

Restitution, Rectification, and Mitigation: Negligent Solicitors and Wills, Again

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A solicitor, when drafting a will, can owe a duty of care in tort to the intended beneficiary of a bequest under that will. The Court of Appeal has recently confirmed that where a solicitor has misdrafted the will, the intended beneficiary can sometimes rectify it, and recover the intended gift. The pattern of this rectification is restitutionary, raising the question analysed in this article of whether an intended beneficiary can have a direct personal action in restitution to reverse the unjust enrichment of an unintended recipient. It seems that, though fraught, such an action may indeed in principle lie.

Many people retain the services of a solicitor to draw up a will. It should be one of the less fraught occasions upon which they visit their solicitor. If all goes according to plan, the beneficiaries intended by them will inherit under the will. If, however, the solicitor is negligent, and the will is invalid or miscast, then some or all of the estate can go to an unintended recipient or recipients. In such circumstances, apart from the estate's action for breach of contract against the negligent solicitor, the decision of the House of Lords in *White v Jones*¹ confirms that the solicitor can also owe a duty of care in tort to the intended beneficiary.

In *White v Jones*, the solicitor's negligence meant that there was no will. Where, however, the negligence results merely in a miscast will rather than in no will at all, the Court of Appeal in the later *Walker v Medlicott*² held that the intended beneficiary can (sometimes) rectify the will and thus, in effect, recover the gift from the unintended recipient. The *pattern* of this rectification action is certainly restitutionary, which raises the question whether, if the will cannot be rectified, or there is no will as on the facts of *White v Jones*, the unintended recipient would be unjustly enriched at the expense of the intended beneficiary who could therefore have a personal claim for restitution.

In seeking to answer that question, the rectification action canvassed in *Walker v Medlicott* is put into context in the next section, and other examples of rectification as a means of restitution are then discussed, so that an unjust enrichment action on these and similar facts can be developed. The aim of the analysis is not so much to argue for the proposition that the intended beneficiary does have an action in restitution against the unintended recipient as to examine the possibility of such an action; and the conclusion will be that such an action may indeed be available in

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1 [1995] 2 AC 207 (HL); see J. Brady, 'Solicitors' Duty of Care in the Drafting of Wills' (1995) 46 NILQ 434; B. Markesinis, 'Five Days in the House of Lords: Some Comparative Reflections on *White v Jones*' (1995) 3 Torts LJ 169; D. Johnston, 'Appointments and Disappointments: *White v Jones* in Rome and Today' (2000) 53 CLP 283; S. Grattan, *Testamentary Negligence* (Belfast: SLS, 2000).

2 [1999] 1 All ER 685 (CA).

principle, though it faces some formidable obstacles which might ultimately prove insurmountable in practice.

Rectification in *Walker v Medlicott*

White v Jones confirmed that a solicitor who negligently fails to draw up a will can owe a duty of care in tort to the intended beneficiary. It is *a fortiori* where a solicitor negligently draws up a will which turns out to be invalid.³ Indeed, according to the Court of Appeal in *Carr-Glynn v Frearsons*,⁴ a solicitor who draws up a valid will, but negligently fails to ensure that the property in the bequest would be available for distribution under it, can also owe a duty of care in tort to the intended beneficiary. In that case, the testatrix had been a co-owner of certain property. When she died, it became clear that she had been a joint tenant of the property, so that her interest vested in the surviving joint tenant rather than in the intended beneficiary. Chadwick LJ held that 'a competent solicitor, acting reasonably, would have advised the testatrix that, in order to be sure that her testamentary wishes should have effect, she should serve a notice of severance in conjunction with the execution of the will'.⁵ Although the solicitor had explained that if the testatrix were a joint tenant, the tenancy would have to be severed so that she could have an interest to bequeath to the intended beneficiary, this was not followed up and no notice of severance was served, and the Court of Appeal held the solicitor liable in tort to the intended beneficiary.

Furthermore, according to the Court of Appeal in *Walker v Medlicott*,⁶ a solicitor who draws up a valid will, but negligently fails to include in it a gift intended by the testator, can also owe a duty of care in tort to the intended beneficiary. Though the claim was accepted in principle, it failed on its facts: the judge in the court below had found that the claimant had not proved negligence against the defendant solicitor: although the solicitor may have misunderstood the instructions of the testatrix and thereby have omitted from the will a gift intended by her for the claimant, it did not follow that such a misunderstanding necessarily constituted negligence on the part of the solicitor, and the claimant had failed to prove by

3 See eg *Ross v Caunters* [1980] Ch 297 (ChD; Megarry VC); *Wall v Hegarty* [1980] ILRM 124 (Ir HC; Barrington J); *Gartside v Sheffield Young & Ellis* [1983] NZLR 37 (NZ CA); *Hill v van Erp* (1996–1997) 188 CLR 159 (HCA). For Canada, see *Earl v Wilhelm (or se Wilhelm v Hickson)* (2000) 183 DLR (4th) 45 (Sask CA), noted J. R. McJannet, 'Wilhelm v Hickson: The Canadian Tort Approach to the Disappointed Beneficiary and the Negligent Solicitor' (2001) 64 Sask L Rev 113.

4 [1999] Ch 326 (CA); see R. Kerridge and A. H. R. Brierley, 'Will Making and the Avoidance of Negligence Claims' [1999] Conv 399; R. Kerridge and A. H. R. Brierley, 'Negligence and Conflicts of Interest in the Will-Making Process' (1999) 115 LQR 201. cp *Makhan v McCawley* (1998) 158 DLR (4th) 164 (Ont HC; Lax J); *Earl v Wilhelm* (2000) 183 DLR (4th) 45 (Sask CA); *Corbett v Bond Pearce* (2001) 151 NLJ 609 (CA). cf *Queensland Art Gallery Board of Trustees v Henderson Trout* [1998] QSC 250; A. Stickley, 'Consequences if an Intended Beneficiary is Cut Out of a Will: Potential Liability if a Unilateral Severance is not Fast Enough' (2000) 20 Qld L 207.

5 [1999] Ch 326, 332. However, such duties do not extend to advising the testator on how to make the most tax efficient gift to beneficiaries: *Cancer Research Campaign v Ernest Brown* [1998] PNLR 592 (Harman J); J. Murphy, 'Probate Solicitors, Disappointed Beneficiaries and the Tortious Duty to Advise on Tax Avoidance' (1998) 14 PN 107. cp *Middleton v Steeds Hudson* [1998] 1 FLR 738 (Johnson J). cf *Hurlingham Estates v Wilde* (1997) 1 Lloyd's Rep. 525 (Lightman J); on which see R. O'Connor, 'The Duty of Solicitors to Give Tax Advice: Recent Developments' (1998) 27 UWALR 195; G. Dal Pont, 'The Duty of Solicitors to Give Tax Advice – A Reply' (1999) 28 UWALR 121; R. O'Connor, 'The Duty of Solicitors to Give Tax Advice – A Rebuttal of the Reply' (1999) 28 UWALR 132.

6 [1999] 1 All ER 685 (CA).

convincing evidence that it did. The Court of Appeal affirmed, and indicated that the claim would also have failed for a further reason. As in any other tort action, the intended beneficiary must mitigate his loss. Section 20(1) of the Administration of Justice Act 1982 allows a court to rectify a will in certain circumstances;⁷ and the Court held, first, that if the claim in negligence by the intended beneficiary had been well founded, he would also have had a good claim under the Act for rectification of the will, and, second, that he should have mitigated his loss on his tort claim by first seeking rectification of the will. Not having so attempted to mitigate his loss, the claim failed.

Although the claimant's failure to rectify the will amounted to a failure to mitigate his loss, *Walker v Medlicott* is nonetheless important for its recognition that an intended beneficiary can seek rectification of the will under section 20(1) of the 1982 Act. Of course, it is not the only possible mitigation in such circumstances.⁸ Neither is it the first time that a statute has been pressed into service to seek to give the intended beneficiary an action against the unintended recipient: after *White v Jones*, for example, there was a debate as to whether a similar result could be reached on the basis of the Inheritance (Provision for Family and Dependents) Act 1975; Weir⁹ arguing it could, Cretney¹⁰ arguing that it could not. Whatever the merits of the 1975 Act in this context, the 1982 Act is potentially of greater practical significance to intended beneficiaries seeking to obtain the gift intended by the testator.

