

Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v Commonwealth Bank of Australia

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1. Introduction

If *Pavey and Matthews Pty Ltd v Paul*¹ was a landmark in the recognition of restitution as an organising category in Australian law the significance of *David Securities Pty Ltd v Commonwealth Bank of Australia*² lies in the structure that it imposes on the "unifying legal concept"³ of unjust enrichment. This significance is evident at different levels. Most obviously, the much exonerated distinction between mistake of fact and mistake of law has been eliminated from the law of restitution for mistaken payments.⁴ At the same time defences to a claim for recovery, such as payment for good consideration, voluntary submission to an honest claim and change of position, have been sketched out, if not precisely defined. But at a more abstract level the High Court has begun to articulate its philosophy of unjust enrichment. The philosophy will be familiar to students of Goff and Jones' *The Law of Restitution*, and Birks' *An Introduction to the Law of Restitution*. It is based upon a closely circumscribed set of "unjust" factors linked, one assumes,⁵ to an enrichment clearly shown to have been at the expense of the plaintiff. "Injustice" for this purpose is not an appeal to some free-floating notion of fairness,

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1 (1986-87) 162 CLR 221.

2 (1992) 175 CLR 353; 109 ALR 57; 66 ALJR 768.

3 *Pavey v Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-57, per Deane J.

4 It is unclear whether the distinction remains for other restitutionary purposes, for example restitution for mistaken services. See Goff, R and Jones, J, *The Law of Restitution* (3rd edn), ch 5, Birks, P, *An Introduction to the Law of Restitution* (1989) Ch V, especially 124-25 on *Greenwood v Bennett* [1973] 1 QB 195. Note also Brennan J in his partial dissent in *David Securities* (1992) above n2 at 391 who explicitly puts to one side the case of mistaken conferral of services. Such a case "raises a question as to the availability of restitution as a remedy in cases where the plaintiff is not seeking a return of money or property with which the plaintiff has parted. That is not the present case and the problems which arise in those cases can be left for another day".

5 Assumed because no issue arose, or could have arisen, as to the nature of enrichment in *David Securities*. A defendant cannot be heard to deny that receipt of money constitutes an enrichment. Similarly, the enrichment was clearly at the expense of the plaintiff.

and the avoidance of unconscientious conduct does not for once appear to be the informing principle.⁶ Consistently with the policy pursued judicially by Lord Goff⁷ and noted by Birks,⁸ the basis for recovery within the accepted categories has been expanded at the same time as defences such as change of position have been recognised and developed. The policy is said to meet the fear of "too much restitution" which might unsettle security of transaction.

The importance of the *David Securities* case therefore lies just as much in the sort of unjust enrichment that is not being recognised as in the specific rules that the High Court is formulating. In this sense the decision is a signpost to paths not taken. No support can be found in the judgments for the broader notions of injustice favoured by Canadian authorities,⁹ although admittedly cases on mistaken payments rarely lend themselves to this wider form of generalisation. Likewise, little support can be found for the iconoclastic suggestion that "failure of consideration" is the basal principle of recovery.¹⁰ Finally, the proprietary approach put forward by the late Stoljar in *The Law of Quasi-Contract*, whereby money paid by mistake may be recoverable on the basis that it is the plaintiff's property, is not so much rejected as ignored.¹¹ The judgments of the High Court can be considered orthodox in that they follow the mainstream of academic writing on restitution and show little inclination to pursue more adventurous lines of inquiry.

The purpose of this article is to analyse the decision in the *David Securities* case. The principles relating to recovery of mistaken payments and the defences recognised by the High Court to a claim for repayment will be examined and their implications for the structure of restitution assessed. Two themes will be developed. First, the result reached by the High Court is sensibly progressive in that it removes obvious archaisms in the law, such as the principle that payments made under a mistake of law are irrecoverable. Second, the Court may have overlooked the dangers involved in transplanting, somewhat uncritically, the Goff and Jones and Birks framework to the Australian context. The charge of ignoring the local dimension can be levelled most cogently against the Court's treatment of the defences of voluntary submission to an honest claim and change of position. Earlier High Court authority on mistake of law has been forced onto a procrustean bed of voluntary submission in a way that may have the unintended consequence of denying recovery to deserv-

6 Getzler, J, *Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention* (1990) 16 *Monash LR* 283. Compare *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 153, per Toohy J.

7 *Barclays Bank Ltd v W.J. Simms* [1980] QB 677; *Lipkin Gorman v Karpnate Ltd* [1991] 2 AC 548. Perhaps the recent decision of *Woolwich Building Society v Inland Revenue Commissioners* [1993] AC 70 represents an exception to this policy: the ground of governmental liability was expanded without a corresponding enlargement of the applicable defences. Compare *Air Canada v British Columbia* (1989) 59 DLR (4th edn) 161.

8 Birks, above n4 at 156.

9 *Pettikus v Becker* (1980) 117 DLR (3rd edn) 257, *Sorochan v Sorochan* (1986) 29 DLR (4th edn) 1; Neave, M, "Living Together - The Legal Effects of the Sexual Division of Labour in Four Common Law Countries" (1991) 17 *Monash LR* 14 at 42-52; *Bryson v Bryson* (1993) 16 Fam LR 112 at 172-232, per Kirby P, at 144-45, per Sheller JA.

10 Butler, P A, "Mistaken Payments, Change of Position and Restitution" in Finn, P (ed) *Essays on Restitution* (1990) 88. This argument is considered at greater length below.

11 Stoljar, *The Law of Quasi-Contract* (2nd edn, 1989).

ing plaintiffs. Moreover, the Court has failed to clarify the relationship between change of position and the rapidly expanding empire of estoppel. Any accommodation between change of position and a substantive doctrine of estoppel cannot sensibly be based on the distinctions proposed by recent House of Lords authority and English textbooks writers. After David Securities the place of unjust enrichment in Australia is assured; its relationship to other, particularly reliance-based forms of obligation remains, however, somewhat obscure.

2. *The facts*

The case concerned a Swiss Franc loan arrangement of a sort which was a prominent feature of 1980s bank lending. The appellants negotiated a series of loans payable in Swiss Francs secured both by registered mortgages on the appellants' property and by unlimited personal guarantees. The loan moneys were in fact provided by the Singapore branch of the Commonwealth Bank, which necessitated the payment of withholding tax on interest arising under the agreement. Falls in the Australian dollar resulted in considerable financial losses for the appellants. Clause 8(b) of the agreement provided that:

all interest payments shall be paid by the Borrower to the Bank without deduction of any tax or duty or other imposts of any kind whatsoever. Should the Borrower any time be compelled by law to deduct any such taxes, duties or imposts ... the Borrower will pay such additional amounts as may be necessary in order that the net amount received shall equal the full amount the Bank would have received had a deduction not been made ...

The effect of this clause was that the appellants paid not only interest under the agreement but also an amount in respect of withholding tax. However, s261(1) of the *Income Tax Assessment Act 1936* (Cth) provides that:

A covenant or stipulation in a mortgage, which has or purports to have the purpose or effect of imposing on the mortgagor the obligation of paying income tax on the interest to be paid under the mortgage ... shall be absolutely void.

This provision was apparently overlooked by both parties in drawing up the agreement.

The High Court, concurring on this point with the Federal Court, held that s261(1) applied to payments in respect of withholding tax made under clause 8(b).¹² The section therefore rendered void money paid under this clause. The appellants sought the return of the money. Their claim directly raised the question whether money paid under a mistake of law could be recovered.

3. *Restitution for mistake: the fact and law distinction*

The principle that money paid under a mistake of law is irrecoverable is of dubious ancestry, insofar as it is at least arguable that until the nineteenth century no distinction was drawn between mistakes of fact and mistakes of law.¹³

¹² The Court rejected the Bank's argument that the agreement was not a mortgage within s261(1). It was sufficient that the loan agreement was collateral to the mortgage: above n2 at 365.

¹³ See Goff and Jones, above n4, ch 4; New South Wales Law Reform Commission, *Restitu-*

Nevertheless, after *Bilbie v Lumley*¹⁴ the principle of irrecoverability became firmly embedded in the common law. As long ago as 1939 Lord Wright, writing extra-judicially, described *Bilbie v Lumley* as an example of how "the dead hand of the past fastens on the living present".¹⁵ Dissatisfaction with the rule is demonstrated by the use made by judges of those cynical devices, manipulation of the fact/law distinction and the proliferation of exceptions to the principle of irrecoverability.¹⁶ The proposition that a payment made under a mistake of law is not of itself a ground for recovery hints at the exceptions and qualifications required to render the principle at all workable. As a relatively self-contained area of restitution, the principle of irrecoverability has attracted the attention of law reformers, who have otherwise left restitution alone for fear of introducing statutory rigidity into a subject which is still in the chrysalis stage and struggling to attain its adult structure.¹⁷

The movement to abolish the irrecoverability rule had enjoyed some success even before the *David Securities* decision. Legislation has been promoted in several jurisdictions to permit recovery.¹⁸ Judicially, the rule was laid to rest in Canada by the Supreme Court in *Air Canada v British Columbia*.¹⁹ The Full Federal Court may have been trying to incite judicial creativity in *David Securities* when it declared that "it is open only to the High Court to remove the distinction between fact and law in respect of common law claims for recovery of money paid by mistake".²⁰ If so, the challenge has been taken up. The High Court unequivocally held, in the words of the majority opinion, that "the rule precluding recovery of moneys paid under a mistake of law should be held not to form part of the law in Australia".²¹ Abrogation of the irrecoverability rule did not, however, mean that the appellants succeeded in recovering the payments made under cl8(b). It had not been established at trial that they had been paid under a mistake. The Court remitted the case to the trial judge to determine whether the appellants should be permitted to call evidence on the issue of mistake and, if so, whether the appellants had in fact paid the additional amounts because of their mistaken belief that their contractual arrangements with the bank required the payments to be made.

tion of Benefits Conferred Under Mistake of Law, (1987) LRC 53 ch 2; Butler, above n10 at 93-97.

14 (1802) 2 East 469; 102 ER 448.

15 *Legal Essays and Addresses* (1939) preface at xix.

