

## HANDS ACROSS THE WATER: THE CONTINUING CONVERGENCE OF AMERICAN AND AUSTRALIAN CONTRACT LAW

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A decade ago Mr Justice Priestley favoured readers of this journal with his insightful "Guide to a Comparison of Australian and United States Contract Law".<sup>1</sup> Following a brief institutional comparison,<sup>2</sup> His Honour reviewed recent Australian and American developments in unconscionability, good faith, and estoppel to illustrate the "numerous similarities" between the two contract regimes. A central theme of his Guide was that because English precedent is now merely persuasive rather than binding in Australia, that nation's contract lawyers and judges likely would make "increased use" of recent American experience in the field.<sup>3</sup>

Much has happened the past decade to confirm Justice Priestley's observations and predictions. Generally speaking, American and Australian contract law have indeed continued to converge, in part because Australian courts have used their new finality powers to rethink much traditional doctrine

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1 Hon LJ Priestley, "A Guide to a Comparison of Australian and United States Contract Law" (1989) 12 *UNSWLJ* 4.

2 Justice Priestley first described certain similarities between the two countries' legal systems, then noted two significant differences: (1) unlike Australian states, each of the 50 American states has virtually unlimited sovereignty over its own contract law; and (2) unlike Australia's High Court, the United States Supreme Court has jurisdiction to hear a contract dispute only in the rare instance that the case presents a substantial question of federal law. Thus, in the United States, "there are 51 final courts of appeal in matters of contract law", whereas in Australia "there is one". *Ibid* at 6.

3 Others have expressed similar sentiments. See, for example, P Finn, "Commerce, The Common Law and Morality" (1989) 17 *MULR* 87 (describing a "growing divergence" of Australian common law from that of England and a "much closer kinship" with those of New Zealand, Canada, and the United States); K Mason, "Restitution Law in Australia" in PD Finn (ed), *Essays on Restitution* (1990) 20 ("American law was rarely cited before full borrowing rights to the library were tendered to Australian judges by Sir Anthony Mason at the time of his swearing in as Chief Justice"); AJ Duggan, "UCC Influences on the Development of Australian Commercial Law" (1996) 29 *Loyola University of Los Angeles Law Review* 991.

and to look beyond their own shores and England for alternative ideas and models.<sup>4</sup>

Last academic year I had the great good fortune to teach Contracts at the University of New South Wales. As the year ended, all too quickly, I thought it might be appropriate to leave behind a footprint or two by updating and extending somewhat Justice Priestley's Guide. To do so, I shall examine briefly three areas of contract law that have received considerable recent attention in Australia and were, in any event, especially interesting to this visitor. Each of the three – restitution, promissory estoppel, and unconscionability<sup>5</sup> – demonstrates both the innovative power of today's Australian High Court and the soundness of Justice Priestley's prediction a decade ago that American and Australian contract law gradually would converge.<sup>6</sup>

Within each area I first shall describe certain fundamental features of American law, including a quite recent development or two, primarily for Australian readers. I then shall review and comment briefly on corresponding recent Australian developments, principally for an American audience. A central theme of this modest paper, which I hope will be evident throughout, is that my own view of recent Australian contract law is highly favourable.<sup>7</sup>

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4 I wish I could report that American judges are similarly becoming "Contracts Citizens of the English Speaking World", but in truth American judges and scholars rarely look beyond our own shores for new ideas. Our principal excuse, I suppose, is that our own 50 states themselves produce such a diverse (and occasionally bewildering) array of approaches to most legal questions. But see EA Farnsworth, "Developments in Contract Law During the 1980's: The Top Ten" (1990) 41 *Case Western Reserve Law Review* 203 (describing, inter alia, the "increasing internationalization" of American contract law).

5 I recognise that some Australian lawyers prefer to conceptualise at least two of these areas, restitution and estoppel, as closely related to contract law rather than as part of it. See, for example, J Carter, "Contract, Restitution and Promissory Estoppel" (1989) 12 *UNSWLJ* 30; AS Burrows, "Contract, Tort and Restitution: A Satisfactory Division?" (1983) 99 *LQ Rev* 217. Indeed, one of the courses I taught at UNSW, titled "Frontiers of Contract", examined the 'frontiers' between contract and restitution, contract and estoppel, and contract and tort. While perhaps it hardly matters, I myself prefer the somewhat simpler, more inclusive view that doctrines like restitution and promissory estoppel are actually part of, rather than adjacent to, contract law.

6 Much already has been spoken and written about the High Court's recent contract law innovations. For overviews, both descriptive and normative, see J Carter and A Stewart, "Commerce and Conscience: The High Court's Developing View of Contract" (1993) 23 *UWA L Rev* 49 (describing the "remarkable flood of contract litigation" reaching the High Court during the 1980s, and how the Court has begun to fashion a "distinctive Australian contract law"); Hon AM Gleeson, "Innovations in Contract: An Australian Analysis" in P Birks (ed) *The Frontiers of Liability* (1994) 113; Hon LJ Priestley, "Contract – The Burgeoning Maelstrom" (1988) 1 *Journal of Contract Law* 15; N Seddon, "Australian Contract Law: Maelstrom or Measured Mutation?" (1994) 7 *Journal of Contract Law* 93.

7 It certainly is more favourable than my view of much recent American contract law. See generally RJ Mooney, "The New Conceptualism in Contract Law" (1995) 74 *Oregon Law Review* 1131.

## I. RESTITUTION

### A. United States

As every reader surely knows, classical contract law<sup>8</sup> featured a determined resistance to implied contracts and contract terms. One example of that resistance was the difficulty of recovering "off the contract" in restitution.<sup>9</sup> Modern American courts, however, gradually became more receptive to restitution claims, recognising that the fairness typically achieved through them tends to outweigh any reduction, real or imagined, in legal certainty or symmetry. Thus, in American law today, restitution is a quite well established theory of recovery to prevent unjust enrichment,<sup>10</sup> as the following few examples will suggest.

A leading Arkansas decision, *Cotnam v Wisdom*,<sup>11</sup> granted a restitution recovery to two physicians who had rendered medical aid to an unconscious accident victim. The court explained that "implied" or "quasi" contracts in such cases are "almost as old as the English system of jurisprudence". They are, of course, a "legal fiction", but the "sensible and humane" considerations that support them serve to create a "plain legal obligation".<sup>12</sup>

8 "Classical contract law", of course, refers to the relatively formalist system of abstract, interrelated rules that dominated the field for at least two generations a century ago. The most readable account of the birth, life, and 'death' of classical contract law remains G Gilmore, *The Death of Contract*, Ohio State University Press (1974). For a much longer, more scholarly rendering of similar developments, primarily in England, see PS Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford University Press (1979). For the view that some American courts are regressing today back toward something like classical contract law, see RJ Mooney, note 8 *supra*.

9 See, for example, *Gardiner v Higgins* 125 NE 561 (Mass 1920) (court will not imply promise by lessee to deliver premises free from subtenancy); *Cashin v Pliter* 134 NW 482 (Mich 1912) (construction company, whose express contract is void, may not recover building costs under implied contract theory); *Verdi v Helper State Bank* 196 P 225 (Utah 1921) (where express contract exists, implied contract to retain funds six additional months impermissible). See generally 66 *American Jurisprudence 2d*, Restitution and Implied Contracts, s 6.

10 The fundamental axiom of American restitution law appears in the very first section of the American Law Institute, *Restatement of Restitution* (1937): "A person who has been unjustly enriched at the expense of another is required to make restitution to the other". "Restatements" of American law are products of the American Law Institute, an organisation of judges, law teachers, and practicing attorneys founded in 1923 to simplify and clarify portions of American law by "restating" them. Technically, Restatements are not 'law', except in the rare instance when a legislature or court formally adopts a "restated" principle, but typically they are persuasive evidence of a general American rule or principle. See generally NEH Hull, "Restatement and Reform: A New Perspective on the Origins of the American Law Institute" (1990) 8 *Law and History Review* 55.

Beyond the Restatement, the best general scholarly account of American restitution law is Professor George Palmer's thorough four volume treatise, GE Palmer, *The Law of Restitution*, Little Brown and Co (1978). For much briefer versions, see A Kull, "Rationalizing Restitution" (1995) 83 *California Law Review*; D Laycock, "The Scope and Significance of Restitution" (1989) 67 *Texas Law Review* 1277.

11 104 SW 165 (Ark 1907).

12 The only difficult issue on appeal concerned the amount recoverable. The trial court allowed the jury to consider, among other factors, "ability to pay", but the Arkansas Supreme Court declared that to be an error. The plaintiff physicians were entitled simply to a "reasonable compensation" for their services, determined by market value, without regard either to medical success or failure or to the patient's ability to pay. On restitution for emergency services generally, see American Law Institute, *Restatement of Restitution* (1937), ss 113-17.

In a second leading example, *Matarese v Moore-McCormick Lines Inc.*<sup>13</sup> the Second Circuit Court of Appeals ordered an employer to pay restitution to a stevedore whose valuable inventions the employer had appropriated. The stevedore's supervisor had promised him one-third of the company's savings from use of his inventions, but the company later denied the supervisor's authority and refused to pay. The court concluded that the doctrine of "unjust enrichment" or "quasi-contract" applies in cases where the "product of an inventor's brain" is "knowingly received and used by another to his own great benefit without compensating the inventor".<sup>14</sup>

A recurring area of difficulty in restitution is the extent to which it may be appropriate in a marital context.<sup>15</sup> Recently, for example, in *Pyeatte v Pyeatte*, an Arizona court considered the case of a former wife who had worked to put her husband through law school on the understanding that he then would work while she attended graduate school.<sup>16</sup> When the husband left the marriage shortly after his own graduation, the principal issue in dissolution proceedings became whether the wife was entitled to compensation for her efforts, either in contract or in restitution. The court concluded that the agreement itself was "not sufficiently definite" to enforce, so denied recovery on the express contract theory. However, it granted the former wife \$23 000 in restitution. She had conferred a "benefit" on her husband, with an "expectation of payment", and he should "in good conscience" compensate her for it. To avoid "unjust enrichment", the court ordered him to do so.<sup>17</sup>

Notice, not incidentally, how beneficial an expansive restitution landscape seems in the last two cases. In both *Matarese* and *Pyeatte*, the plaintiffs' contract claims foundered on irksome technical defences essentially unrelated to the

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13 158 F2d 631 (2d Cir 1946).

14 The court explained that while it was generally "assiduous" in defeating attempts to "delve into the pockets of business firms through spurious claims", the facts in *Matarese* fully justified a restitution recovery. The pre-existing employment relation, the supervisor's promise of substantial compensation, the value and patentability of the stevedore's inventions, and the employer's great cost savings from them, combined to present a clear case of unjust enrichment. Cf *Smith v Recrion Corp* 541 P2d 663 (Nev 1975) (hotel employee not entitled to restitution for value of RV-park suggestion, which he had made "officially" and which failed the "concreteness and novelty" test).

15 For example, *Wisner v Wisner* 631 P2d 115 (Ariz App 1981) ("unjust enrichment, as a legal concept, is not properly applied in the setting of a marital relationship"); *Hubbard v Hubbard* 603 P2d 747 (Okla 1979) (wife may recover in restitution money spent supporting husband during 12 years of medical training); *Roubicek v Roubicek* 21 So2d 244 (Ala 1945) (wife given credit in marital dissolution asset division for valuable work in husband's business); *Lewis v Lewis* 245 SW 509 (Ky 1922) (wife may not recover in restitution even for "great services" rendered in husband's store).

16 661 P2d 196 (Ariz 1983).

17 The Arizona court noted the traditional American reluctance to grant restitution in marital relationship cases, but chose to join the "emerging consensus" in cases like *Pyeatte* that restitution to a working spouse is appropriate to prevent the other's unjust enrichment. For a famous Hollywood decision expanding recovery theories for a nonmarital partner, see *Marvin v Marvin* 557 P2d 106 (Calif 1976) (inter alia, nonmarital partner may recover in restitution the "reasonable value of household services rendered" less the "reasonable value of support received", if services rendered with an "expectation of monetary reward"). See also *Eaton v Gurry* 627 So2d 1317 (Fla App 1993) (plaintiff not precluded from restitution for value of her work at defendant's restaurant merely because they were living together at the time); *Shuraleff v Donnelly* 817 P2d 764 (Or 1991) (reasonable value of individual contributions relevant to division of property accumulated during 15 year nonmarital domestic relationship).

merits, that is, nonagency and indefiniteness. Only the restitution alternative prevented unjust ultimate results in those (and many other) cases.

