Mistake as an Unjust Factor: Autonomy and Unjust Enrichment

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ABSTRACT

This thesis is about the law of mistake in the law of unjust enrichment. It argues that a particular, autonomy-based normative account explains and justifies the current substantive law of mistake, and goes on to suggest consequential resolutions for some of the remaining controversial areas of the law. The normative account is that the justification for recognising mistake as a reason for restitution – what makes the mistaken enrichment 'unjust' – is the value given to the personal autonomy of individuals in determining the terms on which their resources are disposed. That account explains why the law of unjust enrichment has an initial but not exclusive focus on the claimant's intention, including that it must be present, properly formed and properly effected; and for the law of mistake specifically, the account provides a coherent explanation for why the established or 'core' areas of the law appear the way they do. In relation to the still controversial areas of mistake, the same account suggests that: (i) a reasonable degree of uncertainty or doubt should deny an unjust enrichment action based on mistake; (ii) causative ignorance is neither a mistake nor should it be recognised as an unjust factor; (iii) voluntary dispositions should be considered unjust once causative mistake is established; and (iv) while the line between mistakes and mispredictions is blurred in certain circumstances, clear and sound resolutions can be structured on the basis of the autonomy-centred normative account.

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INTRODUCTION

The English law of unjust enrichment has experienced significant development over the last few decades. In particular, a substantial amount of judicial attention has been given to the restitution of enrichments conferred by mistake. Despite the relatively rapid development of this area of unjust enrichment law, or perhaps because of it, there are areas of the law on mistake which remain unresolved and under-explored. For example, the law has no settled position on how to treat the mistaken claimant[1] who *also* has made a misprediction; and whether 'causative ignorance' should form part of the law of mistake or indeed the law of unjust enrichment.[2] At the same time, the presence of settled legal principles does not mean that further analysis is unwarranted. One example is whether the apparent differences in legal principles applying to the restitution of liability mistakes and mistaken gifts are justifiable, given that the claimant arguably is just as mistaken in one case as in the other.

The purpose of this DPhil therefore is to engage in something like the preparatory work for a sensitive art restoration: to determine what is intended of the piece, what details have been omitted or which have failed to stand the test of time, and which areas appear as we would expect and are still in good condition; to identify inconsistencies or perhaps the indelicate work of earlier restorative attempts; and, in so doing, to gain – through a critique and analysis of the body of cases and legal scholarship which make up the law of

[1] The claimant in a case of mistaken payment (or other enrichment) is usually the person who has made the payment (or conferred the enrichment). As such, 'payer', 'transferor', 'donor' and 'claimant' will be used interchangeably in this thesis and should be read as such unless the context otherwise requires. Similarly, this thesis uses 'recipient', 'transferee', 'donee' and 'defendant' as counter-equivalents unless the context otherwise requires. General references to one gender include references to the other.

[2] Although see the judgment of Lord Walker in *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [108], [2013] 2 AC 108, 151 which states, in *obiter*, that causative ignorance should not be an unjust factor, but which declines to provide the reasons as to why this should be the case.

mistake – a better understanding of why it looks the way it does, what changes are needed to ensure that it looks the way it should, and perhaps how initial, apparent, deficiencies ultimately are acceptable on the basis of justifiable grounds. Its thesis is that a key normative foundation of the substantive law of mistake can be understood as being the concern for individual autonomy (in particular, an individual's autonomy over the circumstances in which his resources are disposed), and that this underlying value not only explains and is reflected in the core principles of that substantive law, but can also provide guidance as to how the law ought to appear in those areas which remain unresolved and under-explored. The following structure is adopted.

Part I explores mistake and its normative context. Chapter 1 looks at the normative basis for mistake and identifies a particular conception of individual autonomy. Chapter 2 examines what constitutes an operative mistake for the purposes of the law of unjust enrichment and examines how the law's core substantive legal principles instantiate and reflect the concern for autonomy examined in Chapter 1. This includes an analysis of 'non-mistakes' and why the non-recoverability of enrichments made under them is justified from the normative perspective.

Part II seeks to resolve some of the unsettled areas of the law of mistake. The answers to the questions raised in Part II draw on the normative considerations of Part I, to determine whether enrichments in the various contexts should be considered as 'unjust'. Chapter 3 is concerned with identifying the degree of uncertainty and doubt a mistaken transferor can have while still maintaining a claim in mistake. Chapter 4 focuses on causative ignorance, which is where the transferor would not have conferred the enrichment had he known the truth of some matter, but where the transferor did not have any belief as to the matter prior to, or at the point of, the enrichment. Chapter 5 covers gifts and other voluntary dispositions (that is, transfers to volunteers). It looks at whether

the principles of recovery for those forms of enrichment, in their differences from the default position for mistaken payments generally, are justified. Chapter 6 looks at situations in which both a mistake *and* a misprediction can be seen in the claimant's decision to benefit the defendant, and how the law should respond in such situations. Finally, there is a conclusion which pulls together the central arguments of the thesis.

Before proceeding, it is worth setting out a few matters of scope. There are many circumstances in which a person might mistakenly confer an enrichment on another. For example, the mistaken enrichment might be made: in pursuance of a contractual obligation; with a view to creating a contractual obligation; under the terms of an agreement which does not meet the strict legal requirements of a contract (or which is in any case void, voidable or unenforceable); in accordance with an apparent legal obligation; as a gift or bequest; in order to discharge a liability; to an agent for on-forwarding to a third party; as part of a voluntary settlement (eg, under an express trust); as part of a desire to compromise a claim or to settle a dispute; following the instructions of a third party (either under a contractual or other legal obligation or on whose instructions the claimant is accustomed to act or otherwise); in accordance with a voluntary business or tax structuring; and so on.

There are also various types of mistakes. They may be spontaneous or induced. They may be about some matter of fact or law. They may concern a whole range of subject matters. For example, they can be about: the identity of the recipient; some characteristic or quality of, or fact about, the recipient or third party (eg, for whom the enrichment ultimately is intended) or of or about the claimant himself; the claimant's legal liability to make the payment; a third party's legal or other liability to make a payment (eg, on whose behalf the claimant is paying); the procurement of some benefit through the conferral of the enrichment; the financial history or condition of the claimant, the recipient or a third

party; the occurrence of some prior event; the effect of a law on the transaction or situation or the legal status or validity of a transaction; the factual or legal consequences of the enrichment or of not making the enrichment; the nature of the enrichment being conferred or the transaction of which it is part; and so on.

Among these various and overlapping contexts, this thesis focuses on the nature of a mistaken transfer and the significance of the mistaken belief as its cause. So, while specific circumstances and types of mistakes are considered where relevant (eg, mistaken gifts, induced mistakes), the thesis rests on the idea that, at a higher level of generality, the presence of a 'causative mistake' can explain why the consequential enrichment is unjust and restitution *prima facie* warranted. From the normative perspective, this can explain and justify the various incidences of mistake and present a coherent (though not necessarily uniform) framework for the substantive law, whatever the underlying circumstances of the mistake or its type.

It is also important to stress at the outset that this thesis does not nail its colours to any moral or legal philosophical mast. This is primarily because this thesis is not as much about *what is law* as it is about: (i) what is the law (ie, what substantive rules constitute the law of mistake); (ii) what is the purpose of that particular law; and (iii) what substantive rules ought to constitute that law. While this thesis might be described, say, as more positivist than realist in respect of the first question, more deontological and rights-based than teleological and utilitarian in respect of the second, and more instrumentalist than formalist in respect of the third, it is not the intention to write from the perspective of any particular approach in moral or legal philosophy. What is intended, among other things, is to provide an analysis and interpretation of the substantive law in the light of an argued-for normative basis, noting where the law as found in the judgments of the courts is consistent with the normative basis, highlighting where the law is not, and suggesting – by

reference to that normative basis – possible analyses and solutions in those situations and in others where the law is silent.

PART I

MISTAKE AND ITS NORMATIVE CONTEXT

CHAPTER 1

A NORMATIVE FOUNDATION

As the objective of this thesis is to determine whether one or more aspects of the current law represents a justifiable (if not the best) approach to mistake, it is desirable first to examine what basis or bases underlie it. The normative basis for mistake – why it exists today as positive law, what objects it seeks to achieve, what interests or values it seeks to enhance or protect – is a useful reference for determining whether the law makes sense, whether it is coherent, whether it achieves its purpose and whether it does so in a, or the most, logical, sensible or ordered way. As Klimchuk observes, 'the normative interpretation links the structure of a right or duty to its justification.'[3] Indeed, it should do more than this – it should link not merely the structure but also the substantive content of the law with its justification. An appreciation of the normative foundation of mistake should also provide guidance on solutions to the yet unsettled areas of the law which better reflect those objects, interests and values.

This is not to suggest that the law lacks coherency or rationality if a legal principle is inconsistent with the normative basis underpinning the body of law of which it is part, or if certain aspects of the law do not exactly square up with what might be ideal from the perspective of the normative account. Rather, such differences invite examination of the reasons for the law being different to what its normative basis might suggest and whether they justify such a departure. These departures can indicate the circumstances in which

[3] D Klimchuk, 'The Normative Foundations of Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 85.

the law prefers some other value or goal, and give us insight into the relationship between the law's principal normative basis and other interests which it acknowledges. That the law of mistake across the entirety of its scope and application recognises more than one value makes it no different from other areas of law. And in the same way, departures in the substantive law from what we would expect given a core normative account (provided such departures are principled and justifiable) are helpful in understanding the subtleties and scope of the normative account rather than being fatal to its validity.

1.1 A concern for intent, process and the circumstances of the enrichment

What then underlies mistake? The first thing to note is that, for mistake and the other intent-based unjust factors,[4] the normative basis ought sensibly to explain the concern to inquire into the circumstances in which the enrichment was conferred, rather than the consequences of the enrichment beyond the enrichment itself. In other words, the 'unjustness' of the enrichment has more to do with the circumstances of the transfer from claimant to defendant and less to do with an examination of whether the transfer is better left in the hands of the former or the latter from a utilitarian, egalitarian or other perspective. This is not to say that utility and equality are not goals recognised by the law of mistake, but rather that in seeking to identify when an enrichment is unjust – the question central to its normative account – the law does not seek directly to determine what best promotes utility or equality, whether as between the claimant and defendant or otherwise. So, for example, in *Kelly v Solari*,[5] it did not matter what was the relative or proportionate wealth of the insurance company *qua* Mrs Solari,[6] or in comparison with other insurance

[4] Being the ways in which the transferor's intention can be affected and which would make the relevant enrichment 'unjust' from the point of view of the law. They are listed at the end of the following paragraph.

[5] (1841) 9 M & W 54, 152 ER 24.

[6] On this point, see somewhat similarly, in equity, Lord Walker's judgment in *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [125], [2013] 2 AC 108, 157. Lord Walker does, however, go on to note at paragraph 126 that 'the

companies or widows generally; or which of the claimant and defendant would benefit more from, or better utilize, the enrichment in question.[7]

So much we can tell from the unjust factors themselves, or at least the intent-based ones, including mistake.[8] English law has for many years determined when an enrichment is 'unjust' by reference to the presence of these unjust factors, which signpost some legally relevant problem with the claimant's intention as constituting the 'unjust circumstance' regarded *prima facie* as justifying restitution.[9] By '*prima facie*', we mean that the relevantly affected enrichment is rendered 'unjust' for the purposes of the law; and that therefore, subject only to the application of any defences, the enrichment which was gained by the defendant at the claimant's expense (or its value) is to be restored to the claimant. This category of unjust factors, which collects together the situations in which the claimant's intention or decision to transfer the enrichment was either deficient or qualified, is amenable to further sub-division into enrichments regarded as being unjust because the transferor:

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circumstances of the mistake and its consequences for the person who made the vitiated disposition' are relevant to assessing the gravity of the mistake, which must be causative and of sufficient gravity according to the test for the equitable rescission of voluntary dispositions proposed in that case. See Chapter 5 in relation to the reversal of mistaken voluntary dispositions.

7 Compare S Smith, *Contract Theory* (Oxford University Press 2004) 140-149, in relation to rights-based normative accounts of contract law.

8 The assumption here is that we can begin to induce the reasons from legal principles. Another way of expressing this might be to ask which normative basis for the law (at the level of generality suitable for the task to which it is relevant) offers the best justification for the law's content. The circularity here can be avoided by the recognition that the law does not operate in a vacuum and is responsive to the interests which underlie it, along with the assumption that the law's core substantive principles are the most responsive to, and reflective of, the normative basis or bases even if there are debates at the periphery. Compare H Dagan, 'Restitution's Realism' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 59: 'Legal realists always begin with the existing doctrinal landscape because it may (and often does) incorporate valuable though implicit, and sometimes imperfectly executed, normative choices.' Compare also S Smith, *Contract Theory* (Oxford University Press 2004) 6, including: 'It is a reasonable starting assumption (but no more) that the actual law bears some relation to good law.' See also I Kant, *The Metaphysics of Morals* (MJ Gregor ed, Cambridge University Press 1991) 55; JM Finnis, *Natural Law and Natural Right*s (2nd edn, Oxford University Press 2011) 284-286; R Dworkin, *Law's Empire* (Harvard University Press 1986) 65-68.

9 An 'absence of basis' approach is taken in PBH Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005).

(a) had 'no intent' to transfer the enrichment;[10]

(b) in transferring the enrichment, had in some manner an 'impaired intent', which is to say that there was:

  (i) a causative mistake;

  (ii) illegitimate pressure;

  (iii) relational dependence;

  (iv) personal disadvantage; or

  (v) transactional disadvantage; or

(c) had a 'qualified intent' in relation to the enrichment, and that qualification was unsatisfied.[11]

Seen at the level of the other examples in its sub-division, mistake constitutes an unjust factor because it indicates an impairment of the claimant's decision-making process: 'the transferor forms an intent to transfer and executes that transfer but the decision-making process is impaired'.[12] Alongside mistake are situations where the claimant labours under disadvantages of a kind or so extreme as to warrant the law's intervention, or he is too dependent on, or unduly pressured by, another person so that the decision to enrich is not

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[10] But see W Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 Oxford Journal of Legal Studies 627.

[11] This is covered by the unjust factor traditionally referred to as 'failure of consideration'.

[12] PBH Birks and C Mitchell, 'Unjust Enrichment', ch 15 of PBH Birks (ed), *English Private Law*, vol 2 (Oxford University Press 2000) para [15.55]. In PBH Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005) 105, Birks describes the traditional common law approach of mistake being a reason for restitution 'because it impaired the decision to make the transfer.' In PBH Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 147, Birks says that 'restitution for mistake rests on the fact that the plaintiff's judgement was vitiated in the matter of the transfer of wealth to the defendant.' See also C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (2nd edn, Oxford University Press 2007) para [18.52]; G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 171 ('the mistake operates to vitiate the claimant's intention to transfer a benefit to the defendant'). In C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (3rd edn, Oxford University Press 2013), 'impaired intent' as a category of unjust factors is absorbed into the wider category of 'deficient intent', although there remain references to impairment of the claimant's 'decision-making processes' (para [18.60]), 'thought processes' (para [18.61]) and 'intention' (para [18.70]).

truly his. The other intent-based reasons of 'no intent' and 'qualified intent' do not involve any impairment. In one, the transferor had no intent whatsoever for the enrichment to occur. In the other, there was an intention to effect the transfer, unaffected by disadvantage, dependence, pressure or error of the kind the law considers to be unacceptable. However, the reason for regarding the enrichment as unjust is that the intention of the transferor was that the recipient's enrichment fell within certain parameters, but those parameters were not met.[13]

It is reasonably clear that for these unjust factors, the focus is on the presence of the claimant's intention to effect the enrichment, the quality and character of that intent, the decision-making process through which the claimant went in order to generate it, and other circumstances of the enrichment itself, including whether the enrichment was made on a qualified or conditional basis. For the *prima facie* right to restitution to arise (that is, for the enrichment to be considered as affected by an 'unjust factor'), there is no examination of the wider circumstances or later consequences of the enrichment – only the circumstances of its conferral.

1.2 Beyond intent, process and the circumstances of the enrichment

Looking at the various kinds of intent-based unjust factors, one might be tempted to assert that the law's concern when identifying what makes an enrichment unjust concerns the intention of the claimant, and that individuals should be able to recover enrichments that they have 'not intended' in the various ways in which intention can go awry. So, a claimant may assert unjustness if his intention was absent altogether, intended but impaired, or

[13] It is for this reason that there is a conceptual overlap between failure of consideration and mistake. See the discussion below in this Chapter 1.2 in relation to 'free will' and the content of autonomy. One important difference is that a qualifying condition needs to be obvious to, or shared with, the recipient before there can be a failure of consideration. The later discussion in this Chapter 1.2 and in Chapter 2.4C show how failure of consideration is still a claimant-sided unjust factor which triggers the normative concern established in this Chapter 1.

intended but subject to an unmet qualification. The various ways in which something about the claimant's intention can make an enrichment 'unjust' shows that there is no single aspect of intent (or, rather, no single form of 'faulty intent') which is important, but rather a collection of ways in which personal intention can go wrong as a matter of law and justify its intervention.

It is no criticism that no single conception of intent triggers the *prima facie* claim to restitutionary relief on the basis of unjust enrichment (since, as a matter of fact, there are many ways in which intention can go awry) and that the law is interested in ensuring that enrichments occur with the compounded requirements that an intention to enrich is present, properly formed, and properly effected. But there are important qualifications to the latter proposition which suggest that the normative value involved in restitution for mistake and other intent-based unjust factors might be something other than an interest in the intention of the transferor, but which nevertheless supports the law's focus on it. Three examples should suffice. The first is that a transfer mistakenly made to a recipient who can nevertheless show that the claimant was legally obliged to transfer the enrichment (or its value), for example, under a valid, binding and enforceable contract, will not to the extent of that obligation be restored to the claimant. Secondly, a claimant whose action is founded solely on a misprediction will not be able to recover the transferred enrichment, even though his intention was that the recipient only have the enrichment in circumstances which, as it happened, did not eventuate. Finally, an enrichment which a claimant intends but subject to a qualifying condition (for example, that the recipient held a particular religious affiliation, a fact about which the claimant was uncertain but considered necessary for his consent to the recipient's enrichment) will not be considered unjust on the failure of the condition where the claimant does not notify the recipient of the conditionality, or if it was not otherwise obvious. These qualifications show that 'intent'

is not dispositive, and suggest that while the substantive legal principles are built around 'intention', some other value or goal underlies the intent-based unjust factors. Against this, it might be argued that the above examples are just situations where some other, inconsistent, interest is given preference over the claimant's intention. So, it might be said that the first example is the result of a preference for enforcing valid and binding obligations, including contractual promises.[14] The second and third examples are more difficult – if the competing interest in the security of receipt of a recipient (who is unaware of the contingent nature of the intention in both cases) can be protected by respecting his change of position, it is difficult to see why the law should deny the *prima facie* right to restitution to a claimant who does not in the circumstances intend the recipient to have the enrichment. And if there are competing values, their balancing against claimant intention would seem to be a question about whether *restitution* ultimately should be granted, rather than a question about whether the enrichment is to be considered *unjust* on a *prima facie* basis. Unintended enrichments should answer the 'unjust' question quite easily, *if* that question was directly concerned with the intention of the claimant.

So we might say that the reason why the law does not strictly follow the claimant's intention in these situations is that, while it makes sense to speak in the language of intention, there is a different value in play. If that is right, it still remains to answer the question: why *ought* the law be concerned to ensure that an individual's intention to transfer an enrichment be present, properly formed and reflected in the circumstances of the transfer? There is recent academic writing suggesting that the normative basis is connected with individual autonomy – that individuals should generally only permanently be deprived of their assets and resources as a result of their considered decision to do so.

[14] This thesis later argues that in cases where there is a relevant legal obligation to enrich, the enrichment is not unjust, and therefore there is no competing interest and no giving of priority of one interest over another. See Chapter 2.5.

For example, Weinrib[15] structures his broadly-scoped account of private law generally on corrective justice, which is given its normative content by the Kantian conception of right.[16] This requires him to examine both the will of the claimant and the defendant in the treatment of unjust enrichment within his overall scheme of private law, but it is nevertheless based on the concern for respecting free will and self-determination. In his analysis of Weinrib's account, Lionel Smith similarly accepts the Kantian right, 'which requires that all persons treat one another as purposive, free-willed agents – as ends in themselves',[17] as forming the normative basis of unjust enrichment.[18] Smith speaks of mistake's normative basis in terms of there not being 'a free expression of self-determining agency'.[19] Dagan's view is not predicated on unjust enrichment being an instance of corrective justice, but is nevertheless based on the value of individual autonomy.[20] In supporting what he describes as a liberal presumption of restitution, he says:

> the transferor's mistake undermines the recipient's entitlement and should thus trigger restitutionary liability. The reason for this result is that the mistake vitiates the actor's judgment as to the transfer in question. A mistaken transfer is not the result of an autonomous decision of the actor, but rather subverts her control over her resources. Validating a wealth transfer based on such vitiated judgment would offend the liberal commitment to individual free choice; it

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15 EJ Weinrib, *The Idea of Private Law* (Harvard University Press 1995); EJ Weinrib, *The Idea of Private Law* (rev'd edn, Oxford University Press 2012). See also EJ Weinrib, *Corrective Justice* (Oxford University Press 2012).

16 See I Kant, *The Metaphysics of Morals* (MJ Gregor ed, Cambridge University Press 1991) 56, which sets out Kant's conception as an autonomy or freedom of action (or choice over actions) which acknowledges and accepts and is thus limited by the same freedom in others (emphasis in original): 'Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.' The Universal Principle of Right is explained as 'Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.'

17 L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2118-2119.

18 At least the family of unjust factors based on the consent of the claimant. See L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2141-2146.

19 L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2141.

20 See, for example, H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 41-42. Dagan also relies on the values of utility and community in his approach to unjust enrichment. As will be argued later, utility plays a different normative role in restitution for mistake, and community is not centrally relevant to mistake for Dagan.

> would violate the maxim that the exercise of (subjective) free will should be the prerequisite to any legitimate transfer of, or interference with, resources.[21]

The foregoing reflect the wider view that what underlies the law more generally is a concern to promote conditions favouring individuals being able to lead autonomous, self-authored lives. Raz's conception, for example, is one of individual autonomy in which individuals are (part) authors of their own lives, being able to understand and freely choose between an adequate range of options.[22]

However, as mentioned, the wider debate about the fundamental moral underpinnings of the law more generally is not our concern here. What does concern us is whether autonomy properly can be regarded as the key normative value of a law of mistake which is built around 'intention'. In this respect, one argument against the idea that the law of mistake is underpinned by the law's concern for autonomy is that autonomy fits the law imperfectly. Klimchuk makes this argument, saying that:

> What I have in mind is the rule that restitution will be denied to someone who discharges a legal debt but would not have done so if she had known something she did not know – her true financial situation, for example.[23]

That such a rule exists might indicate that the law does not reflect autonomy as best as it could, but even if so, it is not clear why this must mean that the former must be unrelated

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[21] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 42 (references omitted). See also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1798-1799; R Grantham and C Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 Law Quarterly Review 273, 278.

[22] See Chapter 14 of J Raz, *The Morality of Freedom* (Oxford University Press 1988), especially at pages 369, 373-374, 377-378, 381-382, 389-391, 398.

[23] D Klimchuk, 'The Normative Foundations of Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 95, referring to the case of *Steam Saw Mills v Baring Brothers* [1922] 1 Ch 244. There is a separate question in this example as to whether such a claimant is mistaken or whether there is otherwise an unjust factor. See Chapter 4 on causative ignorance. The immediate discussion assumes in any event that the example claimant made a relevant mistake.

to the latter.[24] The better view is that a substantive law of unjust enrichment with such a rule should not be considered as being unconcerned with the scope and content of claimant autonomy; but rather in cognizance of it. Quite properly, the law does not assist a claimant to recover a mistakenly made payment he is contractually obliged to pay or is otherwise liable to pay (for example, a tax liability) because his autonomy in respect of the enrichment is not undermined by the defendant's enrichment – either because in the previous exercise of his autonomy the claimant has consensually entered into a valid, binding and enforceable contract to pay that enrichment or because the law has for some other reason or in some other way (for example, taxation legislation) limited the claimant's autonomy in that respect.[25] Generally speaking, a transfer which is owed is not unjust even if mistakenly made. No one reasonably can expect unlimited autonomy in everything – and the law is still concerned to protect claimant autonomy even if the extent of protection is not unlimited. So the scope of an individual's autonomy might be limited because the law needs to respect the autonomy of other persons, including recipients who have contracted with the claimant, the autonomy of a claimant who has decided in an earlier exercise of autonomy to enter into valid debt or other personal obligations,[26] or because the law has generally restricted some rights and powers for legitimate purposes such as those of public order.[27] What this means is not that the law is unconcerned with autonomy,

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[24] Although the term 'restitution' is used, the issue here is effectively unjustness rather than restitution. As will be explained later on, there is a need to keep in mind whether the question relates to *prima facie* liability or restitution as the final outcome.

[25] It is worthwhile noting that this explanation has the consequence that the presence of a legal obligation to pay the mistaken payment operates to make the enrichment 'not unjust' rather than operating as a defence to the *prima facie* claim in mistake. See further, Chapter 2.5.

[26] For example, to sell some property – can we claim that the law is unconcerned with autonomy if the claimant cannot recover a painting he sold under a valid, binding and enforceable contract?

[27] Arguably, a recipient's post-enrichment change of position does not fall for inclusion in this discussion of the limits on claimant autonomy, since it does not go towards the *unjustness* or otherwise of the enrichment itself, but towards *restitution* and whether it should be granted.

but that the notion of autonomy under law is not one of unlimited autonomy over anything and everything.[28] There is nothing surprising about this.

Nadler makes a similar argument to Klimchuk about the ill fit, but does so in arguing for a normative underpinning (beyond mistake) of autonomy as meaning more than the capacity to act towards one's self-chosen ends. Claimants who make a liability mistake actually do intend, in a sense, that the enrichment be transferred to the recipient (in the sense that they make a conscious decision to effect the transfer itself). The same can be said in relation to duress. So Nadler's conception goes beyond the bare freedom to act towards self-chosen ends (with indifference as to consequences) to a freedom of self-determination which combines self-chosen acts and the broad 'actualization' of those self-chosen ends.[29]

The insufficiency of an individual's bare capacity to act (as the basis of a 'just' enrichment) and the limitations on autonomy described above together raise the important question about the particular subject matter and content of autonomy of which the law is said to be protective (or, at least, seeking to protect). In answering that question, it is not necessary to incorporate or to refer at all to the idea of actualization to make sense of the relationship between autonomy and the substantive law.[30]

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[28] For a discussion of the meaning and nuances of intention and consent in the context of pressure, see S Smith, *Contract Theory* (Oxford University Press 2004) 331-335.

[29] By which Nadler means not merely 'the abstract capacity to form intentions and set goals' but to effect the consequences of those choices and goals as 'the actualization of that capacity'. See JM Nadler, 'What Right Does Unjust Enrichment Law Protect?' (2008) 28 Oxford Journal of Legal Studies 245, 262-263.

[30] A different proposition, that 'autonomy' can fit other areas of law, is briefly mentioned in D Klimchuk, 'The Normative Foundations of Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 83-84. We can accept that autonomy is the primary goal underlying mistake and even the intent-based unjust factors without being forced also to accept the proposition that autonomy (or some different conception of it) cannot underlie other areas of law. There is simply no reason why the law's concern for autonomy (whether generally or more narrowly as discussed later in this thesis) cannot inform other areas of the law.

It is possible to explain restitution of enrichments conferred under liability mistakes and duress,[31] and to describe the underlying normative content, by reference to a conception based on the autonomy of individuals in the decision to confer the enrichment, or equivalently, the claimant's 'decision-autonomy' or 'autonomy of disposition'. Respect for an individual's decision-autonomy in relation to the disposition of an enrichment means that what is to be protected is *the personal autonomy of individuals to decide for themselves the terms on which the enrichment occurs or, equivalently, to decide the terms on which their resources are transferred*.[32] By this we do not mean to refer to (or to argue for) a freedom of decision and action conterminous with the full scope of the personal will of the individual. Legal persons must still act – including the disposition of their resources – in a way which acknowledges the limits imposed by law, including, for example, limitations on conditions attached to gifts and the avoidance of illegal transactions. After all, it is in the context of the broader legal order in which it inhabits that a particular substantive law gives meaningful content to its normative foundations. What this means in relation to the control by an individual over the terms of transfer is an autonomy of the fullest scope which is not otherwise limited by the legal order; or, put another way, it is an autonomy over that which is not restricted by law and thus given over to individual decision-making. It is this

[31] And under any other intent-based unjust factor affecting a claimant who nevertheless consciously decided to effect the transfer of the enrichment.

[32] 'Terms' in this context is used to mean not only the legal terms and conditions attached to the transfer itself (if any) but in a wider sense, to refer to the claimant's subjective and personal requirements for his decision to confer the enrichment. This includes the facts, circumstances and other matters which are relevantly part of the claimant's decision to benefit the recipient by way of the enrichment. Compare S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013), 247, in which the law's response to 'defective transfers' is expressed more generally, as being 'in order to protect citizens' interests in controlling their property'; and C Webb, 'Property, Unjust Enrichment, and Defective Transfers' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 335, in which claims based on mistake and other unjust factors are said to 'arise as a means of protecting and effectuating the claimant's interest in exclusively determining the disposition of his assets.' The idea of an 'autonomy of disposition' is not new to the law – *cujus est dare ejus est disponere* – and neither is it limited to gratuitous dispositions, but is instead applicable to commercial and bargained-for transactions: see *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening)* [2011] UKSC 38 para 129, [2012] 1 AC 383, 426; *Marquis of Salisbury v Robertson Gladstone* (1861) IX House of Lords Cases (Clark's) 692, 701, 11 ER 900, 903.

sense of autonomy over the terms of transfer which is the relevant meaning for present purposes – the meaning primarily derived by and in the context of the law rather than a meaning given by philosophy or any other discipline.

On this basis, protecting the personal autonomy of individuals to decide for themselves the terms on which their resources are disposed implies three things, that: (a) there is a decision to confer; (b) the decision reflects the autonomy of the individual (that is, the individual acted autonomously in deciding to make the enrichment);[33] and (c) the conferral reflects the decision.[34]

In relation to the first, an individual's autonomy to decide the terms on which the enrichment is to occur is undermined if the enrichment occurs without his decision to confer it. In relation to the second, an individual's autonomy to decide the terms on which the enrichment is to occur is undermined if the enrichment occurs in accordance with a decision made non-autonomously, such as one made under duress. In relation to the third, an individual's autonomy to decide the terms on which the enrichment is to occur is undermined if the enrichment occurs on terms different to those on which he decided the

[33] This implies a standard of individual (decision-making) autonomy which is reasonable in the context of its protection as a normative goal of the substantive law within the society in which that law operates. Human decision-making generally incorporates bounded rationality, and is open to external influences, pressures and other human frailties. Thus, for an enrichment to be unjust for the reason that it is non-autonomous from the perspective of the law, there must have been some relevant effect on the transferor's decision-making ability over the enrichment constituting a legally significant departure from the standard thought to be the appropriate level and having the appropriate qualities or characteristics for the given time and context – thus reaching a point which the law regards the situation as justifying its intervention. The different (intent-based, intent-structured) unjust factors tackle the different ways in which the autonomy of an individual fails to meet that normative standard of being able 'to decide for oneself'. Establishing what non-autonomous means in the context of each of the unjust factors, apart from mistake, is not part of this DPhil, but is nevertheless an important question. A key point is that what qualifies in the various types of circumstances which justify (or ought to justify) a conclusion of 'unjust' is a question strictly to be determined in the context of the particular unjust factor's substantive law response to that (and any other) normative value, and not necessarily by reference to a more abstracted sense of what it might mean to be 'free' or 'autonomous' (but without denying that the answer given in connection with each intent-based unjust factor might be the same). To the extent the value in autonomy is relevant for other areas of law, what is sufficient to justify the law's intervention – to make a contract voidable, or greater still perhaps to void a contract *ab initio*, for example – may require different degrees or types of derogations from 'autonomy'.

[34] It would follow from this that 'autonomy of disposition' does not extend so far as to include a freedom to reverse (for example, because of a change of mind) a decision to confer an enrichment freely made once the disposition has been completed in accordance with that decision.

enrichment should occur. In each case, we would say that the transfer of resources is non-autonomous because it has *occurred on terms which do not reflect a freedom in an individual to decide for himself which factual and other conditions are to apply to the recipient's enrichment*.[35]

Clearly, this conception of autonomy is broadly consistent with the current structure of the intent-based unjust factors. The normative implications that there ought to be a decision to confer, and that it is autonomous, coincide with the substantive propositions that claimants must intend the transfer, and that the transfer must be free of impairments of the relevant kinds; and the normative implication that the actual conferral reflects the (autonomous) decision to confer can be seen in the substantive legal proposition that transfers made on the basis of certain requirements must satisfy those bases.[36] Moreover, this conception deals with Nadler's rightly expressed hesitancy with bare autonomy, and explains the substantive law's concern for the claimant's intention beyond the conscious act of transfer, without needing to deal with a concept as elusive as 'actualization'.

A different way of describing this conception of autonomy is to use the language of free will.[37] Again, we must remember to ground this approach in the broader legal order, recognising that free will in this context does not mean complete autonomy (or freedom) in relation to every aspect of the enrichment but rather that area comprising of those decisions which the law gives over to individual decision-making freedom. From this perspective, the decision to enrich must be autonomously generated, or self-chosen ('it was

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[35] References to autonomy in this thesis are to be read as carrying the meaning imported by this discussion, unless the context otherwise requires.

[36] See further below, in this Chapter 1.2, in relation to the overlap of mistake and failure of consideration.

[37] Compare I Kant, *The Metaphysics of Morals* (MJ Gregor ed, Cambridge University Press 1991) 56, where the language is of free choice. See also Chapter 14 of J Raz, *The Morality of Freedom* (Oxford University Press 1988).

free'). And the actual enrichment itself must reflect the circumstances and conditions on which the claimant decided the transfer was to occur ('it was my will').

The latter arguably includes (i) the personally-held beliefs of fact or law on which the claimant based his decision to enrich in addition to (ii) the conditions (past, present and future) on which the enrichment was qualified. In these situations, even if the claimant's consent to transfer the enrichment was 'free',[38] the enrichment as actually transferred must reflect what the claimant had determined as the facts, circumstances and other matters on which he was satisfied for the recipient to be enriched; otherwise the claimant can assert that the enrichment as conferred was not a reflection of his free will. So, for example, the claimant who makes a liability mistake might argue that he intended the enrichment on the basis that it was in discharge of a certain, existing liability. The enrichment in circumstances where that liability did not exist means that the enrichment does not then occur in circumstances reflecting those upon which the claimant intended its occurrence. The transfer was intended (or consciously decided) but the transfer as made did not reflect the claimant's will because it was not in discharge of *that* particular, existing liability. And it does not reflect his free will just as much as for the claimant who intends to transfer an enrichment to avoid the visitation of harm threatened upon him. For duress, it is the other aspect which is in play – the enrichment does not reflect the individual's free will because it was not freely decided. The rest of the intent-based unjust factors can be explained through either one or the other limb of this concept (or its complete absence), which

[38] Or 'consciously chosen', to use the language and context in R Grantham and C Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 Law Quarterly Review 273, 278.

remains a faithful and direct rendering of 'I didn't mean him to have it'.[39] On this approach, the division of those unjust factors would be:

(a) transfers pursuant to a will not freely (or sufficiently freely) generated: 'my will was not free (or not free enough)' (which would at least include illegitimate pressure, relational dependence, personal disadvantage and transactional disadvantage);

(b) transfers pursuant to the will of the claimant freely generated, but which do not reflect that will: 'that was not my will' (which would include failure of consideration and, arguably, mistake); and

(c) transfers not made pursuant to any (free) will of the claimant: 'I had no will at all in relation to this' (which would cover no intent).

Viewing the intent-based unjust factors from the perspective of autonomy rather than intention is instructive in the sense that it is easier, when using the language of free will instead of the language of deficient and qualified intent, to see mistakes as falling in the same category as failures of consideration. That is, as examples of where the claimant freely chooses to confer the enrichment but the actual enrichment does not, as a matter of reality, reflect what the claimant decided as the necessary terms for the enrichment.[40] At the same time, the orthodox view of mistake as an impaired intention sits comfortably with the idea that the mistaken claimant is not 'free' or 'autonomous' in making the decision to effect the transfer, because he decides from the basis of error. From both perspectives, the mistaken claimant effects a transfer in which his autonomy over the terms of transfer is

[39] The use and explanation of which is found in PBH Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 226-227. See also PBH Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 140ff.

[40] This reasoning applies more strongly to spontaneous mistakes. For induced mistakes, where there is an external interference by way of the inducement, the derogation from free will is more amenable to characterisation as a derogation from freedom in the decision-making process – ie, as a transfer 'pursuant to a will not freely (or sufficiently freely) generated'. See Chapter 2.6 in relation to induced mistakes.

undermined, but it is the amenability of mistake to the former characterisation (in addition to the orthodox view) which helps to explain the relationship between mistake and failure of consideration and why some commentators would more closely relate the two.[41] Of course, the autonomy-centred view does not replace the existing intent-based structure of the English law. The law still needs substantive rules of sufficient particularity in order to manifest, express and apply the more general, conceptual, normative goals operatively upon the specific factual circumstances of individual cases. This is what the collection of intent-based unjust factors does for, and in relation to, autonomy; and the intent-based unjust factors should remain just that – structured around intention. But examining what values might underpin the substantive law is valuable because it tells us more about the nature of the law of mistake and what it seeks to achieve in a way more fundamental than 'intention', and this in turn can provide guidance for the resolution of the difficult and borderline cases.[42]

Earlier, this thesis referred to three examples which suggest that some other value gives the law its normative justification, even though the relevant substantive principles focus on intention. The three examples were where the claimant was legally obliged to transfer the mistaken enrichment (or its value) to the recipient, where the claimant had

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[41] Interestingly, the two approaches can be seen cumulated in H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 42 (references omitted): 'Mistakes are frequently said to "destroy action" by preventing the action from being of its intended character … the mistake vitiates the actor's judgment as to the transfer in question. A mistaken transfer is not the result of an autonomous decision of the actor, but rather subverts her control over her resources. Validating a wealth transfer based on such vitiated judgment would offend the liberal commitment to individual free choice; it would violate the maxim that the exercise of (subjective) free will should be the prerequisite to any legitimate transfer of, or interference with, resources.'

[42] Compare H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 39-40: 'This encounter of normative prescriptions with doctrinal rules dealing with concrete, real-life situations both enriches the theory and helps articulate some important doctrinal guidelines. Thus, on the one hand, this more contextual analysis helps refine the theory by adding to the simple scenario of mistaken payments some nuanced types of mistakes that raise specific difficulties and therefore require some adaptations and modifications to the basic normative framework. On the other hand, this contextual inquiry shows how the theoretical groundwork can inform the doctrine of mistakes. As usual, the impact of theory on doctrine takes various forms: in many cases the theory provides a defensible normative infrastructure for the prevailing rules. But with respect to mistaken payments, the theory yields some directions for legal reform.' See also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1821.

conferred the enrichment under a misprediction, and where the claimant had conferred the enrichment conditionally on the basis of a matter about which he was uncertain but which condition was neither shared nor obvious.[43] The claimant's unshared intention is vitiated in the one instance and unsatisfied in the others, but restitution for unjust enrichment does not follow. How would the conception of autonomy explain these circumstances of non-intentional (but non-unjust) enrichment? In respect of the legal obligation, an answer is that the claimant's autonomy in respect of the enrichment (or its value) has already been limited by law – he has to enrich the recipient anyway.[44] In respect of the misprediction and the unsatisfied but unshared condition, the explanation from the perspective of autonomy is that where the claimant finds himself in that position of uncertainty, and has control over the other terms on which the enrichment is transferred, but then effects the transfer without conditions attached or taking such other steps to address that uncertainty, it would then be consistent with the claimant's autonomy over the terms of his asset's disposition to leave him to the results of the uncontrolled uncertainty so permitted. Put the other way around, there is no derogation from the claimant's autonomy over the terms of disposition if, facing uncertainty, he decides to do nothing about it and to effect the transfer unconditionally.[45]

The same interest in individual autonomy also explains why the enrichment ought to be considered unjust where the conditionality is shared but unsatisfied (at least as a failure

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[43] See the second paragraph of this Chapter 1.2.

[44] Although the autonomy-based explanation for non-recovery given above is a claimant-sided one, there are also other values potentially at play, such as the value in protecting bargains, the autonomy of the counterparty who has bargained for the claimant's performance in the case of a contractual obligation, and public interest values in the case of certain statutory obligations. Arguably, the recognition of individual autonomy, including that of the counterparty, is related to the law's interest in protecting bargains. See the discussion in Chapter 2.5 in relation to enrichments which are the subject of legal obligations.

[45] In relation to known unknowns, see Chapter 2.4 on mispredictions and Chapter 3 on uncertainty and doubt. In relation to unknown unknowns, see Chapter 6.2 in relation to mistake-misprediction alternate analysis and Chapter 4 on causative ignorance.

of consideration). Where the claimant decides that an enrichment should be given on the basis that some past, present or future matter holds true, and then effects the enrichment on that conditional basis, that conduct is a manifestation of his autonomy over the enrichment and over the terms of its transfer to the recipient, which is then contradicted in circumstances where the condition fails.

It might be argued that the claimant's sharing of the condition (or where the condition is obvious) triggers the unjustness of the enrichment because the enrichment is then received by the recipient having knowledge of its (failed) conditionality. This might then support the proposition that the unjust factor in failure of consideration is at least in part 'recipient-sided'. But the act of informing the recipient of the existence of the condition (or of conferring the enrichment in circumstances where the conditionality is obvious) is itself sufficient to show that the claimant's autonomy has been undermined if that condition fails – to change the claimant's status from being autonomous to non-autonomous – because it shows that, in the face of uncertainty about a basis for the enrichment, the claimant did not decide to give over the enrichment to that uncertainty. Thus, the reason the act of sharing the conditionality (or of conferring it in circumstances where the conditionality is obvious) is important from the normative perspective is not because it qualifies the recipient's own autonomy over the enrichment (although it does have this effect), but because it contradicts the assertion that the claimant took the risk of disappointment with respect to the uncertainty and the assertion that an absolute or unconditional transfer in the face of uncertainty was consistent with the autonomy of the claimant over the terms and conditions of the enrichment. If the conditional nature of the transfer – because it was expressed to be conditional or conferred in circumstances where the conditionality was obvious – gives content to the autonomy of the recipient in relation

to the enrichment in its receipt, then it does the same for the autonomy of the claimant in relation to the enrichment in its transfer.[46]

1.3 Autonomy and the recipient's strict liability

A particular feature of unjust enrichment liability is that the defendant can become strictly liable to make restitution without having engaged in any wrongful conduct. By liability, we mean an accrued, court-enforceable right in a claimant to require a defendant to do or not to do something. Can a system of law which reverses mistakes and which is based on protecting individual autonomy explain the strict liability of the recipient? It goes without saying that liability (in the sense we are using it) without wrongdoing is not unknown to the law. Statutory liabilities to pay income tax and the timely disclosure of certain corporate information, for example, are liabilities which can arise without wrongful conduct. They are, however, somewhat exceptional, and involve not insubstantial public law considerations, where it might be said that there are very good reasons why persons in their capacity as members of a society should be required to do or not to do certain things for wider social goals. In private law, where unjust enrichment is located along with contract and tort, the non-consensual imposition of strict liability in the absence of wrongdoing is more unusual. Strict liability does exist, for example, in relation to conversion and inherently hazardous and dangerous activities. Yet, the general position for mistaken payments and unjust enrichment more generally is that not only is a defendant required to give restitution at the moment of receipt, but that the defendant is liable to do so in connection with a court-enforceable, accrued right of the claimant to procure

[46] This is further discussed in Chapter 2.4C.

restitution (that is, to require the defendant to engage in remedial conduct).[47] All the defendant needs to have done is to have received the enrichment, even if he has done so unknowingly. Certainly, the widely-accepted view is that no wrong committed by the defendant is required.[48]

The relevance of autonomy to justifying this position is as follows. Liability in unjust enrichment does not seek to impose damages on the defendant, or otherwise to impose a loss on him. It requires the defendant to give up a gain which the law regards as 'unjust' and which *ought* to be in the claimant's dominion, and not his.[49] That the defendant is giving up a gain which he is not supposed to have, rather than suffering a loss from resources which he is supposed to have, helps to explain why recovery in unjust enrichment can be strict and does not require wrongdoing by the defendant. Provided that the defendant's autonomy in relation to his *own resources* is protected by a change of position

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[47] As to 'obligation' (or duty) and 'liability', see further S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013), 227.

[48] For the proposition that the recipient's *duty* to give restitution should arise only upon knowledge/notice of the transfer and an unreasonable failure to afford restitution, see S Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 Texas Law Review 2177, 2193-2194 (a more recent statement incorporating the idea of recipient *liability* can now be found in S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013), 227). See also H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 43; H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1799 (footnote 10).

[49] At least from the perspective of the law of unjust enrichment, and even though the law of property's title transfer rules might have resulted in a title transfer in the meantime. The fact of title transfer is not necessarily dispositive of who *ought* to have the benefit of property from the point of view of the law of unjust enrichment. See also below, footnote 96. For the law of unjust enrichment, who *ought* to have the enrichment, *prima facie*, is answered by the question of whether the claimant's disposition was 'unjust' or 'non-autonomous'. If so, then the enrichment is, normatively, of the claimant's dominion, and by necessity, no one else's. Any claim by the defendant of the 'loss' of dominion over an enrichment which that law regards as ought not to be within his dominion is not a loss of a kind which that law would necessarily countenance.

Strictly, the question of whether title in the enrichment has passed (and thus who has superior title to the enrichment) is distinct from the question as to whether the enrichment ought to be within the 'autonomy of disposition' of the claimant or the defendant. This is not to suggest that title is irrelevant – the question of title has implications for whether the defendant has been enriched at the claimant's expense (see W Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 Oxford Journal of Legal Studies 627; compare G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 134-135). This has important consequences for the unjust enrichment action, and the general significance of any mistake (or other unjust factor) on which the action is based – but for present purposes it does not go towards identifying in whose autonomy of disposition the enrichment ought to belong. On the passing of title, and recipient liability, see also the discussion in S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013), 227.

defence (so that giving restitution would not result in a loss of his own resources), strict liability does not undermine the defendant's autonomy either over the enrichment or over any other asset. In other words, strict liability is acceptable because what is asked of the defendant in returning to the claimant what normatively belongs to the claimant is relatively 'easy' or non-intrusive.

Although the answer may seem self-evident, a related question which has been the subject of some academic discussion is why, if the recipient has committed no wrong, he, rather than no one or anyone else, ought to be liable to assist a claimant who is often the author of his own misfortune. The difficulty seems to lie largely in the normative context, where liability would appear to breach the Kantian injunction that individuals should be treated as equal ends and not to be subordinated by the law as a means to another's ends.

From the perspective of *structure*, Smith says that the reason for the defendant-recipient's liability is the nexus of transfer between the claimant and the defendant, that the single defective transfer constitutes both the normative loss for the claimant and the normative gain for the defendant.[50] The claimant's normative loss is not the material loss of the enrichment but the disposition of the enrichment otherwise than through the exercise of his Kantian right. The defendant's normative gain correlates with the claimant's normative loss and is the receipt of the non-consensual disposition:

> However, it should be stressed that, unlike in the case of the *vindicatio*, there need not be anything that passed from plaintiff to defendant. The transfer of wealth might have been in the form of services, or the payment of the defendant's debt, or the saving of the defendant's health or property through the consumption of food or other property of the plaintiff. It might have been in the promotion of the defendant's mortgage above that of the plaintiff,

[50] L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2142: 'Before the transfer, the wealth is an external projection of the plaintiff's agency. If the transfer is normatively flawed from the plaintiff's end, then the plaintiff suffers a normative loss. Because the defendant's enrichment is nothing other than the plaintiff's normative deprivation, the defendant's material gain is also a normative gain.' See also S Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 Texas Law Review 2177, 2190, referring to L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2140.

