Outcome Responsibility and Autonomy: Rationalising the Change of Position Defence in Mistaken Payment Claims

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Abstract

Three decades on from its decisive advent in England and Australia, the change of position defence has become part of the fabric of the law of restitution. Yet its rationale — long neglected but increasingly scrutinised — remains a matter of debate. This article seeks to advance the debate by analysing possible rationales for the defence as it applies to the paradigm case of restitution, mistaken payments. After exposing difficulties with many of the candidates that have hitherto attracted support, this article advances two rationales better suited to facilitate principled development of the defence: outcome responsibility, and reciprocal recognition of decisional autonomy. Both rationales put the defence on firm normative foundations, align with its present contours and suggest areas for further development.

I Introduction

Suppose that a claimant mistakenly pays a defendant $1,000. She (the claimant)[1] is prima facie entitled to restitution of $1,000 from the defendant.[2] Suppose now that the defendant, believing himself entitled to the mistaken payment, spends $500 on a lavish meal he would not otherwise have purchased. In Australia, as in most common

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1 For convenience, this article refers to the claimant by feminine pronouns and to the defendant by masculine pronouns.

2 *Kelly v Solari* (1841) 152 ER 24.

law jurisdictions,[3] the defendant may invoke the change of position defence to reduce his liability to the claimant by $500.[4] This article investigates why: that is, the rationale for the change of position defence as it applies to mistaken payment claims.

While its historical roots trace back at least as far as *Moses v Macferlan*,[5] formal recognition of the defence came only three decades ago with the decisions, in quick succession, of *Lipkin Gorman v Karpnale* ('*Lipkin Gorman*')[6] in England and *David Securities v Commonwealth Bank of Australia* ('*David Securities*') in Australia.[7] Judicial explication since has been relatively sparse. The High Court of Australia last addressed the defence in detail a decade ago, in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* ('*Hills*').[8] Important questions about its operation remain.[9] There is, accordingly, much work for a rationale to do in facilitating the principled development of the defence,[10] which this article understands as the end to which rationales are most valuably put.

In achieving that end, a rationale may have broader implications for the law of restitution, particularly given the strategy Lord Goff articulated in *Lipkin Gorman* of a liberalised right to restitution tempered by defences.[11] Already the defence has contributed to the demise of the mistake of law bar,[12] and the overruling of *Sinclair*

3 In England, see *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 695–6 (Goff J); *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 AC 548 ('*Lipkin Gorman*'). In the United States, see American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 65 ('*Third Restatement*'). In Canada, see *Storthoaks (Rural Municipality) v Mobil Oil Canada Ltd* [1976] 2 SCR 147. In Singapore, see *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836; *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543, 568 [59] (Chan Seng Onn J).

4 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 ('*David Securities*'); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 ('*Hills*'); Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 2–3.

5 *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676, 679 (Lord Mansfield). See Eleanor Makeig, 'Money Had and Received – and Retained? The Role of Retention at Notice for Personal Common Law Liability' (2020) 94(11) *Australian Law Journal* 855, 865–6.

6 *Lipkin Gorman* (n 3).

7 *David Securities* (n 4) 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). Limited statutory forms of the defence already existed, for example the *Property Law Act 1969* (WA) s 125 and the *Trustees Act 1962* (WA) s 65(8). Embryonic murmurs of the defence had also emerged in earlier Australian decisions, especially *Australia New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ) and *Commercial Bank of Australia v Ltd v Younis* [1979] 1 NSWLR 444, 450 (Hope JA, Reynolds and Hutley JJA agreeing). Cf *David Securities* (n 4) 384–5 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis, 4th ed, 2021) 962 [2404].

8 *Hills* (n 4).

9 See Justice James Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92(3) *Boston University Law Review* 1009, 1015–17; Elise Bant, 'Change of Position: Outstanding Issues' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 133 ('Outstanding Issues').

10 Edelman (n 9) 1017.

11 *Lipkin Gorman* (n 3) 581 (Lord Goff).

12 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 373 ('*Kleinwort Benson*').

v Brougham;[13] it may yet inform questions about other restitutionary defences such as estoppel,[14] and the very foundations of restitutionary liability.[15]

Some judicial attention has been given to the rationale for the defence. The leading contender that emerges from the cases is 'inequitability', which formed the crux of one of Lord Goff's seminal formulations of the defence in *Lipkin Gorman*[16] and found repeated support in *Hills*.[17] This rationale suffers the critical impediment, however, of being too abstract to guide meaningfully the contest between the innocent and often evenly-matched parties in a change of position case. Moreover, other rationales that have attracted judicial and academic favour — disenrichment, security of receipts, loss allocation, and that the defendant should not be left unjustifiably worse off by restitution (the 'no worse off' rationale) — either work from a faulty premise or do not alone represent a complete rationale for the defence.

This article identifies two better rationales. The first hinges on Honoré's theory of 'outcome responsibility'.[18] It justifies the defence on the basis that the claimant causes any detriment the defendant would suffer if, following a change of position, he were required to make restitution. The second rationale is autonomy. It combines aspects of existing autonomy-based theories to justify the defence on the basis that in bringing her claim, which is arguably designed to protect her autonomy in decision-making ('decisional' autonomy), the claimant must reciprocally recognise the defendant's decisional autonomy.

Both rationales are, it will be argued, normatively persuasive, and neither is inconsistent with the existing case law. Both are therefore good rationales on the criteria this article adopts. Their symmetry with the cases implies that the two rationales coexist in harmony, and it will be seen that in some respects they supplement one another. However, their precise interaction and implications for the defence are matters beyond the scope of this article.

This article proceeds in three parts. Part II lays the groundwork for the substantive arguments, articulating the understanding of 'rationales' and concomitant methodology adopted and explaining its concern here only with the application of the defence to mistaken payments. Part III surveys and debunks inequitability, disenrichment, security of receipts, loss allocation, and the no worse off rationale. Part IV canvasses outcome responsibility and decisional autonomy, concluding that both are better suited to facilitate principled development of the defence in its application to mistaken payment claims.

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13 *Sinclair v Brougham* [1914] AC 398.

14 See, eg, *Hills* (n 4) 625 [156] (Gageler J); Bant, 'Outstanding Issues' (n 9) 161; Ross Grantham, 'Change of Position-Based Defences' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing, 2020) 418, 434.

15 Graham Virgo, 'Change of Position: The Importance of Being Principled' (2005) 13 *Restitution Law Review* 34, 35.

16 *Lipkin Gorman* (n 3) 580 (Lord Goff).

17 *Hills* (n 4) 568 [1], 577 [17], 580 [23], 583 [27] (French CJ), 591 [57], 594 [69], 602 [96] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 620 [146] (Gageler J).

18 See, eg, Tony Honoré, *Responsibility and Fault* (Hart Publishing, 1999); Tony Honoré, 'Appreciations and Responses' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart Publishing, 2001) 219.

II Framing the Inquiry

A *On Rationales*

This article proceeds on an understanding that a rationale for change of position is best directed to facilitating the principled development of the defence.[19] The viability of a rationale to this end raises two well-worn sites of tension that guide the criteria to be applied in identifying an appropriate rationale: the first, between a rationale's consistency with existing law and its normative persuasiveness; the second, between abstractness and specificity.

1 *Consistency and Persuasiveness*

In the first place, a rationale cannot influence the law unless judges recognise and apply it. This is unlikely, given the preference of the common law for incremental development, if a rationale produces a model of the defence starkly inconsistent with the corpus of cases.[20] However, to treat consistency as the pivotal feature of a rationale risks a purely descriptive account. That would not facilitate development, because little if anything could be drawn from the rationale to resolve issues and inconsistencies left extant in the jurisprudence.[21]

To resolve those points, a rationale must identify reasons that underlie, and can be extrapolated beyond the confines of, the cases. That is 'explanation': identifying the actual reasons that the defence exists as it does, without inquiring (unlike the task of 'justification') into whether those reasons are normatively good.[22] But in Gardner's words, attempts to explain legal norms rationally (that is, by reference to reasons) 'cannot but be concerned with the justifiability or defensibility of those norms'.[23] A number of explanations might feasibly underlie a doctrine, particularly where, as in the law of restitution, inconsistent authorities exist. The choice of one explanation without an inquiry into its normative soundness is arbitrary and risks undermining the entire endeavour. By contrast, justifications support 'coherence'[24] and 'theoretical stability';[25] they allow bad cases to be jettisoned on a firm, defensible basis.

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19 Graham Virgo, 'A Taxonomy of Defences in Restitution' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar, 2020) 398, 398; Edelman (n 9) 1010; Grantham, 'Change of Position-Based Defences' (n 14) 418–19; Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 4th ed, 2024) 753.

20 Robert Reed, 'Theory and Practice' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 309, 311.

21 See generally Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998) chs 2–3. See also Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford University Press, 2016) 7.

22 See Joseph Raz, *From Normativity to Responsibility* (Oxford University Press, 2011) 16.

23 John Gardner, 'Backwards and Forwards with Tort Law' in *Torts and Other Wrongs* (Oxford University Press, 2019) 103, 110. See also David Winterton, *Money Awards in Contract* (Hart Publishing, 2015) 17–18. Cf Andy Summers, *Mitigation in the Law of Damages* (Oxford University Press, 2024) xli–xlii.

24 Webb (n 21) 7.

25 Ross Grantham and Charles Rickett, 'Unjust Enrichment — Reason, Place and Content' in CEF Rickett and Ross Grantham, *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 5, 8.

It remains true, however, that a rationale is unlikely to influence the law if it requires a great departure from the law's current state. A normatively persuasive rationale that is also consistent with the cases is, accordingly, a better rationale.

This stance might be criticised as a 'cocktail' of philosophy and law that risks speaking to neither philosophers nor judges.[26] But that criticism could be levelled against any of what have been termed 'interpretive' theories, which mix explanation and justification in seeking to reveal an 'intelligible order' within a body of case law by reference to broader normative considerations.[27] While questions regarding the appropriate balance between theory and doctrine within interpretive scholarship remain,[28] they may be insoluble. As such, this article requires a rationale at a minimum to provide a normatively persuasive justification for the defence and, as between possible justifications, prefers those consistent with the cases.

2 *Abstractness and Specificity*

To facilitate principled development, a rationale cannot leave unbridled discretion. This raises the second tension, manifest in *Hills*, between 'the dangers of a diffuse discretion and the restrictions of rigid rules'.[29] Whereas the *Hills* plurality excoriated attempts to 'chart [the] metes and bounds' of change of position (and legal doctrines generally),[30] French CJ stressed the importance of particularised 'criteria'[31] to avoid 'a distinct tribunal in [each judge's] breast'.[32]

The question what balance ought generally to be struck dwarfs this article. In the specific context of change of position, however, there is particular cause to be wary of wide discretion, and thus of wide rationales. The parties are both innocent and, ordinarily, their merits relatively equal.[33] The defence is thereby vulnerable to 'idiosyncratic notions of palm-tree justice':[34] unconstrained by principle, judges could choose any marginal circumstance they thought ought to make the difference.