Restitution has long been available, of course, in many situations where a doctrine like mistake, impossibility, frustration, or illegality precludes recovery on a contract.<sup>18</sup> For example, in a well known Massachusetts case, *Young v City of Chicopee*,<sup>19</sup> the Court granted restitution to a bridge repair contractor for work it had completed before fire destroyed the bridge altogether. However, the court did *not* permit a "reliance" recovery for the value of materials the contractor had delivered to the job site but not yet "wrought into" the bridge.<sup>20</sup>

Another recurring, contentious restitution issue is its availability to a "defaulting plaintiff", that is, to a party who committed the first material breach of contract. American authority divides on this issue, but surely the better result is to grant relief in most such cases if unjust enrichment otherwise would result. The landmark American decision is *Britton v Turner*,<sup>21</sup> in which the New Hampshire Supreme Court awarded restitution to a worker who had breached a one year employment contract by departing after 10 months. Despite his breach, the plaintiff recovered the value of the benefit he had conferred on the employer, subject, of course, to an offset for any breach related damage.<sup>22</sup>

A more recent example, from Oregon, is *Appalachian Regional Hospitals Inc v Henry*.<sup>23</sup> The plaintiff hospital had lent an employee \$20 000 for further education, and also agreed that if he later returned to work it would forgive the loan \$400 per month. The employee did return, but a dispute developed, and the court ultimately ruled that the hospital could not enforce the loan agreement because it had breached it by failing to furnish the employee a "suitable position". However, the court did grant the hospital *restitution* of the money lent: the loan had "conferred a substantial benefit" on the employee, and to allow him

18 See generally American Law Institute, *Restatement of Restitution* (1937), ss 6-106 and 160-79; American Law Institute, *Restatement (Second) of Contracts* (1981), ss 141, 158, 197-9, 272 and 375-7; GE Palmer, note 11 *supra*, chs 6-8 and 12; JM Perillo, "Restitution in the Second Restatement of Contracts" (1981) 81 *Columbia Law Review* 37.

19 72 NE 63 (Mass 1904).

20 See also *Renner v Kehl* 722 P2d 262 (Ariz 1986) (restitution following mutual mistake); *Cazares v Saenz* 256 Cal Rptr 209 (Cal App 1986) (restitution following impossibility); *Edwards v City of Renton* 409 P2d 153 (Wash 1965) (restitution following illegality).

For a later Massachusetts decision protecting both restitution and reliance interests following a declaration of impossibility, see *Albre Marble & Tile Co v John Bowen Co* 155 NE 2d 437 (Mass 1959) (subcontractor may recover from general contractor the value of labour and materials used in preparing non-wrought-in samples, shop drawings, and the like where the general contractor expressly requested such work, and the general's own noncompliance with statutory bidding procedures caused state termination of the prime contract). American Law Institute, *Restatement (Second) of Contracts* (1981), s 272 also now validates such a result, authorising a court to grant relief in cases like *Young* and *Albre Marble* "as justice requires, including protection of the parties' reliance interests". See generally JP Dawson, "Judicial Revision of Frustrated Contracts: The United States" (1984) 64 *Boston University Law Review* 1.

21 6 NH 481 (1834).

22 Professor Palmer reported that *Britton* remained the "minority" American position for personal services contracts as late as 1978. GE Palmer, note 11 *supra*, at 650.

23 597 P2d 1247 (Or 1979).

to retain it would be analogous to enforcing a “penalty or forfeiture” following a breach.

Finally, there is the sometimes difficult matter of determining the appropriate *measure* of restitution recovery. The well worn fundamental rule is the ‘value of the benefit conferred’, but like most legal rules this one is often easier to state than to apply. At times a literal application makes perfect sense,<sup>24</sup> but just as often the literal ‘value’ would be difficult either to calculate or to justify.

In *Hershiser v US Fidelity & Gty Co*,<sup>25</sup> for example, a personal injury trial had resulted in a \$207 000 judgment against an insurer. The insurer’s trial attorney hired a colleague to pursue an appeal, but the two neglected to agree on a fee. When the appeal succeeded, the literal ‘value of the benefit conferred’ on the insurer was the full \$207 000, but the court sensibly awarded the appellate attorney restitution of only \$1 635, the \$45 per hour market value of his services.<sup>26</sup>

Occasionally a court must decide whether a restitution recovery may exceed the corresponding expectation measure. In instances where the claimant itself has committed the first material breach, like *Britton v Turner*,<sup>27</sup> the virtually uniform rule is no – expectation serves appropriately as a ceiling in such cases.

However, where a *nonbreaching* party seeks restitution, the answer occasionally is different. *United States v Algernon Blair Inc*<sup>28</sup> was a typical losing contract case, in which a steel erection subcontractor sought \$37 000 allegedly due for its partial performance before the general contractor breached. The defence asserted that the subcontractor’s expectation interest was zero because it ultimately would have lost more than \$37 000 had both sides performed fully. The Fourth Circuit Court of Appeals declined to limit the subcontractor’s recovery to expectation, awarding it restitution instead. Citing Aristotle alongside Fuller and Perdue,<sup>29</sup> and noting that restitution serves to prevent both “unjust gain” and “unjust impoverishment”, it remanded the case for inquiry into the “amount for which such services could have been purchased from one in the plaintiff’s position”.<sup>30</sup>

24 A straightforward illustration of the rule is *Michigan Central Ry Co v State* 155 NE 50 (Ind App 1927). A railway company misdelivered a carload of coal to the Indiana state prison. The market value of coal then was \$6.85 per ton, but the prison was able to buy it for \$3.40/ton. Accordingly, the railway’s restitution recovery – quite literally the “value of the benefit conferred” – was \$3.40/ton.

25 556 P2d 663 (Or 1976).

26 See also *Comm v Goodman* 286 NE2d 758 (Ill App 1972) (noting difficulty of determining value of architect’s services to property developer); *Utemark v Samuel* 257 P2d 656 (Cal App 1953) (real estate buyer entitled to restitution from breaching seller, measured by “reasonable cost” of improvements made, not merely their “value”); *Earthinfo v Hydrosphere Resource Consultants* 900 P2d 113 (Colo 1995) (breaching buyer of computer software products liable for “restitution” of profits generated).

27 Note 22 *supra*; see text accompanying notes 22-3 *supra*.

28 479 F2d 638 (4th Cir 1973).

29 See LL Fuller and WR Perdue Jr, “The Reliance Interest in Contract Damages” (1936) 46 *Yale LJ* 52 at 373, arguably the single most influential American contract law article.

30 For similar examples of contractors recovering restitution in excess of expectation, see *Acme Process Equipment Co v United States* 347 F2d 509 (Ct Cl 1965); *Boomer v Muir* 24 P2d 570 (Cal App 1933). For a critique of such decisions, see A Kull, “Restitution as a Remedy for Breach of Contract” (1994) 67 *Southern California Law Review* 1465.

Finally, many American courts the past two decades seem to have reacquired various measures of their earlier, 'classical' hostility toward restitution claims. For example, appellate courts in the far west states of Alaska, Washington, and Idaho, all recently have denied restitution recoveries to claimants who likely would have succeeded during the more expansionist decades of the 1960s and 70s.<sup>31</sup> This renewed resistance to recoveries 'off the contract' is an important feature of the 'New Conceptualism' in American contract law I have described elsewhere.<sup>32</sup> Those of us who disapprove of such regression hope that American courts contributing to it will instead learn from the recent Australian experience and begin again to award appropriate restitution recoveries to deserving claimants.

## B. Australia

Until the last decade or so, restitution was an unpromising theory of recovery in Australian courts. Limited in scope by its close association with implied contracts, and by a legal tradition that emphasised bright-line boundaries between distinct legal categories, restitution languished in the shadows of its more celebrated civil liability cousins, contract and tort.<sup>33</sup>

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One especially difficult context of the expectation vs restitution debate is determining the appropriate recovery by a wrongfully discharged attorney. Some courts have awarded a traditional expectation recovery, ie, the agreed fee less a fair allowance for time and expenses saved by reason of the breach. For example, *Bockman v Rorex* 208 SW2d 991 (Ark 1948).

A compelling criticism of the 'expectation' approach, however, is that it unduly restricts a client's freedom to discharge its attorney. Indeed, some courts have ruled that such a discharge does not even constitute a breach: a client's confidence in its attorney is so important that there exists an 'implied condition' in every attorney-client agreement that the client may discharge the attorney at any time, with or without cause. For example, *Lee v Ingalls Memorial Hospital* 597 NE2d 747 (Ill App 1992); *Jacobson v Sassower* 489 NE2d 1283 (NY 1985). Courts holding such a view typically adopt restitution as the discharged attorney's appropriate remedy: she or he may recover only the reasonable value of services actually performed, a remedy that arguably strikes the correct balance between a client's right to discharge and an attorney's right to fair compensation. For example, *Lee v Ingalls Memorial Hospital*; *Simon v Metoyer* 383 So2d 1321 (La 1980); *Fracasse v Brent* 494 P2d 9 (Calif 1972).

But what if the fair value of work performed exceeds the contract price? With few exceptions, for example, *In re Montgomery* 6 NE2d 40 (NY 1936), courts have treated the contract price as a ceiling in such cases. See generally *Rosenberg v Levin* 409 So2d 1016 (Fla 1982); SM Speiser, *Attorneys' Fees*, Lawyers Cooperative Publishing Co (1973) at [4.24-4.36]; note, WD Hunter, "Limiting the Wrongfully Discharged Attorney's Recovery to Quantum Meruit" (1973) 24 *Hastings Law Journal* 771.

31 See, for example, *Frontier Rock & Sand Inc v Heritage Ventures Inc* 607 P2d 364 (Alaska 1980) (contractor denied restitution for excavation work and gravel delivered to construction site); *Alaska Sales & Service Inc v Millet* 735 P2d 743 (Alaska 1987) (repair shop denied restitution for \$19 000 worth of truck repairs); *Nelse Mortensen & Co v Group Health Cooperative* 566 P2d 560 (Wash App 1977) (contractor denied restitution for cost overruns caused by owner's own substantial delays); *Hensel Phelps Construction Co v King County* 787 P2d 58 (Wash App 1990) (similar); *Gillette v Storm Circle Ranch* 619 P2d 1116 (Idaho 1980) (lessee denied restitution for crop planting expense); *Clampitt v AMR Corp* 706 P2d 34 (Idaho 1985) (farm buyer denied restitution of pre-default installments paid). See generally RJ Mooney, note 8 *supra* at 1171-7.

32 Note 8 *supra*.

33 For a fine summary of traditional, pre-1987 Australian restitution law, see K Mason and JW Carter, *Restitution Law in Australia*, Butterworths (1995) pp 4-34; for a shorter version, see K Mason, note 4 *supra*, pp 20-6.

In 1987, however, restitution emerged dramatically from those shadows when the Australian High Court decided *Pavey & Matthews Pty v Paul*.<sup>34</sup> The majority judgments in *Pavey*, especially that of Deane J, significantly recast Australian restitution law by substituting 'unjust enrichment' for 'implied contract' as its central organising principle. The Court thus swept away the dust of ages, liberated restitution claimants from centuries old implied contract impediments, and signalled the emergence of an important third branch of civil obligation in Australia.<sup>35</sup>

*Pavey* involved a restitution claim by a builder unable to recover on an oral contract because a New South Wales statute declared oral building contracts "not enforceable".<sup>36</sup> The builder and owner had agreed that (1) the builder would do the requested work, and (2) the owner would pay a "reasonable remuneration" for it, calculated by reference to "prevailing rates". When the owner refused to pay the final \$27 000 allegedly due, the builder sued in assumpsit, claiming that sum under a "quantum meruit". The builder prevailed at trial, but the New South Wales Court of Appeal reversed the result, concluding that the assumpsit action was necessarily one to "enforce the contract" and hence barred by the statute.<sup>37</sup>

The High Court majority, however, took a broader view, concluding ultimately that in disputes like *Pavey* the requirements of justice substantially outweigh the historical restrictions on restitution recoveries. It reasoned that the statutory prohibition applied merely to judicial enforcement of the contract itself, not to an action for the reasonable value of a benefit conferred. In the words of Deane J, there was "no apparent reason in justice" why a builder precluded from enforcing a contract also should be deprived of the "ordinary common law right" to recover "fair and reasonable remuneration" for work actually done and accepted. In both theory and practice, it is unjust enrichment, not implied contract, that serves as the "unifying legal concept" of restitution and explains

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34 (1987) 162 CLR 221.

