"Passing On" in the Law of Restitution: A Re-Consideration

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1. *Introduction*

The essence of the restitutionary concept of passing on is easily explained, at least superficially. In terms of the increasingly popular "Oxbridge" analysis[1], the law of restitution is based upon a four-part principle of unjust enrichment: (i) an enrichment to the defendant, (ii) gained "at the plaintiff's expense", (iii) as a result of an unjust factor, (iv) in the absence of a recognised defence. The notion of passing on involves the second and the fourth of those elements.

As to the former, the defendant's gain may be "at the plaintiff's expense" in either of two ways: an *enrichment by subtraction* or an *enrichment by wrongs*. As explained below[2], only the first is relevant to the concept of passing on. Enrichment by subtraction (generally[3]) requires proof that the defendant received value subtracted from the plaintiff. For example, in the simple case of a mistaken payment, money may move out of the plaintiff's pocket and into the defendant's. Assuming that the plaintiff also is able prima facie to establish the first and third elements of the principle of unjust enrichment, restitution will lie in the absence of a recognised defence.

The fourth part of the unjust enrichment principle intimately is tied to the other three parts. A restitutionary defence succeeds because it reveals that, despite initial appearances, (i) the defendant was not relevantly enriched, (ii) the defendant's enrichment was not gained "at the plaintiff's expense", or (iii) the defendant's enrichment was not truly the product of an unjust factor. Passing on is of the second variety. It (potentially) arises when the plaintiff shifts on to a third party the financial burden that is consequent upon the defendant's unjust gain. Thus, in the most common scenario, a business purportedly liable for a tax makes payment to the government, but also attempts to recoup its loss by raising the prices that it charges to its customers. When the tax subsequently is determined to be improper or inapplicable, the business seeks restitutionary relief. The government resists that claim on the basis that its enrich-

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1 See especially Lord Goff and Jones, G, *The Law of Restitution* (4th edn, 1993); Birks, P, *An Introduction to the Law of Restitution* (revd edn, 1989); Burrows, A, *The Law of Restitution* (1993). See also Mason, K and Carter, J W, *Restitution Law in Australia* (1995) at 38.

2 Section 3.

3 Exceptionally, the requirement of *subtractive enrichment* may be satisfied by proof of *interceptive subtraction*. In such cases, the defendant receives value subtracted not from the plaintiff, but rather from a third party which properly would have accrued to the plaintiff but for the defendant's interception: see Burrows above n1 at 45-4.

ment came not at the plaintiff's expense, but rather at the expense of the plaintiff's customers.

The aim of this paper is to determine whether or not the defence of passing on should find a home in the law of restitution. That task will be undertaken in four stages. First, the context for discussion more clearly will be set by means of a summary of the High Court's recent decision in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd.*[4] Second the philosophical basis of the law of restitution will be examined. It will be suggested that the notion of unjust enrichment, as it pertains to instances of subtractive enrichment, is best understood as being based on a model of corrective justice that, on a theoretical level, demands recognition of the defence. Third, however, it will be argued that despite such theoretical congruence, considerations of policy and practice persuasively militate against actual application of the defence. Finally, with respect to an issue incidentally arising, brief examination will be made of the availability of restitutionary relief as between a party who passes on an expense and a party to whom an expense is passed.

2. *The Defence of Passing on in Australia*[5]

Reflecting the fact that Australian courts only recently accepted that a principle of unjust enrichment underlies the law of restitution[6], the defence of passing on has relatively little consideration in Australia.[7] The decision of the High Court in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*[8] is

4 (1994) 182 CLR 51.

5 In the discussion that follows, reference occasionally will be made to the manner in which the passing on defence is approached in other jurisdictions. Considerations of brevity unfortunately preclude an exhaustive treatment of the matter in this paper. However, several excellent summaries do exist: see Jones, G, *Restitution in Public and Private Law* (1991) at 51-6 (India); Woodward, W, "'Passing-on' the Right To Restitution" (1985) 39 *U Miami LR* 873 (United States of America); Michell, P, "Restitution, 'Passing On', and the Recovery of Unlawfully Demanded Taxes: Why *Air Canada* Doesn't Fly" (1995) 53 *U Toronto Fac LR* 130 (Canada). In England, the defence has been rejected by the Court of Appeal in *Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733 and by Hobhouse, J, in *Kleinwort Benson Ltd v South Tyneside BC* [1994] 4 All ER 972. It also was doubted by Lord Goff in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 177-8. Cf *Linz v Electric Wire Co of Palestine Ltd* [1948] AC 371.

6 *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

7 While the focus of this paper is on the common law concept of passing on, it must be noted that legislated forms of the defence increasingly are being used to protect governments from restitutionary claims arising from overpaid taxes: See eg, *Sales Tax Assessment Act (No 1)* 1930 (Cth), s26(1)(1A); *Sales Tax Procedure Act* 1934 (Cth), s51; *Taxation (Administration) Act* 1987 (ACT), s95C; *Recovery of Imposts Act* 1963 (NSW), s4; *State Taxation (Amendment) Act* 1992 (VIC), ss9, 17, 27, 35. In a recent decision, the Federal Court held as a matter of statutory interpretation that legislative schemes encompassing such provisions may constitute complete codes of recovery which preclude recourse to common law actions: *Chippendale Printing Co Pty Ltd v Commonwealth of Australia* (1996) 135 ALR 471. However, there is no reason to believe that the provision of a statutory defence in specialised circumstances implies a legislative intention to deny the defence generally.

8 Above n4. For an analysis of the various aspects of the decision, see McInnes, M, "Mistaken Payments Return to the High Court" (1996) 22 *Monash U LR* 209; Merralls, J D, "Restitutionary Recovery of Tax Payments After the Royal Insurance Case" and Glover,

the leading authority.[9] For present purposes, a simplified statement of the facts will suffice. Legislation validly was enacted by the defendant government which initially imposed a tax upon the plaintiff insurer. Although the relevant statutory provisions subsequently were amended to remove the insurer's liability, the plaintiff mistakenly continued for some time to make payments to the defendant. While oblivious to its error, the insurer attempted[10] to shift the economic burden of the supposed tax on to its customers by raising the composite price of its premiums. In time, the mistake was discovered and the plaintiff sought restitution from the defendant.[11]

The High Court rejected the government's argument that the insurer's act of passing on constituted a defence to the restitutionary claim. Brennan J (speaking for a majority of the Court) refused to apply the defence because, he believed, the act of passing on is irrelevant to the *theory* of the law of restitution.

The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter.[12]

> The fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. [N]o defence of "passing on" is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys.[13]

Brennan J considered the fact that Royal had paid *its* money to the State to be determinative of the issue. He effectively held that the second element of the principle of unjust enrichment merely required the defendant's enrichment to be at the plaintiff's *immediate* expense; it did not further require the defendant's enrichment to be at the plaintiff's *ultimate* expense. In other words, Brennan J conceived the relevant inquiry to ask where the burden consequent upon the government's enrichment initially arose, not where it eventually came to rest. Having found that the Commissioner received money paid out of

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J, "Restitutionary Recovery of Tax Payments After the Royal Insurance Case: Commentary" in McInnes, M (ed), *Restitution: Developments In Unjust Enrichment* (1996) at 117, 131.

9 An earlier decision, *Mason v NSW* (1959) 102 CLR 108, is discussed below at Section 3(A).

10 As explained below, it generally is impossible to determine the extent to which a business truly passes a cost on to its customers: Section 4(B).

11 More precisely, the plaintiff commenced an action for mandamus, seeking to compel the defendant to comply with a duty to refund which the plaintiff argued was created by s111(1) of the *Stamp Act*: "Where the [Commissioner] finds in any case that duty has been overpaid, whether before or after the commencement of the *Stamps Act* 1978 he may refund to the company, person or firm of persons which or who paid the duty the amount of the duty found to be overpaid". A majority of the High Court (Mason CJ, Brennan, Toohey and McHugh JJ) held that the provision did not impose a statutory duty to make repayment. Rather, it merely empowered the defendant to withdraw money from the Consolidated Funds for the purpose of satisfying judgments based on common law principles. Accordingly, while the action was brought by way of mandamus, its success turned upon general restitutionary rules of liability.

12 Above n4 at 90.

13 Id at 90-1.

the insurer's funds, he was not concerned by the fact that Royal may have shifted the economic burden of the supposed tax on to its customers.

In a more detailed judgment, Mason CJ considered the concept of passing on at two levels: (i) "public law", and (ii) "restitutionary law". His comments with respect to the former are considered below.[14] With respect to the latter, the Chief Justice identified two broad sets of reasons as to why the defence should not form part of Australian law.[15] First, he noted that an accurate determination of the effects of an attempt to pass on an expense is "a very complex undertaking".[16] Implicitly, he suggested that it would be undesirable (perhaps fruitless) for the courts to become engaged in such a task. Second, and more significantly, he observed that,

> the basis of the restitutionary relief is not compensation for loss or damage sustained but restoration to the plaintiff of what has been taken or received from the plaintiff without justification.[17]

Accordingly, in the end, Mason CJ agreed with Brennan J that the plaintiff need merely suffer the *immediate* (as opposed to the *ultimate*) expense attendant upon the defendant's unjust enrichment and that an act of passing on *theoretically* is irrelevant to the law of restitution.[18]

> As between the plaintiff and the defendant, the plaintiff having paid away its money by mistake in circumstances in which the defendant has no title to retain the moneys, the plaintiff has the superior claim. The plaintiff's inability to distribute the proceeds to those who recoup the plaintiff was, in my view, an immaterial consideration ....[19]

> ... The subtraction from the plaintiff's wealth enables one to say that the defendant's unjust enrichment has been "at the expense of the plaintiff" notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties. On this approach, it would not matter that the plaintiff is or will be over-compensated because he or she has passed on the tax or charge to someone else.[20]

Is the High Court correct? Is the concept of passing on irrelevant to the *theory* of unjust enrichment? Need the defendant's gain merely be at the plaintiff's *immediate*, rather than *ultimate*, expense?

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14 Section 4A.

15 A large portion of Mason CJ's judgment addresses the availability and form of relief as between a party who passes on an expense and a party to whom an expense is passed. Section 5 of this paper examines those difficult issues.

16 Above n4 at 71.

17 Ibid. See also id at 75.

18 In a deceptive passage, Mason CJ stated that "the defence should not succeed unless it is established that the defendant's enrichment is not at the expense of the plaintiff but at the expense of some other person or persons": id at 73. While perhaps seemingly supportive of the defence of passing on, that comment was addressed to the case of "false passing on", in which a plaintiff business merely acts as a defendant government's agent for the purpose of collecting a tax imposed upon a third party. In that situation, the plaintiff suffers neither the *immediate*, nor the *ultimate*, expense: discussed below at Section 5A.

19 Above n4 at 78.

20 Id at 75.

3. *The Philosophical Basis of Restitution*

Contemporary restitutionary scholarship is marked by a concerted effort to provide theoretical explanations for the inner workings of the principle of unjust enrichment.[21] Though that exercise has its sceptics[22], it undoubtedly has been critical to the modern renaissance of the law of restitution. Such work not only has made the subject more accessible and coherent, it also has distilled from the case law rational and structured rules of recovery, thereby allaying concerns that traditionally inhibited development in the area.[23] In light of that theoretical focus, it is somewhat surprising that relatively little attempt has been made to examine the philosophical underpinnings of the law of restitution as a whole.[24] Unfortunately, a thorough study of that issue must await yet another day. The present section is intended simply to describe and defend a concept of corrective justice that arguably best explains the part of the law of restitution concerned with cases of subtractive enrichment.

