THE FOUNDATIONS OF RESTITUTION FOR WRONGS

Francesco Giglio

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The Foundations of Restitution for Wrongs

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Preface

At this point, shortly before sending this monograph to the publisher, what surprises me most is not the fact that it has taken me the best part of eight years to complete it. Rather, I am baffled by the simple recognition that my manuscript would happily take another eight years to refine. I console myself with the twin thoughts that no book is perfect and that I am a slow thinker. In addition, I had to familiarise myself with very many different areas of law in various legal systems. But many friends and colleagues bear a share of responsibility in having compelled me into such a long period of reflection. I cannot believe how lucky I was, having so many people who read my ideas and demolished them, forcing me to start again. My small revenge is to involve them in my project by naming here at least some of them.

The late Professor Peter Birks must be the first. I must confess that, when I met him for the first time at All Souls College, I had just arrived in England from Germany and was not aware that I was speaking to one of the great masters of the twentieth century. Thus, I started talking of myself and of my great talent. As I had just finished my previous project in Germany on the law of unjust enrichment, I told him what that area of law was about. I am even more grateful to him for not having sent that arrogant Italian out of his rooms immediately than for having taken me as a doctoral student at Oxford University. More than anything, the hours spent in his Roman law seminars will always be in my memory.

At that time, Peter had two DPhil students working on similar projects, James Edelman and myself. Jamie was enviably much quicker than I in producing his doctorate. Even more annoyingly, his work opened up issues which I simply could not ignore. Although I disagree with most of what Jamie states, his monograph on *Gain-Based Damages* is a milestone which has compelled everyone else to re-think the whole subject of restitution for wrongs. Jamie is responsible for at least two years of the eight which have been necessary to complete this book. The forcefulness of his arguments accounts for the differences between my monograph and the doctoral thesis upon which it is based. In the best Birksian tradition, I changed my views on the nature of restitution for wrongs and developed a new approach which appears to me to be much more coherent with the principle of corrective justice.

I am terribly grateful to my friend and colleague John Murphy. He is the only person who has managed to read the whole manuscript – and not only once, but many times. His sometimes witty, but always sharp and useful comments have played a major role in the fine-tuning of my ideas and my prose. His contribution has been essential.

I have received much help from my DPhil examiners, Geoffrey Samuels and Kit Barker. After more than two hours of *viva voce* examination in December 2003, in which they gave me a really hard time, we parted good friends. Kit provided moral and factual support in the years after the examination, for which I shall always be indebted to him. Reading some of Geoffrey's work published in recent years, I have realised how our views diverge. Still, his examination was extremely fair. He encouraged me to develop new ideas and helped me in obtaining funding for my research.

Various other University of Manchester colleagues – both past and present – must also be mentioned: Robert Crier, Neil Duxbury, Andrew Griffiths, Joseph Jaconelli, Andrew McGee and the always-helpful Law Librarian Sue Bate. The School of Law of The University of Manchester and, in particular, its Head of Department, Andrew Sanders, deserve special mention. Andrew has trusted me and it is because of the valuable research time which my School granted to me that the book is ready after 'only' eight years.

My research has seen me wandering around many European universities, the libraries and institutes of which have offered me excellent refuge thanks to kind colleagues. Let me mention Guido Alpa at the Università degli Studi di Genova (now at the University La Sapienza in Rome), Helmut Grothe and Cosima Möller at the Freie Universität Berlin, and the Universität Osnabrück. In Osnabrück, Christian von Bar's European Legal Studies Institute has been one of my main ports of call. Undoubtedly, I would have had to make many more visits abroad if I had not had the privilege of researching at the Bodleian Library of the University of Oxford.

My theoretical position on restitution for wrongs as corrective justice owes much to Dennis Klimchuk. Although he does not always agree with me, his comments have been crucial in the shaping of my views. I am extremely thankful to him and many members of the School of Law of the University of Western Ontario.

My final thanks must go to my publisher, Richard Hart, who has believed in my project, placing science before profit. I hope to prove him wrong: science and profit can go together.

This book is dedicated to my wife, Nicola. She has brought love and *Vernunft* in my life and has given me a solid basis on which to conduct research and, more importantly, to enjoy the research-free time.

