

The Principle of Unjust Enrichment and Formation of Contract: The Importance of a Hidden Policy Factor

Jan M. Smits*

Abstract: The two types of situations discussed in this contribution show how the principle against unjust enrichment interrelates with formation of contract. It is defended that the wish to avoid unjust enrichment plays an important role as a policy factor in cases that are often regarded as contract cases. The situation in which goods are supplied or services are performed without a contract and the case of apparent intention are used to explain this. The contribution shows that in these cases it is the *cumulative impact* of reliance and enrichment that accounts for obligations coming about. Subsequently, the consequences this may have for the taxonomy of the law of obligations are discussed and a plea is made for the resurgence of a separate category of ‘quasi-contract’ at the European level to accommodate the cases discussed.

Keywords: Restitution; Contract; Reliance; Quasi-Contract

1. Introduction

The aim of this contribution, written in honour of Eltjo Schrage, is to show how the principle of unjust enrichment interrelates with formation of contract. This seems to be a suitable topic to honour a colleague who devoted so much of his academic life to both restitution and contract law in a historical and comparative perspective. As will become apparent from this contribution, this comparative-historical perspective is not only a valuable, but even an indispensable one to understand the true relationship, also for modern law, between contract formation and unjust enrichment.

The main tenet of the following is that the principle of unjust enrichment has an important role to play in answering the question whether a contract was concluded or not. At first sight this may sound like a surprising statement as contract and restitution are usually regarded as separate sources of obligations, but on closer look this is different. For a long time, both civil law jurisdictions and English law regarded contract-like and restitution-like obligations as closely connected with each other in the institution of *quasi-contract*. The gradual disappearance of this category in both European-continental and English law led to its function being taken over by either contract or restitution law: obligations that used to be regarded as belonging to quasi-contract now had to be accommodated somewhere else. The consequence of this was that the true reason for imposing liability was, in cases that used to be seen as *quasi-contract*, no longer very clear. The question to be raised is whether this is, in some cases, not a threat for a coherent European private law and if quasi-contract is not the proper term to be used in qualifying the types of obligations discussed in the underneath.

This contribution is structured as follows. First, the traditional view on the relationship between contract and enrichment is explored (section 2). Then, two types of examples are given to show how enrichment and contract are interwoven (section 3). Finally, the consequences this may have for the taxonomy of the European law of obligations are discussed (section 4).

2. The relationship between contract and enrichment

There is hardly a need to explain that in civil law countries the traditional view on the relationship between contract and enrichment is that these are separate sources of obligations:¹ they stand next to each other as independent grounds for liability. This was already the case in Justinian's Institutes of 533, in which contract was placed next to quasi-contract,² the latter incorporating, among others, cases of unjust enrichment and *negotiorum gestio*. The role of quasi-contract throughout European legal history has since been to function as a dogmatic category to accommodate 'contract-like' obligations. This is the most notable in France, where art. 1370 of the Code Civil still follows the Justinian distinction and where both the specific enrichment claims enshrined in the Code and the general enrichment action are usually categorised as quasi-contract.³ But the enrichment action does of course not need quasi-contract as a basis: Dutch and German law for example do recognise enrichment claims as such, based on separate categories of unjust enrichment laid down in the respective civil codes.⁴

Also in English law, contract and enrichment are now regarded as separate sources of obligations. The English courts have denied for more than two centuries what Lord Mansfield had pleaded for, namely a general enrichment action on basis of 'natural justice and equity'.⁵ Instead, English law made use of quasi- or implied contract to justify an enrichment claim. It is well-known that this changed over the last twenty five years. While still in 1978, Lord Diplock held that 'there is no general doctrine of unjust enrichment recognised in English law'⁶, in 1999 it had become possible for Lord Steyn to hold the opposite: 'Unjust enrichment ranks next to contract and tort as part of the law of obligations [as] independent source of rights and obligations'.⁷ The height of this development in English law was reached when Peter Birks, in his famous textbook on restitution, treated unjustified enrichment almost entirely separate from (quasi-)contract.⁸ The main reason for the coming about of this separate restitution category was that it was found to be a highly fictitious exercise to qualify as a contract what is 'actually' not a contract but a restitution-based liability.

