RATIONALISING THE SCOTTISH LAW OF UNJUSTIFIED ENRICHMENT[1]

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1 Introduction

The Scottish law of unjustified enrichment has had a long history. However, until recently it was dominated by three terms: restitution, repetition and recompense. The three *R*'s, as they are called, provided the framework in which the law was classified. However, the rationale of this classification and the exact meaning of the three *R*'s remained obscure. The law was regarded as unsatisfactory by the courts, the Scottish law commission and academics. However, there was no *consensus* as to how to overcome the problems of the taxonomy based on the three *R*'s. There were even some who felt that only parliament could tackle the task. In the recent case of *Shilliday v Smith*[2] the Court of Session solved many of the problems that bedevilled the law. Given the amount of literature that has been generated by the difficulties of the internal taxonomy of the Scottish law of unjustified enrichment over the last couple of years, the manner in which the Court of Session dealt with the problem is interesting: it simply restated the law of unjustified enrichment without paying any attention to the hitherto respected principles. Whereas in the past it was thought that restitution, repetition and recompense were classifications that related to different causes of action, the *Shilliday* case simply presented them as different remedies available in a claim of unjustified enrichment. In this respect the *Shilliday* case is to be welcomed. However, *Shilliday* in fact only completed half the job. Although it abolished the three *R*'s as a means of classifying the different causes of action in unjustified enrichment, it did not offer a new taxonomy in their place. The search for a new classification of the causes of action of unjustified enrichment therefore continues.

2 The history

Before discussing the *Shilliday* case, I shall briefly revisit the historical development of the Scots law of unjustified enrichment in order to set the scene for a proper analysis of its significance. I shall start with a classification of obligations devised by the famous seventeenth century Scottish institutional writer, Stair: Stair did not recognise a distinct law of

[1] I would like to thank Niall Whitty for his helpful comments on a draft of this article. Any remaining errors are of course mine.
[2] 1998 SC 725.

unjustified enrichment.[3] It is well known in Scots law that Stair divided obligations into obediential and conventional obligations. His obediential obligations were then subdivided into restitution, recompense and reparation according to the content of the different obligations. Reparation is the obligation to make good a minus in the pursuer's[4] assets. Restitution and recompense are both concerned with a plus in the defender's hands. Restitution is an obligation to return a *certum* which has been received by the defender, eg to return a moveable or a sum of money which A received from B that was not owed. Recompense is the obligation to make good an *incertum*, for example, in error B has performed a service to A that was not due. Repetition does not appear as a distinct category of obligations. As a classification according to the different content of obligation, the three *R*'s cut directly through the causes of action arising from unjustified enrichment. The problem is that a single cause of action may arise within restitution or recompense depending on whether the content of the obligation is to restore a *certum* or an *incertum*. However, Stair makes it perfectly clear that an obligation to make restitution can turn into an obligation to recompense if, for example, the moveable which B transferred to A has ceased to exist.[5] In this case A can no longer restore the moveable but he has to make recompense in respect of any enrichment which he still holds in his hands. Both restitution and recompense were classifications which comprised causes of action which fell out with unjustified enrichment. The obligation to give back a *certum* appears also in the context of property: the *vindicatio*.[6] The obligation to make good an *incertum* also arises most prominently in the context of *negotiorum gestio*.[7] Thus, Stair's classification based on restitution and recompense was not one which related solely to the law of unjustified enrichment; reparation, restitution and recompense were introduced to classify all obediential obligations. This was presented as a better alternative to the Roman classification of obligations as *ex contractu*, *quasi ex contractu*, *ex delicto* and *quasi ex delicto*. The Roman classification is made according to different sources of obligations. Scottish lawyers had become accustomed to the Roman classification[8] which had re-asserted itself despite the natural law scheme used by Stair. It was the interplay between those two taxonomies which caused great harm to the understanding of the Scottish law of unjustified enrichment. Both classifications became muddled in the course of legal development. In the works of the later institutional writers we can observe that both restitution and recompense were slowly narrowed down to causes of action which arose only from unjustified enrichment.

[3] See Evans-Jones & Hellwege "Some Observations on the Taxonomy of Unjustified Enrichment in Scots Law" 1998 *Edinburgh Law Review* 180 181–183.

[4] In Scots law the "pursuer" is the plaintiff or claimant, while the "defender" is the defendant, or person facing the claim.

[5] *The Institutions of the Law of Scotland* (1981) 1 7 11.

[6] Stair *Institutions* 1 7 2.

[7] Stair *Institutions* 1 8 3–1 8 5.

[8] See especially Mackenzie *Institutions of the Law of Scotland* (1684) book 3 title 1.

Repetition was only introduced as a separate classification as late as 1860 in the fifth edition of Bell's *Principles*.[9] As this term came to be understood, it denoted claims in unjustified enrichment for the return of money that had been received by the defender. Restitution was understood to concern claims for the recovery of objects and recompense for payment where the benefit received was services. It was also understood that distinct causes of action arose within restitution and repetition on the one hand and recompense on the other. However, it was still recognised in the tenth edition of Bells's *Principles* (published in 1899) that restitution, repetition, recompense and reparation was an alternative model to the Roman classification into *quasi ex contractu*, *ex delicto*, and *quasi ex delicto*.[10] It was only in this century that we find for the first time that restitution, repetition and recompense were used to classify obligations described as arising from *quasi ex contractu* and later obligations arising from unjustified enrichment.

Whereas it was not harmful to classify obediential obligations according to the content of obligation as long as one understood that most causes of action might elicit obligations with different content, the modern use of the three *R*'s was harmful because lawyers began to believe that some causes of action, namely those described by the *condictiones*, were restricted to an obligation in restitution or repetition, whereas other causes of action were restricted to an obligation in recompense. It was Birks who first recognised this oddity of the Scots law of unjustified enrichment.[11] Since then, a number of theories have been proposed to explain or move beyond the three *R*'s.[12] However, many of the problems arising from the classification of the law of unjustified enrichment have now been solved by the *Shilliday* case to which I now turn.

3 The facts

In 1988, Mrs Shilliday began to associate with a certain Mr Smith. In July of the following year they began to live together. Then Mr Smith bought a house known as *Lauriston*. They started discussing getting married and became engaged. When Mr Smith bought Lauriston, it was in a state of disrepair. Mrs Shilliday and Mr Smith started refurbishing Lauriston. Subsequently, Mr Smith became aggressive towards Mrs Shilliday and one evening she was locked out of the house. Mrs Shilliday and Mr Smith then split up. In the course of the work on Lauriston, Mrs Shilliday paid £7,018.38 to various people for materials and work and £1,880 directly to Mr Smith. She also left a number of items behind which she had bought. She claimed the value of these items, which was £756.33.