Nevertheless, the imposition in *Walker v Medlicott* of a duty to mitigate loss by seeking rectification under the 1982 Act will have little impact upon the ambit of most claims against negligent solicitors, for at least four reasons. First, the power to rectify under section 20(1) of the 1982 Act only applies in the relatively limited circumstances 'where the will fails to carry out the testator's intention in consequence – (a) of a clerical error; or (b) of a failure [by the solicitor] to understand . . . [the testator's] intentions'; hence, a mistranscription of the testator's intentions for any other reason will not allow rectification. Second, there are many cases where the possibility of rectification will not arise at all on the facts. It will not arise where the solicitors' negligence means that there is no will at all, and thus nothing to rectify.¹¹ Nor will it arise where the will itself is fine, but the negligence

7 On the power to rectify under the 1982 Act, see G. Miller, *The Machinery of Succession* (2nd ed, Aldershot: Dartmouth, 1996) 136–138; on the power more generally, see C. J. Rowland, 'The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting Their Operation' (1993) 1 APLJ 87 (Part 1), 193 (Part 2).

8 See R. Towns, 'Can Equity Come to the Relief of Negligent Solicitors?' [1999] Conv 393 (election as mitigation).

9 T. Weir, 'A *Damnosa Hereditas*?' (1995) 111 LQR 357; cp J. Dwyer, 'A Comedy of Errors' (1996) 4 TLR 77, 79–80.

10 S. Cretney, 'Negligent Solicitors and Wills. A Footnote' (1996) 112 LQR 54.

11 Hence, rectification under s 20(1) of the 1982 Act would not have been available in *Ross v Caunters* and *White v Jones*. Nor, for the same reason, would it have been available in *Hill v van Erp* under the equivalent legislation in Queensland (s 13 of the Succession Act 1981, which is 'more limited' (Miller, above n 7, 137–138, 145 n 81) than s 20(1) of the 1982 Act; cp J. Maxton, *Nevill's Law of Trusts, Wills and Administration in New Zealand* (Wellington: Butterworths, 8th ed, 1985) 261–262; Rowland, above n 7, 205–209). Again, when *Wall v Hegarty* was decided in Ireland and *Gartside v Sheffield Young & Ellis* was decided in New Zealand (on the latter, see Maxton, 257–262, esp 261), there was in neither case an equivalent legislative provision or common law power; had there been, the rectification issue would not have arisen, again because the alleged negligence meant that there was no will at all in either case. There may be seeds of a power to rectify at common law (see Rowland, above n 7, 89) which have begun to germinate in the US (see J. H. Langbein and L. W. Waggoner, 'Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?' 130 U Pa L Rev 521 (1982) and seem now also to be germinating in New Zealand (*McConagle v*

relates to a matter *dehors* the will.¹² Third, the fit between negligence and rectification is not perfect; as Rich pithily observes: '[n]ot every rectifiable error is negligent, and not every negligent error is rectifiable'.¹³ And fourth, even where rectification is possible, it may not be an appropriate or full remedy. For example, it may not necessarily compensate the claimant for all of his loss: such a claimant may have had to bear the costs of the rectification proceedings¹⁴ and may have incurred other relevant costs such as probate costs;¹⁵ these costs would not be recoverable in the rectification action, but many would be in an action against the negligent solicitor.

A particularly stark example of rectification as an inappropriate remedy is provided by the subsequent decision of the Court of Appeal in *Horsfall v Haywards*.¹⁶ The testator wished that the bequest of a house would go his wife for life with remainder to the claimants. After he died, his wife, now widow, moved to Canada; and when the house was sold, the net proceeds of the sale were transmitted to her Canadian bank account. Due to the negligence of the defendant solicitors, the claimants in fact obtained no interest under the will, but they did not discover this until after the proceeds had been transmitted to Canada, whence the widow indicated that she would resist attempts to recover them. In such circumstances, the rectification of the will would have been of no practical benefit to the claimants.¹⁷

For all that there will be relatively few cases in which rectification will be possible or appropriate, *Walker v Medlicott* is nevertheless an important example of the action in the context of a duty to mitigate loss occasioned by negligence in the drafting of the will. However, shorn of the mitigation context in which it arose in that case, the rectification action ensures that the intended beneficiary obtains the gift which would otherwise have gone to the unintended recipient. The pattern is certainly restitutionary, and this raises the question of whether the rectification action ought to be seen as reversing an unjust enrichment. Indeed, whether rectification is possible or not, the further question arises as to whether there is – in the more general *White v Jones*-type situation – a direct personal action in restitution to reverse an unjust enrichment of the unintended recipient at the expense of the intended beneficiary.

Starkey [1997] 3 NZLR 635 (NZ HC); D. W. McMorland, 'Succession' [1997] NZLRev 576, 578; for possible earlier examples, see Rowland, above n 7, 94, 200 and Jersey (M. O'Connell, 'Rectification of Wills: Recent Developments in Jersey' (2001) 5 Jersey L Rev 64) though not (yet?) in Ireland.

12 Hence, rectification under s 20(1) of the 1982 Act would not have been available in *Carr-Glynn v Saunders*. In New South Wales, s 29A of the Wills, Probate and Administration Act 1899 as inserted by s 3 of the Wills, Probate and Administration (Amendment) Act 1989 is broader than s 20(1) of the 1982 Act (see Miller, above n 7, 137); but the issue of rectification again could not for this reason have arisen in *Hawkins v Clayton* (1988) 164 CLR 539 (HCA).

13 B. Rich, 'Errors in Will-Drafting: The Limits of a Remedy in Negligence' (1999) 15 PN 211, 213; see also A. Sprince, 'Disappointed Beneficiaries and Disappearing Principles' (2001) 17 PN 104.

14 See *Walker v Medlicott* [1999] 1 All ER 685, 697 per Sir Christopher Slade.

15 *Hawkins v Clayton*, *passim*; *Wall v Hegarty* [1980] ILRM 124, 130 per Barrington J; though there are limits to such a negligence claim, see *Worby v Rosser* [2000] PNLR 140 (CA); cp *Knox v Till* [1999] 2 NZLR 753 (NZ CA); *Public Trustee v Till* [2001] 2 NZLR 508 (NZ HC; Richardson J) (on the type of negligence claimed in the *Till* cases, cf M. M. Litman and G. B. Robertson, 'Solicitor's Liability for Failure to Substantiate Testamentary Capacity' (1984) 62 Can Bar Rev 457, 469–484); *Corbett v Bond Pearce* (2001) 151 NLJ 609 (CA).

16 [1999] 1 FLR 1182; on which see Rich, above n 13.

17 [1999] 1 FLR 1182, 1189 per Mummery LJ. He was also motivated (as he had also been in *Walker v Medlicott* [1999] 1 All ER 685, 702) by the fact that the time limit for rectification had expired long before the claimants became concerned about their interest under the will.

From rectification to restitution

Walker v Medlicott concerns a special statutory jurisdiction to rectify wills. In the context of gifts *inter vivos*, the courts have recognised a parallel, though limited, jurisdiction to rectify deeds. For example, in *Thompson v Whitmore*¹⁸ Page Wood VC held that, in principle, the intended beneficiary under a marriage settlement, though a volunteer, had the 'right to have [the] settlement rectified by putting the trusts into the shape in which they were intended to be declared',¹⁹ but held, in effect, that there was no mistake in the deed on the facts. Likewise, in *Lister v Hodgson*,²⁰ where the donor intended to make a gift of £300 by deed to the claimant but in fact made it to the defendant and subsequently died, Lord Romilly MR held that the deed could be rectified on the application of the claimant. Again, in the Irish case of *McMechan v Warburton*,²¹ the donor intended to settle certain shares upon the claimant, but the solicitor in error omitted this from the deed; after the donor's death, the claimant successfully sought rectification of the deed.²² Similarly, in the more recent Irish case of *Shanahan v Redmond*,²³ a life assurance company had failed to carry out the donor's instructions to replace the defendant with the claimant as beneficiary under a policy, and Carroll J held that the policy ought to be treated as though it named the claimant and not the defendant – rectification of the policy in all but name.

It is not difficult to see the rectification order under s 20(1) of the 1982 Act canvassed in *Walker v Medlicott* as reversing the unjust enrichment of the unintended recipient named in a miscast will at the expense of the beneficiary intended by the testator.²⁴ Nor is it difficult to see the rectification orders in the deed cases as reversing the unjust enrichment of the unintended recipient mistakenly named in the deed at the expense of the beneficiary intended by the donor.²⁵ If so, this in turn raises the question of whether there can be other restitutionary remedies in that context, and in particular whether there can be a direct personal action on the part of the intended beneficiary against the unintended recipient.

