The Defence of "Change of Position" in English and German Law of Unjust Enrichment

By Florian Mächtel[*]

A. Introduction

In its § 142(1) the *American Restatement of the Law of Restitution*[1] provides that "[t]he right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution." The notion that the recipient of an unjustified benefit must in principle return not more than the enrichment that has actually "survived" in his hands, is not only fundamental to the American law of restitution, but can also be found in English and German law.

In the seminal, 18th Century case of *Moses* v. *Macferlan*, decided by the House of Lords, the highest Court in the United Kingdom, Lord Mansfield held, that the defendant to a restitutionary claim "may defend himself by every thing which [shows] that the plaintiff, *ex aequo et bono*[2], is not entitled to the whole of his demand, or to any part of it."[3] This can be interpreted as an early hint at the so-called defence of "change of position."[4] In Germany, a similar principle, the *Wegfall der Bereicherung* (literally "cessation of the enrichment" but used to indicate the "change of position" defence), is enshrined in § 818 III of the *Bürgerliches Gesetzbuch*

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[1] Scott, A.W. and Seavy, W.A., Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts (St. Paul: American Law Institute 1937).

[2] "According to what is right and good."

[3] 2 Burr. 1005, 1010 (1760).

[4] In the American terminology, "change of circumstances."

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(BGB – Civil Code),[5] which provides, in short, that the obligation to make restitution is excluded to the extent that the recipient of the benefit is no longer enriched.

This essay will make a comparison of the application of the defence in Germany and England. As the first part of the paper (B.), a brief outline of the restitutionary concepts in both countries, will show, this is especially interesting given the fact that the young English law of restitution is still "under construction" whereas German courts have applied their law for more than 100 years. The following chapter (C.) will try to locate the "loss of enrichment defence" and assess its importance for enrichment law. In the subsequent parts flesh will be put on the defence's bones by examining its general requirements (D.), the role of fault and knowledge (E.), the problems of anticipatory reliance (F.) and counter-restitution (G.).

As a conclusion (H.) it will be submitted that German and English law make use of the defence of change of position in a relatively similar way. The longer experience of the German system can serve as a useful guide, in a positive and a negative sense. The article is intended to give an introductory overview on an important, if not the most important, issue in enrichment law in two of Europe's major jurisdictions. It deals with basic questions only, but the reader familiar with the law of restitution and its development will not be surprised by such an approach for an introduction, since it is a branch of the law which has aptly been described as a "minefield;"[6] there is hardly a position which is not disputed.

B. Outline of the Law of Restitution

"[A]ny civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment," Lord Wright correctly observed in the *Fibrosa* case, decided in 1943 by the House of Lords.[7] The task of this preliminary chapter is to provide a short comparison of this essential branch of the law in England and Germany in order to illustrate how both legal systems approach the law of unjust enrichment.

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[5] Most relevant statutory provisions can be found in English translation at http://www.iuscomp.org/gla/index.html (German Law Archive). Translations in this article are based on that source. All references in this paper are made to the BGB if not otherwise indicated. Roman numerals represent a paragraph, Arabic numerals a sentence. 's.' means sentence if a section is not divided into paragraphs.

[6] Meier, *Mistaken Payments in Three-Party Situations: A German View of English Law*, 58 C.L.J. 567 (1999).

[7] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., A.C. 32, 61 (1943).

I. England

In England questions of unjust enrichment form part of the law of restitution, which encompasses all remedies depriving the defendant of a gain, instead of awarding compensation for the claimant's loss.[8] For centuries the English courts granted relief in cases concerned with the skimming off of the defendant's gains on the basis of quasi-contractual remedies and implied contractual obligations (*money had and received*, *money paid*, *quantum valebat*[9], *quantum meruit*[10]).[11] Although this view was doubted in the 1940s,[12] questions of unjust enrichment remained "a peripheral matter in contract or tort;"[13] the latter, restitution in the context of a tort, became acknowledged with the doctrine of "waiving the tort."[14] Gradually, however, the law of restitution emancipated itself. This process culminated in its recognition as a discrete body apart from contract and tort at the beginning of the 1990s with the groundbreaking judgements of the House of Lords in *Lipkin Gorman* v. *Karpnale Ltd.*[15] and *Woolwich Equitable Building Society* v. *IRC.*[16]

In order to succeed with a claim in unjust enrichment one must prove that the defendant obtained a benefit at the plaintiff's expense, a benefit that is unjust for him to retain because of special circumstances[17] commonly referred to as "unjust fac-

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[8] VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 3 (Clarendon Press 1999). *See also*, Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 O.J.L.S. 413 (1995).

[9] "As much as it was worth." When there is a sale of goods without a specified price, the law implies a promise from the buyer to the seller that the former will pay the latter as much as the goods were worth.

[10] "As much as he has deserved." When a person renders a service without a specified price, there is an implied promise from the employer to the worker that he will pay him for his services, as much as he may deserve or merit.

[11] ZWEIGERT & KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 551 (T. Weir trans., Oxford University Press 3rd ed. 1998); Gallo, *Unjust Enrichment: A Comparative Analysis*, 40 A.J.C.L. 431 (1992).

[12] United Australia Ltd. v. Barclays Bank Ltd., A.C. 1, 26 (1941). (Lord Atkin); Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., A.C. 32, 63 (1943). (Lord Wright).

[13] Dickson, *The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law*, 36 I.C.L.Q. 752 (1987).

[14] *See*, Hambley v. Trott, 98 E.R. 1136 (1776). (Lord Mansfield); Martinek, *Der Weg des Common Law zur allgemeinen Bereicherungsklage. Ein später Sieg des Pomponius?*, 47 RabelsZ 289 (1983).

[15] 2 A.C. 548 (1991).

[16] A.C. 70 (1993).

[17] GOFF & JONES, THE LAW OF RESTITUTION para. 1-016 (Sweet & Maxwell 6th ed. 2002); VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 9 (Clarendon Press 1999); Chen-Wishart, *Unjust Factors and the Resti-*

tors." As with all claims there are also specific defences available for the enriched party, such as change of position. It is a matter of dispute whether the unjust enrichment principle and the law of restitution simply quadrate each other[18] or not.[19] The proponents of the latter theory argue that proprietary claims and restitution for wrongs stand separately beside claims in unjust enrichment. Yet this paper is not the right place to elaborate on this point, since the question is of no particular relevance for the topic.[20] At this instant we can therefore record the following: The English law of restitution as such is a relatively young branch of the law. It is characterized by the notion that every enrichment can be retained, as long as there is no recognised ground which renders it unjust.

II. Germany

The concept of "restitution" as it is understood in England does not at all exist in Germany.[21] After further scrutiny, however, one will find several provisions dealing with the restoration of an unjust enrichment. The two most striking legal institutions in this context are §§ 346 et seq. (termination of contract) and §§ 812 et seq. (unjustified enrichment) in the BGB. No German jurist ever had the idea to combine all these claims into one "law of restitution," because of the fixed structure of German law. That is why restitutionary remedies can be located in a contractual context, in the law of obligations imposed by virtue of the law (*gesetzliche Schuldverhältnisse*), the law of property, family and succession law and even in social security and insurance legislation as well as public law. Thus, the comparative lawyer sees himself confronted with problems in structuring his analysis; indeed, as Professor Birks observes, it "is not a subject in which it is easy to draw comparisons."[22]

Restitutionary Response 20 O.J.L.S. 557 (2000); Dickson, *Unjust Enrichment Claims: A Comparative Overview* 54 C.L.J. 105 (1995).

