NEW SQUARE Chambers

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# ARTICLE: CARERS' CLAIMS AND UNJUST ENRICHMENT

James Saunders

1. **The premise:** an individual provides care to another during their lifetime (typically a relative). The relative dies and does not leave an inheritance for the "carer" or leaves an "insufficient" inheritance. The carer later makes a demand of their estate for payment for the care provided.

2. This article will consider whether the care provider in the premises above might have any recourse.

## *Rawlins v Rawlins* 2023 BCSC 466 – The Canadian Approach

3. In March 2023 after an 11-day trial the Supreme Court of British Columbia gave judgment in *Rawlins* in favour of the plaintiff Roy Douglas Rawlins (referred to as Doug). Doug was a son of the deceased (his mother) and claimed against her estate. The estate was worth $2.5m and was left equally to Doug and his two brothers.

4. Doug's claim was advanced under the Wills, Estates and Succession Act 2009 ("WESA") and in unjust enrichment. Doug's claim had three limbs: (i) his role in contributing to and maintaining the deceased's home, (ii) his role in looking after both of his elderly parents in their final years, and (iii) his expectation of receiving the home and certain investments upon the passing of his parents, based on statements that his parents allegedly made to him, and to others in his presence.

5. The central facts for present purposes were:

   (i) Doug had provided care from 2012. Doug spent a considerable amount of his time caring for and looking after the daily needs of his parents, advocating for them, and managing their ongoing medical care.

   (ii) After being laid off work in 2014 Doug chose to stay home to look after his elderly parents on a full-time basis.

   (iii) Doug's father offered to pay him $25,000 per year for the care for himself and his wife but Doug responded that he did not want the money.

(iv) In 2017 after his father's death, Doug's mother broke her hip. The wishes of the Defendant sons prevailed over Doug's and she was transferred to a long term-care facility in 2018.

6. As to the care provided the court found:

(i) Doug was the principal caregiver for both of his parents in their final years.
(ii) With respect to the Deceased, from 2012 onward, she had serious mobility issues and required daily personal care from that point forward. Doug played that role.
(iii) From 2014 Doug was his mother's principal care provider. He continued in that role until Marguerite went into the hospital for the last time on 16 November 2017.

## The Bases of Claim in Canada

7. Doug relied upon S.60 of WESA which provides that if a will "does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children", the court may make an order "that it thinks adequate, just and equitable in the circumstances" for provision of the spouse or children "out of the will-maker's estate".

8. The parallels with the Inheritance (Provision for Family and Dependents) Act 1975 in England and Wales are obvious but not total.

9. Further Doug relied upon unjust enrichment which, in Canada, is structured as follows:

(i) an enrichment of one party,
(ii) a corresponding deprivation of the other party, and
(iii) an absence of juristic reason for the transfer of wealth between the one and the other.

10. The first two limbs are largely analogous to the English approach considered below. As to the third limb the approach is:

> *"The initial burden is on the moving party to establish an absence of any "juristic reason" within any of the traditionally recognized "categories" of contractual, common law, or statutory duties that could explain the transfer of wealth. If that burden is met, then a "de facto burden" rests on the opposing party to show that there is some objectively justifiable reason for the transfer of wealth between the parties, having regard to such matters as the reasonable expectations of the parties, and public policy considerations."*



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## The Result

11. As to unjust enrichment, being the focus of this article, the Court held for each limb:

    (i) The Deceased's estate received a material benefit from the personal care services. The services Doug provided were of financial value to the Deceased's estate. If Doug had not been available to provide personal care services for his parents, they would have been paid for privately out of what ultimately became estate funds. Doug's father had also offered to pay him $25,000 to look after them. Doug declined but this evidenced the value of the services rendered. Actual market cost would have been considerably more.

    (ii) The personal care services that Doug rendered to his parents in their final years involved a deprivation to Doug. Although Doug testified that he did not need to be paid anything to care for his parents, and that he was prepared to do so because he loved them, this did not preclude a finding that his provision of such services represented a deprivation. The services Doug provided clearly had economic value, and he received no remuneration for them.

    (iii) There was no juristic reason for Doug's enrichment of the Deceased's estate. Doug had no contractual, common law, or statutory duty to provide personal care services for his elderly parents. Although he testified that he was happy to do so without pay, Doug's provision of care services was not a "gift". Doug had a subjective expectation that his efforts would eventually be recognized by way of an enhanced inheritance.

12. Doug therefore received a personal monetary award of $40,000 for the period from September of 2012 to September 2014 plus $25,000 per year for the period from September of 2014 through to November 2017. There was no particular evidence of market rates and the court was largely led by Doug's fathers' offer of $25,000 per annum.

## *Re McBride* 2010 BCSC 443

13. *Rawlins* was distinguished from the 2010 BC decision of McBride where a daughter's claim was rejected because the claimant:

    *"elected to remain in the McBride Home based on her own personal preference, unrelated to her mother's emotional or physical needs. Until Mrs. McBride entered her advanced years, any limitations on Margot's activities and choices were self-imposed.*



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*Margot made no sacrifice in her living arrangements or lifestyle to accommodate her mother; she simply never moved out. That was the way that she wanted it to be.*

*Mrs. McBride made no promises to Margot in terms of providing her with a financial benefit or the right to live in the McBride Home. Margot had no expectation to receive compensation or financial benefit of any description from her mother in respect of the things she did for her and the care and companionship she provided to her over the years. As she candidly admitted, she acted out of love."*

## ENGLAND AND WALES

14. Would a claim of this sort be available in England and Wales and why might unjust enrichment be needed?

15. Familial relationships of the sort in contemplation here are unlikely to generate the degree of certainty of terms and the intention to create legal relations needed for a contractual claim by the carer against their relative and latterly their estate.

