

REVERSING COURSE: A CRITIQUE OF THE COURT OF  
APPEALS NEW RULES FOR UNJUST ENRICHMENT AND  
CRIMINAL LEGAL MALPRACTICE ACTIONS

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I. INTRODUCTION

This article will discuss recent developments by the Court of Appeals on the doctrine of unjust enrichment and on the elimination of non-pecuniary damages in criminal legal malpractice actions. Specifically, the article will examine the cases of *Georgia Malone & Co. v. Ralph Rieder*<sup>1</sup> and *Dombrowski v. Bulson*.<sup>2</sup>

In *Georgia Malone*, a divided Court of Appeals held that a plaintiff's unjust enrichment claim could be dismissed as a matter of law at an early pleading stage.<sup>3</sup> The five-judge majority adopted a heightened pleading requirement, which ignores almost one hundred years of established precedent<sup>4</sup> and relies on unfounded policy justifications.<sup>5</sup> The majority's opinion disregards the equitable concerns involved and creates a mandatory pleading rule requiring a connection between the plaintiff and the defendant.<sup>6</sup> The court's new rule is contrary to the remedy of unjust enrichment.<sup>7</sup>

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<sup>1</sup> *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 973 N.E.2d 743, 950 N.Y.S.2d 333 (2012).

<sup>2</sup> *Dombrowski v. Bulson*, 19 N.Y.3d 347, 971 N.E.2d 338, 948 N.Y.S.2d 208 (2012).

<sup>3</sup> *Georgia Malone*, 19 N.Y.3d at 519, 973 N.E.2d at 748, 950 N.Y.S.2d at 338.

<sup>4</sup> See *infra* Part II; see also *Miller v. Schloss*, 218 N.Y. 400, 408, 113 N.E. 337, 339 (1916) (requiring pleading of essential facts); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.20 (3d ed. 2004 & Supp. 2012) (“[T]he plaintiff must plead merely that it would be inequitable for the defendant to retain the benefit or that retention of the benefit without payment therefor [sic] would be unjust.” (first alteration in original) (citing and parenthetically quoting *In re Whirlpool Corp.*, 684 F. Supp. 2d 942, 959 (N.D. Ohio 2009)) (internal quotation marks omitted)).

<sup>5</sup> See *infra* Part III.A.

<sup>6</sup> *Georgia Malone*, 19 N.Y.3d at 519, 973 N.E.2d at 748, 950 N.Y.S.2d at 338.

<sup>7</sup> See *infra* Part III.A.

In *Dombrowski*, a unanimous Court of Appeals held a client could not seek damages for loss of liberty and emotional distress in a criminal legal malpractice action against his attorney.<sup>8</sup> The *Dombrowski* opinion is based on a faulty analysis and unproven policy rationales.<sup>9</sup> Also, the opinion is not in step with modern principles of law permitting recovery of non-pecuniary damages in such actions.<sup>10</sup> Finally, a decision to immunize defense counsel from non-pecuniary damages in criminal legal malpractice actions should be made by the legislature and not by the Court of Appeals.<sup>11</sup>

The *Georgia Malone* and *Dombrowski* decisions demonstrate the Court of Appeals' willingness to dismiss civil claims at the pleading stage for speculative policy justifications not included in the evidentiary record.<sup>12</sup> These decisions are unfortunate departures from established case law and frustrate the letter and spirit of the

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<sup>8</sup> *Dombrowski v. Bulson*, 19 N.Y.3d 347, 352, 971 N.E.2d 338, 340, 948 N.Y.S.2d 208, 210 (2012) ("We see no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages.")

<sup>9</sup> See discussion *infra* Part III.B. *Compare Dombrowski*, 19 N.Y.3d at 352, 971 N.E.2d at 340–41, 948 N.Y.S.2d at 210–11 ("Allowing this type of recovery would have, at best, negative and, at worst, devastating consequences for the criminal justice system. Most significantly, such a ruling could have a chilling effect on the willingness of the already strapped defense bar to represent indigent accused."), *with Wagenmann v. Adams*, 829 F.2d 196, 222 (1st Cir. 1987) ("Were we to accept the notion that a client's recovery on the grim facts of a case such as this must be limited to purely economic loss, we would be doubly wrong. The negligent lawyer would receive the benefit of an enormous windfall, and the victimized client would be left without fair recourse in the face of ghastly wrongdoing."), *and Rowell v. Holt*, 850 So. 2d 474, 480 (Fla. 2003) ("[W]e reject the respondent's arguments that permitting the assessment of damages for psychological injury in the instant case will open Pandora's Box to claims for emotional distress for 'anyone who spent time in jail justifiably or not.'")

<sup>10</sup> See *Snyder v. Baumecker*, 708 F. Supp. 1451, 1464 (D.N.J. 1989) ("[A]n attorney who commits malpractice is liable for any reasonably foreseeable loss caused by his negligence including emotional distress resulting from the loss of liberty." (quoting *Wagenmann*, 829 F.2d at 222) (internal quotation marks omitted)); *Holliday v. Jones*, 264 Cal. Rptr. 448, 458 (Ct. App. 4th Dist. 1989) ("[R]ecover of damages for emotional distress in a legal malpractice case—if it is to be limited at all—should turn on the nature of plaintiff's interest which is harmed and not merely on the reprehensibility of the defendant's conduct.")

<sup>11</sup> See Tracy A. Thomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975, 976 (2006) ("The pretextual use of jurisdiction to restrict remedies has serious implications both within and outside of the tort reform context. The maneuver exceeds the purpose and intent of the legislative power to define and organize the judiciary. Such a violation of the spirit of jurisdictional authority converts the legislature's power to define the jurisdiction of the courts into a plenary power to regulate, or eviscerate, all remedies and legal rights."). Cf. Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636 (2004) (arguing that judicial denial of an adequate remedy violates due process); Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 766 (2001) (arguing that Congress's restriction of remedies under Section 5 of the Fourteenth Amendment provides inadequate redress which dilutes the individual's constitutional right).

<sup>12</sup> See discussion *infra* Part IV.

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liberal pleading requirements in the CPLR.<sup>13</sup>

## II. BACKGROUND—UNJUST ENRICHMENT

“The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought [by the plaintiffs] to be recovered.”<sup>14</sup> For almost one hundred years, since its holding in *Miller v. Schloss*,<sup>15</sup> the Court of Appeals has asked if a benefit has been “conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant . . . and whether the defendant’s conduct was tortious or fraudulent.”<sup>16</sup> The court’s focus has been on an equity and good conscience test,<sup>17</sup> which, at the pleading stage, must be afforded a liberal construction with every favorable inference being given to the plaintiff.<sup>18</sup>

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<sup>13</sup> See, e.g., N.Y. C.P.L.R. 3026 (McKinney 2013) (“Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.”); *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703–04, 864 N.Y.S.2d 70, 71 (App. Div. 2d Dep’t 2008) (“[T]he court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (citing *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994); *Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408, 408, 795 N.Y.S.2d 68, 69 (App. Div. 2d Dep’t 2005) (citations omitted))); *Foley v. D’Agostino*, 21 A.D.2d 60, 65, 248 N.Y.S.2d 121, 127 (App. Div. 1st Dep’t 1964) (“[T]he burden [under CPLR section 3026] is expressly placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced.”); David D. Siegel, *Taking Too Much for Granted About Liberalized Pleadings: “Skimpy” Pleading, Even Though Cause of Action May Exist, Brings Dismissal Too Late to Sue Over*, 160 SIEGEL’S PRAC. REV. 3 (Apr. 2005) (“One of the CPLR’s major accomplishments is its liberalization of pleadings: playing down technicalities and looking to the more basic question of whether, handsomely pleaded or not, the complaint gives notice of the transaction or occurrence out of which the claim arises, and, from anywhere within its four corners, covers the ‘material elements’ of the claim pleaded.”).

<sup>14</sup> *Paramount Film Distrib. Corp. v. State*, 30 N.Y.2d 415, 421, 285 N.E.2d 695, 698, 334 N.Y.S.2d 388, 393 (1972).

To prevail on a claim for unjust enrichment, a party must show that: (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the [other party] to retain what is sought to be recovered. *Corsello v. Verizon N.Y., Inc.*, 77 A.D.3d 344, 370, 908 N.Y.S.2d 57, 78 (App. Div. 2d Dep’t 2010) (alteration in original) (quoting *Citibank, N.A. v. Walker*, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48, 48 (App. Div. 2d Dep’t 2008)) (internal quotations marks omitted).

<sup>15</sup> *Miller v. Schloss*, 218 N.Y. 400, 407, 113 N.E. 337, 339 (1916).

<sup>16</sup> *Paramount*, 30 N.Y.2d at 421, 285 N.E.2d at 698, 334 N.Y.S.2d at 393 (citations omitted).

