Restitution for Wrongs: The Measure of Recovery

Daniel Friedmann*

I. Introduction

When one person misappropriates a protected interest of another, the matter is prima facie within the law of wrongs or within the law of property. This indeed is the way in which most legal systems have dealt with the topic for hundreds of years. However, seventeenth-century English law developed an alternative route to protect the owner's interest. This route enabled the plaintiff to claim the defendant's gain rather than his own loss. The historical reasons for this development were mainly procedural. The rules of pleading in the common-law action of assumpsit—the ancestor of the modern law of restitution—were comparatively liberal.[1] In addition, the tort action was extinguished by the death of the tortfeasor or his victim (*actio personalis moritur cum persona*). But the claim in restitution remained available and thus offered a way to circumvent the tort rule.[2] For the purpose of modern law, these advantages are hardly relevant.[3] But the action for recovery of profits derived from the wrong has other aspects that distinguish it from the action for damages for the wrong. These are of considerable significance. One issue relates to the extent of the overlap of the causes of action. Does the cause

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* Danielle Rubinstein Professor of Comparative Private Law, Tel-Aviv University. I am grateful to the participants of the *Texas Law Review* Symposium on Restitution and Unjust Enrichment for their comments, in particular Peter Birks and Andrew Kull. I am also grateful to Muriel Fabre-Magnan for her advice on French law.

1. JOHN P. DAWSON & GEORGE E. PALMER, CASES ON RESTITUTION 1-6 (2d ed. 1969).

2. The restitutionary claim was also used to avoid certain immunities. This was probably the reason for the development of claims for usurpation of office. Arris v. Stukely, 86 Eng. Rep. 1060 (K.B. 1677); Howard v. Wood, 83 Eng. Rep. 540 (K.B. 1679). The plaintiff, who could not sue the Crown for the payments he was entitled to by virtue of his office, was held entitled to recover the profits that the usurper derived from the office. *See Arris*, 86 Eng. Rep. at 1060-62; *Howard*, 83 Eng. Rep. at 540. *See also* R.M. JACKSON, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW 51-55 (1936).

3. Even so, the question of immunity may still arise. Daniel Friedmann, *Restitution for Wrongs: The Basis of Liability*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 133, 137 (W.R. Cornish et al. eds., 1998) [hereinafter Friedmann, *Restitution for Wrongs*]. Another question that sometimes arises relates to the availability of restitution in cases in which the period of limitation applicable to the tort action has elapsed. 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 2.3, at 63-66 (1978).

of action in restitution depend on the existence of a cause of action in tort (or breach of contract), or is the restitutionary claim independent so that it might be available even in the absence of a cause of action in another branch of the law?[4] The other issue relates to the measure of recovery. It is concerned with the analysis of the factors that lead to the discrepancy between the plaintiff's loss and the defendant's gain. I have examined elsewhere the question of the independence of the restitutionary claim and its theoretical basis.[5] The present Article addresses the other topic, which relates to the measure of recovery.

II. Normal (Objective) and Actual (Subjective) Measurements of Recovery

The wrongful invasion of another's protected interest often yields the wrongdoer substantial gains. The event can be examined from two perspectives. One perspective, that of the law of torts, emphasizes the loss suffered by the plaintiff (the victim). The other perspective, that of the law of restitution, concentrates upon the defendant's (the wrongdoer's) gain. In instances of wrongful appropriation of another's interest, these viewpoints ordinarily represent two sides of the same coin. If the wrongdoer misappropriated $100 which belonged to the victim, the gain of one prima facie equals the loss of the other.[6] But whether this seeming equality indeed reflects the legal position depends on rules relating to assessing damages, on the one hand, and those relating to measuring the enrichment on the other.

Broadly speaking, the assessment of damages for the loss suffered by the victim can be either objective (abstract) or subjective (concrete).[7] In a similar vein, the benefits that the wrongdoer obtains may be measured objectively (abstractly) or subjectively (concretely). The objective measure is based on either the market cost of remedying the loss or the market price

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4. *Cf.* Int'l News Serv. v. Associated Press, 248 U.S. 215, 234-42 (1918) (holding that, in order to prevent unjust enrichment, the plaintiff was entitled to an injunction enjoining a competing agency from copying and distributing news that the plaintiff gathered, thus recognizing that the plaintiff had a quasi-property interest in the news that it gathered even though the news was not copyrighted).

5. *See generally* Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980) [hereinafter Friedmann, *Restitution of Benefits*]; Friedmann, *Restitution for Wrongs*, *supra* note 3, at 139-49.

6. Obviously, in many instances a loss is inflicted on the victim without a corresponding gain to the wrongdoer. Thus, when a robber takes the victim's money after injuring him, the loss of property may be equal to the gain; however, the victim suffered an additional physical injury for which the robber made no corresponding gain. The victim's physical injury does not result from appropriation of his interest. It is a case of mere injury.