Concerning the £1,880 which Mrs Shilliday had paid to Mr Smith, her claim was one in repetition: Mrs Shilliday paid a specific sum of money

[9] See Evans-Jones & Hellwege 1998 *ELR* 185–186

[10] See *Principles* s 525.

[11] Birks "Six questions in search of a subject — unjust enrichment in a crisis of identity" 1985 *JR* 227; Birks "Restitution: a view of Scots law" 1985 *Current Legal Problems* 57.

[12] See the overview in Evans-Jones & Hellwege 1998 *ELR* 189–204.

(*certa pecunia*) to the defender and it is this exact sum of money which she wanted to claim back in unjustified enrichment. Concerning the £7,018.38 her claim was not one in repetition. Mr Smith never received the specific sum of money which Mrs Shilliday wanted to claim back. Instead, his benefit was the work done to Lauriston and the materials attached to it which she had paid for with her money. The content of the obligation was therefore not to give back a *certum* but to make good the value of an intangible benefit. Her claim was one in recompense. Finally, the Court of Session also treated the claim for the value of the items she left behind as one in recompense. I will disregard this last aspect of her claim for now, but will return to it later.[13] I will now look at how the Court of Session and Lord President Rodger analysed the case in his leading judgment.

4 Analysis

The hitherto well-accepted approach to the classification of the Scots law of unjustified enrichment would have solved this case along the following lines. The three *R*'s classify the causes of action in the law of unjustified enrichment and the causes of action for an obligation in repetition are described or represented by the different *condictiones*. In this case the *condictio causa data causa non secuta* describes Mrs Shilliday's cause of action to recover the £1,880 from Mr Smith. The exact ground for a claim in recompense is unclear. While the need to establish enrichment, loss and a causal link is generally accepted, those elements in recompense which render the enrichment unjustified are not clearly defined. There is some authority that the pursuer has to prove that she was in error when conferring the benefit on the defender.[14] On the other hand, with the *condictio causa data causa non secuta* error definitely is not a requirement.[15] Hence, following the traditional view Mrs Shilliday had to prove different facts for the recovery of the different benefits. However, both repetition and recompense are governed by the principle of unjustified enrichment.[16] Thus, it seems odd if the question of whether or not Mr Smith's enrichment was regarded as unjustified depended on whether the benefit was capable of exact return or not. If the court had followed the traditional view, there would have been the danger that Mrs Shilliday's claim in repetition would have succeeded whereas her claim in recompense might have failed. Then Mrs Shilliday would have been able to recover the £1,880 but not the £7,018.38. This result would be startling since the only difference between the two positions is that she paid the £7,018.38 directly to third parties to do work on Mr Smith's house whereas she paid the £1,880 to Mr Smith who then

[13] 8(b) *infra*.

[14] See Stewart *The Law of Restitution in Scotland* (1992) par 8 12–8 15. The requirement of error is not mentioned in Gloag & Henderson *The Law of Scotland* 10 ed (1995) par 29 13.

[15] See Gloag & Henderson *Law of Scotland* par 29 13.

[16] See eg *Morgan Guaranty Trust of New York v Lothian Regional Council* 1995 SC 151 169 *per* Lord Clyde.

in turn paid the third parties to do work on his house. However, both payments benefited Mr Smith and both payments were made in contemplation of the marriage.

The Court of Session did not draw this distinction and therefore did not follow the traditional line of argument. It simply looked upon the *condictio causa data causa non secuta* as describing one cause of action arising from unjustified enrichment regardless of whether they are labelled restitution, repetition or recompense. *Shilliday* was the perfect case to take this step because it involved the transfer of different kinds of benefits, some of which were capable of exact return and some not. It was therefore a case which made particularly clear the harmful consequences of the old classification of the Scots law of unjustified enrichment. Surprisingly, the Court did not discuss any of the wider problems. It simply restated the law without pointing out the radical changes initiated by the decision.

The Lord President, Lord Rodger, commenced his judgment from the principle of unjustified enrichment. He cited Lord Cullen in *Dollar Land (Cumberland) Ltd v CIN Properties Ltd (Scotland)*:[17] "[a] person may be said to have received unjustified enrichment at another's expense when he has obtained a benefit from his actings or expenditure, without there being a legal ground which would justify him in retaining that benefit, [. . .]." He then turned to the question when one person's enrichment could be said to be unjustified. As we have seen, the traditional approach would have been to ask first by what the defender had been benefited: property, money or a service. In the case of the former two, on the traditional view, one would have turned to the *condictiones*, in the case of the latter, one would have faced the problem of the requirements of a claim in recompense. The Lord President, however, did not make this distinction. Regardless of the benefit in question, he simply stated that an enrichment could be said to be unjustified if it fell within one of the recognised categories of *condictio indebiti*, *condictio causa data causa non secuta*, or *condictio sine causa*:[18]

> "Although the usual situations discussed in connection with the *condictio causa data* are where money is paid or property transferred on a particular basis, in my view there is no relevant difference between the two aspects of the pursuer's claim. If she is entitled to recover money paid to the defender in contemplation of a marriage which never took place, in principle she must be equally entitled to recompense for the materials and work which she paid for on the same basis."

If the requirements of one of the *condictiones* are met, then a claim will lie. It is only at a second stage in the Lord President's analysis that the terms restitution, repetition and recompense become important. This is when the court, having identified the cause of action, has to determine the correct remedy. According to the Lord President's view, repetition is the correct remedy if the court orders that a specific sum of money which the defender has received from the pursuer has to be repaid. The remedy

[17] 1996 SC 331 348–349.
[18] 1998 SC 725 729.

to transfer property back to the pursuer is that of restitution; and when the defender has to pay over the value of a service recompense will lie. At this stage of his analysis, Lord Rodger followed the traditional benefit-based approach. This is the problematic part of his opinion. I will return to this issue later.[19] At this point it is worthwhile summarising how the law of unjustified enrichment has been restructured after the *Shilliday* case. (a) As a first stage one has to decide whether or not a cause of action will lie on particular facts. Regardless of the nature of the benefit, the enrichment will be unjustified if the pursuer can prove that his case falls within one of the *condictiones*. (b) Only after the identification of the cause of action do the terms of restitution, repetition and recompense become important in order to decide which is the correct remedy which the pursuer has to plead:[20]

> "It follows that [. . .] in Scots law the term *condictio causa data causa non secuta* is used, not to describe a remedy, but to describe one particular group of situations in which the law may provide a remedy because one party is enriched at the expense of the other. A pursuer whose case falls into that group has a ground of action under our law. That being so, although both parties were agreed that the pursuer's ground of action in the present case fell under the heading of the *condictio causa data*, it is necessary to identify the remedy which the pursuer seeks."

