Northern Ireland
Legal Quarterly
Vol. 73 AD2 (2022) 1–34
Articles DOI: 10.53386/nilq.v73iAD2.947

The scope and rationale(s) of the change of position defence

Duncan Sheehan

University of Leeds

Correspondence email: d.k.sheehan@leeds.ac.uk

ABSTRACT

The article examines an innovative suggested rationale for change of position – namely that the claimant has 'outcome responsibility' for the defendant's change of position. It concludes that the justification fails. Although it purports to justify a single baseline against which to judge if the defendant's position has changed, it – at best – only justifies a subset of the cases in which change of position is normatively attractive; it does not justify the defence in (say) cases of innocent wrongdoing. As such it requires us to accept that there are several different species of defence. An easier route to justifying the availability of the defence in all these different cases is 'irreversible detriment', although that explanation still has to justify why the defendant should not be worse off.

Keywords: change of position; unjust enrichment; irreversible detriment; disenrichment; outcome responsibility; restitution for wrongs.

INTRODUCTION

The defence of change of position was introduced into English law by *Lipkin Gorman v Karpnale*.[1] Lord Goff suggested that it would apply in cases where the defendant had so changed his position that it would be unconscionable to make the defendant repay or repay in full.[2] The question for those researching the defence has therefore been: when is repayment unconscionable? The typical case is where the defendant has detrimentally relied on the receipt in making extraordinary expenditure that is now irreversible and has done so in good faith. In *Lipkin* itself, Cass, a partner at the claimant firm, stole money and gambled it away at the defendant's casino. Change of position succeeded because the club had changed its position in paying out Cass's winnings in reliance on the receipt of the initial stakes.[3]

1 [1991] 2 AC 548.

2 Ibid 577–583; other cases have also rested relief on inequitability. See *Garland v Consumer Gas* 2004 SCC 25, [2004] 1 SCR 629, [64]; *Dextra Bank v Bank of Jamaica* [2001] UKPC 45; [2001] 1 All ER (Comm) 195, 204.

3 [1991] 2 AC 548, 582–583.

The justification for change of position is contested. Often restitution lawyers speak about its rationale as being one of disenrichment.[4] That is, the defendant was enriched, but no longer is. Others have defended the defence on the basis that the defendant requires security of receipt. Put differently, the defendant should be able to rely on an assumption that he is entitled to keep – and use – money or assets received, unless he is disqualified from that assumption, most obviously because he knows differently.[5] James Edelman – now Edelman J of the High Court of Australia – has persuasively argued that security of receipt, however, is the result of having the defence not the reason for it,[6] and we do not pursue this idea here. Another issue arises as to whether change of position is properly a defence or a denial.[7] A denial is a claim that one or more of the prerequisites for the cause of action have not been satisfied. Disenrichment as a rationale may imply that change of position is a denial; if the defendant is not enriched, the requirements of the cause of action are not met. A defence by contrast acknowledges the completeness of the action but alleges a different reason to protect the defendant; it is exculpatory. A defeat provides a third possibility. A defeat[8] does not allege that the cause of action is not made out, nor does it really allege that the defendant has an excuse for not making restitution. Rather it undercuts the rationale for the action without precisely denying any of its elements.

The article's central aim is to assess the rationale for change of position initially put forward by Ajay Ratan[9] compared to other rationales put forward, principally disenrichment and irreversible detriment. Ratan argues that the reason that the defendant can avail herself of the defence is that the claimant is in some sense responsible for the change in her position. We explore in detail how this argument works later, but for now it suffices to note that it cannot justify the whole range of cases where the defence might arguably be said to apply. It may justify the defence in cases of personal unjust enrichment claims where the defendant has relied in some way on receipt. That is the classic instance of the defence. It could potentially justify the

4 Peter Birks, *Unjust Enrichment* 2nd edn (Clarendon Press 2005) 209–210; Harry Liu, 'Changing the shape of change of position' (2004) 15 King's Law Journal 301

5 Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* 9th edn (Sweet & Maxwell 2016) para 27.41

6 *Australian Financial Services & Leasing Pty Ltd v Hills Industries Pty Ltd* [2014] HCA 14, (2014) 253 CLR 580, [92] (Crennan J et al).

7 Andrew Dyson et al, 'Introduction' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016) 1.

8 Dennis Klimchuk, 'What kind of defence is change of position?' in Dyson et al (eds) (n 7 above) 69, 85.

9 Ajay Ratan, 'The unity of pre-receipt and post-receipt detriment' in Dyson et al (eds) (n 7 above) 87.

defence in some, but not all, proprietary cases, where the defendant is the initial recipient of the property and has relied on receipt in some way. The justification has real difficulty in explaining the defence's application to cases where a third party steals the enrichment from the defendant. There are also reasons to believe that change of position should apply in some wrongs cases, allowing the tortfeasor to reduce his liability in restitutionary damages. However, we will see that Ratan's justification cannot apply in the same way as in the unjust enrichment context. Change of position in the wrongs' context must on Ratan's view be a different defence. If remote recipients can avail themselves of the defence in a tracing claim made against them, this must also be a separate defence on Ratan's view. The article therefore suggests that Ratan's view implies there may be at least two and quite possibly more than two different change of position defences.

This article is structured as follows. In the first part, we outline some of the differing rationales of change of position which have been offered, beginning with disenrichment. This was rejected by Australian case law and by cogent arguments put by Elise Bant. However, the irreversible detriment view she propounds, which relies on the defendant's complaint that she would be worse off if made to repay the claimant – and this is no less true of the disenrichment thesis – requires us to decide against which baseline we measure if the defendant is worse off – the 'no worse off than what?' question. The irreversible detriment view is intuitively attractive, supported by authority, and Bant has ably worked through the implications of the justification. Importantly for our purposes the irreversible detriment view does not preclude the availability of change of position in wrongs or proprietary claims, and we explore this in detail in the second part of the article. However, Bant fails to fully explain why the defendant should not be made worse off than the *status quo ante*. That failure leads us to Ratan's paper where he seeks an explanation to justify his suggested baseline that the defendant be no worse off than had the claimant not made (for example) the mistake. In the second part we explore how widely the change of position defence should apply and whether the scope of its application can be explained via Ratan's thesis. We suggest that in the end the thesis Ratan propounds, while interesting, begs more questions than it answers. Proffered as a means of explaining a choice of baseline, it could fill the gap in Bant's thesis even if such was not Ratan's explicit intention. It, however, fails to do so and should be rejected. It does not even plausibly explain the reach of the defence across all unjust enrichment claims. The reach of a 'no worse off thesis' is broader than outcome responsibility can justify. If Bant's explanation of a unitary defence of change of position is to succeed, another justification of why the defendant should not be made worse off is needed.

JUSTIFICATIONS POSITED FOR THE DEFENCE OF CHANGE OF POSITION

The defence has developed significantly over the years, and this has rendered it difficult to identify a clear single unique rationale. Originally it was analysed through the lens of a mistake claim; the suggestion was that when relief for mistake was relatively restricted, succeeding only in cases of liability mistakes, the defence was not needed but, if all causal mistakes allow relief, the defence was required to cut back restitution.[10]

Its scope has since narrowed and broadened. It has narrowed in that it may not apply to duress claims because of the defendant's actions and fault in inducing his own unjust enrichment; although there seems little in the way of authority on this point[11] to the extent to which bad faith (say) is an indicator of economic duress,[12] the defence should be excluded. The defence, as we see, is said not to apply if the defendant changes his position in bad faith, knowing he is not entitled to the enrichment; it is hard to see many cases where a duressor would not know he was not entitled. Possibly change of position does not apply to failure of consideration claims, or at least not all such. In *Haugusund Kommune v Depfa ACS Bank*,[13] for example, the Court of Appeal had to decide whether the local authorities, having entered a void swaps agreement with the banks, were able to rely on change of position in answer to a claim for restitution. They were not able to do so. Aikens LJ drew a distinction between two cases. The first is where the defendant receives money believing it is hers to keep and the second is where the defendant receives money, knowing that she will have to repay it at some point.[14] In such a case the defendant cannot rely on a change of position defence to justify a refusal to repay because the enrichment was accepted on the basis that it would have to be repaid/paid for. On the facts Aikens LJ held that the authorities did take the money on the basis that it was repayable. The agreements were always void,

10 *Barclays Bank v WJ Simms & Sons Ltd* [1980] QB 677, 695-696 (Goff J); Peter Birks, 'Change of position and surviving enrichment' in William Swadling (ed), *The Limits of Restitutionary Claims* (UK National Committee of Comparative Law 1997) 36, 40–41.

11 Duncan Sheehan, 'Defendant-sided unjust factors' (2016) 36 Legal Studies 415; Andrew Burrows, *The Law of Restitution* 3rd edn (Oxford University Press 2011) 544–545; there are a number of undue influence cases where the defendant influencer was innocent and able to rely on the defence. See *Cheese v Thomas* [1994] 1 WLR 129.

12 *D&C Builders v Rees* [1966] QB 617; *Pakistan International Airlines Co v Time Travel (UK) Ltd* [2021] UKSC 40, [56]–[59] (Lord Hodge et al), [102] (Lord Burrows).

13 [2010] EWCA Civ 579, [2012] QB 549; *Goss v Chilcott* [1996] AC 788.

14 [2010] EWCA Civ 579, [2012] QB 549 [123].

but that 'cannot change the basis on which the kommunes received the money'.[15] Burrows – now Lord Burrows of the UK Supreme Court – makes a convincing argument that, while this holds in loan cases, it does not hold in other scenarios. His example is a builder who receives money in advance, pays for material and for a holiday. The builder does not take on any obligation to repay money, but to do the work. If there is a failure of consideration, he ought to be able to rely on the holiday expenditure to found the defence.[16] At the same time the defence has broadened; for example, some cases indicate that it may apply to innocent wrongdoing[17] where the defendant is unaware of the wrong, often a trespass or conversion.