35 Other commentators concur generally in these views. Gareth Jones has praised the "massive learning" displayed in the *Pavey* judgments and described how the High Court "exorcised the ghosts of the past". G Jones, "Restitution: Unjust Enrichment as a Unifying Concept in Australia?" (1988) 1 *Journal of Contract Law* 8. Keith Mason and John Carter agree, suggesting that *Pavey* actually marked the "birth of the law of restitution" in Australia. K Mason and J Carter, note 34 *supra*, p 5. See generally *Special Issue: Contract and Restitution* (1997) 11 *Journal of Contract Law* 93-175.

I myself would add only that Justice Deane's *Pavey* judgment, in my view, is a particularly fine example of what the legendary Karl Llewellyn described as "Grand Style" judging. In *The Common Law Tradition*, Little Brown and Co (1960), Llewellyn described two paradigm judicial styles: Formal Style and Grand Style. A Formal Style judge, emphasising precedent and the "true rule", writes strongly deductive opinions with an air of "single-line inevitability" about them. For her or him, public policy is solely a legislative concern, as is change in the common law itself. By contrast, a Grand Style judge consults principle as well as precedent, recognises that no single rule satisfactorily governs widely varying circumstances, and acknowledges the existence of judicial choice. She or he derives wisdom from her or his legal heritage, but also accepts responsibility, with the legislature, for constantly rethinking and contributing to that heritage. See pp 35-45, 64-75 and 179-91.

36 *Builders Licensing Act* 1971 (NSW), s 45.

37 The Court of Appeal justified its ruling, in part, by invoking a "legislative intention to prevent a builder from recovering any remuneration" for such work without a written, signed contract. See note 35 *supra* at 226.



why in a variety of contexts the law recognises an obligation to make "fair and just restitution" for a benefit conferred.<sup>38</sup>

Nor did this result conflict with any discernible legislative policy. The *Builders Licensing Act 1971* (NSW) was unlike, for example, money-lending legislation, which expressly barred even a post-loan recovery by a noncomplying lender; the *Builders Licensing Act* was silent as to post-performance claims, merely barring a builder's recovery on the oral contract itself. Moreover, even as interpreted in *Pavey*, the Act still provided significant protection against builder fraud by precluding recovery on any unexecuted portion of such a contract.

Deane J in *Pavey* also foreshadowed use of the new unjust enrichment principle in determining the restitution amount recoverable. Ordinarily that amount will equal the "fair value of the benefit provided", calculated at a "reasonable rate for work actually done" plus the "fair market value of materials supplied". Any agreed price likely would "limit the amount recoverable", as would the actual "enhanced value" in a case of unsolicited but accepted work.<sup>39</sup>

Less than a year after *Pavey*, the New South Wales Court of Appeal applied the new "unifying legal concept" of unjust enrichment to a restitution claim involving contract 'illegality'. In *Hurst v Vestcorp Ltd*,<sup>40</sup> several stockbrokers had invested certain loan proceeds in a tax avoidance scheme (the Court's word) designed to encourage funding of Australian films. When their investments curdled, the stockbrokers sued for a declaration that the loan contracts were "illegal" and hence unenforceable: the lender, which had masterminded the scheme, allegedly had breached section 83(1) of the *Companies Act 1961* (NSW) prohibiting investment offers to the "public" without certain required disclosures by an "approved deed".

The Court agreed that the loan contracts violated the *Companies Act* and therefore were unenforceable. Doing so, it rejected the lender's contentions that (1) solicitation of a relatively small number of investors did not constitute an offering to the "public" and that (2) in any event, the Act's criminal sanction was the only one the legislature had intended. To the contrary, explained McHugh JA, the plain legislative purpose had been to protect even a few investors, exactly like those before the Court, and violation of the Act should result in civil as well as criminal consequences.<sup>41</sup>

However, it did not necessarily follow that *restitution* was unavailable to the transgressing lender. Invoking *Pavey & Matthews*, the Court noted that that further question also depended on legislative intent. And nothing in the *Companies Act* indicated that the legislature had intended to deny recovery of such a loan "as a matter of restitution". After all, the stockbroker borrowers had

38 Note 35 *supra* at 256-7.

39 *Ibid* at 263-4. Faithful to the common law tradition of principled decision making, Deane J also cautioned *Pavey* readers against interpreting the majority judgments as endorsing a "judicial discretion" to do whatever "idiosyncratic notions of what is fair and just" might suggest: *ibid* at 256. In response, however, some commentators have questioned whether the High Court in *Pavey* provided adequate guidelines for interpreting the crucial terms 'enrichment' and 'unjust'. See, for example, J Carter and A Stewart, note 7 *supra* at 69-73; K Mason and J Carter, note 34 *supra*, pp 33-4.

40 (1988) 13 ACLR 17.

41 *Ibid* at 60.

received both the money and the extraordinary tax deductions. If they escaped repayment altogether, they would receive an "unmerited benefit". True, such a benefit sometimes does result from judicial application of the illegality doctrine, but the "modern doctrine of restitution" enables a court in "appropriate cases" to "overcome these injustices".<sup>42</sup>

Two months later, in *ANZ Banking Group v Westpac*,<sup>43</sup> the High Court itself elaborated (1) the principles relevant to restitution following a mistake of fact and (2) the availability of various defences to a prima facie restitution claim. That unusual public dispute between two of Australia's 'four pillars' arose from a \$100 000 clerical error in a telegraphic transfer from ANZ to Westpac, for the overdrawn account of a Westpac customer. Following its receipt of the \$114 000 transfer, which should have been \$14 000, Westpac extinguished the overdraft and honored several large checks the customer had drawn. By the time ANZ notified Westpac of the error, only \$17 000 remained in the account.

In retrospect at least, the case seems easy. And perhaps it was once the Court sorted through the maze of credit and debit entries to the insolvent customer's account. ANZ initially had a clear prima facie right to restitution of the \$100 000 paid by "mistake of fact".<sup>44</sup> However, that right could be, and ultimately was, defeated to the extent of \$83 000 by Westpac's "adverse change of position" in "good faith... reliance on the payment" before receiving notice of the mistake. Thus, ANZ recovered only \$17 000, and at least some readers of Chief Justice Mason's sensible judgment must still wonder why skilled bank counsel could not reach that conclusion without litigating the matter all the way to Canberra.<sup>45</sup>

The ANZ Court also addressed briefly the question of possible *defences* to an otherwise valid ('prima facie') restitution claim. Its point was that if avoiding unjust enrichment is the fundamental principle of restitution, then there must be some circumstances in which a restitution order itself would be unjust. The Court mentioned as examples of such possible defences (1) that the payment made was for "good consideration" such as discharge of an existing debt; (2) that the recipient changed its position in good faith reliance on the payment; and (3) that a payment was made to an agent who, without notice of any mistake or irregularity, paid the money to his or her principal. As one leading commentator on the ANZ decision has suggested, the Court's approach to these potential defences suggests a commendable degree of flexibility in contrast to earlier, more 'mechanical' applications.<sup>46</sup>

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42 For the somewhat curious view that Justice McHugh's failure in *Hurst* to identify any "recognised unjust factor" is a "problem" because it suggests that restitution may result simply from an "unmerited benefit", see K Mason and JW Carter, note 34 *supra*, p 881.

43 (1988) 164 CLR 662.

44 See generally K Mason and J Carter, note 34 *supra*, pp 111-47; PA Butler, "Mistaken Payments, Change of Position and Restitution" in PD Finn (ed), *Essays on Restitution* (1990) 87.

45 Perhaps, however, the correct result was far less clear prospectively. Indeed, the trial court granted ANZ restitution of the entire \$100 000 (less a small payment already made by Westpac's customer); and the Court of Appeal initially granted it \$65 467.81 before concluding, on rehearing, that that sum should be subtracted from \$100 000!

46 K Mason, note 4 *supra* at 27-8.

In 1992 the High Court extended its new unjust enrichment principle to cases involving mistakes of law as well as of fact. In *David Securities Pty Ltd v Commonwealth Bank*,<sup>47</sup> a real estate development firm had obtained from a bank a "foreign currency loan", which carried a lower interest rate than that for domestic currency loans. Soon, however, adverse exchange rate fluctuations resulted in losses to the borrower who, with its principals, then sued the bank for alleged contract breaches, torts, and violations of the *Trade Practices Act 1974* (Cth). Naturally, the bank counter-claimed for repayment of its loan.

The principal issue became whether the borrower should receive a credit against the bank's counter-claim, for money it had repaid under a mistake of law. Specifically, the loan agreement required the borrower to "repay" not only interest due but also the bank's tax obligation on that interest. Because the *Income Tax Assessment Act 1936* (Cth) declared such a requirement "void", the borrower contended that it should recover the sums paid thereunder because its "mistake of law" had "unjustly enriched" the bank.

The full Federal Court concluded that the borrower had indeed made a mistake of law, but that, traditionally, restitution was unavailable for such mistakes.<sup>48</sup> A High Court majority, however, continued its expansion and modernisation of restitution doctrine by effectively abandoning that broad traditional rule. It distinguished earlier precedents as instances largely of a payer's "voluntariness or election" to compromise a dispute.<sup>49</sup> Henceforth, a "narrower principle" would apply to mistake of law cases, namely, that restitution of sums paid under such a mistake would be denied only where a payer knowingly enters into a bargain or compromise while under a legal misapprehension.

Mason CJ explained that the "difficulty and illogicality" of drawing a "rigid distinction" between mistakes of law and mistakes of fact "strongly supports" such a narrower principle. Moreover, many courts in the United States and Canada had criticised such an illogical distinction; both New Zealand and Western Australia had abolished the distinction by statute; many academics also condemned it; and, most convincingly, because the fundamental basis of restitution is preventing unjust enrichment, there exists "no justification" for distinguishing among ways in which such enrichment occurs.

So, following *David Securities*, once a party establishes that it paid money in the "mistaken belief that he or she was under a legal obligation" to do so, the burden shifts to the other party to demonstrate why its retaining the payment would *not* be unjust. In *David Securities* itself, the lender had not yet done so, despite its assertion that it had 'changed its position' in reliance on the mistaken

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47 (1992) 175 CLR 353.

48 *David Securities Pty Ltd v Commonwealth Bank* (1990) 93 ALR 271. On the traditional rule, see *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65; *Bilbie v Lumley* (1802) 102 ER 448.

49 See, for example, *J & S Holdings v NRMA Ins* (1982) 41 ALR 539; *York Air Conditioning & Refrigeration Pty Ltd v The Commonwealth* (1949) 80 CLR 11. See generally PH Winfield, "Mistake of Law" (1943) 59 LQ Rev 327.

payments. The High Court remanded for further evidence on that issue, among others.<sup>50</sup>

Another especially interesting recent restitution decision is *Baltic Shipping Co v Dillon*,<sup>51</sup> which re-examined (or at least cited frequently) the traditional "total failure of consideration" requirement. A cruise ship sank after eight of 14 scheduled days, and a passenger sued for restitution of the full \$2 205 fare she had prepaid plus damages for personal injury, property loss, and "disappointment and distress". In both the trial court and the New South Wales Court of Appeal,<sup>52</sup> the passenger prevailed on her restitution claim *and* on approximately \$50 000 of her damages claim.

The High Court, however, reversed the restitution recovery. The cruise line already had refunded a pro rata share of the fare, and the High Court was unpersuaded by the argument that it should refund the remainder because the line's consideration failure had been "total". It distinguished the lower courts' "entire contract" analysis as applicable principally to an enforcement action by a breaching party, rather than to a restitution action by an injured party. Regrettably, perhaps, the Court declined its opportunity to abandon altogether the outdated all or nothing approach by, for example, suggesting in dictum that partial restitution would have been appropriate had the cruise line not already made it. Such a dictum would have allowed the Court to relate its decision more closely to unjust enrichment, its new "unifying legal concept" for restitution.<sup>53</sup>

In Australia as in the United States, determining the appropriate measure of restitution is occasionally difficult. A recent decision by the New South Wales Court of Appeal, *Renard Constructions (ME) Pty Ltd v Minister for Public Works*,<sup>54</sup> addresses this issue; it also demonstrates once again the continuing convergence of American and Australian restitution law.

The Public Works Minister had wrongfully terminated a contract with Renard for construction of two pumping stations. Renard sued for "quantum meruit" under the *Commercial Arbitration Act* 1984 (NSW), and the arbitrator awarded it \$285 000. The trial court reversed that decision, granting judgment to the Minister, but the Court of Appeal reinstated the arbitrator's award.

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50 For useful commentary on *David Securities*, see K Mason and JW Carter, note 34 *supra*, pp 120-5; P Birks, "Modernising the Law of Restitution" (1993) 109 *LQ Rev* 164; M Bryan, "Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*" (1993) 15 *Syd LR* 461.

51 (1993) 176 CLR 344.

52 *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1.

