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## CHANGE OF POSITION: A DEFENCE OF UNJUST DISENRIICHMENT

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### INTRODUCTION

Section 65 of the *Restatement (Third) of Restitution and Unjust Enrichment* refers to the defence of change of position in a claim for unjust enrichment.<sup>1</sup> The section provides, “If receipt of a benefit has led a recipient without notice to change position in such manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient’s liability in restitution is to that extent reduced.”<sup>2</sup>

In England, when the defence of change of position was first explicitly recognised, it was stated in very similar terms. The case which recognised the defence in England was *Lipkin Gorman v. Karpnale Ltd.*<sup>3</sup> In that case change of position was described as a defence available “to a person whose position

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\* Justice of the Supreme Court of Western Australia. My thanks to Elise Bant, Andrew Burrows, Andrew Kull, Charles Mitchell, Robert Stevens, and William Swadling for helpful comments upon, and criticisms of, an earlier version of this Article.

<sup>1</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 (2011).

<sup>2</sup> *Id.*

<sup>3</sup> [1991] 2 A.C. 548 (H.L.) (appeal taken from Eng.).

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*has so changed that it would be inequitable in all the circumstances to require him to make restitution.*"<sup>4</sup>

The leading statement of the defence in both U.S. and English law expresses the defence's focus at this extremely abstract level of inequity. But inequity does not operate at large. In particular, the English courts have recently, and rapidly, developed a considerable number of rules relating to applicability of the change-of-position defence to claims based on unjust enrichment. As the reporter's note (a) to *Restatement (Third)* section 65 observed of the defence's development in English law, "[T]he belated discovery of a general defense of change of position has been the occasion for a much fuller examination of its definition and basic principles than it has ever received in U.S. courts."<sup>5</sup>

This Article utilises the explosion in English case law to explain what is meant by the notion of inequity and what it tells us about the nature of the defence of change of position. In English law, the defence of change of position is sometimes referred to as a defence of disenrichment. The thesis of this Article is that establishing disenrichment is a necessary but not sufficient requirement to the defence. As the rules concerning change of position begin to coalesce in England, the picture that has emerged is that a defendant must prove that any disenrichment is unjust.

This Article is divided into three parts. The first Part explains that the foundations of change of position in "inequity" do not permit unbridled judicial discretion. Instead, this inequity is manifest in established principles. Recent English law is used to explain these principles. Nevertheless, difficult questions relating to each and every one of these principles require resolution. These questions can only be answered in a principled way once the concept of inequity, and the rationale for the defence, is elucidated.

The second Part of the Article turns to the rationale for the defence. Suggestions that the rationale is "security of receipt," "loss allocation," "disenrichment," or "irreversibility" are rejected. Although neither disenrichment nor security of receipt are rationales of the defence, disenrichment is, nevertheless, an essential element the defence and security of receipt and loss allocation may be effects of the defence. The rationale is the protection of the defendant's autonomy. The degree of protection for a defendant's autonomy that the courts have chosen is the same degree of protection as that given to the claimant's autonomy. This outcome resulted from courts effectively developing change of position in tandem with the rules for the claimant to establish a prima facie case. In other words, if a claimant can establish a prima facie claim for unjust enrichment by proving that the defendant has been enriched and that the enrichment is caused by an unjust

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<sup>4</sup> *Id.* at 580 (Lord Goff).

<sup>5</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 reporter's note cmt. a.

factor, *then* a defendant will have a defence of *unjust disenrichment* if, like the claimant, she can prove (1) that she was disenriched and (2) that the disenrichment was caused by an unjust factor. There is a principled coherence to this approach. It could hardly be just for a claimant to be able to insist upon restitution to protect his autonomy and yet deny the same protection to the autonomy of the defendant.

The final Part of this Article then applies that approach to the questions that arise in relation to the principles underlying the defence. With a principled path forward, the many unanswered questions concerning the operation of the change-of-position defence can be answered without resort to idiosyncratic notions of palm-tree justice.

#### I. CHANGE OF POSITION: THE PRINCIPLES GOVERNING “INEQUITABILITY” AND THE REMAINING QUESTIONS

When the defence of change of position was introduced into English law for the first time in *Lipkin Gorman v. Karpnale Ltd.*,<sup>6</sup> the House of Lords was required to overrule the decision of *Baylis v. Bishop of London*.<sup>7</sup> In *Baylis*, a bishop failed in his attempt to raise a defence of position to a claim for restitution of rent charges paid by mistake.<sup>8</sup> The Court of Appeal in *Baylis* had refused to recognise a defence of change of position. Lord Justice Hamilton asserted that a plural and transparent twentieth-century law had no place for vague, discretionary, and unprincipled “justice.”<sup>9</sup> In overruling the *Baylis* decision, the House of Lords was concerned that the defence be developed in a principled way, thus curtailing the objections of Lord Justice Hamilton. In the leading speech, Lord Goff spoke of unjust enrichment in the following terms:

The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.<sup>10</sup>

It is in this light that the references by Lord Goff to inequity must be understood. Lord Goff could not have been suggesting that judges can exercise idiosyncratic discretion in deciding whether the defence applies. This was the very objection that he was trying to counter. A strong consensus

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<sup>6</sup> [1991] 2 A.C. 548 (H.L.) (appeal taken from Eng.).

<sup>7</sup> *Id.* at 579 (stating that the change-of-position defence “is inconsistent with the decisions of the . . . Court of Appeal in *Baylis*”); *Baylis v. Bishop of London*, [1913] 1 Ch. 127.

<sup>8</sup> *Baylis*, 1 Ch. at 135, 138, 141.

<sup>9</sup> *Id.* at 140.

<sup>10</sup> *Lipkin Gorman*, 2 A.C. at 578.

developed around this point in England.<sup>11</sup> The foundation of the defence in “inequitability” is not a prescription for an oneiric image of justice masquerading as unprincipled discretion.

However, despite the consensus that change of position is based on principle, not unbridled discretion, the defence has developed without clear enunciation of a core rationale. Unless we know *why* the defence exists, and unless the nature of “inequitability” can be elucidated, then it is very difficult to avoid the descent into the chasm of discretionary, instance-specific adjudication that Lord Goff was so anxious to avoid.<sup>12</sup> Consider a case like *Scottish Equitable plc v. Derby*.<sup>13</sup> Mr. Derby was a married man, with two children, who struggled to make ends meet.<sup>14</sup> He was then made redundant.<sup>15</sup> He took early retirement and drew early on his pension.<sup>16</sup> When he turned sixty-five he drew down his pension.<sup>17</sup> Scottish Equitable mistakenly failed to deduct the early pension payments.<sup>18</sup> Mr. Derby was paid £51,333 on a policy with a value of £29,486. He was on the breadline; he had no spare cash and had borrowed to the hilt.<sup>19</sup> He used £41,671 to discharge part of the mortgage

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<sup>11</sup> See *Scottish Equitable plc v. Derby*, [2001] EWCA (Civ) 369, [2001] 3 All E.R. 818 at 832 (Brown, L.J.) (Eng.) (rejecting a defence of change of position after observing that “there is no legal principle properly entitling the court to disallow recovery”); *Philip Collins Ltd. v. Davis*, [2000] 3 All E.R. 808 at 827 (Parker J.) (Eng.) (“[I]f recovery of the overpayments is to be denied . . . it must be denied not as a matter of discretion but of legal principle.”); *Standard Bank London Ltd. v. Canara Bank*, [2002] EWHC (Comm) 1574, [90], [2002] All E.R. 340 (“[T]he right to rely on a defence of change of position are matters which depend on the established principles of law rather than the discretion of the court.”); see also *Test Claimants in the FII Grp. Litig. v. Comm’rs for Her Majesty’s Revenue & Customs*, [2008] EWHC (Ch) 2893, [326], [2009] S.T.C. 254 (Henderson J.) (discussing *Scottish Equitable* and the need for courts to “proceed on the basis of principle, not sympathy”); Charles Mitchell, *Change of Position: The Developing Law*, 2005 L.M.C.L.Q. 168, 169 (examining *Lipkin Gorman*, *Philip Collins*, and *Scottish Equitable* and concluding that the “better view of the meaning of those cases is one that recognizes that the change of position defence must be guided by legal principles, not judicial discretion”). Andrew Burrows says that a descent into discretionary adjudication of this defence “would be to take us back to the dark ages of the subject.” Andrew Burrows, *Clouding the Issues on Change of Position*, 63 CAMBRIDGE L.J. 276, 280 (2004).

