

THE RELEVANCE OF THE PLAINTIFF'S IMPOVERISHMENT IN AWARDING CLAIMS BASED ON UNJUSTIFIED ENRICHMENT

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1 Introduction

The purpose of this paper is to evaluate two prominent features of the South African law of unjustified enrichment. The first is the general requirement that the plaintiff must be impoverished.¹ This essentially means that the plaintiff's estate must actually decrease, or would actually have increased had it not been for the event giving rise to the defendant's enrichment.² The second feature is the test for measuring the quantum of enrichment liability, namely the lesser of the plaintiff's impoverishment and the defendant's enrichment, determined at the moment the action is instituted³ (the "double ceiling"⁴ or "double cap"⁵ rule).

Before proceeding further, it is worth mentioning that a remarkable divergence exists among legal systems as to the degree of prominence which is accorded to impoverishment (or loss - a term sometimes used as functional equivalent) when imposing liability on the basis of unjustified enrichment.⁶ Thus, in the civil-law context, German law does not generally

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¹ See eg *Firststrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 6 SA 317 (SCA) para 8 (per Scott JA):

"The basic ingredients of any enrichment action include the enrichment of one party (the defendant) and a corresponding impoverishment of another (the plaintiff). In the absence of an impoverishment there can be no right of action".

See further Lotz "Enrichment" in *LAWSA* 9 rev Brand (1996) para 209(b); Visser *Unjustified Enrichment* (2008) 159; Sonnekus *Unjustified Enrichment in South African Law* (2008) 42-43; Eiselen & Pienaar *Unjustified Enrichment – A Casebook* 3 ed (2008) 25

² See Lotz/Brand *LAWSA* 9 para 209(b); De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed (1987) 339. A decrease in the estate can either result from a decrease in assets or increase in liabilities. Likewise, an estate would otherwise have increased if there would have been an increase in assets or a decrease in liabilities.

³ See eg *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA) para 17; *Mndi v Malgas* 2006 2 SA 182 (E) para 25; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 84J-85A; Visser *Unjustified Enrichment* 161-164

⁴ See Linssen "Remedies for Wrongdoing – The Measure of Recovery" 2006 14(3) *ERPL* 351-357; in French law reference is made to the *double plafond*.

⁵ Visser *Unjustified Enrichment* 115, 161, 266, 730

⁶ For comparative overviews see Beatson & Schrage *Cases, Materials and Texts on Unjustified Enrichment* (2003) ch 4; Schlechtriem *Restitution und Bereicherungsausgleich in Europa* 1 (2000) 231-237

require impoverishment,⁷ whereas Dutch law does,⁸ and also recognises the “double ceiling” rule.⁹ In the common-law context, it has not been resolved in English law whether a claim for restitution based on unjust enrichment of the defendant requires proof of loss on the side of the plaintiff. It is recognised that the enrichment has to be at the plaintiff’s expense, but it is not settled that this means that the plaintiff had to suffer a loss or had to be impoverished.¹⁰ Canadian law however, requires that a claim based on unjust enrichment should be mirrored by a loss,¹¹ and also follows the “double ceiling” rule.¹² Finally, divergence also characterises systems that contain a mixture of civil law and common law. It has been said that in Scots law “loss on the part of the pursuer does not appear within the term ‘unjustified enrichment’ as a definitional necessity of the claim at the same level as ‘enrichment’, but a requirement of loss is nevertheless often stated”.¹³ The position in Louisiana, in turn, closely resembles that of South Africa: its Civil Code unequivocally requires loss and also recognises the “double ceiling” rule.¹⁴

Against the background of this brief comparative overview, which simply serves to dispel the notions that the plaintiff’s impoverishment is a universal requirement for imposing liability on the basis of unjustified enrichment, and that the measure of such liability is universally regarded as the lesser of the plaintiff’s impoverishment and the defendant’s enrichment, the justifications for these notions will now be examined more closely. This will be followed by an evaluation of their application in certain fact patterns involving unjustified enrichment.

2 Justifications for requiring impoverishment

It is not easy to answer the question why South African law traditionally requires that the plaintiff must be impoverished for purposes of imposing enrichment liability, since the requirement is often stated in a way which gives

⁷ See eg Wieling *Bereicherungsrecht* 3 ed (2004) 1-2; Zimmermann “Unjustified Enrichment: The Modern Civilian Approach” 1995 *OJLS* 403; for contrary views see Jansen “Die Korrektur grundloser Vermögensverschiebungen als Restitution” 2003 *ZSS (RA)* 106 132 sqq. The first draft of the German Civil Code still required that the enrichment had to come from the estate (*aus dem Vermögen*) of the plaintiff (see para 748). However, the final version of the German Civil Code simply requires that the enrichment had to be “at the expense of” the plaintiff (para 812 BGB).

⁸ See Art 6:212 BW (“he who is unjustifiably enriched at the expense of another is obliged, to the extent that it is reasonable, to compensate his [ie the other person’s] loss up to the amount of his enrichment”); further see Linssen 2006 *ERPL* 356 and the extracts in Beatson & Schrage *Unjustified Enrichment* 192-203. The duty to return performances that are not owed is specifically regulated in Arts 6:203–6:211 BW.

⁹ See Art 6:212 BW.

¹⁰ Birks *Unjust Enrichment* 2 ed (2005) 79 denied the implication of a loss; also see *Sempre Metals Ltd (formerly Metallgesellschaft Ltd v Her Majesty’s Commissioners of Inland Revenue* [2007] UKHL 34 para 31, but contrast eg McInnes “Interceptive Subtraction, Unjust Enrichment and Wrongs – A Reply to Professor Birks” 2003 *CLJ* 697; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1991] 1 AC 221 237.

¹¹ Cf *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 194 (SCC); also see *Pettkus v Becker* [1980] 2 SCR 217 227.

¹² See McInnes “The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution” 1999 *Alberta LR* 1 20.

¹³ Evans-Jones *Unjustified Enrichment – Enrichment by Deliberate Conferral: Conductio* (2004) para 7 35.

¹⁴ Art 2298.

the impression that it is self-evident. Nonetheless, closer inspection reveals that at least the following justifications could underlie its acceptance.

2 1 The justification of promoting corrective justice: (only) enrichment which can be related to another's impoverishment has to be balanced out

Two ideas which originated in classical Roman law and ancient Greek philosophy are central to the impoverishment requirement. Although these ideas are closely related to each other, this relationship was not appreciated at first.

The first idea is encapsulated in the famous saying of the Roman jurist Sextus Pomponius that "it is by nature fair that nobody be enriched to the detriment of another".¹⁵ Note that Pomponius does not have a problem with persons being enriched in general. His objection is only directed to those cases of enrichment that can be related to some form of detriment befalling another. Unfortunately, the principle is formulated so vaguely that it is of limited use. Pomponius does not explain why detriment is so important, or what exactly it means. The mere fact that one person is enriched to the detriment of another cannot automatically be regarded as unfair. Otherwise a person would not be able to retain the enrichment flowing from a valid contract which results in a loss to another. To be of any use, Pomponius's general principle requires further amplification or qualification.

This brings us to the second idea, which was developed by Aristotle and remains of fundamental importance in private law to this day. It is the familiar notion of corrective justice. In an analysis of various types of justice, Aristotle pointed out that there is a need to "straighten out" or correct the consequences of certain "interactions" or "transactions" between individuals, irrespective of their personal merit.¹⁶ Thus, when one person wrongly causes harm to another, the judge can equalize or correct matters by imposing a penalty. For the interaction to call for correction, the parties therefore have to be linked in a specific way: for example, the one has to do wrong and the other has to suffer harm.

Aristotle concerned him more with the interactions which we would now call contracts and delicts, and not with those covered by Pomponius's enrichment principle, which we nowadays regard as the domain of the law of unjustified enrichment. To appreciate the link between corrective justice and enrichment liability we have to turn the clock forward. Some Roman lawyers and medieval theologians and philosophers came to appreciate that there is a need to redress the imbalance created when a person gains from taking something

¹⁵ *D* 12 6 14, Pomp 21 ad Sabinum ("Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiozem"); another formulation is contained in *D* 50 17 206, Pomp 9 ex variis lectionibus ("Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiozem") For discussions see Zimmermann *The Law of Obligations* (1989) 851-854; Dawson *Unjust Enrichment* (1951) 1-8

¹⁶ *Nicomachean Ethics* V ii, iv

from another by imposing a duty of restitution.¹⁷ However, they did not fully comprehend that unjustified enrichment could be the source of such a duty, and hence a source of obligations distinct from contract and delict. The first person to do so was the seventeenth-century Roman-Dutch jurist De Groot.¹⁸ It is by examining his views that the link between enrichment as a source of obligation and corrective justice, and the relevance of impoverishment in this context, becomes clearer.