Hamilton LJ raised this concern in rejecting the defence almost 80 years before *Lipkin Gorman*, exhorting that 'we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice between man and man"'.[35] Lord Goff echoed this sentiment in *Lipkin Gorman* and stressed the imperative that 'where recovery is denied, it is denied on

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26 Frederick Wilmot-Smith, 'Reasons? For *Restitution*?' (2016) 79(6) *Modern Law Review* 1116, 1127.

27 Stephen A Smith, *Contract Theory* (Clarendon, 2004) 5. Examples of interpretive theories are collected in Steve Hedley, 'The Shock of the Old: Interpretivism in Obligations' in CEF Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 205, 205 n 1.

28 See generally Wilmot-Smith, 'Reasons? For *Restitution*?' (n 26); Beever and Rickett (n 26) 321.

29 *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663, [32] (Mummery LJ) ('*Commerzbank*').

30 *Hills* (n 4) 603 [98] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

31 Ibid 582 [25] (French CJ).

32 Ibid, quoting *Perre v Apand Pty Ltd* (1998) 198 CLR 180, 211 (McHugh J).

33 Grantham, 'Change of Position-Based Defences' (n 14) 418–19, 424; Ross Grantham, 'Allocating the Costs of Making Restitution: Change of Position' in Kit Barker and Ross Grantham (eds), *Apportionment in Private Law* (Hart Publishing, 2018) 197, 197 ('Allocating the Costs of Making Restitution').

34 Edelman (n 9) 1011.

35 *Baylis v Bishop of London* [1913] 1 Ch 127, 140 (Hamilton LJ).

the basis of legal principle'.[36] This concern has, however, receded from judicial view. The defence has been interpreted as 'a broadly stated concept of practical justice',[37] and a trend in the case law has emerged toward unprincipled 'individualised justice'.[38]

And yet, Hamilton LJ's concern remains apposite. Consider *Hills*, for example.[39] Both the claimant (AFSL) and the defendants (Hills and Bosch) were innocent victims of a fraudulent scheme orchestrated by a third party (Skarzynski). AFSL paid more than $500,000 to Hills and Bosch in the mistaken belief, created by invoices Skarzynski had forged, that it was thereby acquiring equipment. The equipment did not actually exist. At Skaryznski's urging, Hills and Bosch treated the payments by AFSL as extinguishing longstanding debts they were owed by Skarzynski's companies. Both defendants thereafter resumed their previously restricted trading relationships with Skarzynski's companies. Hills also abstained from seeking security and commencing recovery proceedings for the debts; Bosch caused to be set aside default judgments and garnishee orders it had already obtained in respect of the debts it was owed. Neither defendant incurred any specific items of expenditure in reliance on the mistaken payments.

One judge might consider determinative, as the trial judge did, that the opportunities Hills forwent to seek security and take recovery action were speculative.[40] Another might consider, like each member of the High Court, that those lost opportunities were still valuable.[41] Yet another might consider the parties' relative fault to tip the balance;[42] another again the parties' relative financial positions and the consequent hardship they would suffer by having to make restitution.[43] Each of these considerations might properly have a place, either in the change of position defence or another. The problem, however, is the inconsistent selection of which considerations trump which. As *Hills*' factual matrix illustrates, that is liable to occur if discretion is too widely given, which raises a risk too of a weighing of the parties' equities at large — an exercise the plurality expressly disavowed.[44]

A rationale therefore needs sufficient content to avoid untethered judicial discretion. It need not and should not be algorithmic, supplying a precise calculus

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36 *Lipkin Gorman* (n 3) 578. See also *Philip Collins Ltd v Davis* [2000] 3 All ER 808, 827 (Jonathan Parker J) ('*Philip Collins v Davis*').

37 *Commerzbank* (n 29) [48] (Munby J).

38 Ross Grantham and Charles Rickett, 'A Normative Account of Defences to Restitutionary Liability' (2008) 67(1) *Cambridge Law Journal* 92, 125.

39 *Hills* (n 4).

40 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555, 565–6 [74]–[77] (Einstein J).

41 *Hills* (n 4) 583 [28] (French CJ), 626 [157] (Gageler J).

42 As is the case in New Zealand and arguably Canada: see respectively Paul F Dalkie, 'The Difficulty with a Concept of Relative Fault in Restitution' (2021) 17(1) *Otago Law Review* 143; Maziar Peihani, 'The Recovery of Mistaken Payments: Revisiting the Doctrine of Relative Fault' (2023) 101(2) *The Canadian Bar Review* 419, 436–8. Cf the position in England: *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, 207 [45] (Lords Bingham and Goff) ('*Dextra Bank*').

43 See, eg, *Menzies v Bennett* (NZ Supreme Court, Beattie J, 14 August 1969); Paul A Walker, 'Change of Position and Restitution for Wrongs: "Ne'er the Twain Shall Meet"?' (2009) 33(1) *Melbourne University Law Review* 235, 268.

44 *Hills* (n 4) 594 [69] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

for every case. But it should provide a framework that facilitates consistent adjudication of the defence.

As such, this article adopts three criteria for assessing the viability of a rationale. First, a rationale cannot be so abstract that it does not meaningfully constrain judicial discretion. Second, a rationale must provide a normative justification for the defence. Third, consistency or 'fit' with the existing case law is a desirable characteristic.

Four features of the defence are relevant for assessing consistency:

(i) the defendant must change his position in good faith,[45] in that he must not subjectively know of the mistake[46] and must objectively have 'a foundation of information'[47] (something 'more than the fact of receipt standing alone'),[48] which is 'obtained in connection with the receipt' and sufficient to justify acting on the basis of it;[49]

(ii) the defendant's change of position must, at least under Australian law, be irreversible[50] (that is, 'legally or practically irreversible' or 'significant[ly]' difficult to reverse);[51]

(iii) the change of position need not result in quantifiable detriment, but if it does, the defence only operates *pro tanto* to the extent of that detriment;[52] and

(iv) the change of position may occur in anticipation of the mistaken transfer.[53]

45 *David Securities* (n 4) 385–6 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 406 (Dawson J); *Lipkin Gorman* (n 3) 579–80 (Lord Goff).

46 *Automotive Holdings Group Ltd v Prime Constructions Australia Pty Ltd* [2018] NSWSC 1960, [259] (Slattery J) ('*Automotive Holdings*').

47 *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) 76 NSWLR 195, 224 [139] (Allsop P, Campbell JA and Handley AJA agreeing) ('*Perpetual Trustees v Heperu*').

48 *State Bank of New South Wales Ltd v Swiss Bank Corporation* (1995) 39 NSWLR 350, 356 (Priestley, Handley and Sheller JJA).

49 *Perpetual Trustees Heperu* (n 47) 224 [139] (Allsop P; Campbell JA and Handley AJA agreeing), cited in *Automotive Holdings* (n 46) [257] (Slattery J).

50 *Hills* (n 4) 580–2 [23]–[25] (French CJ), 602 [95], 604 [102] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 ('*Alpha Wealth*'); *Redland City Council v Kozik* (2024) 98 ALJR 544, 592 [241] (Gordon, Edelman and Steward JJ). Cf Edelman (n 9) 1019.

51 *Alpha Wealth* (n 50) 638 [202] (Buss JA, Steytler JA agreeing); *Point Bay Developments Pty Ltd v Perkins (WA) Pty Ltd* (2021) 9 QR 330, 351 [75] (Flanagan J).

52 *Hills* (n 4) 569 [4], 577–80 [17]–[21] (French CJ), 598–9 [84], 600 [88] (Hayne, Crennan, Kiefel, Bell, and Keane JJ), 622 [150], 625–6 [157]–[158] (Gageler J); *Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd* [2016] QCA 88, [61] (Atkinson J, McMurdo P and Mullins J agreeing).

53 Albeit this feature is still only supported by *obiter dicta* of various English and Australian courts beginning with *Dextra Bank* (n 42) 204 [38] (Lords Bingham and Goff), cited in *Alpha Wealth* (n 50) 601 [23] (Pullin JA), 640 [204] (Buss JA, Steytler JA agreeing); *Fitzsimons v Minister for Liquor Gaming and Racing (NSW)* [2008] NSWSC 782, [125] (McDougall J); *Robinson v Robinson* (2020) 102 NSWLR 1, 41 [200], 42 [204] (Ward JA). See also *Commonwealth Bank of Australia v Stephens* [2017] VSC 385, [521] (Sloss J).

B *Narrowing Focus to Mistaken Payments*

The spectrum of claims to which change of position may be a defence is unclear. Commentators disagree about whether that spectrum spans all kinds of restitutionary claims,[54] or only those based on unjust enrichment.[55] Even within unjust enrichment claims, difficulties arise in relation to certain unjust factors including the *Woolwich* principle,[56] duress,[57] undue influence[58] and failure of condition.[59] And even if its full applications were clear, Duncan Sheehan has recently claimed that the defence has a different rationale in its application to restitution for wrongs than to other cases.[60]

Pursuing a unitary rationale for the defence in its entirety is therefore a fraught enterprise. An appropriate salve, as a matter of both empirics and theory, is to narrow focus to mistaken payment claims.[61] Empirically, the defence has been applied 'almost exclusively' to such claims,[62] including in *David Securities* and *Hills*. And theoretically, those claims are the 'core' case to which the defence applies,[63] in keeping with their role as the paradigmatic case of restitution.[64]

This narrowing does not exclude the possibility that a rationale cultivated in the environment of the mistaken payment claim could apply equally to cases involving other unjust factors. Before that hypothesis can meaningfully be tested, however, a rationale must first be cultivated. It is thus prudent to begin from a paradigmatic case and, from there, to identify analogies or extrapolate to other categories of cases. As such, this article investigates the rationale for the defence only in its application to mistaken payments.

54 See, eg, Mason, Carter and Tolhurst (n 7) 969–70 [2410].

55 See, eg, Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 64–5.

56 Bant, 'Outstanding Issues' (n 9) 134 n 14.

57 See Bant, *The Change of Position Defence* (n 4) 195–204.

58 Ibid.

59 *Goss v Chilcott* [1996] AC 788, 799 (Lord Goff); *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549, affirming *Haugesund Kommune v Depfa ACS Bank* [2009] EWHC 2227 (Comm), [163]–[164] (Tomlinson J); Edelman (n 9) 1025; Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook, 2008) 11, 32.