18 (1860) 1 J&H 268; 70 ER 748.

19 (1860) 1 J&H 268, 273; 70 ER 748, 750.

20 (1867) LR 4 Eq 30; see also *Walker v Armstrong* (1856) 8 De GM&G 531; 44 ER 495.

21 [1896] 1 IR 435 (Chatterton VC); *aff'd* [1896] 1 IR 441 (Ir CA).

22 See also *Leuty v Hillas* (1858) 2 DeG&J 110; 44 ER 929 (trust); *Bonhote v Henderson* [1895] 1 Ch 742 (rectification); *Craddock Brothers v Hunt* [1923] 2 Ch 136 (CA) (rectification of conveyance; hints of trust); *Shepherd v Graham* (1947) 66 NZLR 654 (rectification); *Van Der Linde v Van Der Linde* [1947] Ch 306 (same); *Majestic Homes Property v Wise* [1978] Qd R 225 (same); *Blacklocks v JB Developments (Goldaming)* [1982] Ch 183 (same); *Lac Minerals v Chevron Mineral Corporation of Ireland and Ivernia* [1995] 1 ILRM 161 (Ir HC; Murphy J) (rectification; trust); *Kelly v Cahill* [2001] 2 ILRM 205 (Ir HC; Barr J) (remedial constructive trust).

23 High Court, unreported, 21 June 1994, Carroll J; on which see E. O'Dell, 'Insurance Payments (Mis)Directed, Equitable Maxims (Mis)Used, and Restitution Doctrines Missed' [1997] LMCLQ 197; with the application of *White v Jones* on the facts of *Shanahan* essayed in that piece, *cp Punjab National Bank v de Boinville* [1992] 1 WLR 1138 (CA); *Gorham v British Telecommunications plc* [2000] 1 WLR 2129 (CA); noted M. A. Jones, 'Practical Justice, Financial Planning and the Disappointed Beneficiary' (2001) 17 PN 190; G. McMeel 'Victims of Pension Mis-selling Short-changed?' [2001] CMCLQ 321.

24 Indeed, R. Goff and G. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 5th ed, 1998) contains a short chapter, chapter 31, on the section.

25 Rectification is understood in US law – where it is described as 'reformation' – as a remedy to prevent the unjust enrichment of the defendant; see, eg, G. E. Palmer, *Mistake and Unjust Enrichment* (Ohio State UP: 1962; reprinted Hein, 1993) 17–21; G. E. Palmer, *The Law of Restitution* (Boston: Little Brown, 1978) vol. 3, ch 13. *cp* Goff and Jones, 298–305; K. Barker and L. D. Smith, 'Unjust Enrichment' in D. Hayton (ed), *Law's Future(s)* (Oxford: Hart Publishing, 2000) 411, 415–416, esp 415 figure 1.

Restitution on the facts of *White v Jones*

Apart from the rectification cases, there are in fact many personal actions similar to the intended beneficiary's potential claim against the unintended recipient. For example, in the old case of *Jacob v Allen*²⁶ the defendant's principal had acted as administrator of a deceased's estate, and the defendant had collected money owing to the deceased; when the deceased's will was discovered, the executor recovered the money so paid in an action for money had and received.²⁷ Indeed, in such a case, the payments to the defendant had discharged the liability of the debtors, and the only action open to the claimant was the action against the defendant.²⁸ In the more recent *Official Custodian for Charities v Mackey (No 2)*,²⁹ Nourse J held that it is of the essence of such cases

both that there is a contract or some other current obligation between the third party and the plaintiff on which the defendant intervenes and that the third party is indebted to the plaintiff in the precise sum which he pays to the defendant, so that he cannot claim repayment from the defendant in the face a claim made against the defendant by the plaintiff. It is that which enables the plaintiff to sue the defendant without joining the third party, who no longer has any interest in the subject matter of the suit. It would be a waste of time and money if the plaintiff had to sue the third party [on the debt which he owed] and the latter had to sue the defendant [to recover the money paid]. The [direct] suit for money had and received avoids such circuity of action.³⁰

This passage is an important affirmation of the principle that, in certain circumstances,³¹ where a tenant pays rent to the defendant on lands to which the claimant was entitled, the claimant can recover from the defendant in a direct personal action.³² However, since there was no contract or obligation between the claimants and the third party payors and no intervention by the defendants, the

26 (1703) 1 Salk 27; 91 ER 26; see also *Asher v Wallis* (1707) 11 Mod 146; 88ER956.

27 *Quaere* however, though the action may lie, whether the claimant should have sued the principal and not the agent who should have had the benefit of the defence of ministerial receipt? For example, in *Pond v Underwood* (1705) 2 Ld Ray 1210; 92 ER 299, where the agent had not only received on behalf of the principal but accounted to her, Holt LCJ held that no action for money had and received lay against the agent. Hence, in *Sadler v Evans* (1766) 4 Burr 1984; 98 ER 34, Lord Mansfield held that where an agent has received on behalf of the principal, the action for money had and received lies against the principal not the agent, doubting this aspect of *Jacob v Allen*. On the defence, see generally, W. J. Swadling, 'The Nature of Ministerial Receipt' in P. Birks (ed), *Laundering and Tracing* (Oxford: OUP, 1995) 243.

28 In *Allen v Dundas* (1789) 3 Term R 125; 100 ER 490 it was held that where a debtor owed a debt to a deceased, and had paid it to the executor of a forged will, the payment discharged the debt and no action by the deceased's administrator lay against the debtor; see also *Wood v Dunn* (1866) LR 2 QB 73.

29 [1985] 1 WLR 1308.

30 [1985] 1 WLR 1308, 1313–1314; on preventing circuity of actions, see also [1985] 1 WLR 1308, 1315, and generally G. E. Dawson 'Indirect Enrichment' in E. von Cämmerer, S. Mentschikoff and K. Zweigert (eds), *Ius Privatum Gentium: Festschrift für Max Rheinstein zum 70. Geburtstag am 5. Juli 1969* Band II (*Nationales und Vergleichendes Recht*) (Tübingen: J. C. B. Mohr, Paul Siebeck, 1969) 789, 801; G. Virgo, *Principles of the Law of Restitution* (Oxford: OUP, 1999) 110. On circuity more generally, see M. Mautner, "'The Eternal Triangles of the Law': Towards a Theory of Priorities in Conflicts Involving Remote Parties' 90 Mich L Rev 95 (1991).

31 *Quaere*, however, whether the circumstances ought to be less restrictive than those given by Nourse J? See text with nn 52–63 below.

32 A similar view of the case is taken by A. Tettenborn, 'Lawful Receipt – A Justifying Factor?' [1997] Restitution LR 1, 4 and by P. Birks, 'At the Expense of the Claimant: Direct and Indirect Enrichment in English Law' (2000) Oxford U. Comparative Law Forum 1 at ouclf.iuscomp.org, text with and in n 49; see also Virgo, above n 30, 111; though cf L.D. Smith, 'Three-Party Restitution. A Critique of Birks' Theory of Intercepted Subtraction' (1991) 11 OJLS 481, 491–492.

facts did not come within the principle, and the claimants' claim failed.³³ On the other hand, in *Jacob v Allen*, where the claim succeeded, there was a current obligation between the third party payor and the deceased, and hence between the payor and the claimant executor; into this, the defendant intervened, and the precise debt which was owed to the claimant was in fact paid to the defendant. Similarly, in *In re PMPA Insurance*,³⁴ a company in a group was the payee named on various cheques, standing orders, and bank giros, but the bank paid them to a society in the group, and Lynch J held that the company could recover from the society in a direct personal action. The direct action accepted as a matter of principle in *Mackey* and the results in *Jacob v Allen* and *PMPA* can all easily be explained as preventing the unjust enrichment of the unintended recipients of the moneys at the expense of the intended beneficiaries.

In a *White v Jones* situation, then, both as a matter of principle and by analogy with these personal actions and the rectification cases, the intended beneficiary under a will should be able to maintain a similar personal unjust enrichment action against an unintended recipient who received as a result of a solicitor's negligence.³⁵ To do so, four questions must be answered in favour of the claimant: (1) Has the defendant been enriched? (2) Was the enrichment at the expense of the claimant? (3) Was the enrichment unjust? (4) Are there any defences?³⁶

Is the defendant enriched?