According to De Groot, the law should in certain situations impose an obligation to balance out an imbalance (*onevenheid*).¹⁹ Such an imbalance not only arises from situations which we would nowadays regard as involving delicts, but also in cases of enrichment where someone without legal title derives, or may derive, a benefit from another's property²⁰ - for example where one person enriches another through preserving or improving their property.²¹

De Groot's analysis is significant for a number of reasons. First, unlike Pomponius, he does not generally appeal to fairness to justify imposing an obligation. De Groot specifically refers to the need to correct or balance out an imbalance. Via the earlier theological works, most notably those of Thomas Aquinas,²² this view can ultimately be linked to the Aristotelian concept of corrective justice. Thus, corrective justice-based thinking essentially provided the cornerstone when De Groot laid the foundations of unjustified enrichment as a distinct source of liability. To this day, this idea is of central importance and enjoys widespread support in both civil-law and common-law quarters.²³

Secondly, and crucially for present purposes, De Groot relies on Pomponius in stating that for an enrichment to give rise to an imbalance there had to be

¹⁷ See eg Cicero *De Officiis* 3 5 21; Aquinas *Summa Theologica* II ii question 62 art 1 on whether restitution is an act of commutative (ie corrective) justice; Hallebeek *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 12; Dolezalek "The Moral Theologians' Doctrine of Restitution and Its Juridification in the Sixteenth and Seventeenth Centuries" 1992 *AJ* 104 106

¹⁸ See especially Feenstra "Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence in Roman-Dutch Law" in Schrage (ed) *Unjust Enrichment - The Comparative Legal History of the Law of Restitution* 2 ed (1999) 197 199-200 Further see Visser *Unjustified Enrichment* 17-19

¹⁹ See De Groot *Inl* 3 1 9, 3 1 14-3 1 18; De Groot *De Jure Belli ac Pacis* 2 10 2 1

²⁰ De Groot *Inl* 3 30 1 ("Verbintnisse door baet-trecking ontstaet, wanneer iemand zonder voorige recht-gunninghe baet treckt, ofte zoude komen te trekken, uit eens anders goed"), read with De Groot *Inl* 3 1 15

²¹ De Groot *Inl* 3 1 15; see Feenstra "Grotius' Doctrine of Unjust Enrichment" in *Unjust Enrichment* 204

²² *Summa Theologica* II ii question 62 Aquinas pointed out that an imbalance or unevenness could be restored through an act of restitution Restitution could be regarded as an act of commutative justice or corrective justice as Aristotle called it (see Hallebeek *The Concept of Unjust Enrichment* 12, 88; further see Feenstra "Grotius' Doctrine of Unjust Enrichment" in *Unjust Enrichment* 202, 210 sqq; Birks & McLeod "The Implied Contract Theory of Quasi-contract: Civilian Opinion Current in the Century before Blackstone" 1986 *OJLS* 46 59-63; Jansen 2003 *ZSS (RA)* 132 sqq)

²³ See, in the civil law context, Von Caemmerer "Bereicherung und unerlaubte Handlung" in Dölle, Rheinsteil & Zweigert (eds) *Festschrift für Ernst Rabel* (1954) 335 337; Zimmermann 1995 *OJLS* 403, and, in the common-law context, Weinrib *The Idea of Private Law* (1995) especially 140 sqq; Weinrib "Restoring Restitution" 2005 (91) *Virginia LR* 861; Smith "Restitution: The Heart of Corrective Justice" 2001 *Texas LR* 2115; Burrows "Contract, Tort and Restitution - A Satisfactory Division or Not?" 1983 *LQR* 217; Barker "Unjust Enrichment: Containing the Beast" 1995 *OJLS* 457; Posner "The Concept of Corrective Justice in Recent Theories of Tort Law" 1981 *Journal of Legal Studies* 187; *Regional Municipality of Peel v Canada* [1992] 3 SCR 762 804

a concomitant loss or detriment (*schade*) on the side of the claimant.²⁴ This detriment is manifest in cases where there is enrichment arising from a loss of ownership without legal ground. In that context it is essential for claiming restitution that there has to be a loss of ownership, for if there were no such a loss, there would be no enrichment on the side of the defendant. The plaintiff would remain owner and could simply reclaim possession of the object with a vindicatory action. Or, to put it in corrective justice terms, there can be no duty to provide restitution arising from an imbalance, because there is no imbalance if the plaintiff remains owner.

The difficulty with this analysis, though, is that is restricted to simple two-party situations involving enrichment by way of acquisition of ownership. For example, if I am only obliged to deliver you one horse, but I mistakenly deliver two, thereby making you owner of both, I am automatically impoverished by delivery of the second horse. This loss can then be balanced out by an enrichment claim. But not all forms of enrichment can be related so directly and inevitably to another's loss. For example, you can be enriched through unauthorised use of my horse, but without me suffering an actual loss.²⁵ Given that this amounts to a direct infringement on my right as owner to possess and use my property, it can be asked why this is not also a situation where there is an imbalance, and where corrective justice will not be better served by requiring that you must account for your enrichment. These are not questions which concerned De Groot, but if South African lawyers want to rely on corrective justice-based justifications for requiring impoverishment on the side of the plaintiff, they cannot be left unanswered. This will be done later on.²⁶ For now, a second, closely-related justification for the impoverishment requirement has to be considered.

2 2 The justification that proof of impoverishment is essential to determine that the enrichment was at the expense of the plaintiff

It is a general requirement of the South African law of unjustified enrichment that the plaintiff must have been enriched at the expense of the plaintiff. This requirement is traditionally stated separately from the requirement that the plaintiff has to be impoverished.²⁷ However, the case law regards the two as closely linked: in fact, there are suggestions that the plaintiff must prove that he was impoverished in order to establish that the enrichment was at his expense. Thus, in *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd*,²⁸ Chief Justice Innes stated that

²⁴ De Groot *Inl* 3 30 3 (“Deze verbintenis is het aangeboren recht de naeste: want de billykheit laet niet toe na de scheidende der eygendommen, dat yemand hem zal verryken over eens anders schade”) The references to *Pomp D* 12 6 14 and *D* 50 17 206 are in De Groot *Inl* 3 30 3 n 3

²⁵ To use the famous example of Lord Mansfield in *Hambly v Trott* (1776) 1 Cowp 371, 98 ER 1136

²⁶ See 5 below

²⁷ See eg *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 3 SA 482 (SCA) paras 15, 19-20 per Schutz JA and para 2 per Harms JA; *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA) para 17; *Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd* 2008 1 SA 279 (W) para 22; *Watson NO v Shaw NO* 2008 1 SA 350 (C) para 11; further see generally Visser *Unjustified Enrichment* 156-192; Eiselen & Pienaar *Unjustified Enrichment* 27; Lotz/Brand *LAWSA* 9 para 76(d)

²⁸ 1915 AD 636

"The equitable principle on which the law awards compensation for improvements is that no man should be allowed to enrich himself at the expense of another. Both elements must concur, benefit to the claimant and detriment to the improver, and both must be borne in mind in assessing the amount."²⁹

Although statements like these are also found in some foreign jurisdictions,³⁰ others do not regard it as self-evident that it is only possible to prove that enrichment was at the expense of another if that person was actually impoverished.³¹ To understand the latter approach it is necessary to consider the rationale of the "at the expense of" requirement. In essence, it serves to link a specific person (the plaintiff) causally to the enrichment of another (the defendant).³² Once it is accepted that the "at the expense of" requirement essentially deals with causality, and with providing *locus standi* to a particular plaintiff, it is easier to understand why some accept that the violation of any protectable interest assigned to a plaintiff, and not only the violation of an interest which is manifested in actual impoverishment, could sufficiently link a specific plaintiff to the defendant's enrichment. Proof that the plaintiff was impoverished could of course assist in finding that enrichment was at the expense of the claimant, but such proof need not be a requirement for imposing liability.

