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## THE CONCEPT OF BENEFIT IN THE LAW OF QUASI-CONTRACT

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### INTRODUCTION

The appeal of a legal rule requiring the disgorgement of gains unjustly acquired or retained is so compelling that scholars from classical times to our own era may be cited in its support.<sup>1</sup> The enthusiasm for separating a wrongdoer from his illicit gains, however, has obscured careful analysis of what constitutes an unjust benefit sufficient to entitle a plaintiff to recover in quasi-contract on restitutionary principles.<sup>2</sup> Not only do we lack a comprehensive concept of benefit, but the need to develop uniform yardsticks for measuring the quantum of gains unjustly obtained also has been neglected.

The central function of quasi-contract in providing a remedy in extremis may explain why no wholly consistent or comprehensive definition of benefit is possible or even desirable.<sup>3</sup> Quasi-contract fills many gaps in areas to which other more conventional legal actions do not comfortably extend<sup>4</sup> and often provides a remedy of last resort. To serve these objectives the application of quasi-contract necessarily must be improvisational. In failing to recognize that a doctrine serving such divergent and exigent purposes is not likely to emerge as a model of rationality, courts and scholars often have confused the concept of

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1. See J. DAWSON, UNJUST ENRICHMENT 3 (1951) (authorities cited as various as Pomponius, a second century Roman lawyer, and the *Restatement of Restitution*).

2. See Comment, *Quasi-Contracts—Concept of Benefit*, 46 MICH. L. REV. 543, 544 (1948). Relatively few articles or student comments have treated the concept of benefit as a distinct topic of general application. See generally Jeanblanc, *Restitution under the Statute of Frauds: What Constitutes a Legal Benefit*, 26 IND. L.J. 1 (1950); Note, *The Necessity of Conferring a Benefit For Recovery in Quasi-Contract*, 19 HASTINGS L.J. 1259 (1968).

3. See J. DAWSON, *supra* note 1, at 7.

4. See Comment, *supra* note 2, at 551, 553-54.



quasi-contract. A more reasonable analysis of quasi-contract suggests that the doctrine simply cannot be systemized.

#### THE HISTORICAL ORIGINS OF QUASI-CONTRACT

Quasi-contract<sup>5</sup> grew out of the common law action of general assumpsit, which itself was the progeny of the contract action of special assumpsit.<sup>6</sup> Prior to the development of assumpsit, the personal actions of covenant and debt were the principal means of enforcing contractual obligations.<sup>7</sup> The action of covenant was never used widely in the King's courts.<sup>8</sup> Debt was a much more common device for the enforcement of promises, although recovery in that action did not hinge on a showing of mutual promises; indeed, a defendant would be found liable in debt not because he had made a promise and failed to perform but because he had received a benefit and had not given the agreed value in return.<sup>9</sup>

Since procedural limitations plagued the actions of covenant and debt,<sup>10</sup> lawyers sought alternative forms of action for claims that modern legal minds would denominate contractual. The King's courts showed little interest in expanding the enforceability of promises through liberation of these strict procedural rules, and plaintiffs' lawyers turned to the action of trespass on the case as a more fruitful

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5. Quasi-contract historically is a term limited in application to legal actions for the recovery of money. Modern usage has expanded the meaning of quasi-contract to include a wide range of restitutionary actions both at law and in equity; this modern usage has been criticized, however, as misleading and historically inaccurate. See Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1135 n.88 (1971). See generally Comment, *Restitution: Concepts and Terms*, 19 HASTINGS L.J. 1167 (1968).

6. See J. DAWSON & R. PALMER, *CASES ON RESTITUTION* 1 (1969). The genesis and maturation of quasi-contract is rooted firmly in English legal history. A detailed analysis of the complicated and uncertain history of quasi-contract is beyond the scope of this article; other sources adequately discuss that history. See generally J. DAWSON, *supra* note 1; R. GOFF & G. JONES, *RESTITUTION* (1966); R. JACKSON, *THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW* (1936); W. KEENER, *THE LAW OF QUASI-CONTRACTS* (1893); P. WINFIELD, *QUASI-CONTRACTS* (1952).

7. See S. MILSON, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 60-61 (1969). The actions of covenant and debt were called personal actions because they were purely private and of no interest to the King. To say that these actions were contractual is to impose the logic and classifications of our time upon a much different legal system. See *id.* at 211-17.

8. See *id.* at 215.

9. See *id.* at 224.

10. Defects in the action of debt from the plaintiff's point of view included the defendant's right to wage his law, the requirement that the amount in issue be a sum certain, and the extraordinary difficulty of pleading in debt. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 565-66 (1936).



alternative. Early lawyers clearly understood that a breach of a parol promise was a tort,<sup>11</sup> but only gradually did they perceive actions in trespass as at least partly contractual.<sup>12</sup> The development of the contractual aspects of trespass focused attention on assumpsit, which had its origin in trespass. As actions in assumpsit became more common, efforts were made to make assumpsit applicable to all cases of simple contract to which debt applied.<sup>13</sup>

The first step in the development of assumpsit as a functional substitute for debt was the recognition "that a preexisting debt constituted a consideration for a promise, and therefore, if one who was already under an obligation enforceable by an action of debt made a promise to pay the debt, such action was enforceable by an action of assumpsit."<sup>14</sup> Thus, if a plaintiff could show a second promise to pay, subsequent to the creation of the obligation sought to be enforced, his action in assumpsit would be free of the disabling procedural impediments of debt. The decision in *Slade's Case*,<sup>15</sup> that the second express promise need not be shown,<sup>16</sup> represented the next step. The action created by that decision, indebitatus assumpsit or special assumpsit, became a remedy substantially equivalent to debt.<sup>17</sup>

The final step in the development of quasi-contract as a relatively distinct legal doctrine can be traced to the opinion of Lord Mansfield in *Moses v. Macferlan*,<sup>18</sup> a case involving an action in indebitatus assumpsit. The plaintiff in *Moses* had endorsed notes of a third party over to defendant upon defendant's promise that no action would be commenced against the plaintiff on his endorsement. The defendant breached that promise, sued the plaintiff in a separate action, and recovered judgment. The plaintiff paid the judgment but brought an action against the defendant in special assumpsit.<sup>19</sup> In awarding

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11. See Ames, *The History of Assumpsit: Part I*, 2 HARV. L. REV. 1, 15 (1888).

12. See generally T. PLUCKNETT, *supra* note 10, at 570 (quoted exchange between counsel on whether trespass action sounded in tort or contract).

13. Actions in debt were the exclusive province of the courts of common pleas. The judges of the King's Bench, who had jurisdiction over assumpsit, thus had considerable incentive to permit the expansion of assumpsit as an action in competition with debt. Assumpsit developed as a contractual action in King's Bench. See 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 443 (1923); T. PLUCKNETT, *supra* note 10, at 576.

14. F. WOODWARD, THE LAW OF QUASI-CONTRACTS § 2, at 3 (1913).

15. 76 Eng. Rep. 1074 (K.B. 1602).

16. *Id.*

17. Professor Ames argues that *Slade's Case* was not the source of indebitatus assumpsit; he maintains instead that the holding of *Slade's Case* was the law at least 60 years before the case was decided. See Ames, *supra* note 11, at 16.

18. 97 Eng. Rep. 676 (K.B. 1760).

19. *Id.*



judgment for the plaintiff, Lord Mansfield answered the defendant's objections that there was no promise by observing:

If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu," as the Roman law expresses it).<sup>20</sup>

Lord Mansfield was the first commentator to suggest that obligations based upon fictional promises should be enforced.<sup>21</sup>

Lawyers continued to test the logical limits of the concept of quasi-contract. They focused principal attention on the distinction between actions in contract premised on a consensual agreement and proceedings in quasi-contract grounded in ideas of unjust enrichment.<sup>22</sup> As a result of this persistent probing, the doctrine of quasi-contract evolved into "a peculiar hybrid, a residuary remedy supplementing the contract and tort remedies of the common law and the wide range of equitable remedies."<sup>23</sup>

The reach of quasi-contract has continued to expand; quasi-contractual principles are applied in a wide variety of contemporary situations. This breadth of application has resulted in much confusion. One persistent source of difficulty, and the subject of this article, is the definition of a benefit to the defendant sufficient to entitle a plaintiff to recovery<sup>v</sup>

#### THE MEANING OF BENEFIT

Courts show substantial agreement that a defendant who receives a tangible asset has received a recoverable benefit.<sup>24</sup> Since 1705, in reliance on *Lamine v. Dorrell*,<sup>25</sup> a plaintiff whose goods have been converted and sold may dispense with his action in tort and proceed in

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20. *Id.* at 678.

21. See F. WOODWARD, *supra* note 14, § 2, at 4.

22. See J. DAWSON & R. PALMER, *supra* note 6, at 4.

23. *Id.* at 4-5.