[18] Lipkin Gorman (A Firm) v. Karpnale Ltd., 2 A.C. 548, 578 (1991). (Lord Goff); GOFF & JONES, THE LAW OF RESTITUTION para. 1-001 (Sweet & Maxwell 6th ed. 2002); BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 17 (Clarendon Press 1985) (but see my next fn.); HEDLEY, A CRITICAL INTRODUCTION TO RESTITUTION 11 (Butterworths 2001).

[19] VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 6-17 (Clarendon Press 1999); BIRKS, "Misnomer" in Cornish et al. (eds.), RESTITUTION: PAST, PRESENT AND FUTURE – ESSAYS IN HONOUR OF GARETH JONES 1 (Hart 1998); The idea of "quadration" stems from Birks in *An Introduction to the Law of Restitution*. BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 17 (Clarendon Press 1985).

[20] Nevertheless, for the sake of simplicity "restitution" and "unjust enrichment" will be used synonymously in this paper.

[21] *Cf.*, Dickson, *The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law*, 36 I.C.L.Q. 760 (esp. fn. 42) (1987).

[22] Birks, *At the Expense of the Claimant: Direct and Indirect Enrichment in English Law*, OXFORD U. COMPARATIVE LAW FORUM 1 http://ouclf.iuscomp.org, after n. 4 (2000).

Sections 812-822 BGB form the core of the fragmented German "law of restitution." These provisions are part of the law of obligations, but belong neither to the law of contract, since obligations created by them do not arise out of contract but by virtue of law, nor to the law of delict, which deals with questions of compensation for wrongs. Nevertheless, the systematic position of these norms between the codified law of contract (§§ 433 et seq.) and the law of delict and property (§§ 823 et seq.) indicates that there are connections to these branches of the law.[23] The most important basis for a claim in unjustified enrichment is § 812 I 1, which mirrors the Roman *condictiones indebiti* and *sine causa*,[24] and it is worth stating it in full: "A person who obtains something by performance by another person or in another way at the expense of this person without legal cause is bound to give it up to him." This *seems* to mirror the English principle of unjust enrichment outlined above. German scholars, however, have built an intellectual edifice of considerable height around that norm since its enactment in 1900. According to the predominant view restitution rests on two pillars: a *Leistungskondiktion* (performance-based) pillar and a *Nichtleistungskondiktion* (non-performance-based) pillar.[25] This distinction is not completely alien to English law, since restitutionary claims are often divided into claims founded on the act of the plaintiff and those founded on the act of the defendant.[26]

The formulation of § 812 I 1 leads us to the fundamental distinction between English and German law, which is also reflected in the semantic difference between "unjust" and "unjustified" enrichment:[27] In Germany, whenever a shift of wealth occurs without a juristic reason, it can be recovered. That means that every enrichment is *prima facie* unjustified under German law, unless a legal ground existed for it. The position in English law is, at least in theory, diametrically opposed. As described above, as long as there is no "unjust factor" no shift of wealth can be restored, i.e. every enrichment is *prima facie* just. The consequence of this perception is

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[23] MARKESINIS ET AL., THE GERMAN LAW OF OBLIGATIONS. VOLUME 1. THE LAW OF CONTRACTS AND RESTITUTION 711 (Clarendon Press 1997).

[24] Zimmermann and du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, RESTITUTION LAW REVIEW 18 (1994).

[25] *Id.* at 24; LARENZ AND CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 129 (C.H. Beck 13th ed. 1994).

[26] *E.g.*, GOFF & JONES, THE LAW OF RESTITUTION (Sweet & Maxwell 6th ed. 2002); VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION (Clarendon Press 1999); *Cf.*, ZWEIGERT AND KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 555 (T. Weir trans., Oxford University Press 3rd ed. 1998).

[27] *Cf.*, Krebs, *In Defence of Unjust Factors*, OXFORD U. COMPARATIVE LAW FORUM 3 http://ouclf.iuscomp.org 3, after n. 12 (2000).

that the English law of restitution has to deal with the reasons why there is no basis for the enrichment, whereas this question is generally irrelevant in Germany.[28]

C. Background Information on "Change of Position"

I. Germany

The attempt to locate the defence of "change of position" in German law leads to the discovery of several places speaking to the issue. This is due to the fact that no law of restitution as such exists and questions of unjust enrichment arise in various fields, which are covered by different statutory provisions. The most prominent examples of "erasable enrichment," as it is sometimes called by academic commentators,[29] can be found in §§ 346 III (termination of contract), 818 III (unjustified enrichment), 988 et seq. BGB (owner-possessor-relationship) and § 48 II of the *Verwaltungsverfahrensgesetz* (VwVfG – Federal Administrative Procedures Act) . For reasons of space and simplicity this examination will only focus on the provisions of §§ 812-822, which constitute the central part of the German unjust enrichment law. There, § 818 deals with the extent of the enrichment claim. Whereas the first two paragraphs of this provision expand it to certain substitutes or even the value of the originally obtained object, § 818 III drastically restricts it by stating that "[t]he obligation to provide return or compensation for the value is excluded to the extent that the recipient is no longer enriched." In this sentence the change of position defence (*Wegfall der Bereicherung*) is enshrined, which the German *Bundesgerichtshof* (BGH – Federal Court of Justice) regards as "the highest principle of enrichment law," since "the duty of the [defendant] to make restitution must not lead to a reduction of his estate which is greater than the amount of the actual enrichment."[30] It is for that notion that German jurists see the change of position defence as central to enrichment law, even as characteristic,[31] which has led to the common expression of the "mildness" or "weakness" of claims in unjust enrichment.[32]

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[28] *Cf.*, ZWEIGERT AND KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 557 (T. Weir trans., Oxford University Press 3rd ed. 1998); Riesenhuber, *Englisches Restitutionenrecht "in einer Nussschale"*, JURISTISCHE AUSBILDUNG (JURA) 659 (2002). But, *see also* §§ 817, 819 II.

[29] Zimmermann & du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, RESTITUTION LAW REVIEW 38 (1994); Dawson, *Erasable Enrichment in German Law*, 61 Boston U.L.R. 271 (1981).

[30] BGHZ (Decisions of the Federal Court of Justice in civil matters, with volume and starting page) 1, 75 (81); *see also* BGHZ 55, 128 (131).

[31] *Cf.*, ZWEIGERT & KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 583 (T. Weir trans., Oxford University Press 3rd ed. 1998); Dickson, *The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law*, 36 I.C.L.Q. 785 (1987).