Although we have come a long way from the brief discussion of Pomponius's famous enrichment principle, it is perhaps not inappropriate to conclude by pointing out an interesting aspect of the way in which it is translated which illustrates the point made above. It will be recalled that Pomponius maintained that it is fair that nobody should be enriched *cum alterius detrimento*.³³ I have translated the Latin words rather literally as "to the detriment of another". However, this phrase is often translated in two other ways. The first is as "to the loss of another" or "through another's loss".³⁴ Such a translation suggests that the plaintiff must indeed suffer harm for enrichment liability to be imposed. However, *cum alterius detrimento* is sometimes translated more figuratively, namely as "at the expense of another".³⁵ In this translation the implication of actual loss is less strong: what matters is that you did not gather the gain purely on your own, and that someone else had to be affected by it in a negative manner, without necessarily being impoverished.

²⁹ 649; approved by Ogilvie Thompson JA in *Nortje v Pool NO 1966 3 SA 96 (A)* 104

³⁰ In the context of English law, see Burrows, McKendrick & Edelman *Cases and Materials on the Law of Restitution* 2 ed (2007) 109 ("In relation to restitution of an unjust enrichment, 'at the claimant's expense' means by subtraction from the claimant's wealth. For example, if the claimant mistakenly pays the defendant £100, the defendant's gain of £100 represents a subtraction from the claimant's wealth of £100") But see Birks *Unjust Enrichment* 73-74, where it is said that enrichment "at the expense of another" is enrichment which is "drawn from another", and that that "from" does not necessarily imply "loss". On Dutch law, see the extracts in Beatson & Schrage *Unjustified Enrichment* 196-197 which reflect that enrichment "at the expense of another" requires impoverishment

³¹ See Wieling *Bereicherungsrecht* 2

³² See eg *First National Bank of Southern Africa Ltd v East Coast Design CC 2000 4 SA 137 (D)* 141; *St Helena Primary School v MEC, Department of Education, Free State Province 2007 4 SA 16 (O)* para 25

³³ *D* 12 6 14

³⁴ Birks *An Introduction to the Law of Restitution* (1985) 23; Dawson *Unjust Enrichment* 1-8

³⁵ See Zimmermann *Obligations* 852, Johnston & Zimmermann "Unjustified Enrichment: Surveying the Landscape" in Johnston & Zimmermann (eds) *Unjustified Enrichment – Key Issues in Comparative Perspective* (2002) 3

3 Justifications for the rule that the measure of liability is the lesser of the plaintiff's impoverishment and the defendant's enrichment (the "double ceiling" rule)

The focus now shifts from the impoverishment requirement to the "double ceiling" rule. Again two, related justifications can be discerned.

3.1 The justification based on the notion that the enrichment claim "replaces" a lost proprietary (ie vindicatory) claim

The first justification draws inspiration from the notion that an enrichment claim is essentially awarded to compensate or make good the loss of the right of ownership. It will be recalled that De Groot essentially based enrichment liability on the need to redress an imbalance (*onevenheid*) which arises through becoming owner of another's property.³⁶ Although De Groot did not expressly formulate a "double ceiling" rule, his ideas have influenced the famous Dutch jurist Bregstein in formulating such a rule. In a passage which apparently found favour with Rumpff JA in *Nortje v Pool NO*,³⁷ Bregstein considered these views of De Groot and then stated that

"it follows that with this action [ie the personal enrichment action] ... one can never claim more than the value which was lost by the impoverished party or ... the value remaining with the defendant at the time of the action."³⁸

Bregstein then proceeds to provide the following rather complex justification for the "double ceiling" rule. According to him, enrichment liability and delictual liability are closely related: in fact, he goes as far as regarding it as the *primary* aim of an enrichment action to make good a loss or to redress impoverishment.³⁹ The purpose of the "double ceiling" rule is then to cap the quantum of this claim for making good the loss if the value remaining is less than the value lost:

"[T]he value can only be reclaimed to the extent that it still remains, just as it is only the object which can be reclaimed with the *rei vindicatio* inasmuch as it is still in existence".⁴⁰

Bregstein's argument is not unassailable. If making good a loss is the *primary* aim of imposing enrichment liability, why should the person who suffered loss of ownership be made to bear the risk of devaluation of the object? De Groot, from whom Bregstein derived inspiration, said nothing of the sort. De Groot's focus throughout is on correcting an imbalance due to benefitting or enrichment, and not on compensating losses.

Bregstein's justification for the "double ceiling" rule also suffers from a further limitation. It is restricted to those cases of enrichment which arise

³⁶ See De Groot Inl 3 30 3 ("de billykheyt laet niet toe na de scheydinge der eygendommen, dat yemand hem zal verryken over eens anders schade")

³⁷ 1966 3 SA 96 (A) 115

³⁸ *Ongegronde Vermogensvermeerdering* (1927) 192 (own translation)

³⁹ "The enrichment action is therefore quite similar to a claim for damages: it is primarily aimed at making good a proprietary loss, and it is only limited in one respect, namely the requirement that there has to be a still extant corresponding increase in the estate against which the claim is directed" (197; own translation)

⁴⁰ 194 (own translation)

from the transfer of ownership. It does not provide any justification for other cases of enrichment, such as those resulting from the rendering of services, improving another's property without any loss of ownership, or from use of another's assets. In these circumstances the analogy with the proprietary or vindicatory claim, which is restricted to what remains of the object claimed by the owner, cannot apply. This does not mean that the "double ceiling" rule could not be applied in these cases. But then other justifications are called for.

3.2 The justification that the "double ceiling" rule is a logical consequence of the "at the expense of" requirement

The second justification for the "double ceiling" rule is formulated as follows in Lotz and Brand's exposition of the impoverishment requirement in *LAWSA*.⁴¹ After stating that the quantum of the plaintiff's claim is the amount by which the plaintiff has been impoverished or by which the defendant has been enriched, whichever is the lesser, the accompanying footnote declares that:

"This follows from the next requirement, ie that the defendant's enrichment must be at the plaintiff's expense. See *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd, Bulawayo Waterworks Co Ltd v Fletcher & Fletcher* 1915 AD 636 649".⁴²

To understand this justification, which also enjoys some support in the common law,⁴³ the following examples are helpful.

In the first set of examples, the impoverishment is less than the enrichment. This is illustrated by the facts of *Nortje v Pool NO*.⁴⁴ There the cost to the plaintiffs of prospecting for minerals was less than the increase in the value of the farm. Assuming that the minority was correct, and that an enrichment claim should have been awarded, the quantum would then have been limited to the prospectors' aggregate costs (ie their actual impoverishment), and would not have been the total enrichment of the defendant through the increase in the value of the farm.⁴⁵ Another example is that of the plaintiff who makes an undue payment to the defendant, who in turn uses the money to buy a lottery ticket and wins the lottery. The plaintiff's claim can again be restricted to his actual impoverishment, and not the value remaining with defendant.

In the second set of examples, the enrichment is less than the impoverishment. The typical situation involves expensive improvements to another's property. Illustrative cases include *Skyword (Pvt) Ltd v Peter Scales (Pvt) Ltd*,⁴⁶ where the plaintiff could not recover the full costs of repairing the defendant's

⁴¹ *LAWSA* 9 para 209(b)

⁴² Para 209 n 14 The particular passage from the *Fletcher* case reads as follows:

"The equitable principle on which the law awards compensation for improvements is that no man should be allowed to enrich himself at the expense of another. Both elements must concur, benefit to the claimant and detriment to the improver, and both must be borne in mind in assessing the amount".

⁴³ Cf McInnes "'At the Plaintiff's Expense': Quantifying Restitutory Relief" 1998 *CLJ* 472

⁴⁴ 1966 3 SA 96 (A)

⁴⁵ 108

⁴⁶ 1979 1 SA 570 (R)

aeroplane because the defendant could have had it repaired for less; *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers*,⁴⁷ where the garage was not allowed the full costs of repairs and services, but only the lesser amount of the increased value of the vehicle, and *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd*,⁴⁸ where a well was sunk on the defendant's land at a cost of £500, but the court limited the claim to the enhancement of the property, ie the plaintiff's actual enrichment, which amounted to only £100.

The relevance of these two sets of examples in the context of justifications for the "double ceiling" rule is the following. In the first set of examples, applying the rule prevents a person from making a profit from an enrichment claim. The increase in the value of the farm beyond the prospector's costs, or winning the lottery is the defendant's good fortune, and the plaintiff has nothing to complain about.⁴⁹ Such "excess enrichment" is essentially regarded as causally irrelevant when claiming against the defendant. Since the "at the expense of" requirement is aimed at making the plaintiff only liable for causally relevant enrichment, the application of the "double ceiling" rule then in effect serves to promote this requirement. In the second set of examples, applying the rule in turn prevents the defendant from being liable for more than his actual enrichment. The effect of applying the "double ceiling" rule is that the plaintiff's "excess impoverishment" is regarded as causally irrelevant when claiming against the defendant. Again, applying the rule in effect serves the "at the expense of" requirement.