This standard view is usually widely praised, both in English law and on the continent: formation of contract by offer and acceptance and allowing claims for unjust enrichment have nothing to do with each other and should be regarded as separate subjects. While contract is based on consent of the parties and obligations thus come about because they were intended, unjustified enrichment is an obligation *ex lege*. However, the question raised in this contribution is whether this doctrinal separation of contract and restitution as separate grounds for liability is enlightening in all circumstances. It may not be if formation of contract and enrichment are, in some cases, more related than this view seems to assume. The following will show that there are indeed cases in which the fact that someone would be unjustly enriched if he would not be allowed a contractual claim is an *underlying policy factor* in saying that there *is* a contract.

* Professor of European Private Law, Universiteit Maastricht; in the academic year 2005-2006 also visiting professor, Louisiana State University. This paper is based on a lecture held at the Schrage-symposium (Amsterdam, 17-19 March 2005).

¹ Cf. David Johnston and Reinhard Zimmermann, 'Unjustified enrichment: surveying the legal landscape', in: David Johnston and Reinhard Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective*, Cambridge University Press, Cambridge 2002, pp 3 ff.; E.J.H. Schrage, 'Unjust Enrichment: A Historical and Comparative Overview', in: E.J.H. Schrage (ed.), *Unjust Enrichment and the Law of Contract*, Kluwer Law International, The Hague 2001, pp 1 ff; the contributions of Gaudemet and Sacco to 44 *Archives de Philosophie du Droit* (1999), pp 19 ff., 33 ff. and Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Juta, Cape Town 1990, p 18.

² Inst. 3, 13, 2. See Inst. 3, 27 on quasi-contract.

³ Even if this categorisation under art. 1371 Code Civil can be criticized for historical reasons: see Jack Beatson & Eltjo Schrage (eds.), *Casebooks on the Common Law of Europe: Unjustified Enrichment*, Hart Publishing, Oxford 2003, pp 38 ff.

⁴ Cf. Schrage and Beatson (eds.), o.c., pp 42 ff.

⁵ *Moses v. Macferlan* [1760] 2 Burr 1005 (KB).

⁶ *Orakpo v. Manson Investments Ltd.*, [1978] AC 95, 104.

⁷ *Banque Financière de la Cité v. Parc (Battersea) Ltd.*, [1999] AC 221, 227. The recognition of the general enrichment claim came with *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 AC 548.

⁸ P. Birks, *An Introduction to the Law of Restitution*, Clarendon Press, Oxford 1985; cf. S.J. Stoljar, *The Law of Quasi-Contract*, 2nd ed., Law Book Company, Sydney 1989.

Before this is explained, it seems necessary to clarify that, at a theoretical level, it was already suggested more than once⁹ that the principle against unjust enrichment underlies *the whole* of the law of obligations. This is the meaning often attributed to the famous maxim by Pomponius: ‘*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiores*’.¹⁰ It is also what André Tunc meant when he made a comparison between the general tort law principle and the enrichment action:

‘Le principe énoncé par l’article 1382 du Code Civil est l’une de ces grandes règles d’équité qui pourraient, à elles seules, résumer le Droit tout entier. On pourrait (...) concevoir (...) tout le droit des obligations régi par un seul principe: ‘Chacun doit réparer le dommage qu’il cause, par sa faute, à autrui’; on pourrait d’ailleurs, substituant au principe de responsabilité celui tout aussi général d’enrichissement sans cause, se contenter d’écrire: ‘Nul ne peut s’enrichir injustement aux dépens d’autrui.’¹¹