16 See Goff and Jones, above n4, ch 4 for a list of these exceptions.

17 New South Wales Law Reform Commission, *Restitution of Benefits Conferred Under Mistake of Law* above n13; Law Reform Committee of South Australia, *Report Relating to the Recoverability of Benefits Obtained by Reason of Mistake of Law* (1984); Law Reform Commission of British Columbia, *Report on Benefits Conferred Under a Mistake of Law* (1981) LRC 51; English Law Commission, *Restitution of Payments Made Under a Mistake of Law*, (1991) Consultation Paper No 120. On the place of legislative development in restitution, see Beatson, J, "Should There be Legislative Development of the Law of Restitution?" in Burrows, A (ed), *Essays on the Law of Restitution* (1991), ch 11.

18 *Judicature Amendment Act 1958*, s94A(1) (NZ); *Law Reform (Property, Perpetuities and Succession) Act 1962*, s23(1) (WA).

19 (1989) 59 DLR (4th edn) 161.

20 (1990) 93 ALR 271 at 305.

21 Above n2 at 376, Mason CJ, Deane, Toohey, Gaudron JJ.

The High Court's abolition of the distinction between mistake of fact and mistake of law is a first but important step towards the development of a coherent law of restitution for mistaken payments. Ignorance of the law is no excuse but, as has often been remarked, a plaintiff seeking recovery of overpaid money paid under mistake of law is not trying to further an illegal purpose but, on the contrary, is trying to promote public policy by recognising the invalidity of the transaction and by returning to the status quo before the transaction was entered into.

Nevertheless, abolition of the distinction is only the first step. The High Court's judgments have left unresolved some of the consequences of abolition. These consequences are both theoretical and practical, and not all will be settled by remission of the case to the Federal Court. On some points, the Court's omissions probably constitute a deliberate withholding of its opinion until a more suitable opportunity to systematise the law occurs, but on other questions one is simply left to guess whether it was ignorance or a reluctance to prejudice complex issues which has led to these omissions. The overall result is to leave a somewhat patchy and incomplete law of restitution for mistaken payments. What are these outstanding issues?

At a theoretical level a problem which has received some attention is the relationship between mistake and failure of consideration in permitting recovery of benefits conferred under ineffective transactions. The debate on the role of failure of consideration in restitution has not been especially lucid; indeed, it has confused a number of questions, a confusion that is faithfully reflected in the *David Securities* judgments.²² The presence or absence of consideration may be relevant in three restitutionary contexts.

(i) A benefit may have been conferred by the plaintiff under a contract where the defendant has failed to provide a bargained-for benefit under the contract. Consideration is said in such a case to have failed. This is a well established, if narrow, ground of restitution and the High Court has recently reaffirmed the necessity for complete failure of consideration.²³

(ii) Failure of consideration can also mean, in a broader sense, that "the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself".²⁴ The significance of this wider meaning is that it links, and promotes consistency between, grounds of restitution previously separated by historical accident, such as the common law rules relating to mistaken payments and the equitable principles governing the imposition of a resulting trust upon failure of an express trust purpose.²⁵ It has been argued that cases of mistaken payments are really instances of failure of consideration, in the sense of failure of the purpose for which the payment was made.²⁶ The majority opinion declined to consider

22 Birks, P, *Modernising the Law of Restitution* (1993) 109 LQR 164 at 167. See also Burrows above n17 at 108-109 for a helpful discussion of various meanings of failure of consideration.

23 *Baltic Shipping Co v Dillon* (1993) 111 ALR 289. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61, per Lord Wright.

24 Birks, above n4 at 223.

25 *Re Ames' Settlement* [1946] Ch 217; *Re Gillingham Bus Disaster Fund* [1958] Ch 300; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

26 Matthews, P, "Money Paid Under Mistake of Fact" [1980] *New LJ* 587; Butler, P A,

whether this characterisation should be adopted. "[I]t is unnecessary in the present context to assess the merits of this argument."²⁷ Brennan J, however, rejected the attempt to reanalyse mistake as failure of consideration and clearly preferred to ascribe a narrow meaning to the term:

The point of distinguishing the two categories of unjust enrichment is this: "consideration", when given for a payment made under a mistake, is a benefit given at or prior to the receipt by the payee: at that moment it can be determined whether and to what extent the payee has been unjustly enriched. On the other hand, "consideration which has totally failed" refers to a benefit under a contract or purported contract that the payee has totally failed to give during the period available for contractual performance. It is therefore a fallacy to conflate the two categories and to find a total failure of consideration to be an element common to both.²⁸

The suggestion that cases of mistaken payment should be regarded as examples of failure of consideration was therefore not considered by the majority but expressly rejected by Brennan J who confined failure of consideration to its strict contractual context.

(iii) It is sometimes asserted that it is a defence to a claim for restitution if good consideration was given for the payment. This use of "good consideration" can be traced to the judgment of Goff J in *Barclays Bank v W J Simms Ltd*.²⁹ In *David Securities* the bank argued that it had given consideration for the withholding tax unlawfully paid by the borrowers. The Court held that, while the borrowers had received clear benefits under the loan agreements, it had received no benefit for "the payments which [the Bank seeks] to recover".³⁰

This part of the judgment has been rightly criticised, not so much for the Court's conclusion, which is eminently sensible, as for the inappropriate use of consideration in this context.³¹ While bona fide purchase is a recognised defence to a restitutionary claim³² its applicability to cases of mistaken payments is very doubtful.

Cases in which "good consideration" has been given for the payment turn out upon close inspection to be decisions where the court found no mistake, or where a benefit was conferred by the defendant necessitating counter-restitution by the plaintiff, or where the consideration created a contract to which stricter rules of mistake apply.³³ In *David Securities* the finding that the Bank had given "no consideration" for the borrower's unlawful payments was in substance a holding that the plaintiffs were not prevented from recovering the

"Mistaken Payments, Change of Position and Restitution" in Finn, P (ed), *Essays on Restitution* (1990) ch 4, especially at 122-23.

27 Above n2 at 380.

28 *Id* at 390.

29 [1980] QB 677 at 695, relying on *Aiken v Short* (1856) 1 H&N 210 and dicta in *Kerrison v Glyn, Mills, Currie and Co* (1911) 81 LJKB 465. See also *National Mutual Life Association of Australasia Ltd v Walsh* (1987) 8 NSWLR 585.

30 Above n2 at 383.

31 See Birks, above n22 at 167.

32 See Burrows, above n17 at 472-75.

33 *Id* at 473. See the cases cited by Goff J in *Barclays Bank Ltd v WJ Simms Ltd* [1980] QB 677 at 695.

money by the need to make counter-restitution. But there is a strong argument for abandoning the concept of consideration as a so-called "defence" to cases of mistaken payment since it risks confusion with other uses of consideration in the law of restitution.³⁴

This is the principal theoretical issue which emerges from the High Court judgments. The practical issues are equally intriguing. Just as every solution is said to generate a new problem, so the removal of a legal anomaly exposes other legal inconsistencies less amenable to instant remedy. The High Court's abolition of the mistake of law rule in *David Securities* leaves untouched a number of associated issues. For example, where the general understanding of the law changes as a result of a court decision, should a payment made on the basis of the former understanding of the law be recoverable? Restitution has generally been denied in such a case for two reasons. First, it is arguable that the plaintiff has made no mistake at the time the payment was made. When the law is changed by legislation a payment made on the faith of the previous law is certainly not mistaken. At the time of the payment the law was exactly what the payer believed it to be. But what of a "change" in the law made by judicial decision? One argument for recovery is that the payer has made a mistake since the payment was made on an assumption as to the law which proved to be erroneous. The payer, no doubt along with many others, paid money on an understanding of the law which a later court, in the exercise of its judicial omniscience, has declared to be incorrect. A mistake has therefore been made.

The difficulty with this analysis is that it is premised on the declaratory theory of judicial behaviour, whereby judges declare rather than make the law, and apparent "changes" in the law amount to no more than rectification of previous judicial error. Such a theory has few, if any, subscribers today, and at least since the 1930s American Realist legal philosophers trenchantly destroyed the myth of judicial infallibility it has been accepted that judges create law by the incremental processes of judicial legislation. Accordingly, a payer who made a payment on the faith of the previous decision, *A v B*, only to find that it was overruled in the later case of *X v Y*, cannot necessarily be said to have made a mistake. He or she is simply another victim of the happenstance of judicial law-making.³⁵

The second reason for disallowing a claim where a common understanding of the law is overturned is the threat to security of transaction that would be caused by permitting recovery. Confusion would occur if settlements entered into many years previously could be reopened whenever a court overruled a previous decision. The fear is apparent in remarks made by Lord Coleridge CJ in *Henderson v Folkestone Waterworks Co Ltd*.³⁶ The plaintiff had paid water rates to the defendants but sought recovery after a later decision of the House of Lords had ruled that the defendants were not entitled to collect the rates. Lord Coleridge CJ responded vigorously in argument to the assertion that a mistake of law had been made: "Of what law? I was ignorant of it before the

34 Birks, above n22 at 167.

35 English Law Commission above n17, paras 2.57-2.58.

36 (1885) 1 TLR 329. See also *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* [1969] WAR 155, reversed on other grounds: (1969) 121 CLR 137.

decision of the House of Lords. I had held the contrary and two eminent judges with me. Can that be put as ignorance of law?"

