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Comments

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I. *Introduction*

The recent decision in *RBC Dominion Securities Inc.*v. *Dawson*[1] raises some interesting questions regarding the defences available to a claim in restitution for the recovery of money paid by mistake. At issue were the defences of change of position and estoppel. Both defences are recognized in Canadian law, but questions remain regarding their limits and their relationship.

II. *The Dawson Case*

The plaintiff, a stockbroker, numbered the two defendants among its clients, and held for each of them their shares in a certain corporation. That corporation was reorganized under a mandatory plan which provided for an exchange of shares with another company on the basis of five shares for one in the other company. In reporting to its clients, the plaintiff mistakenly transposed the formula and advised each defendant that the exchange was on the basis of one share for five in the other company. Upon receiving this very good news from the plaintiff, each defendant contacted the plaintiff for confirmation of the information, and each received confirmation. Thereupon each defendant, honestly and reasonably relying on that information, instructed the plaintiff to sell their shares. The end result was that each defendant was grossly overpaid. One defendant was overpaid by $4,920, receiving $5,070 instead of $150. The other was overpaid by $3,207, receiving $3,289 instead of $82.

The plaintiff discovered its mistake just two weeks later. But it was another three weeks before the defendants found out, because the plaintiff waited sixteen days before doing anything to notify them, and then mailed letters to them. By that time each defendant had spent most of the money, and in ways they would not have done had they not had this money. Each defendant refused to make any refund, and each was then sued. The actions were consolidated.

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1. (1992), 95 Nfld. & P.E.I.R. 309; 301 A.P.R. 309 (Nfld. S.C.).

The defendant who received the $4,920 overpayment was fresh out of law school at the time with an annual income of $7,500. This payment, which amounted to two-thirds of her modest income, must have been a welcome windfall indeed. "When one takes into account [the defendant's] income, at that time," said Hickman C.J., "it is unlikely that she or anyone in her financial position would have spent that amount of money, in such a short time, for items which were not necessities, if she had not suddenly and unexpectedly come into the possession of the funds from the sale of her stock."[2] The judgment by no means gives a full itemization of her expenditures, but it does specify a chesterfield, VCR and refurbishment of a dining room table, clothes and other items of furniture.

The other defendant was an articling law student at the time with an annual income of $9,600. His $3,207 overpayment, which amounted to one-third of his income, also was a very significant windfall, and he too promptly disposed of it. He used $1,720 to pay off his Visa account, $500 to pay back a loan from his sisters, and the rest to take an unplanned holiday and entertain some friends. None of this would have been done but for the payment.

Hickman C.J. dismissed both actions in toto, finding in favour of the defendants on two separate grounds, change of position and estoppel.

III. *Change of Position*

Change of position is clearly recognized in Canadian law as a defence to a claim for recovery of money paid by mistake.[3] In order to invoke the defence, the defendant must show that he/she has so changed position as a result of the mistaken payment that it would be inequitable to be required to repay it. "The authorities are clear that for a defendant to succeed he must show a detrimental change of position as a result of the payment..."[4] Furthermore, the defendant presumably must not have been at fault for the mistake,[5] and must have acted bona fide and without notice of the mistake.

The leading case is the decision of the Supreme Court of Canada in *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.*[6] The lessee of a municipality had mistakenly paid $31,000 over a period of almost four years by continuing to make payments under leases that in fact had been

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2. *Ibid.*, at 313.
3. *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.* (1975), 1 D.L.R. (3d) 1 (S.C.C.).
4. *Hydro Electric Commission of Township of Nepean* v. *Ontario Hydro* (1982), 132 D.L.R. (3d) 193, at 214 (S.C.C.), (*per* Dickson J., dissenting).
5. *Larner* v. *London County Council*, [1949] 2 K.B. 683, at 688-9, (*per* Denning L.J.).
6. *Supra*, note 3.

surrendered. By the time the mistake was discovered the municipality had spent the $31,000 and had no funds on hand. In order to make any refund it would have to raise the money by increasing taxes. Nevertheless the municipality was required to make a full refund. Speaking for the court, Martland J. said:

> . . . the moneys received from [the payor] were put in the general account along with tax moneys to pay general everyday expenses. There is no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the Municipality altered its position in any way because these moneys were received. The mere fact that the moneys were spent does not, by itself, furnish an answer to the claim for repayment. If the Municipality is required to refund the moneys to Mobil it will be in the position of having had the use of the moneys, over a period of time, without any obligation to pay interest.[7]

Since there was no evidence that the payment had induced the municipality to do anything different from what it would have done if the payment had not been made, the defence was bound to fail. There was no detriment or prejudice involved, so there was no reason not to require a refund.