[32] LARENZ & CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 295 (C.H. Beck 13th ed. 1994); Hellwege, *The Scope of Application of Change of Position in the Law of Unjust*

II. England

It might come as a surprise, but change of position has been acknowledged by *statute* in England for more than 50 years, albeit only in the context of frustrated contracts.[33] In the common law the recognition took much longer. From the generous starting point of the "heresy"[34] in *Moses* v. *Macferlan*[35] the courts took a rather hostile view towards the defence of change of position.[36] Yet in certain cases of "ministerial receipt"[37] and forged bills of exchange[38] as well as estoppel,[39] a defence was operative which took account of the changed circumstances of the recipient of a benefit. There was, however, no *general* defence of change of position, which could be applied *pro tanto* to enrichment claims. It took until 1991 when in the seminal case of *Lipkin Gorman* v. *Karpnale*[40] the defence of change of position was introduced. In the words of Lord Goff: "[T]he defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."[41] It seems to be no exaggeration to state that change of position will in fact constitute the "heart" of the English law of restitution, as it does in Germany. Among other considerations, this conclusion might be derived from the fact, that in *Lipkin Gorman* not only the defence was recognised, but the whole law of restitution found its recognition as a discrete body of the law. Yet their Lordships stressed, that "it would be unwise to attempt to define [the defence's] scope in abstract terms, but

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Enrichment: A Comparative Study, RESTITUTION LAW REVIEW 93 (1999); Zimmermann & du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, RESTITUTION LAW REVIEW 39 (fn. 202) (1994).

[33] *See* s. 1(2), (3) of the Law Reform (Frustrated Contracts) Act 1943. A more general defence has been available in New Zealand by virtue of s. 94B of the Judicature Act 1908, *cf.*, Watts, *Restitution and Change of Position*, 115 L.Q.R. 199 (1999).

[34] GOFF & JONES, THE LAW OF RESTITUTION para. 40-001 (Sweet & Maxwell 6th ed. 2002).

[35] 2 Burr 1005 (1760).

[36] Baylis v. Bishop of London, 1 Ch. 127 (1913); Durrant v. The Ecclesiastical Commissioners for England and Wales, LR 6 Q.B.D. 234 (1880-81).

[37] *I.e.*, An agent passes on the benefit he received to his principal. *Cf.*, British American Continental Bank v. British Bank for Foreign Trade, 1 K.B. 328 (1926); BURROWS, THE LAW OF RESTITUTION 480 (Butterworths 1993).

[38] The London and River Plate Bank Ltd. v. The Bank of Liverpool Ltd., 1 Q.B. 7 (1896).

[39] Avon County Council v. Howlett, 1 All E.R. 1073 (1983).

[40] 2 AC 548 (1991).

[41] Lipkin Gorman v. Karpnale, 2 AC 548, 580 (1991).

better to allow the law … to develop on a case by case basis,"[42] in order not "to inhibit the development of the defence."[43]

This leads to problems for the comparative lawyer, because English law so far only provides but a sparse guidance with regard to subsequent decisions, while we are faced with a German case law of more than 100 years of application of this defence by German courts. Consequently, the analysis of English law will, to a certain degree, rest on academic opinions, which makes it rather speculative.[44]

D. Basic Principles of the Defence

I. Loss of Enrichment Related to the Enrichment Object

One can imagine two main categories, in which an acquired benefit has been subsequently "erased." The first one is related to the object of enrichment itself. If the latter is lost, stolen, destroyed, transferred or otherwise depleted *without having received something in return* the defendant will be no longer enriched and can therefore in principle plead change of position. The decisive factor in this regard in both Germany and England is the question whether the object that was received in the first place has indeed been erased from the estate of the defendant or whether there is some kind of (partial) substitute for it. This is easily illustrated by a simple case: If the defendant has used money he obtained from the plaintiff to buy a car, which is equal in value, then there is no loss of enrichment; if the value is less than the money received, he is no longer enriched to this extent.[45] There are numerous examples in German cases, where change of position has been applied in such a context, e.g. an unprofitable sale[46] or bad investments.[47] Even if the agent stole the obtained money, the defendant principal can rely on the erasure defence, because there is no question of risk allocation or the like.[48] However, if the defendant uses

[42] *Id*. at 558. (Lord Bridge).

[43] *Id*. at 580. (Lord Goff).

[44] *Cf*., Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 135 (Birks ed., Clarendon Press 1995); GOFF & JONES, THE LAW OF RESTITUTION para. 40-003 (Sweet & Maxwell 6th ed. 2002).

[45] *Cf*., the example of Lord Templeman in Lipkin Gorman 2 A.C. 548, 560 (1991).

[46] R.G.Z. (Decisions of the former Imperial Court in civil matters) 75, 361.

[47] B.G.H., Monatsschrift für Deutsches Recht (M.D.R.) 1957, 598. Further examples can be found in ZWEIGERT & KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 583 (T. Weir trans., Oxford University Press 3rd ed. 1998).

[48] R.G.Z. 65, 292. Criticised in Dawson, *Erasable Enrichment in German Law*, 61 BOSTON UNIVERSITY LAW REVIEW 279 (1981).

the money to repay a loan, this results in an equally large economic advantage by releasing him from the debt, consequently his enrichment has not "disappeared,"[49] or in the words of an English judge: "In general it is not a detriment to pay off a debt which will have to be paid off sooner or later."[50] The problems arise when the defendant makes use of the enrichment and by doing so saved expenditures he would necessarily have incurred, e.g. if he spends the money on his ordinary living costs or if he would have bought the aforementioned car in any event, with or without the actual enrichment. In these cases the "loss" of the enrichment is not related to the actual receipt of the enrichment and therefore no change of position took place.[51]

The English view on these aspects is quite similar. Yet there has been some discussion on the actual test of causation. One could argue, that change of position can only "bite" if the defendant detrimentally *relied* on the validity of receipt.[52] This would have the consequence that theft or destruction by fire and the like would not lead to loss of enrichment![53] However, given that Lord Goff spoke only of "a person whose position has … changed" with the aim in mind to "enable a more generous approach to … restitution,"[54] one can only come to the conclusion that he was inclined to the wider view,[55] namely that change of position must simply be "causally linked to the mistaken receipt,"[56] which exactly mirrors the approach of the German courts.[57] The similarities between the German and the English solutions be-

[49] B.G.H., Neue Juristische Wochenschrift (N.J.W.) 1985, 2700.

[50] National Westminster Bank Plc. v. Somer International (UK) Ltd., E.W.C.A. Civ. 970, para. 26 (2001). (Potter L.J.); *Cf.*, RBC Dominion Securities Inc. v. Dawson, 111 D.L.R. (4th) 230, para. 43 (1994) (Cameron J.A.).

[51] *See* LARENZ & CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 301 (C.H. Beck 13th ed. 1994); Zimmermann & du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, RESTITUTION LAW REVIEW 39 (1994).

[52] That is the Australian point of view: '[The] central element is that the defendant has acted to his or her detriment on the faith of the receipt.' David Securities Pty. Ltd. v. Commonwealth Bank of Australia, 175 C.L.R. 353, 385 (1992).

[53] *Cf.*, BURROWS, THE LAW OF RESTITUTION 427 (Butterworths 1993).

[54] Lipkin Gorman v. Karpnale, 2 A.C. 548, 580 (1991).

[55] GOFF & JONES, THE LAW OF RESTITUTION para. 40-003 (Sweet & Maxwell 6th ed. 2002); BURROWS, THE LAW OF RESTITUTION 427 (Butterworths 1993); Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 146 (Birks ed., Clarendon Press 1995); Key, *Change of Position*, 58 M.L.R. 506, 511 (1995).

[56] Scottish Equitable Plc. v. Derby, E.W.C.A. Civ. 369, para. 30 (2001). (Walker J.). *See also*, South Tyneside MBC v. Svenska International Plc., 1 All E.R. 545, 563 (1995). (Clarke J.).