<sup>12</sup> Witness, for instance, the siren call for such unbridled discretion, based on unconstrained notions of “equity” by Judge Munby in *Commerzbank AG v. Price-Jones*, [2003] EWCA (Civ) 1663 at [56], [2004] 1 P & C.R. 15. See also *Vaught v. Tell Sell UK Ltd.*, [2005] EWHC (QB) 2404, [175]-[176], [2005] All E.R. 308.

<sup>13</sup> [2001] EWCA (Civ) 369, [2001] 3 All E.R. 818 (Eng.).

<sup>14</sup> *Id.* at 820.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 802-21.

<sup>17</sup> *Id.* at 821.

<sup>18</sup> *Id.* at 822.

<sup>19</sup> *Id.*

on his modest home.<sup>20</sup> When Scottish Equitable sought restitution of the payment, one question was whether Mr. Derby's mortgage repayment entitled him to the change-of-position defence.<sup>21</sup> Applying a discretionary approach to "inequity," the answer might seem easy. Mr. Derby desperately needed the money. He had acted honestly. Scottish Equitable had been at fault. Despite these circumstances, the defence was denied. The Court of Appeal rightly stated,

[I]t is impossible not to feel sympathy for him, beset as he now is by financial problems, matrimonial problems and health problems. But the court must proceed on the basis of principle, not sympathy, in order that the defence of change of position should not (as Burrows puts it . . .) "disintegrate into a case by case discretionary analysis of the justice of individual facts, far removed from principle."<sup>22</sup>

And so it is that English cases have rapidly proceeded to recognise such principles:

- a. The burden of proof for each element of the defence is on the defendant. Therefore, the defence will fail in a situation where the defendant does not "give a full account" of how the enrichment was dissipated.<sup>23</sup>
- b. The defendant's position must have changed detrimentally.<sup>24</sup> In other words, the defendant must have been "disenriched" because the defence only operates *pro tanto* to the extent that the defendant's wealth has been reduced at the time of trial.<sup>25</sup>
- c. Disenrichments include situations where the claimant's wealth has been reduced by his own acts or omissions, the acts or omissions of a third party, or a natural event such as where a defendant receives a

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 823-24.

<sup>22</sup> *Id.* at 828 (quoting ANDREW BURROWS, *THE LAW OF RESTITUTION* 426 (1993)).

<sup>23</sup> See *MGN Ltd. v. Horton*, [2009] EWHC (QB) 1680, [33], [2009] All E.R. 99 (Eng.).

<sup>24</sup> *Scottish Equitable*, 3 All E.R. at [35].

<sup>25</sup> *NEC Semi-Conductors Ltd. v. Inland Revenue Comm'rs*, [2006] EWCA (Civ) 606, [175] (Mummery, L.J.); *Commerzbank AG v. Price-Jones*, [2003] EWCA (Civ) 1663, [1], [28], [36], [39], [40], [2004] 1 P & C.R. 15 (Mummery, L.J.); see also PETER BIRKS, *UNJUST ENRICHMENT* 207-12 (2d ed. 2005); ANDREW BURROWS, *THE LAW OF RESTITUTION* 514-15 (2d ed. 2002); GRAHAM VIRGO, *PRINCIPLES OF THE LAW OF RESTITUTION* 695 (2d ed. 2006). Other jurisdictions label the change-of-position defence as "disenrichment" because of this requirement. See GERHARD DANNEMANN, *THE GERMAN LAW OF UNJUSTIFIED ENRICHMENT AND RESTITUTION* 138 (2009) (discussing German law); THOMAS KREBS, *RESTITUTION AT THE CROSSROADS* 279 (2001) (same); cf. *Commerzbank*, EWCA (Civ) 1663 at [66]-[72] (Munby, J).

mistaken payment from a claimant and the payment is then stolen from the defendant.<sup>26</sup> This is described by Andrew Burrows as the “wide view” of change of position.<sup>27</sup>

- d. The defendant must prove that the disenrichment was causally related to the enrichment at the claimant’s expense.<sup>28</sup>
- e. The causal relation can include both changes of position subsequent to the receipt of the enrichment and changes of position which anticipate an enrichment which is received later.<sup>29</sup>
- f. The change of position must be in good faith.<sup>30</sup>
- g. Carelessness by a payer in making the payment or a payee in changing his or her position is irrelevant.<sup>31</sup>
- h. The change of position must not be made with the knowledge of the claim for unjust enrichment.<sup>32</sup>
- i. The change of position will usually not suffice if the defendant believed that the enrichment would otherwise have to be paid back to the claimant or some performance rendered in exchange.<sup>33</sup>

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<sup>26</sup> *Scottish Equitable*, 3 All E.R. at [31] (quoting *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.) (appeal taken from Eng.); *Rahmah v. Abacha*, [2006] EWCA (Civ) 1492, [85] (Arden L.J.) (Eng.); *Cressman v. Coys of Kensington Ltd.*, [2004] 1 W.L.R. 2775 (A.C.), [41]; *Test Claimants in the FII Grp. Litig. v. Comm’rs for Her Majesty’s Revenue & Customs*, [2008] EWHC (Ch) 2893, [325], [2009] S.T.C. 254 (Henderson, J.); *Rose v. AIB Grp. plc*, [2003] EWHC (Ch) 1737, [2003] 1 W.L.R. 2791, [49] (Warren Q.C.); *Nat’l Westminster Bank plc v. Somer Int’l Ltd.*, [2001] EWCA (Civ) 970, [2002] Q.B. 1286 [25]. This principle was applied in a Hong Kong case when an enrichment was stolen immediately after receipt. See *Hua Rong Fin. Ltd. v. Mega Capital Enters.*, [2001] 3 H.K.L.R.D. 623, 632 (C.A.).

<sup>27</sup> BURROWS, *supra* note 25, at 515.

<sup>28</sup> *Rahmah*, EWCA (Civ) at [56], [85]; *Lipkin Gorman*, 2 A.C. at 560 (Lord Templeman’s used car example); *Scottish Equitable*, 3 All E.R. at [31].

<sup>29</sup> *Dextra Bank & Trust Co. v. Bank of Jam.*, [2002] 1 All E.R. (Comm.) 193 (P.C.) [38] (appeal taken from Jam.).

<sup>30</sup> *Lipkin Gorman*, 2 A.C. at 580; *Dextra*, 1 All E.R. at [42].

<sup>31</sup> *Dextra*, 1 All E.R. at [45].

<sup>32</sup> *Lipkin Gorman*, 2 A.C. at 580; *Cressman*, 1 W.L.R. at [41]. In *Niru Battery Manufacturing Co. v. Milestone Trading Ltd.*, [2003] EWCA (Civ) 1446, [2004] Q.B. 985, [168]-[169], this knowledge bar was conflated with “good faith.”

<sup>33</sup> *Goss v. Chilcott*, [1996] 1 A.C. 788 (P.C.) 799 (appeal taken from N.Z.); *Haugesund Kommune v. Depfa ACS Bank*, [2011] EWCA (Civ) 33, [2011] W.L.R. 25 (Eng.).

- j. The person claiming change of position must not be a “wrongdoer.”<sup>34</sup>

Despite the recent explosion of English cases elucidating these principles, uncertainty remains in defining the contours of each pronounced principle. Consider the following in relation to each of the principles set out above:

- a. Although the burden of proof is on the defendant, what must the defendant prove to discharge this burden? In *Scottish Equitable* the Court of Appeal held that the defendants were not required to prove precise details of expenditure but they were required to (and did) satisfy the court that their levels of expenditure would have been lower if they had been paid the correct sums.<sup>35</sup> But how can a defendant prove how much lower the levels of expenditure would have been?
- b. What will count as a relevant disenrichment? The “disenrichment” might be a reduction in the defendant’s assets, as well as a reduction in a defendant’s future income stream or potential future income stream.<sup>36</sup> But what about cases where the defendant has paid money to charity<sup>37</sup> and has a potential claim against the charity for the return of the money paid by the claimant by mistake? Would it make a difference if the charity is prepared voluntarily to return the money even without litigation?
- c. How “wide” is the wide view of change of position? If the innocent defendant *would have* wasted the money even if he had known of the claimant’s mistake, should the defence still apply? So, in the example where a mistaken payment is subsequently stolen, would the defence still apply if the defendant would have gambled, and lost, the money even if he had known of the mistake?
- d. What is the test of causation to be applied?
- e. How can anticipatory changes of position be reconciled with a requirement that there be a causal link for the defence to apply? Plainly, the *receipt* of the enrichment cannot be the cause of the

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<sup>34</sup> *Lipkin Gorman*, 2 A.C. at 580; *Test Claimants in the FII Grp. Litig. v. Comm’rs for Her Majesty’s Revenue & Customs*, [2008] EWHC (Ch) 2893, [337]-[338], [2009] S.T.C. 254; *Barros Mattos Junior v. MacDaniels Ltd.*, [2005] 1 W.L.R. 247.