It has also fractured internally in case law or commentary in two ways. First, Birks contrasted disenriching cases with alleged non-disenriching cases where the defendant is not financially worse off but is still deemed to have changed his position, although it seems extremely difficult to identify clear case law examples of the latter. The second line of fracture contrasts the reliance cases and non-reliance cases. In typical reliance cases the defendant relies on the receipt of the enrichment in making a decision to dissipate it; on the narrow view of the defence this is a necessary condition of its applicability, and there was formerly some dispute as to whether such reliance could take place in anticipation of receipt. It is clear now that it can.[18] Detrimental reliance does not require a link to be proven between specific receipts and specific items of expenditure;[19] general reliance on increased assets will suffice.[20] The defendant is disqualified from relying on the defence if she had no legitimate expectation of being able to rely on the receipt of the asset. This might be because the defendant knew, or was

15 Ibid [124]

16 Burrows (n 11 above) 544–545; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) §23(2)(iii), 117–122; Stevens claims this is still incompatible with the basis of the claim. Robert Stevens, 'The unjust enrichment disaster' (2018) 134 Law Quarterly Review 574, 587. But see *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd* [2018] SGCA 2, [2018] 1 SLR 239; Charles Mitchell and Paul Mitchell, 'Recurring Issues in failure of basis' [2020] Lloyd's Maritime and Commercial Law Quarterly 498, 509.

17 *Cavenagh Investment Pte v Kaushik Rajiv* [2013] SGHC 45 (trespass to land); *Kuwait Airways v Iraqi Airways* [2002] 2 AC 883, [79] (Lord Nicholls) (conversion).

18 *Lipkin Gorman v Karpnale* [1991] 2 AC 548; *Dextra Bank v Bank of Jamaica* [2001] UKPC 45; [2001] 1 All ER (Comm) 195.

19 Paying off debts will not suffice therefore; *Scottish Equitable BS v Derby* [2001] 3 All ER 818; *Credit Suisse v Attar* [2004] EWHC 374 (Comm), [98]; *Goff and Jones* (n 5 above) para 27.11.

20 *Philip Davis v Collins* [2000] 3 All ER 818; *Skyring v Greenwood* (1825) 4 B&C 281, 107 ER 1064; *Holt v Markham* [1923] 1 KB 504.

wilfully blind to the fact that,[21] the claimant had made a mistake or was in bad faith.[22] It may be sufficient that the defendant should have made further inquiries as to her entitlement,[23] although it is clear that English law does not ask about the relative fault of the parties and bar the defence if the defendant is more at fault.[24] Bad faith cancels out the initial assumption of reliance[25] and demonstrates that the defendant's actions were not caused by the receipt of the money. In the second set of cases the change in the defendant's position is independently caused by a third party or act of God. The wide view of the defence, accepted in England,[26] accommodates this; the narrow view of the defence does not. We look in turn at three possible explanations for change of position: disenrichment, irreversible detriment and outcome responsibility. We deal with them in this order because, arguably, it is defects in the previous explanations that spawned the later ones.

Disenrichment and unjust disenrichment

Will a rationale of disenrichment work? There is a pleasing logic to it. If the cause of action responds to the fact that the defendant was enriched initially, the defence should respond to the way that enrichment falls away subsequently. In other words the rationale is related to the initial reason for having a claim. Restitution is available against the defendant to the extent – and only to the extent – that it removes sufficient enrichment to return the defendant to the *status quo ante*. Removing more renders the defendant worse off than previously. This justification has attracted some level of judicial support. In *Test Claimants in the FII Litigation v HMRC*,[27] Henderson J said that the defence was 'essentially concerned with disenrichment'. However, change of position is not, in Mitchell and Goudkamp's language, a

21 *Harrison v Madejski* [2014] EWCA Civ 361, [61]; *Port of Brisbane Authority v ANZ Securities* [2003] 2 Qd R 661, 674–675.

22 *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL) 577.

23 *Jones v Churcher* [2009] EWHC 722, [46]; *Niru Battery Manufacturing v Milestone Trading* [2004] QB 985; *State Bank of NSW v SBC* (1995) 39 NSWLR 350; *Heperu Pty Ltd v Belle* [2009] NSWCA 84, (2009) 76 NSWLR 195; *Citigroup v National Australia Bank* [2012] NSWCA 381, (2012) 82 NSWLR 391; *Cavenagh Investments Pte Ltd v Kaushik* [2013] SGHC 45, [2013] 2 SLR 543, [71] (Chan Seng Onn J). For comment, see eg Robert Chambers, 'Change of position on the faith of receipt' [1996] Restitution Law Review 103, 107–108 and *Goff and Jones* (n 5 above) paras 27.41–27.44

24 *Dextra Bank v Bank of Jamaica* [2001] 1 All ER (Comm) 195.

25 Jessica Palmer, 'Chasing a Will-o'-the-Wisp: making sense of bad faith and wrongdoers in change of position' [2005] Restitution Law Review 53.

26 Andrew Burrows, 'Change of position: the view from England' (2003) 36 Loyola of Los Angeles Law Review 803; *Scottish Equitable BS v Derby* [2001] 3 All ER 818.

27 [2014] EWHC 4302, [2015] STC 1471, [354].

denial.[28] It is not simply a statement that an aspect of the cause of action is not proven. It is not therefore right to treat change of position as part of the general enrichment enquiry.

There are three reasons. First, we remove cases of bad faith disenrichment from the defence;[29] not all causal disenrichments therefore count.[30] The immediate problem therefore with disenrichment as a rationale is that it does not explain why bad faith disenrichments for instance are excluded, and this links to a point below that disenrichment provides no normative basis by itself for an exculpatory defence. We could base a denial on disenrichment, but this would involve our measuring the defendant's enrichment at the time of trial; that we do not do this is the second reason to reject change of position as part of the general enrichment inquiry. A rationale based on disenrichment is incomplete and over-inclusive.

The third reason is that the disenrichment view may also be under-inclusive, excluding non-disenriching changes of position. A position must be taken by those who put weight on disenrichment whether to bar such changes or to explain the defence's availability in such cases differently. Birks took the former view. He argued that there were two different and distinct defences,[31] although saying that non-disenriching changes of position would be rare.[32] Discussion has revolved around the case of *Commerzbank v Price-Jones*.[33] That was a case of a foregone financial benefit. Price-Jones had deliberately chosen not to seek higher-paying employment elsewhere; the court decided that this was too speculative and too evidentially uncertain to succeed, and the decision does not make for a good test case for this reason. In *Palmer v Blue Circle Southern Cement Ltd*,[34] again there was a foregone financial benefit. The defendant chose not to apply for social security benefits to which he was otherwise entitled on the basis of the receipt of the money. Bell J decided that that could be an example of a change of position, following an English estoppel decision to come

28 Charles Mitchell and James Goudkamp, 'Defences and denials in the law of unjust enrichment' in William Swadling (ed), *Restatement, the Third, of Restitution and Unjust Enrichment: Critical Essays* (Hart 2013) 133, 156–157; *Goff and Jones* (n 5 above) para 27.06.

29 James Edelman, 'Change of position: a defence of unjust disenrichment' (2012) 96 Boston University Law Review 1009, 1020–1021.

30 Burrows (n 11 above) 526.

31 Birks (n 4 above) 258–261

32 Peter Birks, 'Change of position: two central questions' (2004) 120 Law Quarterly Review 373, 378.

33 [2003] EWCA Civ 1664; see also *Kinlan v Crimmin* [2006] EWHC 779, [2007] 2 BCC 102.

34 [1999] NSWSC 697.

to this conclusion,[35] and this decision seems not to be a good test case either. One reason is that the change of position in *Palmer* is reducible to money. In fact most alleged non-disenriching changes of position seem ultimately reducible to money. Another reason is the reliance on an estoppel case when, as we see, estoppel may be based on a separate rationale. Other non-disenriching changes of position mooted include going to university; the defendant in *Gertsch v Atsas*[36] gave up work to do so, foregoing income (although possibly raising future earnings power). Another is having a child. Bant has suggested that this latter example cannot be included in disenrichment without stretching the idea altogether out of recognition.[37]

Australian High Court jurisprudence has also accepted that some changes cannot be included in disenrichment and has put forward an alternative rationale – irreversible detriment – discussed in detail in the next subsection. In *Australian Financial Services Pty Ltd v Hills Industries*,[38] AFSL was induced by a fraudster to make payments to Hills for non-existent equipment and to enter into leaseback arrangements regarding the equipment with companies owned by the fraudster. Hills treated the payment, as requested by the fraudster, as discharging certain debts owing to them from other companies, themselves owned by the fraudster, and refrained from taking action against them. The High Court emphatically rejected disenrichment as a rationale for change of position. This was in large measure precisely because some relevant changes of position will be difficult or impossible to value.[39] The plurality also criticised 'disenrichment' as being overly mathematical when the law should ask who should bear the loss and why.[40] French CJ argued that disenrichment was, at best, a circumstance defining a class of case in which recovery could be held inequitable and founded the defence very firmly on 'a general rubric of inequitable recovery'[41] as set out in *Lipkin Gorman v Karpnale* and subsequently in *Dextra Bank v Bank of Jamaica*.[42] More broadly the court did not therefore adopt an unjust enrichment analysis of restitution, and so the apparent symmetry of enrichment versus disenrichment alluded to earlier simply did not arise. Instead

35 *Avon CC v Hewlett* [1983] 1 WLR 605.
36 [1999] NSWSC 898.
37 Elise Bant, *The Change of Position Defence* (Hart 2009) 143; Elise Bant, 'Change of position: outstanding issues' in Dyson et al (eds) (n 7 above) 133, 142–143.
38 [2014] HCA 14, (2014) 253 CLR 580.
39 Ibid [23] (French CJ).
40 Ibid [78], [84].
41 Ibid [23] (French CJ); [79]–[80] (Hayne J et al); [144]–[145] (Gageler J).
42 [2002] 1 All ER (Comm) 193 (PC).