In rejecting the claim reliance was placed on the unsettling consequences of allowing the plaintiff's claim:

Just see what consequences would follow — that wherever there has been a reversal of judgment all the money that has been paid under the previous notion of the law can be recovered back! Has that ever been held? Can it be that every reversal of a decision may give rise to hundreds of actions to recover back money previously paid?³⁷

Floodgate arguments are habitually overestimated by judges and underestimated by academic writers. A variety of techniques can be employed to meet the legitimate concern that courts may be overwhelmed by applications brought by litigants seeking to take advantage of a change in the understanding of the law. For example, strict limitation periods can be enacted. Nevertheless, the fear of multiplicity of claims may be more genuine in this area than in others, particularly where the interpretation of tax legislation has been altered by judicial decision. It is in response to this fear that New Zealand and Western Australian legislation, which permits recovery for mistakes of law, specifically excludes recovery where a payment has been made upon an understanding of the law which has changed since the payment was made.³⁸

It is unclear whether denial of recovery where a change in the understanding of the law has occurred is an outpost of the mistake of law rule or a discrete rule of public policy in its own right. Arguably, the policy of irrecoverability in these cases depends on the distinct policy argument that the risk to security of transaction is particularly high in these cases and that to allow recovery to possibly thousands of claimants might inhibit creative case-law development. Whether restitution for "judicial change in the law" is now possible remains uncertain after *David Securities* since the High Court nowhere alluded to this issue. The facts of *David Securities* did not, of course, require an answer to the question and the consensus of judicial and academic opinion against allowing recovery suggests that no change was intended. Nevertheless, the decision unintentionally demonstrates the advantages of legislative reform in this area, since law reform agencies can recommend a comprehensive package of reforms including ancillary issues such as recovery for "judicial change in the law" as well as the general "mistake of law" rule.³⁹ Decisions such as *David Securities* which are prepared to address, and even to overrule, the principle of irrecoverability for mistake of law rarely consider these consequential but vital issues.

Another equally critical issue, implicitly raised but left unanswered by the *David Securities* case is whether Australian law will recognise restitution as

³⁷ Id at 329.

³⁸ *Judicature Act 1958 (NZ) s94A(2); Property Law Act (WA) s124(2)*. The drafting of these provisions has not escaped criticism. See New South Wales Law Reform Commission, *Restitution of Benefits Conferred Under a Mistake of Law*, above n16, pars 5.27-5.29; English Law Commission, *Restitution of Payments Made Under a Mistake of Law*, above n17, pars 2.59-2.65.

³⁹ See the Law Reform Reports above n17, all of which consider recovery for a change in the understanding of the law as well as for mistake of law.

of right for money unlawfully exacted by government. Recent developments have made this a matter of intense speculation. The conventional response is that such money is irrecoverable unless the payment was made in response to improper pressure. Courts have been astute to find that coercion has occurred; it may even be construed out of the statutory framework for payment itself.⁴⁰ Legislation may also authorise recovery of payments, although such statutory provisions are typically discretionary rather than mandatory.⁴¹ A residue of cases remain, however, where no undue pressure has been applied or where the payer (perhaps an institution rather than an individual) is fully capable of withstanding the pressure, and where there is no legislation conferring a right to recovery.

The *David Securities* case was not an example of an ultra vires payment to government; the dispute was essentially between two private parties as to which was liable to meet a tax liability. Nevertheless, many payments improperly exacted by government are made under a mistake of law, and the elimination of the fact/law distinction in this area clears the ground for discussion in a future case of a possible right to restitution where previously discussion of the issue might previously have been foreclosed by a finding that the payment had been made under a mistake of law. The House of Lords in *Woolwich Building Society v Inland Revenue Commissioners*⁴² has recently by a majority upheld a claim to restitution from the executive as of right, irrespective of any mistake by the payer or pressure exerted by the payee or some third party. The *Woolwich* case was noted in passing by the High Court in *David Securities*,⁴³ but it was treated as part of the chorus of criticism of the traditional rule disallowing recovery for mistakes of law, not as a seminal authority on restitution from the executive.

The High Court judgments contain no clue as to whether such a right of restitution will be recognised by Australian law. While restitution "as of right" has received little encouragement in previous High Court cases,⁴⁴ dicta can be found in early lower court decisions which are, at the very least, sympathetic to such a development. For example, in *Payne v The Queen*⁴⁵ Madden CJ would

40 *Mason v New South Wales* (1959) 102 CLR 108, especially the judgment of Kitto J, at 126-27, 129. But see the unreported decision of Gobbo J in *Esso Australia Resources Ltd and BHP Petroleum (North West Shelf) Pty Ltd v Gas and Fuel Corp of Victoria*, Victoria Supreme Court, 2 March 1993 where the Mason decision was construed to require at least duress of goods.

41 *Income Tax Assessment Act 1936* (Cth), s172. For a recent decision on stamp duty legislation see the unreported decision of the Full Court of the Supreme Court of Victoria in *Royal Insurance Australia Ltd v Comptroller of Stamps*, 6 August 1992, where recovery of overpaid stamp duty under s111(1) of *Stamps Act 1958* (Vic) was ordered.

42 [1993] AC 70. The majority judgments, especially that of Lord Goff, relied strongly on analysis by Birks, P, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in Finn, P (ed), *Essays on Restitution* (1979). The distinction between mistakes of fact and mistakes of law was not abolished. Compare *Air Canada v British Columbia* (1989) 59 DLR (4th) 161.

43 Above n2 at 375.

44 *Sargood Bros v The Commonwealth* (1910) 11 CLR 258; *Werrin v The Commonwealth* (1937-38) 59 CLR 150.

45 (1900-1901) 26 VLR 705 at 719. Another early decision favouring recovery is *Keogh v Siles* (1863) 2 SR (NSW) 167, although in this case, in which a poundkeeper was ordered to repay pound fees, the basis of repayment appears to be that the fees were exacted *colore*

have ordered repayment of overpaid probate duty on the ground that recovery should be permitted to:

a person who pays money under a mere exaction — ie under a demand by law at all ... Many cases have been cited to me on the point, and the principle is plain enough, that where money is demanded by a probate officer not under authority of law, and under no real title to have it at all, he may be in a position to greatly oppress or embarrass the person who is called upon to pay, and it would be an unfair and unjust thing to say that that person, who is practically compelled to take out probate for other purposes, and who has to pay the duty demanded of him, whether demanded rightly or wrongly, in order to get the title by probate which he wants, could not recover the money back if it should turn out afterwards that it had been paid erroneously ... I think the rule of law which precludes the recovery of money paid under a mistake of law does not extend to cases of seeking to recover money which is demanded and insisted upon without any legal right or title, and is sought to be recovered by the person who paid it.⁴⁶

A High Court resolved to recognise a basic right of restitution from the executive could build upon some promising early authority as well as upon the abolition of the mistake of law rule in *David Securities*.

Recognition would inevitably entail consideration of whether specific defences should be available to government in meeting restitutionary claims. The Canadian Supreme Court in *Air Canada v British Columbia*, while abolishing the distinction between mistakes of fact and mistakes of law, allowed the government to plead disruption of public finances as a defence to a restitutionary claim, at least where payment was made under a statute held to be ultra vires.⁴⁷ The spectre of fiscal chaos has occasionally surfaced in Australian judgments. For example, Isaacs J asserted in his dissenting judgment in *Sargood Bros v Commonwealth* that:

After several years, questions might be raised which, on some suddenly discovered interpretation of a taxing act, whether internal revenue or Customs, would unexpectedly require the return of enormous sums of money and quite disorganise the public treasury.⁴⁸

We shall see later that close regard must be paid to the context in which such dicta are uttered. But statements such as these were previously invoked as justifications for the mistake of law rule and are still used in support of a finding that the plaintiff "voluntarily" made the payment to the government. They have not so far constituted an independent defence of disruption of public fi-

officii. More recently, the dissenting opinion of Beaumont J in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd* (1991) 103 ALR 637 can be read as a plea for recognition of a right of restitution within s16(1)(d) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

46 Id at 719. The judgment of Madden CJ was a dissenting opinion, the majority disallowing recovery on other grounds. Madden CJ was strongly influenced by English decisions such as *Morgan v Palmer* (1824) 2 B&C 729 and *Steele v Williams* (1853) 8 Ex 625 which at that time were construed as authorities favouring a broadly based right of recovery but which were subsequently ignored or distinguished out of meaningful existence.

47 (1989) 59 DLR (4th edn) 161 at 197. La Forest J, delivering the majority judgment, indicated that this defence "should not apply" where government simply misapplies an intra vires statute. See also *Canadian Pacific Airlines v The Queen* (1989) 59 DLR (4th edn) 218.

48 (1910-11) 11 CLR 258 at 303.

nances. It is submitted that the dissenting judgment of Wilson J in the *Air Canada* case provides a compelling argument for not recognising such a defence:

What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of 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 the government against itself (and I cannot say that the idea particularly appeals to me) it should be one which distributes the loss fairly 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.⁴⁹

Another defence which found favour with the majority of the Supreme Court in the *Air Canada* case is compendiously known as the "passing on" defence: a payer should not be entitled to restitution where the overpayment has been passed on to third parties, for example where a company has passed on an unlawful tax to its customers in the form of higher prices. The argument is that the defendant has not been enriched at the expense of the plaintiff where the plaintiff has suffered no loss. The loss itself has been shifted to third parties. The defence was peremptorily rejected by Windeyer J in *Mason v New South Wales*: "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."⁵⁰ Although one could wish for a more detailed analysis it is submitted that Windeyer J was correct to disallow the defence. A payer who "passes on" an unlawful payment to customers is not necessarily recouping a loss. Charging a higher price to customers may reduce the number of customers unless all the payer's competitors also pass on the payment.⁵¹ A defence of "passing on" commits a court to an assessment of the economic consequences of making an unlawful payment which few courts are competent to make.

Finally, a right of automatic restitution (in the sense of not requiring mistake or compulsion to be established) will necessitate a reconsideration of the relationship between general principles of restitution and statutory provisions empowering government to repay taxes and other charges which have been unlawfully levied. Although tax legislation routinely provides for the return of overpayments, such legislation may, apart from being framed in discretionary terms, be deficient in that it is confined to certain kinds of mistake or may not permit restitution to the taxpayer.

A recent example is afforded by the subsequent history of *Mutual Pools and Staff Pty Ltd v Federal Commissioner of Taxation*.⁵² In that case a majority of the High Court held that sales tax imposed upon swimming pools constructed "in situ" was unconstitutional under s55 of the Constitution, as it was not a tax upon goods. Repayment of the improperly exacted sales tax to the builders of the swimming pools was refused by the Commissioner of Taxation

49 (1989) 59 DLR (4th edn) 161 at 169.

50 (1959) 102 CLR 108 at 146.

51 Rudden, B and Bishop, W, *Gritz and Quellmehl: Pass it on* (1981) 6 ELR 243; Burrows, A, "Public Authorities, Ultra Vires and Restitution" in Burrows, above n17 at 59.