Considered this way, unjust enrichment is regarded as a *Leitmotiv* underlying the law of obligations. This can be explained by emphasising that the goal of the law of obligations is to establish whether an inroad on the status quo is justified (has a *causa*) or not: such an inroad can be justified by consent (in which case obligations arise out of contract), but it can also be unjustified in case of tort. Both can be redefined in terms of unjustified enrichment: if there is a contract, the enrichment of one party and the impoverishment of the other is justified by consent. If there is tort, no such *causa* exists and the violation of the integrity or assets of the damaged person can only be made good through allowing a tort claim.¹² This somewhat abstract and theoretical idea can have very practical consequences. If it is true that unjustified enrichment as a principle underlies contract law, it may imply that some aspect of enrichment is allowed to play a role in deciding whether there is a contract or not. If, in the circumstances of a case, there is doubt whether a contract should be allowed to exist, the argument that if a contract were *not* to exist would lead to unjustified enrichment of the other party, can be used to decide the case. This will now be explained for two types of situations.

3. Two types of situations

3.1 Supplying goods or performing services without a contract

The first type of situation is one in which A supplies goods or performs services for the benefit of B without an explicit contract to do so. In a typical case, A has done work for B, which was intended to be remunerated at market rates,¹³ but for one reason or another there is no binding contract and B refuses to pay. Such a situation can arise for several reasons. It could be that the parties did not make a formal contract or were acting during negotiations. It could also be that the contract was void or the party performing simply *thought* a contract would be concluded. Cases like these were decided all over Europe and elsewhere. I will give three examples.

In the English case of *British Steel v. Cleveland Bridge and Engineering*,¹⁴ the plaintiff (British Steel) negotiated with the defendant (Cleveland Bridge) about the supply of nodes. During the

⁹ See for Dutch law e.g. H.C.F. Schoordijk, *Het algemeen gedeelte van het verbintenissenrecht naar het Nieuw Burgerlijk Wetboek*, Kluwer, Deventer 1979, p 452; B.W.M. Nieskens-Isphoring, *Het fait accompli in het vermogensrecht*, Kluwer, Deventer 1991, *passim* and J.M. Smits, *Het vertrouwensbeginsel en de contractuele gebondenheid*, Gouda Quint, Arnhem 1995, pp 172 ff. and 182 and cf. for German law Gerhard Kegel, *Vertrag und Delikt*, Carl Heymanns Verlag, Köln 2002, p 129.

¹⁰ D. 50, 17, 206.

¹¹ Mazeaud-Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, tome I, 6. éd., Montchrestien, Paris 1965, p 17.

¹² See on the interrelationship of contract, tort and enrichment e.g. Eduard Picker, ‘Positive Forderungsverletzung und culpa in contrahendo’, 183 *AcP* (1983), pp 398 ff. and cf. Andrew Burrows, *Understanding the Law of Obligations; Essays on Contract, Tort and Restitution*, Hart Publishing, Oxford 1998, pp 9 ff.

¹³ Cf. Steve Hedley, ‘Implied Contract and Restitution’, *Cambridge LJ* 2004, pp 444-445.

¹⁴ [1984] 1 All ER 504 (QB).

negotiations, a letter of intent was issued by Cleveland Bridge asking British Steel to start the work and, while the parties were still negotiating, almost all the nodes were delivered but not paid for. British Steel then claimed payment, in the absence of a contract, on basis of the reasonable value of the nodes. Robert Goff, J. found reason to allow payment but had trouble in finding the proper legal basis for this. Starting the work did after all not mean there was a contract: the parties were still negotiating and it was impossible to say with any certainty what the terms of the contract would have been. In the end, Goff found the following to be the proper reason for allowing a claim:¹⁵

‘In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we say now, in restitution.’

The second example is a Dutch case. In *WGO v. Koma*,¹⁶ decided by the Dutch Supreme Court in 1984, a similar set of facts was at hand. WGO, a semi-governmental agency, was in need of new office space. Koma had a buildings available and WGO told Koma it would indeed rent this building. Before any formal contract was made up, Koma agreed to repair the doors and the windows and undertook several other works. WGO, having told Koma that in order to conclude the formal contract it would need the approval of its board, made use of the building for two months. Then, WGO informed Koma it had found other rental space and preferred to go there. When Koma claimed performance of the contract, the district court held there was actually a rental contract because in the circumstances of the case Koma could rely on WGO having in fact agreed to the contract. The Dutch Supreme Court approved of this and found a contract to be available even though it was very clear to Koma that there was no approval of the board.

