proprietary estoppel is thoughtful, albeit reactionary, although it is clear this cause of action has nothing to do with estoppel. Similarly, his treatment of counter-restitution and set-off, ministerial receipt and illegality is especially helpful. But, whilst other parts of the book might appear to involve textbook treatment, the statements of the law are partial and determined by ensuring compatibility with Stevens's own theories, such that no student, practitioner or judge should use them to identify what the state of the law is. Further, it is disappointing that the book as a whole has been poorly proof-read. There are simply too many unforced errors making some of the analysis difficult to follow. There are, for example, a number of occasions where the parties are wrongly identified, confusing claimant, plaintiff and defendant.

Stevens, thankfully, accepts that the book is not a work of pure theory untethered by what the positive law in any particular time and place may be. Rather, at least as regards the first half of the book which challenges the recognition of unjust enrichment, the approach is emphatically normative, focusing not on what the law is but what it should be. Stevens has constructed a parallel world where unjust enrichment does not exist. There remain significant similarities with English law but also crucial differences. In Stevens's world, the reasons for restitution justify the rules. Where the law does not fit his theories, it is rejected. It is necessary, therefore, to consider whether Stevens's world without unjust enrichment is preferable to the real world with it.

Stevens offers various reasons why he rejects unjust enrichment. He does not consider that there is any unity of reason which can bind together the claims which are usually treated as falling within the Law of Unjust Enrichment. He considers that justifications for restitution which are claimant-focused, having regard to the vitiation or qualification of the claimant's intention to benefit the defendant, are "immoral" by "using the defendant as a mere means to an end, requiring him to correct something that was not his doing" (p. 46). He asserts that rights are bilateral, so the reasons which justify them ought to be bilateral as well, applying to both parties together. For this reason, the bare fact that the claimant paid money to the defendant by mistake is insufficient to impose an obligation on the defendant to make restitution. Rather, the imposition of liability in such a case can be rationalised by reference to what Stevens calls "unjustified performance", which involves three considerations.

First, the claimant must have performed by paying money or rendering a service to the defendant, requiring action and volition. Stevens considers that this does not require enrichment. But he adopts a very narrow definition of enrichment reflecting its everyday use, namely that the defendant is objectively and factually better off through an increase in wealth. But that is not how enrichment is now defined in the Law of Unjust Enrichment. Admittedly, this does require enrichment to be treated as a term of art, but elsewhere in the book Stevens accepts that "loss" has different interpretations beyond the colloquial sense. It is common for ordinary words to have different legal meanings. The real concern is whether those meanings are clear, and enrichment is, encompassing the benefit of money or the provision of a service without proof of an increase in wealth. So there is no reason why enrichment should be rejected. Enrichment cannot, however, be equated with "performance" since the latter appears to incorporate significant components of what is presently considered within the "at the claimant's expense" requirement. The language of "performance" is artificial, particularly in the context of non-contractual transfers. Where, for example, the claimant has paid money to the defendant by mistake, what has been performed?

Second, the defendant must have accepted the claimant's performance, since this justifies the defendant's accountability and so identifies bilateral rights. This requirement does appear to differentiate unjustified performance from unjust enrichment since for the latter there is no requirement of acceptance, although proof of acceptance can assist when establishing a service as an enrichment, or can be deemed where the enrichment is incontrovertibly beneficial. But Stevens's acceptance requirement is not all it appears to be since he accepts that where the claimant's "performance" involves the payment of money, acceptance is always implicit. This will account for most cases and is consistent with orthodox unjust

enrichment analysis which treats money as incontrovertibly beneficial. Even where the "performance" involves the provision of services, Stevens's approach is not too far away from that of orthodox unjust enrichment analysis where the defendant who did not request or accept the enrichment is unlikely to have to make restitution, save where the service is incontrovertibly beneficial. It follows that it is unclear what normative value is added by insisting on an acceptance requirement, especially where that will often be fictional.

