Debt, Damages and Unjust Enrichment

- **David Bennett Q.C.**

Researching work I have been doing on the action for debt for the topic "Debt, Damages and Unjust Enrichment" brought home the continuing association between claims for work and labour done and goods supplied and the historical development of claims for debt, damages and restitution based on unjust enrichment.

The issues of how to recover payment for work and labour done and goods supplied which building dispute practitioners act on today were also the issues for our professional ancestors at the time of the murder of Thomas A'Beckett in Canterbury Cathedral in 1178.

Perhaps it is extraordinary, perhaps it is not, that the form of action for debt devised and used then should, nearly a millennium later, control the outcome of a vital decision for building dispute practitioners; the 1987 decision of the High Court of Australia, Pavey *& Matthews Pty Ltd v Paul* (1987) 162 CLR 221. The decision, critical to the recovery of remuneration for building work done under an unenforceable contract, turned on the basis of the medieval action commenced by the Royal Writ of Debt. In commencing his judgment in *Pavey* Dawson J remarked on this:

> *"It is curious that in the interpretation of a modern statute it should be necessary to unearth the forms of action which find their original in medieval jurisprudence and which might be thought to have been long since buried."*

Commemoration

By way of commemoration of our professional ancestors it is appropriate to recall something of their ingenuity and persistence in playing this part in the development of the law we know today. In doing so research has been drawn from a number of sources. The judicial sources are principally the judgments in:

- *Pavey and Matthews Pty Ltd v Paul* (supra), the NSW Court of Appeal judgment of McHugh JA in that case in [1985] 3 NSWLR 114 at 119 and following;
- the judgment of Priestley J in *Schwarstein v Watson* [1985] 3 NSWLR 134 at 143 and following; and
- the judgment of McPherson J in *Gino D'Alessandro Constructions Pty Ltd v Powis* (1987) 2 Qd.R. 40.

Texts upon which research has been drawn include:

- WS Holdsworth, "A History of English Law", 5th ed. (1942), particularly Vol. 111, 417 and following;
- Pollack and Maitland, "History of English Law" (1968) 2nd Vol. 11, 205;
- Fifoot, "History and Sources of the Common Law" 251, 225-6 etc;
- Professor JB Ames, "Parol Contracts Prior to Assumpsit", 8 Harvard Law Review 252;
- Cheshire and Fifoot "The Law of Contract" 2nd Australian Edition (1969) 87 and following;
- AK Kiralfy "The Action on the Case" (1951).

Having identified these sources, perhaps, it is best to interrupt the account by as few references as possible, with a qualification. The subject includes much which is the subject of differing views and accounts, no doubt the result of imperfect records. As well, there are many details and exceptions. Although frequently they are intriguing, they must be ignored.

Rights and Wrongs

In the late 1100's, when the King's Court was developing its judicial divisions, the classification of writs issued on behalf of the King to bring defendants before his Court for the determination of a private dispute, was based on the simple distinction between rights and wrongs. That is, between the assertion by plaintiffs of their rights, and complaints by plaintiffs about a wrong having been done to them: Baker, "Introduction to English Legal History", 2nd ed. (1979) 54. A right was continuous and ongoing and should be restored. A wrong was something that had happened in the past. It could not be undone but amends must be made.

Royal Praecipe Writ

At that time, plaintiffs wishing to assert a right could, for a fee, call upon the King to issue a praecipe writ. What was a Royal Writ? It was a command by the King under Royal Seal. In the case of a praecipe writ, enforced by the power of the sheriff, it called upon defendants to come before the court either to restore to plaintiffs that which was rightfully theirs or to explain why not.

Writ of Debt

The praecipe writ of debt was used where:

- the plaintiff claimed an entitlement to a precise or certain amount of money;
- the claim was based on some completed act performed for the benefit of the defendant; and
- the benefit was accepted by the defendant. (This usually was proved by proving the defendant's request for the act to be done.)