7. On "abstract" and "concrete" assessment in the context of breach of contract, see TREITEL, REMEDIES FOR BREACH OF CONTRACT 111-24 (1988). These terms are based on the German terminology.

of purchasing a substitute. This measure disregards factors that are peculiar to the victim (the subjective elements) that may either increase or decrease the loss suffered by him. Similarly, the objective measure of the benefit ensuing to the wrongdoer is based on its market price and disregards subjective factors that may increase or decrease the gain derived by the defendant. In this Article, I use the term "normal"[8] damages (or "normal" gain) to describe an assessment that in other legal systems is termed "objective" or "abstract." I use the term "actual" damages (or "actual" gains) to describe an assessment that in other legal systems is termed "subjective" or "concrete."

As already indicated, in cases of appropriation of another's interest, the plaintiff's normal loss is equal to the defendant's normal gain. Where the defendant steals $100 from the plaintiff, the objective gain of the one equals the loss of the other. Similarly, if a defendant wrongfully occupies for one year a plot of land that belongs to the plaintiff, the plaintiff's normal loss amounts to the annual rent payable on such property. This amount is also the defendant's normal gain. The picture may, however, completely change by virtue of subjective elements that may be involved. Thus, in the example in which the defendant steals $100, the plaintiff's actual loss may be much lower than $100 if, for example, he intended to invest the money in an unsuccessful venture or if he kept it in a building that caught fire shortly after the theft. On the other hand, the plaintiff's actual loss may be higher than $100 if, for example, he intended to invest it in an enterprise that proved successful. Similar elements may affect the extent of the defendant's actual enrichment. His enrichment may be nil if he loses the money shortly after having obtained it, or it may be much higher than $100 if he uses it to acquire property that greatly appreciates in value.[9] Similarly, in the example in which the defendant wrongfully occupies the plaintiff's land, the loss to the plaintiff may be nil if he has no plans to rent or use the property. Still, the defendant's gain may exceed the market rental value of the property if he is able to use it profitably.

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8. The use of this term has been suggested to me by Professor Mark Gergen.

9. These examples reflect situations in which additional elements or later occurrences affected the value of that which was appropriated. The term "subjective value" sometimes refers to the value that a party attributes to certain property. For example, the subjective value of an apartment to its owner may be $130,000, though its market price is $100,000; in this case the owner will not sell it. In the context of misappropriation, it is conceivable that the victim will consider the value of the misappropriated property to be $100 while the wrongdoer will attribute to it a value of $150. This type of subjective valuation has been considered in the literature on restitution, notably in the context of unsolicited benefits and free acceptance. *See* Michael Garner, *The Role of Subjective Benefit in the Law of Restitution*, 10 OXFORD J. LEGAL STUD. 42 (1990); Peter Birks, *In Defence of Free Acceptance*, *in* ESSAYS ON THE LAW OF RESTITUTION 105, 127 (Andrew Burrows ed., 1991); GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 64 (1999).

Once subjective elements are taken into account, the above examples lend themselves to innumerable variations. The following table illustrates three basic situations:

	Actual (Subjective) Loss	Normal (Objective) Loss/Gain	Actual (Subjective) Gain
1	0	100	200
2	200	100	0
3	0	100	0

It is clear that if the plaintiff can choose between damages and restitution and, if the assessment is subjective, the plaintiff will claim in restitution the actual gain in situation (1) and the actual loss in situation (2). If he is entitled to choose between the actual and the normal assessments, he will opt for the normal possibility in situation (3) (either in tort or in restitution). Much depends, however, on the position of the legal system and its rules on the measurement of damages in tort (or breach of contract) and on the measurement of the benefit in restitution.

The discussion of the rules on damages is not within the ambit of this Article. It suffices to point out that the initial approach of Anglo-American law is that damages are compensatory and, consequently, that the plaintiff is entitled to recover the losses that he suffered as a result of the wrong. Prima facie, this leads to the actual measurement (hence the "thin skull" rule in torts). However, this approach is severely limited by the rules on mitigation and causation (remoteness of damages) and the date for the assessment of damages.[10] These rules tend to render the assessment of damages more objective and less dependent upon the subjective elements of the plaintiff. Thus, in the above example in which the plaintiff was wrongfully deprived of $100, he is unlikely to recover the loss resulting from the fact that the money was not used for a profitable investment he had in mind. Such consequential loss may well be regarded as "too remote." Alternatively, the plaintiff might be expected to mitigate his loss by borrowing the amount necessary for that investment.[11] Consequently, the loss would be measured objectively and would be limited to the amount lost plus interest.

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10. The modern approach seems to place greater emphasis on the plaintiff's actual situation and thus tends to limit the application of the rules that lead to normal measurement of the loss. *See, e.g.*, Alcoa Minerals of Jam., Inc. v. Broderick, [2000] 3 W.L.R. 23, 26-27 (P.C.) (appeal taken from Jam.) (applying an exception to the ordinary rule regarding the date for the assessment of damages in view of the plaintiff's lack of funds).

11. *But see id.* (holding that the plaintiff behaved reasonably and did not breach his duty to mitigate when he decided not to borrow money to repair his home, which had been damaged by the defendant).

A similar result is likely in the case in which the plaintiff's money is kept in a place that catches fire after it has been stolen. Here, the plaintiff's loss is, in reality, nil. Nevertheless, the fact that money would in any event have been lost is unlikely to be taken into account. The court may apply the rule that the loss "crystallizes" when the wrong is committed so that subsequent events that would have led to the same result will be disregarded. The loss would thus be measured objectively as a loss of $100—no more and no less.