60 Duncan Sheehan, 'The Scope and Rationale(s) of the Change of Position Defence' (2023) 74(2) *Northern Ireland Legal Quarterly* 269. Cf Walker (n 43) 253, 268.

61 Encompassing both physical and non-physical transfers of money. While those two cases might be liable to produce different issues (for example, whether the defendant physically received money might bear on whether any subsequent change of position occurred in good faith), those differences manifest at a factual level. This article therefore does not bifurcate these categories for the purposes of identifying the rationales for the defence.

62 Grantham, 'Change of Position-Based Defences' (n 14) 430.

63 Bant, *The Change of Position Defence* (n 4) 2–3. See also *Lipkin Gorman* (n 3) 580 (Lord Goff).

64 Dennis Klimchuk, 'Unjust Enrichment and the Forms of Justice' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing, 2020) 186, 187. Cf JE Penner, 'We All Make Mistakes: A "Duty of Virtue" Theory of Restitutionary Liability for Mistaken Payments' (2018) 81(2) *Modern Law Review* 222, 223.

C Symmetry with Rationale for Mistaken Payments Liability

If, as Lord Goff proclaimed, defences temper restitutionary liability,[65] one might expect a degree of symmetry between the reasons for imposing that liability and the reasons for relieving a defendant from it. Indeed, on one view (canvassed in Part III(E) below) that is true of the change of position defence. Both liability and defence are justified, so the argument runs, by the imperative that a defendant be left no worse off by making restitution. But as will be seen, that symmetry introduces a circuity and, in turn, begs the foundational question: why ought a defendant not be left worse off?

Conversely, one need look no further than limitation periods (for example) to recognise that defences often reflect extrinsic concerns to the liability which they relieve. Accordingly, this article does not require that a rationale for change of position be determined by, or necessarily consistent with, the rationale(s) that underpin mistaken payments liability.

III Previously-Proposed Rationales

A Inequitability

By a significant margin, the most judicially popular rationale for the defence is inequitability and its cognates, 'unconscionability' and 'injustice'.[66] In formulating the defence, Lord Goff said:

> At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.[67]

Each judgment in *Hills* adopted a version of this standard.[68] Inequitability is also central to statements of the defence in New Zealand,[69] the United States[70] and Canada.[71]

The critical difficulty inequitability faces as a rationale is that it is 'extremely abstract'.[72] What is 'inequitable' depends, as Lord Goff made clear, on all the

65 See above n 11.

66 Edelman and Bant suggest these terms are used interchangeably in the authorities: see Justice James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 332–3. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2004] QB 985, 1000 [149] (Clarke LJ); *National Westminster Bank plc v Somer International* [2002] 1 All ER 198, 210 [30] (Potter LJ).

67 *Lipkin Gorman* (n 3) 580 (Lord Goff).

68 *Hills* (n 4) 568 [1], 577 [17], 580 [23], 583 [27] (French CJ), 591 [57], 594 [69], 602 [96] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 620 [146] (Gageler J). See also *Alpha Wealth* (n 50) 638 [201] (Buss JA, Steytler JA agreeing).

69 *Property Law Act 2007* (NZ) s 74B; *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211, 220–1 (Henry J), 229–30 (Thomas J), 232–3 (Tipping J) ('*Waitaki*').

70 *Third Restatement* (n 3) § 65.

71 *Garland v Consumers' Gas Co Ltd* [2004] 1 SCR 629, 658–9 (Iacobucci J).

72 Edelman (n 8) 1010. See to more dramatic effect Gareth Jones, 'Some Thoughts on Change of Position' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 65, 79.

circumstances. Left untouched, it is vulnerable to inconsistent application — a grave ailment given the finely-balanced dynamics that change of position entails.

Of course, inequitability has not been left untouched. Principles (including those outlined in Part II(A)) have developed to ensure that the discretion is not 'at large'.[73] However, two points weaken the force of this observation. First, courts have still interpreted Lord Goff's formulation 'as if it were indeed set in stone'.[74] Applying inequitability directly in this way, without stating any principles to elucidate when restitution is inequitable, produces decisions that can be confined to their own facts. That frustrates Lord Goff's stated intention that the defence develop on a case-by-case basis.[75]

Second, the abstractness of inequitability means inconsistent principles might conceivably be — and have been — accommodated beneath it. One manifestation is the confusion under Australian law as to whether the defence is 'narrow' or 'wide'.[76] The 'narrow' version requires that the defendant rely on the enrichment in changing his position, and so limits the defence to 'reliance-based' or 'defendant-instigated' changes of position.[77] By contrast, the 'wide' version requires only some causal link, not necessarily reliance, between the enrichment and the change of position. It encompasses 'independent'[78] or 'non-participatory'[79] changes of position, the paradigmatic cases of which involve the spontaneous theft, destruction or devaluation of an enrichment without any action on the defendant's part (as, for example, where mistakenly gifted shares become worthless upon a company's demise).[80]

The wide view has been 'strongly' affirmed in England,[81] where inequitability is also the touchstone of the defence. Clearly, then, inequitability is capable of accommodating independent changes of position.[82] In *David Securities*, however, the 'central element' of the defence was said to be 'detriment on the *faith*

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73 *Hills* (n 4) 594 [69] (Hayne, Crennan, Kiefel, Bell and Keane JJ); Edelman (n 9) 1010. See also Justice WMC Gummow, '*Moses v Macferlan*: 250 Years On' (2010) 84(11) *Australian Law Journal* 756, 760.

74 Jones (n 72) 79.

75 *Lipkin Gorman* (n 3) 580 (Lord Goff).

76 *Alpha Wealth* (n 50) 639–40 [203] (Buss JA, Steytler JA agreeing); Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 528–30.

77 Bant, 'Outstanding Issues' (n 9) 153.

78 Ibid 151.

79 Mason, Carter and Tolhurst (n 7) 982 [2422].

80 Bant labels the narrow/wide distinction a 'false dichotomy'. In her view, reliance is a convenient, not exclusive, label for causation in circumstances where, as in reliance-based change of position cases, a party has taken positive action: Elise Bant, 'Causation and Scope of Liability in Unjust Enrichment' (2009) 17 *Restitution Law Review* 60, 75; Bant, 'Outstanding Issues' (n 9) 152–5. But this assumes that there is no other reason for limiting the relevant causal concept to reliance. As will be seen, both outcome responsibility and decisional autonomy supply such a reason.

81 Bant, 'Outstanding Issues' (n 9) 151. There is also some support for this position in New Zealand (see *Waitaki* (n 69)) in circumstances where statutory forms of the defence expressly require reliance: *Property Law Act 2007* (NZ) (n 69) s 74B; *Companies Act 1993* (NZ) s 296(3); *McIntosh v Fisk* [2017] 1 NZLR 863, 904 [139] (Arnold, O'Regan and Ellen France JJ).

82 See also *Gertsch v Atsas* [1999] NSWSC 898; *Corporate Management Services (Australia) Pty Ltd v Abi-Arraj* [2000] NSWSC 361.

of the receipt',[83] which the *Hills* plurality interpreted to require reliance.[84] *David Securities* was arguably not intended to decide the point,[85] and the *Hills* plurality confined its pronouncement to 'cases such as the present'.[86] Nonetheless, intermediate appellate authorities have since held, as Gageler J did in *Hills*,[87] that reliance is a categorical requirement of the defence.[88]

What emerges from this example is that reifying inequitability into the concrete principles necessary for the consistent adjudication of the defence is counterproductively liable to engender confusion and inconsistency. If the goal of consistent adjudication is taken seriously, a rationale must better guide, if not decisively answer, questions like whether reliance is necessary – which, as will be seen, both the outcome responsibility and autonomy rationales do. Accordingly, inequitability is not the best rationale for the defence.

B *Disenrichment*

Birks, eager to understand the defence in terms more precise than the 'broad language' of inequitability, claimed that 'all [its] known examples' are covered by a narrower core: disenrichment.[89] On this account, the defendant's liability is 'extinguished to the extent that, by reason of an event which would not have happened but for the enrichment, his wealth is reduced'.[90]

While disenrichment has 'powerful'[91] support,[92] courts and commentators alike have levelled a barrage of criticisms against it.[93] It suffices to note one: the falsity of Birks' premise that disenrichment negates the 'enrichment' element of the primary claim.[94] For that premise to be true, disenrichment must be the obverse of

83 *David Securities* (n 4) 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) (emphasis in original).

84 *Hills* (n 4) 597 [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ). 'On the faith of' and 'reliance' are interchangeable: see *Alpha Wealth* (n 50) 639 [203] (Buss JA, Steyler JA agreeing); *Dextra Bank* (n 42) 204 [38] (Lords Bingham and Goff); *Citigroup Pty Ltd v National Australia Bank Ltd* (2012) 82 NSWLR 391, 405 [67] (Barrett JA) ('*Citigroup v NAB*'); *Port of Brisbane Corporation v ANZ Securities Ltd (No 2)* [2003] 2 Qd R 661, 671 [13] (McPherson JA) ('*Port of Brisbane*').

85 Edelman and Bant (n 66) 340–1; Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis Butterworths, 2nd ed, 2018) 472 [12.16C].

86 *Hills* (n 4) 597 [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

87 Ibid 625 [157] (Gageler J).

88 *Port of Brisbane* (n 84) 671 [13] (McPherson JA); *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147, 192 [203] (Meagher JA) ('*Hills (NSWCA)*'); *Citigroup v NAB* (n 84) 405 [64] (Barrett JA), cf 394 [6] (Bathurst CJ, Allsop P and Meagher JA); *Southage Pty Ltd v Vescovi* (2015) 321 ALR 383, 399 [65] (Warren CJ, Santamaria JA and Ginnane AJA).

89 Birks, *Unjust Enrichment* (n 55) 208.

90 Ibid.

91 *Hills* (n 4) 621 [148] (Gageler J). See also Bant, 'Outstanding Issues' (n 9) 140.

92 See, eg, Burrows, *The Law of Restitution* (n 76) 526–7; Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 242, 247–9.

93 See, eg, *Hills* (n 4) 577 [17], 580–2 [23]–[24] (French CJ), 596–7 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 621–2 [148] (Gageler J); *Hills (NSWCA)* (n 88) 180–1 [153] (Allsop P); Mason, Carter and Tolhurst (n 7) 974–5 [2415]; Bant, 'Outstanding Issues' (n 9) 141–2.

94 Birks, *Unjust Enrichment* (n 55) 207–9; Peter Birks, *Restitution: The Future* (Federation Press, 1992) 125; Peter Birks, 'Change of Position and Surviving Enrichment' in William Swadling (ed), *The*

enrichment. But Birks himself shows this is not the case, in both directions; some enrichments do not count as disenrichments, and vice versa.