The benefit gained by a legatee under a will or by a beneficiary on an intestacy almost certainly constitutes an enrichment.

Is the enrichment at the expense of the claimant?

Where a claimant directly transfers the enrichment to the defendant, it is easy to conclude that the defendant's enrichment is received at the expense of the claimant. However, the matter is more complicated where an enrichment is intended by a third party for a claimant, and it arrives instead at the defendant, a

33 [1985] 1 WLR 1308, 1315.

34 [1986] ILRM 524 (Ir HC; Lynch J).

35 This suggestion is not new; see, generally, P. Matthews, 'Round and Round the Garden' [1996] LMCLQ 460 (suggesting a personal action in restitution); see also H. Luntz, 'Solicitors' Liability to Third Parties' (1983) 3 OJLS 284, 288–289 (suggesting the perfection of the testator's intention); P. Canc, 'Negligent Solicitors and Doubly Disappointed Beneficiaries' (1983) 99 LQR 346, 349 (speculating that the proper solution would be to give the intended beneficiary a right of action against the recipient); J. G. Fleming, 'The Solicitor and the Disappointed Beneficiary' (1993) 109 LQR 344, 348 (lamenting that 'neither probate law nor the principle against unjust enrichment is able to compel the undeserving beneficiary to disgorge his unmerited gain'); O'Dell, above n 23 (suggesting a personal action in restitution); K. Tapsell, 'The Negligence Juggernaut and Unjust Enrichment' (1997) 16 Aus Bar Rev 79 (arguing that the incremental development of a restitution remedy would save some who might otherwise be unnecessarily crushed by the negligence juggernaut); M. Lunney, 'In Support of the Chancellor's Foot' (1998–1999) 9 KCLJ 116, 121 (raising the prospect of a claim by the estate – presumably for distribution to the intended beneficiary – against the unintended recipient for the value of the gift); see also Weir, above n 9; Dywer, above n 9; cf Litman and Robertson, above n 15, 490–491 (doubtful); K. Barker, 'Are We Up To Expectations? Solicitors, Beneficiaries and the Tort/Contract Divide' (1994) 14 OJLS 137, 138–139 (rejecting the perfection of the gift).

36 See eg *Banque Financière de la Cité v Parc (Battersea)* [1999] 1 AC 221 (HL) 227 per Lord Steyn; *Dublin Corporation v Building and Allied Trades Union* [1996] 1 IR 468 (Ir SC) 483; [1996] 2 ILRM 547, 558 per Keane J. For the argument that this approach is ahistorical, misconceived, and dangerous, see S. Hedley, *Restitution. Its Divisions and Ordering* (London: Sweet and Maxwell, 2001).

complication which affects the claim of the intended beneficiary against the unintended recipient.

In *Colonial Bank v The Exchange Bank of Yarmouth, Nova Scotia*³⁷ Lord Hobhouse explained that a claimant seeking to show that the defendant had in fact been enriched must show 'that there was a privity between them'³⁸ and held that where, as in the case itself, there was a direct payment from claimant to defendant 'there is the most direct privity between the two parties'.³⁹ Hence, Burrows⁴⁰ states 'a general rule, subject to wide-ranging exceptions, [that] the claimant is not entitled to restitution of benefits conferred by a third party rather than by himself'.⁴¹ Virgo too adopts a similar privity requirement: 'where the defendant obtains a benefit indirectly via a third party then the defendant will not have been enriched at the plaintiff's expense',⁴² and it is subject to a similarly wide range of exceptions. This privity requirement would certainly seem to preclude a claim by the disappointed beneficiary against the legatee. However, 'privity', with its unfortunate contractual overtones, is an unhappy term here;⁴³ the *Colonial Bank* case does not in fact compel such a doctrine,⁴⁴ and the extensive exceptions threaten to overwhelm the general rule.⁴⁵ In particular, Burrows acknowledges that an exception to accommodate the *Lister v Hodgson* cases of rectification of a gift mistakenly conferred upon the wrong person poses difficulties for his thesis.⁴⁶

On the other hand, Birks argues that the defendant in such a case is as surely enriched as if he had *directly* taken the claimant's wealth.⁴⁷ The latter is a case of enrichment by direct subtraction from the claimant, the former Birks has christened

37 (1886) 11 App Cas 84 (PC).

38 (1886) 11 App Cas 84, 85; that is, between claimant and defendant.

39 (1886) 11 App Cas 84, 90.

40 A. S. Burrows, *The Law of Restitution* (London: Butterworths, 1993) 46–54; see also B. F. Fitzgerald, 'Ownership as the Proximity or Privity Principle in Unjust Enrichment Law' (1995) 18 UQLJ 166. I have set out my reasons for disagreeing with Burrows' treatment in E. O'Dell, 'Restitution' in R. Byrne and W. Binchy (eds), *Annual Review of Irish Law 1997* (Dublin: Round Hall Sweet & Maxwell, 1998) 607, 611–616.

41 Burrows, above n 40, 46.

42 Virgo, above n 30, 106.

43 G. E. Dawson, *Unjust Enrichment. A Comparative Analysis* (Boston: Little Brown, 1951) 126–127; all the more so given the decline of the privity doctrine in contract (see n 95 below).

44 There is nothing in Lord Hobhouse's speech to suggest that he intended the word 'privity' to have the narrow meaning ascribed to it by Burrows and Virgo. Furthermore, a converse cannot necessarily logically be derived from a proposition. Hence, although the direct payment on the facts certainly provided a sufficient causal nexus between the claimant and defendant, there is nothing in his speech to suggest that had the payment been indirect, there would have been an insufficient nexus. Similarly, Morritt LJ in *Kleinwort Benson v Birmingham CC* [1996] 4 All ER 733 (CA) held that the words 'at the expense of the plaintiff ... do no more than point to the requirement that the *immediate* source of the unjust enrichment to the plaintiff ... [resulting in] a *subtraction from the plaintiff's gross wealth*' ([1996] 4 All ER 733, 749; (emphasis added)). The first italic might be interpreted as consistent with a privity requirement, but it fails for the same reason as does Lord Hobhouse's *dictum*, and it is further weakened by the second italic which is equally if not more consistent with the interceptive subtraction doctrine discussed below (cf Virgo, above n 30, 106).

45 Birks, above n 32, text after n 9: '... the exceptions are arguably stronger than the rule. Rule and exception must swap places'.

46 Burrows, above n 40, 53. Further, even if these difficulties were overcome and privity still insisted upon subject to an exception for the *Lister v Hodgson* rectification cases, there would be no good reason not to admit an exception for the intended beneficiary's personal claim against the unintended recipient, which is functionally analogous to the rectification cases for which an exception has been admitted.

47 P. Birks, *An Introduction to the Law of Restitution* (Oxford: OUP, rev ed, 1989) 133–134; see also Birks, above n 32, text after n 44; P. Birks and C. Mitchell, 'Unjust Enrichment' in P. Birks (ed), *English Private Law* (OUP, Oxford, 2000) vol II, 525, 530, para 15.13 (no absolute rule of privity); see also 538, para 15.35.

'interceptive subtraction'.⁴⁸ This approach has found judicial favour in the judgment of La Forest J in *LAC Minerals v International Corona Resources*,⁴⁹ and it applies both where the defendant has intercepted the enrichment and where it has been (mis)directed to the defendant. This principle of interceptive subtraction is a better explanation of the rectification and similar personal claims outlined above⁵⁰ than the Burrows strategy of denying the principle on the basis of a privity rule and then making that rule subject to wholesale exceptions.⁵¹

Proof of interceptive subtraction turns on the certainty of the donor's intention to benefit the claimant: in Birks' words, had the defendant not intervened, the enrichment must 'certainly' or 'indubitably' have reached the claimant.⁵² Hence, though the principle of interceptive subtraction was accepted in *Mackey*, it was not made out on the facts: because the amount of money paid to the defendant would not necessarily have been the same amount as that which the sub-tenants would have had to pay to the claimants, it could not be said that the money paid by the sub-tenants ought with certainty to have reached the claimants. On the proof of such certainty, there are at least three possible positions. First, Smith argues against the notion of interceptive subtraction partly on the ground that such certainty is impossibly elusive.⁵³ Second, Virgo, who sees interceptive subtraction as one of the exceptions to which his version of privity is subject,⁵⁴ argues that 'the proper interpretation of the notion of inevitable receipt is that of legal inevitability',⁵⁵ that is, the claimant's receipt of the enrichment was inevitable because 'the third party was legally obliged to transfer the benefit' to the claimant and not because he had simply intended to do so.⁵⁶

Hence, where the third party intends the enrichment to arrive with the claimant, but it is misdirected to the defendant, the analyses of Smith and Virgo give rise to two different situations. First, where the claimant has a preexisting entitlement to the enrichment, each would accept that the defendant is indeed enriched at the

48 Birks, *Introduction*, above n 47.

49 (1989) 61 DLR (4th) 14 (SCC) 45.