It may also be pointed out that the normal yardstick represents the ordinary (or average) loss (or gain) for the event that occurred. Accordingly, in the example of the stolen $100, the ensuing loss (or gain) would usually (or on the average) reflect $100 plus interest. A claim for disproportionate damages resulting from such an event is often regarded with misgivings, but, in view of the stronger inclination of modern law towards individually tailored justice, it is not necessarily doomed to fail.

III. Attributed Loss and Attributed Gain

In addition to the actual and normal measurements of loss and gain, courts sometimes make assumptions about the plaintiff's potential loss or the defendant's potential gain that bear little resemblance to what is likely to have happened in reality. This type of measurement is objective in one respect. It does not depend on the plaintiff's specific situation but is based instead on assumptions that the court is willing to make in his favor.[12] This measurement, however, differs from the objective measurement discussed above in that it does not represent a normal or average loss (or gain), but an inflated one. Let us examine the following example:

Suppose that on January 1 the defendant misappropriated shares that belonged to the plaintiff. On this date the shares were worth $100. The defendant kept them for 10 months and sold them on October 31 for $130. During that period the shares fluctuated in value and reached their peak on June 1 at $350. How is the plaintiff's loss or the defendant's gain to be calculated?

One possibility is to inquire into the plaintiff's actual plans regarding the shares. If the plaintiff can show that he intended to sell them at a certain date, then his actual loss equals the price of the shares on that date. If an objective method is adopted, then it is arguable that he could have replaced the shares within a short time after the misappropriation (if he was aware of the misappropriation).[13] Therefore, his loss should be calculated by reference to the price of the shares when the plaintiff should have replaced them. There are, however, additional possibilities.

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12. When this approach is utilized to measure the defendant's benefit, it is based upon assumptions made against him.

13. Replacement can be regarded as an act required to mitigate the loss.

In particular, a court could assume, to the favor of the plaintiff, that he would have sold the shares when their price reached their peak. Such an assumption, unsupported by evidence, reflects a punitive approach, except that in this case the award is based on a specific yardstick and does not seem completely arbitrary. Indeed, a number of American court decisions reflect such an approach in cases regarding the conversion of shares and securities.[14] Furthermore, courts in some states apply the rule that recovery is based on the highest value of the misappropriated shares between the date of the wrong and the date of trial.[15] This rule, sometimes confined to willful or reckless wrongdoers,[16] can be predicated on the theory that the plaintiff intended to sell the misappropriated shares when they reached their peak. Alternatively, in measuring the defendant's gain, the opportunity that he had to sell the shares at their highest price suffices to impose on him liability for their highest price. The defendant was in possession of shares when they reached their peak, so on this date his enrichment was equal to the highest value of the shares. Under this approach, the fact that their price fell afterwards should be disregarded because a mere change of position ought not be taken into account if the defendant did not act in good faith.[17]

Under the New York approach, the mere opportunity that the wrongdoer had to sell the converted shares or to use another's property is viewed as if it were realized. The wrongdoer who failed to sell the property at its peak or to use it most profitably is treated on equal footing with the wrongdoer who did. No doubt there is a fictitious element in this approach. Still, it can be justified by punitive considerations, at least in the case of a conscious wrongdoer. When used to measure the plaintiff's loss, I call this type of appraisal "attributed loss"; when used to appraise the defendant's benefit, I use the term "attributed gain." As already indicated, both contain a punitive element.

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14. *See, e.g.*, Brown v. Campbell, 536 So. 2d 920, 922 (Ala. 1988); Gowan v. Wisconsin-Alabama Lumber Co., 110 So. 2d 756, 762 (La. 1985).

15. Under New York law, the plaintiff is entitled to recover the highest value of the securities between the time of the wrong and a reasonable time to obtain replacement securities. 1 DAN B. DOBBS, THE LAW OF REMEDIES § 5.13(2) (2d ed. 1993). According to one version of the rule, the relevant period is between the date the plaintiff had notice of the conversion and the reasonable replacement time. *Id.*

16. *Id.*

17. The defense of change of position is generally dependent on the defendant's good faith. *See* RESTATEMENT OF RESTITUTION § 142(2) (1937) [hereinafter RESTATEMENT] ("Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention, or dealing with the subject matter than was the claimant."); Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548, 580 (H.L.) (appeal taken from Eng.) (stating that the defense of change of position is only available to a defendant who has acted in good faith); ANDREW BURROWS, THE LAW OF RESTITUTION 431 (1993); LORD GOFF OF CHIEVELY & GARETH JONES, THE LAW OF RESTITUTION 826-27 (5th ed. 1998); Richard Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 135, 151-58 (Peter Birks ed., 1995).

In the above example, the attributed loss equals the attributed gain. But this is not always the case. It is conceivable that the defendant had a unique opportunity that was not available to others to sell the misappropriated property to a third party at a high price. It is unlikely that the attributed loss will extend its fictitious element to include such a price when the plaintiff never had such an opportunity, yet a court might well include it in the gain attributed to the defendant.