Consider an ephemeral benefit that does not enlarge the defendant's wealth, such as a haircut.[95] A haircut constitutes an enrichment for the purposes of establishing the defendant's liability so long as he chose it.[96] It would follow, if enrichment quadrates with disenrichment, that a defendant who chooses to spend a mistaken payment on a haircut (for example) is enriched by the haircut and therefore cannot avail himself of the defence. But this is contrary to Birks' view,[97] and to authority.[98]

As to disenrichments that do not count as enrichments, a pivotal holding in *Hills*,[99] consistent with prior jurisprudence abroad,[100] was that non-pecuniary or unquantifiable changes of position can attract the defence.[101] Birks came to recognise that these changes (for example, the decision to have a child) have 'foundation[s] in disenrichment'.[102] If disenrichment quadrates with enrichment, that would mean children (for example) are enrichments. But as Birks himself noted, children do not constitute material gains to the defendant for the purposes of the enrichment inquiry.[103]

Without quadration, the premise of negation that justifies a disenrichment model of change of position fails. Disenrichment therefore fails as a rationale for the defence.

C *Security of Receipts*

One rationale that Birks stated for his disenrichment defence was 'security of receipts'.[104] Like disenrichment, this rationale attracted early support.[105] Also like disenrichment, however, it was rejected as a rationale in *Hills*, where the plurality stated that it does not motivate the defence but is instead a result the defence incidentally achieves.[106]

Limits of Restitutionary Claims: A Comparative Analysis (United Kingdom National Committee of Comparative Law, 1997).

95 Bant, 'Outstanding Issues' (n 9) 143.

96 See *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ); *Benedetti v Sawiris* [2014] AC 938, 986–7 [112]–[117] (Lord Reed JSC).

97 Birks, *Restitution: The Future* (n 94) 125, 138.

98 See, eg, *Philip Collins v Davis* (n 36) 830 (Jonathan Parker J).

99 *Hills* (n 4) 600 [88] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 626 [157] (Gageler J).

100 See, eg, *Commerzbank* (n 29) [66] (Munby J); *Philip Collins v Davis* (n 36); *RBC Dominion Securities v Dawson* (1994) 111 DLR (4th) 230; *Kinlan v Crimmin* [2007] BCC 106, 121–2 (Sales DJHC).

101 See also *TRA Global Pty Ltd v Kebakoska* (2011) 209 IR 453 ('*TRA Global*'); *Palmer v Blue Circle Southern Cement* (1999) 48 NSWLR 318, 323–5 [23]–[37] (Bell J).

102 Peter Birks, 'Change of Position: The Two Central Questions' (2004) 120 (July) *Law Quarterly Review* 373, 375.

103 Birks, *Unjust Enrichment* (n 55) 51.

104 Ibid 209.

105 See, eg, *Kleinwort Benson* (n 12) 382, 384 (Lord Goff); Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd ed, 2002); James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 1st ed, 2006) 322; Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press, 2004) 55.

106 *Hills* (n 4) 601 [92] (Hayne, Crennan, Kiefel, Bell and Keane JJ). See also Edelman (n 9) 1018; *Dextra Bank* (n 42) 205 [38] (Lords Bingham and Goff).

In evaluating the plurality's proposition, care should be taken to disentangle two dimensions of the 'slippery' concept of security of receipts.[107] The first, predominant in academic commentary,[108] is the individual-oriented conception Birks envisioned: a 'general interest in our being free to dispose of wealth which appears to be at our disposition' (the 'personal' dimension).[109] The second dimension, increasingly present in the case law,[110] relates to the stability of markets and reflects a desire not to 'unsettle business'[111] (the 'commercial' dimension).

The *Hills* plurality's proposition has force with respect to the commercial dimension, but not the personal dimension. If the concern of the commercial dimension not to disrupt the economy were taken to its logical conclusion, the defence should arguably be available in every case. Otherwise, not only the actuality but also the mere threat of mistaken transfers being reversed could affect the way parties transact, and thus the economy at large. That would be too blunt a model of the defence. The better view is that, while the commercial dimension is not irrelevant, some other rationale guides the change of position defence, the operation of which has the 'additional, desirable effect of reassuring and stabilising markets'.[112]

By contrast, the personal dimension of security of receipts can be understood as a facet of the broader autonomy-based rationale discussed in Part IV(B) below. It will be seen there that the relevant aspect of the defendant's autonomy is his interest in not being held to non-autonomous decisions. If the defendant mistakenly believes his receipt secure, any decision he makes on the basis of that belief is non-autonomous, and holding him to such a decision would infringe his decisional autonomy. That does not automatically entitle the defendant to the defence; as will be seen, the parties' decisional autonomy interests must be sensitively balanced. It does mean, however, that the personal dimension of security of receipts plays an important (albeit not exhaustive) part in the rationale for the defence.

One point ostensibly challenges this conclusion: Justice Gummow's extra-curial observation that restitution for mistaken payments itself qualifies security of receipts.[113] The *Hills* plurality relied on this observation to reinforce its conclusion that security of receipts does not guide the defence.[114] The logic would appear to be that because mistaken payment claims undercut the security of the defendant's receipt, it would be contradictory to allow him a defence on the basis that he is entitled to the security of that receipt. This logic assumes that because security of receipts is qualified by restitution, it falls away as a concern. But arguably the threat

107 Bant, *The Change of Position Defence* (n 4) 214.
108 See, eg, ibid; Dagan (n 105) 45–6; Edelman and Bant, *Unjust Enrichment* (n 66) 348.
109 Birks, *Unjust Enrichment* (n 55) 209. See to similar effect Bant, *The Change of Position Defence* (n 4) 214.
110 See, eg, *Hills (NSWCA)* (n 88) 194 [211] (Meagher JA); *London & River Plate Bank Ltd v Bank of Liverpool Ltd* [1896] 1 QB 7, 11–12, quoted in *Hills* (n 4) 600–1 [90] (Hayne, Crennan, Kiefel, Bell and Keane JJ).
111 *Hills (NSWCA)* (n 88) 194 [211] (Meagher JA), quoting *Taylor v Blakelock* (1886) 32 Ch D 560, 570 (Bowen LJ). See also Virgo, 'A Taxonomy of Defences in Restitution' (n 19) 407; *Banque Worms v BankAmerica International*, 77 NY 2d 362, 372–3 (NY Ct App, 1991).
112 Barker and Grantham, *Unjust Enrichment* (n 85) 458 [12.2]. See also Edelman (n 9) 1018.
113 Gummow (n 73) 757. See also *Hills* (n 4) 583 [28] (French CJ).
114 *Hills* (n 4) 601 [92] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

restitutionary liability poses to security of receipts militates against recognising such liability in the first place, and it is only because this threat is reduced to an acceptable level by the safeguard of defences such as change of position that the liability is recognised.[115] While this does not save the commercial dimension from the criticisms above, it does support the conclusion that the personal dimension is part of the autonomy-based rationale for the defence put forward in Part IV(B).

D *Loss Allocation*

A detrimental change of position introduces into the overall transaction between the claimant and the defendant a loss 'that one of the parties must bear'.[116] The defence is often framed in terms of allocating that loss.[117] For example, the *Hills* plurality stated the relevant inquiry in change of position is '*who* should properly bear the loss and *why*'.[118] It is evident from this formulation, however, that loss allocation does not itself justify the defence; it merely frames the questions that some other reason answers.[119] It is that reason, rather than loss allocation, which is the rationale for the defence.

E *The 'No Worse Off' Rationale*

Consistently with *David Securities*,[120] each judgment in *Hills* considered detriment a necessary element of change of position.[121] From this, Bant deduces a rationale that the defence is designed to ensure the defendant is not left unjustifiably worse off by making restitution than if he had not received the enrichment.[122] It has elsewhere been argued that this is the 'purpose' of the defence.[123] Like loss allocation, however, this 'no worse off' rationale provides no normative basis for the defence: it does not say why the defendant should not be left worse off.[124]

This normative gap can ostensibly be filled by an 'attractive'[125] line of thinking that Wilmot-Smith terms the 'No Harm thesis'.[126] Liability for mistaken payments is justified, the No Harm thesis posits, because the act of restitution leaves the defendant no worse off than he was prior to receiving the enrichment (the *status*

115 Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (Routledge-Cavendish, 2001) 41–2; Mason, Carter and Tolhurst (n 7) 982 [2422].
116 *Third Restatement* (n 3) § 65 cmt a.
117 See, eg, *Waitaki* (n 69) 229 (Thomas J); ibid § 65 cmt h.
118 *Hills* (n 4) 597 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original).
119 Edelman (n 9) 1019; Grantham, 'Allocating the Costs of Making Restitution' (n 33) 198.
120 *David Securities* (n 4) 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 405–6 (Dawson J).
121 *Hills* (n 4) 582 [25] (French CJ), 585 [36] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 626 [157] (Gageler J).
122 Bant, 'Outstanding Issues' (n 9) 148, 161.
123 Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, 'Defences in Unjust Enrichment: Questions and Themes' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 1, 12.
124 Grantham, 'Change of Position-Based Defences' (n 14) 423.
125 Ajay Ratan, 'The Unity of Pre-Receipt and Post-Receipt Detriment' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 87, 109.
126 Frederick Wilmot-Smith, 'Should the Payee Pay?' (2017) 37(4) *Oxford Journal of Legal Studies* 844, 846, 849.

quo ante).[127] There is a close complementarity with the no worse off rationale: if the No Harm thesis is correct, some mechanism must ensure the defendant is left no worse off — a task the defence, understood according to the no worse off rationale, fulfils.

The No Harm thesis is widely argued or assumed to be correct.[128] It only holds, however, if the *status quo ante* is the appropriate baseline. But the No Harm thesis seeks to justify the specific act of making restitution. Arguably, then, the moment immediately prior to that act, the *status quo*, is the more appropriate baseline, at which point the defendant already has the enrichment.[129] As against the *status quo*, restitution leaves the defendant decidedly worse off: he had the enrichment, and restitution takes it away. Absent some reason for the *status quo ante* as the relevant baseline, the No Harm thesis does not hold.

A tempting retort is that, because the enrichment is the product of a mistaken transfer, the defendant is not 'entitled' to it. But this is circuitous; the very question the No Harm thesis seeks to answer is whether restitutionary liability is justified, which is essentially a question of whether the defendant is entitled to the enrichment.[130]

As Wilmot-Smith notes, no other persuasive reason has yet been identified.[131] Accordingly, the No Harm thesis fails, and with it the no worse off rationale.

IV The Better Contenders

This Part proffers two better rationales: the theory of outcome responsibility developed by Honoré, and reciprocal recognition of the parties' decisional autonomy interests.

