Mistaken Payments Return to the High Court: *Commissioner of Revenue* v *Royal Insurance*

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I. INTRODUCTION

Beginning with its momentous decision in *Pavey & Matthews Pty Ltd* v *Paul*,[1] the High Court has accepted that the concept of unjust enrichment underlies the law of restitution.[2] That concept commonly is said to be comprised of four elements:

(i) an enrichment to the defendant,
(ii) received at the plaintiff's expense,
(iii) acquired as the result of an unjust factor,
(iv) in the absence of circumstances supporting a defence.

Those elements are not analysed with equal regularity in the case law. Difficulties occasionally arise with respect to the first element, given the diverse nature of wealth and the relative novelty of the concept of unjust enrichment, and the courts have yet to determine conclusively which benefits count for the purposes of the law of restitution.[3] The third element is examined more frequently, indeed, in many instances, the existence or non-existence of a recognised unjust factor is the only contentious issue in a restitutionary action.[4]

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[1] (1987) 162 CLR 221 (hereafter *Pavey & Matthews*).

[2] See also *Australia and New Zealand Banking Group Ltd* v *Westpac Banking Corporation* (1988) 164 CLR 662 (hereafter *ANZ Bank*); *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353 (hereafter *David Securities*); *Baltic Shipping Co* v *Dillon* (1993) 176 CLR 344 (hereafter *Baltic Shipping*).

[3] Since the law values all things monetarily, money invariably is enriching: *BP Exploration Co (Libya) Ltd* v *Hunt (No 2)* [1979] 1 WLR 783, 799 per Goff J. In contrast, goods and services may or may not be enriching, depending upon the circumstances. Unlike money, they have no inherent value. Recourse therefore must be made to a market valuation, to a recipient's subjective valuation or to some combination of the two. The applicable tests have yet to be settled conclusively. See eg *Brenner* v *First Artists' Management Pty Ltd* [1993] 2 VR 221; A Burrows, *The Law of Restitution* (1993) 7–16; M McInnes, 'Incontrovertible Benefits in the Supreme Court of Canada' (1994) 23 *Cdn Bus LJ* 122.

[4] Each of the High Court's recent decisions in restitution focussed largely on the unjust element. The primary issue in *Pavey & Matthews* was whether or not a builder could claim relief with respect to services rendered under an unenforceable contract. The Court answered in the affirmative, presumably on the basis that a recipient's *free acceptance* of an enrichment can serve as an unjust factor: cf P Birks 'In Defence of Free Acceptance' in *Essays on the Law of Restitution* (A Burrows, ed, 1991) 105 (hereafter 'Free Acceptance'). In *David Securities* (1991) 175 CLR 353, the High Court accepted in the context of an action between private parties that restitutionary relief prima facie lies if a plaintiff confers a benefit upon a defendant as a result of a *mistake of law*. The Court similarly considered the issue of *mistake*, albeit in far less detail, in *Australia and New Zealand Banking Group Ltd* v *Westpac Banking Corporation* (1988) 164 CLR 662. And in *Baltic Shipping* (1993) 176 CLR 344, the plaintiff was denied restitutionary relief of payments made with respect to a sea cruise that ended in disaster because she had

Not surprisingly, the fourth element often receives attention, as well. If presented with a prima facie claim, a defendant is subject to liability in the absence of a valid defence. Rarely, however, is the second element the subject of detailed investigation. Exceptional situations aside,[5] the source of the relevant enrichment typically is clear. Consequently, the requirement that the defendant's gain be at the plaintiff's expense usually is settled by way of intuition or assumption, rather than considered analysis.[6]

The recent decision in *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd*[7] therefore is somewhat unusual. While the enrichment element was not contentious, difficult questions arose with respect to each of the other three components of the guiding principle. Most remarkably, the High Court addressed in some depth the requirement that the defendant's gain be at the plaintiff's expense. The case, however, is a mixed blessing. While it does further clarify the nature of the Australian concept of unjust enrichment, it does so on the basis of a number of questionable propositions.

Sections II and III of this paper briefly describe the facts and judicial history of *Royal Insurance*. Section IV considers the issue of restitutionary relief in two parts. The first part examines various matters pertaining to the unjust factor. In the course of allowing recovery on the basis, inter alia, of a liability mistake, members of the Court made controversial comments regarding the relationship between mistake and retrospective legislation, the distinction between mistake and misprediction, and the recognition of an unjust factor labelled 'absence of legitimate reason for retention'. The second part of Section IV examines the potential defences arising on the facts of *Royal Insurance*: disruption of public finances, voluntary payment, honest receipt and passing on. The final defence in turn involves a consideration of the requirement that the defendant's gain be 'at the plaintiff's expense'. Finally, Section V provides a summary assessment of the merits of the High Court's decision.

received part of that for which she had bargained. The Court affirmed that *failure of consideration* serves as an unjust factor only if it is a *total* failure.

[5] The second element of the concept of unjust enrichment *is* controversial in the relatively rare context of *interceptive subtraction*: see Burrows, op cit (fn 3) 45–8; *Goff and Jones: The Law of Restitution* (G Jones, ed, 4th ed, 1993) 36–8; P Birks, *An Introduction to the Law of Restitution* (1989) 133–8; L Smith, 'Three Party Situations: A Critique of Birks' Theory of Interceptive Subtraction' (1991) 11 *Oxford J of Legal Stud* 481. Moreover, the second element contains a conceptual ambiguity; a defendant's enrichment may be at a plaintiff's expense either in a 'subtractive' sense or in a 'wrong sense': Birks, 23–4. See also fn 112 infra.

[6] The danger inherent in a failure to carefully analyse the second element of the unjust enrichment concept was illustrated by Justice Gaudron's opinion in *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107. See K B Soh, 'Privity of Contract and Restitution' (1989) 105 LQR 4; I M Jackman 'Contract — Rights and Liabilities of Third Parties — Indemnity Insurance — Unjust Enrichment and Privity of Contract' (1989) 63 ALJ 368; K Mason 'Restitution in Australian Law' in *Essays on Restitution* (P D Finn, ed, 1990) 20, 32–6; G Jones 'The Law of Restitution: Past and Future' in *Essays on the Law of Restitution* (A Burrows, ed, 1991) 2–3; cf L Proksch 'Restitution & Privity' (1994) 68 ALJ 188.

[7] (1994) 182 CLR 51 (hereafter *Royal Insurance*).

II. THE FACTS

During the 1980s, the plaintiff, Royal Insurance, issued workers' compensation insurance policies of two types: 'wages' policies and 'cost plus' policies. With respect to each, the *Stamps Act* 1958 (Vic) obligated the insurer to lodge monthly returns of premiums received and to pay to the defendant, the Commissioner of Revenue, stamp duties on those premiums. The calculation of the payable tax was 'self-assessed'; rather than responding to specific monetary demands, the plaintiff calculated for itself the amount due to the Commissioner of Revenue. The plaintiff sought to satisfy its liability by increasing its policy holders' premiums. Though not conclusively established in evidence, the Court proceeded upon the basis that the insurer simply increased its global price, rather than charge its customers the amount of the tax as a separate item.

On 30 June 1985, the Victorian legislature implemented a new workers' compensation scheme which eliminated the need for the plaintiff to pay tax on 'wages' policies. By error, however, the amending legislation did not similarly eliminate the levy on 'cost plus' policies. When that oversight was recognised by the state in 1987, legislation was enacted which removed entirely the plaintiff's obligation to pay stamp duties. Moreover, in order to achieve consistency between the two types of policies, s 2(4) of the *Taxation Acts Amendment Act* 1987 (Vic) stated that the amendment was 'deemed to have come into effect on 30 June 1985'.

Remarkably, the plaintiff continued to remit stamp duties pursuant to the original regime for a considerable time. Between 1985 and 1989, it paid a total of $1 907 908.10 to the defendant. The payments fell into three broad categories, the second of which can be sub-divided:[8]

(i) $138 791.21 was paid in respect of 'wages' policies which were received for extension after 30 June 1985.

(ii) $1 674 301.94 was paid in respect of 'cost plus' policies which were received after 30 June 1985. Of that amount, approximately:
   (a) $1 370 000 was paid in respect of premiums received *before* the 1987 amendment took effect; and
   (b) $300 000 was paid in respect of premiums received *after* the 1987 amendment took effect.

(iii) $95 426.95 was paid in respect of overestimates of premiums on 'cost plus' policies received before 1 July 1985 in regards to liabilities incurred before 1 October 1985.

Finally, in 1989, the plaintiff's error was drawn to its attention by the defendant and payments on the exempted premiums came to an end. Not surprisingly, the plaintiff then sought recovery of its overpayments. It commenced an action for mandamus, seeking to compel the defendant to comply with a duty to refund which the plaintiff argued was created by s 111(1) of the *Stamps Act*:

[8] The numbering used in the following scheme follows the judgment of Brennan J. Mason CJ and Dawson J referred to the same categories in slightly different terms.

> Where the [Commissioner] finds in any case that duty has been overpaid, whether before or after the commencement of the *Stamps Act* 1978, he *may* refund to the company, person or firm of persons which or who paid the duty the amount of the duty found to be overpaid (emphasis added).

In response, the defendant claimed that that provision merely established a discretion to refund overpayments, which she chose to not exercise.[9]

III. JUDICIAL HISTORY

At trial, Beach J dismissed the summons on the ground that s 111(1) conferred a discretion upon the defendant which entitled her to refuse the plaintiff's claim. On appeal, the Full Supreme Court of Victoria took a different view of the matter. It found that the proper, contextual construction of the provision imposed an obligation upon the defendant to refund once satisfied that overpayment had occurred. An order of mandamus therefore was granted to compel repayment to the plaintiff. A further appeal brought the case before the High Court.

Though based on extended analysis, the High Court's interpretation of s 111(1) can be stated briefly for present purposes.[10] A majority (Mason CJ, Brennan, Toohey and McHugh JJ) found that the provision did not impose a duty to make repayment. The source of such an obligation, if it existed, was non-statutory. However, the majority also denied that s 111(1) conferred a discretion upon the defendant enabling her to refuse repayment in the event that restitutionary relief did lie at common law. Rather, the provision was read as merely empowering the defendant, if necessary, to withdraw money from the Consolidated Fund for the purpose of refunding overpaid stamp duties. Dawson J, dissenting on this point, agreed with the Full Court and held that notwithstanding use of the term 'may', the legislation required the defendant to refund the plaintiff's money once satisfied that there had been overpayment.

IV. RESTITUTIONARY RECOVERY OF OVERPAYMENTS

In light of his interpretation of s 111(1) of the *Stamps Act*, Dawson J was not required to decide whether or not a non-statutory right of relief existed in *Royal Insurance*. In contrast, questions regarding the existence of a common law action arose squarely on the majority view of the provision. The success of the plaintiff's summons for mandamus turned largely on the availability of

[9] Though irrelevant to the decision in *Royal Insurance*, it may be noted that the provision now states that the Commissioner 'must refund the amount of overpaid duty' upon application within three years of the overpayment: *State Taxation (Amendment) Act* 1992 (Vic), s 36.

[10] For a more thorough discussion of the relationship between s 111(1) of the *Stamps Act* and the applicability of a restitutionary cause of action, see J Glover, 'Restitutionary Recovery of Taxes After the Royal Insurance Case: Commentary' in *Restitution: Developments in Unjust Enrichment* (M McInnes, ed, 1996) ch 6.

restitutionary relief; if the plaintiff was entitled to such recovery, an order would be granted compelling the defendant to comply with the attending obligation to refund. Ultimately, both Mason CJ and Brennan J (with whom Toohey and McHugh JJ concurred) held that the plaintiff was entitled to recover all of its overpayments. However, in many respects, they employed substantially differing analyses in reaching that conclusion.

A. Mistake of Law

Mason CJ held that all categories of overpayments potentially were subject to restitutionary relief as having been made under mistake of law. In contrast, Brennan J's majority decision relied upon the unjust factor of mistake with respect to only categories (i) and (ii)(b) (as described above).[11]

In considering recovery of payments made under mistake, the starting point for analysis is *David Securities Pty Ltd* v *Commonwealth Bank of Australia*.[12] There, the High Court held that the distinction traditionally drawn between mistakes of fact (for which relief was available) and mistakes of law (for which relief typically was thought to be unavailable) formed no part of the Australian law of restitution. There is a 'prima facie entitlement to recover moneys paid when a mistake of fact or law has caused the payment'.[13] Consequently, the character of the plaintiff's mistake in *Royal Insurance* was immaterial.

