THE GERMAN LAW OF UNJUSTIFIED ENRICHMENT AND RESTITUTION

A Comparative Introduction

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GERHARD DANNEMANN

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Preface

The story of this book goes back fifteen years. In summer 1994, when I was about to join the Oxford law faculty, I met the Regius Professor of English Law, Peter Birks, to discuss my tasks. He asked me to join his restitution course and to give a series of lectures on the German law of unjustified enrichment. I ended up giving those lectures for the eight years which followed, and with a lasting fascination for the comparative law in this area.

An early version of my lecture notes was published in 1997.[1] The present book draws on the latest version as well as a number of articles which have resulted from my encounter with unjust(ified) enrichment.[2] It owes much to all students and fellow convenors who contributed to the discussion in the Oxford BCL Restitution Seminar, arguably the best testing ground for any ideas one might have on this subject.

The book is divided into three parts. Part I (Chapters 1–7) explains the German law of unjustified enrichment in the context of other models of restitutionary liability. Part II (Chapters 8 and 9) looks at the wider comparative perspective. Chapter 8 discusses issues of scope, taxonomy, and approach towards unjust(ified) enrichment, and explains why English and German law have much more in common than first meets the eye. Chapter 9 looks at lessons which German and English law might learn from each other. Particular attention is paid to the suggestion by the late Peter Birks that English law should switch from an unjust factor approach to a German style absence of basis approach.[3] Part III contains translations of leading German cases (Chapter 10) and of provisions of the German Civil Code (Chapter 11) which relate to unjustified enrichment and restitution. These should enable readers without

[1] Basil Markesinis, Werner Lorenz, and Gerhard Dannemann, *The German Law of Obligations, Vol. I: The Law of Contracts and Restitution: a Comparative Introduction* (1997), 710–816.

[2] 'Restitution for Termination of Contract in German Law', in: *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences*, ed. by Francis Rose (1997), 129–153; 'Illegality as a Defence' (2000) Oxford U Comparative Law Forum 4; 'Unjust Enrichment by Transfer: Some Comparative Remarks', in: 79 Texas Law Review (2001), 1837–1867; 'Unjust Enrichment as Absence of Basis: Can English Law Cope?', in: *Mapping the Law*, 363–377. For the use of 'unjust' or 'unjustified', see p. 37.

[3] Birks, *Unjust Enrichment*, Ch 5.

knowledge of the German language to familiarize themselves with the primary sources, and allow them to draw their own comparisons.

This reliance on primary sources is also a methodological feature of the book. While it engages in Part I in an asymmetrical comparison by using English law as a contrast foil or point of reference for explaining German law (rather than presenting German and English law in the same detail), it nevertheless treats both on an equal footing in terms of using legal sources. The book seeks to keep an equal distance from the strong focus on restating existing case law which is traditional for English textbooks (although not for most of the recent English literature on unjust enrichment) and the equally strong focus on doctrinal issues which is traditional for German textbooks. As a consequence, primary sources take pride of place when it comes to stating what the law is, and scholarly writing is given more prominence when it comes to explaining how the law functions and what it should look like. English and German law are also given equal attention in the more comprehensive comparative analysis in Part II.

The book thus aims to represent German law in such a way that it can be more easily understood by readers trained in the common law, but not less accurately than a classical German textbook. It seeks to explain authentic rather than anglicized German law. I hope that it may provide new insights not only to common law readers, but also to those from other jurisdictions, perhaps even German lawyers.

Next to those who have been mentioned above, I owe thanks to the Texas Law Review and Hart Publishing for their kind permission to reproduce or otherwise draw on materials in which they have copyright,[4] to Joy Ruskin-Tompkins for her careful editing of the manuscript, to Corinna Radke, Irene Maier, and Nico Köppel for their painstaking editorial work on Chapter 10, to Nico Köppel also for having compiled the table of cases, and to all student assistants at the Centre for British Studies, Humboldt-Universität for their help in borrowing books and copying articles.

The law is stated as of 1 January 2009.

Gerhard Dannemann
Berlin, February 2009

[4] Gerhard Dannemann, 'Unjust Enrichment by Transfer: Some Comparative Remarks', in: 79 Texas Law Review (2001), 1837–1867. Chapter 10 contains English translations of three cases which were first published in *Cases, Materials and Texts on Unjustified Enrichment*, ed. by Jack Beatson and Eltjo Schrage.