<sup>35</sup> *Scottish Equitable plc v. Derby*, [2001] EWCA (Civ) 369, [2001] 3 All E.R. 818, [33].

<sup>36</sup> *Commerzbank AG v. Price-Jones*, [2003] EWCA (Civ) 1663, [39], [2004] 1 P & C.R. 15; *Gertsch v Atsas* [1999] NSWSC 898 (Austl.); cf. Eugene Fung & Lusina Ho, *Change of Position and Estoppel*, 117 L.Q.R. 14, 17 (2001).

<sup>37</sup> Lord Goff’s paradigmatic example in *Lipkin Gorman*, 2 A.C. at 579.

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disenrichment since the disenrichment occurs *before* the enrichment in cases of anticipatory change of position.

- f. What is meant by good faith and how far does it extend? In particular, it has been suggested that the concept of good faith does not mean acting without bad faith but can extend to a defendant acting in a commercially unacceptable way.<sup>38</sup> What does this mean?
- g. Why should carelessness or even negligence by a defendant be irrelevant? Why is it “equitable” to allow the defence to a negligent defendant?
- h. Is it always true that the recipient’s knowledge of a claim for unjust enrichment will bar the defence? Suppose a mistaken payment is stolen or lost or the recipient’s bank becomes insolvent before the recipient is able to repay it or before the mistaken payer will accept repayment?<sup>39</sup> Further, what amounts to “knowledge” of the unjust enrichment claim for the purposes of the bar to the defence? Does “constructive knowledge” suffice?<sup>40</sup> What about knowledge of a potential or possible claim?<sup>41</sup>
- i. When will the belief that an enrichment must be repaid prevent the operation of the defence of change of position? Suppose a defendant receives an advance payment under a void contract and pays the money to a third party, believing that the contract is valid. Courts have held that the defence will not apply.<sup>42</sup> But suppose the defendant spends the money buying materials or doing preparatory work *in performance of* the putative contract. Will the defence be denied in such a case?
- j. What is the meaning of the “wrongdoing” bar to the change of position? For instance, Lord Goff in *Lipkin Gorman* said that the casino defendant who paid money out under a void gambling

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<sup>38</sup> *Niru Battery Mfg. Co. v. Milestone Trading Ltd.*, [2003] EWCA (Civ) 1446, [2004] Q.B. 1004 at [164].

<sup>39</sup> *Bank of New Zealand Ltd. v Waitaki International Processing (NI) Ltd.* [1999] 2 NZLR 211(N.Z.).

<sup>40</sup> See *Niru Battery Mfg.*, [2004] Q.B. at [164]; *Jones v. Churcher*, [2009] EWHC (QB) 722, [2009] All E.R. 5.

<sup>41</sup> *Rose v. AIB Grp. plc*, [2003] EWHC (Ch) 1737, [2003] 1 W.L.R. 2791, [39].

<sup>42</sup> *Goss v. Chilcott*, [1996] 1 A.C. 788 (P.C.) (appeal taken from N.Z.); *Haugesund Kommune v. Depfa ACS Bank*, [2011] EWCA (Civ) 33 (Eng.).



transaction was not a wrongdoer.<sup>43</sup> But in *Barros Mattos Junior v. MacDaniels Ltd.*,<sup>44</sup> Justice Laddie determined that the Nigerian defendants who innocently received \$8 million of stolen money and converted it to foreign currency (and paid it out, less commission) were wrongdoers because the foreign exchange transaction was unlawful under Nigerian law.<sup>45</sup> This creates a fine distinction between acts which are void but “lawful” (gambling transactions) and acts which are void but “unlawful” (the Nigerian foreign exchange transactions).<sup>46</sup> It has also been suggested that, based on constitutional principles, a government which demands payment of a tax that is not due is a wrongdoer for the purposes of a restitutionary claim but is not a wrongdoer for the purposes of a claim based on a mistaken payment by the taxpayer.<sup>47</sup>

There is therefore uncertainty in the operation of each of the established principles for the defence of change of position. Further principled development of the defence of change of position in the future will be very difficult without identification of a clear rationale for the defence.

## II. THE RATIONALE FOR OPERATION OF THE DEFENCE

### A. *The Rationale Is Not the Security of a Defendant’s Receipt or Loss Allocation*

One contender for the rationale that can be easily excluded is the rationale based on security of receipts. That rationale was rejected by the Privy Council in *Dextra Bank & Trust Co. v. Bank of Jamaica*.<sup>48</sup> Dextra Bank argued that the Bank of Jamaica should be denied the defence because the Bank of Jamaica changed its position in anticipation of a receipt.<sup>49</sup> Hence, it was argued, a rationale based on security of actual receipt could not justify the defence in the

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<sup>43</sup> Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548 (H.L.) 580.

<sup>44</sup> [2005] 1 W.L.R. 247.

<sup>45</sup> *Id.* at [4]-[6], [14], [43]-[44].

<sup>46</sup> An alternative definition of “wrongdoing” excludes claims for restitution based in tort (for example, breach of a statutory duty) from claims for change of position. See JAMES EDELMAN, GAIN-BASED DAMAGES 96 (2002) (referring to this approach in RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 141(2) (1937)).

<sup>47</sup> Test Claimants in the FII Grp. Litig. v. Comm’rs for Her Majesty’s Revenue & Customs, [2008] EWHC (Ch) 2893, [337]-[339], [2009] S.T.C. 254.

<sup>48</sup> *Dextra Bank & Trust Co. v. Bank of Jam.*, [2002] 1 All E.R. (Comm.) 193 (P.C.) at [38] (appeal taken from Jam.).

<sup>49</sup> *Id.* at [34].

case.<sup>50</sup> The Privy Council rejected this argument and explained that such a rationale could not usefully be used to delimit the contours of the defence.<sup>51</sup>

There is a plain reason for this outcome. “Security of receipt” is not a rationale; it is the *effect* of the defence. The rationale *explains* the degree of security which is to be given to the defence.

At one extreme, a rationale dictating that maximum security be given to receipts would defeat all unjust enrichment claims to ensure that every receipt was completely secure. Maximum security of receipt would mean that any benefit received by a defendant ought to be secure from the strict liability of a claim in unjust enrichment. At the other extreme, a rationale requiring only minimal security to be given to receipts would only allow the defence in limited circumstances where a defendant had positively relied upon the receipt of the enrichment. The defence would be denied in a number of cases where it is now recognised as being required. For instance, the defence would be denied in a case where a defendant received a mistaken payment that was immediately stolen.<sup>52</sup> Similarly, the defence would be denied if a defendant were the recipient of a mistaken transfer of shares, the value of which had depreciated by the time the defendant was aware of the claimant’s monetary claim and in a position to sell them.<sup>53</sup> The final example where change of position should be available, but where it would be denied if it were limited to cases of reliance, is in a situation where a claimant bank makes a mistake about instructions from its customer. The bank pays money to a defendant who is a creditor of the customer. The payment discharges a debt owed to the defendant by the creditor. The bank seeks restitution. In England, the defendant is allowed a defence of change of position because a valuable debt owed to him has been discharged.<sup>54</sup> But if security of *relied upon* receipts were required, then the defence would be denied because the defendant has not relied upon the receipt. Interestingly, the *Restatement (Third)* suggests that the defence of change of position in this final example might be denied, but it permits instead a bona-fide-payee defence where the receipt discharges a claim that the defendant has as a creditor.<sup>55</sup>

The same point can be made in relation to an alleged rationale of loss allocation. Like security of receipt, an *effect* of the defence of change of position may be that losses are reallocated if both the claimant and defendant have suffered a loss. But a rationale is needed to explain *when* such loss allocation should occur.

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<sup>50</sup> *Id.* at [37].

<sup>51</sup> *Id.* at [38].

<sup>52</sup> See *Hua Rong Fin. Ltd. v. Mega Capital Enters.*, [2001] 3 H.K.L.R.D. 623, 632 (C.A.); *supra* note 26.

<sup>53</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmt. d (2011).

<sup>54</sup> *Barclays Bank Ltd. v. W.J. Simms Son & Cooke Ltd.*, [1980] Q.B. 679 at 695.

<sup>55</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 67 illus. 1.

