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Introduction

1.1 THE CONCERN OF THIS BOOK

THE WORLD'S POPULATION is ageing.¹ In the United Kingdom, for example, 23 per cent of the population is projected to be aged 65 or older by 2035, while only 18 per cent will be under 16.² One of the most important questions in social policy is therefore how to defuse this 'ticking demographic timebomb'³ by allocating the burdens of funding and providing care for the increasing number of people who will require it in the decades to come.⁴ Of course, it must not be forgotten that some younger people also require care as a result of illness or disability.

This book aims to examine an aspect of the overall conundrum of care provision, namely the legal position of the informal carer as regards support and recognition.⁵ The scope of the book is largely confined to the realm of private law, that is situations where the relevant litigation would be between individuals or other private parties such that the state would not be directly involved. Specifically, the book addresses the availability

¹ See, eg A Börsch-Supan, K Hank and H Jürges, 'A New Comprehensive and International View on Ageing: Introducing the "Survey of Health, Ageing and Retirement in Europe"' in PA Kemp, K Van den Bosch and L Smith (eds), *Social Protection in an Ageing World* (Antwerp, Intersentia, 2008).

² Office for National Statistics, 'Older People's Day 2011' (Office for National Statistics, 2011) 1.

³ Local Government Association, 'LGA Response – "Which?" Investigation into Home Care' (16 March 2012) www.local.gov.uk/web/guest/media-releases/-/journal_content/56/10171/33375393/NEWS-TEMPLATE, quoting the chairman of the Local Government Association's Community Wellbeing Board, Councillor David Rogers.

⁴ See, eg HM Government, *Building the National Care Service* (Cm 7854, 2010); Commission on Funding of Care and Support, *Fairer Care Funding* (Commission on Funding of Care and Support, 2011). Nevertheless, account should be taken of Herring's assertion that more elderly people are involved in the provision of care than in receiving it: J Herring, *Older People in Law and Society* (Oxford, Oxford University Press, 2009) 94. See Princess Royal Trust for Carers, 'Always On Call, Always Concerned: A Survey of the Experiences of Older Carers' (Princess Royal Trust for Carers, 2011) for a discussion of the particular difficulties encountered by older carers.

⁵ For a discussion of the meaning of 'carer', see section 1.2.1 below. Some carers object to the use of the word 'informal' to characterise their role, since they see nothing informal about their level of commitment (L Clements, *Carers and their Rights: The Law relating to Carers*, 4th edn (London, Carers UK, 2011) [2.2]), but here 'informal' is used in the sense that the arrangement lacks a formal contract.

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and propriety of private law remedies for informal carers. This is distinct from the admittedly vital question of state provision for such carers.⁶

The focus of the book is upon English law, although a comparative common law approach is incorporated in spite of the perceived difficulties with comparative analysis in some of the fields under discussion.⁷ The core legal categories explored are property and family property, testamentary promise enforcement, unjust enrichment, succession and undue influence.⁸ The book largely deals with two main scenarios.⁹ The first is where a carer receives some indication from the person for whom he cares¹⁰ that his care will be rewarded in some way, and the reward is not forthcoming. The second considers whether a remedy should be available in the absence of such an indication.

This introductory chapter sets out the background to the topic, before the subsequent chapters undertake a legal analysis. Section 1.2 begins by examining the extent of informal care and setting out key definitions that are used throughout the book. The normative issues and social policy considerations surrounding care and carers are then examined, before the analysis of private law remedies (as distinct from state provision) is justified. Section 1.3 indicates some of the major questions to be addressed, while section 1.4 outlines the substantive legal areas that form the subject matter of the book. This chapter concludes with a summary of the work's structure.

1.2 SOCIAL POLICY CONTEXT AND NORMATIVE CONSIDERATIONS

1.2.1 Statistics and Definitions

Globally, informal care provided in the home is said to be the most important source of care.¹¹ The picture in England and Wales reflects this general position, since the Commission on Funding of Care and Support admitted that '[c]arers are the foundation of the care and support system, and will

⁶ For a comprehensive overview of the public law relating to carers, see Clements, *Carers and their Rights: The Law relating to Carers* *ibid.*

⁷ See, eg D Bradley, 'Family Law' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham, Edward Elgar, 2006).

⁸ See section 1.4.1 below, where contract law is also discussed and excluded from the inquiry (except in section 2.4.1 below, where it is compared with proprietary estoppel) because those who provide care under a contract are not 'informal carers'. Another potential private law remedy relevant to a carer is a right to share in damages available to the victim of a tortiously-inflicted injury. Such claims, discussed in S Degeling, *Restitutionary Rights to Share in Damages: Carers' Claims* (Cambridge, Cambridge University Press, 2003), are not specifically addressed in this book because they arise only in highly specific circumstances.

⁹ For a more detailed explanation, see sections 1.3.1 and 1.3.2 below.

¹⁰ This latter person is termed the 'care recipient': see section 1.2.1 below.

¹¹ Organisation for Economic Co-operation and Development, *Long-term Care for Older People* (Paris, OECD Publishing, 2005) 15.

continue to be so in the future'.¹² Similarly, the Government has said that 'carers embody the spirit of the Big Society',¹³ which has been described as '[a] society in which power and responsibility have shifted: one in which . . . individuals and communities have more aspiration, power and capacity to take decisions and solve problems themselves, and where all of us take greater responsibility for ourselves, our communities and one another'.¹⁴ Some models of support for informal carers are considered in this section.

It is necessary to begin, however, by defining some important terms that will be used throughout the book. Inevitably, judges deciding private law cases are unlikely to be concerned with the precise meaning of terms such as 'care' or 'carer' unless they are applying a specific statutory scheme such as those existing in some Australian states and territories.¹⁵ Nevertheless, the definitions are crucially important in establishing the scope of the present inquiry even if the matter is a source of considerable difficulty.¹⁶ It is convenient to adopt the previous UK Government's definition of 'carer', which states that:

A carer spends a significant proportion of their life providing unpaid support to family or potentially friends. This could be caring for a relative, partner or friend who is ill, frail, disabled or has mental health or substance misuse problems.¹⁷

The 'support' relevant to this book will usually be 'domestic' support,¹⁸ although it is difficult to draw a definitive distinction between domestic and commercial cases.¹⁹ Official definitions are not treated as including parents caring for able-bodied children,²⁰ and on that basis the 2001 Census revealed that there were around 5.2 million carers in England and Wales.²¹ Moreover, the representative organisation Carers UK estimates that 60 per cent of people will become a carer at some point in their lives.²²

Those who provide care services under a formal contract are also excluded from official definitions of 'carer'.²³ These individuals are known

¹² Commission on Funding of Care and Support, *Fairer Care Funding* (n 4) 51.

¹³ Department of Health, *Recognised, Valued and Supported: Next Steps for the Carers Strategy* (Department of Health, 2010) 3.

¹⁴ AVECO, 'Powerful People, Responsible Society: The Report of the Commission on Big Society' (London, AVECO, 2011) [1.4].

¹⁵ These are considered in chs 5 and 6.

¹⁶ See, eg J Herring, 'Caregivers in Medical Law and Ethics' (2008) 25 *Journal of Contemporary Health Law and Policy* 1, 2–3.

¹⁷ Department of Health, *Carers at the Heart of 21st-Century Families and Communities: 'A Caring System on your Side. A Life of your Own'* (Department of Health, 2008) 19.

¹⁸ See further section 5.3.4.3 below on the meaning of 'domestic support and personal care' for the purposes of an eligible 'close personal relationship' in New South Wales.

¹⁹ See, eg sections 2.2.1.6 and 2.2.4.4 below.

²⁰ cf J Herring, 'Where are the Carers in Healthcare Law and Ethics?' (2007) 27 *Legal Studies* 51, 52.

²¹ Office for National Statistics, 'Focus on Health' (Office for National Statistics, 2004) 10.

²² Carers UK, 'Facts about Carers' (London, Carers UK, 2009) 7.

²³ See, eg Directgov, 'Top Tips for Carers' www.direct.gov.uk/en/CaringForSomeone/CaringAndSupportServices/DG_10016779.

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in the social science and policy literature as ‘care workers’ and, as explained in section 1.4.1, they are largely outside the scope of this book. Nevertheless, it has been noted that mechanisms such as Direct Payments, discussed in section 1.2.2.2 below, cause carers to resemble care workers,²⁴ with both positive and negative consequences.²⁵ Moreover, the Law Commission has expressed doubt over the cogency of the distinction between carer and care worker.²⁶ Their Consultation Paper recommended that a person should not be excluded from the definition of ‘carer’ for the purposes of the various assessment duties imposed upon local authorities²⁷ where he was previously unpaid and is now paid using Direct Payments, where he is paid for only some of the care provided or ‘where the local authority believes the caring relationship is not principally a commercial one’.²⁸ While this proposal was to some extent diluted in the final Report through the recommendation of a discretionary approach,²⁹ the difficulties in drawing the distinction between ‘carer’ and ‘care worker’ in some scenarios remain.

The person for whom the carer provides care is referred to as the ‘care recipient’ throughout the book. It should be assumed that the care recipient is an adult unless otherwise stated.³⁰ For ease of expression, the book uses a paradigm of a male carer or applicant and a female care recipient (who may or may not be alive at the time of a private law claim).³¹

Another individual with whom the book is periodically concerned is the ‘pure’ carer. A ‘pure’ carer is one who is not a close relative of, or in a sexual relationship with, the care recipient. An important question, addressed at various points in the book, is whether ‘pure’ carers are or should be treated differently compared to other individuals for the purposes of a private law claim, since it could be argued that family members owe a greater obligation to provide care on an unremunerated basis.³²

It is useful to indicate the amount of care that would have to be provided before a carer is brought within the parameters of the present discussion. Under the Carers (Recognition and Services) Act 1995, a carer must provide, or intend to provide, ‘a substantial amount of care on a

²⁴ C Ungerson, ‘Whose Empowerment and Independence? A Cross-National Perspective on “Cash for Care” Schemes’ (2004) 24 *Ageing and Society* 189.