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PART I
UNJUSTIFIED ENRICHMENT AND RESTITUTION IN GERMAN LAW

1

Introduction

This book aims to make the German law of unjustified enrichment and restitution familiar to readers who are trained in the common law, and also to contribute to an ongoing comparative debate. The comparative perspective of this book draws significantly on the different ways in which the German and English laws of unjust(ified) enrichment have evolved.[1]

It is sometimes forgotten that unjust enrichment has a long tradition in English law. Bracton mentions both *condictio indebiti* and *negotiorum gestio*.[2] *Slade's Case* established an action in debt without need for a contractual promise more than 400 years ago.[3] In 1760, in *Moses v Macferlan*, Lord Mansfield laid the foundations for a comprehensive analysis of unjust enrichment.[4] In 1802 the first publication of a modern scholarly treatment of the English law of unjust enrichment was seen.[5] Moreover, comparisons between the German and English laws of unjust(ified) enrichment have been made for at least seventy years.[6]

This long tradition is easily overlooked because unjust enrichment was for long neglected by courts and academics as an area of English law in its own right. It was barely if at all taught in universities and

[1] See below, Chapter 2, section 6.1, for an explanation of the difference between unjustified and unjust enrichment.

[2] Henry de Bracton, *De legibus et consuetudinibus Angliae* (c. 1220–1250), makes a brief mention of the *condictio indebiti* and *negotiorum gestio* in the chapter *De Actionibus* under the heading *De obligationibus quæ quasi ex contractu nascuntur*.

[3] *Slade's Case* (1602) 4 Coke Rep 91.

[4] *Moses v Macferlan* (1760) 2 Burr 1005.

[5] Sir William Evans, *An Essay on the Action for Money Had and Received* (1802).

[6] See in particular the contributions by W Friedmann and Dawson; an important contribution to an Anglo-French debate was made by Gutteridge and David (all as indicated in the Select Bibliography).

unfamiliar to most legal practitioners. This has changed. Preceded and assisted by scholarly work,[7] English courts have unfrozen the law of unjust enrichment and have, in less than one decade, achieved a rapid development which in other areas of the law might have taken a century.[8] At the same time, a rich comparative debate has unfolded,[9] which has gained a new focus by the proposition made by the late Peter Birks that English law should abandon its present unjust factor approach in favour of a German-style absence of basis approach to unjust enrichment.[10] By contrast, unjustified enrichment has maintained an established position in the *Bürgerliches Gesetzbuch* (BGB, German Civil Code) for more than a century, during which time it has always formed part of the undergraduate syllabus at German law faculties. In German legal learning and practice, unjustified enrichment has for long been as well established as contract and tort. Moreover, the German law of unjustified enrichment appears well settled, as the last phase of major development occurred some forty years ago.

Taking a closer look at the German law of unjustified enrichment from the perspective of English law can therefore be very useful. It can reveal whether English law is capable of switching to an absence of basis approach, and whether the advantages would outweigh the disadvantages which go hand in hand with such a shift. It can also show us where German law, which may have become somewhat complacent over the last decades, can learn from the recent English experience.

[7] Many have contributed to this debate. Three milestones will be mentioned: the American Law Institute's *Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts* (1937) by Austin W Scott and Warren A Seavey; Robert Goff and Gareth Jones, *The Law of Restitution*, 1st edn (1966); P Birks, *An Introduction to the Law of Restitution* (1985).

[8] The most rapid development occurred between 1991 and 1999: *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL); *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL); *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL). However, cases such as *Royal Bank of Scotland v Etridge* [2001] UKHL 44, *Deutsche Morgan Grenfell Group Plc v Her Majesty's Commissioners of Inland Revenue* [2006] UKHL 49, and *Yeoman's Row Management Limited and another v Cobbe* [2008] UKHL 55 show that the phase of development continues.

[9] The reader is referred to the numerous comparative works indicated in the Select Bibliography.

[10] Birks, *Unjust Enrichment*, Ch. 5.

Part I (Chapters 1–7) presents the German law of unjustified enrichment to common law readers by using English law as a contrast foil which serves to illustrate connecting points, similarities, and differences.[11] This comparison is asymmetric[12] in the sense that English law is not explained in the same detail as German law. Chapters 1–7 are also based on the structure of the German law of unjustified enrichment, which is shown in the context of other restitutionary remedies available under German law. As far as sources of law are concerned, the comparison aims at symmetry between English and German law. The traditional German fondness for dogmatic dispute at the expense of the law as practised by the courts finds as little reflection in this book as does the traditional English focus on case law at the expense of scholarly debate, a debate which has been and continues to be a driving force for change in the law of unjust enrichment. The book aims to take the middle ground, by explaining how primary sources (statutes and case law) have interacted with secondary sources (academic writing) to the degree that it is difficult to understand one without the other. It is left to the readers whether they will agree that this methodological set-up is equally beneficial for both English and German law.