<sup>17</sup> *Id.*

<sup>18</sup> See *supra* note 13 and accompanying text; see also *Leon*, 84 N.Y.2d at 88, 638 N.E.2d at 513, 614 N.Y.S.2d at 974 (“[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (quoting *Guggenheimer v. Ginzburg*, 43, N.Y.2d, 268, 275, 372 N.E.2d 17, 20, 401 N.Y.S.2d 182, 185 (1977) (internal quotation marks

The Court of Appeals has long recognized there is a class of cases “where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another.”<sup>19</sup> These relationships are constructive contracts based on the equitable principle that one should not be allowed to enrich oneself unjustly at the expense of another, so an obligation is created by law in the absence of an agreement.<sup>20</sup>

Thus in *Bradkin v. Leverton*,<sup>21</sup> the Court of Appeals reversed the unjust enrichment dismissals of lower courts.<sup>22</sup> Quoting *Miller v. Schloss*, Chief Judge Stanley Fuld stated: “[a] *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.”<sup>23</sup> Chief Judge Fuld concluded that “[a]lthough there was no agreement between them, express or implied, the defendant received a benefit from the plaintiff’s services under circumstances which, in justice, preclude him from denying an obligation to pay for them.”<sup>24</sup> Chief Judge Fuld did not rely on or analyze the relationship between the parties in terms of a connection or awareness standard.<sup>25</sup>

Similarly, in *Paramount Film Distributing Corp. v. State of New York*,<sup>26</sup> a divided court, speaking through Chief Judge Charles D. Breitel, reversed the lower court’s finding of unjust enrichment because the defendant had not “received any benefit, let alone unjust enrichment.”<sup>27</sup> Chief Judge Breitel did not rely on or analyze the relations between the parties in terms of a connection or

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omitted)); *Roni LLC v. Arfa*, 18 N.Y.3d 846, 848, 963 N.E.2d 123, 124, 939 N.Y.S.2d 746, 747 (2011) (“[W]e must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference.”).

<sup>19</sup> *Schloss*, 218 N.Y. at 407–08, 113 N.E. at 339.

<sup>20</sup> *Id.* at 407, 113 N.E. at 339 (“It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which *ex aequo et bono* belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual, in order to fit the cause of action to the contractual remedy.”).

<sup>21</sup> *Bradkin v. Leverton*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970).

<sup>22</sup> *Id.* at 197, 257 N.E.2d at 645, 309 N.Y.S.2d at 196.

<sup>23</sup> *Id.* (quoting *Schloss*, 218 N.Y. at 407, 113 N.E. at 339) (internal quotation marks omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Paramount Film Distrib. Corp. v. State*, 30 N.Y.2d 415, 285 N.E.2d 695, 334 N.Y.S.2d 338 (1972).

<sup>27</sup> *Id.* at 421, 285 N.E.2d at 698, 334 N.Y.S.2d at 393.

awareness standard. Instead, he examined the record to determine if the defendant received a benefit and, if so, whether it was against equity and good conscience to permit the defendant to retain what the plaintiff sought to recover.<sup>28</sup>

In *Simonds v. Simonds*,<sup>29</sup> a unanimous Court of Appeals affirmed the appellate division's imposition of a constructive trust on certain life insurance proceeds when a former spouse had breached a provision in a separation agreement.<sup>30</sup> The court, speaking through Chief Judge Breitel, defined equitable notions of unjust enrichment as emerging from the rigidity of early common law and being based heavily on Roman law.<sup>31</sup> Chief Judge Breitel explained, "[e]quity arose to soften the impact of legal formalisms; to evolve formalisms narrowing the broad scope of equity is to defeat its essential purpose."<sup>32</sup> He concluded that a constructive trust was necessary:

The conclusion is an application of the general rule that equity regards as done that which should have been done. Thus, if an insured, upon lapse or cancellation of insurance, followed by replacement with new insurance, has a contractual obligation to designate a particular person as beneficiary, equity will consider the obligee as a beneficiary.<sup>33</sup>

The Court of Appeals made it clear that the unjust enrichment doctrine does not require the performance of any wrongful act by the party enriched. The court stated that "[i]nnocent parties may frequently be unjustly enriched. What is required, generally, is that a party hold property 'under such circumstances that in equity and

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<sup>28</sup> *Id.* ("It is difficult to say that the State has received any benefit, let alone unjust enrichment.")

<sup>29</sup> *Simonds v. Simonds*, 45 N.Y.2d 233, 380 N.E.2d 189, 408 N.Y.S.2d 359 (1978).

<sup>30</sup> *Id.* at 242–43, 380 N.E.2d at 185, 408 N.Y.S.2d at 364 ("The unjust enrichment in this case is manifest. At a time when decedent was, certainly, anxious to remarry, he entered into a separation agreement with his wife of 14 years. As part of the agreement, he promised to maintain \$7,000 in life insurance with the first wife as beneficiary. Later he broke his promise, and died with insurance policies naming only the second wife and daughter as beneficiaries. They have collected the proceeds, amounting to more than \$55,000, while the first wife has collected nothing. Had the husband kept his promise, the beneficiaries would have collected \$7,000 less in proceeds. To that extent, the beneficiaries have been unjustly enriched, and the proceeds should be subjected to a constructive trust.")

<sup>31</sup> *Id.* at 238–39, 380 N.E.2d at 192, 408 N.Y.S.2d at 361–62 ("Born out of the extreme rigidity of the early common law, equity in its origins drew heavily on Roman law, where equitable notions had long been accepted." (citations omitted)).

<sup>32</sup> *Id.* at 239, 380 N.E.2d at 192, 408 N.Y.S.2d at 362.

<sup>33</sup> *Id.* at 240, 380 N.E.2d at 193, 408 N.Y.S.2d at 362–63 (internal citations omitted).

good conscience he ought not to retain it.”<sup>34</sup> Chief Judge Breitel also stressed that courts, in their application of the doctrine of unjust enrichment, should not look to cases that “rely heavily on formalisms and too little on basic equitable principles, long established in Anglo-American law and in this State.”<sup>35</sup> He concluded, quoting Chief Judge Benjamin Nathan Cardozo: “[t]he equity of the transaction must shape the measure of relief.”<sup>36</sup>

### III. RECENT DECISIONS

In *Goldman v. Metropolitan Life Insurance Co.*,<sup>37</sup> the Court of Appeals affirmed the order of the appellate division and dismissed plaintiff’s complaints.<sup>38</sup> The *Goldman* (and *Franco*) plaintiffs had brought a putative class action for breach of contract and unjust enrichment.<sup>39</sup> The court noted that “[l]ike the *Goldman* and *Franco* plaintiffs, Katz argues that the insurance contract was breached and that the defendant was unjustly enriched”<sup>40</sup> but concluded, “[h]ere, in each case, there was no unjust enrichment because the matter is controlled by contract.”<sup>41</sup> Thus, “[g]iven that the disputed terms and conditions fall entirely within the insurance contract, there is no valid claim for unjust enrichment.”<sup>42</sup>

In *Sperry v. Crompton Corp.*,<sup>43</sup> the Court of Appeals affirmed the appellate division’s dismissal of plaintiff’s unjust enrichment claim.<sup>44</sup> The main issue before the court was whether treble damages relief was available to a class action plaintiff or barred by the application of CPLR section 901(b).<sup>45</sup> The court, speaking though Judge Graffeo, held it was not, and then addressed the

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<sup>34</sup> *Id.* at 242, 380 N.E.2d at 194, 408 N.Y.S.2d at 364 (other citations omitted) (quoting *Miller v. Schloss*, 218 N.Y. 400, 407, 113 N.E. 337, 339 (1916)).

<sup>35</sup> *Simonds*, 45 N.Y.2d at 243, 380 N.E.2d at 195, 408 N.Y.S.2d at 365 (referring to cases that decided the same issues differently).

<sup>36</sup> *Id.* (quoting *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 389, 122 N.E. 378, 381 (1919)) (internal quotation marks omitted).

<sup>37</sup> *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 841 N.E.2d 742, 807 N.Y.S.2d 583 (2005).

<sup>38</sup> *Id.* at 567, 841 N.E.2d at 743, 807 N.Y.S.2d at 584.

<sup>39</sup> *Id.* at 569, 841 N.E.2d at 744, 807 N.Y.S.2d at 585.

<sup>40</sup> *Id.* at 569, 841 N.E.2d at 745, 807 N.Y.S.2d at 586.

<sup>41</sup> *Id.* at 572, 841 N.E.2d at 746, 807 N.Y.S.2d at 587.

<sup>42</sup> *Id.* at 572, 841 N.E.2d at 746–47, 807 N.Y.S.2d at 587–88.

<sup>43</sup> *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 863 N.E.2d 1012, 831 N.Y.S.2d 760.

<sup>44</sup> *Id.* at 209, 863 N.E.2d at 1013–14, 831 N.Y.S.2d at 761–62.