Of course, *David Securities* does not provide authoritative guidance for the recovery of mistaken payments in all circumstances. Most obviously, that case involved benefits conferred between private entities; *Royal Insurance*, in contrast, concerned an enrichment provided by a private party to a public authority.[14] It has been suggested that that distinction is relevant and that a more restrictive rule should apply in the latter situation.[15] It will be argued that that view was not given effect in *Royal Insurance*; by largely ignoring the issue, the Court implicitly denied that the parties' status is determinative of the scope of relief.[16] The availability of restitution was clarified in a number of other respects, as well.

[11] In dicta, Dawson J similarly denied that category (ii)(a) payments were caused by a mistake: *Commissioner of State Revenue* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 100.

[12] (1992) 175 CLR 353.

[13] Id 376.

[14] A third permutation concerns mistaken payments made by the state to a private party (and, presumably, to another public body). That situation is governed by a broad recovery rule based upon the illegality of expenditures made without Parliamentary authority: see eg *Auckland Harbour Board* v *R* [1924] AC 318; *Commonwealth* v *Burns* [1971] VR 825.

[15] See eg B Wells, 'Restitution From the Crown: Private Rights and Public Interest' (1994) 16 *Adel L R* 191.

[16] Compare K Mason, 'Searching for Restitution in Australia', J Merralls, 'Restitutionary Recovery of Taxes After the Royal Insurance Case' and J Glover, 'Restitutionary Recovery of Taxes After the Royal Insurance Case: Commentary' in McInnes (ed), op cit (fn 10) chs 7 and 8.

(1) *Liability Mistakes*

In explaining the plaintiff's right to recovery on the basis of a mistake of law, Mason CJ relied upon the following passage from the majority decision in *David Securities*:

> The payer will be entitled prima facie to recover moneys paid ... under a mistake if it appears that the *moneys were paid in the mistaken belief that he or she was under a legal obligation to pay the moneys* or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment.[17]

That statement calls to mind the 'supposed liability' rule which traditionally was said to limit recovery of mistaken payments to situations in which a payer's erroneous view of the facts led him to believe that he had incurred a legal liability to the defendant.[18] That rule was animated largely by the perceived desirability of restricting the incidence of restitutionary relief.[19] And certainly, the danger of allowing too much restitution is minimal in the case of a liability mistake: 'Restitution for liability mistake is not very threatening because it is closely confined to a particular case of very serious mistake.'[20]

However, the 'supposed liability' rule is indefensible in theory. A mistake serves as an unjust factor by vitiating the plaintiff's intention to transfer an enrichment to the defendant; because she did not truly intend for him to have the benefit, it would be unjust for him to retain it.[21] As a matter of theory, that analysis holds true of both liability and non-liability mistakes. As the High Court recognised in *David Securities*, 'it is illogical to concentrate upon the type of mistake when the crucial factor is that the recipient has been enriched.' To be effective, a mistake need merely be causative.[22] Moreover, the perceived need to restrict recovery to liability mistakes finds little support in practice. Notwithstanding the purported rule, courts long have permitted recovery on the basis of other mistakes,[23] and have not been overwhelmed by a flood of litigation as a result.

Clearly, then, Mason CJ's decision in *Royal Insurance* should not be read in support of the 'supposed liability' rule. The passage cited from *David Securities* surely was chosen not because the Chief Justice wished to confine relief to

[17] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 378 (emphasis added).

[18] See eg *Kelly* v *Solari* (1841) 9 M & W 54, 58; 152 ER 24, 26 per Parke B; *Aiken* v *Short* (1856) 1 H & N 210, 215; 156 ER 1180, 1182 per Bramwell B.

[19] The 'supposed liability' rule unpersuasively draws support from a number of other considerations, as well: Birks, op cit (fn 5) 148–53.

[20] Id 152–3.

[21] Id 140, 147.

[22] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 376, 395. For similar reasons, the High Court also rejected the need to establish a 'fundamental mistake': 377–8, 395–6. Cf *Australia and New Zealand Banking Group* v *Westpac Banking Corporation* (1988) 164 CLR 662, 671–3.

[23] See eg *Larner* v *London County Council* [1949] 1 KB 683; *Lowe* v *Wells Fargo & Co* 78 Kans 105, 96 P 74 (1908) (mistaken belief in moral obligation); *Lady Hood of Avalon* v *MacKinnon* [1909] 1 Ch 476 (mistake gift); *Barclays Bank Ltd* v *W J Simms & Sons Ltd* [1980] QB 677, 690–5 per Goff J.

liability mistakes, but rather because it described precisely the facts before the Court. The overpayments occurred because the insurer's erroneous belief in the existence of a stamp duty led it to regard itself as being subject to a legal liability in the Commissioner's favour.

(2) *Changes in the Law: Retrospective Legislation*

A plaintiff makes payment on the basis of an interpretation of a law which at the time of payment is (or generally is considered to be) correct. That law subsequently is altered (or clarified) so as to deny the liability of a person in the plaintiff's pre-payment circumstances. Should restitutionary relief lie? The fear that that question might be answered in the affirmative was one of the major concerns which traditionally inhibited the recovery of payments made under mistake of law. Very often, laws are (or appear to be) changed. The availability of relief in all such cases would undermine greatly the social value in the security of receipts and might lead to a flood of litigation.

Laws may be given new direction either judicially or legislatively. Judicial changes create difficulties because of the traditional declaratory theory of law. Briefly stated, that theory holds that judges never create, they simply discover and articulate the immutable. Apparent instances of judicial legislation are explained on the basis of the rectification of past errors; an overruling judge merely reveals his predecessor's misperception of the applicable law. As long as restitution was denied for payments made under mistake of law, the declaratory theory of judicial behaviour was of little consequence. Though a payment had been induced by case law subsequently declared to have been erroneous, the payer could not point to an operative unjust factor.[24] However, now that the High Court has held that both mistakes of fact and mistakes of law can underlie restitutionary relief, it has become necessary to articulate some other basis upon which to deny relief in such circumstances.[25] To allow recovery merely because a court altered a rule upon which a payment was based potentially would engender a deluge of litigation. Though the issue has yet to be settled, it is most likely that the declaratory theory simply will be rejected on the grounds of its patent artificiality.[26] However undemocratic, it can hardly be denied that judges, like legislators, do make law.

In contrast, because of the presumption of non-retrospectivity, legislative alterations of liability rules typically are not problematic for the law of

[24] See eg *Henderson* v *The Folkstone Waterworks Co Ltd* (1885) 1 TLR 329; *Derrick* v *Williams* [1939] 2 All ER 559.

[25] The need to restrict the availability of relief has been recognised in jurisdictions which legislatively have abolished the traditional mistake of law rule. Often, the amending statute expressly precludes the recovery of payments made on the faith of laws which subsequently are altered judicially: *Judicature Act* 1958 (NZ), s 94A(2); *Property Law Act* (WA), s 124(2).

[26] Alternatively, if the declaratory theory is retained, recovery simply could be denied on policy grounds. Moreover, even if relief prima facie was available, restitution could be denied for payments made pursuant to contractual compromises and perhaps for payments made in submission to honest claims: Burrows, op cit (fn 3) 101–3. So, too, a restitutionary action could fail for want of causation if a plaintiff had known or strongly suspected that a liability rule was subject to imminent alteration, but chose to pay in any event. Finally, limitations periods would restrict the number of potential claims.

restitution. A statute which speaks prospectively logically cannot affect the character of antecedent actions. If a plaintiff makes payment because she correctly interprets a law as imposing an obligation to do so, she cannot seize upon a subsequent legislative amendment to argue that her intention in conferring a benefit upon the defendant was vitiated. The relevant time for consideration is the moment of payment.[27] At that moment, no error is operative and hence, in the absence of another unjust factor, no basis for restitutionary relief exists.

In *Royal Insurance*, however, the High Court was required to address the troublesome issue of *retrospective* legislative changes. Initially, it will be recalled, the insurer was liable to pay stamp duties on premiums received under 'wages' policies and 'cost plus' policies. Upon the introduction of a new workers' compensation insurance regime, the government intended to exempt the tax payable with respect to both classes of policies. In fact, because of an error, the legislation introduced in 1985 pertained only to 'wages' policies. During the next two years, the plaintiff continued to pay stamp duties as before. At the time of those payments, it was under no obligation with respect to 'wages' policies; in contrast, with respect to 'cost plus' policies, it was responding to an existing liability. In 1987, the government realised its oversight and exempted 'cost plus' policies from the taxing scheme. In rectification of its earlier error, it provided that the amendment was 'deemed to have come into effect on 30 June 1985'. Accordingly, the High Court was faced with the question of whether or not payments made with respect to 'cost plus' policies between 30 June 1985 and the introduction of the retrospective legislation in 1987 (ie category (ii)(a) payments) were recoverable as having been made under a mistake of law.

Mason CJ answered in the affirmative. He recognised that the category (ii)(a) payments were made in response to an existing liability, and hence in one respect were not the product of a mistaken belief. Nevertheless, he held that

> the retrospective operation of . . . the 1987 Act enables one to say that, in light of the law as it was enacted with retrospective effect in 1987, the payments of duty were made under a mistake as to the legal liability to pay them.[28]

Brennan J, in contrast, saw 'no occasion to invoke notions of common law restitution in order to discover a cause of action entitling the payer to a refund.'[29] In his view, the 1987 amendment by necessary implication created a *statutory* right of recovery. His Honour's reasoning is slightly obscure, but appears to proceed upon the following lines. With respect to category (ii)(a) payments, the legislature clearly intended to place taxpayers in the same position that they would have enjoyed between 1985 and 1987 had the *Stamps*

[27] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 389–90 per Brennan J.

[28] *Commissioner of State Revenue* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 67.

[29] Id 90.

Act not imposed a levy upon them during that time. However, to have declared the 1987 amendment retrospective without establishing a statutory right of recovery would have been futile. Because the High Court's decision in *David Securities* was not rendered until 1992, a taxpayer could not have compelled repayment of the tax under the common law. Its mistake would have been one of law, which, in 1987, generally was not thought to support restitutionary relief. Moreover, the legislature could not be assumed to have anticipated the judicial rejection of that rule.[30]

Dawson J, in the clearest opinion on point, doubted in dicta that the retrospective legislation could convert the plaintiff's payments under category (ii)(a) into payments made under mistake of law.

> However much the amendment retrospectively removed the Commissioner's entitlement or authority to receive the payments . . . 'it cannot, however objectively, expunge the facts or "alter the facts of history" '.[31]

The preferable view is that the 1987 retrospective amendment could not support restitutionary recovery of category (ii)(a) payments. The operational foundation of 'mistake' as an unjust factor lies not in policy, but rather in logic. 'Mistake' does not serve as a general rubric under which courts permit relief on the basis of extraneous considerations. If it did, the concept of unjust enrichment would import the uncertainty against which the High Court has keenly guarded.[32] Rather, 'mistake' is effective as an unjust factor because it identifies, on the basis of inherent considerations, a reason why a plaintiff should be entitled to restitution. A person who pays money as a result of a mistake acts pursuant to a vitiated intention; because the recipient was not truly meant to receive the enrichment, it would be unjust for him to retain it.[33] In *Royal Insurance*, the plaintiff was subject to a liability at the time of payment and consequently did truly mean for the defendant to receive the payment.

[30] Must the same logic extend to create a statutory right of recovery under the 1985 legislation with respect to category (i) payments, or to a statutory right of recovery under the 1987 legislation with respect to category (ii)(b) payments? Strictly speaking, the answer must be in the negative because those provisions could have *some* effect even in the absence of a right of recovery. Granted, that effect would differ from the full retrospective effect which the 1987 amendment had with respect to category (ii)(a) payments. It would exempt certain classes of insurance premiums from stamp duties without enabling taxpayers to recover mistakenly conferred enrichments. However, it is conceivable that the legislature intended as much, even if it recognised in the days before *David Securities* that relief would not lie at common law. Moreover, the fact that category (i) and (ii)(b) payments, on the one hand, and category (ii)(a) payments, on the other hand, would thereby be treated differently does not compel a contrary position. Taxpayers falling under the former category could have avoided error by consulting the legislation. Accordingly, they are less worthy of protection. Taxpayers under the latter category, in contrast, could not possibly have been expected to refuse payment in anticipation of the retrospective legislation; accordingly, they are more worthy of protection.