Part II (Chapters 8 and 9) presents a more comprehensive comparative analysis on the basis of Part I. A closer inspection of issues of classification (scope, taxonomy, and general approach) will reveal unexpected similarities between English and German law, forming the basis for the discussion in Chapter 9 concerning what the English law of unjust enrichment and the German law of unjustified enrichment can learn from each other. In particular, Chapter 9 discusses whether English law should switch to a German-style absence of basis approach as proposed by Birks.

Part III makes some important German primary sources on the law of unjustified enrichment and restitution accessible to anglophone readers. Chapter 10 contains English translations of 17 key German judgments (referred to throughout this book as, for example,

[11] See Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?', in: *The Oxford Handbook of Comparative Law*, ed. by Mathias Reimann and Reinhard Zimmermann (2006), 383–419.

[12] On symmetric and asymmetric comparisons, see Jürgen Osterhammel, 'Sozialgeschichte im Zivilisationsvergleich', Geschichte und Gesellschaft (1996), 143ff, 157.

'case no. 12'), and Chapter 11 translations of key provisions of the German Civil Code.

1. The law of unjustified enrichment within the German Civil Code

When an area as vast as civil law is codified it is first necessary to develop a relatively clear concept of how the different component parts of this area of law relate to each other. If nothing more, the basic need to number provisions in a code entails the necessity for an internal order. This structure generally reveals underlying issues, and this is certainly true for the German law of unjustified enrichment.

At its core, the German law of unjustified enrichment consists of 11 sections in the German Civil Code, §§ 812–822 BGB, which are placed in the second book of the BGB, the law of obligations, between contract and tort. Book 3 (§§ 854–1296 BGB) regulates the law of property (*Sachenrecht*). Family law (*Familienrecht*) is treated in Book 4 (§§ 1297–1921). The fifth book (§§ 1922–2385) covers inheritance law (*Erbrecht*).

Within the second book, there is a general part on obligations (sections 1–7). This covers a number of areas which were classified as being common to all obligations, such as rules on performance of obligations, set-off, and assignment. Some are in fact common only to contract and tort law (in particular the rules on damages, §§ 249–254), and a large part is mostly or exclusively concerned with contract law (in particular rules on irregularities and remedies).

Section 8 of the second book governs particular obligations, starting with various types of contracts such as sale, rent and lease, contracts for works and services, but also including provisions for *negotiorum gestio* (§§ 677–687) which in German law is not considered part of the law of unjustified enrichment.[13] Unjustified enrichment is placed between contracts and torts. It is not regulated within contracts because German law did not go down the impasse which English law adopted for some time by treating restitution as claims under an

[13] Below, section 4.2.

implied contract.[14] Like the Roman god Janus, unjustified enrichment has two heads, which are positioned back to back. One head is looking backwards to contract, where restitution under unjustified enrichment will frequently be required to mop up what contract law has spilled. The other head, for a similar purpose, looks onward to torts, and beyond torts to the third book on property law.

The fact that the German law of unjustified enrichment is part of the law of obligations reveals one substantial difference with English law. German unjustified enrichment rules will give rise only to obligations, never to rights *in rem*. This means that they are granted to the claimant as a person, rather than being attached to a particular property. It is important to keep in mind that the distinction between obligations and rights *in rem* relates to the claimant, rather than to the object of the claim. If we look at the object of unjust(ified) enrichment claims, we can observe the reverse situation: while English unjust enrichment rights *in rem* will usually result in a claim for money only, German unjustified enrichment claims can be for the surrender of chattels or property—but only as a personal obligation, not as a matter of proprietary rights.[15]

For the moment, we also need to consider the first book of the BGB (§§ 1–240), the so-called General Part (*Allgemeiner Teil*). One distinct feature of German law is the systematic way and the extent to which general rules governing civil law have been extracted and are dealt with separately. These are to be found in the General Part and include rules which render transactions void on the grounds of mistake, deceit, duress, illegality, and immorality. As a consequence, the rules on mistake, deceit, duress, illegality, and immorality are essentially the same throughout the law of contract, unjustified enrichment, tort, and property. It is therefore only logical that contract and unjustified enrichment run in tandem: with few exceptions, performance made on a void contract can be claimed back. This is also

[14] Goff and Jones, 1–002 to 1–011. Under quasi-contract, unjust enrichment claims were based on an implied contract whereby the defendant was to pay money to the claimant. The high-water mark of this approach was marked by *Sinclair v Brougham* [1914] AC 398 (HL). German scholars embraced the Roman law-based notion of restitution as quasi-contract during the seventeenth and eighteenth centuries, but never agreed on an implied contract as being the basis for such a claim. See Schäfer, 96–100.

[15] See below, Chapter 6, section 1.

true in reverse: an enrichment is generally not considered unjustified if based on a valid contract.