> through a mistaken discharge. And, even if there were something that passed, after the transfer it belongs to the defendant. In unjust enrichment, the nexus between the parties is not a particular tangible thing belonging to the plaintiff but possessed by the defendant; instead, it is a flow of wealth, measured abstractly even if it was locked up in a tangible thing, which has moved from the plaintiff's patrimony to that of the defendant.[51]

The correlativity between the normative gain of the defendant and the normative loss of the claimant means that only the defendant and not any other individual has experienced a normative gain comprising of the claimant's normative loss – an enrichment at the claimant's expense. Therefore, only the defendant, precisely because he has experienced the normative gain at the claimant's expense, can restore the claimant and himself to *status quo ante* from the normative perspective.[52] It is only by restitution from the recipient (rather than any other defendant) that we achieve the position that restitution through 'the transfer of a single sum annuls both the defendant's normative gain and the plaintiff's normative loss.'[53]

As a matter of *content*, autonomy can explain why it is that the recipient (rather than any other defendant) ought to be liable to the claimant. The normative force of the claimant's action lies in his appeal to having autonomy over the disposition of his resources (this being earlier described also as the having of 'decision-autonomy' or 'free will' over his resources), in the sense of having personal autonomy to decide the terms on which the

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[51] L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2142 (references omitted).

[52] It might be asked why the *status quo ante* is preferable. One answer is that the legal order tells us that the change from the *status quo ante* was in some way unacceptable, and that the prior state was legally acceptable and would have been left as it was unless changed by an event acknowledged and recognised by law as being an acceptable means of doing so (eg, a contract of sale for a chattel as contrasted with its theft).

[53] EJ Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 126; more recently, EJ Weinrib, *The Idea of Private Law* (rev'd edn, Oxford University Press 2012) 126. Here, Weinrib bases his account of private law liability on normative loss and gain through wrongdoing (breach of duty) by the defendant in relation to the claimant. In a more recent work, he has grounded defendant liability in unjust enrichment in a duty said to derive from the non-gratuitous nature of the enrichment and the defendant's juridical acceptance of the enrichment as such. See EJ Weinrib, 'Correctively Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 31-53, especially 41-43.

enrichment occurs. That appeal requires the claimant to respect the same in other individuals, so that each individual, including the recipient, is entitled to have the same autonomy over their own resources. And they too, including individuals who are remote and who may have nothing to do with the enrichment in question, must respect the claimant's right in connection with the mistaken enrichment which he now seeks to recall.

But while every individual must respect the claim for restitution, it is a claim against the recipient which best provides for restitution while respecting individual autonomy. The normative flaw in the transfer from claimant to recipient means that the enrichment so received ought to be the subject matter of the claimant's autonomy and not the subject matter of the recipient's. As such, restitution by the actual recipient simply restores to the claimant what is properly the subject matter of the claimant's autonomy, and without resulting in the undermining of the same autonomy interest in another person. Requiring any other person to restore to the claimant the enrichment (or its value) would undermine that individual's decision-autonomy since any restitution would attach not to an extant enrichment outside the scope of that individual's dominion, but to the individual's (own) resources out of which the restitutionary order would need to be met. If the law was instead to respect the non-recipient's autonomy over such resources, the claimant would fail to recover from all such defendants. Either result would be normatively unsatisfactory: either the law fails to remedy an undermining of autonomy, or it creates one. On the other hand, restitution from the recipient would be made out of the extant enrichment which the law says belongs in the dominion of the claimant rather than of the recipient. Recovery from the actual recipient therefore (i) effects the law's concern for the claimant's autonomy over the enrichment (ie, restitution of it) and (ii) maintains the defendant's right to autonomy over what is properly his own resources, in a way which does not work with any other individual as defendant.

The single reversal of the enrichment from that particular defendant to that particular claimant thus resolves the fracture in respective autonomies: the claimant has back what was lost from his autonomy 'unjustly' and the defendant similarly has discharged what his own right in autonomy requires.[54] No other defendant can give restitution without suffering a breach of his own autonomy of disposition since no other defendant has received the subject matter of the claimant's autonomy. It is therefore through recipient liability that each person's autonomy over their own resources is best respected. Effectively, while every individual must respect the claimant's assertion over the enrichment, only the recipient needs to do anything about it because only the recipient has the subject matter of the enrichment which normatively belongs to the claimant – every other potential defendant would say 'I respect your claim over the enrichment, but I can't help you, I don't have it. Go ask after the recipient – he has what is supposed to be yours.'

An alternative approach is that suggested by Dennis Klimchuk. He argues that what the defendant's liability vindicates, arguably:

> is not (or at least is not only) the particular interest this particular plaintiff has in her autonomy. Instead (or as well) it vindicates the value of autonomy more generally, a value in which the defendant can be understood to have an interest, no less than the plaintiff. So liability does not treat the defendant as a mere means. To hold that it does is to treat the relationship between plaintiff and defendant on the terms of the corrective justice approach. That approach, again, aims to anchor liability in the correlative structure of the particular transaction that links the particular plaintiff and defendant. The value-instrumental approach, we might say, connects the plaintiff and defendant in the broader common project constituted in part by the values in the service of whose protection liability is imposed. For *that* perspective, Dagan's account does not license the treatment of the defendant as a mere means.[55]

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[54] Alternatively, what the law and the courts ought to require of the defendant. See S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013), 227-250 (especially 243-245).

[55] D Klimchuk, 'The Normative Foundations of Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 97 (emphasis in original).

It is true that the defendant will have some costs and losses imposed on him in any event. Restitution will involve some transaction, administration and opportunity costs, whether or not the matter is disputed. It is also true to say that there is very little individuals can do to protect themselves from mistaken payment liability in unjust enrichment. But it is hard to see why this is particularly objectionable or material. As noted, restitution is not generally intrusive, and it is limited to the enrichment which remains extant. The liability to make restitution to the claimant of what the claimant unintentionally has transferred to him is also no more than a reciprocation of the defendant's own ability to require the same in his interactions with others if things were to go awry. Granted, the society-avoiding hermit will avoid having to give restitution to others inasmuch as he will avoid the prospect that he will need to ask restitution from others. But those who choose to live in society among other individuals, who expect to have rights in the nature of autonomy respected by others, must likewise respect equivalent rights in others. These – both the right as a claimant and the reciprocal liability as a recipient – are an incidence of living among other individuals in a society which involves human interaction and the possibility of being part of an imperfect interaction. The incurring of time and other costs (beyond what would be captured by defences) is simply a part of being in a circumstance which justifies the law's intervention – something which is neither avoidable nor unique to unjust enrichment liability.[56]

1.4 Efficiency and utility as normative bases

That costs involved with a particular legal rule or set of rules are unavoidable is not to say that they are irrelevant altogether, especially if one takes a utilitarian perspective on how

[56] For example, even a defendant who receives full indemnity costs following the dismissal of a tort claim will experience loss in the nature of time and administration costs.

the law should appear. The various cost consequences of a particular legal rule, and whether those costs can be reduced or minimised (by a different legal rule or a different legal regime), are legitimate considerations which can be balanced against other factors in the proper administration of that law, and of the law generally. At the same time, we must be careful not to overstate the relevance of costs and cost minimization to the question of what makes an enrichment an unjust one – in this context, what underlies mistake as a reason for restitution. The notion that the normative basis of mistake can be seen as one or more of autonomy and utility (or efficiency or social welfare) reflects the more fundamental debate on the underlying justification of private law, and while that is outside the scope of this thesis, Dagan's view on the relevance of efficiency or utility to the law of mistake merits some comment.[57]

Dagan argues for the consideration of both autonomy and efficiency[58] (or more recently, utility[59]) as normative bases for mistake.[60] On the autonomy-based approach, Dagan asserts that:

> the challenge of mistakes doctrine from an autonomy perspective is to allocate the burden of avoiding (or incurring) the harm of mistaken conferrals of

[57] It is of course not the only example of cost-based reasoning, but, as a comparison against the account in Chapter 1.2, suffices for present purposes. Another discussion of cost-based reasoning applied to the law of mistake can be found, for example, within J Beatson and W Bishop, 'Mistaken Payments in the Law of Restitution' (1986) 36 University of Toronto Law Journal 149; RJ Sutton 'Mistaken Payments: An Inner Logic Infringed?' (1987) 37 University of Toronto Law Journal 389; J Beatson, 'Mistaken Payments in the Law of Restitution', ch 6 in *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Oxford University Press 1991).

[58] See H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795; revised in H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004).

[59] In respect of which Dagan uses efficiency as the proxy: H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 39. Utility and autonomy are not necessarily opposing goals, since a conception of utility may include the promotion of personal autonomy. However, in this context, where Dagan refers to maximising efficiency as the proxy for maximising utility, this thesis refers to utility similarly – as a conception based on the maximisation of efficiency rather than any other measure.

[60] The following discussion is based on Dagan's analysis of mistaken payments. Dagan treats mistaken benefits in kind and mistaken improvements in property separately, though still using his autonomy and efficiency-based models.

> benefits between the mistaken party and the recipient in a way that fairly reconciles their interests in liberty and stability.[61]

He argues that for mistakes 'of moderate magnitude that are relatively frequent and in which people are randomly distributed on both the conferring and the receiving sides'[62] the interests of individuals may be best advanced by determining liability for restitution not in accordance with strict liability balanced with a change of position defence, but in accordance with a comparative fault regime: 'The harm caused by the mistake – approximated by the recipient's detrimental reliance – should be allocated to the parties according to their respective fault.'[63] The reason is said to lie in the parties being equally likely to be on either side of the defective transfer:

> it is fair to impose the risk of harm from mistaken conferrals of benefits on potential recipients if doing so advances the long-term advantage of a representative member of this "community of risk" – namely, where the *ex ante* liberty to make mistakes is more valuable to the representative member than the security and stability lost from having to bear exposure to equivalent risk impositions at the hands of others.[64]

Dagan argues that the same standard would be unfair for mistakes that 'generate nonreciprocal harms due to the relative infrequency and gravity of the harm they threaten',[65] and that the 'costs of such mistakes should be distributed among those who benefit from the creation of these non-negligent risks.'[66] For these, it is argued that the

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61 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 50. See also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1807, which has a slight difference in conception.

62 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 50; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1808.

63 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 51 (references omitted); see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1808, in which the words 'approximated by' are omitted.

64 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 50; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1808, where slightly different wording is used.

65 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 51; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1809.

66 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 51; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1809.

present regime of strict liability coupled with a change of position defence would ideally share the reliance harm of mistakes among the beneficiaries, provided that 'the mistaken parties either are in a position to purchase insurance or are capable of self-insuring against liability'.[67] But Dagan goes further and suggests that the law should 'in appropriate cases, prescribe a rule of no restitution that fully protects even [the recipient's] expectations.'[68] In contexts where it is typically the recipient that is in a better position to insure or self-insure and if mistaken parties and recipients are members of the same community of risk, Dagan argues that strict liability without any change of position is more appropriate.[69]

A different regime is said to be preferable in the efficiency-based approach, in which the goal is said to be to minimise the direct,[70] avoidance and administrative costs of mistakes. Dagan distinguishes private from institutional contexts. For private contexts, where it is said that 'neither the mistaken party nor the recipient is, *a priori*, a better cost-avoider or better able to insure against the harm of mistakes',[71] and where there is less of an urgent concern about administrative costs as compared with the institutional context,[72] the most efficient approach (as argued) is a fault-based regime which allocates the

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67 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 51 (see also page 65). See also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1809.

68 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 51-52.

69 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 52; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1809, where Dagan refers to this position as being one which 'may also fairly spread the costs'.

70 For which (that is, the cost of the mistake) Dagan generally uses the recipient's detrimental reliance harm as the proxy.

71 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 55; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1812-1813 (where he refers to the 'reliance harm' of mistakes).

72 H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 55; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1813.

recipient's reliance loss based on the comparative negligence (or comparative fault) of the parties,[73] rather than the current position of strict liability plus change of position.

In institutional contexts, different rules are suggested. For payments from institutions, Dagan argues that the most efficient liability rule for allocating the harm of mistakes is a rule of strict, capped, individual liability.[74] This is because such a rule minimises administrative costs, institutions are usually better able to insure, self-insure or otherwise spread the losses that are unavoidable, and because institutions are usually better able (that is, with less costs) to take precautions against mistakes.[75] In respect of payments to institutions, Dagan argues for a general rule of unlimited restitution on the basis that institutions are unlikely ever to change their position on the faith of mistaken payments made to them and, because institutional recipients are unlikely to incur such detrimental reliance, it would be 'wasteful to induce consumers or citizens to take costly precautions, especially given the superior mistake-avoidance capacity of institutions.'[76]

One important issue with the efficiency (or utility) approach for the purposes of this thesis is that that normative approach does not provide an analytically satisfactory link to the law's intent-based substantive content. As such, it is an unsuitable basis from which to inquire into the issues with which we are concerned. Instead, its main focus is the consequential, though not necessarily unimportant, matters more directly germane to

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[73] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 55, 59-60; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1813, 1817.

[74] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 60, 65; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1818, 1822.

[75] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 61-62. Note that at page 63, Dagan also argues that the capped individual liability rule can be set at a level which incorporates the harm of recipients' frustrated expectations as the measure of the harm of the mistake, as opposed to the proxy of their detrimental reliance, which Dagan generally uses elsewhere in the work, including in its initial conception at [2001] 79 Texas Law Review 1795, 1818-1819.

[76] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 63; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1820.

whether *restitution*, as a remedy, ought to be given. In other words, efficiency as a normative account is apt to explaining the conditions under which the law ought to give restitution to the claimant, more so than it is to explaining the nuances of 'unjust' in relation to mistaken transfers.

The hypothetical example of a system where mistakes are 'quickly discovered and costlessly reversed'[77] is a useful one in this context because it allows us to attempt to determine what it is in the transfer which explains the idea that the claimant ought to get his enrichment back. Restitution in such a situation is said to be:

> *a priori* justified from an economic viewpoint, because, as long as no harm can reasonably be expected from allowing restitution, it is inefficient to induce potential mistaken parties to take precautionary measures.[78]

The pertinent feature in this scheme appears not to be any inherent characteristic of the transfer itself, explaining why it is considered defective, or at least worthy of restitution, but rather that the claimant would seek to prevent its occurrence, and thereby incur costs which would exceed the costs of reversal. That is to say, individuals would undertake (x) what would be unnecessary and costly precautions in the context of the counterfactual to avoid (y) unintended transfers (in the sense that claimants would want to prevent their occurrence or reverse their consequences). However, x provides no reason for restitution beyond the cost implications of y, and y is too broad a conception to be useful for present purposes. The difficulty then with permitting the cost-based approach to determine whether or not the claimant succeeds in his action (and on what terms) is that it does not provide an explicit, principled basis on which to exclude (or include) situations such as

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[77] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 45; see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1802.

[78] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 85. See also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1836.

mispredictions, causative ignorance and changes of mind (for example, in relation to gifts). In other words, it does not tell us whether and why such things should or should not be regarded as 'unjust'. Autonomy, on the other hand, is apt to tell us what it is about a transfer which provides the reason for restitution. Dagan seems to accept this on reflection, including in his 2004 update the following paragraph not contained in the original 2001 article:

> Grounding restitution in these autonomy-based justifications helps delineate the types of mistakes that can trigger a restitutionary cause of action. First, these justifications explain why mispredictions (mistakes as to the future) do not give rise to restitutionary claims. As Birks claims, the sheer fact that things disappointingly turned out differently than the plaintiff expected does not show that her judgment was vitiated. Likewise, protecting people from mispredictions neither would expand their freedom of action nor would it secure the integrity of their selves. Second, as Thomas Krebs argues, building on an earlier version of my account in this chapter, founding restitution on these liberal premises requires that the category of mistakes include not only cases where the belief upon which the plaintiff acted can be proven to be incorrect, but also cases of complete absence of knowledge.[79]

As this thesis will later show, some of these arguments are open to further analysis, but the important point for the present discussion is the recognition that autonomy rather than utility is apt to perform the delineating role in identifying what triggers the *prima facie* claim of 'unjust'. This may be different to what might 'justify restitution' as the final result. It seems clear from Dagan's account outside of the hypothetical unilateral context that the mistaken enrichment potentially generates different legal positions for the parties depending on the circumstances, even if the mistake itself is exactly the same in each case. A normative account of mistake as a reason for restitution (ie, why it is 'unjust') needs to explain why the enrichment is unjust in the hands of the recipient, independent of circumstances and of variations in circumstances which may mean ultimately that greater interests are served by not effecting restitution. So, a normative account of mistake needs

[79] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 41 (references omitted).

to explain why a mistaken enrichment is unjust in the hands of a recipient irrespective of the latter's change of position (and the result of no restitution). This, the efficiency-based account satisfactorily does not do. What the account does do, is to prescribe *its* conditions under which restitution as a remedy should be granted.[80] This is why considerations such as the security interest and the change of position of the recipient, and the costs associated with mistakes, are relevant to it:

> Many other cases are more difficult, however. These are cases where unlimited restitution might threaten the security and stability of recipients, thus undermining their ability to lead their own lives. In these cases, a regime of unlimited restitution might also result in an inefficient allocation of avoidance responsibilities, inducing too little precaution from potential mistaken parties and too much from potential recipients. In these more difficult cases – the vast majority of real-life mistakes – the law must carefully look at both sides of the legal drama. It must balance the mistaken party's liberty interest with the recipient's security interest. It should also look at ways to minimize the costs of mistakes, the costs of their avoidance, and the system's administrative costs. In many cases, these analyses require a regime of comparative negligence. But when there is a significant disparity in the parties' avoidance capacities and abilities to spread the costs of mistakes among the beneficiaries of the activity that generated those mistakes, holding one party strictly liable for the harm caused by mistakes is more appropriate.[81]

The relationship between Dagan's accounts of autonomy and efficiency (or utility) is thus capable of being seen as normative accounts of two different aspects of the law on mistakes: autonomy as the normative basis for why the mistaken enrichment is regarded as unjust and worthy of reversal as a *prima facie* matter, and efficiency (or utility) as a basis for restitution (or the denial of restitution) as the resolution of competing normative claims which the law recognises as being legitimate and worth protecting.[82] At the very

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[80] Somewhat similar is M Gergen, 'What Renders Enrichment Unjust?' (2001) 79 Texas Law Review 1927, 1929: 'Utilitarian concerns are a reason to limit the law's reversal of accidental shifts of wealth; they do not justify it'.

[81] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 85. See also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1836.

[82] In this respect, Dagan (see H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 66-67; H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1823-1825) is right to say that it is necessary to consider mistake along with change of position to have a principled discussion, being a discussion about *restitution*. In the context of the normative basis for mistake as an unjust factor giving rise to a *prima facie* right to restitution, it is not strictly necessary to include a discussion of the change of position defence. It is enough in that context to look at

least, the efficiency account is inapt to explain the unjustness of mistakes, to the extent that a normative account of mistake needs to distinguish between the mistakes that do count from those which do not.

The distinction between 'why a mistake is unjust' and 'when the mistaken claimant should get restitution'[83] is important since the appropriate normative reference depends on the kind of question we are asking. For the issues this thesis analyzes, it is a normative account of the first kind with which we are concerned.

1.5 Restitution through strict liability and change of position as an instantiation of autonomy

Even so, it is not clear whether utility in the sense described by Dagan should be the governing approach to *restitution*. Certainly it is very much removed from the actual operation of the law, in which the detrimental reliance of the recipient operates as a defence to the claim in mistake to the extent of the change of position.[84] The law is also different from Dagan's own account of restitution on the autonomy-based approach, which involves an allocation of harm between the parties according to the particular transactional context. As was mentioned previously,[85] Dagan's account is that the particular transactional context variously justifies a regime based on comparative fault, or one of strict liability coupled

autonomy as justifying the claim. See also H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 41-42.

83 Similar is the distinction between denials and defences made in J Goudkamp and C Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013) 133.

84 Another departure is the suggestion of differential treatment of different classes of mistaken claimants and different classes of recipients, which would be a novel approach if extended beyond overpayments of tax. See also Chapter 5 in relation to mistaken gifts and other voluntary dispositions.

85 See Chapter 1.4 above.

with a change of position defence, or one of strict liability without any change of position defence.

The idea that the autonomy-based approach supports various approaches to the allocation of harm according to the particular transactional context, including a notion of comparative fault and the relevance of the ease and accessibility of precautions and insurance, is a difficult one. Apart from incorporating the notion of fault which generally has been absent from unjust enrichment scholarship and doctrine, it also accepts that there are instances in which the recipient will not have available to him the change of position defence based on novel considerations such as the type of mistake and the availability of insurance. Dagan's account therefore accepts the possibility that recipients of enrichments might suffer actual losses.[86]

Certainly, the autonomy interests of the claimant and recipient are competing and need to be balanced, or at least reconciled.[87] But this does not mean that they need to be balanced or reconciled in any one particular way or that fault is a necessary or appropriate criterion. Neither does it mean that losses need to be shared between claimant and recipient. An appropriate balance and reconciliation between competing autonomy interests, and consistent with decision-autonomy as a normative account, can be seen in the current legal position of strict liability subject to change of position. As explained earlier, autonomy explains the interests of the *claimant* the law seeks to protect. Autonomy in that context is a normative basis which explains why the relevant enrichment is *unjust*, rather than as a normative basis for the result of *restitution* (or otherwise). However, an essential element in this conception of autonomy as a normative basis for the unjustness of

[86] The relevance of fault and the potential for recipient losses are also inherent in Dagan's utility-based model.

[87] An early exploration of the question can be found in PBH Birks, 'The Recovery of Carelessly Mistaken Payments' (1972) Current Legal Problems 179.

a mistaken transfer is the recognition that what is true of the claimant as an individual and in relation to his resources is also true of other individuals, so that the claimant must recognise the recipient's autonomy interests where the vindication of his own autonomy interest begins to infringe on those of the recipient. As will be discussed below, this is manifested in the change of position defence, and it is this dual recognition of claimant and recipient interests which allows autonomy also to provide a sensible normative account in the second context above – that is, as a justification for *restitution*. It justifies restitution on the basis of strict liability subject to the recipient's change of position because autonomy's dual recognition suggests that very limit to the *prima facie* claim as the means of settling the claimant's and recipient's competing interests.

It will be recalled that autonomy refers to the claimant's assertion of control over his own resources – specifically, the terms of their disposition. An individual who makes a claim on this basis ought to accept, as a general proposition, the same assertion of control by the recipient over his own resources; that the latter should not be dispossessed of his own resources in a manner which does not reflect his 'autonomy of disposition'.[88] As Smith says, in the context of the change of position defence, 'If the plaintiff's claim is founded on Kantian right – on her status as a self-determining agent – she must reciprocally recognize the Kantian autonomy of the defendant.'[89] This conforms to the more general

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[88] Or, more generally, an acceptance of the recipient's own freedom of choice. See I Kant, *The Metaphysics of Morals* (MJ Gregor ed, Cambridge University Press 1991) 56. See also J Raz, *The Morality of Freedom* (Oxford University Press 1988) 407-408, 415, 425.

[89] L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115, 2149. See similarly, H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 41-42 (references omitted): 'Helpful as it may be, my current assumption of pure unilateralism is surely unrealistic. Unilateralism not only over-simplifies mistakes. By ignoring the impact of the mistaken party's acts and omissions on other parties, this initial analysis misses important normative considerations. Potential recipients have an autonomy interest that may be affected by other people's mistakes. By the same token, one entailment of the autonomy of the mistaken party herself is taking responsibility for the consequences of her own acts and omissions insofar as they affect other people. For these reasons, my account of mistakes as cases of involuntariness will not be complete without … [the consideration of] the potential impact of mistakes on other people. This shift to multiparty mistakes will refine the liberal case for restitution in ways that must – and indeed do – affect mistakes doctrine. None of these refinements, however, undermines the significance of the liberal presumption of restitution.'

idea that the normative basis for mistake should also explain why it is that the defendant ought to have a change of position recognised:

> 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."[90]

Similarly, Dagan says:

> Indeed, every mistaken party's autonomy claim for freedom of action is countered by the recipient's autonomy claim for security and stability. This symmetry need not imply indeterminacy. It does, however, pose the core challenge of the law of mistakes: in order to adjudicate these two autonomy-based competing claims in a principled fashion, the law must reconcile our liberty to make mistakes with our aspiration for security and stability that is no less essential to our ability to lead our own lives. Mitigating the mistaken party's liberty by the recipient's stability does not require us to compromise our commitment to autonomy. On the contrary, holding people responsible for the potentially adverse consequences of their choices to others is part and parcel of this very commitment.[91]

Thus the claimant's action in mistake which is based on the normative strength of an assertion of control over personal resources (or the assertion of his right to recover the non-autonomous disposal of his resources) must be predicated on non-interference with the same right in another individual in relation to his own resources. And that point of interference can be marked by the change of position defence where the change of position identifies the point at which the claimant's assertion of autonomy (ie, the claim for restitution of the enrichment) would result in a loss for the defendant, constituted at least by the extent of the irrecoverable and detrimental reliance on the faith of the enrichment

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[90] J Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92 Boston University Law Review 1009, 1033 (citing *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33 [72], [2011] WLR 25).

[91] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 46 (references omitted). Compare H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1803.

which the claimant is now seeking to reverse. Permitting restitution of the whole sum of the enrichment in circumstances where there is such a change of position would be an interference with the recipient's autonomy over his own resources since there would result a diminution of the recipient's corpus of resources not determined autonomously by him. It would therefore be entirely appropriate, normatively, to allow for the recipient's change of position, to ensure that a non-autonomous diminution of resources is not imposed on the recipient and so as to avoid contradicting the normative basis which underlies the mistaken transferor's claim in the first place.[92] In short, strict liability coupled with a change of position defence is a sensible approach to *restitution* from the autonomy-based point of view.

The other advantage of this conceptualisation of the relationship between autonomy and the current legal position on restitution is that it recognises that the respective autonomies of the claimant and the recipient are not quite of the same character, and therefore not readily amenable to being balanced against one another as if they were measures of the same thing. Even if we accept that the claimant's autonomy interest and the recipient's autonomy, stability or security interest are drawn from the same proposition that individuals should have an appropriate degree of control over their own resources, this means only that their interests are similar in respect of their *own resources* – on the other hand, their interests are slightly different in respect of the *enrichment*.

[92] It should be noted that the protection of the recipient's autonomy via the change of position defence is not perfect and complete. Just like the claimant's action, the defence of change of position is subject to its own requirements and scope of application (see for example, the summary in E Bant, *The Change of Position Defence* (Hart Publishing 2009) 219). It should also be said that 'contradiction' is perhaps too strong a notion, and that what the recipient's change of position marks is better thought as a 'natural limit' formed by the coexisting and reciprocating freedoms. Kant, referring to his universal law of Right, said that 'it does not at all expect, far less demand, that I *myself should* limit my freedom to those conditions [of non-impairment of the freedom of others] just for the sake of this obligation; instead, reason says only that freedom *is* limited to those conditions in conformity with the Idea of it': see I Kant, *The Metaphysics of Morals* (MJ Gregor ed, Cambridge University Press 1991) 56-57 (emphases in original).

The law's recognition of the *prima facie* claim is protective of the claimant's autonomy interest by allowing him to recover what he disposed of non-intentionally, or non-autonomously – the law being interested to protect his autonomy of action in connection with the transfer of the enrichment by retransferring to him in suitable instances the enrichment (or its value). On the other hand, the law's recognition of a recipient's change of position is protective of the recipient's autonomy interest ordinarily by allowing him to reduce the amount that is to be restored to the claimant by amounts which would be at least inclusive of such detrimental reliance.[93] This can be described in other ways, such as an off-setting of the liability or a limitation or protection against loss. The key point is that the law's concern for the recipient's autonomy is different, in the sense that the concern is not aimed at protecting his autonomy of action over the same enrichment. It cannot be a concern for exactly the same enrichment or the same 'autonomy over enrichment' because if it is of the claimant's (that is, if the enrichment properly belongs within the dominion of the claimant) then it cannot at the same time be of the recipient's. Assuming that there is no better reason for the recipient to have the enrichment (for example, that he contracted validly with the claimant for it), the recipient ought to have no claim of autonomy over the mistaken enrichment.[94] Rather, his claim is a different one, being to ensure that any liability to return the enrichment or its value does not damage his own autonomy of action, not over the enrichment mistakenly transferred, but over his (other) assets in circumstances where restitution of the entire amount of the enrichment would

[93] Accepting that the change of position defence could capture other events, such as the loss of the enrichment by an Act of God.

[94] From the normative perspective, the law of unjust enrichment ought not be concerned with protecting the defendant's autonomy over the enrichment itself because at the time of its receipt the enrichment was unjust and thus did not fall within the corpus of resources available to the recipient to be subjected to his autonomy, irrespective of the passing of title. The enrichment ought instead be the subject of the claimant's autonomy and is thus received by the recipient, from the normative viewpoint, non-absolutely. As Dagan says 'the transferor's mistake undermines the recipient's entitlement': H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 42. See also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1798, referring to the recipient's 'title'.

cause their diminution. It is this potential loss of his 'non-enrichment' assets which would undermine his autonomy and which constitutes the normative concern for the defence.[95] So the autonomy-based claims are different: one is to restore to the claimant what ought to be his, and the other is to ensure that in doing so the recipient does not lose what ought to be his. And just as the mistaken transferor's normative claim that the mistake made the disposition non-autonomous and the enrichment therefore ought to be within his dominion is separate from the question of who has superior title to the enrichment, the recipient's normative claim against the depletion of his assets does not depend on whether or not title in the enrichment had transferred to him. The defendant's normative concern is not in being required give restitution of the enrichment (or its value) itself, but that he should not be required non-autonomously to incur a loss to the assets belonging within his dominion when doing so. The passing or non-passing of title in the specific context of this normative story is not important.[96]

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[95] Compare E Bant, *The Change of Position Defence* (Hart Publishing 2009) 212-217 on the normativity of the defence. There is also some discussion as to whether the recipient's change of position is better seen as reflecting a value received or value surviving model of enrichment. See for example the discussion in J Goudkamp and C Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013) 156-158, and R Chambers, 'Two Kinds of Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 247-9. The language used above to describe the autonomy-based rationale for acknowledging the recipient's change of position is consistent with the value received model. It takes the position that the claimant's action for the enrichment mistakenly transferred is effectively the entirety of the non-autonomous transfer to the recipient then discounted by the extent of the recipient's change of position.

In the value surviving model, the recipient's change of position reduces, to the extent of the change of position, the quantum of the enrichment subject to the claimant's claim. The autonomy-based explanation for looking at the surviving enrichment at the time of the action is the acknowledgment that the recipient should be entitled to deal with his assets (or what he legitimately believes to be his assets) in the usual way, at least until the time at which he becomes aware of the unjust enrichment. If his irrecoverable disposition of assets (whether of the enrichment itself or his non-enrichment assets), made on the faith of the enrichment (or at least without knowledge of the claimant's pending claim), does not reduce the quantum of the claimable enrichment by the amount of that change of position, the effect would be to require the recipient separately to make whole the value of the change of position through some other means. This is an infringement of his autonomy as it appropriates to that portion of the claim the recipient's resources (whether currently held or later acquired) which should otherwise have been available at his disposal in the ordinary way on terms acceptable to him. This would be a more recipient-based approach, in that it does not explicitly acknowledge the full amount of the non-autonomous transfer by the claimant.

[96] See above, footnote 49. One explanation for the position that the law's title transfer rules do not tell us in whose dominion the enrichment normatively belongs is that property law's title transfer rules are, among other things, directed more towards the question of who is entitled to deal with property as titleholder, the answer to which needs to be applied and in operation at the time of a transfer or purported transfer or other dealing (but which may be subject to later modification, such as through rescission of a voidable contract of sale). In contrast, the answer to the 'unjust' element of the unjust enrichment cause of action – which is directed towards whether a disposition of resources was

The foregoing also explains why the change of position must be irrecoverable, so that the value of amounts which are recoverable must be subjected to restitution in favour of the claimant no matter how strong the recipient's interest is in the security of receipt. The restitution of such amounts as are not irrecoverably disposed does not diminish the pool of assets which normatively belongs to the recipient and over which he may continue to assert his dominion. The value of such amounts therefore are extant of the enrichment, which instead forms part of the pool of assets which normatively belongs to the claimant.

What all of this means is that the defendant's claim to autonomy is derivative to the claimant's in the sense that it only arises out of the claimant's action. It is not an interest that the defendant can assert independently over the enrichment itself. It is that in the law's ensuring generally that individuals do not have their resources diminished other than through an autonomous decision, his own position in autonomy is also respected; that he is not made merely an instrument of the claimant's ends without regard to his own interests and that the remediation of the non-autonomous actions of the claimant do not undermine his own autonomy. It is a competing interest and a competing claim, but it is neither the same claim to the same enrichment, nor does it involve quite the same unjustness.

1.6 A conclusion

While the law of mistake is formally structured around 'intention', it can be seen as reflecting a deeper value in autonomy over the disposition of resources. A mistaken enrichment typically undermines this value because it involves a disposition from the pool of resources of an individual in a manner which was unintentional, and therefore,

autonomous and therefore whether the benefit of that property or other enrichment ought to have remained in the dominion of the claimant – might only be discovered (and then applied to the question of title to property) sometime after the disposition. This is not to subordinate one set of rules to another, but to assert that 'title transfer' and 'unjustness' are responses to different questions to which the law must provide different types of answers.

ordinarily, non-autonomous. The scope of autonomy in the sense used is broad but given content by reference to the legal order of which it is part. Such enrichments which the law leaves to the claimant's scope of autonomy – his decision-making discretion – but which are instead transferred non-autonomously, as in appropriate cases of mistake, are then regarded by the law as being *prima facie* 'unjust', and liable to be restored to the claimant subject to the rest of the elements in the unjust enrichment cause of action.

The law's concern for the claimant's autonomy over his own resources necessitates the recognition that in the vindication of that autonomy interest, the autonomy of the recipient over his own resources should also be respected. This requires a resolution of their respective, competing interests. Resolution implies the balancing or reconciliation of those competing interests, but need not mean the sharing or allocation of fault or losses between the parties. The current legal position is one of strict liability with a change of position defence. This structure means that the claimant's assertion that he must have restored to him the mistakenly transferred enrichment reaches only so far as the recipient's enrichment remains extant, so that *restitution* does not diminish the latter's non-enrichment resources.

The effected legal position is thus not one which shares responsibilities or shares losses. Rather, it is a tempering of the vindication of the claimant's interest by reference to the recipient's, by ensuring that the claim does not promote the claimant's interest in autonomy so far as to subordinate the recipient's own autonomy interest to the claimant's. Conversely, the recipient's own appeal to autonomy through the change of position defence to resist restitution of the enrichment is limited to ensuring that the reversal of the claimant's non-autonomous disposition does not result in a comparable consequence for the recipient. No greater power needs to be given in connection with an enrichment in which he may have acquired title in the meantime. The balance lays therefore in the

sensitive coordination and limitation of the claimant's and the recipient's autonomy interests in connection with (but not necessarily in) the same defective transfer, in a manner which reflects the inherent limits of autonomy as conceived and which reconciles their respective and competing interests within that context. In other words, strict liability subject to change of position is consistent with autonomy as a normative account for the restitution of mistaken enrichments.

Autonomy as a normative account explains that structure much better than it does one which contemplates fault-based liability, a denial of changes of position and the sharing of losses (or some combination of them). Such a regime is not to be preferred in any case. Among other things, it would bring the law of unjust enrichment towards the law of torts; towards fault as a means to allocate loss among the parties. This would undermine unjust enrichment's distinctive characteristics.[97]

The foregoing discussion of mistake and autonomy does not address the question whether mistake, unjust enrichment or indeed private law is best understood as an instantiation of the 'public good', or as conforming to some other conception of rights and liabilities within society.[98] For present purposes, it is not necessary to resolve these philosophical questions on the nature of the law if it is possible to identify the value or

[97] This is not to suggest that some circumstances involving mistaken enrichments cannot be regarded as exceptional and treated exceptionally, such as the overpayment of tax to the Revenue. However, the resolution arguably falls to their treatment as exceptional circumstances, in the sensitive departure from the general position, rather than a wholesale restructuring of the law. Policy-based legal principles can deal with such situations, which is what the law has done in respect of such overpayments of tax. In these cases, while a causative mistake might be present on the facts, the particular action is based not on the mistake but the policy reason. It is not the mistake, because recovery is possible even if the claimant does not believe that the payment is due.

[98] Neither does this thesis seek to examine whether corrective justice, pluralistic or distributive ends or some other normative basis or combination of bases at this level of abstraction and context is the reason why mistaken enrichments are reversed – for a discussion in this area, see, for example, generally Part II Normative Foundations of R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009), and in particular, EJ Weinrib, 'Correctively Unjust Enrichment' (31-53), H Dagan, 'Restitution's Realism' (54-80), D Klimchuk, 'The Normative Foundations of Unjust Enrichment' (81-99), M McInnes, 'Resisting Temptations to "Justice"' (100-145), K Barker, 'The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora's Box' (146-180).

values which more directly give the law on mistaken enrichments its normative force. Arguably, neither is it desirable since such deeper, fundamental, questions and answers concerning the nature of law in society are 'too deep' or 'too abstracted', in the sense that they only indirectly provide a normative explanation of the particular substantive law in which we are interested. So, even if one were to accept that welfare maximisation and utility, for example, ultimately might underlie all instances of intent-based unjust enrichment, restitution or even private law, they do not directly explain the law's concern to examine and respond to the intention of the claimant in the various ways that the law does in determining why an enrichment is to be regarded as an unjust one. What they might do, is to provide a foundational basis for the set of goals and values that the substantive corpus of law seeks to achieve and protect within society. It is these intermediate goals and values which can more directly explain why the substantive law appears the way that it does. So while it is important for this thesis to examine what might underlie the law of mistake, the further question of whether the wider, substantive, law and the value or values it seeks to protect are best understood as instances of one grand unifying philosophy or theory of law or another can be left to other works where the resolution of such issues is more relevant. This does assume of course that it is possible to identify the normative basis of mistake independently of one's view about the foundational basis (or more fundamental bases) of the law in society, a proposition generally accepted in unjust enrichment scholarship.[99] Beyond this, the questions of whether autonomy can be regarded as better reflecting one philosophical viewpoint or another, and whether that conception works for other areas of private law beyond mistake, while interesting enough questions,

[99] See for example, D Klimchuk, 'The Normative Foundations of Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 82; and H Dagan, 'Restitution's Realism' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 59-60.

do not assist us in determining how well the law of mistake – speaking with the language of intention as it does – reflects the normative basis which is said directly to justify it.

CHAPTER 2

MISTAKE AS AN UNJUST FACTOR AND ITS CORE PRINCIPLES AS INSTANTIATIONS OF A NORMATIVE BASIS IN AUTONOMY

This chapter examines the key substantive principles of mistake as an unjust factor. It also explains how these principles reflect the normative basis described in Chapter 1.

2.1 What is a Mistake?

A mistake of fact is a belief about the state of the world which differs from the actual state of the world at the time of its holding. This is consistent with Smith's view that the logic supporting mistake claims rests on the belief in something at the time of the enrichment which is different from reality, with that dissonance being causally relevant.[100] However, it is arguably wider than Sheehan's approach – that a mistake 'can be seen as a belief in something that can, at the time it is acted upon, be proven not to be the case'[101] – insofar as this latter approach requires the difference between belief and reality to be provable at the time of the enrichment. The former only requires that the difference between belief and the reality at the time of the enrichment be provable, even if the means of proof is available only subsequent to the time of the enrichment (eg, at the time of the claim).

Authority for the proposition that the claimant must actually hold a belief as to the state of the world can be found in *Kelly v Solari*,[102] in the judgment of Parke B, who

[100] L Smith, 'Restitution for Mistake of Law' [1999] Restitution Law Review 148, 149.

[101] D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 538; compare G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 139-140; PBH Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 224, referring to 'beliefs which are false at the time when the decision [to enrich] is made.'

[102] (1841) 9 M & W 54, 152 ER 24.

referred to recovery for a payment 'under the influence of a mistake, that is, upon the supposition that a specific fact is true … but which fact is untrue'.[103] Similarly, Lord Esher MR in *Barrow v Isaacs & Son*,[104] having found no definition in the case law, regarded a mistake as occurring when a person has 'thought that one thing was in existence, whereas something else was in existence.'[105] Those judgments also affirm that mistake incorporates the notion of incorrectness.

That there must be an actually held belief which is incorrect is uncontroversial. A person who holds no belief as to a particular matter cannot be mistaken about it, and a mistake cannot be made about a matter unless the belief differs from reality: the concept of mistake is incomplete without the notion of incorrectness.[106] That the belief must be incorrect at the time it was relied on to make the payment is also obvious. If a person cannot be said to be incorrect about his belief at the time the payment was made, it cannot be said that the payment was made under, or caused by, a mistake. But it would be wrong to require the mistake to be capable of practical or actual proof at the time of the payment. A person is mistaken if it logically can be demonstrated that his belief at that time was incorrect: it ought not to matter that it is only practically possible to prove this subsequently. A person who makes a payment to another whom he thinks to be his brother makes a mistake even though it may have been impossible as a matter of practical proof to

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[103] *Kelly v Solari* (1841) 9 M & W 54, 58, 152 ER 24, 26 (Parke B).

[104] [1891] 1 QB 417.

[105] *Barrow v Isaacs & Son* [1891] 1 QB 417, 420. See also *Roles v Pascall & Sons* [1911] 1 KB 982, 987, in which Buckley LJ said that 'A mistake exists when a person erroneously thinks that one state of facts exists when, in reality, another state of facts exists'; and *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407 para [28], [2003] QB 679, 690, in which the Court of Appeal said, in relation to contract avoidance, that 'A mistake can be simply defined as an erroneous belief.'

[106] D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 540.

show that the recipient was not actually his brother until the later development of DNA technology.[107]

Conversely, if a belief cannot be demonstrated (at the time of the claim) as being incorrect at the time of the enrichment, the belief cannot be regarded as a mistake for the purposes of the law of unjust enrichment. This is true if the source of the inability to demonstrate error is one of lack of evidence or impracticability of proof as much as if it is conceptually impossible to demonstrate the dissonance with reality. In the latter category would fall situations such as where the subject matter of belief is a subjective opinion independent of any relevant incorporated or underlying objective statements of fact (for example, an opinion that a certain thing is the 'most artistic example' of its kind as opposed, for example, to an opinion that 'the world is flat') or where the belief is not of sufficient certainty to allow the falsity of it (if any) to be demonstrated.[108] Tang gives the example of where: 'an uncle gives his niece a present believing her to be a "good girl". The concept of a "good girl" is so murky that it cannot, save in the most extreme of cases, be demonstrated to be false.'[109] As Sheehan suggests, in principle, 'there must be a method by which we can discover what the correct answer is, and whether the belief that we hold is the same as that correct answer; at the very least it must be possible to prove that the answer is incorrect.'[110]

A. Ignorance and forgetfulness are insufficient

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[107] A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 228. Compare R Dworkin, *A Matter of Principle* (Oxford University Press 1985) 141-142.

[108] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 4. D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 549-550, refers to beliefs 'as to purely subjective matters' and matters 'of personal taste'.

[109] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 4.

[110] D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 540.

That a person is ignorant does not necessarily mean he is mistaken. Ignorance is a different state of mind, going to the completeness of knowledge rather than the accuracy of a belief. Thus, a person who is ignorant of a matter and forms no belief about it cannot later claim to have been mistaken in relation to it. Sheehan gives the example of a person who neither knows nor believes anything about the possible existence of quarks. On proof that quarks do exist, the ignorant person cannot claim that he made a mistake. But the conclusion of 'no mistake' is reached, not because the person is ignorant of the reality but rather because he held no belief in relation to it.

In *Roles v Pascall & Sons*,[111] a worker who was injured at work failed to bring his compensation claim within the period prescribed by the Workmen's Compensation Act, 1906. The late claim could proceed if the worker could show that the failure to make a timely claim 'was occasioned by mistake', which he sought to do on the basis that he did not know of the existence of the Act, or that he was entitled to compensation. The argument was that ignorance counted as a mistake, a proposition which was rejected by each member of the Court of Appeal. Buckley LJ said:

> A mistake exists when a person erroneously thinks that one state of facts exists when, in reality, another state of facts exists; this man was not in that position. He did not think that there was not such an Act as the Workmen's Compensation Act or make any mistake as to its contents or effect. He thought nothing at all about Acts of Parliament. His condition of mind was one not of mistake, but of ignorance.[112]

[111] *Roles v Pascall & Sons* [1911] 1 KB 982.

[112] *Roles v Pascall & Sons* [1911] 1 KB 982, 987.

Both Cozens-Hardy MR[113] and Fletcher Moulton LJ[114] agreed that ignorance was not the same as mistake, and that it was the former and not the latter which was in play in that case.

On the other hand, 'no mistake' is not the automatic consequence of a state of ignorance because it is not true that a person who is ignorant in relation to some matter will always hold no belief in connection with it. For example, in *David Securities Pty Ltd v Commonwealth Bank of Australia*,[115] the claimant company's ignorance of the voiding effect of certain taxation legislation led it mistakenly to believe that the money paid was due under a legal obligation or alternatively that the recipient was legally entitled to payment. There, ignorance of a fact rendered incorrect a belief to which the fact was material.[116] Ignorance led to mistake. The claim in mistake is available, but again it is not for the state of ignorance. It is for the mistaken view of the world so rendered by that ignorance: the claimant is both ignorant and mistaken, but the claim is possible because of the mistake.

There is, therefore, no fixed relationship between ignorance and mistake. As ignorance does not necessarily bear upon the accuracy of a person's belief, it neither counters nor corresponds with mistake. It is neither a mistake nor a non-mistake. It is impossible more closely to relate the two, except perhaps to say that while ignorance itself

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[113] *Roles v Pascall & Sons* [1911] 1 KB 982, 985: 'But mistake is not identical with ignorance. That is really what the argument for the respondent means.'

[114] *Roles v Pascall & Sons* [1911] 1 KB 982, 986: 'There is no possible pretence for arguing that complete ignorance of the existence of the Workmen's Compensation Act comes under the head of "mistake."'

[115] (1992) 175 CLR 353.

[116] For other examples, see the facts in *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349 and *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26, [2013] 2 AC 108.

cannot sustain the mistake claim, it can contribute to the factual matrix constituting the cause of action for it.[117]

An analogy can be drawn with forgetfulness. There too, the claimant is missing a piece of information, the difference being that the forgetful claimant once held the information in mind. However, just like ignorance, forgetting a fact is itself insufficient to qualify as, or disqualify, a claim in mistake. Whether there is a mistake depends on the effect forgetting the fact has on the claimant's state of mind: whether the claimant consequently holds an erroneous belief about the world. There is no fixed relationship. The view here being put forward goes beyond the position taken by Lord Esher MR in *Barrow v Isaacs & Son*,[118] that mere forgetfulness of a fact was not a mistake, and is consistent with the position of Eve J in *Lady Hood of Avalon v Mackinnon*,[119] that a person who forgets a fact can also be mistaken.[120] Forgetting something can lead to mistake, such as where the claimant 'has forgotten the existence of a pre-existing fact, and assumes that such fact did not pre-exist'.[121] In *Lady Hood of Avalon*, the claimant did just that. The claimant made an appointment to her elder daughter, the defendant, upon her marriage. The claimant did not do the same for her younger daughter on the latter's marriage but, wanting to help her raise money, made subsequent appointments totalling £8,600. Desiring

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117 Compare D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 541-545.

118 [1891] 1 QB 417, 420: 'Can you … say, "I forgot," and is that the same thing as saying, "I was mistaken"? I think not. Both those questions depend on something happening in the mind of the person, and you have to see what it is that happens in his mind. If he merely forgets, he does not assume that one state of things exists whereas some other state of things exists: it is a mere passive state of mind; he has forgotten – he has not thought that one thing was in existence, whereas something else was in existence.' Compare Kay LJ (at 425-426), with whom Lopes LJ concurred.

119 [1909] 1 Ch 476.

120 [1909] 1 Ch 476, 482: 'With the greatest possible respect to Lord Esher, I do not quite follow that. It seems to me that when a person has forgotten the existence of a pre-existing fact, and assumes that such fact did not pre-exist, he is labouring under a mistake, and he acts on the footing that the fact really did not pre-exist; and, venturing to criticize the language of Lord Esher, I should have thought that a man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist.'