[57] B.G.H.Z. 118, 383, 386.

come even more obvious if one takes into account one further remark of Lord Goff: "[T]he mere fact, that the defendant has spent the money … does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things."[58] As we have seen, this requirement of an "extraordinary"[59] use of the enrichment object is also recognized in German law. It is interesting to note that there seems to be a relaxation of that principle in both legal systems as far as erroneous overpayments of wages and the like are concerned. In Germany, courts have established a rebuttable presumption "that such extra sums would be promptly spent to maintain [the recipients'] families at a level which they could not otherwise afford."[60] In England, it was held in *Skyring* v. *Greenwood* in 1856 that "[i]t is of great importance to any man that he should not be led to suppose that his annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income. It therefore works a great prejudice to any man, if [he has to repay]."[61] Thus, in both countries "social considerations"[62] seem to influence the standard of proof, which is applied to the defendant.[63] The more the enrichment is linked to the earned income and, allegedly, spent on living costs correspondingly, the easier *Wegfall der Bereicherung* can be invoked.

Moreover, the problem of claims against third parties is addressed in a comparable way. If the "erasure" of the original enrichment object leads to a claim against a third party (e.g. thief, debtor) one could argue that the original recipient has received something for the loss of the benefit and no loss of enrichment took place. Yet there is always the risk that the claim is not valuable. It is therefore possible for

[58] Lipkin Gorman v. Karpnale, 2 A.C. 548, 580 (1991).

[59] VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 714 (Clarendon Press 1999); BURROWS, THE LAW OF RESTITUTION 428 (Butterworths 1993).

[60] Dawson, *Erasable Enrichment in German Law*, 61 B.U. L. REV. 286 (1981); *Cf.*, MARKESINIS ET AL., THE GERMAN LAW OF OBLIGATIONS. VOLUME 1. THE LAW OF CONTRACTS AND RESTITUTION 763 (Clarendon Press 1997). For the courts: R.G.Z. 83, 159 (161); BVerwGE (Decisions of the Federal Administrative Court) 8, 261 (270).

[61] 107 ENG. REP. 1064, 1067 (1825). *Cf.*, County Council v. Howlett, 1 All E.R. 1073 (1983). Both cases concerned 'estoppel,' but are likely to be relevant in a change of position context now.

[62] ZWEIGERT & KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 589 (T. Weir trans., Oxford University Press 3rd ed. 1998).

[63] *See also*, Philip Collins Ltd. v. Davis and Another, 3 All E.R. 808, 827 (2000). (Parker J.).

the defendant to rely on change of position, but the plaintiff can demand the assignment of the claim against the third party to him.[64]

Before we turn our attention to the second scenario in which enrichment can be erased, one difference between the English and the German system shall be pointed out. If the recipient passes on the obtained benefit by way of a gift to a third person, it is clear from the aforesaid that he has suffered a loss of enrichment by this. However, § 822 provides that in such a case the plaintiff is allowed to make a *Durchgriff* ("reach-through") to the donee and can claim back the benefit directly from him. The reason for that lies in the fact that the donee is seen as less worthy of protection, since he gained something without consideration.[65] The English law, on the contrary, does not have a similar "claim extension;" yet there might be proprietary claims available, which are more flexible than in German law.[66] In addition to that, the donor should be able to bring a restitutionary claim against the donee on the ground of a causal mistake, as was recognised in *Barclays Bank* v. *Sims*,[67] with the consequence that this claim has to be vested in the plaintiff as described above.[68]

II. Loss of Enrichment Related to the Recipient's Estate

So far, we have only dealt with change of position related to the enrichment object itself. We will now take a broader perspective with regard to the overall estate of the party being enriched.[69] What if the benefit as such is still in the hands of the defendant, but he has used other means of his assets to do certain things he would not have done, had it not been for the enrichment? He could have incurred expenses for the improvement or maintenance of the enrichment object, or he might have quit his job because of the unjust enrichment. Given the broad "but for"-test of causation both legal systems apply for the erasure of an enrichment, it should be no problem to regard these situations as a change of position.[70]

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[64] Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 172 (Birks ed., Clarendon Press 1995); VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 725 (Clarendon Press 1999); LARENZ & CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 301 (C.H. Beck 13th ed. 1994).

[65] LARENZ & CANARIS, *id.* at 195.

[66] Just compare the stringent scheme of §§ 985 and the English institutions of trusts and tracing.

[67] Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd., Q.B. 677, 695 (1980). (Goff J.).

[68] *Cf.*, Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 171 (Birks ed., Clarendon Press 1995).

[69] This term stems from Birks, OXFORD U. COMPARATIVE L. FORUM 1 at http://ouclf.iuscomp.org, after n. 1 (2000).

[70] For Germany: MARKESINIS ET AL., THE GERMAN LAW OF OBLIGATIONS. VOLUME 1. THE LAW OF CONTRACTS AND RESTITUTION 764 (Clarendon Press 1997); Lieb, *in* MÜNCHENER KOMMENTAR ZUM

Yet there are some German scholars who argue for a limitation of the deductibility of expenses to those that have been incurred by the defendant *in reliance* of the validity of the receipt.[71] This would mean that damages caused by the enrichment object have to be borne by the recipient (textbook examples include the dog destroying the carpet[72]). This makes sense, as there is no inner connection to the invalidity of the transfer as such. So far, however, German courts have declined to adopt this view. In a decision of the BGH in 1991,[73] the judges spoke vaguely of the *Entreicherungsrisiko* ("risk of loss of enrichment"), which shall determine the extent to which a change of position took place. While this is clearly a restriction compared to the simple test, whether the reduction of the defendant's estate was causally linked to the enrichment, the new formula lacks clarity and has consequently been heavily criticised by the academic literature.[74]

Finally, in German law there is one important exception to the rule that causally linked expenses can be seen as a change of position. Let us assume that a person buys something from a thief in good faith and then resells it to a third person equally bona fide. Although the thief cannot pass the title to the first recipient, it is possible that the final recipient acquires good title, if the legitimate owner authorises the latter transaction or if the first recipient has made considerable alterations to the object (e.g. a butcher making sausages out of the obtained pigs). The question now is whether the defendant first recipient can deduct the purchase price paid to the thief from the claim of the original owner.[75] It is generally accepted that he cannot, because this would undermine the law of property. If the original owner had instituted a vindicatory claim pursuant to § 985 as long as the first recipient was

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BÜRGERLICHEN GESETZBUCH. BAND 5. SCHULDRECHT. BESONDERER TEIL III §§ 705-853, § 818, para. 56 (Rebmann et al. eds., C.H.Beck 3rd ed. 1997). For England: Birks, Restitution – The Future 135; Key, *Change of Position*, 58 M.L.R. 509 (1995); Hellwege, *The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study*, RESTITUTION LAW REVIEW 114 (1999).

[71] LARENZ & CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 296, 300 (C.H. Beck 13th ed. 1994); Lieb, *id*. at para. 56 a (but see also 68). It should be noted that this approach differs from the aforementioned narrow concept discussed in English law insofar as it only affects expenses, not the object itself.

[72] Lieb, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH. BAND 5. SCHULDRECHT. BESONDERER TEIL III §§ 705-853, § 818, para. 68 (Rebmann et al. eds., C.H.Beck 3rd ed. 1997).

[73] B.G.H.Z. 116, 251.