[31] *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 101, quoting *University of Wollongong* v *Metwally* (1984) 158 CLR 447, 478 per Deane J.

[32] *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221, 256; *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 378–9.

[33] Birks, op cit (fn 5) 140, 147.

To better appreciate why category (ii)(a) payments could not be recoverable on the basis of mistake, it is useful to compare the effect of retrospective legislation with the effect of the declaratory theory of judicial behaviour. As explained above, the latter holds that a judicial statement of law describes what the law is *and* what the law had always been. Consequently, if a person acted in reliance on a prior, conflicting judicial statement, he did so on the basis of a mistake shared by the earlier, wayward court. At the time of payment, the correct position in law existed, but was unknown. In contrast, retrospective legislation does not purport to represent a position which actually existed prior in time. Indeed, as seen in *Royal Insurance*, the very act of deeming implicitly recognises that a change is effected; circumstances known not to have existed nevertheless are said to have existed. Accordingly, it follows that retrospective legislation cannot support the unjust factor of mistake; a plaintiff cannot rely upon it to establish that, at the time of payment, his intention to confer a benefit was vitiated.

(3) *Mistake and Misprediction*

The High Court's decision in *David Securities* considerably expanded the scope of relief for payments induced by misperceptions. However, while holding that both mistakes of fact and mistakes of law could give rise to liability, it did not articulate a rule permitting recovery of all benefits conferred in error. In particular, it did not state that restitution was available on the basis of both *mistakes* and *mispredictions*.

Though occasionally difficult to apply in practice, there exists a clear distinction in theory between a mistake and a misprediction. The former is an erroneous view of existing facts or circumstances. A plaintiff acts under a mistake when she confers an enrichment upon a defendant because she believes presently to be true that which, in fact, presently is not true. The latter, in contrast, is an ultimately erroneous belief as to future facts or circumstances. A plaintiff acts under a misprediction when she confers an enrichment upon a defendant because she believes that time will bring about a state of affairs which, in fact, does not materialise.

Similarly, a clear distinction can be drawn between the appropriate restitutionary consequences of a mistake and the appropriate restitutionary consequences of a misprediction. As previously explained, mistake serves as an unjust factor because it vitiates the payer's intention to confer an enrichment. At the time of payment, she did not truly intend her actions; she was misled by her erroneous view of the existing circumstances. Accordingly, it is unjust that the recipient retain the benefit. In contrast, misprediction does not properly serve as an unjust factor.[34] At the time of payment, the payer's intention was not vitiated. She had full knowledge of the existing circumstances. True, she ordered her affairs in reliance upon events which she predicted would follow from those circumstances but which failed to

[34] More precisely, misprediction does not serve as an unjust factor in the same manner as mistake. However, as discussed below (text accompanying fn 43), circumstances involving a misprediction may support some other type of unjust factor.

transpire. However, as Birks explains, 'a prediction is an exercise in judgement. To act on the basis of a prediction is to accept the risk of disappointment'.[35] The law of restitution properly is reluctant to shift the burden of a risk which a person freely assumes.[36]

The misprediction issue arose in *Royal Insurance* in the context of category (iii) payments. The plaintiff, it will be recalled, transferred money to the defendant in satisfaction of stamp duties payable on premiums it received from policy holders. With respect to 'cost plus' policies, premiums were calculated on the basis of the costs of claims actually made and paid during the coverage period. Consequently, policy holders did not pay the plaintiff in full until *after* the expiration of the relevant period of insurance, in this case 1 October 1985. However, the regime originally existing under the *Stamps Act* required the plaintiff to pay the levy to the defendant *before* that time. Accordingly, at the start of the coverage period, the insurer calculated its tax liability on the basis of an estimation of the quantum of premiums that eventually it would receive. Although the precise nature of the arrangement is not clear from the opinions in *Royal Insurance*, it was understood as between the parties that any necessary adjustments in liability would be made at the end of the coverage period to reflect accurately the duty payable. In fact, the plaintiff overestimated the amount of premiums it would receive and consequently overpaid the defendant. The question before the Court therefore was whether category (iii) payments could be recovered, and if so, upon what basis.[37]

Mason CJ held that recovery of category (iii) payments was available on the basis of a mistake of law.[38] With respect, that cannot be correct. As the payments in question occurred before any of the legislative amendments took effect, the insurer had responded to an existing liability, albeit one of unascertained extent; there was no mistake of law. Nor was there a mistake of fact. True, the operative error related to the measure of the insurer's liability, which was based on the factual matter of premiums received. However, at the time of payment, the plaintiff did not misperceive existing circumstances. Indeed, as part of its estimation of liability under the *Stamps Act*, it undoubtedly took careful account of the pertinent facts, such as its current level of premium income and the total amount of premiums received in previous

[35] Birks, op cit (fn 5) 147.

[36] The extent to which that proposition is true currently is being tested most dramatically with reference to the concept of *free acceptance*. If P confers an enrichment upon D, knowing that D had not requested it, should D be liable in restitution if he accepts the benefit, intending from the outset to refuse payment? Goff & Jones argue in the negative, reasoning that P, as an officious intervener, 'takes the risk that [D] will pay him for the benefit which he conferred on him. Because the risk is on his head, he has no cause to complain if his hope is disappointed': Goff & Jones, op cit (fn 5) 58. Birks argues to the contrary, reasoning that D's unconscientious behaviour may offset P's assumption of risk: Birks, op cit (fn 4).

[37] Category (iii) involved overpayments made with reference to 'cost plus' policies received by the plaintiff *before* 1 July 1985 in respect of liabilities incurred before 1 October 1985. Payments made with reference to 'cost plus' policies received by the plaintiff *after* 30 June 1985 fell into category (ii).

[38] *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 67.

years. Rather, the insurer's error was a misprediction. On the basis of existing knowledge, it anticipated the costs which it would incur in the future with respect to the policies in question.

Brennan J's treatment of the category (iii) payments is somewhat ambiguous. While stating that they were made 'under a mistake as to the quantum of premiums to be received',[39] he also held that they were not affected by any 'error of law'.[40] Possibly, he perceived an operable mistake of fact. More likely, however, he considered the law of restitution to be irrelevant to the recovery of the overpayments. At several points, he noted that they 'were made provisionally and should have been adjusted in the ordinary course of dealing between Royal and the Comptroller when the over-estimate of premiums was ascertained'.[41] Accordingly, it appears that he believed the basis of relief to lie in the simple fact that the parties had a practice whereby the defendant accounted to the plaintiff for the type of overpayments in question.[42]

Of course, merely to state that the parties had developed a practice of repayments does not satisfy the requirements of any cause of action. Preferably, relief would be based on a more exacting analysis. One possibility lies in the restitutionary notion of *failure of consideration*. As recently explained by the High Court in *Baltic Shipping Co* v *Dillion*, that concept allows for the recovery of money if the 'consideration',[43] or condition, for which it was given fails. In contrast to 'mistake', which serves as an unjust factor by *vitiating* a payer's intention to confer a benefit, 'failure of consideration' serves as an unjust factor by *qualifying* a payer's intention to confer a benefit.[44] In the latter situation, a payer is not misled as to existing circumstances. He knowingly enriches the recipient. However, he intends for her ultimately to retain the benefit only if a specified event transpires in the future (typically, the recipient's provision of a counter-benefit). If that expected event does not occur, the qualification upon the payer's intention is not satisfied and the recipient's enrichment is unjust according to the law of restitution.

The concepts of 'misprediction' and 'failure of consideration' likewise are distinguishable even though both look to the future. In a case of a mere misprediction, the payer assumes a risk of error. In conferring an enrichment

[39] Id 89.
[40] Id 83.
[41] Id 69, 83.
[42] Dawson J similarly recognised that the payments 'would have been the subject of an adjustment when identified even if the amendments to the legislation had not taken place in 1985 and 1987': id 95. However, he did not specifically exclude category (iii) payments from the characterisation of 'mistake': id 100.
[43] The term 'consideration' carries a different meaning in restitution than in contract. In the context of recovery of money paid on the footing that there has been a total failure of consideration, it is the performance of the defendant's promise, not the promise itself, which is the relevant consideration: *Baltic Shipping Co* v *Dillon* (1993) 176 CLR 344, 350–1 per Mason CJ, 376 per Deane and Dawson JJ, 389 per McHugh J. See also *Fibrosa Spolka Akcyjina* v *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48 per Lord Wright. To avoid confusion with the contractual notion, in the restitutionary context it would be better to use a more accurate term, such as 'failure of promised performance': Burrows, op cit (fn 3) 253–4.
[44] Birks, op cit (fn 5) 219.

without stipulating conditions for its retention, he accepts the possibility that his payment may be made for naught. If that risk eventuates against him, there is no basis for restitutionary relief. Certainly, he can not complain that his intention in conferring the benefit was undermined. In contrast, in a case of failure of consideration, the payer does not assume the same risk of error. He confers a benefit because he believes that an event will occur in the future (typically, that the recipient will provide a reciprocal benefit) *and* he premises his intention ultimately to enrich the payee upon occurrence of that event. If that qualification upon his intention is disappointed, then he did not fully intend to enrich the defendant and restitutionary relief may lie. While fine, the distinction between failure of consideration and misprediction therefore is important. First, the two concepts are not conterminous. Failure of consideration invariably entails a misprediction, but misprediction does not invariably entail a failure of consideration. Second, only failure of consideration reveals a factor affecting the payer's intention and hence a basis for awarding relief.[45]

In *Royal Insurance*, the relevant consideration with respect to category (iii) payments was the discharge of the obligation to pay tax. By means of its overpayment, the insurer received part of the Commissioner's expected performance. The defendant extinguished the liability to which the plaintiff actually was subject. That fact is important because the law often is said to require that a failure of consideration be *total*;[46] if a payer receives *any* part of a recipient's expected performance,[47] restitution generally is not available.[48] However, an exception of sorts is recognised in the context of divisible bargains.[49] Restitutionary relief may lie with respect to a discrete unit of promised performance if the consideration for that unit totally fails.[50] In *Royal*

[45] Birks, op cit (fn 5) 217.

[46] See eg Burrows, op cit (fn 3) 253–7. Cf P Birks 'No Consideration: Restitution After Void Contracts' (1993) 26 *U of WA L Rev* 195, 210–14. The High Court recently suggested that the traditional requirement of a *total* failure of consideration is best understood simply as a requirement of counter-restitution. If the defendant must give back benefits received from the plaintiff, she similarly should be entitled to get back benefits conferred upon the plaintiff. 'In cases where consideration can be apportioned or where counter-restitution is relatively simple, insistence on failure or total failure of consideration can be misleading or confusing': *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 383.

[47] Compare *Yeoman Credit Ltd* v *Apps* [1962] 2 QB 508; *Rowland* v *Divall* [1923] 2 KB 500.

[48] A prime example appears in *Baltic Shipping Co* v *Dillon* (1993) 176 CLR 344. The plaintiff prepaid the defendant for a two week cruise. She enjoyed approximately nine days of the vacation before the ship sank off the South Island of New Zealand. Her action for restitutionary recovery of the fare was rejected by the High Court on the ground that she had received part of the defendant's promised performance. Of course, if unable to establish a total failure of consideration, a plaintiff may enjoy restitutionary relief on the basis of some other unjust factor.

[49] Though the restitutionary concept of failure of consideration often arises in the context of ineffective contracts, it is not limited to such circumstances. Accordingly, the term 'bargain' is employed to indicate all situations, contractual and non-contractual, in which a payer confers an enrichment in expectation of a reciprocal benefit.

[50] See eg *Baltic Shipping Co* v *Dillon* (1993) 176 CLR 344, 350 per Mason CJ, 375 per Deane and Dawson JJ. The proposition is easily illustrated. P and D enter into an agreement whereby P is to pay 10 payments of $5 each during the winter months and D is to cut P's lawn ten times during the following summer. P complies with the terms of the

Insurance, every dollar paid by the insurer pertained to a dollar which it expected to receive from its policy holders and hence arguably to a discrete unit of liability under the *Stamps Act*. Because no such liability actually arose with respect to the dollars comprising the overpayment, the relevant consideration necessarily failed; the Commissioner could not possibly have discharged a non-existent debt.