As noted above, the law of restitution is bifurcated by an ambiguity inherent in the second element of the concept of unjust enrichment: "at the plaintiff's expense". In most instances, the operative phrase refers to *enrichment by subtraction*; the defendant gains value subtracted from the plaintiff, as when, for example, the plaintiff mistakenly pays money to the defendant.[25] Exceptionally, the operative phrase is satisfied by proof of an *enrichment by wrong*; the defendant gains through the commission of a wrong against the plaintiff.[26] Because it is the wrong, rather than the subtraction of value, which underlies the cause of action, relief may be granted even if the defendant's conduct facilitated the receipt of an enrichment from someone other than the plaintiff. For example, a beneficiary may enjoy restitutionary relief if a fiduciary breaches an obligation owed under a trust and thereby receives a benefit from a third party.[27] It necessarily follows that the plea of passing on is relevant, if at

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21 See especially Birks, above n1.

22 See eg, Tettenborn, A, *Law of Restitution* (1993) backpage; Hedley, S, "Unjust Enrichment" (1995) 54 *Cambridge LJ* 578.

23 Hamilton, LJ gave damning expression to that concern in *Baylis v Bishop of London* [1913] 1 Ch 127 at 140: "To ask what course would be ex aequo et bono to both sides never was a very precise guide ... [w]hatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man' ". See also *Holt v Markham* [1923] 1 KB 504 at 513 per Scrutton LJ ("well-meaning sloppiness of thought").

24 The point perhaps may be most clearly illustrated by contrasting recent trends in restitution scholarship with those in tort: See eg, Symposium "Formalism, Corrective Justice and Tort Law" (1992) 77 *Iowa LR*.

25 In cases of subtractive enrichment, the law of restitution operates both substantively and remedially. The triggering event of unjust enrichment constitutes an autonomous cause of action for which the legal response inevitably is restitution: See eg, Birks, P, "The Independence of Restitutionary Causes of Action" (1989) 16 *U Queensland LJ* 1. Cf *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378-9, 406.

26 In cases of enrichment by wrongs, the law of restitution is relevant only remedially. The plaintiff's cause of action lies in some other area of law, such as tort: *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL). The law of restitution merely indicates whether or not the claimant is able to recover, as an alternative to the usual private law measure of compensation for her own loss, disgorgement of the defendant's gain: See Birks above n25.

27 See eg, *Boardman v Phipps* [1967] 2 AC 46 (HL). Moreover, that result does not proceed

all, only in cases of enrichment by subtraction. If the plaintiff may suffer an enrichment by wrongs even if she[28] does not lose wealth to the defendant, the question of whether or not she passed the financial burden of the defendant's gain on to a third party is inapplicable. Accordingly, the ensuing discussion focuses on cases of subtractive enrichment.

The law of restitution, as it pertains to instances of subtractive enrichment, is *best* understood as *a model* of corrective justice which *in theory* demands acceptance of the passing on defence. While that sentence may be taken to state the central thesis of this paper, it necessarily is heavily qualified by the italicised words. First, it is proposed that the ensuing analysis provides the *best* explanation of subtractive enrichment. The emphasised superlative acknowledges that other analyses exist, but also indicates that however defensible, they in some way are less attractive than the rationale offered here. Second, this paper will propound *a model* of corrective justice. The italics concede that cases of subtractive enrichment may be explained on the basis of at least two models of corrective justice; one demands recognition of the defence of passing on, the other does not. Finally, it will be argued that the law governing cases of subtractive enrichment is best understood as in terms of a model of corrective justice that affirms the significance of passing on *in theory*. As explained in Section 4, however, that is not to say that the defence actually should be available to litigants; considerations of policy and practice justifiably preclude application of the notion of passing on.

A. Corrective Justice And Passing On

The classical notion of corrective justice, as conceived by Aristotle[29], is premised upon a notion of correlativity. A wrongful event occurs. One party commits a wrong and thereby reaps a gain; another party suffers a wrong and thereby experiences a loss. The critical point of corrective justice is that the wrongful act and gain on the one hand, and the wrongful injury and loss on the other hand, fundamentally are connected; the single event creates a nexus between the events and between the parties. Legal intervention is justified because corrective justice views both parties as equals and seeks to re-establish the equilibrium that existed between them before the wrongful event occurred. The status quo of the party committing the wrong should be restored by compelling him to disgorge that which he wrongfully gained; the status quo of the party suffering the wrong should be restored by allowing her to recover that which she wrongfully lost. Moreover, the notion of corrective justice reveals a relationship which identifies each party as the object or source of the other's remedial response. On the basis of her loss, the party suffering the wrong inherently is identified as the individual to whom the party committing the wrong should divest his gain. Similarly, on the basis of his gain, the party committing the wrong inherently

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from a "lost opportunity" analysis. It is irrelevant that the benefit gained by the fiduciary through the breach of trust could not possibly have been enjoyed by the beneficiary: *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378.

28 For ease of discussion, when speaking in the abstract, this paper will assume plaintiffs to be female and defendants to be male.

29 Aristotle, *Nicomachean Ethics* Book V, ch 2, 4.

is identified as the individual from whom the party suffering the loss should receive compensation.

That philosophy of corrective justice is manifest in the law of restitution as it applies to instances of subtractive enrichment.[30] In such circumstances, the law is concerned to redress an imbalance created by an unjustified transfer of value. The triggering event of unjust enrichment concurrently creates a disequilibrium for both parties; as compared with the positions they held immediately before the event in question, the defendant has more than he deserves *and* the plaintiff has less than she deserves. Those two conditions are not coincidental, but rather inextricably are tied; the defendant's gain is a reflection of the plaintiff's loss *and* the plaintiff's loss is a reflection of the defendant's gain.

The triggering event of unjust enrichment gives rise to the legal response of restitution. And, again, the central element of correlativity appears. The restitutionary remedy simultaneously restores the status quo ante of each of the parties. The defendant's prior position is re-established because he must divest the benefit which he can not in justice retain; the plaintiff's prior position is re-established because she receives the value of which she unjustly was dispossessed. Considered in isolation, the individual consequences of restitution can not be justified on the basis of corrective justice; each must be viewed in the context of the other. Thus, the mere fact that the defendant received an unjust enrichment may constitute a sound reason for his divestment; he has more than the law believes he should have. However, that fact alone does not reveal the plaintiff as the proper recipient of the divestment. The defendant's unjust gain equally might, for example, be paid over to the state. It is only by establishing that the defendant's enrichment came at her expense that the plaintiff is able to identify herself as the person to whom payment should be made. The converse also is true. The mere fact that the plaintiff suffered an unjust loss may constitute a reason why she should receive payment, but it does not reveal any reason why the defendant should be held liable. Again, for example, the state might take steps to remedy the plaintiff's loss. Alternatively, the law might impose a duty to re-establish the plaintiff's status quo ante upon whichever party, however unrelated to the triggering event of unjust enrichment, it judged best able to bear such a burden. It is only by establishing that her unjust loss resulted in an unjust enrichment to the defendant that the plaintiff identifies him as the proper party to make payment.

Several aspects of the preceding analysis require clarification. First, it may be objected that the Aristotelian notion of corrective justice serves to reverse *wrongful* gains and to restore *wrongful* losses and therefore has relatively little scope of application in the law of restitution. While some cases of subtractive enrichment (eg benefits acquired by means of duress) involve wrongful conduct by the defendant, most (eg benefits acquired by means of mistaken payments) do not. Generally speaking, the law of restitution as it pertains to instances of subtractive enrichment is a system of strict, rather than fault-based, liability.[31]

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30 Cf Dawson, J, "Restitution or Damages" (1959) 20 *Ohio State LJ* 175 at 177; Fuller, L L and Perdue, W R, "The Reliance Interest in Contract Damages" (1936) 46 *Yale LJ* 52 at 56.

31 Birks, P, *Restitution The Future* (1992) at 26-60; Birks, P, "Equity in the Modern Law" (1996) 26 *UWA LR* 1 at 67-6. A notable exception arises with respect to the unjust factor

Nevertheless, it is based on a philosophy of corrective justice. Corrective justice provides a form of justice, rather than substantive rules by which justice may be achieved. While Aristotle stated that wrongful gains and losses should be set aright, he left it to others to determine what should count as wrongful so as to bring the concept of corrective justice into operation.[32] Accordingly, in the context of subtractive enrichment, Aristotelian "wrongfulness" may be equated with the "unjust factors" considered under the third element of the concept of unjust enrichment.[33] An unjust factor is a consideration which, in the eyes of the law of restitution, warrants the reversal of an enrichment gained by the defendant at the plaintiff's expense. The "wrongfulness" inherent in unjust factors, then, pertains not to notions of moral turpitude[34], but rather to the fact that the defendant gained a benefit which the law considers he ought not retain and to the fact that the plaintiff suffered a loss from which the law considers she ought to be relieved.

A second point of clarification is required because the goal of corrective justice ie restoration of the status quo of *both* parties can not always be achieved. Of course, perfect restoration often is possible. In a simple case of mistaken payment of money, for example, the value of the defendant's gain and the value of the plaintiff's loss coincide because the law values money at the same rate regardless of who holds it.[35] Accordingly, in the absence of complicating factors, liability in the amount of the sum paid and received will return both parties to their original positions. However, even in the case of a mistaken payment, the law of restitution may be incapable of effecting perfect restoration. For example, the defendant may be able to invoke the defence of change of position and thereby to pro tanto reduce his liability to the extent that he irretrievably spent the money received from the plaintiff.[36] If so, restitutionary relief will be limited to the value abstractly surviving and will not restore the plaintiff's status quo ante. More significantly, a party may recover, or be held liable for, less than it lost or gained if an unjust enrichment takes the form of goods or services. While money inherently carries an immutable value, goods and services have value only to the extent that a particular person assigns (or is deemed to have assigned) value to them. Consequently, the value of goods or services may differ as between the

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variously known as "acceptance", "free acceptance" and "unconscientious receipt". While criticized by many commentators, (see eg, Burrows, A, "Free Acceptance and the Law of Restitution" (1988) 104 LQR 576), it has long been accepted by Australian courts: See eg, *Steele v Tardiani* (1946) 72 CLR 386; *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221; Mason, K and Carter, J W, *Restitution Law in Australia* (1995) at 64.

32 See eg, Kelsen, H, *What Is Justice?: Justice, law and politics in the mirror of science* (1957) at 125-36.

33 See also Barker, K, "Unjust Enrichment: Containing the Beast" (1995) 15 *Oxford JLS* 457 at 469-70.

34 *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256 per Deane J. Even in cases of, say, duress, the unjust factor is not the wrongful conduct of the defendant per se, but rather the effect that such conduct has on the plaintiff's state of mind — ie vitiation of the intention to confer a benefit.

35 *BP Exploration Co (Libya) Ltd v Hunt* (No 2) [1979] 1 WLR 783 at 799 per Robert Goff J.

36 See generally Birks, P, "Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences" and Bryan, M, "Change of Position: Commentary" in McInnes, M (ed), *Restitution: Developments in Unjust Enrichment* (1996) at 49, 75.

provider's perspective and the recipient's perspective. The point is well illustrated by the decision in *Greenwood v Bennett*[37], which stands for the general proposition[38] that restitutionary relief in cases of subtractive enrichment is limited to the lesser of the plaintiff's loss and the defendant's gain. In simplified terms, the plaintiff spent £226 effecting repairs to the defendant's Jaguar, thereby increasing its value by £375. Notwithstanding the extent of its benefit, the defendant's liability was limited to £226; the plaintiff was restored to his status quo ante, but the defendant enjoyed a windfall. Similarly, if the plaintiff in *Greenwood v Bennett* had spent £375 but had raised the value of the vehicle by only £226, he would have been limited to the lesser amount notwithstanding the extent of his loss; the defendant would have been restored to his status quo ante, but the plaintiff would have suffered a loss.[39]

B. *Ernest Weinrib: Normative Corrective Justice*

The suggestion that cases of subtractive enrichment are based upon a notion of corrective justice finds some, albeit sparse and generally unreasoned, support in the case law. A leading statement appears in McLachlin J's opinion in *Peel v Canada*.[40]

> The concept of "injustice" in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium which has been disrupted. [R]estitution focuses on re-establishing equality as between two parties, as a response to a disruption of equilibrium through a subtraction or taking.