52 Above n2.

even though the Commissioner had undertaken to refund in the event of a determination that the tax was unconstitutional. The basis of the refusal was that s26(1A) of the *Sales Tax Assessment Act (No 1) 1930* (Cth) did not permit repayment "unless the Commissioner is satisfied that the tax has not been passed on by the person to another person, or, if passed on to another person, has been refunded to the other person". In *Precision Pools Pty Ltd v Commissioner of Taxation*⁵³ Spender J held that s26(1A) was, as a matter of statutory interpretation, inapplicable to the sales tax wrongly levied in the *Swimming Pools* case. More relevantly for our purposes, Spender J held that express words would be required in order to exclude the common law right of recovery in an action for money had and received.

One would expect clearer words if the section were to have the effect of limiting a right under the general law to be repaid moneys either pursuant to an agreement or in circumstances where the payments were not made voluntarily but under compulsion, the recovery being sought as money had and received.⁵⁴

Precision Pools v Commissioner of Taxation illustrates how a general law right of restitution can be used to supplement, and not merely duplicate, statutory provisions for repayment. It may even enable statutory defences to claims for repayment to be circumvented although (and on this point the decision is disquieting) proper regard must be paid to the policies underlying legislative restrictions on recovery when considering the applicability of the common law action. But, used sensitively, there is no reason why a common law right of restitution should not co-exist with existing statutory repayment provisions.

4. *Defining an operative mistake*

An inevitable consequence of the abolition of the distinction between mistake of fact and mistake of law is the need to clarify the type of mistake which entitles a payer to recover the payment. Legislation abolishing the distinction has generally provided that recovery should be permitted in cases of mistake of law in the same circumstances as if the mistake had been one of fact⁵⁵, and this approach was also adopted by the High Court. The framing of a definition of operative mistake by the majority judgment is particularly convincing. The opportunity has been taken to examine the various formulations of the basis of recovery and to select a test that is conceptually elegant and offers the most generous scope for recovery. Three principles of recovery have at different times been advanced:

(i) *The principle of supposed legal liability*

On this approach the person making the mistaken payment must have supposed that he or she was legally liable to make the payment. This was once considered the only type of mistake to justify restitution and it remains the most common type of mistake affording relief.⁵⁶ As the sole criterion for recovery it was rejected by the High Court. In the words of the majority judgment:

53 (1992) 37 FCR 554.

54 *Id* at 565.

55 See the legislation cited in above n18.

56 *Kelly v Solari* (1841) 9 M&W 54 at 58 per Parke B; *Aiken v Short* (1856) 1 H&N 210 at

[I]t is illogical to concentrate upon the type of mistake made when the crucial factor is that the recipient has been enriched. To overturn the traditional [mistake of law] rule and then replace it with a proposition incorporating the classic formulations of the liability approach ... would be counter-productive.⁵⁷

(ii) The principle of fundamental mistake

On this approach relief will be given where the mistake is sufficiently fundamental to justify recovery. In spite of its manifest tautology, the requirement that a mistake must be fundamental has enjoyed a measure of support in Australia.⁵⁸ But it has always been open to objection on the grounds of unspecificity and low predictive value. These features were emphasised in the majority opinion:

The notion of fundamentality is, however, extremely vague and would seem to add little, if anything, to the requirement that the mistake caused the payment ... insistence upon that factor would only serve to focus attention in a non-specific way on the nature of the mistake, rather than the fact of enrichment.⁵⁹

(iii) The causative approach

A payment will be recoverable on this approach if the mistake has caused the payment to be made. It received the imprimatur of Goff J in *Barclays Bank v W J Simms Ltd*⁶⁰ and its applicability to the Australian law of restitution for mistake had previously been left open by the High Court in *ANZ Banking Group Ltd v Westpac Banking Corp.*⁶¹

In *David Securities* the Court unanimously adopted the causative approach. In the opinion of the majority, "it would be logical to treat mistakes of law in the same way as mistakes of fact ... so that there would be a prima facie entitlement to recover moneys paid when a mistake of law or fact has caused the payment".⁶² It is the simplest and most elegant solution to the problem of finding an operative mistake, encapsulating not only cases where payment was mistakenly made under an assumed legal liability to make the payment but also cases where the payer mistakenly believed that a moral obligation existed to make the payment.⁶³ Simplicity, however, in this context is a relative term. Causative approaches in the law often necessitate an inquiry as to whether the mistake or other invalidating factor was the sole or major cause of the payment. Measurement of how effective a mistake is in combination with other factors will inevitably be imprecise.⁶⁴ The problem may be acute when a payee submits that the payer submitted to an honest claim. If the submission means no more than that the payer would have paid in any event, irrespective of whether a mistake had been made, the defence is simply a denial that the

215 per Bramwell B. See also Goff and Jones, above n4 at 87-90.

57 Above n2 at 376-77.

58 *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177; *ANZ Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662 at 671 and 673.

59 Above n2 at 377-78.

60 [1980] QB 677.

61 (1988) 164 CLR 662 at 671-72.

62 (1992) 175 CLR 353 at 376.

63 *Larner v LCC* [1949] 2 KB 683.

64 Cf Birks, above n4 at 157: "Will-power has no voltage".

mistake caused the payment. It is, however, clear from the general thrust of the High Court judgments that "voluntary submission" amounts to more than a denial of causation. Quite what that broader meaning is will be considered in a later section when it will be suggested that the formulation adopted by the Court risks undermining the basic right of restitution for mistake. But if a non-causative defence of submission to an honest claim does exist, cases will occur in which a mistake caused a payment and the payment was made in voluntary submission to an honest claim. Courts may then find themselves engaged in the thankless task of quantifying the unquantifiable when they attempt to assess the potency of the mistake.⁶⁵

The causative approach can be seen as a deliberate strategic choice in the development of restitution in Australia. It has the potential, as Birks has noted,⁶⁶ to enlarge the category of mistakes for which restitution may be obtained. By the same token, it threatens security of transaction insofar as restitution of a broader range of payments can be ordered than under the previous tests which have now been discarded. It is now widely accepted that the response to the fear of "too much restitution" and instability of transaction must be to develop generous defences to protect good faith recipients of mistaken payments. The elaboration by the High Court of the defences of change of position and voluntary submission to an honest claim can be seen not simply as a reaction to specific arguments raised by the Commonwealth Bank but as a necessary consequence of enlarging the category of operative mistake. Generous formulations of the principles of liability demand generous defences to be available to honest recipients of mistaken payments.

In opting for the causative approach the High Court rejected a gloss on the test which has occasionally surfaced in the judgments, namely that, in addition to proving that the mistake caused the payment to be made, the plaintiff must also establish that retention of the money by the recipient would be unjust in all the circumstances.⁶⁷ This supernumerary test of injustice was unanimously rejected by the Court. The majority judgment declared that:

[I]t is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality.⁶⁸

This rejection of an affirmative requirement of injustice may have a significance extending beyond correction of lower court error. It underlies the determination of the High Court not to sanction a free-floating doctrine of unjust enrichment where injustice is founded upon "liberal notions of justice". The Court's notion of "justness" is firmly grounded in familiar and predominantly private law notions of mistake, compulsion and illegality. On this as on the

65 Compare restitution for compulsion where it is sufficient that the improper pressure was a cause of the payment: *Barton v Armstrong* [1976] AC 104; *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1990) 19 NSWLR 40. See also Arrowsmith, S, "Mistake and the Role of the "Submission to an Honest Claim" in Burrows, above n17 at 17 and 20-22.

66 Birks, above n4 at 156.

67 *National Mutual Life Association v Walsh* (1987) 8 NSWLR 585.

68 Above n2 at 379.

other issues considered, the *David Securities* structure of restitution favoured by the Court is clearly driven by what might be termed the "Oxbridge" model of unjust enrichment formulated by Goff and Jones and Birks,⁶⁹ with its taxonomy of vitiating and qualifying "unjust" factors, rather than, for example, the looser and more intuitive conception of injustice recognised by North American authorities or the proprietary analysis of recovery developed by Stoljar.⁷⁰

5. Defences

A. *Voluntary submission to an honest claim*

One of the defences most frequently raised to a claim for restitution of a mistaken payment is that of voluntary submission to an honest claim. It is also one of the most obscure in terms of its definition and scope. An explanation for its incoherence can be found in the readiness of writers and judges to follow Goff and Jones,⁷¹ and rationalise cases of payment under a mistake of law on the ground that the plaintiff has in good faith settled an honest claim. The rationalisation rarely extends to a critical analysis of this alternative ground of irrecoverability. The desire of judges and writers to find some more intellectually satisfying basis for cases apparently decided upon the discredited ground that a payment made under a mistake of law is irrecoverable is entirely understandable. But in their haste to seize upon "voluntary submission to an honest claim" as the preferred explanation for these cases, they have overlooked the tenuous origins of this defence. Almost all cases allegedly founded upon the voluntary submission principle (or cognate principles)⁷² in fact turn out upon closer inspection to have been decided upon some other basis. In some cases the mistake may not have caused the payment; in others there may even have been no mistake at all. Finally, there are cases where the court unambiguously denied recovery on the ground that payment had been made under a mistake of law, and any overfacile rationalisation of such cases on the basis of "voluntary submission" amounts to a deliberate falsification of the explicit reasoning adopted by the court.

Nor is it clear that the "voluntary submission" principle which has now been expounded by the High Court in the *David Securities* case constitutes a worthwhile addition to the list of restitutionary defences. There may be room for a defence that the payer assumed the risk that a mistake might occur, although its scope will be exceedingly narrow and as a practical matter it will be hard to disentangle from absence of causation. But the version of "voluntary submission" favoured by the majority judgment is not so much defined as loosely asserted, in a way that may well deny recovery to many deserving plaintiffs who might reasonably have hoped to have benefited from the abolition of the mistake of law rule. This major objection was recognised by Brennan

69 See above n4.

70 Stoljar, *Law of Quasi-Contract* (2nd edn, 1989).

71 Goff and Jones, above n4, ch 4.

72 For example, the apparently discrete defence of closing the transaction favoured by Lord Goff in *Woolwich Building Society v IRC* [1993] AC 70 at 165.

J in his separate opinion, which will be considered later in this section, and constitutes the most worrying feature of the judgments in *David Securities*.