The overview above reveals that justifications for requiring impoverishment of the plaintiff and the "double ceiling" rule largely focus on the relatively simple cases of enrichment by way of transfer of ownership of property between two parties. The overview further shows that the justifications rely heavily on the need to give effect to the requirement that enrichment has to be at the expense of plaintiff. In the following sections, the focus will be on certain problem cases which assist in evaluating these justifications. These cases essentially deal with passing on impoverishment to third parties, and with enrichment by "taking" from others through infringing on their rights.

4 Evaluating the relevance of impoverishment in awarding enrichment claims: the problem case of disimpoverishment by passing on

Passing on occurs when a plaintiff manages to pass his impoverishment on to a third party.⁵⁰ Strict adherence to an impoverishment requirement and the "double ceiling" rule requires that an enrichment claim must be denied in these circumstances. As La Forest J stated in the Canadian case of *Air Canada v British Columbia*.⁵¹

⁴⁷ 1998 1 SA 939 (C) 957

⁴⁸ 1915 AD 636

⁴⁹ Whitty & Visser "Unjustified Enrichment" in Zimmermann, Visser & Reid (eds) *Mixed Legal Systems in Comparative Perspective - Property and Obligations in Scotland and South Africa* (2004) 399 410

⁵⁰ See generally Rush *The Defence of Passing On* (2006)

⁵¹ (1989) 59 DLR (4th) 161 (SCC); see McInnes 1999 *Alberta LR* 21

“[t]he law of restitution is not intended to confer windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued to his benefit, it is restored to him.”⁵²

However, a number of legal systems do not follow this approach.⁵³ In the English case of *Kleinwort Benson Ltd v Birmingham City Council*⁵⁴ the plaintiff claimed restitution of payments made under a void contract. The defendant argued that it was not enriched at the claimant's expense, since the claimant had made good its “losses” by hedging transactions with third parties. This defence of passing on was rejected. The circumstances under which the passing on by way of the hedging contracts occurred were regarded as too remote, and irrelevant in determining whether the defendant was enriched at the claimant's expense. Comparable approaches have been followed in Australia⁵⁵ and France.⁵⁶

Against the backdrop of these divergent approaches it can now be asked how South African law deals with passing on, and especially what the implications are for its treatment of the impoverishment requirement. In *Govender v Standard Bank of SA Ltd*⁵⁷ (“*Govender*”) a bank inadvertently paid out a countermanded cheque. It was held that the bank was not impoverished, because the bank was entitled to be indemnified by its client. The recipient's enrichment was then said to be at the expense of the client, not the bank.⁵⁸ However, the court in *Govender* was willing to accept that a different result would have been reached, had the bank been indemnified by an insurer, and not by its own client.⁵⁹ This approach was confirmed in *St Helena Primary School v MEC, Department of Education, Free State Province*.⁶⁰ A building owned by the Department of Education, but used by St Helena Primary School, was damaged. The school had the building repaired, but was partially indemnified by its insurer. The school⁶¹ then instituted an enrichment claim against the Department, essentially on the ground that the Department was enriched by being spared the expense of repairing its own building. It was

⁵² 194

⁵³ Beatson & Schrage *Unjustified Enrichment* 170, 172; Visser *Unjustified Enrichment* 748-752

⁵⁴ [1997] QB 380

⁵⁵ See *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA): “[t]he subtraction from the plaintiff's wealth enables one to say that the defendant's unjust enrichment has been ‘at the expense of the plaintiff’ notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties”

⁵⁶ See Schlechtriem *Restitution und Bereicherungsausgleich* 2 (2001) 233 (para 255), referring to a decision of the Court of Cassation (10 02 1998, *Droit et patrimoine* 1998, Nr 2097) There the operator of a filling station made undue payments to his suppliers, but passed the costs of these payments on to his customers. The owner was allowed to reclaim the undue payments from the suppliers even though he was not impoverished

⁵⁷ 1984 4 SA 392 (C)

⁵⁸ 408-409 After *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A), the bank's claim would have failed, because there was a valid legal ground for the defendant's enrichment

⁵⁹ 1984 (4) SA 392 (C) 408E-G

⁶⁰ 2007 4 SA 16 (O), confirmed on appeal in *St Helena Primary School v MEC, Department of Education, Free State Province* [2008] JOL 22616 (O) The claim ultimately failed, because the enrichment of the Department was supported by a legal ground

⁶¹ Technically, the insurer instituted the action in the name of the school by relying on subrogation, but nothing turns on this aspect of the case

held that the school was impoverished even though it managed to pass the costs of the repairs on to the insurer.⁶²

In the light of these cases, it can be concluded that the South African law of unjustified enrichment professes to, but does not uniformly insist on proof of impoverishment. The courts do not engage in a simple factual enquiry as to whether the plaintiff's estate has decreased, but are influenced by considerations such as the identity of the party who reimbursed the plaintiff (for example, whether it was a client or insurer). In effect the courts at times legally deem a party to be impoverished when this is in fact not the case. Given the artificiality of these determinations, it is suggested that it is preferable to concede the lack of impoverishment in the passing on cases, but not to regard it as fatal for an enrichment claim. Such an approach does not, however, open the floodgates to enrichment claims. The plaintiff still has to meet the requirement that the enrichment was at his expense, which provides the courts with a controlling function. In terms of this requirement, a plaintiff who managed to recoup actual losses still has to establish a sufficiently strong causal connection with the defendant's enrichment to justify awarding a claim. Thus, in *Govender*, it could have been held that the plaintiff bank was not impoverished, but that the defendant was still enriched at the plaintiff's expense, since the reimbursement by the insurer was causally irrelevant. Liability could then be imposed despite the absence of actual impoverishment. In cases where the causal connection is felt to be too weak, the claim could in turn be refused.⁶³

5 Evaluating the relevance of impoverishment in awarding enrichment claims: the problem case of enrichment by "taking" or infringing on another's rights

5.1 Introduction

Earlier on we alluded to the possibility that justifications which operate in the context of loss of ownership situations do not necessarily apply with equal force to other contexts. In this section, the focus will be on a category of cases which has featured particularly prominently in the comparative literature, but which is largely unexplored in South African law.⁶⁴ This is the category of enrichment by infringing on another's rights, or, as it sometimes is put

⁶² Paras 23-24 Because the school repaired the damage out of the proceeds of an insurance policy and not from its own funds, the defendant disputed that the plaintiff was impoverished. The defendant contended that the *res inter alios acta* maxim and collateral-source rule (which essentially states that certain forms of compensation received from a collateral source, wholly independent of the wrongdoer or his insurer, do not operate to reduce the damages recoverable by the victim) did not apply. However, the court accepted the plaintiff's contention that the collateral-source rule applied, and that the source of the funds with which the school repaired the damage was irrelevant.

⁶³ The determination in *St Helena Primary School v MEC, Department of Education, Free State Province* 2007 4 SA 16 (O) that the enrichment was not at the expense of the plaintiff (see para 25) can, however, be subjected to criticism – see Sonnekus & Schlemmer "Verrykingsvordering na Herstel van Brandskade aan Vreemde Eiendom en Versekerbare Belang" 2007 *TSAR* 823 830-831.

⁶⁴ Pioneering studies include Blackie & Farlam "Enrichment by the Act of the Party Enriched" in Zimmermann, Visser & Reid (eds) *Mixed Legal Systems in Comparative Perspective - Property and Obligations in Scotland and South Africa* (2004) 469; Visser & van Zyl "The Borderline between Delict and Enrichment" 2000 *AJ* 300; Van Zyl "Enrichment and Wrongs in South African Law" 1997 *AJ* 273.

more simply, by “taking” from another. In contrast to cases covered by the *condictiones*, the enrichment does not result from the plaintiff deliberately conferring a benefit on or “giving” to the defendant. And in contrast to the various enrichment claims of occupiers and possessors based on improving or preserving another’s property, or of persons who pay another’s debt, the plaintiff does not “impose” enrichment on the defendant. In fact, it is the other way around: it is the defendant who acts by “taking” the enrichment.⁶⁵

Cases of enrichment by taking may of course also involve a loss of ownership, but then it is not the result of giving. For example, a person can be enriched by taking another’s property and then changing it in a way which results in original acquisition of ownership. The enrichment could also result from infringing on some other right of the plaintiff, for example on his right to use his property, as opposed to depriving him of ownership. Thus, to return to an earlier example, the defendant can be enriched by taking the plaintiff’s horse, but then bring it back again, none the worse for wear. In these circumstances, the defendant is in all probability enriched by having the use of the horse: he was at least saved the expense of hiring another one. But it is much less clear that the plaintiff was impoverished, and if not, whether this should be fatal to an enrichment claim against the defendant.