50 See also *H.K.N. Invest OY v Incotrade P.V.T. Ltd* [1993] 3 IR 152 (Ir HC) 162 *per* Costello J, explained as an example of interceptive subtraction in O'Dell, above n 23, 201–202; *Behan v Bank of Ireland* (High Court, unreported, 15 August 1997, Morris J), explained as an example of interceptive subtraction in O'Dell, above n 40, 611–616 (the Supreme Court, on appeal, reached a similar conclusion by a different route: [1998] 2 ILRM 507 (SC)). See also the discussion of *Shamia v Joory* [1958] 1 Q.B. 448 (J. D. Davies 'Shamia v Joory: A Forgotten Chapter in Quasi-Contract' (1959) 75 LQR 220) in Birks, above n 32, text with and in n 46; cf Virgo, above n 30, 113 n 31.

51 See eg Burrows, above n 40, 48 text with n 10; cp Fitzgerald, above n 40, 179–182. Indeed, there are some cases which are susceptible of explanation only in interceptive subtraction terms and not in terms of an exception to a privity rule: see O'Dell, above n 40, 611–616.

52 Birks, *Introduction*, above n 47, 133, 136.

53 Smith, above n 31, 486–487; I have set out my reasons for disagreeing with this in O'Dell, above n 23, 201–202 (arguing that difficulties of fact should never impugn the validity of a principle (any principle), such factual problems merely serve to limit the number of successful cases) and O'Dell, above n 40, 611–616 (arguing that interceptive subtraction is the better explanation for the disputed authorities). See, however, P. Jaffey *The Nature and Scope of Restitution* (Oxford: Hart Publishing, 2000) 260–270 and R. Grantham and C. E. F. Rickett, *Enrichment and Restitution in New Zealand* (Oxford: Hart Publishing, 2000) 20 following other aspects of Smith's analysis.

54 Virgo, above n 30, 109–110, relying upon *Mackey*, text with n 30 above.

55 *ibid* 111. If, as Birks and Mitchell argue, *F.C. Jones (Trustee in Bankruptcy) v Jones* [1997] Ch 159 (CA) is an 'unequivocal example' of interceptive subtraction (above n 47, 532–533, para 15.19), then it is probably a case of this kind.

56 *ibid* 110. He also argues (*ibid* 112) that that the defendant must not have earned the benefit from the third party. This is entirely logical – if the defendant had earned the benefit, then he received it in his own right – and poses no difficulty to a claim by the intended beneficiary against the unintended recipient.

claimant's expense. For Virgo, this is the only proper example of interceptive subtraction; whereas, for Smith, the fact that the claimant already had an entitlement to the enrichment would make this subtraction direct and not interceptive. Second, where the claimant has no preexisting entitlement to the enrichment, each would deny that the defendant is enriched at all at the claimant's expense (any enrichment here on the part of the defendant would be at the expense of the third party). Let it be, however, in this second case, that the third party's intention *is* allowed to generate an entitlement in the claimant to the enrichment (and that, whatever allows the intention to generate the claimant's entitlement to the enrichment, it is not unjust enrichment but some other doctrine). If such an independent entitlement is generated from the third party's intention alone, then, of course, it would become an example of the first case, and Smith and Virgo – for their separate reasons – would again regard defendant's enrichment as at the claimant's expense.

As to whether these analyses are required by the authorities, on the one hand, Nourse J's statement of principle in *Mackey* supports Virgo's notion of legal inevitability, and it is embodied not only in *Craddock Brothers v Hunt* and *PMPA*, but also in the old cases where an office which carries with it the right to receive payments from third parties is usurped from the claimant by the defendant.⁵⁷ On the other hand, however, cases such as *Lister v Hodgson*, *McMechan v Warburton* and *Shanahan v Redmond* demonstrate that it is more than possible for a court to make the necessary determination of certainty as to the donor's intention,⁵⁸ and to do so not only where he was under an obligation to do but also where the third party had simply intended a gift. The donor's intention in such cases is not constitutive of an independent entitlement in the claimant; instead, it is merely one of the facts from which is drawn the conclusion that the defendant was enriched at the claimant's expense. Hence, the positions taken by Smith and Virgo are not borne out by the authorities; in particular, although legal inevitability is a *good* way to prove inevitability, it is not the *only* way to do so. The courts have gone further than Smith and Virgo would allow, looking first at the route down which the enrichment travelled, both at where it was intended to arrive and at where it in fact arrived, and then redirecting the enrichment from the latter to the former.

Indeed, the courts have therefore adopted the third possible position on the proof of certainty of the donor's intention, that taken by Birks, for whom it is enough that, had the defendant not intervened, the enrichment would certainly have reached the claimant because the donor had so intended, whether or not the donor was legally obliged to do so.⁵⁹ An action under section 20(1) of the 1982 Act turns on establishing the 'testator's intention'; and in *Walker v Medlicott* the Court of Appeal held that the claimant must show that intention by 'convincing evidence'.⁶⁰ In both

57 The leading case is *Arris v Stukely* (1677) 2 Mod 260; 86 ER 1060. In *Ministry for Health v Simpson* [1951] AC 251 (HL) there was a similar legal inevitability in the distribution by the executors to the recipients under a will which was subsequently found invalid.

58 *cp Kelly v Cahill* [2001] 2 ILRM 205 (Ir HC) in which Barr J, having found that the donor had certainly intended the gift for the claimant, imposed a remedial constructive trust to reverse the defendant's unjust enrichment.

59 See n 47 above. For an ingenious example of such interceptive subtraction, see C. Rotherham, 'The Recovery of Profits of Wrongdoing and Insolvency: When is Proprietary Relief Justified?' [1997] CfiLR 42, 46–47.

60 [1999] 1 All ER 685, 690 *per* Sir Christopher Slade approving and following *Re Segelman (decd)* [1996] Ch 171, 184 *per* Chadwick J; see also *Wordingham v Royal Exchange Trust Co* [1992] 2 WLR 496; E. Histed, 'Rectification of Wills and Charitable Trusts for Poor Relations: Broadening the Boundaries' [1996] Conv 379.

the action under section 20(1) and the parallel common law restitution action, a court is faced with the same question (did the testator intend to benefit the claimant?) and the same factual objection (there is many a slip twixt cup and lip). If a court can meet the factual objection and find the requisite intent in the section 20(1) action, it can also do so in the restitution action; not only that, the section 20(1) standard of proof could with profit be adopted in the context of the restitution action.⁶¹

Although the authorities do not confine interceptive subtraction to cases where the third party donor is under a legal obligation to pay the claimant, they do not go very much further. For example, they demonstrate that outside this context of legal inevitability, the convincing evidence of the third party's intention to benefit the claimant will most often be provided by the fact that the donor had done all that he could do. In the leading case of *Re Rose*,⁶² the holder of shares in a company, exactly following the form required by the company's articles, executed transfers of some of his shares, first to his wife, and then to a trust for the benefit of his wife and son. The Court of Appeal held that the transfers were effective when the shareholder had done all that he could do, rather than three months later when the company registered the transfers. Likewise, in *White v Jones*, the testator had given full instructions to the solicitor whose subsequent negligence resulted in the frustration of his intentions.

On the other hand, if the husband in *Re Rose* or the testator in *White v Jones* had simply told everyone that they now wanted people other than those named in the various instruments to receive the relevant property, but had not executed the necessary documents or given the necessary instructions to the solicitor, this would not have been sufficient because they would not have done all that they could have done to give effect to this intention. It is only when they have done so that they can be regarded as having certainly intended to benefit the intended beneficiaries.