2. From Roman *condictiones* to a general unjustified enrichment clause

German civil law finds its roots in Roman law.[16] In the area of unjust(ified) enrichment and restitution, Roman law offered a number of so-called *condictiones.* These were actions which could generally be used to enforce an obligation with a specific content (such as payment of a sum of money, or the surrender of, for example, a horse) without having to indicate the basis for this obligation.[17] This approach somewhat resembles the old English action on a promise (*assumpsit*) as applied after *Slade's Case*.[18] These *condictiones* could be used for restitution and were indeed employed for this purpose in the German *ius commune* or Common law, which applied in some parts of Germany until the end of the nineteenth century.[19]

It was mainly the work of nineteenth-century jurists and in particular the German scholar Friedrich Carl von Savigny to extract from these various *condictiones* a general principle, namely that they concerned situations in which one person's assets were increased by a decrease in the assets of another, whereby this shift of wealth is not justified by a valid legal ground (*causa*).[20] Savigny saw this as a common denominator for a variety of rather different situations. For him, this common denominator served as a description of what unjustified enrichment is all about. This is very similar to the position which English law adopted towards the end of the twentieth century.[21]

[16] For a specifically detailed historical account of German law, see Schäfer, 84–312; for a comparative history: Schrage, *Unjust enrichment: the comparative legal history of the law of restitution*.

[17] See Zimmermann, *The Law of Obligations*, 835–836.

[18] *Slade's Case* (1602) 4 Coke Rep 91, 76 ER 1074.

[19] Schäfer, 84–222.

[20] Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, Vol. 5 (1841), Kap. VIII, 503ff, at 525; similar Schäfer 145–155. For a different reading of von Savigny, see Zimmermann and du Plessis (1994) Rest L Rev 14, at 17.

[21] Birks, *Introduction*, 21; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

For German lawyers today, however, this is not merely a description of an area of law, but rather defines who is entitled to restitution. Nearly 60 years after von Savigny's discovery, on 1 January 1900, the German Civil Code entered into force. It contained a general unjustified enrichment clause, which was garnished with a number of surviving Roman law-based specific enrichment regulations. The general clause on unjustified enrichment was added to the BGB rather late in the process as a grand, but largely untested, design, and some of the smaller *condictiones* may have been kept on board in the event that this grand design did turn out not to function as well as was hoped.[22]

While Roman law has played a very important role in the development of both French and German law and has also influenced the shape of the English law of restitution,[23] there are nevertheless striking differences between the approaches which these three systems have taken towards unjustified enrichment. From the English perspective, perhaps the most important of these is the employment of this general unjustified enrichment clause by German law, i.e. § 812 para. 1 sent. 1 BGB, which states:

> A person who obtains something by performance by another person or in another way at the expense of this person without legal ground is bound to give it up to him.[24]

While it is still disputed in German law whether this is really one general clause, or rather two,[25] the comparative context reveals that, in any event, the clause is very general. The French *Code civil*, on the other hand, which is renowned for its audacious general clause on tortious liability (Art. 1382), contains nothing more general on restitution than Art. 1376 on liability for what might in old English terminology be called an action for money had and received—i.e. a restitutionary claim for money which the claimant has paid to the defendant, for example under a mistake. The *Code civil* elaborates on this liability to some small degree in Arts 1377–1381, but has no clear

[22] For a detailed account of the drafting history of §§ 812–822 BGB, see Schäfer 279–312.

[23] This is particularly evident in Sir William Evans, *An Essay on the Action for Money Had and Received* (1802).

[24] See below, Chapter 11, for an English translation of BGB provisions which are relevant for unjustified enrichment.

[25] Schäfer, 429–493.

provision to cover restitution where services or goods were supplied without being due, claims which in old English terminology were for a *quantum meruit* or *quantum valebant*. The *Code civil* is equally silent on restitution for wrongs. It was, rather, the highest French court, the *Cour de Cassation,* which more than a century ago developed a general enrichment claim in the *Boudier* case.[26]

The traditional English position had been formulated by Lord Diplock in *Orakpo v Manson Investments Ltd*:[27]

> My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law.

English law has since reduced its distance from the German position,[28] and could come even closer if English courts were to adopt the dramatic turnaround which Peter Birks proposed, namely that English law should also generally reverse enrichments which lack a legal basis.[29] The German experience can assist those trained in the common law to understand better the difference between the old and the current approach, and the one proposed by Birks. Much of this book will be devoted to that task. Suffice it to say at this stage, that general rules are all very well for including cases which might otherwise have been ignored, but they also tend to cover more than might have been bargained for.[30]

[26] Cass. req. 15.6.1892, S. 1893.1.281; see Zweigert and Kötz, 547–8.