The treatment of enrichment by taking is one of the most complex and contentious topics in the law of unjustified enrichment. It gives rise to fundamental classificatory problems – especially determining the respective domains of the law of unjustified enrichment and delict. These difficulties are hardly surprising, given the closely related “correcting” or balancing out function both areas of law fulfil.⁶⁶ If one person is enriched by taking from another, which area of law should do the balancing out? Should it be the law of delict, which balances out the consequences of wrongful behaviour, including that of taking, by awarding damages? Or should it be the law of unjustified enrichment, which in turn corrects a variety of forms of enrichment without legal ground by imposing a duty of restitution? Or, should it even be both? The question whether the plaintiff from whom the defendant has taken the enrichment must prove that he was either impoverished (in the language of enrichment law) or suffered damage or a loss (in the language of the law of delict) is central to these debates.

If the law of delict is indeed able to accommodate the fact pattern of enrichment by taking, the question arises whether there is any need to consider if enrichment law should do so as well. It can be regarded as simply pragmatic to avoid the problem altogether in the relatively unexplored field of unjustified enrichment, compared to delict, with its more firmly established body of principles on wrongful behaviour. Before the justifications in enrichment

⁶⁵ The label “enrichment by the act of the party enriched” (see Blackie & Farlam “Enrichment by the Act of the Party Enriched” in *Mixed Legal Systems* 469) is somewhat inapposite in these situations. In some cases of enrichment by “taking” (and then the term is already interpreted broadly) the enriched does not act at all (for example if a farmer’s sheep break through a fence and graze on the neighbouring farm – see Wieling *Bereicherungsrecht* 46). Furthermore, the enriched defendant can also “act” in cases of enrichment by “giving”, namely by co-operating with the transfer being made to him.

⁶⁶ See 2 above.

law for requiring impoverishment in the context of enrichment by taking is considered, it is therefore imperative first to consider the relevant delictual principles.

5.2 Delictual claims in cases of enrichment by taking without causing loss

South African law distinguishes between three main types of delict, namely (i) wrongfully causing patrimonial loss (*damnum iniuria datum*, which gives rise to the Aquilian action), (ii) wrongfully infringing on another's personality rights (*iniuria*), and (iii) wrongfully inflicting pain and suffering associated with bodily injury to the plaintiff.⁶⁷ The focus here will be on wrongfully causing patrimonial loss.

To succeed with the Aquilian action the plaintiff must prove a loss.⁶⁸ In determining the measure of liability, the focus is solely on his estate: the loss is measured by comparing his current actual patrimonial position with the patrimonial position he would have been in had the delict not been committed.⁶⁹ It therefore does not matter whether the defendant may have benefitted from the delict, or whether this benefit is greater than plaintiff's actual loss. Thus, if the defendant was enriched through committing fraud, theft or depriving another of possession of their property, no attention is paid to the position of his estate. If a fraudster used his ill-gotten gains to buy a lottery ticket, and won, the plaintiff would only be able to claim the value of the lost money, and not be able to lay claim to the profit. And if the defendant took the plaintiff's horse without permission, entered it for a race and won a fortune, it would not be of any consequence either. The plaintiff would only be able to claim his actual loss in being deprived of possession of the horse. If the horse would have been kept in the stable, the plaintiff would receive nothing.

One may, however, be forgiven a certain degree of unease with the consequence that persons who infringe on the rights of others to use or freely dispose over their property only have to compensate actual losses and may keep gains which directly result from these infringements. The mere fact that persons whose rights were infringed did not at the time happen to be interested in exploiting those rights to their benefit is not a particularly convincing reason. As the Earl of Halsbury asked in *The Mediana*: "what right has a wrongdoer to consider what use you are going to make of your [property]?"⁷⁰ For those

⁶⁷ See Midgley & Van der Walt "Delict" in *LAWSA 8* (2005) para 2 Wrongfully inflicting pain and suffering associated with bodily injury to the plaintiff need not be considered here

⁶⁸ See eg *Jowell v Bramwell-Jones* [2000] 2 All SA 161 (A) para 22 ("The element of damage or loss is fundamental to the Aquilian action and the right of action is incomplete until damage is caused to the plaintiff by reason of the defendant's wrongful conduct (see *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 590; *Ewins v Shield Insurance Co Ltd* 1980 (2) SA 814 SA (A) at 838H–839C) ... Whether a plaintiff has suffered damage or not is a fact which, like any other element of his cause of action and subject to what is said below, must be established on a balance of probabilities. Once the damage or loss is established a court will do its best to quantify that loss even if this involves a degree of guesswork (see *Turkstra Ltd v Richards* 1926 TPD 276 at 282–283)")

⁶⁹ Visser & Potgieter assisted by Steynberg & Floyd *Visser & Potgieter's Law of Damages* 2 ed (2003) 65

⁷⁰ [1900] AC 113 (HL) 117

who find this criticism persuasive, the challenge is either to develop the law of delict to accommodate these cases or to seek relief elsewhere.

As far as developing the law of delict is concerned, the possibilities do not look promising. First, despite some earlier case law to the contrary, there is no enthusiasm for awarding the plaintiff an amount in excess of actual loss in the form of “exemplary” or “punitive” damages.⁷¹ Secondly, there are no obvious links to the claim for non-patrimonial loss in the context of *iniuria*, given that these claims are so strongly aimed at providing satisfaction.⁷² Thirdly, little can be gained from resorting to the notion (derived from English law) that “nominal damages”⁷³ can be awarded to “vindicate a right”, even if there is no actual loss.⁷⁴ Although the plaintiff can then obtain an order for costs in his favour, the amounts awarded as nominal damages are generally insignificant, and hardly enable the plaintiff to lay claim to the defendant’s enrichment. It is in any event doubtful to what extent South African law still recognises this form of relief.⁷⁵ Even if the remedy of nominal damages could be expanded to allow the plaintiff to vindicate his right through being awarded the actual enrichment of the defendant, this would only be a covert tool, indirectly aimed at attacking the mischief of enrichment by wrongful taking. Fourthly, there is the road of possible extension of the disparate group of statutory claims for “damages” due to the infringement of a variety of rights, irrespective of proof of a loss.⁷⁶ But this is hardly a satisfactory solution to a general problem.

Finally, there is the possibility of expanding the concept of patrimonial damages. Attempts at doing so have not been very convincing,⁷⁷ since they lead to a world of fiction, where the loss is supposedly one of an opportunity to bargain and is determined by hypothetical agreements between the parties to pay for the use of that which has been taken – this despite the fact that no bargains would actually have been concluded.⁷⁸ A famous case involved

⁷¹ See Visser & Potgieter *Damages* 174-175, especially n 92. The influence of English law in this context is strong.

⁷² *Whittaker v Roos & Bateman; Morant v Roos & Bateman* 1912 AD 92 123.

⁷³ See Visser & Potgieter *Damages* 179-181, especially authority cited in n 112.

⁷⁴ See *Jansen v Pienaar* 1880 SC 276 277.

⁷⁵ According to Visser & Potgieter *Damages* 178:

“It is probably correct to argue that nominal damages have no place in our law, but until the Appellate Division finally confirms this view, it cannot be concluded that nominal damages have finally disappeared”.

See also *First National Bank of South Africa Ltd v Budree* 1996 1 SA 971 (N) 980. Reference to nominal damages is, however, occasionally made in discussions of foreign law (see eg the judgement of Ackermann J in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 30, 64).

⁷⁶ Visser & Potgieter *Damages* 178 n 122. See eg s 10(a) of the Performers’ Protection Act 11 of 1967, which holds a person who infringes the rights of a performer liable for a certain maximum amount, s 47(1) of the Plant Breeders’ Rights Act 15 of 1976, which awards compensation of up to R10000 for the infringement of a plant breeder’s rights, and s 21(b)(i) of the Heraldry Act 18 of 1962, which recognises a claim for damages up to the amount of R1000 for the misuse of registered heraldic representations, names, special names or uniforms. None of these provisions require proof of actual damages.