B. *The Rationale Is Not “Irreversibility” or “Restitutio in Integrum Impossible”*

In a book that I co-authored with Dr. Elise Bant, we advocated an approach to change of position based in part on irreversibility.<sup>56</sup> In a recent book on change of position, Dr. Bant argued that this concern with protecting a defendant against irreversible transactions lies at the core of the defence. This approach is very similar to the defence to rescission of *restitutio in integrum* impossible.<sup>57</sup> The two approaches proceed by the following syllogism: (1) restitution is concerned with reversing transfers; (2) if a defendant subsequently enters into an irreversible transaction, then the prior transfer between claimant and defendant can no longer be reversed; (3) restitution to the claimant must therefore be impossible and must be refused.

This argument is unsustainable. First, as a rationale, irreversibility is simply an inaccurate description of the cases. A defendant who receives a mistaken payment of £10,000 and spends it on a holiday has entered into an irreversible transaction. If the rationale were irreversibility, then the defence ought to be available whether the defendant is in bad faith, whether the defendant has knowledge of the claim or a liability to repay the money, or whether the defendant would have taken the holiday regardless of the receipt. In all of these situations the defendant has no defence, despite entering into a transaction which might be said to be “irreversible.”

Confronted by this difficulty, Dr. Bant suggests that irreversibility is only one aspect of the defence.<sup>58</sup> But irreversibility cannot even play a limited role. In any personal restitutionary claim, as long as the defendant remains enriched and solvent every transfer of value to a defendant is reversible. A simple example will suffice. Suppose a claimant pays a £100 note to a defendant by mistake and the defendant deposits that note in the bank. Restitution of the claimant’s rights to the precise note will be practically impossible and irreversible, but as long as the defendant remains solvent, there is no difficulty with reversing the transfer of the £100 value received by the defendant. The defendant simply repays the value.

In truth, all the examples of irreversibility cited by Dr. Bant reduce to an inquiry into whether a defendant has been disenriched. In attempting to differentiate her irreversibility requirement from a disenrichment requirement, Dr. Bant gives the example of a mistaken payment (say £50 million) which induces a defendant’s irreversible decision to have another child.<sup>59</sup> The defendant might not be able to point to any significant disenrichment, or at

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<sup>56</sup> JAMES EDELMAN & ELISE BANT, UNJUST ENRICHMENT IN AUSTRALIA 323-25 (2006). For an earlier exposition of this view, see Elise Bant & Peter Creighton, *The Australian Change of Position Defence*, 2002 U. W. AUSTL. L. REV. 208, 212-13.

<sup>57</sup> DOMINIC O’SULLIVAN, STEVEN ELLIOTT & RAFAL ZAKRZEWSKI, THE LAW OF RESCISSION 557, 576 (2008).

<sup>58</sup> See ELISE BANT, THE CHANGE OF POSITION DEFENCE 217 (2009).

<sup>59</sup> *Id.* at 134.

least any disenrichment amounting to the mistaken payment. Far from supporting her thesis, however, this example undermines it. Suppose that the defendant had been considering having another child but would not have done so unless he or she had another £500,000. The defendant is then mistakenly awarded a lottery prize pool of £60 million. Although the decision to have a child is irreversible, the irreversibility is surely only relevant to the extent that the defendant has been disenriched – in this example, £500,000. No court would allow a defendant to keep the £60 million at the claimant's expense when evidence exists that the defendant would have committed to the same course of action for £500,000. Two decisions on related questions illustrate why this obvious conclusion would be reached by courts in such a case. In the first, it was held that an irreversible decision by a defendant to give up an offer of alternative employment would not be a change of position unless the alternative employment was remunerated at a higher level as the defendant's current job.<sup>60</sup> In the second, an irreversible decision to give up employment to become a student was relevant only to the earnings that were forgone.<sup>61</sup>

C. *The Rationale of the Change-of-Position Defence Is Not "Disenrichment"*

The late Professor Birks suggested that the rationale for the defence was that it showed that a key element of the cause of action was absent. Birks believed that one of the defence's central rationales is its concern with the enrichment element of the defence and a desire to ensure that the defendant is only liable to the extent that his assets remain swollen.<sup>62</sup> This view has attracted supporters.<sup>63</sup>

The most obvious problems with this rationale are that it is inconsistent with the English case law and with the defence's principled operation. Consider the defendant who receives a mistaken payment of £10,000 and spends the money on a holiday. Just as the receipt of a holiday would not be an enrichment if the defendant chose it only because he believed it to be free,<sup>64</sup> so too a defendant will be disenriched if he spends the money on a holiday believing that he was not required to repay the money received.

The simple example can easily be altered so that the disenrichment is not sufficient for a defence of change of position. If the defendant took the holiday in bad faith or knew of the claimant's mistake, then the defence will be denied.

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<sup>60</sup> *Commerzbank AG v. Price-Jones*, [2003] EWCA (Civ) 1663, [39], [2004] 1 P & C.R. 15.

<sup>61</sup> *Gertsch v Atsas* [1999] NSWSC 898, [98] (Austl.).

<sup>62</sup> BIRKS, *supra* note 25, at 207-09. In the same book, Professor Birks suggested that a second rationale is the need to protect the security of a defendant's receipt. *Id.* at 209.

<sup>63</sup> See, e.g., Robert Chambers, *Two Kinds of Enrichment*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT* 242, 275-76 (Robert Chambers et al. eds., 2009).

<sup>64</sup> See *Bridgewater v. Griffiths*, [2000] 1 W.L.R. 524 (W.B.) 533-34; *Rowe v. Vale of White Horse Dist. Council*, [2003] EWHC (Admin) 388, [14].

If the defence were based only upon a rationale of disenrichment, then the defence should be available regardless of whether the defendant acted in bad faith or whether the defendant has knowledge of the claim or a liability to repay the money. Yet, as we have seen, the defence is denied in these cases.

Although “disenrichment” cannot be the rationale for the change-of-position defence, there is significant support for it as an *element* of the defence that must be proved before the defence can succeed.<sup>65</sup> In other words, disenrichment is a necessary but not sufficient requirement for the defence. As will be seen below, the defence of change of position also requires that the disenrichment be *unjust*.

D. *The Rationale Is Equal Protection for the Defendant’s Autonomy*

There have been several important statements in English law that have attempted to elucidate the defence’s rationale. In each statement, the courts have emphasised that the “equity” in relation to change of position requires comparison between the position of the payer and the payee.<sup>66</sup> Perhaps the most well-known statement of the rationale of change of position was by Lord Goff in *Lipkin Gorman*: “[T]he injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.”<sup>67</sup> This has been subsequently emphasised by the Court of Appeal as the rationale for the defence.<sup>68</sup> The question then is how to determine when a defendant’s disenrichment is *unjust*? The degree of protection that the courts have chosen is the same protection as is given to the autonomy of the claimant.<sup>69</sup> This ought to be the minimum protection given to a defendant. A claimant should not be entitled to insist upon a right to protection of his autonomy in a primary claim without affording the same protection to the autonomy of the defendant in a defence.

In relation to a claimant’s primary claim, the late Professor Birks described a mistaken payment of a non-existent debt as the “core case” of unjust

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<sup>65</sup> See, e.g., *Sempra Metals Ltd. v. Inland Revenue Comm’rs*, [2008] 1 A.C. 561 (H.L.) [112] (appeal taken from Eng.); *NEC Semi-Conductors Ltd. v. Inland Revenue Comm’rs*, [2006] EWCA (Civ) 606, [175] (“unjustly gained and retained”); *Commerzbank*, EWCA (Civ) 1663 at [1], [28], [36], [39], [40], [2004] 1 P & C.R. 15 (Mummery L.J.); see also *BIRKS*, *supra* note 25, at 207-12; *BURROWS*, *supra* note 25, at 514-15; *VIRGO*, *supra* note 25, at 695.

<sup>66</sup> *Principal Grp. Ltd. v. Anderson*, (1997) 147 D.L.R. 4th 229, 234 (Can. Alta. C.A.); see also *Rose v. AIB Grp. plc*, [2003] EWHC (Ch) 1737, [2003] 1 W.L.R. 2791, [39].

<sup>67</sup> *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.) 579.

<sup>68</sup> *Haugesund Kommune v. Depfa ACS Bank*, [2010] EWCA (Civ) 579, [122] (Aikens L.J.) (Eng.); see *Adrian Briggs & James Edelman, Restitution and Not-so-Local Authority Swaps*, 126 L.Q.R. 500, 504 (2010).