The third and final example discussed here is the well-known American case of *Wheeler v. White*,¹⁷ decided by the Supreme Court of Texas in 1965. Wheeler had promised the project developer White to finance the building of a shopping centre. Before there was any formal contract, the financier Wheeler told White that he could already start breaking down the old buildings in the area because the money would become available anyway. White started the work, but Wheeler subsequently refused to finance the project. Although the court found no contract in the circumstances of this case, it still allowed compensation for the costs on the basis of promissory estoppel.

What these three cases have in common, is that work was done or goods were supplied by one party without a contract actually existing. It is clear, however, that performance took place in a ‘precontractual’ relationship: in all three cases, the parties had had previous contact and at least one of them relied on the contract coming into being when it undertook the work. This led the Queen’s Bench Division to allow a claim on basis of restitution, the Dutch Supreme Court to allow a claim on basis of contract and the Texas Supreme Court to allow a claim on basis of promissory estoppel. I believe it is insightful that each court in these similar cases found a different basis for its allowing the claim. Each of these courts thus emphasises an important aspect of this type of cases. The English court emphasised the aspect of unjustified enrichment: one party performed at the benefit of another party who did not do anything in return. The Dutch court put emphasis on the contract it found present in the circumstances of the case: even though there was no real consent, reasonable parties *should have*

¹⁵ [1984] 1 All ER 504, at 511.

¹⁶ Hoge Raad 27 January 1984, *NJ* 1984, 545.

¹⁷ 398 S.W.2d 93. Also the Dutch case of *Katwijk v. Westdijk* (Hoge Raad 18 April 1969, *NJ* 1969, 336) falls into this category: the decision of the Hoge Raad that no compensation was allowed, was highly criticized in legal doctrine.

agreed to compensation for the work done. And finally the American court highlighted the reliance aspect, stressing that White could rely on Wheeler's promise it would finance the project.

In my view, it is vital to see that in each of these cases – and despite the qualifications given by the courts – the elements of enrichment, reliance and 'implied' consensus can *individually* not be the foundation for the obligations the courts found. On the one hand, mere reliance ('contractual expectation reasoning', as Burrows calls it¹⁸) to legitimise the decision with is not convincing as reliance as such can never be enough. If British Steel would only have been negotiating, relying on a contract to be concluded, but would not have supplied the nodes, the court would certainly have denied the action. Thus, the argument that Cleveland Bridge *benefited* from the work done by British Steel, in combination with its reliance, is what stood at the basis of the obligation. On the other hand, mere enrichment of the party for whose benefit performance took place is not enough either: it needs to be supplemented with some reliance on being paid for, probably flowing from the precontractual dealings among the parties. If Koma or White would simply have started the work for the benefit of the other party, there would have been no need to compensate and, even more, their work could even have been qualified as being without *causa*, presenting a case of unwanted intermeddling. The true reason for allowing a claim in these cases therefore lies in a combination of elements. They are in between cases that cannot be fully explained by contract law – that has for a goal to protect the, in these cases non-existent, consensus – nor by specific restitutionary claims. It is the cumulative impact¹⁹ of both reliance and benefit that explains why an obligation should arise: the party having received a benefit would be unjustifiably enriched if a contract would not be found to exist. The principle that unjustified enrichment should be prevented thus plays a role as a policy factor in reasoning that there is a contract.

The above explains why in many legal systems, as the above cases beautifully show, the basis for a claim to compensate could be found both in contract *and* in enrichment law: whereas the underlying policy factors stem both from contract *and* enrichment and are the same in both English, Dutch and American law, the basis for the obligation to arise can be sought in different directions. What is qualified in one legal system as a restitution case can be a contract case in another one. In section 4, this finding will be criticised for reasons of coherence.