[74] *Cf.*, Lieb, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH. BAND 5. SCHULDRECHT. BESONDERER TEIL III §§ 705-853, § 818, para. 59 a with further references (Rebmann et al. eds., C.H.Beck 3rd ed. 1997).

[75] The claim is based on § 816 I 1 or § 812 I 1 2nd alt. respectively, so called Eingriffskondiktion, because of the first recipient's encroachment into the owner's property right.

still in possession of the enrichment object, there would be no such defence; the mere fact that he passed it on is not sufficient to change his position in this regard.[76] It seems that English law would not have to address this problem in a comparable manner, since there might be more flexible proprietary solutions for the owner and the (controversial) application of the erasure defence to such claims, which is discussed next. In fact, the situation could be vice versa, the first recipient claiming back an enrichment, which the owner might have received in form of improvements.[77]

III. Applicability of the Defence to Different Types of Claims

In England, the application of change of position to different types of claims "is, perhaps, the most difficult task to be undertaken by anyone considering the defence."[78] Whilst it is accepted that change of position applies to all claims based on unjust enrichment in the narrow sense,[79] it is a matter of controversy whether restitution for wrongs and proprietary claims are also covered. To begin with, the statements of their Lordships in *Lipkin Gorman* were relatively broad, speaking of unjust enrichment claims in general, i.e. restitutionary claims.[80] The remark of Lord Goff, that "it is commonly accepted that the defence should not be open to a wrongdoer,"[81] should not be interpreted in the direction that all claims related to wrongs are outside the scope of change of position,[82] but rather in the sense that the defence is not open to defendants acting in bad faith.[83] As far as proprietary claims and especially remedies are concerned, the majority of academics tend to favour an

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[76] *Cf.*, B.G.H.Z. 55, 176, 179; LARENZ & CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 302 (C.H. Beck 13th ed. 1994); Zimmermann & du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, RESTITUTION LAW REVIEW 40 (1994).

[77] See Greenwood v. Bennett, Q.B. 195 (1973). This also raises questions of subjective devaluation, which are outside the scope of this paper.

[78] Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 175 (Birks ed., Clarendon Press 1995) (concerning proprietary claims).

[79] *See*, VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 725 (Clarendon Press 1999).

[80] 2 A.C. 548, 558 (Lord Bridge), 568 (Lord Ackner), 579 (Lord Goff, explicitly referring to tracing at 581); GOFF & JONES, THE LAW OF RESTITUTION para. 40-001 (Sweet & Maxwell 6th ed. 2002).

[81] *Id*. at 580.

[82] Yet this is what Burrows does in *The Law of Restitution*. BURROWS, THE LAW OF RESTITUTION 431 (Butterworths 1993).

[83] VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 727 (Clarendon Press 1999); Hellwege, *The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study*, RESTITUTION LAW REVIEW 99 (1999) (arguing, inter alia, with Boardman v. Phipps, 2 A.C. 46 (1967)). See further below E.

application of the defence,[84] yet one must bear in mind that it is a difficult decision, whether to emphasize the title or the security of receipt.[85]

German law indicates that it might be complicated to develop a change of position defence that applies equally to all kinds of restitutionary claims. As shown in section C.I above., the fragmented German law of restitution uses different kinds of loss of enrichment defences. Most notably in the law of property, the *vindicatio* (§ 985) is flanked by a defence[86] which allows the defendant possessor to deduct only *necessary* and *useful* expenditures *on the object itself* (§§ 994, 996); the German legislator has thereby valued a proprietary claim higher than one in "ordinary" unjust enrichment. Seen in this light the general application of the defence in England to different types of claims should be considered very carefully.

At the end of this section, one can conclude that the differences behind the basic principles of the loss of enrichment defence in German and English law are by and large marginal, since the same test of causation is operative. Normally the outcome will be the same, which becomes especially apparent in the case of overpaid wages, bearing in mind, however, that the comparison focused only on § 818 III. This clearly means that the plaintiff bears all the risks, which can diminish the enrichment received by the defendant.[87] This statement, however, is subject to the following considerations.

E. Fault and Knowledge

The question of which role should be accorded to fault in relation to change of position is of great importance. But before addressing this problem in more detail, it is necessary to clarify its greater context. Firstly, fault can be attributed to the plaintiff as well as the defendant. It is quite clear that the fault of the latter deserves greater attention in the context of a *defence*, but it might be necessary to consider the fault of the former under certain circumstances. Secondly, the fault of the defendant can be

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[84] GOFF & JONES, THE LAW OF RESTITUTION para. 40-002 (Sweet & Maxwell 6th ed. 2002); BURROWS, THE LAW OF RESTITUTION 431 (Butterworths 1993); Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 176, 178 (Birks ed., Clarendon Press 1995). *See also*, Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, A.C. 669, 716 (1996). (Lord Browne-Wilkinson).

[85] *Cf.*, VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 728 (Clarendon Press 1999).

[86] Precisely it is a counter-claim; but the effect is the same as a loss of enrichment defence. *Cf.*, in this context Greenwood v. Bennett, Q.B. 195 (1973).

[87] *Cf.*, ZWEIGERT & KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 583 (T. Weir trans., Oxford University Press 3rd ed. 1998)); GOFF & JONES, THE LAW OF RESTITUTION para. 40-006 (Sweet & Maxwell 6th ed. 2002).

related to the reason why restitution is granted, and thirdly, it can be linked with the defendant's erasure of the enrichment. Fourthly, if fault is under scrutiny, one must always discuss which degree of it is relevant to trigger certain consequences.

I. Fault Related to the Reason for Restitution

In German law, §§ 818 IV, 819 I deal with fault within the change of position defence. Broadly speaking, these norms provide for the defendant's liability under the general clauses of the German law of obligations in §§ 241-432 if he is at fault. This means that he must compensate the plaintiff for any loss in relation to the enrichment object (§§ 292 I, 990 I, 989), though he might not be to blame for it (§ 287 s. 2), and he even has to account for profits made by disposing of the enrichment object (e.g. a profitable sale, § 285).[88] The drafters of the BGB therefore did not merely exclude the loss of enrichment defence in case of the defendant's fault, but "sharpened" his liability, to use a common phrase in German law. But what does fault mean in this context? We are not referring here to any connotations of guilt and culpable states of mind; instead, we are concerned with a question of knowledge. Section 818 IV provides that after the plaintiff has started proceedings in order to be compensated for the unjust enrichment of the defendant, the latter incurs an increased liability, since he knows from this moment that he might have to give back the enrichment object. This case, however, is relatively clear-cut. Section 819 I is more problematic: It effectively bars the plaintiff from pleading change of position if he "knows of the lack of a legal cause [i.e. ground for restitution] at the time of the receipt, or if he later learns of this lack." Until recently, the predominant view among German courts and academics was that a defendant must have positive knowledge of all the *facts* giving rise to restitution and of the *legal* consequence, i.e. an obligation to make restitution.[89] This led to the questionable result that an enrichee, knowing that the enricher had laboured under a mistake, but nevertheless believed that he was entitled to the transferred benefit, could plead change of position. Consequently, this notion led to a complete twisting of the old rule *error iuris nocet*.[90] In a recent decision, however, the BGH revised its former case law and held that a defendant who has positive knowledge of all the facts, but deliberately ignores the legal consequences (*bewusstes Sichverschließen*), will get caught by § 819 I.[91]

[88] B.G.H.Z. 75, 203, 205; 83, 293, 298; LARENZ & CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 314 (C.H. Beck 13th ed. 1994).