1. *Rationale for the Defence*

Martland J. accepted Lord Mansfield's view that the action to recover money paid by mistake is based on equitable grounds, it being prima facie against conscience for a payee to keep money paid by mistake. No doubt there is some truth in the argument of counsel in one case that "the foundation of the right to recover money paid under a mistake of fact is the principle that a man shall not make a profit out of the mistake of another."[8] Martland J. also accepted Lord Mansfield's views regarding defences to the action. Lord Mansfield had said in 1760 that the defendant "may defend himself by every thing which shews that the plaintiff, ex aequo & bono, is not entitled to the whole of his demand, or to any part of it."[9] The question, in other words, is "whether the requirement to repay is just and equitable".[10]

Martland J. also made it clear that the payor in these cases does not bear the burden of proof that it is against conscience, or unjust or inequitable, for the payee to keep the money. Rather it is for the payee to show that it is unjust or inequitable to be required to repay.

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7. *Ibid.*, at 13.
8. *Bayliss* v. *Bishop of London*, [1913] 1 Ch. 127, at 130 (*per* Lord R. Cecil, K.C. and F. Phillips).
9. *Moses* v. *Macferlan* (1760), 2 Burr. 1005, at 1010; 97 E.R. 676, at 679.
10. *Supra*, note 3, at 12.

As *Storthoaks* makes clear, it is not considered unjust or inequitable to require the payee to repay simply because the payee has spent the money before notice of the mistake. In *Storthoaks* itself the money was used to pay the municipality's general everyday expenses. If the municipality did not have this money then presumably it would have raised tax money for this purpose. There was no evidence that the municipality would be any worse off by being required to make a refund than it would have been had it not received the payment in the first place. There was nothing to show that it would be inequitable to require the municipality to refund the overpayments.

An example of a very different case would be that of a payee who was induced by the apparent increase in assets to give that money away to charity. If the payee were then required to make a refund, the payee would be very much prejudiced by having done something that he/she would not have done but for the payment. The payee's position would be worse than it was before the payment. There seems little reason to make the payee bear a loss in this situation. It seems better simply to let the loss lie where it falls in the first place, on the payor. It is one thing to prevent one from profiting from another's mistake; it is another thing to make one lose because of another's mistake.[11] As Lord Goff has said: "... where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff's restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position."[12]

In *Storthoaks* Martland J. noted that there was no evidence of any special projects undertaken or special financial commitments made because of the payments. That such evidence could make a difference is, of course, implicit in this statement. Undertaking special projects would not by itself be a detriment to the municipality. To the contrary, presumably this would be a benefit to the municipality. But the point is that the municipality would be prejudiced if it were then required to refund all the money. It would be worse off because it would have spent money that it "did not have" on special projects that it would not have undertaken without that money. To require a full refund in these circumstances would be inequitable.

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11. See Caroline A. Needham, "Mistaken Payments: A New Look at an Old Theme" (1978), 12 *U.B.C.L.R.* 159, at 191.
12. *Lipkin Gorman* v. *Karpnale Ltd.*, [1991] 3 W.L.R. 10 (H.L.), at 34.

2. *Application to Dawson Case*

Dawson differs from *Storthoaks* in the findings of fact that both defendants did change their positions as a result of the payments. Not only had they spent the money,[13] but they had spent it in extraordinary ways which they otherwise would not have done.