<sup>45</sup> *Id.* at 210, 863 N.E.2d at 1014, 831 N.Y.S.2d at 762 (rejecting a *per se* construction that “the Donnelly Act’s treble damages provision is not a penalty under CPLR [section] 901(b),” as well as the claim that such damages are “primarily remedial in nature”).

secondary issue of whether the plaintiff's unjust enrichment class action claim was properly dismissed by the courts below.<sup>46</sup>

The Court of Appeals stated, “[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.”<sup>47</sup> The court held “that a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment”<sup>48</sup> but concluded the “claim does not lie under the circumstances of this case”<sup>49</sup> because “the connection between the [parties] . . . is simply too attenuated to support such a claim.”<sup>50</sup> The court did not explain, analyze or elaborate the meaning of “too attenuated” which suggests the term is dicta, particularly when immediately followed by a reference to the primary issue before the court. However, the court did state that “in this situation it is not appropriate to substitute unjust enrichment to avoid the statutory limitations on the cause of action created by the Legislature.”<sup>51</sup> Obviously the court's analysis of plaintiff's unjust enrichment class action claim was in the context of a class action.<sup>52</sup>

The *Sperry* Court's unsupported reference to an attenuated “connection between the purchaser of tires and the producers of chemicals used in the rubber-making process” does not warrant a general finding that unjust enrichment claims require a pleading to allege a “connection” between the parties.<sup>53</sup> None of the pre-*Sperry* opinions, including supporting citations to Aristotle, Pomeroy, Chief Judges Benjamin Cardozo, Stanley Fuld, and Charles Brietel, explicitly or implicitly rely on a party “connection” as a prerequisite to the maintenance of an unjust enrichment action.<sup>54</sup> Their focus is

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<sup>46</sup> *Id.* at 215–16, 863 N.E.2d at 1018, 831 N.Y.S.2d at 766.

<sup>47</sup> *Id.* at 215, 863 N.E.2d at 1018, 831 N.Y.S.2d at 766 (alteration in original) (quoting *Paramount Film Distrib. Corp. v. State*, 30 N.Y.2d 415, 421, 285 N.E.2d 695, 698, 344 N.Y.S.2d 388, 393 (1972)) (internal quotation marks omitted).

<sup>48</sup> *Sperry*, 8 N.Y.3d at 215, 863 N.E.2d at 1018, 831 N.Y.S.2d at 766.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 216, 863 N.E.2d at 1018, 831 N.Y.S.2d at 766.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 209 n.2, 863 N.E.2d at 1014 n.2, 831 N.Y.S.2d at 762 n.2 (“The lawsuit has not yet been certified as a class action under CPLR article 9.”).

<sup>53</sup> *Id.* at 216, 863 N.E.2d at 1018, 831 N.Y.S.2d at 766.

<sup>54</sup> *See Simonds v. Simonds*, 45 N.Y.2d 233, 239, 380 N.E.2d 189, 192, 408 N.Y.S.2d 359, 362 (1978). The court in *Simonds* stated:

“Its great underlying principles, which are the constant sources, the never-failing roots, of its particular rules, are unquestionably principles of right, justice, and morality, so far as the same can become the elements of a positive human jurisprudence.” Law without principle is not law; law without justice is of limited value. Since adherence to principles

on the equity and good conscience rule, which the *Sperry* court admits is “[t]he essential inquiry in any action for unjust enrichment.”<sup>55</sup>

In *IDT Corp. v. Morgan Stanley Dean Witter & Co.*<sup>56</sup> the Court of Appeals reversed the appellate division and held that plaintiff’s unjust enrichment action failed to state a cause of action.<sup>57</sup> The court, speaking through Judge Pigott, relied on its decision several years earlier in *Goldman v. Metropolitan Life Insurance Co.*, stating that “[t]he theory of unjust enrichment lies as a quasi-contract claim.’ It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned.”<sup>58</sup> The court went on to conclude the plaintiff’s action for unjust enrichment arose out of events subject to a written contract between the plaintiff and the defendant.<sup>59</sup> The court explained the defendant was not required to return the ten million dollar fee to plaintiff because the “fee arose from services governed” by a contract between the parties.<sup>60</sup> The court also noted that plaintiff “did not pay the alleged fees.”<sup>61</sup>

In *Mandarin Trading Ltd. v. Wildenstein*,<sup>62</sup> a unanimous Court of Appeals affirmed a divided appellate division’s decision to uphold the dismissal of plaintiff’s unjust enrichment claim by the supreme court.<sup>63</sup> The dispute arose over the purchase and sale of the painting “Paysage aux Trois Arbres” by Paul Gauguin.<sup>64</sup> Plaintiff

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of “law” does not invariably produce justice, equity is necessary.

*Id.* (other citations omitted) (quoting 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 67 (Spencer W. Symons ed., 5th ed. 1941) (1881)) (citing ARISTOTLE, NICHOMACHEAN ETHICS bk. V, ch. 9, at 1019–20 (Richard McKeon ed., 1941)).

<sup>55</sup> *Sperry*, 8 N.Y.3d at 215, 863 N.E.2d at 1018, 831 N.Y.S.2d at 766 (quoting *Paramount*, 30 N.Y.2d at 421, 285 N.E.2d at 698, 344 N.Y.S.2d at 393).

<sup>56</sup> *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009).

<sup>57</sup> *Id.* at 138, 879 N.E.2d at 271, 879 N.Y.S.2d at 358.

<sup>58</sup> *Id.* at 142, 907 N.E.2d at 274, 879 N.Y.S.2d at 361 (quoting *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572, 841 N.E.2d 742, 746, 807 N.Y.S.2d 583, 587 (2005)).

<sup>59</sup> *IDT Corp.*, 12 N.Y.3d at 142, 907 N.E.2d at 274, 879 N.Y.S.2d at 361 (“It follows that the unjust enrichment claim cannot form the basis of IDT’s demand that Morgan Stanley return the \$10,000,000 fee paid in relation to the Net2Phone, Inc. transaction, because that fee arose from services governed by an engagement letter signed by IDT on July 26, 2000.” (footnote omitted)).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 944 N.E.2d 1104, 919 N.Y.S.2d 465 (2011).

<sup>63</sup> *Id.* at 183, 944 N.E.2d at 1111, 919 N.Y.S.2d at 472.

<sup>64</sup> *Id.* at 176, 944 N.E.2d at 1106, 919 N.Y.S. at 467.

had purchased the painting based on an appraisal from the defendant who concealed his ownership interest in the painting.<sup>65</sup> As a result, plaintiff claimed defendant was unjustly enriched.<sup>66</sup>

The court, speaking through Judge Jones, adopted the traditional equity and good conscience test for unjust enrichment cases in New York.<sup>67</sup> The court stated, “[a] plaintiff must show that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.”<sup>68</sup> The court then curiously adopted the “too attenuated connection” dicta language from its earlier *Sperry* class action dismissal as a policy justification to dismiss Mandarin’s unjust enrichment claim, stating that “there are no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement.”<sup>69</sup> The court considered the absence of a pleading “connection” between the plaintiff and defendant to be crucial because, “[w]ithout sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal.”<sup>70</sup> The court reaffirmed the New York rule that privity is not required for an unjust enrichment claim but then in a strange twist qualified the no privity rule by stating: “a claim will not be supported if the connection between the parties is too attenuated.”<sup>71</sup>

The court did not explain why its new broad pleading specificity rule was necessary for unjust enrichment actions or how it could possibly supersede the centuries old equitable doctrine created on basic principles of good conscience and fairness.<sup>72</sup> The court provided no guidance or precedent as to what constitutes “too attenuated [a] connection” between parties in an unjust enrichment adversarial proceeding.<sup>73</sup> The court failed to provide any policy justification for its new formalistic pleading rule other than those

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<sup>65</sup> *Id.* at 176–77, 944 N.E.2d at 1106–07, 919 N.Y.S.2d at 467–68.

<sup>66</sup> *Id.* at 176, 944 N.E.2d at 1106, 919 N.Y.S.2d at 467.

<sup>67</sup> *Id.* at 182, 944 N.E.2d at 1110, 919 N.Y.S. at 471.

<sup>68</sup> *Id.* (quoting *Citibank N.A. v. Walker*, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48, 49 (App. Div. 2d Dep’t 2004)) (internal quotation marks omitted).

<sup>69</sup> *Mandarin*, 16 N.Y.3d at 182, 944 N.E.2d at 1111, 919 N.Y.S.2d at 472.

<sup>70</sup> *Id.* at 183, 944 N.E.2d at 1111, 919 N.Y.S.2d at 472 (citations omitted).

<sup>71</sup> *Id.* at 182, 944 N.E.2d at 1111, 919 N.Y.S.2d at 472 (citing *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 863 N.E.2d 1012, 831 N.Y.S.2d 760 (2007)).

<sup>72</sup> *Mandarin*, 16 N.Y.3d at 182, 944 N.E.2d at 1110–11, 919 N.Y.S.2d at 471–72.

<sup>73</sup> *Id.* at 182, 944 N.E.2d at 1111, 919 N.Y.S.2d at 472.

that were fact specific to its *Mandarin* holding.<sup>74</sup> Thus the *Mandarin* Court's qualification of the no privity rule is clearly dicta, and should not be binding in subsequent decisions.<sup>75</sup>

### A. *Georgia Malone*

#### 1. Background

Plaintiff Georgia Malone & Co., a real estate and consulting firm, provided its clients with information regarding the purchase and sale of properties.<sup>76</sup> Defendant Rosewood Realty engaged in the real estate business.<sup>77</sup> Georgia Malone prepared due diligence reports for a developer (CenterRock) and its managing member, defendant Ralph Rieder, who agreed to keep them confidential and to pay Malone a 1.25% commission of the total purchase price for its brokerage work.<sup>78</sup> Based on Malone's reports, CenterRock executed a contract of sale to purchase properties for \$70 million, which it later terminated.<sup>79</sup> CenterRock "refused to pay Malone's demand for its commission in the amount of \$875,000 (1.25% of the contract price)."<sup>80</sup>

Malone claimed that it gave the due diligence materials to a third party for the purpose of selling them to Rosewood, after CenterRock terminated the deal.<sup>81</sup> Malone then alleged that Rosewood used her materials to generate a commission of \$500,000 from a subsequent sale of real property.<sup>82</sup>

Malone commenced an action for breach of contract against CenterRock and Ralph Rieder, and asserted unjust enrichment

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<sup>74</sup> *Id.*

<sup>75</sup> *Georgia Malone & Co. v. Rieder*, 86 A.D.3d 406, 409–10, 926 N.Y.S.2d 494, 498 (App. Div. 1st Dep't 2011), *aff'd*, 19 N.Y.3d 511, 973 N.E.2d 743, 950 N.Y.S.2d 333 (2012); *see also* *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 480–81, 467 N.E.2d 245, 248–49, 478 N.Y.S.2d 597, 600–01 (1984) (citations omitted) (concluding that the existence of an alternate forum is not a prerequisite to the application of forum non conveniens as such a requirement had its origin in dicta by the United States Supreme Court and was not binding to future decisions, although the dictum has persisted as the general rule and has been quoted in subsequent cases).