(4) *Absence of Legitimate Reason for Retention*

While Mason CJ allowed recovery of all categories of overpayments on the basis of mistake of law, he also contemplated that

> the absence of any legitimate basis for retention of the money by the Commissioner might itself ground a claim for unjust enrichment without the need to show any causative mistake on the part of Royal.[51]

As previously discussed, the third element of the concept of unjust enrichment requires that the defendant receive a benefit at the plaintiff's expense as a result of an unjust factor. Such a factor provides the reason why the defendant may be compelled to give back or disgorge an enrichment. The catalogue of unjust factors, like the categories of negligence,[52] must of course remain open.[53] However, the suggestion that it should (or does) include the concept of 'absence of legitimate basis for retention' ought to be rejected. The proposal of Mason CJ cannot be reconciled with the fundamental structure of the Australian notion of unjust enrichment.

It appears that the Chief Justice's obiter comments are based on a misinterpretation of Justice Wilson's opinion in *Air Canada* v *British Columbia*,[54]

bargain and pays a total of $50 to D. However, when summer arrives, D provides lawn maintenance on two occasions and refuses to do more. Assuming that P terminates the parties' contract (if any), he is entitled to restitutionary relief on the basis of total failure of consideration even though he received part of the promised performance. The bargain is divisible into ten units, each valued at $5. Because the 'consideration' has totally failed with respect to eight units, P is entitled to recovery of $40.

[51] *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 67. Mason CJ raised, but did not explore, the matter, presumably because it had not been argued by counsel. The Chief Justice's proposition that relief might be available simply on the basis of the 'absence of any legitimate reason for the retention of the money' suggests that the onus of proof under the third element of the unjust enrichment concept might be placed on the defendant. In that respect, it recalls the Canadian formulation of the concept of unjust enrichment, in which the third element is stated to be 'the absence of any juristic reason for the enrichment': see *Pettkus* v *Becker* [1980] 2 SCR 834, 848; *Hunter Engineering Co* v *Syncrude Canada Ltd* [1989] 1 SCR 426, 471–2. Cf *Rathwell* v *Rathwell* [1978] 2 SCR 436, 455 per Dickson J; *Sorochan* v *Sorochan* [1986] 2 SCR 38; *Peter* v *Beblow* [1993] 1 SCR 980 (SCC). Occasionally, it has been suggested that that formulation entails a reversed onus: M Litman, 'The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust' (1988) 26 *Alta L Rev* 407, 431–4. However, the better view, which ought to be followed in this country, is that the primary burden for each of the first three elements rests upon the plaintiff: Birks, op cit (fn 46) 231–4; P D Maddaugh and J D McCamus, *The Law of Restitution* (1990) 46; L Smith, 'The Province of the Law of Restitution' (1992) 71 *Can Bar Rev* 672, 675–7. That approach is supported by the reasoning of the High Court in *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 378–9.

[52] *Donoghue* v *Stevenson* [1932] AC 562, 619 per Lord MacMillan.

[53] *Peel* v *Canada* (1992) 98 DLR (4th) 140, 154–5 per McLachlin J.

[54] (1989) 59 DLR (4th) 161 (hereafter *Air Canada*).

from which he purported to draw support. In *Air Canada*, the defendant province imposed a levy upon the sale of gasoline. The plaintiff airlines purchased a great deal of gas in the course of their operations and accordingly made substantial payments to the defendant in the belief that the taxing statute was valid. In time, however, the legislation was struck down as being ultra vires. The plaintiffs then sought recovery of the payments made pursuant to the impugned act.

La Forest J, speaking for a majority of the members of the Supreme Court of Canada who considered the restitutionary issue, focussed upon the plaintiffs' mistake of law. The airlines paid money to the province because they erroneously believed themselves subject to a tax.[55] In contrast, the pertinent portion of Justice Wilson's opinion approached the restitutionary issue not on the basis of the plaintiff's mistake, but rather on the basis of the defendant's ultra vires demand. That the two concepts are distinct unjust elements is evidenced by the fact that the failure of one does not preclude operation of the other. For example, fearing adverse financial repercussions, a person may comply with a tax demand despite knowing or strongly suspecting that the enacting legislation is invalid.[56] If so, he cannot claim relief on the basis of mistake. At the time of payment, his intention was not vitiated by error. Nevertheless, relief may be available on the basis of the state's improper demand; as a rare instance of policy motivated restitution,[57] the government

[55] Granted, La Forest J did invoke constitutional considerations in deciding that while payments made under mistake of law generally should be recoverable, an exception must be recognised for payments made under ultra vires or unconstitutional legislation. Moreover, in applying the defence of disruption of public finances (see IV(B)(1) infra), he referred to Birks' argument that ultra vires demand must be recognised as an unjust factor in order to respect the principle that there should be no taxation without Parliamentary authority: id 196–7. Nevertheless, for present purposes, the important fact is that La Forest J, unlike Wilson J, addressed the issue of recovery on the basis that the applicable unjust factor was the plaintiff's mistake of law, rather than the defendant's ultra vires demand. See also P Birks, *Restitution — The Future* (1992) 73–7.

[56] The example is based on the facts of *Woolwich Building Society* v *IRC* [1993] AC 70. Though the precise scope of the House of Lords' decision has yet to be settled (see J Beatson, 'Restitution of Taxes, Levies and Other Imposts: Defining the Limits of the *Woolwich* Principle' (1993) 109 LQR 401), the case can be interpreted as recognising a right of recovery of payments made pursuant to an ultra vires demand. Several passages in the judgments of Lords Goff and Browne-Wilkinson may appear to suggest that the basis of relief in *Woolwich* was not the defendant's ultra vires demand, but rather the fact that the plaintiff had made payment for which there was 'no consideration'. Recently, the English Court of Appeal disturbingly seized upon that possibility: *Westdeutsche Landesbank Girozentrale* v *Islington London Borough Council* [1994] 1 WLR 938. For a persuasive argument that *Woolwich* did not actually accept 'no consideration' as an unjust factor and for a damning criticism of the Court of Appeal's comments, see W J Swadling, 'Restitution for No Consideration: Westdeutsche Landesbank v Islington LBC' [1995] *Restitution L Rev* 73. See also Birks, op cit (fn 46). Structurally, the proposed grounds of 'no consideration' and 'absence of legitimate basis' are similar and are subject to many of the same criticisms: see M McInnes, 'Bases For Restitution: A Call For Clarity with Unjust Factors' (1996) 10 *J of Contract L* 73.

[57] Compare Burrows, op cit (fn 3) 21–2.

may be denied the right to retain money received by way of an illegal levy.[58]

Accordingly, Chief Justice Mason's suggestion that the 'absence of any legitimate basis for retention of the money might itself ground a claim for unjust enrichment without the need to show any causative mistake' is only partially accurate with respect to Justice Wilson's approach to the facts of *Air Canada*. It is not true that Her Ladyship considered the unjust factor to be 'absence of legitimate basis'. Rather, she relied upon ultra vires demand. However, because the unjust factor supporting the airlines' claim was supplied by the province's unconstitutional conduct, it is true that the plaintiff had no need to establish an additional element of mistake. As Wilson J held that the illegality of the tax created a prima facie right of recovery, the only pertinent question remaining related to justifications that the province might have for the retention of the money. In denying the existence of any such justifications, Her Ladyship confined her comments to the type of case before her:

> *Where the payments were made pursuant to an unconstitutional statute* there is no legitimate basis upon which they can be retained.[59]

In contrast, the defendant's actions in *Royal Insurance* did not give rise to an unjust factor. The Commissioner did not impose an ultra vires or unconstitutional tax as in *Air Canada*. Nor did she acquire money by way of duress[60] or under colour of office,[61] as in other leading authorities regarding restitutionary relief from the state. Rather, she simply took receipt of the claimant's overpayments.[62] It is not clear why, without more, she should be required to refund the payments in such circumstances.[63] In particular, the policy reasons underlying *ultra vires* demand as an unjust factor were absent. A tax had not been levied without the authority of the legislature. Nor had the insurer been subject to a demand which was backed by the coercive powers of the state. Nor

[58] The High Court has yet to determine whether or not ultra vires or unconstitutional demand constitutes an unjust factor in the Australian law of restitution: cf *Mason* v *NSW* (1959) 102 CLR 108, 117 per Dixon CJ; *Payne* v *The Queen* (1901) 26 VLR 705, 719 per Madden CJ; B Fitzgerald, 'Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment' (1993) 2 *Griffith L Rev* 1. The issue did not arise for consideration on the facts of *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 67 per Mason CJ, 89 per Brennan J and 101 per Dawson J. The basis of the plaintiff's claim was not that the *Stamps Act* was invalid, but rather that it had been misunderstood.

[59] *Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161, 170 (emphasis added).

[60] See eg *Mason* v *NSW* (1959) 102 CLR 108.

[61] See eg *Bell Bros Pty Ltd* v *Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137.

[62] As discussed infra (Section IV(B)(3)), Brennan J controversially thought it significant that the defendant had constructive knowledge of the fact that the statutory liability had been repealed and hence of the fact that she had no entitlement to the overpayment: *Commissioner of State Revenue (Vic)* v *Royal Insurance* (1994) 182 CLR 51, 89. However, his comments were made with respect to the unjust factor of mistake.

[63] Of course, as explained above, additional facts were present in *Royal Insurance* which warranted refunds with respect to each category of overpayment.

was it misled by the presumption that the *Stamps Act* was validly enacted.[64]

B. Defences to the Restitutionary Claim

If the plaintiff establishes the first three elements of the concept of unjust enrichment, restitution should lie unless the defendant is able to invoke a recognised reason for denying relief.[65] While not all were pursued by the Commissioner of Revenue, a number of such 'defences' arose on the facts of *Royal Insurance*: (i) disruption of public finances, (ii) voluntary payment, (iii) honest receipt, and (iv) passing on.[66]

As a preface to the following discussion, it should be noted that the various concepts typically referred to as 'defences' also pertain to the other three elements of the concept of unjust enrichment. Thus, if the court is satisfied that the plaintiff conferred a benefit 'voluntarily' or 'passed on' the burden of an enrichment, it may hold that, respectively, the defendant's enrichment is not 'unjust' (because the plaintiff's intention is not vitiated) or that the defendant's enrichment is not 'at the plaintiff's expense' (because the relevant loss lies with a third party).[67] Nevertheless, notions such as 'voluntary payment' and 'passing on' may be characterised as defences, at least in a general sense, in so far as their proof will be satisfied by evidence adduced by the defendant.

[64] See *Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161, 168–9 per Wilson J; *Woolwich Building Society* v *IRC* [1993] AC 70, 171–2 per Lord Goff.

[65] In fact, the matter is not quite so clear in this country. The fear exists that judges, as yet unaccustomed to the concept of unjust enrichment, might use it to impose liability on the basis of subjective valuations of what is 'just' on the facts of each case. Accordingly, the High Court has stressed that 'unjust enrichment' is not 'a cause of action' or a 'definitive legal principle according to its own terms': *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 378. Rather, the concept constitutes

> a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.

Pavey & Matthews Pty Ltd v *Paul* (1987) 162 CLR 221, 256–7. See also Birks, op cit (fn 5) 22–5. Nevertheless, Australian law arguably is moving toward the Oxbridge view that restitution is based on the concept of unjust enrichment. In a positive development, the opinions in *Royal Insurance*, unlike those in other recent High Court decisions, are not characterised by a fascination with ancient writs: J W Carter and G Tolhurst, 'Restitution: Payments Made Prior to Discharge of Contract' (1994) 7 *J of Contract L* 273. Rather, they focus squarely on the elements of the concept of unjust enrichment.

[66] The High Court also considered the defence provided by the *Limitation of Actions (Recovery of Imposts) Act* 1961 (Vic). However, its decision on that point is not controversial and will not be examined in this article.

[67] Indeed, it may be possible to link all restitutionary defences to one of the three elements of the concept of unjust enrichment: Birks, op cit (fn 55) ch 6.