It is this clear distinction between (a) causes of action and (b) the response which is elicited by the cause of action which makes the *Shilliday* case so important.

5 The Comparison

At this point it is worthwhile analysing how this approach differs from that adopted in academic writing and by earlier cases, such as, in particular, *Morgan Guaranty Trust of New York v Lothian Regional Council*.[21] Due to the simplicity of Lord Rodger's judgment, there is a real danger of overlooking the radical changes implemented in the decision. One might even be tempted to ask how there could ever have been a problem concerning the use of the three *R*'s. The significance of the *Shilliday* case can only be fully appreciated after such comparison.

5 1 The benefit-based theory

Chapter 29 on unjustified enrichment of the tenth edition of Gloag and Henderson's *The Law of Scotland* adopts a benefit-based approach. Incidentally the author of this chapter is the Lord President, Lord Rodger, writing extra-judicially. He commences the chapter:

> "A person may be said to be unjustifiably enriched at an other's expense when he has become owner of the other's money or property or has used that property or otherwise benefited from his acting or expenditure in circumstances which the law regards as actionably unjust, and so as requiring the enrichment to be reversed. Although the underlying principles are the same in the various spheres, as a general rule Scots law treats cases involving recovery of money under

[19] 8 *infra*.
[20] 1998 SC 725 728.
[21] 1995 SC 151.

the heading of repetition, and those involving recovery of moveable property fall under heading of restitution, while cases in which the defender has benefited unjustifiably from expenditure of actings of the pursuer or from the use of his property are dealt with under the heading of recompense."

Reflecting the traditional view on Scots law, Lord Rodger restricted the *condictiones* to causes of action which give rise only to an obligation of restitution or repetition. The *condictiones* do not appear in his discussion of the obligation to give recompense. According to the traditional approach the causes of action were different depending on the different benefits. This is, of course, not reconcilable with the first statement of this chapter that the underlying principle in all of these cases is that of unjustified enrichment. The underlying principle calls for a unified treatment of the causes of action in unjustified enrichment irrespective of the benefit in question. As we saw, in *Shilliday* Lord Rodger has now departed from the benefit-based taxonomy of the law of unjustified enrichment and given full effect to the underlying principle of unjustified enrichment. In terms of this perspective, the decision in the *Shilliday* case cannot really be described as a surprise. Lord Rodger's treatment of the law of unjustified enrichment in Gloag and Henderson hinted at the need to abolish the benefit-based taxonomy of the law of unjustified enrichment.

5 2 The quantum-based theory

The Scottish Law Commission has suggested that the three *R*'s can possibly be explained on a quantum-based approach. The difference between this approach and the benefit-based structure adopted by Gloag and Henderson is that it does not focus on the nature of the enrichment that was received but on the measure of what is to be restored. Repetition is the obligation to restore money plus interest, restitution to restore property with its fruits and accretions, and recompense to make good the sum by which the defender is *lucratus*. However, the quantum-based theory does not address the crucial problem of why the law of unjustified enrichment should be classified according to the quantum of the obligation: the quantum-based theory obscures the unity of causes of action in unjustified enrichment. In addition, it lacks a historical foundation as the short sketch of the historical development of the Scottish law of unjustified enrichment has shown.[22] After the *Shilliday* case, this theory became redundant. The three *R*'s no longer classify the law of unjustified enrichment but simply denote different remedies.

5 3 Recompense as general enrichment action

The view that recompense represents a general enrichment action has been proposed by MacQueen and Sellar.[23] For their analysis of

[22] For a full discussion see Evans-Jones & Hellwege 1998 *ELR* 190–191.

[23] *Unjust Enrichment in Scots Law* in Schrage (ed) *Unjust Enrichment: the Comparative Legal History of the Law of Restitution* (1995) 289 296.

restitution and repetition, they adopt the traditional benefit-based approach: restitution is about the recovery of property, and repetition about the recovery of money. In the view of MacQueen and Sellar, the causes of action aligned with repetition and restitution are those represented by the *condictiones*. They then go on to observe that recompense has to operate on two different levels: (a) it is concerned with the benefit of services. In this respect it differs from restitution and repetition since a different benefit is in question; (b) it is however, also about the recovery of money or a sum of money representing the value of property in the case in which the defender is, for example, a minor, because traditionally a *condictio* does not lie against a minor. They solve this problem by proposing that recompense is a general enrichment action. As was shown elsewhere, this view is historically incorrect.[24] MacQueen and Sellar are, it is respectfully submitted, in error because they try to explain recompense as a cause of action distinct from the *condictiones*. They thus try to explain what concerns the content of an obligation as representing distinct causes of action. Indeed, from this (erroneous) starting point, the only possible way to explain such diverse and heterogeneous cases, which only have in common the same content of obligation, is by recourse to a general enrichment action. They propose that Scots law should make use of this general enrichment action to develop the Scottish law of unjustified enrichment.[25] Lord Rodger, as we have seen, has gone a different way: he regards the *condictiones* as describing causes of action which may elicit an obligation of recompense. He broadens the scope of applicability of the *condictiones*. With the approach taken by Lord Rodger, a general enrichment action becomes redundant.

5 4 *Morgan Guaranty Trust of New York v Lothian Regional Council*

In *Morgan Guaranty* the former Lord President, Lord Hope, classified the law of unjustified enrichment as follows:[26]

> "As a general rule it would appear that restitution is appropriate where the demand is for the return of corporeal property, repetition where the demand is for the repayment of money and recompense where the defender has been enriched at the pursuers' expense in the implement of a supposed obligation under a contract other than by the delivery of property or the payment of money. Recompense will be available, as a more broadly based remedy, in cases where the benefit was received by the defender in circumstances other than under a contract or a supposed contract."