B. *Voluntary submission and causation*

One meaning sometimes ascribed to voluntary submission is that the payer intended to pay "in any event"; in other words, the payer denies that the mistake, or other ground of restitution, caused the payment to be made. This may be the ground upon which Parke B would have denied liability in a much cited dictum in *Kelly v Solari*.

If indeed the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may generally speaking, be recovered back ...⁷³

Likewise, a causative construction can be placed upon the statement by Goff J in *Barclays Bank v W J Simms* that the payer's claim may fail if "the payer intends that the payee shall have the money at all events whether the fact be true or false, or is deemed in law so to intend ..."⁷⁴

While "voluntary submission" can be defined in terms of absence of causation it seems perversely narrow to limit it in this way. Indeed, a finding that the mistake did not cause the payment scarcely deserves the appellation "voluntary submission" at all. Moreover, the High Court's reinterpretation of its own previous decisions which appeared to have held that money paid under a mistake of law is irrecoverable but which are now said to be reconcilable with the principle of "voluntary submission" clearly implies that the principle means something more than absence of causation. For in all these cases the mistake did in fact cause the payment to be made, and yet recovery was denied. What interpretation can then be given to the term, "voluntary submission to an honest claim?" It is submitted that no clear meaning emerges from a review of earlier High Court authority. Cases declared by the majority in *David Securities* to be based on "voluntary submission" were in fact upon a fair reading of the judgments in these cases decided upon different principles. The majority of the High Court, following Goff and Jones too faithfully on this issue, has constructed an indeterminate rule for refusing relief out of authorities which at best provide only ambiguous support.

Three earlier High Court decisions are central to the construction of the "voluntary submission" principle. All merit close analysis.

(i) *Sargood Bros v The Commonwealth*⁷⁵

The plaintiffs sought repayment of customs duties paid in respect of packaging of certain imported goods. A draft tariff order had been laid which would

73 (1841) 9 M&W 54, 59.

74 [1980] QB 677 at 695. See also the acute analysis of these dicta by Arrowsmith, S, *Mistake and the Role of the "Submission to an Honest Claim"* in Burrows, A (ed), *Essays on the Law of Restitution* (1991), ch 2.

75 (1910) 11 CLR 258. This case was relied upon by Lord Goff in *Woolwich Building Society*

have made duty payable on the packaging but, in the event, the order was not adopted in the form proposed, and the packages were exempt from duty. The plaintiffs had nevertheless paid the exaction in the belief that the tariff order had come into effect. A majority of the High Court, Griffith CJ dissenting, held that the plaintiffs were precluded from recovery by s7 of the *Customs Tariff Act* 1908 which deemed customs collected in these circumstances to have been lawfully imposed and collected. Higgins J showed a disinclination to explore issues going beyond the narrow question of statutory interpretation, but all the other judges briefly adverted to the question of whether the plaintiffs' payment was recoverable at common law. Griffith CJ and O'Connor J considered that the payment had not been voluntary. In their opinion they had been made *colore officii* and "such moneys may be recovered back from [the payee] if it should afterwards turn out that they were not legally payable even though no protest was made or questions raised at the time of payment".⁷⁶ The payments of customs duties in this case were characterised as involuntary even though the plaintiffs had not availed themselves of a special procedure laid down by s167 of the *Customs Act* 1901 which entitled a payer to contest an assessment to duty by depositing with the Collector the amount of duty in dispute. The election not to follow a prescribed procedure for challenging the validity of a payment did not prevent the payer from pleading the involuntariness of the payment. The plaintiffs would have succeeded but for the application of s7 of the *Customs Tariff Act*, which in terms denied restitution.

Isaacs J dissented from this conclusion. The plaintiffs' payments had been voluntary precisely because they had chosen not to invoke the legislative scheme for challenging the assessment: "if the person paying has an obvious means within reach of avoiding payment without sacrificing any right, then, if he elects to pay instead of adopting the alternative course, he cannot afterward aver coercion into payment."⁷⁷ This is the context of a dictum which is often quoted by opponents of restitution as of right from the government:

Such a doctrine, it is evident, would throw the finances of the country into utter confusion. After several years questions might be raised which, on some suddenly discovered interpretation of a taxing Act, whether internal revenue or Customs, would unexpectedly require the return of enormous sums of money, and quite disorganise the public treasury. Indeed, it reduces s167 to a dead letter, depriving it of all efficacy whatsoever.⁷⁸

As the final sentence makes clear, this philippic against restitution from the government is directed against the use of restitutionary actions to recover wrongly paid duty where legislation has explicitly provided an orderly procedure for challenging and recovering unlawful payments. It was not Isaac J's intention, as is sometimes claimed, to elaborate a specific defence of disruption of public finances.

In conclusion, dicta on "voluntary submission" in *Sargood* are concerned to establish the proposition, rejected by Isaacs J, that the enactment of schemes for challenging ultra vires payments does not prevent a plaintiff who

v *IRC* [1993] AC 70 at 165 in constructing his own version of the honest submission defence.

⁷⁶ Id at 276.

⁷⁷ Id at 301.

⁷⁸ Id at 303.

pays the money, and who then seeks repayment without having utilised the scheme, from alleging that the payment was involuntary.

(ii) *Werrin v The Commonwealth*⁷⁹

The plaintiff paid under protest sales tax on certain office furniture and other secondhand goods sold by him. The High Court later held that sales tax was not payable on secondhand goods.⁸⁰ The plaintiff then in separate proceedings sought to recover the tax which had been unlawfully demanded. The High Court held that the tax was irrecoverable. The outcome of *Werrin*, like *Sargood*, was influenced by statutory provisions which, quite independently of the voluntary submission rule, afforded strong grounds for denying recovery. Section 12A of the *Sales Tax Procedure Act 1934-1935* (Cth) provided that any person who had paid an amount of sales tax in respect of any secondhand goods was not entitled to a refund if the amount had been paid before the earlier High Court judgment declaring the sales tax unlawful. Rich, Starke and Dixon JJ held in straightforward fashion that the plaintiff's action was barred by s12A, which was a competent enactment of the Commonwealth Parliament. Only Latham CJ and, briefly, McTiernan J canvassed the wider argument that the sales tax had been voluntarily paid in submission to an honest claim even though the argument appears to have been placed by the Commonwealth in the forefront of its defence. In rejecting the plaintiff's claim, Latham CJ placed considerable reliance on *Whiteley Ltd v The King*,⁸¹ which he regarded as indistinguishable from *Werrin*, and *Pari-Mutuel Association Ltd v The King*⁸² as conclusive authority for denying repayment. These are, of course, well-known English cases which until the recent House of Lords decision in *Woolwich Equitable Building Society v Inland Revenue Commissioners*⁸³ were treated as authority for the proposition that in the absence of duress or some other vitiating factor there was no right of restitution from the government. The impression that Latham CJ was not applying the voluntary submission defence but expounding the principle of government immunity where there is no improper pressure is reinforced by his preoccupation with the evidence on extortion.

The general rule, as stated in *Leake on Contracts*, 6th edn (1911), p3, is that money paid voluntarily, that is to say, without compulsion or extortion or undue influence and with a knowledge of all the facts, cannot be recovered although paid without any consideration. In this case there was no force or fraud or fear, or duress of goods or of person.⁸⁴

The same approach underlies his summary of the case law to the effect that:

The principle appears to me to be quite clear that if a person, instead of contesting a claim, elects to pay money in order to discharge it, he cannot thereafter, because he finds out that he might have successfully contested the

79 (1938) 59 CLR 150.

80 *Deputy Federal Commissioner of Taxation (SA) v Ellis Clark Ltd* (1934) 52 CLR 85.

81 (1909) 101 LT 741; 26 TLR 19.

82 (1930) 47 TLR 110.

83 [1993] AC 70.

84 Above n79 at 157.

claim, recover the money which he so paid merely on the ground that he made a mistake of law.⁸⁵

McTiernan J echoed the Chief Justice's analysis:

The payment of the sums demanded has the character of a voluntary payment made by the plaintiff under a mistake of law about his liability to pay the sums. The decisions cited in the judgment of the Chief Justice, with whose reasons for answering the question in the negative/agree, clearly show that the plaintiff cannot recover the money paid by him in these circumstances.⁸⁶

Although the High Court in *David Securities* placed *Werrin* at the cornerstone of its principle of voluntary submission "founded firmly on the policy that the law wishes to uphold bargains and enforce compromises freely entered into",⁸⁷ in reality there was neither bargain nor compromise in *Werrin*. The High Court there was simply applying the mistake of law rule and denying recovery of unlawfully paid taxes or charges where there was no improper pressure.

(iii) *South Australian Cold Stores Ltd v Electricity Trust of South Australia*⁸⁸

The defendants supplied electricity to consumers at prices which required approval of the Prices Commissioner under the *Prices Act 1948* (SA). Approval was given on 14 January 1952, for certain price rises, although the Order authorising the increases was defective "inter alia" in that it specified no date for the commencement of its operation. It also unlawfully purported to apply the increase to electricity which had been supplied before the date of the intended commencement of the Order. They paid their electricity bills without protest from 1 February 1952 to 1 December 1953 but refused to pay at all for electricity supplied during the following two months and thereafter paid at the rates charged before price increases had purportedly been brought into force. One of the issues which arose was whether the plaintiffs could recoup past overpayments to the electricity company under the defective Order. The High Court held that the plaintiffs were not entitled to recover the payments.

The basis of the Court's⁸⁹ decision was that the plaintiffs had made not so much a mistake of law as no mistake at all. The plaintiffs were simply ignorant of the true legal basis of the defendants' entitlement to charge:

The company was prepared to make the payments without investigating what had been done under the prices legislation. The lawfulness of the demand made by the trust for the higher rates depended upon a legal conclusion or consequence which the manager and secretary of the company was prepared to assume without inquiry or examination. He simply supposed that in some way or other the trust was lawfully entitled to charge the higher rate ... The manager did not know and he did not inquire whether the trust as a public utility or authority stood in a different position from ordinary suppliers of services and he did not know and did not inquire whether the prices

85 Id at 159.

86 Id at 168 and 169.

87 Above n2 at 374.

88 (1957) 98 CLR 65.