24. See, e.g., *City of Vernon v. Southern Cal. Edison Co.*, 191 Cal. App. 2d 378, 394, 12 Cal. Rptr. 701, 711 (1961) (use of electric system); *Bellanca Corp. v. Bellanca*, 53 Del. 378, 383, 169 A.2d 620, 623 (1961) (receipt of brokerage services); *Estate of Phillips*, 10 Misc. 2d 714, 716, 173 N.Y.S.2d 632, 635 (Sur. Ct. 1958) (receipt of money and labor); *Bill v. Gattavara*, 34 Wash. 2d 645, 648, 209 P.2d 457, 459 (1949) (receipt of cash).

25. 92 Eng. Rep. 303 (K.B. 1705).



quasi-contract.<sup>26</sup> Most American courts have followed the English precedent and have allowed a quasi-contract action as an alternative to a tort action in conversion.<sup>27</sup> Since the existence of benefit in these cases usually is clear, the question of whether a benefit sufficient to allow recovery has been shown rarely is raised explicitly.

The plaintiff's right to waive the tort remedy and sue in quasi-contract has not been so obvious when the defendant converter has not resold the wrongfully acquired goods but instead has consumed or retained them. Many American jurisdictions initially rejected the right of a plaintiff to sue in quasi-contract where the converted goods had not been resold.<sup>28</sup> Persistent criticism by respected scholars,<sup>29</sup> however, eventually convinced most jurisdictions to allow quasi-contractual recovery from a converter in the absence of resale.<sup>30</sup> The concepts of benefit expressed in the older cases denying recovery if the converter has not resold nevertheless provide an important starting point for an analysis of the status of the idea of benefit in modern cases. Two fundamental questions shape this analysis: whether the concept of benefit in earlier cases was so narrow that courts would not afford relief

26. *Id.* at 303-04. The rules governing the definition of benefit in quasi-contract are identical whether the origin of the action is in contract or tort. Whether unjust enrichment principles should be applied uniformly to quasi-contracts arising out of a tort, an express contract, or an implied contract raises a broader and more controversial question. The more traditional view holds that quasi-contract principles constitute a body of law separate from either tort or contract and thus are uniformly applicable to any relevant set of facts. Some commentators have argued in recent years, however, that quasi-contract actions based on the existence of an express contract should be resolved separately and more in accordance with conventional contract law. See Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 NW. U.L. REV. 433, 439-40 (1969) [hereinafter cited as Childres & Garamella]; Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1215-19 (1973). *But cf.* Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 189-90 (1959) (only benefit from analyzing quasi-contract actions with traditional contract action is elimination of election of remedies problems).

27. See, e.g., *Felder v. Reeth*, 34 F.2d 744, 746 (9th Cir. 1929); *American Smelting & Refining Co. v. Swisshelm Gold Silver Co.*, 63 Ariz. 204, 210-11, 160 P.2d 757, 760 (1945); *Canepa v. Sun Pacific Co.*, 126 Cal. App. 2d 706, 711, 272 P.2d 860, 864 (1954); *Davidson Grocery Co. v. Johnston*, 24 Idaho 336, 342-43, 133 P. 929, 930 (1913); *Downs v. Finnegan*, 58 Minn. 112, 117, 59 N.W. 981, 982 (1894); *Siegman v. Siegman*, 155 Ore. 173, 182, 62 P.2d 16, 20 (1936); *Ferrous Products Co. v. Gulf States Trading Co.*, 323 S.W.2d 292, 296 (Tex. App. 1959).

28. See, e.g., *Crow v. Boyd*, 17 Ala. 51, 54 (1849); *Woodruff v. Zaban & Son*, 133 Ga. 24, 25-27, 65 S.E. 123, 123-24 (1909); *Jones v. Hoar*, 22 Mass. (5 Pick.) 285, 289-90 (1827); *Capital Garage Co. v. Powell*, 96 Vt. 227, 231, 118 A. 883, 885 (1922). See generally Annot., 97 A.L.R. 250 (1935).

29. See F. WOODWARD, *supra* note 14, § 76, at 122-23; Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221, 229 (1910).

30. In a few jurisdictions the courts have not explicitly rejected the absence of resale as an impediment to recovery in a quasi-contract. See, e.g., *Janiszewski v. Behrmann*, 345 Mich. 8, 36-39, 75 N.W.2d 77, 80-82 (1956) (dictum); *McDonald v. First Nat'l Bank*, 353 Pa. 29, 32-33, 44 A.2d 265, 266 (1945); *Anderson Equipment Co. v. Findley*, 350 Pa. 399, 401-02, 39 A.2d 520, 522 (1944).



on restitutionary principles unless the converted goods were transformed into cash; and whether the restrictions of these older cases were explicable on grounds unrelated to the existence or definition of benefit.

*Jones v. Hoar*<sup>31</sup> is the leading American decision rejecting recovery in quasi-contract absent a sale by the converter. The defendant in *Jones* had entered plaintiff's property and removed valuable timber. No sale of the timber by the defendant was shown.<sup>32</sup> In affirming a judgment for the defendant in a summary opinion, the Massachusetts Supreme Judicial Court approvingly referred to the trial court's opinion, which had cited a number of English and American decisions denying recovery in quasi-contract on similar facts.<sup>33</sup> An examination of the cases cited by the lower court in *Jones* suggests that the plaintiff was denied recovery for two reasons. First, courts did not clearly perceive the general concept of unjustified benefit as the underlying justification for the range of actions that we call quasi-contract. The cases extracted by the trial judge in *Jones* do not refer to the concept of benefit in the abstract but only to some particular manifestation of benefit such as money received or goods exchanged for money.<sup>34</sup> Second, neither the trial nor the appellate court in *Jones* could find precedent for implying a promise from the relationship between the plaintiff and defendant necessary for recovery in quasi-contract.<sup>35</sup> *Jones v. Hoar* manifests a persistent devotion to maintaining the strict integrity of existing legal categories. The judges who decided the case were not philosophically disposed to break new ground by infusing the idea of quasi-contract with a concept that must have seemed dangerously flexible.

Many of the opinions following *Jones v. Hoar* provide no logical justification for denying restitution against a converter in the absence of a sale of the converted goods.<sup>36</sup> The Missouri Supreme Court stated the case against recovery explicitly in *Sandeen v. Kansas City, St. Joseph & Council Bluffs Railway Co.*:<sup>37</sup>

The doctrine [permitting recovery in quasi-contract of the value of converted goods not sold by the converter] came to be extended by some courts to all cases in which the

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31. 22 Mass. (5 Pick.) 285 (1827).

32. *Id.* at 285.

33. *Id.* at 289; *see id.* at 285-89 (footnote) (text of lower court's opinion).

34. *Id.* at 285-89 (footnote).

35. *Id.* at 290.

36. *See* *Quimby v. Lowell*, 89 Me. 547, 549-50, 36 A. 902, 903 (1907); *Telford & F. Turnpike Co. v. Gerhab*, 9 Sad. (Pa.) 550, 553, 13 A. 90, 92 (1888) (*per curiam*).

37. 79 Mo. 278 (1883).



wrong-doer had acquired a benefit by his wrong. It was claimed that natural justice raised the promise upon the faith of the benefit received. . . . This extension of the doctrine would tend to do away with the action of tort, for perhaps in a majority of the wrongs inflicted the wrong-doer receives some benefit.<sup>38</sup>

The court in *Sandeen* correctly perceived the consequences of a flexible definition of the benefit necessary to recovery in restitution; like the court in *Jones*, it found most compelling the impulse to preserve existing legal categories and salvage something of the forms of action.<sup>39</sup>

The cases denying recovery in quasi-contract for conversion without sale represent an enduring strain of judicial hostility to quasi-contractual recovery, even in situations where the defendant has acted wrongly and has received a clear and tangible benefit. This judicial hostility results partially from the courts' distaste for the role of quasi-contract as a subverter of more conventional legal doctrines. No doubt the courts that recognized the existence of a benefit did so only grudgingly, because they were unable, as a matter of logic, to distinguish between a converter who transformed goods into cash and a converter who merely consumed or retained goods himself.

Determination of the existence of benefit in cases arising out of actual or supposed contractual relationships follows standards substantially similar to those applicable in actions where the benefit results from the defendant's tortious conversion of goods. When a breaching party is shown to have received a tangible benefit, courts have been willing to force disgorgement on quasi-contractual grounds.<sup>40</sup> Whether

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38. *Id.* at 281-82.

39. See *Holt v. Mackham* [1923] 1 K.B. 504. In *Holt* Lord Scrutton, writing in 1923, evidenced a similar dislike of quasi-contract because of the violence it does to established legal categories. Lord Scrutton observed:

Now ever since the time when that great judge, Lord Mansfield, with no doubt a praiseworthy desire to free the Court from the fetters of legal rules and enable them to do what they thought to be right in each case . . . the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought.

*Id.* at 513.