Though not unanimous[41], the legal literature similarly contains isolated, if only occasionally more developed, support for the operation of some notion of corrective justice.[42] However, even among scholars who accept the premise

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37 [1973] QB 195 (CA). See also *Gidney v Shank* [1996] 2 WWR 383 (Man QB).

38 See eg, Burrows, above n1 at 19-20. Australian courts, however, recognise many exceptions: See eg, *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 163 per Deane J; Mason, K, and Carter, J W at 568-81; Byrne, D, "Benefits For Services Rendered" in McInnes M (ed), *Restitution: Developments in Unjust Enrichment* (1996) at 87.

39 The rule illustrated by the result in *Greenwood v Bennett* reveals that while the primary aim of the law of restitution as it pertains to instances of subtractive enrichment may be restoration of what has been gained, rather than compensation for what has been lost, it is not correct to say that "impoverishment of the plaintiff [need not be] a correlative of the defendant's unjust enrichment": *Commissioner of State Revenue v Royal Australia Insurance Ltd* (1994) 182 CLR 51 at 74 per Mason CJ.

40 (1992) 98 DLR (4th) 140 at 165 (SCC).

41 A leading dissentient is Jules Coleman. Under his "mixed view" of corrective justice (J Coleman *Risks and Wrongs* (1992) at 369), he argues that, "the point of corrective justice is to provide agents with certain reasons for acting as a consequence of their conduct. If an actor's conduct gives rise to a wrongful loss, the actor has a reason for making repair, expressed as a duty to render compensation. This is the relationship between an agent and his actions as mediated by the principle of corrective justice. The duty to repair in corrective justice, in other words, does not depend upon the wrongdoer's securing a (wrongful) gain as a result of his mischief." Accordingly, as defined by Coleman, corrective justice is concerned only with wrongful losses. Wrongful gains, in contrast, are said to be the concern of *restitutionary*, rather than *corrective*, justice. Regrettably, the argument has not yet been pursued further and the reader to a large extent is left to ponder how, semantics aside, Coleman's notions of corrective and restitutionary justice differ.

42 Barker, K, "Unjust Enrichment: Containing the Beast" (1995) 15 *Oxford JLS* 457 at 469-

of corrective justice, many would reject this paper's proposal that such a philosophy is best understood or formulated in a manner that facilitates theoretical acceptance of the passing on defence. Ernest Weinrib's position is illustrative.[43]

For present purposes, Weinrib's argument begins in response to the suggestion that most instances of tort liability cannot be explained on the basis of corrective justice because such a theory requires *both* a wrongful gain and a wrongful loss. Of course, in the vast majority of tort cases, which is to say negligence cases, the defendant reaps no immediately apparent gain from his wrong. Certainly, for example, the inattentive driver typically takes no tangible or financial benefit from his careless conduct.[44] Nevertheless, Weinrib argues that the driver's duty to compensate and his victim's correlative right of recovery still can be seen as an instance of corrective justice. The reason, he says, lies in the fact that the Aristotelian notions of "gain" and "loss" should be understood in *normative*, rather than *material*, terms. According to Weinrib, the careless driver has more than he ought to have because he violated the norm against carelessly injuring others, regardless of the fact that he received no material benefit from his actions. While the violation of a norm is not commonly spoken of as a "gain", nor the sufferance of such a violation as a "loss", Weinrib draws upon the *Nichomachean Ethics* and counsels against misleading semantics.

> "Gain" is what it is generally called in such cases, even though in certain cases it is not an appropriate term, for instance, for one who struck another — and the "loss" for the one who suffered — but when the suffering is measured, it is called a loss for one party and a gain for the other.[45]

"Gain" and "loss", then, merely are quantified manifestations of the true basis of corrective justice: normative wrongdoing.[46] Moreover, because of the corrective justice correlativity between gain and loss, the measure of the plaintiff's compensable loss equals the measure of the defendant's divestible gain.

The same analysis applies to the law of restitution:

> Whereas tort law allows for recovery for material loss that is unaccompanied by material gain, the law of unjust enrichment allows recovery for material gain that is unaccompanied by material loss. [47]

71; Burrows, A, *The Law of Restitution* (1993) at 18, 376; Fuller, L L and Perdue, W R, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale LJ* 52 at 56; Jaffey, P, "Restitutionary Damages and Disgorgement" [1995] *Restitution L Rev* 30 at 32.

43 Weinrib, E, *The Idea of Private* Law (1995); Weinrib, E, "The Gains and Losses of Corrective Justice" (1994) 44 *Duke LJ* 277.

44 A very tenuous argument to the contrary might suggest that the defendant benefited to the extent that he enjoyed the freedom to drive without bearing the burden of taking reasonable care.

45 Quoted in Weinrib, E, "The Gains and Losses of Corrective Justice" (1994) 44 *Duke LJ* 277 at 279. See also Weinrib, E, *The Idea of Private Law* (1995) at 118.

46 It can be noted, for the sake of completeness, that Weinrib's argument defines the parties' normative rights and duties in Kantian terms: "The Gains and Losses of Corrective Justice" (1994) 44 *Duke LJ* 277 at 289-93. See also Weinrib, E, *The Idea of Private Law* (1995) ch 4.

47 Weinrib, E, "The Gains and Losses of Corrective Justice" (1994) 44 *Duke LJ* 277 at 295-96. See also Weinrib, E, *The Idea of Private Law* (1995) at 117.

> [I]n the case of unjust enrichment, the plaintiff recovers the defendant's gain not when the plaintiff has suffered a corresponding material loss, but when the defendant's enrichment represents an injustice to the plaintiff.[48]
>
> To paraphrase Aristotle, when the defendant's unjust enrichment is measured, it is called a gain for one party and a loss for the other.[49]

While Weinrib's analysis focuses upon instances of enrichment by wrongs[50], it encompasses instances of enrichment by subtraction as well. That is true notwithstanding the fact that under subtractive enrichment, the defendant need not have acquired the benefit through the commission of a civil wrong. For example, the recipient of a mistaken payment may be entirely ignorant of the impugned transfer until after it is completed. Weinrib argues that the defendant's retention of an enrichment in such a case nevertheless violates a duty owed to the plaintiff and therefore falls within the scope of his conception of corrective justice.

> The ultimate basis of this recovery is that corrective justice, being in Aristotle's words "towards another", assumes the mutual externality of the parties and the consequent separateness of their interests. Accordingly, corrective justice recognises no obligation to enrich another. The conferral of a benefit is literally within the free gift of the donor as a self-determining agent. Consequently, only if the donor acts in execution of a donative intent is the transfer of the benefit an expression of right. Unilateral transfers, such as mistaken payments, that are not the product of donative intent are juridically ineffective, regardless of the absence of wrongdoing by the donee. Their restitution can therefore be demanded as a matter of corrective justice. In such circumstances, the enrichment itself represents something that is rightfully the plaintiff's. Because its retention by the defendant is an infringement of the plaintiff's right, the defendant has a duty to restore it to the plaintiff. Liability is the juridical confirmation that, by holding on to the factual gain, the defendant breaches a duty that is correlative to the plaintiff's right.[51]

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48 Weinrib, E, "The Gains and Losses of Corrective Justice" (1994) 44 *Duke LJ* 277 at 286. See also Weinrib, E, *The Idea of Private Law* (1995) at 118.

49 Weinrib, E, "The Gains and Losses of Corrective Justice" (1994) 44 *Duke LJ* 277 at 297.

50 While not directly relevant to the issue of passing on, it is interesting to note that Weinrib's analysis therefore allows corrective justice to explain not only instances of subtractive enrichment, but also instances of enrichment by wrongs. As will be recalled, under orthodox restitutionary analysis, while the former requires that wealth be subtracted from the plaintiff, the latter requires merely that the plaintiff be the victim of a wrong committed by the defendant. Consequently, and more specifically, while the actual source of the defendant's material gain is crucial under the "subtractive" sense of the second element of unjust enrichment, it is irrelevant under the "wrongs" sense: above at text accompanying notes 25-27. However, once "gain" and "loss" are understood in normative, rather than material, terms, the ambiguity commonly thought to inhere in the phrase "at the plaintiff's expense" largely disappears. Under either type of unjust enrichment, the defendant experiences a relevant "gain" because he violates a norm and the plaintiff experiences a relevant "loss" because she suffers the violation of a norm. Moreover, under either type of unjust enrichment, the plaintiff's measure of relief merely is the quantitative representation of the doing and suffering of a wrong. For a similar argument, see K Barker "Unjust Enrichment: Containing the Beast" (1995) 15 *Oxford JLS* 457 at 471-74.

51 Weinrib, E, *The Idea of Private Law* (1995) at 141. See also Kull, A, "Rationalizing Restitution" (1995) 83 *Calif L Rev* 1191 at 1222-6.

The implication of Weinrib's theory for the passing on defence is clear.[52] If it is normative, rather than material, gain and loss which is determinative of liability under the philosophy of corrective justice, then there is no reason why the plaintiff should be denied relief simply because she shifted to a third party the economic loss consequent upon the defendant's economic gain. Passing on is relevant only in terms of material detriment; the plaintiff can not transfer the normative aspect of the defendant's wrong on to the third party. True, the plaintiff herself may in some circumstances violate a norm prohibiting her unjust enrichment at the expense of the third party. For example, the plaintiff who mistakenly responds to a tax demand by the defendant may attempt to pass the economic burden of the purported levy on to her customers by means of an itemised bill. In responding to such a bill, it may be possible for a customer to argue that his payment to the plaintiff occurred by reason of a mistaken belief in the validity of the underlying tax and hence constituted an unjust enrichment.[53] In such a case, however, the normatively violative act committed by the plaintiff and relied upon by the customer would be entirely distinct from the defendant's normatively violative act against the plaintiff. More specifically, the defendant's normative gain and the plaintiff's correlative normative loss would not be eliminated by the transfer of the economic loss to the third party. Accordingly, restitutionary liability would remain as against the defendant.

Weinrib presents one view of corrective justice that might underlie the law of restitution. While certainly defensible, that view need not, and should not, be adopted. The response to Weinrib is two-fold. First, when the law of restitution speaks of gains and losses, it expresses itself in economic, not normative, terms. Certainly that is true of the leading scholarship.[54] It also is true of the case law. Consider, once again, *Greenwood v Bennett*.[55] The plaintiff spent £226 and increased the value of the defendant's Jaguar by £375; restitutionary relief was limited to the lesser amount.[56] In determining why that was so, one inevitably is drawn to economic considerations. To suggest, perhaps, that the law of restitution is premised upon normative gains and losses, and merely quantifies or expresses those gains or losses in monetary terms for the purposes of relief, seems to be an artificial and unnecessary manipulation of an otherwise simple exercise.

Moreover, there are sound reasons for insisting upon an economic, rather than normative, approach. That point can be illustrated with reference to the defence of passing on. Take a simple case in which a government creates a valid tax to which a business wrongly believes itself subject. The business pays the tax, but subsequently successfully[57] passes the attendant economic

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52 While Weinrib's writings do not expressly address the issue of passing on, he has agreed in private correspondence that the defence is rendered irrelevant by his view of corrective justice: letter of 31 May 1996 (on file with the author).