The Writ of Debt was not based on an agreement or contract. It was based on the duty of defendants not to withhold from plaintiffs what was rightfully theirs. The plaintiff's claim was treated as being for the recovery of property. That is, the money detained by the defendant after having received the benefit was treated as the equivalent of the property of the plaintiff. Consistently, the terms of a writ for debt were virtually the same as the terms of a writ for the return of a chattel. This is consistent with the need for the amount of the debt to be certain. The debt had to be as fixed and identifiable as a chattel.

It is because the money due was seen to be property, that the action for debt was treated as a "real action" a claim for a thing (or res).

The formula of the writ of debt in the late 1100's was in these terms:

> *"The King to the sheriff greeting. Order N. that justly and without delay he render to R. 100 marks which he owes him, so he says, and which he complains he is unjustly withholding from him. And unless he will do this etc."* (See Selden Society, Vol. 77 and Royal Writs in England from the Conquest to Glanvil, Ed, RC Van Caenegem (1959) at 437.)

The same form of writ was used for centuries. In 1817 the form of praecipe writ in use was still in similar terms:

> *"Command C.D. ... that justly and without delay, he render unto A.B. the sum of £... which he owes to and unjustly detains from him as it is said and unless, etc."* (Chitty "Treatise on Pleading" (1917).)

As was pointed out by Priestley JA in *Schwarstein v Watson* (supra) at 144, the form of the writ itself shows the separation between the origin of the debt and the fact of the debt itself. The writ says nothing about how the debt arose. It was the withholding of the debt which gave rise to the occasion for the King to call upon the defendant to render up the money or explain.

What was in this for the King?

If the theme of this article is to link the past with the present, it is worth knowing that the filing fees of which clients complain today have a strong bloodline. The King exacted a heavy fee as the price of the issue of a Royal Writ. Pollack and Maitland (supra) record that, in the early years of his reign, before a writ for debt would be issued, Henry II exacted a promise from plaintiffs that the King would receive a quarter to one third of all the money that was recovered pursuant to the writ. Eventually, this made the issue of writs of various kinds an important source of revenue for the King.

There was a political aspect to it, as well. There were various local courts where parties could go to recover debts. But the King soon realised that, by keeping control of administration of justice between subject and subject, he could centralise power. Centralisation of power, as we all know, is very attractive to those at the centre.

Further, the Chancellor was beginning to exercise his powers to determine disputes. This was rivalry from a new source.

These factors eventually produced a competitive drop in the cost of having the King issue a writ.

Quid Pro Quo

It is essential to remember a vital characteristic of the writ of debt. The duty upon defendants not to withhold payment was created by defendants having received and accepted a benefit. In 1338 the phrase *"quid pro quo"* was used in a judgment to refer to this correspondence between the benefit conferred and the duty. In the word of Sharsulle J:

> *"... here you have this service for his allowance, of which knowledge may be had and you have quid pro quo."* (Anon. (1338), YB 11 and 12 Ed 111 586.)

In 1458 Moyle J warmed the hearts of the local Building Dispute Practitioners Society by saying, during the course of argument:

> *"Suppose I retain a carpenter to make me a house and he is to have 40 shillings for the making. Now if the carpenter makes the house he shall have a good action for debt against me ... When he makes the house the action accrues to him to demand the sum due."* ((1458) Anon YB 37 HEN VI Mich f.8, pl. 18.)

Limitations of Writ of Debt

There were technical limitations upon the usefulness of the writ of debt.

Wager of Law

The principal limitation was that the defendant could avoid a determination on the merits of the claim by resorting to wager of law. A successful wager of law was a complete answer to an action for debt.

Defendants waging their law would, in a rigidly set form of words, deny the charge and then produce a number of oath-helpers, call compurgators, to back the defendant's denial by their own oath that the debt was not owing. The required number of oath-helpers varied according to the circumstances. If the defendant did not produce the right number of oath-helpers or if the defendant or any of the oath-helpers departed from the rigid form of word necessary, it would be said "the oath bursts" and the defence by wager of law would fail.

Wager of law was brought to Europe by the barbarian tribes which overran the Roman Empire. It became common from Southern Italy to Scotland.

Of course, the control on its abuse was respect for the

oath and the penalties for perjury. But the Church became concerned about the temptation to perjury presented by wager of law. Pope Innocent III, to take the edge off the temptation to commit perjury, secured the use of a form of oath for oath-helpers which is of a kind that we know very well in affidavits today. After the defendant swore a denial, the oath-helpers had only to swear as to their belief in the truth of the assertion by the defendant. They did not have to swear positively as to the facts.