The facts of a *White v Jones*-type situation involve a solicitor whose negligence frustrates the testator's intentions and enriches the unintended recipient. If Burrows' and Virgo's direct privity requirement is insisted upon, then since the unintended recipient did not receive the gift directly from the intended beneficiary, the former's enrichment is not at the latter's expense. Even if Virgo's exception – in favour of interceptive subtraction where the intercepted enrichment would otherwise have inevitably have arrived with the claimant as a matter of legal obligation – is accepted, then the enrichment of the unintended recipient would still not be at the expense of the intended beneficiary: the former did not receive the gift directly from the latter, whom the testator was not legally obliged to pay. However, if Birks' slightly broader notion of interceptive subtraction is admitted, and the testator's intention to benefit the intended beneficiary is demonstrated by convincing evidence, as where he had done all that he could have done only to have his intentions frustrated by the negligent solicitor, then the enrichment of the

61 In *Gibbons v Nelsons* [2000] PNLR 734 (ChD) 748, Blackburne J adopted the *Walker v Medlicott* 'convincing evidence' standard of proof and applied it outside the statutory rectification context in the more general *White v Jones* context to determine the standard of proof of the testator's intention for the purposes of the tort action. Parity of reasoning would apply the same standard outside the statutory context and in the restitution context canvassed here.

62 *Re Rose*; *Rose v Inland Revenue Commissioners* [1952] 1 Ch 499 (CA); see also *Vandervell v IRC* [1967] 2 AC 291 (HL); *Corin v Patton* (1990) 169 CLR 54 (HCA); *T. Choithram International SA v Pagarnai* [2001] 1 WLR 1 (PC); see generally A. J. Oakley, *Constructive Trusts* (London: Sweet & Maxwell, 3rd ed, 1997) 311–318; S. Lowrie and P. Todd, 'Re Rose Revisited' [1998] CLJ 46; A. Dowling, 'Can Roses Survive on Registered Land?' (1999) 50 NILQ 90.

unintended recipient will be at the expense of the intended beneficiary to whom the gift was intended by the testator. These arguments are finely balanced⁶³ between privity on the one hand and narrow and slightly broader versions of interceptive subtraction on the other, but Birks' version of interceptive subtraction derives crucial support from an analogy with the approach to section 20(1) taken in *Walker v Medlicott* and constitutes the best explanation of the authorities.

Is the enrichment unjust?

In many of the cases, the unjust factor is mistake, as where a mistake in a deed is rectified to ensure that the defendant is not the recipient of a mistaken – and thus unjust – enrichment. However, where a bequest intended for the claimant, the intended beneficiary, arrives with the defendant, the unintended recipient, the claimant is (usually) entirely unaware of the defendant's enrichment. If an enrichment is unjust because it has been received without the claimant's consent,⁶⁴ then, since the intended beneficiary plainly did not consent to the unintended recipient's enrichment, it can be said that this enrichment is unjust. This unjust factor, 'which calls for restitution when wealth is transferred to a defendant wholly without the knowledge'⁶⁵ of the claimant, Birks has christened 'ignorance'.⁶⁶ It is a good explanation of the restitutionary basis of the claimants' claims in cases such as *In re PMPA Insurance*.⁶⁷ And it is the most appropriate unjust factor upon which the intended beneficiary⁶⁸ can rely against the unintended recipient.

Birks⁶⁹ has sought to deploy ignorance to explain as restitutionary the equitable liability to account as a constructive trustee for knowing receipt of trust property and to provide an unjust factor for *Lipkin Gorman v Karpnale*.⁷⁰ However, both the unjust factor itself and its application in these contexts have proved controversial. For example, Goff and Jones 'doubt whether ignorance can properly be of itself the ground of a restitutionary claim'.⁷¹ Burrows accepts the argument for ignorance as an unjust factor in principle⁷² but has expressed doubts as to whether it is

63 Burrows, above n 40, 48, 54.

64 *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 (HL) 408–409 *per* Lord Hope; *cp David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 379.

65 Birks, *Introduction*, above n 47, 140.

66 *ibid*; see generally 139–146.

67 Indeed, in *PMPA*, Lynch J came close to an express judicial statement of Birks' argument; for him, it was clear both that the claimant's cause of action was not based upon mistake and that, since it had not properly consented it should be allowed to recover.

68 *cp White v Jones* [1995] 2 AC 207, 256–257, 275 *per* Lord Browne-Wilkinson: '... the intended beneficiary (being ignorant of the [testator's] instructions) ...'. However, for an argument that mistake might nevertheless be deployed in the intended beneficiary's unjust enrichment action against the unintended recipient, see Tapsell, above n 35.

69 From among many statements of the argument, see eg P. Birks, 'Misdirected Funds: Restitution From the Recipient' [1989] LMCLQ 296.

70 [1991] 2 AC 458 (HL).

71 Goff and Jones, above n 24, 176: 'the transfer by the plaintiff in ignorance will inevitably involve some error on his part' (*ibid*); see also K. Mason and J.W. Carter, *Restitution Law in Australia* (Butterworths: Sydney, 1995) 117–118, para 409; R. Grantham and C. E. F. Rickett, *Enrichment and Restitution in New Zealand* (Oxford: Hart Publishing, 2000) 269 *et seq*. On this view, there would be no unjust factor to support the intended beneficiary. *cf* G. Jones, 'Knowing Receipt and Knowing Assistance' in S. Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem: Hebrew University, 1992) 374, 381 describing the argument that ignorance is *a fortiori* from mistake as an 'impeccable conclusion'.

72 Burrows, above n 40, 139–142; *cp* A. S. Burrows and E. McKendrick, *Cases and Materials on the Law of Restitution* (OUP, Oxford, 1997) ch. 4; A. S. Burrows, 'Proprietary Restitution. Unmasking Unjust Enrichment' (2001) 117 LQR 412.

applicable in some of the common law situations claimed by Birks.⁷³ Some have accepted the need for a personal restitutionary explanation of the equitable liability without committing to ignorance as the unjust factor;⁷⁴ whilst others have rejected such an explanation without impugning ignorance as an unjust factor.⁷⁵ Still others, such as Swadling,⁷⁶ have rejected both from a restitutionary perspective; to say nothing of those who would reject the unjust enrichment explanation of the equitable liability because they would deny the principle against unjust enrichment.⁷⁷ And in a recent twist, Birks has taken the view that even if the equitable liability is not amenable to reinterpretation as a strict personal unjust enrichment action, there must still in principle be a parallel unjust enrichment claim based upon ignorance.⁷⁸

The argument in principle in favour of ignorance as an unjust factor is strong, though it has tended to be obscured by the above equitable debate. An unjust enrichment claim by the intended beneficiary against the unintended recipient would provide an alternative – though not necessarily less controversial – context for a formal judicial recognition of the unjust factor of ignorance to take place without running into the problems associated with the above debate.

Are there defences?

There are at least three matters which can arise by way of reply to the intended beneficiary's unjust enrichment claim against the unintended recipient. First, Goff and Jones argue that to perfect the bequest in *Lister v Hodgson* would frustrate the policies embodied in succession legislation such as the Wills Act, 1837.⁷⁹ The policy objection applies with even greater force against the intended beneficiary's unjust enrichment claim against the recipient under the will. Indeed, it is the most formidable objection to the intended beneficiary's claim, and it may turn out to be

73 A. S. Burrows, 'Misdirected Funds – A Reply' (1990) 106 LQR 20. However, these reservations would not impugn the intended beneficiary's claim.

74 C. Harpum, 'Knowing Assistance and Knowing Receipt: The Basis of Equitable Liability' in P. Birks (ed) *The Frontiers of Liability* (Oxford: OUP, 1994) vol 1, 9; S. Gardner, 'Knowing Assistance and Knowing Receipt: Taking Stock' (1996) 112 LQR 56; G. Jones, 'Knowing Receipt and Knowing Assistance' in Goldstein above n 71, 374; Lord Nicholls, 'Knowing Receipt. The Need for a New Landmark' in W. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds), *Restitution: Past Present & Future. Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1988) 231.

75 L. D. Smith, 'Constructive Trusts and Constructive Trustees' [1999] CLJ 294; L. D. Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 LQR 412.

76 W. J. Swadling, 'Knowing Assistance and Knowing Receipt: Some Lessons from the Law of Torts' in P. Birks (ed), *The Frontiers of Liability* (Oxford: OUP, 1994) vol. 1, 41; W. J. Swadling, 'Restitution and *Bona Fide* Purchase' in W. J. Swadling (ed), *The Limits of Restitutionary Claims* (BIICL: London, 1997) 79; W. J. Swadling 'A Claim in Restitution?' [1996] LMCLQ 63. See also E. Bant, "'Ignorance" as a ground of restitution – Can it survive?' [1998] LMCLQ 18; Virgo, above n 30, ch 7 (who takes a similar position, but nevertheless allows a very limited role for ignorance); cp Grantham and Rickett, above n 71, ch 7. If, as these authors argue, the 'ignorance' cases are properly concerned with the vindication of a pre-existing property right, then the intended beneficiary here would have no claim against the unintended recipient.