40. Various reasons may explain why an aggrieved party chooses to sue in quasi-contract rather than for damages for breach of contract. See, e.g., *Elder v. Chapman*, 176 Ill. 142, 52 N.E. 10 (1898) (gambling contract); *Massey v. Becker*, 90 Ore. 461, 176 P. 425 (1918) (acceptance of payment after default may constitute waiver of breach); *True v. J.B. Deeds & Son*, 151 Tenn. 630, 271 S.W. 41 (1925) (subject matter jurisdiction). Where the plaintiff cannot establish the value of his expected losses with certainty an action in quasi-contract becomes an attractive alternative that will permit judgment for the plaintiff. See *Shriver v. Cook*, 256 Iowa 271, 278-79, 127 N.W.2d 102, 106-07 (1964). Professor Corbin has objected to use of the term quasi-contract to describe a situation in which plaintiff seeks restitution instead of bringing a damage action for breach of an express contract. 5 A. CORBIN, *CONTRACTS* § 1102 (1964). Corbin's view has not been adopted universally by the courts. See *Gladowski v. Felczak*, 346 Pa. 660, 663-65, 31 A.2d 718, 720 (1943).



the defendant is a tortfeasor or a contract breacher, a showing that the defendant unjustly has reaped a tangible gain at the expense of the plaintiff usually will support recovery in quasi-contract.

If the benefit received by the defendant is neither concrete nor readily quantified but incorporeal and difficult to measure, establishing the existence of the benefit required for quasi-contract recovery becomes more complicated. *Phillips v. Homfray*,<sup>41</sup> where the defendant had used underground passages beneath the plaintiff's property to transport coal, provides a starting point for analyzing the existence of benefit when the defendant receives a less tangible gain. The plaintiff in *Phillips* theorized that the net savings that accrued to the defendant as a result of his wrongful use of plaintiff's land rightfully belonged to the plaintiff on quasi-contractual grounds.<sup>42</sup> The court rejected the argument, however, endorsing the defendant's contention that "[u]nless some part of the Plaintiff's property can be traced into the trespasser's estate, . . . his estate cannot be made liable . . . ."<sup>43</sup> The majority reasoned that the defendant had taken nothing from the plaintiff merely by carrying coal underneath plaintiff's property.<sup>44</sup> A dissenting judge attacked the notion that the defendant must possess tangible property or proceeds of property belonging to plaintiff in order to establish the necessary benefit and concluded that a plaintiff need show only that defendant saved an expenditure or that his assets increased because of failure to pay for the benefit received.<sup>45</sup>

The majority opinion in *Phillips* reflects the restrictive view of benefit that plaintiff must establish that the defendant has gained something concrete before recovery in quasi-contract will be available. Other cases of the same era support this strict concept of benefit. In *Schillinger v. United States*<sup>46</sup> the plaintiff alleged that the Government had realized a savings of \$250,000 in laying stone on the Capitol grounds by using plaintiff's patented invention without compensating the plaintiff.<sup>47</sup> The Supreme Court assumed that receipt of a benefit by the Government had been shown but nevertheless rejected plaintiff's

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41. 24 Ch.D. 439 (1883).

42. *Id.* at 439-40.

43. *Id.* at 449.

44. *Id.* at 462.

45. *Id.* at 471 (Baggallay, L.J., dissenting). The theory that plaintiff need only show that defendant saved an expenditure or increased his assets, which Lord Justice Baggallay asserted as a basis for recovery, has been followed more widely in England than in the United States. See Gutteridge & David, *The Doctrine of Unjust Enrichment*, 5 CAMB. L.J. 204, 223-229 (1934).

46. 155 U.S. 163 (1894).

47. *Id.* at 163-65.



claim, concluding that quasi-contract was not available absent a showing of a meeting of the minds.<sup>48</sup> The Court further suggested that even if quasi-contract were appropriate no sufficient benefit had been shown, because the plaintiff had not established what property of his the Government had appropriated.<sup>49</sup> The Court thus restricted the concept of benefit to palpable gain; the plaintiff's assertion that expenses saved by the defendant constituted a cognizable benefit simply fell outside the definition of benefit that the court was willing to accept.<sup>50</sup>

State court decisions in the nineteenth century, frequently involving straying farm animals, adopted a similarly narrow view of benefit. If a defendant's trespassing cattle or sheep consumed the plaintiff's crop or pastureland, the defendant's gain was not difficult to establish since a measurable quantum of plaintiff's crops or pasture grass had been ingested.<sup>51</sup> The benefit to defendant becomes more obscure, however, where straying animals invade plaintiff's field, trampling but not consuming crops, even though a loss to plaintiff is self-evident. In *Tightmeyer v. Mongold*<sup>52</sup> the defendant's cattle had trespassed on plaintiff's property, but plaintiff could not prove that any grass or grain had been consumed.<sup>53</sup> The Kansas Supreme Court held that the absence of tangible benefit to defendant was fatal to plaintiff's quasi-contract claim regardless of how great his loss might be.<sup>54</sup> That same term the Kansas court again rejected the opportunity to broaden the concept of benefit. The court's summary opinion in *Fanson v. Linsley*<sup>55</sup> reflects its conviction that benefit in quasi-contract was not an abstract concept that courts could manipulate flexibly to improve a desperate plaintiff's chance for recovery.<sup>56</sup> The Supreme Court of New Hampshire previously had rendered an opinion that depended upon an equally conservative definition of benefit.<sup>57</sup>

These American cases are united in spirit with the decision in *Phillips v. Homfray*.<sup>58</sup> Although the facts of the cases differed, each reflects an

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48. *Id.* at 169, 170-71.

49. *Id.* at 172.

50. Professor Woodward has criticized the narrow view of benefit endorsed in *Schillinger*. See F. WOODWARD, *supra* note 14, § 275, at 443-445.

51. See, e.g., *Tsuboi v. Cohn*, 40 Idaho 102, 107, 231 P. 708, 709-10 (1924); *Gillespie v. Hendren*, 98 Mo. App. 622, 626-27, 73 S.W. 361, 362 (1903); *Monroe v. Cannon*, 24 Mont. 316, 320, 326, 61 P. 863, 864, 866 (1900).

52. 20 Kan. 90 (1878).

53. *Id.* at 92.

54. *Id.*

55. 20 Kan. 235 (1878).

56. See *id.* at 238-39.

57. See *Page v. Babbit*, 21 N.H. 389, 391-92 (1850).

58. 24 Ch. D. 439 (1883).



implicit fear that adoption of a broader definition of benefit would expand the concept of quasi-contract. Like the Massachusetts court's decision in *Jones v. Hoar*,<sup>59</sup> these cases constituted part of an active, although perhaps unconscious, effort to restrict the development of quasi-contract. Countervailing tendencies already were exerting powerful pressure, but decisions like *Schillinger* and *Tightmeyer* should serve as reminders that the judicial expansion of the definition of benefit was not as inevitable as it now may seem.

Although a venerable strain of American case law exists that defines benefit narrowly so as to preclude recovery where the plaintiff has not proven tangible gain by the defendant, most jurisdictions in recent times have developed a much broader definition of benefit.<sup>60</sup> The Virginia Supreme Court decision in *Raven Red Ash Coal Co. v. Ball*<sup>61</sup> typifies this recent trend. The defendant in *Raven Red* had acquired both mineral rights in plaintiff's land and an easement to construct a railroad to transport the coal extracted from the plaintiff's property; the defendant later obtained mineral rights to parcels surrounding the land of the plaintiff and used the railroad to transport coal mined on those adjoining tracts.<sup>62</sup> The plaintiff instituted an action in quasi-contract to recover the benefit received by defendant from using the railroad to transport coal other than that mined on plaintiff's property.<sup>63</sup> The unjust benefit assertedly received by the defendant in *Raven Red* was clearly intangible; no property belonging to the plaintiff could be traced to defendant's hands. The gain alleged was similar to that rejected as a basis for recovery in *Phillips v. Homfray*<sup>64</sup> — an expense saved by the defendant. The court in *Raven Red* recognized that other jurisdictions had refused to find a gain on similar facts,<sup>65</sup> but affirmed plaintiff's recovery. The court reasoned:

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59. 22 Mass. (5 Pick.) 285 (1827); see notes 31-35 *supra* and accompanying text.

60. See, e.g., *Edwards v. Lee's Adm'r*, 265 Ky. 418, 423-24, 96 S.W.2d 1028, 1030-31 (1936) (benefit from use of cavern running under plaintiff's land); *Carmichael v. Old Straight Creek Coal Corp.*, 232 Ky. 133, 140-42, 22 S.W.2d 572, 576 (1929) (benefit from use of railway over plaintiff's land); *DeCamp v. Bullard*, 159 N.Y. 450, 454-55, 54 N.E. 26, 28 (1899) (benefit from use of plaintiff's stream); *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 542-43, 39 S.E.2d 231, 235-36 (1946) (benefit from wrongful use of easement). See generally Annot., 167 A.L.R. 796 (1947).

61. 185 Va. 534, 39 S.E.2d 231 (1946).

62. *Id.* at 537-38, 39 S.E.2d at 232-33.

