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**EXCESS BAGGAGE? RETHINKING RISK ALLOCATION  
IN THE *RESTATEMENT (THIRD) OF RESTITUTION AND  
UNJUST ENRICHMENT***

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INTRODUCTION: THE ANALYTICAL STRUCTURE OF THE *RESTATEMENT*

The law of restitution in the common law has traditionally been explained with reference to specific reasons for restitution or unjust factors. In John Dawson’s formulation, the common law requires “some specific ground, asserted affirmatively by the party seeking restitution” in order to contain enrichment liability within manageable bounds.<sup>1</sup> Civilian systems, on the other hand, tend to eschew the elaboration of specific reasons (at least openly) for the return of unjustified enrichment. Instead, they look to the absence of any legal ground for the transfer or retention of the enrichment. This difference between the two legal traditions is summed up as follows by Lord Hoffmann in *Deutsche Morgan Grenfell Group Plc v. IRC*<sup>2</sup>:

The answer, at any rate for the moment, is that unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment. In the *Woolwich* case Lord Goff said that English law might have developed so as to recognise such a general principle – the *condictio indebiti* of civilian law – but had not done so. In England, the claimant has to prove that the circumstances in which the payment was made come

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<sup>1</sup> JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 117 (1951).

<sup>2</sup> [2007] 1 A.C. 558 (H.L.) (appeal taken from Eng.).

into one of the categories which the law recognizes as sufficient to make retention by the recipient unjust.<sup>3</sup>

Part I of the *Restatement of Restitution: Quasi Contracts and Constructive Trusts*, entitled “The Right to Restitution,” is organised exclusively around specific reasons for restitution, such as mistake and duress.<sup>4</sup> Everything about it points towards an analysis of unjust enrichment, which focuses exclusively on unjust factors.<sup>5</sup> On the other hand, the *Restatement (Third) of Restitution and Unjust Enrichment* has an important civilian twist to it. Chapter 1, entitled “General Principles,” states that the subject is better described as the law of “unjustified enrichment,” and it makes plain that “unjustified enrichment is enrichment that lacks an adequate legal basis.”<sup>6</sup> The civilian cast of the *Restatement (Third)* is confirmed when we turn our attention to section 6, which is entitled “Payment of Money Not Due.”<sup>7</sup> According to the wording of this provision, “payment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due.”<sup>8</sup> However, the civilian import of chapter 1 and section 6 must be set off against the overall structure of chapter 2, which clearly accords analytical significance to specific reasons for restitution, such as fraud, duress, undue influence, and incapacity, as well as mistake itself. Regarding mistaken transfers in particular, section 6 must be set off against section 5, entitled “Invalidating Mistake.”<sup>9</sup> According to section 5(1), which is intended to “epitomize” the whole law of mistake,

<sup>3</sup> *Id.* at 569 (citation omitted).

<sup>4</sup> RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS pt. I (1937).

<sup>5</sup> Chapter 2, dedicated to “Mistake, Including Fraud,” is divided into topic 1, “Definitions and General Rules,” topic 2, “Mistake of Fact,” topic 3, “Mistake of Law,” topic 4, “Unrealized Expectations” (dealing with gifts), and topic 5, “Defences and Conditions.” RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS ch. 2. Topic 1 comprises paragraphs dealing with mistake, mistake of fact and law, and fraud and misrepresentation; causation and materiality, doubt and suspicion, assumption of risk of mistake and compromise, unilateral mistake in bargains, bona fide purchaser, and discharge for value. *Id.* topic 1. Topic 2 begins with title A, “Money Paid by Mistake: In General”; here, we find paragraphs concerning mistaken belief in existence of contract with payee, mistaken belief in validity of contract with payee, restitution from beneficiary of contract with third person, mistaken belief in duty under a contract with payee, mistaken belief as to existence of a noncontractual duty to pay, mistake as to extent of duty or amount paid in discharge thereof, mistake as to quantity for which money is paid, mistake as to payee, mistaken belief that third person owes duty to payee, purchase of non-existent interest, mistakes where only part of subject matter of purchase has been received, mistake in making gifts, mistaken belief as to existence of proof, and mistake due to fraud or misrepresentation. *Id.* topic 2.

<sup>6</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (2011).

<sup>7</sup> *Id.* § 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* § 5.

“(1) A transfer induced by invalidating mistake is subject to rescission and restitution. The transferee is liable in restitution as necessary to avoid unjust enrichment.”<sup>10</sup> Given this epitome, there can be no doubt that mistake itself plays a key analytical role in justifying or explaining the restitution of mistaken transfers.<sup>11</sup>

In the second edition of his book *Unjust Enrichment*, Peter Birks argued that English law had come to recognise the civilian absence-of-legal-ground approach (or the absence-of-basis approach as it is sometimes called) in the “swaps” cases.<sup>12</sup> He believed that a legal system had to make a choice between the civilian approach and the traditional common-law approach.<sup>13</sup> However, he admitted a limited continuing role for unjust factors. In the words of Lord Walker in *Deutsche Morgan Grenfell Group Plc v. IRC*,<sup>14</sup>

Nevertheless I would add that my tentative inclination is to welcome any tendency of the English law of unjust enrichment to align itself more closely with Scottish law, and so to civilian roots. I see attractions in the suggestion made by Professor Birks in *Unjust Enrichment*, under the heading “The Pyramid: A Limited Reconciliation”: “A pyramid can be constructed in which, at the base, the particular unjust factors such as mistake, pressure, and undue influence become reasons why, higher up, there is no basis for the defendant’s acquisition, which is then the master reason why, higher up still, the enrichment is unjust and must be surrendered.” I would be glad to see the law developing on those lines. The recognition of “no basis” as a single unifying principle would preserve what Lord Hope refers to as the purity of the principle on which unjust enrichment is founded, without in any way removing (as this case illustrates) the need for careful analysis of the content of particular “unjust factors” such as mistake.<sup>15</sup>

This appears to be the approach that the *Restatement (Third)* has taken.<sup>16</sup> Moreover, that the absence-of-a-legal-ground approach and specific reasons for returning the enrichment can exist side by side is also demonstrated by the so-called mixed systems. Indeed, the materials referred to in the reporter’s note to chapter 1<sup>17</sup> make extensive reference to Scottish and South African

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<sup>10</sup> *Id.* § 5(1).

<sup>11</sup> *Id.*

<sup>12</sup> PETER BIRKS, *UNJUST ENRICHMENT* 101-05, 129-42 (2d ed. 2005).

<sup>13</sup> *Id.* at 101-03.

<sup>14</sup> [2007] 1 A.C. 558 (H.L.) (appeal taken from Eng.).

<sup>15</sup> *Id.* at [158] (quoting BIRKS, *supra* note 12, at 116).

<sup>16</sup> In fact, there appears to be an implicit reference in the *Restatement (Third)* to the “pyramid” described in Peter Birks’s *Unjust Enrichment*. See *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 1 cmt. b (“The substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as ‘unjust’ . . . .”); PETER BIRKS, *UNJUST ENRICHMENT*, *supra* note 12, at 116-17.