By 1342 it had become settled that 12 oath-helpers were necessary in most cases. In 1344 there is a case reported about how a dumb man could wage his law: YB 18, 19 Ed III (R.S.) 290. There were special provisions as to how a husband and wife waged their law to defend a claim based on a debt incurred by the wife before the marriage for which, otherwise, her subsequently acquired husband would be responsible. The husband's hand was placed underneath the Bible and at the same time the wife's hand covered the top but according to the circumstances there were variations within this rule. In 1166, by the Assize of Clarendon, it was decreed that a dubious character who successfully defended a criminal charge by wager of law must, nevertheless, depart England within eight days.

As part of the commemoration, lawyer practitioners might smile with pride to know that a claim in debt brought for services rendered by a person under a legal obligation to render them, such as an attorney suing for fees, could not be defeated by defendants waging their law.

There were special provisions for strangers. If a Lombard money lender travelling in England did not know enough people to gather together enough oath-helpers, he could on that ground, achieve the same effect by swearing of the oath himself in the six churches nearest the guild hall.

The right to defend by wager of law was not extinguished in England until the *Civil Procedure Act* 1833. It was abolished in New South Wales in 1846. There is a report in *King v Williams* (1824) 107 ER 483 of a defendant making an interlocutory application to the Court for a ruling on the number of oath-helpers he should produce at the trial to defend the plaintiff's claim. The Court, no doubt embarrassed that this defence was still available, refused the defendant any help. It said he must take his chances at the trial as to the number he should produce. The defendant indicated that, at the trial, that he would produce 11. Upon this, according to the report, the plaintiff withdrew the claim.

For further information on wager of law: see WS Holdsworth, "History of English Law" (5th ed.) Vol. 1, pages 305-308.

Other Limitations of Writ of Debt

The existence of the right to wager of law had a further consequence. The writ of debt could not run against the executor of a deceased estate if the deceased could have waged his law if still alive. It was seen, apparently, to be unfair to the estate that it should be deprived of the defence.

Further, no doubt because the cause of action for debt only arose upon completed performance of the requested act, the action for debt was limited in its use to recover instalments or rent. The fact that the amount of the debt must be certain, and therefore be determined in advance before the performance of the necessary acts by the plaintiff, was a limitation in itself.

There were other procedural limitations, including the fact that claims upon the writ of debt were heard only in the Court of Common Pleas.

The Need for Ingenuity

By reason of these limitations the practitioners of the 14th and 15th centuries began to look over their shoulders at other jurisdictions and other forms of action which might produce a more satisfactory result for their clients.

The Chancellor

Already, in the early development of the equity jurisdiction, the Chancellor was beginning to receive petitions on what were essentially matters of contract. He was ecclesiastic, familiar with canon law and, as Cheshire and Fifoot point out, "m*indful of the secular interests of the realm*". The Chancellor began to provide remedies foreign to the common law which mitigated its rigidity and filled the gaps left by existing remedies.

Writ of Trespass

At the same time the writ of trespass, with its right to trial by jury, was attractive. Anything which avoided wager of law was an improvement. Could practitioners get away from the praecipe writs which enforced a right to use a second family of writs, trespass writs, which were concerned with obtaining amends for a wrong?

The question was: How could a cause of action which was essentially a tort be shaped to achieve recovery of a debt?

Baker, "Introduction to English Legal History", 2nd Ed. (1979) at 56 describes the difference. Under the praecipe writ the defendant was ordered to do right or else explain himself. Under the trespass writ the defendant was required to come to the King's Court to explain why he had done wrong and make amends for it.

Originally, the writ for trespass was concerned with breaches of the King's peace. It was used, between subject and subject to recover damages for direct trespasses by force and in breach of the peace. But, apart from these actions for trespass (known as common or general trespass) the writ of trespass covered injury of almost any kind, depending upon the facts of the particular case. The action for deceit was an important such case. These actions for trespass in particular circumstances or cases, other than the common forms involving direct injury, became known as "trespass on the case". Recovery of amends, or damages, was the essence of all actions for trespass. See generally as to this: AK Kiralfy "The Action on the Case" (1951).