the court[43] founded recovery on the equitable roots of the action in *Moses v Macferlan*,[44] something to which both French CJ and the plurality referred in discussing the foundations of the defence. Gageler J described change of position as being the second stage of an analysis based on 'notions of conscience'.[45] Accepting that some hard-to-value detriments should count, disenrichment seems under-inclusive. In general, of course, in order to calculate the reduction in liability the change of position must be reduced to money,[46] and yet Bant's point above about children – and therefore the more general point in *AFSL* – holds. It is difficult to see a child purely in terms of the cost of milk, nappies and baby food, and the defence could be seen as absolute in exceptional cases if the qualifying change of position cannot be valued. Giving some support for this in *Kinlan v Crimmin* Deputy Judge Sales commented:

> *Even if he may still have in his hands the monies paid to him* ... Mr Crimmin changed his position in a fundamental respect ... Had he realised that the agreement was invalid and the payments made under it were made by mistake, Mr Crimmin would obviously have wished to consider how his continuing interest in the company should be protected, either by his resuming his rights to protect himself as a quasi-partner in the business or by seeking the reformulation of the agreement so as to ensure that it and the payments to him were valid. These opportunities which were denied him cannot be restored to him.[47] (emphasis my own)

The important point here is that no financial detriment is necessary. The defence is available on this view even if the defendant still has the money (the enrichment) paid. Indeed, it is clear from *RBC Dominion Securities v Dawson*[48] that the defendant was enriched by the value of the furniture bought with the mistaken payment. Change of position still applied despite the extant enrichment. The mere fact she still benefited from the money did not defeat the change in her position.

We have seen now that disenrichment is under-inclusive. The first reason for rejecting disenrichment *per se* was that it was over-inclusive because it could not explain why bad faith defendants were excluded from the use of the defence. We can put this objection in a different way; disenrichment *per se* cannot provide a normative reason for an exculpatory defence. On one view, change of position concerns

43 [2014] HCA 14, (2014) 234 CLR 580, [65]–[76] (Hayne J et al); [105]–[126] (Gageler J).
44 (1760) 2 Burr 1005, 97 ER 676.
45 [2014] HCA 14, (2014) 234 CLR 580, [143].
46 *Goff and Jones* (n 5 above) para 27.31.
47 [2006] EWHC 779 (Ch), [2007] BCC 106, 121-122 (Sales DJHC).
48 (1994) 111 DLR (4th) 230.

defendant autonomy, a suggestion made by Lord Reed in *Benedetti v Sawiris*.[49] This is sometimes said to be linked to the enrichment enquiry. To explain the argument, Burrows endorses a link, originally made by Peter Birks, between change of position and subjective devaluation, explicitly developed in the context of the enrichment criterion,[50] and it was in the context of a discussion of subjective devaluation that Lord Reed made his suggestion as to the relevance of autonomy to change of position. Subjective devaluation, as applied to the cause of action, is intended to protect the defendant's freedom of choice by allowing him to argue that he would not have obtained it at a given market price – ie it is worth less to the defendant than the market price and the defendant is not enriched to the same extent. I might say that, although the market price for having my house painted was £1000, I would never have agreed to have it painted magnolia, and so the house painting is only worth £100 to me. In the context of change of position, I might fairly say that I would only have sought the particular service I bought after I received the enrichment. Without that enrichment I would never have spent the money and requiring me to retransfer the money with no credit is tantamount to forcing me to pay for an unwanted service, which subjective devaluation says I should not be forced to do.[51]

This actually suggests that the rationale for the defence is that the defendant's decision to change her position was vitiated by a mistaken belief or reliance on receipt – the 'unjust disenrichment view'.[52] In other words, the defendant spent this money which she would not otherwise have done in error. This is the standard case of change of position, but if the defendant transferred the money in error authority suggests she should recover against her transferee, the third party. In tax cases, for instance, Bant argues the recoverability of money by the defendant from the state bars the defendant's change of position defence.[53] Knox J, for example, said in *Hillsdown Holdings v Pensions Ombudsman* that the defendant's consequent liability to tax was not a change of position except 'to the extent Hillsdown is

49 [2013] UKSC 50, [2014] AC 938, [118], referring to *Sempra Metals Ltd v IRC* [2007] UKHL 34, [119].

50 Burrows (n 11 above) 527.

51 Peter Birks, *An Introduction to the Law of Restitution* revised edn (Clarendon Press 1989) 413.

52 Bant, *Change of Position Defence* (n 37 above) 144; see Edelman (n 29 above) for a developed view of this idea of 'unjust disenrichment'.

53 Bant, 'Change of position' (n 37 above) 144–145.

unable to recover the tax',[54] although Hillsdown's ability to do so was not litigated and Her Majesty's Revenue and Customs was not party to the action.

Disenrichment *per se* does, however, enable us to see a common link between the reliance cases and theft cases. In both the defendant is disenriched, providing a common link. This separate common link is vital since reliance is irrelevant to the latter set of cases. If the theft cases are included, causation might provide a necessary connection,[55] and English law does appear to be shifting to a view based on causation.[56] If the defendant's disenrichment were caused by the receipt, the defence will bite. One way of demonstrating such causation – but not the only one – is to point to the defendant's reliance on the receipt.[57] Causation is not normative, however; it is factual. To conclude, disenrichment does not fit the cases and cannot explain why some disenrichments do not count or why non-disenriching changes do count, assuming that they do. Secondly, by itself disenrichment does not explain why the *status quo ante*, as opposed to some other baseline, is appropriate.

Irreversible detriment

The Australian cases formulate a rationale of irreversible detriment. While this approach also asks whether the defendant is made worse off or not, the change of focus allows us to include non-disenriching changes of position, or cases where the defendant is seemingly still enriched.[58] As we saw in the previous section, this was one reason why the irreversibility criterion was authoritatively confirmed in *Australian Financial Services Pty Ltd v Hills Industries*, referencing the work of Elise Bant.[59] Another advantage of the approach over disenrichment is that it emphasises that detriment as assessed at the time of the claim rather than the time the change of position occurred. This is because the irreversibility criterion tells us that the defendant is not in a position to recover the money that he has paid away. Little is, of course, utterly

54 *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, 904 (Knox J); *K&S Corp Pty Ltd v Sportingbet Australia Pty Ltd* [2003] SASC 96, (2003) 86 SASR 313; *Hinckley & Bosworth BC v Shaw* [1999] 1 LGLR 385.

55 Bant, 'Change of position' (n 37 above) 143–145.

56 *Philip Collins v Davis* [2000] 3 All ER 808; *Wards Solicitors v Hendawi* [2018] EWHC 1907, [32]–[33]; *Goff and Jones* (n 5 above) para 27.08, but see *Credit Suisse v Attar* [2004] EWHC 374 (Comm), [98].

57 Bant, *Change of Position Defence* (n 37 above) 153.

58 Bant provides a number of reasons why the irreversible detriment is preferable at ibid 134–138.

59 [2014] HCA 14, (2014) 234 CLR 580, [23]; see also *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd* [2008] WASCA 119.

irreversible, but it appears purchases of, or improvements to, land may be taken as irreversible.[60] If litigation is needed for the defendant to recover money paid away, we might deem it irreversible.[61] Against that we can put the *dictum* of Knox J in *Hillsdown* that we saw earlier. It will be remembered that the fact the defendant had a right to recover the money he transferred in error from the Revenue rendered change of position unavailable. In practice it will be difficult to get the Revenue to repay in the absence of litigation, and so at best these two lines of authority sit uncomfortably.[62] Nonetheless, in *AFSL* itself the debts owed to Hills by the fraudster's companies were in effect unenforceable, and the change of Hill's position in giving up and discharging those debts was irreversible 'as a practical matter of business'.[63]

Potentially, the Australian position is narrower than the 'irreversible detriment' rationale implies. Australian courts have placed a great deal of emphasis on reliance.[64] The importance Australian courts place on reliance stems in part from a consideration of the relationship between change of position and estoppel. The analogy appears in several places in *AFSL*. The plurality,[65] for example, reference the decision in *Grundt v Great Boulder Gold Mines Pty Ltd*[66] on detriment in estoppel to bolster their case that what matters in change of position is detriment not disenrichment. Too much should not be made of this, however. Estoppel has a rather different focus and the High Court in *Australian Financial Services Pty Ltd v Hills Industries* seems, with respect, to misunderstand this. Gageler J saw change of position as being merely estoppel minus the representation[67] and appears to suggest on this basis first that change of position operates absolutely, unless that

---

60 *Saunders & Co v Hague* [2004] 2 NZLR 475; see, for discussion, eg Charles Mitchell, 'Change of position: the developing law' [2005] Lloyd's Maritime and Commercial Law Quarterly 168.

61 *K&S Corporation v Sportingbet (Australia) Pty Ltd* [2003] SASC 98, (2003) 86 SASR 313.

62 Bant, 'Change of position' (n 37 above) 145 refers to there being 'simple procedures' to recover from the taxing authorities and the transfer being reversible for that reason.

63 *Australian Financial Services Pty Ltd v Hills Industries* [2014] HCA 14, (2014) 253 CLR 580, [95].

64 *Optus Networks Pty Ltd v Gilsan (Intl) Ltd* [2006] NSWCA 171; *Ethnic Earth Pty Ltd v Quoin Technology Pty Ltd* [2006] SASC 7, (2006) 94 SASR 103; *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA), *Citigroup Pty Ltd v NAB* [2012] NSWCA 381, (2012) 82 NSWLR 391.

65 [2014] HCA 14, (2014) 253 CLR 580, [85]; [23] (French CJ).

66 (1937) 59 CLR 641.