²⁵ See, eg E Grootegoed, T Knijn and B Da Roit, ‘Relatives as Paid Care-Givers: How Family Carers Experience Payments for Care’ (2010) 30 *Ageing and Society* 467.

²⁶ Law Commission, *Adult Social Care: A Consultation Paper* (Law Com CP No 192, 2010) [5.30]–[5.36].

²⁷ See section 1.2.2.2 below.

²⁸ Law Commission, *Adult Social Care: A Consultation Paper* (n 26) 47.

²⁹ Law Commission, *Adult Social Care* (Law Com 326, 2011) [7.34]–[7.41].

³⁰ The particular issues that arise where a minor child cares for a parent or other relative are not specifically considered in this book. See, eg G Schofield and J Walsh, ‘Young Carers – or Children in Need of Care? Decision Making for Children of Parents with Mental Health Problems’ (2010) 22 *Child and Family Law Quarterly* 223.

³¹ No substantive comment should be inferred from this choice.

³² See, eg section 5.3.1.1 below.

regular basis' before he can request an assessment of his ability to provide that care.³³ This concept is in itself open to interpretation, and indeed the Law Commission recently recommended its removal.³⁴ Nevertheless, ideas of substance and regularity are of assistance in distinguishing true carers from those who provide occasional support in the context of an ordinary social relationship, even if it is accepted that care of some kind is ubiquitous within such relationships.³⁵

The definitions discussed in this section inevitably vary during the course of the book, and are context-dependent. Even so, it is hoped that a general definition of 'carer' aids the reader in understanding the subject matter of the book.

1.2.2 State Support for Carers

At the outset of a book on private law, it is necessary to address the argument that support for informal carers should be the concern of the welfare state and need not involve contributions from the property of private individuals other than through taxation, or perhaps a state-controlled system facilitating wider use of *formal* care.³⁶ This subsection discusses such arguments and the extent to which they have been acted upon. The use of private law to support carers must, in turn, be justified. That is the aim of section 1.2.3.

1.2.2.1 Normative Arguments relating to State Support for Carers

Many of the normative arguments on state support for carers in general are contributed by scholars on the 'ethic of care'³⁷ and other feminist writers. Those who argue in favour of an 'ethic of care' emphasise 'the relational character of human life, the relational nature of self-conceptions . . . and the inevitable human dependences and interdependences too often ignored in theories that begin with adult moral agents pursuing their own conception of the good'.³⁸

Writing from a United States perspective, Martha Fineman considers society to be dependent on the 'caretaking labor'³⁹ of 'derivative dependants',

³³ Carers (Recognition and Services) Act 1995, s 1(1)(b).

³⁴ Law Commission, *Adult Social Care* (n 29) 87.

³⁵ See, eg M Hubbard, 'The Myth of Independence and the Major Life Activity of Caring' (2004) 8 *Journal of Gender, Race and Justice* 327.

³⁶ See, eg Commission on Funding of Care and Support, *Fairer Care Funding* (n 4) 51.

³⁷ For a summary of the vast literature on the 'ethic of care', see Herring, *Older People in Law and Society* (n 4) 124–30.

³⁸ EF Kittay with B Jennings and AA Wasunna, 'Dependency, Difference and the Global Ethic of Longterm Care' (2005) 13 *Journal of Political Philosophy* 443, 453.

³⁹ MA Fineman, *The Autonomy Myth: A Theory of Dependency* (New York, New Press, 2004) xvii.

that is those who assume or are assigned responsibility for the care of someone who is inevitably dependent on others.⁴⁰ She criticises the fact that most of the costs of care are borne by carers themselves rather than being distributed amongst the true beneficiaries of care, whether institutional or individual. Many of Fineman's arguments appear to be based on the paradigm of a parent (usually a mother) caring for a minor child. Even so, her general thesis could be applied to someone caring for an adult and the recognition of the informal carer in general, especially since she includes people who are elderly, ill or disabled within her concept of inevitable dependency.⁴¹ On her account, society has historically failed to recognise informal care in itself, often because of the insistence on placing marriage at the centre of family policy. Indeed, informal care has been described as the 'invisible pillar' of the welfare state,⁴² and Watson and Mears report that the use of terms such as 'carer' in social policy documents and research literature 'is relatively recent although the activity has been going on since time immemorial'.⁴³

Fineman analyses caring as creating a 'social debt' that 'must be paid according to the principles of equality that demand that those receiving social benefits also share the costs when they are able'.⁴⁴ She considers every member of society to be obligated by that debt, and not only the direct recipients of the care, since the debt 'transcends individual circumstances'.⁴⁵ A societal response to the plight of the carer, she argues, is not a matter of empathy or altruism, but of the preservation of society itself. Similarly, Watson and Mears categorise support for carers not as a form of pure welfare provision but as an 'astute and compassionate investment'.⁴⁶ At the moment, however, according to Fineman's analysis, market institutions can be 'free-riders . . . appropriating the labor of the caretaker' for their own ends.⁴⁷ Fineman envisages the repayment of the social debt through mechanisms such as tax benefits and subsidies, as well as the restructuring of the workplace and other institutions.⁴⁸

Maxine Eichner subjects Fineman's work to exhaustive analysis. She begins positively by claiming that Fineman's approach 'changes the basis of entitlement from need to desert, a far more honorable – and politically

⁴⁰ *ibid* 35–36.

⁴¹ *ibid* 35.

⁴² S Moullin, 'Care in a New Welfare Society: Unpaid Care, Welfare and Employment' (London, Institute for Public Policy Research, 2007) 7.

⁴³ EA Watson and J Mears, *Women, Work and Care of the Elderly* (Aldershot, Ashgate, 1999) 2.

⁴⁴ Fineman, *The Autonomy Myth: A Theory of Dependency* (n 39) xvii.

⁴⁵ *ibid* 47.

⁴⁶ Watson and Mears, *Women, Work and Care of the Elderly* (n 43), 193.

⁴⁷ Fineman, *The Autonomy Myth: A Theory of Dependency* (n 39) xviii.

⁴⁸ For an argument that care should be recognised as work and paid for by taxpayers, see EF Kittay, 'A Feminist Public Ethic of Care Meets the New Communitarian Family Policy' (2001) 111 *Ethics* 523.

palatable – form of entitlement in our society’.⁴⁹ While arguments on desert are often associated with the justification for punishment,⁵⁰ it is possible to argue that it should play a role in theories of redistributive as well as retributive justice.⁵¹

Eichner, however, suggests that Fineman may proceed too quickly from the fact of inevitable dependency to the normative claim that it generates an obligation on the part of the state to support caring.⁵² As Eichner points out, ‘there are a number of instances in which the actions of private citizens produce benefits for society without accruing any legal or moral right to compensation’.⁵³ This bears a resemblance to arguments on voluntariness and risk-taking in the context of unjust enrichment, which are discussed in chapter four of this book.

Eichner is uncomfortable with the use of economic analogies such as ‘debt’ to characterise complex problems of public policy. She offers an alternative consequence of the inevitability of dependency, which she says produces an even stronger justification for a state obligation than Fineman’s analysis. She prefers to focus on the obligation to support the vulnerable care recipient herself rather than any duty owed to the carer. Eichner suggests that the state should support care work by enabling carers to combine their obligations with work in the labour market, rather than ‘directly subsidise . . . carework in private homes’.⁵⁴

Eichner argues that her own ‘public integration’ model is more likely to secure gender equality, and that it recognises the value of care work without requiring women (upon whom caring obligations usually fall)⁵⁵ to withdraw from more public aspects of life in order to perform it. She also points out that subsidy models generally aim only to replace wages and benefits lost during the caring period, and not losses of opportunity.

Although there are clear differences between these approaches, what is common to both of them is the focus on care as a matter of public concern, necessitating state support rather than the private remedies with which this book is concerned. The recognition of care as something valuable and worthy of support, however, is crucial whether it is a public or a private matter. The remainder of this subsection explores mechanisms by which carers are recognised and supported by the law in England and Wales.

⁴⁹ M Eichner, ‘Dependency and the Liberal Polity: on Martha Fineman’s *The Autonomy Myth*’ (2005) 93 *California Law Review* 1285, 1291.

⁵⁰ See, eg A von Hirsch, *Censure and Sanctions* (Oxford, Clarendon Press, 1993).

⁵¹ J Moriarty, ‘Against the Asymmetry of Desert’ (2003) 37 *Noûs* 518.

⁵² Eichner, ‘Dependency and the Liberal Polity: on Martha Fineman’s *The Autonomy Myth*’ (n 49) 1310–11.

⁵³ *ibid* 1311.

⁵⁴ *ibid* 1287.

⁵⁵ See the various studies cited in Herring, *Older People in Law and Society* (n 4) 98–99.

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1.2.2.2 Current Statutory Recognition and Support of the Carer in England and Wales

Some statutory recognition of the carer, leading to the availability of support for carers,⁵⁶ is emerging in England and Wales. For example, the Carers (Recognition and Services) Act 1995 granted carers the right to an assessment of their ability to provide care when a local authority is ascertaining a care recipient's need for more formal community care. The Carers and Disabled Children Act 2000 made the right to an assessment independent of the care recipient's assessment, and gave local authorities powers to provide services for carers.