⁷⁷ Cf the criticism of Sharpe & Waddams “Damages for Lost Opportunity to Bargain” 1982 *OJLS* 290 in Linssen 2006 *ERPL* 354.

⁷⁸ Linssen 2006 *ERPL* 351 353 sq; especially the discussion of *Penarth Dock Engineering Company Ltd v Pounds; Ministry of Defence v Ashmann, Attorney General v Blake and Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* 1952 2 QB 246.

Princess Caroline of Monaco.⁷⁹ A publisher printed a fabricated interview supposedly conducted with the Princess, who then succeeded in claiming damages, even though there were no indications that she suffered any loss. In quantifying the damages, the publisher's gains were taken into account. German academic comment suggests that this so-called damages claim in reality masks a claim based on unjustified enrichment.⁸⁰ In English law, in turn, the comments by Lord Steyn in *Surrey CC v Bredero Homes Ltd*⁸¹ on *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*⁸² are instructive. In the latter case, the defendants built houses in breach of a restrictive covenant in favour of the plaintiffs, without it being apparent that they suffered any loss as a consequence of such breach. The plaintiffs were then awarded an amount in lieu of injunctions they sought to have the houses demolished. According to Lord Steyn

"The plaintiff's argument that the Wrotham Park case can be justified on the basis of a loss of a bargaining opportunity is a fiction. The object of an award in the Wrotham Park case was not to compensate the plaintiffs for financial injury, but to deprive the defendants of an unjustly acquired gain".⁸³

Thus, the prospects for developing the law of delict to accommodate situations of wrongful taking from another without proof of actual patrimonial loss are not particularly promising. Granted, the possibility of such a development cannot be ruled out altogether, especially if it is felt that this branch of law is more established than enrichment law, and could provide greater flexibility in dealing with these situations. However, irrespective of how flexibly the concept of loss is treated in the course of such a development, there are some situations involving enrichment by taking where the law of delict would in any event not be able to provide assistance, especially not by way of the Aquilian action. These are situations where the plaintiff would not be able to meet all the requirements for a delictual claim, especially fault.⁸⁴ Thus, if the person who took the horse for a ride honestly believed that he was entitled to do so, the plaintiff's delictual claim could fail due to the absence of fault. Furthermore, if a delictual claim for damages were to be awarded in the "taking" cases, the defendant would not be able to raise a defence that

⁷⁹ BGH 15 11 1994, BGHZ 128, 1 (for English extracts see Beatson & Schrage *Unjustified Enrichment* 555-556)

⁸⁰ See Beatson & Schrage *Unjustified Enrichment* 547-548; Schlechtriem "Anmerkung zu BGH Urteil von 15 11 1994" 1996 *JZ* 362 (extract translated in Beatson & Schrage *Unjustified Enrichment* 555-556); also see Schlechtriem "Privacy, Publicity and Restitution of Wrongful Gains: Another New Economy?" 2001 *Oxford U Comparative L Forum* 3 criticising BGH 14 2 1958 (the "Herrenreiter" case), BGHZ 26, 349 353

⁸¹ [1993] 1 WLR 1361 1369

⁸² [1974] 1 WLR 798 Ch D

⁸³ [1993] 1 WLR 1361 1369

⁸⁴ See Sonnekus *Unjustified Enrichment* 48. The major debate among common lawyers about the extent to which a "wrong" (as opposed to unjust enrichment) could trigger a duty to make restitution goes beyond the question whether the plaintiff should prove loss or impoverishment, and cannot be canvassed here. It does appear, though, that once it is accepted that enrichment claims do not require proof of impoverishment, most of the cases where a "wrong" is said to be the cause of action could be regarded as cases involving unjust enrichment (see Krebs "Eingriffskondition und Restitution for Wrongs im englischen Recht" in Zimmermann (ed) *Grundstrukturen eines Europäischen Bereicherungsrechts* (2005) 163 172-173; Burrows *The Law of Restitution* (2002) 461)

the enrichment has been lost. Thus, if the defendant in good faith spent the proceeds from the use of the horse, he would still be liable. Both these problem situations can be adequately accommodated within the law of unjustified enrichment: it does not require proof of fault on the side of the defendant, and it protects the party who has lost enrichment in good faith. Ultimately, it therefore appears worthwhile investigating whether the law of unjustified enrichment would not be a more appropriate or alternative source of relief in situations of enrichment by taking.

5 3 Enrichment claims in cases of “taking” without actual impoverishment

The law of unjustified enrichment could respond in at least two ways to the challenge of providing adequate relief in the situation where enrichment is taken from another, but the plaintiff suffers no loss or impoverishment.⁸⁵ These ways are either expanding the impoverishment requirement or relaxing it.

5 3 1 *Expanding the impoverishment requirement*

The first possibility is to require impoverishment on the side of the plaintiff, but to interpret the concept broadly. In an extensive comment on the example of the horse taken without permission, McInnes argues that the fictional plaintiff indeed suffered a “loss”. This term is then defined broadly, to include a loss of *dominium*, in the sense that the owner was deprived of the ability to realise the financial potential inherent in the asset.⁸⁶ Thus, to him it is irrelevant whether the owner actually intended to hire out the horse at all. It suffices that the owner was deprived of the opportunity of *possibly* renting out the horse. Adapted to the South African context, the argument is then essentially that impoverishment can also take the form of potentially depriving the owner of the ability to realise the asset’s inherent economic potential.

The benefit of following this broad approach is that it is not too disruptive: South African law could still generally require impoverishment, and give effect to the justifications for this requirement. For purposes of the justification that the plaintiff must be impoverished before an imbalance exists which has to be rectified in the interests of corrective justice, the concept of impoverishment would just be given a broader meaning.⁸⁷ A similar argument could apply to the justification that proof of impoverishment is essential because it shows that the defendant was enriched at the expense of the plaintiff.⁸⁸

⁸⁵ It is assumed here that the “without legal ground” or *sine causa* requirement is met. Thus, if property law accords a person some limited use of another’s unutilised property in situations of distress or need, an enrichment claim should be refused on the ground that the *sine causa* requirement is not met. The politically highly sensitive issue of squatting rights therefore primarily needs to be resolved through specific rules of property law which determine in what exceptional circumstances use of another’s land does not involve an unlawful taking that gives rise to an enrichment claim.

⁸⁶ “*Hambly v Trott* and the Claimant’s Expense: Professor Birks’ Challenge” in Degeling & Edelman (eds) *Unjust Enrichment in Commercial Law* (2008) 118 sqq.

⁸⁷ See 2 1 above.

⁸⁸ See 2 2 above.

The difficulty with such an approach, though, is that it is somewhat artificial.⁸⁹ When the horse is used without the owner's authority, the owner's rights are indeed violated. But to speak of a loss or, for that matter, impoverishment, when it is *certain* that the violation would never have had any patrimonial consequences, reaches beyond the established boundaries of these concepts. McInnes effectively equates the violation of a right to a loss. This confuses cause and effect, for, while the violation of a right *could* result in a loss, it does not do so automatically. If the horse is taken without permission, the owner's rights of use and possession are indeed violated. But if the owner cannot show that these violations have somehow negatively influenced his patrimony (for example, if he would have rented out the horse to a third party), there cannot be a loss in any normal sense of the word. It further does not help to beg the question by arguing that such an extended interpretation is necessary to ensure that reparation is provided.⁹⁰ Such an argument does not take into account the possibility that the violation of the right itself could be sufficient to warrant providing reparation. If this is the case, an extended interpretation of loss or impoverishment is unnecessary.