[89] B.G.H., N.J.W. 1992, 2415, 2417; Lieb, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH. BAND 5. SCHULDRECHT. BESONDERER TEIL III §§ 705-853, § 819, para. 2 (Rebmann et al. eds., C.H.Beck 3rd ed. 1997).

[90] Equivalent to 'No one must be ignorant of the law.' *Cf.*, Jewell, *The Boundaries of Change of Position – A Comparative Study*, RESTITUTION LAW REVIEW 25 (2000).

[91] B.G.H., N.J.W. 1996, 2652, 2653.

To sum up, a mixture of actual knowledge (of the factual circumstances) and a kind of constructive knowledge (willful ignorance of the law) will exclude the application of change of position. Yet it has to be stressed that even conscious doubt on the validity of the receipt is not in itself sufficient to trigger that result.[92]

Let us turn now to England. In *Lipkin Gorman,* several remarks of their Lordships ("changed position in good faith,"[93] "innocent defendant," "bona fide change of position"[94]) made clear that fault will prevent the application of the loss of enrichment defence by the defendant. The reason for this, clearly, is an outflow of the principle that it must be "inequitable"[95] for the defendant to render restitution if he changed his position, which is not the case, when he acted *mala fide*.[96] While it goes without saying that a recipient with positive knowledge that he is not entitled to the obtained benefit, cannot plead change of position, the question of where to draw the line is still a matter of (academic) controversy. One camp displays great reluctance to grant the position whereby the honest, but careless defendant is entitled to apply the loss of enrichment defence.[97] Other commentators would like to extend the exclusion of the defence to enrichees who knew or ought to have known that their receipt was invalid.[98]

Yet the latter ones also tend to approve of a "mutual fault assessment" approach, which is applied, for example, in New Zealand[99] ("contributory negligence") and to

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[92] With the exception of § 818 IV, however. This is overlooked by Goff and Jones in *The Law of Restitution*. GOFF & JONES, THE LAW OF RESTITUTION para. 40-007 (esp. fn. 93) (Sweet & Maxwell 6th ed. 2002). *See also*, Jewell, *The Boundaries of Change of Position – A Comparative Study*, RESTITUTION LAW REVIEW 19 (2000).

[93] 2 A.C. 548, 558 (1991). (Lord Bridge)

[94] *Id*. at 579 (Lord Goff).

[95] *Id*. at 580 (Lord Goff).

[96] VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 720 (Clarendon Press 1999).

[97] GOFF & JONES, THE LAW OF RESTITUTION para. 40-007 (Sweet & Maxwell 6th ed. 2002); *See also,* Jewell, *The Boundaries of Change of Position – A Comparative Study*, RESTITUTION LAW REVIEW 43 (2000), in which Jewell wants to include recklessness in the knowledge requirement. There is some judicial support from New Zealand for this proposition: National Bank of New Zealand v. Waitaki International Processing (NI) Ltd., 2 N.Z.L.R. 211 (1999). But, see below.

[98] VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 721 (Clarendon Press 1999); Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 158 (Birks ed., Clarendon Press 1995).

[99] Thomas v. Houston Corbett and Co., N.Z.L.R. 151 (1969); Watts, *Restitution and Change of Position*, 115 L.Q.R. 199 (1999).

a certain extent in the United States[100] ("relative fault"). The first concept would mean that the defendant would be barred from using the defence of loss of enrichment *insofar* as he negligently contributed to the reason for restitution,[101] the second concept would mean that he is excluded from the defence if he is *more at fault*.[102] Both methods therefore would entail the assessment of the defendant's *and* the plaintiff's responsibility for the reasons leading to restitution. It is submitted that especially the former approach seems to be most appropriate to balancing the contrary interests of enricher (seeking restitution) and enrichee (trusting the security of receipt). The all-or-nothing method in Germany appears to be too rigid, since it nearly completely disregards the fact that every deduction from the defendant's enrichment leads to a corresponding loss of the plaintiff and should only be preserved for situations in which the recipient has a completely clean slate. It would therefore be desirable if English law followed the flexible "contributory fault" scheme as developed in New Zealand. In a recent advice of the Privy Council,[103] however, Lord Bingham and Lord Goff held that they are "most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so" describing it as an "alien concept."[104] This is regrettable as it seems that a valuable chance has been missed for the development of the change of position defence in a way that would make it comparable to the long established and well-working institution of 'contributory negligence' which we know from the law of tort.[105]

II. Fault Related to the Erasure of the Enrichment

This section is concerned with the question whether the defendant's conduct in using the enrichment object is relevant to the application of the loss of enrichment

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[100] See § 142(2) and Comments (c) and (e) in Scott, A.W. & Seavy W.A., RESTATEMENT OF THE LAW OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (American Law Institute 1937); Blue Cross and Blue Shield of Alabama v. Weitz, 913 F.2d 1544, 1549 (esp. fn. 9) (1990); ZWEIGERT & KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 591 (T. Weir trans., Oxford University Press 3rd ed. 1998); critical Dawson, *Erasable Enrichment in German Law*, 61 B.U. L. REV. 304 (1981).

[101] VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 722 (CLARENDON PRESS 1999)); Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 156 (Birks ed., Clarendon Press 1995).

[102] BURROWS, THE LAW OF RESTITUTION 429 (London: Butterworths 1993); Nolan, *id*.; Key, *Change of Position*, 58 M.L.R. 515 (1995); *See also*, the recommendation of the Law Commission for England and Wales, Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments para. 2.22 (Law Com. No. 227, London: HMSO 1994).

[103] The final Court of Appeal for a number of Commonwealth countries.

[104] Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica, 1 All E.R. (Commercial Cases) 193, para. 45 (2002).

[105] *See* the Law Reform (Contributory Negligence) Act 1945.

defence. Does it matter whether the received benefit was destroyed by accident, by the enrichee's negligence or even willful act? In Germany as well as in England the predominant view is that the defendant is not required to act reasonably, since the honest recipient can rely on the validity of the receipt and therefore he can deploy his resources as he thinks fit.[106] Yet one has mixed feelings about granting the change of position to a defendant who washes the unjustly obtained money in the washing machine or even burns it.[107] One is inclined to follow Burrows, who does indeed want to introduce an exception, even if only for such extreme situations.[108] In the context of the termination of contracts the German legislator has taken account of those situations by stating that loss of enrichment can only be pleaded if the recipient "has taken the care which he usually takes in his own affairs" (§ 346 III 1 No. 3).[109] This seems to be a good solution, since the defence is only excluded if the defendant has acted unreasonably as *measured by his own standards* (so-called *diligentia quam in suis*[110]). It should be adopted for the general change of position defence.

F. Loss of Enrichment in Anticipation of Receipt

The question whether an innocent enrichee can deduct expenses from the enrichment, which were made before the actual receipt, is debated at length in England. As a starting point, reference is often made to § 142(1) of the *American Restatement of Restitution*, which provides that the change of circumstances can be taken into account "*after* the receipt of the benefit."[111] This view has found support in two first instance decisions. In the case of *Westdeutsche Landesbank Girozentrale* v. *Islington LBC* it was held that it must be evaluated whether the defendant's position has

[106] For Germany: Lieb, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH. BAND 5. SCHULDRECHT. BESONDERER TEIL III §§ 705-853, § 818, para. 70 (Rebmann et al. eds., C.H.Beck 3rd ed. 1997); Jewell, *The Boundaries of Change of Position – A Comparative Study*, RESTITUTION LAW REVIEW 44 (2000). For England: BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 62 (Clarendon Press 1985); GOFF & JONES, THE LAW OF RESTITUTION para. 40-006 (Sweet & Maxwell 6th ed. 2002); Key, *Change of Position*, 58 M.L.R. 517 (1995); Law Commission for England and Wales, Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments para. 2.23 (Law Com. No. 227, London: HMSO 1994).