53 John Carter and Gregory Tolhurst make this point, among others, in JW Carter and G Tolhurst, "Restitution: Payments Made Prior to Discharge of Contract" (1994) 7 *Journal of Contract Law* 273.

A second restitution related issue in *Baltic Shipping* was whether the plaintiff could recover in the same action both restitution of money paid and damages for breach. The Court ruled that allowing both would constitute double recovery, at least on the *Baltic Shipping* facts, but of course in other circumstances the answer might vary. For a full discussion, see AL Corbin, *Corbin on Contracts*, West Publishing Co (1964) pp 482-91.

54 (1992) 26 NSWLR 234.

Once past the inevitable question of who committed the first material breach,<sup>55</sup> the principal issues became (1) how to measure a restitution recovery and (2) whether the contractor was *entitled* to such a recovery if it would exceed the amount remaining due under the contract. Regarding measurement, the Minister contended that the arbitrator had erred by awarding the contractor a “reasonable remuneration”; instead, he should have calculated the “value to the [government] of the work performed”. The Court of Appeal was not persuaded, however, answering simply that the arbitrator was “justified” in applying the “reasonable remuneration” standard.

More fundamentally, the Court of Appeal also rejected the Minister’s contention that a party’s hypothetical expectation recovery serves as an appropriate ‘ceiling’ on restitution. Citing authorities from the United States, England, and New Zealand,<sup>56</sup> the Court explained that a breach victim like Renard has an “election” whether to sue for “breach of contract” or for “quantum meruit for work done”. There is “nothing anomalous” in the circumstance that the two alternative remedies, “proceeding on entirely different principles”, frequently yield different results.<sup>57</sup>

In sum, Australian courts the past decade or so have taken several large steps forward in the restitution field. Beginning in *Pavey & Matthews*, they have freed restitution from the unduly conceptualist restraints of implied contract and grounded it explicitly on the more functional, justice regarding principle of preventing unjust enrichment. More generally, they have made available a modern, coherent theory of recovery to a great many parties who need and deserve legal protection – for example, the builder in *Pavey*, the contractor in *Renard*, even the banks in *ANZ* and *David Securities*. Along the way, they also have increased substantially the similarities between Australian and American contract law.

Certainly one cannot yet say that Australian restitution principles are fully developed, or completely tidy, or entirely without critics. Courts and commentators alike continue to ponder such questions as (1) when, if ever, a party who committed the first material breach may recover in restitution for a

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55 The contractor prevailed on this issue. The arbitrator found that the Minister’s termination decision had reflected a “fundamental misunderstanding of relevant matters”, primarily the length of the contractor’s default. Thus, concluded Meagher JA, that decision was “so distorted by prejudice and misinformation” that it “lacked contractual justification” and “amounted to a repudiation”. *Ibid* at 276.

56 *United States v Zara Contracting Co* 146 F2d 606 (2d Cir 1944); *Boomer v Muir* 24 P2d 570 (Calif 1933); *Rover International Ltd v Cannon Film Sales Ltd* (1989) 1 WLR 912; *Slowey v Lodder* (1901) 20 NZLR 321.

57 The Court paid little heed to academic criticism of permitting such an “election”. See, for example, R Goff and G Jones, *The Law of Restitution*, Sweet and Maxwell (2<sup>nd</sup> ed, 1978) pp 379-80; DW Greig and J Davis, *The Law of Contract*, Law Book Co (1987) pp 1286-7. For a later version, see JW Carter, “Discharged Contracts: Claims for Restitution” (1997) 11 *Journal of Contract Law* 130. And for more on measuring restitution generally, see *Brenner v First Artists’ Management Pty Ltd* (1993) 2 VR 221 (artist managers awarded “fair and reasonable remuneration”, based substantially on their costs, despite lack of measurable economic benefit); *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101 (account of profits ordered to avoid unjust enrichment); K Mason and JW Carter, note 34 *supra*, pp 568-81.

benefit conferred;<sup>58</sup> (2) when, if ever, a recipient's change of position should defeat a restitution claim;<sup>59</sup> (3) whether profits derived from a contract breach should be recoverable by the breach victim, either as contract damages or in restitution;<sup>60</sup> (4) whether unconscionability principles contribute meaningfully to restitution analysis;<sup>61</sup> and (5) whether restitution principles assist third party beneficiary contract analysis.<sup>62</sup>

However, one certainly can hope and believe that into the new millennium Australian courts will answer most such questions as they continue to modernise restitution law in order to prevent unjust enrichment. And further, that American courts will follow in a field where once they led.

## II. PROMISSORY ESTOPPEL

### A. United States

A second fundamental feature of classical contract law was its essentially unitary standard for promise enforcement. Bargain consideration was the sole talisman, and courts generally paid little attention either to its adequacy or to possible alternatives.<sup>63</sup>

By the time of *Restatement (Second) of Contracts*, however, many American courts were routinely accepting promissory estoppel as a legitimate alternative basis for contract related liability.<sup>64</sup> One need not agree entirely with Grant

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- 58 See generally K Mason, note 4 *supra* at 43-5; C Cato, *Restitution in Australia and New Zealand*, Cavendish Publishing (1997) pp 193-8; J Beatson, "What Can Restitution Do For You?" (1989) 2 *Journal of Contract Law* 65 at 76-7; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457.
- 59 See generally K Mason, note 4 *supra* at 42-3; K Mason and J Carter, note 34 *supra*, pp 840-50; D O'Brien, "Change of Position: The Past, the Present and the Future" (1995) 25 *Queensland Law Society Journal* 511; *ANZ Banking Group v Westpac* (1988) 164 CLR 662.
- 60 SM Waddams, "Profits Derived from Breach of Contract: Damages or Restitution" (1997) 11 *Journal of Contract Law* 115; S Stoljar, "Restitutory Relief for Breach of Contract" (1989) 2 *Journal of Contract Law* 1.
- 61 See generally K Mason, note 4 *supra* at 37-42; C Cato, note 59 *supra*, pp 258-66; J Getzler, "Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention" (1990) 16 *Monash ULR* 283; *Stern v McArthur* (1988) 165 CLR 489.
- 62 See generally K Mason, note 4 *supra* at 32-6; K Mason and J Carter, note 34 *supra*, pp 721-4; *Trident General Ins Co v McNiece Bros Pty Ltd* (1988) 165 CLR 107.
- 63 See American Law Institute, *Restatement of Contracts* (1932), s 75; G Gilmore, note 9 *supra*, pp 18-34; EA Farnsworth, *Contracts*, Foundation Press (3<sup>rd</sup> ed, 1999) pp 14-19, 45-8, and 91-101; LL Fuller, "Consideration and Form" (1941) 41 *Columbia Law Review* 799.
- 64 The first *Contracts Restatement* ultimately did include a section protecting nonbargained reliance despite initial objections by its Reporter Samuel Williston and others. See American Law Institute, *Restatement of Contracts* (1932), s 90; G Gilmore, note 9 *supra*, pp 59-66. The Reporter for *Restatement (Second)* has described s 90 as setting forth the first *Restatement's* "most notable and influential rule", EA Farnsworth, note 64 *supra*, p 94, and other commentators generally concur. See CL Knapp, "Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel" (1981) 81 *Columbia Law Review* 52 (promissory estoppel "perhaps the most radical and expansive development" of contract law this century); EM Holmes, "Restatement of Promissory Estoppel" (1996) 32 *Willamette Law Review* 263 (describing the gradual acceptance of promissory estoppel in all 50 states).

Gilmore that the estoppel 'exception' has swallowed up the consideration 'rule'<sup>65</sup> to conclude that American courts today are considerably more receptive than they were two generations ago to claims founded upon non-bargained, detrimental reliance. And further, that this development symbolises an important modern transformation of American contract law more generally, from classical conceptualism toward a more flexible, fairness oriented regime.<sup>66</sup>

The earliest American applications of promissory estoppel were simply as a substitute for bargain consideration, that is, as a basis for enforcing a gratuitous promise. In *Ricketts v Scothorn*,<sup>67</sup> for example, a grandfather had promised his granddaughter \$2 000, hoping she then would decide to quit work. Relying on that promise, she did leave work temporarily, but the grandfather's executor later refused to pay. The Nebraska Supreme Court enforced the promise, believing it would have been "grossly inequitable" to permit the promisor (or his executor) to renege simply because traditional consideration was absent.<sup>68</sup>

By mid-century, American courts were expanding promissory estoppel beyond gratuitous promises into mainstream commercial relations. In *Drennan v Star Paving Co*,<sup>69</sup> the California Supreme Court applied it to a paving subcontractor's attempt to revoke its bid after the general contractor had used it in its own successful bid for the prime contract. Analogising the general contractor's plight to that of a unilateral contract offeree, the court first invoked *Restatement (Second)*, s 45: the subcontractor's bid necessarily included an "implied subsidiary promise" not to revoke until the general contractor had a reasonable opportunity to accept it following award of the prime contract.<sup>70</sup>

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Today, American Law Institute, *Restatement (Second) of Contracts* (1981) at [90(1)] provides as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

65 G Gilmore, note 9 *supra*, p 72.

66 See RJ Mooney, note 8 *supra*; G Gilmore, note 9 *supra*; CL Knapp, "Rescuing Reliance: The Perils of Promissory Estoppel" (1998) 49 *Hastings Law Journal* 1191; JM Feinman, "Promissory Estoppel and Judicial Method" (1984) 97 *Harv L Rev* 678.

67 77 NW 365 (Neb 1898).

68 *Ricketts* was among the early American decisions establishing a so-called general theory of promissory estoppel. Before then, American courts had tried to preserve the tidiness of consideration doctrine by confining promissory estoppel to a few discrete fact patterns, such as promises within families, promises by bailees, certain promises to convey land, and certain charitable bequests. See generally EA Farnsworth, note 64 *supra*, pp 91-101; CL Knapp, note 65 *supra*; SD Henderson, "Promissory Estoppel and Traditional Contract Doctrine" (1969) 78 *Yale LJ* 343.

69 333 P2d 757 (Calif 1958).

70 The potential for injustice in unilateral contract formation perplexed American scholars and judges for many years. That potential arose, of course, from two formation rules that did not combine well: (1) an offer is revocable until accepted, and (2) acceptance of a unilateral contract offer does not occur until the offeree has completed its performance. So in Professor Maurice Wormser's famous Brooklyn Bridge hypothetical ("I'll pay you \$100 to walk across the Brooklyn Bridge"), the offeror could revoke her or his offer even after the offeree had begun walking; indeed, until he had taken the very last step. See IM Wormser, "The True Conception of Unilateral Contracts" (1916) 26 *Yale LJ* 136.

But what about consideration for the implied subsidiary promise? Unlike a typical unilateral contract case, in *Drennan* there was no offeree's beginning of performance to support an 'option contract'. So the Court turned again to promissory estoppel, in *Restatement (Second)*, s 90,<sup>71</sup> as a substitute for bargain consideration: the general contractor had reasonably relied to its detriment on the subcontractor's bid, and that reliance served as a perfectly adequate reason to enforce the implied subsidiary promise not to revoke. Thus, the subcontractor's attempt to revoke its bid was ineffective, and the general contractor recovered its increased paving costs.<sup>72</sup>

The decade after *Drennan* witnessed an even greater American expansion of promissory estoppel, further into the area of pre-contractual negotiations. A major advance occurred in *Hoffman v Red Owl Stores Inc*,<sup>73</sup> where a grocery store franchiser had promised a store if the potential franchisee would contribute \$18 000 cash to its operation. Later, after the franchisee agreed, and spent time and money preparing to operate the store, the franchiser reneged by demanding an additional \$11 000 cash. The Wisconsin Supreme Court concluded that a lack of sufficient definiteness precluded its finding an actual contract, but allowed the franchisee to recover his out of pocket "reliance damages" under the principle of promissory estoppel.<sup>74</sup>

So, in a variety of contexts, modern American courts are generally receptive to contract related claims based on promissory estoppel.<sup>75</sup> As with restitution, however, a further important issue often arises, namely, the appropriate measure

To preclude such a result, *Restatement (Second)*, s 45 provides that an offeree's tendering or beginning performance renders the offer irrevocable, by creating an "option contract" permitting the offeree to accept by completing its performance. Happily, perhaps, 34 years after first posing his Brooklyn Bridge hypothetical, Professor Wormser agreed that his original, classical 'solution' was wrong: "Since that time I have repented, so that now, clad in sackcloth, I state frankly, that my point of view has changed. I agree... with the rule set forth in the Restatement." IM Wormser, "Book Review" (1950) 3 *Journal of Legal Education* 145.