A *Outcome Responsibility*

Outcome responsibility says 'we are, if of full capacity and hence in a position to control our behaviour, responsible for the outcomes of our conduct'.[132] Situated within the change of position defence, it fastens on the claimant's role as instigator: her mistaken payment initiates the sequence of events that leads to the defendant's change of position, and thus to the defendant's putative detriment were he to make restitution in full.

Sheehan, building upon work by Ajay Ratan,[133] has dismissed outcome responsibility as a rationale for the change of position defence. His conclusion is founded on the failure of outcome responsibility to explain the availability of the

[127] Ibid 848–9

[128] See, eg, Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 15, 356; Birks, *Unjust Enrichment* (n 55) 7, 209; J Beatson and W Bishop, 'Mistaken Payments in the Law of Restitution' (1986) 36(2) *University of Toronto Law Journal* 149, 150; Krebs (n 115) 41; Webb (n 21) 195; Klimchuk, 'Unjust Enrichment and the Forms of Justice' (n 64)195; Ratan (n 125) 88.

[129] Wilmot-Smith, 'Should the Payee Pay?' (n 126) 848–9.

[130] Ibid 849.

[131] Ibid 848.

[132] Honoré, *Responsibility and Fault* (n 18) 76.

[133] Ratan (n 125).

defence for independent changes of position and cases of innocent wrongdoing.[134] But neither of these supposed lacunae afflicts the arguments of this article. The first is no lacuna under Australian law given the apparent requirement of reliance that emerges from the authorities, as canvassed in Part III(A) above.[135] The second is presently irrelevant given the concern of this article only with mistaken payments.

Proceeding then from an unimpeded starting point, Part IV(A)(1) briefly outlines the salient features of outcome responsibility. Parts IV(A)(2)–(4) address three assumptions on which the viability of outcome responsibility as a rationale rests, namely that:

(1) outcome responsibility can sensibly be applied in the context of change of position (which Part IV(A)(2) vindicates);

(2) the claimant is outcome responsible for the defendant's putative detriment (which Part IV(A)(3) shows is true in reliance-based changes of position, but not independent changes of position); and

(3) the claimant's outcome responsibility can ground the attribution of the defendant's detriment to her in a legal, rather than merely moral, sense (which Part IV(A)(4) vindicates).

That much suggests outcome responsibility justifies the defence in cases of reliance-based changes of position. Part IV(A)(5) concludes by analysing the consistency of this rationale with the current features of the defence.

1 *Defining Outcome Responsibility*

Outcome responsibility attributes to us a basic responsibility, more fundamental than moral or legal responsibility,[136] for the outcomes of our conduct. Those outcomes, both good and bad, often depend on matters out of our control: that one negligent driver strikes and kills a pedestrian, and another equally negligent driver does not, is partly a matter of luck.[137] Yet it is a 'familiar and pervasive feature of human life'[138] that we attribute responsibility to the first driver for this negative outcome.[139]

Honoré posits that one reason for this attribution is personhood.[140] Responsibility for our successes and failures alike accords us a sense of history in the world, of having made a difference; as such, he says, it is 'an essential constituent of our character and identity'.[141] As Part IV(A)(3) develops, this premise is important in selecting some means — ultimately, this article suggests, common-

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[134] Sheehan (n 60).

[135] See above nn 83–8.

[136] Honoré, *Responsibility and Fault* (n 18) 27; Honoré, 'Appreciations and Responses' (n 18) 223, 228. Cf Peter Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart Publishing, 2001) 81, 81.

[137] Arthur Ripstein, 'Private Law and Private Narratives' (2000) 20(4) *Oxford Journal of Legal Studies* 683, 684.

[138] Ibid 683.

[139] Honoré, *Responsibility and Fault* (n 18) 25.

[140] Honoré, 'Appreciations and Responses' (n 18) 226.

[141] Honoré, *Responsibility and Fault* (n 18) 76.

sense causation as framed by Hart and Honoré[142] — of delimiting precisely when one person is outcome responsible for another's loss.

Outcome responsibility is but a 'stepping stone' to legal liability.[143] Before it justifies legal liability, outcome responsibility requires an 'extra element': either fault by the responsible party or a special risk of harm inherent in their impugned action.[144] This requirement, the 'addition thesis',[145] is revisited in Part IV(A)(4) below.

2 *Threshold Matters*

Honoré's primary analytical context for outcome responsibility is (a) liability (b) in tort. Change of position is (a) a defence (b) to (for present purposes) mistaken payment claims. Neither difference renders outcome responsibility inapt here, however. As to (a), Honoré himself deploys outcome responsibility to justify a defence, contributory negligence.[146] As to (b), Honoré purports to lay out a general theory of responsibility; its instantiation in tort is a useful rather than exhaustive example. The argument may be made that outcome responsibility only makes sense when it relates, as it does in tort, to responsibility for a loss. But that argument does not touch the change of position defence, which, unlike restitutionary liability, is indeed concerned with loss.[147]

Another conceptual objection might arise from Honoré's description of outcome responsibility as the result of an 'implicit bet' on outcomes.[148] The analogy seems problematic: a claimant arguably does not 'choose' to make a mistaken payment in the same way a gambler 'chooses' to bet. But Honoré later recanted the analogy,[149] stating that an individual need only be of 'full capacity' to be held outcome responsible.[150] It is the existence of capacity, rather than its exercise in a particular case, that is necessary.[151] And while a mistake might represent a momentary deviation from capacity for an otherwise-capable person, it does not impeach the existence of that capacity or, consequently, the mistaken claimant's outcome responsibility. The objection is therefore toothless.

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142 To be distinguished from the common-sense approach to causation endorsed by the High Court of Australia in, for example, *Fitzgerald v Penn* (1954) 91 CLR 268, 278 (Dixon CJ, Fullagar and Kitto JJ) and *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 and criticised in the authorities collected in *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1, 74–5 [392]–[393] (Edelman J).

143 Ratan (n 125) 104, also at 87; Honoré, 'Appreciations and Responses' (n 18) 228–9. Indeed, Lucy claims that liability in private law is 'best understood as a specific form' of outcome responsibility: William Lucy, *Philosophy of Private Law* (Oxford University Press, 2006) 59.

144 Honoré, *Responsibility and Fault* (n 18) 27.

145 Dennis Klimchuk, 'Book Review: *Responsibility and Fault* by Tony Honoré' (2000) 109(436) *Mind* 937, 938.

146 Honoré, *Responsibility and Fault* (n 18) 89–90.

147 See *Hills* (n 4) 597 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

148 Honoré, *Responsibility and Fault* (n 18) 25.

149 Honoré, 'Appreciations and Responses' (n 18) 225–6.

150 Honoré, *Responsibility and Fault* (n 18) 76.

151 Ripstein, 'Private Law and Private Narratives' (n 137) 685.

3 *Common-Sense Causation and the Claimant's Outcome Responsibility*

The question then arises: how does one determine when, and for what, a claimant in a mistaken payment case is outcome responsible? While recognising that the bounds of outcome responsibility are delimited by 'causal criteria', Honoré refrains from enumerating them.[152] What follows is the argument that such criteria can be found in the framework of common-sense causation that he and Hart construct in *Causation in the Law*.[153]

(a) *Common-Sense Causation in Outline*

Common-sense causation operates negatively. It takes as its subject some prima facie connection between an event and an outcome and says two things can interrupt it: an abnormal condition, being something that is not 'present as part of the usual state or mode of operation of the thing under inquiry';[154] or a choice, being a 'free, deliberate and informed act or omission of a human being, intended to exploit the situation created by an [earlier event]'.[155]

The object of both the 'abnormality' and 'choice' principles is to identify what makes the difference in producing an outcome.[156] So emerges a shared basis between common-sense causation and outcome responsibility: a sense of meaningful intervention in the world. While sustained criticism has sunk common-sense causation into desuetude in its titular aim as a general theory of causation,[157] this shared basis means, as Perry has recognised, that common-sense causation can be understood as an analysis of outcome responsibility.[158]

(b) *Preferring Common-Sense Causation*

At this point another potential objection rears its head. Hart and Honoré refer to common-sense causation not as all-encompassing, but rather as one of a tripartite 'family' of causal concepts.[159] Whereas common-sense causation chiefly concerns the bringing about of physical events, its two siblings, 'interpersonal transactions'[160] and 'opportunities'[161], concern the causing of human conduct. An interpersonal transaction occurs where one person's conduct provides a reason for another's conduct;[162] opportunities involve one person's conduct providing an opportunity for another's.[163] Ostensibly, either theory fits change of position.

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[152] Honoré, 'Appreciations and Responses' (n 18) 223; see also 229. Cf Stephen R Perry, 'The Moral Foundations of Tort Law' (1992) 77(2) *Iowa Law Review* 449, 494.
[153] HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985).
[154] Ibid 35.
[155] Ibid 136. This has been judicially described as an 'undoubted rule': *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 367 (Lord Hoffmann). See further Summers (n 23) 91–2.
[156] Hart and Honoré (n 153) 29, 34, 35.
[157] Andrew Summers, 'Common-Sense Causation in the Law' (2018) 38(4) *Oxford Journal of Legal Studies* 793, 800.
[158] Perry (n 152) 503.
[159] Hart and Honoré (n 153) 28.
[160] Ibid 51.
[161] Ibid 59.
[162] Ibid 51.
[163] Ibid 59.

That fit is, however, superficial. Unlike interpersonal transactions, change of position cases are not typified by a defendant's 'persuasion' or 'inducement' to act.[164] Nor is a claimant under any duty to take precautions in respect of her mistaken transfer, which duties are a premise of the theory of opportunities.[165] And in any event, the key difference Hart and Honoré give between causation of physical events and causation of human conduct — that generalisations play a more central role in the former[166] — is open to criticism. As Mackie argues, our general knowledge of human purposes informs our causal interpretations of human conduct in much the same way as our general knowledge of physical events informs our sense of physical causation.[167] Common-sense causation has also been deployed as an explanation for another doctrine concerned with human conduct: mitigation.[168]

It remains then to consider in what circumstances common-sense causation says a claimant is outcome responsible for the defendant's change of position.

(c) *Applying Common-Sense Causation*

The first task is to establish some prima facie connection between the claimant's mistaken transfer and the defendant's putative detriment. This task might be analogised with the 'factual' (as opposed to 'legal') stage of the bifurcated approach to causation orthodox in the judiciary and the academy.[169] At this stage Bant suggests the appropriate metric varies as between independent and reliance-based changes of position. For the former, the 'but-for' standard is appropriate. By contrast, because the latter involves human decision-making, Bant says the question ought to be whether the claimant's mistaken transfer was 'a factor' in the defendant's change of position.[170] But whichever standard is adopted, it is clearly satisfied in a typical case. But for the claimant's mistaken transfer, the defendant could not have acted on the enrichment (in a reliance-based change of position), nor could the enrichment be thieved, destroyed or devalued by someone or something else (in an independent change of position). Moreoever, in a reliance-based case, the transfer was at least 'a factor' in the defendant's change of position.