67 [2014] HCA 14, (2014) 253 CLR 580, [155]–[158].

would be disproportionate.[68] This is a novel idea,[69] certainly if the absolute nature of change of position is to be the norm rather than an exceptional response to the 'unvaluability' of the defendant's change of position. Gageler J's point makes sense if change of position is indeed just estoppel minus the representation; however, as Hudson has pointed out, the idea behind estoppel is that a claimant who made a representation to the defendant that X was true is held to that where that fact is taken as the shared relevant state of things. The claimant is held to that because the defendant has relied to their detriment on the representation, and the claimant needs to be responsible for that. To allow one party to depart from the adopted state of affairs infringes the other's autonomy,[70] and so we hold the representing party to their representation.[71] The plurality in *AFSL* also comment that estoppel provides a level of protection to the defendant's expectations which change of position does not.[72] The tight connection with estoppel is also inconsistent with the view, accepted by Gageler J, that the payee can rely on information from sources other than the claimant payor.[73] While the full relationship between estoppel and change of position is beyond our scope, the point is that the justification for an all-or-nothing estoppel and a change of position defence are not the same. Estoppel is concerned with the defendant's autonomy; change of position with not rendering the defendant worse off.

The link with reliance and estoppel led Gageler J to exclude independent changes of position from the defence.[74] The question was not explored by all the justices. French CJ deliberately eschewed any analysis of the question.[75] There was reliance by the defendant and the question did not need to be decided. With respect, however, excluding such changes of position does seem to fly in the face of the stated rationale for the defence in *AFSL*. An independent change of position, such as the destruction or the theft of the asset, will be a detriment to the defendant. Requiring restitution of the value of a thing destroyed or stolen without fault renders the defendant worse off than had there been no transfer of the asset in the first place and, in practical terms,

68 Ibid [158]; see Bant, *Change of Position Defence* (n 37 above) 161; Bant, 'Change of position' (n 37 above) 160–162.

69 Bant, 'Change of position' (n 37 above) 161.

70 Jessica Hudson, 'The price of coherence in estoppel' (2017) 39 Sydney Law Review 1, 11–12

71 *Goff and Jones* (n 5 above) para 30.16; Bant, *Change of Position Defence* (n 37 above) 163.

72 [2014] HCA 14 (2014) 253 CLR 580, [86] (Crennan J et al).

73 Ibid [157] (Gageler J); *Citigroup v National Australia Bank* [2012] NSWCA 381, (2012) 82 NSWLR 392, [5] Bathurst CJ (et al).

74 Ibid [142].

75 Ibid [25].

that detriment is irreversible, and there is Australian authority – albeit first instance – for this.[76]

While this may be a legitimate criticism of *AFSL*, irreversible detriment has important advantages over disenrichment. It can – and by cutting the implicit link with the enrichment inquiry was designed to – accommodate non-disenriching and difficult to value changes of position.[77] It reflects a 'no worse off' rationale for the defence. While that rationale is also present in the disenrichment thesis, by cutting the link with the enrichment inquiry it leaves the door open to the defence's application in appropriate cases of restitution for wrongs and, indeed, also to proprietary claims, where appropriate. We can see the 'no worse off' rationale in the plurality's references to disadvantage resulting to the defendant if restitution were ordered[78] and more clearly in Gageler J's comment:

> The second condition [for the application of the defence] is that, by reason of having so acted or refrained from acting, the defendant would be placed in a worse position if ordered to make restitution of the payment than if the defendant had not received the payment at all.[79]

Change of position prevents the defendant from being in a worse – or entirely different – position after making restitution to the *status quo ante*. It is not the purpose of restitutionary remedies to do so.[80] The missing piece, as with the disenrichment thesis, is why this – as opposed to some other baseline – is appropriate.

Outcome responsibility

What is outcome responsibility?

In the introduction we suggested that an alternative justification – and one which was explicitly intended as clarifying the choice of baseline – might be that of Ajay Ratan. He identifies one potentially attractive way to proceed in justifying change of position, pointing to a link between the defence and foundational questions of the justification of liability, particularly in terms of ensuring the defendant is 'no worse off'.[81] His question therefore is 'no worse off than what?' It is the question of which baseline we use to assess whether and by how much the

76 In *Gertsch v Atsas* [1999] NSWSC 898 the theft of a luxury car was accepted as a relevant change of position. See also *Corporate Management Services (Australia) Pty Ltd v Abi-Arraj* [2000] NSWSC 361; Bant, *Change of Position Defence* (n 37 above) 136.

77 Bant, 'Change of position' (n 37 above) 147.

78 [2014] HCA 14, (2014) 253 CLR 580, [85].

79 Ibid [157].

80 Bant, *Change of Position Defence* (n 37 above) 171.

81 Ratan (n 9 above) 109

defendant has changed her position. There are a number of different possible baselines available. One we might call the 'no receipt' baseline. Here we assume that the change of position defence should not render the defendant worse off than if she had not received the enrichment.[82] Gageler J in *AFSL*, for example, quite clearly asks in the quotation just above whether the defendant would be worse off as against a baseline counterfactual that the defendant had not received the benefit: the 'no receipt' baseline. Yet this sits uneasily with the availability of the defence in cases of anticipatory reliance.[83] In anticipatory reliance cases the defendant had not received the enrichment when she relied. One solution is to tack on an additional baseline that the defendant be no worse off than had she not relied in anticipation of the receipt. Ratan's aim is to justify a single competitor baseline that operates in both anticipatory reliance and reliance *ex post* cases. He suggests that the defendant be no worse off than had the claimant not had his decision-making impaired.[84] He calls this the 'no defect' baseline[85] and argues that it does everything the 'no receipt' baseline does and more and is therefore preferable. We can agree with this, however, without necessarily accepting the outcome responsibility thesis he propounds.

One possible link between the two questions of the rationale for the claimant's ability to seek restitution in the first place and the rationale for the defence is to ask which baseline is the most compelling in justifying imposing liability. In other words in justifying awarding restitution at all we need to ask against which baseline is the defendant better off and remove just enough so that the defendant is no worse off; restitution is justified in the absence of defendant wrongdoing because the defendant will be 'no worse off'. This is another 'no worse off than what?' question. The same baseline can then be used in change of position. Ratan points to Grantham and Rickett's argument that corrective justice should be relevant to defences as an example of such a linkage between the rationales for liability and the defence. Grantham and Rickett explicitly adopt the corrective justice view of Ernest Weinrib,[86] although without requiring that it be the sole driver of all private law liability. Weinrib's view links Aristotelian corrective justice and Kantian right. Injustice occurs when the prior equality of the parties is disrupted – there is a breach of Kantian right. Both parties critically must be implicated. This is where the requirement of

82 Burrows (n 11 above) 528–531.

83 Ratan (n 9 above) 88.

84 Ibid 91.

85 Ibid 91–92.

86 Ross Grantham and Charles Rickett, 'A normative account of defences to restitutionary liability' [2008] Cambridge Law Journal 92, 98.

bilaterality comes from,[87] as well as the related requirement that the reasons for the claim must apply equally to claimant and defendant. Applying this to defences, Grantham and Rickett conclude that the reasons the defendant provides for excluding liability must also apply equally to the claimant and defendant.[88] Grantham and Rickett correctly sound a note of caution,[89] accepting that Weinrib never himself discussed defences in his treatment of unjust enrichment.

Ultimately, Ratan does not pursue a line of attack that links the fundamental rationale for requiring restitution with that of the defence of change of position. He thinks a justification of unjust enrichment along the 'no worse off' lines might not allow us to choose between baselines. This requires some explanation. Ratan takes the position that unjust enrichment theory has yet to provide a compelling case in favour of the 'no worse off' thesis. Wilmot-Smith indeed describes the whole argument as question-begging because there is no way of justifying eg a *status quo ante* baseline without answering the question why the defendant should not keep the transfer.[90]

Ratan takes a slightly different tack, appealing to outcome responsibility.[91] Outcome responsibility is in part constitutive of our identity. In short, if we are not responsible for our acts and their consequences on others, while there may be bodies and minds, there are no real people doing real things.[92] In wrongs cases, the wrongdoer is blameworthy in some respect and therefore the wrongful losses need to be repaired by the wrongdoer. Put differently the things we do are our responsibility not merely things that just happen. Robert Kane expresses it well,[93] saying that agents who express or exercise free will are authors of and characters in their own story. By virtue of self-forming judgements of the will, the agent is an arbiter of his own life, taking responsibility for making it what it is. Outcomes that we cause are ours in a way that those we do not so cause are not ours.[94] We therefore use outcome responsibility to morally attribute outcomes to agents. It is this that outcome responsibility adds to references to causation or disenrichment. Causation is factual. It provides no moral reason for the claimant's responsibility for the defendant's acts and

87 Ibid 100–102.
88 Ibid 104.
89 Ibid 105.
90 Frederick Wilmot-Smith, 'Should the payee pay?' (2017) 37 Oxford Journal of Legal Studies 844, 849–851.
91 Ratan (n 9 above) 104.
92 Tony Honoré, 'Responsibility and luck: the moral basis for strict liability' (1988) 104 Law Quarterly Review 530.
93 Robert Kane, 'Responsibility, luck and chance: reflections on free will and indeterminism' (1999) 96 Journal of Philosophy 217, 240.
94 Ratan (n 9 above) 104.

therefore no moral reason why the claimant should care. Outcome responsibility does provide a morally significant reason why the claimant should care what the defendant has done or suffered.