(1) *Disruption of Public Finances*

Though not argued before the High Court, Mason CJ considered whether or not a claim for the recovery of mistaken payments should be subject to a defence of *disruption of public finances*.[68]

Occasionally, it is suggested that restitutionary relief should be available less readily against the state than against a private party.[69] Chief among the concerns animating that view is the fear that the imposition of liability upon a public authority may have a significant and wide-ranging affect on public finances. That argument received dramatic application in *Air Canada*, the facts of which were provided above.[70] La Forest J denied recovery of payments made by the plaintiff in the mistaken belief that the impugned taxing statute was valid. Among the reasons for that decision was the fact that a contrary ruling effectively would force the province to impose a new levy to pay for the old. Deficit spending ensures that the state does not have an accessible pool of resources from which to satisfy large debts. It was thought that no taxpayer should be permitted to dictate taxing policy. Similarly, La Forest J feared that the general availability of relief against a public authority could create 'fiscal chaos'; because every dollar collected under invalid legislation prima facie would be recoverable, the measure of liability could be enormous.[71] It was thought that no taxpayer should be permitted to bankrupt the state.

In *Royal Insurance*, Mason CJ refused to limit the scope of restitutionary recovery by means of a defence designed to prevent disruption of public finances. The remedy for such disruption was said necessarily to lie with the legislature; it alone 'can determine who is to bear the burden of making up any shortfall in public funds'.[72] In reaching that conclusion, the Chief Justice joined with other commentators[73] in preferring Justice Wilson's dissenting opinion to Justice La Forest's opinion in *Air Canada*:

> Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of the government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that this idea particularly appeals to me), it should be one which distributes the loss fairly

[68] The issue was not considered by Brennan or Dawson JJ.

[69] See eg Wells, op cit (fn 15).

[70] See text accompanying fn 54 supra. Strictly speaking, La Forest J invoked the notion of disruption of finances not as a distinct defence, but rather as a policy consideration supporting the rule denying recovery of ultra vires payments.

[71] That fear is not entirely unfounded. For example, in the depression-era American case of *United States* v *Butler* 297 US 1 (1936), the Treasury collected over $1 billion in tax under an impugned statute. The ramifications of imposing liability in such circumstances are daunting. See also *Sargood Bros* v *Commonwealth* (1910) 11 CLR 258, 303 per Isaacs J.

[72] *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 68.

[73] See eg *Woolwich Building Society* v *IRC* [1993] AC 70, 76–7, 176 per Lord Goff; Birks, op cit (fn 55) 76–7.

> across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due. I find it quite ironic to describe such a person as 'asserting a right to disrupt the government by demanding a refund' or 'creating fiscal chaos' or 'requiring a new generation to pay for the expenditures of the old'. By refusing to adopt such a policy the courts are not 'visiting the sins of the fathers on the children'. The 'sin' in this case (if it can be so described) is that of government and only government and government has means available to it to protect against the consequences of it. It should not, in my opinion, be done by the courts and certainly not at the expense of the individual taxpayer.[74]

As previously argued, however, Justice Wilson's decision in *Air Canada* and the plaintiff's claim in *Royal Insurance* proceeded upon different grounds. The former concerned an ultra vires demand; the latter concerned a mistake of law. Is that distinction relevant with respect to the defence of disruption of public finances? In policy terms, the danger of disruption is stronger in the case of an ultra vires demand. An invalid taxing statute is apt to engender many payments, all of which would be recoverable under Justice Wilson's view. In contrast, if a statutory demand is non-existent, as in *Royal Insurance*, only those taxpayers who labour under a mistake will seek relief.[75] On the other hand, as a matter of fairness, the state arguably is more deserving of protection when it innocently receives payment from a taxpayer who has committed an avoidable error, than when it wrongfully demands payment from a taxpayer who is ill-equipped to determine the validity of an imposition. Stated otherwise, the applicable rule perhaps should follow the equities of each case.

It is suggested that Mason CJ was correct to reject a defence of financial disruption. First, such a concept defies precise formulation. Certainly, the state can not be immune from all liability. Where, however, is the line to be drawn between liability which merely inconveniences a government and liability which intolerably requires the imposition of a new tax or which creates fiscal chaos? Second, it is difficult to reconcile a defence based on broad notions of fairness with accepted principles of recovery. While a taxpayer may be to blame for committing an avoidable error, it is well established that a plaintiff's negligence is no bar to the recovery of mistaken payments.[76] Finally, the state sufficiently is protected from disruptive judgments by other means. Though not conclusively settled, the recently recognised defence of

[74] *Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161, 169.

[75] Similarly, as La Forest J recognised, there is less danger of disruption when valid legislation is misapplied than when invalid legislation is applied. Accordingly, he held that relief should be denied in the latter situation, but not the former: id 197. Of course, depending upon the circumstances, valid legislation may form the backdrop against which relief is available on other grounds, such as duress: see *Mason* v *New South Wales* (1959) 102 CLR 108.

[76] *Kelly* v *Solari* (1841) 9 M & W, 54; 152 ER 24. However, in extreme cases, negligence shades into recklessness such that relief properly can be denied on the basis that a payer accepted the risk of error and hence paid 'voluntarily': Burrows, op cit (fn 3) 102–3.

change of position should apply to both private and public defendants.[77] Moreover, the state generally is free to enact legislation curtailing a taxpayer's right of recovery.[78]

(2) *Voluntary Payment*

Applauded in so far as it rejected the purported rule denying recovery of payments made under mistake of law, the High Court's decision in *David Securities* nevertheless has been subject to considerable criticism for the manner in which it defined the scope of relief.[79]

While recognising that mistakes of law generally should be treated in the same manner as mistakes of fact, all members of the Court were alive to the danger of allowing too much restitution. Brennan J gave forthright expression to the concern:

> To admit mistake of law as a ground for restitution in any case in which mistake of fact would ground such a remedy would render many payments insecure even in cases where both parties expected the payment to be final: the uncertainty of the law and the overruling of decisions by later cases or on appeal would infect many payments with a provisional quality incompatible with orderly commerce. Moreover, while mistakes of fact are specific to particular relationships, the revealing of a mistake of law in one case could throw into uncertainty the finality of payments made in a great variety of cases.[80]

The majority of the Court avoided that danger by means of a narrow interpretation of the Australian cases traditionally thought to support the proposition that restitution is not available on the basis of a mistake of law. With one exception,[81] the denial of relief in those decisions was explained on the ground that the plaintiffs had acted *voluntarily*:

> The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required; he or she is

[77] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 385. Admittedly, a public authority often would find it difficult to satisfy the requirement of detrimental reliance, as required by the Australian defence of change of position. With respect to the defence generally, see P Birks, 'Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences' and M Bryan, 'Change of Position: Commentary' in McInnes (ed), op cit (fn 10) chs 3 and 4.

[78] See eg *Mutual Pools* v *Commonwealth* (1994) 119 ALR 577.

[79] The most thorough examination is M Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v Commonwealth Bank of Australia' (1993) 15 *Syd L R* 461, 475–84. See also A Burrows 'Restitution for Mistake in Australia' (1993) 13 *Oxford J of Leg Stud* 584; P Watts, 'Mistaken Payments and the Law of Restitution' (1993) 2 LMCQ 145; K-L Liew, 'Recovery of Monies Paid Under Mistake of Law: The Australian Approach' (1994) 6 CBLJ 157; K-L Liew, 'Mistaken Payments- The Right of Recovery and the Defences' (1995) 7 *Bond L R* 95; M McInnes, 'Case Comment: David Securities v Commonwealth Bank of Australia' (1994) 22 *Aus Bus L Rev* 437.

[80] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 394, 398.

[81] *York Air Conditioning & Refrigeration (Australasia) Pty Ltd* v *The Commonwealth* (1949) 80 CLR 11 per Williams J.

prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity of the obligation, rather than contest the claim for payment. We use the term 'voluntary' therefore to refer to a payment made in satisfaction of an honest claim.[82]

Undoubtedly, truly 'voluntary' payments generally should not attract restitutionary relief. If a person confers a benefit, fully intending the recipient to retain the enrichment in all events, there is no basis for recovery on the ground of a subsequently discovered mistake.[83] The simple reason is that the enrichment was not caused by the error.[84] The same conclusion holds if a payer consciously is unaware of the law and yet fails to investigate his position prior to payment.[85] Similarly, while a precise test has yet to be conclusively accepted,[86] a claimant should not succeed if she confers a benefit under a purported legal obligation which she knows or strongly suspects to be inapplicable. In such circumstances, it plausibly can be said that her actions are the product of volition, rather than mistake.[87]

Nevertheless, the majority decision in *David Securities* is problematic because it relies upon cases of both mistake and ignorance[88] in support of the proposition that voluntary payments are irrecoverable.[89] It is unfair and inaccurate to include payments made in complete ignorance of the invalidity of an apparent liability within the Court's definition of 'voluntary'.[90] Clearly, a payer in such circumstances does not 'believe a particular law or contractual provision requiring the payment is, or may be, invalid'. Nor can it properly be said that 'he or she is prepared to assume the validity of the obligation, or is prepared to make payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for repayment'. If a payer's ignorance is such that the possibility of mistake does not arise, it strains credulity to say that she truly is prepared to assume the validity of the obligation. Equally, it is misleading to say that she is prepared to comply regardless of the validity of the demand, rather than contest the claim. Absent at least an inkling that the purported obligation may be invalid, why would the payer ever contest a claim?

As a result of the preceding considerations, the practical effect of *David*

[82] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 373–4.

[83] *Kelly* v *Solari* (1841) 9 M & W 54, 59; 152 ER 24, 26.

[84] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 376–8; *Holt* v *Markham* [1923] 1 KB 504.

[85] P Butler, 'Mistaken Payments, Change of Position and Restitution' in *Essays on Restitution* (P D Finn, ed, 1990) 87, 95.

[86] See Burrows, op cit (fn 3) 102; S Arrowsmith, 'Mistake and the Role of the "Submission to An Honest Claim" ' in Burrows (ed), op cit (fn 4) 17.

[87] Alternatively, relief may be denied because the plaintiff sufficiently took the risk of error: Burrows, op cit (fn 3) 102.

[88] The Court expressly included 'ignorance' within the broader term 'mistake': *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 369, 374.

[89] See eg *South Australia Cold Stores Ltd* v *Electricity Trust of South Australia* (1957) 98 CLR 65.

[90] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 396–8.

Securities appeared limited. While broadening the scope of recovery by equating mistakes of fact and mistakes of law, the majority simultaneously confined the availability of relief with its concept of voluntariness. It seemed that the incidence of restitution likely would not change significantly. The reason is that people seldom contemplate the validity of an apparent obligation only to come to an erroneous conclusion. Typically, both payer and payee simply and reasonably assume the validity of an imposition and are oblivious to the possibility of error.[91]

Despite its prominence in *David Securities*, the notion of voluntariness was not considered in *Royal Insurance*. That omission is particularly curious given that the insurer's payments plausibly could be characterised as 'voluntary' according to the earlier decision. The explanation for the lack of discussion on point is not altogether clear. It may lie in the fact that the majority in *David Securities* spoke of voluntariness in the context of a payment made in satisfaction of an 'honest claim'.[92] In that case, money was received in response to a demand. In contrast, in *Royal Insurance*, the defendant made no request for payment.[93] However, if the focus of analysis is on the payer's voluntariness,[94] rather than extraneous policy considerations, the presence of an honest claim should not be determinative of liability.[95] Whatever factors shaped the payer's state of mind, the essential fact is that either he did or did not sufficiently intend to confer the enrichment irretrievably upon the payee.

A better explanation for the difference between *David Securities* and *Royal Insurance* may lie in the timing of the two decisions. Arguably, the former was animated more by a desire to reconcile the existing case law with the availability of restitutionary relief than by a genuine desire to articulate a broad notion of voluntariness. The majority simply could have rejected the traditional mistake of law doctrine and overruled the decisions generally thought to support it. Instead, they chose the more difficult approach of reinterpreting those cases on the basis of voluntariness. They may have done so because they were particularly anxious in 1992 to confine the impact of the recently accepted concept of unjust enrichment[96] lest it produce the type of palm-tree justice that previously inhibited the development of the law of restitution.[97] To have disposed of a long-standing rule predominantly on the basis of the logic of the unjust enrichment concept would have been a dramatic step. It

[91] The point was not lost upon Brennan J in dissent: *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 397.

[92] Id 374.