71 See note 65 *supra*.

72 The *Drennan* principle – protecting an offeree's reasonable, detrimental reliance to the extent necessary to avoid injustice – appears now in *Restatement (Second)*, s 87(2). For a recent thorough discussion of *Drennan*, and certain of the broader philosophical issues it raises, see A Konefsky, "Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel" (1997) 65 *University of Cincinnati Law Review* 1169.

Another landmark California decision shortly before *Drennan* applied promissory estoppel to avoid an unjust result under the Statute of Frauds. See *Monarco v LoGreco* 220 P2d 737 (Cal 1950) (stepfather's promise to bequeath family farm in exchange for stepson's continuing to live and work on it held enforceable, despite apparent Statute of Frauds bar, following stepson's 20 years of reliance); see generally S Macaulay "Justice Traynor and the Law of Contracts" (1961) 13 *Stanford Law Review* 812.

73 133 NW2d 267 (Wis 1965).

74 For early commentary on *Red Owl*, see "Expanded Application of Promissory Estoppel in Restatement of Contracts Section 90" (1966) 65 *Michigan Law Review* 351; "Reliance Losses: Promissory Estoppel as a Basis of Recovery for Breach of Agreement to Agree" (1966) 51 *Cornell Law Review* 351.

75 Indeed, as the 1980s began, some courts and commentators were beginning to think of promissory estoppel not simply as a useful contract doctrine, but as an entirely "independent theory of recovery". See MB Metzger and MJ Phillips, "The Emergence of Promissory Estoppel as an Independent Theory of Recovery" (1983) 35 *Rutgers Law Review* 472. Other optimists even were predicting the triumph of promissory estoppel over the parol evidence rule. See CL Knapp, note 65 *supra* at 78; MB Metzger, "The Parol Evidence Rule: Promissory Estoppel's Next Conquest?" (1983) 36 *Vanderbilt Law Review* 1383.



of recovery for such a claim. *Restatement (Second)* s 90 authorises a court to "limit the remedy as justice requires", language that plainly grants a court discretion to award either full expectation or a typically more limited, reliance based remedy.<sup>76</sup>

Early decisions tended to award expectation. In *Ricketts*, for example, the granddaughter received the entire \$2 000 promised, even though she had lost only about \$500 in wages during her time away from work.<sup>77</sup> More recently, however, when the two remedies diverge significantly, American judicial views on the issue also seem to diverge. Interested readers will find this subject canvassed thoroughly in two impressive articles whose authors reach dramatically different conclusions. Edward Yorio and Steve Thel concluded in 1991 that only in the rarest instance does a court limit a promissory estoppel claimant to reliance damages. Instead, courts 'routinely' grant such claimants "specific performance or (if feasible) expectation damages".<sup>78</sup>

Last year, however, Robert Hillman argued persuasively that American courts in fact *do* tend to award reliance damages where that remedy differs markedly from expectation.<sup>79</sup> Certainly in *Hoffman*, for example, the Court explicitly limited recovery to the disappointed franchisee's reliance damages, awarding him simply his cost of moving, his down payment on the store site, and his loss on the sale of a bakery business.<sup>80</sup>

Again like restitution, a further promissory estoppel remedy issue is whether a reliance recovery ever may exceed the expectation measure. In other words, once

76 In some cases the two remedies will be substantially identical. See, for example, *Percy J Matherne Contractor Inc v Grinnell Fire Protection Systems Co* 915 F Supp 818 (MD La 1995) (contractor's recovery identical whether based on contract breach or mere detrimental reliance); *Royal Fixture Co v Phoenix Leasing Inc* 886 SW2d 157 (Mo Ct App 1994) (vendor's recovery similar under theories of implied agency and promissory estoppel); see generally LL Fuller and WR Perdue, note 30 *supra* at 73-5; RA Hillman, "Questioning the 'New Consensus' on Promissory Estoppel: An Empirical and Theoretical Study" (1998) 98 *Columbia Law Review* 580 at 601 and 610.

77 77 NW at 367. See E Yorio and S Thel, "The Promissory Basis of Section 90" (1991) 101 *Yale LJ* 111 at 134. This early 'all or nothing' attitude toward promissory estoppel remedies appears most famously in Professor Williston's comment during the 1926 American Law Institute debates on the original s 90: "Either the promise is binding or it is not. If the promise is binding, it has to be enforced as it is made." See generally LL Fuller and WR Perdue, note 30 *supra* at 64 and 401-6.

78 E Yorio and S Thel, note 78 *supra* at 112. Other authors have reached essentially the same conclusion. For example, D Slawson, "The Role of Reliance in Contract Damages" (1990) 76 *Cornell Law Review* 17; DA Farber and JH Matheson, "Beyond Promissory Estoppel: Contract Law and the 'Invisible Handshake'" (1985) 52 *University of Chicago Law Review* 903.

79 RA Hillman, note 77 *supra*. Professor Hillman's study led him to conclude also that (1) the theory of promissory estoppel "seldom leads to victory in reported decisions"; and that (2) courts typically consider actual, detrimental reliance an element of "immense importance" in a promissory estoppel case.

80 For another example, consider the unusual case of *Sullivan v O'Connor* 296 NE2d 183 (Mass 1973). A cosmetic surgeon had promised to reduce the size of a patient's prominent nose, but, in three painful operations, actually worsened its appearance. The court considered whether, for the surgeon's 'clear promise' of a specific result, the patient should recover full expectation damages or merely reliance damages: the value of her promised nose less that of her post-surgery nose, or the value of her original nose less that of her post-surgery nose. Declining to follow a famous New Hampshire precedent to the contrary, the Massachusetts Supreme Judicial Court selected the latter, more limited remedy. Cf *Hawkins v McGee* 146 A 641 (NH 1929) (the famous "hairy hand" case, immortalised in the film *The Paper Chase*).

again, may a party to a losing contract avoid an anticipated loss by claiming reliance as an alternative to expectation? Although few American courts have considered the issue, at least one has answered affirmatively.<sup>81</sup>

Finally, what of the very recent past, and the future, of promissory estoppel in American law? Elsewhere I have argued that during the 1980s and early 90s many American courts substantially abandoned the egalitarian contract jurisprudence of the 1960s and 70s in favour of a more conceptualist ethic, emphasising once again 'freedom of contract' and marketplace economics.<sup>82</sup> One casualty of that 'new conceptualism', it seems, has been the continued expansion of promissory estoppel.<sup>83</sup> Enjoying less favour with courts<sup>84</sup> and commentators<sup>85</sup> alike, the doctrine seems currently adrift, as American lawyers, judges, academics, and politicians debate the shape and content of our contract regime for the new millennium.

However, those of us who prefer a broader promissory estoppel doctrine need not despair altogether. In a stunning new article – brilliantly conceived, deftly argued, engagingly written – Charles Knapp urges a "rescue" of "reliance".<sup>86</sup>

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81 In *Acme Process Equip Co v United States* 347 F2d 509 (Ct Cl 1965), a contractor sued the Federal Government for wrongful cancellation of a contract to manufacture rifles. It succeeded on the liability issue, then faced the remedy question. Because the contractor ultimately would have lost money on the contract, the Court of Claims awarded it "restitution" as an alternative to expectation. Then, however, because the contractor had delivered very few rifles before the wrongful cancellation, at a very high initial unit cost, the Court based its "restitution" award on the contractor's reasonable costs incurred rather than the more usual benefit conferred. In other words, it granted a reliance recovery.

In addition, several courts have awarded reliance damages in cases where at the time of breach the innocent party had not yet begun, or barely had begun, its performance. In those cases, expectation damages seemed too uncertain, so the courts simply required the breaching parties to reimburse the others' expenses. For example, *C C Hauff Hardware Inc v Long Manufacturing Co* 148 NW2d 425 (Iowa 1967); *Goodman v Dicker* 169 F2d 684 (DC Cir 1948).

82 RJ Mooney, note 8 *supra*.

83 See, for example, EA Farnsworth, note 5 *supra* (one of the ten most notable contract law developments of the 1980s was the "trend favouring formality over reliance".)

84 Phuong Pham's recent survey of New York and California decisions reveals that between 1981 and 1994 (1) New York courts rejected 29 promissory estoppel claims while sustaining only two, and (2) California courts rejected ten such claims while sustaining but two. PN Pham, "The Waning of Promissory Estoppel" (1994) 79 *Cornell Law Review* 1263. The stated reasons for rejection included (1) lack of a "clear and definite" promise, (for example, *Messina v Biderman* 571 NYS 499 (App Div 1991)); (2) lack of "definite and substantial" reliance, (for example, *Smith v City of San Francisco* 275 Cal Rptr (Ct App 1990)); and (3) insufficiently "egregious" conduct by the promisor, (for example, *Cunnison v Richardson Greenshields Securities Inc* 485 NYS2d 272 (App Div 1985)). See also CL Knapp, note 65 *supra*; RA Hillman, note 77 *supra*.

85 Several so called "promise theorists" recently have questioned either the theoretical soundness or the practical utility of promissory estoppel. See, for example, RE Barnett, "The Death of Reliance" (1996) 41 *Journal of Legal Education* 518; JP Kostritsky, "A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense" (1987) 33 *Wayne Law Review* 895; RE Barnett and ME Becker, "Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations" (1987) 15 *Hofstra Law Review* 443. See generally C Fried, *Contract as Promise: A Theory of Contractual Obligation*, Harvard University Press (1981); JM Feinman, note 67 *supra*; JM Feinman, "The Last Promissory Estoppel Article" (1992) 61 *Fordham Law Review* 303; M Gibson, "Promissory Estoppel, Article 2 of the UCC., and the Restatement (Third) of Contracts" (1988) 73 *Iowa Law Review* 659.

86 CL Knapp, note 67 *supra*. Gentle reader, if you peruse only one Contracts article this year, let it be Knapp's. Unless, of course, Denis Harley writes one.

Not only promissory estoppel narrowly conceived, but the “literally dozens” of instances where contract law does or should recognise that one party has changed its position in reliance on another’s commitment. As Knapp describes so well, promissory estoppel is emblematic of the “equity side of contract law”, which twentieth century judges and academics have “thawed out, nourished, and gradually nursed back to health”. Just as equity without law would be tyranny – “shapeless, unpredictable, reflecting nothing more than the judge’s personal predilection” – law without equity would be tyranny as well – “cold and unforgiving, rewarding wealth and power with still greater wealth and power, repaying trust with betrayal”.<sup>87</sup> Reliance may be “dead”,<sup>88</sup> as some have argued, but borrowing once again from Grant Gilmore, “who knows what unlikely resurrection the Easter-tide may bring?”<sup>89</sup>

## B. Australia

Promissory estoppel developed more slowly in Australia than in the United States, languishing for many years as merely one among a myriad of estoppel varieties that together resembled nothing so much as characters in an English comedy of mistaken identities.<sup>90</sup> Happily, however, as with restitution, recent High Court decisions have substantially modernised, expanded, and clarified promissory estoppel, creating in the process another striking convergence between Australian and American contract law.

The major Australian landmark is *Waltons Stores (Interstate) Ltd v Maher*.<sup>91</sup> A prospective tenant had promised to lease a major commercial site, then changed its mind, but failed to notify the owner even as the owner demolished an existing structure and rebuilt to the tenant's specifications. The trial court and New South Wales Court of Appeal ruled for the owner on a theory of “common law estoppel”, that is, estoppel to deny that the parties actually had *entered into* a lease. The High Court, however, affirmed on a factually more accurate, more revolutionary ground, concluding that the tenant should be estopped to deny its implied *promise* that it *would* enter into a lease. In other words, promissory estoppel.<sup>92</sup>

87 *Ibid* at 1333-4.

88 RE Barnett, note 86 *supra*.

89 G Gilmore, note 9 *supra*, p 103.

90 Concededly this characterisation of pre-*Waltons* Australian estoppel is a trifle impolite, but surely not inaccurate. One author recently identified twelve Australian estoppel varieties, a list to which Michael Spence later added three more! See A Leopold, “Estoppel: A Practical Appraisal of Recent Development” (1991) 7 *Aust Bar Rev* 47; M Spence, “Australian Estoppel and the Protection of Reliance” (1997) 11 *Journal of Contract Law* 203. Moreover, the High Court judges themselves expressed widely divergent understandings of estoppel in cases like *Waltons* and *Verwayen*. See text at notes 92-7 and 100-5 *infra*.

91 (1988) 164 CLR 387.

92 Here I summarise primarily the lead *Waltons* judgment, by Mason and Wilson JJ. The other three justices also voted to affirm, though each articulated the governing estoppel principle somewhat differently. Deane J preferred to proceed on a “more cautious basis”, categorising the relevant estoppel as simply an extension of “estoppel by conduct”: *ibid* at 452, per Deane J. Gaudron J preferred the lower courts’ rationale of estoppel to deny that a lease in fact had been concluded. And Brennan J provided his usual exhaustive review of principles and authorities, concluding, it seems, that either promissory estoppel or estoppel by conduct would support the judgment.