5 3 2 *Relaxing the impoverishment requirement*

This brings us to the second possible route whereby enrichment liability can be imposed in cases of enrichment by taking where there is no actual impoverishment. In essence, it involves accepting that the impoverishment requirement should be relaxed in these circumstances. To evaluate the merits of following this route, it is worth returning to the two justifications for requiring proof of impoverishment by the plaintiff. It will be recalled that the first of these justifications was that the purpose of the law of unjustified enrichment is to "correct" or "balance out" imbalances.⁹¹ It was then said that for an imbalance to exist the defendant must be enriched and the plaintiff must be impoverished. However, as Barker has observed,

"it may still be possible to justify a restitutionary response by reference to corrective justice, even when the plaintiff has suffered no loss by virtue of the defendant's wrong. On this view, 'correcting' wrongs can mean stripping defendants of the profits which they make via the infringement of a plaintiff's right, even where the infringement has caused the latter no harm and even where the consequence is to enhance the plaintiff's prior economic position. 'Correcting' the imbalance which occurs by virtue of the defendant's infringement is part and parcel of the desire to fully protect the plaintiff's enjoyment of a right".⁹²

Adapted to the South African context, the point is essentially that there is no reason why the plaintiff *must* be impoverished before the defendant's enrichment has to be balanced out in the interests of corrective justice. If only detriment of an actual patrimonial nature is regarded as worthy of correction, the enriched defendant may violate the rights of others with impunity, and

⁸⁹ See Hogg *Obligations* 2 ed (2006) para 4 33

⁹⁰ McInnes "*Hambly v Trott*" in *Unjust Enrichment in Commercial Law* 118-119

⁹¹ See 2 1 above

⁹² Barker "Unjust Enrichment" 1995 *OJLS* 457; also see Weinrib "Restitutionary Damages as Corrective Justice" 2000 (1) *Theoretical Inquiries in Law* 1; but see Gordley "The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib" 2000 (1) *Theoretical Inquiries in Law* 39

then (rather cynically) point to the lack of loss as reason for the absence of any imbalance. Why a violation itself does not deserve correction, but only a violation reflected in a loss, is simply not clear.

This brings us to the second justification for requiring impoverishment on the side of the plaintiff, namely the need to give effect to the “at the expense of” requirement.⁹³ Again, the logic of the justification does not withstand scrutiny. The fact that the plaintiff suffered loss or impoverishment may indeed be useful in proving that the defendant has been enriched at the plaintiff’s expense, since it helps identifying causally connected plaintiffs: if it was not the plaintiff who was impoverished, but another party, the lack of impoverishment on the side of the plaintiff helps shows that the enrichment was not at his expense, but at the expense of another.⁹⁴ But this does not mean that the causal link can *only* be established by proof of impoverishment. No violence will be done to the words “at the expense of another” if they were to be interpreted to cover the situation where enrichment arose from “taking” from another or infringing on their specific rights. Thus, it can simply be said that the defendant who gained from taking the horse without permission was enriched at the owner’s expense by infringing on his right of use. The “at the expense of” requirement then still fulfils its crucial function of ensuring proof of causality, namely that a specific plaintiff (the person whose rights were infringed upon), could lay claim to the enrichment in the hands of the defendant (the one whose enrichment arose from the infringement of that right). Ultimately, through proper application of this requirement, the South African law of unjustified enrichment would still be able to keep liability in acceptable bounds, even if it were to abolish the impoverishment requirement to accommodate the “taking” cases.⁹⁵

It is understandable that there may be some concern that relaxing the impoverishment requirement in cases of enrichment by “taking” would lead South African law into uncharted waters. However, there is nothing particularly novel about this approach. This is illustrated by the German experience, which for some time now has allowed an enrichment claim based on taking (the *Eingriffskondiktion*), without specifically requiring proof of impoverishment. The crucial question is whether the defendant was enriched by infringing or encroaching on a right where the gains to be derived from this right were solely allocated or assigned to the plaintiff (for example where

⁹³ See 2 2 above

⁹⁴ It was therefore not necessary to reconfirm the impoverishment requirement in *Firststrand Bank Ltd v Nedbank (Swaziland)* 2004 6 SA 317 (SCA). The court could simply have found that identifying the impoverished party assisted in establishing at whose expense the defendant was enriched. Impoverishment could then serve as means of proof that the “at the expense of” requirement was met, and need not have been regarded as a separate requirement.

⁹⁵ It is therefore not necessary to relax the “at the expense of” requirement as Blackie and Farlam suggest (“Enrichment by the Act of the Party Enriched” in *Mixed Legal Systems* 496-497). The “at the expense of” requirement must be retained to ensure that there is a causal link between the plaintiff and the defendant’s enrichment. It would perhaps have been preferable to state that the “at the expense of” requirement should be reinterpreted so that it also covers situations where there is no impoverishment.

there is infringement on an owner's right of use).⁹⁶ It is this infringement which constitutes the imbalance, and which indicates that the enrichment of the defendant was at the expense of the plaintiff.⁹⁷

The German experience has not, however, been entirely free of difficulties. As indicated earlier, the relationship between claims based on enrichment by taking and delictual claims for damages remains unclear. Thus, in the Princess of Caroline of Monaco case,⁹⁸ there undoubtedly was enrichment as a result of an encroachment on a personality right which only she was entitled to exploit.⁹⁹ Yet, the court awarded compensation or damages. One possible explanation is that the court may have regarded it as too difficult to quantify an enrichment claim, which would require determining the profit derived by the publication concerned.¹⁰⁰ Although this issue does not affect the question whether an enrichment claim should be allowed in principle, it is therefore important to be clear about how such a claim will be awarded in practice. South African law will no doubt face similar difficulties, and it is then to this matter which we will now turn.

5 3 3 *Quantifying enrichment liability when the plaintiff is not impoverished*

If South African law were indeed to award enrichment claims in cases of "taking" without proof of impoverishment by the plaintiff, these claims could not be quantified with the "double ceiling" rule. The logic is simple. If there is no impoverishment, the measure, being the lesser of the plaintiff's impoverishment and the defendant's enrichment, would then always be zero. The focus in the "taking" cases will therefore inevitably be on the defendant's enrichment, and the challenge is to determine how much of it must be surrendered. This question has received considerable attention in comparative literature, and cannot be examined in detail here.¹⁰¹ The purpose of this section is simply to indicate that there are no insurmountable obstacles in the way of such quantification.

Courts regularly exercise discretionary powers in determining the measure of a variety of remedies. The use of such powers is, for example, well-established in cases where a person in possession of another's property

⁹⁶ This is according to the *Zuweisungstheorie* ("attribution theory"), which maintains that not all gains which result from encroaching on a right gives rise to an enrichment claim: rights are said to have a certain "allocation" or "attribution" content or potential (*Zuweisungsgehalt*), and it is only if the legal order exclusively "attributes" or "allocates" the gain to the holder of the right that he is awarded an enrichment claim. The theory originates from Wilburg and was developed by von Caemmerer (see Schlechtriem *Restitution und Bereicherungsausgleich* 2 ch 6 para 12 (90); Visser *Unjustified Enrichment* 128-129, 680; Wieling *Bereicherungsrecht* 47; Birks "Direct and Indirect Enrichment in English Law" in Johnston & Zimmermann (eds) *Unjustified Enrichment – Key Issues in Comparative Perspective* 493 511).

⁹⁷ See Beatson & Schrage *Unjustified Enrichment* 184-185, and the discussion there of BGH, 9 March 1989, BGHZ 107, 117 (extract translated at 190-192).

⁹⁸ BGH 15 11 1994, BGHZ 128, 1.

⁹⁹ See Zimmermann "Bereicherungsrecht in Europa: Eine Einführung" in Zimmermann (ed) *Grundstrukturen eines Europäischen bereicherungsrechts* 17 39 esp n 130.

¹⁰⁰ See Schlechtriem "Anmerkung zu BGH Urteil von 15 11 1995" 1996 *JZ* 362 (extract translated in Beatson & Schrage *Unjustified Enrichment* 555-556).

¹⁰¹ See eg Schlechtriem *Restitution und Bereicherungsausgleich* 2 ch 6 paras 330 sqq.

imposes enrichment through preserving or improving it. In these cases the courts ultimately can determine an amount which is fair and equitable under the circumstances.¹⁰² In the context of enrichment by taking, and especially by use, it is also desirable to resort to such a flexible approach.¹⁰³ However, as the experience of other systems shows, certain general measures can guide the exercise of these discretions. Of these measures, the following have been particularly prominent.