(i) *Chesterfield*

There was an exception. One defendant spent $300 on a chesterfield which she would have done anyway regardless of this payment. It is clear from *Storthoaks* that an ordinary expenditure such as this would not be sufficient to raise the change of position defence. However, the action against her was dismissed in toto. Although he did not discuss the issue, presumably Hickman C.J. proceeded on the basis that the change of position defence operates on an all or nothing basis.[14]

There is nothing in principle to support an all or nothing approach to the change of position defence. Principle supports a pro tanto approach. The rationale for the defence is that the payee should not suffer detriment because of the payor's mistake. There is no detriment as regards the $300 chesterfield. Moreover, although Hickman C.J. cites *Storthoaks* in overall support of his decision, nothing said in that case supports an all or nothing approach to the change of position defence. To the contrary, *Storthoaks* supports a pro tanto approach. Martland J. quoted Lord Mansfield's statement that the defendant may show that the plaintiff is not entitled "to the whole of his demand, or to any part of it."[15] He also quoted this statement from the American *Restatement of Restitution*:[16]

> The right of a person to restitution from another because of a benefit received is terminated *or diminished* if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make *full* restitution.[17] (emphasis added)

English law also treats change of position as a pro tanto defence.[18]

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13. Actually, the judgment did not say that all of the money had been spent before the mistake was known; it said only that most of it had been spent. The judgment did not concern itself with the unspent portion, presumably for the reason given *infra*, at note 14 and accompanying text.
14. This would also explain why the judgment did not concern itself with the unspent portion of the money.
15. *Supra*, note 3, at 12.
16. American Law Institute, *Restatement of the Law of Restitution; Quasi-Contracts and Constructive Trusts* (St. Paul, American Law Institute Publishers, 1937), ss. 142(1).
17. *Supra*, note 3, at 13.
18. *Lipkin Gorman* v. *Karpnale Ltd.*, *supra*, note 12.

It is submitted that the change of position defence should not have barred a claim for the $300 spent on the chesterfield.[19]

(ii) *Debts*

One defendant used a substantial part of his overpayment to pay off two of his debts, a $1,720 Visa account and a $500 loan from two of his sisters. Now since he would have had to pay these debts anyway at some point, the overpayment saved him from having to use his other money for this. Is this then not a case where the money was used to meet ordinary expenses? It certainly would be if the money had been used to pay debts as they fell due. Such payments would not qualify for the change of position defence.

However, Hickman C.J. found that these were not payments to meet ordinary expenses. He said:

> ... [The defendant] ... was suddenly and unexpectedly placed in a financial position which allowed him to make expenditures he would not have thought of making if he had known that his windfall was illusionary. [The defendant], who still has debts to pay, testified that had he known the facts, he would not have paid off his Visa account in one fell sweep, nor would he have made the other expenditures at that time. I accept [his] evidence ... and find that his payment of one of his debts only, namely, his Visa account, was not a payment made in order to meet ordinary expenses. Rather, [he] took advantage of his windfall to liquidate one or more of his debts in a manner which he would not ordinarily have done and which was obviously out of line with the manner in which he was dealing with his total indebtedness at that time.[20]

It is submitted that this difficulty could have been overcome by giving the plaintiff subrogation rights allowing it to stand in the shoes of Visa and the sisters.[21] If the plaintiff were substituted for those creditors, on the same terms as those of the original loans, how would the defendant be

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19. Whether the estoppel defence should have acted as a total bar is discussed *infra*.

20. *Supra*, note 1, at 314.

21. "... '[S]ubrogation' ... is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances. Some rights by subrogation are contractual in their origin, as in the case of contracts of insurance. Others, such as the right of an innocent lender to recover from a company moneys borrowed *ultra vires* to the extent that these have been expended on discharging the company's lawful debts, are in no way based on contract and appear to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment": *Orakpo* v. *Manson Investments Ltd.*, [1978] A.C. 95, at 104, *per* Lord Diplock. For a discussion of cases in which the plaintiff has been subrogated to the rights of a payee's creditors against the payee, see P. Maddaugh and J. McCamus, *The Law of Restitution* (Aurora, Canada Law Book, 1990), at 171-181.

worse off than he was before the payment? The defendant might argue that he might have received more lenient treatment from his original creditors than he might from the plaintiff. This would seem to be a weak argument as regards Visa, but stronger as regards the sisters. However, so far as we know there was nothing to prevent the sisters from assigning their rights to someone else. In any event, such possible prejudice would be negligible compared with the large windfall that will otherwise fall to the defendant at the plaintiff's expense. To be an excuse, the defendant's prejudice should be substantial not de minimis. It is submitted that the defendant would not suffer sufficient prejudice to render it inequitable to require him to repay these debts to the plaintiff.