53 Below at Section 5.

54 See eg, Birks, P, *An Introduction to the Law of Restitution* (revd edn, 1989) at 13; Burrows, A, *The Law of Restitution* (1993) at 7-20.

55 [1973] QB 195 (CA).

56 Similarly, if the plaintiff had spent £375 but increased the value of the defendant's Jaguar by only £226, relief would have been measured in the lesser amount.

57 An unrealistic assumption: below at Section 4(B).

burden on to its customer in the form of a composite charge (ie the bill presented to the customer does not itemise the purported tax as a distinct component of the charge). Two possible restitutionary actions come to mind. For reasons explained below[58], the first, by the customer against the business, almost surely should fail.[59] The second possible restitutionary action, by the business against the government, is more hopeful. The state's enrichment is obvious; the receipt of money is an incontrovertible benefit.[60] An unjust factor also is readily apparent; the business made payment only because it mistakenly believed that the tax was valid.[61] The contentious issue, of course, pertains to the requirement that the government's enrichment be "at the expense" of the business. Specifically, the pertinent question is whether or not the latter's act of passing on precludes recovery.

Under Weinrib's view of corrective justice, the passing on defence is inapplicable because material loss to the plaintiff is not determinative of liability. Weinrib's analysis merely requires that the business establish that the government violated a norm prohibiting the retention of the initial payment. Accordingly, the business in the preceding hypothetical would be permitted to reap an economic windfall; it would enjoy recovery even though it suffered no material loss.[62]

Stepping back from the perspective of pure theory, such a result is difficult to defend. Admittedly, the extent to which instrumentalist considerations should inform private law rules of liability is open to debate. Weinrib rejects functionalist approaches and argues that,

> [p]rivate law is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this intelligibility in terms of a purpose, the only thing to be said is that the purpose of private law is to be private law.[63]

In contrast, the position taken in this paper is that while pure theory is invaluable in providing foundational structure to the law and thereby in revealing the range of acceptable rules, occasionally it is desirable for philosophy to yield to practicality. Despite Weinrib's powerful arguments to the contrary, it is difficult to accept that the law exists simply to serve itself. Certainly, the more

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58 Section 5(B)(iii).

59 For similar reasons, it would be difficult to maintain an action between the customer and the government.

60 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 799 per Robert Goff J.

61 In England, there still may be doubt on the ground that the mistake may be one of law, rather than fact. Cf *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 (SCC).

62 To the contrary, it might be argued that the business could have raised its price to the post-tax level even in the absence of the tax and thereby received the amount of the government's liability in the form of market profit rather than restitutionary relief. However, that argument is not convincing. First, if the business wished to receive additional profit, it should have taken steps itself to raise its prices or reduce its costs; it should not be permitted to rely on the government to earn its profits for it. Second, the claim that the improper imposition of the tax deprived the business of the opportunity to raise its price and reap additional profit lies, if at all, in tort rather than unjust enrichment; the gist of the complaint pertains to losses wrongfully inflicted, rather than to enrichments wrongfully received.

63 Weinrib, E, *The Idea of Private Law* (1995) at 5.

common view is that the law exists to serve its subjects. And in that regard, it can be questioned whether the availability of restitutionary relief in the situation described above advances society's interests. True, there is a societal interest in the enforcement of the norm prohibiting the government's retention of the enrichment which it received as a result of an unjust factor. However, there also is a strongly countervailing societal interest in the avoidance of wasteful and un-productive expenditures. If the legislation had not been mis-interpreted, if events had unfolded as they should have, the money in question would lie with neither the government nor the business, but rather with the customer. Accepting that the customer is unable to recover, why should scarce social resources be used to transfer the windfall from the government to the business?

To summarise, there is relatively little societal benefit involved in the redistribution of money from one party to another merely because the latter suffered a normative wrong at the hands of the former. Similarly, it is difficult to justify the legal costs of re-distributing money from one party to another simply because the former reaped a financial gain and the latter suffered an immediate financial loss which it subsequently was able to shift on to a third party. Accordingly, the second element of the principle of unjust enrichment should be formulated so as to require the defendant's benefit to be gained not only at the plaintiff's *economic* (as opposed to normative) expense, but also at the plaintiff's *ultimate* (as opposed to immediate) expense. In other words, the courts should ask not where the economic burden attendant upon the defendant's enrichment initially arose, but rather where it eventually came to rest. It is only by doing so that the law of restitution can be certain of serving a useful purpose.

A. Policy and Practical Considerations

In the preceding section, it was proposed restitutionary relief potentially should lie only if the plaintiff suffers the ultimate economic expense correlative to the defendant's enrichment. If that is correct, then it follows that the defence of passing on is sound in *theory*. However, that is not to say that the defence should be available in practice. As will be discussed in this section, policy and practical considerations militate against its application.

While the proposed division between theory, policy and practice initially may seem odd, in fact it is quite common. The law frequently refuses, on practical or policy grounds, to follow concepts through to their logical conclusions. "The life of the law has not been logic; it has been experience".[64] Indeed, for better or worse, that aphorism often finds application in the law of restitution. For example, the unjust factor of failure of consideration, in theory, should be capable of applying whether the plaintiff supplies services, goods or money to the defendant. Assuming the defendant to be enriched in any situation, the only question should be whether or not the plaintiff is able to establish a ground of relief. And in any event, the plaintiff may have conferred the benefit only on the assumption (subsequently proved erroneous) that some event would transpire in the future (most commonly, the defen-

64 Holmes, O W, *The Common Law* (1881) at 1.

dant's provision of a counter-benefit). Theoretically, failure of consideration therefore should apply in any case. However, notwithstanding recent arguments favouring conceptual consistency across all forms of enrichment[65], the law of restitution continues (at least formally) to adhere to the traditional view that failure of consideration applies only in money cases.[66]

4. *Policy Against Government Misconduct*

It is unfortunate that most of the cases touching upon the passing on defence have arisen in the context of taxing provisions. Government involvement often clouds issues and results in decisions being formulated or interpreted more broadly than is necessary and appropriate.[67] Specifically, policy considerations arising as a result of government misconduct may be so strong as to overcome circumstances such as passing on that normally might inhibit the availability of restitutionary relief. Typically, however, those policy considerations are not identified and analysed. Consequently, their effect in allowing recovery by a party who suffered merely an immediate (as opposed to an ultimate) burden may be mistaken for a general rejection of the passing on defence. Moreover, because such policy considerations are not properly understood, they occasionally are misapplied to allow relief in circumstances in which the state has not engaged in misconduct and hence in which the defence of passing on might be operative.

(i) Unconstitutional Demand

An appropriate starting point for discussion are those cases in which a defendant government receives payment pursuant to an unconstitutional taxing provision. In such circumstances, a strong rule of recovery is required to vindicate the fundamental constitutional principle, enshrined in the English Bill of Rights, that there should be "no taxation without Parliament". Of course, a bare rule to the effect that the state is not permitted to impose taxes without proper authority is useful only prospectively in preventing the improper imposition of levies. To be truly meaningful, it must be coupled with a rule that allows taxpayers to recover payments made under unconstitu-

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65 See eg, Burrows, A, *The Law of Restitution* (1993) ch 9; Birks, P, *An Introduction to the Law of Restitution* (revd edn, 1989) at 226-34.

66 Mason, K, and Carter, J W, *Restitution Law in Australia* (1995) at 62-3.

67 The discussion that follows considers the availability of the passing on defence to government defendants. However, an issue which appears not to have been considered by the courts is whether the defence could be used *against* government plaintiffs. Such plaintiffs undeniably enjoy advantages not open to other types of claimants. For example, a citizen who receives unauthorised payments from the consolidated revenue can not resist liability on the basis of the defence of estoppel. It has been reasoned that such payments prima facie are recoverable on the ground that they are illegal (*Auckland Harbour Board v The King* [1924] AC 318 (PC)) and that an estoppel can not be based on an assertion that is contrary to law: *Attorney-General v Gray* [1977] 1 NSWLR 406; *Burns v Commonwealth* [1971] VR 825. Although the desirability of prohibiting and reversing illegal payments by the government may remain, the reasoning underlying the defence of estoppel technically does not apply with respect to the defence of passing on. An assertion that the government shifted the economic burden of its payment (while undoubtedly difficult, perhaps impossible, to establish in evidence) does not turn upon the illegality of the initial payment.

tional demands.[68] While that latter rule has yet to be accepted in Australian law formally[69], ultra vires demand increasingly is finding favour as an unjust factor in other jurisdictions.[70] Arguably, however, even that rule is insufficient to protect the integrity of the guiding constitutional principle. Very often, a taxpayer passes the economic burden of a tax on to a customer in such a way as to preclude a successful restitutionary action by that customer against the government.[71] If the passing on defence is applicable in such cases, the state consequently will be able to retain its unconstitutional gain against everyone.

For the preceding reasons, the case law (implicitly) recognises that the passing on defence is inapplicable where the plaintiff taxpayer seeks recovery on the basis of the defendant government's unconstitutional demand.[72] That proposition is illustrated nicely by the opposing opinions in *Air Canada v British Columbia*.[73] The defendant province purported to impose a tax upon purchasers of gasoline. The plaintiff airlines, which had consumed a great deal of gasoline in the course of their operations, sought recovery of taxes paid when the legislation subsequently was struck down as being ultra vires the province. LaForest J, speaking for a majority of the judges who addressed the restitutionary issues, approached the claim as being based on a mistake of law. While prepared to abolish the traditional distinction between mistakes of fact and mistakes of law[74], he nevertheless denied relief for a variety of reasons.[75] Of present concern is his dicta opinion that the airlines were precluded from recovering by reason of the fact that they had raised their prices in response to the defendant's demand and thereby (purportedly) had passed the burden of the tax on to their customers. In doing so, he drew upon the work of Professor Palmer.

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68 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 172-3.

69 Cf *State Bank of New South Wales v FCT* (1995) 95 ATC 4734; *Mason v NSW* (1959) 102 CLR 108 at 116-7 per Dixon J.

70 See eg, Beatson, J, "Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the *Woolwich* Principle" (1993) 109 *LQR* 401; Pannam, C L, "The Recovery of Unconstitutional Tax in Australia and the United States" (1964) 42 *Texas LR* 77.

71 Below at Section 5.

72 To the contrary, a number of American and Indian courts have applied the passing on defence in favour of governments unjustifiably in receipt of unconstitutional levies: see Woodward, WJ, " 'Passing-on' the Right To Restitution" (1985) 39 *U Miami LR* 873; Jones, G, *Restitution in Public and Private Law* (1991) at 51-6. So, too, the European Court of Justice has recognised that the defence of passing on *could* apply with respect to restitutionary claims for the recovery of taxes paid pursuant to unlawful demands: See eg, *Amministrazione delle Finanze dello Stato v Spa San Giorgio* [1983] ECR 3595. The best tactic appears to be to meet such cases head on, agree that they correctly interpret the theory of unjust enrichment, note that they often are decided under (or under the influence of) statutory passing on provisions, and object that (from the perspective of Anglo-Australian law) they give undue weight to the policy considerations militating against improper taxation.

73 (1989) 59 DLR (4th) 161 (SCC) (hereinafter *Air Canada*).

74 *Bilbie v Lumley* (1802) 2 East 469, 102 ER 448.

75 See generally McCamus, J D, "Restitution and the Supreme Court: The Continuing Progress of the Unjust Enrichment Principle" (1991) 2 *Supreme Court LR* (2d) 505; M McInnes "Towards Recovery for Payments Made Under a Mistake of Law" (1990) 11 *Advocates' Q* 493; R van de Moesselaer "Recovery of Money Paid Under Mistake of Law" (1991) 5 *Saskatchewan LR* 331.