3.2 Apparent intention

The second type of situation concerns the well-known case in which party A expresses itself contrary to its actual intent and party B claims it could rely on A's declaration. Typical is where A makes a mistake in offering his house to B, stating he wants to sell his house for € 100.000 less than he intended. When B accepts A's offer, A maintains he is not bound to his offer as he did not intend to declare what he did declare. The question now is whether A is bound to his apparent intention.

Every legal system has its own way of dealing with this type of case, but in each jurisdiction a key role is played by the question whether there can be justified reliance on the actual intent of the party expressing itself.²⁰ In this respect, it is irrelevant whether this problem is discussed in the context of *dissensus* (cf. art. 3:35 Dutch Civil Code), mistake (cf. § 119 German BGB²¹), *erreur-obstacle*, injurious reliance²² or interpretation.²³ if one party disputes it is bound to what it said, that party can

¹⁸ Burrows, *Understanding the Law of Obligations*, o.c., p 96.

¹⁹ See for this term also S.M. Waddams, 'The Relation of Unjust Enrichment to other Concepts', in: Schrage (ed.), *Unjust Enrichment and the Law of Contract*, o.c., p 422.

²⁰ For an overview, see Hugh Beale et al (eds.), *Casebooks on the Common Law of Europe: Contract Law*, Hart Publishing, Oxford 2002, pp 120 ff. and 343 ff.

²¹ § 119 I BGB declares the contract avoidable, while § 122 then makes clear that in case of avoidance the party should compensate the damage the other party suffered by relying on the validity of the legal act (*Vertrauensschaden*).

²² Cf. *Smith v. Hughes* [1871] L.R. 6 Q.B. 597, 607: 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

²³ For a short overview see Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law, Parts I and II*, Kluwer Law International, The Hague 2000, Note 2 to art. 2:102.

still be bound if the other party could rely on its declaration. The European jurisdictions are therefore well-represented by the Principles of European Contract Law (PECL). Next to the formation of contract on the basis of consensus (art. 2:201 PECL), art. 2:102 PECL makes clear that a party is also bound by its apparent intention to create a legal relationship:

‘The intention of a party to be legally bound by contract is to be determined from the party’s statements or conduct as they were reasonably understood by the other party.’

This provision provides for the case in which ‘something else’ than the voluntary assumption of obligations must account for a party being bound. This something else consists of reasonable reliance. However, any legal system has difficulties in answering the question when this reasonable reliance exactly exists.²⁴ It is often said this is dependent on the circumstances of the case.²⁵ No doubt this is true, but it does not lead us very far.

On closer look, the desire to prevent unjust enrichment can be seen as one of the most important policy factors underlying the formation of contract by way of reliance. What is meant by this is that courts are only willing to say there is a contract in the absence of explicit consent if the contract shows, to some extent, an equality of performance and counter-performance. If allowing the contract to have been concluded would be at the benefit of one of the parties alone, the court would in most cases say there is no binding contract. The reason for this is that there *can* be no reliance that someone really intended to agree if that contract is very detrimental to that party. If someone agrees to sell something under its value, this is fine as long as that party does not plead the contract is not binding. As soon as it starts challenging its intention, enrichment becomes important as a policy factor to say that there is a binding contract. Of course, one should be aware it is not the *only* factor. If true intention can be shown (for example through some formality), the contract is binding as well, but this is exceptional. Put otherwise: there is a concern that no party shall be enriched at the other party’s expense except if a deliberate decision to do so is clearly present. And the less certain it is that A intended to be bound, the more important the enrichment factor becomes in establishing there is a contract.

The idea that enrichment is an important policy factor in deciding about the formation of contract is not new. Already in 1927, the Dutch law professor M.H. Bregstein held:²⁶

‘Any legal system is reluctant to accept a transfer of wealth that is not justified by an exchange of goods or is based on an explicit intention to give the other party a benefit.’