Again, the problems inherent in this definition have been pointed out elsewhere.[27] Lord President Hope still classified different causes of action according to the nature of the benefit which had been received in cases of an enrichment in implement of a supposed obligation under a contract. As was shown above, Lord President Rodger took a different approach

[24] See Evans-Jones & Hellwege 1998 *ELR* 191–196.
[25] See especially Sellar in *Stair Memorial Encyclopaedia XV* (1996) par 73–74 85.
[26] 1995 SC 151 155.
[27] Evans-Jones & Hellwege 1998 *ELR* 196–197.

in the *Shilliday* case. However, it is startling that Lord President Rodger expressly agrees with this passage of Lord President Hope's opinion. Yet, according to Lord President Hope's opinion, Mrs Shilliday's only remedy would have been one of recompense since she did not confer any benefit to Mr Smith in the implement of a supposed obligation under a contract. There was no contract in question in this case. Despite Lord President Rodger's agreement, he clearly holds that the *Shilliday* case involved both the remedy of recompense and that of repetition. How can this be reconciled? It is important to notice at which stage of his analysis Lord President Rodger expresses his agreement with Lord President Hope. It is not when he discusses the question of whether Mr Smith's enrichment is unjustified. It is at the second stage of his analysis when discussing the correct remedy. Thus, Lord President Rodger adopts Lord President Hope's benefit-based approach only to define the different remedies which are open to Mrs Shilliday, but not to classify, as Lord President Hope still did, the different causes of actions in unjustified enrichment.

5 5 Theories overcoming the three *R*'s

There are a number of approaches which try to overcome the problems of classifying the causes of action in unjustified enrichment according to the different contents of obligation: restitution, repetition and recompense. Birks, who was the first to draw attention to the unsatisfactory state of Scots law, proposed the unjust factor approach of English law. His arguments in favour of Scots law adopting the unjust factor approach is as follows:[28]

> "If there were an agreed map, it would be possible simply to launch in. But since there is none it is essential, however dogmatically, to state one."

The map which Birks then states is the well-known classification into enrichment by subtraction of wrongs, the former subdivided into cases of non-voluntary transfers, such as transfers under mistake or duress and cases of policy motivated restitution. By broadening the applicability of the *condictiones* also to cases of the recovery of a sum of money representing the value of service or property, Lord President Rodger recognises that the agreed map of Scots law is that of the *condictiones*. For the same reasons, Stewart's views as expressed in his *Law of Restitution in Scotland* seem to have become redundant.[29]

Equally, Whitty's theory seems no longer to be defensible after the *Shilliday* case. Whitty states that "the orthodox view is that within the domain of repetition and restitution, Scots law recognises a series of specific grounds of recovery".[30] These specific grounds, which have been identified in the *Shilliday* case as the *condictiones*, have now been extended to recompense as well. They are no longer, as Whitty still

[28] Birks 1985 *CLP* 65.

[29] See also the discussion by Evans-Jones & Hellwege 1998 *ELR* 198–200.

[30] Whitty "Some trends and issues in Scots enrichment law" 1994 *JR* 127 135; Whitty "Die Reform des schottischen Bereicherungsrechts" 1995 *Zeitschrift für Europäisches Privatrecht* 216.

believed, restricted to restitution and repetition. Whitty's point of departure is the attempt to explain recompense as a cause of action distinct from the causes of action eliciting a claim in restitution and repetition:[31]

> "Scots law has not yet identified and systematised the specific grounds recognised in a recompense claim as rendering the defender's enrichment unjustified. The courts have scarcely progressed beyond the proposition that error is essential in some cases but not others. [. . .] The resultant difficulties are compounded by the fact that recompense is a conglomerate category of wide scope and diverse historical origins whose only unifying element seems to be the *quantum lucratus* measure of recovery."

In the *Shilliday* case the significance of restitution, repetition and recompense has been restricted to denote different remedies. The need to explain restitution, repetition and recompense as distinct causes of action is thus overcome.

5 6 Summary

It should be clear by now that the approach adopted in the *Shilliday* case is novel and that it overcomes many of the taxonomical problems hitherto found in the Scottish law of unjustified enrichment.[32] With respect to the amount of literature written on the taxonomy of the Scottish law of unjustified enrichment and the attempts made in the case law, it is surprising that Lord President Rodger simply restates Scots law without any discussion. In the present context Julius von Kirchmann's famous words come to mind:[33]

> "Three correcting words from parliament can turn whole law libraries into waste paper."

The correcting words came from the Court of Session. The waste paper is a lot of the literature hitherto written on the taxonomy of Scottish law of unjustified enrichment.

6 The consequences

Hitherto, as we have seen, academics and courts have felt a need to define recompense as a cause of action distinct from the *condictiones*. After having restricted the significance of recompense to simply denoting a remedy, there is no need to comply with this task any longer. Two consequences follow once recompense is seen only to denote a remedy:

(a) In order to plead recompense successfully the pursuer had to prove five elements:[34]
   (i) loss on the pursuer's side;
   (ii) enrichment on the defender's side;
   (iii) no *animus donandi* on the pursuer's side;
   (iv) the pursuer must not have acted *in suo*;
   (v) there is no other remedy available to the pursuer.

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[31] 1994 *JR* 135.
[32] See however 8 *infra*.
[33] *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* (1848).
[34] See Gloag & Henderson *Law of Scotland* par 29 13.

In the *Shilliday* case, the defender argued that the claim in recompense should fail because the pursuer acted *in suo*. This was correctly rejected by the Court of Session. The cause of action was fully described by the *condictio causa data causa non secuta*. No recourse is needed to a distinct cause of action of recompense and after the *Shilliday* case it is incorrect even to try to identify, and speak of, distinct elements of a cause of action in recompense.

(b) In the *Shilliday* case, the scope of application of the *condictiones* was extended. They now can also elicit a claim in recompense. Thus, one has to work out if what has hitherto been dealt with as a distinct cause of action of recompense can, after the *Shilliday* case, be dealt with by applying the *condictiones*. An example will make this point clear: traditionally, in Scots law the cause of action against a minor is described by the latin phrase *actio in quantum locupletior factus est pupillus* which was regarded as part of the law of recompense. This dates back to Stair.[35] After the *Shilliday* case, Scots law has to decide whether there is still any need for a separate enrichment action against a minor or whether the *condictiones* can be extended to cover these claims as well. For Stair, the reason for separating out the case of the minor was that he should always only be liable *in quantum locupletior factus est* and not to the extent of what he had received. Thus the obligation owed by the minor had as its contents an *incertum*. Historically, the rationale goes back further: in Roman law a *condictio* was an *actio civilis*. However, a minor was not able to contract a civil law obligation. Roman law thus developed a special *actio in factum*, a praetorian claim.[36] The minor was therefore only treated differently for pure formalistic reasons, which had their foundation in the Roman system of actions. This reason for having a separate action against minors does not exist in Scots law. In addition, today restitution and repetition are also governed by the principle of unjustified enrichment. Finally, in principle, all persons are liable only to the extent of their enrichment: it is now accepted in Scots law that the *condictiones* are governed by the principle of unjustified enrichment. The policy reason to protect minors therefore does not demand a separate enrichment action against minors. It is therefore submitted that the *condictiones* could be applied in such cases.[37]

7 The aftermath

I have pointed out above that the *Shilliday* case abolished the benefit-based taxonomy of causes of action in unjustified enrichment. It has therefore overcome the hitherto well-accepted, though heavily criticised,

[35] *Institutions* 1 8 6.