[107] This seems to be of no problem for Key.); Key, *Change of Position*, 58 M.L.R. 516 (1995).

[108] BURROWS, THE LAW OF RESTITUTION 431 (Butterworths 1993).

[109] Critical of this approach: Zimmermann, *Restitution after Termination for Breach of Contract in German Law*, RESTITUION LAW REVIEW 24 (1997).

[110] 'The same care that he exercises for his own affairs.'

[111] Emphasis added.

changed "*since* he received [the benefit]."[112] This notion is expressed more clearly in *South Tyneside MBC* v. *Svenska*, where Mr. Justice Clarke held that "save perhaps in exceptional circumstances, the defence of change of position is confined to changes which take place after receipt."[113] The judge feared that otherwise the defendant would rely upon the supposed validity of a void contract, whereas Prof. Burrows argued that the acknowledgement of "anticipatory reliance" as a valid change of position leads to the protection of a mere expectation, which is generally alien to the law.[114]

This string of arguments is highly contestable. To begin with, it seems merely arbitrary to distinguish between anticipatory and actual reliance. If the defendant has been informed that he will receive a certain amount of money and gives a different sum to charity in reliance of the receipt, can it matter whether the money was actually in the defendant's account at the time he made the donation? Maybe the transfer of the money has simply been delayed in the banking system.[115] Secondly, we must bear in mind that "anticipatory reliance" is not a cause of action, but part of a defence.[116] Therefore, it is not just an issue of the protection of an expectation, but the protection of a *fulfilled* expectation, since questions of loss of enrichment can only arise when the benefit was actually received. This leads us to a third point. One can clearly show that it is justified that the plaintiff takes the risk of the defendant's loss of enrichment before receipt. By incurring expenses prior to the actual enrichment the defendant bears the risk that his expectation of an enrichment might not be fulfilled, but not more; once the benefit has been transferred, his situation is in no way different from a defendant who changes his position after receipt.[117] Finally, given the "but for"-test of causation, one can truly come to the conclusion that it would be inequitable for the defendant to be required to make restitution if he has disbursements *causally linked* to the enrichment, but made before the actual receipt.

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[112] Westdeutsche Landesbank Girozentrale v. Islington LBC, 4 All E.R. 890, 948 (1994). (Hobhouse J.). Emphasis added.

[113] 1 All E.R. 545, 565 (1995).

[114] BURROWS, THE LAW OF RESTITUTION 424 (Butterworths 1993).

[115] Example from Key, *Change of Position*, 58 M.L.R. 514 (1995); Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 165 (Birks ed., Clarendon Press 1995).

[116] *Cf.*, VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 719 (CLARENDON PRESS 1999); Jewell, *Change of Position*, *in* LESSONS OF THE SWAPS LITIGATION 275 (Birks et al. eds., Mansfield Press 2000).

[117] Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 166 (Birks ed., Clarendon Press 1995); Jewell, *id*. at 279; Key, *Change of Position*, 58 M.L.R. 513 (1995).

These overwhelming reasons seem to have influenced the judiciary, too. The advice of the Privy Council in *Dextra Bank & Trust Co. Ltd.* v. *Bank of Jamaica* has made it clear, that "anticipatory reliance" must be regarded as a change of position.[118] Therefore, one need be no prophet to say that English law will adopt that conclusion.

In Germany, the problem of "anticipatory reliance" has attracted far less attention. One reason might be that the courts have always regarded it as a case of loss of enrichment.[119] This can be exemplified by a well-known case in which the defendant was notified by his employer that he would receive a considerable amount of money as a grant to cover medical costs. In expectation of this benefit he bought his wife an expensive muskrat fur coat. After receiving the payment, it turned out that the defendant was not entitled to the allowance. The subsequent claim in unjust enrichment was dismissed because of loss of enrichment. The *Oberverwaltungsgericht* (Higher Administrative Court) of Hamburg held, that "[i]t is sufficient, if the [incurred] loss antedates the actual receipt … as long as the loss is causally linked to the receipt."[120] In public law the parliament has expressed this more clearly than in the succinct § 818 III. Section 48 II 1 of the Federal Administrative Procedures Act speaks broadly of *Vertrauensschutz* (the protection of reliance) as the concept behind change of position.

We can therefore conclude that better reasons exist for the acknowledgement of "anticipatory reliance" as part of the loss of enrichment defence. This concept has been applied without problems for a long time in Germany and it seems as if English law will take the same course.

G. Counter-Restitution and *Saldotheorie*

In *Lipkin Gorman* Lord Goff stated, that the defence of change of position "is likely to be available on comparatively rare occasions."[121] As far as the German law is concerned, we find a high degree of compatibility with the view expressed by Lord Goff.[122] The reason for that lies in the fact that restitution is often granted in the

[118] Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica, 1 All E.R. (Commercial Cases) 193, para. 35 (2002); *See also* Thomas v. Houston Corbett and Co., N.Z.L.R. 151, 164 (1969). (North P.).

[119] R.G.Z. 137, 324, 336; B.G.H.Z. 1, 75, 81.

[120] Oberverwaltungsgericht Hamburg, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 73, 74 (1988).

[121] 2 A.C. 548, 580 (1991).

[122] If one believes Chen-Wishart, *Unjust Factors and the Restitutionary Response*, 20 O.J.L.S. 561 (2000), this might be true for England, too.

context of contracts, which involve the *mutual* exchange of performances between the parties. Contracts in this respect are called synallagmatic contracts. An example might illustrate the problem in relation to loss of enrichment: P buys a car worth £9,000 from D for £10,000 and destroys it in an accident two weeks later due to his own negligence. It subsequently turns out that the sales contract was void. Under § 812 I 1, P can now claim back the purchase price since it was paid "without legal cause," and D can demand the car accordingly. Yet the car is completely worthless and therefore P can plead loss of enrichment. At the end of the day, P receives £10,000 and D nothing. This result is referred to in Germany as the *Zweikondiktionentheorie* or the theory of the two separate enrichment claims.

Shortly after the enactment of the BGB the courts were dissatisfied with that outcome and "invented" the so-called *Saldotheorie* or net-gain theory.[123] It is based on the consideration that the defendant, relying on the security of his receipt (which is the basis of the change of position defence), must also remain aware of the fact that he only received the enrichment because he gave something in return. In other words: There are two parties trusting in the security of receipt, both are likewise worthy of protection, which effectively means that security of receipt is "neutralised"[124] as a factor. This means that each of them has to bear his own loss: *Casum sentit dominus*.[125] Consequently, the application of the change of position defence is excluded in cases of synallagmatic contracts; the risk of loss of enrichment is shifted back from the plaintiff to the defendant. Finally, the *Saldotheorie* leads to an automatic set-off of both claims in unjust enrichment expressed in monetary terms. In this light, we would apply the law in the above example in the following way: In principle, D can claim £9,000 (the value of the car) from P, who cannot plead the loss of enrichment defence, P can claim £10,000 from D; yet both claims are balanced out against each other with the consequence that P can demand £1,000 from D, the *Saldo* or net-gain.