Damages for Defective Work

Arising out of this, lawyers began to treat the breach of an assumpsit or undertaking as the basis for an action for trespass on the case. It was established that liability in tort

arose when persons had caused damage to others by the manner in which they fulfilled a duty which they had undertaken (assumpsit) to perform. It was necessary for the plaintiff to show reliance and change of position on the faith of the undertaking. The earliest such case of which the author has found a record concerning building work was in 1373, a case which concerned a negligent builder. See CP Roll, M.47, Ed. III m.6.

This use of assumpsit was a critical development towards recovery of damages for breaches of contract despite the fact that, at that stage, the cause of action was in tort.

For practical purposes, it meant that by issuing a writ for trespass on the case, disputes as to debts could be tried by a jury and defeat by wager of law was not a risk. The judgment of the Court was based on assessing the damage that had been done to the plaintiff by the broken undertaking.

In 1436 a lawyer named Newton described the position in the following way in the course of his argument to the Court:

> *"If a carpenter makes a covenant with me to make a house good and strong and of a certain form, and he makes me a house which is weak and bad and of another form, I shall have an action of trespass on my case."* (Anon (1436), YB 14 Hy. IV, p.18.)

Damages Caused by Failing to Act

But practitioners still had their problems. The Courts accepted a right to damages arising from undertaking to do something, but doing it badly. The judges were divided about moving from misfeasance of this kind to non-feasance - damage from doing nothing at all.

Some judges were prepared to hold that mere non-feasances in breach of an undertaking gave a good cause of action in trespass or deceit on the case.

In 1424, in the Court of Common Pleas, Babington CJ would have pleased building dispute practitioners by holding:

> *"If he covenant to cover a house and do not and it is spoiled by rain, I shall have trespass on the case against the covenantor since I am damaged by the non-feasance."* (YB *Hen. VII* pl. 33 f.36.)

Holdsworth, "History of English Law", Vol. III, 434, records a dispute between judges in 1436 about a proposition put by Paston J that there is no action upon the case against a carpenter who takes it upon himself to build a house but does not do so. Two judges in the case, however, considered that such an action would be open.

Despite this, in the case in 1503, a disappointed building practitioner heard the Court declare:

> *"Where a carpenter makes a bargain to make a house and does nothing, no action on the case lies, for it sounds in covenant. But if he makes the house improperly the action on the case well lies."* (Nota, Keilway, 50.)

Finally, accepting that the distinction was impractical and holding jurisdiction back, the judges admitted liability for non-feasance, that is damage suffered by the other party not taking promised action.

In 1505, in the Court of Common Pleas, Chief Justice Frowyk gave a judgment which would have caused much discussion for building dispute practitioners of the day. He held that a covenant with a carpenter that for £20 he would build a house by a certain day would give a good action if the money was paid but the house was not built and as well a good action if the carpenter built it and misbuilt it: Anon (1505), YB 20 Hy. V 2, Mich. No. 18.

In the following year, building practitioners had a breakthrough in the Court of Kings Bench. There, Chief Justice Fineux held:

> *"If one makes a covenant to build me a house by a certain day, and he does nothing about it I shall have an action [on the case] on this nonfeasance as much as if he had been guilty of a misfeasance for I am damaged by this."* (Nota, YB 21 Hy VII f.41, pl. 66.)

Note that covenant was used by the Chief Justice in the sense simply of "agreement" not a covenant under seal.

Thus, by this action known as assumpsit, there was available a general action for damages whenever the defendant had given an undertaking but had either failed to fulfil it at all or had fulfilled it improperly.

Indebitatus Assumpsit

About the middle of the 16th century, the courts began to allow assumpsit to be brought for debt. At first, to establish the element of undertaking, it was necessary to prove that the defendant had made an express promise to pay the debt after the debt had been incurred. It was the breach of such a subsequent promise or undertaking which gave rise to the cause of action. This requirement that there be an express subsequent promise plainly limited the availability of the cause of action but it was an advance nonetheless.