It is submitted that the change of position defence should not have barred a claim regarding the money that the defendant used to pay off his debts. The plaintiff should have been given subrogation rights for these debts.

(iii) *VCR*

One defendant used part of her overpayment to buy a VCR. Here the original money benefit had been transformed into another benefit. The original money benefit could not be returned, but the transformed benefit could have been given. Justice could have been done by granting rights in the VCR to the plaintiff. After all, in the circumstances why should the defendant be able to keep this asset free and clear from any claim by the plaintiff? If the defendant still had the money she would be required to return it. Her defence was that she had spent the money on the VCR, so that she would be worse off than before if she were required to repay that money now. But how would she be prejudiced if the plaintiff were simply given proprietary rights in the VCR?

Proprietary rights could take the form of either constructive trust or lien. The former would give full ownership rights in the assets, the latter a limited charge. The lien is all that is necessary to do justice in a case like this.

It is submitted that the plaintiff should have been given proprietary rights by way of a lien against the VCR for the amount spent on it.

(iv) *A Caveat*

Not every case will be as straightforward as this one in determining the effect of the mistaken payment. Difficult cases there surely will be. The question is not what happened *to* the payment, but what happened *because of* the payment. So the answer cannot be found simply by tracing the money. For example, the payee might put the money in the bank but then use other money thereby freed up to do something that he/she would

not do but for the payment. Or the payee might use the money to pay for ordinary expenses but then use other money thereby freed up to do something extraordinary. One must take a global view of the situation.

One must also take a broad common sense approach.[22] A payee might not be able to prove precisely all the details of his/her change of position, but a common sense view of the situation may clearly indicate that there was indeed a sufficient change of position to make it inequitable to require repayment. In particular, everyone knows that most individuals are likely over time to adjust their standard of living to their income.[23] If the payee does adjust his/her standard of living because of the overpayment and spends all the money, it would be inequitable to require repayment even though the payee cannot identify precisely, on an item by item basis, what he/she has done differently because of the overpayment. The fact is that the payment has generally affected the payee's standard of living.[24]

(v) *Vacation, Entertainment and Refurbishment*

The vacation, entertainment of friends, and refurbishment of the dining room table, clothes and other items of furniture, all clearly qualify for the change of position defence. It would be inequitable to require the defendants to refund all the money spent on these items. This would prejudice them.

Moreover, these are not assets like the VCR, which was a straightforward transformed benefit. Indeed the vacation and entertainment are not assets at all, both having been consumed. The only assets here are the refurbished dining room table, clothes and other items of furniture. But the money used for their refurbishment does not account for all but only part of each asset, so it is not possible to do justice by granting proprietary rights to the plaintiff. A lien would render the assets liable to sale for its satisfaction, and this would not be fair to the defendant because it would leave her much worse off than before.

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22. See Lord Goff and G. Jones, *The Law of Restitution*, 3rd ed. (London, Sweet & Maxwell, 1986), at 705.

23. "It is of great importance to any man ... that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income ...": *Skyring* v. *Greenwood* (1825), 4 B. & C. 281, at 289; 107 E.R. 1064, at 1067 (*per* Abbott C.J.).

24. The Law Commission Consultation Paper No. 120, *Restitution of Payments Made Under Mistake of Law* (1991), states that *Storthoaks* appears to exclude such a defence because it held that "specific items of expenditure must be proved to have resulted from specific receipts": at 52. However, Martland J. did not say this. He said: "There is no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the Municipality altered its position in any way because these moneys were received." See text, *supra*, at note 7.

Is anything else possible? Would it be fair to require the defendants to refund *part* of the money spent on these items? Or does it follow automatically that if it is inequitable to require a full refund for these items then it is also inequitable to require a partial refund?

