

Book Review

The Laws of Restitution by Robert Stevens
(2023) Oxford University Press, 433 pp
ISBN 9780192885029

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Please cite this book review as:

Mark Leeming, 'Book Review: *The Laws of Restitution* by Robert Stevens'
(2023) 45(4) *Sydney Law Review* 551.



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This is a very unusual book. It is 420 pages of argument, beautifully and clearly laid out on the page, and beautifully and clearly advocated in its text. The footnotes (nearly 1,900 in all) carry none of the argument, and for the most part simply supply citations, letting the text flow without interruption. The book is probably best read two or three chapters at a time, carefully — and the reader who does so will hear Stevens' voice, mostly forceful, at times impassioned, seldom apologetic, and never uncertain. Reading it took me back to the course taught on Friday afternoons by the author and Professors McFarlane and Swadling, which I was fortunate to audit in Michaelmas Term 2022. I learned much from the free-flowing exchanges between the three academics and a large class of very bright BCL and doctoral students, which constantly shifted between analysis of the case, the often divergent approaches of each presenter, and how each differed from the views of Professors Birks and Burrows. 'Peter Birks would have none of this' or 'Andy Burrows would say this' were frequent refrains, and most often it would be Stevens presenting those men's positions, and attempting to do so in their voices (and accents). All three had mastered the difficult craft of keeping the students' minds alert and engaged. It was

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immensely stimulating for me, perhaps even more so than for the students, for I was not required to read the materials or to sit an examination.

The book is, in large measure, a polemic. I mean that in the best possible way. The main argument is that those seeking to unify the ‘law’ of restitution or unjust enrichment have made a great mistake. Instead of unity, there is a miscellany of classes of case, each with its own rules. The title’s plural encapsulates its central thesis.

There is no disguising the book’s ambition. The first page of the first chapter proclaims:

The negative purpose of this work is to ensure that no further books on this topic are written.

... [I]t seeks to show that there is no unified area of law called ‘restitution’ or ‘unjust enrichment’. There are instead (depending upon how you count them) seven or eight different kinds of private law claim, none of which has anything important in common one with another, that have been grouped together by commentators. Few of them have anything very much to do with ‘enrichment’ as that word is used in everyday speech, and what is restituted differs between them.¹

Having identified its negative purpose, the book explains that ‘[t]he positive purpose of this work is to identify and describe the various reasons for “restitution” that any properly constructed system of private law ought to recognise’.² That overlaps with its negative purpose, but confirms an intention, borne out in the ensuing chapters, that in the course of criticising the conventional approach, the principles and themes underlying this area of the law are to be illuminated.

The book’s main purpose is not to present the material, but to attack what has become, at least in England, the dominant academic paradigm, which was created by the very men who both taught, and later taught with, the author. The statement of the book’s negative purpose on page 1 is fittingly preceded by gracious acknowledgements to Birks and Burrows. It must be said that none of this comes as a great surprise, and was foreshadowed by the author’s ‘The Unjust Enrichment Disaster’,³ an article cited in five decisions of the High Court and Court of Appeal of England and Wales and influential in many more. Building upon the exclusion of gains by wrongdoing from coverage in Birks’ *Unjust Enrichment*⁴ and *Goff & Jones on Unjust Enrichment*,⁵ Stevens there contended that there remained ‘still four or five different jigsaw puzzles in one box’.⁶ This work is the book-length treatment of that idea.

The book’s structure, as well as something of its punchy style, may be seen in its table of contents. Each of the 20 chapters bears a single word title: ‘Summary’,

¹ Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 3.

² *Ibid.*

³ Robert Stevens, ‘The Unjust Enrichment Disaster’ (2018) 134 *Law Quarterly Review* 574.

⁴ Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005).

⁵ Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016).

⁶ Stevens (n 3) 574.

‘Foundations’, ‘Performance’, ‘Reversal’, ‘Theory’, ‘Practice’, ‘Conditions’, ‘Contract’, ‘Discharge’, ‘Necessity’, ‘Things’, ‘Equity: General’, ‘Equity: Restitution’, ‘Improvements’, ‘Wrongs’, ‘Profits’, ‘Damages’, ‘Defences’, ‘Illegality’ and ‘Conclusion’. Each chapter has its own structure, and the detailed table of contents is a model of its type, and will be a convenient first port of call for those consulting as opposed to reading the book.