63. *Id.* at 538, 39 S.E.2d at 232-33. Recovery in quasi-contract for the value of use and occupancy of land traditionally has been denied in the absence of a landlord-tenant relationship. See *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 536, 538-39, 4 N.W. 292, 293 (1880). The reasons for this restriction on recovery for use and occupation of land are mainly historical. See AMES, LECTURES ON LEGAL HISTORY 167-71 (1913).

64. 24 Ch. D. 439 (1883); see notes 41-45 *supra* and accompanying text.

65. 185 Va. at 543-48, 39 S.E.2d at 235-238; see Annot., 167 A.L.R. 796, 803-05 (1947).



The illegal transportation of the coal in question across plaintiff's land was intentional, deliberate and repeated from time to time for a period of years. Defendant has no moral or legal right to enrich itself by this illegal use of plaintiff's property. . . . Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received. Defendant's estate has been enhanced by just this much.<sup>66</sup>

The court did not distinguish between a concrete gain and an intangible benefit. In asserting that the fundamental question concerned whether the plaintiff had received an unjustified benefit, the court concluded that it would be illogical to deny recovery merely because the defendant's gain did not assume tangible form.<sup>67</sup>

Whether a particular court chooses to define benefit strictly or liberally, in order to obtain relief in quasi-contract the plaintiff must show receipt by the defendant of a gain that justifiably should be restored to the plaintiff. The phrase "unjust enrichment" presumes the existence of some benefit wrongfully acquired. Despite black letter statements that a gain must be shown to justify recovery,<sup>68</sup> however, a substantial body of cases arguably have allowed recovery in quasi-contract even in the absence of any demonstrable benefit to the defendant.<sup>69</sup> A long line of scholars have noted this anomalous result and have offered various explanations, including the theory that the remedy is intended primarily to restore the status quo ante.<sup>70</sup> Some

66. *Id.* at 548, 39 S.E.2d at 238 (footnote omitted).

67. *Id.* at 547, 39 S.E.2d at 237. The court in *Raven Red* reasoned that since the defendant benefits substantially from his own wrongdoing regardless of the injury he inflicts on the plaintiff, an implied promise to compensate plaintiff should be found even where the defendant's actions do nothing to diminish the value of the plaintiff's property. *Id.*

68. See RESTATEMENT OF CONTRACTS § 348, comment *a*, at 591-92 (1932).

69. See, e.g., *Williams v. Dougan*, 175 Cal. App. 2d 414, 415-418, 346 P.2d 241, 242-44 (1959) (plaintiff recovered monies expended on care of animals that defendant inherited but for which she had no concern); *People's Nat'l Bank v. Magruder*, 77 Fla. 235, 244-46, 81 So. 440, 443-44 (1919) (landlord's leasehold improvements made in reliance on tenant's oral agreement to extend lease constitutes benefit to tenant); *Vickery v. Ritchie*, 202 Mass. 247, 250-52, 88 N.E. 835, 836 (1909) (defendant received no benefit when plaintiff made unsuccessful business investment; recovery nevertheless allowed); *Clement v. Rowe*, 33 S.D. 499, 505-07, 146 N.W. 700, 701-02 (1914) (land transferred to third party at defendant's direction); *Abrams v. Financial Serv. Co.*, 13 Utah 2d 343, 346, 374 P.2d 309, 311 (1962) (prospective buyer gained nothing from home improvements since sale was not finalized, but seller allowed recovery); cf. *Campbell v. Tennessee Valley Authority*, 421 F.2d 293, 294-97 (5th Cir. 1969) (since valuation of benefit difficult, fair market value of services or products used to determine plaintiff's recovery); *Maragos v. City of Minot*, 191 N.W.2d 570, 572 (N.D. 1971) (dictum) (inverse condemnation proceeding; recovery available on implied contract theory despite absence of benefit to Government).

70. See D. DOBBS, *THE LAW OF REMEDIES* 792 (1973); Childres & Garamella at 436-37; Fuller & Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 394 (1937); Henderson, *supra* note 5, at 1147; Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 230 (1936); Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1219-1226 (1973).



commentators have maintained that quasi-contract served as a respectable disguise for the award of reliance damages before courts recognized reliance losses as an appropriate basis for measuring recovery in breach of contract actions;<sup>71</sup> another asserts that courts in deciding cases that arise from the breach of personal service contracts have dispensed with the requirement that a benefit be shown simply to protect the legitimate interests of plaintiffs who might go uncompensated otherwise.<sup>72</sup> One commentator unreasonably ascribes the recovery of damages without requiring a showing of gain to judicial ignorance of elementary distinctions in the law of quasi-contract.<sup>73</sup> Whatever the correct explanation of this trend may be, any inquiry into the definition of benefit must account for those cases ostensibly decided on quasi-contractual grounds that permit recovery without requiring a finding of gain.

The clear preference of American courts in this century has been to relax and in some instances to dispense with the requirement that benefit be shown before quasi-contractual recovery is allowed. In this judicial environment, the definition of benefit has varied depending upon the exigencies of a particular case. Some courts consider benefit to be any net gain measurable in monetary terms.<sup>74</sup> Other courts have refused to eliminate explicitly the requirement that a benefit be proved but nonetheless have found the necessary benefit on facts establishing a most tenuous gain.<sup>75</sup> The *Restatement of Restitution* also specifically

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71. Fuller & Perdue, *supra* note 70, at 393-94.

72. Note, *supra* note 2, at 1267. Personal service contracts raise significantly different problems in the determination of unjust gain than do contracts for the sale of goods or other tangible property. See RESTATEMENT OF RESTITUTION § 40 & comment a, at 155 (1937); Childres & Garamella at 451.

73. See 1970 DUKE L.J. 573, 581-82. The author criticizes the Fifth Circuit for its decision in *Campbell v. Tennessee Valley Authority*, in which the court permitted recovery in quasi-contract measured by the market value of plaintiff's services in preparing microfilms rather than by the value received by the defendant. *Id.*; see 421 F.2d 293, 294-97 (5th Cir. 1969). The author attributes the court's decision to its failure to distinguish between contracts implied in law and contracts implied in fact. See 1970 DUKE L.J. at 581-82. The author fails to perceive, however, that the fundamental and threshold problem raised by *Campbell* is not the proper standard for measuring benefit, but instead whether the defendant received any benefit at all. See 421 F.2d at 298 (Rives, J., dissenting).

74. See *Ablah v. Eyman*, 188 Kan. 665, 678-79, 365 P.2d 181, 191-92 (1961); *Independent Electric Lighting Corp. v. M. Brodsky & Co.*, 118 Misc. 561, 563, 194 N.Y.S. 1, 2 (Sup. Ct. 1972).

75. See, e.g., *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586, 592-93 (5th Cir. 1957) (unsuccessful exploration for mineral deposits); *H.W. Kastor & Sons Adv. Co. v. Grove Labs.*, 58 F. Supp. 1011, 1016-17 (E.D. Mo. 1945) (unsuccessful advertising campaign); *Meyer v. Parobek*, 119 Cal. App. 2d 509, 511-12, 259 P.2d 948, 950-51 (1953) (sale of assets in bankruptcy to satisfy creditors); *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 407-08, 125 P. 860, 861-62 (1912) (advertising benefits where defendant ceased operation). Some courts have arrived at a more restrictive view of benefit. See *General Metals, Inc. v. Green Fuel Economizer Co.*, 213 F. Supp. 641, 652 (D. Md. 1963); *Tramonte v. A.J. Rasmussen & Sons*, 167 S.W.2d 566, 567 (Tex. Civ. App. 1942).



sanctions recovery on unjust enrichment principles for the preservation of life and health even though the measurement of longer life or better health cannot be translated easily into dollar amounts.<sup>76</sup> A substantial body of case law similarly supports recovery in quasi-contract for the wrongful use of plaintiff's ideas,<sup>77</sup> even though the precise measurement of defendant's gain in such cases often has proved difficult.<sup>78</sup>

Procedural reforms, such as the adoption of *Field Codes* and the growing influence of the *Federal Rules of Civil Procedure*, also have contributed to the expansion of the concept of benefit. By eroding the restrictive influence of the common law forms of action, these reforms have freed courts from excessive concern over whether a quasi-contractual remedy conflicts with the theory of plaintiff's action.<sup>79</sup> Result-oriented courts therefore may have expanded the concept of benefit without any intellectual direction.

76. RESTATEMENT OF RESTITUTION § 116 (1937); see *Cotnam v. Wisdom*, 83 Ark. 601, 605-08, 104 S.W. 164, 165-66 (1907); *In re Crisan's Estate*, 362 Mich. 569, 574-76, 107 N.W.2d 907, 910-11 (1961).

77. See, e.g., *Servo Corp. v. General Electric Co.*, 337 F.2d 716, 722-25 (4th Cir. 1964); *Hamilton Nat'l Bank v. Belt*, 210 F.2d 706, 708 (D.C. Cir. 1953); *DeFillips v. Chrysler Corp.*, 53 F. Supp. 977, 980 (S.D.N.Y. 1944); *Liggett & Myer Tobacco Co. v. Meyer*, 101 Ind. App. 420, 429-431, 194 N.E. 206, 210 (1935). See generally Havighurst, *The Right to Compensation for an Idea*, 49 Nw. U.L. Rev. 295 (1954); Annot., 170 A.L.R. 449 (1947).

78. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 403-05 (1940); Havighurst, *supra* note 77, at 299-300.

79. See *Murphy v. Lifschitz*, 49 N.Y.S.2d 439, 440-42 (Sup. Ct. 1944), *aff'd* 294 N.Y. 892, 63 N.E.2d 26 (1945) (per curiam). The plaintiff in *Murphy*, a purchaser of liquor under a sales contract, brought an action for specific performance or, alternatively, damages after defendant seller failed to deliver the contract goods. *Id.* at 440. Defendant had sold the subject liquor in the black market at a price substantially above the contract price. *Id.* Finding no basis for awarding plaintiff a substantial recovery on a breach of contract theory, the court instead awarded plaintiff recovery measured by defendant's profit: the difference between contract price and black market price. *Id.* at 441-42. The court evidenced no discomfort in awarding relief measured by a quasi-contract standard even though the plaintiff's action had been brought on the contract.

The trend toward a liberal definition of benefit has not been without negative impact; flexible definitions of benefit have further confused the muddled meaning of benefit and have exacerbated the difficulty of framing damage awards in quasi-contract. The good samaritan cases involving physicians illustrate the difficulty of determining damages under a broad definition of benefit. The plaintiff physician may properly persuade the court that defendant's improved health is a sufficient benefit to justify a recovery, but articulation of a rational and consistent monetary standard that could be used to measure the value of defendant's improved health is quite difficult. See Comment, *supra* note 2, at 545. Courts that have awarded recovery in these good samaritan cases measure the damages by the value of plaintiff's services rather than the benefit conferred on the defendant. See *Cotnam v. Wisdom*, 83 Ark. 601, 606-07, 104 S.W. 164, 166 (1907); *Ladd v. Witte*, 116 Wis. 35, 40, 92 N.W. 365, 367 (1902). This measure of recovery conflicts with the theory of the action, however, which asserts that the defendant has received an unjustified benefit. To award recovery measured by the value of plaintiff's services without inquiring into whether the value approximates defendant's unjust gain may be the only convenient basis for measuring the award; it nevertheless begs the question confronting the court in quasi-contract actions. Although plaintiff's recovery historically has been measured by the value of his services and not their value to the defendant, application of this general rule does not answer the argument that courts should consider the defendant's gain; in quantum meruit



THE CHILDRES-GARAMELLA HYPOTHESIS:  
A RATIONAL CONTROL MECHANISM?

Against this background of ongoing judicial redefinition of benefit, Robert Childres and Jack Garamella published a major article setting forth an analytical framework within which quasi-contract actions properly may be confined.<sup>80</sup> Childres and Garamella do not discuss specifically the concept of benefit as an idea common to the wide range of quasi-contract actions but limit the applicability of their theory to suits growing out of express contracts. Observing that quasi-contract principles have been overly utilized,<sup>81</sup> the authors contend that a clear distinction should be made between quasi-contract actions where an actual benefit is conferred and those actions to recover the reasonable value of expenses and services; Childres and Garamella argue that only the former situation presents an appropriate setting for the application of unjust enrichment theory.<sup>82</sup> The "reasonable value" cases, long assumed to be based upon unjust enrichment principles, are simply reliance damage actions.<sup>83</sup>

The factual distinction between "actual benefit" and "reasonable value" cases may be simply illustrated. Assume A contracts with B to sell a new automobile to B for \$3,000. B gives A his check for the \$3,000 purchase price, but A refuses to deliver the promised auto-

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actions the plaintiff's services ordinarily are requested, but in good samaritan cases the defendant frequently makes no such request. See *Edson v. Hammond*, 142 App. Div. 693, 696, 127 N.Y.S. 359, 360 (1911). See generally RESTATEMENT OF RESTITUTION § 113, comment g, at 473-74 (1937) (appropriate measure of damage in good samaritan cases is value of plaintiff's services).

Some courts have held that a plaintiff's recovery cannot be limited to nominal damages simply because it is difficult to assign a monetary value to an intangible benefit. See *Shell Petroleum Corp. v. Scully*, 71 F.2d 772, 774 (5th Cir. 1934) (unauthorized exploration for minerals; recovery not limited to nominal damages despite difficulties of measuring benefit); *Edwards v. Lee's Adm'r*, 265 Ky. 418, 427-28, 96 S.W.2d 1028, 1031-33 (1936) (trespass on cavern partially beneath plaintiff's property; plaintiff entitled to one-third of net profits of tourist enterprise where benefit difficult to apportion). See also *Humble Oil & Refining Co. v. Kishi*, 276 S.W. 190, 191 (Tex. Comm. Civ. App. 1925), modified and remanded, 291 S.W. 538 (1927) (recovery cannot be limited to nominal damages because of uncertainty of defendant's benefit from unauthorized drilling on plaintiff's property).

80. See Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 Nw. U.L. Rev. 433 (1969) [hereinafter cited as Childres & Garamella].

81. See *id.* at 444.

82. *Id.* at 435-36.

83. *Id.* at 437-39, 457. See also Fuller & Perdue (parts 1 & 2), *supra* note 83, at 52, 373. Fuller and Perdue identify three interests that courts have recognized—explicitly or implicitly—when awarding contract damages: a restitution interest, which describes the claim of a promisee who has conferred some value on the promisor in reliance on the contract; a reliance interest, which is premised on the promisee's claim to expenses incurred in reliance on the contract but that have not benefitted the promisor; and an expectancy interest, which reflects the promisee's claim to the value that the breaching party's promise represents. *Id.* at 53-54.



mobile. Since A has been enriched tangibly to the extent of \$3,000, an action in quasi-contract to compel disgorgement of A's unjustified gain would properly lie. According to the Childres-Garamella hypothesis, this fact pattern presents a case of "actual enrichment." Assume next that A agrees to custom build an automobile for B at a contract price of \$10,000. A purchases the necessary materials at a cost of \$5,000 and hires an assistant at a salary of \$1,500. The materials prove unsuitable, however, and the assistant is incompetent; A therefore discards the materials, discharges his assistant, purchases new materials at a cost of \$6,000, and engages a new assistant at a salary of \$1,800. As work on the automobile begins anew, B repudiates the contract. A brings an action to recover \$15,000 representing the cost of materials, the salary expense of his assistants, and the value of his own labor. This fact pattern presents a "reasonable value" case in which reliance, rather than quasi-contract principles, should apply.

Childres and Garamella's analysis also addresses the question of whether an aggrieved party suing in quasi-contract after part performance can recover only according to the underlying contract rate.<sup>84</sup> The question of when and to what extent recovery should be allowed in excess of the contract rate relates directly to the concept of benefit in quasi-contract, since courts implicitly must determine the extent of the defendant's benefit in deciding whether recovery should exceed the contract rate.<sup>85</sup> Childres and Garamella propose no solution to this question, concluding only that recovery should be limited to the contract rate in some cases and not in others.<sup>86</sup> The authors do suggest some guidelines for distinguishing between these two types of cases. Suppose A contracts to supply B with 100 rifles at a unit cost of \$100. A delivers the first 30 rifles but at a unit cost of \$300. B then repudiates the agreement, and A sues in quasi-contract for \$9,000 — the cost of manufacturing the rifles.<sup>87</sup> Under the Childres-Garamella

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84. See W. KEENER, *supra* note 6, at 289; F. WOODWARD, *supra* note 14, § 268, at 430-31. The great majority of American courts have permitted recovery in quasi-contract in excess of the contract price. See, e.g., *Southern Painting Co. v. United States*, 222 F.2d 431, 433-34 (10th Cir. 1955); *Boomer v. Muir*, 24 P.2d 570, 578 (Cal. Dist. App. 1933); *Heitz v. Sayers*, 32 Del. 207, 218-20, 121 A. 225, 230-31 (1923). See generally Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264 (1959). Only a few jurisdictions have denied recovery in excess of the contract rate. See *Kehoe v. Mayor & Common Council*, 56 N.J.L. 23, 26-27, 27 A. 912, 913 (Sup. Ct. 1893); *Doolittle & Chamberlain v. McCullough*, 12 Ohio St. 360, 365-67 (1861).

85. See Childres & Garamella at 446-47.

86. *Id.* at 457-58.

