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A GENERAL ASSESSMENT

Submitted by :
MUHAMMAD ADLI
G. 901298

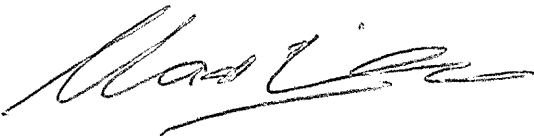
This Dissertation is submitted as a partial fulfilment
of the requirement for the higher degree of
Master of Comparative Laws

KULLIYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
PETALING JAYA
M A L A Y S I A
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**FUNDAMENTAL PRINCIPLES OF QUASI CONTRACT :
A GENERAL ASSESSMENT**

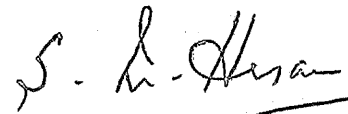
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By,



**MUHAMMAD ADLI
G. 901298
KULLIYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
PETALING JAYA - MALAYSIA**

SUPERVISOR,



**Prof. Dr. Misbahul Hassan
KULLIYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
PETALING JAYA - MALAYSIA**

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Kulliyah of Laws/
Post Graduate School
International Islamic University
Petaling Jaya, Selangor Darul Ehsan,
Malaysia.
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All E.R.	The All England Reports, (from 1936) f
A.L.L1949)	Indian Law Reports, Allahabad Series (from 1949)
A.L.R.	Australian Law Reports
B.C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols 1822 - 1830. 107 - 109 E.R.
Beav.	Beaven's Reports, Rolls Courts, 36 vols. 1856 - 1860
Burr	Burrow's Reports, King Bench, 5 vols 1756 - 1772 97 - 98 E.R.
C.B.	Common Bench Report, 18 vols. 1845 - 1856 171 - 173 E.R.
Ch.	Law Reports, Chanchery Division, since 1890
C.J.	Chief Justice
C.L.J	Cambridge Law Journal
C.L.P	Current Law Problem
C.L.R.	Common Wealth Law Reports.
C.P.	Common Pleas.
D.L.R.	Dominion Law Reports.
Dr.	Doctor (PHD).
Ed.	Edition.

Et. al.	and other people or things.
Ex.	Exchequer Reports (Welsby, Hurlstone and Gurdon, 11 Vols 1847 - 1856. 154 - 156 E.R.
F.M.S.L.R.	Federated Malay States Law Reports.
H & N.	Hurlstone and Norman's Reports, Exchequer 7 Vol. 1856 - 1862
Ibid	in the same book, article, etc. previously mentioned.
K.B.	Law Reports, the King's Bench, (from 1901).
K.B.D.	King's Bench Division 1900 - 1952
L.J. Ex	Law Journal, Exchequer.
Lloyd's Rep	Lloyd's Law Reports, 1968 - Current
L.M.C.L.Q	Law Maritime and Commercial Law Quarterly
L.P.	Lord President.
L.R. Ex	Law Reports, Exchequer Division.
L.T.	Law Times Reports, 1859 - 1947
Ltd.	Limited.
M.L.J.	Malays ian Law Journal.
M.L.R.	Modern Law Report.
N & W	North Western Reports.
No.	Number.
Op. Cit.	In the work already quoted.
Ors.	Others.
P.C.	Privy Council.

p.	page
Q.B.	Law Reports, Queen's Bench, (from 1875 - 1890).
Q.B.D.	Queen's Bench Division.
(S.A.W.)	Sallallahu 'Alaihi Wassalam.
s.	Section.
S.C.R	Canada Supreme Court Reports 1921 - current
S.S.L.R.	Straits Settlements Law Report.
Str.	Strange's Reports, 2 Vols, 1716 -1747
	93 E.R
(S.W.T.)	Subhanahu Wata'ala.
T.L.R.	Times Law Reports.
Term. Rep.	Term Reports (Dunford and East) 8 Vols. 1785 - 1800
v.	Versus.
V.L.R.	Victoria law Report.
Vol	Volume.
W.L.R.	Weekly Law Reports.
W.W.R.	Western Weekly Report (from 1971 - current) Canada

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Sale of Goods Act 1979
State Transport (Coordination) Act 1931
Torts Act 1977
Unsolicited goods and service Act 1971

INTRODUCTION

General Principles of Unjust Enrichment

Restitutionary remedy has always been an indispensable tool of the courts of justice to prevent injustice. The remedy was conceived and developed with the view of preventing a person to be unjustly enriched at the expense of another. Thus, it has become a common practice of courts of equity of various countries to allow recovery in cases of payment under mistake or undue judgment or payment under duress; payment to a minor or other incapacitated person; deliveries made due to mistake; services rendered under defective contract; expenses incurred to some properties of another during the absence of the latter and other cases of solutio indibito and negotiorum gestio.