<sup>76</sup> *Georgia Malone*, 19 N.Y.3d at 513, 973 N.E.2d at 744, 950 N.Y.S.2d at 334.

<sup>77</sup> *Id.* at 514, 973 N.E.2d at 744, 950 N.Y.S.2d at 334.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 514–15, 973 N.E.2d at 745, 950 N.Y.S.2d at 335.

<sup>80</sup> *Id.* at 515, 973 N.E.2d at 745, 950 N.Y.S.2d at 335.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

claims against CenterRock, Rieder, and Rosewood.<sup>83</sup> The “Supreme Court dismissed all claims except those against CenterRock. On Malone’s appeal, the Appellate Division modified, with two Justices dissenting, by reinstating the unjust enrichment claims against the Rieders, and otherwise affirmed.”<sup>84</sup>

Malone then appealed to the Court of Appeals, seeking reinstatement of its unjust enrichment claim on the grounds that Rosewood profited, at Malone’s expense, by collecting a commission on the sale of the properties.<sup>85</sup> Rosewood argued Malone failed to state an unjust enrichment claim because it did not allege a “business relationship or connection between them.”<sup>86</sup> Rosewood also argued that Malone’s complaint was inadequate because it did not assert that Rosewood was aware of the confidentiality of the Malone due diligence report, or that Rosewood knew that CenterRock had not paid Malone for producing the due diligence documents.<sup>87</sup> These defenses were based on the *Mandarin* and *Sperry* heightened pleading requirements.<sup>88</sup>

## 2. The Court of Appeals’ Decision

The Court of Appeals majority defined the question as follows:

In this action, a real estate company that prepared due diligence reports for a developer in connection with the potential purchase of commercial properties alleges that a rival brokerage firm was unjustly enriched when it acquired the materials from the developer and later obtained a commission on the ultimate sale of the properties. The issue before us is whether a sufficient relationship existed between the two real estate firms to provide a basis for an unjust enrichment cause of action. Based on the allegations presented in the complaint, we hold that the relationship between these two parties was too attenuated.<sup>89</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (citing *Georgia Malone & Co. v. Rieder*, 86 A.D.3d 406, 409–10, 926 N.Y.S.2d 494, 498 (App. Div. 1st Dep’t 2011), *aff’d*, 19 N.Y.3d 511, 973 N.E.2d 743, 950 N.Y.S.2d 333 (2012)).

<sup>85</sup> *Georgia Malone*, 19 N.Y.3d at 515, 973 N.E.2d at 745, 950 N.Y.S.2d at 335.

<sup>86</sup> *Id.* at 515–16, 973 N.E.2d at 745–46, 950 N.Y.S.2d at 335–36.

<sup>87</sup> *Id.* at 516, 973 N.E.2d at 746, 950 N.Y.S.2d at 336.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 513, 973 N.E.2d at 744, 950 N.Y.S.2d at 334.

*a. The Majority*

The majority based its decision to deny Malone's request for reinstatement of its unjust enrichment claim against Rosewood on the following factors. First, Malone failed to plead a claim for unjust enrichment due to a lack of factual allegations in its complaint that indicated a relationship (business relationship or connection) between Malone and Rosewood, "or at least an awareness by [the defendant] of [the plaintiff's] existence."<sup>90</sup> The court relied on its earlier, fact-specific, heightened pleading rules in *Sperry v. Crompton Corp.* and *Mandarin Trading Limited v. Wildenstein*.<sup>91</sup> Second, if Malone's unjust enrichment claim was permitted, it "would impose a burdensome obligation in commercial transactions."<sup>92</sup>

The majority's policy justification for dismissal of Malone's unjust enrichment claim is less than one paragraph and not supported by the record.<sup>93</sup> The majority stated, "[t]he rule urged by Malone would require parties to probe the underlying relationships between the businesses with whom they contract and other entities tangentially involved but with whom they have no direct connection."<sup>94</sup>

*b. The Dissent*

Chief Judge Lippman and Judge Pigott, citing *Mandarin Trading Ltd. v. Wildenstein*, stated:

We have established that "[t]he essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." It is apparent that equity and good conscience do not permit Rosewood to retain the benefits of Malone's diligent work, and that plaintiff has

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<sup>90</sup> *Id.* at 517, 973 N.E.2d at 746, 950 N.Y.S.2d at 336 (alteration in original) (quoting *Mandarin Trading Ltd.*, 16 N.Y.3d at 182, 944 N.E.2d at 1110, 919 N.Y.S.2d at 471 (2011)) (internal quotation marks omitted).

<sup>91</sup> *Georgia Malone*, 19 N.Y.3d at 517–18, 973 N.E.2d at 746–47, 950 N.Y.S.2d at 336–37 ("Similar to *Sperry* and *Mandarin*, the relationship between Malone and Rosewood is too attenuated because they simply had no dealings with each other.").

<sup>92</sup> *Id.* at 519, 973 N.E.2d at 748, 950 N.Y.S.2d at 338.

<sup>93</sup> *See id.*

<sup>94</sup> *Id.*

adequately pleaded that Rosewood was unjustly enriched.<sup>95</sup>

The dissent stressed that the plaintiff's pleadings showed that "Malone performed the services and due diligence necessary to equip a buyer to negotiate and to execute the purchase of the commercial properties. Rosewood then profited. . . . while Malone never received compensation for its work."<sup>96</sup> The dissent explained that "it is only fair to allow Malone's claim against Rosewood to proceed at this early stage in the litigation."<sup>97</sup>

The dissent explained that the court's precedent on unjust enrichment never required there be a business relationship or connection between the parties.<sup>98</sup> Citing Chief Judge Fuld,<sup>99</sup> the dissent stated, "In *Bradkin v. Leverton*, we found a viable unjust enrichment claim where there were no direct dealings between plaintiff and defendant. . . . The defendant in *Bradkin* knowingly used plaintiff's contacts without paying for them, similar to Rosewood's alleged use of Malone's due diligence materials."<sup>100</sup> The dissent, citing *Simonds v. Simonds*, also stated:

This Court's precedent on unjust enrichment has never required that there be a close relationship or dealings between the parties. . . . "What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it. . . .'" Nowhere in *Simonds* did we require defendant to have procured the unjust benefit or that there be contact between plaintiff and defendant.<sup>101</sup>

Also, the dissent distinguished *Sperry v. Crompton Corp.* and *Mandarin Trading Ltd. v. Wildenstein*, stating, "[o]ur holdings in *Sperry* and *Mandarin Trading* never required that there be direct contact or a close relationship between the parties."<sup>102</sup>

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<sup>95</sup> *Id.* (Lippman, C.J., dissenting) (alterations in original) (other citation omitted) (quoting *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 944 N.E.2d 1104, 1110, 919 N.Y.S.2d 465, 471 (2011)).

<sup>96</sup> *Id.* at 520, 973 N.E.2d at 748–49, 950 N.Y.S.2d at 338–39.

<sup>97</sup> *Id.* at 520, 973 N.E.2d at 749, 950 N.Y.S.2d at 339.

<sup>98</sup> *Id.* at 521, 973 N.E.2d at 749, 950 N.Y.S.2d at 339 ("Requiring a relationship of mutual dealing where the plaintiff confers a benefit on the unjustly enriched party treads too close to requiring privity, which this Court expressly disclaimed in *Sperry* and *Mandarin Trading*.").

<sup>99</sup> *Bradkin v. Leverton*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970).

<sup>100</sup> *Georgia Malone*, 19 N.Y.3d at 523, 973 N.E.2d at 751, 950 N.Y.S.2d at 341 (Lippman, C.J., dissenting) (citation omitted).

<sup>101</sup> *Id.* at 522, 973 N.E.2d at 750, 950 N.Y.S.2d at 340 (quoting *Simonds v. Simonds*, 45 N.Y.2d 233, 242, 380 N.E.2d 189, 194, 408 N.Y.S.2d 359, 364 (1978)).

<sup>102</sup> *Georgia Malone*, 19 N.Y.3d at 521, 973 N.E.2d at 749, 950 N.Y.S. at 339.