77 P. D. Finn 'The Liability of Third Parties for Knowing Receipt or Assistance' in D. M. W. Waters (ed), *Equity, Fiduciaries and Trusts 1993* (Toronto: Carswell, 1993) 195.

78 P. Birks, 'Equity in the Modern Law' (1996) UWALR 1, 72; P. Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLRev 623, 651.

79 Goff and Jones, above n 24, 39, 706. On such policies, see J. H. Langbein, 'Substantial Compliance with the Wills Act' 88 Harv L Rev 489, 491–503 (1975); M. Davey, 'The Making and Revocation of Wills – I' [1980] Conv 64, 67–70; A. G. Lang, 'Formality v Intention – Wills in an Australian Supermarket' (1985) 5 Melb ULR 82, 85–89; P. Critchley, 'Privileged Wills and Testamentary Formalities: A Time to Die?' [1999] CLJ 49, 51–53.

the rock upon which the principle of such claims ultimately founders. However, the point is met with characteristic elegance and style by Matthews, who points out that *White v Jones* itself is a case in which the claimants were allowed to prove

... a deceased's intention *otherwise* than by way of the strict rule laid down by Parliament [in the Wills Act] to prevent fraud. ... we cannot now jib at the courts' ignoring Parliament's formal rules here. They have done it too often ... for the objection to have much force. ... If the [claimants] can prove the testator's intention to benefit *them*, then *pro tanto* they also prove the testator's intention *not* to benefit the actual recipients.⁸⁰

On this view, therefore, the policy of the sanctity of the will is not immutable; it is gone around in many contexts; in particular, once it has been breached in a *White v Jones* negligence action, it cannot logically hold in the parallel restitution action. The aims of the enquiry, to determine what the testator did and did not intend, are the same, whether it is the tort action against the solicitor or the restitution action against the unintended recipient; and if the Wills Act policy does not preclude the tort claim, it cannot logically preclude the restitution claim.⁸¹ On the other hand, the tort claim does not resemble the redistribution of the inheritance nearly so much as the restitution claim does, and this resemblance may in the end keep the restitution claim – though perhaps not the tort claim – within the clutches of the Wills Act policy.

Second, Tettenborn⁸² has argued for a defence of 'lawful receipt', by which a defendant – such as the unintended recipient, here – should be able to argue: 'I received my enrichment from A, who ... voluntarily transferred it to me'.⁸³ However, the very fact that plaintiffs have succeeded in the rectification and similar cases discussed above is strong evidence that the law does not know this defence. Of course, if it were adopted,⁸⁴ such a defence would plainly answer many claims based upon interceptive subtraction; but, even so, it is not easy to apply to the claim of the intended beneficiary against the unintended recipient. On the one hand, that claim is based on the fact that the testator did not in fact intend that the unintended recipient be enriched and thus did not voluntarily transfer it to the recipient, and instead did all that he could do to ensure that the enrichment would not arrive with the recipient. On this view, there is therefore no room for a defence based on the notion that the testator voluntarily enriched the claimant. On the other hand, the unintended recipient in fact received from the estate, and the executor of a miscast will or the administrator of an intestacy will have been acting not only

80 Above n 35, 461; cp the use to which the proof of the same intention is put in *Walker v Medlicott*, above text after n 6. On the one hand, many of the actions to which Matthews refers (constructive trusts, secret trusts) are proprietary, whereas the action here contemplated is personal, which may be enough to bring it outside the ambit of the statutory policy (O'Dell, above n 23, 200 text with n 30). On the other, the circumvention of the policy has been raised against outcomes similar to that in *White v Jones*; see eg L. Klar, 'A Comment on *Whittingham v Crease*' (1978) 6 CCLT 311, 317; cf *McJannet*, above n 3, 134–135; *Hill v van Erp* (1997) 188 CLR 159, 181 *per* Dawson J.

81 The point is not that the will itself, or distribution on intestacy, is upset or struck down; indeed, it is precisely because of the operation of the will or distribution on intestacy that there is either a tort claim or a restitution claim or both. Furthermore, it might similarly be objected as a matter of policy that the courts ought to be unwilling to disturb the carefully struck legislative balance in s 20(1) of the 1982 Act between keeping to the will as drafted and allowing the intended beneficiary some claim; but this would also preclude *White v Jones*, and once that has been granted, there is no good reason to preclude the restitution action.

82 A. Tettenborn, 'Lawful Receipt – A Justifying Factor?' [1997] Restitution LR 1.

83 [1997] Restitution LR 1, 5.

84 cp Virgo, 'The recongition of the [Tettenborn] principle of lawful receipt is to be welcomed' (Virgo, above n 30, 107); cp Goff and Jones above n 24, 39, 65; Birks, above n 32, text after n 76.

lawfully but in pursuit of the obligations of the office.⁸⁵ On this view, all of the elements of the putative defence are made out. However, it is no more than a subset of the privity requirement: privity would deny a claimant an action in respect of an enrichment conferred on the defendant not by the claimant but by the third party; whereas the lawful receipt defence would deny such an action where that enrichment was voluntarily conferred by the third party. It was argued above that the notion of interceptive subtraction was a better explanation of the cases than a privity rule subject to exceptions, and if the privity rule falls, so should this subset.⁸⁶

Third, Gummow J has (*obiter*) given two reasons to deny such a claim: first, that there would be no unjust factor ('the qualifying or vitiating factor would be negligence of Mrs Hill, something for which the next of kin bore no responsibility'); and, second, that the defendant's enrichment would not be at the claimant's expense (it was not 'clear that the wealth in question would "certainly" have vested in Mrs van Erp had it not been "intercepted" by Mrs Hill and diverted to the next of kin whilst "en route" from the testatrix').⁸⁷ His first objection, cast in the language of negligence and responsibility, assumes fault-based liability for restitution; it overlooks the strict liability of recipients in restitution⁸⁸ given effect in this context by the unjust factor of ignorance, and is answered by the recognition of that factor.⁸⁹ His second restates Smith's uncertainty objections to interceptive subtraction, and is answered by an application of the *Walker v Medlicott* standard of proof of the testator's intentions by convincing evidence.

Consequently, it seems that, on the application of the four enquiries mandated by the principle against unjust enrichment, there is an arguable case for saying that the beneficiary intended by the testator can have a direct personal restitution action against the unintended recipient, though that case quickly runs into formidable – if not necessarily insuperable – obstacles on at least three of the four enquiries.

In *Walker v Medlicott*, the Court of Appeal held, in an action against the negligent solicitor, that the intended beneficiary had to mitigate his loss by first seeking rectification of the will under section 20(1) of the 1980 Act. If the intended beneficiary also has a direct personal restitution action against the unintended beneficiary, the question would arise as to whether, by analogy with *Walker v*

85 In *Earl v Wilhelm* (2000) 183 DLR (4th) 45 (Sask CA) the negligent solicitor sought contribution and indemnity from the residuary beneficiaries on the ground that any additional benefits they received amounted to an unjust enrichment, but the Saskatchewan Court of Appeal rejected this argument on the grounds that 'it cannot be characterized as an unjust enrichment when it occurred as a result of the operation of law' ((2000) 183 DLR (4th) 45, 62 *per* Sherstobitoff JA, Bayda CJS, Jackson JA concurring). In the case itself, on the facts, the relevant operation of law was a court order, but there would be no relevant difference if the distribution were the result of the actions of an executor or administrator.

86 One context in which the defence of lawful receipt might prove useful is already adequately covered by other doctrines which produce the same result: see P. Watts 'Does a subcontractor have restitutionary rights against the employer?' [1995] LMCLQ 398; J. Lipton, 'Lender Liability in Unjust Enrichment to Third Party Service Providers' (1997) 20 UNSWL 101; Birks, above n 32, text after n 90.

87 *Hill v van Erp* (1996–1997) 188 CLR 159 (HCA) 226; see also Barker, above n 35, 138–139. On *Hill* generally, see S. Yeo, 'Rethinking Proximity: A Paper Tiger?' (1997) 5 TLR 165; Lunney, above n 35; on this aspect of *Hill*, see Tapsell, above n 35.