89 Dixon CJ, McTiernan, Williams, Webb and Taylor JJ.

commissioner had made any and what order. Had he seen the order he is unlikely to have been aware, at all events unless he took legal advice, that without gazettal it possessed no force. In a vague general way he may have supposed that if any conditions precedent existed upon which the trust's title to charge higher rates depended, those conditions had been fulfilled. As it turns out the question whether they were fulfilled or not depends upon a matter of law. Perhaps that does not matter, because if the document had been otherwise expressed, the conditions prescribed by law might have been fulfilled. And the manager was unaware of the need for the document or its existence, much less of its contents or terms. *What does matter is that he entertained no belief as to the existence or non-existence of facts as such which turned out to be mistaken.* It was a simple case of a bona fide assertion of right on the part of the trust which the company acceded to without inquiry or investigation.⁹⁰

Although the majority judgment in *David Securities* invoked *South Australian Cold Stores* to buttress its principle of voluntary submission, the case, like *Werrin*, is dubious support for the principle and its attendant policy of upholding bargains and enforcing compromises. The judgment in *South Australian Cold Stores* rested on no such principle. Rather, the Court there denied relief because the plaintiffs had been ignorant of the invalidity of the Order as opposed to having been mistaken about it. In *David Securities* the majority interpreted mistake to include ignorance, approving Winfield's definition of mistake as embracing "sheer ignorance of something relevant to the transaction in hand".⁹¹ If mistake incorporates ignorance then it is strongly arguable that the company in *South Australian Cold Stores* had made a mistake and should not have been denied recovery on this ground. If this is right, some alternative justification for *South Australian Cold Stores* must be found. One possibility is to apply the causative analysis of voluntary submission discussed earlier: the plaintiffs would have paid for their electricity even if there had been a mistake. This can be supported by reference to the High Court's finding that "[o]n the side of the company it was simply taken for granted that somehow or another the charges might be lawfully made",⁹² and by the Court regarding the case as falling within the category of cases described by Lord Abinger CB in *Kelly v Solari* as an example of the causative approach to voluntary submission:

There may also be cases in which, although he [the payer] might by investigation learn the state of the facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there is no doubt that he is equally bound.⁹³

Whatever the precise status of the *South Australian Cold Stores* decision, it manifestly has nothing to say on the broader, non-causative approach to voluntary submission advocated by the majority judgment in *David Securities*.

90 Above n2 at 73-74. Author's emphasis.

91 (1992) 175 CLR 353 at 369 citing Winfield, P (1943) 59 LQR 327.

92 (1957) 98 CLR 65 at 75.

93 (1841) 9 M&W 54 at 58.

(iv) *David Securities* and voluntary submission

What emerges most clearly from this review of previous authority is the absence of any clear conception of voluntary submission to an honest claim. The cases themselves offer little enlightenment on the nature of such a defence and were decided on different grounds. Nevertheless, the majority judgment in *David Securities* was concerned to construct the defence on these unpromising foundations. What sort of voluntary submission principle are the majority judges trying to develop?

At the outset, two types of mistaken payment cases can be put to one side. The first, already discussed, arises where the payer would have paid the money "in any event", even if the mistake had been known to the payer. This unusual case is not a true example of submission to an honest claim but simply a denial that the mistake caused the payment. The second type concerns payments made pursuant to a compromise of contested litigation. Where there is true accord and satisfaction the payment cannot be set aside. In the words of Brennan J:

When a claim is settled by accord and satisfaction, a payment made in satisfaction is made in discharge of an obligation created by the accord: it is unaffected by any mistake as to the validity of the claim compromised.⁹⁴

Here also, it seems unnecessary to invoke the voluntary submission principle to justify the binding effect of a compromise. The majority in *David Securities* obviously has in mind a formulation of the voluntary settlement principle which is not confined to cases of absence of causality or true compromise. The formulation is broadly stated: "We use the term 'voluntary' therefore to refer to a payment made in satisfaction of an honest claim, rather than a payment not made under any form of compromise or undue influence".⁹⁵ Its basis lies in the plaintiff's election:

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 prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment.⁹⁶

A wide range of payers could be caught within the meshes of this defence. Some still entertain a belief that the law requiring payment is invalid and, as an act of calculation, will nevertheless choose to make the payment. Others will be genuinely uncertain as to the legality of the payment but, perhaps in order to avoid the legal costs incurred in investigating the matter or in order not to jeopardise a valued business relationship, will decide to pay. Yet others will make the payment in ignorance of the fact that it may not be payable. Those falling within this last class should probably not fall within a voluntary submission principle at all. They have not knowingly taken a risk as to the validity of the payment. But this is where the High Court's reinterpretation of earlier authority is worrying. The *South Australian Cold Stores* case suggests

94 Above n2 at 395.

95 *Id* at 374.

96 *Ibid*.

that the principle could apply even to cases of payments made in total ignorance of the true legal position. In that case the Court remarked of the payer, who was initially unaware of the amended electricity charges order, that "it was simply supposed that in some way or other the trust was lawfully entitled to charge the higher rate".⁹⁷ It was not a case where a payer suspected the invalidity of the order. On the contrary, the manager of the paying company "entertained no belief as to the existence or non-existence of facts as such which turned out to be mistaken".⁹⁸ It has been suggested that the foundations of voluntary submission lie in the notion of assumption of risk.⁹⁹ This may be the most satisfactory approach to adopt to an obscure defence. The difficulty for Australian law is to be found in the characterisation by the majority judgment of the High Court in *David Securities* of the *South Australian Cold Stores* case as one of voluntary submission to an honest claim. For the payer in that case, being ignorant of the invalidity of the order, could not be said to be consciously assuming a risk. It makes no sense to apply the "voluntary submission" principle to a payer who is totally oblivious of the right to restitution. If the *South Australian Cold Stores* case truly exemplifies the voluntary submission principle many payers could find themselves with bleaker prospects of recovery than before *David Securities* was decided.

The dissent of Brennan J on this issue is partly based upon the perception that the majority's principle of voluntary submission is nebulous and might defeat a number of restitutionary claims which deserve to succeed. He convincingly argues that the majority's approach:

is too broad because it is capable of including payments under compulsion or duress and, in cases of mistake of fact, it precludes recovery in cases where it is undoubted that restitution lies. All that the definition requires is that the payee should make a claim honestly and the payment be made in satisfaction of the claim.¹⁰⁰

Likewise, his criticism of the term "voluntary" to characterise, as the majority does, payments made in ignorance of relevant facts or law is well-founded: it is an abuse of language to assert that the plaintiff in the *South Australian Cold Stores* case who paid its electricity bills in ignorance of the invalidity of the prices order was "voluntarily" submitting to an honest claim.

But if Brennan J's diagnosis of the defects of the majority's voluntary submission principle is convincing his prescription is less compelling. Seemingly convinced that some bar to recovery was necessary, he formulated his own defence as follows:

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 maintain the money or property.¹⁰¹

97 (1957) 98 CLR 65 at 73.

98 Ibid.

99 Arrowsmith, S, "Mistake and the Role of Submission to an Honest Claim" in Burrows, above n17 at 17, 24, 25 and above n32 at 101-103.

100 Above n2 at 396.

101 Id at 399.

While Brennan J is right to search for a principle that is "dressed in modern attire rather than an older garb that will not fit",¹⁰² it is doubtful whether his proposed new suit of "honest claim of right" has successfully superseded the threadbare old clothes of voluntary submission. A number of objections can be raised against his formulation. First, it resurrects for the purposes of his defence the distinction between mistake of fact and mistake of law which was abolished as a ground of liability by the whole Court for the very good reasons of its illogicality and artificiality. Second, it would effectively bar most restitutionary actions against government since most¹⁰³ are founded on mistakes of law. At a time when restitution from the executive has become a matter of intense debate the creation of a defence that would defeat most such claims at the threshold appears perverse. Finally, although Brennan J concurred with the majority judgment in rejecting the distinction between mistakes of fact and mistakes of law as a basis for recovery his proposed limiting principle would in practice bar almost all restitutionary claims based on a mistake of law. Most recipients honestly believe that they are entitled to the money they have received. In many of the cases where the recipient is dishonest, existing restitutionary principles will permit the payer to recover on the grounds of compulsion, unconscionability or illegality. Given the generous subjective formulation of Brennan J's proposed defence, and the alternative avenues of recovery which are available against defendants who have acted in bad faith, very few plaintiffs indeed will succeed in recovering money solely on the ground that it was paid under a mistake of law. Most of the gains accruing from the elimination of the distinction between mistake of fact and mistake of law would be nullified if Brennan J's limiting principle became widely accepted.

In conclusion, the scope for any limiting principle of this nature, whether it goes under the description of "voluntary submission", "honest claim of right" or any other label should be very limited. The voluntary submission principle itself resembles some psychic phenomenon which from a distance has an appearance of solidity but which dematerialises upon closer inspection. It has been shown that most cases falling under this heading are in fact explicable, and generally explained in their judgments, upon other grounds. There is room for a principle which denies recovery on the ground of the payer's assumption of risk. But its scope will be very narrow. One example, suggested by the facts of *Cam Sons Pty Ltd v Ramsay*,¹⁰⁴ might arise where X Co makes a payment to Y, which Y accepts, and X Co recognises that the payment might be invalid but is concerned to avoid a higher payment which Y could exact under another, clearly lawful procedure. X Co has assumed the risk of invalidity and should be precluded from recovering the money. As Dixon CJ remarked in *Cam Sons Pty Ltd v Ramsay*:

[T]he feature of the case which stands out is that the deviation of the law prescribed was by the company itself and for its own advantage and it was

102 Ibid.

103 But not all. The plaintiffs in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 were not mistaken as to the law. In the event they understood it rather better than the Inland Revenue.

104 (1960) 104 CLR 247.

only for that reason that the moneys can be said not to have been due and payable to [Y].¹⁰⁵

But such cases of conscious assumption of risk will be infrequent. There is certainly no justification for applying the defence to payers, as in the *South Australian Cold Stores Ltd* case, who are completely ignorant of a possible ground of restitution. Now that the rule of irrecoverability of payments made under a mistake of law has received its *quietus* in *David Securities* it is important that the right of restitution should not be emasculated by an underanalysed and unstructured defence of voluntary submission.