> There is no doubt that if the tax authority retains a payment to which it is not entitled, it has been unjustly enriched. It has not been enriched at the taxpayer's expense, however, if he has shifted the economic burden of the tax to others. Unless restitution for the benefit can be worked out, it seems preferable to leave the enrichment with the tax authority instead of putting the legal machinery in motion for the purpose of shifting the same enrichment to the taxpayer.[76]

In the final analysis, LaForest J held that:

> [t]he law of restitution is not intended to confer windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued to his benefit, it is restored to him.[77]

Wilson J offered a dissenting view in *Air Canada*. Rather than analyse the facts as giving rise to the unjust factor of mistake, she considered the third element of the principle of unjust enrichment to be satisfied on the basis of the defendant's ultra vires demand. The reason for restitution, she believed, lay not in the airlines' vitiated intention in making payment, but rather in the province's unconstitutional demand. Moreover, she specifically rejected the suggestion that passing on could constitute a defence under such an analysis.

> In terms of [LaForest J's] analysis, the [airlines] are unable to show that the unjust enrichment of the province was at their expense. In my view there is no requirement that they be able to do so. Where the payments were made pursuant to an unconstitutional statute there is no legitimate basis upon which they can be retained.[78]

While it may be objected that the integrity of the principle against unconstitutional taxation warrants protection in whichever terms a claim is framed, it can be seen that the applicability of the passing on defence is affected by the court's perception of the state's actions. In LaForest J's view, the province's "misconduct" was minimal; not only was the airline's claim perceived to be based on its own mistake, but the reason for the unconstitutionality of the impugned provision was said to "come close to raising a mere techni-

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76 Palmer, G E, *The Law of Restitution* (1986 Supplement) at 255.

77 Somewhat curiously, he so held despite being aware of the fact that the plaintiffs may have suffered reduced sales volume, and hence profit, as a result of raising their prices in an attempt to shift the burden of the tax on to their customers: (1989) 59 DLR (4th) 161 at 194. Indeed, his decision generally fails to fully consider the economic consequences of the airlines' purported passing on. Subsequent Canadian cases have been more sensitive: See eg, *Air Canada v Ontario (Liquor Control Board)* (1995) 126 DLR (4th) 301 at 330 (Ont CA) (leave to appeal to SCC granted); *Cherubini Metal Works Ltd v Nova Scotia* (1995) 137 NSR (2d) 197 (NS CA).

78 (1989) 59 DLR (4th) 161 at 170. Wilson J's comments may be read to suggest that the plaintiffs need not have suffered even an immediate expense. That interpretation should be rejected. While wealth need not be taken from the plaintiff in cases of enrichment by wrongs, a claim based on a government's ultra vires demand can not underlie a claim in that branch of the law of restitution. As previously explained (above at n26), the law of restitution is relevant only remedially in cases of enrichment by wrongs; it simply determines whether the remedy of disgorgement is available as an alternative to a remedy of compensation. The operative cause of action must be found in some other area of law. "Ultra vires demand", however, is not an independent cause of action; it simply is (potentially) an unjust factor within an autonomous action in unjust enrichment. Accordingly, it pertains only to cases of enrichment by subtraction.

cal issue".[79] His Lordship accordingly saw no policy reason for displacing the operation of the passing on defence. In contrast, Wilson J placed much greater stress on the province's misdeed; not only was the airline's claim perceived to turn squarely on the province's ultra vires demand, but the government's unconstitutional act (tentatively) was likened to a "sin".[80] She accordingly perceived the need to defend the constitutional principle in question.

To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.[81]

(ii) Duress

Arguably, the passing on defence should be inapplicable not only in cases of unconstitutional demand, but also in cases of government duress. While the same constitutional principles are not involved, there nevertheless remains a need to deter the state from improperly using the great weight of its authority for extortionate purposes. *Mason v NSW*[82] supports that view. While suspecting the invalidity of a taxing statute, the plaintiffs complied with the defendant's call for an inter-state trucking levy for fear that the state would exercise a statutory power to seize their vehicle if they refused. In time the statute was declared unconstitutional and the plaintiffs were permitted restitutionary recovery on the ground of duress of goods. Windeyer J rejected the defendant's argument that restitutionary relief should be denied to the extent that the plaintiffs passed the burden of the tax on to their customers in the form of higher prices.

> If the defendant be improperly enriched on what principle can it claim to retain its ill-gotten gains merely because the plaintiffs have not, it is said, been correspondingly impoverished? The concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to our law. Even if there were any equity in favour of third parties attaching to the fruits of any judgment that the plaintiffs might recover — and there is nothing proved at all remotely suggesting that there is — this circumstance would be quite irrelevant to the present proceedings. Certainly it would not entitle the defendant to refuse to return moneys which it was not in law entitled to collect and which *ex hypothesi* it got by extortion.[83]

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79 (1989) 59 DLR (4th) 161 at 197. In LaForest J's view, the province was merely guilty of "sloppy housekeeping"; it had been competent to enact a taxing provision and simply had used the wrong form in doing so.

80 (1989) 59 DLR (4th) 161 at 169.

81 (1989) 59 DLR (4th) 161 at 170, quoting *Amax Potash Ltd v Government of Saskatchewan* (1976) 71 DLR (3d) 1 at 10 per Dickson J (SCC).

82 (1959) 102 CLR 108.

83 (1959) 102 CLR 108 at 146. Menzies J similarly stated at 136: It appears that some of the freights which the plaintiffs had charged they had passed on to their customers as part of the charge that they are now seeking to recover. The only legal significance that could be given to this is any bearing it may have upon the question whether the charges were paid voluntarily or under compulsion.

Windeyer J's view should be rejected to the extent that it denies the theoretical relevance of the passing on defence in all cases of restitution. First, it is inconsistent with the notion of corrective justice defended in the preceding section. Unless the plaintiff suffers the ultimate economic burden consequent upon the defendant's unjust enrichment, persuasive considerations militate against recovery. Second, most of Windeyer J's statement is dicta. *Mason v NSW* was concerned not with cases of subtractive enrichment generally, but rather with a very specific type of restitutionary claim. Accordingly, the ratio of the opinion is confined to the last sentence of the quoted passage, with which this paper agrees. Assuming the defence theoretically to be of general application, it nevertheless should not apply in circumstances of government duress. As between allowing government retention of a benefit obtained through extortion and allowing restitutionary relief to a claimant who suffered merely an immediate expense, policy considerations point to the latter.[84] Particularly in light of the fact that the temptation for misconduct is constant in the case of a government defendant, the law of restitution properly favours deterrence over philosophical consistency.

(iii) Mistake

In *Royal Insurance*, Mason CJ suggested that the analysis regarding payments received by virtue of unconstitutional demands should extend to cases of mistake. As will be recalled, the plaintiff insurer mistakenly believed itself liable under a taxing provision validly enacted by the defendant state. As the taxing scheme was based on self-assessment, the defendant made no demands upon the plaintiff; the insurer remitted the purported taxes unilaterally. The defendant attempted to resist the plaintiff's subsequent restitutionary claim on the basis that the insurer had passed the economic burden of its payments on to its customers in the form of increased premiums. The Chief Justice stated that,

> [t]here is a fundamental principle of public law that no tax can be levied by the executive government without Parliamentary authority, a principle which traces back to the Bill of Rights 1688 (Imp). In accordance with that principle, the Crown can not assert an entitlement to retain money paid by way of a causative mistake as and for tax that is not payable in the absence of circumstances which disentitle the payer from recovery. It would be subversive of an important constitutional value if this Court were to endorse a principle of law which, in the absence of such circumstances, authorised the retention of payments which it lacked the authority to receive and which were paid as the result of a causative mistake.[85]

Significantly, however, the Bill of Rights states merely that, "The levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is Illegal".[86] The "fundamental principle of public law" identified by the Chief Justice applies to money collected by way of unconstitutional demands; it does not properly extend to include payments paid pursuant to valid

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84 It further is arguable, though to a lesser extent, that the defence of passing on similarly should be unavailable to a private defendant who receives an enrichment by means of duress.

85 *Commissioner of Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 69.

86 (1688) 1 Will and Mar, Sess 2, ch 2.

legislation as a result of the *payer's* mistake.[87] Granted, the "fundamental principle" may appropriately apply to cases in which the *state* mis-interprets valid legislation and accordingly demands payment from the taxpayer. As Beatson has argued, "such misconstruction is an error of law and an administrative act based on an error of law is likely in most cases to be ultra vires, thus falling within the basic formulation".[88] However, there is a clear distinction between that situation and the situation (as occurred in *Royal Insurance*) in which *only* the taxpayer commits an error. In the latter case, the defendant state effectively is in the same position as any other party upon whom the claimant might mistakenly confer a benefit. The constitutional principle in question is based not upon the receipt of payments per se, but rather upon the unlawful exercise of power.[89]

Nor did Windeyer J's opinion in *Mason v NSW* provide the support which Mason CJ sought in *Royal Insurance*. While recognising that *Mason v NSW* was based on duress, whereas the facts before him involved a mere mistake, the Chief Justice relied upon the Windeyer J passage quoted above in rejecting the relevance of the defendant's plea of passing on.

> Once it is accepted that causative mistake of law is a basis for recovery, the making of an unlawful demand for payment, though material to the making of the mistake, is no longer of critical importance.[90]

Granted, once the insurer established an unjust factor on the basis of a causative mistake, the presence or absence of an improper demand by the state could not affect matters at the *third* stage of the unjust enrichment analysis; restitutionary liability requires proof of only one unjust factor. Arguably, however, the presence of duress in *Mason*, and its absence in *Royal Insurance*, might have been of critical importance with respect to the *fourth* stage of analysis. Windeyer J recognised a sound reason for rejecting the application of the passing on defence — ie the need to deter government misconduct. That reasoning, however, was not applicable to the facts of *Royal Insurance*. The state had not obtained a benefit by extortionate means; rather, it merely passively took receipt of the insurer's mistaken payments.[91] As between allowing government retention of a benefit innocently obtained through a mistaken payment and allowing restitutionary relief to a claimant who suffered

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87 Cf Mason, K, and Carter, J W, *Restitution Law in Australia* (1995) at 782.

88 Beatson, J, "Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the *Woolwich* Principle" (1993) 109 *LQR* 401 at 405. See also *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 177, 196, 205.

89 See eg, Birks, P, " 'When Money Is Paid In Pursuance of a Void Authority' — Duty To Repay?" (1992) 14 *Public Law* 580 at 587.

90 (1994) 182 CLR 51 at 74-5.

91 While exploring the contentious defence of "honest receipt", Brennan J suggested that the defendant "must be taken to have known at all material times that [she] had no entitlement to retain these amounts" and therefore dishonestly had taken receipt of the plaintiff's payments: (1994) 182 CLR 51 at 89. (For an examination of the defence of "honest receipt", see McInnes, M, "Mistaken Payments Return to the High Court" (1996) 22 *Monash U LR* 209 at 9.) However, there appears to have been no evidence that the Commissioner of Revenue (or her minions) had actual knowledge of the insurer's mistaken belief. Moreover, in light of the fact that the taxing scheme was based on self-assessment, and in light of the fact that the insurer was liable for some taxes regardless of its error, it is difficult to convincingly fix the defendant with constructive knowledge.

merely an immediate expense[92], there are no policy considerations (yet identified) sufficient to displace the general, theoretical rule that recovery should only lie in favour a party suffering an ultimate expense.