<sup>17</sup> See, e.g., *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 1

enrichment law, both of which take a mixed approach to the restitution of unjust(ified) enrichment and, particularly, to the restitution of mistaken transfers. According to such a mixed approach, both elements must be present to trigger restitution. The emphasis placed on these elements, however, need not be the same in all cases. Rather, individual cases can emphasize the element which provides the most direct and intuitive explanation for restitution.<sup>18</sup>

#### I. THE ROLE OF MISTAKE IN CONTRACT AND UNJUST ENRICHMENT

Mistake plays entirely different roles in the first and third Restatements. In the context of contract, the effect of mistake, at least potentially, is to invalidate.<sup>19</sup> The conditions under which invalidation occurs will vary between jurisdictions. Nevertheless, we can say very generally that a mistake will lead to invalidation only if there are good reasons to allow it to sweep aside the parties' contract. In the context of unjustified enrichment, however, mistake plays a different role: it serves to show that the enrichment of the recipient was involuntary. The involuntariness of the transfer – perhaps in combination with other factors – triggers its restitution.<sup>20</sup> Accepting this, we must further accept that the mistake analysis in the context of unjust enrichment is a purely plaintiff-sided one. If mistake is significant because it renders the transfer involuntary, self-evidently we need not pay attention to the kind of countervailing factors that make the invalidation of contracts on grounds of mistake rather rare. Indeed, this is specifically acknowledged in the *Restatement (Third)*. According to section 5, comment d,

The distinction drawn in the law of contracts between mutual and unilateral mistake has no direct application to the law of restitution. When a plaintiff seeks restitution on account of mistake, the basis of liability is that the plaintiff has conferred an unintended benefit on the defendant; the unintentional character of the plaintiff's act is independent of the defendant's state of mind . . . . The claim based on mistake is the

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reporter's note.

<sup>18</sup> Whether, in the end, the “without legal ground” approach can coherently be combined with the “unjust factor” approach is a matter on which the authors of this contribution differ. See Helen Scott, *Unjustified Enrichment*, 17 *RESTITUTION L. REV.* 258, 259 (2009) (reviewing DANIEL VISSER, *UNJUSTIFIED ENRICHMENT* (2008)) (“Thus, Visser espouses a ‘third way’ between the unjust factors approach and the absence of legal ground analysis, one which is capable of avoiding the weaknesses of each. However, this reviewer remains sceptical. A factor such as mistake is either analytically significant or it is not. Mixed legal systems certainly have the advantage of flexibility: they can move between the common-law and the civil-law approaches as appropriate. But it does not seem that the approaches can be blended at the same level of analysis in the way that Visser seeks to do here.”).

<sup>19</sup> See *RESTATEMENT (SECOND) OF CONTRACTS* ch. 6, introductory note (1981).

<sup>20</sup> See *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* ch. 2, introductory note.

same, in other words, whether or not the recipient shared the transferor's mistake, and whether or not the recipient was aware of it at the time.<sup>21</sup>

The avoidance of a contract is a necessary precursor to the recovery in unjust enrichment of any benefits rendered under that contract. In such a case, the result of the mistake inquiry in contract will largely determine the effect of the mistake in enrichment, since there can be no restitution in unjust enrichment of a benefit conferred under a valid contract.<sup>22</sup> But that practical coincidence should not blind us to the fact that the mistake inquiries in contract and unjust enrichment remain theoretically distinct. In simple terms, triggering the restitution of a transfer in unjust enrichment on grounds of mistake is much easier than avoiding a contract on grounds of mistake.

## II. THE ALLOCATION-OF-RISK ANALYSIS

In answering the difficult question of when mistakes should be permitted to invalidate contracts, the *Restatement (Second) of Contracts* makes use of the concept of allocation of risk.<sup>23</sup> According to the *Restatement (Second)* – setting aside the special issues raised by shared mistake in expression, and simplifying considerably – a mistake as to a basic assumption, which the parties shared and which induced their contract, will permit the adversely affected party to avoid the contract unless he or she bears the risk of mistake under that rule.<sup>24</sup> On the other hand, avoidance on grounds of a basic mistake unique to one of the parties is permitted where enforcement would be unconscionable or the other party had reason to be aware of the mistake or caused the mistake, provided again that the party avoiding the contract did not bear the risk of mistake.<sup>25</sup> The risk-allocation device constitutes a species of universal test for invalidating mistake in contract. In the words of the *Restatement (Second)*, “Stating these rules in terms of allocation of risk avoids such artificial and specious distinctions as are sometimes drawn between ‘intrinsic’ and ‘extrinsic’ mistakes or between mistakes that go to the ‘identity’ or ‘existence’ of the subject matter and those that go merely to its ‘attributes,’ ‘quality’ or ‘value.’”<sup>26</sup>

Section 154 of the *Restatement (Second)* provides the following guide to risk allocation:

- A party [to a contract] bears the risk of a mistake when
- (a) the risk is allocated to him by agreement of the parties, or

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<sup>21</sup> *Id.* § 5 cmt. d.

<sup>22</sup> *Cf. id.* § 34. This provision appears to deal exclusively with the restitution of performance rendered under contracts invalidated for mistake. *Id.*

<sup>23</sup> RESTATEMENT (SECOND) OF CONTRACTS § 154.

<sup>24</sup> *Id.* § 152(a).

<sup>25</sup> *Id.* § 153.

<sup>26</sup> *Id.* § 154 cmt. a.

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.<sup>27</sup>

According to comment b to section 154, “The most obvious case of allocation of the risk of a mistake is one in which the parties themselves provide for it by their agreement . . . .”<sup>28</sup> For example, an insurer may expressly undertake the risk of loss of property covered as of a date already past.<sup>29</sup> Comment c makes a provision also for “conscious ignorance,” which corresponds to section 154(b) above.<sup>30</sup> And section 154(c) – dealt with in comment d – makes provision for cases in which it is reasonably clear that the mistaken party should bear the risk for reasons other than those listed in (a) or (b).<sup>31</sup> In illustration 3, which follows comment d, A pays B, an insurance company, \$100,000 for an annuity contract under which B agrees to make fixed quarterly payments to C, who is 50 years old, for the rest of C’s life.<sup>32</sup> A and B believe that C is in good health and has a normal life expectancy, but in fact C is “afflicted with an incurable fatal disease and cannot live more than a year.”<sup>33</sup> According to the illustration, “The contract is not voidable by A, because the court will allocate to A the risk of the mistake.”<sup>34</sup>

In fact, the allocation-of-risk analysis figures in the *Restatement of Restitution: Quasi Contracts and Constructive Trusts* also. Chapter 2, topic 1, “Definitions and General Rules,” includes section 11, “Assumption of Risk of Mistake.”<sup>35</sup> According to this provision, the position is as follows:

(1) A person is not entitled to rescind a transaction with another if, by way of compromise or otherwise, he agreed with the other to assume, or intended to assume, the risk of mistake for which otherwise he would be entitled to rescission and consequent restitution.

(2) A person is entitled to rescind a transaction with another because of a mistake if the parties have so agreed, although otherwise he would not be entitled to rescission.

(3) An agreement that there shall or shall not be rescission of a transaction because of a mistake can itself be rescinded if the agreement

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<sup>27</sup> *Id.* § 154.

<sup>28</sup> *Id.* § 154 cmt. b.

<sup>29</sup> *See id.* § 154 cmt. b, illus. 1.

<sup>30</sup> *Id.* § 154 cmt. c.

<sup>31</sup> *Id.* § 154(c)

<sup>32</sup> *Id.* § 154 cmt. d, illus. 3.

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

<sup>34</sup> *Id.*

<sup>35</sup> RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 11 (1937).

was induced by fraud or material misrepresentation or by a mutual mistake as to the existence of a basic fact assumed by both parties.<sup>36</sup>

Thus the allocation-of-risk analysis appears to have been relevant in the context of the restitution of unjust enrichment since the original *Restatement*. But this provision seems to have dealt exclusively with the rescission of transactions. In other words, it apparently did not deal with the invalidation or restitution of transfers. Furthermore, in contrast to the *Restatement (Second) of Contracts*, the *Restatement of Restitution: Quasi Contracts and Constructive Trusts* appears to have set out only one technique for allocating risk. Section 11(1) dealt explicitly with the cases corresponding to section 154(a) in the *Restatement (Second) of Contracts* – cases in which risk of mistake is explicitly allocated between the parties through a compromise or other explicit agreement.<sup>37</sup> The rule set out in the *Restatement (Second)*, section 154(b), arguably was implied also by the qualification that the person seeking to rescind may “agree[] with the other to assume, or intend[] to assume, the risk of mistake,” although here too the rule was limited to transactions.<sup>38</sup> Section 11(1), however, did not deal with allocation of risk by a court, the situation contemplated in section 154(c).<sup>39</sup> That the scope of the allocation-of-risk analysis was indeed limited in this way is borne out by the comments and illustrations to section 11. Nor did the concept of allocation of risk play any prominent role in other places in the *Restatement of Restitution: Quasi Contracts and Constructive Trusts* where it might conceivably have done so, such as topic 2, “Mistake of Fact,” and topic 3, “Mistake of Law,” which set out more specific rules regarding restitution on grounds of mistake.