87. See *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 530 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966) (restitution available on similar facts; remand to determine why costs exceeded contract rate).



analysis, whether A may recover more than the \$3,000 contract price depends on why the expenses incurred by A exceeded the contract rate. Courts should permit recovery in excess of the contract rate where the additional costs were incurred not because of A's inefficient operation but because the "real" value of the rifles when completed and delivered exceeded the contract price. Such recovery should be allowed because A is not casting the additional cost of his incompetence on the defendant but rather seeks to obtain only a return of the increment of "real" value above the contract price unjustly received by B.<sup>88</sup>

The Childres-Garamella hypothesis has major implications for the law of quasi-contract and the concept of benefit. By narrowly defining benefit to include only cases in which the defendant can be shown to have obtained "real" gain, the authors' theory contracts the area of the law to which unjust enrichment principles should apply.<sup>89</sup> This narrow definition of benefit excludes from the ambit of quasi-contract law innumerable cases that traditionally have been decided by applying quasi-contract concepts.<sup>90</sup> In arguing that cases growing out of an explicitly contractual setting are more appropriately decided on reliance theory, Childres and Garamella inject a useful control mechanism into the law of quasi-contract by which the outer limits of the remedy may be more rationally defined.

The Childres-Garamella hypothesis is not without defects. By limiting their inquiry to quasi-contract actions arising out of actual contractual relations,<sup>91</sup> the authors do not analyze directly the multitude of quasi-contract actions that arise in tort or that do not depend on any underlying express contract. The tangled history of quasi-contract and its broad application militate against such a compartmentalization of the doctrine into neat, self-contained segments. Quasi-contract resulted from the need to supplement a variety of tort and implied contract remedies and has developed without sharp distinctions based on the origin of the action. Childres and Garamella may be correct in objecting to such imprecision as the

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88. Under the Childres-Garamella analysis, A could recover costs in excess of the contract rate even if they did not represent a "real" increase in value of the rifle to the extent that his additional expense represented startup costs that increased the production costs of earlier units. See Childres & Garamella at 445.

89. See *id.* at 443.

90. See *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 530 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966) (non-defaulting plaintiff recovers reasonable cost of performance); *Boomer v. Muir*, 24 P.2d 570, 578 (Cal. Dist. App. 1933) (plaintiff recovers cost of performance less inefficiency loss).

91. See Childres & Garamella at 433-37.



root of much confused thinking about quasi-contract, but the history and purposes of the action cannot be ignored.<sup>92</sup>

Childres and Garamella's fundamental distinction between actions in which the plaintiff seeks to recover "real" enrichment or gain and those in which the plaintiff seeks to recover the "reasonable value" of his effort also raises difficulties. The authors themselves observe that the *Restatement of Restitution* does not recognize the distinction between cases of "real gain" and "reasonable value."<sup>93</sup> They also concede indirectly that a substantial body of case law relevant to their hypothesis yields no explicit recognition of the theory they assert.<sup>94</sup> Although the distinction between "real gain" and "reasonable value" is valid in the sense that those concepts represent very different means of measuring recovery in restitution,<sup>95</sup> no other established scholar in the field has based a comprehensive analysis of quasi-contract on that distinction. In arguing that this distinction provides a rationalizing principle that will allow the orderly classification of a vast body of quasi-contract cases, Childres and Garamella move well beyond current thinking.<sup>96</sup>

In criticizing courts for awarding a restitution recovery in excess of the contract rate, the authors assert that any rational measurement of damages in restitution should reflect, to the maximum extent possible, the allocation of risks agreed upon by the parties themselves in their contract.<sup>97</sup> Although Childres and Garamella claim that their approach will preserve the parties' respective positions under the contract, the risks allocated by the parties to control the amount of a recovery in quasi-contract actually do not determine recovery under the Childres-Garamella formula. For example, assume that a manufacturer contracts to sell tanks to the Government at \$10,000 each, that the Government repudiates, and that the plaintiff proves that the cost of manufacturing each tank delivered before breach was \$20,000. Under the Childres-

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92. Professor Dawson has observed correctly that "we can probably say now that damage remedies can be ignored and quasi-contract used as to any kind of legal wrong from which gains are realized." J. DAWSON, *supra* note 1, at 23. A remedy that is so broadly based and that has so many potential applications cannot be compartmentalized satisfactorily in the manner Childres and Garamella suggest.

93. Childres & Garamella at 436; see RESTATEMENT OF RESTITUTION § 149 (1937).

94. See Childres & Garamella at 435-36.

95. See 5 A. CORBIN, *supra* note 40, § 1113; Note, *Contracts: Remedies for Total Breach of Contract: Restitution and "Damages,"* 43 CORNELL L. REV. 274, 279 (1957).

96. Childres and Garamella suggest that other commentators may not have suggested their hypothesis earlier because certain legal concepts vital to an understanding of the larger theory, such as the reliance interest or restitution itself, are of relatively recent origin. See Childres & Garamella at 433-34.

97. *Id.* at 446.



Garamella hypothesis, recovery nonetheless would be limited to the contract rate of \$10,000; recovery in excess of the contract rate would not be allowed because the plaintiff must not be permitted to shift its contractual loss to the Government where the loss is caused by its own ineffectiveness. If the plaintiff can show that the tanks have a "real" value of \$15,000 each, however, the Childres-Garamella approach would entitle the manufacturer to \$15,000 for each tank delivered.<sup>98</sup>

Assume next that the tanks have a "real" value 50 percent greater than the contract price because the cost of steel increased substantially between the date of contract and the date of breach. In fixing the price of tanks at \$10,000 with no provision for upward adjustment if the cost of materials increased, the parties presumably allocated the risk of higher material costs to the plaintiff. In an ordinary contract action, absent breach by the Government, the plaintiff would be unable, except under extraordinary circumstances, to recover the additional cost of steel.<sup>99</sup> The Childres-Garamella hypothesis would allow recovery of the "real" value of the tanks, however, presumably reflecting the increased costs of steel. Childres and Garamella recognize this inconsistency in their thesis but urge that the analogy to cases in which the breaching party receives money and is required to disgorge that gain is too close to arrive at any different result where the "real" value of the goods the defendant receives exceeds the contract rate.<sup>100</sup> In presenting their hypothesis the authors should at least explain more fully why in some cases the allocation of risks should be shifted radically from that provided for by the parties. In these cases Childres and Garamella abandon the basic assumption of their analysis that recovery should be based on the allocation of risks agreed on by the parties. Ironically, the authors cast aside this assumption because of precedent—courts always have given restitution in cases of actual enrichment without reference to the contract rate<sup>101</sup>—a reason they condemn elsewhere as the cause of much muddled thinking in the area of quasi-contract. The Childres-Garamella position forces the conclusion that the defendant in the preceeding example should pay \$15,000 per tank despite the lower contract price only because the defendant is a bad man and deserves punishment for breaking the contract.<sup>102</sup>

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98. *See id.* at 443.

99. *See* UNIFORM COMMERCIAL CODE § 2-615, comment 4; 6 A. CORBIN, *supra* note 40, § 1333.

100. *See* Childres & Garamella at 443.

101. *See id.*

102. Despite the natural conclusion of their hypothesis, Childres and Garamella term the use of the bad man standard for measuring contract damages "nonsense." *See id.* at 435.



The greatest failing of the Childres-Garamella analysis may be its assumption that the plaintiff can easily prove the fundamental economic distinctions necessary to proper application of the Childres-Garamella test. The existence of rules distinguishing between costs that are attributable to plaintiff's inefficiency and those that confer "real" benefits on the defendant, of course, would be useful for measuring recovery in quasi-contract. Cases are tried and decided, however, by judges, lawyers, and juries wholly unskilled in economic analysis.<sup>103</sup> Moreover, economists concede that the measurement of the economic efficiency of a particular production process presents many difficulties. Although the concept of inefficiency theoretically may not be difficult to grasp, the precise measurement of the inefficiency of a particular production process is not a simple task. One crucial factor in that measuring process, for example, is the potential gain in efficiency that would result if the plaintiff had made better use of scale economies.<sup>104</sup> The accurate measurement of economic efficiency must account for factors such as planning, designing, and organizing, which are not easily quantified.<sup>105</sup> Furthermore, the performance of a single contract that is the subject of litigation may provide an inaccurate measurement of efficiency.<sup>106</sup> Finally, costs of production may yield precious little information about the efficiency of plaintiff's manufacturing operation absent a comparison of plaintiff's operations with those of similar firms. Such comparative studies multiply the variables relevant to determining what part of plaintiff's costs result from his inefficiency.<sup>107</sup>

The application of the Childres-Garamella hypothesis even in the simple case would require considerable economic expertise. Modern quasi-contract claims often arise in complicated litigation involving substantial sums of money and a multitude of second and third tier subcontractors.<sup>108</sup> The proper application of Childres and Garamella's

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103. Legal scholars have shown a growing interest in the relationship between law and economics. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

104. Scale economies are defined as "reductions in cost per unit of product manufactured and sold associated with the operation of large as compared to small production, distribution, and merchandising." Scherer, *Economies of Scale and Industrial Concentration*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 16 (H. Goldschmid, H. Mann, & J. Weston eds. 1974).

105. See McGee, *Efficiency and Economies of Scale*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING*, *supra* note 104, at 65. See generally *id.* at 65-88.