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Table of Cases

English and American Cases

German Cases

Italian Cases

Contents

Introduction

'THE FOUNDATIONS OF Restitution for Wrongs' is a difficult choice as a title. It might sound pretentious and could pave the way to a useless broad-spectrum analysis. It is possible, if not to avert, to reduce the risk of being pretentious by explaining why this title has been chosen. In recent years, many judicial and academic doctrines have increasingly contributed to illustrate some aspects of restitution for wrongs; yet these efforts tend to concentrate on particular issues and are difficult to reconcile within a general framework. A wide-angle analysis would enable a more coherent approach to restitution for wrongs because it would consider the basic theoretical fabric of this topic. This is what I endeavour to do in the present study. To achieve my goal, I pursue two avenues: legal comparison and legal theory. The former offers the tools for a better understanding of English law through the evaluation of the responses given by other jurisdictions to two central issues: the identification of the party which should keep the wrongful profits and the consistency of restitution for wrongs with the law of obligations. Legal comparison, however, would struggle to explain why a certain allocation of wealth is, or should be, adopted by the legal system. Theoretical analysis is the proper place to deal with this question, which is increasingly attracting the interest of philosophers and theorists.

On the other hand, a detailed analysis of cases and theories would no doubt provide a large quantity of information. But it would jeopardise my aim of setting a general framework. Conversely, a too superficial investigation would deprive the analysis of any valuable content. For this reason, I shall stick to a few guidelines: to identify the structural elements of restitution for wrongs, explain why these damages should be awarded, and distinguish them from other heads of damages which take the benefit of the wrongdoer into consideration. The individuation of research targets is all the more important if one considers that restitution for wrongs can be tackled from many different viewpoints. In *Attorney-General v Blake*,[1] the House of Lords finally recognised that gain-based damages are part of the judicial tools. In the literature, James Edelman's recent monograph has provided a principled analysis of restitutionary damages, while Ernst Weinrib in a seminal article has powerfully opened the discussion on their theoretical basis.

The terms 'restitutionary damages' and 'restitution for wrongs' refer to the legal response which compels the wrongdoer qua wrongdoer to give up to the victim

[1] *A-G v Blake* [2001] 1 AC 268.

the benefit obtained from the perpetration of a wrong. A simple instance will clarify its context of application. Famous actor C employs D as a private secretary. In the employment contract there is an express reference to D's duty to respect her employer's privacy in any form. This notwithstanding, D writes a book on C's private life. The book sells very well and D's profits outstrip C's loss. C brings an action for damages. If the court were to award only compensation, C would not be worse off after the award than he was before the wrongful event took place. Yet, wrongdoer D would be better off, for she could keep the difference between what she has to pay as compensation and the proceeds of the sale of the book. A decision about restitution for wrongs is a decision about which party deserves that difference.

The foundations of this legal institution are multifarious. I do not intend to examine all aspects linked to them. As already intimated, the perspective from which the topic will be investigated is mainly comparative and theoretical. The comparison will cast light on the English concept of restitution for wrongs through an investigation of German and Italian law, but also Roman law. The theoretical analysis will pursue two main tasks. On the one hand, I shall explain how legal philosophy has shaped the matter at issue and how the academic lawyers have sought to accommodate the judicial doctrines in a coherent structure. On the other hand, I shall provide an account of the nature of restitutionary damages based upon corrective justice.

One of the central questions which I shall consider concerns the reason why restitution for wrongs is seen as exceptional or rejected altogether. There are many possible explanations. The identification of all factors which contribute to the mistrust surrounding restitutionary damages would have put my research skills under excessive strain. I have concentrated my efforts on two areas which, in my view, have played a central role: legal history and Aristotelian philosophy. In the search for the appropriate clues, the comparative-theoretical analysis reaches three main conclusions. First, there is no structural incompatibility between the law of damages of the legal systems under comparison and restitution for wrongs. If restitution for wrongs were to be introduced into the legal systems compared it would not conflict with any of their fundamental principles. Secondly, there are at least two reasons accounting for the suspicion with which the courts look at restitutionary damages. The first can be traced to a development of the Roman civil trial which eventually left compensation as the main legal response to all civil wrongs. The second lies in the influence which Aristotelian philosophy has exerted – especially through the Late Scholastics – on legal science. Thirdly, corrective justice does account for restitution for wrongs.

The theory of restitution for wrongs is caught within the larger debate on the role of non-compensatory damages. As this debate focuses primarily on exemplary damages, there is a risk of confusing restitution with punishment to the detriment of a correct understanding of the former. Yet, the temptation of the a fortiori argument, according to which whenever there is room for exemplary damages there is room also for restitutionary damages, must be resisted. Peter