On the one hand we know that the defendants would not have wanted to spend this money for these items had they known it was not theirs to spend. So they will be worse off than before if they have to make a full refund. On the other hand we know that had the money been theirs to spend then they did want these items. So they will be better off than before if they do not have to make any refund, because they will end up getting these items free. Is there anything wrong with this?

There does not seem to be anything wrong with this if they would not have been willing to spend any of their other money on these items. Although they would be enriched at the plaintiff's expense, their enrichment would not be unjust because they would not have wanted these items had they been asked to give up some of their other money in return for them. But the case is different if they would have been willing to spend some of their other money for these items. In that case, in principle, they should not get these items free but should pay whatever amounts they would have been willing to pay for them. For example, if the defendant would have been willing to take the vacation had it been possible to get it for half price then he should be liable for that half price. Or if he would have been willing to entertain his friends if he could have done so at half the price then he should pay this amount to the plaintiff. If the other defendant would have been willing to refurbish her furniture or clothing at some other price, then she should pay that price.

The difficulties of determining this in practice, however, are truly formidable.[25] How can it be determined whether the defendants would have been willing to pay some other price? Still more difficult, how can it be determined what price they would have been willing to pay? This could be very difficult even for "necessaries," as illustrated by *Mutual Life Ins. Co. of Baltimore* v. *Metzger*,[26] where the defendant arranged a $400 funeral for her mother under the mistaken belief that she was the beneficiary of a life insurance policy for $500 (the amount incorrectly stated in the policy), when in fact the policy was for $50. Bond C.J. said:

> We are hardly permitted to suppose that she would have contracted a bill of only $50 if the policy had correctly stated the amount. It is more reasonable to suppose that she would even then have provided a more

25. See J. Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford Clarendon, 1991), at 139-141.

26. (1934), 172 A. 610 (Maryland C.A.).

> costly funeral, in expectation of paying for it from her other resources ... Her testimony is that with all her resources she could not afford to pay $400 for the funeral, and she evidently made some part of the expenditure from the money expected from this policy over and above the amount of $50. For exactly what part she relied on this policy it is impossible to determine from the testimony given. She could not now estimate it except by conjecture, because when she contracted for the funeral the problem arising from the reduced amount of insurance was not actually presented to her and decided.[27]

In the end the court concluded that it must make its own estimate of what she would have spent had the true facts been known, which it fixed at $200.

Our case presents too many imponderables to suppose that the defendants would have been willing to pay some other prices for these items, and to further suppose that we can make a reasonable estimate of what prices they would have been willing to pay. However, there will be cases like *Mutual Life Ins. Co. of Baltimore* v. *Metzger* where it would seem reasonable to do this. This may be so even for cases involving luxuries. For example, suppose a payee, whose habit was to take an annual vacation, took a special vacation this year, in lieu of the regular vacation, because of the extra money from the mistaken payment. It would seem reasonable to suppose that the payee would have been willing to spend at least as much on the special vacation as he/she would have spent on a regular vacation. It could be said as well that the overpayment saved the payee from making an expenditure that he/she would have made in the ordinary course, and to that extent the change of position defence should be unavailable.

There is as well the important question of who should bear the burden of proof regarding the possibility of a partial refund. It is of course for the payee to prove the change of position defence. The payee must prove that the payment has caused him/her to act in a way that he/she would not have otherwise, and that he/she would be prejudiced to be required to pay back the money now. Beyond that, it is submitted, the burden should rest with the payor to prove that the payment has caused some other benefit to the payee and to prove the value of that benefit.

IV. *Estoppel*

Apart from the change of position defence, the other ground of decision was that the plaintiff was estopped from recovering any money from the defendants. Hickman C.J. found that the plaintiff owed duties as a

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27. *Ibid.*, at 612. The action was not for money paid by mistake but for reformation of the policy. However, the change of position defence was considered to be the same for both actions.

stockbroker to provide accurate information to its clients, that it was negligent in discharging its duties, and that it induced the defendants to rely on its advice and information to their detriment.