121 [1909] 1 Ch 476, 482 (Eve J).

to equalise the shares of her two daughters, and forgetting about the prior appointment, the claimant made what was a second appointment to the defendant: for £8,600. Forgetfulness there led to mistake. The claimant forgot that she had made an earlier appointment to the defendant, leading her mistakenly to believe that it was necessary to make the second appointment to the defendant in order to achieve a degree of equality as between her daughters. But the superadded requirement of making an assumption inconsistent with reality is necessary because it is that erroneous belief which constitutes the mistake. So, for example, a claimant insurer which forgets that a policy has lapsed pays in the mistaken belief that it is liable to pay under a valid policy.[122] Similarly, a bank which forgets that it has already made a particular payment, pays a second time in the mistaken belief that it has still to be made.[123] It is not enough that through forgetfulness (or ignorance) a fact was not held in the mind of the claimant. Without a consequential falsification of a relevant belief, there is no mistake.[124]

Mistaken beliefs generated from ignorance and forgetfulness show that, at a lower level of generality, the definition of mistake – a belief about the state of the world which differs from the actual state of the world at the time of its holding – incorporates at least two sub-forms:

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[122] *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24.

[123] *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1980] 2 WLR 202, [1979] 3 All ER 1025.

[124] The connections between ignorance and forgetfulness on the one hand, and mistake on the other, can be seen in the judgments of Kay LJ in *Barrow v Isaacs & Son* [1891] 1 QB 417, 425-426, and Eve J in *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476, 484. A more recent statement can be found in *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [105], [2013] 2 AC 108, 150: 'Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake.'

(i) mistakes generated through *misinformation* as to the true state of things (eg, the entry of wrong data leading to an erroneous belief, including the misinterpretation of, or incorrect reasoning applied to, correct data); and

(ii) mistakes generated through *insufficient information* as to the true state of things (eg, the omission of relevant, material data, leading to an erroneous belief).[125]

While the end result is the same, and there is blurring at the lines between the sub-forms, it is important to remember that the key condition is the erroneous belief – the events which can lead to or cause it cannot be used in substitution. For example, it is not enough to point to a failure to enter correct data, in essence a case of ignorance. Failing to enter correct data is not a mistake unless the omitted data affects the accuracy of an actually held belief so that the belief is wrong.[126] Otherwise, there is only incompleteness, not error.

It is worth noting that 'ignorance' is used here to refer to a particular state of mind in the context of the unjust factor of mistake and not as a reference to ignorance potentially as an unjust factor (that is, ignorance of a fact relevant to the transaction as opposed to ignorance of the transaction itself). This is consistent with the approach in *Goff & Jones: The Law of Unjust Enrichment*,[127] to the relationship between mistake and ignorance. The authors refer to two situations. The first is where 'C intended to confer a benefit on D, but where he would not have acted as he did but for his ignorance of some material fact. If a claim is available in these cases, then it is because C acted on the basis of a restitution-

[125] See G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 145-146, where Virgo distinguishes between 'active' and 'passive' mistakes.

[126] See the examples considered in A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 215-217; A Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) para [3-12].

[127] C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (formerly *The Law of Restitution*) (8th edn, Sweet & Maxwell 2011) (hereafter, '*Goff & Jones*').

grounding "mistake"'.[128] This says no more than that ignorance of the true state of affairs can be observed in some if not all cases of mistake, and supports the proposition above that a person can be both ignorant and mistaken at the same time, the former state having led to the latter. The second situation to which *Goff & Jones* refers is where the claimant is unaware of the transfer, the enrichment coming into the hands of the recipient without any participation by the claimant. *Holiday v Sigil*,[129] in which the claimant inadvertently dropped a £500 note later picked up by the defendant, is a good example of this kind of 'ignorance'.[130] It does not come within the scope of this work.[131]

B. What constitutes a belief?

Tacit beliefs and assumptions

Until now, the terms 'belief' and 'actually held belief' have been used without further explanation. They will suffice in most cases, as the belief claimed to be mistaken is one the claimant had specifically and consciously formulated when he determined to confer the enrichment. However, not every belief is so positively formulated. Let us assume, for example, that a Roman Catholic family patriarch makes a spontaneous gift of money to his grandson on notice of the latter's upcoming wedding. The grandfather later discovers that the marriage is a sham, designed to accord residency status to a decidedly non-Catholic

[128] *Goff & Jones*, para [8-03]. Compare Lord Goff of Chieveley and G Jones, *The Law of Restitution* (7th edn, Sweet & Maxwell 2007) para [4-001].

[129] (1826) 2 Car & P 176, 172 ER 81.

[130] This is dealt with in Chapter 8 of *Goff & Jones* as 'Lack of Consent and Want of Authority'.

[131] *Goff & Jones* says that recovery of this kind of enrichment is better described as being based on a 'lack of consent', which includes examples where the transfer is made with the knowledge of the claimant but who is powerless to stop it, and is related to cases where the assets of the claimant are transferred by a third party in excess of its authority: see Chapter 8 of *Goff & Jones*. See also A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 403-407; G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 131-136. Compare Lord Goff of Chieveley and G Jones, *The Law of Restitution* (7th edn, Sweet & Maxwell 2007) para [4-001]; W Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 Oxford Journal of Legal Studies 627.

woman in return for cash consideration. The grandfather then seeks the return of his money as money paid under a mistake of fact. His success depends in part on showing that he held a belief contrary to reality. However, the belief he consciously formulated and held was that his grandson was getting married to a woman he did not happen to know. Neither having discussed the marriage with anyone, nor having met the wife to be, the claimant never consciously formulated any other belief about the marriage, including in particular any conscious belief that the marriage was real and that the wife to be was Catholic. On the other hand, the claimant knew that his grandson was Catholic and getting married. Limiting himself to the character of the marriage, the claimant might seek to argue that he implicitly believed the marriage to be a 'proper' one without necessarily subjecting it to conscious determination.

Sheehan regards implicitly formulated beliefs – which he terms 'tacit assumptions' – as beliefs counting for the purposes of mistake on the basis that, while they are not explicitly formulated in the mind of the claimant, they are no less real and it is the reality of the belief rather than its form which is relevant.[132] With those beliefs explicitly formulated and consciously held, Sheehan includes tacit assumptions which are 'a necessary basis for other consciously held beliefs, even if not consciously held itself'[133] but warns that the law must be careful to avoid 'finding beliefs which do not exist.'[134] A second type of tacit assumption may be added. In the above hypothetical, the implicit belief that the marriage was a proper one is a belief which would exist if, for the claimant, it necessarily followed from (rather than forming a necessary basis of) the belief that his Catholic grandson was about to get married. This is not to say that as a matter of reality

[132] D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 539-540.

[133] D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 540.

[134] D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 540.

all marriages necessarily are 'real' ones, or that everyone who is informed of a marriage necessarily will believe it to be 'real'. It is only to accept that a person who believes that his grandson is about to get married could implicitly also believe without more that the marriage is a real one.[135]

Where this is the case, because the particular factual scenario supports an implication of that kind, the latter is a belief which is held and is as real as the consciously formulated belief generating it, albeit only implicitly formulated. Thus, to the categories of 'beliefs' must be added those beliefs which are not consciously held but which can be regarded as necessarily following from those which are consciously held.

Pre-existing beliefs

Earlier in this chapter, this thesis spoke of mistake being generated by the 'entry of wrong data', 'incorrect reasoning' and the 'omission of relevant, material data'. Certainly, the correctness of some matter which is explicitly contemplated by the claimant immediately before and as part of the decision to transfer the enrichment will be a belief held in the mind of the claimant and which may be a mistake for the purposes of the law of unjust enrichment. However, beliefs which are formulated and considered much earlier in the story can also count as relevant beliefs. Requiring that a belief must be a thought in the mind of the claimant (whether a conscious belief or a tacit assumption) and contemplated as an immediate part of his decision to enrich the defendant, or formulated at the same time as the other beliefs which led to the decision to enrich the defendant, would each be a gloss on the legal requirements – which are that the relevant mistaken belief was held and that it was causative. It should not matter when the mistake was made (ie, when the mistaken

[135] In other words, the basis of the tacit assumption is that, for the claimant, it naturally followed or was a logical consequence of the conscious belief – the tacit assumption need not, objectively, be a logical or analytically necessary consequence.

belief was formulated) provided that it remained causally relevant. In other words, if we accept – as beliefs – conscious determinations and tacit assumptions which were causative inputs into the decision-making process immediately preceding the enrichment, then we should also accept those matters which the claimant has earlier believed or assumed to be true even though they were not the subject of contemplation in the immediate lead up to the enrichment. The proviso is that such beliefs remained part of the causally relevant context from which the enrichment was decided. If that is true, because that earlier formulated belief or assumption was a 'but for' cause of the enrichment, then the belief or assumption, even if considered prior to the claimant ever contemplating the enrichment he now seeks to reverse, remains an actuating and operative factor in the mind of the claimant as much as the matters he subjected to contemplation immediately prior to taking action. Such antecedent beliefs remain a contemporaneous part of his decision to enrich the defendant through their causative effect upon the enrichment which followed.

So, in the Birksian example of the homophobic uncle,[136] if on different facts the uncle previously had assumed or believed that the particular nephew was of a heterosexual orientation like the other beneficiaries, then provided that that assumption or belief had not been revised by the time of the enrichment, there would be a belief about the nephew's heterosexuality even though the donor did not explicitly think about the sexual orientation of the recipients at the time he decided to confer the various enrichments. The nephew's sexual orientation is still a belief input into the decision-making process because it was a belief which (a) remained unaffected in the mind of the claimant and (b) was causative of the enrichment.[137] It therefore remains a relevantly held belief and also an operative

[136] This is further discussed below, in Chapter 2.1C.

[137] The causal relevance of 'something' means that it affected the claimant's decision-making in the relevant way. It does not mean that the claimant was mistaken. What needs to be causally relevant is the incorrect belief – see Chapter 4 on causative ignorance.

mistake in the mind of the claimant even though it was earlier formulated and even though the claimant did not consciously revisit the matter at the time of the enrichment.

Combined with tacit assumptions which, for the claimant, logically or naturally follow beliefs consciously held, the acceptance of 'pre-existing', contemplated matters provides one response to Wittgenstein's example concerning the children's game:[138]

> Someone says to me, "Show the children a game." I teach them gambling with dice, and the other says, "I didn't mean that sort of game". In that case, must he have had the exclusion of the game with dice before his mind when he gave me the order?[139]

Taking the facts of this example, say the quoted speaker (in the example, 'Someone') claims that he was mistaken, based on a belief that the instructor-teacher knew of (and acquiesced in) the injunction that children should not be gambling with dice; or put slightly differently, that the instructor was aware that it was not socially acceptable to teach children such games and that the reference as to 'games' had a meaning which was limited in that way, perhaps because these things were matters of 'common sense' and 'went without saying'.[140] Should the assertion that there was such a belief be accepted in this

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[138] With thanks to Charles Mitchell and Fred Wilmot-Smith for this example.

[139] L Wittgenstein, *Philosophical Investigations* (P Hacker and J Schulte (trs), rev'd 4th edn, Wiley-Blackwell 2009) 38e. Wittgenstein was there not concerned strictly with mistakes or beliefs, but the facts of his hypothetical example are suitable for present purposes.

[140] A belief about what the instructor actually would or would not do in the future would be a (mis)prediction. As to the co-incidence of mistakes and mispredictions, see Chapter 6. An action could also be run in failure of consideration, based on the 'obviousness' of the qualification to the scope of acceptable games, for example. As to mistake and failure of consideration, see Chapter 1.2. As to mispredictions and failures of consideration, see Chapter 2.4C. A different claim, that the claimant believed that the other was a 'responsible' or 'suitable' person to whom the task of instruction as to appropriate games could be delegated (or, based on that belief, a tacit assumption that the instructor knew not to teach gambling with dice, such a game not being a 'children's game') is problematic in that the initial belief is likely to be too vague to be proved wrong. As to this, see the fourth paragraph of this Chapter 2.1. If that belief is too vague to be assessed for truth or falsity, the law should not be too quick to find a tacit assumption based on such 'non-qualifying' beliefs, given that such claimed assumptions are not explicitly formulated and their existence derived from a belief which is itself too vague to be mistaken. That said, it is open to a court, in relation to a claimant who believes that another is a 'responsible person', to find that the claimant would also (tacitly) assume that that person would hold a particular point of view or intend to take a particular course of action in relation to a specific subject matter – and accept that tacit assumption as counting for the purposes of mistake while at the same time rejecting the antecedent belief as being incapable of assessment. That a belief is too vague to be assessed for mistake does not mean that the claimant did not believe it. And if it is believed, it can, arguably, generate a tacit assumption which is itself sufficiently formulated to be a belief amenable to assessment in its own right.

scenario, where the claimant does not explicitly have the exclusion (or any other) in mind before acting, or is the claimant better regarded as being merely ignorant of the state of mind of the person to whom the task was given (ie, that the claimant should be considered as not having any relevant belief about the mental state of the other person)?

This is not a situation in which the claimant speaker knew or believed something personal about the instructor, for example that the instructor was a primary school teacher who was known for working well with children, which would support a tacit assumption that the instructor would know to teach only 'children's games' or at least not to teach them gambling. In the absence of such antecedent beliefs or knowledge about the instructor, the question remains whether the law should effectively inform the claimant's belief about 'games' with more detailed content. Clearly, the claimant believed the instructor to have some conception of 'game'. Expressed differently, the question is whether, in the context of a social convention that certain games are not suitable for instruction to children, it is legitimate and appropriate for the law to include such additional content (in accordance with 'common sense' and as 'going without saying') to the claimant's explicitly formulated belief in respect of 'games' – and thereby accept that what the belief was about was quite properly something slightly different: not 'games' but 'children's games' in accordance with that external social convention.

Arguably, unless there is merit in widening *per se* the scope of autonomy-based recovery via the action for mistake, the value in an individual's autonomy over the terms of disposition does not suggest any particular approach to the social convention against teaching children such games (or indeed other games which are or involve elements which are dangerous, morally offensive or which might encourage unsociable and unhealthy

habits).[141] In other words, the normative basis in autonomy identified in Chapter 1 does not suggest the answer that the law should be quick to admit social conventions or other widely shared beliefs[142] to give meaning and content to other beliefs already held. Nor, conversely, that the law ought readily to ignore such social conventions and widely shared beliefs altogether except where the claimant clearly can establish that he in some manner incorporated them into his decision-making process.

While it is not made explicit in the facts of the example, in instances where individuals make decisions in contexts where social conventions and widely shared beliefs might apply, those individuals may already have contemplated the existence of such a convention or belief. Indeed, an individual might regard some matter to be of 'common sense' and 'obviously as going without saying' precisely because he has put his mind to the issue on a prior occasion and concluded as such. This is where the earlier resolutions about antecedent beliefs and tacit assumptions are relevant. Provided the Wittgenstein claimant can establish that he previously recognised the existence of this social convention or widely shared view – that the generally accepted or understood position was that there are simply some 'games' (including gambling with dice, life-endangering games or morally offensive ones) which are 'off the table', that there are some games children simply should not play, or be taught to play – the claimant can argue that there was also a tacit assumption about the instructor's agreement with that 'common understanding'. Where this prior recognition exists, the basis of the claimant's claim is his coordinate beliefs that:

[141] Compare the approach in RA Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Harvard University Press 2014) 50.

[142] Or what would reflect 'widely shared background norms': RA Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Harvard University Press 2014) 50.

(a) there existed such a convention or commonly held (though not necessarily universal) belief; and

(b) the instructor was a member of the class of persons, group or society in which the convention or shared belief was commonly held.

From this, it could have quite naturally followed for the claimant that the instructor knew that the reference to 'games' meant 'children's games'. While the work is done primarily by the special character of the convention or belief as one which is understood by the claimant to be commonly shared by a class, group or society into which the instructor (obviously, for the claimant) falls – whether or not that class is particularly large or small[143] – it is also an important part of the story that the tacit assumption was not contradicted in the mind of the claimant by anything the claimant knew or believed in relation to the convention or the instructor.[144] Of course this does not mean that all members of the relevant class will ascribe to the convention. But the point is that it may be perfectly sensible in appropriate circumstances for a person, sometimes incorrectly, to assume or expect – and for the law to acknowledge this as occurring – without more, that a particular member of a class, group or society ascribes to a position usual among its membership, especially if there is something particular or special about that position that it is believed to command something approaching universal assent or agreement among those individuals.[145]

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[143] In this respect, it does not strictly matter if the belief actually has the status of a social convention or how widely shared it is, nor indeed is it necessary for the claimant to show that there is an objective standard to which a reasonable person would ascribe with respect to the subject matter. What is important is that the claimant believes there to be a feature of a class into which the claimant believes the other person (or the relevant thing) falls.

[144] Or a degree of uncertainty or doubt which would not be compatible with that belief (or which would not be compatible with a mistake in relation to that belief) – see Chapter 3.

[145] It is necessary for the claimant actually to have considered and acknowledged (or at least have reached a conclusion as to) the existence of the social convention or belief, at some prior point in time. It cannot be sufficient simply that such a convention or belief was shown to have been widely shared or in existence, since that strictly does not implicate the claimant's own belief.

Although the above line of reasoning may provide a basis for generally recognising social conventions or other widely shared or accepted beliefs, the reasoning is still very much in the same format as that supporting other tacit assumptions, such as that held by the Catholic patriarch. That is, a belief not explicitly formulated at the time of the decision-making activity of the claimant but which, for the claimant, naturally followed from beliefs already held. And as resolved earlier in this section, these consequential assumptions can be based on matters about which the claimant has contemplated well before, and not actively during the time of, his decision-making.

It will be noted that the generation of the Wittgenstein claimant's tacit assumption also somewhat differs from that of the Catholic patriarch. The tacit assumption about the grandson's marriage logically or naturally followed for the grandfather based on what the latter knew or believed about the former: that is, based on specific knowledge or beliefs about the grandson. In contrast, the Wittgenstein claimant's tacit assumption about the instructor logically or naturally followed (again, for the claimant, rather than as an objective analytical or logical necessity) less from what the claimant particularly knew about the instructor, but more from what the claimant believed about a more general category into which the instructor fell. Nevertheless, in both instances the tacit assumptions about the character of the marriage and the limitation to the instruction are in one way or another generated from other beliefs which the claimant already held.

The failure to appreciate the material relevance of a known fact

A different version of the 'pre-existing, sustained' belief scenario is where the claimant believes, correctly, something to be true but does not input or rely on it (explicitly or otherwise) as part of the decision-making process; or, put differently, where the claimant knows or believes something to be true but does not realise that it is materially relevant to

the decision being made.[146] Such cases may fall into the sub-form of mistake, described earlier in this thesis as 'the omission of relevant, material data, leading to an erroneous belief',[147] if the omission of the *known* data[148] thereafter led to a mistake.

In instances where the claimant truly believes that the decision-making process included all possibly relevant and material considerations, or that the beliefs on which the decision was made were sufficient to support the enrichment in the face of all the other known and unknown facts in the world, the omission of the 'known', material fact will automatically generate a mistake. However, for the reasons which will be discussed in Chapter 4 on causative ignorance, it is unlikely that many claimants will be able to show that they had such beliefs.

In the majority of cases, the courts will need to examine whether the failure to consider the immediate relevance of the material fact resulted in the contradiction of some other belief of the claimant. Two different examples will suffice.

> *Example 1 – A chemist knows that a chemical reagent comes in two grades, with the purer, non-standard grade being required for particular types of experiments and processes, such as those for pharmaceutical research and production, and processes involving certain groups of elements. The chemist conducts an experiment with the standard grade reagent, not realising that his particular process required the non-standard grade.*
>
> *Example 2 – A donor, through personal experience, knows a certain solicitor to be untrustworthy and a rogue, and desires no involvement with him. The donor makes a gift of money to a charity, and later discovers that the firm at which the solicitor is a partner is on the panel of legal advisers to the charity's management committee.*

[146] With thanks to Charles Mitchell for raising this issue.

[147] See Chapter 2.1A.

[148] The broader sub-form of mistake would include the omission of both *known* and *unknown* material data, provided that any such omission led to an incorrect belief.

In both examples, the individuals concerned would have acted differently had they realised the material relevance of what they knew or believed to the decision they had made – the chemist would have used the appropriate grade of reagent to produce a different and more reliable result; and the donor would not have made the donation even though it would not be the rogue himself but another partner of the firm who would have been involved in giving advice to the charity.

The chemist is likely to succeed in showing that his failure to appreciate that he had the wrong grade of reagent (ie, that choosing the right grade was relevant to his particular activity) involved a mistaken belief. His prior knowledge that a particular grade of reagent was necessary for a certain types of experiments and processes, combined with the knowledge that he was undertaking 'an experiment', implicates his beliefs as to what facts must have been true about the experiment he was undertaking – which is to say that on these facts he must have tacitly assumed he was using a grade of reagent suitable for the experiment at hand.

On the other hand, the donor in the second example is in a slightly different position. While it is true that the donor would not have acted as he did had he known better – if nothing else an instance of causative ignorance – it is difficult to discern a relevant mistake, at least one based solely on his failure to appreciate the solicitor's connection with the charity. The donor would still need to establish that that failure to appreciate the relevance of that fact contradicted some actual belief or assumption, whether explicit or tacit, that the solicitor was in no manner connected with the donation or the charity.

While it mattered to the donor to have no involvement with the solicitor whatsoever, and while it would be open to him to lead evidence to show that he had assumed the latter's lack of connection, he could not establish that assumption by relying only on the fact of the donation and his subjective position with respect to the solicitor. Accepting an argued-

for tacit assumption of this kind – that 'I didn't want anything to do with that person, so I must have assumed he was not involved' – risks too easily accepting a belief which might not have existed, since the donor's beliefs about the existence of the solicitor in the context of his actions (making a donation to charity) are together too general or insufficiently proximate to implicate the donor's state of mind about how the two were related or otherwise. There are, after all, a whole multitude of possible ways in which the solicitor directly or indirectly could have had a connection or involvement with the donation or the charity. In the absence of better information to evidence what the donor thought or did not think about the solicitor's involvement, it seems difficult to see how the claimant is in a situation normatively different to one in which he merely omitted to consider the possibility that the solicitor was incidentally involved (causative ignorance) or one in which he declined to do any sort of due diligence (a waiver of inquiry). In each of the latter instances, the claimant is willing to act (ie, to enrich) even though he does not have any reason to believe anything certain or in particular about the solicitor's actual involvement (or lack thereof) with the charity.

Degrees of complexity in decision-making

The above examples suggest that the more complex the decision being made, the more complex, formulaic and interrelated the structure of factual bases or beliefs will be for the decision-maker, surrounding and supporting the decision in his mind. It would then more likely follow that there would be a greater number of tacit beliefs, these being related to those conscious beliefs held as part of the complex structure of decision-making for the claimant.

On the other hand, what might be described as 'superficial decision-making' is likely to involve fewer beliefs, consciously or tacitly held. Revelations of material facts are more likely to surprise claimants as uncontemplated unknowns 'from left field' rather than as

contradictions of existing beliefs. In this context, the law should be careful not *ex post* and with the benefit of hindsight to overanalyse such superficially made decisions, so as to avoid treating quickly made, unthinking decisions as if they were well-considered and deeply contemplated ones supported by a matrix of facts which reasonable persons acting carefully would have considered but which the particular claimant did not actually consider. At the same time, the law cannot be too dismissive of claims made on the basis of such decisions. The Wittgenstein claimant, for example, gives not a second thought to the decision to delegate the teaching of games to the children – yet he is likely to have held a belief amenable to mistake.

General beliefs and specific beliefs

In *Pitt v Holt*,[149] Mrs Pitt, acting on behalf of her husband, executed discretionary trusts of income and capital in relation to amounts receivable by Mr Pitt under a personal injury settlement. While neither Mrs Pitt nor any of her professional advisers had specifically turned their minds to the question of inheritance tax ('IHT'), Mrs Pitt believed – and had been advised – that there were no adverse tax implications arising from the proposed structure. The reality was that inheritance tax was applicable: on the whole value of the sum put into the trust at the outset, on any capital paid out of the trust and on the value of the property the subject of the trust every ten years after its creation.[150] Had Mrs Pitt known or been advised of the inheritance tax issue, it 'would have been easy to create the

[149] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26, [2013] 2 AC 108, reversing *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197, [2012] Ch 132, on whether there had been a mistake sufficient to invoke the equitable jurisdiction to set aside a voluntary disposition. Note that the following discussion of the facts in *Pitt v Holt* concerns the identification of beliefs and mistaken beliefs. A discussion of the case in the context of the restitution of voluntary dispositions conferred by mistake can be found in Chapter 5.

[150] See *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [9], [2012] Ch 132, 147; *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [54], [2013] 2 AC 108, 134.

settlement in a way which did not have these tax consequences'[151] and 'it would most probably have made no difference to the distribution of capital or income during his lifetime'.[152] There is little doubt that she would have done so.[153]

While Mrs Pitt's general belief about there being no adverse tax consequences was contradicted by the more specific inheritance tax consequences of which she was ignorant (ie, her general belief about the absence of adverse taxation consequences was mistaken because it was not true that there were no adverse tax consequences), Mrs Pitt equally can be regarded as making another mistake – a more specific one, about inheritance tax. In other words, *Pitt v Holt* can be regarded as an example of where there was both an explicit belief and a tacit belief, each of which were mistaken (ie, an explicit mistake and a tacit mistake). It is clear that Mrs Pitt had an explicit belief that there were no adverse tax consequences in the structure she was seeking to effect for her husband, so there was an explicit mistake because that explicit belief was wrong. In addition to this, Mrs Pitt can be seen as having a tacit belief that there were no inheritance tax implications in the structure. That tacit belief existed because it was either a necessary basis for, or alternatively a necessary consequence of, her explicit belief that there were no adverse taxation consequences from the trust structure.[154] There was a tacit mistake because that tacit belief was wrong.

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[151] *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [10], [2012] Ch 132, 147.

[152] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [134], [2013] 2 AC 108, 160.

[153] See *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [134], [2013] 2 AC 108, 160

[154] See similarly the facts in *Ogden v Trustees of the RHS Griffiths 2003 Settlement, In re Griffiths, decd* [2008] EWHC 118 (Ch), [2009] Ch 162, in which the donor was held to have made a mistake about his state of health at the time of the relevant disposition. The donor, who had been diagnosed with rheumatoid arthritis, believed that he had a state of health consistent with a life expectancy of seven to nine years. It was a necessary basis for that belief, or a necessary conclusion of that belief, that the donor did not then presently have a condition inconsistent with that life expectancy, by making it remote that he would even see out a further three years. This case is further discussed in Chapter 6 in the context of mistake-misprediction co-incidence.

Analysing the mistakes in *Pitt v Holt* in this manner arguably is preferable to the description of the mistake given by the Court of Appeal, which was that Mrs Pitt had a general belief but made a specific mistake (which contradicted the general belief):[155]

> On the one hand, it seems that no relevant person applied his or her mind to the question of whether and if so how IHT might affect the transaction. Neither Mrs Pitt nor her advisers turned their minds to that question. On the other hand, Mrs Pitt was advised that there were no adverse tax implications of what was proposed. In itself, a belief or assumption in general terms which is false in one material respect, even if not in others, seems to me to suffice as a mistake for these purposes. I would therefore hold that there was a belief, not specifically as to IHT but generally as to adverse tax effects, which was mistaken as regards IHT, and that on that basis Mrs Pitt was under a mistaken belief at the time of the transaction.

As much as that description is correct – because a general belief may be contradicted by a specific matter and a specific belief (eg, that there is a liability to make a payment under a particular clause of a particular contract) can be contradicted by a more general matter (eg, the contract is void) – it is submitted, for reasons of clarity, that the better approach is specifically to identify and examine each relevant belief at appropriate thresholds of significance and granularity.

Lord Walker's characterisation in the Supreme Court of what Lloyd LJ had held differs from the above account, and is closer to the position for which this thesis argues. That characterisation was that Lloyd LJ was prepared to accept that 'Mrs Pitt had an incorrect conscious belief, or made an incorrect tacit assumption, that the proposed SNT (which had been the subject of advice from two professional firms, and approved by the Court of Protection) had no adverse tax effects.'[156] The incorrect conscious belief was as to the absence of adverse tax consequences – that belief as to the absence of adverse tax

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[155] *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [216], [2012] Ch 132, 200.

[156] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [133], [2013] 2 AC 108, 159.

consequences was not the subject of a tacit assumption (or tacit belief). The incorrect tacit assumption was as to inheritance tax – that belief as to inheritance tax was not the subject of a conscious belief. In Lord Walker's view, Lloyd LJ had held that Mrs Pitt could be seen as having had either an incorrect conscious belief *or* an incorrect tacit assumption. Rather, Mrs Pitt can be regarded as having had both.

Similar characterisation issues can be seen in the facts of *Kleinwort Benson Ltd v Lincoln City Council*.[157] There, the claimant bank and its local authority counterparty each made payments under a respective belief that it was liable to do so under the relevant provision of a swaps contract into which they had entered. That belief about a relatively specific matter was contradicted by the more general proposition that the contract was *ultra vires* the local authority counterparty and therefore void. Even if the relevant officers of the claimant bank had only explicitly turned their minds to the bank's liability to pay under the payment provision, there must have been a tacit belief about the validity of the contract generally, this being a necessary basis for the explicit belief as to liability under the payment provision. And a belief that (a) the contract was valid and enforceable was as much a mistaken belief as (x) a belief that the payments were due under the specific payment provision, because it was simply not true that (b) the contract was valid and enforceable as much as it was simply not true that (y) the payments were due.

In these examples, we can regard the claimant as having made at least two mistakes. First, a general mistake about the absence of adverse tax consequences or about the validity of a swaps contract; and, secondly, a more specific mistake about the inheritance tax implications or the validity of the payment provision. This is essentially a question of characterisation as well as a matter of carefully analysing the subject matters about which

[157] [1998] UKHL 38, [1999] 2 AC 349.

a claimant might properly be said to have been mistaken. We must be careful to observe the injunction against 'finding beliefs which do not exist',[158] as well as being careful not to create analytically similar re-characterisations of what is in essence the same mistake. One might well ask what the purpose of this analysis is if the result is the same between Mrs Pitt having (i) a general belief which is contradicted by a specific reality, (ii) a specific belief which is contradicted by a general reality, (iii) a general belief which is contradicted by a general reality and (iv) a specific belief which is contradicted by a specific reality. One reason is correctly to identify the range of relevant events which are disclosed by the facts, so that the most relevant and suitable can be selected, appropriated to and incorporated into the reasons for the judgment ultimately given. That is just good analysis and scholarship in a system based on the doctrine of precedent: we should understand, on the clearest and best explained reasons, why an enrichment is considered unjust. Another reason is to show that ignorance can lead to tacit mistakes just as easily as it can lead to explicit mistakes. This is the subject of the next section.

C. Ignorance, beliefs and mistakes

The claimant in *Pitt v Holt* never explicitly and specifically turned her mind to inheritance tax as regards the structure she was putting in place. She had an explicit belief about there being no adverse tax consequences generally and only a tacit assumption about the absence of IHT in particular. It was resolved above that Mrs Pitt was mistaken as to this tacit belief. At the same time, the claimant and her advisers were plainly ignorant of the IHT consequences of the transaction. This does not mean that the claimant's ignorance of what is a material fact is sufficient in itself to constitute a mistake in the sense known to the law of unjust enrichment. We saw earlier that there is no fixed relationship between ignorance

[158] D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 540.

and mistake, but it may lead to mistake if it is materially relevant to a particular belief held by the claimant, rendering incorrect what was believed to be true. This can now be combined with what we know about explicit and tacit beliefs: as much as ignorance can lead to an explicit mistake because its materiality to what was expressly believed renders the latter incorrect, ignorance can lead to a tacit mistake because the particular subject matter of which the claimant was ignorant is material to what was tacitly assumed or believed, thus rendering it incorrect.

In *Pitt v Holt*, ignorance led to a tacit mistake because the matter about which the claimant was ignorant – the presence of IHT consequences – directly contradicted the belief that there was no IHT applicable. The noteworthy feature of *Pitt v Holt* in this context was that the claimant's belief (as to IHT), and the mistake (as to IHT), were tacit ones. As for ignorance, there is little in the facts of *Pitt v Holt* to suggest that ignorance could itself support the claim in unjust enrichment.[159] So, ignorance of a subject matter can lead to a valid claim in mistake in the law of unjust enrichment in at least two ways:

(a) if it leads to a mistake by rendering false a belief explicitly held; or

(b) if it leads to a mistake by rendering false a belief tacitly held.

In each case there is a belief, whether explicit or tacit, which is mistaken because ignorance of some material fact renders the belief incorrect. These are cases of mistake, not cases of ignorance being an unjust factor.[160]

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[159] See the discussion in Chapter 4 in relation to causative ignorance.

[160] Compare the approach in HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1. Referring to *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 and *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, among others, Tang suggests a characterisation test, arguing that 'The key to differentiating a mistaken tacit belief from ignorance/lack of belief is that the former is capable of *influencing or inducing* a claimant's actions – for example, to make a gift, to enter into a contract etc – whereas the latter is not capable of inducing such a course of action' (at 9, references omitted) and that 'it is suggested that the better view is that ignorance/lack of belief in making a gift does not give the donor a right to restitution unless it may be properly characterised as a mistaken tacit belief which induced the gift' (at 9). This approach is unhelpful, for two reasons. The first is that the claimant's ignorance of a matter of fact or law is quite capable of influencing his actions. The test therefore does not do the distinguishing work which Tang wishes it to do. The second is that this characterisation

The Birksian example of the gift by the homophobic uncle to the gay nephew[161] is a difficult one in this context. It is difficult because the example is intentionally non-specific about what else the uncle knows or believes of the nephew.[162] If the uncle had met the nephew on prior occasions and had observed no evidence of homosexuality in circumstances when such evidence might have been expected, or had observed unambiguously heterosexual behaviour, then the uncle may have formulated, consciously, a belief as to heterosexuality capable of supporting the claim in mistake. On the other hand, if the uncle was not close to the nephew and had no actual knowledge at all of the latter's personal life, it is quite conceivable for the uncle not to have positively formed and consciously held any belief about the sexuality of the nephew, in particular that the nephew was not gay. Assuming there is no other relevant belief for which the nephew's heterosexuality was a necessary basis or consequence (ie, making it a tacit belief), there is then nothing to evidence 'the nephew's heterosexuality' as a belief forming part of the uncle's decision to confer the enrichment. The most the latter would be able to say is that he did not know the truth and he would not have conferred the gift had he known the truth. That is not enough. That is only ignorance, and ignorance does not make a person mistaken unless it falsifies some belief. That it also caused the payment does not matter. Causation only transforms the situation into one of 'but for ignorance', not 'but for mistake'. This

approach does not properly reflect the relationship between ignorance and mistake, which is one of potential causality between distinct mental states, but instead tends towards the suggestion that ignorance and mistake are alternative analyses, each available as a conclusion depending on the light in which the facts are cast: 'Almost every situation involving ignorance/lack of belief could potentially be twisted into a mistake by recasting the issue' (at 9). A factual scenario which involves a mistaken belief which induces a gift may (and typically does) still involve ignorance on the claimant's part – and both mistake and ignorance can be acknowledged as being present, without any need to characterise the claimant as having been mistaken rather than ignorant (or vice versa).

[161] PBH Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005) 149-150: 'If an uncle gives £1,000 each to all his nephews and nieces and then finds that one of them is gay, the fact that he is a notorious homophobe will not in itself show that he made a mistake which caused that gift. At the very least the uncle would have to show that his belief as to sexual orientation was actively in his mind when the gift was made.'

[162] A similar comment can be made in relation to the example in A Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) para [3-12]: 'Assume I give £1,000 to my niece as a birthday present, not realising that she has just married a man I privately detest.'

does not mean the enrichment was not unjust, or that the uncle should not get his money back; only that he cannot do so under the rubric of mistake.[163]

2.2 Why mistaken enrichments are unjust enrichments[164]

As discussed in Chapter 1, English law has generally determined when an enrichment would be considered 'unjust' by reference to a family of 'unjust factors', whereby the presence of one or more of these unjust factors explains why, in the absence of a promise or a wrong, the defendant nevertheless has to give up the gain to the claimant.[165] Unjust factors are seen as falling into two broad divisions: intent-based and policy-based.[166] Mistake is in the former category, which collects all situations in which the claimant's intention or decision to transfer the enrichment is either deficient[167] or qualified. Like the other examples in the same sub-division of 'impaired intent', mistake constitutes an unjust

[163] See Chapter 4 on the issue of causative ignorance.

[164] The focus of this part is on mistaken payments, as the majority of the cases involve mistaken payments rather than mistaken enrichments in kind, but the *prima facie* right to restitution for mistake should be determined in the same way as a matter of principle – an enrichment conferred by mistake is equally unjust whether the enrichment happens to be in money or non-money form. See, for example, G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 139; A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 242-243; *Goff & Jones*, paras [9-02]-[9-04]; J Edelman and E Bant, *Unjust Enrichment in Australia* (Oxford University Press 2006) 172-173.

[165] C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (2nd edn, Oxford University Press 2007) para [18.03]; PBH Birks and C Mitchell, 'Unjust Enrichment', ch 15 of PBH Birks (ed), *English Private Law*, vol 2 (Oxford University Press 2000) para [15.46]. See also *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [21], [2007] 1 AC 558, 569 (Lord Hoffmann).

[166] The intent-based factors are referred to in PBH Birks and C Mitchell, 'Unjust Enrichment', ch 15 of PBH Birks (ed), *English Private Law*, vol 2 (Oxford University Press 2000) para [15.47]-[15.48], as 'non-voluntary' transfers. In the second edition, the policy-based reasons are described as a 'residual' class of reasons not reducible to a form of 'I did not mean him to have it.' See C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (2nd edn, Oxford University Press 2007) para [18.45], and more recently C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (3rd edn Oxford University Press 2013) para [18.14].

[167] Deficient intent further sub-divides into 'no intent' and 'impaired intent', the latter being constituted by mistake, illegitimate pressure, relational dependence, personal disadvantage and transactional disadvantage. See C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (2nd edn, Oxford University Press 2007) para [18.46]-[18.84]; PBH Birks and C Mitchell, 'Unjust Enrichment', ch 15 of PBH Birks (ed), *English Private Law*, vol 2 (Oxford University Press 2000) para [15.55]; see also PBH Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005) 42. The current edition of *English Private Law* (3rd edn Oxford University Press 2013) generally utilizes the wider category of 'deficient intent'.

factor – a reason for restitution – because it indicates a vitiating impairment of the claimant's decision-making with respect to the enrichment.

For many years, the mistake had to be one of fact as opposed to law,[168] and as to a 'supposed liability'.[169] It remains necessary to show that the mistake caused the payment.[170] While Robert Goff J (as he then was) declined to articulate a test for causation while expressing the general rule of recovery in *Barclays Bank v Simms*, the mistake in that case was one but for which the claimant would not have paid the money,[171] and in respect of which causation was held to be satisfied. In *Kelly v Solari*, recovery was framed in terms of 'but for' causation.[172] In *Kleinwort Benson Ltd v Lincoln City Council*,[173] Lord Goff spoke in terms of the sufficiency of a 'but for' mistake,[174] as did Lord Hoffmann.[175] Lord Hope seemed to take the view that a 'but for' mistake was necessary.[176] While

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[168] The mistake of law bar was removed in *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349.

[169] This requirement was removed in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (hereafter, '*Barclays Bank v Simms*') in relation to mistakes of fact. See *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, 1272-1273, [1999] 1 All ER 941 (Ch D) 964 (Neuberger J) in relation to mistakes of law.

[170] *Barclays Bank v Simms* [1980] QB 677, 695.

[171] *Barclays Bank v Simms* [1980] QB 677, 703.

[172] *Kelly v Solari* (1841) 9 M & W 54, 58 (Parke B), 59 (Rolfe B), 152 ER 24, 26. See also G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 154.

[173] [1998] UKHL 38, [1999] 2 AC 349.

[174] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 372, where Lord Goff, in criticizing the mistake of law rule, said: 'the rule allows the payee to retain a payment which would not have been made to him but for the payer's mistake, whereas justice appears to demand that money so paid should be repaid unless there are special circumstances justifying its retention.'

[175] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 399 (Lord Hoffmann): 'it is prima facie unjust for the recipient to retain the money when, if the payer had known the true state of affairs, he would not have paid.' It should be noted that this cannot be taken to mean that Lord Hoffmann would accept 'but for ignorance'. The clear context of those words was the payer's mistake – therefore, the reference to knowledge of the 'true state of affairs' is at least a reference to knowledge of the mistake.

[176] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 407-408 (Lord Hope of Craighead). At 408, Lord Hope said: 'it will not be enough for the payer to prove that he made a mistake. He must prove that he would not have made the payment had he known of his mistake at the time when it was made. If the payer would have made the payment even if he had known of his mistake, the sum paid is not recoverable on the ground of that

Kleinwort Benson Ltd v Lincoln City Council was a mistake of law case, Lords Hoffmann and Hope expressed no relevant limitation on their approaches to recovery, and Lord Goff, although not expressly stating that his reference to 'but for' causation applied to mistakes of fact, concluded that English law should recognise 'a general right to recover money paid under a mistake, whether of fact or law'.[177] This view is shared by Professor Burrows, who states that the 'but for' causation test is the general test for causation for mistaken payments and generally in the law of unjust enrichment.[178]

As we will see later, a different approach (as to what is required, or what else is required) might sometimes be taken, for example, where the mistake is induced,[179] and in the equitable jurisdiction to set aside voluntary dispositions affected by mistake.[180] However, it seems clear enough that the weight of judicial and academic authority is with the 'but for' causation test for spontaneous mistakes at common law. In mistake cases, the impairment of mistake vitiates the claimant's decision to enrich the defendant and thus also his consent to the recipient having the enrichment in the circumstances under which it was conferred: 'the mistake negatives the voluntariness with which the claimant paid the

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mistake.' See also *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [59], [2007] 1 AC 558, 581.

177 *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 375 (Lord Goff of Chieveley).

178 A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 91-92, 209, 229. Compare G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 154-168; *Goff & Jones*, paras [9-49]-[9-53]; *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, 1273, [1999] 1 All ER 941 (Ch D) 964, where Neuberger J considered that the *prima facie* test of causation propounded in *Barclays Bank v Simms* was equally applicable to the then new right of recovery for mistakes of law, and accepted the sufficiency of the 'but for' causation test for claims in mistake, 'possibly coupled with a requirement for a close and direct connection between the mistake and the payment and/or a requirement that the mistake impinges on the relationship between payer and payee'. It is arguable, however, that to the extent Neuberger J was speaking of a 'but for' test of causation in relation to mistakes of fact, his comments were *obiter dicta*, the recovery of overpayments made under a mistake of fact being conceded by counsel for the defendant, subject to any defences. See also *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [59]-[62], [2007] 1 AC 558, 581-582 (Lord Hope of Craighead), [84] 591 (Lord Scott of Foscote), [143] 609 (Lord Walker of Gestingthorpe); *Test Claimants in the Franked Investment Group Litigation v Commissioners of the Inland Revenue* [2010] EWCA Civ 103 para [182].

179 See Chapter 2.6.

180 See Chapter 5.

money.'[181] Combined with the causal requirement, and accepting causation as a 'but for' test for present purposes, mistake cases exhibit the additional feature that the recipient would not have received the enrichment had it not been for the impairment of mistake. This, the cases tell us, absent a contractual or other legal obligation to make the payment,[182] is sufficient to justify a *prima facie* right to restitution for unjust enrichment. In other cases of impaired intent, restitution is justified by reasons relating to the disapproval of enrichments obtained in circumstances involving illegitimate pressure, unacceptable forms of disadvantage, and so forth. So far as mistake is concerned, the view of the law of unjust enrichment must be that, *prima facie*, a recipient of a gain ought to give it up when the decision to confer the enrichment was vitiated by a mistake without which impairment he would not have received the enrichment: 'it is unjust for a person to retain a benefit which he has received at the expense of another which that person did not intend him to receive because it was made under a mistake'.[183]

It was the conclusion of Chapter 1 that a key normative basis underlying mistake as an unjust factor was the law's concern for individuals having autonomy over the terms of disposition of their resources. A mistake, or more accurately, a causative mistake, means that the transferor has been deprived of that autonomy in a manner which was central to the enrichment. A person who transfers an enrichment on the basis that a certain matter of fact or law is true (believing it to be so), but when in reality it is not true, is a person who did not have autonomy over the terms on which his assets were transferred. Such a person decides to confer an enrichment on the basis of some matter, say X, but (a) matter X is not

[181] A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 203.

[182] See also G Virgo, 'Demolishing the Pyramid – The Presence of Basis and Risk-Taking in the Law of Unjust Enrichment', ch 20 in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart Publishing 2009).

[183] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [59], [2007] 1 AC 558, 581 (Lord Hope of Craighead).

true and therefore (b) his decision to confer the enrichment is based on a mistake, and (c) he actually confers the enrichment on the reality of not-X.

As discussed in Chapter 1, there are at least two ways in which we can say that the claimant's autonomy in respect of the enrichment has been subverted or undermined. One is to say that the claimant's *decision* to make the transfer is not freely or autonomously generated, but is instead vitiated and does not reflect his will. This is because his decision to make the transfer was based on the truth of certain matters of fact or law – but those matters were untrue. So the decision-making process is vitiated by error, and the *decision* to enrich is no longer an accurate manifestation of the claimant's autonomy.

The other way is to focus on the effectuation of the *transfer* itself. In this regard, we say that the claimant's intention to make the transfer is freely or autonomously generated without pressure, influence and the like but still nevertheless based on the truth of certain matters of fact or law. These constitute the circumstances on which the claimant is satisfied that the enrichment occur. However, this intention was not effected by the actual transfer because the enrichment was transferred in circumstances different to those so intended. Thus the *transfer itself did not reflect the will* of the claimant and it is this difference between what was intended and what actually occurred which constitutes the subversion of the claimant's autonomy over the terms of disposition of the enrichment.

In the language of free will, we would say the causative mistake either means that (a) the decision was not free, or (b) the transfer was not the will of the claimant; and in both cases that the defendant's enrichment does not reflect the free will or autonomy of the claimant over his resources. The better view is probably that it is the vitiation of the decision-making process rather than the incorrect effectuation of the transfer which best explains the subversion of autonomy with which the law is concerned. The examples of the 'non-mistakes' of waiver of inquiry, decisions to pay in any event and mispredictions,

which are discussed later in this chapter, are more intuitively understood as non-mistakes on the basis of what happens in the mind of the claimant than on the basis of 'effective transfer'. The acceptance of induced mistakes as a reason for restitution, also discussed later in this chapter, even where the claimant would have decided to confer the enrichment absent the inducement, suggests the same conclusion. Finally, there is the matter of timing. While it is possible to analyse a claimant's will as having been vitiated prior to the transfer of the enrichment, the reverse is not true – an 'ineffective transfer' cannot logically be analysed as preceding the vitiation of the claimant's will. The ineffective transfer only can occur, at earliest, simultaneously with the vitiation of the will which it effects. Therefore, it is arguable that the former way of characterising the subversion of autonomy is that it is logically just the consequence of the latter. Another way to put it is that because it is possible to see the subversion of individual autonomy over the terms of disposition as having occurred upon the *decision* to transfer, the mistaken claimant's autonomy is already subverted before the event of *transfer* occurs, which is only a demonstration of that undermined autonomy.

Whichever of the 'vitiated intent' or 'ineffective transfer' models is preferred, the relationship between causative mistake and autonomy is that the former is the manner by which the transferor's autonomy over his asset or resource has been subverted. It follows that if there is no causative mistake, then, absent some other basis for regarding the autonomy of the transferor as undermined, there is no normative reason, at least from autonomy's perspective, to consider the enrichment to be unjust – or in stronger terms, the enrichment is not normatively objectionable. We can see this in the three 'non-mistakes' of waivers of inquiry, payments in any event, and mispredictions; and in the exceptional

case where 'the payment is made for good consideration'.[184] We shall now examine these in turn, before looking at induced mistakes.

2.3 Non-mistakes, and unvitiated personal autonomy – waivers of inquiry and payments in any event

The relationship between the causative impairment of mistake on the one hand, and the undermining of the claimant's autonomy as the basis for the unjustness of the enrichment on the other, can be seen in the so-called exceptions for 'waiver of inquiry' and for 'payment in any event'. While these exceptions were cumulated by Parke B in *Kelly v Solari*,[185] and Robert Goff J in *Barclays Bank v Simms* referred only to where the payer 'intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend',[186] it is probably better to regard the two as being separate; and this remains correct even though in many instances a person waives further inquiry because he determines that the recipient should have the money in any event. There are subtle differences.