The first measure is that of the objectively-determined, reasonable "licence fee" the defendant would have to pay the plaintiff if he properly requested consent.¹⁰⁴ In the case of the horse which is used without permission, the enrichment of the defendant can then be quantified as the rental he would have had to pay for the horse, ie the amount by which his estate would otherwise have decreased. Measuring enrichment by way of such an objective approach is not unfamiliar in South African law. Reference has been made to paying rental in cases of enrichment by use of another's corporeal property,¹⁰⁵ and statutory claims for payment of licence fees are recognised in situations of unauthorised taking through infringing on intellectual property rights.¹⁰⁶ When applying this objective test to measuring enrichment, it does not matter whether the particular defendant made a profit by taking or not. And neither does it matter that the plaintiff was even better off as a consequence of the taking. Plaintiffs should generally be prevented from laying claim to enrichments which are too remote or causally irrelevant.¹⁰⁷

However, in certain circumstances it may not be appropriate to use the objective measure. Some systems then demand that the person who is enriched by taking should surrender the actual profits earned as a consequence of the taking.¹⁰⁸ It is not easy to discern when precisely use is made of this measure,¹⁰⁹ but it does seem as if it is especially the person who flagrantly or cynically infringes on another's rights who should disgorge his profits. In this regard, copyright law provides an interesting statutory parallel: whereas the owner normally can lay claim to a reasonable royalty which would have

¹⁰² See *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 1 SA 939 (C) 957; *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd; Bulawayo Waterworks Co Ltd v Fletcher and Fletcher* 1915 AD 636, 648, 656-657; *Wynland Construction (Pty) Ltd v Ashley-Smith* 1985 1 SA 534 (C) 538

¹⁰³ See the references to a reasonable or fair amount in *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) (Ltd)* 1961 1 SA 704 (C) 708-710; Blackie & Farlam "Enrichment by the Act of the Party Enriched" in *Mixed Legal Systems* 478

¹⁰⁴ See Linssen 2006 *ERPL* 353-360; Sonnekus *Unjustified Enrichment* 47-51

¹⁰⁵ See *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 1 SA 704 (C) 708-710; *Rubin v Botha* 1911 AD 568; Blackie & Farlam "Enrichment by the Act of the Party Enriched" in *Mixed Legal Systems* 478, 486 Cases where there is enrichment by "taking" through original acquisition of ownership (as opposed to use), but without impoverishment, are rare *De Villiers v Van Zyl* 1880 Forod 77 may serve as an example The defendants knew that plaintiff intended to capture and domesticate some birds which had been hatched on the plaintiff's land The defendants then drove the birds from the plaintiff's land, and caught and kept the birds The plaintiff was then awarded the value of the birds Although the claim was formulated in delict, there probably was no actual loss, since the plaintiff could never have been owner of the birds without capturing and maintaining sufficient control over them The case is better explained in terms of a duty to surrender unjustified enrichment arising from "taking" through original acquisition of ownership

¹⁰⁶ See eg s 24(1A) of the Copyright Act 98 of 1978

¹⁰⁷ On the extent to which this principle also underlies the "double ceiling" rule, see 3 2 above

¹⁰⁸ See Linssen 2006 *ERPL* 358-360; 361-362

¹⁰⁹ Schlechtriem *Restitution und Bereicherungsausgleich* 2 335 sqq

been payable by a licensee in respect of the work concerned,¹¹⁰ the owner can claim an additional amount in cases of flagrant infringement of copyright. In calculating these “damages”, the defendant’s actual enrichment is then taken into account.¹¹¹

6 The appropriate action with which to lay claim to enrichment when the plaintiff has not been impoverished

It has been argued above that it is justifiable in certain circumstances to impose enrichment liability in the absence of proof of actual loss on the side of the plaintiff. It does not fall within the ambit of this article to identify the appropriate enrichment claims which could be applied in these circumstances, and the following brief remarks will have to suffice.

In principle, there can be no objection to continue resorting to an existing action if the situation would otherwise have been dealt with in terms of that action. Thus, if the plaintiff made an undue payment, but subsequently passed on the impoverishment,¹¹² the *condictio indebiti* should still be the appropriate action. To allow a general action in these circumstances, and let it operate in tandem with the *condictio indebiti*, creates the risk of inconsistency: for example, to require proof of excusable mistake from the plaintiff who has not passed on the impoverishment and claims with the *condictio indebiti*, but not to require such proof from the plaintiff who has benefitted from passing on is irrational and indefensible.

However, in cases of enrichment by taking or infringing on another’s rights, latching on to the existing actions may not be a fruitful exercise.¹¹³ Cases of enrichment by use have thus far not enjoyed much attention, and the appropriate claim is in any event unsure.¹¹⁴ In these situations it is therefore worth seriously considering applying the general enrichment action, as foreshadowed in *McCarthy Retail Ltd v Shortdistance Carriers CC*.¹¹⁵

7 Conclusions

The question whether the plaintiff has been impoverished has gradually and subtly assumed a position of great prominence in the South African law of unjustified enrichment. Proof of impoverishment, defined in terms of actual detrimental effects on the plaintiff’s patrimony, is said to be a

¹¹⁰ S 24(1A) of the Copyright Act 98 of 1978

¹¹¹ S 24(3); on this provision further see *Metro Goldwyn-Mayer Incorporated v Ackerman* [1996] 1 All SA 584 (SE); Visser *Unjustified Enrichment* 689-690

¹¹² See 4 above

¹¹³ Historically, the *condictio sine causa specialis* is awarded in cases where a person is enriched as a result of disposing over or consuming another’s property, but this has always been rather odd, given that the *conditiones* generally apply to cases where enrichment is given without legal ground

¹¹⁴ See *Hefer v Van Greuning* 1979 4 SA 952 (A) 959, where the possibility is raised of “an enrichment action” being available in the case of enrichment as a result of use; reference is then made to *De Vos Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg* 2 ed (1971) 229 sq, which in turn refers to a variety of actions that could fulfil such a function

¹¹⁵ 2001 3 SA 482 (SCA) See Visser “The Potential Role of a General Enrichment Action” 2009 *Stell LR* 373

general requirement for all enrichment claims. Impoverishment is further of central importance when determining the measure of enrichment liability: according to the “double ceiling” rule the measure of an enrichment claim is limited to the lesser of the plaintiff’s impoverishment and the defendant’s enrichment.

However, surprisingly little attention has been paid to the justifications for according impoverishment such a prominent position. Upon closer investigation, these justifications are rather weak. It is not apparent why the plaintiff *must* be impoverished for the defendant’s enrichment to be “balanced out” in the interest of “corrective justice”, or why the plaintiff *must* be impoverished for the defendant’s enrichment to be at the expense of the plaintiff. This weakness is particularly pronounced in cases of enrichment by taking or infringing on another person’s rights. For example, where the defendant is enriched by unauthorised use of the plaintiff’s property, the infringement on the plaintiff’s rights itself points to an imbalance that needs to be corrected. The infringement may often result in a loss or impoverishment, but does not have to do so. A similar objection can be raised against the justification that proof of impoverishment is essential to meet the requirement that enrichment was at the plaintiff’s expense. By showing that he holds the right, and that it is the infringement on this right which resulted in the defendant’s enrichment, the plaintiff can establish the necessary causal link which shows that the defendant’s enrichment was at his expense. Again, such an infringement may, but does not have to result in a loss or impoverishment.

Rejecting the impoverishment requirement does not give rise to insurmountable problems of quantification. The “double ceiling” rule would by definition not apply if there is no impoverishment. However, its underlying justification, namely to prevent the plaintiff from claiming causally irrelevant enrichment, is still important. As the experiences of some other jurisdictions show, an objective, market-related standard is usually adequate to measure the value of the defendant’s enrichment. Enrichment which exceeds this measure would then be causally irrelevant, especially if it is the product of the defendant’s industry. However, there are exceptional cases that the defendant (especially one who cynically violated the plaintiff’s rights) should have to surrender his actual profits.

Although there are alternative approaches to dealing with the situation where a defendant is enriched by taking from the plaintiff, but without the plaintiff suffering a loss or impoverishment, these approaches do not look particularly promising. Attempts at remaining loyal to the impoverishment requirement, but defining it more broadly to cover situations which do not have any patrimonial consequences are rather artificial. If there is no loss, it is also not convincing to accommodate situations of enrichment by “taking” within the law of delict, and the Aquilian action in particular. More violence would be done to the law of delict by not requiring proof of loss, than would be done to the law of unjustified enrichment by not requiring proof of impoverishment.

SUMMARY

The question whether the plaintiff has been impoverished is of central importance in the South African law of unjustified enrichment. Proof of impoverishment is a general requirement for enrichment claims, and according to the “double ceiling” rule, the measure of the claim is limited to the lesser of the plaintiff’s impoverishment and the defendant’s enrichment. It is argued that the justifications for according impoverishment such a prominent position are not strong, and that the impoverishment requirement must be relaxed in certain circumstances – most notably where the defendant is enriched through “taking” or infringing on the plaintiff’s rights. The impossibility of applying the “double ceiling” rule in these circumstances does not present any major difficulties. As the experiences of other jurisdictions show, there are alternative tests that can provide levels of relief which adequately balance the interests of the parties.