Recovery based on the attributed loss (or gain) was allowed by the Privy Council in *Inverugie Investments Ltd. v. Hackett*,[18] in which the plaintiff was a lessee of some thirty apartments in a Bahamian hotel complex. The defendants, who were the owners of the hotel, wrongfully ejected the plaintiff and used the apartments as part of the hotel. The average occupancy of the apartments was about thirty-five to forty percent. The plaintiff obtained an order for possession and brought an action for *mesne* profits for the fifteen years during which the apartments were in the defendants' possession.[19] The Privy Council applied the so-called "user principle" and held the defendants liable to pay damages for trespass in an amount equal to the rent of all the apartments they wrongfully occupied for the entire period. The fact that, in all probability, the plaintiff would not have been able to rent the apartments at full occupancy during the whole period was held to be of no moment.[20] Similarly disregarded was the fact that the defendants were able to let only thirty-five to forty percent of the apartments.[21] They had to pay rent for all of them. Lord Lloyd reasoned:

> The plaintiff may not have suffered any *actual* loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any *actual* benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.[22]

The result was, however, mitigated in one respect: tour operators were required to pay rent that was at least thirty-five percent lower than the published seasonal rate for the apartments, so a similar reduction was granted to the defendants.[23] At this stage it suffices to point out that, had

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18. [1995] 1 W.L.R. 713 (P.C.) (appeal taken from Bah.).
19. *Id.* at 715.
20. *Id.* at 718.
21. *Id.*
22. *Id.* *See also* VIRGO, *supra* note 9, at 488-89.
23. *Inverugie Invs.*, [1995] 1 W.L.R. at 719.

a tour operator wished to take not just a few apartments for one season but to rent thirty of them for a period of fifteen years, he probably would have paid a much lower amount. Indeed, the plaintiff who was wrongfully ejected from the premises was required under his contract to pay the rent agreed upon.[24] His liability to pay ceased upon his ejection, so the amount of the rent was of course deducted from the value of the occupancy as calculated by the court.[25] The rent agreed upon does, however, offer some indication as to the value of the occupancy. It is, of course, highly probable that after the contract was made the occupancy increased in value so that the lease proved profitable to the lessee (the plaintiff). (Otherwise, it is unlikely that the defendant would have wrongfully ejected the plaintiff.) Hence, the difference between the contractual rent and the market rent, which actually represents the normal loss (and gain), could furnish a guide to the actual loss (and gain) of the parties involved.

The court in *Inverugie Investments* thus faced the following possibilities in appraising the plaintiff's loss and the defendants' gain:

A. The Plaintiff's Loss

1. Estimated actual loss.—This estimation could have been based on the net profits the plaintiff likely would have derived during the period had he occupied the premises, with an allowance for developments in the relevant market during the period during which he was wrongfully deprived of possession.

2. Normal loss based on the market price of long-term renting of the thirty apartments for the whole period (less the contractual rate).—This appraisal may be somewhat lower than the actual loss, but it is unlikely that the difference would have been substantial.

3. Attributed loss.—The attributed loss would be based on assumptions which are highly unlikely to have materialized. There are a variety of possibilities. For example, the court could have assumed one-hundred-percent occupancy by customers paying the full, published rate. As already indicated, the court chose a more moderate yardstick. The court based the plaintiff's loss on one-hundred-percent occupancy but reduced the rate by thirty-five percent (the tour operator's rate).

B. The Defendants' Gain

1. Actual gain.—This gain would be based on the net profits derived by the defendants during the period in which they wrongfully occupied the apartments.

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24. *Id.*
25. *Id.*

2. *Normal gain*.—The normal gain would be based on the market price of long-term renting of the thirty apartments (less the contractual rate). It is clear that this amount is equal to the normal loss.[26]

3. *Attributed gains*.—These are gains the defendants could have realized—gains that never fully materialized in reality. Obviously, the calculation of such gains is based on assumptions about the possibilities of renting and could thus correspond to the assumptions made for the purpose of calculating the attributed loss.[27]

However, this type of reasoning often has a stronger appeal when made with regard to the defendant's potential gain than with regard to the plaintiff's attributed loss. Thus, an argument in the *Inverugie Investment* case that the plaintiff could have achieved one-hundred-percent occupancy of the apartments is most unconvincing in view of past experience. On the other hand, a similar argument based on the defendants' benefit is much stronger. The defendants were in possession of the apartments and enjoyed the advantage of being in complete control of their potential. The court could thus have found it possible to attribute to them benefits equal to the maximum potential of the apartments, even if it were unlikely for this potential to be realized. Needless to say, there is a strong punitive element in the imposition of liability for attributed losses or for attributed gains.

When we take into account the possibilities of attributed losses and attributed gains, the table depicted in Part II must be extended as follows:

Attributed Loss	Actual (Subjective) Loss	Normal (Objective) Loss/Gain	Actual (Subjective) Gain	Attributed Gain
300	0	100	200	350
300	200	100	0	350
300	0	100	0	350

As already indicated, the attributed gain is not one actually realized, and its imposition is punitive. The more important type of gain is the actual gain, which consists of benefits actually derived by the defendant. In Part IV, I shall examine actual gain more closely.

IV. The Defendant's Culpability and the Nature and Extent of His Contribution

A. General Considerations

The *Restatement of Restitution* distinguishes between the conscious wrongdoer and the one who innocently misappropriates another's interest.