As to the first exception, a person waives inquiry when he consciously chooses not to determine the truth or otherwise of a matter, appreciated as being potentially material, before deciding to confer the enrichment. By this it is meant that the claimant appreciates the need to make further inquiries if he were desirous of determining the correctness or

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184 *Barclays Bank v Simms* [1980] QB 677, 695.

185 *Kelly v Solari* (1841) 9 M & W 54, 59, 152 ER 24, 26.

186 *Barclays Bank v Simms* [1980] QB 677, 695. Compare C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (2nd edn, Oxford University Press 2007) para [18.67], where the reference is seemingly only to payment in the context of a wrong view of some matter, but 'without regard to its truth or falsity, deliberately waiving inquiry.' See also PBH Birks and C Mitchell, 'Unjust Enrichment', ch 15 of PBH Birks (ed), *English Private Law*, vol 2 (Oxford University Press 2000) para [15.72], and C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (3rd edn Oxford University Press 2013) para [18.66], referring to where the claimant 'positively intended the defendant to benefit in all events, irrespective of the truth or falsity of his beliefs', and citing, in addition to *Kelly v Solari* and *Barclays Bank v Simms*, the cases of *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 2 All ER (Comm) 274, [19]–[25] and *BP Oil International Ltd v Target Shipping Ltd* [2012] EWHC 1590 (Comm), [2012] 2 Lloyd's Rep 245 para [232].

otherwise of some matter, but ultimately decides to waive such further inquiries. It is important that the claimant contemplates the relevance of further investigations at some point in the decision-making process and prior to the decision to enrich.

For example, if in the retrial of *Kelly v Solari*, it was determined that the directors had become aware of the issue that the insurance premiums might have been unpaid, and therefore that they may not have been obliged under the terms of the insurance to pay the claim, but thereafter 'had determined that they would not expose the office to unpopularity, and would therefore pay the money at all events',[187] then that would entail a waiver of inquiry (and a 'payment in any event'). So too if the directors had, being uncertain as to the issue of liability but due to considerations such as the assumed likelihood of error and a relatively low insured sum, accepted the risk of error by declining to check their records and proceeding with the enrichment notwithstanding.[188]

On the other hand, if the directors had made a decision to pay at all events *prior* to the question of the non-payment of premium arising (ie prior to becoming aware of the non-payment of premium), or which otherwise prevented that issue from arising, then this thesis takes the view that there is no 'waiver of inquiry' since the prospect of further inquiries never arises and there is nothing to be 'waived'. Similarly, a decision-making process which merely omits to consider inquiries into a relevant matter, or which involves

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

[188] See generally *Kelly v Solari* (1841) 9 M & W 54, 58, 152 ER 24, 26 (Lord Abinger CB), averting to, but not giving examples of, such considerations. There may be a number of reasons why a claimant might decide to 'waive inquiry'. This may be that the matter of fact or law is not the most material consideration in relation to the decision to enrich (whether in the context of the size of the enrichment or in the context of other, more material, reasons for the enrichment). It may be that the time and costs involved in undertaking further due diligence or confirmation are thought to be excessively high or otherwise imbalanced. It may also be that the claimant thinks it more likely than not that the particular matter is as believed. In this last situation, it may be said that the claimant has made a payment under a state of doubt or uncertainty – as to this, see Chapter 3. Such reasons to waive inquiry need not involve a payment in any event, since it is possible for a claimant with such reasons still to have decided not to confer the enrichment if informed of the reality of the matter waived – ie, because there would be no other reasons for the claimant to want to enrich the recipient.

a direct or indirect determination not to investigate a particular matter the materiality of which is not appreciated, is also not a waiver of inquiry in the sense used in this thesis.[189] It follows from the above that not all 'waivers of inquiry' in the sense used will involve a 'payment in any event' and not all payments in any event will involve a waiver of inquiry.

The decision to waive inquiry as to the correctness of a particular matter of fact or law means that the decision to enrich in the circumstances no longer depends on the truth of that particular matter, and thus any dissonance between any putative belief and the contradicting reality plays no part in the decision-making process. Consequently, because any such 'mistake' does not constitute a causative impairment of the claimant's decision-making process, the decision to enrich is not vitiated or impaired by mistake, and the enrichment is not unjust.[190] In addition to this, claimants who have waived inquiry (but who do not have a reason to pay in any event) are, depending on the degree of doubt held, unlikely to establish that they held a relevant belief about the truth of the matter waived,[191] or alternatively, likely to have taken a risk of the subject matter being wrong.[192]

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[189] On such omissions, see Chapter 2.1B. To the extent that there is no relevant belief, these cases are likely to be instances of causative ignorance, as to which see Chapter 4. One might take a different view about waiver of inquiry, that it requires only that the claimant has a conscious or tacit awareness that he is not inquiring into what is the relevant subject matter of fact or law. This would result in a greater overlap with payments in any event. But, as a general proposition, the practical result is the same – ie, the enrichment in either case is a non-mistake.

[190] In a factual context in which there is more than one causative mistake, a waiver of inquiry only renders non-causative the 'mistake' or 'mistakes' to which the waiver relates.

[191] Although this is a different reason for 'not unjust', going more to the existence of the mistaken belief rather than as to its causal relevance. As to the degree of doubt consistent with mistake, see Chapter 3. There is an expanded sense in which a person might be said to have 'waived inquiry', which is where a belief which he holds has been put in issue but because the claimant has no subjective belief of doubt or uncertainty as to it he consequently takes no action further to confirm matters, being confident in the correctness of his belief. However, it is different from the sense in which the term has been used here since the claimant does not believe that any further confirmations are necessary to determine the correctness of the belief, and thus that there is no inquiry being waived. In such a case, the belief is held (rather than its subject matter 'waived') and able to cause the enrichment. One example is *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, [1999] 1 All ER 941 (Ch D), in which the claimant, among other things, made rental payments being certain that the amounts transferred were greater than what was required under the contract (believing also that these overpayments could later be recovered). The claimant had been told by the defendant recipient that it was the latter's belief that the rental payments made were actually at the correct level and properly due. The case turned on other facts, but it is an example of where an enrichment is conferred by a claimant on the basis of the certainty of a specific matter while also taking no relevant action further to inquire about the contrary position put to it.

[192] It is possible also to explain the result in instances of waiver of inquiry on the basis that the claimant took the risk of error: see for example *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49

Risk-taking is discussed more fully below in the context of mispredictions,[193] and is equally applicable in this context as describing the claimant's willingness to make the transfer conscious of the possibility that the enrichment is transferred in circumstances where the relevant belief might turn out to be wrong. Thus, risk-taking refers to the factual acceptance of the transfer or other enrichment taking place while there is subjective uncertainty as to the correctness of some fact about the world. Rather than 'risk-taking', some might prefer to express the claimant as 'taking a risk-in-fact'. Whichever label is preferred, the claimant has taken such a factual risk because, being able to withhold the enrichment pending further queries or to transfer it conditionally, he decides to transfer the enrichment waiving further inquiries into the fact rather than (first) assuring himself as to its correctness as the basis for the recipient's enrichment.

Likewise, the claimant who has decided to 'pay in any event' is equally unconcerned about the unresolved matter. Such claimants have decided to pay *even if* a supposition as to something is incorrect. Here again, that particular 'belief' plays no determinative role in the decision to enrich the defendant, meaning that the decision cannot be impaired by any error in it. In a sense, 'no-impairment' is a stronger case here than in a waiver of inquiry, since the claimant is not merely open to the possibility that the belief might be wrong, but has determined to pay even if it is wrong. This means there is no 'but for' causative mistake, as any potential for it is negated by the decision to pay whatever the scenario.[194] There was some basis or reason for the payment irrespective of the reality –

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para [25]-[27], [2007] 1 AC 558, 570-571 (Lord Hoffmann), [64]-[65] 583, [70] 585 (Lord Hope of Craighead), [175] 618 (Lord Brown of Eaton-under-Heywood); compare *Goff & Jones*, paras [9-24]-[9-26] and [9.27]-[9.30]. As to risk-taking, see Chapter 2.4, especially section C ('Normative considerations'). See also A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) 67-68, and F Wilmot-Smith, 'Replacing Risk-Taking Reasoning' (2011) 127 Law Quarterly Review 610.

[193] See Chapter 2.4B and 2.4C.

[194] Compare *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [84], [2007] 1 AC 558, 591 (Lord Scott of Foscote).

for example, in order to avoid damage to reputation,[195] or to avoid the trouble and cost of a dispute. The claimant who has paid in any event might also have 'waived inquiry' but in each case the claimant has disposed of his asset without relying on the belief that something was true when it was not.[196]

These so-called exceptions ('so-called', because they are better viewed as non-mistakes) reinforce the proposition that mistake involves a causally relevant impairment of the decision-making process of the claimant. It is important to see that impairment and causation are bound up together. It might be tempting to say the reason why there is no action for mistake in the two 'exceptional' situations is because the mistake is 'ignored' and has no role in the decision-making process, thus being causally irrelevant to the enrichment and leaving the requirement of causation unsatisfied (at least in respect of that mistake). The lack of causation then constitutes an alternative reason for considering the enrichment as not being unjust: 'no causation' rather than 'no impairment'. However, the decision of the claimant in both cases is unimpaired precisely because the putative belief is causally irrelevant to the decision. Put the other way, because any such belief plays no causative role, the decision to enrich cannot be said to have been impaired by it. Thus, to say a mistake is causally irrelevant is also to say that it did not impair the claimant in such a way as to make the enrichment unjust. Those statements are two sides of the same coin. On this view, mistaken payments are unjust because of the presence of two inter-connected events: (i) a vitiating impairment of the claimant's decision-making process, (ii) without which the enrichment would not have been conferred in the circumstances as they were.

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

[196] 'Risk-taking' does no explanatory work in instances of 'payment in any event', where, like the hypothesis to be tested in *Kelly v Solari*, there is a reason for the enrichment other than the correctness of the relevant supposition.

The same result is justified from the normative perspective. The claimant who waives inquiry makes a decision to confer the enrichment having determined to make no further checks and confirmations about the relevant subject matter of belief. There are legitimate and perfectly reasonable reasons why a claimant may determine to go ahead with an enrichment waiving such further inquiries. But this also means that the claimant cannot then claim that his autonomy over the terms of transfer was subverted by the underlying reality – it was in the factual context of having the opportunity better to satisfy himself before acting that the claimant determined not to do so, but instead to go ahead with the enrichment unabated and unqualified. Even if the claimant is disappointed when he later discovers the reality (and even if it can be shown by impeccable evidence that he would not have conferred the enrichment had he known of that reality), the fact that the claimant was content to have the enrichment effected in those circumstances does not change the autonomous nature of his conduct since his decision to effect the disposition did not require that the unknown matter conform to any particular reality. Similarly, if it was later discovered that the reality was instead not a disappointment for the claimant (and he would have conferred the enrichment even more pressingly had he known of that reality), the fact that the claimant was content to have the enrichment effected in those (same) circumstances does not make even more autonomous the nature of his conduct since any particular state of reality with respect to the uncertain subject matter was in the same way an irrelevant matter for his action. So, from the perspective of autonomy, the act of a claimant who is content to ignore the uncertainty and to go ahead undeterred with the disposition of his asset reflects rather than undermines his autonomy of action. In such circumstances, it makes sense to regard the claimant's action as consistent with his free

will in the relevant sense, and the autonomy-centred normative basis is not called into play.[197]

The same is true for a claimant who determines to pay in any event – he has some reason or basis for the recipient to have the enrichment whatever the reality in respect of the particular subject matter. As such, an enrichment which is conferred with that basis in mind and which reflects that basis involves no subversion of the claimant's autonomy over the terms of disposition, whatever the reality turns out to be. Rather, the enrichment involves the effectuation of the claimant's autonomy that the enrichment be transferred on the terms and for the reasons freely determined by the claimant.[198]

2.4 Non-mistakes, and unvitiated personal autonomy – mispredictions

A misprediction is a mistake as to the future.[199] More specifically, it is a belief as to the future – a prediction – which subsequently turns out to be incorrect: hence a mistaken view as to the future, or a misprediction. However, mispredictions are not mistakes, at least not of the kind known to the law of unjust enrichment. A mistake is a belief which is incorrect. The law of unjust enrichment responds to mistakes which cause the

[197] Assuming there is no other unjust factor relevant on the facts. The waiver of inquiry only means that his autonomy is not subverted in the manner of a mistake with respect to the particular subject matter of the waiver, and does not prevent him from showing that the enrichment was unjust in some other way in relation to the same or other facts.

[198] The assumption being that the claimant, because he has another reason to support the enrichment, does not rely on the truth of the relevant supposition as part of his decision-making process. In instances where there is (also) a mistake which at least constitutes a contributory cause of the enrichment, the reasoning here may not apply. See further Chapter 2.6 in relation to induced mistakes.

[199] PBH Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 147. In *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [109], [2013] 2 AC 108, 151, Lord Walker referred to a misprediction as follows: 'A misprediction relates to some possible future event, whereas a legally significant mistake normally relates to some past or present matter of fact or law.'

enrichment.[200] A misprediction is not a mistake of this kind because it is impossible to say that the belief which caused the enrichment was incorrect.[201]

The correctness of this point is not immediately obvious. A person may argue that the belief was that something in the future would happen. The belief causes the payment. The belief is subsequently shown to be 'wrong' in that the event does not occur. It seems to follow that the belief was incorrect and caused the enrichment. The answer to this lies in the requirement discussed above that, in a mistake, the belief must be incorrect at the time it was relied on to make the payment.[202] That is, the belief is logically demonstrable (as at the time of the claim) as being wrong at the time of the enrichment. If a belief cannot be said to be incorrect at the time of the enrichment, the enrichment cannot be said to have been made as a result of, or caused by, a mistake. The problem is that a misprediction is never, whether at the time of the enrichment or subsequently, analytically or logically demonstrable as being wrong as at the time of the enrichment. The most which can be said about a misprediction is that the money was paid under a belief which was uncertain and, as events turned out, was 'wrong', and then only in the sense that it was not as anticipated.[203] It was the uncertain belief which caused the payment, not the 'wrong' one. In short, for the enrichment to be conferred 'by mistake', the mistake must exist at the time of the enrichment. Beliefs which are subsequently wrong – mispredictions – do not satisfy this requirement.

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[200] *Barclays Bank v Simms* [1980] QB 677, 695.

[201] See PBH Birks, 'Private Law', ch 1 of PBH Birks and FD Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press 2000) 14-16; D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 551.

[202] See Chapter 2.1.

[203] See Chapter 6.2B and 6.2D in relation to subjective beliefs of inevitability.

It does not follow from the above that enrichments caused by mispredictions are not unjust enrichments. It is only that mispredictions do not meet the requirements of 'mistake', and fall outside its definition. It may be that enrichments caused by mispredictions are unjust for similar reasons which justify restitution in cases of mistake or other unjust factors. It may also be that enrichments caused by mispredictions are unjust for reasons not shared with other unjust factors. In either case, the enrichment, subject to the other elements of the cause of action being satisfied, will be 'unjust' and lead to restitution. However, the better view, as will now be explained, is that a misprediction should not be regarded as making the resulting enrichment unjust.

A. Why a misprediction is not an unjust factor I: no impairment

Leaving aside the question of autonomy, mistaken payments are unjust because they involve a causative impairment which vitiates the claimant's decision-making process. A misprediction involves no such impairment.[204] A mispredictor hopes for or anticipates a future fact or event, on which he relies in conferring the enrichment. As the belief is about a future matter which cannot, by definition, be correct or incorrect at the time of the transfer, it is impossible to say the belief was a mistake which impaired the decision to effect it. Absent mistake, it is difficult to see how an uncertain belief can be regarded as a vitiating impairment even if it was causally relevant to the enrichment. At most, it means the claimant decided to confer the enrichment when he did not know how things would turn out. There is no impairment of a person's decision-making where he decides to do so. Of course, an enrichment can be unjust even without mistake. The problem with mistakes of future fact is not that they are non-mistakes but, rather, that they involve no impairment of the claimant when, apart from enrichments transferred without any consent at all of the

[204] PBH Birks, 'Private Law', ch 1 of PBH Birks and FD Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press 2000) 14-16.

claimant and enrichments which are qualified, all the intent-based reasons which make enrichments unjust involve some form of impairment of the claimant's decision-making process. Cases of duress involve the impairment of illegitimate pressure, cases of personal disadvantage involve the impairment of some extreme form of disability, and so forth; but the underlying logic of a causally relevant vitiating impairment is completely absent in a misprediction. That absence makes mispredictions stand out in the context of those intent-based unjust factors which in one way or another reflect the more general assertion from the claimant that 'I didn't mean him to have it'.[205]

It is true that, when the predicted state of affairs fails, the mispredictor might claim he too did not mean the recipient to have the enrichment, the claimant then having realised, much like an ordinary case of mistake, that what was believed was not matched by reality. However, a closer scrutiny of the assertion reveals a use of 'I didn't mean him to have it' in a fundamentally different sense. That assertion in *this* case is correct as much as the claimant did not intend the recipient to have the enrichment in the circumstances *as they turned out.* But it remains true that there was neither impairment nor a lack of intent to confer the enrichment in the circumstances *as they were* (ie, under which it was actually conferred). In a case of mistake, as in duress and the like, the decision to confer the enrichment is vitiated by an existing impairment so that any lack of intent or involuntariness is referable to the decision to confer the enrichment, as opposed to the recipient's subsequent retention of it following a change in circumstances (ie, the outcome of the prediction). An analogy may be drawn with the earlier analysis of waiver of inquiry. There too, the decision to go ahead with the enrichment without waiting to assure himself about the 'known unknown' meant the decision to enrich could not be said to be impaired.

[205] PBH Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 226-227.

The assertion that there was no intent to enrich in the circumstances as they turned out is itself questionable. A mispredictor enriches in anticipation of a future matter he knows has not yet happened, and thus there is some risk the event might fail in the inherently uncertain future.[206] The assertion thus seems inconsistent with the conduct of conferring the enrichment in advance and with the knowledge that the expected event might not occur, especially considering that the claimant could have secured the enrichment's return by imposing a condition or obtaining a promise to repay. In any case, it is unnecessary to go this far. Even accepting the claimant's intent as somehow being 'spoiled' by subsequent events, it remains true that the making of a prediction which can neither be wrong nor right at the time did not impair his decision to make the transfer.

Thus, matters of definition aside, 'no impairment' in mistakes of future fact reveal them to be conceptually and functionally different from the mistakes English law has accepted as making enrichments unjust. They are different from the mistakes which generated restitution in cases such as *Kelly v Solari* and *Chase Manhattan*,[207] and different from the mistakes for which the general right of recovery in *Barclays Bank v Simms* is seemingly intended. Furthermore, 'no impairment' distinguishes mispredictions from every intent-based reason which makes an enrichment unjust outside qualified intent and the narrow 'no intent' reason which covers claimants who are completely ignorant of the transfer, have no power to prevent it, or who have a flatly contrary intent but ultimately do not prevent the transfer in the circumstances. In respect of the established reasons for restitution, only the category of policy-based unjust factors remains. While there might be a policy-based reason affording restitution to mispredictors in specific and particular

[206] See for example M McInnes 'Enrichments, Expenses and Restitutionary Defences' (2002) 118 Law Quarterly Review 209, 210; D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 565.

[207] *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1980] 2 WLR 202, [1979] 3 All ER 1025.

instances, there is no general policy reason to give restitution to mispredictors. This is not surprising. As will be discussed below, there is nothing unjust about the future not turning out as hoped when a person chooses to confer an enrichment in advance, voluntarily and without impairment.

B. Why a misprediction is not an unjust factor II: risk taking

There is a second, related reason to deny the unjustness of mispredictions. It is that a person who, without more, confers an enrichment on the basis of a prediction necessarily accepts the risk of disappointment. A predictor knows that the matter on which he relies falls to the uncertain future and might possibly fail to materialise or sustain, but confers the enrichment notwithstanding. To ensure the enrichment is returned in the event the prediction fails, the claimant may, for example, obtain a promise to repay in that event, or qualify the enrichment by conferring it subject to the condition that the expectation is realised.[208] To do otherwise, conscious that the enrichment is made without his requirements being satisfied, risks those requirements to the uncertainty of the future and the prospect of its disappointment:

> A prediction is an exercise of judgement. To act on the basis of a prediction is to accept the risk of disappointment. If you then complain of having been mistaken you are merely asking to be relieved of a risk knowingly run.[209]

And similarly:

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[208] Thus, giving the claimant an action in failure of consideration should the anticipated matter fail to materialise or sustain itself.

[209] PBH Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 147. Here as well, the waiver of inquiry analogy seems apt, as the claimant decides to pay without waiting to discover the reality of the matter on which he later says he relies. See *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [25]-[27], [2007] 1 AC 558, 570-571 (Lord Hoffmann), [64]-[65] 583, [70] 585 (Lord Hope of Craighead), [175] 618 (Lord Brown of Eaton-under-Heywood). Compare A Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) para [3-3]; P Jaffey, *The Nature and Scope of Restitution* (Hart Publishing 2000) 173.

> We took risks, we knew we took them; things have come out against us, and therefore we have no cause for complaint, but bow to the will of Providence.[210]

A person who pays or otherwise enriches another in anticipation of a future state of affairs can hardly complain the enrichment was (or has since become) unjust when he knows the future might not turn out as hoped and, without seeking to protect himself from the possibility, determines to confer the enrichment anyway. Money paid because of pressure and coercion by illegitimate means is unjust, as is money paid as a result of undue influence, but the payment of money *simpliciter* in anticipation of some future event is insufficient to render the enrichment unjust when the claimant does not set up the straightforward and certain means of recovery to protect himself from the possible disappointment of the uncertain future.

Although Birks disqualifies mispredictors as risk-takers from the action in mistake, it is implicit from the absence of discussion about recoverability under any other unjust factor that he did not consider mispredictions as recoverable in the law of unjust enrichment generally. That is correct in principle. Once mistakes of future fact are excised from mistakes proper, there is, absent a separate causative event, no basis on which to consider the enrichment as unjust. Cumulating the reasons given above, a mispredictor anticipates a state of affairs he knows does not yet exist, but, instead of waiting to see how the inherently uncertain future reveals itself, he confers the enrichment in advance, voluntarily and without impairment, and without setting up a simple means to recover the enrichment should the future disappoint. What is unjust about such enrichments?

C. Normative considerations

[210] 'Scott's Message to the Public' in ch 20 of L Huxley (ed), *Scott's Last Expedition, Vol I: Being the Journals of Captain RF Scott, RN, CVO* (Smith, Elder & Co 1913) 607.

'No impairment' and 'risk-taking' also explain why a misprediction does not ordinarily involve a derogation from the claimant's autonomy of disposition.[211] Like instances of waiver of inquiry and payment in any event, a mispredicting transferor freely determines to make the transfer, not being impaired as to the matter later claimed to have been the subject of a mistake. The claimant does not make the transfer believing something to be true but which in reality was not true. He knows that the matter falls to the uncertain future but chooses to transfer anyway. He was free in his decision to transfer (in the sense of deciding autonomously) and the transferred enrichment reflected the terms so determined. The transfer which the claimant actually made thus reflects his unimpaired autonomy – both in the decision to make the transfer and in the effectuation of it. Therefore, in making a transfer on the basis of a misprediction, there is no relevant derogation from autonomy. Rather, because the claimant made the transfer he intended and because the claimant decided not to obtain a promise for the return of the enrichment should the future matter disappoint, or to impose a qualification on the basis of the future matter, the risk of the future can be regarded as a manifestation of his autonomy.

Wilmot-Smith has correctly argued that the language and reasoning of 'risk-taking' must be used carefully.[212] The primary criticism against risk-taking reasoning is that it can be used in a circular manner: that is, one might regard the claimant as a risk-taker because one assumes the conclusion that the claimant cannot recover in an action in unjust

[211] 'Ordinarily', because it is possible for a misprediction to have an alternative analysis as a mistake, for which restitution would be available subject to the other elements of the unjust enrichment cause of action: see Chapter 6.2. In such cases, restitution does not arise from the misprediction but from the mistake from which the misprediction is generated, and the uncertainty of the future does not work against the claimant because he is unaware of it. There is an analogous situation in relation to causative ignorance, which is discussed in Chapter 4. There too, the claimant is dealing with an 'unknown unknown' which circumstances similarly do not justify restitution unless it has meant that the claimant was also mistaken (or otherwise subject to some other derogation from autonomy). See the discussion as to the relationship between ignorance and mistake in Chapter 2.1.

[212] F Wilmot-Smith, 'Replacing Risk-Taking Reasoning' (2011) 127 Law Quarterly Review 610.

enrichment.[213] While Wilmot-Smith focuses on enrichments in the context of anticipated contracts which fail to materialise, that criticism can also apply in the context of mispredictions. After all, one might envisage a legal system in which enrichments conferred on the basis of a future event are returnable upon the failure of that future event. In *A Restatement of the English Law of Unjust Enrichment*,[214] Burrows warns of the 'danger of the language of "risk-taking" being elusive and conclusionary'[215] and expresses the need for courts, to the extent they go beyond the examples specified in the Restatement, to 'explain precisely why the claimant is regarded as taking a risk that rules out restitution for mistake.'[216]

The answer to this concern in the context of mispredictions is that the risk-taking with which we are concerned refers to the claimant's willingness to make the transfer open to the possibility that the enrichment is transferred to the recipient in circumstances where the belief as to the future (the prediction) might turn out to be wrong. Thus, risk-taking in the sense we are using it and in the context of mispredictions is not an assertion or conclusion of law, but refers to the factual taking of risk – that the enrichment is transferred to the possession or benefit of the transferee when the claimant does not know (as a matter of belief) if the subject matter which is said to concern him is true or not. It is not the risk of non-recovery at law, or even the risk of non-recovery in fact (eg, the risk of insolvency), but the risk of factual error that is relevant here.[217] And what we say is that a person who

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[213] See F Wilmot-Smith, 'Replacing Risk-Taking Reasoning' (2011) 127 Law Quarterly Review 610, 613; W Seah, 'Mispredictions, Mistakes and the Law of Unjust Enrichment' [2007] Restitution Law Review 93, 105.

[214] A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012).

[215] A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) 68.

[216] A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) 68.

[217] Burrows refers to a misprediction as 'taking the risk of being incorrect': A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) 67. See similarly A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 203 ('Mispredictions in themselves do not trigger restitution because the claimant necessarily takes the risk of being incorrect about the future'); *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [198], [2012] Ch 132, 195 (Lloyd LJ); *Futter v The Commissioners for Her Majesty's Revenue and Customs;*

determines to take the 'risk-in-fact' does not show enough to justify restitution. He simply does not deserve it. The reason is that there is no undermining of his autonomy over the terms of the disposition. Having determined to confer the enrichment in anticipation of an event which was still in the uncertain future, and having determined to do so without obtaining a promise for its return, or qualified the enrichment, in what respect has his control over the terms of disposition been subverted? The claimant had the ability to contract for the enrichment's return or to confer it on a qualified basis (thus imposing, effectively, the risk-in-fact on the recipient) but chose to go ahead with the enrichment having determined to do so without putting into place the easy means for its return should the unknown future matter turn out to be against him.[218] The terms on which the enrichment was then actually transferred reflected this autonomy over the enrichment.

Because a mispredicting claimant (that is, one who confers the enrichment on the basis of a prediction but without obtaining a promise or imposing a qualification) takes the risk-in-fact, he does not strictly take the risk of non-recovery – no matter how the future turns out, once the enrichment is transferred based (only) on the misprediction, it should generally not be recoverable. Likewise, if he does not take the risk-in-fact and instead obtains a promise or imposes a qualification, he still does not take the risk of non-

Pitt v The Commissioners for Her Majesty's Revenue and Customs [2013] UKSC 26 para [113]-[114] (the risk 'of being wrong'), [135], [2013] 2 AC 108, 153, 160; *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 410 (Lord Hope of Craighead). Compare *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [25]-[27], [2007] 1 AC 558, 571 (Lord Hoffmann), [64]-[65] 583, [70] 585 (Lord Hope of Craighead), [175] 618 (Lord Brown of Eaton-under-Heywood).

[218] There is in this respect a similarity with waiver of inquiry and the reasoning there employed to explain why the claimant's autonomy is not subverted. It is also worth noting that the approach advocated here and the approach advocated by Wilmot-Smith ((2011) 127 Law Quarterly Review 610) have the same result for the claimant who, without more, confers an enrichment in anticipation of a contract which fails to materialise. In the language of the current law of mistake, the claimant has conferred the enrichment under a misprediction, the misprediction being that the contract would come into effect. There is no restitution unless the claimant obtained a promise for the enrichment's return in the event that there was no contract, or imposed a qualification to the same effect, or some alternative basis. See the discussion of mistake and misprediction co-incidence and the facts of *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) in Chapter 6.3C.

recovery[219] because he will have an action either in contract or failure of consideration. On this reasoning, the notion of the risk of non-recovery is irrelevant. Whether there is an ability to recover the enrichment is something which can be dictated by the claimant, so if there is a risk which the claimant takes then it is the risk-in-fact that the anticipated event does not materialise after he transfers the enrichment unencumbered. It is the taking of this risk rather than the risk of 'non-recovery' which explains why the claimant should not recover in restitution from the normative perspective, and the reason that the failure of the hoped-for event does not subvert his autonomy over the enrichment.

In the context of mispredictions, the disqualification of claims on the basis of 'risk-running' is therefore not a separate substantive principle, but an intermediate proposition between autonomy as a normative basis and misprediction as a substantive legal principle (of non-recovery) which explains and justifies why mispredictions are not unjust and do not result in restitution. As was observed earlier,[220] it is not out of the bounds of reason that a legal system might choose to give restitution to disappointed individuals who have conferred an enrichment on the basis of a future circumstance occurring, particularly if restitution would not impose loss on the recipient. 'Risk-taking' is English law's explanation for why it takes a different view.

There are a couple of other points to make about risk-taking (and autonomy) before moving on. First, the concept of risk-running is a 'negativing' one, operating to negate the application of the relevant facts towards the constitution of an unjust factor – in our context, the unjust factor of mistake. Risk-taking is intended to explain, where it exists, why some facts are unable to support the claim on the basis of mistake. But it is not dispositive of

[219] Or more accurately, the risk of non-action, since he will take the risk of recipient insolvency.

[220] In the second paragraph of this Chapter 2.4C.

the claim in mistake (or in relation to any other unjust factor) in just the same way that a waiver of inquiry, a payment in any event and a misprediction are not dispositive of the claim for restitution. The claimant may still rely on different facts to support the action in mistake or some other unjust factor. There is of course nothing particularly unusual about an action failing with one set of facts and succeeding with another set of facts. There is an important qualification to this, which is that risk-taking can go further and disqualify facts which would otherwise support the claim in unjust enrichment when viewed in isolation.[221]

Second, its explanatory relevance is not limited to mispredictions. As will be argued in Chapter 3, risk-taking also intermediates the normative basis in autonomy and non-recovery for payments made in a state of doubt (as to past or present matters). As discussed above, risk-running can also explain certain waivers of inquiry. In this context, waivers of inquiry and payments in a state of doubt relate to risk-taking and mistakes of past and present in the same way that mispredictions relate to risk-taking and mistakes of the future. And it is also the action or in-action in response to a perceived risk-in-fact, as a manifestation of the actor's autonomy, which distinguishes mispredictions from failures of consideration.[222]

In a failure of consideration, the claimant transfers an enrichment which is qualified by a condition. The claimant does not actually wish that the enrichment is transferred and then later returned, but rather that the recipient is enriched with certain qualifying

[221] See Chapter 6.

[222] A broader significance for risk-taking can be seen in G Virgo, 'Demolishing the Pyramid – The Presence of Basis and Risk-Taking in the Law of Unjust Enrichment', ch 20 in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart Publishing 2009) 504-506. Interestingly, the situations mentioned in this paragraph (mispredictions, uncertainty and doubt, waivers of inquiry, and failures of consideration) involve concepts (risk-taking, no mistake (no impairment, no causation) and risk allocation) similar to those in Virgo's examination of risk-taking as a distinct principle 'barring' recovery for unjust enrichment. From the perspective of the normative account of mistake argued in this thesis, those concepts would be viewed as making the claimant 'autonomous' or at least not 'non-autonomous'.

conditions or requirements occurring or holding good.[223] In the instance of a failure of consideration, the law regards the enrichment as being 'unjust' because the claimant has decided that the recipient should be enriched on the basis of a set of conditions, say X, but that as things turned out, the recipient was enriched with the set of conditions not-X. What then is the difference between this and a misprediction, for which the law does not allow recovery?

It was observed above,[224] that the lack of impairment distinguished mispredictions from mistake and every other intent-based unjust factor outside 'no intent' and 'qualified intent'. The existence of unjust factors outside 'no impairment' shows that the lack of impairment in a misprediction is insufficient on its own to support the conclusion that the enrichment was not unjust. This is not to contradict what was said earlier about the significance of 'no impairment', but only to say that there can still be reasons making an enrichment unjust notwithstanding the lack of impairment. What then made mispredictions non-unjust was the additional element of risk-taking as to facts about the world when their time had yet to come. However, in instances where the claimant is interested in the occurrence or non-occurrence of some future matter, the position changes where the enrichment is subjected either to a promise to repay or a qualifying condition. In the former case, consent explains why the claimant recovers: the enrichment is not unjust, but restitution follows under 'contract' because the recipient promised to return it in the event. In the latter case, the enrichment has to be given up because it was conditional and the condition failed. The case becomes one of 'qualified intent'. The imposition or existence of the condition can be seen as doing two things: it denies the proposition that

[223] The reflex of this is that the recipient's enrichment is not intended – and unjust – in circumstances where the qualifying conditions do not hold good.

[224] See section A within this Chapter 2.4.

the claimant took the risk of disappointment, and it provides the reason why the enrichment is considered unjust in the context of the future events – the claimant's condition for the enrichment has failed.

As to risk, the conditionality of the enrichment is evidence that the claimant does not intend to take the risk-in-fact that the enrichment occurs without his requirements for the enrichment being in place. The claimant's basis for the recipient's enrichment is, among other matters, that the future matter is satisfied. An enrichment which the claimant expressly pegs to that contingency, or which is conferred in circumstances in which that conditionality is obvious, shows that the claimant in this respect strictly does not rely on the prediction at all – the position he has taken is either that the recipient will be enriched on the terms he has determined, or not at all. Indeed, the reason for the claimant acting in the way that he does may well be his concern about the risk of the uncertain future.[225]

As to autonomy, the qualification also establishes why it is that the claimant is considered non-autonomous when the future 'does not turn out'. The existence of the qualification establishes the undermining of the claimant's autonomy because it shows that the claimant did not merely confer the enrichment and 'hope for the best'. Instead, the claimant's actions in informing the recipient of the existence of the condition (or of conferring the enrichment in circumstances where it was obviously conditional) shows not only that he did not want the recipient to be enriched if the future turned out otherwise than desired, but that in transferring the enrichment – conditionally rather than unconditionally – he did not give over the enrichment to the uncertainty of the future, hoping that all would

[225] Essentially, the risk-in-fact is transferred to the recipient – he has to return the enrichment if the future disappoints (compare G Virgo, 'Demolishing the Pyramid – The Presence of Basis and Risk-Taking in the Law of Unjust Enrichment', ch 20 in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart Publishing 2009) 506). Similar reasoning need not apply where the basis is a present or past basis – ie the claimant may believe without any subjective uncertainty in the truth of some past factual basis for the enrichment, and then still transfer the enrichment conditionally on that basis. The enrichment is then both mistaken and subject to a failure of consideration.

turn out well. In other words, the conditionality of the disposition is a reflection of the claimant's exercise of autonomy in the face of an uncertain future, and the recipient's (continuing) enrichment in circumstances where that conditionality has failed consequently would not be a reflection of that autonomy.[226] Similar reasoning leading to the same result would apply where the uncertain matter was instead a present or past one. In that context, a claimant who has not obtained a promise to repay or qualified the enrichment would unlikely succeed in mistake, either because he did not hold a relevant, mistaken belief or because he waived inquiry – an entirely appropriate substantive legal position for a person who had been satisfied to effect a transfer which he knew to be founded upon an uncertain basis.

Finally, nothing above is intended to suggest that failure of consideration is restitution in respect of a misprediction (even in relation to cases where the conditional matter is one as to the future). Failure of consideration can certainly give restitution to claimants who have a keen interest in what happens in the future, but proof that the misprediction is incidental to the claim is found in those cases, such as *Chillingworth v Esche*,[227] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,[228] *Hussey v*

[226] As much as a decision to enrich without communicating the conditionality when it is not obvious would be a reflection of the claimant's decision-making autonomy (but not amounting to a failure of consideration). In essence, once the claimant is aware of an uncertainty (whether past, present or future), what actions he takes or refrains from taking will directly dictate the availability of restitution for unjust enrichment and in each instance as a manifestation of that autonomy. In this regard, it is the claimant's action in procuring the conditionality of the enrichment rather than the defendant's acceptance of the conditions which is important. This approach would also suggest that the claimant's autonomy is undermined when he believes that the condition has been communicated to the recipient and the condition fails, even if in reality the recipient was not informed and the condition not obvious (eg, if the condition was communicated to an intermediary for passing on to the recipient). The law's substantive rules on what constitutes a failure of consideration might not be met in such a situation and whether or not restitution is given would depend on other matters, such as whether a relevant mistake might be established. Looking at the situation purely from the normative perspective taken by this thesis, it would appear that the claimant's autonomy ought to be considered as undermined and the consequential enrichment of the recipient as having been unjust unless the claimant could be seen as taking a risk as to the communication of the qualification to the recipient. However, with the condition not having been communicated, the recipient should presumably be afforded the change of position defence in such a case.

[227] [1924] 1 Ch 97.

[228] [1943] AC 32.

Palmer[229] and *P v P*,[230] the judgments as to which clearly indicate that the reason restitution is given is the failure of the enrichment's qualifying condition rather than the claimant's failure accurately to predict the future fact or event. The in-the-future subject matter of a misprediction may indeed constitute the subject matter of the qualifying condition, but restitution follows from the qualifying condition being unsatisfied, not from the failure of the prediction.[231]

D. Mistake and misprediction – conclusions

The position taken by a number of commentators is that a misprediction should not be an unjust factor. This is correct, although the reasons have not always been clearly articulated. The irrecoverability of money paid and other enrichments conferred under a misprediction involves three points:

(i) A mistake of future fact is not a relevant mistake because the payment or other enrichment is not made under, or caused by, a belief which is analytically or logically incorrect at the time of the enrichment.

(ii) A mistake of future fact is not a relevant mistake because the claimant's decision-making process is not impaired by it.

(iii) A mistake of future fact is not an unjust factor because:

  (a) the claimant's decision to confer the enrichment is not impaired by it; and

  (b) the claimant took the risk of the prediction not eventuating.

[229] [1972] 1 WLR 1286 (CA).

[230] [1916] 2 IR 400 (KB).

[231] Compare T Krebs, *Restitution at the Crossroads: A Comparative Study* (London, Cavendish 2001) 77; see also A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 220.

The points as to 'no-impairment' and 'risk-taking' go towards the mispredictor's continuing autonomy over the terms of disposition of the enrichment.[232]

2.5 Mistake, but unvitiated personal autonomy – payments made for good consideration or subject to other legal obligations

In *Barclays Bank v Simms*, Robert Goff J was of the view that a mistake claim may fail if 'the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt'.[233] Robert Goff J later observed, in relation to the general right of recovery for causative mistake, that 'if the money was due under a contract between the payer and the payee, there can be no recovery on this ground unless the contract itself is held void for mistake … or is rescinded by the plaintiff.'[234] Burrows views this as reflecting a wider principle which covers all legal obligations (beyond contractually binding payments) and which generally renders the mistake as 'not unjust', rather than operating as a defence to an otherwise valid and fully-formed claim:[235]

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[232] This thesis has referred to the 'irrecoverability' of enrichments made as a result of a misprediction, and to the 'disqualification' of claims from unjust enrichment on the basis of risk-taking. The reference to claimants who have obtained a promise or imposed a qualification on an enrichment which is based on some event of matter happening or sustaining in the future being able to recover in contract or in failure of consideration shows that the language used to describe the principle that a misprediction is not an unjust factor must carefully be monitored. It is correct that a misprediction affords no recovery: it is neither a mistake nor unjust. It is not correct that claimants who are hoping for some version of the future cannot recover: another unjust factor (or contract) can provide a reason for restitution. It is correct that a person who mispredicts is disqualified. 'No impairment' and 'risk-taking' deny him his claim, and he is disqualified to the extent he needs to rely on facts which reveal him to be no more than an unimpaired risk-taker. But it is not correct that the claimant is disqualified absolutely from restitution for unjust enrichment: another reason may justify restitution in the presence of, and despite, the misprediction. In this sense, it is better to speak of a misprediction, generally, as a 'non-qualifier' as opposed to a 'disqualifier'. 'Generally', because there are some instances in which the presence of the misprediction might deny an otherwise good claim in unjust enrichment (such as a claim in mistake) if that claim were to be viewed in isolation. See Chapter 6 for a further discussion of these issues.

[233] *Barclays Bank v Simms* [1980] QB 677, 695.

[234] *Barclays Bank v Simms* [1980] QB 677, 695.

[235] This is to be distinguished from circumstances in which the recipient has given good consideration as a *bona fide* purchaser, in which case that defence may apply. This section is about circumstances where the claimant is under a pre-existing legal obligation *to enrich* the recipient when the mistaken enrichment is made. The line may be blurred

> Where the defendant is legally entitled to the enrichment – in the sense that that enrichment is owed to it by the claimant under a valid legal obligation – there can normally be no liability to make restitution despite there being an unjust factor. The reason for this is that the prima facie injustice established by the unjust factor is normally outweighed by the fact that the defendant is legally entitled to the enrichment. Overall, therefore, the enrichment is not unjust.[236]

Somewhat similarly, *Goff & Jones* refers to contracts, statutes and judgments as 'justifying grounds'.[237] Its view is that such legal obligations operate to negate the mistake (although it is not completely clear that the authors think of these justifying grounds as making the claim 'non-unjust' rather than operating as a defence to the claim):

> a claimant will have a prima facie right to restitution where he has transferred a benefit to a defendant by mistake, under duress, or on a basis that fails. Nevertheless, the defendant can escape liability if another legal rule entitles him to keep the benefit, and this rule overrides the rule generated by the law of unjust enrichment which entitles the claimant to restitution. For example, a claimant may have paid money to a defendant by mistake, but even so, the payment may be irrecoverable if the claimant was required to pay the money by a statute or by a contract previously entered by the parties. Although the claimant would otherwise have a claim in unjust enrichment, the defendant's enrichment is justified by the statute or contract.[238]

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where, for example, the mistaken enrichment is the entry into a contract, or a payment in response to a unilateral offer which then effects the entry into a contract, in respect of which the claimant has no obligation to enter, but which entry creates the legal obligation supporting the claimant's enrichment of the recipient and the recipient's entitlement to the enrichment. The blurring occurs because the (mistaken) entry into the contract straddles the line between the claimant's legal obligations which are claimant-sided restrictions on claimant autonomy on the one hand, and on the other, *bona fide* purchase and change of position, which are recipient-sided limitations on, and which operate as defences to, the same autonomy-based claim. The situation is not quite one of a pre-existing legal obligation, but rather a legal obligation which comes into being as a result of the mistake. At the same time, the situation is also not quite one of a defence, since the recipient's bargained-for position under which he is contractually, legally entitled to the enrichment might be undone by the mistake then avoiding the contract. See generally A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 88-91, 212-214 and 243-254. Note that in *Barclays Bank v Simms* [1980] QB 677, 695, Robert Goff J refers to the non-recoverability of payments made for good consideration as a 'defence to the claim'. See also J Goudkamp and C Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013).

[236] A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 88-89 (references omitted). See also 212-213. 'Normally', because there are exceptions to this proposition, which are discussed in A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 90-91.

[237] See *Goff & Jones*, Part 2, Chapters 2 and 3; G Virgo, 'Demolishing the Pyramid – The Presence of Basis and Risk-Taking in the Law of Unjust Enrichment', ch 20 in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart Publishing 2009) 488-504.

[238] *Goff & Jones*, para [1-12].

Normatively, it is not difficult to see why this should be so if a person's claim in mistake is based on the undermining of his autonomy over the terms on which his resources are disposed. As discussed in Chapter 1, this is not an autonomy of decision-making and action conterminous with the full scope of an individual's personal will, but rather that which is of the fullest scope not restricted by illegality, unlawfulness, or breach of public policy, and not otherwise or elsewhere limited by the legal order which gives that autonomy its content. That scope of conduct is the scope of individual autonomy which is regarded by the law as basic or inherent to its values and deserving of protection.

This then suggests, among others, two things. One is that the law should respect a valid and binding agreement arising out of an earlier exercise of the claimant's autonomy, under which the claimant has already agreed, and is obliged to ensure, that the recipient have the enrichment or its value. The other is acknowledging the law's legitimate limitations on individual autonomy more generally. We discussed one of these limits in Chapter 1, which was the change of position defence. It marks a natural limit to the mistaken payer's claim, founded as it is on personal autonomy over the disposition of resources. But the law's entitlement to impose obligations on individuals or otherwise to restrict their personal autonomy also exists outside of the law of unjust enrichment. Tax statutes, property laws and the criminal law, for example, all place limits on what individuals can do with their own assets. Thus, when looking at the individual who is making a claim under the law of unjust enrichment, we must acknowledge the limits and restrictions on individual autonomy by way of judgments, statutory obligations or other legal obligations the legal order imposes or otherwise recognises. So, returning to the matter of mistake in the context of an existing contractual or other legal obligation to enrich, the claimant ought not (as a normative matter) be able to recover the mistaken enrichment on the basis of his subverted autonomy when the law already restricts that

autonomy by requiring the enrichment or its value (or a portion of it) to be transferred, even if the genesis of the valid obligation is not a prior exercise of the claimant's autonomy.

One might seek to distinguish the one case where the claimant has voluntarily entered into a binding contractual obligation from others where the law imposes the obligation by way of judgment, statute or otherwise. Arguably, the former case appears more directly to be based in claimant autonomy for the reason that the recipient's enrichment was validly promised to him by the claimant, the claimant having previously exercised his autonomy over the enrichment (or its value) by contracting for its transfer.[239] This contrasts with statutory obligations, judgment debts and other legal obligations to the extent that they are enrichments which the claimant does not directly agree (or agree at all) to make, but which the law says he is obliged to make. However, it is the limiting effect of the consequential, valid, binding and enforceable contract on the claimant's autonomy, rather than the claimant's exercise of autonomy from which it is derived, which provides the basis for limiting the claimant's autonomy with respect to the unjust enrichment claim in mistake. We know this must be the case because the claimant who, apart from making the mistaken payment, has separately exercised his autonomy and made elsewhere a promise to enrich the recipient in a contract which is:

(a) void for illegality, public policy reasons or being *ultra vires* a party; or

(b) frustrated or terminated for breach prior to the obligation to enrich becoming due for performance,

will not be barred from recovery of the mistaken payment, and may recover in unjust enrichment notwithstanding the prior exercise of autonomy.

[239] There may be fine questions about where one draws the line between various kinds of voluntary acts (eg, in entering into a sale and purchase contract, earning an income, incurring a debt and so on), each of which ultimately can result in a legal obligation to enrich.

It might be argued that this is not conclusive, because the claimant's autonomy in relation to any purported contractual promise (as opposed to the enrichment) is in each case vitiated: by mistake in the case of void contracts,[240] or want of condition in the case of contracts which have been discharged. Even if these conclusions were available on the facts, it seems fairly settled that the cases, when looking at whether the mistake has been negatived by the prior entry into the contract, ask whether there is a valid obligation to enrich the recipient, and not whether the claimant's autonomy can be characterised as having being subject to a prior and unvitiated exercise.

The picture is clearer in situations where the mistaken enrichment is itself made in pursuance of the contractual obligation, as in *Kleinwort Benson Ltd v Lincoln City Council*. The claimant, beyond showing the vitiation of autonomy inherent in the mistaken payment, must show, according to the law of contract, that the contract or relevant contractual obligation can be set aside, whether because of the mistake or for other reasons.[241] Establishing that in the matter of his consent to the contract or contractual obligation his autonomy had been undermined by mistake is not enough. If the claimant's contractual entry was caused by his unilateral mistake,[242] but which mistake is insufficient to avoid the contract or the relevant contractual obligation to enrich, the claimant cannot recover the mistaken enrichment even though his autonomy with respect to contractual entry could be said to have been undermined by his unilateral mistake.