Until *Waltons*, Australian promissory estoppel was a narrow, defensive doctrine, confined largely to “precluding departure from a representation by a person in a pre-existing contractual relationship that he will not enforce his contractual rights”.<sup>93</sup> But drawing on English and Australian judicial dicta,<sup>94</sup> as well as on several American authorities,<sup>95</sup> the High Court expanded the doctrine considerably, into the area of pre-contractual relations. Following *Waltons*, promissory estoppel can serve as a ‘sword’ as well as a ‘shield’, supporting one’s own cause of action in addition to defeating another’s.

The High Court in *Waltons* limited its new, expanded promissory estoppel doctrine in two significant respects. First, it required that the promisee’s detrimental reliance occur with the promisor’s ‘knowledge’. It thus explicitly distinguished various American authorities, including *Restatement (Second) s 90*, that require only a promisor’s ‘reasonable expectation’ of detrimental reliance. Second, the High Court declared its intention to invoke promissory estoppel only when a promisor’s refusal to perform would be ‘unconscionable’. In *Waltons* itself, the Court concluded that the prospective tenant (1) did indeed know about the ongoing demolition and rebuilding and (2) had indeed acted unconscionably when it nevertheless failed to notify the owner of its mind change.<sup>96</sup>

Following *Waltons*, promissory estoppel became a growth industry for Australian contract lawyers. In *Foran v Wight*,<sup>97</sup> real estate buyers sued to recover their deposit from the repudiating sellers. They prevailed at trial, but the New South Wales Court of Appeal reversed that decision, reasoning that (1) the buyers did not ‘accept’ the sellers’ anticipatory repudiation, and that (2) the buyers also could not ‘terminate’ for failure to complete because they failed to demonstrate their own ability and willingness to perform. A High Court majority, however, reversed again, invoking promissory estoppel as well as other doctrines to order return of the deposit. In the view of all but Mason CJ, there was at least a *possibility* that, but for the sellers’ repudiation, the buyers would

93 *Ibid* at 399, per Mason and Wilson JJ.

94 For example, *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, per Denning LJ; *Legione v Hateley* (1983) 152 CLR 400.

95 Mason and Wilson JJ cited American Law Institute, *Restatement (Second) of Contracts* (1981), s 90; G Gilmore, note 9 *supra*; EA Farnsworth, note 64 *supra* at [2.19]; and *Allegheny College v National Chautauqua County Bank* 159 NE 173 (NY 1927), per Cardozo J. Their Honours noted that “direct enforcement of promises” by means of promissory estoppel had “proceeded apace in the United States”. They then cautioned, at 402, against analogising too closely to the American experience because promissory estoppel developed there “partly in response to the limiting effects of the... bargain theory of consideration”. In the end, however, they concluded that the two nations’ approaches to the doctrine are in fact fundamentally similar: “[I]n the United States, as in Australia, there is an obvious interrelationship between the doctrines of consideration and promissory estoppel”, the latter “tending to occupy ground left vacant” by the former.

96 Deane J put the matter rather more succinctly: “In so far as substantive merits are concerned, the [Mahers] have them all: *Waltons* deliberately failed to speak or to warn in circumstances where... simple standards of honesty and fair dealing required [it to do so]” at 434 For early commentary on *Waltons*, see K Sutton, “Contract by Estoppel” (1989) 1 *Journal of Contract Law* 205; K Lindgren, “Estoppel in Contract” (1989) 12 *UNSWLJ* 153; L Kirk, “Confronting the Forms of Action: The Emergence of Substantive Estoppel” (1991) 13 *Adelaide Law Review* 225.

97 (1989) 168 CLR 385.

have succeeded in raising the purchase money and thus performing. Therefore, the sellers should be estopped to resile from that repudiation.<sup>98</sup>

Then in the celebrated case of *Commonwealth v Verwayen*,<sup>99</sup> the High Court itself confirmed once again the vitality of its new promissory estoppel principles. Years earlier, in 1964, two Australian Navy vessels had collided, injuring several crew members. The plaintiff Verwayen did not then assert his negligence claim against the Navy because of a judicial dictum suggesting an armed services immunity for negligent acts committed in the line of duty.<sup>100</sup>

Two decades later, however, the High Court disapproved that dictum, at least in its earlier broad form,<sup>101</sup> and the plaintiff filed a claim. The Government responded by effectively admitting liability, declining to plead either the Statute of Limitations or any form of armed services immunity. Indeed, it represented repeatedly to the plaintiff and others that it would not contest liability for the 1964 collision; it would simply litigate the damages issue in each case. Partway through the litigation, however, the Government changed its mind, and sought and received permission to plead both its potential defences. It then prevailed at trial on the limitations defence, the Court ruling also that (1) any alleged government waiver of that defence had been effectively revoked, and (2) the plaintiff had not established any form of estoppel.

However, the Full Supreme Court of Victoria reversed the decision, concluding that the Government should be "estopped from resiling from its promise" not to assert the two defences. The High Court, by a 4-3 margin, dismissed the Government's further appeal. Two High Court justices concluded that the Government had *waived* its defences, while two others held the Government *estopped* to assert them. The three dissenters urged, variously, that (1) the government had not waived its defences; and (2) even applying promissory estoppel to the case, the plaintiff Verwayen's detrimental reliance consisted merely of post-promise litigation expenses rather than his 1964 personal injuries.

The most interesting issue in *Verwayen* was, assuming promissory estoppel applied, what measure of damages was most appropriate? Four of the six justices recognising estoppel on the facts favoured limiting the estoppel remedy to proven, tangible reliance costs – that is, the post-promise litigation expenses. (Two of those six, remember, accepted the plaintiff's *waiver* contention.) The remaining two, Deane and Dawson JJ, went further. They urged that, while in theory reliance rather than expectation may be the proper remedy in a promissory estoppel case, they disagreed that the plaintiff Verwayen had suffered no reliance damage beyond added litigation costs. Instead, they

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98 One interesting dictum in the case was Justice Deane's acceptance of a complete merger between legal and equitable "estoppel by conduct", thus discarding the troublesome distinction between representations of existing fact and promises of future action or inaction: *ibid* at 435. See generally P Parkinson, "Equitable Estoppel: Developments after *Waltons Stores (Interstate) v Maher*" (1990) 3 *Journal of Contract Law* 50; JW Carter, "*Foran v Wight*" (1990) 3 *Journal of Contract Law* 70.

99 (1990) 170 CLR 394.

100 See generally *Parker v Commonwealth* (1965) 112 CLR 295.

101 See *Groves v Commonwealth* (1982) 150 CLR 113.

suggested, the Government's promise and later retraction almost certainly had caused the plaintiff other, nonquantifiable damage from increased stress, anxiety, and ill health. Thus, the only way to "satisfy the minimum equity", to be certain to compensate the plaintiff fully for *all* his detrimental reliance, was to award him a full expectation recovery for his 1964 personal injuries.<sup>102</sup>

The following year, in *Metropolitan Transit Authority v Waverley Transit Pty Ltd*,<sup>103</sup> the Victoria Supreme Court Appeal Division ruled that promissory estoppel principles required Melbourne's Metropolitan Transit Authority ("MTA") to renew an existing bus company contract without soliciting further public tenders. The Authority had "created an expectation" that it would renew the contract; the company had relied on that expectation by investing substantial sums expanding its service area; and therefore, under *Waltons*, an "estoppel arose against MTA" requiring that it renew the contract for a further two years.<sup>104</sup>

Two years after *Verwayen*, the High Court returned to the expectation vs reliance issue in the context of an action for breach of contract. Its decision in *Commonwealth v Amann Aviation Pty Ltd*<sup>105</sup> affirmed a reliance type award based on the contractor's "wasted expenditure", but explained that in *Amann* such an award was perfectly consistent with the "general rule" of expectation damages.

The Government had improperly repudiated an aerial surveillance contract by issuing an invalid termination notice. The trial court granted the contractor its 'lost profit' of \$820 000, reduced by half because of the 50 per cent chance the Government in any event would have terminated *properly*. But that award was plainly too meager because it failed to account at all for the contractor's \$5 500 000 of out of pocket expenditures.<sup>106</sup> The Full Court, by contrast, allowed the contractor to recover its "expenditure rendered futile" by the Government's repudiation, and the High Court affirmed that decision.

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102 Australian readers likely will realise that this single brief sentence in the text attempts to summarise a great deal of interesting judicial and academic discussion about remedies in promissory estoppel cases, especially *Verwayen*. Scarman LJ coined the useful term "minimum equity to do justice to the plaintiff" in *Crabb v Arum District Council* [1976] 1 Ch 179. A decade later in *Waltons*, Brennan J urged that same reliance based approach on his Australian audience: note 92 *supra* at 416. Then in *Verwayen* at least five High Court justices endorsed the approach, though apparently without notable success in influencing the remedies actually granted in future cases. See notes 110-13 *infra* and accompanying text. For more on *Verwayen*, see M Spence, "Estoppel and Limitation" (1991) 107 *LQ Rev* 221; A Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1996) 20 *Melb UL Rev* 805. For a thorough judicial discussion, in a case with facts essentially similar to those in *Verwayen*, see *Commonwealth v Clark* [1994] 2 VR 333.

103 [1991] 1 VR 181.

104 The Court also concluded that the MTA had violated the principle of 'natural justice', which requires at least a hearing whenever a "statutory authority" like the MTA purports to exercise a "power or authority to affect the rights of individual citizens": *ibid* at 204.

105 (1992) 174 CLR 64.

106 In other words, even the nondiscounted \$820 000 would have moved the contractor nowhere near "the same situation... as if the contract has been performed". *Robinson v Harman* (1848) 154 ER 363 at 365.

Mason CJ and Dawson J explained that the fundamental axiom of contract damages is expectation, not reliance.<sup>107</sup> However, where expectation is difficult to calculate, a nonbreaching party may elect to sue for its costs incurred instead. Then, following the venerable American judge with the venerable name Learned Hand,<sup>108</sup> they explained that, of course, the breaching party could reduce any such recovery by the amount the contractor would have lost, but the onus is on that party to *establish* such an anticipated loss. Thus, in *Amann*, allowing the reliance type recovery of 'wasted expenditure' truly *was* consistent with fundamental expectation principles. The Court was not prepared to endorse the rather futuristic approach of at least one American and one English court, allowing an aggrieved contractor in such a case a true *election* regardless of any anticipated loss.<sup>109</sup>

Naturally, a plea of promissory estoppel does not always succeed, either as sword or as shield. In *Austotel Ltd v Franklins Ltd*,<sup>110</sup> the New South Wales Court of Appeal declined to apply the doctrine to facts quite similar to those in *Waltons*. A shopping centre developer and a supermarket chain had appeared to agree on the essential terms of a long-term lease. Later, the parties agreed to enlarge the store by nine per cent, but neither dared mention a possible price adjustment. The developer advertised the supermarket's future location, and continued to build to its specifications; in turn, the market owners provided a letter of intent to potential lenders and purchased new equipment for the store. Still later, however, the developer decided to lease the location to another tenant.

At trial, the market owners prevailed. The Court did not find a concluded contract, but, applying *Waltons Stores*, it ordered the developer to execute a lease at a rental either agreed upon or as the Court would determine. A divided Court of Appeal, however, reversed that decision. The majority emphasised that the dispute was between capable businesspeople who had deliberately avoided signing a lease, each hoping to gain a price advantage. Kirby P suggested that courts should be "careful to conserve relief" in "commercial matters" so as not to substitute "lawyerly conscience" for the "hardheaded decisions of business people".<sup>111</sup>

Similarly, in *Australian Securities Commission v Marlborough Gold Mines Ltd*,<sup>112</sup> the Commission had stated initially that it would not oppose Marlborough's application to convert from a limited liability company to a no

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107 Quoting Baron Parke in *Robinson, ibid*, that an aggrieved party is "so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed". Mason CJ and Dawson J explained (to the trial judge, among others) that a correct expectation measure includes both costs incurred and anticipated profit or loss.

108 In *L Albert & Son v Armstrong Rubber Co* 178 F2d 182 (2d Cir 1949). Many have considered Hand J, who served 37 years on the 2d Circuit Court of Appeals (1924-61) the most able American judge never appointed to the Supreme Court. For a magisterial new biography, see G Gunther, *Learned Hand: The Man and the Judge*, Knopf (1994).

109 See *Ame Process Equipment Co*, note 82 *supra*; *Anglia Television Ltd v Reed* [1972] 1 QB 60, per Denning MR.

110 (1989) 16 NSWLR 582.