Allocation-of-risk analysis plays a far more prominent role in the new *Restatement (Third) of Restitution and Unjust Enrichment* than it did in the *Restatement of Restitution: Quasi Contracts and Constructive Trusts*. In the *Restatement (Third)*, risk allocation appears to function as a universal test for the restitution of mistaken transfers, in that it purports to describe all the circumstances in which a mistake will invalidate a transfer.<sup>40</sup> Thus, risk allocation features prominently in section 5, “Invalidating Mistake,” as well as in section 6, “Payment of Money Not Due.”

According to section 5, the following position obtains:

- (1) A transfer induced by invalidating mistake is subject to rescission and restitution. . . .
- (2) . . . . There is invalidating mistake only when
  - (a) but for the mistake the transaction in question would not have taken place; and

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Compare *id.*, with RESTATEMENT (SECOND) OF CONTRACTS § 154.

<sup>40</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 (2011).

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- (b) the claimant does not bear the risk of the mistake.
- (3) A claimant bears the risk of a mistake when
- (a) the risk is allocated to the claimant by agreement of the parties;
  - (b) the claimant has consciously assumed the risk by deciding to act in the face of a recognized uncertainty; or
  - (c) allocation to the claimant of the risk in question accords with the common understanding of the transaction concerned.<sup>41</sup>

We can immediately see how closely section 5(3) mimics section 154 of the *Restatement (Second) of Contracts*. Section 5(3)(a) is identical to section 154(a).<sup>42</sup> The wording of section 5(3)(b) differs from that of section 154(b), in that it refers explicitly to the conscious assumption of risk by the plaintiff, but the substance is the same; this is especially evident from the fact that the phrase “conscious assumption of risk,” used explicitly in section 5(3)(b), is echoed in comment c of section 154 of the *Restatement (Second) of Contracts*.<sup>43</sup> The only deviation comes in section 5(3)(c), which deals with cases where the risk of mistake is allocated “accord[ing] . . . [to] the common understanding of the transaction concerned,” whereas 154(c) speaks of the allocation of risk by the court on the grounds of reasonableness.<sup>44</sup> Yet here too it seems that the gist in each case is the same. The notes to section 5(3)(c) speak of “risks assigned as a matter of law,” a formulation which reveals the essential similarities between that provision and section 154(c) of the *Restatement (Second)*.<sup>45</sup>

In light of the observations made in the previous section, the close similarities between these two sets of rules should give us pause. Section 154 of the *Restatement (Second)* seeks to provide rules for determining which mistakes are capable of invalidating contracts; section 5(3) seeks to provide rules for determining which mistakes will trigger the invalidation (i.e., restitution) of transfers.<sup>46</sup> Admittedly, as we have seen, section 153 of the *Restatement (Second)* imposes additional requirements for voidability: in cases involving unilateral errors it also requires that the effect of the mistake was such as to render the enforcement of the contract unconscionable or that the other party had reason to know of the mistake or had caused the mistake through his fault.<sup>47</sup> Nevertheless, according to section 152, in cases involving shared mistakes, voidability turns exclusively on whether the affected party

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<sup>41</sup> *Id.*

<sup>42</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 154(a).

<sup>43</sup> Compare *id.* § 154 cmt. c, with RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5(3)(b).

<sup>44</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5(3)(c).

<sup>45</sup> *Id.* § 5 cmt. b.

<sup>46</sup> Compare *id.* § 5(3), with RESTATEMENT (SECOND) OF CONTRACTS § 154.

<sup>47</sup> RESTATEMENT (SECOND) OF CONTRACTS § 153.



bore the risk of mistake under the rule in section 154.<sup>48</sup> Here, at least the requirements for the invalidation of contract and the restitution of transfers are the same; yet, surely rules for two such different purposes should differ. After all, in the latter case, the “good reasons” necessary to justify sweeping away a presumptively valid contract are unnecessary: the plaintiff is seeking to invalidate a transfer, not a contract. The transferor did not promise the benefit to its recipient nor did the recipient of the transfer bargain for it. The recipient’s reliance on the appearance of finality does not deserve the same level of protection as that afforded to a contracting party’s reliance on the appearance of contractual validity.

Moreover, turning to the content of the rules themselves, it is unclear why, in the context of enrichment claims, the risk of mistake should ever be on the plaintiff. If the purpose of mistake in unjust enrichment is to demonstrate the involuntary character of the plaintiff’s transfer, surely all the plaintiff needs to demonstrate is that he suffered from a genuine mistake which caused him to make the transfer. In other words, in unjust enrichment the risk of mistake is always on the defendant. The only circumstances in which the risk of mistake might logically be said to be allocated to the plaintiff are (1) those in which the plaintiff foresees the possibility that he might be mistaken but pays anyway, presumably in order to bring matters to a close or avoid litigation,<sup>49</sup> in which case his mistake does not actually cause the transfer, and (2) those rare instances where the court, despite the transfer being without basis and despite the presence of a causal mistake, nevertheless considers it appropriate to allocate the risk to the plaintiff. Other than in these rare instances, which will be discussed rather in Part V, allocation of risk does not, in our view, add anything to the causative mistake analysis.

As we have already seen, where the transfer consists of performance in terms of a valid contract or other agreement (such as a compromise), a causative mistake on the part of the transferor will not be sufficient to trigger restitution.<sup>50</sup> In such cases, restitution will be possible only where the mistake in question is a mistake capable of invalidating that underlying contract. Thus, the question of whether the party who performed under the putative contract bore the risk of mistake will, in practice, determine whether or not that performance will be recoverable. Nevertheless, in the normal course of events, the allocation of the risk of mistake has analytical significance only insofar as it allows us to distinguish between mistakes that have the power to invalidate contracts and those that do not – that is, only insofar as it determines

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<sup>48</sup> *Id.* § 152(1).

<sup>49</sup> We might reasonably describe such cases as cases in which the plaintiff has assumed the risk of mistake. Note that there is always the possibility of a defence here, i.e., good consideration.

<sup>50</sup> Thus, allocation of risk features prominently in the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 34 cmt. a (2011).

contractual validity. To avoid confusion, we will refer to mistakes which can invalidate contracts as “nullifying mistakes.”

It is important, once again, to distinguish such a nullifying mistake from the mistake which triggers the restitution of unjust enrichment. All that is necessary for a mistake of this kind to trigger the restitution of a transfer is that it caused the transfer. According to the arguments advanced in this section, the risk of such a mistake always rests on the defendant, so there is no need in principle for an independent inquiry into risk allocation. We might refer to this type of mistake as a “performance or execution mistake,” since it pertains to the payor’s attempts to satisfy a liability or discharge some other legally recognised purpose. Indeed, in comment c to section 6 the *Restatement (Third)* draws a similar distinction between mistakes in performance and mistakes in formation.<sup>51</sup>

### III. APPLICATION OF THE RISK-ASSIGNMENT ANALYSIS IN THE ILLUSTRATIONS TO SECTIONS 5 AND 6

The next step is to investigate how the allocation-of-risk analysis is applied in practice in the *Restatement (Third) of Restitution and Unjust Enrichment*’s treatment of mistaken transfers, in particular in section 5, “Invalidating Mistake,” and section 6, “Payment of Money Not Due.” Is it correct, as we have hypothesized, that the allocation-of-risk analysis does useful analytical work only in the context of nullifying mistakes and is superfluous in the context of performance or execution mistakes? We turn now to an examination of the illustrations advanced with respect to proposition 5(3) in section 5, and also those advanced with respect to the rule in section 6.