B. *Impracticability of Application*

The principle of corrective justice underlying instances of subtractive enrichment supports the passing on defence in *theory*. In the preceding section, however, it was argued that *policy* reasons pertaining to government misconduct occasionally militate against the operation of the defence. The present section further argues that, even in the absence of such policy considerations, the application of the defence ought to be rejected for *practical* reasons. Succinctly stated, (almost) invariably it is impossible to determine the extent to which a party truly succeeded in an attempt to pass on an expense.[93]

Granted, very often it easily can be proved whether or not, say, a plaintiff enterprise raised its prices *subsequent* to purportedly becoming subject to a tax in a defendant government's favour. However, it commonly is difficult, and occasionally impossible, to establish that such an increase in price in fact was *attributable* to the apparent tax. As the United States Supreme Court has noted, the interaction of economic determinants in the market place typically precludes the isolation and assessment of individual variables.

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions can not be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price.[94]

Obviously, a plea of passing on is possible only if a price increase sufficiently can be linked to a defendant government's enrichment and to a plaintiff business's expense. An enterprise generally must be free to adjust its prices (usually with a view to earning greater profits) and the government can have no claim to benefit from such commercial decisions.

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92 As discussed below, the party suffering the ultimate expense correlative to the defendant's enrichment frequently has no restitutionary claim: below at Section 5.

93 For an excellent discussion of the economic implications of passing on, see Rudden, B, Bishop, W, "Gritz and Quellmehl: Pass It On" (1981) 6 *European LR* 243.

94 *Hanover Shoe v United Shoe Machinery Corp* 392 US 481 at 491 (1968). The United States Supreme Court went on to note that there may be situations (such as when the plaintiff business has a pre-existing "cost-plus" contract) in which it is easy to establish whether or not a charge has been incorporated into a business's prices. The European Court of Justice similarly conceded that it may be relatively easy in a regulated economy (in which a government both imposes an invalid tax and sets the price at which a product or service is sold) to determine whether or not a charge has been included in a price. However, somewhat more cautiously, it refused to assume passing on even in such circumstances. [I]t is quite probable, depending upon the nature of the market, that the charge has been passed on. However, the numerous factors which determine commercial strategy vary from one case to another so that it is virtually impossible to determine how they affect the passing on of the charge. *Les Fils de Jules Bianco SA v Directeur General des Douanes* [1988] ECR 1099 at 1119-20. See also at 1111-13 per Slynn, A G.

Even when it is possible to establish that, say, a plaintiff enterprise raised its prices in direct response to a purported tax, it very rarely is possible to determine the extent to which the expense truly was passed on. Exceptional (perhaps fanciful) circumstances aside[95], increased price leads to decreased demand in the market place. Accordingly, while a business which increases its prices in response to an apparent tax may thereby recoup some (perhaps all) of the expense attendant upon the defendant's enrichment, it also may suffer a loss of custom and hence of revenue; the act of passing on is apt to have both positive and negative consequences. And unless an enterprise is able to shift the burden of an apparent tax without suffering the ill effect of lost business, to some extent it passes on merely the immediate, rather than the ultimate, burden. The difficulty, of course, lies in determining the relative strengths of the positive and negative effects of passing on.

Economic theory provides a framework within which to understand such matters. When the elasticity of demand for a product or service is high[96], it is not possible to shift (much of) the ultimate burden. A small increase in price results in a large decrease in demand; the beneficial consequence of receiving more income per unit sold to some significant extent is off-set (perhaps even outweighed) by the detrimental consequence of selling fewer units. In contrast, when the elasticity of demand is low[97], it is possible to shift (much of) the ultimate burden. An increase in price does not appreciably diminish demand; the beneficial consequence of receiving more income per unit sold is not (significantly) off-set by the detrimental consequence of selling slightly fewer units. Economic theory cannot, however, quantify the actual elasticity of a particular product or service and therefore is of limited value in the present context.[98]

Documentary evidence similarly is of little value.[99] Invoices, receipts, sales figures and the like may reveal, for example, that an enterprise: (i) purportedly became subject to an invalid tax, (ii) raised its prices, and (iii) subsequently enjoyed fewer profits. Such evidence can not, however, sufficiently indicate whether those events were causally related or merely sequential. Even in the absence of the apparent tax, the enterprise might have determined that the market could bear an increase in price. Moreover, even if a nexus is estab-

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95 An increase in price never results in a decrease in demand with respect to goods or services for which there is perfect inelasticity of demand — ie, for which customer demand remains constant regardless of price. Notwithstanding economic theory, the notion of perfect inelasticity seems irrelevant in practice. Some people surely will do without (or with less) of *any* product or service if it is sufficiently costly. For example, under private medical schemes, even life-saving operations may carry too high a price for some patients.

96 For instance, if a small change in price results in a large change in demand. A dramatic illustration occurred in *Shannon v Hughes and Co* 109 SW 2d 1174 at 1175 (1937). The plaintiff ice cream company was subject to an invalid tax of 7%. Because the elasticity of demand for ice cream is high, the effect of the apparent levy devastated the company's market and precluded a profitable operation.

97 For instance, demand is relatively unresponsive to changes in price.

98 Indeed, the United States Supreme Court has suggested that "in the real world the drastic simplifications of economic theory must be abandoned": *Illinois Brick Co v Illinois* (1971) 431 US 720 at 742.

99 See eg, *Amministrazione delle Finanze dello Stato v Spa San Giorgio* [1983] ECR 3595 at 3626 per Mancini, A G.

lished between the levy and the increase in price, the enterprise's loss of custom might (partially) be attributable to other factors. For instance, some previous customers might have altered their spending habits not because of the increase in price, but rather because they chose to purchase a new product which appeared in the market. Similarly, even if it is established that the enterprise did not experience a decline in revenue following an increase in price as a result of the imposition of a tax, it might still have suffered an expense as a result of the levy. While established spending patterns may have continued, potential new customers may have been dissuaded by high prices.[100]

On the basis of the preceding discussion, it clearly is impossible (at least in the vast majority of cases) to determine the extent to which an attempt to pass on an expense ultimately succeeds in shifting a burden. The placement of the burden of proof therefore is of determinative importance. Upon whom should it lie? Because restitutionary defences inextricably are linked to the three basic elements of the concept of unjust enrichment, the matter is not entirely free of doubt. Conceivably, the plaintiff might be required to prove the un-provable and to establish the precise extent of her expense when satisfying the second element of the concept of unjust enrichment.[101] Surely, however, the preferable view is that the defendant should bear the burden of establishing all of the elements of the passing on defence, including proof of the extent to which the plaintiff ultimately transferred some portion of her immediate expense on to a third party. Certainly, that approach would be consistent with general restitutionary practice. For example, even though the defence of change of position serves to defeat a restitutionary claim by controverting prima facie proof of an enrichment, it lies for the defendant to prove, rather than for the plaintiff to disprove, a change of position.[102]

If the concept of passing on is to find a place in the law of restitution, the burden of proof should rest upon the defendant. However, it must be asked whether the defence indeed *should* be recognised. International judicial opinion is mixed.[103] Academic opinion also is divided. Goff & Jones[104] expressly adopt the defence in most circumstances, as does Palmer.[105] The Law Reform Com-

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100 For example, the imposition of an additional tax on cigarettes may not affect the behaviour of individuals already addicted to nicotine. It may, however, raise the cost of smoking to a level which discourages other individuals from taking up the habit in the first place. Arguably, the loss of *future* customers is a concern (if at all) for tort rather than restitution. Analysed in one way, an enterprise's claim might simply be for compensation for a wrongful loss. However, if the enterprise's operation is seen to be an ongoing affair, the loss also might be seen to be an illegitimate expense consequent upon the government's enrichment.

101 In *Les Fils de Jules Bianco SA v Directeur General des Douanes*, the defendant government defended a statutory defence of passing on by arguing that the legislation merely required the plaintiff to prove a positive fact — ie, that it had borne the burden of an invalid tax. The European Court of Justice rejected that argument and preferred to interpret the statute's provisions as requiring proof of a negative — ie, that the plaintiff had not shifted the economic burden attendant upon the government's enrichment: [1988] ECR 1099 at 1117-18. See also at 1110-11 per Slynn AG. Cf *Allied Air Conditioning Inc v British Columbia* (1994) 87 BCLR (2d) 207 (BCCA).

102 See generally Birks, P, above n36 and Bryan, M, above n36.

103 Above n5.

104 Lord Goff and Jones, G, above n1 at 35, 552-3; Jones, G, *Restitution In Public and Private Law* (1991) at 46.

105 Palmer, G, *The Law of Restitution* (1986 Supplement) at 255.

mission of England effectively endorses a notion of passing on, at least in some situations.[106] Similarly, while recognising that the High Court "virtually rejected" the notion of passing on in *Royal Insurance*, Mason & Carter seem guardedly sympathetic to the defence.[107] In contrast, Birks appears to recognise the theoretical relevance of passing on, but rejects its application on practical grounds; he believes that it would "commit the court to an impossible inquiry".[108] While previously advocating an analogous defence of "mitigation" [109], Burrows now apparently rejects both that proposal and the defence of passing on.[110] Generally negative views also have been expressed by Tettenborn[111], Beatson[112] and Rose.[113]

The arguments for and against recognition of the concept of passing on are not so imbalanced that the answer is obvious.[114] In the final analysis, how-

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106 Law Commission, Law 227 (*Restitution: Mistake of Law and Ultra Vires Public Authority Receipts and Payments*) (1994) paras 10.44-10.48.

107 Mason, K, and Carter, J W, above n1 at 779-82. See also Mason, K, "Searching For Restitution In Australia" in McInnes, M (ed), *Restitution: Developments in Unjust Enrichment* (1996) at 1.

108 Birks, P, *Restitution-The Future* (1993) at 126, 76; Birks, P, "Restitution From the Executive: A Tercentenary Footnote to the Bill of Rights" in Finn, P D (ed), *Essays On Restitution* (1990) 164 at 172, n46. Cf Birks, P, "Equity in the Modern Law" (1996) 26 *UWA LR* 1 at 41.

109 Burrows, A, above n1 at 475-6.

110 Burrows, A, "Swaps and the Friction Between Common Law and Equity" [1995] *Restitution LR* 13 at 22-3.

111 Tettenborn, A, above n22 at 32, 244.

112 Beatson, J, "Restitution of Overpaid Tax, Discretion and Passing On" (1995) 111 *LQR* 375.

113 Rose, F, "Passing On" in Birks, P (ed), *Laundering and Tracing* (1995) at 261.

114 While this paper argues that the notion of passing on should not be applied in any case, it also recognises that that position exceptionally may seem inappropriate. Consider the following scenario. A reclusive homeowner wishes to have a new garage added on to his house. He enters into a form of "cost-plus" contract with a builder, under which the total price is calculated to include an amount equal to the (undetermined) costs actually incurred during the project, plus a remunerative fee. The builder purchases materials from a supplier. Because of a clerical error, the supplier charges twice for a shipment of lumber valued at $250. Following payment of the duplicated charge, the builder demands and receives $500 from the homeowner pursuant to the "costs" portion of their contract. The error is discovered and, some time later, the builder brings a restitutionary claim against the supplier. The homeowner is less diligent and fails to institute proceedings against the builder within the required period. Should the builder enjoy recovery against the supplier? Notwithstanding the fact that the supplier received an enrichment at the immediate expense of the builder as a result of an unjust factor, there seems little reason to answer in the affirmative. The philosophy of corrective justice underlying the law of restitution (as it pertains to cases of subtractive enrichment) favours recognition of the passing on defence. The builder should not be awarded recovery because she did not bear the ultimate economic loss correlative to the supplier's gain. Moreover, there are no policy considerations militating against the defence. The supplier obviously was not in the position of a government, nor did it act wrongfully as a private party. Nor do the practical considerations canvassed above likely apply. In the circumstances, it would not be difficult for the supplier to prove sufficiently that the builder passed the full economic value of the error on to the homeowner and (because the reclusive homeowner did not communicate the price of the garage to any other potential customers and hence did not affect the demand for such work) that the builder suffered no detriment as a result of doing so. Finally, because of the lapsed limitation period, there is no possibility of a complicating restitutionary action by the homeowner. The question, very simply, is whether: (i) the supplier should retain its $250 windfall, or (ii) the legal

ever, it does seem preferable to deny the defence a place in the law of restitution. Even if technically available, it seldom would be applied if the preceding policy and practical considerations were taken into account. Moreover, while acknowledging the general right of a defendant to resist a claim in any manner he chooses, it must be recognised that legal rules should be formulated with a view to the efficient administration of justice. Though recognition of the defence of passing on seldom would alter the appropriate outcome of a dispute, it commonly might add substantially to litigation costs. Particularly in the case of corporate and government defendants, there would be a temptation to tactically (threaten to) use the defence in futile, but administratively costly, efforts to avoid liability.