Third, the claimant's accepted performance should be reversed where there was no objectively good legal reason which justifies the performance so that the defendant was not entitled to it, without needing to show that the claimant's intention to benefit the defendant has been vitiated, for example by mistake. But, as Stevens correctly identifies, mistake and other recognised grounds of restitution will remain relevant to determine whether there was an objective reason for the performance; mistake might vitiate that reason.

Stevens's claims for the recognition of unjustified performance are not as radical as he suggests. Whilst there are differences between unjust enrichment and unjustified performance, in practice they are likely to be marginal. The vital difference for Stevens relates to the reasons for reversal. But if bilateral reasons are required for the imposition of liability, he does not satisfactorily explain why this cannot be identified within an unjust enrichment claim where the defendant has benefited from receipt in circumstances where the benefit was not due. A response that the defendant must have accepted the receipt for an obligation to make restitution to be imposed is much less convincing if the defendant is deemed to have accepted the payment of money.

Stevens is also exercised by what he considers to be the inadequacies of the Law of Unjust Enrichment in dealing with two hypothetical scenarios he identifies, where his doctrine of unjustified performance would reach the right result by denying liability. The first is the famous scenario of the claimant heating the flat above and the second involves the claimant mistakenly destroying a rare stamp which increases the value of the defendant's now even rarer stamp. But liability would not now be imposed within the Law of Unjust Enrichment in either case, because of the incidental benefit bar and the need to establish a transfer of value between the parties respectively.

This reflects one of the significant problems with the Law of Unjust Enrichment, namely that it is still comparatively new and developing. Stevens's critique of that law is sometimes well made, but the appropriate response is to ensure continued principled development rather than reject unjust enrichment and start again. This raises another significant concern of Stevens, namely that unjust enrichment encompasses an incoherent group of claims which cannot legitimately be brought together. Judges and commentators have created difficulties by seeking unity for fear of difference and complexity. This has been reflected in a failure to identify clearly what exactly unjust enrichment is. Lord Burrows recently hedged his judicial bets when he described unjust enrichment as principle, the cause of action or a category of causes of action in *Attorney General of Trinidad and Tobago v Trinsalvage Enterprises Ltd.* [2023] UKPC 26, at [44]. Unjust enrichment is properly categorised as a single category of different causes of action which are connected by the fact that the defendant received an enrichment at the claimant's expense in recognised circumstances of injustice and subject to particular defences. But the interpretation of that structure varies depending on

the cause of action and the reasons for restitution. The grounds of restitution are clearly distinct but so too may be the rules relating to the identification of the enrichment (whilst still being recognisable enrichments), and at the claimant's expense (the incidental benefit bar, for example, applies differently depending on the relevant ground of restitution) and particularly as regards the application of defences. This is illustrated by the defence of change of position, the operation of which depends on the underlying ground; for example, it does not apply to claims involving recovery of overpaid taxes and, as Stevens correctly identifies, its application where the ground is total failure of basis varies.

Having examined the claim in "unjustified performance", Stevens goes on to consider two other claims which orthodoxy states fall within the Law of Unjust Enrichment. The first involves performance which is subject to a condition which has failed, which encompasses much of the law involving failure of basis, albeit without a need to establish total failure of basis because, Stevens asserts, conditions are digital matters which either fail or they do not. If the condition has failed and benefits have been received by the claimant, then this should be dealt with through counter-restitution. There is much in this part of the book to be welcomed, particularly as to the vital importance of construction of the agreement to identify the condition. But much of this analysis of the law could operate within the existing structure of unjust enrichment, with Stevens providing convincing reasons why the total failure requirement should be rejected. The second claim involves intervention in another's affairs, typically through the discharge of an obligation where the underlying policy of the law is to ensure that the burden of a legal obligation falls on the proper person. Stevens considers that this needs to be recognised as a claim distinct from unjustified performance because there is no performance by the claimant towards the defendant. But this is only because he assumes performance involves payment of money to the defendant; it could involve payment to a third party which discharges the defendant's liability. But that takes us back to enrichment reasoning within the Law of Unjust Enrichment.