It appears that the mistakes discussed in the illustrations to section 5(3) divide neatly into nullifying mistakes and performance mistakes.<sup>52</sup> Illustration 3,<sup>53</sup> which pertains to section 5(3)(a), states that a

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<sup>51</sup> *Id.* § 6 cmt. c.

<sup>52</sup> In fact, it appears that the *Restatement (Third)*, like the *Restatement of Restitution: Quasi Contracts and Constructive Trusts*, does not distinguish between these two species of mistake, dealing with both together under the banner of “invalidating mistake.” See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5; RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 6 (1937).

<sup>53</sup> Illustration 3 is based on *Tarrant v. Monson*, 619 P.2d 1210, 1211 (Nev. 1980). According to the court,

We have held that a mutual mistake of fact may void a contract, and a mutual mistake is a basis for an equitable rescission of a contract. However, under the facts of this case, a mutual mistake did not occur. In this field, a mistake is a state of mind not in accord with the facts. One who acts, knowing that he does not know certain matters of fact, makes no mistake as to those matters. If a person is in fact aware of certain uncertainties a mistake does not exist at all. One who is uncertain assumes the risk that the facts will turn out unfavorably to his interests.

*Id.* (citations omitted).

Customer leaves a diamond engagement ring with Jeweler for repairs, to be completed within two weeks. Customer returns repeatedly to retrieve the ring, only to be told each time that some new problem is delaying completion of the work. Months go by before Jeweler admits that the ring has been misplaced; he offers to replace it with a ring of Customer's choice. Customer selects a new ring which Jeweler delivers to her, though he complains that the replacement is worth \$1000 more than the original. Six months later, Jeweler finds the original ring in his safe in a mislabeled envelope. Jeweler offers to exchange the original ring for the replacement. When Customer refuses, Jeweler sues for rescission and restitution on the basis of mistake. Restitution will be denied. While Jeweler has made several mistakes in dealing with Customer, his delivery of the replacement ring was not the result of an invalidating mistake as defined in this section. Jeweler delivered the new ring in settlement of Customer's claim to the old one (whether or not Customer had formally asserted her legal rights). Under the circumstances, the parties' agreement allocated to Jeweler the risk that the original ring would never be found, or that (if found) its value would be less than the cost of its replacement.<sup>54</sup>

In this illustration the mistake is a putative nullifying mistake: its potential effect is to invalidate the compromise agreement in terms of which the jeweller delivered the substitute ring to his customer. However, the risk of a mistake as to the whereabouts of the original ring was clearly allocated to the jeweller by the parties' compromise: the point of the compromise was to forestall the reopening of the dispute should the ring be found. Here, the allocation-of-risk device does indeed appear to be doing useful work.<sup>55</sup> It allows us to determine whether the jeweller's mistake as to the whereabouts of the ring was in fact an invalidating mistake (i.e., whether the parties' compromise stands).<sup>56</sup>

According to illustration 9,<sup>57</sup>

<sup>54</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. b, illus. 3.

<sup>55</sup> *Cf. id.* § 6 cmt. d, illus. 17.

<sup>56</sup> Regarding the juristic character of compromises, see RESTATEMENT (SECOND) OF CONTRACTS § 74(2) (1981), and ANDREW BURROWS, *THE LAW OF RESTITUTION* 603-04 (3d ed. 2011) (dealing with a "contract of compromise" or "settlement"). According to Burrows, "[W]hile it is convenient to treat such a contract within the 'dispute resolved' defence, it is a general theme throughout the law of unjust enrichment that a valid contract that is inconsistent with restitution rules out restitution." *Id.* at 603. Nevertheless, he explicitly acknowledges that such a compromise could be invalidated, like any contract. *Id.* at 91. Whether the absence of a relationship of indebtedness is treated as part of the cause of action or whether the presence of a valid contract is treated as a defence, the compromise still requires invalidation for restitution to follow. See, in this regard, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 62, which treats indebtedness as a defence even while recognising that it is part of the cause of action.

<sup>57</sup> Illustration 9 is based on *Nelson v. Rice*, 12 P.3d 238, 240 (Ariz. Ct. App. 2000). The case makes extensive reference to the discussion of the allocation of risk by a court in the

Estate prepares to sell furniture (including paintings) at auction. Estate's Appraiser informs Estate that she is not qualified to appraise fine art, but that the paintings to be sold do not constitute fine art. Buyer at Estate's auction purchases two paintings for \$60 which he resells at a subsequent auction for \$1 million. When the facts come to light, Estate sues Appraiser for damages and Buyer for restitution. (Estate argues that it is entitled to rescind the sale on the ground of mistake; alternatively, that Buyer has been unjustly enriched at Estate's expense in the amount of \$999,940.) Estate is not entitled to restitution from Buyer. Estate made a serious mistake when it sold the paintings for \$60, but not an invalidating mistake by the rule of this section. When a completed sale transaction is valid in other respects, the risk that the price will be revealed (in the light of further information) to be either too low or too high is assigned to the disappointed party as a matter of law.<sup>58</sup>

Again, this is an entirely straightforward example of a putative nullifying mistake. According to the law of contract, a mistake as to the value of an item sold is assigned to the seller.<sup>59</sup> Thus, the contract stands in the face of such a mistake and restitution of performance rendered under it is impossible. Again, the allocation-of-risk analysis appears to be doing useful work here.<sup>60</sup>

On the other hand, when we shift our attention to the performance or execution mistakes considered in the context of section 5, this is no longer the case. According to illustration 1,

A's life is insured with B Company for \$50,000. C is the named beneficiary. The body of a shipwreck victim is officially identified as that of A. Neither B nor C doubts the accuracy of the identification. On receipt of formal proof of A's death, B pays C \$50,000. A is later discovered alive. The risk that A is still alive has not been allocated by agreement of the parties; nor has B chosen to act in conscious ignorance with respect to its liability under the policy. B's payment is the result of an invalidating mistake as defined in this section; B has a claim in restitution by the rule of § 6.<sup>61</sup>

In this case, restitution is said to be permitted because there is neither risk allocation by agreement nor conscious ignorance on the part of B. The question arises, however, of whether the risk concept is adding anything here. B was genuinely mistaken as to his liability under the (valid) contract with C, and it was this mistake that caused his overpayment relative to his obligations

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contractual context in section 154(c) of the RESTATEMENT (SECOND) OF CONTRACTS. *See id.* at 242.

<sup>58</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. b, illus. 9.

<sup>59</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 154.

<sup>60</sup> Illustrations 6, 7, and 8 deal with invalidating mistake within the specific contexts of mistakenly made gifts and mistakes in expression. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. b.