[36] See eg Kaser *Das Römische Privatrecht I* 2 ed (1971) 600; Kaser *Das Römische Privatrecht II* 2 ed (1975) 425.

[37] See Evans-Jones and Hellwege 1998 *ELR* 216.

internal taxonomy of the law of unjustified enrichment. However, the *Shilliday* case has not defined how the law of unjustified enrichment should be divided up instead. This is the very important future task for both courts and academics. I will now turn to this problem.

Although Lord Rodger decided the case on basis of the *condictio causa data causa non secuta*, the role which Lord Rodger assigns to the *condictiones* is not quite clear. The *condictiones* are not capable of covering all the cases which may arise within the law of unjustified enrichment. Thus, it will be crucial for the future development of the Scots law of unjustified enrichment to define the residual causes of action outside the *condictiones* and to define their relationship with the *condictiones*. Two models have already been proposed: some have argued that Scots law should adopt the English approach, that is adopt the classification into autonomous unjust enrichment and restitution for wrongs.[38] In autonomous unjust enrichment a specific factor, such as mistake, ignorance, duress, *et cetera*, has to be proved to render the enrichment unjust. In restitution for wrongs, the unjustness of the enrichment follows from the fact that it was caused by a wrong. Others have opposed this view and argued instead for the adoption of something similar to the German classification into *Leistungskondiktion* (enrichment-by-performance) and *Nichtleistungskondiktion* (enrichment-by-non-performance).[39] The difference between the two models is that the former divides autonomous unjust enrichment according to factors which render the enrichment unjust, whereas the latter classifies according to the manner in which an enrichment came about, for example, by performance, interference, by operation of law, *et cetera*, and only then asks whether this enrichment can be justified by a cause or a legal ground.

The *Shilliday* case does not settle this problem. Both views can argue that *Shilliday* was either only about the internal classification of autonomous unjustified enrichment, or that it only concerned the cases of enrichment-by-performance. Lord Rodger touches on this problem although he does not discuss it explicitly. He states:[40]

> "The pursuer points, rather, to a particular factor which makes the defender's enrichment unjust. Where such a relevant factor exists, that factor, rather than the mere fact of expenditure by the pursuer and benefit to the defender, constitutes the ground of action. So, in *Newton*, the pursuer was allowed to recover from his former wife money which he had spent on a house which actually belonged to her, but which he had mistakenly thought belonged to him. The critical factor in the pursuer's ground of action was his mistake about the title: he recovered because his wife was benefiting from sums which he would not have spent if he had been aware of the true position. In the present case also the pursuer does not simply rely on the fact that she spent money on the defender's property from which he had benefited. On the contrary, the critical factor in her ground of action is that she acted as she did in contemplation of the parties' marriage, which did not take place. That is why she asks to be recompensed."

[38] Birks 1985 *CLP* 65–66; Birks 1985 *JR* 244–245; Stewart *Restitution* par 3 8; Stewart *Delict* 2 ed (1993) ch 13.

[39] Blackie "Enrichment and Wrongs in Scots Law" 1992 *Acta Juridica* 23; Whitty 1994 *JR* 127; Steven "Recompense for Interference in Scots Law" 1996 *JR* 51; Scottish Law Commission *Recovery of Benefits Conferred under Error of Law I* Discussion Paper 95 (1993) par 3 23–3 30; Evans-Jones & Hellwege 1998 *ELR* 204–211.

[40] 1998 SC 725 731.

Lord Rodger describes the factor rendering the enrichment unjustified in *Newton v Newton*[41] as mistake. Thus, the cause of action seems to be akin to that of the *condictio indebiti* which Lord Rodger describes extra-judicially as mistake as to legal liability.[42] In Birks's terminology, the claim in *Newton v Newton* and the *condictio indebiti* would form part of a larger category of vitiated consent.[43] Following Birks's cases like *Newton v Newton* and all other cases of the *condictio indebiti*, it would form part of the same cause of action, mistake, which again forms part of his great category of autonomous unjust enrichment. However, following the view expressed by those who would like to see Scots law develop in a direction akin to German law, these cases and the *condictio indebiti* would fall into distinct categories: with the *condictio indebiti* the pursuer transferred the enrichment onto the defender acting in performance of a supposed obligation. He conferred the benefit deliberately and for the purpose of discharging an obligation onto the defender. The enrichment is unjustified if this purpose fails because the performance was undue. The factual situation in *Newton v Newton* is totally different. Mr Newton, thinking that it was his own property that he was improving, never transferred any benefit deliberately onto Mrs Newton.[44] However, Birks, and following him Stewart, would probably dismiss this as an irrelevant distinction between the two cases and argue that the important similarity is that both cases involve a mistake. The crucial question thus seems to be whether cases like *Newton v Newton* can truly be explained solely on the basis of mistake. It is submitted that this is not possible. There are two different legal contexts into which these cases fit. It is the legal context of the *bona fide* possessor and that of recompense following an *accessio*. I will discuss both in turn concerning the question of whether they can be analysed on the ground of mistake:

7 1 *Bona fide* possessor

The legal context is property, not unjustified enrichment.[45] If mistake were enough, then the *bona fide* possessor should have an active claim against the owner. This is the consequence that English academics have drawn from analysing the case of the mistaken improver as an application of the unjust factor of mistake.[46] This is not the case in Scots law. The right of the *bona fide* possessor does not simply accrue when he mistakenly improves the property of another but only when he is dispossessed of that property and a court will only allow the owner to take possession after he has recompensed the possessor.[47] Finally, the

[41] 1925 SC 715.
[42] Gloag & Henderson *Law of Scotland* par 29 4.
[43] Birks *An Introduction to the Law Of Restitution* (1989) 146–173.
[44] Mr Newton's claim would be described as the Scottish *Verwendungskondiktion*. See Whitty 1995 *Zeitschrift für Europäisches Privatrecht* 228.
[45] See *Stair Memorial Encyclopaedia XVIII* par 131 *et seq*.
[46] Burrows *The Law of Restitution* (1993) 120–122. A comparative study of these problems has been made by Verse "Improvements and Enrichment: A Comparative Analysis" 1998 *Restitution Law Review* 85; Verse *Verwendungen im Eigenümter-Besitzer-Verhältnis* (1999).
[47] *Stair Memorial Encyclopaedia XVIII* par 131 173.