The approach is captured by a passage from the book’s conclusion which combines metaphors popularised by Isaiah Berlin and Charles Darwin:

In law, there is no scope for being a hedgehog concerned with one big idea, or a fox with many. We all of us must be both splitters and lumpers. Each reason [for the classes in which restitution is awarded] must occupy the space it rightly has, neither more nor less.⁷

Lord Rodger once wrote, in the context of identifying a rule for determining a duty of care, that ‘appellate judges should follow the philosopher’s advice to “Seek simplicity, and distrust it”’,⁸ sentiments endorsed in Lord Reed’s foreword. He might also have relied upon Fullagar J’s caution to the same effect that judges should resist ‘the temptation, which is so apt to assail us, to import a meretricious symmetry into the law’.⁹

The book presents a large body of case law. It ‘attempts to straddle what, as a matter of low brute fact, the positive law actually is in different jurisdictions, and the high principles of justice to which they all aspire’.¹⁰ Much like those Friday afternoon seminars, readers are supposed not to be wholly ignorant of the material, although a pithy summary is given of the aspects which bear upon the argument. The prose is sparing, with short, direct, clear sentences with no room to hide ambiguity in subordinate clauses or undefined qualifiers. It recalls that of Orwell or Cormac McCarthy. As Lord Reed’s generous foreword observes, the book is highly readable. There is no shilly-shallying. The reader is left in no doubt as to the author’s position. Decisions of ultimate appellate courts throughout the common law world are described as right or wrong. On the whole, British decisions fare worse than Australian decisions — but that is to be expected given the different attitudes in those jurisdictions to the book’s thesis. Unsurprisingly, Lord Reed’s distancing from the ‘four-stage test’ for liability in *Investment Trust Companies v Revenue and Customs Commissioners* is endorsed;¹¹ the statement that the four questions ‘are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements’¹² is antithetical to a conception that there is a unified, rule-based area of law analogous to the law of contract. However, *Banque Financière de la Cité v Parc (Battersea)*,¹³ *Dextra Bank v Bank of Jamaica*¹⁴ and

⁷ Ibid 417.

⁸ *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, 204 [51].

⁹ *Attorney-General (NSW) v Perpetual Trustee* (1952) 85 CLR 237, 285.

¹⁰ Stevens (n 1) 16.

¹¹ *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275, 295 [41] (‘*Investment Trust Companies*’). Cf *Mann v Paterson Constructions* (2019) 267 CLR 560, 598 [79]–[80], 648–50 [212]–[213].

¹² *Investment Trust Companies* (n 11) 295 [41].

¹³ *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.

¹⁴ *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193.

*Sempra Metals v Inland Revenue Commissioners*¹⁵ are ‘wrongly decided’; more, including *Patel v Mirza*,¹⁶ *Menelaou v Bank of Cyprus*¹⁷ and *Lipkin Gorman v Karpnale*¹⁸ are ‘wrongly reasoned’. My impression is that the majority of the recent decisions of ultimate appellate English courts analysed in this book are regarded as wrongly decided or wrong reasoned or both.

Although most of the decisions considered are English, the book extends to Australian decisions, especially, recent ones. The approach taken by the High Court of Australia in cases of illegality, ‘remorselessly focusing upon the purpose of the statutory prohibition concerned’,¹⁹ is strongly preferred, with the author criticising the approach advocated by Professor Burrows²⁰ that the common law somehow ‘takes over’ where a statute fails to deal with the consequences of its breach:

It is difficult to understand how *any* approach, other than the ordinary one of construing a statute’s legal effects, may be sensibly or legitimately adopted by a court in cases of regulatory illegality created by legislation.²¹

The award of damages in *Clark v Macourt*²² is labelled correct, but the generous approach in *Ancient Order of Foresters v Lifeplan Australia Friendly Society*²³ in making third parties who assist in a breach of fiduciary duty accountable for profits is deprecated. While *Farah Constructions v Say-Dee*²⁴ is regarded as correct in rejecting the Court of Appeal’s approach to unjust enrichment, ‘the court’s conclusion that the other family members had no notice of the director’s breach is insupportable’, since the father’s knowledge when acquiring the properties for his wife and daughter should have been attributed to them.²⁵ The result in the High Court in *Baltic Shipping v Dillon*²⁶ is treated as wrong on the facts, the book favouring the decision of Kirby P,²⁷ holding that the contract should have been treated as one where the entitlement to payment depended on the ship completing its cruise, rather than sinking on the tenth day. The innovative aspects of *Waltons Stores v Maher*²⁸ are singled out for special criticism, with Gaudron J’s analysis endorsed. Gageler J’s answer in *Mann v Paterson Constructions*²⁹ that the contract price should operate as an overall cap upon what is recoverable is ‘correct’, with the dissentients’ position

¹⁵ *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2008] AC 561.