Indeed, in case of an explicit contract to transfer money or goods or to perform services, the transfer of value (enrichment) is justified by consent of the parties. In a case in which the transfer of money or goods, or performance of services, is *not* justified by consent, it can only be justified in another way. In principle it is *sine causa* unless there is some exchange of performance and counter-performance. In this sense intention and enrichment cannot be separated and are complementary. The principle that unjustified enrichment should be avoided thus plays a role in assessing whether there is a contractual obligation in a way that is much more important than fair price doctrines such as *laesio enormis*. It is no surprise that such doctrines that seek to prevent excessive benefits for one of the parties by applying an external measure are generally not accepted:²⁷ if there is a gross disproportion between the mutual obligations, this is usually already dealt with in the context of formation of contract.

²⁴ Instead of many, I refer to Claus-Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht*, Beck, München 1971, pp 491 ff.; Joannes Köndgen, *Selbstbindung ohne Vertrag*, Mohr, Tübingen 1981, p 106; Nieskens, *Het fait accompli in het vermogensrecht*, o.c., *passim* and p 116 and the overview at Smits, *Het vertrouwensbeginsel en de contractuele gebondenheid*, o.c., pp 123 ff.

²⁵ Cf. Canaris, *Die Vertrauenshaftung im deutschen Privatrecht*, o.c., p 526; Asser-Hartkamp II, *Algemene leer der overeenkomsten*, 12th ed., Kluwer, Deventer 2005, no. 110.

²⁶ M.H. Bregstein, *Ongegronde vermogensvermeerdering*, Amsterdam 1927.

²⁷ Several European countries do have rules on these. In French law, the *lésion* of art. 1674 ff. Code Civil is in case of immovable goods a ground for rescission if the price undervalues the immovable by more than seven-twelfths and in Austria the pars. 934-935 and 1060 ABGB contain an even more general provision. In other

3.3 The cumulative impact of reliance and enrichment

The conclusion from the above cases should be obvious. Unlike it is often assumed, the principle that unjust enrichment should be avoided plays an important role in contract formation. In cases where performance took place without a contract or where there is only an apparent intention to create legal relations, enrichment is an important policy factor in deciding whether a party is bound or not. It is then the cumulative impact of both reliance and enrichment that is decisive.

The above is not to say that there are no differences between the two types of situations discussed. If goods are supplied or services performed, there is often an irreversible²⁸ situation: one party received a benefit that can no longer be ‘undone’ and the only way to do justice is then to allow compensation to the other party. The principle against unjust enrichment here works to redress what already went wrong. This can lead to the conclusion that a contract was concluded (allowing the expectation interest to be compensated), but this need not be as we saw that it can also lead to a claim on basis of restitution or reliance. Following Fuller and Perdue²⁹ – and unlike it is the case with ‘normal’ contracts on basis of consensus – it depends on the circumstances of the case whether there is liability for the expectation, reliance or restitution interest. In case of apparent intention, unjust enrichment is used in a slightly different way, namely not to redress an irreversible situation but to decide whether reliance on the other party’s intention is reasonable. This can also lead to compensation for different types of interests. What both situations have in common, however, is that they both need reasoning on basis of unjustified enrichment to reach the result that some contractual interest should be compensated.

4. Consequences for taxonomy in Europe: a plea for the resurgence of quasi-contract

If it is true there are cases where the cumulative impact of enrichment and reliance explains best why an obligation should come about, the question that remains to be answered is whether this should mean something for the structuring of the law of obligations. The purpose of a dogmatic structure is after all to facilitate legal thinking and to put together what belongs together. To ensure that like cases are treated alike, that inconsistencies are discovered and that the law is thus made clearer and more accessible are vital functions of this structuring.³⁰

It was already mentioned that the type of cases we are concerned about in this contribution are dogmatically embedded in different ways. Under English law, these cases used to be seen as quasi-contracts or implied contracts, but are now generally regarded as restitutionary in nature, together with other restitutionary claims, such as restitution for wrongs or claims to redress unjust enrichment in property law.³¹ In most civil law jurisdictions, they are regarded as contract cases. On the one hand, this confirms that these situations are at the border of restitution and contract law. On the other hand, however, from a viewpoint of a European legal science it is not very insightful to characterise similar cases in one country as belonging to contract law and in the other belonging to the law of restitution. Europeanisation of law also means that one should think about the proper way of coherently systematising similar cases.