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164 Ibid 52. Hart and Honoré also suggest that an interpersonal transaction requires that the inducing party intend the induced party to act as they do: ibid 53. That is incompatible with change of position; the claimant need not intend the defendant to rely on the mistaken transfer. Bagshaw doubts whether intention is necessary to Hart and Honoré's account: Roderick Bagshaw, 'Causing the Behaviour of Others and Other Causal Mixtures' in Richard Goldberg (ed), *Perspectives on Causation* (Hart Publishing, 2011) 361, 367. Even if it is not, however, an ill fit remains between change of position and persuasion or inducement.

165 Hart and Honoré (n 153) 195.

166 Ibid 52.

167 JL Mackie, *The Cement of the Universe: A Study of Causation* (Oxford University Press, 1980) 120–5.

168 Summers (n 23) ch 6.

169 Summers (n 157) 798; *Wallace v Kam* (2013) 250 CLR 375, 381 [11] (French CJ, Crennan, Kiefel, Gageler and Keane JJ); *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322, 353–4 [163] (Edelman J). 'Factual causation' and 'scope of liability' are similarly bifurcated under State civil liability legislation: *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C.

170 Bant, 'Causation and Scope of Liability in Unjust Enrichment' (n 80) 76; Bant, 'Outstanding Issues' (n 9) 153.

The contribution of common-sense causation is to displace this prima facie connection if either of the choice or abnormality principles applies.[171] These principles suggest that independent changes of position ought to be excluded from the defence, consistently with the narrow view that Australian authority favours. In particular, theft involves free, deliberate and informed human action, as does intentional destruction; these cases of independent change of position are therefore excluded by the choice principle. And cases of spontaneous destruction or devaluation (where, for example, the defendant's enrichment consists in shares and market forces render them worthless) can readily be perceived as abnormal. The claimant is not in these circumstances outcome responsible for the defendant's detriment. Independent changes of position therefore do not count.

By contrast, though a reliance-based change of position involves human conduct, it is premised on the defendant's mistaken belief that he is entitled to the enrichment. This means, on Hart and Honoré's analysis, that it is not intended to exploit the mistaken transfer.[172] Accordingly, it does not engage the choice principle and interrupt the claimant's outcome responsibility. The obvious exception is where the defendant changes his position in bad faith; this is addressed in Part IV(A)(5)(a) below.

4 *Justification*

Accepting that much, recall the addition thesis: that outcome responsibility only justifies legal liability when combined with fault or a special risk of harm.[173] There is an argument that because change of position reduces rather than imposes liability, the addition thesis need not hold to justify it.[174] But reducing the claimant's entitlement can be viewed as imposing on her part of her loss, as Honoré suggests in the context of contributory negligence.[175]

To satisfy the addition thesis, either the claimant must be at fault in making the mistaken transfer, or the transfer must carry a special risk of harm. The former is difficult: a claimant is not always at 'fault' (however that term is understood) in making the mistaken transfer, nor is the claimant's fault currently an element of the defence. Special risk is more promising. The relevant harm is the detriment the defendant would suffer by making restitution, having already changed his position. To pay a person carries a strong likelihood that the person will spend or otherwise rely upon the payment. Since a mistaken payment necessarily carries the potential for an order for restitution, that strong likelihood translates into a special risk that

171 Cf those cases and commentary which assume a 'but-for' connection is sufficient: *Test Claimants in the FII Group Litigation v Commissioners for Her Majesty's Revenue & Customs (No 5)* [2015] STC 1471, [343] (Henderson J) ('*FII (No 5)*'); *Scottish Equitable plc v Derby* [2001] 3 All ER 818, 827 [31] (Robert Walker LJ); Ratan (n 125) 110. See further Bant, 'Outstanding Issues' (n 9) 153.

172 Hart and Honoré (n 153) 149–50.

173 See above nn 144–5 and accompanying text.

174 More generally, Stevens argues that the range of reasons that might justify reducing or defeating liability is broader than the reasons that justify imposing liability: Robert Stevens, 'Private Law and the Form of Reasons' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 119.

175 Honoré, *Responsibility and Fault* (n 18) 89.

the defendant will suffer harm. On that basis, mistaken payments do arguably satisfy the addition thesis.

5 *Consistency*

If the claims made so far are accepted, outcome responsibility justifies the defence in relation to reliance-based changes of position. In terms of the key features of the defence, outcome responsibility does not exclude the possibility of non-pecuniary and unquantifiable detriment. Indeed, unlike the decisional autonomy rationale in Part IV(B) below, it does not prescribe any qualities that the defendant's detriment must have; it only sets out who is responsible for it. It is consistent with (or at least does not stand in the way of) the accepted *pro tanto* operation of the defence. It is also, as Ratan persuasively argues, consistent with the availability of anticipatory changes of position.[176]

Two features warrant more detailed consideration: good faith and irreversibility.

(a) *Good Faith*

As noted above, a defendant who labours under a mistake does not, by changing his position, engage the choice principle; the claimant remains outcome responsible for the defendant's putative detriment. But if the defendant changes his position in subjective bad faith (that is, with knowledge of the mistake),[177] his action is intended to exploit the mistaken transfer and the choice principle renders him outcome responsible for any resultant detriment he suffers. In this way, outcome responsibility is consistent with the subjective aspect of the good faith requirement.

In addition, the abnormality principle can be seen to cohere with the objective aspect of good faith sketched by the cases.[178] Those cases converge on a standard that Bant and Bryan argue 'strongly resembles a reasonableness requirement'.[179] That aligns with the abnormality principle if the concept of reasonableness is linked, as it has been in mitigation jurisprudence, to the 'ordinary course of things'.[180] Conduct that is unreasonable (or, on the current authorities, not supported by a requisite foundation of information) can be seen as abnormal, thereby interrupting the claimant's outcome responsibility.

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176 Ratan (n 125).

177 *Automotive Holdings* (n 46) [259] (Slattery J); *Lipkin Gorman* (n 3) 580 (Lord Goff).

178 See above nn 47–9 and accompanying text.

179 Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) *Oxford Journal of Legal Studies* 427, 449. The authors of *Mason & Carter's Restitution Law in Australia* argue that, in holding mere negligence insufficient to establish a lack of good faith, several cases 'effectively deny' a reasonableness requirement: Mason, Carter and Tolhurst (n 7) 982 [2422]. However, one of the Australian authorities cited appears to leave the question of reasonableness open: see *Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd* (2017) 52 VR 664, 746 [280] (Hargrave J). Gageler J later did so, unequivocally, in *Hills* (on the basis that the question did not arise): *Hills* (n 4) 625 [157] (Gageler J). See also *Automotive Holdings* (n 46) [263] (Slattery J). Cf *FII (No 5)* (n 171) [353]–[355] (Henderson J).

180 *Kelvin Shipping v Canadian Pacific Railway Co* ('*The Metagama*') (1928) SC (HL) 21, 25 (Viscount Haldane). See also *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, 1625 (Lord Guest). See further Summers (n 23) 110.

(b) *Irreversibility*

The final element to survey for consistency is irreversibility. Outcome responsibility accommodates this requirement within the choice principle because of the temporal posture of the defence. At the time of adjudicating the defence, the question is not whether the defendant has reversed his change of position but whether he could in future. It follows that, whether or not he knew before, the defendant must know now (given the claimant has brought proceedings) that the payment was mistaken and, if it is raised by the claimant, that a particular course is available to him to reverse all or part of his putative detriment. Thus, a prospective failure to reverse would have the requisite qualities (of being informed, free and deliberate) to engage the choice principle.

Australian courts have set the threshold of difficulty that must be met before a change of position is considered irreversible.[181] They have yet to grapple in detail, however, with how 'complete' irreversibility must be. In particular, it is unclear whether the defendant must be able to recoup the entirety of his putative detriment, or, if not, what approximation will suffice. Outcome responsibility supplies an answer, which is that reversibility should be understood as a spectrum, not as a categorical disqualifier. The claimant is outcome responsible for the act comprising the defendant's change of position; the claimant is *not* outcome responsible for any subsequent failure by the defendant to reverse it, in circumstances where he could. Reversibility should therefore disentitle the defendant from the defence not categorically, but only to the extent that his detriment is reversible.

Thus, outcome responsibility is not only consistent with the cases; it also suggests the refinement of existing principle. In combination with the matters canvassed above (namely its comprehensibility as a conceptual framework for change of position and its justificatory force), it is therefore a good rationale for the defence.

B *Autonomy*

The second rationale that this article contends is persuasive is reciprocal recognition of the parties' decisional autonomy. Autonomy-based rationales have found significant academic favour,[182] and, significantly for this article's aim of identifying a rationale that 'speaks' to judges, hints of judicial support have also emerged.[183]

The autonomy-based rationales commentators proffer generally follow the same two-step logic. First, they argue that the claimant's claim protects a particular autonomy interest that she has. Second, they argue (or assume) that the claimant must, in invoking her autonomy-protecting claim, reciprocally recognise the same autonomy interest in D. Thus, the argument runs, the change of position defence is

181 See above nn 50–1 and accompanying text.

182 See, eg, Edelman (n 8); Weeliem Seah, 'Mistake as an Unjust Factor: Autonomy and Unjust Enrichment' (DPhil thesis, University of Oxford, 2015) 41–3; Dagan (n 105) 46; Virgo, *The Principles of the Law of Restitution* (n 19) 755.

183 *Benedetti v Sawiris* (n 96) 987–8 [118] (Lord Reed); *Sempra Metals v Inland Revenue Commissioners* [2008] 1 AC 561, 606 [119] (Lord Nicholls), 650 [232] (Lord Mance). See further AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Publishing, 2012) 224.

justified on the basis that it performs the necessary task of taking into account the effect of the claimant's claim on the defendant's relevant autonomy interest.

However, these rationales run into three difficulties. First, autonomy is a 'protean' concept,[184] and commentators define the claimant's autonomy interest, and thus the defendant's reciprocal interest, in different ways. Part IV(B)(1) focuses on two, which can be termed 'autonomy of disposition' and 'decisional autonomy'. It ultimately prefers the latter on the basis that, reciprocated to the defendant, the former bears significant inconsistencies with the case law. Second, few commentators provide a reason at the second step why the claimant must reciprocally recognise the defendant's autonomy interest. Part IV(B)(2) locates such a reason in Kantian theory. Third, the question arises of how to reconcile the parties' competing autonomy interests, which is addressed in Part IV(B)(3).

In addressing these difficulties, several points of consistency are noted between an autonomy-based rationale and the cases. Part IV(B)(4) concludes by refuting other points of purported inconsistency.