<sup>69</sup> James Edelman, *Liability in Unjust Enrichment Where a Contract Fails to Materialize*, in *CONTRACT FORMATION AND PARTIES* 159, 171 (Andrew Burrows & Edwin Peels eds., 2010).

enrichment.<sup>70</sup> This is a core case of unjust enrichment because it illustrates that the payer's normative claim to an enrichment is based upon his or her payment being made with an impaired intention. The claimant's entitlement is based on (1) the defendant's enrichment at his expense and (2) the injustice of that enrichment.<sup>71</sup> Birks explained that the rest of the subject of unjust enrichment was concerned with all events "materially identical" with that core case of the mistaken payment.<sup>72</sup> There is now a consensus that the generalisation of this core case extends to situations where a claimant's intention to enrich a defendant is impaired or qualified. For example, a defendant is entitled to restitution of unjust enrichment if he pays money to a defendant by mistake, by duress or undue influence, or qualified by a condition which fails.<sup>73</sup> Each of these situations involves a right to restitution from a defendant where the defendant's enrichment would not have arisen but for the imperfect intention of the claimant. Outside unjust enrichment, restitution can also be awarded for reasons of wrongdoing or for particular policy reasons.<sup>74</sup> It has been recognised that restitution for wrongdoing has nothing to do with unjust enrichment<sup>75</sup> and arguably neither does restitution for policy reasons.<sup>76</sup>

If the core meaning of "unjust" in relation to a claimant's claim for restitution of unjust enrichment is that his intention was vitiated or qualified, then the natural meaning of "unjust" for the defendant's defence ought to be the same. This is particularly the case if the defendant's position is being compared with the claimant's. In other words, if a claimant is entitled to restitution of a defendant's enrichment when the receipt of that enrichment is unjust, then the defendant should be entitled to defend that claim by showing that the defendant has subsequently been disenriched in circumstances which are unjust, as measured by the same yardstick. Change of position is essentially a defence of "unjust disenrichment."

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<sup>70</sup> BIRKS, *supra* note 25, at 3.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Sempra Metals Ltd. v. Inland Revenue Comm'rs*, [2008] 1 A.C. 561 (H.L.) [23], [25] (appeal taken from Eng.); *Deutsche Morgan Grenfell Grp. v. Inland Revenue Comm'rs*, [2006] UKHL 49, [2007] 1 A.C. 558 (H.L.) [21] (appeal taken from Eng.); *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 (H.L.) 61 (Eng.); *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676 (K.B.) 681; *Farah Constrs. Pty. Ltd. v. Say-Dee Pty Ltd.*, (2007) 230 CLR 89, 156 (Austl.).

<sup>74</sup> BIRKS, *supra* note 25, at 11-16 (discussing "[r]estitution outside unjust enrichment").

<sup>75</sup> *Sempra Metals Ltd.*, 1 A.C. at [116] (Lord Nicholls), [132]-[146] (Lord Scott), [230]-[231] (Lord Mance); *Kingstreet Invs. Ltd. v. New Brunswick*, 1 S.C.R. 3, para. 33 (Can.); *Farah Constrs. Pty.*, 230 CLR at 156.

<sup>76</sup> It was assumed, without argument to the contrary, that constitutional policy is a ground of unjust enrichment in *Deutsche Morgan Grenfell Group*, [2006] UKHL 49, [2007] 1 A.C. 558. *But see Kingstreet Invs. Ltd.*, 1 S.C.R. 3; EDELMAN & BANT, *supra* note 56, at ch. 13.

We can apply this thesis to the core case for the defence of change of position. We have seen that the core case of unjust enrichment involves the enrichment of a defendant when the claimant would not have conferred that enrichment but for a mistake as to liability to pay the defendant.<sup>77</sup> Therefore, the core case for the defence of change of position is where a defendant would not have been disenriched but for a mistake as to liability to repay the claimant. A claimant who pays a defendant £10,000, mistakenly believing himself to be liable to do so, will have a *prima facie* entitlement to restitution if but for the mistake, the money would not have been paid.<sup>78</sup> But if the defendant disenriches herself by spending that £10,000 on a holiday, which would not have been taken but for the mistaken belief that she was not liable to repay the claimant, then she will have a defence of change of position.

The application of this rationale of change of position is not confined to a defendant's disenrichment caused by mistake. A claimant who pays money to a defendant by mistake would be met with a defence of change of position if the defendant had been compelled by duress to dissipate that money in a manner which disenriches the defendant. One example of this situation would be a fraudulent scheme where the claimant is defrauded into mistakenly paying money to the defendant who, under duress, is made to pay the money to the fraudster.<sup>79</sup>

The approach applies in the same way to cases of failure of consideration. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, a Polish company ordered textile machinery from a company in England and made a part payment of £1,000.<sup>80</sup> The English company incurred expenses in preliminary work for manufacturing the machines.<sup>81</sup> Before the machines could be completed and sent to the Polish company, the outbreak of World War II frustrated the contract.<sup>82</sup> The House of Lords was unanimous in finding that the Polish company was entitled to restitution of its payment because the English company had been unjustly enriched.<sup>83</sup> The enrichment was unjust

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<sup>77</sup> BIRKS, *supra* note 25, at 3 (calling mistaken payment of an undue debt the "core case" of unjust enrichment).

<sup>78</sup> *Kleinwort Benson Ltd. v. Lincoln City Council*, [1992] 2 A.C. 349 (H.L.) 372 (Lord Goff), 399 (Lord Hoffman), 407-08 (Lord Hope) (Eng.); *Nurdin & Peacock Plc. v. DB Ramsden & Co.*, [1999] 1 W.L.R. 1249 at 1262 (Eng.); *Dextra Bank & Trust Co. v. Bank of Jam.*, [2002] 1 All E.R. (Comm.) 193 (P.C.) [38] (appeal taken from Jam.); *Saunders & Co. v Hague* [2004] 2 NZLR 475, 490-91 (HC) (Chisolm, J.).

<sup>79</sup> For an example of the reverse, see generally *D. Owen & Co. v. Cronk*, [1895] 1 Q.B. 265 (C.A.), where the claimant acted under duress in conferring the enrichment and the defendant was mistaken in the disenrichment.

<sup>80</sup> *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 (H.L.) 34 (Eng.).

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

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

<sup>83</sup> *Id.* at 33.

because there was a failure of consideration. “Consideration” meant the condition for which the work had been performed.<sup>84</sup> The condition for the Polish company’s payment was that machines would be provided.<sup>85</sup> None were.<sup>86</sup> Viscount Simon L.C. observed that English law did not recognise any defence based on the expenditure by the defendant.<sup>87</sup> Even if the Law Reform (Frustrated Contracts) Act 1943<sup>88</sup> had not been enacted, the recognition of the common-law defence of change of position would mean that the common-law result in a case like *Fibrosa* would be different today. The claimant paid money on the condition of receiving machines. The claimant was entitled to restitution because the defendant was enriched and that condition failed. This precise conclusion was reached by Justice Robert Goff while passing on what he considered to be a statutory recognition of the change-of-position defence in the Law Reform (Frustrated Contracts) Act 1943, section 1(3).<sup>89</sup> Justice Goff explained that the defence applied to the extent of a defendant’s expenditures “for the purpose of the performance of the contract.”<sup>90</sup> The defendant had expended money for a shared condition or purpose – producing the machines – which failed. In the absence of the Act, the defendant would have had a defence to the extent that it was unjustly *disenriched* by its expenditure for the condition of fulfilling the contract.

Finally, the same restrictions that apply to the unjust factor in unjust enrichment have been applied to the element of injustice in the defence of unjust disenrichment.<sup>91</sup> For instance, the law sometimes recognises that enrichment at the expense of another is not unjust even if the claimant conferred the enrichment upon the defendant by mistake.<sup>92</sup> An example of this is where the claimant labours under a unilateral mistake when entering into a bilateral contract with the defendant. In unjust enrichment, recovery is not generally possible. I have explained elsewhere that this principle is based on

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<sup>84</sup> *Id.* With this decision, the House of Lords brought English law in line with their earlier decision for Scottish law in *Cantiare San Rocco S.A. v. Clyde Shipbuilding & Engineering Co.*, [1924] A.C. 226 (H.L.) at 235. In this case, Lord Birkenhead L.C. (with whom Lord Atkinson agreed) stated, “The rule may, I think, be fairly stated thus: A person who had given to another any money or other property for a purpose which had failed could recover what he had given . . .” *Id.*

<sup>85</sup> *Fibrosa*, [1943] A.C. at 33-34.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 49 (explaining that English common law does not provide a remedy for a defendant that has expended money in an attempt, but failure, to fulfill a contract and arguing that any such remedy must come from the legislature).

<sup>88</sup> Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40 § 1(3) (Eng.).

<sup>89</sup> See *B.P. Exploration Co. v. Hunt*, [1979] 1 W.L.R. 783 (Q.B.) at 804 (Eng.).