<sup>61</sup> *Id.* § 5 cmt. b, illus. 1.

under the contract. Nor was there any valid contractual obligation to oppose the prima facie cause of action generated by this mistake – the money was not due, as is signalled in the *Restatement (Third) of Restitution and Unjust Enrichment* by the reference to section 6. Thus, either the causative-mistake analysis or the absence-of-legal-ground analysis appears to provide a simpler justification for the outcome reached in this case than the risk analysis does.<sup>62</sup>

Conversely, in illustration 2, the facts are said to be the same as in illustration 1, except that here “B agrees to pay \$15,000 now, to be retained by C in any event, and the balance of \$35,000 in two years’ time if A has not subsequently reappeared,” whereupon A is discovered alive.<sup>63</sup> According to the *Restatement (Third)*, the terms of the transaction constitute an express allocation between the parties of the risk that payment under the policy is not in fact due.<sup>64</sup> However, it is simpler to say that the parties’ agreement – that the \$15,000 is to be retained in any event – acts as a valid basis for the transfer; in other words, the transfer is due. A cross-reference to section 6 underlines this point.<sup>65</sup> On the other hand, the absence of causative mistake appears to be the best explanation for the denial of restitution in illustration 4, which refers specifically to comment b(2) on conscious ignorance:

A’s life is insured with B Company for \$50,000. C is the named beneficiary. A disappears without explanation and is absent for many years. C claims payment of the death benefit. Recognizing that A’s death has not been positively established, B decides to pay the claim in view of (i) the perceived likelihood that A is in fact dead, and (ii) the small amount of the policy as compared to the anticipated cost of further investigation and litigation. Shortly after B’s payment to C, A is discovered alive. Because B determined to act in conscious ignorance of the relevant circumstances, B assumed the risk that payment to C was not in fact due. B’s payment to C is not the result of an invalidating mistake as defined in this section.<sup>66</sup>

As the *Restatement (Third)* recognises, there is no agreement between B and C here, so there cannot be any compromise or other legal ground underpinning

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<sup>62</sup> Illustration 1 is based on *Pilot Life Insurance Co. v. Cudd*, 36 S.E.2d 860, 861-63 (S.C. 1945). There was some reference to assumption of risk in the cases cited therein. *Id.* at 864.

<sup>63</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. b(1), illus. 2.

<sup>64</sup> *Id.*

<sup>65</sup> The illustration is based on *Sears v. Grand Lodge A.O.U.W. of New York*, 57 N.E. 618 (N.Y. 1900). In that case the court found, “The defendant [insurer], in executing the agreement of compromise, assumed the risk and calculated the chances of being placed in the present situation, and there would seem to be no reason in law or public policy why plaintiff [wife of insured] should not recover.” *Id.* at 619-20.

<sup>66</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. b(2), illus. 4.

the transfer.<sup>67</sup> Nevertheless, as the *Restatement (Third)* says, *B* has determined to act in conscious ignorance of the relevant circumstances.<sup>68</sup> Under these circumstances *B* might be said to have “assumed the risk” that he was mistaken.<sup>69</sup> Yet this analysis appears to be superfluous under the circumstances: *B*’s mistake as to *A*’s death cannot have caused the payments to *C*.<sup>70</sup>

Finally, illustration 5 is also raised in the context of conscious ignorance:

Mining Company pays a royalty to Landowner for every ton of wollastonite extracted from the Willsboro Mine. Company closes the Willsboro Mine in 1982 and opens New Mine ten miles away. For the next 12 years, Company continues to pay royalties on wollastonite extracted from New Mine, although Company has no such obligation. Company finally realizes its mistake and sues Landowner in restitution. Landowner offers to prove that Company had ample, repeated opportunities to ascertain its real legal obligations; that Company officials unaccountably ignored the matter for 12 years; and that Company failed to act diligently to protect its rights. Landowner argues from this that Company acted in “conscious ignorance” of the facts and thereby assumed the risk of its payment mistake. The argument is misconceived. Inexcusable carelessness is not conscious ignorance. Assumption of the risk of mistake in this context is unintelligible except as a conscious choice between payment and nonpayment (as in Illustration 4); yet Landowner’s evidence tends to show, not that Company made such a choice, but that Company did not know what it was doing. Landowner is potentially protected against Company’s lack of diligence by the defense of change of position (§ 65) and by the applicable statute of limitations 14 (§ 70).<sup>71</sup>

Here, a genuine, if careless, mistake on the part of the mining company resulted in the payments in question. Again, risk allocation or assumption seemingly has nothing to add to this analysis: the reason for restitution is that the company’s mistake caused the payments in question.<sup>72</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Illustration 4 is based on *Meeme Mutual Home Protection Fire Insurance Co. v. Lorfeld*, 216 N.W. 507 (Wis. 1927). The court found that the plaintiff’s mistake of fact rested upon unconscious ignorance. *See id.* at 508.

<sup>71</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. b(2), illus. 5.

<sup>72</sup> Illustration 5 borrows the facts and reverses the result of *Estate of Hatch v. NYCO Minerals, Inc.*, 704 N.Y.S.2d 340, 341 (N.Y. 2000). The case relies on the concept of conscious ignorance, attributing it specifically to section 154 of the *Restatement (Second) of Contracts*. *Id.* at 341.

In conclusion, it appears that although allocation of risk is applied to both nullifying and performance mistakes in the illustrations to section 5, the concept does useful work only in the context of nullifying mistakes. All of the cases of performance mistake in which restitution is denied can be explained on the simple basis that the plaintiff's mistake did not cause his transfer or that there was a compromise or other species of legal ground to support the transfer. In other words, a mixed analysis of the restitution of enrichment by transfer can comfortably accommodate the results in all these cases.

The comments and illustrations to section 6 confirm these findings. Comment b to section 6 deals with "Mistake as to payee" and gives four illustrations of such mistakes.<sup>73</sup> All four illustrations appear to be species of straightforward clerical error leading to the payment of an amount not owing.<sup>74</sup> All are clearly performance mistakes, which occur when the payor pays an amount to the wrong recipient (whether owed in terms of a valid contract or not).<sup>75</sup> For example, according to illustration 1,

Oil Company owes royalties to unrelated lessors named Horace W. Smith and Horatio W. Smith, both of whom are listed in Company's records as H. W. Smith. By a clerical error, Company begins to pay the royalties due under both leases to Horace W. Smith. To the extent that Horace has received payments intended for Horatio, Company has a claim in restitution against Horace.<sup>76</sup>

The *Restatement (Third)* gives no explanation for the outcome in this case or the others. In particular, this outcome is not explained in terms of allocation of risk. Such an explanation would be superfluous. Restitution can easily be explained with reference to the fact that the payment in question was not due. Alternatively, it can be said to arise directly from the company's causative mistake.<sup>77</sup>

Comment c is headed "Mistake as to liability" and gives ten more illustrations.<sup>78</sup> Like the illustrations discussed above, those of comment c describe performance errors relative to a genuine liability on the part of the plaintiff.<sup>79</sup> Illustrations 5 and 6 deal with mistakes as to the identity of the creditor (i.e., the plaintiff has paid the wrong person),<sup>80</sup> 7 and 8 deal with

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<sup>73</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. b.

<sup>74</sup> See *id.* § 6 cmt. b, illus. 1-4.

<sup>75</sup> Illustration 2, for example, simply concerns an electronic transfer to the wrong person. See *id.* § 6 cmt. b, illus. 2.

<sup>76</sup> *Id.* § 6 cmt. b, illus. 1.

<sup>77</sup> The risk concept is not used in *Amoco Production Co. v. Smith*, 946 S.W.2d 162, 163 (Tex. App. 1997), the case on which this example is based.

<sup>78</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. c.