Finally the dissent rejected the majority's policy justifications for dismissing Malone's unjust enrichment claim against Rosewood.<sup>103</sup> Chief Judge Lippman explained a ruling in favor of Malone "would not impede commercial transactions or create an excessive burden on contracting parties."<sup>104</sup> He stated, "[i]f a business partner conveys information whose source is clearly the company's direct competitor, the company can inquire about the circumstances of the transmission of the information."<sup>105</sup> If Rosewood saw Malone's name on the due diligence materials, an allegation that could be fully shown during discovery, it is highly likely for Rosewood to have known the materials were suspect.<sup>106</sup> Thus, Chief Judge Lippman concluded that Malone's complaint should not have been dismissed at the pleading stage.<sup>107</sup>

### 3. Critique

It is well established in New York that under CPLR section 3211, a motion to dismiss should not be granted without first affording the plaintiffs pleading a liberal construction, and according it the benefit of every possible favorable inference.<sup>108</sup>

Unjust enrichment claims are subject to modern pleading rules in New York, and to CPLR section 104, which requires application of a just determination standard.<sup>109</sup> Malone's complaint should not have

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<sup>103</sup> *Id.* at 523, 973 N.E.2d at 751, 919 N.Y.S.2d at 341 ("The majority's policy concerns are unfounded.").

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See* *Roni LLC. v. Arfa*, 18 N.Y.3d 846, 848, 963 N.E.2d 123, 124, 939 N.Y.S.2d 746, 747 (2011) ("On a CPLR 3211 motion to dismiss, however, we must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference. Indeed, the question of [w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (quoting *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 832 N.E.2d 26, 31, 799 N.Y.S.2d 170, 175 (2005)); *see also* *Jacobs v. Macy's E., Inc.*, 262 A.D.2d 607, 608, 693 N.Y.S.2d 164, 167 (App. Div. 2d Dep't 1999) ("It is well settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference." (citations omitted)); *Gruen v. Cnty. of Suffolk*, 187 A.D.2d 560, 562, 590 N.Y.S.2d 217, 219 (App. Div. 2d Dep't 1992) ("[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion . . . will fail." (alteration in original) (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 20, 401 N.Y.S.2d 182, 185 (1977)) (internal quotation marks omitted)).

<sup>109</sup> *See supra* notes 12–13 and accompanying text; *see also* N.Y. C.P.L.R. 104 (McKinney

been dismissed without giving her at least limited disclosure to establish the existence of genuine issues of material fact between the parties. If she failed to do so, her complaint could be dismissed by a summary judgment.

The majorities adoption of a “sufficient relationship” pleading rule as a mandatory requirement for maintenance of unjust enrichment actions in New York is unfounded and contrary to the equity and good conscience test established by almost one hundred years of jurisprudence in the Empire State.<sup>110</sup> The majorities new pleading rule is nothing more than a heightened pleading requirement based on questionable dicta from its *Sperry* and *Mandarin Trading* decisions, and, unfortunately, contravenes pleading requirements mandated by the CPLR and applicable case law.<sup>111</sup>

The majority’s focus on a connection between the parties may be applicable to unjust enrichment claims based on a “quantum meruit theory” where it makes sense to require some connection between the parties that is not “too attenuated.”<sup>112</sup> However, the majority fails to recognize that an unjust enrichment claim is broader than a quantum meruit claim. As Chief Judges Breitel and Fuld explained there is no need for a “connection” because the equity and good conscience test asks only if a benefit has been conferred on the defendant under mistake of fact or law.<sup>113</sup> If the benefit remains with the defendant, the court may determine if the defendant’s

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2013).

<sup>110</sup> See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.1(2) (2d ed. 1993) (“Unjust enrichment cannot be precisely defined, and for that very reason has potential for resolving new problems in striking ways.”); 1 GEORGE E. PALMER, LAW OF RESTITUTION § 1.3 (1978) (“The great development of constructive trust as a remedy aimed at unjust enrichment has taken place in this country [the United States], for most of our courts have freed the remedy of any necessary connection with fiduciary relationship.”); *id.* § 1.1 (“Unjust enrichment is an indefinable idea in the same way that justice is indefinable. But many of the meanings of justice are derived from a sense of injustice.”).

<sup>111</sup> See *Georgia Malone & Co. v. Rieder*, 86 A.D.3d 406, 418–19, 926 N.Y.S.2d 494, 505–06 (App. Div. 1st Dep’t 2011) (Acosta, J., dissenting) (rejecting the majority’s attempt to reintroduce a heightened privity requirement for prudential reasons), *aff’d*, 19 N.Y.3d 511, 973 N.E.2d 743, 950 N.Y.S.2d 333 (2012).

<sup>112</sup> *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 522 n.2, 973 N.E.2d 743, 750 n.2, 950 N.Y.S.2d 333, 340 n.2 (2012) (“Only plaintiffs pleading a quantum meruit theory of unjust enrichment are required to show that they performed services for the defendants or at the defendant’s behest.” (citations omitted)); *id.* at 516, 973 N.E.2d at 746, 950 N.Y.S.2d at 336.

<sup>113</sup> *Id.* at 522, 973 N.E.2d at 750, 950 N.Y.S.2d at 340 (“What is required, generally, is that a party hold property under such circumstances that in equity and good conscience he ought not to retain it.” (citations omitted) (quoting *Miller v. Schloss*, 218 N.Y. 400, 407, 113 N.E. 337, 339 (1916)) (internal quotation marks omitted)).

conduct has been tortious or fraudulent.<sup>114</sup> The fact that a “relationship” must exist between the plaintiff and defendant will often frustrate the purpose of unjust enrichment actions.<sup>115</sup>

For example, assume a New York employee embezzles one million dollars from her employer and gives the money to her uncle in Buffalo who has no “relationship” or “connection” with the employer. Under *Georgia Malone*, the employer might be unable to maintain an action against the uncle unless he was “aware” the gift was stolen from the employer.<sup>116</sup> If the employer’s action was dismissed at an early pleading stage, it would have no opportunity to develop facts through discovery to support an unjust enrichment argument.<sup>117</sup> *Georgia Malone* explicitly requires the employer to plead with specificity and particularity facts that unequivocally demonstrate what the Court of Appeals defines as a “substantial relationship” prerequisite.<sup>118</sup> The principle goes further. Suppose Rembrandt (“R”), removes Paul Gauguin’s “Paysage Aux Trois Arbes” from the Metropolitan Museum and sells it to Picasso (“P”) for one million dollars (assume the painting is worth fifteen million dollars and P, who lives in rural Wyoming County, has no relationship with the Met or reason to believe the painting is worth more than one million dollars). Assuming P is a purchaser in good faith, can the Met sue him and recover damages under an unjust enrichment theory? What would Chief Judges Breitel and Fuld say? These hypotheticals and other questions, such as privity concerns, cut against the majority’s *Georgia Malone* rule.

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<sup>114</sup> *Schloss*, 218 N.Y. at 407–08, 113 N.E. at 339 (“There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability . . .” (quoting *People ex rel. Dusenbury v. Speir*, 77 N.Y. 144, 150 (1879)) (internal quotation marks omitted)).

<sup>115</sup> As a result of *Georgia Malone*, a claim for unjust enrichment requires a showing of a direct relationship between the plaintiff and the defendant; that the defendant was enriched at the plaintiff’s expense; and that it is against equity and good conscience to permit the other party to retain the benefits. *Georgia Malone*, 19 N.Y.3d at 516–17, 973 N.E.2d at 746–47, 950 N.Y.S.2d at 336–37.

<sup>116</sup> *See id.* at 519, 973 N.E.2d at 748, 950 N.Y.S.2d at 338 (dismissing unjust enrichment claim because it failed to allege that the third-party was aware of the wrongfulness of the actions perpetrated against the plaintiff).

<sup>117</sup> *See id.* at 520, 973 N.E.2d at 749, 950 N.Y.S.2d at 339 (Lippman, C.J., dissenting) (stating that under CPLR section 3211, motions to dismiss are to be given liberal constructions and provide the opposing party the benefit of all possible favorable inferences).

<sup>118</sup> *Id.* at 519, 973 N.E.2d at 748, 950 N.Y.S.2d at 338 (majority opinion) (holding that a sufficient showing of a connection between the parties at the pleading stage is necessary under a unjust enrichment claim).

In addition, there are serious concerns about the Georgia Malone's majority policy justification.<sup>119</sup> The dissent addresses them,<sup>120</sup> but in addition, it is common knowledge that information or real estate is available through engineering reports, financial reports and other documents, but it is necessary for a professional broker to marshal and analyze the data.<sup>121</sup> Doesn't a broker, such as Georgia Malone, deserve to be compensated? The Court of Appeals' majority policy justification has "set back the rules of real estate building sales for generations by allowing a competing broker who purchased stolen due diligence information to profit greatly while the procuring broker received nothing."<sup>122</sup>

Finally, the majority's policy justifications are not supported by the record because Georgia Malone's unjust enrichment claim against Rosewood was dismissed at an early pleading stage.<sup>123</sup> New York courts never had an opportunity to consider the merits or whether equity and good conscience entitled Georgia Malone to recover damages from Rosewood! The final result is unfair and provides confusing precedent for plaintiffs filing unjust enrichment claims in New York.

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<sup>119</sup> *Id.* (stating that a rule requiring parties to examine both the businesses with whom they contract and other businesses who are involved, yet have no direct connection with the specific party, would create a burdensome requirement within commercial transactions).