106. See *id.* at 58-59.

107. See *id.* at 61-65.

108. See *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 535-36 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966); *General Metals, Inc. v. Green Fuel Economizer Co.*, 213 F. Supp. 641, 642-43 (D. Md. 1963).



theory to such cases would enmesh the court in a morass of conflicting economic evidence further complicating litigation that is already sufficiently perplexing.<sup>109</sup> One reason courts frequently remedy defendant's unjust benefit by awarding plaintiff his reliance or out of pocket losses is because the task of quantifying benefit is not a practical alternative.

Although Childres and Garamella bring some measure of order to this muddled area of the law, the authors attempt to push their reasoning too far. Modern courts and scholars still view quasi-contract as a doctrine to be pressed into service when the application of more conventional doctrines would not yield a result that is compelled by natural justice.<sup>110</sup> The power of scholarship to impose order in this field seems more limited than Childres and Garamella are willing to concede.

### IS BENEFIT ENOUGH?

#### MORAL POSTURE OF THE PLAINTIFF

Professor Woodward defines quasi-contracts as "legal obligations arising . . . from the receipt of a benefit the retention of which is unjust, and requiring the obligor to make restitution."<sup>111</sup> As this observation suggests, the plaintiff must show not only that the benefit received by the defendant is legally sufficient but also that retention of the benefit by defendant at the expense of the plaintiff is unjust. The moral posture of the plaintiff—the "justice" of his claim—thus becomes important to the success of his action.<sup>112</sup> If the quasi-contract action arises out of tort, the defendant is by definition the wrongdoer and the plaintiff has the superior moral position. In quasi-contract cases

109. See Childres & Burgess, *Seller's Remedies: The Primacy of UCC 2-703(2)*, 48 N.Y.U.L. REV. 833, 847 (1973) (recognition by Professor Childres of limitations of economic analysis).

110. See *Coleman Engineering Co. v. North Am. Aviation, Inc.*, 65 Cal. 2d 396, 410, 55 Cal. Rptr. 1, 11, 420 P.2d 713, 723 (1966) (Traynor, C.J., dissenting); *Dyer Constr. Co. v. Ellas Constr. Co.*, 287 N.E.2d 262, 264 (Ind. 1972); *Clark v. Peoples Sav. & Loan Ass'n*, 221 Ind. 168, 172, 46 N.E.2d 681, 682 (1943); J. DAWSON, *supra* note 1, at 8; Note, *supra* note 2, at 1267. Quasi-contract frequently has been utilized where the plaintiff's argument is not supported by more traditional concepts of recovery. See *Minsky's Follies, Inc. v. Sennes*, 206 F.2d 1, 2-3 (5th Cir. 1953) (plaintiff incurred great cost in expectation of sale). See also *Fildew v. Besley*, 42 Mich. 100, 101, 3 N.W. 278, 279 (1879) (dictum) (fire destroyed structure before completion; quasi-contract supplements traditional contract concepts but recovery denied).

111. F. WOODWARD, *supra* note 14, § 2, at 4.

112. See RESTATEMENT OF RESTITUTION, Introductory Note §§ 150-159, at 596 (1937) (moral position of plaintiff a factor in measuring extent of plaintiff's recovery). See generally Childres & Garamella at 443; 5 A. CORBIN, *supra* note 40, § 1112.



arising from express contracts, the problem of assigning moral fault also presents no difficulty since the defendant usually has breached. Complications arise, however, where the plaintiff has breached an express contract but attempts to establish that retention by the defendant of an acknowledged benefit is unjust because the value of the plaintiff's performance exceeds the damages inflicted by his breach.<sup>113</sup> The inflexible application of a rule broadly denying the right to recovery to defaulting plaintiffs would produce many harsh results.<sup>114</sup> Many courts avoid harsh results by refusing to follow the rule denying plaintiff's right to recovery.<sup>115</sup> In other jurisdictions that purport to follow the harsh majority rule, judges have devised legal fictions to permit plaintiff's recovery without explicitly overruling earlier cases.<sup>116</sup>

The majority rule denying recovery to defaulting plaintiffs despite a net benefit to defendant received its first authoritative expression in *Stark v. Parker*.<sup>117</sup> The plaintiff in *Stark* had agreed to work for defendant for a year with his compensation payable at the end of the term. The plaintiff without legal excuse left defendant's employ before the expiration of the contract but brought suit in quasi-contract to recover the value of the services that he had rendered prior to the breach.<sup>118</sup> Plaintiff's counsel argued that plaintiff should recover in quantum meruit conceding that the defendant's damages from the breach should be deducted from plaintiff's recovery; the court, however, refused recovery altogether.<sup>119</sup> Writing for the Supreme Judicial Court of Massachusetts, Justice Lincoln flatly rejected the idea "that a party who deliberately . . . enters into an engagement and

113. See, e.g., *Varner v. Hardy*, 209 Ala. 575, 575-76, 96 So. 860, 861-62 (1923); *Fritts v. Quinton*, 118 Kan. 111, 112-13, 233 P. 1036, 1037-38 (1925); *Waite v. C.E. Shoemaker & Co.*, 50 Mont. 264, 274-75, 146 P. 736, 738 (1915); *Strand v. Mayne*, 14 Utah 2d 355, 356, 384 P.2d 396, 397 (1963). See generally *Lee, Plaintiff in Default*, 19 VAND. L. REV. 1023, 1025-27 (1966).

114. Application of the rule denying recovery to defaulting plaintiffs penalizes most severely the plaintiff who has rendered a major part of his promised performance. See *Freedman v. Rector, Warden & Vestrymen*, 37 Cal. 2d 16, 22, 230 P.2d 629, 632 (1951).

115. See, e.g., *Porter v. Whitlock*, 142 Iowa 66, 68-69, 120 N.W. 649, 650 (1909); *McKnight v. Bertram Heating & Plumbing Co.*, 65 Kan. 859, 70 P. 345, 346 (1902) (per curiam) (en banc) (opinion not contained in official reporter); *Miles Homes, Inc. v. Starrett*, 23 Wis. 2d 356, 360-61, 127 N.W.2d 243, 246 (1964).

116. See *Joachim v. Andover Silver Co.*, 104 N.H. 18, 21, 177 A.2d 394, 396 (1962) (plaintiff recovers for fully performed divisible portion); *Chaude v. Shepard*, 122 N.Y. 397, 401-02, 25 N.E. 358, 360 (1890) (recovery based on distinction between payments to ensure performance and payments on the contract).

117. 19 Mass. (2 Pick.) 267 (1824).

118. *Id.*

119. *Id.* at 268.



voluntarily breaks it ... should be permitted to make that very engagement the foundation of a claim to compensation for services under it."<sup>120</sup> Emphasizing its moral outrage with the plaintiff's actions,<sup>121</sup> the court failed to distinguish between a suit on the contract and a suit in quasi-contract based on the concept of unjust enrichment.<sup>122</sup>

Several courts have qualified the rule in *Stark* by attempting to distinguish between a defaulting plaintiff who willfully breaches without excuse and one whose breach is non-willful.<sup>123</sup> Such distinctions are often difficult to make, however, and frequently amount to little more than a particular appellate court's subjective intuition.<sup>124</sup> In continuing to deny defaulting plaintiffs recovery, other courts have not cited the plaintiff's moral fault but have reasoned that the benefit conferred on the defendant did not exceed the harm caused by the breach.<sup>125</sup> The computation of net gain or loss when the plaintiff has defaulted, however, sometimes owes more to plaintiff's status as a legal "sinner" than to the rules of mathematics.<sup>126</sup>

A long line of authority rejects the rule of *Stark*. In *Britton v. Turner*,<sup>127</sup> on facts almost identical to those in *Stark*, a defaulting plaintiff gained recovery in quasi-contract despite his acknowledged default.<sup>128</sup> Focusing on the unjust enrichment accruing to a defendant who receives a net gain,<sup>129</sup> the court discounted the rationale in *Stark* as "technical reasoning" that obscured the central issue: the defendant received beneficial services but paid no compensation.<sup>130</sup> More recent cases adopting the *Britton* rule have added little by way of further analysis; most cases emphasize the defendant's unjust enrichment in granting recovery despite the plaintiff's status as a defaulting party.<sup>131</sup>

120. *Id.* at 271.

121. *See id.* at 275 ("the laborer is worthy of his hire, only upon the performance of his contract, and as the reward of his fidelity").

122. *See id.* at 272-73. *See also* Lee, *supra* note 113, at 1024.

123. *See Harris v. The Cecil N. Bean*, 197 F.2d 919, 921-22 (2d Cir. 1952); *Begovich v. Murphy*, 359 Mich. 156, 159, 101 N.W. 2d 278, 280 (1960); RESTATEMENT OF CONTRACTS § 357 (1932).

124. *See* 5 A. CORBIN, *supra* note 40, § 1123.

125. *See Kitchin v. Mori*, 84 Nev. 181, 183-84, 437 P.2d 865, 866 (1968); *Dluge v. Whiteson*, 292 Pa. 334, 335-36, 141 A. 230, 231 (1928).

126. *See Newcomb v. Ray*, 99 N.H. 463, 467-68, 114 A.2d 882, 884-85 (1955).