The *Saldotheorie* has remained a matter of controversy among academics,[126] but it is still the preferred solution by judges dealing with restitution in relation to synallagmatic contracts. Yet it is clear that it can only be applied if both parties deserve

[123] R.G.Z. 54, 137, 141; B.G.H., N.J.W. 1988, 3011; Lieb, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH. BAND 5. SCHULDRECHT. BESONDERER TEIL III §§ 705-853, § 818, para. 85 (Rebmann et al. eds., C.H.Beck 3rd ed. 1997).

[124] To the point: Jewell, *The Boundaries of Change of Position – A Comparative Study*, RESTITUTION LAW REVIEW 35 (2000).

[125] Equivalent to 'The loss lies where it falls.'

[126] *See* most notably LARENZ & CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 321 (C.H. Beck 13th ed. 1994) with further references.

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the same level of protection. In cases of minors, fraud, and duress the courts have resorted to the *Zweikondiktionentheorie*, so that the innocent party is only liable to return the surviving enrichment.[127]

In England the problem of mutual restitution has been addressed from a different angle, namely as the defence of "counter-restitution impossible."[128] Originally a claim in restitution could only succeed if the plaintiff was able to give back to the defendant, what he had originally received from him (*restitutio in integrum*), since otherwise the plaintiff would have been unjustly enriched.[129] The courts were reluctant to make a valuation of the benefit received by the plaintiff, when he did not retain it in its original form and therefore denied restitution if (precise) counter-restitution was impossible.[130] This has rightly been described by Prof. Birks as "overkill,"[131] because "assuming solvency, it is always possible for the plaintiff to pay the defendant a sum of money for the value of the benefit received."[132] Whilst there are some cases that indicate that the judiciary is willing, at least in equity, to depart from the strict rule[133] and the uniform academic demand for its abolishment,[134] there is so far no authority, which clearly favours the general valuation of the counter-restitution in monetary terms.[135] If English law made such a desirable

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[127] *Cf.*, B.G.H.Z. 57, 137, 150; LARENZ & CANARIS, LEHRBUCH DES SCHULDRECHTS. ZWEITER BAND. BESONDERER TEIL. 2. HALBBAND 329 (C.H. Beck 13th ed. 1994); MARKESINIS ET AL., THE GERMAN LAW OF OBLIGATIONS. VOLUME 1. THE LAW OF CONTRACTS AND RESTITUTION 765 (Clarendon Press 1997).

[128] It seems to be controversial whether it is a defence or bar, and whether there is a separate cause of action for the defendant for counter-restitution based on total failure of consideration. But these considerations are of little relevance for the purpose of this paper.

[129] Spence v. Crawford, 3 All E.R. 271, esp. 288 (1939). (Lord Wright); Adam v. Newbigging, 13 APP. CAS. 308 (1888).

[130] This resembles the approach in relation to total failure of consideration, *cf.*, McKendrick, *Total Failure of Consideration and Counter-Restitution: Two Issues or One?*, *in* LAUNDERING AND TRACING 217(Birks ed., Clarendon Press 1995).

[131] In RESTITUTION – THE FUTURE 129 (The Federation Press 1992).

[132] BURROWS, THE LAW OF RESTITUTION 134 (Butterworths 1993).

[133] Erlanger v. New Sombrero Phosphate Co., 3 APP. CAS. 1218 (1878); O'Sullivan v. Management Agency and Music Ltd., Q.B. 428 (1985).

[134] McKendrick, *Total Failure of Consideration and Counter-Restitution: Two Issues or One?*, *in* LAUNDERING AND TRACING 233 (Birks ed., Clarendon Press 1995); VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 691 (Clarendon Press 1999); Birks, RESTITUTION – THE FUTURE 129 (The Federation Press 1992); BURROWS, THE LAW OF RESTITUTION 134 (Butterworths 1993).

[135] On the contrary, see Smith New Court Securities Ltd. v. Scrimgeour Vickers, 1 W.L.R. 1271, esp. 1280 (1994). (Nourse L.J.).

step, there would hardly be a difference to the German *Saldotheorie*, at least with respect to the outcome. Turning back to our example, P would be able to claim £10,000, but would be obliged to return the value of the car (£9,000). Surely, D would opt for a set-off, which would leave P with £1,000.

Correctly, Nolan has asked whether or not the question of counter-restitution is merely a specific instance of loss of enrichment[136] (and indeed Prof. Birks subsumed it under that heading[137]), since the same results might be achieved more coherently, if one simply allows the defendant to deduct from his enrichment the value of what he has given to the plaintiff before.[138]

While the development in English law is still at an early stage, some critical remarks on the German *Saldotheorie* seem appropriate. This theory is in fact nothing more than a rough "rule of thumb." It does not sufficiently take into account the degree of fault attributable to plaintiff and defendant, it is inconsistent with the rules on the termination of contracts (§ 346 III 1 No. 3), fails to address the problem of random loss of enrichment adequately and ignores the difficulties in cases of advance performance. An approach similar to the one developed in Section E. above, namely a concept of "mutual fault assessment" as a basis for allocating the risks, seems more appropriate to the author. English law should therefore carefully consider not to adopt the German solution, even if it is just in the outcome.

H. Conclusion

The examination of the application of the change of position defence in Germany and England reveals considerable concordances between both legal orders. Most notably in the context of causation, anticipatory reliance and to some extent fault, there is hardly a difference, either in the concept, or in the outcome. It is apparently no coincidence since German enrichment law has been discussed in several English articles, which have even influenced the leading work on restitution, Goff and Jones,[139] let alone the fact that on reading the works of some English academics the reader who is familiar with German enrichment law will detect some interesting parallels. Yet it has to be noted that the tendency among English scholars to develop a loss of enrichment defence encompassing all restitutionary claims does not

[136] Nolan, *Change of Position*, *in* LAUNDERING AND TRACING 187 (Birks ed., Clarendon Press 1995).

[137] Birks, RESTITUTION – THE FUTURE 128 (The Federation Press 1992).

[138] This solution has never gained significant acceptance in Germany, since it would undermine the basic rule of restitution in kind; anyway, the Saldotheorie has clearly overridden such a straightforward approach.

[139] See the references to the German approach at para. 40-005.

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fit into that pattern, since German law has made use of different change of position defences for good reasons.

As has been pointed out on several occasions in the text, the German solution to change of position is not free of flaws. The sacrosanct principle whereby a *bona fide* defendant must under no circumstances be required to return more than the surviving enrichment has been "enforced with an unrelieved rigor and disregard of consequences that would be hard to find elsewhere in modern German law."[140] It is the author's firm belief that a flexible approach would be more appropriate, balancing the responsibilities of defendant and plaintiff in a more equitable way. This should be done by adopting a "mutual fault assessment."

English law, therefore, should not follow the current German law in this regard, but rather develop its own way, hopefully based on a relative fault approach combined with the unrestricted valuation of claims and counter-claims. Since the defence of change of position is still in its youth in England, such a hope does not seem to be illusory.

[140] Dawson, *Erasable Enrichment in German Law*, 61 B.U. L. REV. 272 (1981).

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