The Court of King's Bench

Tasting the possibilities for future development of its jurisdiction, which did not include actions for debt begun by original writ, the Court of Kings Bench began to depart from the requirement that the subsequent promise to pay the debt be made expressly. It began to treat the existence of the debt as a sufficient basis for the court to imply an undertaking on the part of the defendant to pay it.

In 1573 in *Edwards v Burre* (Dalison 104 pl. 45) it was held that it was the custom of the Kings Bench to treat the debt as "an assumption in law" in contrast to the opposite custom in the Court of Common Pleas.

This form of action came to be known as indebitatus assumpsit. At a stroke it made the action based on trespass on the case co-terminous with the writ of debt but it avoided the grave disadvantages that the writ of debt suffered.

The stage was set, however, for a show down. There were forces against this athletic newcomer.

Newly-vulnerable defendants saw things as moving too fast. They contended that, to be consistent with

principle, if the action based on the limit of debt was open in a particular case, the new forms of action in trespass on the case could not be used. Further, it was said, the implication of an undertaking to pay could not be made.

This contention fell on fertile ground when raised before judges of the Court of Common Pleas. That Court was fast losing important parts of its sole jurisdiction in writs of debt to the upstart Indebitatus Assumpsit. In the late 1500's many cases in assumpsit were denied, and judgments based on an assumpsit overruled in appeals in which Common Pleas judges sat.

This conflict could not be allowed to persist. It was resolved by *Slade's* case in 1602.

John Slade sold a crop to Humphrey Morley for £16. Morley refused to pay. John Slade brought a case for recovery in assumpsit. Since it was an executed contract for a sum certain, debt would lie. The case raised the contested point precisely.

In order to dispose of the dispute once and for all, *Slade's* case was heard over six years and before all the judges of England. They ruled, in 1602, that plaintiffs could take their choice. They could bring an action in a assumpsit even though the action for debt was available. They also upheld the Court of Kings Bench in ruling that a promise to pay was implied in the existence of every debt: (1602) 4 Co Rep 92b; 76 ER 1074.

Special Assumpsit

After *Slade's* case another branch of the action of assumpsit had developed, known as special assumpsit, in cases where there was an express undertaking to pay a sum of money.

The difference between these two types of assumpsit, indebitatus and special, is reflected in the development in what we know as the common counts of claim. If relying on contract, one pleaded the special circumstances of the contract. If one was relying upon indebitatus assumpsit, it was not necessary to plead the special circumstances of the contract because the cause of action still was based on the existence of the debt for a sum certain with the overlaid implied promise to pay. But it became the practice to include in the pleading a general description, or count, as to the basis of the debt, whether it be work and labour done, goods supplied, money lent and so forth. By virtue of the general applicability of these counts to a number of common types of claim if they became known as "common" counts.

Quantum Meruit

But building practitioners had an outstanding problem. What to do when the work had been done pursuant to the defendant's request but the precise amount to be paid had not been agreed? Under both the writ of debt and indebitatus assumpsit, the claim must be for a sum certain.

It was during the course of the 17th century that our professional ancestors achieved the ability to bring the action of indebitatus assumpsit although the remuneration or price to be paid for the work or goods had been left indeterminate by the parties.

In *Hall v Walland* (1621) 79 ER 528 it was held that:

> *"a promise to pay tantum quantum meruit is certain enough and he should make the demand what he deserves and if he demand too much the jury shall abridge it according to their discretion".*

In *Rolte v Sharp* (1627) 79 ER 668 it was held that it was "the common course and always allowed" to plead a promise to pay "tantum quantum meruit". See also *Canwey v Aldwyn* (1639) 79 ER 1092 and *Boult v Harris* (1675) 84 ER 828; *King v Locke* (1663) 83 ER 1030 and *Webb v Moore* (1691) 86 ER 442.

It became established that where the contract for work done which gave rise to the debt did not stipulate the remuneration or price, the jury would assess what the plaintiff deserved - "quantum meruit". The verdict of the jury was then treated as the equivalent of the determination of the remuneration of the parties at the time of their bargain. (See *Pavey and Matthews Pty Ltd v Paul* (supra) at 231.)