This requirement of moral attribution of blame may lie behind the relative fault requirements found in §142(3) Restatement of Restitution, and in §65 Restatement, the Third, of Restitution and Unjust Enrichment, comment f) of which says that a recipient whose negligence exceeds that of the claimant in the transaction by which the recipient was unjustly enriched cannot use the defence. There are signs of relative fault in Commonwealth case law as well. Relative fault can be used to attribute the loss,[95] and there are two ways to do this. First the defendant may be barred completely from availing herself of the defence should she be more at fault. This is the route of the Restatement. *Waitaki Intl Processing (NZ) Ltd v National Bank of NZ*[96] goes a different route. If the payer is thought to be 70 per cent at fault and payee 30 per cent at fault, only 70 per cent of the change of position can be available to the payee – ie the payee must absorb 30 per cent of his loss.[97] In *Waitaki* itself, the reduction was 10 per cent. The payor bank had continually insisted the payment was correct (which explains their 90 per cent responsibility); however, there were questions as to whether the account into which the payee put the money to keep it safe prior to repayment and the security for that was adequate. Henry J held it was not adequate and upheld the trial judge's allocation of 10 per cent responsibility to the payee.[98] This question of relative fault was to be judged in the 'round'. *Dextra Bank v BoJ* rejected both approaches to relative fault and subsequently Chisholm J accepted that as binding on him in New Zealand in *Saunders & Co v Hague*.[99]

Despite this, we might think that outcome responsibility lends itself well to a relative fault approach and *vice versa* – the relative fault approach could be justified as the court apportioning outcome responsibility. Ratan, however, does not take this route. He maintains that relative fault is the wrong way to think about things. On his view the effect of the mistake is to provide a justification for making

95 Scott Struan, 'Mistaken payments and the change of position defence: rare cases and elegance' (2012) 12 Otago Law Review 645, 653; See Henry Cohen, 'Change of position in quasi-contracts' (1932) 45 Harvard Law Review 1333, 1356–1358 to the effect that the meaning of predominant fault in this context is unclear.

96 [1999] 2 NZLR 211; *Thomas v Houston, Corbett & Co* [1969] NZLR 151; Ross Grantham and Charles Rickett, 'Change of position and balancing the equities' [1999] Restitution Law Review 157.

97 John McCamus, 'Rethinking section 142 of the Restatement: fault, bad faith and change of position' (2008) 65 Washington and Lee Law Review 889, 911–912.

98 [1999] 2 NZLR 211 (CA), 221–222; 229–231 (Thomas J).

99 [2004] 2 NZLR 475, 493.

restitution of the payment. If, however, the claimant's actions, albeit caused by his mistake, have led the defendant to rely on the faith of the receipt and pay money away, the claimant has outcome responsibility for that payment away if he can be said to have put the defendant in the position of believing himself entitled (irrespective of fault).[100] If the claimant cannot be said to have done that, the detriment cannot properly be brought into account.[101] There is no need to rely on relative fault. Outcome responsibility simply works on the basis that the claimant cannot expect the defendant to return the money or other asset, but at the same time not give credit to the defendant for actions (sufficiently) causally connected to his mistake. He must take the rough with the smooth.[102] The claimant cannot justify distinguishing between the consequences of the defect in her decision-making on the basis that one furthers her own interests (getting the money back) and the other does not.[103]

Moral luck plays an important role in this. Moral luck occurs when an agent is treated as an object of moral assessment despite a significant aspect of the moral judgment depending on factors beyond her control.[104] We are concerned here with resultant luck,[105] which occurs when our actions and projects turn out differently because of matters beyond our control. By paying over the money the claimant puts herself at risk of moral luck. This lies at the heart of the idea of respecting the claimant as a person. Her acts have consequences, and she has to live with them – not just some of them. Otherwise, she is not a real person doing real things. On this view, change of position is not merely a case of respecting the other's autonomy in the same way as you would expect yours to be respected (although arguably it may be that as well) because the claimant bears responsibility for the change of position. One rejoinder might be that the defendant is responsible for his actions not the claimant. We explore this later in the second subsection.

The defence responds to (in)action by the defendant. If the asset transferred is stolen, should the defence apply? It seems so. Birks put the point in this way. If change of position were not available, the receipt of anything would be a cause of dread, leading to the adoption of

100 See *Wards Solicitors v Hendawi* [2018] EWHC 1907, [36].
101 Ratan (n 9 above) 105.
102 Ibid 105.
103 Ibid 113; see also Tony Honoré, *Responsibility and Fault* (Hart 1999) 9, 1.34–135.
104 Dana K Nelkin, 'Moral luck', *Stanford Encyclopedia of Philosophy* (2019).
105 Thomas Nagel, 'Moral luck' in D Stateman (ed), *Moral Luck* (State University New York Press 1993) 57, 60.

extreme measures to protect assets.[106] A deliberate choice not to adopt these measures should see the defendant protected from liability just as a deliberate choice to pay away would entail his protection. Moral luck precisely brings into account things that are out of the claimant's control and so what the choice is that the defendant makes on account of the claimant's mistake does not matter. The claimant's outcome responsibility provides the relevant moral link justifying the presence of the defence. What, however, if the defendant makes no choice at all?[107] On one view even pure inaction can be covered. By putting the asset in the hands of the defendant, and therefore in a position to be stolen, the claimant bears some outcome responsibility. An obvious rejoinder is that the thief bears responsibility not the claimant, and we return to this in the next subsection, but it is worth saying a little here too. We may think pragmatically that the difficulty of distinguishing conscious negative reliance from pure inaction is too great and this might prove a persuasive reason allowing the defence in theft cases and other independent changes of position.

When are we outcome responsible?

We must therefore explore this idea of sufficient causal connection because, in the absence of a relative fault approach, it seems the only way to control for outcomes we are not responsible for as a claimant and which therefore cannot be brought into account by the defendant in change of position and to decide what outcomes the claimant is responsible for.[108] The normal test of causation in unjust enrichment cases is 'but-for', and there is authority that this holds true in change of position too. In other words, it is a necessary condition for the defence's application that but for the receipt or anticipated receipt the defendant would not have paid away the money,[109] despite some confusion caused by *dicta* by Mummery LJ in *Commerzbank* to the effect that the test was whether there was a relevant connection.[110] The connection on

106 Birks (n 4 above) 211; Liu (n 4 above) 304; *Scottish Equitable BS v Derby* [2001] 3 All ER 818.

107 This distinction between negative reliance and pure inaction is raised by Oliver Black, 'Varieties of legal reliance' (2017) 28 King's Law Journal 363, 377.

108 Ratan (n 9 above) 105 has the example of A setting fire to B's car and coincidentally also mistakenly paying B £100. This is slightly different in that the fire is not causally connected at all to the payment and so cannot be brought into account in availing B of a change of position defence justifying not returning the money. Here we are talking about how causally connected phenomena might still not be brought into account.

109 *RBC Dominion Securities v Dawson* (1994) 111 DLR (4th) 230; *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540.

110 [2003] EWCA Civ 1663, [43] (Mummery LJ).

the facts was in fact a but-for link. Bant has suggested, however, that the appropriate test in unjust enrichment claims (or those related to impairments in the claimant's intention or decision) is not but for, but whether x was a factor in the claimant's decision.[111] This avoids the issue of over-determination[112] where there are several independently sufficient reasons/causes for an impugned decision. Bant takes the view that this 'a reason' test applies equally to the human decision-making process in change of position,[113] although counterfactual causation remains relevant to the non-reliance cases. In other words, the defendant must merely prove that the receipt of the money (or, on Ratan's view, the defect in the claimant's decision-making) was a factor in the decision to spend the money. Whichever view one takes – that the test is 'but-for' or 'a factor' – this still remains incomplete. We are not outcome-responsible for everything that happened or was decided because of (causally) our actions.[114] Responsibility is limited to outcomes properly attributable to the conduct. The idea of moral luck raised above does not preclude this; it does not require everything out of the claimant's control to be brought into account.

Let us start with cases where we are both outcome responsible.[115] Imagine A goes to a posh restaurant and spends B's mistakenly paid money. A is outcome responsible. A chose to go to the restaurant; A is responsible for that choice. However, it was a contributing factor to A's decision that B had given him the money. Consequently, B too could be outcome responsible. In every jurisdiction change of position seems uncontroversially available here. Yet A's outcome responsibility for his own actions seems to militate against this conclusion. A way out might be causal contribution. To what extent has B's action contributed to the loss? Honoré discusses the question of causal contribution[116] in *Responsibility and Fault*. His focus is tort, and in *Responsibility and Fault* Honoré applies causal contribution to contributory negligence, but by applying it in the change of position context we can test the workability of Ratan's hypothesis. Importantly, contributory negligence in tort requires an apportionment; the damages received by the claimant can be reduced to reflect her contribution to the loss.[117] That contributory approach has been rejected in change of position both by authority and by Ratan himself. Consistency with this

111 Elise Bant, 'Causation and scope of liability in unjust enrichment' [2009] Restitution Law Review 60.
112 Ibid 67.
113 Ibid 75–76.
114 Honoré (n 103 above) 77.
115 Ibid 89.
116 Ibid 91.
117 Law Reform (Contributory Negligence) Act 1945, s 1.

requires a more absolutist approach; questions of causal contribution become a gateway to the defence, and once through the gateway the defence is available to the full extent of the defendant's changed position. Hart and Honoré discuss causal contribution in the context of 'degrees of causation'[118] where we say that an outcome was caused partly by A but mostly by B.[119] The assessment of causal contribution may be rough-and-ready; Hart and Honoré refer to it as 'vague and commonsensical'.[120] On this view, if the party most responsible for the outcome is the claimant, the defence is available. If the party most responsible is the defendant, it is not.

In deciding this question of causal contribution and which party should bear the loss associated with the change of position, we could incorporate a normative judgment as to which causes count more than others. One way to do this might be by reference to whether the defendant has acted in reasonable reliance. If he has not reasonably relied, the defence ought not to be available.[121] On the outcome responsibility view, if the defendant has acted unreasonably in his reliance or in bad faith, the causal contribution of the claimant's (perhaps obvious) error is too low. A flipside example where the claimant does have sufficient responsibility may be this. There have been suggestions in Australian cases, albeit that Gageler J for example pulled back from this in *AFSL*,[122] to the effect that the information on which the defendant relies in making his decision to pay away should derive from the payer. This could be a central (but not the only) case where the claimant's responsibility is greater than the defendant's and where the defence should be available.