<sup>79</sup> A distinction is drawn here for the first time between mistakes in performance and mistakes in formation (i.e., nullifying mistakes). See *id.*

<sup>80</sup> See *id.* § 6 cmt. c, illus. 5-6.

double payments,<sup>81</sup> and 9 concerns the mistaken overpayment of a tenant of his rental (either in response to his landlord's demand or spontaneously).<sup>82</sup> Illustration 13 concerns the payment of royalties after the expiry of a patent.<sup>83</sup> Illustrations 10, 12, and 14, however, involve slightly more complex errors, namely mistakes as to the other party's contractual performance.<sup>84</sup> Illustrations 10 and 12 in particular concern the overestimation by the plaintiff of that performance, leading to over-performance on his part.<sup>85</sup>

Illustration 12 provides, "Bank Customer presents Mexican currency for exchange into U.S. dollars. The teller makes the exchange without recognizing that Customer's bills are 'old pesos,' officially devalued (four years earlier) by a factor of 1000 to 1. Bank has a claim in restitution to recover the amount of the overpayment."<sup>86</sup> On the other hand, illustration 14 concerns the plaintiff's ignorance of the recipient's breach of contract, resulting in the recipient's forfeiture of his right to claim against the plaintiff:

Seller engages Agent to represent him in a sale of property. The sale is completed, and Seller pays Agent the agreed commission. Seller subsequently learns that, in the course of the transaction, Agent committed a breach of his duty of loyalty; the consequence under local law is that Agent forfeited his right to a commission. Seller has a claim in restitution against Agent to recover the commission paid.<sup>87</sup>

In all these cases, restitution can be straightforwardly explained with reference to the plaintiff's mistaken payment of a sum not owed. No explanation of assignment of risk is necessary, nor is any proffered by the *Restatement (Third)*.<sup>88</sup>

However, in comment d, "Allocating the risk of uncertainty," the risk-assignment analysis is reintroduced.<sup>89</sup> Three illustrations are given.<sup>90</sup> The focus is exclusively on compromise and other express (contractual) allocations of risk.<sup>91</sup> According to the text that precedes the illustrations, "The basis of a claim to recover a payment of money not due disappears if the payment in question was made pursuant to a valid agreement by which the parties

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<sup>81</sup> See *id.* § 6 cmt. c, illus. 7-8.

<sup>82</sup> See *id.* § 6 cmt. c, illus. 9.

<sup>83</sup> See *id.* § 6 cmt. c, illus. 13.

<sup>84</sup> See *id.* § 6 cmt. c, illus. 10, 12, 14.

<sup>85</sup> See *id.* § 6 cmt. c, illus. 10, 12.

<sup>86</sup> *Id.* § 6 cmt. c, illus. 12.

<sup>87</sup> *Id.* § 6 cmt. c, illus. 14.

<sup>88</sup> Illustration 14 is based on comment e to section 469 of the RESTATEMENT (SECOND) OF AGENCY and on *Wechsler v. Bowman*, 34 N.E.2d 322, 326 (N.Y. 1941). No mention is made of risk in this case.

<sup>89</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. d.

<sup>90</sup> See *id.* § 6 cmt. d, illus. 15-17.

<sup>91</sup> See *id.* § 6 cmt. d.



allocated to the claimant the risk of a perceived uncertainty as to the underlying obligation.”<sup>92</sup>

In this context, allocation of risk is revealed as a useful technique for construing and analysing compromises: for determining whether the compromise in question is itself invalidated by a nullifying mistake. Illustration 15 provides an example of the allocation of risk:

Buyer and Seller agree to a sale of a quantity of oats at \$1 a bushel, the amount due to be determined on delivery. After measuring the first 500 bushels, the parties agree to estimate the whole quantity delivered at 2000 bushels, “hit or miss.” Buyer pays on this basis. Subsequent measurement reveals that in fact only 1500 bushels were delivered. Buyer has no claim in restitution.<sup>93</sup>

Here, the parties’ agreement estimating the quantity delivered at 2000 bushels clearly supersedes their previous arrangement (that the bushels would be individually measured) and renders irrelevant their mistake as to the number of bushels in fact present, since the risk of such a mistake is allocated by the agreement itself. Thus, the buyer’s payment was in fact owed in terms of the valid agreement. In the words of the *Restatement (Third)*, “payment in settlement responds to the payor’s obligation as imposed by the settlement, not to the underlying obligation that was the original source of the claim.”<sup>94</sup>

The underlying obligation is, however, central to illustration 16:

Same facts as Illustration 15, except that the parties measured what they took to be 500 bushels (and formed their estimate of the total) using a half-bushel measure which they believed to be a whole bushel. Buyer has a claim in restitution to recover the overpayment, based on the actual quantity delivered at the contract rate.<sup>95</sup>

Here the parties’ settlement – to estimate the whole quantity at 200 bushels – is invalidated by their mistake in using the wrong measure; the risk of that mistake is not allocated. Thus, the original arrangement (bushels to be individually counted) is revived. The buyer can recover his mistaken overpayment relative to his obligations under the original sale contract.<sup>96</sup>

Finally, illustration 17 presents a case where risk allocation is less clear:

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* § 6 cmt. d, illus. 15.

<sup>94</sup> *Id.* § 6 cmt. d.

<sup>95</sup> *Id.* § 6 cmt. d, illus. 15.

<sup>96</sup> Illustrations 15 and 16 are both based on *Wheadon v. Olds*, 20 Wend. 174 (N.Y. Sup. Ct. 1838). According to Judge Cowen,

The agreement to risk was *pro tanto*, annulled by the error. The money was paid under a contract void for so much as the oats fell short . . . . The effect would have been different, had the truth been known to the plaintiff. . . . The foundation of the arrangement to take at the plaintiff’s risque was a misreckoning, one number being put instead of another . . . .

*Id.* at 176.

A's ship is lost at sea. There is nothing to identify the missing crew members but a list of names. B is the wife of C, whom she has not seen for years; it appears that C was one of the sailors lost in the disaster. B claims damages from A as C's widow. A pays \$10,000 in satisfaction of B's claim. C is later discovered alive. Whether A can recover \$10,000 from B in restitution depends on the scope of the parties' agreement of compromise. If C's identity was 'one of the uncertainties of which the parties were conscious and which it was the purpose of the contract to resolve,' the risk of A's mistake has been allocated to A, and A has no claim in restitution. On the other hand, if C's identity was not regarded as uncertain – the scope of the parties' compromise being limited to issues of A's responsibility and B's damages – the risk of the relevant uncertainty has not been allocated by the settlement agreement. In that event, the agreement between A and B is itself subject to avoidance for mutual mistake, and A has a claim in restitution within the rule of this section.<sup>97</sup>

In this case restitution depends on whether the risk of the mistake which materialised (as to C's identity) was in fact allocated by the compromise agreement. If it was, the transfer was made in fulfilment of a valid contractual obligation; in other words, it was due. If it was not, the agreement between A and B is nullified by their error, and the transfer by A to B represents a mistaken payment of an amount not owed.<sup>98</sup>

Again, it appears from illustrations 15, 16, and 17 that allocation of risk constitutes a useful technique for determining the effect of mistake on the validity of compromise and settlement agreements. A valid contractual compromise justifies a payment otherwise not due, thus barring restitution. Conversely, if a compromise is invalidated (i.e., by a mistake, the risk of which it did not allocate) the payment is once again recoverable to the extent that it exceeds liability under the original obligation.

Finally, comment e concerns "Voluntary payment."<sup>99</sup> Voluntary payment is identified as an important counter-principle to the prima facie restitutionary claim generated by payment of an amount not due.<sup>100</sup> According to the wording of the *Restatement (Third)*, "[M]oney voluntarily paid in the face of a recognized uncertainty as to the existence or extent of the payor's obligation to the recipient may not be recovered, on the ground of 'mistake,' merely because the payment is subsequently revealed to have exceeded the true amount of the underlying obligation."<sup>101</sup> A voluntary payment in this sense will generally

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<sup>97</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. d, illus. 17.

<sup>98</sup> The illustration is based on *Grand Trunk Western Railroad Co. v. Lahiff*, 261 N.W. 11 (Wis. 1935). The conclusion of the court was expressed in terms of consciousness of ignorance (or the lack thereof). See *id.* at 13.

<sup>99</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. e.

<sup>100</sup> *Id.* § 6 cmt. a.