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[240] Although it is not true for every case in which the claimant has purported to enter into a contract which is ultimately found to be void for illegality, public policy or being *ultra vires* a party that the claimant will necessarily be mistaken. The claimant may, for example, be aware of the questionable nature or character of the counterparty or the contract, and have some doubt as to the latter's validity and enforceability.

[241] In *Barclays Bank v Simms*, Robert Goff J speaks of recovery in the context of a contractual obligation where 'the contract itself is held void for mistake' or 'is rescinded by the plaintiff' ([1980] QB 677, 695) and that even where the payee has given consideration for the payment, 'that transaction may itself be set aside (and so provide no defence to the claim)' ([1980] QB 677, 695). In *Kleinwort Benson Ltd v Lincoln City Council*, the contractual obligation to pay was set aside because the underlying swaps contract was *ultra vires* the local authority.

[242] Whether or not it is the same mistake which makes the enrichment a mistaken one.

In each case it would make no sense, normatively, to regard the enrichment as unjust if, despite whatever vitiations of autonomy exist in relation to the mistaken enrichment, or in relation to the claimant's consent to the contract, the claimant remained subject to a contractual obligation to enrich the recipient. What is unjust about an enrichment paid by mistake if the claimant is legally obliged to confer it anyway? Thus, whatever conclusions one might have in relation to the claimant's autonomy with respect to his entry to the contract, it is necessary still to look at the status of the contractual obligation. It is the latter which matters.

On that basis, the reason a contractual obligation stops the unjust enrichment claim is the limiting effect of the legal obligation on the claimant's personal autonomy, rather than his prior exercise of it in making the promise. This locates contractual obligations within the same conceptual framework as other legal obligations, such as those which arise from statutes and judgments. It also means that we are concerned not with the causative event or source of the obligation, but rather the effect of the obligation on the autonomy of the claimant. The key feature in each case is the same, which is that the claimant's autonomy to do whatever he wishes with his assets, or at least to have autonomy over the terms of their disposition – the value which is protected by the action in mistake – is already limited by the law.

As discussed in Chapter 1, the wider legal order gives content to the scope of autonomy given to individuals over what they can and cannot do with their assets, and thus when an infringement of autonomy can be said to be an 'unjust' one from the perspective of the law of mistake. So, if the legal order validly recognises an obligation that the enrichment (or its value) occur, then the law of mistake ought not recognise a claim of 'unjust' to the extent of that obligation. An enrichment is not unjust if the law recognises that it should occur. This does not necessarily render the law of unjust enrichment

subsidiary or subordinate to the rest of the law.[243] What it means is that the law of mistake (and possibly the wider set of intent-based unjust factors) refers to the broader legal order to determine what is legitimately and properly within an individual's autonomy (with respect to his own resources) and thus also the field of operation for its own principles. That would appear to be an appropriate approach for a body of law based on individual autonomy – to look at the broader legal context to see what else the law has said about the scope of personal autonomy. More specifically, it makes sense that such a law would be interested to know if the *autonomy* which it seeks to protect in relation to the transfer which is claimed to be *unjust* is actually an autonomy of which the claimant has been deprived by the law elsewhere for other reasons (ie, because some or all of the impugned transaction ought to have occurred anyway under another principle of law).[244] After all, the law logically cannot know if an enrichment is unjust until it knows, among other matters, whether the claimant was already required to confer it. It would follow from this reasoning that obligations which are not legally enforceable, such as natural obligations and moral obligations not resounding in a legal obligation, should not themselves constitute a relevant limitation on individual autonomy from the law's perspective, and therefore ought not – at

[243] See generally, R Grantham and C Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 Law Quarterly Review 273.

[244] This normative perspective supports Burrows' view on the relationship between legal obligations and the mistake claim – the presence of the legal obligation negates the unjustness of the claim (or shows that the element of an unjust factor is absent) rather than operating as a defence to an otherwise valid claim: see A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 88-91. On the distinction between denials and defences to the action in unjust enrichment, see J Goudkamp and C Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013), in particular Part B on Terminology, and 151-153 in relation to the recipient's contractual entitlement to receive payment; and A Burrows, 'Is There a Defence of Good Consideration?' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing 2013), especially 171 (citing *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 407-408), 174-175 (citing *Test Claimants in the Franked Investment Group Litigation v Commissioners of the Inland Revenue* [2010] EWCA Civ 103, [181]), 177-178 (citing *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 [84]-[85] (Lord Scott), [2007] 1 AC 558, 592 [2007] 1 All ER 449, [2006] 3 WLR 781, [2007] 1 CMLR 429) and 182-183.

least on the reasoning applied – deny the claim that the mistaken enrichment was an unjust one.[245]

The other defence against the notion of 'subsidiarity' is that the law of unjust enrichment itself is able to change, and has changed, the scope of its application. The expanded scope of operative mistake,[246] the recognition of the change of position defence,[247] and the removal of the mistake of law bar[248] each show the law's ability to change the scope of its own application without deference to the external legal order – to determine for itself when a person can be mistaken, when a mistake will not result in restitution and what can be the proper subject matter of a mistake. In other words, the law of unjust enrichment can also decide for itself when there is an unacceptable undermining of personal decision-making.[249]

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[245] Unless a much broader view was taken of the normative conception in autonomy; one which would accept as a relevant fetter on autonomy those dispositions 'payable in point of honor and honesty': *Moses v Macferlan* (1760) 2 Burr 1005, 1012, 97 ER 676, 680. This does not suggest that natural obligations do not prevent restitution – the question is whether, if applicable, they would operate as a 'denial' or a 'defence'. See M McInnes, 'Natural Obligations and Unjust Enrichment' in E Bant and M Harding (eds), *Exploring Private Law* (Cambridge University Press 2010), especially 179-182, 185 (among other matters, suggesting 'denial'); D Sheehan, 'Natural Obligations in English Law' [2004] Lloyd's Maritime & Commercial Law Quarterly 172, especially 176-179, 181 (among other matters, suggesting 'defence'); G Virgo, 'Demolishing the Pyramid – The Presence of Basis and Risk-Taking in the Law of Unjust Enrichment', ch 20 in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart Publishing 2009) 488-504, especially 489, 498-500; *Goff & Jones*, paras [2-41]-[2-44].

[246] Following *Barclays Bank v Simms* [1980] QB 677.

[247] *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 AC 548, [1991] 3 WLR 10.

[248] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349.

[249] One interesting scenario at the boundary between unjust enrichment and the broader legal order is the mistaken entry into a contract. This differs from the other scenarios because it is the very act of contractual entry which is regarded as the mistaken enrichment, and which the law of unjust enrichment would consider as unjust. This means that from the perspective of the law of unjust enrichment, the enrichment-via-entry is impugned. But the law of contract has its own rules about the validity of the contract. These rules are different to the ones applied by the law of unjust enrichment, which is understandable given that they apply to relationships of bargain and when they can be undone. Thus, in mistaken entry into contract situations, the strict and sensitive relief of unjust enrichment in relation to an enrichment which the recipient is not intended to have clashes with the different rules of contract in relation to an enrichment for which the recipient has bargained. In this scenario, the law of unjust enrichment might be seen as 'strongly' deferring to the law of contract to decide when contracts are valid, void or voidable – and thus whether the causative mistake which the law of unjust enrichment says exists is able to provide the result in restitution which the claimant seeks. Another view is that there is at most only a 'weak' form of deferral, because what is occurring is essentially just an assessment of whether there is a defence of good consideration which, in the bargaining context, properly reflects the claimant's need to acknowledge the autonomy of the counterparty who has bargained for the claimant's performance.

2.6 Induced mistakes

A. Causation – a different test

Arguably, a mistaken claimant is equally mistaken and equally non-autonomous whether the source of the mistake is his own error or the misrepresentation of another person, and so it would normatively be consistent to treat all mistakes, whether spontaneous or induced, in a broadly similar fashion. However, the law with respect to causation for induced mistakes appears to differ from the 'but for' causation test used for spontaneous mistakes. The authors of Anson note that the misrepresentation needs to be a material inducement to the addressee, but 'it need only be *an* inducement for the party to enter into the contract, not the sole or predominant or decisive inducement.'[250] Similarly, Virgo says that:[251]

> If the claimant transfers a benefit to the defendant as a result of a mistake which was induced by a misrepresentation by the defendant, it is not necessary to show that the mistake was a "but for" cause of the benefit being transferred. Rather, it is enough that the mistake was simply a contributory cause of the transfer.

Burrows notes that this test is applicable to other unjust factors beyond mistake:[252]

> Where the unjust factor involves conduct of the defendant or a third party that has allegedly induced the rendering of the benefit (eg, misrepresentation, duress, or undue influence), a different causation test than the "but for" test applies at least where the conduct is highly reprehensible as in cases of fraudulent misrepresentation and duress to the person. This test has been expressed in various ways. The unjust factor at the time of the decision to render the benefit must have been "actively present to his mind" or must have

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[250] J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (Oxford University Press 2010) 305 (emphasis added), citing *Attwood v Small* (1838) 6 Cl & Fin 232, 502; *Reynell v Sprye* (1852) 1 De GM & G 660, 708; *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140 at [59], [218] and also *Barton v Armstrong* [1976] AC 104, 119 by comparison in the context of duress.

[251] G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 169, citing *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA). See also G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 183, in relation to cases where the benefit induced by the misrepresentation is the claimant's entry into a contract.

[252] A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 92-93 (references omitted). In a footnote to this (footnote 35, page 93), Professor Burrows explains 'it is probably more accurate to regard this as a different rather than a weaker test because there can be examples of mistaken payments … where the claimant succeeds even though the mistake was not actively present in his mind because he can establish the "but for" test: ie, he would not have made the payment had he known the truth.'

> "influenced" the claimant's decision or must have been "a reason" for the claimant's conduct. If this can be established it does not matter that the unjust factor was not the sole or predominant reason for the decision or conduct. Nor does it matter that the "but for" test cannot be made out, ie, that the claimant would, or might, have rendered the benefit irrespective of the unjust factor. In general terms, therefore, this appears to be a weaker, more pro-claimant, test than the "but for" test.

A similar, 'presence in the mind' test can be seen in the insurance context where the insured fails to disclose material information, even if the omission did not cause the insurer to accept the contract or the particular terms of the contract when it would not otherwise have done so.[253]

In many instances, the claimant's induced mistake has resulted in his entry into a contract which he then, through a claim for rescission,[254] seeks to reverse. Therefore, restitution is practically effected by way of rescission of the contract.[255] In this context, the 'unjust factor' for the purposes of the law of unjust enrichment – the induced mistake – would also comprise the event which allows the avoidance of the contract. In these

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[253] See J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Sweet & Maxwell 2012) para [17-11], and the rejection of the 'decisive influence test' in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501. While the granting of rescission for non-disclosure (whether in the context of insurance contracts or otherwise) is arguably more directly concerned with a departure from a standard of behaviour than the claimant's subjective mistake, the effect on the claimant is quite arguably the reason for that concern. In *Carter v Boehm* (1766) 3 Burr 1905, 1910, 97 ER 1162, 1164, Lord Mansfield said 'Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.' Earlier (3 Burr 1905, 1909, 97 ER 1162, 1164), Lord Mansfield had said that:

> The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.
>
> The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

In *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1 para [42], [2003] 1 AC 469, 492, Lord Hobhouse noted that, according to Lord Mansfield's formulation, 'It thus was not actual fraud as known to the common law but a form of mistake of which the other party was not allowed to take advantage.' See also J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Sweet & Maxwell 2012) para [16-03].

[254] The language here is deliberately obscure. The question of whether rescission is properly part of the law of contract, or the law of unjust enrichment, or both, is not within the scope of this thesis. Also outside this discussion is rescission for breach of a contractual term, incorporated into the contract following an antecedent misrepresentation (such actions not being for the misrepresentation).

[255] Subject to the discretion to award damages under the Misrepresentation Act 1967.

cases[256] *and* also in those cases in which the defendant's enrichment is not the claimant's entry into a contract but the transfer of some other enrichment (for example, where the claimant is induced into believing that he owes the defendant a sum of money, on the mistaken belief of which the claimant then pays), the claimant's action in *unjust enrichment*, in relation to the requirement for an unjust factor, can relevantly be satisfied by establishing the alternative and arguably easier test with respect to causation.

B. Normative justifications I: the source of the error

As mentioned, it would not have been surprising, from the normative perspective, to see similar rather than different approaches to causation for induced mistakes and spontaneous mistakes: the mistaken claimant is just as mistaken in each case. That being said, it would still be entirely consistent with valuing 'autonomy' – which justifies restitution for a unilateral, *spontaneous* derogation – to make restitution even easier where the undermining of autonomy is externally induced. In other words, if the law is satisfied to provide relief to a person whose autonomy has been undermined by an error he has brought upon himself, it would be unsurprising for the law to be more sensitive to, and to make the same relief more readily available in, circumstances where the undermining of personal autonomy (through mistake) was brought about by the external interference of another, especially if

[256] Subject to any further requirements the general law might have for the avoidance of such contracts.

the interference came from the beneficiary of the claimant's mistake,[257] and whether or not that interference could also be said to have constituted a civil wrong.[258]

That the law is concerned to protect a certain interest or value (eg, autonomy of disposition) does not mean that particular situations through which that interest or value might be undermined (or protected) do not justify special attention or different rules. As between spontaneous and induced mistakes, while the result is the same, in the sense that a claimant will be 'equally mistaken', the genesis of his less than ideal position is not the same and therefore potentially open to different treatment. This 'same end but different beginning' proposition can be seen in other areas of the law's instantiation of social values, such as the concern for personal safety: a rough analogy might be drawn with the individual who has suffered the same physical injury due to his own clumsiness (for which there may be no remedy, or a remedy based on a very narrow set of rules), or due to the failure of a local authority to give adequate warning of a dangerous environment (for which a remedy would be available on a different set of rules) or due to being struck without excuse by another person (where the claimant might have the greatest cause for complaint and the easiest set of rules, for causation or otherwise).

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[257] Similar is Virgo – see G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 169: 'The reason for the adoption of this different test of causation where the claimant's mistake was induced by the defendant is that the defendant is to blame for creating the claimant's mistake, regardless of whether the misrepresentation was made fraudulently, negligently or innocently. It follows from the defendant's conduct in inducing the mistake that it is easier to conclude that the benefit received by the defendant was unjustly received as a result of the mistake.' See also page 183, in relation to the contractual context: 'The reason for this generous test of causation is simply because the misrepresentor has interfered with the risks involved in the bargaining process between the parties and this makes it easier to justify setting the contract aside. Equally there are no dangers of the claimant fabricating the mistake where the mistake was induced by a clear misrepresentation of another party.' The normative explanation in this thesis, also based on an external interference with the claimant's autonomy, differs in its generality, in that it neither distinguishes between (a) enrichments which are bargained-for and those which are not, nor (b) enrichments received by the misrepresentor and those received by a third party.

[258] Not all induced mistakes can be decanted into the category of civil wrongs – for example, innocent misrepresentations. Therefore, to the extent the contributory cause test is available for such non-wrong inducements, the reason for the induced claimant's different treatment as regards causation is arguably the presence of the inducement itself – the external interference – rather than the claimant's suffering of a wrong. See A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, Oxford University Press 2004) 376.

C. Normative justifications II: outcome versus process

It was discussed earlier in this chapter in the context of spontaneous mistakes that a claimant who has determined to enrich the defendant 'in any event' does not get restitution for mistake, on the basis that any incorrect belief held when the claimant had a separate and sufficient reason to transfer the enrichment in any event would play no relevant causative role in the decision to enrich, and thus could not be regarded as an impairment. Normatively speaking, the presence of the independent and sufficient cause for the enrichment in the hands of the recipient meant that the enrichment still reflected what the claimant would have decided for himself. However, in the context of induced mistakes, the mistaken claimant can obtain restitution even if he had a reason to enrich the recipient and was going to do so anyway. For example, the authors of *Goff & Jones* state that:[259]

> In contrast, a looser "contributory cause" test may apply where the mistake was induced by a misrepresentation for which the defendant was responsible.[260] On this approach, it is enough that the claimant's mistaken belief or assumption played *a* part in the claimant's decision-making process, and it is not fatal that the claimant would have acted in the same way in any event.

In *Edgington v Fitzmaurice*,[261] the defendants had represented that the purposes of monies raised in connection with a bond offer were to improve the company property and to develop the business of the company, when the true purpose was to apply the proceeds of the fund-raising to meet the pressing liabilities of the company. The claimant had been relevantly induced by the misrepresentation to subscribe for the bonds, but it was also true

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[259] *Goff & Jones*, para [9-50] (emphasis in original).

[260] Here, citing, by analogy, *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA) (noting that it was not a rescission case) and *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2003] 1 AC 959, 967, in relation to the approach to contracts induced by fraudulent misrepresentation, and noting that the position for non-fraudulent misrepresentations seems to be less clear (citing D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (Oxford University Press 2007), paras [4.93]-[4.94]).

[261] (1885) 29 Ch D 459.

that the claimant had made a spontaneous mistake, believing that the bonds would give him as a bond holder a charge on the property of the company, but for which mistake he would not have joined the subscription. It was held that the claimant was entitled to the return of the subscription money (less the interest the claimant had received on the bonds) notwithstanding that the claimant had 'another reason for his taking the debentures'.[262] Similarly, the authors of *Chitty on Contracts* state that 'In cases of fraud, however, if the representee seeks to rescind, it is no defence for the representor to show that if the misrepresentation had not been made, the misrepresentee would still have made the contract.'[263]

How then can recovery by induced mistaken claimants be reconciled with the position with respect to spontaneous mistaken claimants, to which no restitution is afforded when they have independently sufficient reasons to act in the same way in any event? The last paragraph of the preceding sub-section provides a clue as to why this might be so. The distinction between the two ways in which we can view or assess the quality of personal autonomy – that is, by reference to the result or *outcome* on the one hand, and by reference to the degree of freedom in the *process* or method on the other – can also explain why a decision to enrich 'in any event' does not prevent recovery for induced mistakes. The explanation is that where the induced mistake at least constitutes a contributory cause of

[262] This was the phrase used by Lord Hoffmann in discussing *Edgington v Fitzmaurice*, in *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2002] UKHL 43 para [14], [2003] 1 AC 959, 966. It is not explicitly made clear by the judgment at trial and of the Court of Appeal in *Edgington v Fitzmaurice* that the spontaneous mistake as to the charge was established in evidence as a reason for the claimant to have paid the subscription money 'in any event', but it is clear that the prospect of the charge was a key motivation and reason for the subscription, and certainly constituting at least a but for cause of it (a but for cause signifying at least what is a necessary condition, though not necessarily a reason to pay in any event). See also *Barton v Armstrong* [1976] AC 104 (PC) 118, where Lord Cross of Chelsea said, in *obiter*: 'Had Armstrong made a fraudulent misrepresentation to Barton for the purpose of inducing him to execute the deed … [and had] Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision to execute the deed, for in this field the court does not allow an examination into the relative importance of contributory causes.'

[263] H Beale (ed), *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para [6-038] and citing *Re Leeds Bank* (1887) 56 LJ Ch 321.

the enrichment, the difference between outcome and process is normatively significant, and tracks the law's approach to the difference between spontaneous and induced mistakes as being substantively significant:

(a) For spontaneous mistakes, which are purely internal to the claimant, the law can leave the question as to whether the claimant's autonomy has been undermined to the proxy of outcome. It does this by asking whether the claimant would have decided differently had it not been for the mistake. If the outcome does not reflect the autonomy of the claimant (because he would not have conferred the enrichment in the circumstances had he not been mistaken), then the enrichment is unjust.

(b) For induced mistakes, because of the existence of external interference, the law may be less satisfied with leaving the question of autonomy (solely) to the proxy of outcome. Having genuine concern (also) to ensure that the decision-making process of the claimant has been unaffected and sufficiently free to the relevant degree, unjustness may be established upon an additional, different basis: that that process no longer reflects the autonomy of the claimant to decide for himself – that the claimant was no longer sufficiently free – because an external interference and inducement had become 'a contributory cause' and 'actively present to his mind'.[264]

This reasoning relies on the proposition that there are at least two normatively relevant ways in which autonomy of disposition can be adversely affected by mistake. One is as to 'unwarranted outcome', which looks at whether the mistake has meant that the claimant has transferred the enrichment on terms and in circumstances other than the one he believed

[264] In *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA) 483, Bowen LJ, in relation to the fraudulent misstatement, said that 'But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference.'

were applicable. The other is as to 'unwarranted interference', which instead looks at whether the mistake has constituted an unacceptable degree of interference with the claimant's decision-making process. The latter emphasises that, although a person may ultimately put into effect the same transaction, it does not mean that he has acted with an acceptable degree of autonomy during the decision-making process leading up to that transfer. This mirrors the earlier discussion,[265] that a derogation from 'free will' – as that phrase is used in the context of the discussion – can occur in two ways (other than being completely absent), which are that the transaction did not reflect the claimant's will, or that the decision to effect the transfer was not made sufficiently freely. On this basis, induced mistakes would be considered as falling in the same category as, for example, duress and undue influence – as an unwarranted interference with autonomy, the claimant being insufficiently free in his decision-making process – both of which other reasons for restitution conveniently share the easier test for causation under which restitution is possible even if the claimant would have acted in the same way in the absence of the external interference.[266]

2.7 A conclusion

The aim of Part I has been to provide an intelligible normative account of the law of mistake within the broader law of unjust enrichment, and to set out how that normative account is manifested in the substantive law. A concern for an individual's autonomy of disposition provides a good fit for the law of mistake which is directly concerned with the subjective state of mind and actions of the claimant (and of the defendant, captured within

[265] See Chapter 1.2.

[266] See for example *Barton v Armstrong* [1976] AC 104 (PC) 119 (Lord Cross), 121 (Lord Wilberforce and Lord Simon) (duress of the person) and *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555 para [86] (Jonathan Parker LJ, with Kay and Peter Gibson LJJ agreeing) (undue influence). See also the discussion in A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 92-95 and A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) 74 ('physical duress'), 76 (undue influence).

the defendant's change of position). It is also a 'recognizably moral theory',[267] and it is transparent in the sense that 'the legal concepts employed by a judge are an appropriate way of expressing in practice the broader concepts'[268] of such autonomy, which this thesis has argued as also sensibly explaining other aspects of the law of unjust enrichment. Nevertheless, the primary focus of this Part has been to establish 'autonomy over resources' as a, if not the, core concern underlying the recognition of mistake *as an unjust factor* – whatever that concern's wider significance to unjust enrichment law – and how that concern is manifested in the core substantive principles of the law of mistake. With that set out, the unsettled areas of the law of mistake can be examined, with the normative conception as an aid to their resolution. We turn to this now in Part II. Four different areas are considered in turn, each being the subject of a separate chapter.

[267] S Smith, *Contract Theory* (Oxford University Press 2004) 23.

[268] S Smith, *Contract Theory* (Oxford University Press 2004) 27.

PART II

NORMATIVE RESOLUTIONS

CHAPTER 3

UNCERTAINTY AND DOUBT

Can a person who is in a state of doubt or uncertainty about some matter of fact or law recover for being 'mistaken' as to that matter? Before answering this question, it is helpful to compare this situation with 'waiver of inquiry', discussed in Chapter 2 above, and to establish that they are not the same.

A waiver of inquiry will often occur in circumstances where the claimant is uncertain about some matter – indeed what is being waived is the inquiry to resolve the claimant's subjective uncertainty. But this does not mean that waiver of inquiry and uncertainty will always coexist, and more importantly neither does it mean that the uncertain claimant will always have waived inquiry. For example, a claimant may be unsure as to his liability to make a certain payment, but feel compelled by circumstances or the prospect of the burden of litigation, penalties and administration. There may also be claimants who have some uncertainty about a belief but do not realise or believe that there exist any means (and there may be none) to check the correctness or otherwise of that belief.[269] Such persons may not have waived inquiry, but nevertheless act in a state of some doubt or uncertainty. So not every claimant who is uncertain can have his claim analytically disposed by looking for the absence or presence of a waiver of inquiry, and the presence of 'uncertainty' and its compatibility with the mistake claim should be retained distinctly as a separate question.

[269] For example, a historical, scientific or legal proposition for which there is no definitive answer or current means of determination. An example may be that of the swaps cases, in which the claimants could be said to have had less than an absolutely certain belief about the validity of the underlying contracts, but yet might not be characterised as having decided to waive inquiry.

Returning to the original question: can a person who is in a state of doubt or a state of uncertainty as to some matter recover for being 'mistaken' about it? There are a number of issues here. Who is the uncertain claimant (or, when is a belief an uncertain one)? Is an uncertain belief a belief held for the purposes of the law of mistake? Can an uncertain belief be mistaken?

3.1 Who is the uncertain claimant – or when is a belief an uncertain one?

The uncertain claimant is the claimant who confers the enrichment in a state of uncertainty or doubt about the correctness of a matter, the belief as to the truth of which is causative of the decision to enrich. The claimant believes the matter with some degree of certainty, but also entertains some doubt about its correctness.

In relation to mistake, the case law does not require a *prima facie* inquiry into the degree of certainty of belief held by the mistaken claimant; the case law only requires the claimant to have held a belief as to the relevant subject matter. So it is enough for mistake that the claimant believed in the matter, whether he had spent enormous amounts of time undertaking due diligence or whether he formed a belief – but one honestly held – without prior research. The touchstone for doubt and uncertainty, then, is not whether or not the claimant could assert that he believed to a degree of absolute certainty and 100% assuredness (or any other degree of assuredness) the matter to be 'true', but rather whether the claimant – however quickly or slowly with great contemplation and diligence or otherwise the belief was formed – subjectively, perceived that the belief might be wrong. If so, then that belief is one which is affected by *some* doubt and uncertainty. For a claimant in this scenario, the first step is to establish that the 'uncertain belief' is a relevantly held belief for the law of mistake.

3.2 Is an uncertain belief a belief for the purposes of mistake?

It was resolved in Chapter 2 that a mistaken belief is an erroneous belief about the world in which the claimant is impaired by the dissonance between what was believed and reality, and that the belief must be explicitly formulated and consciously held in the mind of the claimant, or if otherwise, then for the claimant either: (i) 'a necessary basis for other consciously held beliefs, even if not consciously held itself';[270] or (ii) a supposition which logically follows from those consciously held. We decided a moment ago that an uncertain belief is a belief in respect of which the claimant holds some degree of uncertainty or doubt about the correctness of its subject matter. The distinction therefore is not in the accuracy of the belief but the character or quality in which it is held in the mind of the claimant. One is accepted without question while the other is not. Focusing then on the latter, uncertain belief, at one extreme is the claimant that doubts that the underlying subject matter is true at all. The subject matter of the belief might be different from the reality (thus exhibiting error and dissonance) but since the claimant essentially does not believe at all in the truth of the subject matter, he cannot say that it was a belief which he held for the purposes of mistake. At the other extreme is the claimant who absolutely believes in the matter and would have not entertained the prospect of doubt but for the matter being put in issue from a source which the claimant does not trust or perhaps because of a fleeting, thrown away thought that 'anything's possible'. For this claimant, there is at most only the smallest of doubts, and while there is uncertainty, the degree of it is so small that it would be more accurate to characterise the claimant as holding the belief rather than as not holding the belief at all.[271]

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[270] D Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 540.

[271] In *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, [1999] 1 All ER 941 (Ch D), the claimant, among other things, made a number of rental payments being certain that the amounts being transferred were greater than what was required under the contract (believing also that these overpayments could later be recovered). The claimant had been told by the defendant recipient that it was the latter's belief that the rental payments made were

The balance of probabilities test offered by Burrows[272] in the context of uncertainty is a suitable test to determine whether an uncertain belief is relevantly held. If the claimant believes the matter probably to be true, then he holds that belief for the purposes of the law of mistake. Conversely, if the claimant believes that the matter is probably not true, then it would be wrong to characterise the uncertain belief as held by the claimant and amenable to be a mistaken belief of the claimant. On this basis, an uncertain belief is a belief for the purposes of the law of mistake if the claimant believes that the matter is, on the balance of probabilities, true.

3.3 Can the uncertain belief, held by the uncertain claimant, be mistaken?

The preceding section looked at the question of when an uncertain belief could be considered as held by the claimant for claims based on mistake. When a held, but uncertain, belief can properly be considered as a mistaken belief is a separate question because the presence of at least *some* uncertainty or doubt raises the issue of whether and when the claimant takes the risk that he may have been wrong. In *Kleinwort Benson Ltd v Lincoln City Council*,[273] Lord Hope opined that:

> Cases where the payer was aware that there was an issue of law which was relevant but, being in doubt as to what the law was, paid without waiting to resolve that doubt may be left on one side. A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong – and that is so whether the issue is one of fact or one of law.[274]

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actually at the correct level and properly due. The case turned on other facts, but it is an example of where an enrichment is conferred by a claimant being certain about a specific matter and having taken no further material, pre-transfer action to verify the truth despite the correctness of the belief being put in issue. See also the facts in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, [1992] 3 WLR 366.

[272] A Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 780.

[273] [1998] UKHL 38, [1999] 2 AC 349.

[274] *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 410 (Lord Hope of Craighead). Compare *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [25]-[27], [2007] 1 AC 558, 570-571 (Lord Hoffmann), [64]-[65] 583, [70] 585 (Lord Hope of Craighead), [175] 618 (Lord Brown of Eaton-under-Heywood).

There is a clear analogy here with mispredictions and waivers of inquiry, in which the claimant confers an enrichment taking the risk-in-fact that the matter on which he relies is not borne out by reality. In this context, the question is to identify when the uncertain belief, which is held because the claimant believes that the matter is probably true, becomes too uncertain for the claimant to say that he was affected by an erroneous belief; or, as Burrows puts it, the question is 'what degree of doubt is compatible with a mistake claim.'[275] For Burrows, who rejects a causation test in such circumstances,[276] a possible single-test solution might be found on the balance of probabilities,[277] which looks at whether the claimant believes that his belief is more likely than not to be wrong (that is, whether he believes that he is probably making a mistake,[278] or put another way, whether the amount of uncertainty or doubt exceeds the amount of assuredness). In these cases, the claimant will not recover on the ground of mistake. Two reasons are given, being either that the claimant is not mistaken at all or that the claimant has taken the risk of error.[279] Cumulated, this means that the claimant does not actually believe that the doubted state of affairs is likely to be correct and accepts that he might be wrong.

Burrows is right to reject causation as the appropriate touchstone. On principle, one might argue that there ought to be a narrower door to mistake for claimants who already have misgivings about the certainty of the underlying facts or law on which they are relying as the bases of their actions. More fundamentally, it might create confusion to apply the same causation test to the uncertain claimant, because it asks the wrong question, or at least

[275] A Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 780.

[276] A Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 780.

[277] A Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 780.

[278] A Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 780.

[279] A Burrows, 'Restitution of Mistaken Enrichments' (2012) 92 Boston University Law Review 767, 780-781.

a question which does not account for the claimant's recognition that he might be wrong. While but for causation identifies the causal relevance of the mistake to the enrichment where the claimant has no idea of his mistake, it is not the appropriate question to determine whether restitution ought to be granted in circumstances where the claimant is already contemplating the prospect of mistake. In the latter scenario we already have better, more proximate and direct evidence of how the claimant would behave (whether or not including a waiver of inquiry) when faced with the prospect of being wrong: which is that the claimant decided to confer the enrichment in the face of that uncertainty.

So causation is not the right touchstone for identifying what degree of doubt is incompatible with the claim in mistake. Apart from the balance of probabilities, one suitable threshold at which to limit recovery is where the uncertainty, subjectively assessed, reaches the lower threshold of 'reasonable doubt'. Recall that where the ground for the recovery of an enrichment is mistake, it is because the claimant has suffered an impairment of his consent via the error upon which the decision to enrich is based. Where a claimant has a state of doubt reaching 'reasonable doubt', it means that he is aware of the reasonable chance of being wrong. Assuming he has not obtained a promise to return, or qualified, the enrichment in the event of error, and assuming no other unjust factor is applicable, such a claimant cannot assert that he was relevantly impaired (or deny that he took the risk-in-fact) since he knew that there was a reasonable prospect that the belief might be wrong. In those circumstances, the recipient's enrichment reflects the autonomy of the claimant who assented to that prospect. Turned around, if the degree of doubt was thought to be unreasonably slight, then, arguably, the claimant can assert impairment since the subjective notion of having input wrong information into the decision-making process (and thus the proposition of acting prospectively to protect against that risk) was an 'unreasonable' one.

Reasonable doubt therefore seems to be a good proxy for the point where the presence and degree of uncertainty which might have still sensibly permitted the claim 'I was mistaken' on the one hand shifts towards the recognition that one might actually be wrong on the other – where causative mistake starts to be replaced by the supervening decision to confer the enrichment notwithstanding the prospect of error (that is, risk-taking) as the better explanation for why the particular enrichment was conferred. In the language of autonomy, the threshold of subjective reasonable doubt is a suitable place to mark where the claimant's degree of confidence in a belief is insufficiently assured and the prospect of error sufficiently serious in the mind of the claimant that his recognition of that reasonable prospect of error and the conferral of the enrichment in such circumstances reflects the autonomous mind and actions of an individual who has accepted the idea that the enrichment might be disposed on terms different to those contemplated.[280]

3.4 A conclusion

Uncertainty in the context of mistake involves the appreciation of a risk that one might be wrong. In this context, the role of the substantive law is to separate situations in which an uncertain claimant is mistaken because he did not take the risk of the error which undermined his autonomy, from situations in which an uncertain claimant is not mistaken because his acceptance of the risk of error is instead a reflection of his autonomy. This thesis argues that the appropriate substantive principle is one based on reasonable doubt as the point at which the claimant is too uncertain to be mistaken.

[280] Although the uncertain claimant is considered as failing to establish mistake either because he did not hold the relevant belief (a balance of probabilities test) or because the belief was too uncertain (a reasonable doubt test), the practical effect of this scheme is to collapse the test for 'uncertainty and doubt' in the context of mistake into the higher test of reasonable doubt. Apart from reasons of analytical clarity, the balance of probabilities test for whether a claimant holds the relevant belief remains useful for unjust enrichment generally, such as to determine whether a claimant believes in the existence of a threat in the context of duress. Compare G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 162-163, where the test proposed (at page 163) for identifying excessive doubt (or suspicion or 'recklessness') is where the claimant 'was aware that there was a possibility that he or she had been mistaken.'

At the start of this chapter, it was said that uncertainty and waiver of inquiry should be analysed separately, since they are distinct mental states. In many if not most cases, a person will have waived inquiry because he has decided to proceed without conducting further possible due diligence on a matter about which he is uncertain. In cases where a waiver of inquiry has occurred in proceeding with the enrichment in the context of uncertainty and doubt, one would expect the application of principles in relation to 'uncertainty' and 'waiver' to produce the same results in relation to the one set of facts. In this context, the claimant's subjective appreciation of reasonable doubt as to the particular supposition and the concomitant risk-in-fact would lead to the conclusions that in proceeding with the enrichment, the claimant: (a) was too uncertain to be mistaken; and (b) had waived inquiry as to that matter.

CHAPTER 4

CAUSATIVE IGNORANCE

4.1 What is it?

The facts in *Pitt v Holt*[281] were summarised above in Chapter 2. In that case, the claimant set up discretionary trusts of income and capital in the belief that the trust structure involved no adverse tax implications. Neither the claimant nor any of her professional advisers had specifically turned their minds to the question of inheritance tax, which in reality applied to impose significant tax liabilities. Had the claimant known or been advised of the inheritance tax implications, it 'would have been easy to create the settlement in a way which did not have these tax consequences',[282] 'it would most probably have made no difference to the distribution of capital or income during [the beneficiary's] lifetime'[283] and there is little doubt that she would have done so.[284]

This is not a case of causative ignorance, or what *Goff & Jones* refers to as a true case of 'mere causative ignorance'.[285] This, the authors correctly describe as 'where the claimant made neither an active nor a tacit mistake and simply acted in a state of mere

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[281] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26, [2013] 2 AC 108; on appeal from *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197, [2012] Ch 132.

[282] *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [10], [2012] Ch 132, 147.

[283] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [134], [2013] 2 AC 108, 160.

[284] See *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [134], [2013] 2 AC 108, 160.

[285] Or what was referred to in W Seah, 'Mispredictions, Mistakes and the Law of Unjust Enrichment' [2007] Restitution Law Review 93, 99 as 'but for ignorance'.

causative ignorance. He would not have acted as he did had he known of some fact of which he was ignorant; but when he acted, he held no belief or assumption about that fact, conscious or tacit.'[286] Strictly, *Pitt v Holt* is not a case of the kind with which we are concerned here – that is, of causative ignorance – because there was an explicit (or 'active') mistaken belief, or a tacit mistaken belief, or both.[287] *Pitt v Holt* is more like *David Securities*,[288] in that ignorance of some matter of fact or law led to a mistake because that ignorance rendered a belief incorrect. In *Pitt v Holt*, ignorance of the inheritance tax implications led the settlor mistakenly to believe that there were generally no adverse tax consequences (including no adverse inheritance tax implications) to the proposed settlement structure.[289] As much as the claimant and her advisers were ignorant of some material matter, they were also mistaken. Lord Walker, giving the judgment of the Supreme Court, was therefore correct to treat it as a case resting on mistake rather than causative ignorance.

The type of case with which we are concerned here is where the ignorance neither leads to nor forms part of nor is the subject of a mistake, but which is nevertheless 'causal' in the sense that had the claimant been aware of the matter of which he was actually ignorant, he would not have conferred the enrichment that he did. An example is where a person donates money to a local community group for the reason that the group is the only organisation lobbying for the commercial redevelopment of a long-unused light industrial

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[286] *Goff & Jones*, para [9-37].

[287] See the discussion in Chapter 2.1B and C.

[288] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. In this case, the claimant company's ignorance of the voiding effect of certain taxation legislation led it mistakenly to believe that the money paid was due under a legal obligation or alternatively that the recipient was legally entitled to payment. So, ignorance of a fact rendered incorrect a belief to which the fact was material.

[289] It was crucial for the claimant that she was found to be mistaken rather than merely ignorant. For Lord Walker, who gave the lead judgment (with whom the rest of the court agreed) in *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26, [2013] 2 AC 108: 'mere ignorance, even if causative, is insufficient' (at paragraph 108).

zone nearby, which he supports – but not realising that the group also actively supports the amendment of a flight path servicing Heathrow Airport, which would place aircraft on take-off and landing approaches directly over his house.[290] Had the donor known of the recipient group's active support for the flight path amendment, he would not have made the donation that he did. Is the donor here mistaken? Should he recover in unjust enrichment? It will be noted that while the claimant would have acted differently had he known the truth, he was satisfied to act – and did act – on the basis of the truth of matters which were completely true. There was no belief which was falsified by reality, and the matters which the claimant determined were important to him in the conferral of the enrichment were all in existence. As explained in the following sections, these are important points, as they explain why causative ignorance has no role to play in the law on mistaken enrichments and also why causative ignorance should not be an unjust factor independent of mistake.

4.2 No mistaken belief

In Chapter 2, it was resolved that a claimant who is ignorant of some matter is not necessarily mistaken in relation to it. The same relationship is true even where the respective states of mind are causative of the enrichment in the 'but for' sense – that is to say, a claimant who would not have conferred the enrichment had he known the truth of the matter about which he was ignorant is not necessarily a claimant who has conferred an enrichment caused by mistake. If the law of unjust enrichment seeks to identify situations in which the claimant has conferred an enrichment caused by mistake, then it should not

[290] Adapted from the example referred to in A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 215 (footnote 73).

ask whether the claimant would have conferred the enrichment that he did had he known the truth of the matter. That is the wrong question.

Say a person is invited to the wedding of a female acquaintance. He knows nothing of the groom and the invitation states that guests need not bring wedding gifts, but instead names a charity to which guests may choose to make a donation if they wish. Let us look at two scenarios:

(a) In the first scenario, the guest is well acquainted with the bride. Indeed, the bride is a fairly close friend and the guest has spent a considerable amount of time in social situations with her. As a result of his close acquaintance with the bride, he forms a belief that the groom would be (as the bride would have chosen a groom that was), like the bride, a fellow police officer and law-abiding citizen. He decides to bring two gifts to the wedding. The first gift is a miniature of Édouard Detaille's *Le Rêve*, which he decides to give because he knows that it is a favourite painting of the bride. He also brings a small gift of money as a token 'to help the couple along'.

(b) In the second scenario, the invited guest is not particularly well acquainted with the bride, but he had heard someone mention that she liked *Le Rêve* and so he decides, notwithstanding the invitation, to bring along two gifts – a miniature of the painting, and a small gift of money as a token 'to help the couple along'. He holds no particular beliefs about what kind of man the groom is or any other particular belief about the groom generally.

After the wedding, the guest discovers that the husband is not a police officer and is instead awaiting sentence for the most recent of a string of criminal convictions. He seeks to recover the token gift of money. He decides that he does not want to seek recovery of the miniature painting. In both scenarios, the claimant would not have conferred the gift of

money had he known what he later discovered. To determine whether an enrichment is unjust on the basis of whether the claimant would have conferred the enrichment had he been aware of some particular matter of fact or law is to use a 'but for ignorance' or 'causal ignorance' test. The problem with such a test is that in situations such as these, restitution *prima facie* would be available in two very different scenarios: one where the claimant believes the groom to be a police officer and law-abiding citizen and another where the claimant has formulated no relevant belief about the husband-to-be. Yet only in the former scenario is the guest mistaken.

It can be seen from this that the use of a 'but for ignorance' test does not distinguish between the actual beliefs (whether explicit or tacit) of the first scenario and the absence of any relevant particular belief in the second scenario. This is because the test is not a test of what a person believed – it does not ask whether the claimant held any belief in relation to the matter which is subsequently discovered to be in existence. Instead, it assumes in its counterfactual the claimant's knowledge of the matter of which the claimant was actually ignorant, and tests whether the claimant would have changed his mind about the decision to confer the enrichment in such assumed circumstances. In other words, it identifies whether the claimant would have acted differently had he been better informed. But because the test does not involve an inquiry into what the claimant believed – there is, in particular, no inquiry as to whether the claimant held a belief which was contradicted by the reality of which he was ignorant – it cannot be used to test for the presence of a mistake, nor of a causal mistake. As such, asking whether the claimant would have conferred the enrichment that he did 'had he known the truth' of the matter has no place in an action to recover an enrichment claimed to have been transferred *by mistake*. The appropriate formulation in mistake cases is first to ask whether there was a mistake (ie, whether the claimant held a belief about the state of the world which differed from the

actual state of the world at the time of its holding) and then to ask whether the claimant would have conferred the enrichment that he did had he not made the mistake – that is, had he been better informed *and* known the truth of the matter about which he was mistaken. This formulation ensures that the *prima facie* right to recovery[291] arises because of a causal mistake and properly distinguishes between donors and other claimants who are genuinely mistaken on the one hand and, on the other, donors and other claimants who have regretted the enrichment having discovered something of which they were previously unaware.

There are examples of academic and judicial misgivings about the ease with which the law is able to identify the line between instances of operative mistake and causative ignorance. For example, in *Goff & Jones*, it is argued that:[292]

> denying relief for mere causative ignorance produces a boundary line which may be difficult to draw in practice, and which is susceptible to judicial manipulation, according to whether it is felt that relief should be afforded – with the courts finding or declining to find incorrect conscious beliefs or tacit assumptions according to the court's perception of the merits of the claim.

That was a position with which Lord Walker partly agreed in *Pitt v Holt*:[293]

> For present purposes a mistake must be distinguished from mere ignorance or inadvertence, and also from what scholars in the field of unjust enrichment refer to as misprediction … These distinctions are reasonably clear in a general sort of way, but they tend to get blurred when it comes to facts of particular cases. The editors of *Goff & Jones, The Law of Unjust Enrichment*, 8th ed (2011), para 9-11 comment that the distinction between mistake and misprediction can lead to "some uncomfortably fine distinctions", and the same is true of the distinction between mistake and ignorance.

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[291] Leaving aside, in this context, additional requirements which may be added in particular contexts. See Chapter 5 on gifts and other voluntary dispositions.

[292] *Goff & Jones*, para [9-41], referring to the different readings of the facts at first instance and in the Court of Appeal in *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] 1 WLR 1199, [2011] EWCA Civ 197, [2011] 3 WLR 19.

[293] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [104], [2013] 2 AC 108, 149-150. See also para [108], 160.

Lord Walker thought the term 'manipulation' to be 'a bit harsh'.[294] He went on to say that:[295]

> The fact that a unilateral mistake is sufficient means that the court may have to make findings as to the state of mind, at some time in the past, of a claimant with a lively personal interest in establishing that there was a serious causative mistake. This will often be a difficult task. But as a criticism of the Court of Appeal in *Pitt v Holt* I would reject it. The case was heard on affidavit evidence, without cross-examination, and the Court of Appeal was in as good a position as the deputy judge to draw inferences and make findings of fact.

The common feature in each of the passages quoted above is the suggestion that the difficulty in distinguishing between mistake and mere causative ignorance is more practical (or evidential) than theoretical. Still, Lord Walker (in contrast to *Goff & Jones*) ultimately regarded the distinction as one which should be made. From the theoretical perspective, it does not appear to be particularly troublesome to draw the line between mistake and 'mere ignorance'. As discussed, a mistake goes to the incorrectness of a belief whereas ignorance requires no finding of a belief. Therefore, if the causally relevant fact is the subject of a belief, then it may be a mistake. If the causally relevant fact is not the subject of a belief, then the claimant is merely ignorant. The line is drawn at the point of existence of the belief. In that respect, an analytically clear line separates enrichments for which there is a relevant belief about the subject matter, whether consciously held or tacitly held, from enrichments for which there is none.[296]

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[294] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [127], [2013] 2 AC 108, 158.

[295] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [127], [2013] 2 AC 108, 158.

[296] See Chapter 2.1B.

4.3 Should causative ignorance be an unjust factor? Impairment and deficiency

It is a separate question whether claimants such as the wedding guest in the second scenario – that is, claimants who have not laboured under any mistaken belief, but who nevertheless could establish causative ignorance – ought to be given restitution. Krebs thinks that they should:

> had the transferor been in possession of all the relevant facts, would he have made the transfer? If not, he clearly did not really mean the transferee to have the benefit. His consent to the transfer, and thereby the basis of the transfer, is vitiated. Restitution is justified.[297]

The same conclusion is reached in *Goff & Jones*, which takes the view that, on balance, causative ignorance ought to be recognised as a ground for restitution.[298] In *Pitt v Holt*, Lord Walker (with whom the other Justices agreed) thought otherwise:[299]

> It may indeed be difficult to draw the line between mere causative ignorance and a mistaken conscious belief or a mistaken tacit assumption. I would hold that mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.

While the step from causative ignorance to 'I didn't mean him to have it' appears to be a minor one, causative ignorance – at least if it is easily to sit alongside all the other intent-based unjust factors – should signify that the claimant's intention has been in some relevant manner absent or impaired, or has otherwise experienced a deficiency. One can readily understand the assertion by the causatively ignorant claimant that his intention was impaired or otherwise deficient because he did not have access to material information (material, because it would have caused him to change his mind about conferring the

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[297] T Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish 2001) 37.

[298] *Goff & Jones*, paras [9-37]-[9-42].

[299] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [108], [2013] 2 AC 108, 151.

enrichment on the terms that he did) at the time he made his decision to confer the enrichment.

By this we cannot mean that the claimant, armed with better information, regrets the decision made and wishes to have made a different decision. Most unjust enrichment scholars would readily agree that English law does not, and should not, allow restitutionary liability merely on the basis of the claimant's change of mind about the enrichment (or regret about a poorly exercised judgement, or one too quickly made), even in circumstances where restitution would cause no loss to the recipient. That is not a good enough reason for restitution. What the claimant needs to show is that something has happened in relation to his decision to confer the enrichment prior to or in the conferral of the enrichment, which made that conferral an 'unjust' one. There must be something about the decision-making process leading to the enrichment or about the quality or character of his intention, as discussed in Chapter 1. The claim therefore must be based essentially on the proposition that in the making of his decision to confer the enrichment, it was normatively significant that he lacked materially relevant, causative information, albeit not amounting to a mistake or another already recognised unjust factor.