<sup>120</sup> *Id.* at 523, 973 N.E.2d at 751, 950 N.Y.S.2d at 341 (Lippman, C.J., dissenting) (arguing that the majority's concerns are unfounded, and that finding for unjust enrichment in the case at hand would not impeded commercial transactions).

<sup>121</sup> *Id.* at 522, 973 N.E.2d at 750–51, 950 N.Y.S.2d at 340–41 ("Drawing every inference in favor of plaintiff, Rosewood could not have been a good-faith purchaser because it had notice from Malone's letterhead that the diligence materials did not belong to CenterRock and the Rieders.").

<sup>122</sup> See John Caher, *Nexus Needed for Unjust Enrichment Is Clarified*, N.Y.L.J., June 29, 2012; Glen Banks, *Addressing Unjust Enrichment Claim at Pleading Stage*, N.Y.L.J., July 23, 2012.

<sup>123</sup> Generally, a party responding to a motion under CPLR section 3211(a) or CPLR section 3211(b) may demonstrate that facts may exist that would justify the case proceeding forward but that those facts cannot be stated at that time, as necessary disclosure has not yet occurred. See generally David D. Siegel, *Practice Commentaries*, C3211:49–51, in N.Y. C.P.L.R. 3211 (McKinney 2013) (observing that CPLR section 3211(d) affords the court discretion to deny or permit further affidavits or allow discovery prior to dismissal); N.Y. C.P.L.R. 3041 (McKinney 2013) ("Any party may require any other party to give a bill of particulars of such party's claim, or a copy of the items of the account alleged in a pleading."); *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70–71, 790 N.E.2d 1156, 1162, 760 N.Y.S.2d 727, 733 (2003) ("[I]n default proceedings [where] the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." (quoting Jack B. Weinstein, Harold L. Korn & Arthur R. Miller, *New York Civil Practice: CPLR PP 3215:24* (7th ed. 2012) (emphasis added))).

*B. Dombrowski v. Bulson—The New Rule Eliminating Recovery of Non-Pecuniary Damages in Criminal Legal Malpractice Actions*

In *Dombrowski v. Bulson*, a unanimous Court of Appeals held that a plaintiff suing his former defense attorney in a criminal legal malpractice action could not recover non-pecuniary damages for loss of liberty and emotional distress.<sup>124</sup> The court reversed the appellate division which had found a parallel between actions for malpractice in criminal claims and claims for false arrest and malicious prosecution.<sup>125</sup> The Court of Appeals rejected this conclusion and relied on unsubstantiated policy reasons to support its decision.<sup>126</sup> The court, speaking through Chief Judge Lippman, stated:

Allowing this type of recovery would have, at best, negative and, at worst, devastating consequences for the criminal justice system. Most significantly, such a ruling could have a chilling effect on the willingness of the already strapped defense bar to represent indigent accused. Further, it would put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions.<sup>127</sup>

The *Dombrowski* decision is based on faulty analysis and unproven policy justifications. The opinion is contrary to modern principles of law encouraging recovery of non-pecuniary damages in such actions.<sup>128</sup> Furthermore, the court's policy rationale should be left to the legislature, which is in a better position to determine if the lawyers should be immune from non-pecuniary damage awards for criminal malpractice actions.

### 1. Background

In *Wilson v. City of New York*,<sup>129</sup> a client brought an action against

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<sup>124</sup> *Dombrowski v. Bulson*, 19 N.Y.3d 347, 352, 971 N.E.2d 338, 340–41, 948 N.Y.S.2d 208, 210–11 (2012).

<sup>125</sup> *Id.* at 351, 971 N.E.2d at 340, 948 N.E.2d at 210 (“Although the harm suffered by the claimant is the same—loss of liberty—we reject the argument that these types of actions are analogous.”).

<sup>126</sup> *Id.* at 352, 971 N.E.2d at 340–41, 948 N.E.2d at 210–11.

<sup>127</sup> *Id.*

<sup>128</sup> See *infra* Part III.B.2.

<sup>129</sup> *Wilson v. City of N.Y.*, 294 A.D.2d 290, 743 N.Y.S.2d 30 (App. Div. 1st Dep’t 2002). The court held that a criminal defendant “must demonstrate that he would have been either

his former attorney for legal malpractice in a criminal matter.<sup>130</sup> The supreme court denied the attorney's motion for summary judgment, and the appellate division, in an issue of first impression, reversed,<sup>131</sup> relying on *Wolkstein v. Morgenstern*,<sup>132</sup> which held "[a] cause of action for legal malpractice does not afford recovery for any item of damages other than pecuniary loss."<sup>133</sup> The appellate division explained that "pecuniary damages 'compensate [a] victim for the economic consequences of the injury, such as medical expenses [and] lost earnings' while . . . nonpecuniary damages [are] 'those damages awarded to compensate an injured person for the physical and emotional consequences of the injury.'"<sup>134</sup> The appellate division admitted the primary harm caused by the attorney malpractice is an unwarranted loss of liberty which is necessarily non-pecuniary in nature but stated, "[t]his Court's holding in *Wolkstein v. Morgenstern* . . . amounts to a policy-based ruling not limited to that context."<sup>135</sup> The appellate division did not explain or justify its "policy-based" ruling in *Wolkstein*, but merely concluded "that the non-pecuniary damages must be dismissed is as applicable in the instant matter as it was in *Wolkstein*."<sup>136</sup>

In *Dombrowski v. Bulson*, the plaintiff alleged that his attorney negligently represented him in a criminal action and that, as a result, he was convicted after a jury trial of two felonies and a misdemeanor.<sup>137</sup> Plaintiff was sentenced to four years plus a period of post-release supervision.<sup>138</sup> The county court denied plaintiff's motion to vacate the judgment of conviction on the ground of ineffective assistance of counsel and the plaintiff sought and obtained a writ of habeas corpus in federal district court.<sup>139</sup> The federal magistrate determined that plaintiff's defense counsel failed

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exonerated or released earlier, and therefore not subjected to attack by a fellow inmate, had [counsel] not represented him in a negligent manner." *Id.* at 293, 743 N.Y.S.2d at 33.

<sup>130</sup> *Id.* at 291, 743 N.Y.S.2d at 31.

<sup>131</sup> *Id.* at 292–93, 743 N.Y.S.2d at 32 ("[L]imiting victims of legal malpractice to pecuniary damages, although issued in the context of a claim of legal malpractice in a civil action, amounts to a policy-based ruling not limited to that context.").

<sup>132</sup> *Wolkstein v. Morgenstern*, 275 A.D.2d 635, 743 N.Y.S.2d 171 (App. Div. 1st Dep't 2000)

<sup>133</sup> *Id.* at 637, 713 N.Y.S.2d at 173.

<sup>134</sup> *Wilson*, 294 A.D.2d at 292, 743 N.Y.S.2d at 32 (quoting *McDougald v. Garber*, 73 N.Y.2d 246, 251, 536 N.E.2d 372, 373, 538 N.Y.S.2d 937, 938 (1989)).

<sup>135</sup> *Wilson*, 294 A.D.2d at 292–93, 743 N.Y.S.2d at 32.

<sup>136</sup> *Id.* at 293, 743 N.Y.S.2d at 33.

<sup>137</sup> *Dombrowski v. Bulson*, 19 N.Y.3d 347, 349, 971 N.E.2d 338, 339, 948 N.E.2d 208, 209 (2012).

<sup>138</sup> *Id.* at 350, 971 N.E.2d at 339, 948 N.E.2d at 209.

<sup>139</sup> *Id.* at 349, 971 N.E.2d at 339, 948 N.Y.S.2d at 209.

to conduct an adequate investigation and failed to conduct a sufficient cross examination of the complainant.<sup>140</sup> When the magistrate issued his ruling, plaintiff had been imprisoned for more than five years and the prosecution declined to retry him.<sup>141</sup> The indictment was dismissed and plaintiff sued his former attorney for legal malpractice seeking money damages for his loss of liberty arising from his wrongful imprisonment and for lost wages.<sup>142</sup>

The supreme court granted defendant's summary judgment motion holding plaintiff had no right to recover any damages.<sup>143</sup> The appellate division affirmed the lower courts order that plaintiff could not recover pecuniary damages for lost wages since he had received disability payments while incarcerated but concluded that the lower court had erred in determining that plaintiff was not entitled to seek non-pecuniary damages for his loss of liberty and emotional distress.<sup>144</sup>

The appellate division stated, "[i]t is well settled that nonpecuniary damages are not recoverable in a legal malpractice action involving the negligence of an attorney in a civil matter,"<sup>145</sup> but, citing *Martinez v. Long Island Jewish Hillside Medical Center*,<sup>146</sup> noted: "[w]here emotional or other nonpecuniary loss is a direct result of a defendant's breach of duty, a plaintiff may recover damages for such loss."<sup>147</sup> The appellate division analogized a cause of action for criminal legal malpractice to actions for false arrest and malicious prosecution both of which allow for plaintiffs to recover damages for loss of liberty resulting from her wrongful imprisonment.<sup>148</sup>

The appellate division also noted recent trends in other jurisdictions allowing recovery of non-pecuniary damages in

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<sup>140</sup> *Id.* at 349–50, 971 N.E.2d at 339, 948 N.E.2d at 209.