16. A claim under the 1975 Act might be available but whilst the provision of care may be considered as part of the historic "conduct" and the "moral obligations" owed by the testator to the claimant (as was similarly considered in Rawlins) the jurisdiction will typically be bounded by limit of maintenance need.

17. Proprietary estoppel may be a natural candidate but will not assist a claimant where there was a shared expectation of an increased inheritance or some monetary recompense but no specific promises or assurances in respect of particular property.

18. This leaves unjust enrichment. The "test" in England differs from Canada and asks the following:

    (1) Has the defendant been enriched?
    (2) Was the enrichment at the claimant's expense?
    (3) Was the enrichment unjust?
    (4) Are there any defences available to the defendant?

19. Limbs 1 and 2 are analogous. As to limb 3, Canada adopts the "absence of basis" approach to unjust enrichment and requires a claimant to show that there was no contract, gift or similarly justificatory basis for the transfer. Doug was able to achieve this by simply proving he did not internally and subjectively intend a gift.



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20. Contrastingly English law has adopted “unjust factors” and an approach which presumes security of receipt and a general entitlement to keep what is received unless a prospective claimant can demonstrate a basis for recovery. Contracts and gifts where they are found will provide a justifying ground for the receipt and generally prevent the enrichment being considered “unjust” or an unjust factor being established.

## ***Mate v Mate*** **[2023] EWHC 238 (Ch) and Unjust Factors**

21. The utility of unjust enrichment where services have been provided and proprietary estoppel fails was highlighted in *Mate v Mate* discussed here for its treatment of “free acceptance” as an unjust factor. The three likely candidates for unjust factors in care cases in England are (i) free acceptance, (ii) failure of consideration and (iii) mistake.

22. Carers are unlikely to be mistaken about a present fact, namely their entitlement to remuneration or an enhanced inheritance. Both are more likely to be mispredictions about the future which cannot found a claim.[1]

23. As to free acceptance the premise is that where A provides services to B and it ought reasonably to be understood that some pay or compensation was anticipated, B should either reject the services or be bound to pay (at least something) for them.

24. *Mate* highlights that in order for the free acceptance by the defendant of the claimant's services to be unjust:

> *“53.1 "it will be necessary for the defendant to be given sufficient notice of the impending benefit to enable a free choice to be made to refuse it": Goff & Jones: The Law of Unjust Enrichment, 9th ed., at §17-09;*
>
> *53.2 "[t]he defendant must know, or ought to have known, that the claimant expected to be paid for his services": op. cit., at §17-11; and*
>
> *53.3 "[w]here a defendant has had no option about whether to accept the benefit the principle of free acceptance does not apply. In other words, there must have been an opportunity to reject the benefit": op. cit. at §17-13.”*

[1] Goff and Jones: The Law of Unjust Enrichment 10th Ed. At 9-07



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newsquarechambers.co.uk

25. Looking back to *Rawlins* all would be satisfied provided the expectation of an increased inheritance was suitably shared or objectively ought to have been known to Doug's mother. There seems no reason in principle why a like claim could not arise on the English approach on the rights facts.

## *Barton v Gwyn Jones* [2023] UKSC 3 – Free Acceptance or Failure of Basis?

26. The central note of caution for free acceptance arises from Lord Burrow's recent obiter comments in dissent in *Barton*. Lord Burrows there said:

> *"230. In my view, free acceptance is not an unjust factor in English law. It appears that past authorities supposedly embracing free acceptance as an unjust factor are better explained as examples of different unjust factors, in particular failure of consideration."*
>
> *"free acceptance is flawed as an unjust factor because it entails giving restitution to a risk-taker."*

27. The supposed benefit of failure of consideration is that it requires the claimant's condition for conferring the benefit to be shared by the defendant. Conversely, it is said, for free acceptance, it suffices that the defendant is merely aware that the claimant expects to receive a quid pro quo for the benefit.[2]

28. In the author's view the supposed differences may not be quite so stark. Where the recipient knows the benefit is to be paid for the positions are very similar. Where they ought to know the benefit was not gratuitous the law imputes that knowledge as if it were actually held.

29. It may be true that the value exchange/condition for services being conferred has not been clearly and expressly agreed but arguments are then best left to valuation once it is found that something was to be paid or given; the recipient may argue how much should be paid, but not that nothing should be.

## Valuing Quantum

30. The basic principle is that a claim for unjust enrichment is not a claim for compensation for loss, but for recovery of a benefit unjustly gained by a defendant at the expense of the claimant: *Benedetti v Sawiris* [2013] UKSC 50. The enrichment is valued at the time of receipt.

31. It is central that in our case the claimant does not obtain their promised enhanced inheritance because unjust enrichment is not a claim to enforce a promise. Instead, they may be safeguarded from having

[2] Citing William Day and Graham Virgo "Risks on the Contract/Unjust Enrichment Borderline" (2020) 136 LQR 349



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newsquarechambers.co.uk

provided services for nothing under a shared, but ultimately unfulfilled, understanding by recovering the value received by the Defendant.

32. The starting point in valuing the enrichment is the objective market value and the test is "the price which a reasonable person in the defendant's position would have had to pay for the services" (*ibid*).

33. A court must ignore a defendant's "generous or parsimonious personality" but can take into account "conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual) position" as the defendant.

## Conclusion

34. Time may tell as to whether unjust enrichment claims by carers for services rendered emerge in England and Wales, but in the author's view, drawing on Canadian case law, there is a path for such claims to be pursued.

Nothing in this article constitutes legal advice and is academic discussion alone.


## JAMES SAUNDERS

James.Saunders@NewSquareChambers.co.uk

newsquarechambers.co.uk/barristers/james-saunders/

linkedin.com/in/james-saunders-99693318a/