However, in a world in which no person reasonably can expect access at all times to perfect and complete information, should an absence of information count? The law accepts that an enrichment is unjust when made on the basis of *incorrect* information – that is, a mistake. Should the same treatment be accorded to information which is *incomplete*? In this context, 'impairment' and 'deficiency' are difficult concepts to apply. On the one hand, it can be reasoned that a person operating without all the material information is impaired by such material omission, or that the intention to confer is deficient because the material from which that intention was generated was also deficient (in the material omission). On the other hand, no one expects to have access to all information in existence

directly or indirectly material to a decision prior to making that decision – and decisions to transfer resources are made every day without any expectation that they should be reversible upon the discovery that the corpus of information used by the decision-maker was merely *incomplete*. That in one sense is just a description of what flows from the present state of the substantive law, but it also suggests that the omission of information does not so obviously indicate impairment or deficiency of the kind which the law has recognised in the family of intent-based reasons for restitution. The equivocation in looking at causative ignorance from the perspectives of impairment and deficiency is lessened when we turn, as we now will, to the perspective of autonomy.

4.4 Should causative ignorance be an unjust factor? Quantity, quality and autonomy

On the normative account of Part I, the specific ways in which an individual's intention has thus far been recognised as vitiated are analysed as instances of individuals not having had an acceptable degree of autonomy over the terms on which their resources are disposed. So, mistaken claimants recover because, assuming the other requirements of the cause of action are satisfied, the enrichment was intended on the basis of a belief which was not true. For individuals who have transferred an enrichment under duress, we might say that the transfer was not autonomous because the decision to do so was overly forced. For individuals who have transferred the enrichment on conditions which fail to materialise or subsist, we might say that the transfer did not reflect the claimant's autonomy because the recipient's enrichment was approved on the specified basis of a set of circumstances X, whereas the reality was that the recipient was enriched on the basis of the set of circumstances not-X. And so on. In each case, the claimant's 'autonomy of disposition' is impeached by the presence of some unjust factor which resulted in a transfer to the

recipient of an enrichment which did not reflect the individual's freedom to choose the circumstances of that enrichment.

Of course it must follow that if the intent-based unjust factors are manifestations of a more general proposition based on individual autonomy, a particular transaction which does not neatly fit into the established categories of unjust factors is nevertheless equally unjust if by reference to the normative principle it is still possible to show that the claimant's autonomy of disposition was impeached. What then of causative ignorance: can it be said that the claimant's autonomy over the terms on which the enrichment is to be effected and the recipient enriched has been undermined?

There are three key aspects to the answer. The first is that raised above, of incomplete information rather than imperfect information; or alternatively, quantity rather than quality. While it is right that imperfect or 'bad' information interferes with the exercise of autonomy, and that incomplete information can result in decisions being made on the basis of imperfect information, what is here under consideration is incompleteness itself, without any consequential imperfection. The information on which the claimant acts is only incomplete. 'Incomplete' in this context does not mean that the claimant believed that he had all (or a certain quantity of) the information about a particular subject matter (and makes a decision on that basis) whereas in reality he did not; but rather, and much more broadly, 'incomplete' means that the claimant's decision about the transfer (whether to confer it, and on what terms) would have been different if he had *more information* about that or any other subject matter. However, it is not clear whether incomplete information itself should be seen as undermining a decision-maker's autonomy when the claimed *quantity* of information not available to the decision-making process did not affect the *quality* of information which was. Individuals make decisions all the time on the basis of incomplete information, on the basis that they do not have omniscient knowledge, and

that if they stayed their hand and made additional inquiries they may discover more information which they would consider relevant to their decision. The missing information may be important, and material, in that its presence in the mind of the decision-maker would have caused him to make a different decision, including perhaps a decision not to confer any enrichment at all. Yet the absence of that information does not corrupt what information the individual used in order to make the decision that he did. The information on which the decision was based *was and remains correct*.

Still, even accepting that individuals cannot expect to have all the relevant information when they come to make decisions about what to do with their resources, it is likewise true that individuals cannot always expect to be completely free of mistakes when making decisions – people acknowledge the possibility of occasionally being mistaken when making decisions in the same way as they may be ignorant of some material fact – and yet the law takes the view that recovery on the basis of mistake ought to be given when it occurs.

But ignorance is different from mistake, and this is the second key aspect, because there is a clear and satisfactory analytical basis on which to regard the mistake as undermining the claimant's ability to decide for himself what terms should apply to the transfer. In contrast, in the absence of error, and the acceptance that individuals cannot insist on 'knowing everything', it is a difficult task to identify what is unjust about a transfer in ignorance – why the concern for autonomy requires that the claimant ought to be treated as if impressed with specific awareness of some piece of information when it did not form any active or tacit basis for his decision and was not present in his decision-making process. That, with the benefit of more information, the claimant would have decided differently – that the ignorance was causative – is not enough. Causation is a necessary element but the real work in establishing the injustice is done by the mistake or

other impairment.[300] And ignorance is simply not analytically satisfactory as an impairment or other derogation of autonomy because it is so inherent in human decision-making that reversing 'ignorant' transfers would go beyond the standard of autonomy it would reasonably be expected for the law to protect.[301] Like mistake, 'mere ignorance' can have a real, causative impact on the decision, but very much unlike mistake (and the other examples of vitiated intent), it does not introduce or create error or any other disturbance into either the matters on which the claimant based his decision to transfer the enrichment, or into his reasoning process.[302] More fundamentally, it is questionable whether a state of 'ignorance' can be fully remedied at all. For example, in cases of mistake, the matters of fact or law on which the decision is based are limited and finite. Such beliefs could be listed. Because of this, it would be possible to say whether or not

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[300] We cannot accept that something is unjust just because it is causative of course. Causation just shows that something was relevant, not that it was unjust. It is a necessary part of the cause of action as the unjust factor needs to be causally relevant – otherwise the unjust factor would have no impact on the transfer – but the point is that causal relevance of an event or condition is not sufficient to show its unjustness. The event or condition itself must be unjust.

[301] It might be asked quite legitimately why the mistaken claimant ought to have his enrichment considered 'unjust' when he is open to a similar challenge: when human information and decision-making is imperfect, and when individuals can be expected to make mistakes from time to time, why therefore should claimants be able to reverse mistaken transfers and treated as if they acted with 'correct' information at all relevant times. The difference – as is explained later in this chapter – is that while it would be unreasonable (in relation to a given enrichment) to expect to know all information which would (or, information which by itself would not, but with and in the context of other unknown information would) cause an individual to think differently about a transfer and its terms, and therefore also unreasonable to expect the law to procure this result, it would on the other hand be reasonable to expect that the finite list of bases on which the enrichment was conferred was free of causative mistake, and therefore also reasonable to expect the law to procure this result. Thus a system of law quite conceivably might entertain complaints about the presence of a material mistake while at the same time being less responsive to complaints about acting without the benefit of full material information. 'Reasonable' in this context is meant to coordinate with the discussion in Chapter 1 as to 'a standard of individual (decision-making) autonomy which is reasonable in the context of its protection as a normative goal of the substantive law within the society in which that law operates'. See footnote 33. So if it is correct for a given society that it is (i) reasonable to expect enrichments to be freed from the problems of mistaken beliefs (because it is reasonable to fix mistakes), and (ii) unreasonable to expect enrichments to be freed from the problems of personal ignorance (because it is unreasonable to fix ignorance not amounting to mistake), then one would expect the substantive law to reflect a normative standard in which (iii) a mistake is considered as rendering persons non-autonomous and (iv) mere ignorance not amounting to mistake is considered as not rendering persons non-autonomous.

[302] It is a different thing to say that the claimant believed that there was no other material information in existence that would have caused him to think differently about the transfer. If it could be established that the claimant held that belief, then it is a matter for the law on mistake, but a recognition that the claimant had some doubt as to whether he knew all that was material to his decision might lead to the conclusion that no restitution should follow. That would be the same result as a claim on the basis of causative ignorance, but the same conclusion is reached for different reasons. On uncertainty and doubt, see Chapter 3. See also footnote 307.

the enrichment would have been made but for mistake (the mistake pleaded, and any other mistake). In other words, it would reasonably be possible to determine what mistakes were made, what the result of those mistakes were in relation to the enrichment, and therefore to 'cure the enrichment of mistake'.[303]

On the other hand, while it is possible to determine what the claimant would have done with the benefit of information about some material subject matter of which the claimant has discovered he was ignorant, it would not be possible to 'cure the enrichment of ignorance'. For a complaint which is based on lacking some piece of relevant, material information, it cannot be determined what other 'unknown unknowns' exist in the world which would have had a material effect on the decision to enrich and the terms of the enrichment, including situations where the claimant lacked the benefit of *even more* relevant information about the subject matter of which he was ignorant and on which the claim is based. In our example of the wedding guest, the decision to seek restitution of the money on discovery of the 'truth about the groom's character' might itself have been reversed (or a different enrichment made) if, say, the guest had known that the convictions had been secured by evidence given by allegedly corrupt individuals. But matters of causative ignorance need not relate so closely to the subject or purpose of the enrichment, and have little to do with the enrichment other than that the claimant would not have made the transfer which he did had he been aware of the unknown matter. So, for example, the claimant might have been ignorant of the existence of a certain charity or individual who he believes would have made a more deserving recipient of the money. The ignorance might have to do with the extent of his wife's latest credit card bill. It might have to do with the planning or implementation of a new taxation system which would adversely

[303] Compare the situation with enrichments affected by duress, undue influence, personal disadvantage and so on.

affect his finances if and when implemented, the rejection of his son's car accident insurance claim, his daughter's decision to expand her collection of vintage guitars, changes to the interest rate for long-term deposits at his local bank, a recent port vintage declaration, and so on.[304]

The practical inability fully to cure a claimant of causative ignorance derives from the point that, unlike causative mistakes which are by nature more limited in number and which can more or less be fixed with the provision of a particular correction (ie, the 'correct information'), the ignorant claimant's complaint is only corrected to the extent of the additional information thus far discovered, and remains generally subject to the further discovery of more unknown but material information about the initial subject matter of the claim or any other possibly causative piece of information. The limited scope of a claimant's discernible corpus of mistakes is thus in contrast with the relative indiscernibility of his material unknowns, making it extremely difficult if not effectively impossible to determine whether a transfer has been altogether eliminated of 'ignorance', and therefore whether the transfer could ever be said to be free of it.[305] Practically speaking, this is not an issue in resolving a claim based on causative ignorance, as claims can be determined on the limited basis of what the claimant would have done with the benefit of the omitted information discovered and so pleaded. But the inability to render

[304] It is one thing to say that individuals should have a *prima facie* right of recovery of mistaken transfers – that they ought to have a *prima facie* right to relief because the set of beliefs on which their action was based departs from the current state of knowledge. It is another thing to say that people should have the same *prima facie* right to relief because they acted without the benefit of having the entire corpus of knowledge about matters relevant to whether or not the enrichment should be made in the manner which it was, including matters on which the claimant placed no reliance in deciding to confer the enrichment that he did.

[305] If causative ignorance is accepted as an unjust factor and a departure from the standard of autonomy which ought to be cured, this would imply that the acceptable and expected degree of autonomy (in this context) is one in which individuals have knowledge of all material information known and unknown (whether or not one also takes the view that having knowledge of all existing matters of fact and law is required in order to assess the materiality of any piece of information). Only decisions by individuals having such a degree of knowledge could be regarded as safe from the 'unjustness' of causative ignorance. In contrast, the degree of knowledge which individuals should have in order to meet the acceptable standard of autonomy which is implied by recognising restitution for mistake is one of having access to a much narrower scope of knowledge: that the facts and law on which they relied as true in making the enrichment are in accordance with the current state of knowledge (ie, are free from error).

an enrichment free and clear of 'ignorance' suggests a level or degree of inherency in decision-making which makes it an analytically unsatisfactory basis on which to treat claimants experiencing it as suffering from a normatively unacceptable departure from the standard of human decision-making expected to be protected by law.

The third aspect is that 'autonomy over the terms of disposition' means allowing individuals the freedom to decide what is required to be in place – what is required to obtain their satisfaction to proceed with the transfer – before they give the green light on the enrichment. Once the transferor is able so to decide, then provided the actual enrichment reflects his decision, the normative concern in autonomy is met. So it is difficult to see why the wedding guest in the second scenario should be regarded as having acted non-autonomously, or that the consequential enrichment was unjust, when he decided, prior to and up to the point of transfer, despite knowing nothing of the qualities or character of the groom, that he was satisfied that the necessary terms and conditions were in place for him to go ahead and transfer the enrichment that he did. He might later say that had he known about the convictions, he would not have conferred the same enrichment, or that had he thought about what was important to him, then he may have acted differently before conferring the enrichment. But, as a matter of reality, his decision-making autonomy – that is, his ability to decide what terms and conditions were required – at the time of the enrichment depended neither on the reality nor his view of the subject matter of which he was ignorant. In other words, his ignorance had no impact on his autonomy of disposition as it did not make him any more or less *able to decide for himself* what terms and conditions were needed to be in place before he was happy for the enrichment to occur.

Put together, these three aspects concerning causative ignorance[306] mean that the enrichment caused by 'mere ignorance' should not be considered unjust. While it is true that the claimant would have decided differently had he known more, it is also true that the claimant decided for himself that he was satisfied for the enrichment to occur on the basis of a particular set of facts and other circumstances. That is what then happened. Or put another way, the claimant got exactly what he had decided as the satisfactory set of facts, circumstances and other terms for the enrichment to have his blessing. The fact that the claimant did not stay his hand and seek more information before making his decision to enrich does not mean that the claimant was non-autonomous in making the transfer or lost autonomy over being able to determine its terms. Likewise, the fact that he did not have the complete set of material information did not make him non-autonomous. The last two propositions are related to a more general proposition that no person reasonably can expect the law to procure that their decisions are effected on the basis of having access to such a degree of decision-relevant information (ie, all of it). An 'unjust factor' should sensibly distinguish enrichments which have in the particular way exhibited a sufficient departure from the degree or standard of decision-making autonomy to be protected by law, from enrichments which fall within the acceptable boundaries of human decision-making. For these reasons, it is submitted that the better view – on the normative basis discussed in Part I – is that there is nothing unjust about a transfer effected by causative ignorance.[307]

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[306] Ie, ordered third then first then second, that (i) such claimants are able freely to decide what terms should apply to the transfer, (ii) get exactly those terms, and (iii) a claim based on ignorance is analytically unsatisfactory, implying a standard of autonomy beyond which it would be reasonable for the law to protect.

[307] There is an analytical overlap between causative mistake and causative ignorance where the claimant believes that, in conferring the enrichment, there was *no other material information* bearing upon the decision to enrich. The existence of such material information (about which the claimant did not know and the discovery of which would have caused him not to confer the enrichment that he did) would make him both causatively ignorant, and mistaken. While, on the account given in this thesis, such cases are not recoverable on the ground of causative ignorance, they would *prima facie* be recoverable on the ground of mistake – provided that the claimant could establish that he believed (consciously or tacitly) that he had all the information material to his decision to enrich. It is likely that in the vast majority of cases, such claimants would not be able to establish such a belief, and that any analytical overlap is only theoretical. Most transferees are likely to expect that they could not possibly know all the information in the world which materially would bear (either alone or with other information) on their decision-making process –

From this, it can be concluded that, from the perspective of autonomy, there is no particular magic in the information available to the claimant being greater or lesser in quantum or indeed in the omission of information which is relevant and causative, since the question fundamentally is whether the claimant made the decision to enrich autonomously and whether the transfer which followed reflected that autonomous decision. Once we accept that individuals ought not to expect to be able to make decisions having any particular quantum of knowledge, it should make no difference how much information a person actually has – in other words, once we accept that there should be no cause for complaint from having less than 100% knowledge, there is no difference between having 99%, 50% or even 10% of the available information. Quantum is only significant when it (or the lack of it) is antecedent to some relevant, qualitative effect on the standard of autonomy to be protected in individual decision-making, as where it results in the claimant's decision being made on a mistaken basis. Another example may be where the information is so substantially meagre that it puts the claimant at an extreme personal or transactional disadvantage. Conversely, the omission of relevant information from the claimant's decision-making process does not necessarily undermine autonomy if, cognisant of his lack of relevant information, he decides to dispense with further inquiries, or if he otherwise decides that what information he does have satisfies him enough to proceed with the enrichment. In those cases, the mere lack of information not amounting to mistake or another recognised form of impairment, even if material and even if its possession by the claimant would undoubtedly have caused him to have acted differently, has not deprived the claimant of his ability to decide what terms and conditions were to be

especially in relation to material facts which have nothing to do with the purpose, subject matter or recipient of the enrichment.

in place for the enrichment to have his approval. Lord Walker was right to reject causative ignorance as an unjust factor.

CHAPTER 5

GIFTS AND OTHER VOLUNTARY TRANSACTIONS AFFECTED BY MISTAKE

Under the established common law, where the claimant has conferred an enrichment by mistake, recovery by way of restitution for unjust enrichment is generally determined under the statements of principle made in *Barclays Bank v Simms* and the line of authorities which has since followed that decision. On the question of 'unjust', it is enough that there was a relevant mistake which was causative. Following the removal of the supposed liability requirement, the question is whether the same causative mistake approach should be taken in the equitable jurisdiction, in which cases involving gifts and other voluntary dispositions[308] have traditionally been decided.[309] That is, should special rules apply in relation to mistaken gift transfers or should there be only the need for the claimant to show but for mistake before the *prima facie* right to restitution arises? Certainly, Robert Goff J's formulation in *Barclays Bank v Simms* is expressed widely enough to cover gifts of money.[310]

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[308] For the purposes of this thesis, gifts are considered to be a subset of voluntary dispositions and those terms will be used interchangeably unless the context otherwise requires.

[309] Primarily because the common law for a long time required, until its removal in *Barclays Bank v Simms*, that the mistake be as to a supposed liability, and also because significant gifts and other voluntary dispositions had been effected by way of formal instruments, the rescission and rectification of which lay in equity rather than at law.

[310] While it was not a case in which the equitable jurisdiction was in consideration, it is noteworthy that in his judgment, Robert Goff J gave examples of voluntary transactions which were recoverable on his approach to causative mistake. See *Barclays Bank v Simms* [1980] QB 677, 696-697.

5.1 The position in authority

The position in equity has for over two decades been influenced by the judgment of Millett J in *Gibbon v Mitchell*,[311] in which a voluntary transaction (a deed of surrender) was set aside on the basis that the claimant, while knowing the nature of the legal transaction into which he was entering, made a mistake as to its legal effect:[312]

> In my judgment, these cases show that, wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it. The proposition that equity will never relieve against mistakes of law is clearly too widely stated: see *Stone v Godfrey* (1854) 5 De GM & G 76, and *Whiteside v Whiteside* [1950] Ch 65, 74.

It was material that the mistake was as to the effect of the transaction rather than as to some consequence of it:[313]

> Mr Gibbon did not merely execute the deed under a mistake of law as to the legal consequences of his doing so. He executed it under a mistake as to its legal effect. The deed itself shows that to be the case. Since its effect was not that which he intended, he is entitled to have it set aside. Equity acts on the conscience. The parties whose interest it would be to oppose the setting aside of the deed are the unborn future children of Mr Gibbon and the objects of discretionary trust to arise on forfeiture, that is to say his grandchildren, nephews and nieces. They are all volunteers. In my judgment they could not conscionably insist upon their legal rights under the deed once they had become aware of the circumstances in which they had acquired them.

That equity required the mistake to be as to the 'effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it' was not the first time which equity imposed a limitation on the type of mistake which would justify

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311 [1990] 1 WLR 1304, [1990] 3 All ER 338.

312 *Gibbon v Mitchell* [1990] 1 WLR 1304, 1309, [1990] 3 All ER 338, 343.

313 *Gibbon v Mitchell* [1990] 1 WLR 1304, 1310, [1990] 3 All ER 338, 343.

relief. Over 90 years previously, Lindley LJ, giving the judgment of the Court of Appeal in *Ogilvie v Littleboy*,[314] required that the mistake, if spontaneous, had to be a 'serious' one:[315]

> Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor.
>
> … In the absence of … circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.

Ogilvie v Littleboy was not cited by Millett J in *Gibbon v Mitchell*, but the two requirements of a 'serious' mistake as to the 'effect of the transaction itself' were considered by Lloyd LJ to have continuing application to the equitable jurisdiction in *Sieff v Fox*,[316] albeit in *obiter*.[317]

More recent cases have suggested that, while the second restriction no longer applies, the first remains. In *Re Griffiths*,[318] the donor effected a transfer of shares,[319] with the intention that the disposition would create an inheritance tax-effective structure, or at least

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[314] *Ogilvie v Littleboy* (1897) 13 TLR 399; affirmed by the House of Lords in *Ogilvie v Allen* (1899) 15 TLR 294.

[315] *Ogilvie v Littleboy* (1897) 13 TLR 399, 400 (Lindley LJ).

[316] *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811, [2005] 3 All ER 693. See [2005] 3 All ER 693, 725.

[317] Compare Lord Scott, *obiter*, in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [87], [2007] 1 AC 558, 592: 'There are, I think, some problems about voluntary payments made as gifts but that would not have been made but for some causative mistake, whether of fact or law, eg a gift of £1,000 by A to B where B is believed by A to be impecunious but is in fact a person of substantial wealth and where A would not have made the gift if he had known that to be so. My present opinion is that unless there were some other reason, such as a misrepresentation by B, to enable the gift to be set aside, the mistake made by A would not suffice, notwithstanding that the payment had not been made pursuant to any legal obligation and that but for the mistake it would not have been made. But the availability of a restitutionary remedy to recover gifts which would not have been made but for some mistake of fact or of law does not need to be pursued on this appeal and can be left for another day.'

[318] *Ogden v Trustees of the RHS Griffiths 2003 Settlement, In re Griffiths, decd* [2008] EWHC 118 (Ch), [2009] Ch 162.

[319] The transfer of shares was one of three transactions effected. The first two could not be recovered on the basis of mistake. See the description in *Goff & Jones*, para [9-10].

one which would have resulted in certain inheritance tax benefits if he were to survive for at least seven years following the disposition, or to a lesser degree of benefit if he survived for at least three years following the disposition. The donor knew at the time of the disposition that he had rheumatoid arthritis, which reduced his life expectancy to around seven to nine years. He did not know that he also had an aggressive lung cancer which effectively rendered as remote any chance of survival to the seven and three-year thresholds.[320] As things turned out, the donor died within seven months of diagnosis.[321] He was held to have been mistaken as to his state of health when he effected the transfer of shares.[322] Having undertaken a review of authorities, including *Ogilvie v Littleboy*, *Gibbon v Mitchell* and *Sieff v Fox*, Lewison J concluded that relief in equity was properly based on a test of sufficient seriousness, irrespective of whether the mistake in question could be characterised as one as to the effect of the impugned transaction:[323]

> It is plain in my judgment that a mistake of fact is capable of bringing the equitable jurisdiction into play. All that is required is a mistake of a sufficiently serious nature. In my judgment a mistake about an existing or pre-existing fact if sufficiently serious is enough to bring the jurisdiction into play. If and to the extent that Millett J intended to restrict the scope of the equitable jurisdiction to a mistake about the effect of a transaction, I respectfully disagree.

In holding that the types of mistake which would justify relief in equity included mistakes other than as to the effect of the relevant transaction itself, Lewison J relied on *Lady Hood*

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[320] Lewison J found that at the time of the relevant disposition, 'following the onset of lung cancer at that time his life expectancy did not exceed three years': see *Ogden v Trustees of the RHS Griffiths 2003 Settlement, In re Griffiths, decd* [2008] EWHC 118 (Ch) para [18], [2009] Ch 162, 167.

[321] And around 14 months following the disposition. See the description of facts in [2008] EWHC 118 (Ch) para [4]-[18], [2009] Ch 162, 164-167.

[322] While the donor was held to have been mistaken as to the state of his health, the transfers were made to obtain an inheritance tax benefit, which would only accrue if he lived for three or more years from the date of the dispositions. See Chapter 6 on the co-incidence of mistake and misprediction and the discussion of this case in that context.

[323] *Ogden v Trustees of the RHS Griffiths 2003 Settlement, In re Griffiths, decd* [2008] EWHC 118 (Ch) para [25], [2009] Ch 162, 169.

of Avalon v Mackinnon,[324] in which equitable relief was given where there was no mistake about the effect of the transaction itself, but rather as to existing facts which were relevant to the transaction. For Lewison J, it was also necessary to show that the donor would not have conferred the enrichment that he did had he been aware of his mistake:[325]

> In a case where it is an individual disposing of his own property, it seems to me that the higher test applies. Thus the claimants must show that if Mr Griffiths had been aware of the true facts he would not have acted as he did. I should add that I do not consider that it is necessary for the claimants to show what Mr Griffiths would have done if he had not made the mistake. It is sufficient for them to show that he would not have done what he in fact did.

It is clear that Lewison J used a but for test for causation. That the mistake may be as to any *kind* of existing or pre-existing fact is also aligned with the position at common law. However, at common law, there is no general requirement that the mistake itself be 'of a sufficiently serious nature'.

The requirement that the mistake be a 'serious' one was confirmed by the Supreme Court in *Pitt v Holt*.[326] The facts of this case were summarised in Chapter 2, but one important point in this context was that the trust in that case was formally structured, creating discretionary trusts of income and capital for the benefit of the personal injury claimant, his wife, children and remoter issue during his lifetime, after which the whole fund was to be held on trust for his personal representatives for the benefit of his estate. It was settled with the belief that there were no adverse tax implications arising from the proposed structure, but the reality was that inheritance tax applied to the trust as it did to

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[324] [1909] 1 Ch 476. See Chapter 2.1A for a further discussion of this case.

[325] *Ogden v Trustees of the RHS Griffiths 2003 Settlement, In re Griffiths, decd* [2008] EWHC 118 (Ch) para [27], [2009] Ch 162, 170.

[326] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26, [2013] 2 AC 108; reversing *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197, [2012] Ch 132, on whether there had been a mistake sufficient to invoke the equitable jurisdiction to set aside the voluntary disposition.

any ordinary discretionary trust.[327] Had the settlor known or been advised of the inheritance tax issue, it 'would have been easy to create the settlement in a way which did not have these tax consequences.'[328] The settlor sought to have the trust set aside for mistake.[329]

In the Court of Appeal, Lloyd LJ conducted a comprehensive review of the authorities in the course of giving the lead judgment and ultimately formulated a test which drew from each of *Gibbon v Mitchell*, *Lady Hood of Avalon* and *Ogilvie v Littleboy*. Although he questioned the result in *Re Griffiths*, and noted that the judge did not have the benefit of full adversarial argument on the law, Lloyd LJ agreed with Lewison J's holding in *Re Griffiths* that a mistake as to an existing fact of sufficient seriousness was 'capable of bringing the jurisdiction into play.'[330] For Lloyd LJ, 'seriousness' was a necessary element.[331]

Were it not for certain observations made by Lloyd LJ, which are discussed below, it would have been easier to argue that while there is no specific requirement of seriousness at common law, the but for test of causation functions in the same manner, identifying the kind of mistakes which for the claimant are so serious, important, material, fundamental or crucial that the transaction would not have proceeded were it not for the mistake having been made. Thus, there would be a common core shared by the question asked at law ('Would the enrichment have happened but for the mistake?') and the requisite answer in

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[327] *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [9], [2012] Ch 132, 147.

[328] *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [10], [2012] Ch 132, 147.

[329] The claim in mistake was in addition to a claim based on the rule in *Re Hastings-Bass, decd* [1975] Ch 25, [1974] 2 WLR 904, [1974] 2 All ER 193.

[330] *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [206], [2012] Ch 132, 198.

[331] *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [210]-[211], [2012] Ch 132, 199.

equity ('No, the mistake was that serious.'). But it is not certain that this kind of reasoning would have generated an acceptable answer to the question of whether the mistake was 'sufficiently serious' even for Lewison J who did incorporate a requirement for but for causation. One can interpret Lewison J as imposing a super-added requirement that the mistake, whatever its relationship with the enrichment, was also of a 'type' capable of characterisation as 'sufficiently serious', as opposed to one which might be described as 'footling or idiosyncratic'.[332]

Still, that prior kind of reasoning is not without precedent. In *University of Canterbury v Attorney-General*,[333] the claimant made a gift of shares to enlarge a fund which the claimant believed to be insufficiently endowed to enable the continuance of its scholarship programme. As it turned out, it was the existence of restrictive conditions rather than the lack of funds which had prevented the grant of scholarships. Williamson J seemed open to the idea that causative mistake satisfied the requirement of seriousness in equity, or alternatively that causative mistake would suffice, saying:[334]

> In summary, I am of the view that the transfer of shares in this case was made under a fundamental or basic mistake of fact. Accordingly it would satisfy the test of Sir Wilfred Greene MR in the case of *Morgan v Ashcroft*. Certainly it meets the causative mistake test described in the above extract from Goff and Jones. Like so many other cases and situations, the conclusion depends upon an assessment of fact and degree in relation to the nature of the mistake. Words such as fundamental, basic, material, causative are descriptive of a mistake which is of such a nature and importance in the context of the transaction that it is just to order a recipient to return the property.

[332] A Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) para [3-12].

[333] *University of Canterbury v Attorney-General* [1995] NZLR 78.

[334] *University of Canterbury v Attorney-General* [1995] NZLR 78, 86.

The 'certain observations' of Lloyd LJ mentioned above were to a proposition in *Clarkson v Barclays Private Bank & Trust (Isle of Man) Ltd*,[335] that: 'By way of analogy with the approach of the courts to a common law claim in restitution, the best measure as to whether the mistake was so serious as to render it unjust for the volunteer donee to retain the moneys is if the payment would not have been made 'but for' the mistake. In other words, the mistake was the cause of the payment.'[336] To this, and other authorities in the Isle of Man and Jersey to which he referred,[337] Lloyd LJ opined that:[338]

> Not only does it seem to me that they give wholly inadequate effect to the gravity of the test posed by Lindley LJ, they also ignore the distinction drawn by Millett J between effect and consequences.

The existence of additional requirements beyond causative mistake was confirmed by the Supreme Court on appeal. This now provides the authoritative pronouncement on the setting aside of, and thus restitution under, voluntary dispositions on the ground of mistake. In his judgment (with which the rest of the Supreme Court agreed), Lord Walker 'provisionally concluded' that:[339]

> the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.

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335 *Clarkson v Barclays Private Bank & Trust (Isle of Man) Ltd* [2007] WTLR 1703.

336 *Clarkson v Barclays Private Bank & Trust (Isle of Man) Ltd* [2007] WTLR 1703, 1715 para [41] (Deemster Kerruish).

337 *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [208], [2012] Ch 132, 198, being *In re Betsam Trust; McBurney v McBurney* [2009] WTLR 1489 (Isle of Man) and *In re A Trust* [2009] JLR 447 (Jersey). See also *Goff & Jones*, para [9-103].

338 *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [209], [2012] Ch 132, 199.

339 *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [122], [2013] 2 AC 108, 156.

He went on to add that for the mistake to be of sufficient gravity, the leaving of the mistaken disposition uncorrected must generate injustice or unconscionableness, assessed objectively and on the facts of the particular case, 'including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.'[340]

So, consistent with the position at common law, it makes no difference if the mistake is as to fact or law, there is no need to distinguish between mistakes as to effects or consequences, and the carelessness of the claimant (not amounting to 'risk-running') or the unilateral nature of his mistake does not deny the claim.[341] However, beyond the requirements of the common law, it is necessary that the mistake be of sufficient gravity and be separately assessed as generating injustice. The result is that, at present, the position in equity is substantially different from the position at law, with recovery being more restrictive.

But an important question which *Pitt v Holt* did not address is to what extent such requirements are confined to equity. Was it intended that the same approach should be applicable to mistaken informal gifts of money at common law? On the face of it, the Supreme Court was concerned only with the equitable jurisdiction to set aside or rescind a voluntary disposition, and not with the law on restitution for mistaken enrichments generally. There was therefore no reference to the general principles of *Barclays Bank v Simms* and, in particular, no reference to Robert Goff J's examples of a mistaken voluntary

[340] See *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [124]-[126], [2013] 2 AC 108, 156-157. There are issues raised by the additional requirement of injustice in leaving the mistake uncorrected, but these do not concern us for present purposes.

[341] See *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [114]-[123], [2013] 2 AC 108, 153-156.

payment (by which he meant 'a payment made without legal obligation').[342] Two of these examples were as follows:[343]

> (1) A man, forgetting that he has already paid his subscription to the National Trust, pays it a second time. (2) A substantial charity uses a computer for the purpose of distributing small benefactions. The computer runs mad, and pays one beneficiary the same gift one hundred times over.

Arguably, the examples do not involve a 'pure bounty' effected via a conscious act of disposition – in the first example, the claimant makes the payment voluntarily and without obligation, but is at the same time motivated by the *quid pro quo* of subscription in return; and in the second (and other examples given in the same passage), the claimant is completely unaware of the additional, impugned transfers occurring and thus cannot in any relevant sense be said to have intended the very act of disposition. Therefore, there are important differences between the formal, structured, voluntary disposition in *Pitt v Holt* and the examples contemplated in *Barclays Bank v Simms*. However, the principles applying to the recovery of mistaken payments at common law are widely cast and are expressed widely enough to capture the kind of mistake made in *Pitt v Holt*. Reciprocally, the subject matter of 'voluntary dispositions' which concerned the Supreme Court is wide enough to catch the examples of payments 'made without legal obligation' given in *Barclays Bank v Simms* even though the claimant in them might have sought recovery at common law in an action for money had and received.

It would for these reasons have been beneficial if the Supreme Court had clarified the scope of the ostensibly equitable jurisdiction with which it had been concerned, and its relationship with the jurisdiction at law for causative mistake. As Watterson notes:[344]

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[342] *Barclays Bank v Simms* [1980] QB 677, 696.

[343] *Barclays Bank v Simms* [1980] QB 677, 697.

[344] S Watterson 'Reversing Mistaken Voluntary Dispositions' [2013] Cambridge Law Journal 501, 503.

> Gifts can vary enormously in form (they may be effected formally or informally) and in subject-matter. The paradigm involves a disposal of rights to an asset, either outright to a donee, or via a trust or settlement. However, a merely personal right to some benefit may be gifted by a deed (e.g. an annuity). And other, non-asset-based gifts are also conceivable (e.g. a parent who pays his son's debts, or paints his house). There are also two different ways in which the law might "reverse" a gift: (i) by rescission, involving *in specie* reversal or unwinding of the transaction, cancelling personal and proprietary rights conferred by it and bringing consequential relief; or (ii) by monetary reversal only, achieved via a personal restitutionary remedy against the donee.
>
> It remains unclear whether the equitable mistake jurisdiction encompasses all these configurations. In *Pitt* and many earlier cases, it was relied upon to achieve *in specie* rescission of formal, asset-based voluntary transactions. Unfortunately, the Supreme Court has failed to clarify whether these are jurisdictional limits. Important questions are therefore left unanswered. Does the jurisdiction extend more widely to encompass informal as well as formal gifts? And to gifts of any subject-matter? And does it allow a merely monetary reversal of a gift, via a personal restitutionary remedy?

Naturally, the Supreme Court was concerned to give proper effect to the history of equitable authorities dealing with voluntary dispositions into trusts. The common law had had little to say for as long as it required mistaken dispositions to be in aid of a supposed liability. When that requirement was removed in *Barclays Bank v Simms,* the examples of voluntary dispositions given in that case and to which the new causative approach could henceforth be applied did not involve the disposition of assets consciously and in order to confer a bounty on another, or the voluntary disposition into trust of the kind which were the subject of the line of equity cases concerning the Supreme Court.[345] It was therefore not surprising that the Supreme Court did not think it necessary to resolve possibly competing lines of authority.

5.2 Normativity

Whatever the scope of *Pitt v Holt* – and the most straightforward interpretation is that it leaves differences between the equitable and common law approaches to restitution for

[345] *Gibbon v Mitchell*, *Ogilvie v Littleboy* and *Lady Hood of Avalon* were not cited in *Barclays Bank v Simms*.

mistaken gifts – the normative question which needs to be resolved is as follows: what *should* the law be on the restitution of mistaken gifts and other types of mistaken voluntary dispositions?

Watterson notes that there is 'manifestly some desire to restrict the reversal of mistaken gifts.'[346] In his review of restitution for executed *inter vivos* gifts made pursuant to mistake, Tang argued that, somewhat like contracts, a completed gift ought to be protected from 'an overzealous application of the law of restitution'[347] and as such there ought to be a more restrictive approach to restitution for mistaken gifts (than for other mistaken payments) by allowing restitution only where there was a 'failure of basis' or, in its absence, a 'serious mistake which goes to the root of the gift'.[348] His reasons for concluding that the causal mistake approach was inappropriate for mistaken gifts were:[349]

> First, the authorities both in law and in equity do not support this proposition. Second, gifts are unravelled too easily under this model because they are wrongly perceived to be insignificant and unimportant. Third, the assumption that it is possible to identify *the* causative factor in the context of gift-giving is incorrect. While causal mistakes may be identified with regard to mistaken payments in a commercial context, the reasons behind most gift-giving is often much more nebulous and elusive. Most gifts are motivated by a multitude of reasons, making it impossible to identify the causative factor that inspired the gift. Fourth, the causal mistake approach is justified on a narrow conception of autonomy, which concentrates solely on the subjective intent of the donor. This model of autonomy is deficient because it pays inadequate attention to the competing autonomy of the donee and the importance of relationships. In doing so, it allows the donor to infringe unfairly on the donee's autonomy by conferring on the donor an indirect power (the restitutionary right to recall the value of the gift) to influence and dictate the donee's life choices. Finally, there are serious conceptual difficulties, due to the indeterminate nature of human actions, in using the but-for theory to analyse gift-giving.

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[346] S Watterson 'Reversing Mistaken Voluntary Dispositions' [2013] Cambridge Law Journal 501, 503.

[347] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 24.

[348] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 29-33.

[349] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 33-34 (emphasis in original).

The first objection can be left aside as the position in authority has been discussed. It also does not contribute directly to the normative question as to whether mistaken gifts ought to be treated differently from other mistaken enrichments. For his second reason, Tang concluded that:[350]

> Restitution scholars who support the causal mistake approach wrongly marginalise the gift as an unimportant one-sided transaction. Yet such a characterisation is inconsistent with social reality. A completed gift is worth protecting because it fosters important affective bonds such as trust which is as important to our everyday social lives as contracts are to commerce. Thus, if gifts are reconceptualised as important exchanges functioning in the affective realm of a moral economy analogous to contracts functioning in the economic realm, then it is understandable why the law should insist that only serious mistakes, which nullify the intent of the donor to make the gift, would ground a restitutionary liability.

It is not clear why 'serious mistakes' which are said to nullify the intent of the donor to make the gift are sufficient, whereas other mistakes which also nullify the intent of the donor, such as those but for which the gift would not have been made in the first place, are insufficient. It is also not obvious that Tang's approach will foster the gifting culture he envisages. Making it harder to reverse gifts may cause potential donors to think twice before making a gift, knowing that the prospect of recovering a gift is more difficult. They may also take additional steps to ensure that the idiosyncratic and 'non-serious' matters which actually are material to them are matched by the reality (or at least backed by a greater level of inquiry), which will delay gifts being made or prevent them altogether where the inquiries provide insufficient assurance. The result may be that donors will be more careful before making gifts and that fewer gifts will be made, though those which are made will then be less likely to be the subject of a claim for restitution on the basis of mistake. Conversely, the greater ability to reverse mistaken gifts may lead to more gifts

[350] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 34.

being given, with donors having greater confidence in recovery should they later discover that they have made some sufficiently important error. As Dagan argues:[351]

> In a world without restitution, people may be too hesitant in conferring benefits. To some extent, one may count on other people's decency. But, in an imperfect world like ours, this may not be a sufficient guarantee. Thus, facing the risk of an irrevocable mistake, they may either avoid transfers they would otherwise want to make, or engage excessively in precaution taking. Both alternatives are not only wasteful from an economic standpoint, they are also harmful to autonomy. Systematic avoidance of conferrals of benefits or obsessive confirmations and verifications to minimize the risk of mistakes may lead people to interact with one another in an intolerably thoroughgoing, rigid fashion. Restitution can help relieve people's interactions from this burden. By softening the possible tangible losses of mistakes, restitution can give people breathing space for spontaneity and ease that are important aspects of freedom and individuality.

As regards Tang's third objection, it is not necessary to identify 'the' one and only cause of the gift. A 'but for' causation test for mistake identifies the presence of a mistake without which the particular gift would not have been made. That there may be other reasons or 'causes' motivating the gift is not the point, if it is possible to show – as the but for test would show – that such other reasons would not have been enough to result in the gift being made despite the mistake. This is because the presence of the but for mistake shows that such other reasons for the gift are not enough to justify the gift (from the claimant's point of view) in the face of the mistake. It does not matter in these circumstances that we may not know what the other causes, if any, might have been.[352]

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[351] H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 43-44 (references omitted) (see also H Dagan, 'Mistakes' [2001] 79 Texas Law Review 1795, 1799-1800), speaking generally of 'conferring benefits' rather than specifically of making gifts.

[352] A different form of reasoning can be found in Chapter 6.3, which deals with the co-incidence of two but for causes in mistake and misprediction, and the need in that context to determine which of the two causative events should take precedence effectively to determine the result. In a case where there is only one but for cause, there is no such competition between motivating factors because the presence and content of a but for cause in the context of the enrichment (ie, the gift) evidences the relative significance of the reasons for the enrichment and the precedence of that cause over other motivating reasons.

The fourth objection, the appeal to donee autonomy, is difficult for a number of reasons. The striking down of conditional gifts (in the testamentary context) is a problematic comparison.[353] They are not mistake cases but rather cases in which the testamentary donation is conditional on future events to a greater or lesser degree within the control of the donee.[354] By comparison, in relation to the right to restitution for a gift transferred by mistake, any effect on the donee's autonomy derives from the grant of the right to restitution itself, rather than the claimant's design or purpose of the gift. After all, by definition a gift is 'mistaken' because the subject matter of the mistake was not communicated or otherwise shared with the recipient as a condition for the gift, and as such the donee has no knowledge of the donor's factual conditions for the gift.[355] The law may well impose limits on a donor's ability to influence the lives of others through conditional giving,[356] but there is a difference between gifts with conditions attached and gifts on the basis of the mistaken beliefs of the donor. The latter do not rely on continuing, post-transfer conditions for their validity, and so the donee's personal relationships and other personal decisions cannot, *ex post*, affect whether or not the donor is granted a *prima facie* right to restitution of the mistaken gift for unjust enrichment. A mistaken gift is, *ex hypothesi*, not made on the basis of conditions to be met by the donee's future conduct, but on the basis of the donor's beliefs about past or present facts existing at the time of the enrichment. In such circumstances, it seems unreasonable to deny the right to restitution

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353 HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 19-20.

354 The testamentary cases cited are entirely irrelevant in circumstances where the mistake is as to matters such as the state of the donee's employment or need, the state of the donor's bank account, or a mistake about the donee's performance in final examinations. Rather, the objection is to the width of the right to restitution, so as to permit 'donor interference' with donee autonomy in those cases where the mistake is related to the personal life choices, decisions or relationships of the donee.

355 See Chapter 1.2 in relation to the overlap between mistake and failure of consideration. It is also possible that a gift is the subject of both a mistake and a failure of consideration in relation to the same subject matter.

356 See R Chambers, 'Conditional Gifts', ch 18 in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd edn, LLP 1998) 441.

on the basis that the donors in such situations are seeking to control the future conduct of the donee in an analogous way to testamentary donors making conditional gifts.

Assuming that the enrichment was conferred on the basis of a but for mistake, then it is difficult to identify the objection to restitution in these cases other than for reasons which are unrelated to the autonomy of the claimant. Arguably the autonomy of the donee is not one of those reasons either. The gift is made on the basis of certain past or present beliefs which, if mistaken, vitiate the donor's consent and, normatively, his autonomy. The right to recover the gift then exists or does not exist whatever the future choices and decisions of the donee. For instance, in Tang's example of a devout Catholic who makes a gift to a person he later discovers to be a pro-abortion activist,[357] there would be no right to restitution if at the time of the gift the donee was believed to be, and was, for example, also a devout Catholic, even if soon after the gift the donee became a pro-abortion activist to the donor's abhorrence. Conversely, there would be a right to restitution (under the causative mistake approach) if at the time of the gift the donee was not the devout and pro-life Catholic the donor believed him to be, even if soon after the gift the donee became the devout and pro-life Catholic the donor had thought he was. This is, and must be, because the *prima facie* right to restitution must exist (or not exist) at the time of the enrichment and it must exist (or not exist) irrespective of whatever happens in the future. It follows that the grant of the right to restitution does not interfere with the donee's future life choices. The *prima facie* right exists or fails to exist at the time the gift is made, and is a position determined entirely on the beliefs of the donor (which may include beliefs about the donee's life choices up to the time of the disposition) and whether such beliefs correspond with reality. What life choices the donee makes subsequently are irrelevant to

[357] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 20.

whether the claimant has the right to seek the gift's return. The right, if it exists, also exists prior to any possible application of influence by the claimant on the donee. The only interference with the donee's life choices is the prospect that the claimant might choose to use the accrued right to restitution *thereafter* to influence the future actions of the donee, especially where the donee has made life choices or finds himself in positions from which it would be difficult to resile; but such a capacity for interference is an inherent practical consequence of persons having rights which are exigible against others or things (and indeed, also of claims and actions in pursuance of rights which are unfounded or non-existent). There is also the separate question of why the law ought to put any weight on the possibility of the claimant attempting to influence the donee with such a ubiquitous power: the claimant may only want to get the mistakenly transferred gift back.[358]

Nevertheless, the power of the claimant *subsequently* to influence the donee remains in any right to restitution so granted, along with the objection based on the idea that the former has (and might use) that influence because of his mistake as to (and disagreement with) the latter's or some other person's race, religion, sexual orientation, views on abortion[359] or lifestyle.[360] But it appears that central to Tang's difficulty with the claimant having such a right of influence over the donee through the actual or threatened vindication of the right to recall the gift – in contrast with those instances in which the claimant has yet to confer the gift, but has chosen not to – is that the gift is 'completed':[361]

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[358] Similar arguments can be made in relation to gifts expressed conditionally as to some present or past fact. For example, a donor who hears whispers through relations of a distant cousin's marriage and who, being uncertain as to that fact, makes a gift on the condition that she had actually married ought to have restitution if at the time of the gift the cousin was in fact unmarried. The cousin cannot be said to have been under any influence to become married (or to have any other marital status) as the donor's right to seek restitution did not depend on the cousin's conduct after the time of the gift.

[359] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 20.

[360] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 18.

[361] HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 Journal of Contract Law 1, 18 (emphasis in original).

> While it may be unobjectionable for a donor to subtly attempt to influence the donee's lifestyle with the *promise* of a gift or bequest, it is quite another thing to allow the donor to do so with a *completed* gift. In the latter situation, the donee did not know of the unspoken assumptions which came with the gift.

This begs the question. A gift is only 'completed' at the time of the claim as much as a contract is regarded as completed if the law regards it as absolute and incapable of being avoided by vitiating factors such as mistake. Furthermore, if we can accept a system of law in which a donor can apply some measure of influence on the donee with the promise or the possibility that the donee will enjoy the benefit of a gift, then surely we can accept that the same donor can also apply some measure of influence when he has the same power – to determine whether the donee will enjoy the benefit of a gift – in the much narrower range of (and more objectionable) circumstances in relation to gifts vitiated by causal mistake. The difficulty with the objection to influence being placed in the hands of donors who are granted the right to restitution is that presumably there would be no such objection if there was no choice in the matter and the enrichment automatically and mandatorily returned to the claimant (subject to any applicable defences). But the result would be that the gift would be back with the donor with which he can 'subtly attempt to influence the donee's lifestyle with the promise of a gift or bequest' – the very position said to be unobjectionable.

Therefore it would seem curious to deny the substantive legal right for the recovery (whether of value or *in specie*) of a mistaken gift on the basis of what the claimant might do by way of leveraging such a right. If there are mischiefs to be cured – such as the use of a right in an attempt to influence the future life choices of the donee – the cure surely belongs to limitations on the exercise of such rights in unacceptable ways, rather than to impose additional requirements before which the mistake can be considered 'unjust'. The latter would apply generally and insensitively to all claimants, including those who would

want for nothing more than the return of the gift made by mistake. The notion that the personal autonomy of donees ought to have some recognition and protection (to say nothing of any protection received by way of the change of position defence) does not mean that it is necessarily relevant in determining what needs to be shown by the claimant in order to bring his action in relation to an enrichment in which they are volunteers. Donee autonomy may justify limits to the amount of pressure persons may apply through leveraging their existing legal rights, but the cure is at the branch and not the vine.