I believe there are three possibilities with regard to the taxonomy of these obligations. The first possibility is to restructure the present-day law on basis of the various elements of contract, restitution and tort, leading to one new single law of obligations. In particular English authors defend such a radical approach.³² Thus, Atiyah proposes to redefine English law in terms of reliance-based and benefit-based liabilities.³³ Steve Hedley distinguishes eight types of interests to be protected,³⁴

countries, the mere fact of an imbalance is not enough to say that the contract is void or voidable (cf. however art. 3.10 Unidroit Principles on International Commercial Contract that does recognise ‘gross disparity’).

²⁸ Cf. B.W.M. Nieskens, *Het fait accompli in het vermogensrecht*, o.c., p 137.

²⁹ L. Fuller and R. Perdue, ‘The Reliance Interest in Contract Damages’, 52 *Yale LR* (1936), pp 52 ff.

³⁰ Cf. Ewan McKendrick, ‘Taxonomy: does it matter?’, in: Johnston and Zimmermann (eds.), o.c., pp 632 ff.

³¹ Cf. Birks, *An Introduction to the Law of Restitution*, o.c., pp 49 ff. and 313 ff.

³² For an overview: Burrows, *Understanding the Law of Obligations*, o.c., pp 1 ff.

³³ P.S. Atiyah, ‘Contracts, Promises and the Law of Obligations’, 94 *LQR* (1978), pp 193 ff.

while Cooke suggests to come to a restructuring on basis of duties of reasonable care.³⁵ Although these proposals do accommodate new types of obligations, their disadvantage is that at the same time they do not retain what is already established: existing categories are given up while there is no need for this. To redefine an ordinary contract on basis of consensus in terms of protection of interests or duties of care would in my view not promote the clarity of the law.

The second possibility is to categorise the cases discussed as either a contract or a restitution based liability. As said before, this is now the usual approach. Thus, English law carved out a general enrichment claim. This is generally approved of as before the rise of this action restitution-based liabilities were based on implied contract and this was often found to be highly fictitious.³⁶ Now, it can be submitted that in case of for example payment under mistake of fact, it is fictitious to base a legal remedy to recover the money on the defendants implied promise to pay it back. But in the cases described above, it seems to me this is different: there is just as much reason to base liability on contract as there is to base it on restitution. If it is the mixture of the two elements together that justifies the claim, it is just as fictitious to say there is a contractual claim as it is to say the claim is of a restitutionary nature: such qualifications miss the point that these liabilities should form a separate category. In this respect, Steve Hedley's view that the cases discussed should remain contract cases, cannot be accepted either. To Hedley, the 'incomplete contract' situations, where one party did work for the other and expected to be remunerated at market rates, are simply contracts 'without a shadow of a fiction'.³⁷ But the truth is that these contracts are not based on consent and it should be questioned whether, from a viewpoint of taxonomy, the same category should be used for contracts based on consent and contracts that find their origins at least partly in the wish to prevent unjust enrichment.

The third way to categorize the discussed cases is to create a separate category for obligations that come about because of the cumulative impact of enrichment and reliance. Such obligations, that are not based upon explicit consent, do not amount to a wrong and are not pure enrichment either, are very much like obligations that 'normal' parties would have agreed to. The question therefore needs to be raised whether such cases should not be categorised as falling under the old category of 'quasi-contract.'