<sup>90</sup> *Id.* at 784.

<sup>91</sup> EDELMAN & BANT, *supra* note 56, at 320.

<sup>92</sup> *Id.* at 10-11.



the need for respect for mutual autonomy in bilateral arrangements.<sup>93</sup> In bilateral exchanges, a claim for unjust enrichment (whether expressed as mistake or as failure of consideration) is only possible where the objective condition of the claimant's transfer to the defendant has failed. The conditionality means that the autonomy of both parties to the bilateral arrangement is protected. This is true even if the bilateral arrangement is a void contract.<sup>94</sup> The same ought to be true for change of position. Assume that a claimant and defendant enter into a contract which turns out to be void. The claimant cannot recover for payments to the defendant as a result of a unilateral mistake. Equally, the defendant in this case cannot have a defence of change of position if the defendant labours under a unilateral mistake. Thus, there will be no defence for a defendant who receives a payment under a void contract but mistakenly gambles with the money and loses it. The defendant's mistake is unilateral; the gambling is not a shared condition for the use of the money.<sup>95</sup>

### III. APPLICATION: THIS RATIONALE EXPLAINS THE EXISTING PRINCIPLES AND PROVIDES CLARITY FOR FUTURE DEVELOPMENT

We now turn to the application of this equality of treatment rationale. In each of the areas identified in Part I of this Article, we can see that the rationale explains the existing principles and provides a clear and coherent manner in which the defence can be developed for each of the difficult issues which arise in these areas:

- A claimant is required to prove that a defendant would not have been enriched but for the mistake that the claimant made. Suppose, however, that the claimant makes a payment to a defendant as a result of a mistake about some relevant fact. Suppose also that there is evidence that the claimant might have paid a lesser sum to the defendant even if aware of the relevant fact. It is unlikely that the claimant would have to prove precisely the reduced amount which would have been paid. This is likely a matter of judicial estimation to be assessed in the same manner as the assessment of damages for a lost chance of investment.<sup>96</sup> By applying the

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<sup>93</sup> Edelman, *supra* note 69, at 171.

<sup>94</sup> See *Deutsche Morgan Grenfell Grp. v. Inland Revenue Comm'rs*, [2006] UKHL 49, [2007] 1 A.C. 558 (H.L.) [26]-[28] (Lord Hoffman) (appeal taken from Eng.); *id.* at [175] (Lord Brown); *Sharma v. Simposh Ltd.*, [2011] EWCA (Civ) 1383, [44]-[46], [2011] All E.R. 192.

<sup>95</sup> *Goss v. Chilcott*, [1996] 1 A.C. 788 (P.C.) 799 (appeal taken from N.Z.); *Haugesund Kommune v. Depfa ACS Bank*, [2010] EWCA (Civ) 579, [2011] W.L.R. 25 (Aikens L.J.) (Eng.).

<sup>96</sup> *Parabola Invs. Ltd. v. Browallia Cal Ltd.*, [2010] EWCA (Civ) 486, [2011] Q.B. 477 at [24] (Eng.). I am grateful to Dr. Steven Elliott for bringing this analogy to my attention.

rationale that protects the defendant in the same way as that of the claimant, the same must be true of a defendant's assertion of change of position. The defendant is not required to provide precise details of the levels of expenditure that would not have been made but for the defendant's mistake about liability to repay.<sup>97</sup> It is a matter of judicial estimation.

- By focusing on the symmetry of protection for the defendant and claimant, the notion of what amounts to a disenrichment should be the same test as what amounts to an enrichment. Enrichment is concerned with the exercise of a deliberate, wealth-enhancing preference by a defendant.<sup>98</sup> Hence, a defendant who, after demand, chose to retain a licence plate which had been mistakenly transferred was held to be enriched.<sup>99</sup> Disenrichment likewise requires a reduction in the enrichment acquired by the defendant and also requires evidence of a deliberate preference by the defendant. Therefore a defendant's refusal to request the return of a mistaken payment from a charity, which the charity would readily return, should not be a disenrichment. However, if the defendant's claim is not readily realisable (such as if the defendant is required to litigate against the charity for the return of the payment), then disenrichment should be recognised without the need to litigate.<sup>100</sup>
- This rationale also explains why the wide view of change of position should not encompass every situation where a defendant is disenriched by the actions of a third party. As we saw above, the most commonly cited example of the "wide view" is where money is mistakenly paid to a defendant and then is stolen by a third party.<sup>101</sup> In all of the cases in which this example is considered it has been assumed that a defendant would have behaved differently if she had known of the mistake: for instance, the money would have been immediately returned to the claimant. But suppose there is evidence, based on prior occasions, that even if the defendant had known of the mistake, the defendant would still have used the

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<sup>97</sup> Philip Collins v. Davis, [2003] 3 All E.R. 808 at 827 (Parker J.); Scottish Equitable plc v. Derby, [2001] EWCA (Civ) 369, [2001] 3 All E.R. 818 at [33].

<sup>98</sup> Cressman v. Coys of Kensington Ltd., [2004] 1 W.L.R. 2775 (A.C.) 2792.

<sup>99</sup> See *id.* at 2775.

<sup>100</sup> Bishopsgate Inv. Mgmt. Ltd. v. Maxwell, [1994] 1 All E.R. 261 (C.A.) at 26. Dr. Bant also draws a relevant analogy with respect to cases in which defendants claim to have changed their position based on payment of taxes. BANT, *supra* note 58, at 131 n.39 (citing Hillsdown Holdings v. Pensions Ombudsman, [1997] 1 All E.R. 862 (Q.B.) at 904, and Hinckley & Bosworth Borough Council v. Shaw, [2000] L.G.R. 9).

<sup>101</sup> See *supra* notes 26-27 and accompanying text.

money for his own benefit, such as by gambling it to make a profit. If the defendant would have appropriated the money to his own use, and for his own profit, and had he known of the mistake, then he should also bear any risk of loss.<sup>102</sup>

- The test for causation on this approach is also easily answered: the disenrichment would not have occurred “but for” the unjust factor. A mistaken payment is only actionable if the claimant would not have conferred the enrichment but for the mistake.<sup>103</sup> The symmetrical protection of the defendant explains why the causation test for the defendant is a test of whether the defendant would have been *disenriched* but for a mistake. The defendant’s mistake will usually relate to his assumed absence of liability to repay.<sup>104</sup> But other mistakes will count for a defendant, just as other mistakes suffice for a claimant. The following example is a good illustration. Suppose a defendant is unjustly enriched by the receipt of goods requested from supplier *A* (against whom the defendant has a set off right) but supplied by supplier *B*. The defendant had no contract with supplier *B* but, by reason of his mistake about the identity of the supplier, the defendant consumes the goods thinking he has a set-off.<sup>105</sup> As Lord Millett has confirmed, this case is today understood as an application of change of position.<sup>106</sup>
- The same difficulties encountered in the law of torts will apply to the application of “but for” causation in this area of the law. For example, suppose that a business mistakenly overcharges every customer by £10 over the course of a year. At the end of the year the owner of the business makes an additional £200,000 in profit as

<sup>102</sup> Related authority, which might support this view, can be seen in the cases involving the change-of-position laches defence. *See* Clegg v. Edmondson, (1857) 44 Eng. Rep. 573 (C.A.) 604, 8 De.G.M.&G. 747, 814 (Eng.) (Knight Bruce L.J.) (“He should shew himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing.”).

<sup>103</sup> Kleinwort Benson Ltd. v. Lincoln City Council, [1992] 2 A.C. 349 (H.L.) 372 (Lord Goff), 399 (Lord Hoffman), 407-08 (Lord Hope) (Eng.); Nurdin & Peacock plc v. DB Ramsden & Co., [1999] 1 W.L.R. 1249 (Ch.) at 1262 (Eng.); Dextra Bank & Trust Co. v. Bank of Jam., [2002] 1 All E.R. (Comm.) 193 (P.C.) [38] (appeal taken from Jam.); *Saunders & Co. v Hague* [2004] 2 NZLR 475, 490-91 (HC) (Chisolm, J.).

<sup>104</sup> Scottish Equitable plc v. Derby, [2001] EWCA (Civ) 369, [2001] 3 All E.R. 818, [31]; Nat’l Westminster Bank plc v. Somer Int’l Ltd., [2001] EWCA (Civ) 970, [2002] Q.B. 1286 at [25]; Test Claimants in the FII Grp. Litig. v. Comm’rs for Her Majesty’s Revenue & Customs, [2008] EWHC (Ch) 2893, [263], [325], [2009] S.T.C. 254.