5. *Third Party Actions*

It has been suggested that passing on should not play a role in the law of restitution; notwithstanding the fact that the defence is sound in theory, reasons of policy and practice demand that a claimant who shifted an expense (or attempted to do so) nevertheless should be permitted recovery. One objection to that proposal is that it may leave a plaintiff unjustly enriched at the expense of a third party to whom an economic burden was transferred. This section briefly addresses that issue.

A. False Cases of Passing On

Three situations must be distinguished. The most common example of the first situation occurs when a government improperly imposes a tax upon a consumer and requires that an enterprise selling the product or service in question act as a collecting agent. In such circumstances, the notion of passing on does not truly arise. The government's enrichment immediately and ultimately is at the consumer's expense; the enterprise serves merely as a conduit through which money is passed. Accordingly, it properly has been recognised in dicta by Mason CJ in *Royal Insurance*[115], as well as by Canadian[116] and American[117] courts, that the enterprise has no action against the government.

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system should incur costs in transferring the windfall to the builder. The societal interest in avoiding waste would favour the former.

115 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 73.

116 For example, in *Canadian Pacific Airlines v British Columbia* (1989) 59 DLR (4th) 218, the defendant province imposed an ultra vires tax upon consumers of in-flight alcoholic drinks, which it required the plaintiff airline to collect. The airline's restitutionary claim against the province was rejected on the ground that it merely had acted (for a fee, no less) as the government's tax collecting agent. The Supreme Court of Canada recognised that the true taxpayer was not the airline, but rather the passengers who had consumed in-flight drinks. LaForest J was distinctly unimpressed with the airline's suggestion that it should be permitted recovery so that it could reimburse its passengers by way of reduced fares (at 233-4): I am unable to see how it could identify the passengers who consumed the alcohol, so repayment to [the plaintiff] would simply amount to a windfall to the airline. Wilson J suggested that individual passengers, if it were practical to do so, might bring claims against the province: at 221. It fortunately is difficult to imagine that any particular passenger would have consumed enough alcohol, and paid enough tax, to make such a claim feasible.

117 See eg, *Re Kesbec v McGoldrick* 16 NE 2d 288 (1938); *Twentieth Century Sporting Club v United States* 34 F Supp 1021 (1940).

By the same token, however, the enterprise should not be held liable to the third party.[118] Assuming that the business pays the money over to the government before learning of the true facts, any such claim can be resisted on the basis of either ministerial receipt[119] or, more generally, change of position.[120]

B. Passing On: Composite Charges[121]

The second situation generally arises when a government improperly imposes a tax upon an enterprise which, in turn, passes (or attempts to pass) the economic burden of the levy on to its customer as part of a composite charge. The bill presented by the enterprise to the customer simply states a global price and does not specify the tax as a distinct component of the overall charge. As explained above, assuming that the enterprise is able to establish the elements of unjust enrichment, it should enjoy relief despite its (apparent) act of passing on. Moreover, the enterprise should not be subject to a restitutionary claim by its customer.

It might be objected that the availability of relief to the enterprise, without a concomitant right of relief in the customer, allows the former to reap a windfall at the latter's expense. That position, however, is subject to two counter-arguments. First of all, it must be remembered that "unjust enrichment" is a term of art. The law of restitution is not concerned to reverse all enrichments which appear unfair according to vaguely defined notions of "justice". Rather, it facilitates recovery only upon satisfaction of three conditions: (i) an enrichment, (ii) "at the plaintiff's expense", (iii) as a result of a recognised unjust factor.[122] While able to prove that the enterprise received an enrichment at his expense, the customer in the present scenario can not establish an unjust factor. The most promising possibility, mistake, is inapplicable because the customer's intention in benefiting the enterprise was not vitiated by error. Rather, as explained below[123], in complying with the global price, he simply responded to the market.[124]

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118 Conceivably, an action might lie between the third party and the government. However, given that a levy often will be widely dispersed among many taxpayers who individually pay very little, one is tempted to agree with Mancini AG that it was "difficult to imagine a proposition which is more implausible in practice and more venturesome in theory": *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595 at 3627.

119 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662.

120 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 384-6. See also Birks, P, above n36 and Bryan, M, above n36.

121 Occasionally, it is argued that the defence of passing on is relevant only if an expense is shifted in the form of itemised charges. That position is unprincipled and properly has been rejected by Australian courts in the context of statutory passing on defences: See eg, *Otto Australia Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 477 at 480 per Sheppard J.

122 *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-7 per Deane J.

123 Text accompanying nn 130-2.

124 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595 at 3627 per Mancini AG; cf *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 119 ALR 577 at 591 per Brennan J, and at 602 per Dawson and Toohey JJ; *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 90-1 per Brennan J. Nor would the concept of failure of consideration apply. In the circumstances, the customer did not premise his intention to benefit the enterprise upon the fulfillment of a condition — ie the eventual extinguishment of a tax liability. Again, he merely responded to the market price.

Second, with respect to events occurring in an open market (and even for some events occurring in regulated markets), it can not be known how much of the customer's purchase price was referable to the tax wrongly imposed upon the enterprise by the government. As explained above[125], the determination of price involves a complex calculation in which individual components (such as tax) seldom can be isolated. Accordingly, even assuming that a customer can prove an unjust factor, he can not establish how much of his global payment is referable to his restitutionary claim. And, of course, the enterprise clearly should be entitled to retain that (indeterminate) part of the purchase price that reflects costing factors other than the tax.

C. *Passing On: Itemised Charges*

The third, and most problematic, situation typically arises when a government imposes a tax upon an enterprise which, in turn, passes (or attempts to pass) the economic burden of the levy on to its customer as part of an itemised charge. The bill presented by the business to the customer specifies the tax as a distinct component of the global price. According to the analysis proposed above, the enterprise should enjoy recovery from the government. Should the customer enjoy recovery from the enterprise? The first and second elements of the principle of unjust enrichment obviously are met; the business received an enrichment at the customer's expense. Moreover, itemisation of the enterprise's price arguably supports recognition of an unjust factor. Conceivably, the customer might be entitled to show that his payment was caused by his mistaken belief that a tax liability was owed to the government; if he had known that the levy was not properly due, he would have refused to pay that portion of the enterprise's price that purportedly was referable to the tax.[126]

There are, however, reasons of policy and doctrine for resisting such a proposal. First, as noted above, it often is impossible to determine accurately how much of a purchase price actually is referable to an apparent tax and hence properly is the subject of a restitutionary claim. The itemisation of a bill is of less assistance than might be assumed. As the United States Supreme Court has noted, it typically is impossible for a company to identify the extent to which particular costs are reflected in the price of a product or service.[127] Generally, factors such as tax simply are considered with a view to determining, in all of the circumstances, how much the market will bear.[128]

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125 Above at text accompanying n94.

126 Similarly, itemisation arguably might support the unjust factor of failure of consideration. However, that proposal is subject to the same counter-arguments presented in the text with respect to the unjust factor of mistake.

127 *Hanover Shoe v United Shoe Machinery Corp* 392 US 481 at 491 (1968). As previously noted, the situation is considerably less complex if events occur in a regulated market or under "cost-plus" contracts: above at n94.

128 For example, an enterprise simultaneously faced with both an apparent 5% tax and a downturn in the economy might determine, having regard to all of the circumstances, that the market is able to sustain only a 2% rise in price. For convenience, it might present 5% of its price as being referable to the tax, even though, in fact, it attempts to shift a burden of only 2% and is willing to bear a 3% loss of profits. If a customer is able to recover 5% of his purchase price in a restitutionary action, he will reap a 3% gain.

Second, application of the notion of mistake in such circumstances seems artificially to prefer form over substance. There are many reasons why a business may or may not itemise its bills. Granted, an enterprise may do so because it wishes to pass on the economic burden of a levy to which it purportedly is subject. However, it alternatively may do so, for example, simply because it is under the control of the type of person who is inclined to itemisation (of the prices his company charges, of the household tasks he intends to perform during his weekend, of the groceries he intends to purchase for dinner). Should an enterprise be subject to a restitutionary claim, while its competitor is not, merely because the former employs a meticulous manager? Similarly, if the same enterprise presents an itemised bill to one customer, but, being too hurried on another occasion to list the various pricing components, presents another with a composite bill, should the former, but not the latter, purchaser enjoy a right of action?

Third, recognition of such a claim potentially could entail an unwieldy chain of litigation. If a customer is permitted recovery against an enterprise, there seems no reason in logic (assuming proof of the elements of the principle of unjust enrichment) why a sub-purchaser could not have an action against the customer, a sub-sub-purchaser an action against the sub-purchaser, and so on.[129] While perhaps not conclusive in itself, that prospect certainly demands attention given that the chain of litigation seldom might deliver eventual relief to the parties ultimately bearing the burden of the initial demand. As a cost is passed down a chain of purchasers, it is apt to become increasingly widely dispersed; as each purchaser in turn becomes a vendor, he is apt to sell to several new purchasers, and so on. At some point, individual purchasers will have little at stake and simply will allow unjust enrichments to lie where they fall. However, before the chain of litigation comes to an end, it may generate considerable costs for the legal system.

Finally, setting aside considerations of policy and practice, there are reasons of doctrine for doubting that a restitutionary action of the type under examination properly lies in a significant number of cases. A mere coincidence of: (i) an enrichment to the defendant that is gained at the plaintiff's expense, and (ii) an unjust factor, does not support the availability of relief. The law of restitution intervenes only if it is established on a balance of probabilities that the former event is causally related to the latter event.[130] While the matter has received surprisingly little attention in the courts, it seems clear that the issue is to be determined on the basis of a "but-for" test.[131] If, "but-for" the unjust factor in question, the claimant would not have conferred the enrichment, the test is satisfied and relief may follow; if, "but-for" the unjust factor, the claimant nevertheless would have conferred the enrichment, the test is not satisfied and relief should not follow.

Whether presented with a global bill or an itemised bill, a customer usually simply responds to a market price when making payment.[132] Consider,

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129 *Esso Australia Resources Ltd v Gas and Fuel Corporation* [1993] 2 VR 99 at 108 per Gobbo J; *Illinois Brick Co v Illinois* 431 US 720 at 745 (1971) (USSC).

130 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378.