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26. *See supra* section III(A)(2).
27. *See supra* section III(A)(3).

The defendant who "was consciously tortious in acquiring the benefit . . . is . . . deprived of any profit derived from his subsequent dealing with it."[28] But if he was no more at fault than the plaintiff, "he is permitted to retain gains which result from his dealing with property."[29] The American Law Institute's discussion draft of the *Restatement (Third) of Restitution and Unjust Enrichment*[30] adopts a similar position. Section 3 of the *ALI Draft* is entitled "No profit from intentional wrong,"[31] and comment *a* explains that "[a]ny profit realized in consequence of intentional wrongdoing is unjust enrichment" and should be disgorged.[32] However, the distinction between the conscious wrongdoer and one who has acted innocently does not allow sufficient flexibility. Between the two extreme situations—conscious wrongdoing and innocent action—there is a whole gamut of possibilities. Among them is the case of a party who knows of another's claim yet continues to believe in his own right, maintaining that the claim of the other party is unfounded.[33] There are also cases in which the wrongdoer has acted consciously but under great necessity,[34] as well as cases that fall short of necessity but where the wrongdoer has acted under considerable pressure.[35] Such pressure may not excuse the wrongdoing, but it mitigates the defendant's culpability. It is therefore submitted that the test should be *the degree of the defendant's culpability* rather than simply whether he acted consciously.

Additional considerations include the nature and extent of the defendant's contribution to the creation of the profits and the relative importance of his contribution as compared to the part attributed to the plaintiff's misappropriated interest. When the actual gain exceeds the normal one, it means that there have been additional elements that increased the benefit.[36] These elements may be either external—meaning

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28. RESTATEMENT, *supra* note 17, §§ 150-159 introductory note.

29. *Id.*

30. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Discussion Draft 2000) [hereinafter ALI DRAFT].

31. RESTATEMENT, *supra* note 17, § 3.

32. *Id.* § 3 cmt. a.

33. HANOCH DAGAN, UNJUST ENRICHMENT 74 (1997).

34. *See, e.g.*, Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910) (holding a shipowner liable for damage to a dock when a severe storm required the ship's master to maintain its moorings). Such necessity may excuse the wrongdoing, though liability based on unjust enrichment remains. *See* Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasion of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926); RESTATEMENT, *supra* note 17, § 122 (describing "a duty of restitution for the amount of harm done" when benefits are derived from an "incomplete privilege"); Friedmann, *Restitution of Benefits*, *supra* note 5, at 540-46 ("[I]t might be thought as a general proposition that necessity is a complete defense to an action in tort, but does not affect liability based on unjust enrichment.").

35. *See, e.g.*, De Camp v. Bullard, 54 N.E. 26 (N.Y. 1899) (discussed *infra* text accompanying notes 78-86).

36. It is conceivable for the actual gain to be lower than the normal one. *See supra* text accompanying note 9. This is likely to be the result of a "negative element," such as an accident, that

they do not belong to any of the parties involved—or they may belong to the defendant.[37]

When the defendant's contribution leads to profits in excess of the plaintiff's normal loss, disgorgement entails making the defendant forfeit his contribution as a windfall to the plaintiff. This result may be justified when the wrongdoer's contribution was minor or when it was in itself illegal or immoral.[38] But in cases in which the wrongdoer made substantial investments that lead to a dramatic increase in profits, complete forfeiture of the profits is likely to be too extreme.

This scenario is clearly demonstrated by the leading case of *Sheldon v. Metro-Goldwyn Pictures Corp.*,[39] in which the defendants negotiated the acquisition of the motion picture rights in the plaintiffs' play. The price was $30,000, but the negotiations fell through. Nevertheless, the defendants used parts of the plaintiffs' play in the motion picture, and the U.S. Supreme Court noted the conclusions of the Court of Appeals that the defendants had "deliberately lifted the play" and that their "borrowing was a deliberate plagiarism."[40] The net profits of the movie amounted to $587,604.[41]

The district court felt bound by previous authority and awarded the plaintiffs the whole amount of these profits, even though it considered the result "punitive and unjust."[42] The Second Circuit Court of Appeals reversed and held that there should be an apportionment of profits and that the plaintiffs were to receive twenty percent.[43] The Supreme Court affirmed the decision.[44]

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destroys the benefit or the result of the defendant's failure to take advantage of normal market possibilities, such as when the defendant does not bother to receive interest on the money he misappropriates. *See supra* note 17 and accompanying text.

37. There is a third possibility—namely that the additional elements belong to the plaintiff. This possibility can be disregarded on the ground that these elements are included in that which was wrongfully taken from the plaintiff and therefore should be taken into account when calculating the normal gain.

38. *See, e.g.*, Reading v. Attorney-General, [1951] A.C. 507 (H.L.) (appeal taken from Eng.). In that case, a sergeant in the British army was paid large sums of money to help smuggle goods into Cairo. Wearing his uniform, he succeeded in guiding the lorry carrying the goods through the checkpoints. The court held that the Crown was entitled to the money acquired by virtue of the sergeant's uniform and position. Needless to say, the sergeant's illegal activity did not entitle him to share in the fund thus created. Compare the example in which *A* pays *C* $1000 in exchange for *C*'s promise to injure *B*. *C* does not carry out his part of the agreement, so *B* remains unharmed. It is submitted that *B* is entitled to recover the $1000 from *C*. The gain was mainly created through *C*'s illegal activity (his promise to injure *B*). But this kind of "contribution" should be forfeited, and the whole amount should be recoverable by *B*. For a discussion of this example, see Friedmann, *Restitution of Benefits*, *supra* note 5, at 555-56.