The Carers (Equal Opportunities) Act 2004 then placed local authorities under a duty to inform carers of their rights under the previous two Acts, and required consideration of the carer's employment, training and housing needs as part of the assessment. Under the 2004 Act, a local authority may also enlist the help of housing, health, education and other local authorities in providing support to carers. This has been described as a 'major cultural shift', since it involved seeing carers 'not so much as unpaid providers of care services for disabled people, but as people in their own right'.⁵⁷

In the employment context,⁵⁸ one example of recognition for carers is the introduction by the Work and Families Act 2006 of a right to request flexible working for those who care for certain adults.⁵⁹ This accords somewhat with Eichner's suggested approach. Regulations currently restrict eligibility for the right to request flexible working to a carer who is a spouse, same-sex civil partner or relative of the care recipient, or one who lives in the same household as the care recipient,⁶⁰ but the Government has proposed that the right should be extended to all employees.⁶¹ Moreover, the definition of discrimination on grounds of disability in the Equality Act 2010⁶² is broad enough to include carers due to the concept of 'associative' discrimination.⁶³ Similar concepts are

⁵⁶ See, generally E Victor, 'A Systematic Review of Interventions for Carers in the UK: Outcomes and Explanatory Evidence' (Essex, Princess Royal Trust for Carers, 2009).

⁵⁷ Clements, *Carers and their Rights: The Law relating to Carers* (n 5) [1.3].

⁵⁸ See, eg R Horton, 'Care-giving and Reasonable Adjustment in the UK' in N Busby and G James (eds), *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21st Century* (Cheltenham, Edward Elgar, 2011).

⁵⁹ Work and Families Act 2006, s 12, amending Employment Rights Act 1996, s 80F.

⁶⁰ Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations, SI 2006/3314, r 5, inserting Flexible Working (Eligibility, Complaints and Remedies) Regulations, SI 2002/3236, r 3B.

⁶¹ Department of Business, Innovation and Skills, *Consultation on Modern Workplaces* (BIS, 2011) ch 4.

⁶² Equality Act 2010, s 13.

⁶³ See, eg Clements, *Carers and their Rights: The Law relating to Carers* (n 5) [13.9]–[13.30]. See also N Busby, 'Carers and The Equality Act 2010: Protected Characteristics and Identity' (2011) 11 *Contemporary Issues in Law* 71 for a discussion of the failure to include being a carer as a specific protected characteristic.

evident in the European Court of Justice's decision in Case C-303/06 *Coleman v Attridge Law*,⁶⁴ which required the Disability Discrimination Act 1995 to be interpreted as covering carers of disabled children even though the carers are not disabled themselves.⁶⁵ As a result of this decision, Jonathan Herring argues that a refusal to accede to a carer's request for flexible working could constitute disability discrimination in certain circumstances.⁶⁶

Despite the initiatives described above, the overall position of the informal carer is often regarded as inadequate,⁶⁷ although the Government does have ambitious plans to improve that position.⁶⁸ One reason for the current weakness, in Herring's view, is that several of the schemes are 'largely permissive, authorizing local authorities to provide . . . services . . . rather than dictating that they must'.⁶⁹ In their Report on adult social care law in England and Wales,⁷⁰ the Law Commission proposed inter alia that there should be a single statute governing the whole area including a statement of fundamental principles. They also made proposals on provision for carers,⁷¹ such as the introduction of a single duty to assess the carer and a definition of carers' services to mirror the one used for community care services. Although they were of the view that local authorities are already required to provide some services to carers where 'a carer's needs gave rise to a critical risk to the sustainability of the caring role',⁷² they recommended that local authorities should be required to use a national framework for the eligibility of carers for services, while retaining discretion over the actual eligibility criteria.⁷³ This would encourage greater clarity but it does not appear to meet Herring's criticism.

All of the Law Commission's proposals had to be considered by policy-makers alongside recommendations from the Commission on Funding of Care and Support, which supported the Law Commission's recommendations on the entitlements of carers.⁷⁴ In July 2012 the

⁶⁴ Case C-303/06 *Coleman v Attridge Law* [2008] All ER (EC) 1105 (ECJ). See A Stewart, S Niccolai and C Hoskyns, 'Disability Discrimination by Association: A Case of the Double Yes?' (2011) 20 *Social and Legal Studies* 173 for discussion.

⁶⁵ *EBR Attridge Law LLP (formerly Attridge Law) v Coleman* [2010] 1 CMLR 28 (EAT).

⁶⁶ J Herring, 'Carers' in L Gostin et al (eds), *Principles of Mental Health Law and Policy* (Oxford, Oxford University Press, 2010) [10.73].

⁶⁷ See, eg Moullin, 'Care in a New Welfare Society: Unpaid Care, Welfare and Employment' (n 42).

⁶⁸ Department of Health, *Recognised, Valued and Supported: Next Steps for the Carers Strategy* (n 13); Department of Health, *Caring for our Future: Reforming Care and Support* (Cm 8378, 2012) 34–35.

⁶⁹ Herring, *Older People in Law and Society* (n 4) 102.

⁷⁰ Law Commission, *Adult Social Care* (n 29).

⁷¹ See, especially *ibid* Part 7.

⁷² *ibid* [7.66].

⁷³ *ibid* 84.

⁷⁴ Commission on Funding of Care and Support, *Fairer Care Funding* (n 4) 6.

Government published a detailed response to the Commission's proposals simultaneously with its White Paper on the future of adult social care.⁷⁵

As well as provisions on the general availability of services for carers, a publicly administered direct remuneration approach is in evidence in England and Wales.⁷⁶ For example, a carer's allowance is a limited benefit payable to a person who spends at least 35 hours per week caring for someone who is herself in receipt of certain benefits related to illness or disability.⁷⁷ It could be argued that such benefits should be taken into account by a judge adjudicating on a private law claim,⁷⁸ or even that the availability of the benefits renders a discussion of private law remedies futile and unnecessary.⁷⁹ One counter-argument is that many jurisdictions are apparently content to adjust private property rights in recognition of the consequences of other relationships, such as marriage, even in the context of a welfare state.⁸⁰ In any event, care-related benefits frequently go unclaimed,⁸¹ and they have been roundly criticised for their inadequacy.⁸²

Many of those eligible for social care can also obtain money from a local authority in order to purchase care services under the Direct Payment Scheme,⁸³ regulated by the Health and Social Care Act 2001.⁸⁴ The scheme

⁷⁵ Department of Health, *Reforming the Law for Adult Care and Support: The Government's response to Law Commission Report 326 on Adult Social Care* (Cm 8379, 2012); Department of Health, *Caring for our Future: Reforming Care and Support* (n 68).

⁷⁶ For an analysis of the pilot schemes implementing individual budgets, and the apparently limited use of the budgets to pay carers, see C Glendinning et al, 'The Individual Budgets Pilot Projects: Impact and Outcomes for Carers' (York, Social Policy Research Unit, 2009). See, generally C Hatton and J Waters, 'The National Personal Budget Survey' (London, Think Personal, Act Local, 2011).

⁷⁷ The applicant in *Re Land (deca)* received a carer's allowance of £36 per week ([2006] EWHC 2069 (Ch), [2007] 1 WLR 1009 [2]). The amount currently payable is £58.45 per week, and there are restrictions based on age, income and student status: Directgov, 'Carer's Allowance' www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/Caringforsomeone/DC_10018705. *Re Land* is discussed in ch 5.

⁷⁸ In New Zealand, the court is instructed to disregard a range of benefits when making an order for family provision: Family Protection Act 1955 (NZ), s 13. In England and Wales, courts are generally reluctant to attach a great deal of significance to the availability of state support for a family provision applicant, particularly in cases involving large estates. See, eg *Re E, E v E* [1966] 1 WLR 709 (Ch); *Re Collins (decd)* [1990] Fam 56, 61–62 (Hollings J); *Ilott v Mitson* [2011] EWCA Civ 346, [2011] 2 FCR 1 [75] (Arden LJ).

⁷⁹ For a response to this argument, see section 1.2.3 below.

⁸⁰ In her dissenting judgment in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534, Lady Hale was anxious that a marital agreement should not be given such weight as to allow a wife to 'cast the burden of supporting her husband onto the state' ([190]). For an argument that financial support should be a matter of public liability rather than private law, see KJ Gray, *Reallocation of Property on Divorce* (Abingdon, Professional Books, 1977) 302–34.

⁸¹ Carers UK, 'Carers Missing Millions: A report into carers' unclaimed benefits' (London, Carers UK, 2010).

⁸² Herring, *Older People in Law and Society* (n 4) 100–101.

⁸³ of the limitations on the availability of such social care, discussed in section 1.2.3.4 below.

⁸⁴ Health and Social Care Act 2001, s 57. For an international comparative analysis of 'cash-for-care' schemes, see H Arksey and PA Kemp, 'Dimensions of Choice: A Narrative Review of Cash-for-Care Schemes' (York, Social Policy Research Unit, 2008).

is intended to 'increase the choice, flexibility and independence of the care recipient'.⁸⁵ A significant limitation, however, is that a Direct Payment recipient is often prohibited from purchasing services from spouses, civil partners or people living with the recipient as such, or from close relatives living in the same household.⁸⁶ The definition of such a relative has been described as 'expansive',⁸⁷ and contrasts with the approach to eligibility to request flexible working under the Work and Families Act 2006. A relative can be paid through Direct Payments where the local authority concerned is 'satisfied that securing the service from such a person is necessary . . . to meet satisfactorily the prescribed person's need for that service',⁸⁸ but Luke Clements claims that local authorities often erroneously assume that 'exceptional circumstances' must be present before this threshold is met.⁸⁹ The Government has signalled its intention to increase the use of Direct Payments and personal budgets,⁹⁰ including in respect of services provided to carers themselves,⁹¹ although the National Audit Office has emphasised that more should be done in order to ensure value for money when the availability of these mechanisms is extended.⁹²

While it can result in both eligibility and ineligibility, the question whether a carer and a care recipient live in the same household can therefore assume crucial importance in the public support context. As chapter five demonstrates, the same is presently true of claims by carers under family provision statutes.

