Absence of Juristic Reason, Unjust Factors and the Nature of Intention

Duncan Sheehan

Canadian common law organises its law of unjust enrichment in terms of absence of juristic reason after *Garland v Consumer Gas*. The paper asks what this tells us about the underpinning rationale of Canadian (or Civilian) unjust enrichment law versus that of the unjust factors approach in what I will call two-party condicito claims where a transfer is made between A and B and A’s putative purpose fails. McInnes has argued for a limited reconciliation between the two approaches, suggesting both systems are concerned with party autonomy and that Canadian law can still use the older jurisprudence.

In an absence of basis approach there can be only one putative basis in play; this is why the condicitiones are mutually exclusive – in Scots or South African law where the condicito indebiti (payment to discharge a non-existent debt) applies the condicito causa data causa non secuta (payment on the basis of non-forthcoming counter-performance) cannot. Edelman argued that mistake and failure of consideration cannot lie concurrently in English law either because in a failure of consideration claim the defendant’s autonomy is also implicated. Unjust factors approaches do tend to allow this, however, as the English swaps cases indicate.

To understand this, the paper examines how collective intention can be conceptualised. The first view is that collective intentions are merely interlocking personal intentions. The second is that when “we intend” something there is a plural subject separate from either of us and that “we” can intend something even if neither of us intend it individually. The paper suggests that the differing positions as to concurrency are based on differing views of collective intentions.

The *Garland* test is a two stage test. First the plaintiff must show that no juristic reason from an established category – contract, gift, statutory obligation - exists to deny recovery. Secondly, that prima facie case is rebuttable where the defendant shows there is another reason to deny recovery, bearing in mind eg the parties’ reasonable expectations. A case where the claimant is mistaken as to whether he owes the money will therefore typically be dealt with at the first stage, but in *Bond v Esquimalt* Huddart JA argues that the effects of a failed contract (usually a failure of consideration claim in England) are best dealt with at the second stage of analysis. The paper asks to what extent Canadian law has grappled with how it views collective intention and how that fits with its more Civilian-esque absence of juristic reason structure. If Canadian common law is to effectively use previous authority and make good on the limited reconciliation urged by McInnes, it will need to engage with this question, and also engage in comparative dialogue both with other common law and Civilian jurisdictions.