C. *Change of position*

One of the innovative features of the *David Securities* case is its formulation, and to some extent explication, of a defence of change of position. In its reply to the plaintiffs' claim to restitution the Commonwealth Bank contended that it was an inference from the terms of the lending agreement that, had it realised that it was liable to pay withholding tax, it would have exercised contractual rights to ensure that it did not lose money by paying the tax. If the plaintiffs were entitled to restitution and the liability to pay the tax still rested on the Bank, the latter was out of pocket and had therefore suffered a detrimental change of position. The majority judgment ruled that there was insufficient evidence to enable the Court to make an assessment on a possible change of position, and the case was remitted to the Federal Court for a determination as to whether the Bank had changed its position on the faith of the receipt of payments by the plaintiffs.¹⁰⁶

The importance of *David Securities* in the context of change of position lies not so much in the recognition of the defence, since this had been foreshadowed, albeit obliquely, in the High Court's earlier decision of *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation*,¹⁰⁷ and the acceptance of the defence by the House of Lords in *Lipkin Gorman v Karpnale Ltd*¹⁰⁸ made it likely that the High Court would recognise the defence when a suitable opportunity arose. Of greater consequence is the fact that the High Court for the first time went some way towards analysing the nature of the defence. Like Lord Goff in *Lipkin Gorman*¹⁰⁹ the Court refrained from detailed delineation of its scope for fear of prejudicing future cases.

The Court's self-restraint may have been excessive since it supplied no example of how the defence might operate in practice. Later cases will be required to elucidate how change of position applies, for example, to a recipient of a mistaken payment who in good faith uses the money to acquire video cassette recorders or to pay debts owed to members of the family.¹¹⁰ The need

105 *Id* at 258.

106 Above n2 at 386. Brennan J saw no need to decide this issue since a finding that the money paid in satisfaction of an honest claim of right would render a defence of change of position superfluous. Similarly, if the defence of honest claim of right did not prevail there was no room for change of position to apply.

107 (1988) 164 CLR 662 at 673.

108 [1991] 2 AC 548.

109 *Id* at 580.

110 See *RBC Dominion Securities Inc v Dawson* (1992) 95 Nfld & PEIR 309; 301 APR 309

for guidance on the questions is already been felt by banks for whom the problem of the mistaken computer payment is by no means a rarity.

Nevertheless, some of the contours of change of position are beginning to emerge. Brief comments will be made upon two aspects of the defence: its basis in reliance, and the vexed questions of the relationship between change of position and estoppel.

(i) The reliance basis of change of position

The High Court in *David Securities* has committed Australian law not just to the defence of change of position but to a version of the defence which applies whenever the defendant has altered his or her position in reliance upon the validity of the payment. In the words of the majority judgment:

the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the faith of the receipt ... In the jurisdictions in which it has been accepted (Canada and the United States), the defence operates in different ways but the common element in all cases is the requirement that the defendant point to expenditure or financial commitment which can be ascribed to the mistaken payment.¹¹¹

As the judgment notes, reliance-based change of position operates in the United States,¹¹² Canada¹¹³ and is the basis of legislation enacting the defence of change of position in New Zealand¹¹⁴ and Western Australia.¹¹⁵ The English acceptance of the defence is more ambiguous although the illustrations put forward by Lord Goff of its applicability to a recipient of stolen money who gives it to charity also suggest that it is reliance-based.¹¹⁶

Reliance-based change of position is not, however, the only model which the High Court could have adopted. An alternative is provided by the *Restatement of the Law of Restitution* which in paragraph 142(1) defines change of position in the following terms:

The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

(Newfoundland Supreme Court), criticised by Doré, W, 1992 *Dalhousie LJ* at 615. The Court applied change of position as a complete defence. Doré suggests at 620 that the plaintiff could have been given subrogation rights in respect of the debts, allowing it to stand in the shoes of the creditors.

111 Above n2 at 385.

112 *Grand Lodge, AOUW of Minnesota v Towne* (1917) 161 NW 403 at 407.

113 *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3rd edn, 1986) 1 at 13.

114 Section 94B of the *Judicature Act* 1908 (NZ); *Thomas v Houston Corbett & Co* [1969] NZLR 151.

115 *Property Law Act* 1969 (WA) s125(1).

116 *Lipkin Gorman v Karpnale* [1991] 2 AC 548 at 579. See also Birks, "The English Recognition of Unjust Enrichment" (1991) *LMCLQ* 473 at 486ff. Birks characterises this version of the defence as enrichment-based, as opposed to hardship based version. Passages in Lord Goff's judgment suggest that a broader, hardship version is not necessarily excluded. See, eg, [1991] 2 AC 548 at 580.

While United States courts have not escaped the reliance-based approach,¹¹⁷ the more expansive formulation of this provision enables certain problem cases to be brought within the scope of the defence where there has been no reliance upon the faith of the validity of the payment. The examination problem favourite is that of a payer who mistakenly pays money to a payee from whom a third party steals it.¹¹⁸ The loss of the money here has not been in reliance on the security of the payment, and yet many would consider that the defence should be available to the payee.

More contentious are other proposed applications of the change of position defence where there has been no reliance upon the faith of the validity of the payment. What about the payee of a mistaken payment who in good faith considers that she is entitled to the money but makes no specific expenditure on the faith of its validity, but who uses the money to improve her straitened financial circumstances? Several years later the payer demands the money. Repayment by the payee will cause her immediate financial collapse.¹¹⁹ A reliance-based defence of change of position will not avail the payee in this situation. Whether the defence should apply here is debatable; the payer also has his rights. Another argument that this payee will have to meet is that the money was spent on ordinary items of domestic expenditure. Application of the defence is usually denied if the mistaken payment was spent on domestic expenses. This was confirmed by the majority judgment in *David Securities*: "In no jurisdiction, however, can a defendant resort to the defence of change of position where he or she has simply spent the money received on ordinary living expenses".¹²⁰

This limitation, which was also imposed in *Lipkin Gorman v Karpnale*,¹²¹ merits reconsideration. Many of the objections to "mere spending of money" constituting change of position can be traced, as Lord Goff acknowledged in *Lipkin Gorman v Karpnale*, to scepticism expressed by Lord Simonds in *Ministry of Health v Simpson*. Some of the charities in that case had expended legacies that they had wrongly received on alterations to buildings. Lord Simonds held that this expenditure was not a reason for denying the next-of-kin a personal remedy against the charities. He tersely stated that the equitable rule entitling the next-of-kin to recover "did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid".¹²²

The expenditure in *Ministry of Health v Simpson* was far removed from expenditure "on ordinary living expenses". Significant improvements had been made, for example, by some of the charities on children's wards in hospitals.¹²³ Nevertheless, Lord Simonds' words have ever since cast a blight on the defence of change of position and the blight has not been removed by the judgments in *David Securities*. It is submitted that an opportunity was missed

117 Dawson, J, "Restitution Without Enrichment" (1981) 61 *BULR* 563 at 568-76.

118 *Restatement of Restitution*, para 142, comment (b); Goff and Jones, above n4 at 693-94; Jones, G, *A Topography of the Law of Restitution*, in Finn, above n26 at 16.

119 Birks, above n116 at 489.

120 Above n2 at 386.

121 [1991] 2 AC 548 at 580.

122 [1951] AC 251 at 276.

123 [1948] Ch 465 at 546-47.

in the majority judgment for reconsidering these dicta and their simplistic assumption that expenditure on "ordinary living expenses" cannot constitute a detrimental change of position. A sudden demand for repayment from a payee who has in good faith paid money on items of domestic expenditure can be extremely prejudicial to the payee. Exceptionally, the prejudice may outweigh the legitimate concerns of the payer. A reassessment of the "ordinary living expenses" limitation could open the way to a defence of change of position which is more receptive to genuine cases of hardship.¹²⁴

(ii) Change of position and estoppel

The election of the High Court for the reliance-based version of the defence of change of position raises in a critical form the question of the relationship between change of position and estoppel, which is also reliance-based. An imaginative and sensible solution might be to conflate the defences into a composite entitled injurious or detrimental reliance.¹²⁵ The complete absence of any citation to the recent wealth of authority on estoppel, however, perhaps because the issue was not canvassed before the High Court, suggests that for the time being the Court regards estoppel and change of position as discrete defences. The omission of any discussion of estoppel is puzzling, given the high profile enjoyed by the doctrine in recent years, largely as a result of the High Court's own activity.

Estoppel is, of course, an established defence to restitutionary claims but recent High Court decisions have rendered the distinction between estoppel and change of position highly elusive. In *Lipkin Gorman v Karpnale* Lord Goff distinguished estoppel from change of position in two respects, neither of which may be relevant to Australian law as it has developed since *Waltons Stores (Interstate) Ltd v Maher*¹²⁶

First:

Estoppel normally depends upon the existence of a representation by one party, in reliance upon which the representee has so changed his position that it is inequitable for the representor to go back upon his representation. But in cases of restitution, the requirement of a representation appears to be unnecessary.¹²⁷

In an Australian context this distinction is probably untenable since it is now recognised that an estoppel can arise from the conduct of the estopped party. A representation is simply one form of legally effective conduct which prevents reliance upon legal entitlement. The clearest analysis of estoppel by conduct can be found in the judgments of Deane J in *Waltons Stores (Interstate) v Maher* and *The Commonwealth v Verwayen* where an overriding doctrine of estoppel by conduct was developed, predicated upon an:

124 The approach favoured by Goff and Jones, above n4 at 693, based on German law would reach a similar result.

125 Butler, P A, "Mistaken Payments, Change of Position and Restitution" in Finn, P (ed), *Essays on Restitution*, at 87, 126-131.

126 (1988) 164 CLR 387.

127 [1991] 2 AC 548 at 579.

[U]nconscientious departure by one party from the subject-matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation.¹²⁸

But it can also be found in Mason CJ's acceptance in *The Commonwealth v Verwayen* of an "overarching" doctrine of estoppel by conduct based upon an assumption which the estopped party has induced the other party to hold,¹²⁹ and the criteria for estoppel elaborated by Brennan J in *Waltons Stores (Interstate) v Maher* which omit all reference to representations but which require the defendant to have induced the plaintiff to adopt an assumption or expectation.¹³⁰ Since the trend of Australian estoppel doctrine is moving towards incorporating representations within a generalised doctrine of estoppel by conduct, a distinction between estoppel and change of position founded upon the presence or absence of a representation seems hardly sustainable.