This present piecemeal recognition of carers in England and Wales contrasts with the wide recognition of the relationship between carer and care recipient on a comparable basis to conjugal cohabitants in some Australian states and territories, as discussed in chapters five and six.

⁸⁵ A Stewart, 'Home or Home: Caring about and for Elderly Family Members in a Welfare State' in R Probert (ed), *Family Life and the Law* (Aldershot, Ashgate, 2007) 175.

⁸⁶ For a full list of presumptive exclusions see Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations, SI 2009/1887, rr 11(2) and 12(3).

⁸⁷ Stewart, 'Home or Home: Caring about and for Elderly Family Members in a Welfare State' (n 85) 173.

⁸⁸ SI 2009/1887, rr 11(1) and 12(2).

⁸⁹ Clements, *Carers and their Rights: The Law relating to Carers* (n 5) [5.35].

⁹⁰ Department of Health, *A Vision for Adult Social Care: Capable Communities and Active Citizens* (Department of Health, 2010) ch 4; Department of Health, *Caring for our Future: Reforming Care and Support* (n 68) ch 7. A personal budget is a mechanism by which an individual can control the purchasing of care services for which they are eligible. It 'can be taken by an individual as a direct (cash) payment; as an account held and managed by the [relevant] council in line with the individual's wishes; or as an account placed with a third party (provider) and called off by the individual; or as a mixture of these approaches' (ibid 15 fn 22).

⁹¹ HM Government, 'Recognised, Valued and Supported: Next Steps for the Carers Strategy' (Department of Health, 2010) [3.4].

⁹² National Audit Office, *Oversight of User Choice and Provider Competition in Care Markets* (2010–12, HC 1458).

1.2.3 Private Law Support for Carers

This subsection considers whether the use of private law remedies to support carers is necessary or justifiable in principle, in the light of the arguments on state support. Of course, the suitability of *particular* private law mechanisms to benefit carers is considered throughout the course of the book. The subsection begins by assessing the potential inadequacy of public support as a justification for the use of private support. A proposal based on private law is then evaluated.

1.2.3.1 *The Limitations of State Support*

In contrast to the writers considered above, Mika Oldham places more of an emphasis on private law remedies for the carer. On the one hand, she does accept that carers are 'effectively stepping in to discharge a duty that in fact falls on the State',⁹³ and on that basis advocates the availability of a restitutionary claim against the state for care work provided. On the other hand, she acknowledges that public policy considerations make this unlikely.

On Oldham's account, England has never been a true welfare state because the state is not the sole provider of welfare.⁹⁴ She appears to work on the assumption that public provision will never be adequate and she expresses concern about the heavy financial burden that would be imposed upon the state in the absence of informal caring. Indeed, the total amount of informal care provided in the UK has been valued at £87 billion per year.⁹⁵ Herring accepts this, albeit retaining his disappointment that financial considerations, rather than the 'real value' of care, provide the focus of debate.⁹⁶

The potential burden on the state is particularly significant given that care needs are expected to increase by 87 per cent between 2002 and 2051.⁹⁷ The previous government predicted a £6 billion funding gap in formal adult social care within two decades.⁹⁸ Understandably, it was therefore

⁹³ MPC Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France' [2001] *Cambridge Law Journal* 128, 165.

⁹⁴ *ibid* 133.

⁹⁵ L Buckner and S Yeandle, 'Valuing Carers – Calculating the Value of Unpaid Care' (London, Carers UK, 2007). *cf* G Conochie, 'Supporting Carers: The Case for Change' (Essex, Princess Royal Trust for Carers and Crossroads Care, 2011) for an argument that *further* savings in public expenditure could be made if carers were better supported.

⁹⁶ Herring, 'Carers' in Gostin et al (eds), *Principles of Mental Health Law and Policy* (n 66) [10.12].

⁹⁷ R Hancock et al, 'Paying for Long-Term Care for Older People in the UK: Modelling and Distributional Effects of a Range of Options' (Kent, Personal Social Services Research Unit, 2007).

⁹⁸ Department of Health, *The Case for Change: Why England Needs a New Care and Support System* (London, Department of Health, 2008) 14.

anxious to recognise the importance of informal caring, and published proposals under which informal carers would be ‘universally recognised and valued as being fundamental to strong families and stable communities’.⁹⁹ Laudable as this was, the target date for the implementation of the proposal was 2018.¹⁰⁰

The present coalition government set up a Commission on Funding of Care and Support (the ‘Dilnot Commission’), which reported in July 2011.¹⁰¹ They warned that the current system of formal social care provided by local authorities is inconsistent and unfit for purpose, and indeed the Equality and Human Rights Commission found ‘many instances of [formal] home care . . . where human rights were breached or put at risk because of the way care was delivered’.¹⁰² The Dilnot Commission opined that ‘the Government must devote greater resources to the adult social care system’ in England.¹⁰³ These proposals were supported by Carers UK and other relevant organisations.¹⁰⁴ An ambitious White Paper on the future of social care published in July 2012 was explicitly not intended to set out a funding settlement for care and support in future years,¹⁰⁵ although the accompanying ‘progress report’ on funding did agree with the principles of the Dilnot Commission’s model and rather loosely committed to implementing it ‘if a way to pay for it can be found’.¹⁰⁶

A sustainable social care system such as that outlined by the Dilnot Commission would make life easier for many informal carers,¹⁰⁷ if and (crucially) when¹⁰⁸ it is properly implemented. Budgets remain stretched,¹⁰⁹

⁹⁹ Department of Health, *Carers at the Heart of 21st-Century Families and Communities* (n 17) 16.

¹⁰⁰ See also HM Government, *Recognised, Valued and Supported: Next Steps for the Carers Strategy* (n 13), published by the current government.

¹⁰¹ Commission on Funding of Care and Support, *Fairer Care Funding* (n 4).

¹⁰² Equality and Human Rights Commission, *Close To Home: An Inquiry into Older People and Human Rights in Home Care* (Manchester, Equality and Human Rights Commission, 2011) 95. See also Which?, ‘Which? Exposes Failings in Home Care System’ (16 March 2012) www.which.co.uk/news/2012/03/which-exposes-failings-in-home-care-system-281517/.
^{cf} Department of Health, *Caring for our Future: Reforming Care and Support* (n 68) chs 5 and 6.

¹⁰³ Commission on Funding of Care and Support, *Fairer Care Funding* (n 4) 8.

¹⁰⁴ Carers UK, ‘Carers UK: Act on Dilnot to Fix Broken Social Care System’ (www.carersuk.org/newsroom/item/2203-carers-uk-act-on-dilnot-to-fix-broken-social-care-system); Carers UK, ‘The Dilnot Commission and Carers’ (London, Carers UK, 2011).

¹⁰⁵ Department of Health, *Caring for our Future: Reforming Care and Support* (n 68).

¹⁰⁶ Department of Health, *Caring for our Future: Progress Report on Funding Reform* (Cm 8381, 2012) 6. For criticism, see Age UK, ‘Age UK Response to Social Care White Paper’ (11 July 2012) www.ageuk.org.uk/latest-news/age-uk-response-to-social-care-white-paper/.

¹⁰⁷ Commission on Funding of Care and Support, *Fairer Care Funding* (n 4) 52.

¹⁰⁸ N Hawkes, ‘Reform of Long Term Care for Elderly Must not be Postponed, Dilnot Says’ [2011] *British Medical Journal* 343.

¹⁰⁹ See, eg *R (on the application of W) v Birmingham City Council* [2011] EWHC 1147 (Admin), [2011] Eq LR 721; *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33, [2011] PTSR 1266; *R (on the application of JM) v Isle of Wight Council* [2011] EWHC 2911 (Admin), [2012] Eq LR 34; *R (on the application of KM) v Cambridgeshire County Council* [2012] UKSC 23, (2012) 162 NLJ 780; Age UK, ‘Care in Crisis 2012’ (London, Age UK, 2012); N Triggles, ‘State-Funded Elderly Care Declining, Labour Figures Suggest’ (BBC News

however, and the extent of resistance to official involvement by some care recipients should not be underestimated.¹¹⁰ In spite of the potential expansion of state-provided care, then, private law remedies for informal carers, such as the mechanism proposed by Oldham, are important and may be necessary in some cases.

1.2.3.2 *Oldham's Proposal*

In response to the funding shortfalls discussed above, Oldham advocates a system of 'successional priority', which would give a person who takes care of a relative a prioritised right of provision from that relative's estate.¹¹¹ She suggests that such a 'priority' concept could be combined with equity release and a state-sponsored loan system to provide a more instantaneous incentive for an informal carer.¹¹² Oldham claims that private law measures such as those embodied in her proposal, with the notion of a quid pro quo for care, would foster the idea of interdependence rather than dependence. She goes as far as to argue that such measures could be necessary to support and encourage care.

Oldham's proposal is somewhat underdeveloped. She accepts that its implementation would require 'careful deliberation of many issues',¹¹³ implying that she has not yet performed such a task. Nevertheless, as well as reflecting the concept of desert that can be found in Fineman's writing, it may well be that the possibility of private payment is necessary to encourage people to care for others, and considerations of reward encouraging intervention have been said to justify claims by the provider of a service in the context of maritime salvage.¹¹⁴ As Katie Wise puts it: '[e]ncouraging family caregiving is sound public policy, as it can help contain the costs of caring for the nation's growing elderly population, while promoting positive family relationships'.¹¹⁵ While it is true that encouraging non-familial or 'pure' caring does not give rise to the promotion of

Online, 16 May 2012) www.bbc.co.uk/news/health-18026534. cf Department of Health, *Caring for our Future: Progress Report on Funding Reform* (n 106) 16.

¹¹⁰ See, eg *Special Trustees for Great Ormond Street Hospital for Children v Rushin, Re Morris (decd)* [2001] WTLR 1137 (Ch).