<sup>141</sup> *Id.* at 350, 971 N.E.2d at 339, 948 N.E.2d at 209.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Dombrowski v. Bulson*, 79 A.D.3d 1587, 1589, 915 N.Y.S.2d 778, 780 (App. Div. 4th Dep't 2010), *rev'd*, 19 N.Y.3d 347, 971 N.E.2d 338, 948 N.E.2d 208 (2012).

<sup>146</sup> *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987).

<sup>147</sup> *Dombrowski*, 79 A.D.3d at 1589, 915 N.Y.S.2d at 780.

<sup>148</sup> *Id.* at 1589–90, 915 N.Y.S.2d at 780 (“In our view, a cause of action for criminal legal malpractice is analogous to causes of action for false arrest and malicious prosecution, both of which allow recovery for the plaintiff's loss of liberty resulting from the plaintiff's wrongful incarceration.”).

criminal legal malpractice cases,<sup>149</sup> and concluded that a plaintiff wrongfully convicted due to the malpractice of his attorney in a criminal case may recover loss of liberty or other losses directly attributable to his imprisonment.<sup>150</sup>

## 2. The Court of Appeals' Decision

A unanimous Court of Appeals found the First Department's unexplained first impression policy rationale in *Wilson v. City of New York* preferable to the thoughtful and enlightened *Dombrowski* opinion by the Fourth Department.<sup>151</sup> Chief Judge Lippman stated, “[w]e see no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages.”<sup>152</sup> The court reversed the appellate division's modification and reinstatement of that portion of the plaintiff's complaint seeking non-pecuniary damages and held, as a matter of law, that these damages are not permitted in legal malpractice actions arising out of criminal representation.<sup>153</sup> The court reasoned that criminal attorney malpractice requires the plaintiff to have “at least a colorable claim of actual innocence—that the conviction would not have resulted absent the attorney's negligent representation.”<sup>154</sup>

The Court of Appeals rejected the appellate division's finding that there is a parallel between actions for malpractice in criminal actions and claims for false arrest and malicious prosecution.<sup>155</sup> The court observed, “[f]alse arrest and malicious prosecution are intentional torts. Malicious prosecution, in particular, requires a showing that the proceeding was commenced against the claimant with actual malice.”<sup>156</sup> The court's distinction between intentional

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<sup>149</sup> *Id.* at 1590, 915 N.Y.S.2d at 780 (citing *Wagenmann v. Adams*, 829 F.2d 196, 221–22 (1st Cir. 1987); *Snyder v. Baumecker*, 708 F. Supp. 1451, 1464 (N.J. Dist. 1989); *Rowell v. Holt*, 850 So. 2d 474 (Fla. 2003); *Holliday v. Jones*, 215 Cal. App. 3d 102, 118–119 (1989)).

<sup>150</sup> *Dombrowski*, 79 A.D.3d at 1590, 915 N.Y.S.2d at 780 (“We thus conclude that a plaintiff who establishes that he or she was wrongfully convicted due to the malpractice of his or her attorney in a criminal case may recover compensatory damages for the actual injury sustained, i.e., loss of liberty, and any consequent emotional injuries or other losses directly attributable to his or her imprisonment.”).

<sup>151</sup> *Dombrowski*, 19 N.Y.3d at 351–52, 971 N.E.2d at 340, 948 N.Y.S.2d at 210.

<sup>152</sup> *Id.* at 352, 971 N.E.2d at 340, 948 N.Y.S.2d at 210.

<sup>153</sup> *Id.* at 352, 971 N.E.2d at 340–41, 948 N.Y.S.2d at 210–11.

<sup>154</sup> *Id.* at 351, 971 N.E.2d at 340, 948 N.Y.S.2d at 210.

<sup>155</sup> *Id.* (“Although the harm suffered by the claimant is the same—loss of liberty—we reject the argument that these types of actions are analogous.”).

<sup>156</sup> *Id.*

and negligent torts fails because as the court admits, the plaintiff must prove by a greater weight of the evidence that he was innocent of the crimes he was indicted for in the criminal proceeding.<sup>157</sup> Thus, if a plaintiff can meet this burden of proof and also show that the legal malpractice caused a loss of liberty, the damages available for the tort of false imprisonment is actionable regardless of malice.<sup>158</sup> The fact that an actual malice showing is available for a malicious prosecution action is not determinative because an innocent person falsely imprisoned is equally damaged in respect to compensatory damages, regardless of whether the imprisonment flows from intentional conduct by the defendant.<sup>159</sup>

The crux of the Court of Appeals decision in *Dombrowski* rests on policy issues that are not supported by the record. The Court stated:

Allowing this type of recovery would have, at best, negative and, at worst, devastating consequences for the criminal justice system. Most significantly, such a ruling could have a

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<sup>157</sup> See *Stevens v. Bispham*, 851 P.2d 556, 566 (Or. 1993) (“We hold that, in order for one convicted of a criminal offense to bring an action for professional negligence against that person’s criminal defense counsel, the person must . . . allege ‘harm’ in that the person has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise.”); *Mahoney v. Shaheen, Capiello, Stein & Gordon, P.A.*, 727 A.2d 996, 1000 (N.H. 1999) (“[T]actical or strategic decisions made by defense counsel during their representation should not be subject to attack by clients unable to prove their actual innocence.”).

<sup>158</sup> See, e.g., *Battalla v. New York*, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 36 (1961) (“It is fundamental to our common-law system that one may seek redress for every substantial wrong.”); *Ehrgott v. Mayor of N.Y.*, 96 N.Y. 264, 281 (1884) (“The best statement of the rule is that a wrong-doer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury.”); D. Dusty Rhoades & Laura W. Morgan, *Recovery for Emotional Distress Damages in Attorney Malpractice Actions*, 45 S.C. L. REV. 837, 845 (1993) (“When an attorney’s negligence causes a client’s loss of liberty, courts have been willing to step away from the general rule barring damages for emotional distress. Generally, these cases hold that when an attorney represents a criminal defendant, incarceration is the foreseeable result of negligence. Accordingly, damages for the mental anguish arising from that foreseeable result, a non-pecuniary damage, should not be barred.”).

<sup>159</sup> *Velie v. Ellis Law, P.C.*, 48 A.D.3d 674, 675, 854 N.Y.S.2d 137, 138 (App. Div. 2d Dep’t 2008) (“To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that the defendant attorney failed to exercise ‘the ordinary reasonable skill and knowledge commonly possessed by a member of the legal community, and that the attorney’s breach of [that] duty proximately caused plaintiff to sustain actual and ascertainable damages.” (quoting *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442, 867 N.E.2d 385, 387, 835 N.Y.S.2d 534, 536 (2007))); *Hoppe v. Ranzini*, 385 A.2d 913, 917 (N.J. Super. Ct. App. Div. 1978) (“[An attorney is liable for] that which his negligence was a substantial factor in bringing about. His negligence need not be *the* proximate cause of such damages. It suffices if it is *a* proximate cause thereof.”).

chilling effect on the willingness of the already strapped defense bar to represent indigent accused. Further, it would put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions.<sup>160</sup>

The court's policy concerns are best left to the legislature, which is in a better position to decide if court appointed or public defender attorneys should be immunized from non-pecuniary damages in criminal legal malpractice actions. Obviously, the court's ban on non-pecuniary damages will prevent additional financial burdens on the public purse in New York, but this concern should be resolved by the legislature. Similarly, the court's ban may have a potential affect on the cost and availability of malpractice insurance for the private bar, but the *Dombrowski* record is silent on this issue.<sup>161</sup>

The court's reference to "devastating consequences for the criminal justice system" in New York is mistaken and not supported by evidence in the record.<sup>162</sup> Lacking evidence on this issue, the court should not conclude that the inclusion of non-pecuniary damages in a criminal legal malpractice cases would affect the quality of legal representation for criminal defendants in New York.<sup>163</sup> The court's conclusions are speculative and contrary to the idea that one may seek redress for every substantiated wrong.

The court's policy focus should have been on the "nature of [the] plaintiff's interest which is harmed,"<sup>164</sup> and not on whether inclusion of non-pecuniary damages in criminal legal malpractice actions will have a "chilling effect" on defense lawyers.<sup>165</sup> Again, the

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<sup>160</sup> *Dombrowski v. Bulson*, 19 N.Y.3d 347, 352, 971 N.E.2d 338, 340–41, 948 N.Y.S.2d 208, 210–11 (2012).

<sup>161</sup> *Id.* (focusing only on the effects of attorneys' willingness to participate rather than broader financial concerns the ruling may have).

<sup>162</sup> *Id.*; see also *Battalla*, 10 N.Y.2d at 240, 176 N.E.2d at 731, 219 N.Y.S.2d at 37 ("Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction."); *Green v. T.A. Shoemaker & Co.*, 73 A. 688, 692 (Md. 1909) ("The argument from mere expediency cannot commend itself to a court of justice resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one.").

<sup>163</sup> *Dombrowski*, 19 N.Y.3d at 352, 971 N.E.2d at 340–41, 948 N.Y.S.2d at 210–11 ("[A contrary holding] could have a chilling effect on the willingness of the already strapped defense bar to represent indigent accused. . . . [and] put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions.").

<sup>164</sup> *Holliday v. Jones*, 264 Cal. Rptr. 448, 458 (Ct. App. 4th Dist. 1989).