Part V of the book considers restitutionary claims in the context of property and trusts. Stevens's rejection of unjust enrichment in these contexts is persuasive and he does not need to invent any new doctrines to justify what he considers to be the right approach. That said, he is on less secure ground when dealing with equitable proprietary claims, where he assumes that knowledge is required before liability can be imposed on a third party, but that only applies to personal liability in a claim for "knowing receipt", a claim which does not involve a trust because the defendant will no longer have trust property.

Part VI covers justifications for recognising gain-based remedies for wrongs, particularly interference with intellectual property rights, breach of confidence and fiduciaries. Again, his analysis of equitable wrongs is less secure, since he considers that a fiduciary's duty to account for profits is not based on the commission of the wrong. But this radical suggestion ignores the fact that authorised profits are legitimate and fails to explain the difficulties relating to the identification of which profits the defendant should be liable to disgorge. Further, it creates particular problems when examining accessorial liability by dishonest assistance, since that liability cannot relate to the duty to account but relates instead to the breach of fiduciary duty.

This is a bold book, which impresses with its ambition and range and the confidence with which Stevens asserts his positions. Private lawyers should read it to be challenged and consider whether the world Stevens advocates is preferable to the one we have. But for this lawyer, despite Stevens's best efforts, when the marginal concerns he identifies are dealt with, as they can be, the Law of Unjust Enrichment emerges even stronger.

GRAHAM VIRGO
DOWNING COLLEGE

Egalitarian Digital Privacy: Image-Based Abuse and Beyond. By TSACHI KEREN-PAZ. [Bristol: Bristol University Press, 2023. 272 pp. Hardback £85.00. ISBN 978-1-52921-401-7.]

In *Egalitarian Digital Privacy*, Professor Tsachi Keren-Paz seeks to address the distinctly twenty-first-century problem of disseminating intimate sexual images of individuals online without their consent. UK criminal law did not catch up with this phenomenon – colloquially termed "revenge porn" – until the Criminal Justice and Courts Act 2015, and despite shortcomings, section 33 of that Act was used to convict many disseminators, including reality TV figure Stephen Bear. Sections 188 & 190 of the Online Safety Act 2023 very recently repealed s.33 and replaced it with strengthened protections. But the focus of *Egalitarian Digital Privacy* is not criminal law but private law. Keren-Paz forcefully and persuasively argues that privacy and wider tort doctrine can and should be developed to address the problem of online dissemination of non-consensual intimate images (NCII) by providing meaningful, effective remedies for victims. In particular, he puts forward what is at first glance the rather ambitious argument that intermediaries or platforms such as Facebook and PornHub should not only have legal obligations to filter out NCII, but should also bear strict liability for hosting any NCII that might slip through the net. Furthermore – bolder again – online viewers of NCII should bear strict liability for violating the privacy of the depicted victims. More cautious tort lawyers may view such prima facie claims as a stretch or overreach. But over the course of the book, the author builds highly persuasive arguments – often using creative, convincing legal analogy – that show these proposals to be eminently reasonable and achievable developments of existing doctrine.

Egalitarian Digital Privacy starts by providing an account of the problem of NCII. It weaves together diverse doctrinal and extralegal sources to provide a comprehensive picture of the extent, severity and very real harms of the image-based abuse problem. Keren-Paz convincingly demonstrates that NCII entails a gendered form of sexual abuse that causes severe, irreparable and ongoing harms. He draws out the systemic and asymmetrical harms of NCII that affect not only individual victims, but also women as a group, such as by entrenching patriarchal double-standards regarding sexuality. Yet, as the author points out, disseminating NCII is an activity that private law treats less severely than disseminating a music album without permission, despite the fact that the latter entails only modest commercial harm.

Some of Keren-Paz's arguments are arguably "easy hits". For example, his critique of the controversial section 230 of the US Communications Decency Act 1996,