It will be necessary to decide when the claimant's outcome responsibility has effectively disappeared – ie where she is responsible for some of the defendant's changed position but not all of it. We may be looking for the unjust enrichment equivalent of a *novus actus interveniens*, or some type of remoteness rule.[123] The function of this rule would be to say when a change in the defendant's position is so remote from the original enrichment that the claimant cannot be

118 H L A Hart and Tony Honoré, *Causation in the Law* 2nd edn (Oxford University Press 1985) 233.

119 *Clay v Crump* [1963] 3 All ER 687 is a tort case where the court sets out three contributory factors in order of importance, and see Law Reform (Married Women and Tortfeasors) Act 1935, s 6(2).

120 Hart and Honoré (n 118 above) 233.

121 Bant (n 111 above) 77–78.

122 [2014] HCA 14, (2014) 234 CLR 580, [157], citing *Citigroup Pty Ltd v National Bank of Australia* [2012] NSWCA 381, (2012) 82 NSWLR 392, rejecting the view in *Swiss Bank Corporation v State Bank of NSW* (1995) 39 NSWLR 350.

123 On which see Richard Nolan, 'Change of position' in Peter Birks (ed), *Laundering and Tracing* (Clarendon Press 1995) 135, 149–151.

sensibly said to be responsible for the change. In tort law, a *novus actus interveniens* is an act of a third party breaking the chain of causation. Clerk and Lindsell observe that no precise test exists and refer to four issues: what was the impact of the intervening conduct, was the conduct deliberate or unreasonable, foreseeable and independent of the defendant?[124] In tort, remoteness rules attempt to provide for the reasonable foreseeability of the loss caused to the claimant so as to protect the defendant from being responsible for things which although counterfactually connected should not be brought into account.

There is relatively little general guidance in tort law, since the extent of the defendant's liability should reflect the policy behind the specific tort.[125] In some wrongs a no remoteness rule, or one allowing expansive recovery, might be appropriate, say in cases of deceit or fraud, where the defendant cannot be allowed to say the claimant's loss is too remote to be compensable.[126] In most tort cases the loss must be reasonably foreseeable. The unjust enrichment claimant is not even a wrongdoer, so, accepting *per arguendo* the tort analogy, we might argue that he should certainly not be taken to be responsible for anything more. Bant has, however, argued that remoteness rules are unnecessary and any causally related change should be taken into account. Indeed, this is one of her reasons why irreversible detriment is preferable to disenrichment, some of whose proponents have suggested a remoteness principle.[127] Some might also find the analogy with tort unconvincing. After all, part of the train of events in many unjust enrichment scenarios is precisely that nobody intended any of it.

However, even if remoteness rules are thought inapplicable, it will still be necessary to make a normative choice as to what operative causes count more than others in deciding whether the claimant or defendant should bear the loss. The very idea of claimant outcome responsibility suggests that the idea of *novus actus interveniens* is appropriate if the *novus actus* plausibly cuts the chain of responsibility. Where, for example, the money paid by the claimant is stolen by a third party from the defendant, we might conclude that it is the thief who is responsible, or maybe the defendant who fails to take precautions against the theft. If the claimant is not responsible (for whichever reason), it cannot be brought into account as a relevant

124 Michael A Jones, Anthony M Dugdale and Mark Simpson (eds), *Clerk and Lindsell on Torts* 23rd edn (Sweet & Maxwell 2020) para 2.114; *Chubb Fire Ltd v Vicar of Spalding* [2010] EWCA Civ 981.

125 *Clerk and Lindsell* (n 124 above) para 2.150.

126 *Doyle v Olby* [1969] 2 QB 158.

127 Bant, *Change of Position Defence* (n 37 above) 136, discussing eg Nolan (n 123 above).

change of position, but this seems very unfair on the defendant, particularly because it is precisely the need to avoid incentivising unnecessary precautions to protect assets that we saw Birks point to as a reason why we need the defence in this context.

EXTENDING CHANGE OF POSITION: DIFFERENT SPECIES OF DEFENCE?

There are a number of difficulties therefore with Ratan's proposed rationale. It will require us to construct an apparatus to assess causal contribution, but without that assessment becoming overly uncertain and 'hand-wavy' in the way that assessments of contributory or relative fault threatened to be overly uncertain. We have also seen that there is a real difficulty in including theft cases within Ratan's outcome responsibility justification for change of position and therefore within the scope of the defence. We might include it pragmatically, but it will seem a stretch to many to say that the claimant bears outcome responsibility, as a result of a sufficient causal connection, for the theft of the transferred asset. The analogy with tort which may help with 'causal contribution' in other ways seems to militate against it. Even, however, *per arguendo* accepting that theft cases can be justified via outcome responsibility, it is impossible to include change of position in wrongs within Ratan's justification, and there are difficulties in the application of his thesis to proprietary claims also. This section examines the justification for extending the defence to first wrongs and then proprietary claims and shows that, while an irreversible detriment view allows for the defence to apply in these cases, Ratan's outcome responsibility justification does not do so.

Extending the defence to innocent wrongdoing

This section explores the question whether the defence of change of position applies to wrongs – specifically to the cases usually dealt with under the heading of restitution for wrongs. These cases lie outside of unjust enrichment because there is a breach of duty by the defendant. There are some cases where disgorgement for a wrong is available, but no change of position applies, as for example where dishonest conduct is present,[128] which would bar the defendant from change of position as being in bad faith. There are wrongs of strict liability where use-damages are available against an innocent defendant where matters appear more open in principle. It is rarely if ever suggested that change of position should apply more widely. The application of the defence to wrongdoing appears to depend on tortious use-damages

128 Bant, *Change of Position* (n 37 above) 169.

cases being restitutionary in the sense of being gain-based rather than compensatory and loss-based.[129] If these damages are loss-based, change of position ought not to apply. The defence does not – in any of its guises – apply to claims to recover losses caused by the defendant. It is beyond the scope of the article to prove that these examples of use-damages are restitutionary, but they are commonly, although not universally, seen as such in the academy.[130] We start by examining the authority for the availability of the defence in this narrow context and then seek to justify that availability.

Application of the defence

Authority in favour of the defence's availability is admittedly flimsy. *Lipkin Gorman* suggested that it is 'commonly accepted' that a wrongdoer should not be able to avail himself of the defence.[131] Lord Goff did not discuss it further since the question did not arise for decision, although it is hard to think, given the way he made no further comment, that he disagreed with the statement. Henderson J in *Test Claimants in the FII Litigation v HMRC*[132] considered that the wrongdoer bar applied to cases where the defendant is sued for a legal wrong. The common law has, however, diverged with some jurisdictions, such as Hong Kong, taking a very hard line against the application of the defence[133] to wrongdoers and in cases of illegality, and others, like Singapore, being much more liberal.

The standard-bearer case for the availability of the defence in trespass – and by extension other innocent wrongdoing – cases is *Cavenagh Investments Pte Ltd v Rajiv Kaushik*.[134] The decision involved a condominium development at Pebble Bay in Singapore. An employee of the management company forged signatures on the lease agreement, allowing him to lease the apartment to the defendant without the defendant realising that the lease was unauthorised, and he was paying rent to the employee personally. When this came to light

129 Craig Rotherham, 'Morally blameless wrongdoers and the change of position defence' (2018) 30 Singapore Academy of Law Journal 149, 150.

130 See eg Burrows (n 11 above) 647–654; James Edelman, *Gain-Based Damages* (Hart 2002) ch 2.

131 [1991] 2 AC 548 (HL) 580.

132 [2008] EWHC 2893, [320].

133 See *Arrow ECS Norway v AM Yang Trading Ltd* [2018] HKCFI 975, [2018] 5 HKC 317; *DBS Bank v Pan Jing* [2020] HKCFI 368; see, for discussion, Connie H Y Lee and Joshua Yeung, 'Unjust enrichment and illegality: "innocent" wrongdoing and its implications for the change of position defence' [2021] Lloyd's Maritime and Commercial Law Quarterly 51.

134 [2013] SGHC 45, [2013] 2 SLR 543.

the plaintiff sued for trespass and claimed for use-damages. Kaushik claimed change of position and succeeded. Chan Seng Onn J said:[135]

> I do not take the view that there should be a blanket ban on the defence of change of position applying to all cases of restitution for wrongs ... Where there is no moral turpitude but the wrong involved is one where the law has prescribed the remedy for a particular policy reason, the defence should also not apply ... In the present case I do not see why the defence should not apply

In essence the judge said that the policy behind rendering the conduct wrongful would not be defeated by providing a change of position defence. In making this decision, the judge relied in part on a *dictum* of Lord Nicholls in *Kuwait Airways v Iraqi Airways (Nos 4 & 5)*.[136] That dispute arose from the Gulf War and the conversion by Iraqi Airways of planes taken by Iraqi forces following Iraq's annexation of Kuwait. Lord Nicholls' *dictum* is not completely clear as he apparently believed a claim in conversion to be one in unjust enrichment, saying:

> Vindication of a plaintiff's proprietary interests requires that, in general, all those who convert his goods should be accountable for *benefits* they receive. They must make restitution to the extent they are unjustly enriched. The goods are his, and he is entitled to reclaim them and any benefits others have derived from them. Liability in this regard should be strict subject to defences available to restitutionary claims such as change of position[137]

Conversion is not the same as unjust enrichment, as Chan Seng Onn J recognised;[138] however, the point is that the defence can operate if it is consistent with the policy behind the wrongfulness.[139] Specifically, the policy behind conversion does not require that the innocent defendant, who may not have realised he was interfering with another's rights, suffer the loss consequential on his change of position in reliance.