In the Justinian system, quasi-contract contained different types of actions, including *negotiorum gestio* and several types of enrichment claims.³⁸ Both on the European continent and in English law, the category was used as a basis for new claims that could not be categorised as contract and did not fall into one of the other sources of obligations.³⁹ In English law, it was with the emancipation of a general enrichment action that quasi-contract came under attack, while its role on the continent was more and more marginalised as well. Thus, Peter Birks wrote that there is a 'false overtone' in using the term,⁴⁰ while Jossierand held that quasi-contract was 'un monstre légendaire à banner de notre vocabulaire juridique'.⁴¹

However, if there are, next to the enrichment claims that belong to the law of restitution and next to the ordinary contracts based on consent, cases that look like contracts but *are* not contracts because consent is missing, would these cases then not deserve to be put into a separate category? And would the term 'quasi-contract' not be the proper name for this category? It would mean that an old category is filled with new contents. Such a categorisation would have three advantages. First, it would put together into one category what belongs together: obligations arising out of the combined elements of enrichment and reliance. Second, it would thereby make the existing categories of

³⁴ Steve Hedley, 'Contract, Tort and Restitution: or, On Cutting the Legal System Down to Size', 8 *LS* (1998), pp 147 ff.

³⁵ R. Cooke, Tort and Contract, in: Paul D. Finn (ed.), *Essays on Contract*, Lawbook Co., Sydney 1987, pp 228 ff.

³⁶ See, e.g., Burrows, p 93 on the artificial reasoning in the case *Way v. Latilla*, [1937] 3 All ER 759.

³⁷ Steve Hedley, 'Implied Contract and Restitution', *Cambridge LJ* 2004, pp 444-445. Also see Hedley, o.c., 8 *LS* (1998), pp 147 ff.

³⁸ For an overview of the development of quasi-contract in both civil and common law: Gerhard Kegel, *Vertrag und Delikt*, Carl Heymans Verlag, Köln 2002, pp 4 ff.

³⁹ Cf. for English law Lord Atkin in *United Australia Ltd. v. Barclay's Bank Ltd.*, [1941] AC 1, 29: 'fantastic resemblances of contracts invented in order to meet requirements of the law (...).'

⁴⁰ Birks, *An Introduction to the Law of Restitution*, o.c., p 34.

⁴¹ L. Jossierand, *Cours de droit civil positif français*, tome II, Sirey, Paris 1930, no. 10.

restitution and contract more coherent. Now, restitution law has to accommodate a large amount of different types of claims: it would enhance clarity if the actions that are ‘contract-like’ would be transferred to another place. Likewise, contract law would still only be about the normal contracts based on consensus of the parties. Third, the ongoing process of Europeanisation of private law prompts the need to think about the best way to coherently systematise similar cases. If jurisdictions do this in different ways – and we saw this is the case – it is best to create a system that is as coherent as possible at the European level. To allow a separate category of quasi-contract will enhance this coherence as cases that are now part of English restitution law and Dutch or German contract law can then be put together.

5. Conclusions

This contribution should have made two things clear. First it shows, in the two types of cases discussed, how the principle that unjust enrichment is to be avoided interrelates with formation of contract. The principle against unjust enrichment operates as a policy factor in the situation in which goods are supplied or services are performed and in the situation in which a party challenges its intention to enter into a legally binding contract. In these two situations, the cumulative impact of reliance and enrichment best explains why an obligation should come about. From a viewpoint of taxonomy, it is best if these types of cases are put together into one category and it is suggested that quasi-contract should fulfil this role.

Second, this contribution shows how important it is to approach the law of obligations from a comparative and historical perspective. Without this approach, it would not only have been impossible to interrelate enrichment and contract in the way it was done here, it would also have prevented us from pleading for a resurgence of quasi-contract. Without the possibility to show how quasi-contract, in different jurisdictions and in different periods of legal history, functioned as a basis for new types of obligations, the argument set out here would have been much weaker – if it would have existed at all. In this way, the above is also to be seen as a tribute to the method Eltjo Schrage applied in such a stimulating way over the last twenty five years.