[27] *Orakpo v Manson Investments Ltd* [1978] AC 95, 104 (HL). Lord Diplock may not have been aware of the fact that this case—which concerned subrogation—would not actually have been an enrichment case 'in a legal system that is based upon the civil law' because a *cessio legis* (see section 4.6) would have prevented any enrichment.

[28] The essence of this principle is that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive. This has been the basis for the law of unjust enrichment as it has developed both in the civilian system and in Scotland, which has a mixed system—partly civilian and partly common law. On the whole, now that the common law systems see their law of restitution as being based upon this principle, one would expect them to apply it, broadly speaking, in the same way and to reach results which, broadly speaking, were similar. . . (Lord Hope in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).)

[29] Birks, *Unjust Enrichment*, Ch. 5.

[30] See below, Chapter 2, section 1 and Chapter 9, section 3.2.

3. The unjustified enrichment model of restitution

It has been discussed in English law for some time whether 'unjust enrichment' and 'restitution' have an exclusive relationship, whereby all claims for restitution are based on unjust enrichment, and restitution is the only remedy available for unjust enrichment.[31] In German law, on the other hand, it is beyond dispute that the relationship is far from being exclusive. Unjustified enrichment is only one amongst several models that allow restitution as a remedy. Conversely, in a limited number of situations there can be claims based on unjustified enrichment which are not for restitution of an enrichment held by the defendant, but for recovery of expenditure regardless of whether this corresponds with an enrichment, or even a claim for damages.[32]

1. Unjustified enrichment in a nutshell

If we take a cursory glance at §§ 812–822 BGB, we are able to distinguish grounds of unjustified enrichment (is the claimant entitled to claim restitution from the defendant?) in §§ 812–817 BGB from rules on the measure of restitution (what and how much can the claimant claim?) in §§ 818–820. In short, the grounds of restitution are as follows. If the claimant, by an intentional act of performance, enriches the defendant without a valid legal ground, restitution is permitted under § 812 para. 1 sent. 1 alt. 1 BGB.[33] Defences against this type of claim are (1) the claimant knew there was no valid legal ground, (2) there was not a legal, but a moral obligation (both § 814 BGB), and (3) the claimant's own wrongdoing was the reason why the underlying contract was void (§ 817 BGB).[34] If the defendant acquired an enrichment other than by performance by the claimant, restitution occurs under § 812 para. 1 sent. 1 alt. 2 BGB. This provision covers in particular what in English law is wrongs-based restitution, but

[31] In favour of such an exclusive relationship: Birks, *Introduction*, 26, 40; Burrows, 5–7; against: Birks, *Unjust Enrichment*, 25–27; Mitchell, in: *English Private Law*, 18.04; Virgo, 6ff.
[32] Below, section 5.
[33] Below, Chapter 2, section 1.
[34] Below, Chapter 4.

additionally serves to fill the gaps left by any other situation which calls for restitution.[35]

The measure of restitution under §§ 818–820 BGB can be summarized as follows: restitution in kind can be claimed, if this is possible, or otherwise the monetary value of the enrichment.[36] This is generally measured as the benefit which survives in the hands of the defendant, thus excluding, for example, money which the defendant has since lost. What in English law is called the defence of change of position (or disenrichment) is thus considered within assessment (all § 818 BGB). Stricter rules operate once the claim for restitution is pending, or once the defendant is *mala fide* (§§ 818 para. 3, 819 BGB).[37] In these situations, the defendant is no longer liable under the unjustified enrichment model of measuring restitution, but must answer under the stricter general rules which govern the legal relationship between the owner of personal or real property and the unauthorized possessor (or owner/possessor model for short, §§ 818 para. 4, 292, 987ff. BGB). This implies, *inter alia*, that the defendant may be liable in damages (this being an example of damages being granted as a remedy for unjustified enrichment) and can no longer rely on disenrichment.

2. Applications of the unjustified enrichment model outside §§ 812–822 BGB

This example shows that unjustified enrichment is not the only model of restitution within the German Civil Code. But just as unjustified enrichment refers to the owner/possessor model, for example for the measure of restitution from a *mala fide* defendant, there are numerous provisions throughout the *Bürgerliches Gesetzbuch* which refer to the unjustified enrichment model of measuring restitution in § 818 BGB.

An example can be taken from inheritance law. Under German (and also French) law, surviving spouses and children have statutory minimum rights to inherit (*Pflichtteil* in German, *reserve* in French law). Let us assume that a dying person makes generous gifts to friends in

[35] Below, Chapter 5.
[36] Below, Chapter 6.
[37] Below, Chapter 6, section 6.

order to circumvent those rights. After death, the surviving spouse or children may be permitted under the law of succession (§ 2329 BGB) to claim back some or all of those gifts. Rather than creating separate rules on how the surviving value is to be calculated in this situation, the law of succession will simply refer to the unjustified enrichment model of calculation in § 818 BGB.