<sup>105</sup> *See, e.g.*, Boulton v. Jones, (1857) Eng. Rep. 232 (Exch.) 232, 2 H. & N. 564.

<sup>106</sup> Shogun Fin. Ltd. v. Hudson, [2003] UKHL 62, [2004] 1 A.C. 919, [96] (appeal taken from Eng.).

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a result of these overcharges. Delighted at this profit, the owner takes six months off of work and spends the profit on a long holiday which he would not otherwise have taken. Each individual customer brings a claim for his or her money back – £10 each. Each customer argues that the business owner has not changed his position because but for each single mistaken payment the business owner would still have taken the holiday. As in the law of torts, the but-for test of causation will not always apply.<sup>107</sup> It ought to be sufficient here that each payment made a material contribution to the defendant’s decision to take the holiday.

- The puzzle of how causation operates in relation to anticipatory change of position can also be explained on this approach. Anticipatory change of position is not a situation where the effect or outcome precedes its cause. Precisely the same “but for” test of causation applies in these cases.<sup>108</sup> The impairment of the defendant’s intention must cause the change of position. Suppose a wealthy philanthropist naturalist announces a £10,000 donation to the WWF thinking it is the World Wildlife Federation, when in fact it is the World Wrestling Federation. The WWF, in anticipation of the receipt, disenriches itself by spending the money holding a wrestling spectacle which it would not otherwise have produced. Assuming the philanthropist would not have given money to the wrestlers, he is likely to be entitled to restitution because his mistake caused his payment.<sup>109</sup> So too, the WWF is also mistaken when it spends the money in anticipation of its receipt: it is mistaken about the fact that the philanthropist’s motivation was to support wrestling and also mistaken about whether any receipt would be vulnerable to a claim for restitution. But for that mistake, the WWF would not have made its expenditure. It has a change-of-position defence of £10,000.
- The equality-of-treatment analysis explains the courts’ approaches to good faith and the reason why not merely bad faith should operate as a bar to change of position. A mistaken claimant who pays in bad faith, illegally, or contrary to public policy but makes a mistaken payment cannot recover.<sup>110</sup> Equally, a defendant who

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<sup>107</sup> A comparison from the law of torts is illustrated in *Sienkiewicz v. Grief Ltd.*, [2011] UKSC 10, [2011] 2 A.C. 229 (S.C.), [17]-[18] (appeal taken from Eng.).

<sup>108</sup> EDELMAN & BANT, *supra* note 56, at 328.

<sup>109</sup> *Barclays Bank Ltd. v. W. J. Simms Son & Cooke Ltd.*, [1980] Q.B. 677 at 695 (“If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.”).

<sup>110</sup> *Parkinson v. Coll. of Ambulance Ltd.*, [1925] 2 K.B. 1 at 5 (Eng.) (“The plaintiff

changes his position in bad faith, illegally, or in a manner contrary to public policy cannot recover.<sup>111</sup> In these cases the law does not confer protection on the claimant or on the defendant.

- The answer to the question of why a careless defendant is entitled to the defence is also simple. The defendant is protected to the same extent as the claimant. Since the claimant is entitled to restitution of a mistaken payment made carelessly,<sup>112</sup> so too is a defendant entitled to a defence of change of position when the defendant is careless in losing the enrichment: “[I]f fault is to be taken into account at all, it would surely be unjust to take into account the fault of one party (the defendant) but to ignore fault on the part of the other (the plaintiff).”<sup>113</sup>
- The equality-of-treatment rationale also explains why “knowledge” of a claim usually operates as a bar to change of position and the circumstances in which knowledge might extend to knowledge of a *possible* claim or a potential claim.<sup>114</sup>

With respect to actual knowledge, if a claimant makes an unconditional payment with knowledge of all the relevant facts, then in the absence of duress or undue influence there is no need to protect the claimant. The law of unjust enrichment does not do so. Equally, a defendant who receives a payment with knowledge of the claimant’s mistake does not need protection. All the defendant needs to do is to undertake to hold the payment for the benefit of the claimant. This is as effective as a tender of restitution.<sup>115</sup>

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cannot recover the money, because in order to maintain the action it is necessary for him to set up his illegal bargain.”).

<sup>111</sup> *Niru Battery Mfg. Co. v. Milestone Trading Ltd.*, [2003] EWCA (Civ) 1446, [2004] Q.B. (C.A.) 985 at [168]-[169].

<sup>112</sup> *Kelly v. Solari*, (1841) 152 Eng. Rep. 24 (Exch.) 24; 9 M. & W. 54, 54 (“Money paid by the plaintiff to the defendant under a bona fide forgetfulness of facts which disentitled the defendant to receive it, may be recovered back in an action for money had and received.”).

<sup>113</sup> *Dextra Bank & Trust Co. v. Bank of Jam.*, [2002] 1 All E.R. (Comm.) 193 (P.C.) [42] (appeal taken from Jam.).

<sup>114</sup> *Rose v. AIB Grp. plc.*, [2003] EWHC (Ch) 1737, [2003] 1 W.L.R. 2791, [41] (arguing that defence of change of position should be available where a creditor “did not know and could not have known . . . of the existence of the petition”).

<sup>115</sup> *Portman Bldg. Soc’y v. Hamlyn Taylor Neck*, [1998] 4 All E.R. 202 (C.A.) at 203 (finding that a defendant who entered a legal contract to oversee a property in the name of the plaintiff was not enriched by payments from plaintiffs spent on the property). In *National Bank of New Zealand v. Waitaki International Processing*, where the defendant did just this, a defence of change of position was allowed but Judge Tipping noticed that it had not been argued that the defendant was not enriched. See [1999] 2 NZLR 211 (CA) 232

In relation to constructive knowledge, a primary claim for mistake, the claim will fail if the claimants knew sufficient facts for it to be concluded, objectively, that he had taken the risk of being mistaken.<sup>116</sup> Exactly the same risk-taking analysis is used in change-of-position cases to describe situations when a defendant might be denied the defence.<sup>117</sup> The risk-taking analysis in both situations can often be little more than a statement of a conclusion. In relation to the primary claim, the conclusion that a claimant, or defendant, has borne the risk should be deconstructed into a question of whether, but for the mistake, the claimant would probably have made the payment in any event; mere awareness of the possibility of mistake will not be sufficient to disentitle the claim.<sup>118</sup> In relation to the defence it should be asked whether but for the defendant's mistaken belief in an absence of any liability to repay, the defendant would probably have made the change-of-position expenditure in any event. Hence, a payment made by mistake, but to close a transaction, will not be recoverable by a claimant.<sup>119</sup> Additionally, a defendant's mistake as to liability to repay will not permit a defence if the disenrichment was made for commercial reasons, which probably would have caused it to be made in any event.<sup>120</sup> On the other hand, awareness by a defendant of the general risk of mistake in transactions of this type will not usually be sufficient to infer that the defendant would have acted in the same way but for the mistake about liability to repay.<sup>121</sup>

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(N.Z.) (finding it difficult to identify enrichment in a case where the party always knew the money would be reclaimed).

<sup>116</sup> *Deutsche Morgan Grenfell Grp. v. Inland Revenue Comm'rs*, [2006] UKHL 49, [2007] 1 A.C. 558 (H.L.) [26] (appeal taken from Eng.) ("The real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money.").

<sup>117</sup> *See Rose*, 1 W.L.R. at [58] (stating one potential approach to limiting the defence of change of position where a party "cannot rely on the change of position *as a defence* because [that party] took a risk: aware of the risk, it cannot complain when the risk becomes a reality").

<sup>118</sup> *See Deutsche Morgan*, 1 A.C. at [24]-[26] (arguing that the mere existence of doubt does not amount to knowingly taking on a risk of mistake).

<sup>119</sup> *Brennan v. Bolt Burdon (a firm)*, [2004] EWCA (Civ) 1017, [2005] Q.B. 303 (C.A.) [14] (Kay L.J.), [30] (Bodey J.) (Eng.) (recognizing the importance of providing stability for "closed transactions" by barring recovery in such cases).

<sup>120</sup> *See Rose*, 1 W.L.R. at [58] (barring a defence of change of position where a bank could have mitigated its risk and chose not to for commercial reasons).

<sup>121</sup> *See Rahmah v. Abacha*, [2006] EWCA (Civ) 1492, [2007] Bus. L.R. 233 (C.A.) at [40] (Eng.) ("The claim in restitution failed because the money had not been paid under a mistake, but merely in anticipation of something which did not materialize.").