111 For more on *Austotel*, see P Parkinson, note 99 *supra*.

112 (1993) 177 CLR 485.

liability company. Marlborough therefore scheduled a company meeting as a first step toward obtaining required court approval of the change. However, the Commission then learned of a Federal Court decision invalidating the procedure Marlborough intended to follow, so reversed its position and opposed the change.

A unanimous High Court declined to estop the Commission. On the *Marlborough* facts, such a position reversal was neither "unjust" nor "unconscionable" and was one the company could reasonably have foreseen. Therefore, the company did not justifiably rely on the Commission's initial non-opposition when it commenced its form change procedure.

So, a decade after the High Court's landmark ruling in *Waltons Stores*, Australian promissory estoppel bears precious little resemblance to its pre-1988 form. Indeed, one insightful commentator has suggested the post-*Waltons* emergence of a truly distinctive "Australian estoppel" doctrine.<sup>113</sup> Still, important questions remain about the doctrine's future.

One such question is the extent to which the High Court will require 'unconscionable conduct' as a prerequisite for invoking promissory estoppel. In *Waltons*, Mason and Wilson JJ located the very "origins" of promissory estoppel in the "equitable concept of unconscionable conduct" and explained that courts invoke the doctrine "on the footing that it would be unconscionable" for the promisor to renege.<sup>114</sup> Other justices have reiterated that rationale, both in *Waltons* and in *Verwayen*.<sup>115</sup> My own hunch, influenced no doubt by the American experience of non-linkage between unconscionable conduct and promissory estoppel, is that unconscionability will slowly disappear from the Australian estoppel landscape. It seems inevitable, does it not, that courts will encounter many future disputes in which relief seems appropriate for a promisee's detrimental reliance but the promisor's conduct does not rise to the level of 'unconscionability'.

A second question, as in the United States, is the appropriate remedy for promise induced detrimental reliance. In an important 1996 article, Andrew Robertson reported that 24 of 26 decisions sustaining promissory estoppel claims after *Verwayen* awarded expectation relief rather than limiting claimants to a reliance based remedy.<sup>116</sup> This research suggests that many Australian courts currently remain unpersuaded by the High Court's stated preference simply to satisfy the "minimum equity" in such cases. Robertson himself, there and elsewhere,<sup>117</sup> has urged greater adherence to that principle, and it seems quite likely to me that his (and former Justice Brennan's) view will become the norm

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113 See M Spence, note 91 *supra*.

114 164 CLR 387 at 402-4.

115 See, for example, *ibid* at 419, per Brennan J; note 100 *supra* at 440-1, per Deane J.

116 See A Robertson, note 103 *supra*.

117 *Ibid*. See also A Robertson, "Towards a Unifying Purpose for Estoppel" (1996) 22 *Monash ULR* 1 ("protecting against detrimental reliance can, and should, be seen as [the] unifying purpose" for estoppel); A Robertson, "Reliance and Expectation in Estoppel Remedies" (1998) 18 *Legal Studies* 360 (1998) (same). But see E Cooke, "Estoppel and the Protection of Expectations" (1997) 17 *Legal Studies* 258.



during the next decade or so. Perhaps Robertson, or Michael Spence,<sup>118</sup> or some other scholar soon will write an article like Robert Hillman's, reinterpreting the Australian promissory estoppel remedy picture.<sup>119</sup>

### III. UNCONSCIONABILITY

#### A. United States

A third prominent feature of classical contract law was a resolute judicial reluctance to police bargains for fairness. By and large, American courts tended to confine traditional contract defences like fraud, duress, mistake, and impossibility within narrow, 'objective' limits.<sup>120</sup> Moreover, even when confronting a plainly oppressive or unfair term, most courts declined to police overtly, preferring to employ one among a variety of 'covert' strategies like declaring a lack of mutual assent or interpreting disputed language in some unusual way to favour the disadvantaged party.<sup>121</sup>

Slowly, however, as standard form adhesion contracts proliferated throughout the American economy, and judicial activism increased in contract law as elsewhere, dissatisfaction with such covert strategies became more common. The great Legal Realist scholar Karl Llewellyn provided the classic three part critique of those strategies: (1) they invite the drafter to "recur to the attack", (2) they fail to produce progress toward "minimum decencies" in contract drafting and (3) they seriously embarrass future efforts at "true construction".<sup>122</sup>

118 See, for example, M Spence, note 91 *supra*.

119 See RA Hillman, note 77 *supra*. Arguably, a piece of such an article already has appeared. See A Robertson, "Estoppel and the Minimum Equity Principle: *The Public Trustee, as Administrator of the Estate of Percy Henry Williams (dec'd) v Wadley*" (1998) 13 *Journal of Contract Law* 178 (suggesting that *Wadley* "may well be the start of a stricter approach to the minimum equity principle").

120 Grant Gilmore has described how Oliver Wendell Holmes, the leading classical era contract theorist, transformed such defences into objective, definition laden "questions of law", with the intended result that a contractual obligation be "never discharged, though the heavens fall". G Gilmore, note 9 *supra*, p 48; see generally OW Holmes Jr, *The Common Law*, Little Brown and Co (1881), pp 241-64 ("Void and Voidable Contracts").

121 See generally EA Farnsworth, note 64 *supra*, pp 223-320; TD Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 *Harv L Rev* 1173; E Patterson, "An Apology for Consideration" (1958) 58 *Columbia Law Review* 929; F Kessler, "Contracts of Adhesion - Some Thoughts on Freedom of Contract" (1943) 43 *Columbia Law Review* 629.

122 Llewellyn's famous paragraph seems worth quoting in full:

The difficulty with these techniques of ours is threefold. First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to recur to the attack. Give him time, and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction: that of marking out for any given type of transaction what the minimum decencies are which a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type. Third, since they purport to construe, and do not really construe, nor are intended to, but are instead a tool of intentional and creative misconstruction, they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.

Because Llewellyn was the principal drafter of Uniform Commercial Code Article Two, the Sales article, he was able to include in it a section authorising courts to police bargains more forthrightly, by declaring them unconscionable in whole or part.<sup>123</sup> Section 2-302, entitled "Unconscionable Contract or Clause", sets forth the following rule applicable to contracts for the sale of goods:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.<sup>124</sup>

*Restatement (Second)* s 208, modelled after UCC 2-302 and applicable to all contracts, contains nearly identical language.<sup>125</sup>

The first real indication that American courts might invoke the unconscionability doctrine more readily, at least in consumer transactions, came in *Henningsen v Bloomfield Motors*.<sup>126</sup> A new Plymouth's steering mechanism had failed ten days after purchase, injuring the buyer's wife. The defendant dealer denied liability, contending it effectively disclaimed the implied warranty of merchantability by language appearing on the back of the purchase order, amid eight and a half inches of fine print.<sup>127</sup>

K Llewellyn, "Book Review" (1939) 52 *Harv L Rev* 700 at 702. On Llewellyn generally, see W Twining, *Karl Llewellyn and the Realist Movement*, University of Oklahoma Press (1973); NEH Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence*, University of Chicago Press (1997); G Gilmore, "In Memoriam: Karl Llewellyn" (1962) 71 *Yale LJ* 813.

123 Llewellyn, of course, did not invent the doctrine; for pre-Code application, see, for example, *Scott v United States* 79 US 443 (1870); *Campbell Soup v Wentz* 172 F2d 80 (3d Cir 1948); *Henningsen v Bloomfield Motors Inc* 161 A2d 69 (NJ 1960). For a useful brief introduction, see JJ White and RS Summers, *Uniform Commercial Code*, West Publishing Co (4<sup>th</sup> ed, 1995) pp 132-59.

124 The Uniform Commercial Code ("UCC") is a joint product of the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute. A century ago, the need for greater certainty and uniformity in American state law, especially commercial law, was becoming apparent. Thus, in 1892 a group of lawyers, judges, and legal academics founded the NCCUSL to codify portions of that law. The Commissioners' first model statute was the *Uniform Negotiable Instruments Law*, promulgated in 1896 and adopted ultimately by all states. Other such statutes, notably the *Uniform Sales Act* and the *Uniform Trust Receipts Act*, followed soon after.

Beginning in 1940, the Commissioners joined with the American Law Institute, see note 11 *supra*, to produce a single uniform statute governing all aspects of a typical commercial transaction. The UCC's first official text appeared in 1952, but few states adopted it until after further significant revisions in 1962.

Then within a decade, 49 states enacted the Code largely without revision, and today a Permanent Editorial Board revises and updates portions of it from time to time. See generally A Dunham, "A History of the National Conference of Commissioners on Uniform State Laws" (1965) 30 *Law & Contemporary Problems* 233; K Llewellyn, "Why We Need the UCC" (1957) 10 *University of Florida Law Review* 367; WA Schnader, "A Short History of the Preparation and Enactment of the Uniform Commercial Code" (1967) 22 *University of Miami Law Review* 1.

125 *Restatement (Second) of Contracts*, s 208. Other jurisdictions are expanding unconscionability as well. See generally "Symposium on Unconscionability Around the World: Seven Perspectives on the Contractual Doctrine" (1992) 14 *Loyola LA International & Comparative Law Journal* 435.

126 161 A2d 69 (NJ 1960).

127 The UCC provisions governing implied warranties and disclaimers appear in ss 2-314 and 2-316. The latter provides, in part: "[T]o exclude or modify the implied warranty of merchantability... the language must mention merchantability and in case of a writing must be conspicuous."

The New Jersey Supreme Court disagreed, noting that (1) the purchase order front failed to call attention to the purported disclaimer; and (2) in any event, a typical consumer would not have understood the dealer's disclaimer language to constitute a waiver of personal injury protection. Moreover, in a remarkably candid dictum, the Court explained the even more fundamental point, that the disclaimer appeared in a "standardized form designed for mass use", which virtually all auto dealers simply "imposed upon" their customers.<sup>128</sup>

Five years later, the federal Circuit Court of Appeals for the District of Columbia produced what remains today the leading American unconscionability precedent. In *Williams v Walker-Thomas Furniture Store*,<sup>129</sup> a store had sold numerous furniture items over several years to a very low income consumer.<sup>130</sup> The store's standard instalment contract granted it a security interest in *all* items sold until *all* were fully paid for. Somehow, the consumer had managed to pay the store over \$1 400 during those years, but, with her debt reduced to a mere \$164, the store sold her a \$514 stereo set. A short time later she defaulted, and the store sought to repossess *all* her purchased furniture.

The Court of Appeals majority suggested strongly that the store's "dragnet" security clause was unconscionable, at least on the *Williams* facts. In a typically insightful opinion by one of America's finest judges, J Skelly Wright,<sup>131</sup> it described unconscionability as (1) an "absence of meaningful choice" for one party, together with (2) contract terms "unreasonably favourable" to the other.<sup>132</sup> It then remanded the case for a full hearing on the issue.

Following *Williams*, it became common for American judges and academics to distinguish between 'procedural' and 'substantive' unconscionability. The

128 161 A2d 69 at 87. The Court's further description of the automobile industry, and its consumer contracts, remains essentially accurate today:

Manufacturers are few in number and strong in bargaining position. In the matter of warranties... the Automobile Manufacturers Association has enabled them to present a united front. From the standpoint of the purchaser, there can be no arms length negotiating on the subject. Because his capacity for bargaining is so grossly unequal, the inexorable conclusion which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker.

*Ibid* at 94. See generally WD Slawson, "Standard Form Contracts and the Democratic Control of Lawmaking Power" (1971) 84 *Harv L Rev* 529 (urging greater judicial intervention in contract disputes to insure "democratic" private lawmaking); TD Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 *Harv L Rev* 1174 (standard form contracts should be "presumptively unenforceable").

129 350 F2d 445 (DC Cir 1965).

130 The consumer was a single parent raising seven children on \$218 per month in government welfare benefits.

131 For accounts of Wright's life, career, and judicial philosophy, see AS Miller, *A "Capacity for Outrage": The Judicial Odyssey of J Skelly Wright*, Greenwood Press (1984); WJ Brennan Jr, "Tribute to J Skelly Wright" (1988) 98 *Yale LJ* 207; TC Grey, "J Skelly Wright" (1980) 7 *Hastings Constitutional Law Quarterly* 873.