[93] If a claim could be implied on the facts of *Royal Insurance*, an alternative explanation for the availability of relief might be that the defendant did not make an 'honest claim'. Brennan J imposed upon the Commissioner constructive knowledge of the fact that the insurer mistakenly made payment in the absence of liability: *Commissioner of State Revenue* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 89. The issue of constructive knowledge is considered in the following section.

[94] For a discussion of the possible meanings of 'voluntary', see Bryan, op cit (fn 79) 476–84.

[95] Conceivably, however, relief might be awarded on policy grounds notwithstanding the payer's voluntariness if the payee did not receive the enrichment in good faith.

[96] See fn 65 supra.

[97] See eg *Baylis* v *Bishop of London* [1913] 1 Ch 127, 140.

was much safer to base the decision on other grounds and to rely upon that concept merely for additional support and analytical guidance.[98] Conceivably, by December of 1994, the Court had become more confident that judges would not abuse the unjust enrichment concept and no longer perceived the need to confine so closely the scope of relief. Accordingly, the notion of voluntariness was de-emphasised in *Royal Insurance.*

(3) *Honest Receipt*

In *David Securities*, Brennan J perceived a need to limit the scope of recovery for mistaken payments but rejected the concept of voluntariness developed by the majority. He thought it preferable to focus upon the payee's, rather than the payer's, state of mind; the question is not whether the latter acted voluntarily, but rather whether the former acted in good faith. Accordingly, he formulated the defence of honest receipt:[99]

> It is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property.[100]

Persistence has been rewarded. Though previously dissenting on point, Brennan J now appears to have majority support for his view. Toohey and McHugh JJ, who preferred the defence of voluntariness in *David Securities*, concurred with Brennan J in *Royal Insurance.* His Honour reiterated the defence of honest receipt:

> The amounts in items (i) and (ii)(b) were paid under a mistake as to the existence of a statutory liability to pay . . . The Comptroller must be taken to have known at all material times that the statutory liability had been repealed and that she had no entitlement to retain these amounts. It would therefore be unjust that the Commissioner should retain these amounts; they were recoverable under the general law of restitution.[101]

Brennan J defined the scope of the defence in *David Securities.*[102] First, it operates only in cases of mistake of law. His Honour reasoned that the defence would unduly restrict the availability of relief if applied to cases of mistake of

[98] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 375.

[99] As with the majority's defence of voluntariness, Justice Brennan's defence of honest receipt assumes that the defendant has no right to receive the benefit: id 376, 398–9. If entitled to the enrichment because, for example, payment is made in satisfaction of a debt, a recipient clearly is not subject to liability: see eg *Barclays Bank Ltd* v *WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 695 per Goff J.

[100] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 399.

[101] *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 89. Brennan J cited his discussion in *David Securities* in support of that statement. Accordingly, it is clear that his comment was not merely a reflection of the facts before the Court. His Honour intended to reiterate the defence of honest receipt.

[102] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 399–400.

fact, as well.[103] Second, the defence operates *pro tanto*. If a recipient considers herself entitled only to part of a mistaken payment, her honest receipt defeats a payer's claim only with respect to that part. Third, the defence applies whether or not a payer acts in response to a payee's demand. Fourth, failure of the defence of honest receipt likely precludes application of the defence of change of position. Fifth, the notion of honest receipt is inapplicable when payment is made in ignorance of a statute designed to protect a class of individuals to which a payer belongs. Finally, the onus lies on a recipient to prove that she had a ground to claim in conscience at the time of the enrichment.

Royal Insurance further refines the scope of the defence of honest receipt by clarifying the requisite mental state. Justice Brennan's opinion in *David Securities* suggests a subjective test, based on the defendant's actual state of mind. Did she receive the enrichment, honestly believing herself entitled to do so? In *Royal Insurance*, in contrast, he employed a more objective approach. The Commissioner of Revenue was liable because she (or, presumably, her minions) 'must be taken to have known at all material times that the statutory liability had been repealed and that she had no entitlement to retain these amounts.'[104] However, there is no suggestion in the facts that the defendant actually deliberated upon the status of the plaintiff's payments. Moreover, the scheme pursuant to which the plaintiff acted was one of self-assessment; the defendant did not make demands. Finally, it is likely that even after 'wages' and 'cost plus' policies were exempted from stamp duties, the insurer incurred liabilities to the Commissioner on different grounds. Consequently, the mere fact of receiving *some* payment from the plaintiff probably did not alert the defendant to the existence of an error.

The defendant was held liable because of her constructive knowledge of the plaintiff's error. However, Brennan J did not specify the basis upon which that knowledge was imputed to her. Was she subject to a duty to ascertain the status of the insurer's payments because of her position as a public authority? Would a private party ever be subject to such a duty? Leaving aside the existence of a duty, of what relevance is a recipient's negligence or recklessness? Must an 'honest belief' be reasonable?

Regardless of how those questions are answered, it is doubtful that the defence of honest receipt properly forms part of the law of restitution. First, as formulated by Brennan J, it reintroduces the troublesome distinction between mistakes of fact and mistakes of law. In practice, because the line between fact and law is notoriously difficult to draw,[105] it discourages settlements and leads to courts reaching inconsistent decisions in seemingly similar cases.

[103] The danger of too much restitution pertains more to mistakes of law than to mistakes of fact. The latter is apt to be confined to a particular relationship. In contrast, a mistake of law often will be shared by many individuals.

[104] *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 89 per Brennan J.

[105] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 374, 402.

Moreover, as noted in *David Securities*,[106] the traditional dichotomy theoretically is incompatible with the concept of unjust enrichment. The rationale of mistake as an unjust factor (ie vitiation of the plaintiff's intention) applies equally to both types of mistake.

Second, while it may be argued that the defence is a function of policy, rather than theory,[107] the law should be reluctant to give effect to a policy rule which engenders dubious results. And certainly, questionable consequences flow from Justice Brennan's defence of honest receipt. Consider a situation in which a mistake of law causes P to pay $1 million to each of D_1 and D_2. At the time of receipt, D_1 knows of P's error. In contrast, D_2 does not realise P's error until the next day. Even though neither recipient alters his position as a result of payment, D_2 has a defence to P's restitutionary claim because he 'honestly believed, when he learnt of the payment . . . that he was entitled to receive and retain the money.'[108] D_1, in contrast, must make restitution to P because he knew of the operative error at the moment of enrichment. It is difficult to accept that D_1 and D_2 should be treated differently; in the absence of additional considerations, both should be held liable.

Finally, the need for the defence of honest receipt is obviated by the recognition in *David Securities* of the defence of change of position.[109] The societal value in the security of receipts and the finality of transactions largely is animated by the need to prevent the law of restitution from imposing onerous and unfair burdens. In that regard, the fact that a defendant receives payment in good faith is an important, but insufficient, consideration. It is only when that honest receipt is causally connected to a subsequent detriment[110] that a prima facie right to restitution should be defeated. Returning to the example provided above, both D_1 and D_2 should be held liable. The fact that D_2 initially received the money in good faith should not be determinative. While still in possession of the entire enrichment, he learned of P's error and was in a position to make repayment.

[106] Id 375. See also *Hydro Electric Commission of Nepean* v *Ontario Hydro* [1982] SCR 347, 367 per Dickson J.

[107] Compare Birks, op cit (fn 56) ch 2.

[108] *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 399.

[109] The danger of too much restitution would be minimised further if the declaratory theory of judicial behaviour was rejected: See Section IV(A)(2) supra.

[110] While leaving the precise scope of the defence of change of position open, the High Court has indicated that a defendant must establish that she suffered a detriment *in reliance* upon the receipt of an enrichment: *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 385. A number of commentators criticise the requirement of reliance and argue that a defendant should be required to show merely that her position changed subsequent to the receipt of an enrichment such that liability would be inequitable in the circumstances: see eg Burrows, op cit (fn 3) 424–8; Goff & Jones, op cit (fn 5) 741; Birks, 'Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences' and Bryan, 'Change of Position: Commentary' in McInnes (ed), op cit (fn 10) chs 3–4.

(4) *Passing On*

As previously noted, the interests of analytical clarity suggest that individual defences to restitutionary claims should be linked to the questions of: (i) whether the defendant is enriched, (ii) whether that enrichment is at the plaintiff's expense, and (iii) whether the enrichment is attributable to an unjust factor.[111] If operable, the defence of passing on pertains to the second element of the concept of unjust enrichment. The gist of that defence is that, despite outward appearances, the defendant's enrichment is not truly at the plaintiff's expense. While the benefit was subtracted[112] from the plaintiff in an immediate and superficial sense, the corresponding detriment ultimately was shifted to a third party.

The passing on defence arose in *Royal Insurance* because the Commissioner of Revenue argued that while the insurer mistakenly had paid money exempted under the *Stamps Act*, it had shifted the burden of those payments on to its customers. Though not established conclusively, the Court proceeded upon the basis that the plaintiff did not charge the tax to its policy holders as a separate item, but rather simply increased premiums by an amount reflective of the supposed liability.

In a brief opinion, Brennan J rejected the Commissioner's argument on the ground that the insurer made payment with its own money. Accepting that the plaintiff might be subject to claims by its policy holders with respect to overpayments recovered from the defendant,[113] he held that

> no defence of 'passing on' is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys.[114]

Mason CJ reached the same conclusion by means of a more finely reasoned judgment:[115]

> As between the plaintiff and the defendant, the plaintiff having paid away

[111] Birks, op cit (fn 55) ch 6.

[112] The phrase 'at the plaintiff's expense' contains an ambiguity which underlies the major, theoretical division in the law of restitution. Typically, the phrase applies in a 'subtractive' sense. The defendant is enriched by the receipt of wealth taken from the plaintiff. For example, in the case of mistaken payments (such as *Royal Insurance*), the gist of the restitutionary action is that the defendant acquired a benefit which belonged to the plaintiff and which should be restored.

However, the phrase exceptionally applies in a 'wrongs' sense. The defendant is enriched not by the receipt of wealth subtracted from the plaintiff, but by the commission of a wrong against the plaintiff. For example, if a trustee abuses his position to acquire an enrichment, he must disgorge his wrongful gain to the beneficiary. That is true even if the beneficiary never owned, or could have acquired, the enrichment and therefore suffered no subtraction of wealth: *Boardman* v *Phipps* [1967] 2 AC 46. It follows that the passing on defence has no application to an action based on the 'wrongs' sense of the phrase. Because the plaintiff need not establish that he suffered a loss, the defendant has nothing to gain by showing that she ultimately received her benefit from a third party. Cf *Warman International Ltd* v *Dwyer* (1995) 69 ALJR 362, 367; M McInnes, 'The Plaintiff's Expense in Restitution: Difficulties in the High Court' (1995) 23 *Aust Bus L Rev* 472.

[113] That possibility is considered at fn 145 infra.

[114] *Commissioner of State Revenue (Vic)* v *Royal Insurance* (1994) 182 CLR 51, 90–1.

[115] Dawson J agreed in dicta: id 101.

> *its* money by mistake in circumstances in which the defendant has no title to retain the moneys, the plaintiff has the superior claim. The plaintiff's inability to distribute the proceeds to those who recoup the plaintiff was, in my view, an immaterial consideration.[116]

Although the ensuing discussion is confined to the type of situation which arose in *Royal Insurance*, it must be noted that Mason CJ also considered, in dicta, the situation in which the plaintiff acts as a mere conduit in making payment to the defendant.[117] He believed that the latter situation would have arisen if the insurer had itemised its customer invoices to include the purported tax as a separate entry. Drawing upon a number of American decisions,[118] the Chief Justice felt that the plaintiff thereby would have become subject to a constructive trust with respect to the tax payments. Accordingly, if it failed to pay the money over to the Commissioner, the insurer would have held the money for the benefit of its policy holders. Similarly, if the insurer had recovered payments mistakenly made to the Commissioner, the award would have been held on trust for the customers. Of course, often it would be impossible or impractical to give effect to such a trust. The beneficiaries might not be identifiable or they might number in the thousands. If the plaintiff nevertheless was permitted recovery, it likely would retain the money for itself and thereby reap a windfall.[119] Consequently, in such circumstances, Mason CJ held that the passing on defence should bar restitution unless the plaintiff satisfies the court that it will honour the terms of the trust.