1 *Defining the Parties' Autonomy Interests*

(a) *The Claimant's Autonomy Interest*

It is beyond the scope of this article to identify definitively the best rationale(s) for the claimant's entitlement to recover a mistaken payment.[185] What is presently material is that persuasive arguments have been advanced that one rationale is the protection of the claimant's autonomy. The starting point of these arguments is the orthodox view that the claimant's mistake vitiates her 'intention',[186] 'free will',[187] or 'consent'[188] in relation to the mistaken transfer. In other words, the mistake renders the claimant's decision to transfer 'non-autonomous' by creating a misalignment between the circumstances in which the claimant was content to make the transfer and the circumstances as they exist in fact.[189] Holding the claimant to this non-autonomous decision would infringe some autonomy interest she has, such that her mistake provides a reason to allow her to recover the enrichment.

Commentators split roughly in two, however, as to what that autonomy interest is. The first group prefers 'decisional' autonomy: an individual's interest in being held only to autonomous decisions, which is a 'recurring theme throughout

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184 Richard H Fallon Jr, 'Two Senses of Autonomy' (1994) 46(4) *Stanford Law Review* 875, 876.

185 For recent, detailed consideration of this point, see, eg, Wilmot-Smith, 'Should the Payee Pay?' (n 126); Penner (n 64).

186 See, eg, *David Securities* (n 4) 378 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); Birks, *Unjust Enrichment* (n 55) 105; Mason, Carter and Tolhurst (n 7) 160 [403]; Edelman (n 9) 1022.

187 Mitchell McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (2003) 48(3) *McGill Law Journal* 419, 424; Grantham, 'Change of Position-Based Defences' (n 14) 418.

188 Dennis Klimchuk, 'The Normative Foundations of Unjust Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 81, 93; Wilmot-Smith, 'Reasons? For *Restitution*?' (n 26) 1128.

189 Seah (n 182) 18–20.

unjust enrichment'.[190] On this account, the mere fact that the claimant's decision to transfer was non-autonomous means she should not be held to the transfer.[191]

The second group of commentators is less unified (a matter discussed in Part IV(B)(1)(b)(i) below), but can be tied together by the idea of 'autonomy of disposition'. Autonomy of disposition, which traces back to the maxim *cujus est dare, ejus est disponere* ('whose is to give, his is to dispose'),[192] is an individual's interest (applicable beyond the context of restitution)[193] in only being deprived of property by an autonomous decision.[194] This is subtly different to decisional autonomy: what establishes the claimant's prima facie entitlement to restitution is not the presence of a non-autonomous decision, but the absence of an autonomous decision to transfer the enrichment.

That subtle difference does not affect the analysis in relation to the claimant. Suppose, for example, that the claimant mistakenly pays the defendant $100,000. Holding the claimant to the transfer infringes her decisional autonomy, because the decision to transfer was non-autonomous; it also infringes her autonomy of disposition, because there was no autonomous decision to part with the $100,000.

(b) *The Defendant's Reciprocal Interest*

By contrast, this subtle difference becomes material in the reciprocal recognition of these interests in the defendant, and thus bears crucially on which interest should be adopted for the purposes of an autonomy-based rationale. Because different rationales are produced depending on which interest is adopted, consistency with the case law is used, in line with the general approach of this article, as a means of determining which interest to prefer.

The difference between these interests can be illustrated by continuing with the example above. Suppose that the defendant, upon receiving the $100,000 from the claimant, changes his position in two ways. First, he gifts $50,000 to a friend. Then, he decides to divorce his spouse on the basis of his newfound (apparent) financial security.

(i) Autonomy of Disposition

What is material in relation to the defendant's autonomy of disposition is whether the defendant has been deprived of his property without an autonomous decision. Whether the $100,000 constitutes 'his' property is the source of the disunity foreshadowed earlier, and leads to two markedly different conceptions of when the defendant's autonomy of disposition is infringed by an order for restitution. In

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190 McInnes (n 187) 446.

191 Ibid; Klimchuk, 'The Normative Foundations of Unjust Enrichment' (n 188) 93. See also Bant, *The Change of Position Defence* (n 4) 213.

192 Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke*, ed Steve Sheppard (Liberty Fund, 2003) vol 1, 178.

193 *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383, 426 [129] (Lord Walker).

194 Grantham, 'Allocating the Costs of Making Restitution' (n 33) 197; Dagan (n 105) 42; Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) 203; Seah (n 182) 18–20.

particular, autonomy of disposition underlies two different, general theories for restitutionary liability that diverge on this point.

The first is the 'property' theory, according to which the claimant's mistake and the consequent discordance of the transfer with her autonomy of disposition means that she retains, despite the passage of legal title to the defendant, a 'normative' interest in the enrichment that the law vindicates. On this theory, which has been the subject of various criticisms and defences,[195] but arguably represents the theoretical orthodoxy,[196] the claimant's continuing interest in the enrichment prevents the enrichment from being 'the defendant's'.[197] This would suggest, in the example above, that since the enrichment is not the defendant's, to the extent he has not spent it his autonomy of disposition is not infringed by having to return it. Thus, it suggests that the defendant can only avail himself of the defence to the extent of his $50,000 expenditure. Unless he can point to any financial detriment based on the decision to divorce, that decision does not bear on his liability.

The second theory that autonomy of disposition underlies is put forward by Grantham. The enrichment becomes the defendant's, Grantham argues, as soon as he integrates it into his 'plans and projects'.[198] The only circumstances in which this is not so are where the claimant immediately asks for the enrichment back,[199] where the defendant does not know of the mistaken payment (for example, because it was paid into a dormant bank account),[200] or where the defendant knows of the claimant's mistake and, as a result, abstains from incorporating it into his plans and projects. In all other circumstances, the enrichment is the defendant's, such that an order for restitution necessarily infringes the defendant's autonomy of disposition by exacting the enrichment, even where he has incurred no financial detriment or made no actual decision on the basis of the enrichment. This produces an extraordinarily broad conception of the defence, as Grantham himself concedes.[201] Thus, in the example above, it is the mere fact that the defendant has incorporated the enrichment into his plans – something less, even, than his having made either the gift or the decision to divorce – that means his autonomy of disposition is infringed by restitution, and that he should have the benefit of the defence.

Both variations of autonomy of disposition suggest models of the defence that are manifestly inconsistent with the authorities. The 'property' theory is both underinclusive and overinclusive. It does not include, in the example above, the decision to divorce, which English authority suggests should count[202] and which more generally falls into the category of non-pecuniary changes of position, a category accepted in *Hills* to be capable of attracting the defence.[203] It similarly

195 See generally Klimchuk, 'Unjust Enrichment and the Forms of Justice' (n 64) 190–2; Wilmot-Smith, 'Reasons? For *Restitution*?' (n 26), 1129–34.
196 Wilmot-Smith, 'Should the Payee Pay?' (n 126) 849 n 26.
197 See, eg, Webb (n 21) 97; Dan Priel, 'The Justice in Unjust Enrichment' (2014) 51(3) *Osgoode Hall Law Journal* 813, 838.
198 Grantham, 'Allocating the Costs of Making Restitution (n 33) 209–11.
199 Ibid 210.
200 Ibid.
201 Ibid 212.
202 *Commerzbank* (n 29) [66] (Munby J).
203 *Hills* (n 4) 600 [88] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

excludes forgone opportunities, again inconsistently with *Hills*,[204] because they do not actively cause financial detriment. It is overinclusive because even if the $50,000 gift is reversible, unless and until that gift is reversed an order for restitution would still require the defendant to dip into his own wealth and thereby infringe his autonomy of disposition.[205] Irreversibility therefore does not seem to be a prerequisite to the defence on this account, contrary to the authorities noted above.[206]

Grantham's conception of autonomy of disposition also appears to include reversible change of position. It is the mere fact that the enrichment has been incorporated into the defendant's plans and projects, rather than whether those plans and projects are irreversible (or have even come to fruition), that renders restitution an infringement of the defendant's autonomy of disposition. Another significant overinclusion is that Grantham's rationale has no inherent mechanism to exclude bad faith changes of position. The enrichment is apparently, on Grantham's model, still considered to be the defendant's even if he incorporates it into his plans and projects with knowledge that the claimant's transfer was mistaken.

Grantham suggests a novel cure for the latter inconsistency: that once the defendant becomes aware of the claimant's mistake he comes under a duty, like a voluntary bailee of goods, not to dissipate the enrichment.[207] However, Grantham does not argue that this duty is related to the defendant's autonomy of disposition; rather, he introduces it into his account only on the basis that it 'largely coincide[s]' with the cases.[208] Even assuming that consistency with the cases can be a good reason to superimpose an otherwise alien element into his account, it is a weak reason here because a bailee's duty includes a requirement to act reasonably. As noted above, such a requirement has not been definitively recognised in change of position.

As such, a rationale based on either conception of autonomy of disposition involves significant inconsistency with the case law, in particular the requirements of irreversibility and good faith.

(ii) Decisional Autonomy

By contrast, decisional autonomy carries neither inconsistency and, as will be seen below, is otherwise consistent with the accepted features of the defence. It does, however, present a different problem. To avoid infringing the defendant's decisional autonomy requires that he not be held to non-autonomous decisions in relation to the enrichment — in the example above, his decisions to gift $50,000 and to divorce his spouse, both of which were made on the mistaken basis that he was entitled to the enrichment. That end cannot be achieved by affording the defendant a defence, because that would not reverse the gift or the divorce. But although the defence cannot *prevent* an infringement to the defendant's autonomy, it does provide the next best thing: it retrospectively cures the defect in the defendant's decision-making. The defendant was content to gift $50,000 and divorce his spouse on the

[204] Ibid 583–4 [29]–[30] (French CJ), 626 [157] (Gageler J). See also *TRA Global* (n 101).
[205] Cf Seah (n 182) 46–7.
[206] See above nn 50–1 and accompanying text.
[207] Grantham, 'Allocating the Costs of Making Restitution (n 33) 218.
[208] Ibid.

understanding that he was entitled to the $100,000; if he is afforded a full defence, that understanding is effectively validated.

It follows from framing the defence as the next best thing to reversing the defendant's non-autonomous decisions that if those decisions *are* easily reversible, the defence should not be available. This neatly accords, unlike autonomy of disposition, with the irreversibility requirement under current law. So, for example, if the $50,000 gift is reversible, and the defendant's decisional autonomy is thereby able to be directly vindicated, the defendant should not be able to avail himself of the defence in respect of that change of position.[209]

As foreshadowed, a rationale based on decisional autonomy is also consistent with the good faith requirement, insofar as that requirement is subjective.[210] As Bant notes, if the defendant 'knows that the claimant's decision to transfer was vitiated, there is no need to protect his autonomy, because his change of position reflected an unimpaired exercise of his decision-making capacity'.[211]

Thus, decisional autonomy can be preferred over autonomy of disposition on the basis that it does not suffer from the same inconsistencies with the case law. It also clearly excludes independent changes of position, because in such cases the defendant has made no decision in relation to the enrichment, let alone a non-autonomous decision. In this respect, it is both consistent with the reliance-favouring authority canvassed above and a more useful rationale than inequitability (which failed to provide guidance on whether reliance should be necessary).