Estoppel is a very broad doctrine which applies in many different contexts. In the context of mistaken payment cases, estoppel applies where the payor has made a representation, expressly by words or implicitly by conduct, that the payment belongs to the payee, and the payee, not being at fault for the mistake and acting bona fide and without notice of the mistake, has relied on the representation in a way that would be detrimental to him/her if it were untrue.[28] There may be as well an additional requirement that the payor owe a duty to the payee regarding the representation.[29] This was not an issue in the *Dawson* case because both representation and duty were present. A payor who owes a duty to the payee can be estopped as regards that duty even without a representation.

A mere payment of money is not by itself treated as a representation by the payor that the payment belongs to the payee. Moreover, the courts have not been quick to impose any duties on a payor regarding mistaken payments. However, employers are said to owe a duty of accuracy in paying employees.[30]

According to the traditional view, estoppel operates as a full defence rather than a pro tanto one.[31] The rationale for this is that estoppel is simply a rule of evidence whose object is to prevent a representor from proving facts contrary to his/her representation. In the mistaken payments context this means that the payor, having represented to the payee that the money belongs to the payee, is precluded from proving facts contrary to that representation. Thus estoppel operates on an all or nothing basis.

Compared with the change of position defence, the estoppel defence is much more difficult to raise, but it does give the payee the advantage of a full defence. The change of position defence operates on a pro tanto basis, not on an all or nothing basis. Change of position is a substantive law defence, not a rule of evidence to preclude a representor from proving facts contrary to his/her representation. In fact change of position does not depend on representation at all.

In the *Dawson* case, then, the two defences lead to different results on the facts. The change of position defence was not a complete defence, but according to the traditional view the estoppel defence was.

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28. *Avon County Council* v. *Howlett*, [1983] 1 All E.R. 1073, at 1085 (*per* Slade L.J.).
29. *Ibid.*, at 1085-1086.
30. P. Maddaugh and J. McCamus, *supra*, note 21, at 226-229.
31. *Avon County Council* v. *Howlett*, *supra*, note 28.

1. *Should Estoppel be All or Nothing?*

The traditional view of estoppel is ripe for review, not only on its own merits but also in its relationship to the change of position defence. As Professor Atiyah has pointed out, it is difficult to understand why estoppel is treated as a rule of evidence rather than a rule of law. To test this, he suggests that one should "... ask whether the exclusion of the evidence is based on grounds which are in any way related to the general purpose of the law of evidence, namely proof of facts by satisfactory means. The answer is surely No. The evidence is not excluded because of possible unreliability or any other evidentiary principle. It is excluded because it would be unjust to admit it and allow the rights of the representee to be affected by it."[32] The purpose of estoppel is to prevent detriment. Why should it go beyond this?

The reason given by Slade L.J. in *Avon County Council* v. *Howlett*[33] was that a pro tanto approach would place an onus on the payee to precisely quantify the pecuniary amount of his/her prejudice, which would be unfair. He said:

> [O]ne has to postulate a situation in which the defendant was perfectly entitled to conduct his business affairs on the assumption that the relevant representations were true, until he was told otherwise. Meantime ... the defendant ... may, in reliance on the representations, have either altered his general mode of living or undertaken commitments or incurred expenditures or entered into other transactions which it may be very difficult for him subsequently to recall and identify retrospectively in complete detail; he may even have done so, while leaving some of the particular moneys paid to him by the plaintiff untouched. If the pecuniary amount of his prejudice has to be precisely quantified by a defendant in such circumstances, he may be faced with obvious difficulties of proof.[34]

To be sure, it would not be fair to place such a heavy onus on the payee. But neither is it necessary to do this. Rather, the courts could take a broad common sense approach as suggested above for the change of position defence.[35] It is significant that Slade L.J. was alone in making this suggestion. Moreover, when the House of Lords later recognized change of position as a pro tanto defence, there was no suggestion that such a heavy onus would be placed on the payee. One of the reasons given by Lord Goff for recognizing the change of position defence was that it was