131 See eg, *Holt v Markham* [1923] 1 KB 504 (CA); Burrows, A, Above n1 at 23-7.

132 Occasionally, it may be otherwise. For example, a purchaser under a "cost-plus" contract

by way of illustration, a situation in which a purchaser buys a bag of sugar from a grocer for a total price of $25. For whatever reason, the grocer itemises the bill as follows: $20 as wholesale costs, $3 for operating costs, $1 for profit and $1 for a state tax supposedly affecting sellers of sugar. Subsequently it is discovered that while validly enacted, the tax was mis-applied. Accordingly, the vendor is entitled to recover as against the government on the basis of vitiation of intention. "But-for" the mistaken belief that she was subject to a tax demand, the vendor certainly would not have enriched the state; aside from the apparent levy, there simply was no reason for her to make payment. The same analysis, however, probably does not hold true as between the vendor and the purchaser. "But-for" the fact that the bill was itemised (purportedly) to reflect that $1 of the price was referable to the supposed tax, it is likely that the customer nevertheless would have paid the total amount of $25. He wanted the sugar, he was informed of the market price, and he chose to meet the vendor's demand. Particularly in light of the earlier discussion regarding the difficulty of isolating and measuring individual pricing variables, it seems doubtful that purchasers generally place much stock in the itemisation of bills.

(i) Forms of Relief

If the purchaser under an itemised bill does enjoy a right of recovery, it must be asked whether the applicable form of relief is personal or proprietary. On that point, the following comments necessarily are brief and inconclusive. The debate regarding appropriate forms of relief constitutes one of the major challenges facing the law of restitution; resolution of that issue certainly lies beyond the scope of this paper.[133]

In the present context, the possibility of proprietary relief derives largely from two decisions. The first is that of Learned Hand J in *East 123 Fifty-fourth Street Inc v United States*.[134] The plaintiff restaurant incorrectly was classified as a "cabaret" and hence purportedly became subject to a surcharge with respect to amounts it received for admissions, refreshments, services and merchandise. It sought to shift the burden of the tax on to its customers by means of an additional entry on its itemised bills. In time, it was determined that the plaintiff in fact was not a "cabaret" and therefore was not subject to the levy.[135] It brought a restitutionary action which the government sought to

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may legitimately argue that he responded to a price only because he accepted the validity of the underlying itemisation.

133 See generally Birks, P, "Equity in the Modern Law" (1996) 26 *UWA LR* 1 at 79-97; Gummow, W M C, "Unjust Enrichment, Restitution and Proprietary Remedies" in Finn, P D (ed), *Essays On Restitution* (1990) 47; Goode, R "Property and Unjust Enrichment" in Burrows, A, *Essays On the Law of Restitution* (1991) at 215.

134 157 F (2d) 68 (1946).

135 The majority of the Second Circuit Court of Appeal rejected the passing on defence outright and allowed the plaintiff's restitutionary claim. According to Chase J (Swan J concurring), the issue simply was who, as between the restaurant and the government, was entitled to the amounts illegally collected. The fact that the plaintiff (purportedly) had shifted the burden of the tax on to its customers was considered insufficient to tip the equities in the government's favour. The majority reasoned that the customers, when presented with the plaintiff's itemised bills, were free to either accept or reject the charge; if they chose the former, their payments became the property of the restaurant. Accordingly, the plaintiff was held entitled to recover on the simple basis that it had paid *its* money to the government.

resist on the basis of the passing on defence. In a celebrated dissent, Learned Hand J considered the bills' itemisation to be of determinative significance with respect to that plea. If (as was not proven) the plaintiff simply had charged a global price, the guests would have had no legally recognisable interest in the judgment money and there would be no equities militating against the restaurant's recovery. However, because the tax had been passed on in the form of itemised bills,

> the [restaurant] collected the money under what the guests must have understood to be a statement that it was obliged to pay the tax, and that [as] it meant to do so, the money was charged with a constructive trust certainly so long as it remained in the [restaurant's] hands. When the [restaurant], having taken the money charged with the constructive trust, paid it to the [government], a claim against the [government] at once arose in [the restaurant's] favour, based upon the [government's] unlawful exaction. That claim was certainly a substitute for the money whose payment created it and if a constructive trust attached to the money, the same trust attached to the claim.[136]

Accordingly, as the customers were the true beneficial owners of the initial payments (and hence any judgment money), the restaurant would be permitted relief only if it established that the individual customers were identifiable in a manner that facilitated refunds.[137] On the facts of the case, such proof obviously was impossible and relief accordingly was denied to the restaurant.

To similar effect is Mason CJ's decision in *Royal Insurance*. While the Chief Justice agreed with the majority that the insurer's purported act of passing on was irrelevant in theory and hence no bar to recovery, he also believed that a somewhat different analysis would have been required if (as was not established in *Royal Insurance*) the insurer had itemised its bills to its customers so as to identify the supposed tax as a separate item of charge. Drawing upon Hand J's opinion in *East 123 Fifty-fourth Street*, Mason CJ suggested in dicta that a business in such circumstances takes payment from its customers on constructive trust.

> The tax so received was received by the owner as a fiduciary on the footing that it would apply the money in payment of the tax. If that purpose failed or could not be effected because the tax was not payable then the owner held the moneys for the benefit of the patrons who paid the moneys. The same result would ensue if the owner recovered the payments from the revenue made as and for tax which was not payable.[138]

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136 *East 123 Fifty-fourth Street Inc v United States* 157 F 2d 68 at 70-1 (1946).

137 Other American courts have required proof not merely that individual customers were identifiable, but also that proper distribution of judgment money would occur: See eg, *Decorative Carpets Inc v State Board of Equalization* 58 Cal 2d 252 (1962); *Standard Oil Co v Bollinger (No 2)* 180 NE 396 (1932); *Benzoline Motor Fuel Co v Bollinger* 187 NE 657 (1933); *Indian Motorcycle Co v United States* 9 F Supp 608 (1935).

138 (1994) 182 CLR 51 at 77-8. Mason CJ further suggested that the patrons in such a situation would have a restitutionary claim against the Revenue, so long as it retained the payments received from the business. Cf *Javor v State Board of Equalization* 527 P 2d 1153 (1974): if patrons statutorily are precluded from claiming against state, a business may be compellable to claim on their behalf.

While Mason CJ accordingly believed that the business should recover as against the state on the basis that the former had legal title to the money prior to making payment to the latter, he also indicated that the business,

> should be required to satisfy the court, by undertakings or other means, that it will distribute the moneys to the patrons from whom they were collected, thereby recognising the beneficial ownership of those moneys.[139]

Mason CJ's judgment raises a number of difficult issues. In this paper, it is possible to address them only briefly. First, while the precise role of the constructive trust in the Australian law of restitution remains somewhat ill-defined[140], it clearly is not (yet) as robust as its counter-part in the United States. It therefore is worrisome that Mason CJ's endorsement of Hand J's opinion was not supported by thorough analysis. The discussion of constructive trusts in *Royal Insurance* unfortunately leaves one with the impression that the Chief Justice simply adopted the reasoning underlying the dissent in *East 123 Fifty-fourth Street* without fully considering the compatibility of the American and Australian jurisprudence.

Second, Mason CJ's opinion is of less practical significance than might be assumed. If, in the context of itemised bills, a business is permitted recovery only upon proof that judgment moneys will be re-distributed to the appropriate customers, restitutionary relief seldom will lie. Unless able to retain recovery for itself, how often will an enterprise institute proceedings? Occasionally, a business might enter into an agreement with its customers under which it receives either payment or goodwill in exchange for its efforts.[141] Often, however, such a bargain is not feasible. Certainly that is true, for example, if an enterprise passes (or attempts to pass) the burden of a tax on to a great many patrons, each of whom suffers little expense.[142]

Third, if relief is denied for want of proof of distribution, the policy concerns discussed above could be violated. In some circumstances, the government thereby would be permitted retention of taxes collected under ultra vires demands or under duress.

Finally, if a trust relationship exists between the business and its customers in the type of situation under consideration, it is not entirely clear why a trust relationship does not similarly exist between the government and the business. Just as the customers enriched the business in the belief that their payments would be used to discharge a tax liability, so too the business enriched the government in the belief that its payment would be used to discharge a tax liability. Obviously, that analysis quickly resolves itself into a question (far

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139 (1994) 182 CLR 51 at 78. While Mason CJ purported to distinguish Hand J's opinion on that point, there seems little relevant difference between: (i) recognising a claim to restitutionary relief, but premising recovery upon proof that re-distribution will occur, and (ii) denying a claim in the absence of proof that re-distribution could occur.

140 See eg, *Muschinski v Dodds* (1985) 160 CLR 583 at 616-7 per Deane J; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 146-9 per Mason CJ, Wilson and Deane JJ, and 151-5 per Toohey J; *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41 at 124-5 per Deane J.

141 See eg, *Standard Oil Co v Bollinger* 180 NE 396 (1932).

142 In such circumstances, it is no answer to allow customers to compel an enterprise to institute proceedings on their behalf, as has occurred in some American jurisdictions: *Javor v State Board of Equalization* 527 P 2d 1153 (1974). Notwithstanding such a law, patrons will lack sufficient motivation to vindicate their rights.

beyond the scope of this paper) as to whether restitutionary relief generally should be proprietary, rather than personal.

6. *Concluding Remarks*

In *Royal Insurance*, the High Court rejected the passing on defence on theoretical grounds. In contrast, it has been argued in this paper that the defence should have been accepted in theory, but rejected on policy and practical grounds. Under either analysis, of course, the end result is the same — ie the defendant is unable to resist a claim for restitution. Why, then, does it matter which approach the law adopts?

The answer to that question stems from the fact that the passing on concept is significant not only as a potential defence, but also for its ability to reveal the structure and meaning of the second element of the concept of unjust enrichment. What does it mean to say that the defendant received an enrichment "at the plaintiff's expense"? While an intuitive response provides an adequate reply in most circumstances, the matter is not nearly as clear as might first seem. Certainly, the High Court has experienced considerable difficulties in answering that question.[143] Those difficulties might have been avoided if, following the direction provided by the passing on debate, attention had been focused upon a determination of whether or not the plaintiff suffered an ultimate economic loss correlative to the defendant's gain. The benefits of such an approach are varied. Most simply, if presented with an inferior approach and a superior approach, the latter inherently is preferable. Furthermore, adoption of the proposed approach would inhibit the wrongful extension of the cause of action in unjust enrichment to individuals who suffer neither an immediate, nor an ultimate, economic loss.[144] Finally, and perhaps most importantly, a focus upon ultimate economic losses would inform a basic set of rules guiding the quantification of restitutionary relief. As noted above[145], while the value of money remains constant, the value of goods or services may vary significantly from one person to another. For example, provision of a service may entail great cost to the supplier, but benefit the recipient only marginally. Alternatively, a service may be supplied at little cost, but constitute an enormous enrichment. As a general rule, the measure of restitutionary relief should be limited to the lesser of the plaintiff's loss and the defendant's gain; the plaintiff should not be permitted to reap a windfall and the defendant should not be held liable for an amount in excess of his actual enrichment.[146] The issue of quantification, however, has received too little attention and the basic rule frequently is ignored without reason.[147] It may well be that departures from the general rule occasionally are justified. However, avoidance of error demands a clear analysis beginning with a proper understanding of the concept of "the plaintiff's expense".

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143 See eg, McInnes, M, "The Structure and Challenges of Unjust Enrichment" in McInnes, M (ed), *Restitution: Developments in Unjust Enrichment* (1996) at 17; McInnes, M, "The Plaintiff's Expense in Restitution: Difficulties in the High Court" (1995) 23 *ABLR* 472.

144 See *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd* (1988) 165 CLR 107 at 176 per Gaudron J, cf 145-6 per Deane J.

145 Text accompanying n35.

146 Burrows, A, above n1 at 19-20.

147 See eg, Mason, K, and Carter, J W, above n1 at 568-81; Byrne, D, above n38.