---

135 Ibid [64]–[65].

136 [2002] UKHL 19, [2002] 2 AC 883 (HL); more recently Henderson J at first instance in *Test Claimants in the FII Litigation v HMRC* [2008] EWHC 2398, [320], suggested that the wrongdoing Lord Goff had had in mind on the facts of *Lipkin Gorman* was conversion.

137 [2002] UKHL 19, [2002] 2 AC 883, [79].

138 [2013] SGHC 45, [2013] 2 SLR 543.

139 *Rose v AIB Group* [2003] EWHC 1737, [2003] 1 WLR 2791; Duncan Sheehan, 'Change of position in insolvency' [2004] Cambridge Law Journal 41; *Skandinaviska Enskilda Banken v Conway* [2019] UKPC 36, [2020] AC 1111, 1153; *Test Claimants in the FII Litigation v HMRC* [2014] EWHC 4302 (Ch) [315] (Henderson J); it seems a stretch to call the Revenue a wrongdoer, but certainly the policy underlying *Woolwich v IRC* [1993] AC 70 is inconsistent with change of position. See also Bant, 'Change of position' (n 37 above) 131.

Justification for the defence

Rotherham has put forward a strong defence of change of position in this context. His first point links the availability of the defence and the rationale for the availability of use-damages. Rotherham argues that the salience of allowing the defence militates in favour of seeing the relief as restitutionary. This is slightly shaky and backwards, but he does provide a more positive case for the defence, noting that the justification for imposing gain-based liability on an innocent defendant is itself shaky at best.[140] Gain-based relief is frequently seen by courts as exceptional, and Rotherham believes there is little merit in rendering liability for gains strict just because liability for losses are strict. The argument is that innocent wrongdoers are in the same moral position as the unjust enrichment defendant.[141] Take, for example, a mistaken payee and one who buys a chattel from a converter. Both are completely unknowing and morally innocent. From here we can conclude that an innocent wrongdoer who exercises her autonomy and pays away the value of property that she has innocently converted should be able to put the risk of that on the claimant and take advantage of the defence. Douglas has also argued that the importance of the claimant's property rights does not in itself justify strict liability to repay all benefits,[142] and this also lies behind Lord Nicholls' suggestion that converters be able to take advantage of change of position.[143] The importance of the property right needs to be balanced against the defendant's freedom of action. Importantly the defendant, if he has changed his position, would not be free to determine his own spending priorities if liability were imposed; if he is an innocent defendant this is unfair.[144] Theft cases where the innocently converted asset is then stolen should probably also count and for the same reason as in unjust enrichment, namely that the innocent (and possibly unknowing) wrongdoer would be forced to introduce unwanted precautions against loss.[145]

The basis of the defence is therefore that good faith defendants should have their freedom of action protected as part of an internal trade-off with the strictness of the liability. As Bant suggests, restitution does not aim to impose loss on a defendant.[146] Subject to overriding

140 Rotherham (n 129 above) 165–166.

141 Paul A Walker, 'Change of position and restitution for wrongs: ne'er the twain shall meet' (2009) 33 Melbourne University Law Review 235, 251–252.

142 Simon Douglas, 'The nature of conversion' [2009] Cambridge Law Journal 198, 220.

143 *Kuwait Airways v Iraqi Airways* [2002] UKHL 19, [2002] 2 AC 883, [79] (Lord Nicholls).

144 Rotherham (n 129 above) 167.

145 Birks (n 10 above) 38.

146 Bant, *Change of Position Defence* (n 37 above) 171.

policy considerations, there is therefore no principled reason why change of position should not apply to strict liability wrongs or claims to vindicate a continuing proprietary right (which conversion arguably does). This is a rather more nuanced position than that of Burrows[147] to the effect that change of position can never outweigh the policy behind wrongdoing. Importantly, the claimant's right to a loss-based remedy remains unaffected by change of position and so this only affects recovery in cases where the defendant's gain is greater than the claimant's loss and reflects the point that anything the claimant recovers over and above her losses amounts to a windfall.

In *Ministry of Defence v Ashman*[148] Mrs Ashman remained in Ministry of Defence (MoD) accommodation after her entitlement to do so ended. The MoD sought to recover mesne profits from her and succeeded. However, although Mrs Ashman had made a deliberate decision to remain in the property, the Court of Appeal did not award the objective market rent as mesne profits, but the lower discounted rate applicable to the type of local authority housing she would have gone into had it been available, which it had not been (at least until the eviction order was made). Although not couched in terms of change of position as such, the reasoning given by Hoffmann LJ for the reduction, which he termed an example of subjective devaluation,[149] was in terms of her having no practical choice but to remain. She was innocent, and the reduction in quantum is consistent with the policy behind trespass. This can legitimately be seen as taking her autonomy into account.[150] We have seen that a link has been drawn between subjective devaluation and change of position via this respect for the defendant's autonomy, and so this provides further support by analogy for using the defendant's autonomy as the foundation for the defence of change of position in these cases of innocent wrongdoing.

Importantly therefore, the justification for the defence in the wrongs context is defendant-sided in that it concentrates on the moral position of the defendant, not that of the claimant. If the 'outcome responsibility' justification for the defence of change of position in unjust enrichment is sound, we must conclude that any justified change of position defence in wrongs cases is not the same defence. An outcome responsibility

147 Burrows (n 11 above) 699–700; see also Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (Hart 2000) 354.

148 (1993) 66 P&CR 195.

149 Ibid 201–202.

150 Craig Rotherham, 'Subjective valuation of enrichment in restitution for wrongs' [2017] Lloyd's Maritime and Commercial Law Quarterly 412, 419–422; *Cavenagh Investments Pte Ltd v Kaushik* [2013] SGHC 45, [2013] 2 SLR 543 also accepts subjective devaluation within trespass. See Rachel Leow, 'Change of position in restitution for wrongs: a view from Singapore' (2014) 130 Law Quarterly Review 18.

analysis after all would presumably fix the wrongdoer with the greater level of responsibility than the (also) innocent claimant. This in turn entails that change of position should be inapplicable. Accepting of course that there is a greater weight of authority for denying the defence here, we can, however, say that, if the innocent defendant is made to repay or give up his gains to the claimant, he will be made irreversibly worse off. In *Cavenagh Investments*, Kaushik would in effect be forced to pay rent twice were change of position not available. Since litigation would presumably be needed to recover the payments to the fraudster, those payments would be irreversible in the sense used in *AFSL*. Kaushik would be made worse off, and that is not the purpose of a restitutionary claim.

Extending the defence to proprietary cases

This section is divided into two subsections. First, we examine how the defence works in the proprietary context and see that the mechanics are different from those in personal claims. Secondly, we examine the extent to which the claimant can be said to have outcome responsibility for the defendant's actions.

There are two preliminary matters. First proprietary claims are distinctively different from personal claims. One difference is simply that the mechanics of the defence's operation are different. There is also a question whether change of position is inconsistent with vested rights.[151] If the defendant is a trustee for the claimant, it is difficult to argue that change of position lies without unduly weakening the protection of beneficiaries against trustees.[152] A second difference is that the defendant might not be enriched in the same type of way as in personal claims. First Chambers[153] and later Lodder[154] have claimed that there are two distinct types of enrichment. The defendant might be enriched by value or by rights. Value in this context is relational exchange value, as opposed to simple aesthetic value, and refers to value defined by relation to, reference to and ultimately in exchange for another item. By contrast, where a party is enriched by rights and is so unjustly, the claimant is able to recover that specific right through

151 Elise Bant and James Edelman, *Unjust Enrichment* 2nd edn (Hart 2016) 354; See also *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10; [2013] Ch 156, [103] (Morris QC).

152 On which protection, see Duncan Sheehan, 'Equitable remedies for breach of trust' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies* (Edward Elgar 2019) 146.

153 Robert Chambers, 'Two kinds of enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of Unjust Enrichment Law* (Oxford University Press 2014) 242.

154 Andrew Lodder, *Enrichment in the Law of Restitution of Unjust Enrichment* (Hart 2016) 38–43.

a power to re-vest it,[155] and it does not matter if we think the right valueless.[156] If we accept this dichotomy between enrichment by rights and by value and also that there should be symmetry between disenrichment and enrichment,[157] disenrichment by value should not affect enrichment by rights and the defence of change of position in the proprietary claims' context – if it applies – cannot be based on disenrichment. However, such a blanket ban can be avoided if we adopt the irreversible detriment approach.[158]

The second preliminary point is that change of position might be relevant to subrogation claims,[159] but they do not require explanation separate from the personal claim. In *Boscawen v Bajwa*,[160] the Abbey National's money was held on trust for the purchase of a property owned by Bajwa. That property was subject to a mortgage in favour of the Halifax Building Society. The money was used to discharge the latter mortgage, but no purchase went through and Abbey sought to be subrogated to the Halifax's mortgage. Bajwa would have been enriched by having the debt discharged, was enriched at the expense of Abbey and the money was paid without authority. The mortgage secured a personal debt and the personal unjust enrichment claim will be susceptible to change of position.[161]

Operation of the defence by counter-restitution

It would be wrong if an express trustee having enriched himself (even if innocently) through a breach of trust could defend himself with change of position. Some authors have chosen to distinguish therefore between unexercised powers where the defendant can rely on change of position and the power once exercised after which the defendant cannot.[162] Rescission claims, for example, are often, although not universally, held up as involving a power. Birke Häcker is often seen as the leading proponent of this idea.[163] Häcker distinguishes between the

155 Ibid 64–65

156 Chambers (n 153 above) 242–243, discussing the decision in *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183. Lodder (n 154 above) 112; *Armstrong v Jackson* [1917] 2 KB 722; *Balfour & Clarke v Hollandia Ravensthorpe* (1978) 18 SASR 240.

157 On which see Liu (n 4 above) 306.

158 Bant, *Change of Position Defence* (n 37 above) 206.

159 *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 341; *Goff and Jones* (n 5 above) para 27.70.

160 [1996] 1 WLR 328.