¹¹¹ Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France' (n 93) 173–77.

¹¹² For a general discussion of the use of equity release by the elderly, see L Fox O'Mahony, *Home Equity and Ageing Owners: Between Risk and Regulation* (Oxford, Hart Publishing, 2012) 269–317. cf 'deferred payment' (discussed at n 154), which is in substance a state-sponsored loan facilitating payment for formal care.

¹¹³ Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France' (n 93) 173.

¹¹⁴ See, eg FD Rose, *Kennedy & Rose: Law of Salvage*, 7th edn (London, Sweet & Maxwell, 2009) [1.036].

¹¹⁵ K Wise, 'Caring for our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly' (2002) 5 *New York University Journal of Legislation and Public Policy* 563, 598.

familial relationships, it would serve the important goal of encouraging social solidarity generally.¹¹⁶ Indeed, while Oldham tends to focus on ‘priority’ for *relatives* who provide care, she admits that there may be ‘no compelling reason’ to take a restrictive approach to the matter,¹¹⁷ and her scheme could easily be applied to ‘pure’ carers who are not relatives. In the light of fears that the availability of informal care will reduce in the future,¹¹⁸ the encouragement of care through private financial incentives could be a useful tool in preventing this decline.

At first glance, arguments involving private law seem far removed from the ideal of state provision for carers (and indeed of care) considered above. Nevertheless, they could be consistent with Wise’s argument that the state and the family should share responsibility for the care of the elderly.¹¹⁹ Oldham’s thoughts have a pragmatism that contrasts with what has been called the excessive idealism of the ‘edicts issued by Fineman to the State’.¹²⁰ Moreover, Fineman herself accepts that care recipients ‘owe an individual debt to their individual caretakers’, which exists alongside the broader societal debt,¹²¹ and Simone Wong is content to invoke her broad analysis in the context of property reallocation as between unmarried conjugal cohabitants.¹²² Nevertheless, Oldham’s proposal is still open to criticism, and some of the controversial issues are considered in section 1.2.3.3.

1.2.3.3 *Some Criticisms: Altruism and the Expectation of a Remedy*

Oldham admits that some would reject her scheme on the basis that care should be provided on the basis of affection rather than mercenary considerations. Indeed, most of the subjects of a study by Karen Rowlingson were ‘uncomfortable with the idea of linking any financial reward with the provision of care’,¹²³ and a report on care funding has admitted that

¹¹⁶ See further section 5.2.1.3 below.

¹¹⁷ Oldham, ‘Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France’ (n 93) 173.

¹¹⁸ Caring Choices, ‘The Future of Care Funding: Time for a Change’ (London, King’s Fund, 2008) 17. See also Herring, ‘Carers’ in Gostin et al (eds), *Principles of Mental Health Law and Policy* (n 66) [10.13]–[10.15].

¹¹⁹ Wise, ‘Caring for our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly’ (n 115).

¹²⁰ H Reece, ‘*The Autonomy Myth: A Theory of Dependency*’ (Book Review) (2008) 20 *Child and Family Law Quarterly* 109, 113.

¹²¹ Fineman, *The Autonomy Myth: A Theory of Dependency* (n 39) 48.

¹²² S Wong, ‘Caring and Sharing: Interdependence as a Basis for Property Redistribution’ in A Bottomley and S Wong (eds), *Changing Contours of Domestic Life, Family and Law: Caring and Sharing* (Oxford, Hart Publishing, 2009).

¹²³ K Rowlingson, ‘Attitudes to Inheritance: Focus Group Report’ (Bath, University of Bath, 2004) 38, cited in M Izuhara, *Housing, Care and Inheritance* (Abingdon, Routledge, 2008) 110.

'unpaid carers are by definition not "in it for the money"'.¹²⁴ The idea of financial rewards is likely to be particularly controversial in the familial context.

On the other hand, Oldham claims that this sort of view can fail to take account of the 'modern, economy-driven world'.¹²⁵ Indeed, while Elizabeth Watson and Jane Mears found that the carers in their study were not motivated by reward and that some considered it rewarding in itself, the authors identified a risk of over-sentimentalising care if it were seen to relate to love alone.¹²⁶ The opportunity costs of caring can be very high: it has been claimed that UK carers lose an average of £11,000¹²⁷ per year due to their caring responsibilities, and significant health problems often arise as a result of those same responsibilities.¹²⁸ That said, Wells has cautioned against provision for carers going beyond the enforcement of promises on the basis that 'the economic disadvantages suffered by carers may not be inherent in the relationship itself'.¹²⁹

As far as families are concerned, it should be noted that adult children are currently under no *legal* obligation to provide care or financial support for their elderly parents.¹³⁰ Moreover, the treatment of care as something merely inherent in familial relationships can easily lead to its under-appreciation by society. As will be frequently demonstrated in the course of the book, the courts sometimes make assumptions about expectations attached to particular categories of relationship when evaluating care in certain areas of private law.¹³¹ In others, by contrast, a familial relationship facilitates the very possibility of a claim.¹³²

Whatever special considerations might apply to familial carers, Jeroen Kortmann points to research suggesting that 'rewarding people may actually cause them to lose interest in an activity they once enjoyed',¹³³ such that 'good Samaritans may start to attribute their helpful conduct to external reasons (the rewards) rather than to internal reasons (their sense of

¹²⁴ Caring Choices, 'The Future of Care Funding: Time for a Change' (n 118) 26.

¹²⁵ Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France' (n 93) 177.

¹²⁶ Watson and Mears, *Women, Work and Care of the Elderly* (n 43) 30–32.

¹²⁷ House of Commons Work and Pensions Committee, *Valuing and Supporting Carers* (2007–08, HC 485) [102]. See also BBC News Online, 'Unpaid Carers Cost Economy £5.3bn, Charity Warns' (27 June 2012) www.bbc.co.uk/news/health-18599455.

¹²⁸ Department of Health, *Carers at the Heart of 21st-Century Families and Communities* (n 17) ch 5; Princess Royal Trust for Carers, 'Always On Call, Always Concerned: A Survey of the Experiences of Older Carers' (n 4).

¹²⁹ RP Wells, 'Testamentary Promises: A New Approach' (PhD thesis, King's College London 2007) 319.

¹³⁰ J Herring, *Family Law*, 5th edn (Harlow, Pearson, 2011) 705–708. For a philosophical discussion, see S Keller, 'Four Theories of Filial Duty' (2006) 56 *Philosophical Quarterly* 223.

¹³¹ See sections 2.2.4.4 and 3.3.2 below.

¹³² See, generally ch 5.

¹³³ J Kortmann, *Altruism and Private Law: Liability for Nonfeasance and Negotiorum Gestio* (Oxford, Oxford University Press, 2005) 93.

moral obligation)¹³⁴. Nevertheless, he also accepts that ‘the “undermining effect” does not occur with regard to those who would not intervene in a no-rewards system’.¹³⁵ If the fears of a future shortage of informal care prove well-founded, it could be that society needs to target precisely those individuals.

The mere fact that private support for carers is necessary or desirable from the carer’s perspective does not mean, however, that it should occur. An important criticism of the suggestion that a care recipient should be expected to provide in some way for a carer is that, quite apart from any *moral* duty that may be owed by the care recipient,¹³⁶ someone who voluntarily assumes caring obligations towards a care recipient cannot and should not expect payment after the event. The absence of an enforceable contract between carer and care recipient could suggest that the care was provided gratuitously and effectively intended as a gift.¹³⁷ This raises similar issues to the idea that voluntarily-rendered services cannot necessarily constitute a form of unjust enrichment, as well as the debate about concepts such as voluntariness, free acceptance and risk-taking in that field.¹³⁸

However, it is questionable to assume that the decision to care for another person is voluntary. Fineman highlights the tendency to ‘ignore the fact that choice occurs within the constraints of social conditions, including history and tradition’.¹³⁹ While she makes her argument in the course of a discussion on the allocation of childcare responsibilities within families, it could also apply to care more generally.¹⁴⁰ There must surely be cases where a carer is effectively placed under a ‘moral compulsion’ to provide care.¹⁴¹

Conversely, the care recipient may herself have helped to foster an expectation of a remedy, and she may also have the means to provide it. Indeed, the significance of the perceived unconscionability of the care recipient’s conduct towards the carer pervades this book.¹⁴²

Finally, if it is necessary to remunerate carers to encourage caring, an argument considered above, it could equally be seen as unjust not to facilitate a remedy for those who were motivated purely by altruism (defined

¹³⁴ *ibid* 94.

¹³⁵ *ibid* 94.

¹³⁶ See, eg *ibid* 84.

¹³⁷ See, eg the notion of ‘donative intent’ present in the Canadian Law of unjust enrichment, considered in section 4.5 below.

¹³⁸ These arguments are considered in Ch 4.

¹³⁹ Fineman, *The Autonomy Myth: A Theory of Dependency* (n 39) 41.

¹⁴⁰ See, eg H Arksey and C Glendinning, ‘Choice in the Context of Informal Care-Giving’ (2007) 15 *Health and Social Care in the Community* 165.

¹⁴¹ See, eg Kortmann, *Altruism and Private Law: Liability for Nonfeasance and Negotiorum Gestio* (n 133) 95–98.

¹⁴² See section 1.3 below.

as being ‘opposed to egoism or selfishness’¹⁴³). The adjustment of private property rights is inevitably controversial at least while both parties are alive. On the other hand, a compensation principle has recently been developed by the English judiciary in the context of financial relief on divorce, in order to recompense for the disadvantages suffered by spouses who care for children or make other sacrifices.¹⁴⁴ Moreover, the difficulties of requesting or expecting *inter vivos* payment in a domestic context involving vulnerable individuals might at least justify retrospective payment out of an estate, particularly since testamentary freedom is already curtailed on other bases.¹⁴⁵ The specific arguments relating to a number of private law mechanisms are considered in the body of the book, although it is helpful to offer some general conclusions on the utility of private law.