39. 309 U.S. 390 (1940).

40. *Id.* at 397.

41. *Id.* at 396.

42. *Id.* at 398.

43. 106 F.2d 45 (2d Cir. 1939).

44. *Sheldon*, 309 U.S. at 409.

The decision of the district court may be in line with the *Restatement of Restitution*, but the award of the whole profit meant a complete forfeiture of the contribution of the motion picture actors, directors, and others who participated in its production. This result was too extreme, even though the wrong was deliberate. The final result reached is somewhere between the actual price of the copyright (the normal loss or gain) and the whole profit. The award was actually about four times this price, yet it amounted to a mere twenty percent of the total profits.

The position of the *Restatement of Restitution*, under which the question of whether the defendant was a conscious wrongdoer is the sole test for his liability to disgorge profits, fails also in the opposite case in which the defendant believed he owned the entitlement.[45] When the interest that the defendant misappropriated or the duty he breached is of great importance, he may be required to disgorge all or part of his profits despite the fact that he is not regarded as a conscious wrongdoer. This is clearly demonstrated by *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*,[46] in which the defendants staged a musical revue that included a selection from the plaintiffs' play *Kismet*. The court held that the infringement of the plaintiffs' copyright was not "conscious and deliberate" because the defendants believed that their use of *Kismet* was protected under a license which they possessed.[47] Nevertheless, the court followed *Sheldon* and ordered apportionment of profits.[48]

In one respect the defendants' good faith did affect the measure of their liability. Restitution of profits does not entitle the plaintiff to recover the defendant's gross revenue. The defendant is therefore entitled to deduct his expenses in producing the gain. In this respect, the court indicated that the innocent wrongdoer is likely to be treated more leniently than the conscious wrongdoer. "A portion of an infringer's overhead properly may be deducted from gross revenues . . . at least where the infringement was not willful, conscious, or deliberate."[49] The decision was based on the Copyright Act of 1976.[50] Still, the decision indicates the possibility of awarding profits for innocent misappropriation where the infringed interest is of sufficient importance.

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45. *See* RESTATEMENT, *supra* note 17, § 203 cmt. a (stating that only conscious wrongdoers must be compelled to surrender profits arising from their conversion of property).

46. 772 F.2d 505 (9th Cir. 1985). *See* discussion *infra* text accompanying notes 200-211.

47. *Frank Music*, 772 F.2d at 515.

48. *Id.* at 518.

49. *Id.* at 515. A similar issue arises concerning the deduction of income tax paid on the profits. Some courts allow a tax deduction where the infringer acted innocently but not where the infringement was conscious or deliberate. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.03[B] (1978).

50. 17 U.S.C. § 504(c)(2) (1994) (enabling courts, at their discretion, to reduce statutory damages to $200 in the case of innocent infringement).

Let us examine the various possibilities of recovery of gains in a number of specific contexts.

B. Conversion

Suppose *D* converts an article worth $100 belonging to *P* and sells it to *T* for $200. There can be diverse reasons for *T*'s paying a high price: (1) *T* does so because of his special needs or idiosyncrasies; (2) *D* manages to get the high price because of his negotiating skill or his ability to find a purchaser with special needs; or (3) *D* defrauds *T*.

The *Restatement of Restitution* draws a basic distinction between the innocent converter and one who acts consciously.[51] No doubt the defendant's good faith (or lack thereof) is a dominant factor to be taken into account, but it is not the only one. Other elements affecting the gain must also be considered. Thus, possibility (1) assumes that the source of the gain (*T*'s special needs or idiosyncrasies) is external. *D* has no entitlement to it. This gain should therefore inure to the benefit of the owner. *P* is therefore entitled to the full price paid by *T*. *D* should receive nothing, even if he is completely innocent. The second possibility is more complex because *D* has contributed to the additional gain. In this case, the *Restatement*'s position—that *D*'s liability should be limited to $100 if he has acted innocently[52]—seem stronger. Yet, as Palmer points out, "[t]he cases do not support this limitation: recovery of the proceeds of sale has been allowed under the venerable common count of money had and received, whether the conversion was innocent or willful."[53] It seems that the reason for allowing the plaintiff to recover the full sale price is that the defendant's contribution was traditionally regarded as secondary or of minor importance. Unlike the case in which the defendant makes a substantial investment in improving the object sold,[54] courts tend to disregard such vague and nontangible contributions. Today, in the commercial era, we may perhaps view the matter differently and attribute greater weight to marketing ability.

Indeed, *D*'s position is likely to be stronger if, instead of a converted article, his skill has enabled the marketing of an idea or the sale of a complex business entity. As already indicated, the nature of the defendant's contribution is of great importance. As suggested above, courts traditionally attribute considerable weight to tangible investment by

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51. *See generally* RESTATEMENT, *supra* note 17, § 154.