Benefit Conferred; No Contract

We have seen the recovery for a debt arising as a result of the performance of the work for an agreed amount. We have seen the development, over the centuries, to a point where there could be recovery for work done where there was a contract but where the amount to be paid was left unstipulated.

What about a situation where there is a benefit conferred and accepted, (let us say, work done) but *"there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable."* (see *Pavey and Matthews Pty Ltd v Paul* (supra) at 232-255.)

It was here that the roots of the original Writ of Debt provided the answer. Remember that writ depended on duty to pay for a benefit conferred not upon contract. The action for debt always had been the appropriate remedy for the recovery of judgment debts and of government imposts and taxes. In none of these cases was there any element of contract. The action for money had and received was a common count based on debt which need not involve any contractual basis. An obvious example is money paid by mistake. Therefore, it was logical enough that claims for restitution where there was benefit conferred but no contract or no viable contract could be based on the original praecipe writs of debt.

Between 1673 and 1705 (see Maitland "The Causes of Action at Common Law" (1968 reprint) 57; Brennan J *Pavey and Matthews Pty Ltd v Paul* (supra) at 232) the action of indebitatus assumpsit was held to provide a remedy where there was no contractual context of any kind for the acts performed which gave rise to the debt.

Thus, we have come to the present day. The history recounted here culminates in the 1987 decision of the High Court of Australia in *Pavey and Matthews Pty Ltd v Paul* (supra).

Pavey and Matthews Pty Ltd v Paul

There the Court had to consider a claim by a licensed

builder for the value of work done and material supplied under an oral building contract. The work had been done, the benefit conferred, at the request of the plaintiff. The defence, however, was based on section 45, *Builders Licensing Act* 1971 (NSW). It provided:

"A contract under which the holder of the license undertakes to carry out, by himself or by others, any building work or to vary any building work or the manner of carrying out any building work, specified in a building contract is not enforceable against the other party to the contract unless the contract is in writing signed by each of the parties or his agent in that behalf and sufficiently describes the building work the subject of the contract."

The case squarely raised the question whether to allow the builder to recover the fair value of the work done would be to enforce the contract itself. The builder argued that it would not. It argued that restitution under an unenforceable contract is recovery on the basis of a duty imposed by law, the basis that the courts of the 12th century considered justice ought be done.

The High Court, by reference to the history described above, held that the builder should succeed. There was an obligation on the defendant to make fair and just restitution for the benefit derived at the expense of the plaintiff. The obligation arose out of the benefit having been conferred by the plaintiff at the defendant's request.

Quantum in Restitution

The quantum of remuneration or compensation to plaintiffs in such cases is controlled by the benefit conferred, the juridical basis of the action.

In *Pavey and Matthews* Deane J said (at 262):

"What the concept of monetary restitution involved is the payment of an amount which constitutes, in all relevant circumstances, fair and just compensation for the benefit or 'enrichment' actually or constructively accepted. Ordinarily that will correspond to the fair value of the benefit provided (e.g. remuneration calculated at a reasonable rate for work actually done or the fair value of material supplied)."

His Honour went on to point out, however, that other circumstances cannot be ignored in assessing the benefit to the defendant. It may be that the work done by the plaintiff has a far greater cost, calculated on standard hourly rates and so forth, than the value of its benefit to the defendant in improving the value of the defendant's property on which the work was done.

It may be, on the other hand, that a small amount of work done at the defendant's request adds very much to the value to the property, with a consequent greater benefit to the defendant than the value of the work at market rates.

It is outside the scope of this article to elaborate further on this question. Its relevance is that it illustrates of the link that has run through the subject of "Debt, Damages and Unjust Enrichment" since the earliest days of the King's justice.

Perhaps, this account has made all of us feel more closely associated with, and proud to be part of, a line of practitioners who have faced problems of a kind unknown to us in order to serve their clients, whose problems are fundamentally the same as those of our clients today. Those practitioners have played an important role throughout the history of the development of the English law of debt, damages and unjust restitution.

We, for now, are those who carry the torch.

- This article has been based upon an address by the author to the Building Dispute Practitioners Society on the occasion of its 1996 Annual General Meeting.