1.2.3.4 *Evaluation of Private Law Arguments in General*

Although Oldham does not develop the details of her ‘successional priority’ proposal, part of the discussion in this book does so even without that specific aim. For the moment, the important point is that a private law solution to the problem of support for carers may sometimes be necessary even if state support is considered normatively desirable. Moreover, in some circumstances an expectation of remuneration is a reasonable one, and the idea that a care recipient should meet that expectation could also be reasonable depending on the available resources.

The resource-based qualification to the legitimacy of a private law remedy is important, not least because of the claims of non-caring dependants and others on the care recipient’s property.¹⁴⁶ Karen Rowlingson and Stephen McKay suggest that the increase in home ownership makes it more likely that people will inherit something when an older relative dies,¹⁴⁷ but the cost of institutional or other formal care may militate against this trend.¹⁴⁸ In broad contrast to health care provided under the National Health Service, many care recipients have to pay for formal social care on a means-tested basis.¹⁴⁹ Local authorities are placed under a duty to recover payments

¹⁴³ *Oxford English Dictionary Online*, ‘Altruism, n’ (Oxford, Oxford University Press, 2012).

¹⁴⁴ See especially *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.

¹⁴⁵ See further section 5.2 below.

¹⁴⁶ See, eg sections 3.5.5 and 5.2.2 below.

¹⁴⁷ K Rowlingson and S McKay, ‘Attitudes to Inheritance in Britain’ (Bristol, Joseph Rowntree Foundation, The Policy Press, 2005) 6. Wells, ‘Testamentary Promises: A New Approach’ (n 129) 35–36 suggests that the same phenomenon could lead to an increase in disputes regarding testamentary promises. For a general discussion of home ownership and inheritance, see Fox O’Mahony, *Home Equity and Ageing Owners: Between Risk and Regulation* (n 112) 138–46.

¹⁴⁸ See, eg Fox O’Mahony, *Home Equity and Ageing Owners: Between Risk and Regulation* (n 112) 32–37.

¹⁴⁹ The Dilnot Commission reported that those with assets worth over £23,250 must fund their own care and receive no financial state support in order to do so. The relevant assets can include a home if no dependant is living in it: Commission on Funding of Care and

covering residential care in certain circumstances,¹⁵⁰ and they also have a power to charge for non-residential services including personal care under the Health and Social Services and Social Security Adjudications Act 1983.¹⁵¹ The Dilnot Commission recommended that the maximum lifetime contribution towards care expected of any one individual should be capped at £35,000, and that ‘the the asset threshold for those in residential care beyond which no means-tested help is given should increase’.¹⁵² Nevertheless, under their proposed system people would be primarily responsible for their own care costs, with the state providing ‘social insurance’ subject to a significant ‘excess’.¹⁵³ Any liability to pay for formal care, whether the liability crystallises before or after death, could have a significant impact on the availability of property with which to remunerate the informal carer.¹⁵⁴ Moreover, some would doubtless argue that it is futile for the state to limit the financial liability of a care recipient in respect of formal care only for private law to impose additional liability towards informal carers.

It is beyond the scope of the book to enter into detailed arguments about whether informal carers or indeed more formal care should be given greater state recognition in the context of a welfare state. Such questions relate more to social policy than law. Something of an analogy could be drawn with the Law Commission’s Report on adult social care law, in which it was emphasised that: ‘it is Government that must make political judgements about spending priorities and rights and responsibilities.’¹⁵⁵

Support, *Fairer Care Funding* (n 4) 11. See, e.g. National Assistance (Assessment of Resources) Regulations, SI 1992/2977. *cf* the outgoing Labour Government’s proposed ‘National Care Service’ which would have been free at the point of delivery: HM Government, *Building the National Care Service* (n 4). The current government has signalled an intention to ‘break down barriers between health and social care funding to incentivise preventative action’: Department of Health, *A Vision for Adult Social Care: Capable Communities and Active Citizens* (n 90) 6. See also Department of Health, *Caring for our Future: Reforming Care and Support* (n 68) 57–61.

¹⁵⁰ National Assistance Act 1948, s 22.

¹⁵¹ Health and Social Services and Social Security Adjudications Act 1983, Part VII. See, e.g. *R v Somerset County Council, ex p Harcombe* (1997) 96 LGR 444 (QB). This system would have been altered by the Personal Care at Home Act 2010, through which the previous Government could have required local authorities to provide personal care in the home free of charge for an indefinite period in certain circumstances. The current coalition government has announced that it does not intend to commence the relevant provisions: Department of Health, ‘Coalition Document sets out Positive Direction for Health and Social Care’ (20 May 2010) www.dh.gov.uk/en/MediaCentre/Pressreleases/DH_116236.

¹⁵² Commission on Funding of Care and Support, *Fairer Care Funding* (n 4) 5. *cf* Department of Health, *Caring for our Future: Progress Report on Funding Reform* (n 106).

¹⁵³ *ibid* 20.

¹⁵⁴ The property at issue in *Campbell v Griffin* [2001] EWCA Civ 990, [2001] WTLR 981, an estoppel case discussed in ch 2, was subject to a statutory charge imposed under s 22 of the 1983 Act. The Government has committed to the universal availability of ‘deferred payment’, so that from April 2015 ‘[n]o one will have to sell their home in their own (or spouse’s) lifetime to pay for residential care’: Department of Health, *Caring for our Future: Progress Report on Funding Reform* (n 106) 17.

¹⁵⁵ Law Commission, *Adult Social Care* (n 29) [1.12].

Conversely, from a pragmatic perspective, remedies are in fact being awarded (and denied) to carers in private law cases both in England and Wales and in the Commonwealth and such cases are worthy of analysis. Even if private law is not a comprehensive solution, a detailed consideration of its utility as a means of support for the informal carer is therefore justifiable.

1.3 QUESTIONS TO BE ADDRESSED IN THE BOOK

This section begins by outlining some scenarios involving carers and care recipients that form the basis of the book. It then describes the key questions that the book seeks to answer, which cut across various legal categories. Section 1.4 then outlines those areas of law with which the book is concerned.

1.3.1 Core Scenarios with which the Book is Concerned

It is hoped that a general description of the main scenarios with which this book is concerned will help to clarify the analysis that follows. These two main scenarios (along with one secondary scenario), and specifically the differences between them, are a recurring theme in the book, although the facts of each scenario are expanded upon or modified as necessary in the course of the discussion. All three are focused on the relationship between the carer and the care recipient, and not on the potential involvement of third parties. The same can generally be said for the book as a whole. The question whether, for example, an adult child of an elderly care recipient owes an obligation to provide for a carer is nevertheless an interesting one,¹⁵⁶ and it could be argued that the offspring has benefited from the care in a similar way to the care recipient.¹⁵⁷ The argument is weakened, however, by the absence of a legal duty to care or provide for one's elderly parents in England and Wales and other jurisdictions.¹⁵⁸

The first core scenario with which this book is concerned is one in which a care recipient is provided with care in her own home by a friend or relative in the absence of an enforceable contract covering the care. The care recipient indicates in some way that the carer will receive some property or other benefit in return for his efforts, often on the death

¹⁵⁶ See, eg Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown. A Consultation Paper* (Law Com CP No 179, 2006) 212–13.

¹⁵⁷ In *Rubin v Gendemann* [2012] ABCA 38, the claimant cited care services to the defendant's mother as an aspect of her unjust enrichment claim. No such care was found to have taken place on the facts.

¹⁵⁸ See, eg section 1.2.3.3 above.

of the care recipient, and for some reason the relevant benefit fails to materialise.¹⁵⁹

The second scenario is similar to the first, except that no indication of a benefit for the carer is made. Rather, the care recipient simply accepts the care provided and again it could be said that insufficient remuneration materialises. Of course, the notion of 'sufficient' remuneration raises difficulties where a care recipient provides *some inter vivos* or testamentary benefit to her carer, not least since it has been said that even the idea of contractual consideration 'precludes any inquiry as to adequacy'.¹⁶⁰ This point is discussed throughout the book.¹⁶¹

Although the distinction between these scenarios is not easy to draw,¹⁶² much of the book is concerned with the extent to which there is a factual, legal or normative difference between them. Section 1.3.2 expands upon the importance of these scenarios to the nature of the book, introducing the complementary concepts of unconscionability of dealing and outcome.

A third relevant scenario involves a situation where a benefit (promised or not) is in fact transferred by a grateful care recipient to her carer but the transfer is later challenged by the care recipient or (more likely) her estate. This book is generally concerned with a converse question whether a carer should receive a benefit in spite of the fact that none was forthcoming rather than whether a benefit should be retained by the carer. Undue influence is nevertheless discussed in the last substantive chapter of the book as an example of the law's approach where a benefit has been transferred.

1.3.2 Unconscionability of Dealing and Outcome

The main question to be addressed in this book is whether private law remedies for carers do, can and should, address unconscionability of dealing or unconscionability of outcome. This distinction has been identified by Kevin Gray and Susan Francis Gray in the particular context of proprietary estoppel and the constructive trust.¹⁶³ In this book, it is used more generally and in a modified form.

¹⁵⁹ For a wide-ranging discussion of legal approaches to testamentary promises, see Wells, 'Testamentary Promises: A New Approach' (n 129). For an historical analysis of a body of New Jersey case law concerning promises made in return for care, see H Hartog, *Someday All This will be Yours: A History of Inheritance and Old Age* (Cambridge, Massachusetts, Harvard University Press, 2012).

¹⁶⁰ *Midland Bank Trust Co Ltd v Green (No 1)*, [1981] AC 513 (HL) 531 (Lord Wilberforce).