52. RESTATEMENT, *surpra* note 17, § 154 cmt. a.

53. 1 PALMER, *supra* note 3, § 2.12, at 158.

54. *Cf.* Greenwood v. Bennett, [1973] 1 Q.B. 195 (Eng. C.A. 1972) (holding that the legal owner of a stolen car will not be granted an order for its recovery from an innocent purchaser unless he pays for the improvements made by the purchaser).

asking if the defendant has physically improved the article sold. Today, there is no reason to disregard nontangible contribution. Still, the question of whether the defendant's contribution was substantial or relatively insignificant remains highly relevant.

The third possibility enumerated above assumes that *D* got an inflated price by defrauding *T*, the purchaser. While *D*'s contribution may be substantial, it was obtained in a reprehensible manner. This fact raises the issue of whether immoral or illegal contributions (for example, bribes paid in order to make a sale) or contributions that violate public policy should be taken into account. I would argue that normally such "shady" contributions should be disregarded, though this rule may be subject to exceptions. In any event, investment by way of immoral personal work or service of the wrongdoer should be forfeited.[55] *P* should therefore be allowed to recover the full $200 from *D*. This result is also not in line with the position of the first *Restatement*, since it is assumed that *D* acted innocently in converting *P*'s property. *D* was a conscious wrongdoer as to *T*, whom he defrauded, but not as to *P*, whose property he converted. This example raises an additional point: the possibility that *T* will sue *D* in either tort or restitution. The mere possibility of such a claim should not defeat the claim of *P* against *D*.[56] *D* is thus exposed to claims by both *P* and *T*. As between the two, the right of *T* is superior to *P*'s with regard to the $100 that was paid in excess of the value of the article sold to *T*. If *T* does not sue, then, as between *P* and *D*, the excess in value becomes *P*'s.

C. Wrongful Use of Another's Property

The normal measure of recovery for the temporary use of another's property is the rent or hire rate, but it is possible to imagine instances in which recovery of profits could be allowed. Consider an example. The defendant rents the plaintiff's property to a third party. The plaintiff may recover the full amount of the rent—even if it exceeds the usual amount payable for this type of property. This result may be reached irrespective of whether the defendant was a conscious wrongdoer or whether he acted innocently. The case is analogous to that of an unauthorized sale of the plaintiff's property. The contribution of the wrongdoer is likely to be considered too meager and may be disregarded, even if he acted innocently.

When, however, the defendant uses the plaintiff's property in the course of his business, the award of profits becomes highly problematic.

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55. *See supra* note 38 and accompanying text.

56. *See* 1 PALMER, *supra* note 3, § 3.18, at 341–42.

Suppose that the plaintiff has a large vacant plot that he does not use. The defendant trespasses on it, builds a huge circus tent, and runs a circus business that yields him considerable profits. If the defendant is a conscious wrongdoer, then under the *Restatement* he is liable to the plaintiff for his profits. Such a punitive result is unreasonable. The entire profits of the circus business cannot plausibly be attributed to the plaintiff's vacant plot of land. The denial of recovery of profits can also be explained on grounds of causation.[57] If we apply the but-for test, the conclusion is likely to be that the defendant would have made similar profits had he used another plot, though he would have had to pay rent. His liability, therefore, should be confined to reasonable payment for the use of the land. Such liability ought to be imposed irrespective of whether the defendant was a conscious wrongdoer or whether he acted in good faith. The only difference between these possibilities is that the award against the conscious wrongdoer might be based on a much more liberal scale. The wrongdoer should have negotiated the renting of the plot. If he acted consciously and simply decided to take it without permission, his liability need not be limited to the amount he would have been required to pay had he made a contract with the owner. Yet, to impose liability in an amount equal to his whole profits seems unreasonable. A proper solution might be to award against the conscious wrongdoer an amount exceeding the ordinary rent but falling short of his full profits.[58]

In some instances, courts have allowed recovery of profits for the use of another's property, notably where the property was particularly important or had certain unique characteristics. Thus, restitution of profits was awarded in *Edwards v. Lee's Administrator*,[59] the famous "Kentucky Cave Case," in which the defendant trespassed on part of the cave that was below the plaintiff's land. The court emphasized the fact that the defendant was a conscious wrongdoer, but the result can also be explained by virtue of the unique features of the cave involved.[60] Restitution of profits is often allowed in cases of unauthorized use of another's copyright. This result may be reached even if the defendant was not a conscious wrongdoer.[61] Again, the explanation seems to lie in the particular importance attributed to this type of property and its unique nature.[62] As

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57. *See* discussion *infra* Part V and text accompanying notes 192-225.

58. An alternative possibility, which contains a stronger punitive element, is to apportion the profits between the landowner and the conscious wrongdoer. *Cf. Sheldon*, 309 U.S. at 399 (discussed *supra* text accompanying notes 39-44).

59. 96 S.W.2d 1028 (Ky. 1936).

60. *See also* John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 613-14 (1981). *Edwards* is further discussed *infra* text accompanying notes 195-199.

61. *See* Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 515 (9th Cir. 1955); *see also* 1 PALMER, *supra* note 3, § 2.12, at 163-64.

62. DAGAN, *supra* note 33, at 82-85.

already indicated, when the defendant's contribution is substantial, the profits may be apportioned.