To summarize, the *Bürgerliches Gesetzbuch* contains several different grounds for restitution-type relief, among which unjustified enrichment figures most prominently. Similarly, there are several models for the consequences of restitutionary liability.[38] These models for the measure of restitution are principally employed in tandem with a particular ground of restitution-type relief, but the law will also borrow these for certain other situations by operation of a cross-reference. It is important to remember that this is not a coincidental overlap between different areas of the law which have grown in different ways, as might easily have happened in English law, but on the contrary, it is the product of careful design. To use a metaphor, it is a complicated clock mechanism rather than a pile of scrap metal. Superficial criticism would see chaos; more justified criticism would state that the most complicated clocks are not necessarily the most accurate.

4. Six other models of restitution

The six other models of restitution which German law offers are: (1) the termination of contract model, (2) the *negotiorum gestio* model, (3) the tort model, (4) the owner/possessor model, (5) the substitution model, and (6) the *cessio legis* model. They all cover some of the ground which, at least arguably, belongs to the English law of unjust enrichment, and they therefore deserve to be covered in turn.

1. The termination of contract model

If a contract is terminated, this will frequently entitle the parties to claim back what they have already performed, i.e. restitution. As will be explained below, the consequences of termination of contract are

[38] Below, sections 4 and 5.

governed by specific contractual rules in §§ 346ff BGB.[39] This is in contrast with English law, which treats this as a case of unjust enrichment (in the form of failure of consideration).

2. The *negotiorum gestio* model

Sometimes a party will act in the interest of another party without having been instructed to do so, for example in order to save another person's life, limb, or property in an emergency. In German law, this is not governed by unjustified enrichment, but rather by the rules on *negotiorum gestio* or *Geschäftsführung ohne Auftrag* (§§ 677–687 BGB). In sum, the party who was justified to act in the interest of another party can recover from the latter expenses which were reasonably incurred, while the other party can claim from the intervener any enrichment which the intervener gained from the exercise of the other party's interests. More will be said about this below.[40] This model will frequently be invoked by other models of restitutionary liability, in particular for the recovery of unauthorized expenditure. The same model is also employed for disgorgement of profits if the defendant wilfully infringed a right of the claimant (cases of unjustified *negotiorum gestio*, § 687 para. 2 BGB).[41]

3. The tort model

It has been debated in English law for some time whether wrongs-based restitution forms part of unjust enrichment or, rather, belongs to tort law.[42] No similar debate can be observed amongst German lawyers. This is largely due to the fact that restitutionary damages are not generally recognized as a measure of damages in German law.[43] Nevertheless, the enrichment of the defendant will serve as a measure

[39] Below, Chapter 3, section 3.

[40] Below, Chapter 5, section 3.2. For a comparative analysis, see Kortmann, *Altruism in Private Law*.

[41] Below, Chapter 5, section 2.3.

[42] See e.g. Birks, *Unjust Enrichment*, 11–16; Mitchell, in: *English Private Law*, 18.04; Virgo, 6–17 (not part of unjust enrichment). The opposite view is taken by for example Burrows 5–7, Goff and Jones, 1050–1051; Tettenborn, 17.

[43] See Hans Stoll, *Haftungsfolgen im bürgerlichen Recht* (1993), nos 33–36 and 196–235.

of damages in some areas where other methods are unsatisfactory because of the difficulty of proving loss, or in order to ensure that tort does not pay. This is in particular true for intellectual property rights. The case law of the *Bundesgerichtshof* gives the claimant a choice between three different measures of damages, namely (a) to prove and claim his or her loss, (b) to claim a reasonable licence fee, and (c) to claim the profit which the defendant has gained from the violation of the claimant's intellectual property right.[44] The third measure, which is undoubtedly restitutionary, is generally available 'in lieu of damages' for negligent or intentional copyright violations under § 97 para. 1 sent. 2 *Urheberrechtsgesetz* (Copyright Act).[45] We will return to this issue in the context of wrongs-based restitution.[46]

4. The owner/possessor model

The legal relationship between owner and possessor (*Eigentümer-Besitzer-Verhältnis*) concerns situations where corporeal property (i.e. chattels or land) is in the possession of a party who is not entitled to such possession against the owner. This covers, for example, a person living in a house without having title, a valid lease, or tenancy contract with the owner.

Of the claims arising under the owner/possessor model, three are of a restitution-type nature. First, the vindication claim itself, that is, the claim to restore the property to the owner under § 985 BGB. This is a purely proprietary claim and need not concern us any further in this context. Secondly, the owner's claim for the benefit which the possessor has gained from using the property, for example by living in the house. Thirdly, the possessor's counterclaim for unauthorized expenditure on the property.