161 Ibid 340–341; *Filby v Mortgage Express Ltd* [2004] EWCA Civ 759.

162 See eg Ben McFarlane, *The Structure of Property Law* (Hart 2008) 333–335; Bant, *Change of Position Defence* (n 37 above) 206–207.

163 Birke Häcker, 'Proprietary restitution in impaired consent transfers: a generalised power model' [2009] Cambridge Law Journal 324.

'immediate interest' model, generating a trust and the 'power model' arguing that both in common law and equitable rescission the claimant has a power *in rem*.[164] In the tracing context, the ability of the trust beneficiary (say) to claim against a third party is also, controversially, said to be based on a power.[165] This is not universally accepted either, although, if we do accept it, there is an analogy with rescission where change of position can definitely be taken into account.[166] Penner, however, argues that the beneficiary is simply electing to enforce the trust interest against the third party and that this is a feature of the beneficiary's interest in a trust fund, and not an interest in particular assets.[167] This analysis need not preclude change of position though. It is possible to accept the operation of change of position in proprietary cases while subscribing to the interest in a fund analysis.[168]

Where the claim operates by means of a power, the operation of the defence is by means of a counter-restitutionary payment,[169] or by way of set-off.[170] If the claimant has a tracing claim over a painting in the hands of the defendant, who had saved £150 to buy a new picture but now spends it on a celebration dinner, the claimant can only assert the equitable right if she pays £150 to the defendant.[171] The traceably surviving right should only be recoverable if the claimant is prepared to give credit for the change of the defendant's position. It is important that the money paid away or spent comes from a source unconnected traceably to the assets over which the claim is made. If the money paid away is traceably derived from the initial receipt, change of position is unnecessary as the traceable assets recoverable have reduced. The counter-restitution requirement is inevitable. If the defendant has a right that is traceably derived from the claimant's right, that right cannot be divided. The defendant either has it or not. The claimant either has a claim or not, and so making restitution conditional on counter-restitution is the only way of implementing the defence.

---

164 Ibid 328–331.

165 Aruna Nair, *Claims to Traceable Proceeds* (Oxford University Press 2017) para 6.42.

166 Bant, *Change of Position Defence* (n 37 above) 207.

167 James Penner, 'The (true) nature of the beneficiary's equitable proprietary interest under a trust' (2014) 27 Canadian Journal of Law and Jurisprudence 473.

168 Peter Jaffey, *Private Law and Property Claims* (Hart 2007) 161–163.

169 Jaffey's model does not operate like this, but there are significant criticisms to his model; see Duncan Sheehan, 'Express trusts, private law theory and legal concepts' (2022) 35 Canadian Journal of Law and Jurisprudence 511–536.

170 *Alati v Kruger* (1955) 94 CLR 216.

171 McFarlane (n 162 above) 334; Häcker (n 163 above) 347–349; *AH Macdonald & Co Pty Ltd v Wells* (1931) 45 CLR 506 provides an example of an innocent misrepresentor taking advantage of change of position.

Application of outcome responsibility to the claim

This requires us to cleanly separate out a number of scenarios. Rescission claims are, albeit controversially, said to be unjust enrichment claims. However, rescission claims rely on mistake, duress or undue influence and calling them unjust enrichment claims draws attention therefore to the unity in the reason for restitution.[172] In the first scenario where the claimant wishes to rescind against the immediate recipient of the asset and recover the very asset transferred, change of position should be available for the same reason as in the personal unjust enrichment cases. If, as a result of a mistake, a deed is voidable, but the beneficiary of that deed has paid away money (from a different account) and a sufficient causal connection can be found between the claimant's mistake and the defendant's payment, the claimant should be seen on Ratan's view as having sufficient outcome responsibility for the payment away. By the same token, the defence will not be available, as we saw earlier, if the defendant is at fault or in bad faith in some way for causing the transfer.[173]

A rescission claim may reach substitute assets through tracing; this is our second scenario. In *Bainbridge v Bainbridge*,[174] Master Matthews commented that rescission founded claims to property other than that initially transferred.[175] Where the substitute property remains in the hands of the initial transferee who then pays away money (again from a different account) in reliance, the defence must continue to apply – and again for the same reason as in personal unjust enrichment claims.

The third scenario is where the claimant attempts to claim against a third-party donee. Such parties are also vulnerable to rescission,[176] and claims by a beneficiary of a trust may likewise extend to remote transferees. Some transferees with notice are vulnerable to rescission,[177] although the presence of notice makes it harder to see the availability of change of position. It is controversial whether these are unjust enrichment claims. *Foskett v McKeown*[178] is authority that they are not. Birks, however, argued strongly that they are.[179]

---

172 Bant, *Change of Position Defence* (n 37 above) 90–91.

173 See, in this context, Robert Chambers, 'Proprietary restitution and change of position' in Dyson et al (eds) (n 7 above) 115, 123.

174 [2016] EWHC 898.

175 Ibid [24]–[32]; see also Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski (eds), *The Law of Rescission* 2nd edn (Oxford University Press 2014) paras 21-04–21.05.

176 *Bainbridge v Bainbridge* [2016] EWHC 898, [24]–[32]; *Load v Green* (1846) 15 M&W 216, 153 ER 828.

177 O'Sullivan et al (n 175 above) paras 21.08–21.21.

178 [2001] 1 AC 102 (HL).

179 Birks (n 4 above) 198.

Whether we think the claim lies in unjust enrichment or not, the power of Ratan's argument reduces as the claimant traces into the hands of third parties and there is, as in *Foskett v McKeown*, a tracing but no causation link.[180] The additional steps in the chain make it ever harder to say that the actions of the claimant led to the defendant's reliance. In cases like *Foskett* the claimant trust beneficiary has no real non-fictional responsibility for the asset transfer by the trustee at all; it is impossible to see how he has, in fact, contributed to the outcome. The House of Lords, in fact, not only rejected the idea that these are unjust enrichment claims but also rejected change of position. This supports Chambers in his claim that, even if the proprietary claim against the initial recipient is sourced in unjust enrichment and is susceptible to the defence, a claim against subsequent transferees being sourced in property is not sourced in unjust enrichment. The property right is enforced because it is a property right. This has an important corollary on Chambers' view; if unjust enrichment is irrelevant, so is the defence of change of position.[181]

However, the strictness of the liability of the innocent third-party donee to return assets and the effect of the claim on his creditors in insolvency can be set against the need for the donee's freedom of action to be respected. That the defendant (and by extension his creditors) knows nothing of, and cannot guard against, the claimant or his claim militates in favour of the defence, and actually militates in its favour irrespective of whether we think the claim is an unjust enrichment claim. The defendant's moral position should not depend on which bank account he decides (arbitrarily) to withdraw from. If the third-party tracing defendant takes money from a separate unconnected account and is forced to repay the defendant, he will be made irreversibly 'worse off' than the *status quo ante*. This is the defendant-sided justification which was so powerful in cases of innocent wrongdoing and which becomes more powerful in the proprietary context as any suggestion of the claimant's outcome responsibility recedes. Ratan's outcome responsibility thesis has no purchase in these cases. The justification in *AFSL* therefore has purchase here too, and, indeed, Bant has shown how this characterisation of the defence – irreversible detriment – ties with the principle of *restitutio in integrum* in rescission.[182] Once we accept that change of position is not tied to an unjust enrichment cause of action and disentangle it from the enrichment inquiry by reference to irreversible detriment, the way is open to accept the defence in

180 Duncan Sheehan, 'Subtractive and wrongful enrichment: identifying gain in the law of restitution' in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) 331, 346.

181 Chambers (n 173 above) 128–129.

182 Bant, 'Change of position' (n 37 above) 149.

misapplied trust property and rescission cases – even if they are not unjust enrichment claims.[183]

CONCLUSION

The implications of Ratan's view of change of position in unjust enrichment is that the defence can be fitted into a framework whereby the two parties – claimant and defendant – are locked together through the medium of the claimant's outcome responsibility for the defendant's position. Change of position, justified in this way, might encompass both cases of personal claims and at least some proprietary claims, particularly rescission or subrogation claims, although it struggles to accommodate the unjust enrichment defendant's independent changes of position such as the object's theft; such might need a separate explanation. There is authority that change of position may also stretch to cases of innocent wrongdoers. There are good normative reasons why such parties should be granted a defence, although the outcome responsibility argument in personal unjust enrichment claims has no purchase. Nonetheless, internal trade-offs between the defendant's freedom of action and the strictness of liability in these torts render the defence justifiable, and this rationale also has purchase in the context of proprietary claims against remote recipients, where again the outcome responsibility justification seems to have little, if any, purchase.

Ratan developed his view in the context of a desire to find a single baseline against which to judge how far the defendant had changed her position in both anticipatory receipt cases and post-receipt reliance cases. We might question whether he really needed to build such an elaborate edifice for such a purpose, particularly given the need to construct an apparatus around assessing causal contribution, and the need to hunt for a different explanation in those cases of wrongs, independent changes of position, and proprietary claims where the application of change of position seems ethically defensible, and in wrongs cases supported by some authority, but where outcome responsibility has no purchase. It is true, of course, that in assessing 'detriment' some baseline – preferably single baseline – needs to be picked and there remains a difficult question as to how to justify the baseline. In other words, Bant's thesis allows us to justify change of position outside personal unjust enrichment claims – in some restitution for wrongs cases and some proprietary claims – but it assumes rather than fully explaining why the defendant should not be made worse off. Ratan's justification does not and cannot, however, fully fill the gap in Bant's thesis that needs filling. Either we cut back

183 Bant, *Change of Position Defence* (n 37 above) 208–209.

the defence substantially, or we continue to work to justify why the defendant should not be made worse off. It is submitted that to cut back the scope of the defence so substantially would be a retrograde step; defendants who deserve to be exculpated from liability would be drawn back into the ambit of liability. More work is therefore needed.