Olwell v. Nye & Nissen Co.[63] raised a similar issue of measuring the defendant's gains from using the plaintiff's property. There, the plaintiff had purchased an egg-washing machine in 1929 for $1200. The plaintiff had no use for the machine, but in 1945 he found out that the defendant was using it without his permission in the course of the defendant's business. The plaintiff offered to sell it for $600, half of its original cost. The defendant declined and made a counteroffer of $50, which the plaintiff refused. In the present action, the plaintiff claimed the reasonable value of the use of the machine for the whole period of its unauthorized use (about three years).[64] The value claimed was $25 per month. The trial court held that, because the defendant was a conscious wrongdoer, he was liable for his profits.[65] These included saving of expenses, which were calculated by reference to the cost of manual labor (the expense that would have been incurred had the eggs been washed by hand). The defendant's estimated savings were $10 per day. Because the machine was used only one day per week, the trial court awarded $10 for 156 weeks, or $1560.[66] The Supreme Court of Washington, relying on the *Restatement*, affirmed this approach but reduced the award on the ground that the plaintiff claimed only $25 per month, or $900 over the three-year period.[67]

The decision was criticized on the ground that it is unreasonable to award an amount so much higher than the price which the plaintiff asked for the machine.[68] In essence, the question is one of causation. Although the court spoke about profits, it was unreasonable to award the plaintiff a share in the profits that the defendant derived from his enterprise. The machine was used in the course of the defendant's business, but its profits cannot be entirely attributed to the use of the machine. In measuring the extent of the benefit, particularly in the context of expense saving, the correct measure is normally that of the cost of the reasonable alternative which is as similar as possible. An unreasonable alternative fails to pass the but-for test. If the defendant uses another's tractor to plough his land, the benefit equals the rent of such a tractor, not the cost of manual labor that would have been employed if tractors were not available. If the

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63. 173 P.2d 652 (Wash. 1946).

64. *Id.* at 653.

65. *Id.*

66. *Id.* Theoretically, the court could have adopted an even more extreme measure. As already indicated, courts sometimes impose liability for the mere opportunity that the defendant had to use the plaintiff's property (attributed gain). *See supra* text accompanying notes 17-26. Under this approach, the defendant could have been liable at the rate of $10 a day for each day he kept the machine, whether or not he actually used it.

67. *Olwell*, 173 P.2d at 654.

68. *See* 1 PALMER, *supra* note 3, § 2.22, at 160-61.

defendant misappropriates another's television set, his benefit equals its price, not the amount it would have cost him to hire engineers and designers to build a television from raw materials. The fact that the defendant was a conscious wrongdoer will not impose upon him such liability.

Hence, in the *Olwell* type of situation, the correct measure of recovery is the reasonable rent of this type of machine. Such an award should be made irrespective of whether the defendant was a conscious wrongdoer. Apparently, this is what the plaintiff in *Olwell* claimed, and this is what he got in reality. In this type of situation, the difference between the conscious wrongdoer and the one who acted in good faith may be reflected by the amount awarded for the use of the property. In the case of a conscious wrongdoer, the amount awarded to the victim is likely to be higher than that awarded against the innocent one. In addition, a conscious wrongdoer may be liable even if he did not actually use the plaintiff's property that he kept in his possession. On the other hand, the defendant who acted in good faith may be exempt from liability in restitution if he did not actually use the property.[69]

Questions of payment for the use of another's property arose in *De Camp v. Bullard*[70] and *Raven Red Ash Coal Co. v. Ball*.[71] Both cases concerned transportation of materials by the defendants through the plaintiffs' land. In *Raven*, the defendant had an easement over the plaintiff's land for the purpose of transporting coal mined on nearby land.[72] He also transported coal mined from other tracts of land to which the easement did not apply. This constituted trespass.[73] The plaintiff suffered no actual loss,[74] but the court held that the plaintiff was entitled to the reasonable value of the illegal use of the easement.[75] It seems that the only evidence on this point was that the prevailing rate of payment for transportation of coal over another's land was one cent per ton; but that price should have been much less where the owner of the easement had already entered upon the land and constructed (and was maintaining) a tramroad for transportation of coal.[76] Even so, the jury awarded the

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69. *But see* RESTATEMENT, *supra* note 17, § 128 cmt. k, illus. 2 (suggesting that an innocent party is liable for the rental value of the property he was not entitled to keep in his possession even if he did not use it). In my view, the innocent party should be exempt. The case is analogous to change of position. *Id.* § 142. He may, however, be liable in tort, provided the plaintiff suffered actual loss.

70. 54 N.E. 26 (N.Y. 1899).

71. 39 S.E.2d 231 (Va. 1946). *See also* John A. Artukovich & Sons v. Reliance Truck Co., 614 P.2d 327 (Ariz. 1980) (holding that, where the plaintiff could not have used his property, the loss of use was compensable not under a theory of conversion, but rather under a theory of unjust enrichment).

72. *Raven*, 39 S.E.2d at 232-33.

73. *Id.* at 233.

74. *Id.* (quoting the plaintiff's testimony that the reason he sued for use and occupancy was because he suffered "no more damage other than the exclusion of use during that moment").

75. *Id.* at 239.

76. *Id.*