2 *Reciprocity*

For an autonomy-based rationale to be normatively persuasive, some justification must be given for why the claimant must reciprocally recognise the defendant's autonomy. Many commentators avoid this task.[212] Grantham and Rickett are an exception, and suggest two possible justifications.[213] The first is corrective justice. Given the longstanding debate that rages about which form of justice, corrective or distributive, underpins mistaken payment liability,[214] this article is agnostic on the topic; as such, the potential role of corrective justice as a justification for reciprocity is not pursued here. The second justification, to which Seah also adverts, is 'contradiction'.[215]

If understood as *moral* contradiction, this justification has force. Its basis can be found in the Categorical Imperative, the centrepiece of Kant's moral philosophy. Its first formulation, the Formula of Universal Law, enjoins us to 'act only in accordance with that maxim through which you can at the same time will that it

209 Dagan (n 105) 48. Cf Bant, *The Change of Position Defence* (n 4) 213.
210 As to the consistency of decisional autonomy with the objective aspect of good faith, see Part IV(B)(4) below.
211 Bant, *The Change of Position Defence* (n 4) 213.
212 See, eg, Edelman (n 9) 1021; McInnes (n 187) 455.
213 Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 38) 101, 104.
214 See generally Klimchuk, 'Unjust Enrichment and the Forms of Justice' (n 64) 186.
215 Seah (n 182) 44.

become a universal law'.[216] In other words, the subjective maxims or bases on which we act must be capable of being universalised to every other person without contradiction; if we assert something to be true of ourselves, we must accept it to be equally true of others.

The Formula of Universal Law and Kantian moral philosophy generally are 'pre-legal'.[217] But Kantian philosophy predominates, both explicitly and implicitly,[218] in theoretical accounts of restitution and of private law more broadly.[219] Whether this is desirable is beyond the scope of this article.[220] But the preponderance of Kantian thinking in private law theory offers at least a promising basis to say that the Formula of Universal Law can properly inform the change of position defence.

Applied to change of position, the Formula means the claimant cannot invoke her decisional autonomy in respect of the enrichment without accepting that the defendant is also entitled to the same decisional autonomy. In asking that she not be held to her non-autonomous decision in relation to the enrichment (the mistaken transfer), the claimant must accept that the defendant is also entitled to ask not to be held to any non-autonomous decisions he makes in relation to the enrichment. Kantian moral philosophy thus substantiates the intuition that the claimant must reciprocally recognise the defendant's autonomy.

3 *Reconciling the Parties' Autonomy Interests*

How, then, should the parties' competing decisional autonomy interests be reconciled? It may be accepted that they deserve 'equal' respect.[221] 'Equality' should not be a rigid implement, however, because the manner in which the parties' autonomy interests are implicated differs in two material respects.

First, the claimant's non-autonomous decision is a mistaken payment of money, whereas the defendant's non-autonomous decision need not involve financial expenditure. Thus, the 'unjust disenrichment' model that Edelman J posits extra-judicially — which suggests that equal respect requires the defendant's change of position, like the claimant's mistaken transfer, to be 'disenriching'[222] — proceeds from the false premise that the parties' decisions mirror one another.

Second, as noted above, the defendant's non-autonomous decision is not reversed by affording him a defence. So, unlike the claimant — reversal of whose

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216 Immanuel Kant, *Groundwork of the Metaphysics of Morals* in *Practical Philosophy*, tr/ed Mary J Gregor (Cambridge University Press, 1996) 4:421.

217 Grantham and Rickett 'A Normative Account of Defences to Restitutionary Liability' (n 38) 100. See also Wilmot-Smith, 'Should the Payee Pay?' (n 126) 852 n 36.

218 Jennifer M Nadler, 'What Right Does Unjust Enrichment Law Protect?' (2008) 28(2) *Oxford Journal of Legal Studies* 245, 248.

219 See Alan Brudner, *The Unity of the Common Law* (Oxford University Press, 2nd ed, 2013) 65; Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, 2012) ch 4; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) 19–24.

220 See generally Chris Maxwell, 'Thinking Philosophically About Law: The Role of Moral and Political Reasoning in Shaping the Law' (2023) 47(1) *Melbourne University Law Review* 229, 231–7.

221 Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 38) 101; Edelman (n 9) 1021.

222 Edelman (n 9) 1021–3.

non-autonomous decision is the very outcome of restitution — the defendant's decisional autonomy cannot be directly vindicated within the confines of the restitutionary claim.

This asymmetry warrants a flexible approach. Flexibility is achieved by a conception of the defence as a balancing act, rather than a rigid preference for one party's decisional autonomy interest.[223] This approach evokes Lord Goff's weighing of injustices,[224] albeit its parameters are narrower. What falls to be compared between the parties is not 'free-floating justice', but their 'more definite' decisional autonomy interests.[225] It is not the general 'balancing of competing equities' disavowed in *Hills*;[226] at the same time, its flexibility addresses the concern that the defence not be unduly restricted by technicality.[227]

4 *Consistency*

Several points of consistency between a decisional autonomy-based rationale and the cases have already been noted, namely the good faith requirement (insofar as it is subjective) and the availability of the defence in cases of non-pecuniary and unquantifiable changes of position. In addition, anticipatory changes of position are readily accommodated into this framework; whether it occurs before or after receipt, the defendant's change of position is premised on a mistake and so his decisional autonomy is infringed by holding him to it. And as noted in Part IV(B)(3) above, a premise of the defence is that it cannot reverse the defendant's change of position and so opts for the next best thing. A corollary is that, consistently with the irreversibility requirement, if it is possible for the defendant to reverse the change of position himself the defence should not be available.

However, Bant suggests two other features of the defence are incongruous with a purely autonomy-based rationale.

(a) *Fault*

The first is the role of fault. Bant seizes, in particular, upon the requirement that the defendant's reliance be reasonable. As noted above, this is not yet an accepted part of the defence. However, the concern applies equally to the good faith requirement insofar as it is objective. Bant's concern is that limiting the availability of the defence by reference to the defendant's fault 'cannot reflect a concern to *protect* [his] autonomy'.[228]

This relies on the faulty premise, however, that the defence is single-mindedly concerned with protecting the defendant's autonomy, without regard to other considerations. As framed above, and as Bant herself recognises, the defence does not protect the defendant's decisional autonomy to an unlimited extent

223 Grantham, 'Change of Position-Based Defences' (n 14) 426; Bant, *The Change of Position Defence* (n 4) 214; Seah (n 182) 41.
224 *Lipkin Gorman* (n 3) 579 (Lord Goff).
225 Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 38) 123.
226 *Hills* (n 4) 594 [69] (Hayne, Crennan, Kiefel, Bell and Keane JJ).
227 Ibid 582 [24] (French CJ), 600 [88] (Hayne, Crennan, Kiefel, Bell and Keane JJ).
228 Bant, *The Change of Position Defence* (n 4) 213 (emphasis in original).

wherever it is infringed;[229] it reconciles both parties' decisional autonomy interests.[230] If the defendant changes his position unreasonably or otherwise than in objective good faith, that may provide a reason to defer his autonomy interest to the claimant's.[231] So understood, an autonomy-based rationale is consistent with these fault-based features of the defence.

(b) *Pro Tanto Operation*

Second, Bant argues that an exclusive autonomy rationale would produce a defence that operates in full, rather than *pro tanto* (as it currently does).[232] This argument is grounded in Dagan's view of autonomy, which attaches significance not merely to the decisions the defendant actually makes on the basis of a mistaken payment but also to the expectations the payment engenders about his wealth. Those expectations in turn feed in manifold (and difficult-to-isolate) ways into his 'life-plans'.[233] As Bant suggests, for the defence to protect this autonomy interest fully it would arguably have to apply in full wherever the defendant generates an expectation that the enrichment is part of his wealth, because it is difficult to extricate precisely what effect that expectation has on the defendant's life plans.[234]

However, Dagan's view of autonomy is wider than the decisional autonomy interest that this article adopts. It is not the mere fact that the defendant has generated expectations on the basis of an enrichment that implicates the defendant's decisional autonomy, but the crystallisation of those expectations into actual decisions. Thus, the defendant must point to specific decisions made on the basis of the enrichment to invoke the defence. Where those decisions involve expenditure less than the full amount of the enrichment, the defendant's decisional autonomy is given effect by affording him the defence to the extent of that expenditure. Accordingly, the *pro tanto* operation of the defence is consistent with the decisional autonomy rationale posited above.

Reciprocal recognition of decisional autonomy therefore provides a persuasive normative justification that is consistent with the accepted features of the defence.

V Conclusion

Of all defences to restitutionary claims, change of position has received the lion's share of theoretical attention.[235] As was seen in Part III, however, the corpus of thinking that has developed about its foundations is unsatisfying. Rationales hitherto in vogue have material shortcomings in their capacity to facilitate principled development of the defence: inequitability its abstractness; disenrichment its false premise; security of receipts its subsidiarity to a broader autonomy-based rationale;

[229] Ibid 217. See also Seah (n 182) 16–17.
[230] Bant, *The Change of Position Defence* (n 4) 214.
[231] Ross Grantham, 'Change of Position-Based Defences' (n 14) 429.
[232] Bant, *The Change of Position Defence* (n 4) 213.
[233] Dagan (n 105) 48.
[234] Bant, *The Change of Position Defence* (n 4) 213.
[235] Graham Virgo, 'Review: *Tort Law Defences* by James Goudkamp' (2015) 74(1) *Cambridge Law Journal* 160, 160.

and loss allocation and the 'no worse off' rationale their inability to provide a normative justification for the defence.

Part IV advanced two better rationales: outcome responsibility and reciprocal recognition of decisional autonomy. Both justify the defence in its application to mistaken payment claims and broadly align with the state of the authorities.

That alignment suggests these rationales can stand comfortably together and, at times, complementarily: as, for example, in the more precise position that can be drawn from outcome responsibility than decisional autonomy about the irreversibility requirement, and the content that decisional autonomy gives to the requisite qualities of the defendant's putative detriment, which outcome responsibility does not. The precise interaction between the rationales is, however, a matter for further analysis. So are the exact contours along which they suggest the defence should develop. What this article has sought to demonstrate is that, as and when further questions inevitably arise about the change of position defence, they are best confronted using these rationales.