¹⁶ *Patel v Mirza* [2017] AC 467.

¹⁷ *Menelaou v Bank of Cyprus plc* [2016] AC 176.

¹⁸ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

¹⁹ Such as *Equuscorp v Haxton* (2012) 246 CLR 498 and *Gnych v Polish Club* (2015) 255 CLR 414, cited in Stevens (n 1) 400.

²⁰ Andrew Burrows, ‘Illegality as a Defence in Contract’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Thomson Reuters, 2016) 435, 439.

²¹ Stevens (n 1) 397 (emphasis in original) (citations omitted).

²² *Clark v Macourt* (2013) 253 CLR 1.

²³ *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1.

²⁴ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

²⁵ Stevens (n 1) 260–1.

²⁶ *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

²⁷ *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1.

²⁸ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

²⁹ *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560.

'insupportable'.³⁰ Allsop P's judgment in *Bunnings Group v CHEP Australia*³¹ ordering user damages following the defendant's conversion of the plaintiffs' pallets, even though it had not lost sales, is endorsed. And so on.

I think it's a terrific book. I liked it when I first began to read it. My liking does not derive merely from the pleasant memory of an Oxford sabbatical. Nor is it merely because of my sympathy for the major premise. I think there are three main reasons which may not be apparent from the foregoing.

First, there is an immense quantity of dense, sturdy, rigorous analysis of cases. That is why an essentially English work can address many of the most important recent Australian cases in its area (the same is true, so far as I can see, for Canada). The succinct, pared back style permits a great many points to be made about a very large number of cases. In short, rather like a prospector finding an especially rich lode of ore, it is satisfying to find a book with so much valuable analysis.

Secondly, the book reflects Stevens' familiarity with the reality of the litigation process. He well recognises that courts are constrained at every turn by litigants' choices: the case pleaded, the evidence advanced, and the submissions made. There is so much more to most important decisions than the purple passages where abstract propositions of law are formulated, and it is refreshing and immensely stimulating to be confronted, repeatedly, by the facts of the case and the author's critique of the correctness of their characterisation or the application of the law to them. Instead of that far too common refrain, to the effect that 'this case was a missed opportunity to clarify the law', Stevens insists that '[l]ess criticism should be directed at courts who are constrained by the way in which cases are argued before them'.³² That is said when criticising *Waltons Stores* and the difficulties encountered by claims for restitution for the value of work done based upon 'unjust enrichment'. The flavour of the work emerges from its contention that

through sticking to what they know, practitioners have resorted to ill-suited rules such as 'estoppel' for a solution, and academics have proposed other principles to fill the gap, variously labelled 'unjust sacrifice' or the 'promise-detriment' principle. No such new concept is however required or justified.³³

Thirdly, the effectiveness of the book is in part a product of its style. The book is immensely readable. Many legal authors would do well to think more about making their works less unreadable. Stevens has done just that, and it is reflected in the size of each chapter, which often commence with an enticing anecdote or memorable metaphor, and a racy style with short, pungent, often pugnacious sentences.

No doubt some readers will disagree with many of this book's contentions, and all will disagree with some of them; that does not make it less valuable. No doubt also some will disagree with the vigour of its critique. There is force in that viewpoint, although to my mind there is room for criticism, including robust

³⁰ Stevens (n 1) 134.

³¹ *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420.

³² Stevens (n 1) 287.

³³ *Ibid.*

criticism, of the reasoning in decisions. Devlin once wrote in a different context, ‘The English judiciary is popularly treated as a national institution, like the navy, and tends to be admired to excess’,³⁴ and I suspect that the disadvantages of an absence of criticism probably outweigh the disadvantages of robust challenges to legal reasoning exemplified in works such as this.

If I were a judge in the United Kingdom, I would be interested in this book’s endorsement or criticism of any decision I was founding my decision upon. That is not necessarily because I would agree with the view expressed, but because it would help me to satisfy myself that I had considered as many angles as I could and my approach was as sturdy as could be. The book will be useful for similar reasons to Australian practitioners and judges, especially because in the areas of law addressed Australian authority is often thin and English authority persuasive. It would have assisted me to deal with a submission based on the ‘transfer of value’ in one recent appeal.³⁵ Many aspects accord with the position in Australia, where the notion that complicated problems in contract and tort and equity are to be resolved by a talismanic formula generally applicable across the board has never been especially well received. It remains to be seen how in tune with the times this book will turn out to be in the United Kingdom. Lord Reed’s sympathetic and insightful foreword hints that the tide may have turned.

³⁴ Patrick Devlin, *The Judge* (Oxford University Press, 1979) 25.

³⁵ *Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214.