88 *Lipkin Gorman v Karpnale* [1991] 2 AC 458, 587 *per* Lord Goff; *Banque Financière de la Cité v Parc (Battersea)* [1999] 1 AC 221 (HL) 227 *per* Lord Steyn.

89 cf Tapsell, above n 35: 'In Gummow J's view, before you can apply unjust enrichment, you ... have to look at the existing pigeon holes to see if you can fit the facts into one of them. Unfortunately, negligence is not yet one of them. The real question which arises is: why isn't it?' To which the answer is: because it is not a plaintiff-sided consent-related unjust factor (such as ignorance or mistake), it does not amount to a free acceptance or unconscientious receipt, and has not been recognised as a strong policy from elsewhere in the law requiring restitution.

Medlicott, in an action against the negligent solicitor, the intended beneficiary must mitigate his loss by first seeking restitution from the unintended recipient. This would be a considerably less limited duty to mitigate than that recognised in *Walker v Medlicott*, as, unlike that case, it would apply not only to cases of a valid but miscast will, but also to invalid wills and cases of negligence *dehors* the will. However, such a duty is unlikely to arise. It is a general rule that it is not the duty of the injured party to embark upon litigation to mitigate loss,⁹⁰ and it was only because the facts necessary for a rectification claim against the will were a subset of the facts necessary for a negligence claim against the solicitor that an exception was stated in *Walker v Medlicott*.⁹¹ There, if the negligence claim against the solicitor would have been successful, it followed that the rectification claim must also have been successful. However, the facts necessary for a restitution claim against the unintended recipient are different from those necessary for a negligence claim against the solicitor; of course, there will be a certain degree of factual overlap, but in the restitution claim, it will be necessary to prove facts entirely unrelated to the negligence claim, and *vice versa*. Hence, the reasons which justified mitigation by rectification in *Walker v Medlicott* do not apply to require mitigation by restitution here. Indeed, the claimant's tort claim against the solicitor and restitution claim against the unintended recipient are alternative claims, to which the normal rules of election between actions⁹² would apply.

In the event, therefore, *Walker v Medlicott* illustrates that in some *White v Jones* actions against negligent solicitors, the claimant can be required to mitigate his loss by first seeking to rectify the will, if that is possible and there is a will to rectify. But no similar mitigation requirement would arise if there exists a direct personal restitution action by the intended beneficiary against the unintended recipient to prevent the unjust enrichment of the latter at the expense of the former.

Conclusion

Walker v Medlicott gives content to the power in section 20(1) of the Administration of Justice Act 1982 to rectify a miscast will. The pattern is restitutionary; indeed, there are many other examples of restitutionary rectification of deeds, and this raises the question whether an intended beneficiary can have a personal action in restitution against the unintended recipient where rectification is unavailable, whether because though there is a will the facts do not come within the terms of s 20(1), or because there is no will to rectify. Certainly, many judges have been uneasy with a solution which leaves the unintended recipient in possession of the enrichment,⁹³ an outcome prevented if the intended beneficiary can sue the unintended recipient in restitution.

The much-maligned doctrine of privity ensured that a remedy in contract by the intended beneficiary against the negligent solicitor did not lie at common law;⁹⁴ and its subsequent statutory abrogation does not seem to have been sufficiently

90 See eg *Pilkington v Wood* [1953] Ch 770, 777 per Harman J.

91 See *Horsfall v Hayward* [1999] 1 FLR 1182, 1187–1188 per Mummery LJ.

92 See O'Dell, above n 23, 198 n 10.

93 See eg *White v Jones* [1995] 2 AC 207, 278 per Lord Mustill (dissenting); *Hill v van Erp* (1996–1997) 188 CLR 159, 213 per McHugh J (dissenting); *Carr-Glynn v Frearsons* [1999] Ch 326, 339 per Thorpe LJ; *Walker v Medlicott* [1999] 1 All ER 685, 697 per Sir Christopher Slade, 700 per Mummery LJ.

94 See eg *White v Jones* [1995] 2 AC 207, 256–257, 266–267 per Lord Goff, 280–282 per Lord Mustill.

wide to change that conclusion.⁹⁵ *White v Jones* filled this gap by unequivocally establishing a remedy in tort by the intended beneficiary against the negligent solicitor. But there are also gaps in this tort remedy, as where the testator's intention is frustrated by actions not amounting to negligence on the part of the solicitor.⁹⁶ In such cases, as *White v Jones* filled the gaps in contract, so the restitution remedy would fill the gaps in tort. Furthermore, such an action would prevent the swelling of the estate: if an unintended recipient receives from the estate, and the intended beneficiary recovers from the solicitor, the effect is that the estate has increased and may even be doubled;⁹⁷ restitution to the intended beneficiary from the unintended recipient would have the (indirect) effect of preventing such an increase to or doubling of the estate.

Such an action would of course need to fulfil the terms of the four enquiries of the principle against unjust enrichment. The application of those enquiries demonstrates that there is an arguable case in favour of a personal unjust enrichment action by the intended beneficiary against the unintended recipient. On this view then, the unintended recipient should not retain the value of the enrichment received, where the testator's demonstrable intention was that the unintended recipient not get it and the testator had done all that he could do to ensure that he not get it, only to see that intention frustrated by the third party. But this arguable case is fraught with difficulties. Whether the unintended recipient's enrichment was received at the expense of the intended beneficiary depends upon whether a strict principle of privity or a flexible notion of interceptive subtraction is adopted; whether there is cause of action depends on whether ignorance is recognised as an unjust factor; and whether there would be defences to any claim depends on the strictness of the Wills Act policy and the existence of the defence of lawful receipt.

The analysis essayed here was not so much an argument that the intended beneficiary does have a personal action in restitution to reverse the unjust enrichment of the unintended recipient as simply an analysis of the availability of such an action in principle. Despite the hurdles to be jumped, it is clear that such an action is possible, perhaps even plausible. Judicial discussion of such an action would have the effect of clarifying the proper scope of some important restitutionary doctrines; judicial recognition would also go some way towards ensuring that a testator's intentions are not frustrated by a solicitor's negligence. The testator's trip to the solicitor's office might not have a fraught outcome after all.

95 Johnston, above n 1, 295–296. The Contracts (Rights of Third Parties) Act 1999 renders terms of contracts enforceable by third parties if, *inter alia*, 'the contract purports to confer a benefit on a third party' (s 1(1)(b)) unless 'it appears that the parties did not intend the contract to be enforceable by the third party' (s 1(2)). Whether or not a claim in contract by the intended beneficiary against the negligent solicitor is excluded by s 1(2), the Law Commission felt that such a claim would in any event fall 'just outside' the ambit of s 1(1)(b) in first place (*Report on Privity Contract: Contracts for the Benefit of Third Parties* (Law Com. No 242; Cm. 3329 1996), para 7.25 and generally paras 7.19–7.27; discussed J. Adams, D. Beyeveld and R. Brownsword, 'Privity of Contract The Benefits and Burdens of Law Reform' (1997) 60 MLR 238, 250; A. S. Burrows 'The Contracts (Rights of Third Parties) Act 1999 and its Implications for Commercial Contracts' [2000] LMCLQ 540, 544; Jones (2001) 17 PN 190, 202–204; and C. Mitchell, 'Searching for the Principle Behind Privity Reform' in P. Kincaid (ed), *Privity. Private Justice or Public Regulation* (Dartmouth: Ashgate, 2001) 104, 112–114).

96 Recall, for example, that the solicitor in *Walker v Medlicott* was held not to be negligent; see also *Queensland Art Gallery Board of Trustees v Henderson Trout* [1998] Q.S.C. 250; the *Till* cases, above n 15; *Worby v Rosser* [2000] PNLR 140 (CA); *Gibbons v Nelsons* [2000] PNLR 735 (Blackburne J); *X v Woollcombe Yonge* [2001] WTLR 301 (Neuberger J). In such circumstances there is no tort action at all.

97 A matter which did not go unnoticed in *White v Jones* (see [1995] 2 AC 207, 257–258 *per* Lord Goff, 278 *per* Lord Mustill, 293 *per* Lord Nolan), though it seems from *Earl v Wilhelm* (2000) 183 DLR (4th) 45 (Sask CA) 62 that such an increase does not *per se* amount to an unjust enrichment.