rights of the possessor are part of broader considerations concerning how to balance the interest between the possessor and the owner. The claim of the *bona fide* possessor is thus not only dependent on his mistake. Questions such as who has the right to the fruits accruing during his possession — the owner or the *bona fide* possessor — have to be taken into account. For this reason it seems unwise to cut out the claim of the possessor and put it into a different branch of law, the law of unjustified enrichment. Thus, it is submitted, the cause of action should not be explained on the basis of mistake. The right of the possessor arises because and when he is dispossessed of the thing which he improved. It seems as if a mistake is a necessary requirement of the cause of action; however, it cannot be explained solely on the ground of mistake and therefore should not be analysed together with the *condictio indebiti* as belonging to a category of vitiated consent.

7 2 *Accessio*[48]

A closely related legal problem to that of the *bona fide* improver is that of *accessio*.[49] The person who loses his title by way of accession may also have a claim in recompense against the owner of the principal.[50] Can and should this right of the former owner of the accessory be explained on the basis of vitiated consent or mistake? The crucial fact is that the owner of the principal became owner of the accessory by operation of law. If there is no cause to justify this enrichment, the former owner of the accessory should *prima facie* have a claim. Under the Birksian approach one would have to analyse it rather differently. Under this analysis it would be irrelevant that the enrichment came about by operation of law rather than by a deliberate conferment of the benefit to the owner of the principal. The unjustness of the enrichment would rather be determined by unjust factors such as mistake, ignorance, powerlessness, duress, *et cetera*. It is submitted that Scots law as it stands today has adopted the former, rather than the Birksian approach:

(a) In the decision of the House of Lords in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd (Scotland)* Lord Hope stated:[51]

> "In general terms it may be said that the remedy is available where the enrichment lacks a legal ground to justify the retention of the benefit."

This is a statement of the utmost importance. Applied to our problem there is no need to show any unjust factor, such as mistake, to render the enrichment unjustified. The enrichment which comes about by way of *accessio* is unjustified if there is no legal ground or no cause to justify it.[52]

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[48] See also Reid "Unjustified Enrichment and Property Law" 1994 *JR* 167 181–187; Steven 1996 *JR* 51 61.

[49] *Stair Memorial Encyclopaedia XVIII* par 173.

[50] *Stair Memorial Encyclopaedia XVIII* par 577.

[51] 1996 SC 330.

[52] See now also Lord Hope's general comparative observations in *Kleinwort Benson Ltd v Lincoln City Council* 1998 4 All ER 513 561.

(b) Scots law has already classified the law of unjustified enrichment according to the manner in which the enrichment was conferred to the defender. The *condictiones* deal with cases in which the pursuer wilfully transfers a benefit onto the defender. In the case of recompense following *accessio*, the crucial factor is that the defender is enriched by operation of law. This is a workable concept. The unjust factor approach would cut through these categories and reclassify according to unjust factors. Thus, the problem of *accessio* would appear under the unjust factors of mistake, ignorance, powerlessness, duress, wrong, *et cetera*. This is, however, not the approach taken by Scots law. It treats the question of recompense following *accessio* as a distinct category, the rationale of this category being the manner in which the enrichment occurred.

It thus seems as if Scots law has already decided to go down a similar route to that of German law. In addition, it might be of interest that the internal division of autonomous unjust enrichment in English law does not yet constitute a developed model which could easily be adopted by other legal systems. Recently, Birks observed that the case of *Trustee of the Property of FC Jones & Sons v Jones*[53] might prove that English law recognises a claim in autonomous unjust enrichment which is based on interference, although this interference was not characterised as a wrong.[54] Thus the internal division of autonomous unjust enrichment in English law is still unclear.[55]

8 The problem

So far, we have been concerned about the taxonomy of the causes of action in unjustified enrichment. We have observed how important it was to abolish the three *R*'s as a means of classifying causes of action and we have visited the consequences of this major step. However, the three *R*'s still have a function to fulfil. As we have already observed, in the view of Lord President Rodger, restitution, repetition and recompense now denote different remedies. This, it is submitted, is the problematic part of the *Shilliday* case. Lord Rodger states:[56]

> "The person framing the pleadings must consider how the defender's enrichment has come about and then search among the usual range of remedies to find a remedy or combination of remedies which will achieve his purpose of having that enrichment reversed. Elementary examples make this clear. For instance, if A has been unjustly enriched because he has received a sum of money from B, the enrichment can be reversed by ordering A to repay the money to B. B's remedy will be repetition of the sum of money from A. On the other hand, if the unjust enrichment arises out of the transfer of moveable property, the enrichment can be reversed by ordering A to transfer the property back to B. An action of restitution of the property will be

[53] 1997 Ch 159.

[54] Birks "On taking seriously the difference between tracing and claiming" 1997 *Trust Law International* 2 9.

[55] See also the criticism towards the English unjust factor approach by Meier *Irrtum und Zweckverfehlung* (1999) and by Zimmermann "Unjustified Enrichment: The Modern Civilian Approach" 1995 *OJLS* 403.

[56] 1998 SC 725 727 *et seq.*

appropriate. [. . .] If A is unjustly enriched by having had the benefit of B's services, the enrichment can be reversed by ordering A to pay B a sum representing the value of the benefit which A has enjoyed. An action of recompense will be appropriate. So repetition, restitution, [. . .] and recompense are simply examples of remedies which the courts grant to reverse an unjust enrichment, depending on the way in which the particular enrichment has arisen."