The owner/possessor model will be covered below in more detail.[47] Its significance extends beyond situations governed by property law. As has been mentioned above, this model is invoked by the

[44] BGH 16.2.1973, BGHZ 60, 206.

[45] The German original of this provision reads: 'An Stelle des Schadenersatzes kann der Verletzte die Herausgabe des Gewinns, den der Verletzer durch die Verletzung des Rechts erzielt hat, und Rechnungslegung über diesen Gewinn verlangen.'

[46] Below, Chapter 5, section 2.2.

[47] At Chapter 5, section 2.1.

provisions on unjustified enrichment in order to increase liability once the enriched person is not acting *bona fide* or has been sued in court.

5. The substitution model

Another restitution-type remedy which can be available within the entire German law of obligations, is substitution. If a claim lies against a defendant, and the initial object of this claim is destroyed, been damaged, taken or given away by the defendant, the claimant is entitled to receive anything which the defendant has obtained on the basis of such destruction, damage, taking or giving away. The initial object of the claim is thus substituted with another object. Under § 285 BGB, whenever the defendant is excused from performing on the ground that performance is impossible, the claimant 'may demand surrender of what has been received as substitute or an assignment of the substitute claim'.

This can be illustrated by the following example. A advertises his used car and agrees with B a price of €10,000. Before B collects the car and hands over the money, C approaches A and offers €11,000. A sells the car to C and pockets the €11,000. A initially owed (specific) performance of the sales contract to B. This became impossible for A, as A no longer owns the car. Due to this impossibility, A no longer owes specific performance of the sales contract under § 275 BGB, but has to surrender under § 285 what he has received as a result of this impossibility—namely the €11,000. A can counterclaim from B the purchase price of €10,000, but as either party can declare set-off, the ultimate result is that B can cream off the extra €1,000 which A has made by his breach of contract with B.

Thus, substitution can serve as a gains-based remedy. German courts will, however, scrutinize not only the causal link between the impossibility and the defendant's receipt of value, but also whether the second object has really replaced the first. For example, if B had rented rather than bought the car from A, B will not be allowed to claim the purchase price, because that has not replaced the rental value of the car. In what is terminologically a slight overstatement, German courts require the second object to be identical to the object which it replaces (*Identität zwischen geschuldetem und*

ersetztem Gegenstand).[48] Section 818 para. (1) contains a specific rule on substitution for unjustified enrichment claims, about which more will be said below.[49]

6. The *cessio legis* model

Some situations which in English law may call for restitution are instead covered by *cessio legis* in German law. This is an assignment which operates by virtue of the law and which is not merely imputed. For example, if a guarantor pays instead of the principal debtor, § 774 BGB transfers the creditor's claim onto the guarantor who can use this claim to proceed against the debtor.[50] Similar provisions apply, for example, to insurers who can recover from a tortfeasor for damage caused to the insured person.[51] *Cessio legis* also occurs if an absconding parent fails to pay maintenance for his or her child and another relative steps in; the relative can recover from the parent by virtue of *cessio legis* under § 1607 para. 2 or 3 BGB. Similarly, § 426 BGB allows joint and several debtors to recover from each other for what they have paid to the creditor in excess of their own share. And § 268 para. 3 BGB allows a creditor with a secured claim to save his or her securities by paying another creditor with privileged securities who has a claim against the same debtor. The same person can then recover from the debtor, by *cessio legis*, of the claim which the privileged creditor has against the debtor. We notice here a difference in the scope of English and German unjust(ified) enrichment law. For English law, these would be cases of either subrogation[52] or legal compulsion. For German law, this is not an unjustified enrichment case: because

[48] See BGH 23.12.1966, BGHZ 46, 260. The registration of an emolument stipulated in favour of the claimant became impossible when the defendant sold the property to a third party. The claimant was not allowed to recover in substitution the difference between the purchase price and the lower price which the property would have attracted with a registered emolument. The *Bundesgerichtshof* argued that the purchase price replaced the property, rather than a contractual right to have an emolument registered.

[49] At Chapter 6, section 2.2.

[50] For a comparative analysis, see Jens Kuhlmann, *Rückgriffsgrundlagen bei Gesamtschuld, Bürgschaft und Schadensversicherung in Deutschland, England und Schweden* (2005).

[51] Section 67 *Versicherungsvertragsgesetz* (Insurance Contract Act) transfers the victim's claim to the insurer.

[52] See Charles Mitchell and Stephen Watterson, *Subrogation Law and Practice* (2007).

the claim is assigned by operation of the law, the debtor is not enriched but remains liable under the original claim.

This also explains why *cessio legis* is the only solitary restitution-type model. It does not borrow from others, and neither is it borrowed by other models of restitution-type relief.