¹⁶¹ See, eg sections 2.2.4.1, 2.3.4.1, 2.3.4.3, 3.4.3, 3.5.4, 5.4.9.3 and 5.4.10 below.

¹⁶² See, eg section 2.2.2.5 below.

¹⁶³ K Gray and SF Gray, *Elements of Land Law*, 5th edn (Oxford, Oxford University Press, 2009) [9.2.86]–[9.2.87].

A focus on unconscionability of dealing could provide a remedy only where the care recipient made a promise or indication that the carer would receive a benefit, and the carer provides the service on that basis before he is disappointed. Such an approach, while controversial and difficult in itself, generally circumvents only requirements relating to matters such as certainty and formalities.

By contrast, a desire to correct a perceived unconscionable outcome could justify a remedy on the basis that a carer simply deserves to be rewarded because of the service he has provided, notwithstanding the fact that no promise was ever made to him. An approach based on unconscionability of outcome could involve a much more fundamental intrusion into the property rights or the testamentary freedom of the care recipient.¹⁶⁴ In the context of the constructive trust, Gray has pointed out that an 'unconscionable outcome' approach involves the imposition of a trust 'wherever the end result of parties' mutual dealings is to leave them with economic or proprietary allocations considered unacceptable to the conscience of equity'.¹⁶⁵ In spite of the reference to 'dealings' in the quoted passage, it is clear that the focus of intervention is not on those dealings but on the end result produced by them.

It must be pointed out that the concern of this book is limited to neither the imposition of a constructive trust nor the triggering of *equity's* conscience as such. Instead, those aspects of the book concerning 'unconscionability of outcome' address the circumstances in which it is possible or appropriate for the law in general to intervene even in the absence of a promise or indication. For the purposes of this book, moreover, even addressing unconscionability of outcome encompasses consideration of the parties' 'dealings' in a broad sense, since the trigger for legal intervention in the scenarios under discussion is care provided by one party for the other.

It could be argued that unconscionability of outcome does not truly involve unconscionability if that is understood to imply some form of wrongdoing. This claim could be made on the basis that the only thing the care recipient has done 'wrong' is to accept the care without paying for it: she has not made any sort of promise or indication that she has later repudiated in words or actions.¹⁶⁶

Conversely, there is some doubt over whether even 'unconscionability of dealing' involves wrongdoing. In the context of proprietary estoppel, for example, presented in this book as a prime example of 'unconsciona-

¹⁶⁴ See Wells, 'Testamentary Promises: A New Approach' (n 129) 319 for some arguments in favour of limiting provision for carers to the enforcement of promises.

¹⁶⁵ K Gray, 'Property in Common Law Systems' in AJ Van der Walt and GE Van Maanen (eds), *Property Law on the Threshold of the 21st Century* (Antwerp, MAKLU, 1996) 259–60.

¹⁶⁶ An analogy could be drawn with Birks' argument on 'wrongdoing' in the context of undue influence, discussed at 174 and section 7.3.3 below.

bility of dealing', Lord Browne-Wilkinson cast doubt on the need to demonstrate 'unconscionable conduct' in *Lim Teng Huan v Ang Swee Chuan*.¹⁶⁷ Indeed, in some estoppel cases an attempt to make a testamentary gift has failed for reasons outside the promisor's control.¹⁶⁸

In any case, the unconscionability to which this book refers is not intended in any technical sense. Indeed, Hilary Delany and Desmond Ryan highlight the dangers involved in using 'unconscionability' as 'a vehicle for arriving at a desired result' where it has little to do with the applicable principles.¹⁶⁹ This, they argue, 'ought to be avoided if the principle is not to be irreparably damaged on the grounds of growing concerns about legitimacy and doctrinal transparency'.¹⁷⁰ Except in relation to proprietary estoppel,¹⁷¹ where it is at least arguable that unconscionability retains a substantive role,¹⁷² the word 'unconscionable' is generally used in this book simply to denote significant normative undesirability.

The distinction between these two conceptions of unconscionability will be taken to correspond broadly with that between the first two scenarios introduced in section 1.3.1 above, and is a recurring theme throughout the book.

The third scenario put forward in section 1.3.1, where a carer does receive a benefit from the care recipient but is challenged for some reason after the event, does not neatly address unconscionability either of dealing or outcome as outlined in this section. The dealings of the parties are, of course, being observed, but unlike in the other two scenarios it is the carer's dealings, if any, that are really the subject of complaint. It is a hotly debated question¹⁷³ whether undue influence, the mechanism through which transferred benefits are discussed in this book, involves actual wrongdoing or simply wrongdoing in the sense that, in Peter Birks' words: 'it is unconscientious to retain what ought to be given back.'¹⁷⁴

Some of the areas of law outlined in section 1.4 have the potential to address both types of unconscionability. A degree of imprecision surrounding the meanings of unconscionability of dealing and outcome is inevitable. It is hoped that these are clarified to an extent in the course of

¹⁶⁷ *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113 (PC) 117.

¹⁶⁸ See, eg *Campbell v Griffin* (n 154), discussed at section 2.2.3.2 below. Conversely, dishonourable conduct by a defendant cannot necessarily be equated with unconscionability for the purposes of an estoppel claim: D Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] *Cambridge Law Journal* 537, 541–42.

¹⁶⁹ H Delany and D Ryan, 'Unconscionability: A Unifying Theme in Equity?' [2008] *Conveyancer and Property Lawyer* 401, 433.

¹⁷⁰ *ibid* 433.

¹⁷¹ The doctrine is addressed in ch 2.

¹⁷² See section 2.2.4.3 below.

¹⁷³ See section 7.3.3 below.

¹⁷⁴ P Birks, 'Undue influence as Wrongful Exploitation' (2004) 120 *Law Quarterly Review* 34, 37. See, eg *Hammond v Osborn* [2002] EWCA Civ 885, [2002] WTLR 1125 [31] (Sir Martin Nourse).

discussing particular mechanisms, but a firm conclusion on which form of unconscionability is being addressed is not always possible.

1.3.3 The Purpose, Nature and Measure of Relief

Another pertinent question, to which reference is made throughout the book, is the appropriate remedy that should be awarded to a carer who succeeds in a private law claim. There are many possible measures and bases of relief, as demonstrated in the range of claim categories that are considered in the course of the book. Indeed, there are difficulties even in defining the process that is occurring when a carer is granted a private law remedy, that is, in deciding whether he is being ‘compensated’, ‘rewarded’ or ‘remunerated’.¹⁷⁵ These words are inherently bound up with the measure of relief and it would be inappropriate to express a concluded view on terminology here. It could be that ‘compensation’ focuses more on the loss or detriment suffered by the carer as a result of taking on caring responsibilities, while it is arguable that the true value of the services performed by the carer as a benefit conferred on the care recipient is recognised only if we are prepared to speak of ‘remuneration’ or ‘reward’. That said, the use of terminology as to the measure of relief is fluid even amongst members of the judiciary. In the Canadian case of *Gould v Royal Trust Corp of Canada*, Pearlman J described a claim by a carer as one for ‘compensation for unjust enrichment’ in respect of the services she had provided.¹⁷⁶

The remedy given to a carer could, for example, satisfy any expectation generated by a promise, as occurs in some proprietary estoppel and testamentary promise cases. It could simply compensate the carer for loss incurred in reliance on a promise, which is deemed appropriate in other estoppel cases. A further possibility is for the remedy to be based on the carer’s future need for maintenance, which is the approach undertaken in most family provision cases. Such need might be said to be the strongest justification for providing a remedy to a carer in the first place, but also to devalue his care.¹⁷⁷ Finally, the remedy could provide the carer with the reasonable value of the services performed, and thus be based upon the principles governing the award of a quantum meruit in the context of unjust enrichment.

The amount of discretion conferred upon the court when deciding upon a remedy could also vary. The book attempts to draw a conclusion on which of these possibilities is most suitable, or whether any of them is

¹⁷⁵ See Kortmann, *Altruism and Private Law: Liability for Nonfeasance and Negotiorum Gestio* (n 133) 81–83 for a discussion of this issue.

¹⁷⁶ *Gould v Royal Trust Corp of Canada* [2009] BCSC 1528 [159].

¹⁷⁷ See further section 5.4.11 below.

suitable at all. It also analyses the extent of a reward that the carer can retain when one has been transferred by the care recipient but is the subject of a challenge on grounds of undue influence.

1.4 SUBJECT MATTER OF THE BOOK

This section outlines the categories of private law (broadly conceived) that form the substance of the discussion. As noted in section 1.1, a comparative approach will be adopted. It should be emphasised that this book does not attempt to provide a comprehensive comparative account of any given area of law. Rather, the focus is upon the English 'law of carers' and relevant comparisons from the Commonwealth are made where they offer interesting or useful alternatives.

Because contract law (alongside part performance) is eliminated at the outset, section 1.4.1 discusses it in more detail than is used to discuss other private law mechanisms in the following subsections.

1.4.1 The Limitations of Contract Law and the Doctrine of Part Performance

In Roman Law, the device of *negotiorum gestio* (a kind of quasi-contract) enabled a person to claim expenses for reasonably acting in the interests of another, even in the absence of an express arrangement.¹⁷⁸ By contrast, English private law historically contained no general mechanism to provide for such a claimant in the absence of a contract, a position that Reinhard Zimmermann attributes to 'the traditional individualism and the reserved mentality of the English people'.¹⁷⁹ Duncan Sheehan argues against this traditional position and claims that English law does recognise a form of *negotiorum gestio*,¹⁸⁰ while Kortmann argues that no general principle of relief yet exists even though there are a number of exceptions to the general rule.¹⁸¹

In any event, the difficulty with the general position as traditionally described is that the context in which informal care is provided may not

¹⁷⁸ This institution, rooted primarily in altruistic ideals, has been incorporated into several European Civil Codes, notably the German *Bürgerliches Gesetzbuch*. See, eg R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, Clarendon Press, 1996), ch 14; Kortmann, *Altruism and Private Law: Liability for Nonfeasance and Negotiorum Gestio* (n 133) 106–10.