- The equality-of-treatment approach clarifies when knowledge that something must be provided in exchange for the enrichment will bar the defence. This point was explained in detail above.<sup>122</sup> When the claim is based on failure of consideration, the claimant is entitled to restitution of a benefit conferred upon a condition that fails. Equally, if the defendant changes his position by making expenditure on a shared condition that fails, then the defendant will be entitled to a defence. Thus, spending an advance payment in relation to a contract that is later frustrated will enliven the defence.<sup>123</sup> But spending the advance payment for some other purpose or condition, such as a holiday, will not.<sup>124</sup> In fact, as we have seen above, the defence will not apply even if the defendant labours under some separate and independent mistake in making this expenditure.
- We can understand what is meant by a “wrongdoer” from this Article’s analysis. Lord Goff’s reference to “wrongdoing” in *Lipkin Gorman*<sup>125</sup> was probably borrowed from the American *Restatement of Restitution: Quasi Contracts and Constructive Trusts*,<sup>126</sup> which described the law of civil wrongs.<sup>127</sup> As we have seen, restitution is a multi-causal remedy.<sup>128</sup> But the rationale for reversing an enrichment obtained by wrongdoing is not the protection of the claimant’s intention. Change of position does not apply. Hence,

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<sup>122</sup> See *supra* notes 80-87 and accompanying text.

<sup>123</sup> See *B.P. Exploration Co. v. Hunt*, [1979] 1 W.L.R. 783 (Q.B.) at 804 (Eng.).

<sup>124</sup> *Goss v. Chilcott*, [1996] 1 A.C. 788 (P.C.) 799 (appeal taken from N.Z.) (finding no defence of changed position where a party used the money for an alternative purpose despite knowing it would eventually require repayment); *Haugesund Kommune v. Depfa ACS Bank*, [2010] EWCA (Civ) 579, [123] (Eng.) (finding the defence of change of position inapplicable where “a defendant obtains money and, at the time of receipt, he understands that he will have to repay that sum at some stage in the future”).

<sup>125</sup> *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.) 580 (appeal taken from Eng.).

<sup>126</sup> RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 141(2) (1937) (“Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.”).

<sup>127</sup> *W. Areas Exploration Ltd. v. Streeter (No 3)* (2009) 234 Fam LR 265, 276 (Austl.) (explaining that other courts have held a change-of-defence position to not be open to a wrongdoer); JAMES EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY 96-97 (2010) (recognizing that the expansion of a defence of change of position to incorporate the “law of wrongs” is undesirable).

<sup>128</sup> See *supra* notes 73-74 and accompanying text (explaining that restitution has been awarded for cases of unjust enrichment, cases of wrongdoing, and policy reasons).

although a defendant, in principle, would be entitled to the defence of change of position to a claim for restitution of unjust enrichment which was caused by his duress of the claimant, the claimant could simply recharacterise the claim as restitution for the wrong of intimidation to bar the defence.<sup>129</sup> This explanation justifies the approach of the courts where, on the same facts, a claim for mistake can be subject to the change-of-position defence but a claim based on restitution for reasons of constitutional policy, which are not concerned with the claimant's intention, cannot.<sup>130</sup> It is unnecessary, however, to abuse the term "wrongdoer" in these cases. The simple point is that where the claim for restitution is not concerned with the intention of the claimant, the defendant will not have a defence of change of position. Restitution is not limited to claims for unjust enrichment and wrongdoing. It is not necessary to characterise a claim as based on "wrongdoing."<sup>131</sup> Courts need only recognise that the policy-motivated restitutionary claim for restitution of a tax payment pursuant to government demand is not concerned with an impairment of intention claim for restitution of unjust enrichment.<sup>132</sup>

#### CONCLUSION

The purpose of this Article was to elucidate the rationale of the defence of change of position and to emancipate that rationale from very high level statements in English law, and in the *Restatement of Restitution: Quasi Contracts and Constructive Trusts*, that the basis for the defence is "inequity." This Article used the proliferation of English cases since

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<sup>129</sup> For the explanation of the contemporary merging and historical common roots of the unjust factor of duress, the tort of intimidation and the crime of menaces, see James Edelman, *An Historical Essay on Duress, Intimidation and Menaces*, 1 J. CORP. AFF. & CORP. CRIMES 1 (2011).

<sup>130</sup> See *Littlewoods v. Comm'rs for Her Majesty's Revenues & Customs*, [2010] EWHC (Ch) 1071, [101], [105]-[109] (Eng.) (debating the availability of the defence to claims surrounding the unlawful levying of taxes); *Test Claimants in the FII Grp. Litig. v. Comm'rs for Her Majesty's Revenues & Customs*, [2008] EWHC (Ch) 2893, [337], [2009] S.T.C. 254 (Eng.) (calling the change-of-position defence "quite simply, not a fault-based claim at all").

<sup>131</sup> See *Woolwich Equitable Bldg. Soc'y v. Inland Revenue Comm'rs*, [1993] A.C. 70 (H.L.) 71 (reformulating the law of restitution to allow "a prima facie right of recovery based solely on payment of money pursuant to an ultra vires demand by a public authority" even absent unlawfulness).

<sup>132</sup> Although the government might commit a breach of statutory duty under the European Communities Act of 1972, the bar to change of position in these cases of restitution for constitutional reasons does not require the government to be described as a wrongdoer. See European Communities Act 1972, c. 5 § 1 (providing for unified excise taxes and customs duties in the European Community).



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1991 to illuminate the rationale and to show that “inequitability” is not an invitation to apply idiosyncratic discretion.

In England, from Lord Goff’s statement of the essence of the defence in 1991 to the application of those words by the Court of Appeal in 2010, there has been an insistence that the defence balance the injustice in relation to the claimant with the injustice in relation to the defendant. The principles by which the defence operates in English law have developed by reference to this principle. The injustice with which the law is concerned for the claimant – i.e., the reason for allowing a claim – means that a claimant must prove the existence of an established unjust factor. An unjust factor, such as mistake, duress, or failure of consideration, protects the claimant’s intention in circumstances in which a defendant is enriched. The defence of change of position provides the same protection for a defendant who receives the enrichment. As Lord Justice Rix concisely explained, unjust enrichment “reflects the moral consciousness that a defendant who has been unjustly enriched at another’s expense must, subject to defences which are part and parcel of that same moral consciousness, such as change of position, return what he has received.”<sup>133</sup>

A claimant must prove that a defendant has been enriched. Conversely, a defendant must prove that she has been disenriched. A claimant must also prove that the defendant’s enrichment was caused by some unjust factor. Conversely, a defendant must prove that the disenrichment was caused by some unjust factor. In other words, for the defence to apply, disenrichment is not enough. A defendant will not be entitled to the defence unless he or she was *unjustly* disenriched. The meaning of “inequitability” in the defence deconstructs into the same requirement for an unjust factor as the primary claim for unjust enrichment. For this reason, the English law description of the defence of change of position as a defence of disenrichment is not entirely accurate. It should be a defence of unjust disenrichment.

A core case of unjust enrichment is that of a claimant whose enrichment of a defendant is caused by the claimant’s mistaken belief in a non-existent debt. From this core case of mistake we can generalise to other situations in which claims in unjust enrichment arise. Similarly, a core case of change of position will be that of a defendant whose *disenrichment* is caused by a mistaken belief that there is no liability to the claimant. From this core case of change of position we can generalise to other situations in which a defence based on disenrichment will arise. In both instances – unjust enrichment and unjust disenrichment – the law is concerned to protect, respectively, the wealth of the claimant and the wealth of the defendant from imperfections in their intentions.

We saw that this rationale not only explains the existing principles but also provides a coherent and principled path for development of the defence of change of position through a maze of difficult questions which the courts may

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<sup>133</sup> *Haugesund Kommune v. Depfa ACS Bank*, [2011] EWCA (Civ) 33, [72] (Eng.), [2011] W.L.R. 25 (Eng.).

encounter in the future. It also explains one large puzzle that results from the application of the defence in the very case which recognised it in English law: *Lipkin Gorman v. Karpnale Ltd.* In that case the question was whether the casino was entitled to a defence of change of position in relation to its receipt of money for losing bets by a fraudulent solicitor, which was traceable to the claimant law firm's assets. The casino asserted a defence of change of position in relation to *winning* bets that it had paid out to the solicitor. The House of Lords recognised the defence. This case has baffled commentators who have struggled to explain why the payment by the casino on the winning bets was a defence to claims based on independent betting transactions from the losing receipts. By understanding the rationale of the defence as protection of the autonomy of the casino, the reason can be simply explained: but for its mistaken belief that it was entitled to retain the receipts from the losing bets, the casino would never have entered into the winning bet transactions.<sup>134</sup>

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<sup>134</sup> This is very close to the explanation provided by Lord Goff in *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.).