<sup>101</sup> *Id.* § 6 cmt. e.

amount to a payment in settlement of a claim.<sup>102</sup> Often, this involves the explicit compromise of an uncertain liability.<sup>103</sup> But the *Restatement (Third)* acknowledges that a settlement may exist even in the absence of agreement between the parties: “If a disputed claim is paid in full, notwithstanding a recognized uncertainty as to the existence or extent of the payor’s liability, the payor has typically made a conscious decision that the anticipated cost of resisting the claim exceeds the amount of the demand.”<sup>104</sup>

The denial of restitution in cases where the plaintiff has assumed the risk that he might be mistaken about his liability seems entirely correct. But once again, it is unclear what independent purpose the allocation or assumption of risk analysis serves here. We can capture the same point by saying that the payment of an amount not due is insufficient to give rise to a restitutionary claim in unjust enrichment. In addition, the transferor must have been mistaken as to the extent of his liability, and that mistake must have caused the payment.

Illustration 18 to comment e appears to be an instance of risk allocation through explicit compromise.<sup>105</sup> Compromise, however, is not explicit in Illustration 19:

A’s life is insured with B Company for the benefit of C. A disappears and is not heard from for seven years. C obtains a certificate of presumptive death and claims payment under the policy. B offers to pay the death benefit in exchange for C’s undertaking to repay the proceeds should A be found alive. C rejects B’s offer and threatens suit if the claim is not paid unconditionally. In a suit by C, the certificate of A’s presumptive death would be sufficient – in the absence of evidence to the contrary – to support a finding of B’s liability. Choosing to avoid the cost of further investigation and litigation, B pays C in full. A is then discovered alive. Because the fact of A’s death was recognized to be uncertain, B is not entitled to recover the payment on the ground of mistake.<sup>106</sup>

The illustration concerns the payment of an amount not owed in the face of uncertainty as to liability in order to avoid, for example, the cost of litigation.<sup>107</sup> B has therefore assumed the risk that A may be discovered alive.<sup>108</sup> On the other hand, we can equally say that there is no causative mistake on B’s part.

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (“Where the terms of settlement involve an explicit compromise of an uncertain liability, the contractual mechanism by which a risk of uncertainty is allocated to the payor is transparent.”).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* § 6 cmt. e, illus. 18.

<sup>106</sup> *Id.* § 6 cmt. e, illus. 19.

<sup>107</sup> *See id.*

<sup>108</sup> The concept of assumption of risk is used in the cases on which this illustration is

Finally, Illustration 20 reads as follows:

A spur track connecting Railroad's main line and Utility's plant is owned by Railroad and Customer in contiguous segments. Freight cars belonging to Shipper and located on the spur are damaged in a derailment. It is uncontested that Shipper is entitled to compensation from the owner of the track where the derailment occurred. After being informed by one of its employees that the accident took place on its portion of the spur, Railroad asks Shipper the amount of the damage and pays the ensuing claim. When subsequent investigation reveals that the derailment actually occurred on track owned by Utility, Railroad brings an action against Shipper for restitution. Shipper argues that Railroad is not entitled to restitution of a "voluntary payment." Railroad's payment to Shipper is not "voluntary" within the meaning of the "voluntary payment doctrine." The rule bars restitution when a payor has assumed the risk of a recognized uncertainty about its underlying liability; but Railroad paid Shipper before it was aware that its liability was in doubt. Railroad has a claim in restitution against Shipper.<sup>109</sup>

Once again, the payment of an amount not due under the influence of a causative mistake is found to be sufficient to trigger restitution. Assumption of risk appears to add nothing to this analysis.<sup>110</sup>

#### IV. EVALUATION OF THE ALLOCATION-OF-RISK ANALYSIS IN THE CONTEXT OF MISTAKEN TRANSFERS

The risk-allocation analysis plays an important role in the interpretation of contracts, including contracts of settlement or compromise, which may or may not be nullified by mistake. It also assists in determining whether a performance mistake can be said to have caused the payment in question, by asking whether the payor foresaw the possibility that he might be mistaken but paid anyway, thus assuming the risk of mistake. However, the risk-allocation analysis plays only a mediated role in determining whether a mistake will trigger restitution of a payment in unjust enrichment. Again, there are only two relevant questions here: Was the money due, and was the payor mistaken about his liability? Allocation of risk, an inherently bilateral concept, is merely an extra level of analysis, which occludes these simpler issues.

Thus one last question arises: What triggers the assignment-of-risk analysis in those cases in which the *Restatement (Third)* applies it? In cases involving (putative) nullifying mistake, the answer is simple. Here, applying the analysis

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based. See, e.g., *N.Y. Life Ins. Co. v. Chittenden & Eastmen*, 112 N.W. 96, 99 (Iowa 1907).

<sup>109</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. e, illus. 20.

<sup>110</sup> The illustrations refers to *CSX Transportation, Inc. v. Appalachian Railcar Services, Inc.*, 509 F.3d 384, 387 (7th Cir. 2007) ("The point of the voluntary-payment doctrine is to prevent recovery when a transfer was made pursuant to an agreement of the parties that allocated between them the risk of any later-discovered mistake." (citing RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 cmt. d (Tentative Draft Nov. 1, 2001))).

culled from sections 151 through 154 of the *Restatement (Second) of Contracts* is appropriate since restitution turns on the invalidation of a compromise or other valid contract.<sup>111</sup> Indeed, that is expressly done in many of the cases discussed above. This explains, for example, illustrations 3 and 9 to section 5, and illustrations 15, 16, and 17 (in the context of comment d) to section 6. On the other hand, when it comes to performance mistakes, the *Restatement (Third) of Restitution and Unjust Enrichment* appears to apply the allocation-of-risk analysis inconsistently. The allocation-of-risk analysis is applied to all the (putative) performance mistakes adduced in the illustrations to section 5, but in section 6 it is largely omitted and emerges only in the context of the (putative) performance mistakes described in comment e, “Voluntary payment.”

The explanation for this inconsistency appears to be that the performance mistakes in the illustrations to section 5 and comment e in section 6 are all errors which resemble mistakes capable of avoiding contract. Illustrations 1 and 5 to section 5 involve performance mistakes in which the restitutionary claim is successful.<sup>112</sup> The mistakes adduced in both illustrations superficially resemble nullifying mistakes in that they are the sort of anterior mistakes of fact that would typically be sufficient to invalidate a contract, provided that the risk of mistake were found to rest on the other party: for example, in illustration 1, *B* and *C* mistakenly believe that *A* (the insured party) is dead.<sup>113</sup> Moreover, in both cases there is a valid contractual relationship between payor and payee.<sup>114</sup> These observations are true, also, of illustration 20 to section 6. Thus in all three cases the analogy to nullifying mistake in contract is hard to resist: the transfers cannot be analyzed as transfers in execution of a (nullified) contractual obligation, but they do take place within a contractual context in the wider sense, and in each case the mistake which triggers the transfer is a mistake as to the surrounding circumstances.

However, the role of anterior factual mistake in these cases is of course secondary. These higher-order mistakes are significant merely because they give rise to a further primary mistake as to the extent of the payor’s liability under the valid contract: that is, a performance mistake. To return to illustration 1, the parties’ higher-order mistake as to the death of *A* gives rise to a primary mistake that the \$50,000 for which *A*’s life is insured is owing under the contract.<sup>115</sup> In illustration 5, Mining Company’s higher-order mistake is that it overlooked the fact that mining on the Willsboro mine has ceased, an initial mistake which gives rise to a further primary mistake about the extent of

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<sup>111</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 151-154 (1981).

<sup>112</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 cmt. b(1), illus. 1; *id.* § 5 cmt. b(2), illus. 5.

<sup>113</sup> *Id.* § 5 cmt. b(1), illus. 1.

<sup>114</sup> *Id.*; *id.* § 5 cmt. b(2), illus. 5.