(a) *Theory, Policy and Practicality*

A potential defence may be denied a place in the law of restitution for one of two reasons. First, it may be rejected on theoretical grounds because it does not accord with the concept of unjust enrichment. Having accepted that that concept provides analytical guidance in areas of uncertainty,[120] the High Court should strive to develop the law in a principled manner. Accordingly, as suggested above, defences generally should reflect deficiencies in a claimant's

[116] Id 78.

[117] Id 75–9. Justice Brennan's carefully phrased decision implicitly indicates that he recognised, but chose not to address, that type of situation. For an excellent examination of the issues, see W J Woodward, '"Passing On" the Right to Restitution' (1985) 39 *U Miami L R* 872.

[118] *123 East Fifty-fourth Street* v *United States* (1946) 157 F Rep 2d 68 per Hand J; *Decorative Carpets Inc* v *State Board of Equalization* 373 P 2d 637 (1962); *Javor* v *State Board of Equalization* 527 P 2d 1153 (1974).

[119] Strictly speaking, the facts of *Canadian Pacific* did not involve a tax payer who passed on the burden of a levy. Nevertheless, the plaintiff's claim did illustrate the possibility of a restitutionary award constituting a windfall. The defendant province imposed a tax upon consumers of in-flight alcoholic beverages. The plaintiff airline collected the tax from its passengers and remitted the money to the province. After the tax was determined to be invalid, the airline sought restitution of the payments. While conceding the practical impossibility of making precise refunds to individual consumers, the airline promised that it would pass on the fruits of recovery to its passengers in the form of lower fares. LaForest J held that the plaintiff, as a mere agent, had no basis for a claim. It was a tax collector, not a tax payer. Moreover, he found the airline's argument disingenuous; recovery would 'simply amount to a windfall to the airline': *Canadian Pacific Airlines Ltd* v *British Columbia* (1989) 59 DLR (4th) 218, 234.

[120] *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 222, 256–7.

prima facie case. In the present context, it must be determined whether or not the passing on defence is compatible with the requirement that the defendant's enrichment be 'at the plaintiff's expense'. Alternatively, notwithstanding theoretical compatibility with the concept of unjust enrichment, a potential defence may be rejected because its operation would engender insuperable difficulties or undesirable consequences. While the modern law of restitution is based largely on theory, practicality ultimately must prevail. The true genius of the common law, in all its forms, is common sense.[121]

On the facts of *Royal Insurance*, the High Court rejected the defence of passing on *in theory*.[122] Brennan J bluntly stated that

> the passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter.[123]

The Chief Justice offered more thorough reasons. He started from the premise that the aim of the law of restitution is 'not compensation for loss or damage but restoration of what had been taken or received'.[124] While that proposition is incontestable,[125] the conclusions which Mason CJ drew from it are controversial. He expressly disavowed the suggestion that the concept of unjust enrichment requires that 'impoverishment of the plaintiff [be] a correlative of the defendant's unjust enrichment'.[126] Similarly, he denied that restitutionary relief should be withheld merely because it overcompensates a plaintiff's loss:[127]

> Because the object of restitutionary relief is to divest the defendant of what the defendant is not entitled to retain, the court does not assess the amount of its award by reference to the actual loss which the plaintiff has sustained.[128]

While the primary aim of the law of restitution certainly is restoration, rather than compensation, it does not follow that the plaintiff's loss is irrelevant nor that it need not be correlated to the defendant's gain. In cases of enrichment by subtraction,[129] the appropriate measure of relief generally is accepted to be

[121] 'The life of the law has not been logic; it has been experience': O W Holmes, *The Common Law* (1881) 1.

[122] Mason CJ also considered the practical difficulties that would attend upon the defence: *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 71–3.

[123] Id 90.

[124] Id 73.

[125] A minor, semantic quibble: Chief Justice Mason's statement is entirely accurate with respect to cases of enrichment by subtraction. With respect to cases of enrichment by wrongs, however, it may be preferable to speak not of 'restoration', but rather of 'disgorgement'. Because the defendant's benefit may be derived from a third party, rather than from the plaintiff, 'restoration' is misleading in so far as it connotes a 'giving back'. On the distinction between enrichment by subtraction and enrichment by wrong, see fn 112 supra.

[126] *Commissioner of State Revenue (Vic)* v *Royal Insurance* (1994) 182 CLR 51, 74.

[127] Ibid.

[128] Ibid.

[129] See fn 113 supra.

the highest amount common to the plaintiff's loss and the defendant's gain.[130] The explanation for that position is clear. The mere fact that the defendant receives an enrichment as a result of an unjust factor may provide a reason why she should be compelled to divest the benefit, but it does not identify a reason why any particular person should be the beneficiary of such divestment. Generally, it is only when the plaintiff can establish a nexus between a depletion of his wealth and an accretion to the defendant's wealth that he can establish a claim to recovery. In that sense, the law of restitution is animated by a philosophy of corrective justice.[131] So far as possible, its aim is to restore both parties to their status *quo ante*.

In *Royal Insurance*, the High Court accepted the preceding analysis only in a superficial sense. Mason CJ and Brennan J agreed that the defendant's gain must be at the plaintiff's *immediate* expense. The defendant's enrichment must have been subtracted in first instance from the plaintiff.[132] However, they denied that the defendant's gain must be at the plaintiff's *ultimate* expense. The plaintiff need not suffer any overall detriment:

> The subtraction from the plaintiff's wealth enables one to say that the defendant's unjust enrichment has been "at the expense of the plaintiff", notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties.[133]

Consequently, because the insurer made the overpayments with its own money, the Commissioner's gain was at the claimant's expense even if the real burden of the supposed tax was borne by the policy holders.

The High Court's view is not shared by any of the leading scholars. That is clear from the fact that all of the academics accept the passing on defence in theory. Such a defence presupposes that the defendant's gain must be at the plaintiff's ultimate expense; if the plaintiff's immediate expense was sufficient, there would be no call for an inquiry as to who truly bore the burden of the enrichment. Birks recognises the conceptual relationship between the passing on defence and the second element of the unjust enrichment principle. His opposition to the former is based simply on practical grounds. He fears that it would 'commit the court to an impossible inquiry'.[134] Goff and Jones expressly accept the defence in most circumstances,[135] as does

[130] Indeed, one of the primary differences between cases of enrichment by subtraction and cases of enrichment by wrongs is that a plaintiff is limited to recovering its loss in the former, but not the latter: Birks, op cit (fn 5) 351–5; Goff and Jones, op cit (fn 5) 38; Burrows, op cit (fn 3) 17–18.

[131] See *Peel* v *Canada* (1992) 98 DLR (4th) 140, 165. In contrast, the philosophy animating the law of restitution in cases of enrichment by wrongs finds expression in the maxim that no person should profit from her own wrongdoing. (However, that maxim does not invariably identify situations in which restitutionary relief is, or should be, available: *Attorney-General* v *Guardian Newspapers (No 2)* [1990] 1 AC 109, 286 per Lord Goff.) In such cases, because the wrong itself provides a nexus between the parties, the measure of relief need not limited by the amount of the plaintiff's loss: Birks, op cit (fn 5) 352.

[132] *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75, 90.

[133] Id 75 per Mason CJ, 90–1 per Brennan J, 101 per Dawson J.

[134] Birks, op cit (fn 55) 126, 75.

[135] Goff and Jones, op cit (fn 5) 35, 552–3; G Jones, *Restitution in Public and Private Law* (1991) 46 (hereafter *Public*).

Palmer.[136] And while Burrows rejects the passing on defence per se, he advocates adoption of the analogous defence of mitigation.[137]

Of course, the mere fact that Mason CJ and Brennan J are at odds with the academics does not mean that their Honours are wrong. The concept of unjust enrichment was recognised only recently in this country and the courts certainly will determine for themselves the contours of the Australian law of restitution. Nevertheless, the divergence of opinion at least is cause for concern. That concern would be assuaged somewhat if the case law supported the High Court's position in *Royal Insurance*.

The Chief Justice sought such support in *Mason* v *New South Wales*.[138] In that case, the defendant imposed an improper levy upon inter-state trucking which was enforced by means of legislative provisions permitting the seizure of vehicles not issued with valid licences. The plaintiffs complied with the demand under protest. In time, the taxing provision was struck down and the plaintiffs sought recovery of their payments. The claim was allowed on the ground of duress of goods. The defendant attempted to resist liability on the basis that the plaintiffs had passed the burden of the tax onto their customers in the form of higher prices. Windeyer J rejected that argument:

> If the defendant be improperly enriched on what principle can it claim to retain its ill-gotten gains merely because the plaintiffs have not, it is said, been correspondingly impoverished. The concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to our law. Even if there were any equity in favour of third parties attaching to the fruits of any judgment the plaintiffs might recover — and there is nothing proved at all remotely that there is — this circumstance would be quite irrelevant to the present proceedings. Certainly it would not entitle the defendant to refuse to return moneys which it was not in law entitled to collect and which *ex hypothesi* it got by extortion.[139]

Mason CJ acknowledged that *Royal Insurance* and *Mason* were factually distinguishable. In the former, the Commissioner was not guilty of any wrongdoing. She merely took receipt of payments caused by the insurer's spontaneous, self-induced mistake.[140] In the latter, the State extorted money by

[136] G Palmer, *The Law of Restitution* (1986 Supplement) 255.

[137] Burrows, op cit (fn 3) 475–6. The two defences essentially are the same. The only difference lies in placement of the onus of proof. Burrows rejects the passing on defence on the assumption that it imposes upon the plaintiff a burden to prove that it truly suffered a loss despite an apparent passing on. Such an approach is contrary to the general rule that a defendant must establish all the elements of a defence. However, Burrows does accept that a defendant should be relieved of a prima facie obligation to pay restitution if it establishes that a plaintiff suffered no actual loss.

[138] (1959) 102 CLR 108.

[139] *Mason* v *New South Wales* (1959) 102 CLR 108, 146. To similar effect, Menzies J stated:

> It appears that some of the freights which the plaintiffs charged they had passed on to their customers part of the charge that they are now seeking to recover. The only legal significance that could be given to this is any bearing it may have upon the question whether the charges were paid voluntarily or under compulsion: id 136.

[140] Compare Justice Brennan's suggestion that the Commissioner had constructive knowledge of the fact that she was not entitled to the money: *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Pty Ltd* (1994) 182 CLR 51, 89.

means of duress of goods. However, the Chief Justice denied that distinction any relevance:

> Once it is accepted that causative mistake of law is a basis for recovery, the making of an unlawful demand for payment, though material to the making of a causative mistake, is no longer of critical importance.[141]

In theory, Mason CJ undeniably is correct. With respect to the unjust factor, the existence of a causative mistake alone is relevant. It is the vitiation of the payer's intention per se that supports the claim for relief. The reasons for that vitiation are immaterial. More importantly, the second element of the unjust enrichment concept logically cannot be affected by the character of the parties' actions. Whether or not the defendant's gain came at the plaintiff's expense is determined by the movement of wealth, not by the propriety of the defendant's behaviour. However, that is not to say that impropriety should be ignored. Policy may overlay theory so as to deny the wrongdoer a defence which she would enjoy if she were innocent.[142]

Even if generally applicable, the passing on defence should be denied in a case such as *Mason*. To hold otherwise would violate the general principle that a person should not be permitted to benefit from his own wrongdoing.[143] Leaving aside for the moment the issue of the true economic consequences of passing on, either the plaintiff or the defendant will enjoy a windfall in the type of situation under consideration. Although the ultimate expense rests on the third party to whom the burden is shifted, that individual seldom will enjoy a claim which is likely to be enforced.[144] Accordingly, a policy question arises as to which of the litigants, neither of whom can establish an undisputed right to the money, should enjoy the enrichment. The defendant's misconduct

[141] Id 74–5.

[142] Goff and Jones, op cit (fn 5) 35; Jones, op cit (fn 135) 29, 38–40, 45–6.

[143] It was suggested above that the law of restitution in cases of enrichment by subtraction is animated by a principle of corrective justice rather than by the maxim that no person should profit from wrongdoing: see fn 132 supra. The present discussion does not contradict that view. While the law in such cases is fundamentally premised upon a model of corrective justice, it also can accommodate other considerations.