<sup>165</sup> *Dombrowski*, 19 N.Y.3d at 352, 971 N.E.2d at 340–41, 948 N.Y.S.2d at 210–11; see RESTATEMENT (SECOND) OF TORTS § 431 (1965) ("[A]ctor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b)

conclusion is not supported in the record. To the contrary, one can reasonably conclude that criminal defense lawyers will have enhanced incentives to vigorously represent their clients if they understand non-pecuniary damages can be awarded for their negligent representation of criminal defendants.

Finally, the Court of Appeals did not discuss or analyze recent trends in other states in favor of allowing recovery for loss of liberty in criminal legal malpractice cases.<sup>166</sup> Courts in Massachusetts, New Jersey, California, and Florida have stepped away from the general rule barring damages for emotional distress in criminal legal malpractice cases.<sup>167</sup> They recognize that wrongful convictions caused by a lawyer's criminal negligence can lead to lengthy incarceration and loss of liberty, which may constitute the only grounds for a meaningful damage recovery in a criminal malpractice action.

For example, in *Lawson v. Nugent*, the District Court of New Jersey held that a plaintiff should be allowed to recover damages for emotional distress as a result of counsel's failure to mitigate or investigate substantial sentencing enhancements.<sup>168</sup> As a result of counsel's woes, the claimant sought damages for "emotional anguish he sustained during the 'extra' twenty months of confinement [he served] in a maximum security penitentiary."<sup>169</sup> Recognizing that "mental and emotional distress is just as 'real' as physical pain, and that its valuation is no more difficult," the court directed that damages for emotional distress should be recoverable.<sup>170</sup> The court

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there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.").

<sup>166</sup> See David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 MASS. L. REV. 74, 82 (1993).

<sup>167</sup> See, e.g., *Singleton v. Stegall*, 580 So. 2d 1242, 1246 (Miss. 1991) (holding that a client could maintain a legal malpractice action seeking damages for emotional distress based on the allegations that the attorney failed to pursue the client's claims for post-conviction relief); *Lawson v. Nugent*, 702 F. Supp. 91, 95 (D. N.J. 1988) (concluding that damages are recoverable when an attorney's negligence in representing the client in a criminal case caused the client to serve more time in prison than necessary); *Bowman v. Doherty*, 686 P.2d 112, 118 (Kan. 1984) (holding that damages for emotional distress may be recovered in criminal malpractice cases).

<sup>168</sup> *Lawson*, 702 F. Supp. at 92 ("Plaintiff alleges that defendant permitted and recommended the guilty plea without inquiring whether any factual basis existed for the plea, particularly with regard to the use of weapons.").

<sup>169</sup> *Id.* Four years after sentencing, other legal counsel successfully obtained a reduction of the defendant's sentence. *Id.* The court vacated the defendant's guilty plea as to the two aggravated counts of the indictment. *Id.*

<sup>170</sup> *Id.* at 95 (citing *Berman v. Allen*, 404 A.2d 8, 15 (N.J. Sup. Ct. 1979)).

directed that “medical evidence establishing substantial bodily injury or severe and demonstrable psychiatric injury proximately caused by the tortfeasor’s conduct” could be demonstrated without undue burden or frustrating public policy concerns.<sup>171</sup>

Similarly, in *Singleton v. Stegall*,<sup>172</sup> the Supreme Court of Mississippi held that a legal malpractice action, seeking damages for emotional distress, was viable when damages are proven to be “separable from that proximately flowing from [the client’s] encounter with the legal process.”<sup>173</sup> The court reasoned that a client may show that counsel’s defaults were the proximate cause of substantial emotional distress that may be, at times, differentiated from that attendant upon a legal plight.<sup>174</sup> The court noted that “a citizen’s encounter with the legal process is a source of great anxiety. The average litigant experiences substantial emotional distress from ‘the rigors of an action, with all of its traumatic impact.’”<sup>175</sup> Nevertheless, the court directed that recovery may be appropriate in certain cases where counsel’s woes have caused the tortious infliction of emotional distress irregular to the legal process.<sup>176</sup>

In *Wagenmann v. Adams*, the Court of Appeals for the First Circuit also concluded that a client could recover damages for intentional infliction of emotional distress in a malpractice action.<sup>177</sup> While recognizing that non-pecuniary damages are generally disallowed in most malpractice cases, the court reasoned that situations when the lawyer’s malpractice results in a loss of liberty are inherently different.<sup>178</sup> Focusing on the nature of the harm, the court reasoned that “[a]ny attorney . . . should readily . . . anticipate[] the agonies attendant upon involuntary (and inappropriate) commitment . . . and the subsequent stigma and fear

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<sup>171</sup> *Lawson*, 702 F. Supp. at 95 (citing *Gautam v. De Luca*, 521 A.2d 1343, 1349 (N.J. Super. Ct. App. Div. 1987)).

<sup>172</sup> *Singleton v. Stegall*, 580 So. 2d 1242, 1242 (Miss. 1991) (remanding malpractice action to determine whether a prisoner could recover damages for emotional distress as a result of counsel’s failure to prepare, file, and present a petition for post-conviction relief, allowing the statute of limitations to run).

<sup>173</sup> *Id.* at 1247.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Wagenmann v. Adams*, 829 F.2d 196, 221–22 (1st Cir. 1987) (holding that emotionally-based injuries were proper in malpractice action when counsels’ neglect contributed to the defendant’s confinement).

<sup>178</sup> *Id.* at 222.

associated with such a traumatic episode.”<sup>179</sup> Thus, the court concluded that when counsel “caused his client a substantial loss of liberty and exposed him to a consequent parade of horrible, . . . [there is] no reason artificially to shield . . . his carelessness.”<sup>180</sup> The court also observed that to disallow such recovery would not be in the interest of justice, concluding that “[t]he indignities to which the plaintiff was subjected through the callous neglect of one appointed to champion his cause translate into a substantial monetary entitlement.”<sup>181</sup>

#### IV. CONCLUSION

The *Georgia Malone* and *Dombrowski* discussions are primarily based on broad and sweeping policy generalizations, which are unsubstantiated and not supported by the record. The Court of Appeals’ policy pronouncements are brief and conclusory. They are not the product of a careful and thoughtful analysis, which the bench and bar of New York expect and deserve from the Empire State’s highest court.

The tort of unjust enrichment is an equitable remedy developed by former Chief Judges Benjamin Cardozo, Stanley Fuld, and Charles Breitel, who relied on Aristotle and Pomeroy to develop an equity and good conscience test to do, “that which should have been done”<sup>182</sup> and “to soften the impact of legal formalisms.”<sup>183</sup> Their test was not intended to be augmented by a mandatory unprecedented heightened pleading requirement propounded by the *Georgia Malone* Court of Appeals. If New York courts determine the century old traditional requirements of unjust enrichment exist, they should

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (“We are not required by the law of the commonwealth, as we read it, to reach such an unjust result.”).

<sup>182</sup> *Simonds v. Simonds*, 45 N.Y.2d 233, 240, 380 N.E.2d 189, 193, 408 N.Y.S.2d 359, 362 (1978). See *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380, (1919) (“[C]onstructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”); *Latham v. Father Divine*, 299 N.Y. 22, 27, 85 N.E.2d 168, 170 (1949) (“[I]ts applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them.”).

<sup>183</sup> *Simonds*, 45 N.Y.2d at 239, 380 N.E.2d at 192, 408 N.Y.S.2d at 362; see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 39 (Andrew L. Kaufman ed., Quid Pro Law Books 2010) (“[W]hen the demon of formalism tempts the intellect with the lure of scientific order,” a judge needs to be reminded that “[t]he final cause of law is the welfare of society.”).

not be prohibited from fashioning enforcement relief by hyper-technical pleading rules created *sua sponte* by the *Georgia Malone* Court of Appeals.

The tort of criminal legal malpractice provides a remedy of damages for a defense counsel's negligence which results in a wrongful conviction and wrongful incarceration.<sup>184</sup> The remedy is a meaningless one without a measure of recovery, which the *Dombrowski* Court of Appeals denies as a matter of law.<sup>185</sup> The loss of liberty and emotional distress damages are extremely difficult to prove, but a deserving plaintiff should be given the opportunity to do so. The criminal defense bar of New York, most of whom are court appointed or public defenders, will not lose interest or incentives in representing defendants because non-pecuniary damages may be awarded against them in criminal legal malpractice actions. The arduous requirement that a plaintiff proves "a colorable claim of actual innocence"<sup>186</sup> and "that [his] conviction would not have resulted absent [his] attorney's negligent representation"<sup>187</sup> will screen out most claims before the issue of non-pecuniary damages arise. Finally, the legislature, and not the Court of Appeals, should decide whether criminal defense attorneys should be immunized from non-pecuniary damage awards.

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<sup>184</sup> *Dombrowski v. Bulson*, 19 N.Y.3d 347, 350, 971 N.E.2d 338, 339, 948 N.Y.S.2d 208, 209 (2012).

<sup>185</sup> *Id.* at 350, 352, 971 N.E.2d at 339, 341, 948 N.Y.S.2d at 209, 211.

<sup>186</sup> *Id.* at 351, 971 N.E.2d at 340, 948 N.Y.S.2d at 210.

<sup>187</sup> *Id.*