Finally, as to Tang's fifth objection, it is correct that like other proposed tests, the but for test for causation has its own particular difficulties. Its advantage, however, is that it is principled, the result being based on the role and significance of the mistake to the enrichment said to have been conferred 'by mistake', rather than being based on the successful characterisation of the mistake as fitting within categories, types or contexts of mistake amenable to characterisation as 'serious'. The fact that the result of the test cannot be predicted on an abstracted level of facts, as category-based tests permit, does mean that it is heavily dependent on facts and circumstances peculiar to the parties and the background factual scenario involved. But this does mean also that the test is sensitive to the particular idiosyncrasies of the persons and facts concerned, and reflects the reality that different persons will have different decision-making criteria and may have different responses in relation to the same mistake.[362]

As such, this thesis argues that from the normative perspective, voluntary dispositions which are caused by mistake should be treated – as regards the 'unjust'

[362] Compare E Bant, 'Causation and Scope of Liability in Unjust Enrichment' [2009] Restitution Law Review 60, 68: 'there lies the more contentious concern that human decision-making may simply be more indeterminate than is the case with involuntary objects. Even if the particular set of reasons for a party's decision was capable of being identified and repeated, there is no certainty that, presented with those same reasons, the party would act in the same way. The propensity for humans to learn from their mistakes, or just decide differently on the day, suggests that humans may operate more randomly or arbitrarily. If that is correct, the "but for" test cannot apply: indeterminacy is antithetical to the determinate assumptions on which it is based.'

question – no differently from enrichments conferred under a mistake by the claimant as to his supposed liability and no differently from the principles of *Barclays Bank v Simms* and the authorities which have followed.[363] Normatively, it makes no difference whether the claimant's reasons were motivated by gift or obligation – his autonomy over the terms of the enrichment has been undermined by acting on the basis of facts which never existed in the first place. Therefore, this thesis argues that where there is a but for mistake which has led to a gift or other voluntary disposition being made, the argued-for normative reason in Part I as to why we have the law of mistake is triggered in the same way as in relation to a but for mistake which has led to a disposition the claimant thought to be obligatory. Given that the claimant is 'equally mistaken' or 'equally non-autonomous' in the normative sense, the *prima facie* right to restitution should follow in the same way in both instances. The mistaken donor is 'just as mistaken' or 'just as non-autonomous'.

It is correct that the law acknowledges that a valid contract can trump the claimant's action in restitution for mistake even in circumstances where the claimant can show that but for his mistake he would not have entered into the contract in the first place. In such cases where the claimant's unilateral mistake is *insufficient* to avoid the contract,[364] (i) the claimant is arguably[365] just as non-autonomous as (ii) the mistaken donor and (iii) the mistaken, supposed obligor. However, in these contract cases there are other significant counter-values in play which do not exist when the mistaken enrichment is in the form of a gift, such as the need to protect (a) the sanctity of a negotiated and struck bargain or (b)

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[363] See also A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 207, 214-217; T Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish 2001) 76-81. See also J Edelman and E Bant, *Unjust Enrichment in Australia* (Oxford University Press 2006) 171 and following, especially 172 and 188, for an Australian conception.

[364] As to the normativity of cases where the mistake may have nothing to do with the claimant's entry into a contract, see Chapters 1.2 and 2.5.

[365] 'Arguably' because it is not certain that in these cases the claimant is strictly non-autonomous. See the discussion of the normative significance of valid contracts in Chapter 2.5.

the autonomy of the counterparty who has bargained for the counter-performance of the claimant. And so it is where the unilateral mistake of the claimant is so serious or sufficiently grave (eg, a fundamental mistake as to identity or as to the existence of the subject matter of the contract) or where the interest in protecting the counterparty's autonomy is itself undermined (eg, by his conduct in leading the claimant into mistake), so that the countervailing values in the sanctity of the bargain or the counterparty's autonomy interest in it are themselves impeached, that the claimant's own lack of autonomy can be given effect in restitution through the avoidance of the contract. In other words, 'seriousness' is required to overturn contracts because there is a value in protecting bargains and the autonomy of the counterparty who has bargained for the claimant's performance. The argument in relation to gifts and other voluntary dispositions, is that the corresponding 'sanctity of gift' and the 'autonomy of the donee' simply do not apply in the same way as they do in relation to contracts and counterparties.[366]

While it might be argued that voluntary dispositions effected by *formal* instrument might lend themselves to a treatment analogous to or approaching the treatment of contracts,[367] there should be no difference, applying the autonomy-centred normative approach, whether the form of the gift is formal or informal. The autonomy of the donor is equally undermined whatever form he has chosen for the disposition of his assets. There is in each case no bargain to protect and the recipient is rendered no more or less autonomous in connection with the form of the gift. It is likely that, for formal dispositions, claimants will have contemplated the nature, consequences and terms of the disposition more seriously and carefully. But a relevant mistake in these circumstances does not make

[366] Compare D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, Oxford University Press 2014) para [29.22]-[29.23].

[367] Compare J Edelman and E Bant, *Unjust Enrichment in Australia* (Oxford University Press 2006) 188.

the claimant any less non-autonomous as regards the disposition of his assets, or the enrichment any more normatively justified. In terms of authority, the Supreme Court confirmed in *Pitt v Holt* that the argument that 'any voluntary disposition should be accorded the same protection as a commercial bargain, simply because it is made under seal, is insupportable.'[368] And if that is correct, it means that the legal concept of 'gift', whether formal or informal, is not particularly relevant to when an enrichment is 'unjust'.

[368] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [115], [2013] 2 AC 108, 154.

CHAPTER 6

DISTINGUISHING MISTAKES AND MISPREDICTIONS

6.1 Introduction

This chapter, which is complex, is about whether restitution ought to be granted or denied when an enrichment has been conferred on facts which can be said to disclose both a mistake and a misprediction. The structure adopted in finding a way through this difficult terrain is as follows. First, the mistake-misprediction context is briefly introduced. Chapter 6.2 ('Mistake-misprediction alternative analysis: logical and factual reflexes') then looks at instances where the mistake and the misprediction are really alternative analyses of each other. These are cases where, on the face of it, the claimant could be described either as having made a mistake or as having made a misprediction. But, for three reasons which will be set out, the claimant essentially is only mistaken and the misprediction effectively only an illusion. Chapter 6.3 ('The co-incidence or concurrence of independent mistakes and mispredictions') deals with a different type of scenario, which is where, on close analysis, there is indeed *both* a mistake *and* a misprediction. The first three of four subdivisions deal with a particular subset of that base scenario, which is where the mistake is incorporated into the misprediction. The three subdivisions each contain a discussion of that subset, grounded in autonomy, and are divided into cases where (A) restitution is given for mistake, (B) restitution is not given because of the misprediction, and (C) cases where restitution may or may not be given depending on the precise impact on claimant autonomy. A fourth and final subdivision (D) covers a fundamentally different

subset of 'mistake-and-misprediction', which is where the two are present on the facts but unrelated to each other. Chapter 6.4 sets out the conclusions.

Let us now move to introducing the topic by considering a background example. Say a person hears of a friend's wedding plans and confers a gift of money upon the groom, though saying nothing of its purpose, only later to discover that the wedding has been called off.[369] In an action to recover the money, the donor might claim that he was mistaken at the time of the gift, believing that the bride and groom were (a) very much in love and (b) minded to be wed, and also that (c) the wedding was on foot. The defendant might suggest that what the claimant did instead was to have predicted, wrongly as things turned out, that the wedding would take place, and that the claimant, seeking as he does the return of the gift, should fail unless he could establish among other things the promise of its return or that it was transferred conditionally, so that there is a failure of consideration.

For the claim in mistake to succeed, the claimant would need to establish that he conferred the gift on the basis of some relevant belief (perhaps one or more of (a), (b) and (c)), and that such beliefs were incorrect at the relevant time. There would be no mistake if the relevant beliefs were true at the time of the gift, even if the groom changed his mind the day after receiving the gift and called off the wedding. There would also be no recovery if what the claimant did instead was merely to have enriched the defendant on the basis of a future, anticipated state of affairs – a misprediction. For future matters, recovery would

[369] Adapted from an example of Justice Edelman, given in chambers, the Supreme Court of Western Australia, Hilary 2012.

require something more, like establishing that the gift was conferred conditionally on the anticipated matter – the wedding – actually occurring.[370]

One might imagine the time spent by the counterparties arguing about the exact basis or bases on which the gift was made: whether the claimant acted on the basis of a belief about a past or present matter or whether he acted on the basis of some future state of affairs, or both. In *Pitt v Holt*, Lord Walker opined that:[371]

> For present purposes a mistake must be distinguished from … what scholars in the field of unjust enrichment refer to as misprediction … These distinctions are reasonably clear in a general sort of way, but they tend to get blurred when it comes to facts of particular cases. The editors of *Goff & Jones, The Law of Unjust Enrichment*, 8th ed (2011), para 9-11 comment that the distinction between mistake and misprediction can lead to "some uncomfortably fine distinctions"...

Lord Walker would later say:[372]

> A misprediction relates to some possible future event, whereas a legally significant mistake normally relates to some past or present matter of fact or law. But here too the distinction may not be clear on the facts of a particular case. The issue which divided the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 was whether (as Lord Hoffmann put it at p 398) the correct view was that, "a person who pays in accordance with what was then a settled view of the law has not made a mistake" and "that his state of mind could be better described as a failure to predict the outcome of some future event (scilicet, a decision of this House) than a mistake about the existing state of the law". There is another interesting discussion of this point in the judgments given in the Court of Appeal in *Brennan v Bolt Burdon* [2005] QB 303.

The purpose of this chapter is to examine a number of principles and situations of 'fine distinction', and to set out the ways in which mistake and misprediction can be separated

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[370] As opposed to some other future condition which could still be achieved even with the failure of the wedding, for example, that the money was for wedding-related expenses.

[371] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [104], [2013] 2 AC 108, 149-150. See also *Goff & Jones*, para [9-09]-[9-11].

[372] *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [109], [2013] 2 AC 108, 151.

and kept analytically distinct where the line between the two might otherwise appear to be blurred. Its purpose is not to explain the normativity of mistakes and mispredictions, or why misprediction in contrast with mistake and failure of consideration is not an unjust factor. That work was done in Chapter 2. But in the same way as in the other chapters of Part II, the underlying notions of impairment, risk and autonomy can provide guidance towards the most normatively coherent outcomes, and thus also the substantive legal principles which would correspond with those outcomes. The issues to be discussed in this chapter arise out of the various ways in which a 'blurring' of mistake and misprediction can appear in relation to the one set of facts. The following examples will be referred to in this chapter at various stages to illustrate different aspects of that blurring:

Example 1: *A person believes that the RMS Titanic is unsinkable, only later to discover his error.*

Example 2: *A person mixes together what he believes to be hydrochloric acid and sodium hydroxide, wanting to produce sodium chloride. None is produced.*

Example 3: *A person mistakenly believes that his sister was recently made redundant. He anticipates that she will experience significant financial difficulties in connection with her 'unemployment'.*

Example 4: *A person mistakenly believes that a certain, exceptionally skilled, jockey is fit and capable of riding in an upcoming horse race. As a consequence, he bets on the outcome of the race and loses.*

In the first two examples, the person involved may be equally well described as 'being mistaken' or as 'having mispredicted'. The last two examples follow a different format. There, the mistake and the misprediction are distinct from each other, in that the mistake cannot be re-analysed as the misprediction. But there is some overlap between the two as well. They are not completely unrelated: the factual error of the mistake has been built into the subsequent misprediction.

6.2 Mistake-misprediction alternative analysis: logical and factual reflexes

One line which clearly can be drawn between mistakes and mispredictions is in relation to beliefs which are amenable to alternative analysis either as a mistake or as a misprediction. Take the person in Example 1, who believed that the RMS *Titanic* was unsinkable. This looks very much like a belief about the characteristics of its build – that the application of shipbuilding technology meant that the hull would be impervious to seawater ingress. But it could just as easily be characterised as a belief as to the future – that the *Titanic* would never be lost at sea. The question becomes what the law should do about enrichments conferred by such kinds of mistake or misprediction.

The correct view is that restitution *prima facie* ought to be granted on the basis that the claimant was mistaken rather than denying restitution on the basis that the claimant had mispredicted. From the mistake perspective, the claimant can assert the vitiating impairment of his mistake. And in these cases the 'misprediction' is best viewed as irrelevant – ie, as a red herring. There are three reasons for this.

A. A first reason: subsequent events of falsification

As discussed in Chapter 2, a feature which distinguishes mispredictions from mistakes is that the underlying belief is not wrong (or right) at the time of the belief, but is only wrong (or right) subsequently, having regard to later events. Until those subsequent events occur, the prediction is neither right nor wrong, only uncertain. Any such subsequent events of falsification indicate that the claimant made a misprediction, rather than a mistake proper. But we must be careful not to proceed too quickly from subsequent proof of error to the conclusion of misprediction.

In *Kleinwort Benson Ltd v Lincoln City Council*,[373] the claimant bank entered into interest rate swaps contracts it believed to be valid but which were subsequently held in *Hazell v Hammersmith and Fulham London BC*[374] to have been *ultra vires* the local authorities with whom the bank had contracted. The contracts consequently were void. A majority consisting of Lords Goff, Hoffmann and Hope held that the claimant bank made a mistake of law. To the contrary is the Birksian argument that the claimant bank, Kleinwort Benson, did not make an operative mistake as to the validity of the agreements because the belief of validity was not incorrect at the time of contracting. Birks regarded mistakes of *fact* as 'beliefs which are false at the time when the decision [to enrich] is made'[375] and it seems that Birks regarded mistakes of law as fundamentally the same, except that the mistake is as to the state of the *law* rather than being as to any particular fact.[376] The latter proposition, regarding mistakes of law, can also be observed in the speeches of the Law Lords in *Kleinwort Benson Ltd v Lincoln City Council*.[377] Applied to the belief of validity held by the claimant bank when it executed the swaps contracts – that they were valid and enforceable – there was no mistake, the argument goes, as there was no impairment via the input of data which was incorrect at the time; or, in the language of this thesis, there was no belief analytically or logically demonstrable as being incorrect at the time. According to Birks, the reason why the belief of validity was not incorrect was because the falsifying event had not yet come into existence. For Birks, the falsifying

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373 [1998] UKHL 38, [1999] 2 AC 349.

374 *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, [1991] 2 WLR 372.

375 PBH Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 224.

376 PBH Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 216, 223-226.

377 [1998] UKHL 38, [1999] 2 AC 349, 358 (Lord Browne-Wilkinson), 394, 396 (Lord Lloyd of Berwick), 398 (Lord Hoffmann), 409-411 (Lord Hope of Craighead). Lord Goff's speech does not expressly assert this, but it is implicit in places: ibid, 375, 379. Admittedly, it is also possible to draw from some of the speeches what appear to be departures from this position.

event was the subsequent decision in *Hazell*, which held as *ultra vires* and void the swaps contracts of the kind Kleinwort Benson entered and believed were valid:

> The falsifying decision was made by the House of Lords after these parties entered, and performed, their swap. The making of that decision meant that it became true that any court contemplating the facts thereafter must regard the money paid under the void swap as not having been due: the swap contract had been void and the money had not been due. But it is equally true that the data on which the parties entered the swap had not been and could not be falsified at the time. The parties were not impaired.[378]

However, it is important to distinguish between events which 'subsequently falsify', which indicate a misprediction, and events which are merely subsequent demonstrations of falsity. As with subsequent DNA evidence of fraternity,[379] things which only come to light later can prove what has always been the case. That the falsity is asserted by reference to a subsequent *event* does not necessarily mean the antecedent belief was uncertain (or, at least, not erroneous) until later falsified by the event. The event may have been a mere, subsequent, demonstration of falsity. Elizabeth, the mother of John the Baptist, was believed to be incapable of bearing children.[380] It was subsequently shown that she was not. The event evidencing the error came into existence later, but that later event of her pregnancy established what was the case all along. So the *Titanic* was believed to be unsinkable. While such a belief is also capable of being characterised as being one as to the future (ie, having an alternative analysis as a prediction), when the error subsequently became manifest via the form of an iceberg, it proved what was the case all along – it was not unsinkable. In all of these cases, the subsequent 'falsifying event' only demonstrates the reality of a belief already false at the time which it was held. What falsified the belief

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[378] PBH Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 226. Compare *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [31], [2007] 1 AC 558, 572 (Lord Hoffmann).

[379] A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 228.

[380] Luke 1:7.

in each case was the then-existing and contradicting factual reality of which the 'falsifying event' was a demonstration. Not distinguishing between falsifying facts or events, and facts or events which demonstrate or make apparent the falsity of a belief, therefore risks labelling as a misprediction[381] what is actually a mistake proper.

The same can happen with mistakes of law. In *Kleinwort Benson Ltd v Lincoln City Council*, the falsifying fact or event was the existence of a position at law which contradicted the claimant's belief that the agreements were within the power of the local authorities and valid, and not necessarily the judgment or case in which the contradictory law was stated and made apparent. So: (i) the falsifying fact or event was that, as a matter of law, the swaps contracts were *ultra vires* the local authorities and void, this contradicting the claimant bank's belief; whereas (ii) the demonstration of falsity was the decision in *Hazell*, which made known the contradictory law. This does not mean that *Hazell* was not also the falsifying fact or event, only that falsification and demonstration are conceptually different; and while they may be incorporated into the one event – as where a person who believes it will not rain is wrong and shown to be wrong by the event of rainfall – this will not always be the case. Because of this, and because falsification and error can exist before the event demonstrating it, the fact that *Hazell* post-dated the *Kleinwort Benson Ltd v Lincoln City Council* contracts does not deny mistake. *Hazell* may have shown what was always the case, or at least what was the case at the relevant time.

It is sufficient for present purposes to say that unless mistake of law is to be treated differently from mistake of fact in the law of unjust enrichment, and there is some

[381] Or, at least, a non-mistake. See PBH Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 223-228, where Birks refers to the subsequent falsification in a misprediction to deny the existence of a mistake in *Kleinwort Benson Ltd v Lincoln City Council*, but ultimately accepts that the claimant bank need not necessarily be taken as having predicted. Compare G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 144, on how a mistake of law might be argued as a mistake as opposed to a misprediction notwithstanding subsequent falsification, relying on a declaratory theory of judicial law-making.

suggestion it might be,[382] it is not enough later to be told that one's belief is incorrect. It must be incorrect at the time. For Kleinwort Benson, that meant showing the contradicting law stated in *Hazell* – that the swaps agreements were *ultra vires* the local authorities and void – was the law in existence at the time it contracted with Lincoln City Council and the other local authorities.[383] That *Hazell* post-dated the facts of *Kleinwort Benson Ltd v Lincoln City Council* does not dispose of the matter.

Similarly, in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners*,[384] the claimant made payments of advance corporation tax in the belief that a group income election allowing deferral of the tax was not available to it, and therefore that it was liable to pay the tax to the Revenue at the time at which it was paid. The belief was based on the clear words of a statutory provision subsequently held by the European Court of Justice in *Metallgesellschaft Ltd v Inland Revenue Commissioners and*

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382 See for example, *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [23], [31], [2007] 1 AC 558, 569-570, 572 (Lord Hoffmann); *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 399-400 (Lord Hoffmann). See also A Burrows, 'Common Law Retrospectivity', ch 41 of A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013) 550:

> There is also an acute practical difficulty in applying the critics' view. That is because it requires analysing what was the state of the law – including the settled view of the law – at the time of the payment. There is no need to embark on that often problematic inquiry if one applies Lord Goff's approach. Instead, one simply asks what was the claimant's belief at the time of payment as to the position in law and was that mistaken in light of what we now know to be the correct legal position.

This might be seen as a widening the ambit for 'mistake', by treating those beliefs about law as mistaken not because the law was different at the time of the enrichment, but because the law later determined *to be applicable* at the time of the enrichment was different to what was believed. Still, at a higher level of abstraction, (i) a mistake of law resulting from a (contradictory) law 'which is applicable' is equivalent to (ii) a mistake of fact resulting from a (contradictory) fact 'which is applicable'. The difference is that the law can change. But here too there is a close analogy with the discovery of new information about facts in the world, which can turn a belief consistent with the state of knowledge at the time of the enrichment into a mistaken belief upon the later discovery:

> In essence, therefore, the retrospective nature of common law decision-making means that, with the benefit of hindsight, it is perfectly correct and consistent to say both that the claimant was acting in accordance with the law as it then was *and* that in so doing the claimant was making a mistake as to the law. (A Burrows, 'Common Law Retrospectivity' at 549, emphasis in original.)

383 See for example *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349, 358, 362 (Lord Browne-Wilkinson), 396 (Lord Lloyd of Berwick).

384 [2006] UKHL 49, [2007] 1 AC 558.

Hoechst AG v Inland Revenue Commissioners[385] to have infringed the right of establishment in article 43 of the EC Treaty. As in *Kleinwort Benson Ltd v Lincoln City Council*, the judgment which contradicted the belief under which the payments were made was only delivered later. Nevertheless, this would be no bar to the claim in mistake to the extent it was accepted that the subsequent judgment represented the state of the law at the time of the payments:

> the mistake was not discovered until the European Court of Justice gave judgment in the *Metallgesellschaft/Hoechst* case … It was the judgment that first turned recognition of the possibility of a mistake into knowledge that there had indeed been a mistake.[386]

On such a hypothesis, it made no difference that *Metallgesellschaft/Hoechst* did not exist at the time of the payments. The mistake would have already been made – it was only that it had not yet been demonstrated.[387]

Turning back to our example, the fact the claimant only knew, contrary to his belief, that the *Titanic* was not unsinkable when future events came into existence does not necessarily suggest that the belief is better characterised as a misprediction. On the contrary, it may be that the later events were only demonstrations of the error the claimant and many others had already made.

B. A second reason: the effect on the claimant

It was resolved in Chapter 2 that mispredictions do not justify restitution because the claimant is unimpaired by error and runs the factual risk of an uncertain future. In the

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[385] [2001] Ch 620, [2001] 2 WLR 1497.

[386] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [144], [2007] 1 AC 558, 609 (Lord Walker of Gestingthorpe), compare [31] 572 (Lord Hoffmann), [71] 585 (Lord Hope of Craighead), [88]-[89] 592 (Lord Scott of Foscote), [172] 617 (Lord Brown of Eaton-under-Heywood).

[387] Compare *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners (formerly Inland Revenue Commissioners)* [2012] UKSC 19 para [221], [2012] 2 AC 337, 427-428 (Lord Reed).

cases of the *Titanic* and Elizabeth, the 'mistaken mispredictor' makes a particular mistake of fact which may be regarded either as a separate and additional mistake, or as a coordinate expression of the specific mistake on which the claim is based. This particular, additional or coordinate, mistake is that the view of the future is inevitable, certain, 'risk-free' in respect of the subject matter of the belief: that there was no risk as to the *Titanic*, or that childbirth was an impossible proposition. When the specific subject matter of the belief is shown by later events to have been wrong, the subsequent demonstration of falsity *also* shows that the belief as to certainty or the absence of risk was wrong from the beginning.

Assuming the law requires 'but for' causation, if the hypothetical claimant seeks to recover the enrichment as one he would not have conferred but for the misprediction that a future outcome would *certainly* not occur (or occur), then it necessarily follows that the claimant would not have conferred the enrichment but for the belief that there was *no risk*. That is, the claimant would not have conferred the enrichment in the circumstances in which he did, had he known, contrary to his belief, that the future event was not inevitable or was not 'risk free'. Therefore, the risk-running explanation which generally denies restitution to mispredicting claimants does not operate here.

The other reason given in Chapter 2 to deny restitution of enrichments made on the basis of a misprediction is the absence of error. But if we accept that our hypothetical claimant actually believed that the *Titanic*, inevitably, would not – in the future – sink, then we must accept that his consent was impaired by the coordinate and erroneous belief as to the absence of risk. There should be no difficulty with showing that the belief as to risk was analytically incorrect at the time of the enrichment. This is so even though it appears contradictory to say that, at the time the enrichment was conferred, a belief that a particular future event will happen cannot be right or wrong, but the coordinate belief that there is no risk the same event might fail can be wrong. The inconsistency is avoided because the

subject matters of the two beliefs are fundamentally different. This can be further explained as follows:

(a) One is a belief as to the future, which is uncertain and cannot logically be proven wrong (or right) at the time it is relied on to confer the enrichment – the 'correctness' or otherwise depends on how the future turns out. When subsequent events show that things have not turned out as anticipated, they do not change the fact that, at the time of the enrichment, the particular belief was still an uncertain, and not a mistaken, one.

(b) The other belief is one as to the absence of risk. Much like a belief as to some future event, that belief cannot be proven wrong at the time it was relied on to confer the enrichment,[388] and can only be proven wrong by reference to subsequent events. But this is an impossibility of practical proof only, and the reference to subsequent events is only to prove what must logically have been true or false at the time of the enrichment. When subsequent events show the event believed to be without risk has actually failed, it follows that a risk was present and taken at the time of the enrichment, and the claimant had been wrong (as to risk) all along. The variance between the belief and the state of the world at the time of the enrichment is thus capable of logical demonstration, even though practical demonstration was not possible until later. Again, it is through subsequent events that the belief becomes demonstrably incorrect at the time of the enrichment. This conclusion is supported by the recognition that the correctness or otherwise of the belief does not depend on what actually happens later. Even if subsequent events turned out as expected (eg, the *Titanic*'s safe arrival in New York City), it could not be said that the belief that

[388] Unless there is an appeal to general human experience, or the inherently uncertain future, or both.

> there was no risk was correct. The most which could be said is that future events did not prove the belief to be incorrect. Thus, the particular feature of predictions – as being uncertain until future events prove the prediction right or wrong – is not present here. This makes sense: the belief as to risk is one of the present and already must be right or wrong, irrespective of future events.

So to summarise, in these cases, the 'no impairment' and 'risk-taking' arguments, as set out in Chapter 2 to justify why a misprediction is not an unjust factor, do not work. As to the former, the claimant's decision-making process is impaired by the belief as to certainty because it led him to confer the enrichment in circumstances different from what he believed. Insofar as the enrichment can be causally connected with that belief, the claimant's decision-making ability has been relevantly impaired – 'no impairment' therefore does not operate as an obstacle to restitution in this case. As to the latter, the claimant who does not know of the risk of disappointment is not a claimant who takes that risk 'knowingly run', and certainly not in the same way as a claimant who is cognisant of the uncertainty surrounding the future matter. The latter knows that there is a risk of disappointment, whereas the former, believing the future matter to be inevitable and without risk, does not.

It is possible for the law to deny the claims of 'impairment' and 'no risk'. It may focus on the misprediction characterisation and say that, as the matter lay in the future, the risk, howsoever small, was objectively apparent and there should be no restitution (ie, it was not 'unjust') when any reasonable person would have appreciated the possibility that the future could disappoint. However, to take an objective approach would depart from the general approach taken with other intent-based unjust factors, which focus on the subjective state of mind of the claimant. This includes the approach in mistake, where a mistaken payer is not denied restitution because he unknowingly runs an objective risk in

omitting to undertake due diligence into a belief on which reliance was placed.[389] Assuming the subjective approach prevails, the law is then faced with a claimant who pays under a misprediction, but who was impaired and did not, at least consciously, take the risk of disappointment. Crucially, this claimant experiences the same derogation of autonomy as was described in Chapter 2 in connection with causative mistakes, and is a type of mispredictor different from the ones determined in the same chapter to be undeserving of restitution for unjust enrichment. It may be that these mispredictors ought to have a *prima facie* right to restitution. But the crucial point is that if the law decides otherwise while maintaining its preference for the subjective mental state, then it needs to find reasons other than 'no impairment' and 'risk-taking' to justify that denial.

C. A third reason: the mistake generates the misprediction, not vice versa

More fundamentally, it might be argued that the action to recover the enrichment in these cases should be characterised as, in essence, an action for mistake for the reason that, while the misprediction and the mistake are alternative analyses of each other, it is the mistake (eg, as to the qualities of the ship) which generates the misprediction of what the future will or will not bring, rather than the other way around. It makes no sense to regard a prediction as to the future as generating a belief as to the present or past. It was Elizabeth's physical condition which led to the belief that the future would bring no children. It was the *Titanic*'s build which led to the belief that it would not be lost at sea. And, because they are alternative analyses, the misprediction can be regarded as essentially no more than a manifestation or a logical reflex of the pre-existing mistake.

D. Conclusions

[389] For example, *Kelly v Solari* (1841) 9 M & W 54, 59; 152 ER 24, 26 (Parke B).

Subject to one caveat, the three preceding reasons suggest that in claims which are amenable to this dual mistake-misprediction characterisation, the claimant ought to have available to him the *prima facie* right to restitution as if he were a straightforwardly mistaken claimant. While a defendant might do his best to focus on the misprediction features of the claim, it is quite reasonable to conclude that the claimant did not intend to take any risk and laboured under a mistake. And it was that mistake which generated the mirage of a misprediction: the misprediction was merely a manifestation of the mistake and serves only to prove what was wrongly believed from the very beginning.

The one caveat is that the claimant must absolutely and completely believe in the particular mistake, with no room for any uncertainty or at least any reasonable degree of uncertainty. Without it, the dual character of the mistake and misprediction begins to unravel. Once the claimant begins to appreciate the risk of the future and no longer has what is effectively a subjective belief of inevitability, the claimant begins to lose the reasons[390] for denying that it is really a misprediction. And as discussed in Chapter 3 on uncertainty and doubt, as the claimant begins to doubt the certainty of his conviction, this would also start to undermine the reasons for calling it a mistake.

In similar situations where the misprediction is sensibly a re-analysis of the antecedent mistake, it should not matter whether the misprediction is a *logical* or *factual* reflex of the mistake, or where the underlying beliefs of fact fall on the scale of complexity: whether they concern a simpler belief about the 'physical status' of someone or something, or a more complex belief about relationships or systems of interaction between things. Many beliefs are held with a sufficient degree of certainty precisely because they are generated from a structure of other, underlying, beliefs. The facts of Example 2 set out

[390] That is, 'no risk-running' and 'impairment'.

above replicate the common high school experiment where the student who adds hydrochloric acid to sodium hydroxide expects to produce sodium chloride and water. The expectation that salt and water will be produced is a prediction which can be made before conducting the experiment and which reflects existing beliefs about things in the world and how they relate and interact with each other. Another might be the result of a coin toss which is executed in a wholly controlled manner and environment (eg, mechanical impulse, closed and fixed environmental conditions, and so on), and where there is sufficient information so that the behaviour of the coin (from its initial and consistent point of origin) and its interactions within that environment can be computed and modelled with accuracy. Like the chemical formulation of Example 2, the person who has access to the fully completed model knows the input factors and how they relate with one another to determine the result. While there is a prediction in both of these instances, there is to the actor's mind no risk, uncertainty or speculation – the predictor knows what is coming. Beliefs as to the future in these cases are *factually reflexive* of the beliefs which underlie them, and analytically provable as correct or incorrect at the time they are held: $HCl + NaOH \rightarrow NaCl + H_2O$. If there is a misprediction – that is, if the determined outcome does not occur – this is not because the chance inherent in the uncertain future fell against the predictor. It must be because some mistake was made in the determination process; an input was incorrectly entered, a relationship improperly formulated or assessed, or some other error. It follows from this that, while the belief may appear to ground a misprediction, here too there is all along an existing mistake. Where enrichments have been conferred by the claimant on the defendant acting on such a 'misprediction', restitution may follow. But the correct analysis is that it follows for mistake.[391]

[391] Compare P Jaffey, *The Nature and Scope of Restitution* (Hart Publishing 2000) 173-174. Here the examples of the future date of an eclipse or the next leap year are given, and where it would appear that the author would give

The concept of 'factual reflex' is used above to refer to predictions based on facts about the world and their relationships, and to distinguish them from predictions that are 'logical reflexes', which are closer to re-characterisations or re-analyses of an underlying belief. The claimant is equally non-autonomous in both cases, but different expressions are used because predictions generated out of present beliefs which are about more complex systems of interaction and relationships between facts are more intuitively expressed as reflecting those *factual* relationships and systems than as reflecting *logical* re-characterisations of the same beliefs. Another way to describe this distinction is one of 'mistake → misprediction' (eg, A + B leads to C + D) and 'mistake = misprediction' (eg, the *Titanic* is unsinkable = will not sink). The terms are of context and are not as important as what they signify as being commonly shared: which is that because of the present but mistaken belief as to inevitability, the misprediction is wholly a manifestation of the mistake and that what the individual can be said to have then presently believed and what he can be said to have anticipated were alternative analyses of one another.

There is a final point. We can see from these examples that it is possible to have mispredictions different from those discussed in Chapter 2, which were speculative predictions into the uncertain and unknown future into which category the vast majority of mispredictions will fall. A feature of these predictions, saying nothing of the subjective state of mind, is that what will happen (or not) remains objectively uncertain and speculative. There is, in these cases, always some degree of *objective uncertainty* connected with the unpredictability of the future. Beliefs range from the highly speculative, as in the outcome of a horse race, to the less speculative, as in the result of a referendum. Speculative predictions can be contrasted with what might be termed 'input-

restitution on the basis of the mistake as to the future rather than the antecedent mistake as to the present. The examples are relevantly described as mistakes as to a 'future event with respect to which there is no uncertainty.'

reliant' or 'formula-based' predictions, like those of the chemical experiment and the controlled coin toss. In these latter predictions, the outcome still lies in the future and thus a belief as to what will happen retains a predictive quality. The difference is that the outcome is logically determinable through the application of a finite set of variables which have a content and relationship with each other and the outcome being predicted, which are all capable of ascertainment prior to the outcome actually occurring. Evidence of an error in relation to this type of misprediction is therefore likely to indicate the existence of an antecedent mistake.

6.3 The co-incidence or concurrence of independent mistakes and mispredictions

The preceding section dealt with cases in which the line between mistake and misprediction was blurred because their facts were amenable to analysis either as the claimant being mistaken or as having mispredicted. Even if it was possible to describe a separate 'mistake about something' and a different 'misprediction about something', the one description was analytically a reflex of the other.

Still, for this reason, it was possible to resolve the competing characterisations, and to show that the facts constituted a mistake to which the law of unjust enrichment could respond. Other cases involve mistake and misprediction co-inciding in yet a different way: where on the facts it is possible to identify both a (causative) mistake and a (causative) misprediction, but where they are analytically distinct and independent of each other – that is, one is not a reflex of the other, not being connected by way of some fixed, logical or factual relationship or formula.

In *Re Griffiths*,[392] the donor effected a transfer of shares intending that the disposition would create an inheritance tax-effective structure, which it would have if he were to survive for at least seven years following the disposition, or to a lesser degree if he survived for at least three years following the disposition. The donor knew at the time of the disposition that he had rheumatoid arthritis, which reduced his life expectancy to around seven to nine years. He did not know that he also had an aggressive lung cancer which effectively rendered as remote any chance of survival to the three-year threshold. As things turned out, the donor died within seven months of diagnosis. He was held to have been mistaken as to his state of health when he effected the transfer of shares. At the same time, the transfers were made to obtain, and in anticipation of, an inheritance tax benefit, which would only accrue if he lived for three or more years from the date of the dispositions.

Thus, it is reasonably clear that the donor also engaged in a (causative) prediction about how long he would live – had he expected not to live for at least another three years he would not have effected the disposition that he did. This concurrency of mistake and misprediction has led some commentators to say that the line between mistake and misprediction is unclear, and that *Re Griffiths* is an example of this instability between mistakes and mispredictions. For example, Charles Mitchell writing in *English Private Law* describes the case as illustrating 'the ease with which the courts can manipulate the outcome of litigation by finding either that the claimant's mistake relates to a present fact or that it relates to a future fact.'[393]

It is clear that *Re Griffiths* does not conform to either scenario discussed in the preceding section – that is, it is not a case of alternate analyses, because the claimant's

[392] *Ogden v Trustees of the RHS Griffiths 2003 Settlement, In re Griffiths, decd* [2008] EWHC 118 (Ch), [2009] Ch 162.

[393] C Mitchell, 'Unjust Enrichment', ch 18 of A Burrows (ed), *English Private Law* (3rd edn Oxford University Press 2013) [18.60], footnote 152.

anticipation of living for at least another three years was neither the logical reflex of a belief as to his particular state of health nor a factual reflex in which his anticipated lifespan was the result of a fixed formula in which his state of health was one of the inputs. But it does not follow from this that, outside of those special cases, a court is able, and required, to undertake a single, unitary, characterisation of the facts as either 'a mistake case' or 'a misprediction case'. Neither should it be quickly accepted that such facts are amenable to manipulation into one characterisation or another according to the desires of the courts. As has been observed elsewhere, a case might well involve both a distinct causative mistake and a distinct causative misprediction without the consequential need to characterise it as a case of one as opposed to the other.[394] This does raise a new question, which is how to resolve the concurrency of the mistake (and hence the restitution which it suggests) with the misprediction (and hence the 'no restitution' which it suggests). The answers depend on the manner in which the mistake and misprediction co-incide on the facts and the role they play in causing the enrichment, and each other.

Theoretically, there must be at least four different ways of potential co-incidence: (i) the mistake and misprediction are alternative analyses; (ii) a mistake leads to (is incorporated into) a misprediction; (iii) a misprediction leads to (is incorporated into) a mistake; and (iv) the mistake and misprediction co-incide in the one set of facts but are unrelated.

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[394] See W Seah, 'Mispredictions, Mistakes and the Law of Unjust Enrichment' [2007] Restitution Law Review 93, 114 and *Goff & Jones*, paras [9-12]-[9-14]. Compare the language used by Hildyard J in *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch) para [662] (reversed on appeal in *Bellis v Challinor* [2015] EWCA Civ 59) that 'both [mistake and misprediction] were operative; and that in such circumstances a claim for restitution on grounds of mistake should be available (subject of course, to the various defences, if available)' and also in a supplementary judgment in *Challinor v Juliet Bellis & Co* [2013] EWHC 620 (Ch) para [123], that, perhaps somewhat differently: 'Counsel also suggested that my approach to another interesting question as to the boundaries between "mistake" and "misprediction", by reference to *Dextra Bank & Trust Co v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC), was unsafe; I was not persuaded that the causative reason for the payment by the Claimants was misprediction. As it seems to me that is primarily a question of legal characterisation on the basis of the facts as found (see paragraph 662 of my main judgment): it does not justify an appeal.'

The first was considered in the preceding section and the third is not realistic as a prediction which has yet to fail cannot sensibly be incorporated into a mistake of past or present fact.[395] The fourth is better examined after looking at instances of mistakes leading to mispredictions, which would probably cover the majority of instances in which mistake-misprediction co-incidence occurs. Instances of this third model of co-incidence occur when an enrichment is conferred as a result of a prediction, but *part* of the reasoning underlying the prediction is a mistaken belief. One point of clarification is that the following treatment of instances in which 'a mistake leads to (is incorporated into) a misprediction' is intended to examine the impact of a subsequent speculative misprediction which incorporates an antecedent mistake (because the factual error of the mistake has been built into the subsequent prediction); but it is not intended to include those cases of 'input-reliant' or 'formula-based' mispredictions or indeed any other cases of alternative analysis, which are conceptually and structurally different and which were covered in the preceding section. The mispredictions with which this section is concerned are the more common ones in which the claimant has a clear appreciation of the risk of the future. The question for these cases is how the presence of such a misprediction affects the antecedent mistake.

A. Restitution for mistake

In Example 3, a person mistakenly believes that his sister was recently made redundant and makes a gift of money in accordance with the significant degree of future financial difficulty he anticipates will be associated with that unemployment. He later discovers his mistake, and seeks to recover the money from his sister even though he conferred the enrichment under a prediction as to her future financial condition. Had he known either

[395] A fuller explanation can be found in W Seah, 'Mispredictions, Mistakes and the Law of Unjust Enrichment' [2007] Restitution Law Review 93, 120-121.

that she had not been made redundant or that she would not have associated future financial difficulties, he would not have conferred the enrichment. In other words, the brother made a 'but for' mistake leading to a 'but for' misprediction, and the enrichment was conferred because of that mistake and misprediction. In such cases, it is arguable that restitution ought to be granted since:

(i) there is an operative mistake;[396] and

(ii) while the mistake was incorporated into the misprediction, the risk the claimant took in predicting did not negate the impairment of the mistake, and the decision to enrich despite the uncertainty of the future was based on a belief about the present which was impaired by that operative mistake.

The second element needs explanation. A person who predicts is anticipating some version of the future: generally, a future he knows to be uncertain and will eventuate in one way out of a number of potential ways. An enrichment relying on a prediction is an enrichment taking the risk the future will disappoint, at least in the absence of some qualifying condition or promise. However, where a mistake is incorporated into the set of facts underlying the prediction, the situation is slightly different. There, the claimant operates from a set of facts affected by the mistake, meaning that his assessment of the future possibilities, their likelihood of occurrence and so forth is compromised in some way. The mistake may be material or otherwise completely irrelevant to the prediction. It may be material, for example, if the mistake causes the claimant to believe that one or more events is more or less likely than reality would have it. Even more material is a mistake which

[396] Compare *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [87], [2007] 1 AC 558, 592 (Lord Scott of Foscote). See also the discussion in Chapter 5.1 in relation to gifts and other voluntary transactions.

causes the claimant to believe in the possibility of some future outcome when in reality it is impossible.

The generous brother's mistake about his sister's redundancy led him to predict that she would suffer some consequential financial strain. The reality at that time, however, was that that particular 'future possibility' was non-existent: she was not made unemployed and would, on the facts at the time of the enrichment, suffer no financial difficulty resulting from redundancy. While the claimant may be said to have taken a risk as to quantum, or the degree of financial difficulty his sister would suffer (ie, by possibly gifting her too much), he did not take the risk that she would not be made redundant at all and that the basis of his expectation that she would experience financial difficulty in the future was nugatory.[397] At the same time, the decision to confer the enrichment was impaired by mistake. The brother decided to enrich because he believed that his sister was unemployed, the reality being that she was not unemployed at all. That mistake vitiated his decision-making process, and meant that he made his decision to enrich on a non-existent basis. It might be said the brother intended his sister to be enriched, howsoever her financial situation subsequently changed, because he still took to predicting her degree of future financial difficulty. But the decision to confer the enrichment under a prediction should not be taken out of the context of the facts underlying it. The brother's decision to enrich was for redundancy-consequential financial difficulties. Because the redundancy never happened, the anticipated future was an impossibility.[398] The fact that he mispredicted and took the risk of the impossible future therefore does not, in this case,

[397] The risk taken in failing to check when there is no reason to doubt is not one which, by itself, denies recovery: *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24.

[398] It may be that the sister would later become unemployed, and subsequently suffer financial difficulty as a result. But neither that possibility nor its later occurrence changes the fact that the enrichment was conferred under the impairment of mistake.

affect the conclusion that the mistake was a vitiating impairment on his decision-making ability which undermined his autonomy of disposition.

The same reasoning can explain the result in *Kerrison v Glyn, Mills, Currie & Co*,[399] the facts of which follow this model. In that case, the appellant claimant (Kerrison) was a joint owner and the English manager of a Mexican mining undertaking, which kept a current account with New York bankers Kessler & Co. In order to cover credit given by Kessler & Co to the undertaking, Kerrison agreed to pay, on notification of financial accommodation having being granted, the sterling equivalent to the credit of Kessler & Co's account with its English bankers Glyn, Mills, Currie and Co, the defendant. In anticipation of present and future claims in respect of which no liability had yet accrued, Kerrison lodged £500 with the defendant bank, only subsequently to discover that Kessler & Co had by that time become insolvent. The House of Lords unanimously allowed Kerrison to recover the payment, holding that it was money paid under a mistake of fact, the mistake being as to the financial viability of Kessler & Co:[400]

> Kerrison, at the time he paid the money, had not been advised that Kessler & Co had made any advances of their own money to the Bote Mining Co in respect of which he was bound to recoup them. He lodged the money in the belief that Kessler & Co were a living commercial entity able to carry on their business as theretofore, that they were in a position to honour and would honour the drafts of the Bote Mining Co up to the sum which he, in anticipation, sent to recoup them for their repeated advances. Kessler & Co had, in fact, ceased to be in that position. If not commercially dead, they were at least in a state of suspended animation, utterly incapable of carrying on business, making advances, or of doing the very things he lodged this money to their credit to enable them to accomplish.
>
> I cannot doubt but that on general principles he would be entitled to recover back money paid in ignorance of these vital matters as money paid in mistake of fact.

[399] (1912) 81 LJKB 465 (HL).

[400] *Kerrison v Glyn, Mills, Currie & Co* (1912) 81 LJKB 465 (HL) 469-470 (Lord Atkinson); see also at 471 (Lord Shaw of Dunfermline), 472 (Lord Mersey). The Earl of Halsbury and Earl Loreburn LC gave concurring speeches.

Kerrison made a mistake as to creditworthiness for which mistake the House of Lords explicitly gave restitution.[401] It is clear that Kerrison had also mispredicted. Kerrison had no present liability in respect of the £500 when he lodged that amount with the defendant. He was anticipating both present claims about which he had not yet been notified and future claims, for which claims there was no liability. The House of Lords itself noted that the payment was in anticipation of future liability.[402] So, irrespective of any mistake Kerrison may have made, he also mispredicted.[403] The misprediction, that he would subsequently become liable for amounts equivalent to credit afforded, was clearly a 'but for' cause of the payment.[404] But for the expectation that he would become liable for financial accommodation afforded to the mining undertaking, there was no reason for Kerrison to pay money to Kessler & Co's account with the defendant. The case is thus one in which the claimant paid money under a causative misprediction and was nevertheless able to obtain restitution for mistake.[405]

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401 That it was considered to be a 'but for' mistake can also be seen in the speeches of Lord Shaw of Dunfermline and Lord Mersey.

402 *Kerrison v Glyn, Mills, Currie & Co* (1912) 81 LJKB 465 (HL) 469 (Lord Atkinson), 471 (Lord Shaw of Dunfermline), 472 (Lord Mersey).

403 See also A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 102, 206-207; compare G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 149-150; PBH Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005) 153.

404 This remains consistent with Lord Mersey's view that the mistake as to present creditworthiness was a but for mistake (*Kerrison v Glyn, Mills, Currie & Co* (1912) 81 LJKB 465 (HL) 472), and Lord Atkinson's view that the claimant believed that Kessler & Co 'were in a position to honour and would honour the drafts of the Bote Mining Co' ((1912) 81 LJKB 465 (HL) 470). It is however, arguably inconsistent with Lord Shaw's reasoning that the mistake 'was indeed the only reason for payment': (1912) 81 LJKB 465 (HL) 471.

405 Compare *Goff & Jones*, para [9-14]. The argument that *Kerrison* could have been reasoned as a case involving failure of consideration (see, for example, G Virgo, *The Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 149-150; PBH Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 228) is correct, but does not make the discussion of *Kerrison* any less important here. The relevance and usefulness of *Kerrison* is it tells us that a claimant can both be mistaken and mispredict in conferring an enrichment he later seeks to recover, and that restitution for unjust enrichment can be given for mistake even though the claimant made a 'but for' misprediction on the facts. That *Kerrison* could have been reasoned as a case of failure of consideration does highlight the differences between the two causes of action. Facts are capable of generating more than one cause of action within the law of unjust enrichment (see, for example, A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 202, where there is a discussion of alternative grounds for restitution in mistake and failure of consideration in the context of void or unenforceable contracts, citing *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 1 WLR 912, *Strickland v Turner* (1852) 7 Exch 208, and *Pritchard v Merchant's and Tradesman's Mutual Life-Assurance Society* (1858) 3 CBNS 622) and the potential variations in the application of limitation periods and defences – in particular, the change of position defence – mark important differences between

The case is also one in which the facts follow the model where an antecedent mistake leads to a misprediction. The claimant's mistaken belief that Kessler & Co were creditworthy led him to believe that financial accommodation and liability to the New York bankers would accrue in the future. The mistake led to the misprediction; and here too the misprediction arguably does nothing to derogate from the mistake, which was the logical *conditio sine qua non* for the prediction's existence (ie, without the banker's creditworthiness, they would not have been able – in the future – to provide credit to the mining concern). So again, the fact the claimant predicted and took *a risk* of the future does not affect the conclusion that the mistake was a vitiating impairment on his decision-making ability which undermined his autonomy over the terms of disposition, and which made the enrichment an unjust one. The last point is important. As we will now see, in other cases, because of the way in which the mistake and the misprediction relate to each other and to the enrichment, the vitiation of the mistake is negated by the risk of the subsequent misprediction.