127. 6 N.H. 481 (1834).

128. *Id.* at 482, 485-86. In *Britton* the plaintiff, who had contracted with the defendant to perform services, left the defendant's service before the contract was fully performed and without the defendant's consent. *Id.* at 482. Plaintiff sued, asking to be compensated in quantum meruit for services performed. *Id.*

129. *Id.* at 487.

130. *Id.* at 493.

131. *See, e.g., Caplan v. Schroeder*, 56 Cal. 2d 515, 518-21, 364 P.2d 321, 324, 15 Cal. Rptr. 145, 148 (1961); *Loeffler v. Wilcox*, 132 Colo. 449, 453, 289 P.2d 902, 904 (1955);



## THE PLUS-MINUS FACTOR

Keener and Woodward maintain that the plaintiff must prove both that the defendant has committed a wrong and that the defendant has benefitted at the expense of the plaintiff: "the facts must show not only a plus, but a minus quality."<sup>132</sup> Since the idea that the defendant should not be entitled to retain a benefit wrongfully obtained at plaintiff's expense partially underlies quasi-contract, the Keener-Woodward view makes some sense. If the defendant's gain cannot be shown to have caused plaintiff a loss, no basis exists for permitting recovery in quasi-contract.

Despite the Keener-Woodward conclusion that quasi-contractual recovery on such facts would not be appropriate, the law today is otherwise. The *Restatement of Restitution*, for example, intimates that plaintiff's recovery in quasi-contract does not require a showing that plaintiff's loss corresponds precisely to defendant's gain.<sup>133</sup> The Washington Supreme Court embraced this view in *Olwell v. Nye & Nissen Co.*<sup>134</sup> 'The defendant had used the plaintiff's washing machine on an average of one day per week over a three year period.'<sup>135</sup> The plaintiff, who had placed the machine in storage, not intending to use it, brought an action in quasi-contract to recover the reasonable value of the machine's use. Although the machine was valued at only \$600, the plaintiff recovered judgment in the trial court for more than \$1500.<sup>136</sup> 'The court measured the plaintiff's recovery by the defendant's "negative unjust enrichment," the amount defendant saved in wages paid by using the machine. The defendant argued that the plaintiff suffered no loss since he had not intended to use the machine.'<sup>137</sup> 'Although the court did assert that a loss must be shown as a condition to recovery,<sup>138</sup> 'it defined loss so flexibly that the case stands for the proposition that plaintiff need suffer no demonstrable loss in order to recover in quasi-contract.'<sup>139</sup> Other courts also have

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Peters v. Halligan, 182 Neb. 51, 60, 152 N.W.2d 103, 109 (1967); Burke v. McKee, 304 P.2d 307, 308-09 (Okla. 1956).

132. W. KEENER, *supra* note 6, at 163; F. WOODWARD, *supra* note 14, § 274, at 442. See also D. DOBBS, *supra* note 70, at 419; York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. REV. 449, 504 (1957).

133. See RESTATEMENT OF RESTITUTION, Introductory Note §§ 150-59, at 595-96 (1937).

134. 26 Wash. 2d 282, 173 P.2d 652 (1946).

135. *Id.* at 283-84, 173 P.2d at 652-53.

136. See *id.* at 287-88, 173 P.2d at 654-55. The appellate court reduced the amount of the judgment, not because it objected to the amount, but because the amount exceeded the sum plaintiff asked for in his complaint. *Id.*

137. *Id.* at 285-86, 173 P.2d at 653-54.

138. *Id.*

139. See D. DOBBS, *supra* note 70, at 418.



rejected the notion that plaintiff's loss must be matched against a corresponding gain by defendant before an action in quasi-contract will lie.<sup>140</sup>

The rejection of the Keener-Woodward plus-minus limitation has increased the yardsticks available to measure damage awards in unjust enrichment actions. As long as a plaintiff's recovery in quasi-contract could not exceed his loss, the range of alternatives available to a court in framing a damage award was limited; that standard effectively denies judges the right to measure plaintiff's recovery by defendant's profits, since the necessary link between defendant's profits and plaintiff's loss does not exist.<sup>141</sup> Once a plaintiff's recovery can exceed the amount of his loss, courts become free to apply a variety of tests in the calculation of recovery. The case of *Owll v. Nye and Nissen Co.*<sup>142</sup> provides a useful illustration. If the court had felt bound strictly by the Keener-Woodward plus-minus limitation, the plaintiff's recovery probably would not have been measured by the defendant's negative unjust enrichment.<sup>143</sup> By abandoning the narrow limitation, the court in *Owll* had a much wider range of alternatives available to assess plaintiff's award. Instead of granting plaintiff the net profits that the defendant earned by using the machine, the court properly could have measured recovery by looking to the expenses saved as measured by the rental value of the machine rather than by wages saved or by awarding plaintiff the fair market value of the machine.

The decline of the Keener-Woodward plus-minus limitation illustrates the general tendency of courts to breach the doctrinal barriers that have been constructed to restrict recovery in quasi-contract. As courts have stretched the concept of benefit itself to apply quasi-contract principles to cases in which a particular result seemed just, they also have rejected the plus-minus distinction where its application would restrict recovery unjustly. In sweeping aside the artificial restraints of the plus-minus formula, however, the courts have eliminated almost all limitations on the calculation of damage awards in quasi-contract actions. The field appears open to wide-ranging judicial subjectivity in measuring a plaintiff's proper recovery. Since no firmly fixed standards guide either the definition of benefit or application of the plus-minus formula, the

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140. See, e.g., *Catts v. Phalen*, 43 U.S. (2 How.) 376, 381-82 (1844); *Federal Sugar Refining Co. v. United States Sugar Equalization Bd.*, 268 F. 575, 582 (S.D.N.Y. 1920); *Ablah v. Eyman*, 188 Kan. 665, 677-80, 365 P.2d 181, 190-92 (1961).

141. See F. WOODWARD, *supra* note 14, § 274, at 442.

142. 26 Wash. 2d 282, 173 P.2d 652 (1946).

143. Cf. D. DOBBS, *supra* note 70, at 418 (under Keener-Woodward analysis recovery limited to value of converted goods; no consideration of defendant's profits).



risks of injustice and unpredictability are great.<sup>144</sup> A meaningful attempt to reconcile and unify the law of quasi-contract must be grounded in concepts more legitimate and less artificial than the Keener-Woodward view that an action in quasi-contract will not lie unless an equivalent gain and loss are shown.

#### CONCLUSION

No single comprehensive definition of benefit in quasi-contract is possible. However convenient a uniform definition might be, a fair reading of the cases that invoke quasi-contract principles shows that too few consistent conceptual threads exist to fashion a unifying definition. Several factors account for this conceptual discord. The divergent factual settings in which quasi-contract principles are invoked stretch across an extraordinarily broad range of legal categories. Actions grounded in quasi-contract serve as alternatives to proceedings in both tort and contract. In the contract category alone, quasi-contract principles may be utilized in cases having their origin in express contract and also in actions where no explicit consensual agreement between the parties exists.

The varying attitudes of courts toward the idea of quasi-contract also complicates analysis. Some jurisdictions have embraced the principles underlying quasi-contract with genuine enthusiasm; others have shown hostility to application of a doctrine that sometimes violates the logical symmetry of more conventional legal rules. Inconsistencies also arise from variations in judicial attitudes toward plaintiffs. A court that perceives the plaintiff as a wrongdoer may deny recovery, even though the defendant has reaped an unjustified gain at plaintiff's expense. After determining that the defendant has benefitted and the plaintiff is without legal "sin," courts still confront the difficult task of measuring the defendant's gain. This tangled judicial environment produces a paradoxical treatment of the concept of benefit. Although that concept relates to the particular facts of the case in which it is being applied, courts often express the concept of benefit so generally that the definition becomes essentially meaningless as precedent.

Impatient to reconcile or at least to explain seeming inconsistencies in conflicting cases, legal scholars tend to be uncomfortable with the

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144. Cf. Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897) (predictability is central to a rational legal system).



conceptual disorders inherent in quasi-contract. In the field of quasi-contract, theories have been advanced that actions arising in a contractual context should be distinguished from other applications of the doctrine. Such segmentation permits the development of generalizations that are reasonably accurate within their self-defined limits but that do not apply across the whole range of quasi-contract actions; these generalizations are useful only in the sense that they illuminate the inherent haziness of quasi-contract principles.

Quasi-contract owes its origin to the persistent desire to do justice; it saves a deserving plaintiff's claim from failure under conventional legal principles. Resort to quasi-contractual concepts often reflects a failure of such conventional principles to serve the ends of justice. The perception of what is just is by no means an objective vision and varies from generation to generation, from case to case, and from court to court. In fulfilling this ubiquitous impulse to do justice where legal logic has failed, quasi-contract has presented extraordinary difficulties to those who have sought to systematize and reconcile the distinctly unsystematic and conflicting cases that constitute the law of quasi-contract. The doctrine, in both its origin and its application, has proved itself immune to such attempts at organization.