Lord President Rodger thus adopts a benefit-based approach for classifying the different remedies. Hence, Lord Rodger does not truly abolish or overcome the benefit-based theory with all its problems but simply relocates it. Just as it proved to be problematic in classifying the causes of actions arising from unjustified enrichment according to the different benefits, the same is true, it is submitted, for a benefited-based taxonomy of restitutionary remedies. The correct remedy depends, according to Lord President Rodger, on what the court is asked to order: restitution if specific property is to be given back, repetition if a specific sum of money is to be given back and recompense if payment of a sum of money representing the value of services or the value of property by which, and to the amount, the defender is benefited is ordered. The Lord President believes that the pursuer can determine which remedy he ought to plead by observing what benefit he transferred: property, money or services. It seems as if what the court orders is simply a mirror-image of the way the enrichment came about. This is a very literalistic approach to the term restitution. However, there are many cases which seem to be more complicated and in which the correct remedy can not be anticipated merely by looking at the benefit received.[57] Consider the following three examples:

(a) A transferred the title of his car to B in anticipation of B's marriage. The marriage is cancelled. A's cause of action is the *condictio causa data causa non secuta*. According to the view of the Lord President, A should plead the remedy of restitution. While the case is at trial, the car is destroyed without any fault on B's side. A cannot claim back the title of the car. Stair accepted that the obligation of restitution can now turn into an obligation of recompense.[58] A now wants a sum of money representing the value of the car to the extent of B's enrichment. The proper remedy is that of recompense. Hence, the choice of remedy does not depend only "on the way in which the particular enrichment has arisen" but also on subsequent events. In order to take account of the possibility of such subsequent events, a pursuer always has to plead both restitution and recompense in a case like the one cited.

(b) The problem is even present in the *Shilliday* case itself. The pursuer asked for the value of "a number of items, worth £756.33 in total, which she put into the house and garden and which she had to leave behind when she was put out of the house". If one observed just the

[57] The Lord President acknowledges that there may be very complex cases in which the identification of the proper remedy is rather hard: 1998 SC 728. Thus, my criticism is not that the Lord President was not aware of these problematic cases but that the benefit-based classification is the wrong starting point for an analysis of the remedies.

[58] *Institutions* I 7 11.

way in which the enrichment came about, one would assume that the correct remedy to plead is restitution of these items: Mr Smith was enriched by the title of these items. However, recompense of the value was held to be the proper remedy. Hence, the mirror-image rule is not only not true because it cannot take into account any subsequent events, but it also does not work for all transfer cases. In some transfer cases the correct remedy is only recompense where, following Lord Rodger's definition, it should be restitution. The facts given in the opinions of their lordships are not entirely clear as to what had happened to these items. If it were the case that Mr Smith acquired property through *accessio* then indeed recompense is traditionally the correct remedy.[59] This makes it clear that recompense is much wider than just reversing an unjust enrichment where the benefit in question is a service. It thus seems that the benefit-based classification of remedies is open to much the same criticisms as was the benefit-based taxonomy of the causes of action. The literature written on the taxonomy of unjustified enrichment has therefore not, as was submitted above, turned into waste paper. To a certain extent it can still be useful for understanding the taxonomy of the remedies which reverse an unjust enrichment.

(c) The last point I would like to submit is as yet speculative. As was pointed out above, historically, restitution was about giving back a specific sum of money or specific property. Today, Scots law seems to be willing to develop further its defence of change of position. In the case of an undue payment, the effect of that defence is that the defender does not have to give back the specific sum of money which he received, but less. He has to pay over the amount to the extent of his surviving enrichment. Following the historical division of restitution and recompense according to whether the obligation is to restitute a *certum* or to recompense an *incertum,* the defender's obligation should be described as one of recompense. Whether Scots law will follow this line of argument is as yet unclear. If it were to follow this line of argument, the pursuer would again have to plead both remedies: that of repetition and that of recompense. At this stage of development it is worthwhile to note that Lord Rodger's definition leaves no room for this problem to develop. Hence, although it was an important step to abolish the benefit-based classification of the causes of action, the problems have only been relocated by introducing a benefited-based taxonomy of the restitutionary remedies.

9 Residual Issues

I will turn now to three residual issues arising from the *Shilliday* case. The purpose of this section is not to discuss these three issues in full, but simply to draw the reader's attention to some central points:

[59] See *Stair Memorial Encyclopaedia XVIII* par 577.

9 1 The *condictio causa data causa non secuta*[60]

The Court of Session also revisited some problems concerning the requirements of the *condictio causa data causa non secuta*. Lord Rodger states that "it is sufficient to note that the term *condictio causa data causa non secuta* covers situations where A is enriched because B has paid him money or transferred property to him in the expectation of receiving a consideration from A, but A does not provide that consideration. The relevant situations in this group also include cases where B paid the money or transferred the property to A on a particular basis which fails to materialise — for example, in contemplation of a marriage which does not take place."[61] Lord President Rodger rejected the view, as did Lord Kirkwood and Lord Caplan, that the marriage had to become a condition of the transfer in its formal, contractual sense. This is the correct approach. However, the question discussed goes right to the problem of what is the exact reason for regarding the enrichment as unjustified in the case of the *condictio causa data causa non secuta*. Scots lawyers might find it useful to observe that exactly the same problem that was addressed by their Lordships in the *Shilliday* case has been extensively discussed in Germany in the late nineteenth century. The discussion took place between Bernhard Windscheid and Otto Lenel. Windscheid held that the basis of the *condictio causa data causa non secuta* is that the pursuer transferred the benefit under a *Voraussetzung* (presumption). The enrichment is unjustified if this presumption fails to materialise and, in addition, if the defender was able to notice that the transfer was made under that specific presumption or if the pursuer communicated his presumption to the defender at the time of the transfer.[62] Lenel opposed this view forcefully: he argued that Windscheid's view would lead to the recognition of something which is not merely a legally irrelevant motive for the transfer, but which is also not a condition in its formal sense.[63] In the *Shilliday* case, the Court of Session faced similar problems. It adopted an approach which is akin to that of Windscheid. A similar approach is adopted both by German law[64] and by English law.[65] Scots lawyers might find it helpful to consult the parallel discussion in the German literature, especially on the resulting problems of drawing the border line between the *condictio indebiti* and the *condictio causa data causa non secuta*.

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[60] On the *condicio causa data causa non secuta* see Evans-Jones "The claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)" 1997 *Acta Juridica* 139; Faber "Rückforderung wegen Zweckverfehlung — Irrungen und Wirrungen bei der Anwendung römischen Rechts in Schottland" 1993 *Zeitschrift für Europäisches Privatrecht* 279.

[61] 1998 SC 725 727.

[62] *Die Lehre des römischen Rechts von der Voraussetzung* (1851); 1892 *Archiv für die civilistische Praxis* 161.

[63] 1889 *Archiv für die civilistische Praxis* 213; 1892 *Archiv für die civilistische Praxis* 49.

[64] See Lieb in *Münchener Kommentar V* 3 ed (1997) par 812 n 162–164.

[65] Birks *Introduction* 147–148.