[144] For example, on the facts of *Royal Insurance*, it is unlikely that the third parties enjoyed a restitutionary action against either of the litigants: cf *Commissioner of State Revenue (Vic)* v *Royal Insurance Australia Ltd* (1994) 182 CLR 51, 69 per Brennan J; *Mutual Pools & Staff Pty Ltd* v *Commonwealth* (1994) 119 ALR 577, 591 per Brennan J, 602 per Dawson and Toohey JJ. The most promising unjust factor, mistake, could not be established. In responding to a global charge for the coverage they received, the policy holders did not share the plaintiff's mistaken belief in the existence of a tax. Rather, they simply complied with the market price of the service they received: see eg *Amministrazione delle Finanze dello Stato* v *San Giorgio spa* [1985] 2 CMLR 658, 675 per Mancini AG (hereafter *San Giorgio*).

Moreover, a plaintiff who passes on a purported charge may disperse the ultimate burden amongst a large number of third parties. Because she has little to gain, an individual third party is unlikely to prosecute any claim which she may enjoy.

Finally, it would be undesirable in practice to allow a third party an action against the plaintiff. Recognition of such a claim logically would extend to allow a fourth party, to whom the third party had passed the burden, a claim against his predecessor, and so on. The possibility of an unwieldy chain of litigation soon would arise: *Esso Australia Resources Ltd* v *Gas & Fuel Corporation of Victoria* [1993] 2 VR 99, 108 per Gobbo J; *Illinois Brick Co* v *Illinois* 431 US 720, 745 (1971) (USSC); Jones, op cit (fn 134) 47.

provides a sound reason for rejecting the passing on defence and for favouring recovery by the plaintiff.

Strictly speaking, Justice Windeyer's opinion in *Mason* is not inconsistent with the preceding analysis. As implicitly recognised in the final sentence of the quoted passage,[145] his Honour's comments regarding the *general* inapplicability of the passing on defence were dicta. Moreover, the leading Canadian authority suggests that the availability of the defence may turn on the character of the defendant's conduct.[146] As previously discussed,[147] *Air Canada* involved payments made in the erroneous belief that a tax demand was valid. A majority of the Court addressing the restitutionary issues approached the action as being premised upon the unjust factor of mistake. The claim was successfully resisted, inter alia, on the ground that the plaintiff passed on the burden of the levy to its customers. With respect to the defendant's behaviour, LaForest J denied that the relationship between the parties was unjust or oppressive in the circumstances:

> The tax levied in this case, though unconstitutional, comes close to raising a mere technical issue. Had the statute been enacted in proper form there would have been no difficulty in exacting the tax as actually imposed.[148]

Whether or not one agrees with that assessment of the situation,[149] the important point is that from Justice La Forest's perspective, there was no reason to preclude the operation of the passing on defence. The defendant had not acted wrongfully.

In contrast, Wilson J approached the plaintiff's claim on the basis that the defendant's ultra vires demand served as the unjust factor. Her reliance upon the province's wrongful action inevitably precluded recourse to the passing on defence:[150]

> To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.[151]

[145] See text accompanying fn 139 supra.

[146] Because passing on is most apt to occur in the context of improper state demands, the issue at hand has received scant attention in the English courts. The traditional rule denying recovery of payments made under mistake of law generally provided the state with a sufficient ground for resisting claims. Recently, however, Lord Goff appeared to accept the possibility of a passing on defence in theory, but doubted its desirability in practice: *Woolwich Equitable Building Society* v *IRC* [1993] AC 70, 177–8.

[147] See text accompanying fn 54 supra.

[148] *Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161, 197. La Forest J conceded that the defendant may have been guilty of 'sloppy housekeeping' in enacting invalid legislation, but stressed that 'it would not be unjust for the province to retain money that it could have obtained in any event by a statute properly framed to do what it purported to do': id 198–9. Conceivably, the defendant's behaviour would have been considered wrongful if the legislation never could have been validly enacted.

[149] Compare Jones, op cit (fn 135) 45.

[150] Notably, Wilson J did not deny the general availability of the passing on defence. Her Ladyship's comments were addressed specifically to situations of legislative misconduct.

[151] *Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161, 170, quoting *Amax Potash Ltd* v *Government of Saskatchewan* (1976) 71 DLR (3d) 1, 10 per Dickson J (SCC).

Recognition of a right of recovery serves an important deterrence function in cases of wrongdoing. Because the state rarely would be subject to a successful claim by the party ultimately bearing the expense,[152] it would have little incentive to avoid the imposition of an illegal tax if permitted to invoke the passing on defence.

If, contrary to *Royal Insurance*, the second element of the unjust enrichment concept properly requires that the defendant's gain be at the plaintiff's ultimate expense, should the passing on defence be available in the absence of wrongdoing? In theory, the answer is yes. A defendant should be entitled to resist a claim to the extent that it can establish that the burden of its benefit was shifted onto a third party. In practice, however, the defence would be problematic. Aside from exceptional instances of perfectly inelastic demand, increased price leads to decreased trade.[153] Consequently, even if an enterprise shifts the immediate burden of an expense in its entirety, it cannot escape the ultimate burden of that expense entirely. It will enjoy fewer sales as a result of its actions.[154] Moreover, because of the complex interrelationship of economic variables, it virtually is impossible to isolate and assess the market impact of a variation in a single factor, such as price.[155] Certainly, normal commercial documentation (such as invoices and sales records) cannot accurately reveal the consequences of a shifted burden.[156] Nor are economic theories of much assistance: 'in the real world the drastic simplifications of economic theory must be abandoned'.[157] As a result, the true effects of passing on generally must remain unknown.

[152] See fn 145 supra.

[153] For an excellent economic analysis demonstrating the difficulties in isolating the effects of passing on, see B Rudden and W Bishop, 'Gritz and Quellmehl: Pass It On' (1981) 6 ECLR 243.

[154] In *Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161, the plaintiff airlines conceded that they had passed on to their customers the burden of the invalid tax by raising fares, but argued that they had suffered a concomitant loss in business. LaForest J nevertheless imposed liability, noting that the plaintiffs had not proven the extent of their ultimate loss: id 193–4. Unfortunately, His Lordship did not treat the argument to the depth of analysis which it warranted, nor does his judgment reveal an appreciation of the difficulties inherent in proof of such loss.

[155] That is true with respect to both the effects *and* the causes of a price increase. In an open market, price is a function of many variables. Therefore, it often is difficult to state with certainty that a price increase following upon, say, the improper imposition of an tax was *caused* by the introduction of the levy. It may be that even in the absence of the levy, the plaintiff would have raised its price. If so, it should be entitled to retain its additional income. However, because of the vagaries of the evidentiary process, operation of the passing on defence could improperly deprive the plaintiff of that profit.

[156] In *Amministrazione delle Finanze dello Stato* v *San Giorgio spa* [1985] 2 CMLR 658, 673, Mancini AG persuasively argued that the informative value of ordinary commercial documentation is slight:

> Documents regarding costs throw some light on the profits of the entrepreneur; but to believe that they make it possible to identify all the factors on the basis of which the price is determined is disingenuous, if only because most of those factors are extraneous to the entrepreneur. It suffices to bear in mind -even though the observation may be banal- that, in a market subject to competition, the price of a particular item is affected by the production costs of all the other undertakings operating in the same sector and in particular those of the (marginal) undertakings whose costs are higher. Can all this be proved? And can it be translated into quantities and figures? I doubt it.

[157] *Illinois Brick Co* v *Illinois* 431 US 720, 742 (1970).

Clearly, then, it cannot be presumed that an actor in the marketplace suffers no loss merely because, in an immediate sense, he shifts the financial burden of an expense on to a third party.[158] Moreover, it would be inappropriate to require a claimant to establish positively the true extent of his loss. Such an onus effectively would bar recovery on evidentiary grounds in the vast majority of cases.[159] However, notwithstanding the difficulties inherent in the passing on defence, should it be available to defendants? Or is the defence so problematic that it simply should be denied a place in the law of restitution? Generally, of course, the defendant is free to choose the manner in which she meets a claim. However, the passing on defence entails considerations which extend beyond the immediate parties to an action. While the rules of court may allow a plaintiff to recoup the costs that he incurs while responding to an unsuccessful defence, costs incurred by the judicial system cannot be shifted onto a defendant. And in light of the highly complex nature of the attendant inquiry, the operation of the passing on defence often might intolerably tax judicial resources.

A number of arguments have been offered in opposition to the passing on defence. Burrows provides two arguments in support.[160] First, he promotes the analogous defence of mitigation[161] on the ground that leaving the windfall with the defendant, rather than shifting it to the plaintiff, minimises litigation and thereby saves judicial resources. However, the contrary seems more likely; because a defendant would bear the difficult onus of establishing the true extent of a plaintiff's loss,[162] the defence seldom would succeed. Consequently, its availability would not discourage restitutionary actions; notwithstanding an immediate passing on, a claimant would feel sufficiently confident in filing suit. At the same time, availability of the defence would encourage desperate defendants to engage the courts in costly and almost invariably fruitless investigations. Second, Burrows promotes the mitigation defence on the ground that in cases like *Royal Insurance*, the innocent recipient should be favoured over the mistaken payer who primarily is responsible for her own loss. While not without merit, that proposition is somewhat at

[158] Application of such a presumption almost invariably works an injustice against the plaintiff. In *Shannon* v *Hughes & Co* 109 SW 2d 1174 (1937), the plaintiff ice cream vendor shifted the immediate burden of an illegal tax onto its customers. There followed a sharp decline in the purchase of ice cream, probably because the demand for such a product is highly elastic. However, given the nature of the market, establishing a causal connection between increased price and decreased sales was daunting. Nevertheless, the court restricted the claimant's recovery to those payments which it could affirmatively prove had not ultimately been passed on. Consequently, the plaintiff suffered considerable loss at the government's hands.

[159] In *Amministrazione delle Finanze dello Stato* v *San Giorgio spa*, the defendant government conceded that '99%' of plaintiffs could not discharge such an onus: [1985] 2 CMLR 658, 673. For that reason, the European Court of Justice has held that it is contrary to Community Law to 'place on the taxpayer the burden of establishing that the unduly paid charges have not been passed on to other persons': *Les Fils de Jules Bianco SA* v *Directeur General des Douanes et Droits Indirects* [1989] 3 CMLR 36.

[160] Burrows, op cit (fn 3) 475.

[161] As previously discussed, the mitigation defence and the passing on defence essentially are the same: see fn 138 supra.

[162] That is true of both Burrows' defence of mitigation and the preferable formulation of the passing on defence.

odds with the accepted view that the plaintiff's negligence in committing a mistake is no bar to recovery;[163] it is doubtful that an innocent error (as opposed to a wrongful act[164]) should affect the right of recovery.

In the absence of empirical information revealing the operational effects of the passing on defence, it is not possible to provide a definitive answer as to whether or not such a concept should be included in the law of restitution. However, it tentatively is suggested on the basis of the preceding discussion that in *Royal Insurance*, the High Court reached the right decision for the wrong reason. Though sound in theory, the passing on defence may be unacceptable in practice. In a perfect world, it would inexpensively and decisively defeat restitutionary claims which ultimately could not satisfy the second element of the concept of unjust enrichment. In the real world, it might seldom have any effect beyond increasing litigation costs.

V. CONCLUSION

Royal Insurance is a mixed blessing. Positively, the High Court analysed at least parts of the plaintiff's claim largely in terms of the concept of unjust enrichment. As reliance increasingly is placed upon that concept, it seems only a matter of time until restitution properly assumes equal status with tort and contract in the law of civil obligations.

Unfortunately, the judgments in *Royal Insurance* occasionally are unsatisfactory with regard to more specific issues. Mason CJ misperceived the role of retrospective legislation in the context of allegedly mistaken payments, failed to appreciate the relationship between mistake and misprediction, and improperly suggested that 'absence of legitimate reason for retention' might serve as an unjust factor. While the majority did not join with the Chief Justice on those matters, it also generally did not support its position with as much analysis as might be hoped. Moreover, while Mason CJ appropriately denied the notion of disruption of public finances, problems persist with regard to the defences of voluntary payment and honest receipt, as initially developed in *David Securities*. Most worrisome of all, however, is the Court's interpretation of the second element of the concept of unjust enrichment and its consequent treatment of the defence of passing on. Although that defence may not merit recognition, it is an error to reject it on the basis that the defendant's gain need merely be at the plaintiff's immediate, as opposed to ultimate, expense.

[163] See fn 77 supra.
[164] See text accompanying fn 144 supra.