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32. P. Atiyah, *Essays on Contract* (Oxford Clarendon paperback ed., 1986, reprinted with a new chapter 1990), at 311.
33. *Supra*, note 28. For a comment, see Andrew S. Burrows, "Mistaken Payments and Estoppel" (1984), 100, L.Q.R. 31.
34. *Ibid.*, at 1086.
35. See text *supra* accompanying note 22.

desirable to have a pro tanto defence, but that it had been held in *Avon* that estoppel cannot operate pro tanto.[36]

All three members of the court in *Avon* recognized that the traditional approach to estoppel could cause injustice in some circumstances. And although they applied the traditional approach to the case before them, in dicta all three judges indicated that they would at least be prepared to consider granting relief in some cases. Slade L.J. said that in a case "where the sums sought to be recovered were so large as to bear no relation to any detriment which the recipient could possibly have suffered," the court might have jurisdiction to require the payee to give an undertaking to return some of the money so as not to make a profit from the estoppel.[37] Eveleigh L.J. would consider a case where it would be "unconscionable" for the claim to be barred totally. Cumming-Bruce L.J. said that once the payee proved facts sufficient to raise an estoppel, the onus would be on the payor to prove that a total bar would be inequitable because it would allow the payee to retain a windfall profit.

2. *Estoppel* v. *Change of Position*

Unlike estoppel, which is a very ancient defence, change of position is a relatively recent defence. Although the foundations were laid by Lord Mansfield in the eighteenth century, they were not built upon until this century. Indeed change of position was not recognized as a defence in England until 1991.[38] It was not even mentioned in the *Avon* case. When at last the House of Lords recognized change of position, at the same time it also made clear that it is a pro tanto defence. The Supreme Court of Canada, of course, has recognized change of position as a pro tanto defence since its decision in *Storthoaks* in 1975.

La Forest J. said recently that "... it will take some time for the courts to work out the limits of the developing law of restitution ..."[39] Among the matters that need to be worked out, it is submitted, is the relationship between these two defences. In particular, should estoppel continue to be a full defence when change of position is available as a pro tanto defence? The answer, it is submitted, is No. First, for the same reasons that the courts will not allow a payee to use the change of position defence to make a profit from the payor's mistake, they should not allow the payee to use

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36. *Lipkin Gorman* v. *Karpnale Ltd.*, *supra*, note 12, at 33-4.
37. *Supra*, note 28, at 1089. An undertaking appears curious, but at least it would preserve the form of the rule of evidence approach, though not of course its substance.
38. *Lipkin Gorman* v. *Karpnale Ltd.*, *supra*, note 12.
39. *Air Canada* v. *British Columbia* (1989), 59 D.L.R. (4th) 161 (S.C.C.), at 193.

estoppel for this purpose. Second, in cases of money paid by mistake, there is now great overlap between the two defences. Indeed change of position will apply to almost every case to which estoppel will. Estoppel is a very blunt tool for the prevention of detriment. It does very rough justice. It prevents detriment, but sometimes at the expense of justice for both parties. Change of position, in contrast, is a much more refined tool. It prevents detriment and does justice for both parties. Change of position is thus a much better tool for the job. Since it makes no sense to use a blunt tool when a better tool is at hand, it is submitted that estoppel should not be used when the change of position defence is available.[40]

V. *Conclusion*

Hickman C.J. began his discussion of the law on mistaken payments by saying that it was somewhat fluid and unsettled, that there were overlapping issues, and that an holistic approach should be taken. Indeed he said that the English decisions reminded him of "Shakespeare's mischievous comment, when referring to those charged with the interpretation of the law, in *As You Like It*, he said, 'and then, the justice ... Full of wise saws and modern instances'."[41] Having thus set the stage, that he did not then write a better part for himself is a pity.

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40. ... "[I]t was held ... in *Avon County Council* v. *Howlett* that estoppel cannot operate pro tanto, with the effect that if, for example, the defendant has innocently changed his position by disposing of part of the money, a defence of estoppel would provide him with a defence to the whole of the claim. Considerations such as these provide a strong indication that, in many cases, estoppel is not an appropriate concept to deal with the problem": *Lipkin Gorman* v. *Karpnale Ltd.*, *supra*, note 12, at 34 (*per* Lord Goff).

41. *Supra*, note 1, at 315.