B. No restitution for misprediction

Another example of the same model of co-incidence or concurrence can be found in Example 4. There, a gambler mistakenly believes that a certain, exceptionally skilled, jockey is fit and capable of riding in an upcoming horse race, and consequently bets on the outcome of the race, which does not go in his favour. Intuition tells us the mistaken mispredictor should not be able to claim mistake and recover the value of the enrichment.

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the two distinct unjust factors. Another difference shown by *Kerrison* is in relation to the time at which the *prima facie* claim accrues. If Kerrison sought recovery before the actual failure of consideration – the failure of Kessler & Co to provide financial accommodation to the mining concern – he could have succeeded in mistake immediately, which he did. In failure of consideration, he would have had to wait until it became clear no credit was forthcoming. See also A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 219-221; P Jaffey, *The Nature and Scope of Restitution* (Hart Publishing 2000) 174.

Principle points in the same direction. The existence of the misprediction denies the claimant recovery, since:

(i) there is an operative mistake; but

(ii) the risk the claimant took in predicting negated the impairment of the mistake.

Again, the second element should be explained. In this case, as in the case above, the mistake the claimant makes is one which vitiates his decision-making process. His mistake means that the set of facts from which he operates is compromised. This is an impairment because he believes, among other things, the likelihood of certain relevant outcomes to be one thing, whereas in reality they are another. Had he known of his mistake, that in reality the jockey would not be riding, he would not have placed the bet that he did. The mistaken gambler thus makes a 'but for' mistake which vitiates his decision to confer the enrichment. In the absence of the misprediction, this would suggest, *prima facie*, an unjust enrichment.

However, the difference between this case and the previous ones lies in the way the mistake and misprediction relate to each other and the enrichment. In each case, the mistake is incorporated into the misprediction. But the mistake relates to the misprediction in a different way for the gambler. Here, the subject matter of the mistaken belief is relevant to him because it is a factor which makes more or less likely one or more possible outcomes of the future: it is something which helps the gambler take the risk he intends to take. So, since the subject matter of the mistaken belief is causally relevant because of its materiality to the probability of an outcome – on which the claimant was willing to take the risk of the uncertain future – what impairment there is in the mistake to indicate unjustness is negated by the broader activity of which it was a part. Put another way, because the subject matter of the mistake was a matter relevant to the question of *how* or *what outcome* to predict, the risk the claimant was willing to assume in so predicting

'overrides' or 'negates' the impairment of his mistake. These statements of principle become clearer once the facts are reinserted: the unjustness in conferring the enrichment under a causative mistake that the jockey was fit to ride is negatived by the realisation that the jockey's fitness was relevant to the claimant because it helped him to risk a sum of money, quite intentionally, on the outcome of a horse race. The way in which the mistake relates to the misprediction and the roles they play in the gambler's decision to confer the enrichment mean that what might have been unjust about the mistake when viewed in isolation is negated by the risk he was willing to run as part of the broader decision to confer the enrichment.

How is this result explained normatively? How are the facts of the enrichment consistent with the idea that the claimant's autonomy has not been relevantly and sufficiently undermined by mistake, or that the enrichment was conferred in circumstances which are not normatively unjust? The normative explanation has two aspects to it. The first is that where the law is faced with a set of facts containing both a mistake (suggesting restitution) and a misprediction (suggesting no restitution) bound together in the decision to enrich, it has to decide whether to give the claimant a *prima facie* right to restitution or deny it. For a law which is concerned to effect and protect the autonomy of individuals, this crystallises into a determination as to which of the two causes of the enrichment best reflects the autonomy of the claimant. And in this context, the misprediction best represents the autonomy or will of the claimant because it is more causally potent than the mistake.

The reasoning underlying this normative, rather than legal, conclusion is that the subject matter of the prediction – the particular horse's winning of the race – was directly and essentially the basis for the claimant's placing of the bet (the enrichment); whereas the mistaken belief about the fitness of the jockey was only an indirect basis, being an

antecedent input into that more direct and more important reason for the claimant's action. This makes the mistake subordinate to the prediction, in that in an alternate universe in which the claimant had been informed of his error pre-race and had been given the chance to revisit his decision as to whether or not to proceed with the bet, but had nevertheless re-assured himself that his prediction would hold, he would have proceeded with the bet all the same. Alternatively, if the situation were reversed so that the claimant had instead come to believe that the relevant horse would in no circumstances win the race, then however convinced he was of the truth of his belief about the jockey's fitness or whatever assurances he might have received about other matters antecedent to, and forming the basis of, his original prediction, he would have resiled from the bet if given the opportunity. Therefore, it is the prediction which was dispositive and drove the enrichment, constituting the more important, the more potent, cause of it. In the original enrichment, the mistake plays an important part in the story, but it is a part which is subordinate to the misprediction. Put differently, the mistake is a necessary element which facilitates the enrichment and the prediction, but it is the misprediction on which the claimant ultimately acts.

The second and other normative aspect is the nature of the dissonance the mistake created between the transaction the claimant believed he was undertaking and the transaction he actually undertook. In entering the transaction on a basis of the predicted outcome of a horse race, the claimant took (we assume, consciously) a risk about how the future outcome might turn out: a risk-in-fact, which is the risk that the horse he believes will win does not when the race is run. We might call this the risk the claimant *accepted*. The risk which the claimant actually *took*, because of the mistake, is one which arguably involved a lower probability that the claimant's favoured horse would win; but it is exactly the same risk as the risk which the claimant accepted he was taking as regards its nature –

that the horse might not win the race. So when we examine the consequences of the mistake on the operation of the claimant's personal autonomy, another argument against the normative significance of the mistake is that it did not result in the claimant taking a risk different to the one he already knew he was taking.

That is not quite the entire picture of course. It remains true in the original story that the claimant would not have entered into the transaction in the first place were it not for the mistake: he would not have made a bet based on his prediction if he did not believe he had the benefit of the material, albeit mistaken, information about the jockey. However, that means 'only' that the mistake was causative. As was discussed in the context of causative ignorance,[406] and as is apparent in relation to mispredictions, the fact that some event or thing is causative means only that the claimant would have acted differently – it does not mean that he has acted non-autonomously, or that the enrichment is thereby unjust, because the claimant acted as a result of ignorance, or on the basis of a misprediction, for example. The thing or event itself must, in relation to the enrichment it causes, derogate from the autonomy of the individual in the sense understood by the law so that the enrichment, viewed in its totality, no longer reflects the autonomy of the claimant, and is unjust. In the plain instance of causative mistake alone, because the connections between the mistake, the undermining of autonomy, and the enrichment which was the result are sufficiently clear, so too is the unjustness of the enrichment as constituting a poor reflection of the claimant's exercise of autonomy over the disposition of his assets.

However, the same result does not necessarily follow outside the ordinary case. And so in instances like that of the mistaken gambler, despite the presence of a causative

[406] See Chapter 4.

mistake, the subsequent enrichment should not be regarded ultimately as unjust because the derogation from autonomy by way of the mistake is normatively negated by its relationship with the causal misprediction into which it was incorporated. That, given the subordination of the mistake to the more causally significant predictive activity, the autonomy and will of the claimant is better represented by the prediction and the denial of restitution it entails.

The situation is different for the generous brother. While his mistaken belief is incorporated into the prediction, it is incorporated in a different way; the relationship between mistake and misprediction is different. That his sister was made redundant was not a mere variable to be considered in determining how to run the risk of the future. Rather, the belief was the logical condition precedent to the prediction and the underlying premise for every possible outcome at risk: the brother was trying to predict the degree of her redundancy-consequential financial difficulty. The mistake meant that the risk the brother accepted, and the one he actually took, were completely different. It is therefore nonsensical to say that the vitiating impairment of his mistake was somehow negated because he was a risk-taker in attempting to predict her post-redundancy financial situation. Thus, what risk the brother does take in perhaps gifting over too much money does not undermine the impairment of his mistake, which can be seen as being the more significant cause and the better representation of why the enrichment was made in the way that it was. This leaves him free to make the claim that the vitiating impairment of mistake caused the enrichment to be unjust and without tainting himself as a risk-taker by so claiming.

As it happens, the consequence of being mistaken as to the underlying premise is that the generous brother's exercise of predicting is rendered nonsensical and a nullity. But it is not necessary to show this or otherwise to 'remove' the risk entailed in the causative

prediction before the enrichment can be regarded as unjust. As will now be discussed, the risk in the prediction might not touch the mistake at all.

C. Cases in the middle

The above examples are at opposing ends of the spectrum, in the sense that those which suggest restitution for mistake are those in which the mistake removes the entire logical basis for the claimant's prediction, while that which suggests no restitution is a case in which the claimant's mistake is clearly a subordinate aspect of a wider and obvious risk-taking adventure. Other cases will fall in between – cases in which the mistake does not render a nugatory the basis of a prediction, or the prediction does not disclose an obvious intent to gamble on the future, or both as in the example of *Dextra Bank & Trust Co Ltd v Bank of Jamaica*.[407]

In *Dextra Bank*, the claimant bank paid over US$2,999,000 to the Bank of Jamaica (BOJ) in circumstances where both parties had been deceived by a third party as to the intention of the other – Dextra believed the money was to be loaned, whereas the BOJ believed it had agreed to buy the sum in its Jamaican dollar equivalent. The Jamaican dollar sums paid by the BOJ in pursuance of the 'purchase' were received not by Dextra but by others, including those responsible for the deception. Dextra brought an action against the BOJ for the US$2,999,000, claiming *inter alia* that it was money paid under a mistake of fact: that it was paid under a 'mistaken belief that the money was paid as a loan.'[408] The Privy Council noted that, in order to recover money as having been paid under a mistake of fact, a claimant had to establish among other matters 'a specific fact as to which the plaintiff was mistaken in making the payment, and a causal relationship

[407] [2002] 1 All ER (Comm) 193 (PC).

[408] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [26].

between that mistake of fact and the payment of the money'.[409] It noted that Dextra's claim had difficulties in respect of these elements. Relying on Birks,[410] the Privy Council advised that Dextra's 'mistake' – having intended to make a loan – did not appear to have been a mistake as to a specific fact such as to the identity of the defendant, 'but rather a misprediction as to the nature of the transaction which would come into existence when the Dextra cheque was delivered to the BOJ, which is a very different matter'.[411]

The difficulty with the mistake claim was that Dextra never directly communicated with the BOJ or completely settled the terms of the contract when it drew the cheque and arranged for its delivery to the BOJ. Dextra entrusted its agents with delivery, with instructions to deliver the cheque only on execution of a promissory note securing the loan on terms. Those instructions were not followed and the cheque was delivered to the BOJ and credited to its account without any contract of loan being created. At no time did Dextra actually believe a contract of loan had been formed, though it believed one would, in the future, be in existence by the time the promissory note was executed. It followed that Dextra enriched the BOJ relying on the faith of a fact which it knew had not yet come into existence:[412]

> Here, unfortunately, Dextra failed to communicate directly with the BOJ to make sure that the BOJ understood that the money was being offered as a loan. Instead, it left the communication of this vital matter to its agent, Phillips. Dextra's misplaced reliance on Phillips led it to assume that a loan would result; and this prediction proved to be mistaken. But a misprediction does not, in their Lordships' opinion, provide the basis for a claim to recover money as having been paid under a mistake of fact.

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409 *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [28], citing as authority, *Barclays Bank v Simms* [1980] QB 677, 694.

410 PBH Birks, *An Introduction to the Law of Restitution* (Oxford University Press 1985) 147-148.

411 *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [29].

412 *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [29].

Dextra also argued that it made a mistake of fact when it was deceived into believing the BOJ had agreed to take a loan. However, the Privy Council decided that, while this could be regarded as a mistake (as opposed to a misprediction), it did not cause Dextra's payment to the BOJ. This was because:[413]

> it was overtaken by the specific instructions given by Dextra to Phillips that the cheque was not to be handed over to the BOJ except against the delivery to him of a promissory note evidencing the loan and its terms. It was upon the compliance by Phillips with this instruction that Dextra relied to ensure that a loan was made upon the terms acceptable to it. The significance of the earlier deception by Wildish was only that it contributed to Dextra instructing Phillips to ensure that the cheque was handed over as a loan.

The Privy Council concluded that Dextra could not recover, as the payment 'was not … caused by any such mistake of fact as that now alleged by Dextra; it was caused by a misprediction by Dextra that Phillips would carry out his instructions and that a loan would eventuate.'[414] The conclusion is consistent with the general position in principle: mispredictions afford no recovery as unjust factors. However, the decision on the facts seems wrong. Had the BOJ not changed its position by indemnifying the fraudsters, the Privy Council's reasoning would still have denied Dextra recovery of the money in the hands of the BOJ. The BOJ would have been allowed to keep the windfall. Either the application of the misprediction reasoning is wrong, or the Privy Council overlooked some other basis for recovery. Or both.

While the Privy Council examined whether or not there was a causative mistake in Dextra's belief about what the BOJ had agreed, it may have taken an either-or approach to causation. Indications of this can be seen in: (i) the acknowledgment that Dextra's

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413 *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [30].

414 *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [30]. The Privy Council also advised that the BOJ would have the change of position and *bona fide* purchase defences available to it, had it been necessary to rely on them.

'misplaced reliance' on its agents led it to mispredict, but which misplaced reliance was not, it seems, considered as potentially being a causally relevant mistake co-existing with the misprediction; and (ii) statements to the effect that the enrichment was caused by one instead of the other.[415] It is unclear whether the Privy Council actually adopted such an approach, but it would have been wrong to do so. The principle that mispredictions afford no recovery is not quite the same as the proposition that restitution is not afforded to mispredictors or, alternatively, that enrichments conferred as a result of mispredictions are not unjust. The latter statement is correct insofar as it concerns the legal effect of a misprediction on the enrichment it causes: a misprediction does not make the enrichment unjust. But it does not follow that an enrichment caused by a misprediction is not unjust. The existence of a causative misprediction does not automatically deny the existence and operation of other unjust factors. As already discussed, a causal mistake can co-incide with a causal misprediction, and it is possible – normatively speaking at least – for the mistake to support the claim in unjust enrichment notwithstanding the presence of the causal misprediction.

Assuming the Privy Council did not take an either-or approach, it nevertheless considered that there was no reason for restitution. It was right to say there was no operative mistake in the belief that the BOJ had reached an 'in-principle agreement' to take a loan. Dextra may have held an incorrect belief as to the fact, but the mistake was rendered a causal nullity by Dextra instructing its agents not to hand over the cheque except on the security of the promissory note evidencing the loan. What causal significance there might have been between the belief and the enrichment was replaced by those instructions that payment was only to be effected on those terms. The BOJ was not to be paid because they

[415] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [30], [33].

'had agreed' to a loan (as Dextra knew that there was not yet a formalised, concluded agreement) but rather when, and because, it had executed one.

There is no reason to think Dextra would not have handed over the cheque to its agents had it known the BOJ had not yet reached that in-principle agreement, or was contemplating a different transaction (ie, had it known of *that* mistake). So far as Dextra was concerned, the money was perfectly safe in the hands of its agents and would remain so until such time as Dextra or its agents secured a transaction of the kind and on the terms Dextra was contemplating or, if different, was willing to accept. So, with the cheque in hand, the agents still could have effected the enrichment. That mistake was not a 'but for' mistake.[416]

At the same time, the Privy Council passed over the substantive legal relevance of Dextra's mistake as to the trustworthiness of its agents. While the 'misplaced reliance' was acknowledged, the Privy Council did not consider it as rendering the enrichment unjust in its own right, perhaps because it was incorporated into the subsequent misprediction: 'Dextra's misplaced reliance on Phillips led it to assume that a loan would result; and this prediction proved to be mistaken.'[417] Arguably, the Privy Council ought to have considered the possibility that the 'misplaced reliance' was a mistake rendering the enrichment unjust notwithstanding the presence of the causal misprediction to which it led. If we accept the 'but for' test of causation, then the mistake of believing the agents to be trustworthy was a causative mistake. Had Dextra known of its mistake, that the agents were not trustworthy, it would never have entrusted them with the cheque. Dextra would

[416] An argument that there was a 'but for' mistake in *Dextra Bank* was made in M McInnes 'Enrichments, Expenses and Restitutionary Defences' (2002) 118 Law Quarterly Review 209, 210: 'but for its belief that BOJ previously requested a loan, Dextra would not have asked the rogue to deliver its cheque. Dextra arguably did not so much act in the hope of initiating a transaction, but rather in the belief that it was concluding one. Its intention arguably turned more upon the past than on the future.'

[417] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [29].

have taken negotiations directly (or indirectly, through other agents) with the BOJ to determine whether the latter would agree to borrow the currency or enter into some other agreed transaction. The money would not have reached the BOJ in the contractually unintended manner that it did.

It will be noted that the misplaced reliance on the agents only 'indirectly resulted' in the transfer of the enrichment to the BOJ in the sense that the mistake did not immediately and directly lead to Dextra paying the BOJ. Rather, the misplaced reliance led to Dextra entrusting the cheque to its agents, who were then able to effect the enrichment of the BOJ as part of the fraudulent plan. This indirectness between mistake and the enrichment, or the intervention of additional steps or events between mistake and enrichment, is not problematic if the relevant question for causation is a mechanical one, importing no requirement that the mistake have any particular features *qua* the enrichment other than being a 'but for' cause.[418] There is no requirement, for example, that the mistake be the most proximate or direct cause of the enrichment.[419] So it would be unusual to regard a but for mistake, in connection with the carrying out of a third party's payment instructions (for example, *Barclays Bank v Simms*), as satisfying the broad test of causation whereas a but for mistake, in connection with the instruction of a third party to carry out the payment, would not. Dextra's 'misplaced reliance' upon its agents was, effectively, a mistake about the reliability of the system which it had established. Provided that it satisfies the but for test, a mistake as to the reliability of a payment instruction system, which results in a payment other than the one intended, surely falls within the requirement that the mistake

[418] In *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, 1273, [1999] 1 All ER 941 (Ch D) 964, Neuberger J accepted, in relation to mistake of law, the sufficiency of the but for test of causation, but added that it might be 'possibly coupled with a requirement for a close and direct connection between the mistake and the payment and/or a requirement that the mistake impinges on the relationship between payer and payee'.

[419] This is slightly different to the discussion in Ch 2.6, which deals with the different test for causation in relation to induced mistakes.

be one which causes the payment or other enrichment, even if it may not be 'a specific fact as to which the plaintiff was mistaken *in making the payment*'.[420] Indeed, misdirected funds transfers in the banking context or which are the result of an automated transfer system (or both) are often generated by this type of mistake. One example (of a recoverable mistake) given by Robert Goff J in *Barclays Bank v Simms* was that of:

> A substantial charity uses a computer for the purpose of distributing small benefactions. The computer runs mad, and pays one beneficiary the same gift one hundred times over.[421]

In addition to the mistake, these examples also involve the kind of misprediction which the Privy Council identified in *Dextra Bank*: that the instructions reliably would be followed and the anticipated outcome or enrichment would result on the terms as instructed. It is unlikely that that type of misprediction will be regarded as analytically the reflex, or an alternative analysis, of the mistake.[422] A claimant who holds a belief about the integrity of a system to put into effect payment instructions – that a third party or computer system can be relied on to follow instructions – will typically also accept that there might occur events extraneous to the system of instruction and over which he has no knowledge or control or both, which might prevent the enrichment from occurring (or occurring on terms); for example, events of force majeure or mistakes further 'downstream' in the payment process if further steps or payment intermediaries are involved. On this basis, these cases are better viewed as involving a distinct mistake incorporated into a distinct misprediction.

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[420] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) para [28] (emphasis added). See similarly the facts and reasoning in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49 para [59]-[62], [2007] 1 AC 558, 581-582 (Lord Hope of Craighead). Compare the description of the pleaded mistake in *Dextra Bank* and its connection with the enrichment, given in *Test Claimants in the Franked Investment Group Litigation v Commissioners of the Inland Revenue* [2010] EWCA Civ 103 para [182] and in G Virgo, 'Causation and Remoteness within the Law of Unjust Enrichment', ch 8 of S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 153.

[421] *Barclays Bank v Simms* [1980] QB 677, 697.

[422] Although this would ultimately point to the same conclusion – *prima facie* recovery for mistake.

In relation to *Dextra Bank*, (i) the mistake as to the trustworthiness or reliability of its agents to carry out its instructions led to (ii) a misprediction as to the faithfulness which they would apply to its instructions and the eventual transaction which would be obtained as a result. Unlike the other examples of co-incidence discussed above in which the enrichment was considered unjust, the mistaken belief here does not form the logical basis of the claimant's prediction (so that, as a result of the mistake, the prediction is a logical impossibility). And arguably, like the mistaken gambler, Dextra's mistake went towards the probability that its prediction would eventuate – it made the anticipated outcome more likely.

However, unlike the case of the mistaken gambler, the misprediction in *Dextra Bank* does not clearly disclose a risk-taking intent in the claimant which can be said readily to derogate from the unjustness of the earlier, incorporated mistake. The mistaken gambler made an antecedent mistake, but the misprediction which followed disclosed an intentional acceptance of the risk of adventure which negated the unjustness in his claim that 'I didn't mean him to have it'. On the other hand, it is difficult to counter Dextra's mistake by looking at the acceptance of the risk-in-fact in the misprediction because Dextra did not intend for the money to be at risk at all. Dextra intended no gamble – hence its instructions to agents it believed could be trusted that the cheque was not to be delivered until the loan was executed. The risk which Dextra intended to run was as to whether the contemplated transaction would result, versus a possibility that it would not (along with the consequences of underutilised capital and other opportunity costs). It was not that Dextra had hoped for a loan transaction in the context of a future in which it thought that other transaction options might also occur without its consent. And rather than the trustworthiness of its agents being relevant to Dextra because it wished to predict what type of transaction ultimately would eventuate, it was Dextra's mistake which put it at risk in the first place. It was only

at risk of having its money disappear or otherwise transferred as part of a transaction it did not contemplate because it believed that its agents could be trusted to follow its instructions. It was not anything approaching 'money fairly lost at play'.[423] In such a case, it makes no sense to say that the unjustness of Dextra's mistake that its agents could be trusted was outweighed by the risk taken in anticipating that they would follow their instructions and negotiate for a loan transaction as a result. Had the Privy Council considered the applicability of that causative mistake as an unjust factor, it may have concluded that the mistake made the enrichment unjust even though Dextra mispredicted: that the extent of risk disclosed by the misprediction as having been accepted by the claimant did not contradict the unjustness of the mistake as the qualitatively more significant reason for the enrichment which followed. In the result, while the Privy Council was correct to say that Dextra mispredicted, it should have treated the case as being one of mistake-misprediction concurrency, and considered whether Dextra conferred the enrichment under a causative mistake which made the enrichment *prima facie* unjust notwithstanding the presence of the misprediction.

Another case which falls into the same category is *Re Griffiths*. The facts of the case were described earlier in this chapter. The donor in that case was held to have been mistaken as to the state of his health at the time he effected a particular transfer of shares. The donor also mispredicted how long he would live, as he transferred the shares anticipating survival beyond at least the three year and more beneficially the seven year statutory threshold for the disposition to attract inheritance tax benefits. The donor knew that he had rheumatoid arthritis, which was consistent with his having a life expectancy of around seven to nine years. His mistake was that, being ignorant of an aggressive lung

[423] *Moses v Macferlan* (1760) 2 Burr 1005, 1012, 97 ER 676, 681.

cancer which effectively rendered as remote any chance of survival to the statutory thresholds, he continued to believe that he had a state of health consistent with a seven to nine year life expectancy.[424]

Also as discussed above,[425] *Re Griffiths* is not a case of alternative analysis. A belief about having a life expectancy of a particular period or a belief generally about one's state of health is not logically reflexive with a belief that one would then actually live that or any particular number of years into the future. There are many factors and events which impact on how long a person will live, so that persons of equivalent life expectancies and states of health will not necessarily live any particular (or the same) length of time. For the same reasons, neither is it a case of an input-reliant or formula-based misprediction.

Rather, the claimant can be seen as making a mistake about his state of health, which was then incorporated into a consequential misprediction that he would at least live to see the first threshold of the statutory period (being the expectation on which the structure of the disposition was based).[426] Nevertheless, there is a difficulty with *Re Griffiths*.

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[424] The donor's belief about his state of health was consistent with surviving the statutory period. A necessary basis for this belief must be that he did not then have lung cancer (or any other medical condition) of the kind which would have made his survival for the statutory period an unlikely prospect. He thus had both a general explicit belief and a specific tacit assumption. Compare *Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 para [113], [2013] 2 AC 108, 152-153, and the discussion at Chapter 2.1B.

[425] See the discussion of the facts in the opening paragraphs of this Chapter 6.3.

[426] There are a number of different ways the various mistakes can be expressed, such as mistakes about one's state of health, existing medical conditions and life expectancy, and mispredictions about how long one would live, whether the life expectancy would be achieved and whether the structure would be tax-effective in reality. It is sufficient for present purposes that the donor made some present mistake about his state of being which led to a subsequent misprediction about his future survival. Compare the characterisation of mistake in *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, 1260-1261:

> In my judgment, the position ultimately adopted by Mr Brock is correct, Nurdin's mistake can be characterised in one of two ways, or, possibly more accurately, in two cumulative ways. First, when putting the automated payment arrangements into effect in 1994, Nurdin failed to ensure that the arrangements were such that the level of payment was to be the subject of, at the least, reconsideration, and, at the most, automatic reduction, once the instalment due on 1 November 1995 had been paid. Further or alternatively, in November 1995, Nurdin forgot that the extra £59,338 per annum ceased to be payable under the lease, and therefore failed to instruct the accounts department not to pay DBR quarterly payments at the rate of more than £207,683 per annum unless and until the rent was reviewed above that figure.

Another approach to the donor's misprediction as to surviving the statutory period is to recast it as a present belief as to the 'chance, likelihood or probability' of survival, in the same way that the mistaken gambler's misprediction

On the one hand, it is quite unlike *Dextra Bank*, in which the claimant bank did not intend to take any risk as to the nature of any transaction which subsequently came into effect – that any eventual transaction, if one were to be put in place, would have been on the terms as intended and instructed. The claimant in *Re Griffiths* intended the recipient's enrichment (and effected it), having the hope that his survival would turn the enrichment into a tax-effective one. The risks-in-fact intended by the respective claimants were therefore quite different. Dextra predicted that a loan would come into effect, but intended no risk as to the nature of the transaction – it was to be a loan or nothing (save where Dextra consented to a different transaction). The happening or not happening of the loan transaction was the risk that Dextra knew lay in the future, but it did not contemplate the risk that the enrichment might be put into the hands of the defendant on a basis other than one intended by it. However, the donor in *Re Griffiths* did take such a risk, having transferred the enrichment to the recipient while hoping that his future survival would give him the tax-effective outcome for which he was hoping. The donor conferred the enrichment knowing that there was a risk that the future fact on which the enrichment was based might fail and thus that the enrichment occurred on a basis other than the one which he desired.

might be recast as a mistake as to the likelihood the chosen horse would win. Thus the donor was content to put into effect the structure not because he believed he would live long enough into the uncertain future, but because he believed that he stood a real chance of doing so. And as to the mistaken gambler, not because he believed the horse would win, but because he thought it stood a real chance of doing so. But this is misconceived. In essence it is the anticipated future which matters. If either claimant had been told by some sorcery that their belief as to chance was correct but nevertheless would not result in survival or a winning bet, the fact that the chance was a real one would not have been sufficient for both claimants to enrich. They enriched on the basis of how they hoped the future would turn out – and the prediction should not be open to characterisation as a belief about present chance contrary to that proposition.

The other difficulty with that approach is that if the belief was really about 'chance' then the claim is that the claimant acted on the basis that things were of one particular chance, likelihood or probability (due to the mistake) whereas in reality things were of another chance, likelihood or probability. Restitution of an enrichment which was based on chance – and based on the proposition that the enrichment was run on a different degree of chance than the degree of chance intended – will likely have significant difficulties in relation to uncertainty and risk-taking.

On the other hand, the donor was also in a position somewhat like the generous brother whose mistake rendered impossible the event which he was predicting:[427]

> The relevant mistake on which they rely is that Mr Griffiths mistakenly believed, at the times of the transfers, that there was a real chance that he would survive for seven years whereas in fact at that time his state of health was such that he had no real chance of surviving for that long.

The difference for the generous brother, however, is that his mistake rendered his prediction a logical nullity – the prediction would make no sense unless the belief was true; whereas in *Re Griffiths* the donor's mistake only made it highly improbable that his predicted outcome would eventuate. The donor – whether his belief was true or false – always appreciated the risk of not surviving the statutory period, whereas the generous brother did not appreciate the risk that his sister had not been made redundant at all (and the *Dextra Bank* claimant, because it believed its agents to be trustworthy, never appreciated that the money entrusted to them was at risk of being fraudulently applied for a purpose different from the instructed purpose). It is possible to argue that while the donor in *Re Griffiths* knew he was taking a risk as to the future, his mistake meant that he was taking more risk than he intended and to such a significant degree that there was some qualitative or normative difference between *intending* to take a risk of some degree that he might not survive three or seven years following the disposition and *actually* taking a risk as to a version of the future that, because of the mistake, had almost no chance of occurring.

Save for that argument, it would be difficult to regard the mistake as making the enrichment non-autonomous (in the sense of rendering the donor unable to determine the terms of disposition, and the enrichment therefore unjust) in the particular context of the donor's subsequent misprediction. Perhaps the position might be different in an extreme

[427] *Ogden v Trustees of the RHS Griffiths 2003 Settlement, In re Griffiths, decd* [2008] EWHC 118 (Ch) para [6], [2009] Ch 162, 165.

case, but it would not be inconsistent with the sense of autonomy used in this thesis generally not to consider the enrichment unjust in circumstances which contain the same reasons justifying the denial of unjustness as in relation to the mistaken gambler. One of the reasons is that just discussed: the risk the donor believed existed and decided to take was of the same nature as the risk which did exist and which he actually took.[428] The mistake the donor made meant that there was a dissonance between the risk he accepted and the risk actually taken – the claimant accepted a risk that he might not live to satisfy the relevant statutory period when in reality he was almost certain not to do so. But the difference is of degree rather than nature, with the claimant intending to take a particular risk (that he might not survive the statutory period) and in reality, despite the mistake, still taking that very risk.[429] Because the mistake made no difference to the *type* or *nature* of the risk the claimant did not already intend to take, that would count against regarding it as making the subsequent enrichment unjust on the basis that the claimant had been rendered 'non-autonomous'.

It remains true in this analysis that the donor also made a but for mistake, in that he would not have proceeded with the transfer on the terms that he did (including the taking of the risk as to the future) had he not made the mistake, because he would have known that the probabilities were different than what he supposed and that he stood little to no

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[428] Even having a clean bill of health would not have resulted in the donor thinking that he had avoided the risk of failing to survive the statutory period.

[429] Compare *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197 para [198], [2012] Ch 132, 195 (Lloyd LJ), and in the insurance context, the language in the judgment of Lord Mansfield in *Carter v Boehm* (1766) 3 Burr 1905, 1909, 97 ER 1162, 1164:

> The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.
>
> The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.'

chance of obtaining the tax benefit. It would be argued that one might be willing to take the risk of life events in certain situations but not others. But it also remains true that the claimant made a but for misprediction as well, in the sense that he would not have proceeded but for the hopeful anticipation of living past the relevant statutory threshold; and so the difficulty with the argument based on mistake, and the other reason why the enrichment ought not to be considered unjust, is that as regards their respective roles in the decision to confer the enrichment, the mistake was very much subordinated to the misprediction: it was the latter which was dispositive of the decision to enrich. We know this because had the donor known of his mistake but nevertheless believed that he would have survived the statutory period, he would have proceeded with the disposition of shares; conversely, had the donor's belief been correct – that is, had it been true that he had a state of health consistent with a life expectancy of seven to nine years – but had for whatever reasons come to believe that he would not survive the statutory period, he would not have made the disposition. And so it was not the truth or otherwise of the mistaken matter which determined whether the claimant would have proceeded with the enrichment that he actually did but rather what he expected of the future.[430] The misprediction was the real or more potent reason for the enrichment.

To complete the circle, it is important to show that this reasoning cannot also be applied to undermine the analysis in relation to *Dextra Bank*, *Kerrison* and the generous brother. As to the nature of the risks-in-fact, the risks the claimants actually took were fundamentally different in nature to the risks they thought they were taking.[431] As to the

[430] Similarly, the ultimate deciding factor for whether or not the claim is subsequently made seems to be the fact of the donor's failure to survive the statutory period – presumably, if the donor had made a mistake but yet survived the statutory period the claim for restitution on the basis of mistake (unaffected by any misprediction) would not be made even though the enrichment was 'unjust'.

[431] In Kerrison's case, the risk that financial accommodation would not be forthcoming or not required and hence the loss of the use value of the anticipatory payments, versus the risks of principal losses in the certain insolvency of the recipient and the issues involved in participating in the applicable statutory regime.

greater causal potency of the misprediction over the mistake, it does not apply to the generous brother. His enrichment only makes sense if his belief about his sister's employment status was true. For Kerrison, it is unlikely that advance payments would have been made to a company known to be insolvent even if he anticipated the receipt of financial accommodation, since such accommodation (and the benefits thereto) would have been subject to the statutory insolvency regime and its attendant complications. For Dextra, could it be said that it would have gone ahead with the enrichment had it convinced itself that, despite knowing of its mistake about the trustworthiness of its agents, a loan transaction would nevertheless have resulted? Probably not. Dextra's management would have had the interest (to say nothing of the duty) to exercise skill, care and diligence with respect to the particular transaction and also more generally in relation to the conduct of the bank's business. As such, there would have been reasons, including the need to manage, control and mitigate various corporate risks (eg, business and operational risk, reputational risk, transactional and financial risk), which would have led Dextra to avoid using its agents once it had become aware of its mistake and that its agents could not in reality be trusted; and similarly, any officers, employees or other third party contractors discovered to be in the same position. Beyond this, there is also, at least today, further regulatory and compliance bases for banks to ensure that they have an appropriate level of assurance with respect to the custody of money and the identity of their customers, agents, intermediaries and other banking services users and parties (eg, in connection with regulatory frameworks on corruption and bribery, financial fraud, money-laundering, terrorist-financing and sanctions). Thus, whether as profit-motivated enterprises, custodians of depositors' funds or as regulated entities, it is highly likely that Dextra and any other financial institution in the same position would have cut ties with its agents, or at the very least not entrusted or continued to entrust the agents with the funds, once it

discovered its mistake – even if it believed quite separately that a loan agreement would still have resulted in the future.

To summarise, in cases of mistake-misprediction concurrency, the law has to decide whether to consider the mistaken enrichment to be 'unjust' in the light of the misprediction – or from the normative perspective, whether something about the presence of the misprediction has meant that the claimant can no longer properly maintain that the enrichment was non-autonomous due to the mistake. A mistake ought to be insufficient to render unjust (or non-autonomous) an enrichment it causes if that enrichment still reflects a decision in which 'what is true at the time of the enrichment' was not quite as meaningful or important to the claimant as 'what might be true later'. If the mistake leaves unaffected the nature of the risk the claimant knew he was taking, and if that risk was incorporated in a misprediction which was qualitatively the more significant reason for the enrichment, it ought to follow that the misprediction was a better reflection of his autonomy than the mistake a derogation of it. Effectively, the mistake is overridden and no longer counts even though it was a 'but for' cause of the enrichment.[432]

On this basis, the earlier conclusion in Chapter 2[433] that mispredictions are non-qualifiers rather than disqualifiers remains correct. The generous brother's enrichment was unjust even though he mispredicted. It does, however, require a qualification: in some cases, like that of the mistaken gambler, the presence of a misprediction has the effect of disqualifying an otherwise good claim in unjust enrichment, by overriding what qualifies with what does not.

[432] The position may be different where the claimant's mistake is induced. As to this, see the discussion in Chapter 2.6 – there is theoretically no reason though why the above reasoning could not be applied to negate some or all 'induced mistakes' if to do so would better represent the balance of interest in claimant autonomy and any other relevant value.

[433] See footnote 232.

D. Distinct and unrelated mistake and misprediction

In the fourth model of co-incidence,[434] the mistake and misprediction are distinct and unrelated to each other. That they are unrelated distinguishes this from the other models of co-incidence. 'Unrelated' only means the mistake and misprediction do not affect the content of one another: the content of one is not incorporated or carried into the content of another. It is not that they are unrelated in their connection with the enrichment; rather, both the mistake and the misprediction are causally relevant to it. A possible example would be where a person makes a donation to a charity, predicting that he would soon receive an inheritance from his ailing aunt. The inheritance does not materialise and the donor was at the same time mistaken as to the content of his bank balance when he conferred the enrichment: he believed he had £1,000 to his credit when in fact he had none. The mistake and the misprediction are unrelated to each other; but, both are causative of the enrichment – had he known either of his mistake or that he would not be receiving the inheritance, he would not have made the £200 cash donation to the charity.

Arguably, principle would favour a *prima facie* finding of 'unjust' in this case, for the reason that, while the claimant is unimpaired by the misprediction and takes the risk of those matters within its scope, he also conferred the enrichment under an independent, operative mistake. As the misprediction relates to a separate and unconnected matter upon which the state of his accounts does not bear, it is not immediately clear how the donor's acceptance of the risk-in-fact in predicting his receipt of the inheritance would contradict or otherwise undermine the unjustness of the donation caused by the mistaken belief that he had more money than he actually did have.

[434] The four models of co-incidence are set out in the opening paragraphs of this Chapter 6.3.

The mistaken belief as to the present has no relevance to the future being predicted (quite unlike the mistaken gambler) – the condition of his bank account would not have led him to think one way or another about the prospect of an inheritance.[435] While it is correct that the status of his bank account was material to the wider decision concerning the 'affordability' of the donation, the donation's affordability does not involve taking a risk-in-fact in the same way as betting on the outcome of a horse race. The question of affordability is a matter of both present financial condition and anticipated financial condition. The prediction as to the inheritance, and the risk-in-fact which is inherent to that prediction, was an input into the ultimate decision on 'affordability' and whether to enrich, as opposed to the subject matter of that decision. In contrast, the prediction as to the outcome of a horse race is substantially the entire subject matter of a decision to place a bet. As such, the decision to enrich on the basis that the donation was 'affordable' cannot conclusively be regarded as a 'risky adventure' having to do essentially with a (mis)prediction in the same way that it cannot conclusively be regarded as a 'riskless enterprise' having to do essentially with the present state of finances. It was a decision with *a* degree of risk, but which risk was disconnected from and unrelated to the mistake apart from their respective causal contributions to the decision to enrich.

If that characterisation is correct, the mistake was a relevant cause of the enrichment and a vitiating impairment which had nothing to do with the prediction and the risk that prediction entailed. In this and other cases following the same model, the usual conclusion should be that the enrichment was 'unjust', on the basis that the independent mistake provides a reason for restitution which remains unrelated to facts which reveal the claimant to be a risk-taker, and which facts he is not required to explain in asserting the causative

[435] The assumption here is that the claimant did not think that his personal credit balance (a) was known to the potential benefactor and (b) would play a role in the latter's decision about whether or not to bequeath a gift.

relevance of his mistake to the enrichment claimed to be unjust. But the same qualification to the proposition that mispredictions are non-qualifiers rather than disqualifiers might operate in this context. While the mistake and the misprediction are distinct and unrelated except for their causative role in the enrichment, there may be instances within this model in which the misprediction was a far more significant and material, even dominant, cause of the enrichment than the causative mistake. It might be that, while the vitiating impairment of mistake is unconnected with the risk involved in the misprediction, the former might not be regarded as making the enrichment unjust in the face of the latter, more dominant cause in such cases.

That reasoning follows the normative approach taken in this thesis. The usual case for restitution on the basis of mistake in this model of co-incidence makes sense because the vitiation of autonomy in the causative mistake is unaffected by the unrelated misprediction. The autonomy-centred view of the prediction, that the enrichment reflects the claimant's autonomous acceptance of the risk-in-fact as regards his anticipated inheritance, does not obviously undermine the claimant's separate assertion that his autonomy over the donation was vitiated by his mistake about the state of his bank account. However, in instances where the misprediction plays substantially the more important or dominant role within the same model of independent causes, it would be more accurate to say that the misprediction ought to be regarded as a better reflection of his autonomy than the comparatively minor mistake as a derogation from it.

6.4 Conclusions on mistake-misprediction alternative analysis and co-incidence

Enrichments in which assertions of mistake and misprediction overlap are difficult. However, much of the difficulty can be removed by the recognition that there are a number of ways in which a mistake and a misprediction can appear in the lead up to the enrichment.

Instances where the mistake and the misprediction are alternative analyses of each other can quickly be resolved – they are unjust on the basis of mistake. In these cases, because the misprediction is entirely a logical or factual manifestation of the underlying mistake, all the subsequent 'misprediction' demonstrates is that the claimant had been in some way mistaken from the beginning and that the conferral of the enrichment was non-autonomous as a result.

Cases where there is a mistake and a separate misprediction should be decided according to the manner in which they relate to each other and the enrichment. The majority of cases will be where the mistaken belief is incorporated into the subsequent misprediction. In some cases, the mistake is so fundamental to what followed that the enrichment is unjust even though the claimant also mispredicted. In other cases, the reverse is true: the misprediction is so fundamental to what followed that the enrichment is not unjust even though the claimant was mistaken. Yet other cases need to be closely assessed for the precise nature and measure of decision-autonomy effected through the enrichment as a culmination of competing causes. The same is true for cases in which the mistake and misprediction are causative of the enrichment but are otherwise wholly unrelated. Still, in all of these cases, the various arguments appear reducible to a single proposition, which is the need to ask which of the mistake and the misprediction is the more causally significant reason for the enrichment, and thus a better reflection of the claimant's autonomy or the lack thereof.

CONCLUSION

Part I of this thesis (in Chapter 1) started by seeking to explain the normative underpinnings of that part of the law of unjust enrichment concerned with mistake. It did so in the belief that the normative basis is of central importance not only in understanding the law but also in helping to resolve controversies within it.

It was argued that the core normative justification for the law of mistake is 'autonomy of disposition', which in its expanded form is 'the personal autonomy of individuals to decide for themselves the terms on which the enrichment occurs or, equivalently, to decide the terms on which their resources are transferred'. An enrichment in which the transferor's autonomy of disposition has been undermined by mistake is therefore unjust and liable to be restored, subject to the satisfaction of the other elements of the claim in unjust enrichment. But that autonomy of disposition is not unlimited and operates within a broader legal order which can validly impose limitations on the decision-making discretion of individuals in relation to the disposition of their resources. This explains why the law focuses on the concept of claimant intention (that it be present, properly formed and properly effected), while at the same time accepting that an actual derogation from that intention in relation to an enrichment might not always make the enrichment an unjust one. Apart from being consistent with the existence and structure of the other intent-based unjust factors, the account also explains the recipient's strict liability for mistake, and the need to ensure that restitution is subjected to the recipient's change of position. Other normative accounts, such as utility and economic efficiency, are too abstracted to provide a direct and convincing explanation for why a mistake renders an enrichment *unjust*. In particular, they cannot distinguish the mistakes which count from those which do not.

Chapter 2 showed, as one might expect of a close relationship between an area of law and its justification, that the settled areas of the substantive law of mistake sensibly instantiate the value in individual autonomy. Apart from providing the explanation for why enrichments conferred under causative mistakes are considered 'unjust', the interest in protecting autonomy of disposition also explains four other core aspects of the law.

First, claimants who 'waive inquiry' or who decide to enrich 'in any event' are neither mistaken nor non-autonomous. Rather than undermining the claimant's autonomy over his resources, an enrichment in circumstances in which the claimant decides to proceed consciously without regard to particular knowledge reflects the claimant's freedom to decide the terms of the enrichment's disposition.

Secondly, mispredictions are not unjust because the mispredictor's unimpaired decision – freely to transfer the enrichment in circumstances in which he is cognisant of the risk-in-fact of the future – is a manifestation of his decision-making freedom over the terms of the transfer. Conversely, the imposition of a qualification (or a transfer in circumstances where the qualification is obvious) shows that the claimant did not merely confer the enrichment with the hope that all would turn out well.

Thirdly, mistaken transfers for which there is a separate legal obligation to enrich are not unjust to the extent of that legal obligation because the law already requires the claimant to effect that enrichment (or its value). The mistaken transfer of that enrichment therefore does not subvert the claimant's autonomy with respect to the enrichment – he is required by law to transfer it anyway.

Finally, the interest in protecting the same individual 'decision-autonomy' can explain why enrichments caused by induced mistakes are unjust even in circumstances where the claimant would have decided to transfer the enrichment anyway. The reason is

that autonomy of disposition implies not only that the *outcome* of the actual enrichment reflects what the transferor decided, but also that in making the decision to dispose of his assets, the claimant is left autonomous in that *process*. It is for this reason that the law is sensitive to an externally induced interference with the claimant where that interference has become 'actively present to his mind'.

In Part II, this thesis turned to using the normative analysis to provide solutions to unsettled questions in the law of mistake.

In relation to what level of uncertainty and doubt is consistent with a claim in mistake (Chapter 3), there should be no restitution for mistake once a threshold level of reasonable doubt is reached. This is for the reason that the presence and degree of uncertainty is at that point sufficiently significant in the claimant's mind that his decision to enrich in that situation reflects the autonomy of someone who has accepted that the enrichment might be conferred on terms different to those contemplated.

For claims based on causative ignorance (Chapter 4), there should be no restitution for mistake because the claimant has no relevant belief. Furthermore, there should be no restitution for unjust enrichment because (i) such claimants are able freely to decide what terms should apply to the transfer, (ii) get exactly those terms, and (iii) a claim based only on causative ignorance goes beyond the standard of autonomy it would be reasonable for the law to protect.

In relation to mistaken gifts and other mistaken voluntary dispositions (Chapter 5), there is no normative reason in autonomy for giving such mistaken enrichments their own special regime. This is because (i) the claimant is equally non-autonomous whether his appreciation of the enrichment is that it was voluntary or obligatory, and (ii) the event of a gift, unlike a bargained-for enrichment, does not suggest that the autonomy of the claimant

to decide the terms of the recipient's enrichment should be limited in any way, such as to matters only of 'sufficient gravity'.

For mistaken enrichments in relation to which the claimant can also be seen as having made a misprediction (Chapter 6), the necessary first step is the recognition that this blurring of the line between mistake and misprediction can occur in different ways. Rules can then be identified to handle different scenarios. Two main divisions can be made. First, examples of alternative analysis should be treated as mistakes, since the misprediction is only a logical or factual manifestation of the mistake and, unlike ordinary mispredictions, involve impairment and no appreciation of the risk-in-fact. Enrichments conferred as a result of such particular types of 'mistake and misprediction' are non-autonomous. Secondly, instances where distinct mistakes and mispredictions co-incide are not as straightforward: whether the enrichment is unjust or not depends on how the mistake and the misprediction relate to each other and to the enrichment. However, a general rule based in autonomy can be proposed, which is that there should be no restitution for mistake where the misprediction is the more causally significant reason for the enrichment, and thus a better reflection of the claimant's autonomy than the mistake is a derogation from it.

In this thesis, the normative account has therefore been considered in the context of both the core (Part I) and the unsettled (Part II) areas of the law of mistake, binding them together by providing an evaluative and analytical framework for both. From the point of view of that account, we obtained explanations and guidance as to why the law looks the way that it does, and also how it ought to look. But that does not mean that the existing law can be explained only by reference to autonomy. Other values and goals can limit or stretch the boundaries of the justification. At the same time, the amenability of the core principles of mistake to analysis as instantiations of an autonomy of disposition suggests a

level of coherence within the law of mistake in the law of unjust enrichment which belies its relative youth within a private law family in which contract and tort are much longer established. Unsettled aspects of mistake do remain, but not intractably so. Perhaps what might be true of human families might also be true of legal ones, in that newer additions often have the benefit of more attention, and have had less time in which to develop unseemly habits.

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