The second ground of differentiation proposed by Lord Goff is that:

[I]t was held by the Court of Appeal in *Avon County Council v Howlett*¹³¹ that estoppel cannot operate *pro tanto*, with the effect that if, for example, the defendant has innocently changed his position by disposing of part of the money, a defence of estoppel would provide him with a defence to the whole of the claim.¹³²

Change of position can operate *pro tanto* and, indeed, was applied *pro tanto* by the House of Lords in *Lipkin Gorman v Karpnale*.

Will estoppel operate *pro tanto* in Australia? There is no clear answer to this question. The majority judgment in *David Securities* cited *Avon County Council v Howlett* neutrally, without apparent approval or disapproval.¹³³ Nevertheless, there are good reasons for supposing that *Avon County Council v Howlett* will not survive close scrutiny at appellate level should a suitable occasion for review arise. The proposition that the estoppel cannot operate *pro tanto* is premised upon the assumption that estoppel is a rule of evidence which precludes a representor from averring facts contrary to his or her own representation.¹³⁴ Since recent decisions have established that "estoppel by conduct has expanded beyond its evidentiary function into a substantive doctrine",¹³⁵ there seems little justification for a relic of an age when estoppel by representation was considered a rule of evidence surviving into the modern era of a substantive doctrine of estoppel by conduct.

If the arguments adduced by Lord Goff in *Lipkin Gorman v Karpnale* for distinguishing change of position from estoppel carry little weight in Australia

128 (1990) 170 CLR 394 at 444.

129 (1990) 170 CLR 394 at 413. See also *Foran v Wight* (1989) 168 CLR 385 at 411-413.

130 (1988) 164 CLR 387 at 428-429.

131 [1983] 1 WLR 605.

132 [1991] 2 AC 548 at 579.

133 Above n2 at 385. *Avon County Council v Howlett* is considered by Meagher, R P, Gummow, W M C and Lehane, J R, *Equity Doctrine and Remedies* (3rd edn, 1992) as being not so much correct as self-evident, at any rate upon the assumption that estoppel by representation is an evidential and not a substantive doctrine.

134 *Greenwood v Martins Bank Ltd* [1932] 1 KB 371; [1933] AC 51.

135 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 412, per Mason CJ.

can other distinctions be drawn? Assuming that the two defences are not integrated into a general defence of detrimental reliance (perhaps the most desirable approach), two possible grounds of differentiation remain:

(i) Redefinition of the defence of change of position in terms of hardship rather than detrimental reliance. The overlap between the two defences occurs because both are reliance-based. If change of position were to be defined in terms of avoidance of hardship, even where the payee had not made financial commitments on the faith of the validity of the payment, there would be a small residue of cases (the thief who steals from the mistaken payee, for example) which could not be handled through estoppel. The scope of change of position would be very small but at least the defence would be discrete. However, as we have seen, the High Court in *David Securities* committed itself to a reliance-based version of the defence and this basis of differentiation would not for the moment appear to be available.

(ii) The absence of conduct which induces the plaintiff's act of detrimental reliance. This ground of differentiation may be more promising. For all the bewildering varieties of estoppel analysed in recent cases, the High Court has consistently placed emphasis on the need for conduct which induces the plaintiff to act to his or her detriment. For Brennan J the fact that "the defendant has induced the plaintiff to adopt that assumption or expectation"¹³⁶ is fundamental to his understanding of estoppel. Similarly, for Deane J the estopped party "must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it".¹³⁷ The examples he supplies of "playing a part" can all be characterised as unconscientious conduct.

The concept of conduct which induces a plaintiff's act of detrimental reliance is central to estoppel but peripheral to the concept of change of position. Indeed, it is absent from the definition of change of position to be found in paragraph 142 of the *Restatement of Restitution*. A change of position may be induced by the payer's conduct but its presence is not a precondition to the application of the defence. Computer errors by banks, the paradigm of change of position in practice as well as in textbook examples, serve to illustrate the difference. Suppose that a bank's computer error results in an employee receiving twice his or her monthly pay. The recipient in good faith buys household goods which would not otherwise have been acquired. Bank officials may have been unaware at the relevant time of the malfunction. Can it be said that the bank has conducted itself so as to induce the payee to act to his or her detriment? The language of "conduct" and "inducement" seems inappropriate when applied to a computer failure of which the computer's operators were ignorant. The position might of course be otherwise if the bank neglected to keep the computer in proper working order, but, leaving aside cases of fault, it strains language to apply a volitional term such as inducement to a case of mechanical failure. Change of position, on the other hand, need not be defined in terms of conduct inducing an act of detrimental reliance. As the majority

136 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-29.

137 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 444. See also Mason CJ at 412: "equitable estoppel will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped."

opinion itself emphasises, it is acting on the faith of the receipt, not on the faith of the payer's conduct, which creates the change of position.¹³⁸ The fact of the money having been paid into the account (and the subsequent application in good faith by the recipient) and not the behaviour of the bank, unconscionable or otherwise, is the real basis of the defence.

The last few paragraphs have assumed that there is a difference between estoppel and change of position which awaits explication. This is justified by what is no more than an argument from silence: the failure of the High Court to discuss its own landmark cases on estoppel. But there is of course no need to insist upon discrete defences of estoppel and change of position. The basis of change of position in reliance proposed by the High Court suggests that an amalgamation of the principles of estoppel and change of position would be a sensible way forward, perhaps under the label of injurious reliance. This synthesis would be based upon the notion, well established in the estoppel cases, that it may be unconscionable for payers in certain circumstances to recover wrongful payments. The unconscientious conduct could arise from the conduct of the payer (as in the estoppel cases) or from the response of a good faith payee to the payment (which is the present focus of the change of position cases). A general defence of injurious reliance would remove the need to elaborate subtle and often unconvincing differences between estoppel and change of position. But that is for the future; for the present there are no signs that the High Court has even perceived the affinity between these defences.

6. Conclusion

David Securities Pty Ltd v Commonwealth Bank of Australia occupies a central place in the Australian law of restitution, not so much because of its recognition of the place of unjust enrichment within the scheme of private law liability but because of its insights into the sort of restitution that Australian lawyers can expect to see. In general terms, the High Court is sensibly innovative, concerned to eliminate obviously outdated distinctions such as the mistake of law rule, and adopting a carefully structured approach to issues of liability and defences. It owes a heavy intellectual debt to the writings of Goff and Jones, Birks and to the judgments of Lord Goff. The judgments in *David Securities* contain seven references to Goff and Jones' *The Law of Restitution* and ten references to Birks', *An Introduction to the Law of Restitution*.¹³⁹ The influence of Lord Goff can be detected in the broad acceptance of his formulation of an operative mistake in *Barclays Bank v W J Simms Ltd*¹⁴⁰ as well as, to a lesser extent, in some reliance upon his judgment in *Lipkin Gorman v Karpnale Ltd*.¹⁴¹ Will the High Court approve his judgment in *Woolwich Building Society v Inland Revenue Commissioners*¹⁴² should a suitable oppor-

138 Cf *David Securities* above n2 at 385: "The defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the *faith of the receipt*".

139 See Getzler, J, above n6 at 287 for the influence of these authors in other contexts.

140 [1980] QB 677.

141 [1991] 2 AC 548.

142 [1993] AC 70.

tunity for doing so arise? The advantages of this approach are largely to be found in the intellectual coherence it brings to the restitutionary scheme. The drawbacks are both general and specific to restitution within an Australian context. The place of voluntary submission to an honest claim within the framework of restitution is uncertain. The defence is very much a legacy of Goff and Jones' rationalisation of mistake of law cases on a ground, voluntary submission, which in their opinion commands greater intellectual assent.¹⁴³ The concept has proved to be remarkably elusive, and the attempts in the judgments in *David Securities* to pin it down are no more successful than others.¹⁴⁴ It may prove upon closer analysis to be a largely mythical defence, cases decided on this supposed principle being explicable on alternative bases. A more local reservation about the framework is that it ignores developments elsewhere in Australian law which have obvious implications for restitutionary liability. The most obvious example is the relationship between change of position and estoppel. The convergence between reliance-based defence of change of position recognised by the High Court in the *David Securities* case and the expanding reliance-based liability in estoppel developed by the High Court in *Walton's* case and *The Commonwealth v Verwayen*¹⁴⁵ may necessitate either integration of these concepts or a clearer demarcation between them than we have so far seen.¹⁴⁶ The High Court in *David Securities v Commonwealth Bank* has made a start to fashioning a coherent structure of unjust enrichment. The challenge that lies ahead is the strategic task of identifying the proper place of restitution within the framework of other rapidly expanding forms of private law liability.

143 See Goff and Jones, above n4, ch 4 for the development of this argument.

144 The High Court is not alone in its inability to provide a satisfactory definition of voluntary payment. In *Woolwich Equitable Building Society v IRC* [1993] AC 70 Lord Goff attempts to define voluntary submission at 165 as well as the related concept of closing the transaction. The cases invoked in support of the principle, where they are not simple applications of the mistake of law rule, are really illustrations of other principles, as discussed in the text, eg *Henderson Folkstone Waterworks Ltd* (1885) 1 TLR 329 (n36); *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 (above n75). *Maskell v Horner* [1915] 3 KB 106 is, as Birks remarks in *Introduction to the Law of Restitution* at 181-182, a case on causation, as to whether the unlawful demand caused the payment to be made.

145 Reliance may not only form the basis of liability. It may also define the limits of the remedy, at any rate according to Mason CJ, Brennan J, McHugh J and (obiter) Toohey J in above n37.

146 Developments in estoppel are also relevant to restitutionary claims previously based on free acceptance and failure of consideration, eg, *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880. See Garner, M, *The Role of Subjective Benefit in the Law of Unjust Enrichment* (1990) 10 OJLS 42; Beatson, J, *Benefit, Reliance and the Structure of Unjust Enrichment in the Use and Abuse of Unjust Enrichment* (1991) ch 2 at 36-39.