¹⁷⁹ Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* ibid 435.

¹⁸⁰ D Sheehan, 'Negotiorum Gestio: A Civilian Concept in the Common Law?' [2006] *International and Comparative Law Quarterly* 253.

¹⁸¹ Kortmann, *Altruism and Private Law: Liability for Nonfeasance and Negotiorum Gestio* (n 133) 164–65.

permit sufficient certainty or intention to create legal relations to generate an enforceable contract.¹⁸² For that reason, and although there is research relating to 'Private Care Agreements' between relatives and similar arrangements,¹⁸³ scenarios where there is a contract and the 'carer' is effectively a 'care worker' are outside the scope of the book. Rather, the focus of the inquiry is provided by selected areas of private law (broadly conceived) that could provide a remedy even where there is no contract. That said, it can be difficult to assess the evidence in order to establish whether or not there was in fact a contractual relationship. In *Murphy v Rayner*, for example, the judge found that a carer had deliberately misled the court by claiming that she had not been paid a wage for her work 'to try to bolster her case as to her expectation of an interest in the [p]roperty' controlled by the care recipient,¹⁸⁴ which she pursued unsuccessfully via proprietary estoppel.

Maddison v Alderson was an early attempt by an unpaid 'housekeeper' to claim an interest in the property of the person for whom she worked.¹⁸⁵ The claimant used a contractual analysis in conjunction with the equitable doctrine of part performance. The jury found that she had been induced to work unpaid by an oral promise that she would be given a life interest in her 'master's' house, and he had died intestate. The House of Lords accepted that the doctrine of part performance could in principle have been invoked to transfer the interest to her, thereby circumventing the formality requirements imposed by what was then the Statute of Frauds 1677. Nevertheless, her claim failed on the basis that the work she performed was not 'unequivocally' done with reference to a sufficiently certain contractual arrangement.¹⁸⁶ In other words, the doctrine of part performance could operate only to enforce a contract that would have been valid but for the formality requirements relating to land, and only where there was a strong connection between that contract and the acts of part performance undertaken.

¹⁸² See, eg *Dable v Peisley* [2009] NSWSC 772, but cf, eg *Parker v Clarke* [1960] 1 WLR 286 (Assizes); *Schaefer v Schuhmann* [1972] AC 572 (PC); *Scheps v Cobb, Estate of Dagobert Scheps (decd)* [2005] NSWSC 455. See also C Barton, 'Contract – A Justifiable Taboo?' in Probert (ed), *Family Life and the Law: Under One Roof* (n 85) for discussion of a contractual approach to family life.

¹⁸³ See, eg MI Hall, 'The Care Agreement: Transfer of Property in Exchange for the Promise of Care and Support' (2002) 21 *Estates, Trusts and Pensions Journal* 209; J Long, 'Caring by Contract: Care Arrangements for Older People' in K Boele-Woelki, J Miles and JM Scherpe (eds), *The Future of Family Property in Europe: Proceedings of the 4th Conference of the Commission on European Family Law* (Cambridge, Intersentia, 2011). See Wells, 'Testamentary Promises: A New Approach' (n 129) ch 5 for a full analysis of the enforcement of testamentary promises via the law of contract.

¹⁸⁴ *Murphy v Rayner* [2011] EWHC 1 (Ch) [69] (Deputy Judge Jeremy Cousins QC).

¹⁸⁵ *Maddison v Alderson* (1883) 8 App Cas 467 (HL). See SJ Burridge, 'A Metric Measurement of the Chancellor's Foot' [1982] *Cambridge Law Journal* 290 for a (now dated) discussion of the use of contract law, part performance, proprietary estoppel and constructive trusts in the kind of scenarios considered in this book.

¹⁸⁶ *Maddison v Alderson* *ibid* 477.

Although the requirements for the *connection* with a contract were subsequently relaxed,¹⁸⁷ the doctrine of part performance in relation to contracts concerning land was abolished prospectively in England and Wales in 1989¹⁸⁸ and is now of historical relevance only within this jurisdiction. Even if the doctrine remained active, however, it would still be difficult for many informal carers to point to a sufficiently certain arrangement.

The difficulty is illustrated by the first instance decision in *Jennings v Rice*,¹⁸⁹ a proprietary estoppel case involving care that produced an important Court of Appeal decision considered at length in chapter two. Thompson points out that it would have been open to the claimant to make submissions on the doctrine of part performance in addition to estoppel if some of the dealings between the parties occurred before the doctrine was abolished.¹⁹⁰ In the event, however, Judge Weeks QC dismissed the claimant's contractual claim on the grounds of uncertainty in relation to both the offer and the consideration, as well as a lack of intention to create legal relations.

The same problem relating to the requirements of a contract occurs in Australia,¹⁹¹ where the doctrine of part performance continues to operate.¹⁹² Part performance is not, therefore, given further detailed consideration in the book, and claims involving facts to which the doctrine was previously applicable in England would now be argued under the doctrine of proprietary estoppel.

1.4.2 Property Law

There have been a number of recent cases in England in which a carer has gained a remedy using the doctrine of proprietary estoppel, which can be invoked as the basis of a claim as well as a defence. In cases involving care, the doctrine operates on the basis of unconscionability in the face of a representation by the care recipient to the effect that the carer will receive an interest in her property. Where this is coupled with detrimental reliance on the part of the carer, he may be given a remedy. The appropriate remedy may be the value of the promised benefit or it may be something more modest.

¹⁸⁷ *Steadman v Steadman* [1976] AC 536 (HL).

¹⁸⁸ Law of Property (Miscellaneous Provisions) Act 1989, s 2, which came into force on 27 September 1989; Law of Property (Miscellaneous Provisions) Act 1989, s 5(3)–(4)(a).

¹⁸⁹ *Jennings v Rice* [2001] WTLR 871 (Ch).

¹⁹⁰ MP Thompson, 'The Flexibility of Estoppel' [2003] *Conveyancer and Property Lawyer* 225, 227.

¹⁹¹ See, eg *Gors v Henderson* [1998] WASC 273.

¹⁹² For a full account, see L Willmott, S Christensen, D Butler and B Dixon, *Contract Law*, 3rd edn (Melbourne, Oxford University Press, 2009) [11.335]–[11.395]. The Singapore Court of Appeal has confirmed that the doctrine continues to operate there: *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338.

A mechanism addressing 'unconscionability of outcome' due to the representation requirement, proprietary estoppel is considered in chapter two. Another major means of informally creating property rights in the domestic context,¹⁹³ the common intention constructive trust, is also considered in that chapter.

1.4.3 Statutory Enforcement of Testamentary Promises

In New Zealand, uniquely, non-contractual testamentary promises made broadly in return for services are statutorily enforceable as a result of the Law Reform (Testamentary Promises) Act 1949. The legislation, which is often invoked by carers, is considered in chapter three. The court has a wide discretion in determining the appropriate award. Reforms proposed by the New Zealand Law Commission, which could provide an unjust enrichment-style remedy even in the absence of a promise if implemented, are also evaluated.

1.4.4 Unjust Enrichment

A carer may seek to argue that a care recipient has been unjustly enriched by the services he provided, and claim a remedy on that basis. Chapter four considers the limited potential for success of such claims in English law as it currently stands, alongside the more developed position in Canada.

1.4.5 Family Provision

The book also considers whether a remedy can and should be supplied for carers out of a care recipient's estate using a family provision statute. Chapter five concerns the eligibility of a 'pure' carer and the relevance of care provided in the context of a family provision claim both where there has been a promise of provision and where there has been no such prom-

¹⁹³ This follows the preference of the majority in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 for a constructive trust analysis in the domestic context, as compared to the resulting trust founded on a contribution to the purchase price of the relevant property. Indeed, in the subsequent Supreme Court decision in *Jones v Kernott* it was said that: 'The time has come to make it clear . . . that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares': [2011] UKSC 53, [2011] 3 WLR 1121 [25] (Lord Walker and Lady Hale).

ise. The jurisdictions that receive most attention in that chapter are England and Wales, where there is no specific recognition of carers, and New South Wales, where carers are specifically provided for by the 'close personal relationship' category of claimant.

1.4.6 Provision on Relationship Breakdown

Much of the book concerns differences in the judicial treatment between, on the one hand, 'pure' carers and, on the other, unmarried cohabitants in a sexual relationship. The reason for this is that neither has a formal relationship with the defendant (or the person whose estate is the subject of a claim), and it can be difficult to distinguish between the two categories.

Nevertheless, 'pure' carers were expressly excluded from the Law Commission's proposed statutory scheme for the *inter vivos* redistribution of unmarried cohabitants' property on relationship breakdown in England and Wales. The reasons for this approach are considered in chapter six, and it is contrasted with that adopted in other jurisdictions, in particular Australia.

1.4.7 Undue Influence

Undue influence is distinct from all the other private law mechanisms considered in this book. It is a method by which an *inter vivos* 'remedy' already provided to a carer by the care recipient can subsequently be challenged on the basis that there is a relationship of influence between carer and care recipient and that the property transfer is inexplicable.

1.5 SUMMARY

This introductory chapter has sought to provide background information on carers in social policy, to justify the analysis of a carer's legal position in the context of private law, and to outline the structure and content of the remainder of the book. The substantive analysis is undertaken in the following chapters. Chapters two and three discuss scenarios where there is a promise or indication made by the care recipient in the context of property law and testamentary promise legislation, before chapter four considers potential claims in unjust enrichment. Statutory family provision on death and *inter vivos* provision for carers are addressed in chapters five and six respectively, and chapter seven analyses the potential for a benefit in fact provided to a carer to be challenged. The book is concluded in chapter eight.