Cases and Materials on Restitution

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Part III Restitutionary Remedies

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Cases and Materials on Restitution

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PART I

Introduction

In historical terms, the practice of organizing legal rules into collections which we look upon as "subjects" of the substantive law is a relatively recent phenomenon. The rise and fall of the medieval writ system and the reformulation of the law pronounced by the courts of common law and equity into their modern form is properly the subject of a course in the history of English legal doctrine. It is sufficient for our purposes to note simply that this evolutionary process did not proceed at the same pace in all areas of the law. Although it was easily seen that the rules relating to the enforcement of undertakings could be usefully brought together and described in one place, recognition of the unity of what we now view as tort law was a more difficult matter. In 1871, O.W. Holmes Jr., greeted a new addition of Addison on Torts with this remark: "We are inclined to think that torts is not a proper subject for a law book" (Goff and Jones, p. 59, n. 6). In 1931, Winfield offered a general definition of the nature of tortious liability which has been widely adopted. Interestingly, however, his approach was rejected by one contemporary reviewer in the following manner:

"The truth is that there cannot be a tort until there is a wrong for which a remedy by trespass, case or detinue would have been given (i.e., at common law prior to 1852). The criterion is empirical, not a priori. But it enables one to give a perfect definition per genus et differentiam: A tort is a civil wrong (that is the genus) which is differentiated from other civil wrongs (that is only one other: breach of contract) by reference to the remedies which the common law created."

P.A. Landon (1931), The Bell Yard, Nov., p. 32).

It is, of course, now generally recognized that the various sub-branches of the law of tort have more in common than their historical origins in certain forms of action (See C.A. Wright, The Province and Function of the Law of Torts in Linden (ed.) Studies in Canadian Tort Law, p. 1). The law of restitution has not yet achieved recognition of this kind. Many lawyers and jurists would argue that the disparate strands of law and equity which have been woven together by the advocates of restitutary law are simply not sufficiently inter-related to warrant treatment between the covers of one book. Indeed, even those who agree that it is sound to recognize and develop a "subject" of this kind have not been able to reach agreement as to the boundaries of the subject or as to its most appropriate name. Accordingly,