9 2 Enrichment

Mrs Shilliday was able to recover the full value of the items she left behind and the full amount paid to third parties for work done and materials supplied. Lord President Rodger makes clear that the remedy of recompense will not necessarily always grant the full value:[66]

> "The pursuer says that the value of the benefit which she conferred on the defender is the cost of the various materials, repairs and items. That would not necessarily be so in all cases, but no point arises here since [. . .] the defender does not dispute that the cost to the pursuer is the true measure of the value of the benefit to him."

Thus the Lord President reminds us that the true inquiry is into what the defender has gained, not what the pursuer has lost. The defender might be able to say that he values the items less than their objective value. In English law this would be a problem of subjective devaluation,[67] in German law of *aufgedrängte Bereicherung*.[68] The defender might also prove that he has changed his position. Both principles, that of subjective devaluation and that of change of position, have not yet received extensive attention in Scots law.

9 3 *Shilliday v Smith* and *Royal Bank of Scotland v Watt*

Although the Court of Session did not expressly refer to *Royal Bank of Scotland v Watt*,[69] it seems that the *Shilliday* case leaves no room for the *ratio decidendi* of the *Watt* case. In the *Watt* case Lord Mayfield pointed out that "none of the authorities [. . .] support the view [. . .] that in order to succeed in the claim of repetition the pursuer must establish that the defender was *lucratus*. That in my view is the essential difference between the remedy of repetition and recompense".[70] In the *Morgan Guaranty* case, Lord Clyde stated that "[t]he two formulation are of course in some respect distinct, as was pointed out in *The Royal Bank of Scotland v Watt*. In recompense the emphasis is upon the enrichment [. . .]. In repetition, the emphasis is upon the payment of money in the mistaken belief that it was due. But the two formulations are clearly related to each other and may well be treated as falling under the single descriptive heading of unjust enrichment".[71] As I have pointed out above, Lord President Rodger only regards repetition, restitution and recompense as possible remedies to reverse an unjustified enrichment. At the first stage, the pursuer has to prove that the defender was enriched and that this enrichment is unjustified and at his expense. To prove that the enrichment is both unjustified and at his expense, the pursuer may prove that his case falls within one of the *condictiones*. The *condictiones* are governed by the principle of unjustified enrichment. This view is irreconcilable with

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[66] 1998 SC 725 728.

[67] See Birks *Introduction* 109–114.

[68] See Lieb *Münchener Kommentar V* par 818 n 35. A comparative study between English and German law on the problem of subjective devaluation is now provided by Verse 1998 *RLR* 85.

[69] 1991 SC 48.

[70] 1991 SC 61.

[71] 1995 SC 169.

the view expressed in the *Watt* case which clearly has as its basis the view that the responses of restitution and repetition and also the causes of action described by the *condictiones* have nothing to do with law of unjust enrichment. It is especially important to note that the *Watt* case seems to be bad law after the *Shilliday* case for the development of the defence of change of position. With regard to this defence the *Watt* case has already caused quite some confusion in academic writing.[72]

10 Conclusion

The *Shilliday* case is to be more than welcomed. It overcomes the benefit-based classification of causes of action. After *Shilliday*, the question of whether an enrichment is unjustified or not is no longer influenced by the nature of the benefit. *Shilliday* did not expressly address the problem of how the law of unjustified enrichment should now be classified. It is submitted that Scots law should not adopt the English unjust factor approach but introduce a division according to the manner in which the enrichment has come about: (a) by performance (b) or by non-performance, for example, by operation of law with *accessio*. It was argued that this latter classification is already found in Scots law and that it, rather than the unjust factor approach, gains support from the recent House of Lords decision in the *Dollar Land* case. It was then submitted that the newly adopted benefit-based taxonomy of the remedies may prove equally problematic as the benefit-based taxonomy of the causes of action did. Finally, one important consequence of the abolition of the benefit-based taxonomy was pointed out: since the *condictiones* are not related to the benefit in question, those cases which have traditionally been considered as involving causes of action distinct from the *condictiones* have to be revisited, for example, the enrichment claim against minors. It is now open to Scots law to apply the *condictiones* to these cases as well.

Birks noted in 1985:[73]

> "In Scotland, largely thanks to the great institutional writers, it could be said as late as the early decades of this century that the law on this subject was more rational and better understood than in England [. . .]. Even one textbook on the Scots law in the period before *Goff and Jones* would have confirmed that lead [. . .]. But the opportunity was missed."

After the *Shilliday* and *Dollar Land* cases, Scots law has again taken the lead. In English law certain causes of action are traditionally restricted to certain benefits, for example, the unjust factor of failure of consideration to money.[74] In Scots law all causes of action arising from unjustified enrichment, especially those described by the *condictiones*, now apply regardless of the nature of the benefit.

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[72] See for example Stewart's distinction between a defence of non-enrichment and a defence of change of position: *Restitution* par 4 43–4 56 and 4 57–4 59; *Delict* par 13 5–13 6.

[73] 1985 *CLP* 64–65.

[74] Burrows *Restitution* 250.

OPSOMMING

Die Skotse verrykingsreg was tot onlangs in drie hoofkategorieë verdeel, naamlik "*restitution*", "*repetition*" en "*recompense*". Gesamentlik het hulle bekend gestaan as die "*three R's*". Die grond vir hierdie verdeling en die presiese betekenis daarvan was lank in onsekerheid gehul. 'n Belangrike gevolg van die klassifikasie was dat die feite wat beweer moes word om met 'n verrykingseis te slaag, verskil het na gelang van die aard van die bevoordeling. In die onlangse beslissing van die Skotse Court of Session in *Shilliday v Smith* 1998 SC 725 is weggedoen met hierdie voordeel-gebaseerde taksonomie. Hierdie saak maak dit nou moontlik vir die Skotse reg om eenvormige eisoorsake te ontwikkel. Die *Shilliday*-beslissing het egter nie dié taak voltooi nie. Eerstens het dit nie verklaar hoe die verrykinsgreg gestruktureer moet word nadat met die voordeel-gebaseerde taksonomie weggedoen is nie. Dit word aan die hand gedoen dat die Skotse verrykingsreg moet ontwikkel in 'n rigting soortgelyk aan die Duitse reg, en inderdaad alreeds in hierdie rigting begin ontwikkel het. Tweedens het die beslissling nie werklik die voordeel-gebaseerde taksonomie afgeskaf nie. Eisoorsake word weliswaar nie meer geklassifiseer na gelang van die voordeel wat die verweerder ontvang het nie, maar remedies wel. Daar word geargumenteer dat 'n voordeel-gebaseerde taksonomie van remedies net so problematies kan wees as 'n voordeel-gebaseerde taksonomie van eisoorsake.