The principle of unjust enrichment is placed to the forefront of the American Restatement of Restitution. Paragraph 1 states that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other¹. Similar statements of principle had been made by Lord Mansfield in a number of cases² concerning the action for money that has and received. His conclusion was that "the gist of this kind of

1. Published in 1937

2. See e.g. Moses v. Macferlan (1760) 2 Burr. 1005,1012; Sadler V. Enans (1766) 4 Burr. 1984; Jestons v. Brooke (1778) 2 Cowp. 793, 795; cited from Goff and Jones, The Law of Restitution, 3rd ed. (1986) at 13

action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

Palmer³ speaks of that restitution based upon unjust enrichment cuts across many branches of law, including contract, tort and fiduciary relationship. Thus, when one person mistakenly confers a benefit on another, like by paying debt the other owed to a third person, the sole basis of liability is unjust enrichment.

It can be said that the law of restitution on the account of the principle of unjust enrichment is a substantive principle that underlies not only quasi contractual claims but also other related claims which make up the law of restitution

A number of academic writers⁴ have sought to explain quasi contract as a historical phenomenon. According to this widely held interpretation, the primary emphasis is placed on the use of "implied contract" by the judges of the King's Bench during the sixteenth and seventeenth centuries to expand the scope of their jurisdiction. However, a persuasive case has been made by Goff and Jones, that implied contract, as restriction on quasi contract claims, should be jettisoned as "a mean-

3. Palmer, The Law of Restitution, Vol I, (1978) at 2

4. See. Stoljar, The Law of Quasi Contract, at 9-15; Goff and Jones, The law of Restitution, 3rd ed. (1986) at 7-13; Palmer, Law of Restitution (1978), vol. I, at 6-9; Dawson, Unjust Enrichment: A Comparative Analysis (1951), at 10-21.

ingless, irrelevant and misleading anachronism".⁵ Under this view of quasi contract, implied contract is a historical anomaly and should be housed in a museum containing curious legal fictions which played a role in the evolution of law and not elevated into a modern principle underlying quasi-contract.⁶

Meaning and Scope

The phrases unjust enrichment, quasi contract, and the word restitution have the same meaning. They cause of one person gives up to another an enrichment received at his expenses or its value in money⁷. This person is obliged by the ties of "natural justice" and equity to refund the money.⁸.

Goff and Jones⁹ set out three vital elements in unjust enrichment:

1. The defendant has been enriched by the receipt of the benefit;
2. He has been enriched by the plaintiff expense;
3. It would be unjust to allow him to retain that benefit.

5. Goff and Jones, Ibid, at 11

6. English restitution scholars have expressed a similar disdain for theory of implied contract, Goff and Jones, Ibid

7. Birk, Introduction to Law of Restitution, 1985, p. 3

8. Furmston, Cheshire and Fifoot's law of Contract, 10th ed. (1981) at 575

9. Goff and Jones, Op cit, at 13-14

Regarding the question whether a defendant has received a benefit is one which different courts and judges answer in different ways. In recent article ¹⁰ Mr Beatson has properly questioned the tendency of some courts and writers to inflate the concept of benefit (or enrichment) so as to include within the scope services rendered at another's request which did not in fact benefit that person because of contract, under which they were to be rendered, was discharged or terminated or where services were rendered in anticipation of a contract which never materialised. Using fashionable economic analysis, he concludes that enrichment must be equated with exchange value. On this However, according to Lord Diplock, in England still does not have any general doctrine of unjust enrichment¹¹. Professor Birks is not anxious that English law should recognise any such doctrine, fearing that this empty moral aspiration "threatens to undo the effort taken to make 'unjust' look downwards to the cases.¹² It is not surprising that, in the past, common law jurisdictions have thought of the law of restitution as bundle of "specific remedies in particular cases".¹³

Goff and Jones stated that "the case law is now suffi-

10. "Benefit, Reliance and The structure of Unjust Enrichment", (1987) C.L.P. 71

11. Orakpo v. Manson Investments Ltd., (1978) A.C. 95 at 104

12. Birks, Op cit., at 22-25.

13. Orakpo v Manson Investment Ltd. (1978) A.C 95 at 104

ciently mature for the Courts to recognise a generalised right to restitution¹⁴. The principle of unjust enrichment has also been accorded statutory recognition such as "Torts (interference with goods) Act 1977 which imposes liability on a person who is unjustly enriched as a result of enforcement of a double liability in proceedings for wrongful interference with goods"¹⁵. Torts Act 1977 is also buttressed insolvency Act 1986 under which the definition of liabilities includes liability "arising out of an obligation to make restitution".

Liability was fragmented into heads of liability; and this fragmentation cut across the common law and equity. Each head developed a technical set of rules designed to satisfy the volition and non voluntariness elements. These rules became tailored to the nature of the benefit.

As a general rule, quasi contractual action required the claimant to establish his case by relying on one of the following heads:

- (i) mistake,
- (ii) duress,
- (iii) agency of necessity,
- (iv) necessitous intervention by a stranger, or
- (v) Contractually ineffective transactions.

14. Goff and Jones, Op cit. 15

15. J Beatson, Use and Abuse of Unjust Enrichment. (1st ed), 1991, at 2

The discussion in the dissertation is, therefore, focused on the fundamental principles of unjust enrichment as a source of an obligation which has been developed in common law system.

CHAPTER ONE

RULES OF PAYMENT

UNDER MISTAKE