5. Conclusions

To some extent, German and English law share a similar historical development in how unjust(ified) enrichment cases have been approached. Both have historically resorted to unspecific claims or actions which could, amongst other things, be used for what we now see as unjust(ified) enrichment claims, namely Roman law-type *condictiones* for German common law,[53] and *assumpsit* for English law. Both German and English law have subsequently turned unjust(ified) enrichment into a recognised area of law with individual grounds of enrichment, namely *condictiones* as first developed by von Savigny for German law, and unjust enrichment based on individual unjust factors for English law. On the other hand, unlike English law, German law never attempted to push unjust(ified) enrichment into 'quasi-contract'. Furthermore, German law moved in 1900 to a general unjustified enrichment clause for intentional transfers, whereby a shift of wealth is generally to be reversed if this is not justified by a legal ground, a proposition which has only recently been made for English law.

As regards the scope of unjust enrichment and restitution, English law operates with a relatively simple model. Restitution is invariably the remedy for unjust enrichment. While it is subject to dispute whether restitution as a remedy is limited to unjust enrichment-based claims, or whether notably wrongs-based restitution occurs outside unjust enrichment,[54] German law has adopted a much more complicated combination of various models of restitution-type remedies with various grounds which may give rise to those remedies. If we look at what is covered by unjust(ified) enrichment, we can observe the following:

(1) Unjustified enrichment in German law covers the majority of the central ground, namely the reversal of unjust(ified)

[53] See Schäfer, 95–104.
[54] See above, section 4.3.

intentional transfers from the claimant to the defendant. There is one exception: the reversal of transfers made under a valid contract which was subsequently terminated is governed by German contract law, rather than being considered to be a case of unjustified enrichment.

(2) For situations in which the claimant has paid a debt which the defendant owed to a third party, *cessio legis* will frequently prevent any enrichment of the defendant, so that unjustified enrichment will have to deal only with some residual cases.

(3) As concerns improvements to the defendant's property and other cases of unauthorized expenditure, this is mainly covered by either the owner/possessor model, or *negotiorum gestio*, with unjustified enrichment playing no more than a marginal role.

(4) With regard to wrongs-based restitution, German law leaves this largely to unjustified enrichment, with the primary exception of claims between owners and unauthorized possesors, which are covered by the owner/possessor model.

As to the measure of restitution, German law distinguishes between the following, partially overlapping models:

(1) surviving enrichment, initially corresponding to the claimant's disenrichment (basic measure);

(2) initial enrichment of the defendant corresponding with the claimant's disenrichment (*mala fide* defendant, or claim pending);

(3) benefits derived from the initial enrichment, and substitutes; these may exceed the claimant's disenrichment;

and additionally for cases where enrichment and disenrichment are not initially identical:

(4) the claimant's disenrichment, even if this is larger than the defendant's enrichment (recovery of expenditure under *negotiorum gestio*);

(5) the defendant's entire gain, even where that exceeds the claimant's disenrichment and/or defendant's initial enrichment (available under unjustified *negotiorum gestio* and § 816, disputed for interference cases in unjustified enrichment).

This more complicated German model has some benefits, the most obvious one being that it allows for refined solutions. For example, English law has long struggled with mistaken improvements and other unauthorized expenditure, and finds it difficult to measure how exactly the defendant may be enriched. The German solution is to treat this partially outside unjustified enrichment and allow recovery based on expenditure incurred by the claimant, rather than on any increase in the defendant's assets.

On the other hand, the interaction between the different models can also demonstrate how the German Civil Code has exaggerated with its use of cross-references, as is illustrated by the following example.

Let us assume that A keeps a bicycle which A reasonably believes he has inherited from C. When it transpires that C has instead left his entire estate to B, B requires A to hand over the bicycle. Before doing so, A repairs a puncture and claims from B the cost of parts and for his (A's) labour. In order to solve this relatively simple case, we have to start our journey in the law of succession (the fifth book), and in particular § 2021, which refers to unjustified enrichment in the second book. Since A knew of B's right to the bicycle when A repaired the puncture, § 819 BGB will invoke 'the general provisions', which means § 292, which in turn refers to the law of property (the third book) and in particular to §§ 989 and 994 para. (2). The latter provision invokes the law of *negotiorum gestio* to discover whether A was entitled to repair the puncture. That is the case if B's consent could be presumed, as we will assume here. *Negotiorum gestio* in turn calls the law of mandate (a gratuitous contract of service) to find out what A can claim from B in this instance. After a journey through three books and the laws of inheritance, unjustified enrichment, obligations in general, property, and *negotiorum gestio*, we finally arrive at specific contracts and § 670 BGB to learn that A can claim for parts, but not for his labour. Surely there must be a simpler way to arrive at this unspectacular result.