<sup>115</sup> See *id.* § 5 cmt. b(1), illus. 1.

its liability under the valid contract with Landowner.<sup>116</sup> In illustration 20 to section 6, Railroad's higher-order factual mistake about where the accident occurred gives rise to a primary mistake as to its liability under a valid contractual/regulatory regime to Shipper, the recipient of the payment.<sup>117</sup> In all three cases, it is the payor's performance mistake, a mistake about the payor's liability which leads in turn to involuntary payment, that triggers the restitutionary claim. The anterior mistake is in fact irrelevant to the enrichment claim, and the analogy to nullifying mistake in contract turns out to be spurious.

The illustrations to comments b and c in section 6, in contrast, are of a different order. These are either clerical errors leading to the payment of someone other than the intended payee (in the case of the illustrations to comment b) or mistakes as to the identity of the creditor (i.e., the plaintiff has paid the wrong person), double payments, mistaken overpayments of a valid obligation, or mistakes as to the other party's contractual performance (in the case of the illustrations to comment c). None of these illustrations involves the kind of error of fact or mistake as to surrounding circumstances, whether shared or unilateral, that could conceivably nullify a contract in accordance with the provisions of sections 151 through 154 of the *Restatement (Second) of Contracts*. Whereas the illustrations discussed in the previous paragraphs all involved an anterior higher-order or secondary mistake (a mistake of fact or mistake as to surrounding circumstances) leading in turn to the primary liability mistake, in the illustrations to comments b and c to section 6 there is no such higher-order mistake. This simple point explains the inconsistent application of the allocation-of-risk analysis in the *Restatement (Third)*.

#### V. MIGHT THERE BE EXCEPTIONAL CASES IN WHICH RISK CAN, AFTER ALL, PLAY A ROLE?

In conclusion, an unjust enrichment analysis, which requires both the presence of a causative mistake and the absence of a legal ground, can easily explain the resolution of unjust enrichment claims in all of the illustrations discussed above, without requiring any recourse to the allocation-of-risk analysis. Although allocation of risk plays a useful analytical role in determining which mistakes are capable of nullifying a contract, it does not appear to have any exclusively unjust-enrichment-related role to perform in that context. On the other hand, in most instances the allocation-of-risk analysis can be safely eliminated from the analysis of performance mistakes (mistakes as to the payor's liability). However, as already contemplated in Part II, it is conceivable that there might be instances in which mistake triggers restitution of a payment made without legal ground, but where the court, nevertheless, should have the power to allocate the risk to the plaintiff, rather than to the defendant where it ordinarily resides.

<sup>116</sup> See *id.* § 5 cmt. b(2), illus. 5.

<sup>117</sup> *Id.* § 6 cmt. b(1), illus. 1.

This point can be illustrated by means of the South African case law relating to the reasonableness of mistake. South African law has consistently required that a mistake that triggers the repayment of an unowed sum can do so only if it is adjudged to have been reasonable.<sup>118</sup> This rule has been subjected to strong criticism, but the courts have held on to the requirement.<sup>119</sup> The reason they have done so, it would seem, is to retain a fall-back mechanism to ensure an equitable outcome in all cases. In *Willis Faber Enthoven (EDMS) Bpk v. The Receiver of Revenue*,<sup>120</sup> the court explained the circumstances under which the absence of excusability could undo the normal result that a mistaken payment of an unowed sum is recoverable:

It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not. All that need be said is that, if the payer's conduct is so slack that he does not in the court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and *vice versa*. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no *debitum* and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.<sup>121</sup>

A recent case, *Affirmative Portfolios CC v. Transnet Ltd. t/a Metrorail*, provides an example of the kind of rare situation in which the safety net of excusability provides a better result than would have been possible without it.<sup>122</sup> In this case, a labor broker had supplied station platform controllers to a railway company under terms of a written agreement at a certain hourly rate of R15.<sup>123</sup> Prior to signing the written agreement, however, the broker increased the rate to R17.50, an amount the company paid for about six months.<sup>124</sup> The company then notified the broker that the charges exceeded what the agreement allowed and that the company would in the future pay at the lower

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<sup>118</sup> See *Willis Faber Enthoven (EDMS) Bpk v. The Receiver of Revenue* 1992 (4) SA 202 (A) at 224 (S. Afr.).

<sup>119</sup> See Helen Scott, *The Requirement of Excusable Mistake in the Context of the Conductio Indebiti: Scottish and South African Law Compared*, 124 SOUTH AFR. L.J. 827, 863 (2007); DANIEL VISSER, UNJUSTIFIED ENRICHMENT 316-18 (2008).

<sup>120</sup> 1992 (4) SA 202 (A) at 224 (S. Afr.).

<sup>121</sup> *Id.*

<sup>122</sup> *Affirmative Portfolios CC v. Transnet Ltd. t/a Metrorail* 2008 (1) SA 196 (A) (S. Afr.), also published at [http://www.justice.gov.za/sca/judgments/sca\\_2008/sca08-127.pdf](http://www.justice.gov.za/sca/judgments/sca_2008/sca08-127.pdf) at 11 para. 33.

<sup>123</sup> *Id.* at 3 para. 3.

<sup>124</sup> *Id.* at 4 para. 5.

rate.<sup>125</sup> The broker agreed to the lower rate but reserved its rights.<sup>126</sup> After about a year and a half, the company terminated the agreement.<sup>127</sup> The labor broker thereupon instituted a contractual claim for the difference between the rates, and the company instituted a counterclaim based on unjust enrichment with respect to what it alleged to be an overpayment during the first six months of the existence of the contract.<sup>128</sup> The court of first instance dismissed the labor broker's contractual claim but upheld the company's enrichment claim.<sup>129</sup> Both parties appealed.<sup>130</sup> The Supreme Court of Appeal held that the contractual claim must fail because, although there was evidence that an oral agreement with respect to the higher rate may have been entered into, both the operation of the parol evidence rule and the inclusion of a non-variation clause prevented the broker from holding the company to the higher rate.<sup>131</sup> The enrichment claim also had to fail, the court held, because the company had failed to satisfy the court that its mistake was reasonable or excusable.<sup>132</sup> It seemed that the mistake could only have been the result of extreme slackness on the part of the company officials and had not been induced by the broker.<sup>133</sup>

*Affirmative Portfolios* represents one of the rare instances in South African law in which the requirement that the mistake be reasonable played a useful role in excluding an undeserving claim.<sup>134</sup> In making payments according to the increased rate, the company had represented that it regarded itself bound by the oral variation – a representation relied upon by the broker in so far as it paid its employees according to the increased rate. Thus, “The requirement served to protect the broker’s reasonable reliance on the oral variation.”<sup>135</sup> Admittedly, a similar result could have been achieved through the defence of loss of enrichment or change of position. Here, however, the onus would have been on the defendant broker to demonstrate his loss of enrichment; arguably it was preferable to exclude the company’s claim at an earlier stage. In the context of the *Restatement (Third)*, the same result could be obtained in cases such as these by using the device of the allocation of risk: where the recipient has relied on a representation of indebtedness by the plaintiff, it is just that the

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 4 para. 7.

<sup>127</sup> *Id.* at 5 para. 8.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 3 para. 1.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 6 para. 13.

<sup>132</sup> *Id.* at 9 para. 20.

<sup>133</sup> *Id.* at 12 para. 35. Whether or not the defendant had induced the mistake has played an important role in the court’s approach as to whether that mistake should be regarded as excusable. See Scott, *supra* note 119, at 839-51.

<sup>134</sup> See Helen Scott, *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail*, 2009 RESTITUTION L. REV. 221, 223.

<sup>135</sup> *Id.*



risk of mistake be allocated to the plaintiff. In this way the excess baggage might contain something useful after all: a kind of Swiss Army knife, a tool to deal effectively with unusual problems.