132 In full, the renowned descriptive sentence reads as follows: "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." See note 130 *supra* at 449. See also *Hume v United States* 132 US 406 at 411 (1889) (quoting *Earl of Chesterfield v Janssen* (Ch 1750) 28 Eng Rep 82 at 100: an unconscionable contract is one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other").

former refers to “bargaining naughtiness”, such as an unscrupulous use of pressure tactics, fine print, confusing language, or, perhaps, even bargaining power inequality; the latter describes the inherent substantive unfairness of a disputed term.<sup>133</sup> As the *Williams* description suggests, American courts generally require the presence of both procedural *and* substantive misbehaviour before declaring a contract or contract term unconscionable.<sup>134</sup>

During the 1960s and 70s, a sprinkling of decisions fell onto American reporter pages heralding a greater judicial willingness to invoke unconscionability principles to ensure reasonable levels of contract disclosure and fairness. In *Jones v Star Credit Corp.*,<sup>135</sup> for example, a New York court refused to enforce a \$1 234 door-to-door sale contract for a home freezer worth no more than \$300. Invoking UCC section 2-302, the court concluded that the welfare recipient buyers, who already had paid \$620 of the contract price, could simply retain the freezer without paying more.<sup>136</sup> Other leading decisions illustrating ‘price unconscionability’ include *American Home Improvement Inc v*

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133 Professor Arthur Leff seems to have coined this distinction, in his important early article on the UCC, s 2-302. AA Leff, “Unconscionability and the Code – The Emperor’s New Clause” (1967) 115 *University of Pennsylvania Law Review* 485 at 487 (“Hereafter, to distinguish the two interests, I shall often refer to bargaining naughtiness as ‘procedural unconscionability’, and to evils in the resulting contract as ‘substantive unconscionability.’”)

Many believe that bargaining power inequality alone is or should be inadequate to establish procedural unconscionability. Official Comment 1 to UCC, s 2-302 states that the unconscionability principle is one of “prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power”. But see *Sosa v Paulus* 924 P2d 353 (Utah 1997) (surgeon’s far superior bargaining power over patient resulted in procedurally unconscionable arbitration agreement); *Hanson v Funk Seeds International* 373 NW2d 30 (SD 1985) (warranty disclaimer and remedy limitation unconscionable due to unequal bargaining power between seed manufacturer and farmer).

134 See, for example, *Kohl v Bay Colony Club Condo Inc* 398 So2d 865 (Fla Ct App 1981) (virtual unanimity among authorities that both procedural and substantive elements necessary to establish unconscionability); *Communications Maintenance Inc v Motorola Inc* 761 F2d 1202 (7th Cir 1985) (Indiana courts require both substantive and procedural unfairness); *Northwest Acceptance Corp v Almont Gravel Inc* 412 NW2d 719 at 723 (Mich Ct App 1987) (procedural or substantive element alone is not enough). But see *Gillman v Chase Manhattan Bank NA* 534 NE2d 824 (NY 1988) (an ‘outrageous’ substantive term alone may suffice to establish unconscionability); *Resource Management Co v Weston Ranch & Livestock Co* 706 P2d 1028 at 1043 (Utah 1985) (gross disparity in terms alone can support finding of unconscionability, as can, in a rare case, mere unfair surprise).

135 298 NYS 2d 264 (Sup Ct 1969).

136 Among several memorable lines in the *Jones* opinion are these at 266:

The law is beginning to fight back against those who once took advantage of the poor and illiterate without risk of either exposure or interference...Section 2-302 ...enacts the moral sense of the community into the law of commercial transactions...It permits a court to accomplish directly what heretofore was often accomplished by construction of language, manipulations of fluid rules of contract law and determinations based upon a presumed public policy.

Notice also the unusual remedy granted in *Jones*, an application of the authority UCC, s 2-302 grants courts the power to “limit the application of any unconscionable clause...”.

*MacIver*,<sup>137</sup> *Frostifresh Corp v Reynoso*,<sup>138</sup> and *Von Lehm v Astor Art Galleries Ltd.*<sup>139</sup>

Beyond warranty disclaimers, “dragnet clauses”, and shocking price terms, American courts also have scrutinised such terms as forum selection clauses, franchise termination rights, and other forms of liability disclaimer. In *Huntley v Alejandre*,<sup>140</sup> a Florida court held that a clause mandating Havana, Cuba as the sole forum for litigating any dispute was an effort to oust all other courts of jurisdiction and therefore “void and not enforceable”. In *Shell Oil Co v Marinello*,<sup>141</sup> the New Jersey Supreme Court ruled that a clause granting Shell the absolute right to terminate a service station franchise on 10 days notice was a “grossly unfair” result of “disproportionate bargaining power” and hence unenforceable. And in *Weaver v American Oil Co*,<sup>142</sup> the Indiana Supreme Court declined to enforce an “unconscionable” lease term purporting to require a service station franchisee to indemnify the franchisor even for harm caused by the franchisor’s own negligence!<sup>143</sup>

Beginning around 1980, however, American courts seemed to become noticeably more reluctant to declare contracts or contract terms unconscionable. Exalting the values of “commercial certainty”<sup>144</sup> and “freedom of contract”, they have tended recently to distinguish or otherwise retreat from the unconscionability jurisprudence of a decade or two earlier. Certainly a court today will not enforce an *egregiously* repressive contract or term,<sup>145</sup> but nonenforcement seems now very much the exception rather than the rule.<sup>146</sup> In

137 201 A2d 886 (NH 1964) (\$800 commission and \$809 finance charge added to \$959 sale price of windows and siding unconscionable).

138 274 NYS2d 757 (1966) (\$1 145 installment contract for freezer costing \$348 wholesale “shocking to the conscience”).

139 380 NYS2d 532 (1976) (\$67 000 price for jade carvings worth \$14 750 unconscionable). On price unconscionability generally, see JL Harrison, “Class, Personality, Contract, and Unconscionability” (1994) 35 *William & Mary Law Review* 445; MA Eisenberg, “The Bargain Principle and Its Limits” (1982) 95 *Harv L Rev* 741.

140 139 So2d 911 (Fla App 1962).

141 307 A2d 598 (NJ 1973).

142 276 NE2d 144 (Ind 1971).

143 The *Weaver* Court noted that had the case involved a sale of goods, the Court would have applied UCC, s 2-302 to declare the term unconscionable. However, in *any* contract dispute, the Court continued, “the law should seek the truth... in this more enlightened age”. Only in this way “can justice be served and the true meaning of freedom of contract preserved”. *Ibid* at 147-8.

144 See, for example, *In re Metal-Built Products Inc* 3 Bankr Rep 176 (ED Pa 1980) (given the need for “commercial certainty”, annual interest rate of 100 per cent is not unconscionable).

145 For example, *Maxwell v Fidelity Financial Services* 907 P2d 51 (Ariz 1995) (residential hot water heater sold for \$6 500 plus 19.5 per cent interest, for a total time price of \$14 860); *Carboni v Arrospide* 2 Cal Rptr 845 (Cal App 1991) (reducing 200 per cent annual interest rate to 24 per cent); *Art’s Flower Shop v Chesapeake & Potomac Telephone Company* 413 SE2d 670 (W Va 1991) (telephone company’s yellow pages monopoly rendered its liability limitation unconscionable).

146 See generally RJ Mooney, note 8 *supra* at 1187-204; EA Farnsworth, note 5 *supra* at 222-5.

general, more American courts today appear once again to be 'captives' of 'free contract' ideology.<sup>147</sup>

The bank fee cases are a typical example. As late as 1985, in *Perdue v Crocker National Bank*,<sup>148</sup> the California Supreme Court held that an allegation of unconscionability directed at a bank's \$6 NSF cheque processing fee stated a possible claim for relief. Noting that the bank's processing cost was only 30 cents, and that the signature card "agreement" was a "totally one sided transaction", the Court remanded for a full hearing on the "commercial setting, purpose, and effect" of the purported agreement in order to determine the unconscionability issue.<sup>149</sup>

In 1994, however, in *California Grocers Association v Bank of America*,<sup>150</sup> the California Court of Appeal reversed a trial court's ruling that a \$3 NSF fee, representing a 100 per cent markup, was unconscionable. It distinguished *Perdue* on the ground that the \$1.50 markup before it was considerably less, in both percentage and absolute terms, than the markup in *Perdue*. More fundamentally, though, the Court believed (contrary to the trial court's ruling) that a 100 per cent markup was "wholly within the range of commonly accepted notions of fair profitability", and the \$3 fee was "not so exorbitant as to shock the conscience".<sup>151</sup>

A series of Oregon decisions is quite similar, though focusing more on the implied good faith obligation than on unconscionability. In *Best v United States National Bank*,<sup>152</sup> the Oregon Supreme Court ordered a bank to set NSF and other miscellaneous fees at levels consistent with the "reasonable expectations of its depositors". A mere four years later, however, in *Tolbert v First National Bank*,<sup>153</sup> the same Court declared that the depositors' expectations were

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147 See L Wittgenstein, *Philosophical Investigations*, Oxford: Basil Blackwell (3rd ed, 1967) at [115] ("A picture held us captive"), quoted in K Johnson, "Commercial Law" (1983) 13 *New Mexico Law Review* 293. See generally B Mensch, "Freedom of Contract as Ideology" (1981) 33 *Stanford Law Review* 753 (book review); P Atiyah, note 9 *supra*; MJ Trebilcock, *The Limits of Freedom of Contract*, Harvard University Press (1993).

148 702 P2d 503 (Calif 1985).

149 *Ibid* at 514. See also *Truta v Avis Rent A Car System Inc* 238 Cal Rptr 806 (Cal App 1987) (\$6 daily charge for "collision damage waiver" protection raised legitimate unconscionability issue); *Beasley v Wells Fargo Bank* 1 Cal Rptr 2d 446 (Cal App 1991) (bank fees assessed against credit card customers ruled excessive as liquidated damages and therefore invalid).

150 27 Cal Rptr 2d 396 (Cal App 1994).

151 *Ibid* at 403. The court also concluded that the \$3 fee did not violate the implied covenant of good faith and fair dealing, which "should not be read to vary an express term". In sum, the Court concluded, the case centered around a "question of economic policy", and it is primarily a "legislative and not a judicial function to determine such policy": *ibid* at 404. Another way of thinking about the case, of course, is that in fact it centered around a far less grandiose issue, one of ordinary contract law for which courts are perfectly well suited: was the bank's \$3 NSF fee so procedurally and substantively unfair to its customers that a court should decline to enforce it?

152 739 P2d 554 (Or 1987).

153 823 P2d 965 (Or 1991).

“irrelevant” because when opening their accounts they “agreed” to the existing charges and granted the bank unlimited discretion to alter them.<sup>154</sup>

Even the United States Supreme Court recently turned back a serious unconscionability claim. In *Carnival Cruise Lines v Shute*,<sup>155</sup> two residents of Washington state had purchased tickets for a cruise from Los Angeles to Mexico and back. The tickets (sent to the Shutes only after they paid) required that any dispute between the parties be litigated in Florida. After Mrs Shute was injured on deck, allegedly due to the crew’s negligence, the Shutes sued in Washington federal court.

The Ninth Circuit Court of Appeals declined to enforce the forum selection clause, both because it was “not freely bargained for” and because the record indicated that the Shutes were “physically and financially incapable” of litigating in Florida.<sup>156</sup> However, a Supreme Court majority of seven to two reversed that decision, apparently less concerned than the Ninth Circuit either about the lack of actual agreement to the disputed term or about its fundamental unfairness to passengers who reside over 3 000 miles from the Sunshine State. In the majority’s view, “common sense” dictated that a cruise line ticket would be a “form contract the terms of which are not subject to negotiation”.<sup>157</sup>

So, in general, American unconscionability doctrine over the past four decades has first flowed and then ebbed. During the 1960s and 70s courts invoked it, if not frequently, at least in enough high profile instances for it to help promote reasonable levels of disclosure and fairness in contractual exchanges. Since about 1980, however, courts have *declined* to apply it so often that observers now question whether it continues to serve at all as a significant check on market power excess. Once again, as with restitution and promissory estoppel, we who gaze back somewhat nostalgically toward the middle years of this century can but hope for, and urge, a renewed recognition among legislators and judges that unconscionability is an important, legitimate, fundamentally democratic component of any modern contract regime. Like Australia’s, perhaps.

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154 *Ibid* at 969. See also *United States National Bank v Boge* 814 P2d (Or 1991) (bank’s good faith obligation consists of mere “honesty in fact” and cannot provide a remedy even for an “unpleasantly motivated act”).

A second, similar example of recent retreat from earlier unconscionability rulings may be found in arbitration clause cases. Compare, for example, *Graham v Scissor-Tail Inc* 623 P2d 165 (Calif 1981) (unbargained arbitration clause unconscionable) with *Keating v Superior Court* 645 P2d 1192 (Calif 1982) (standardised arbitration clause in franchise agreements not unconscionable). See generally KR Davis, “The Arbitration Claws: Unconscionability in the Securities Industry” (1998) 78 *Boston University Law Review* (urging legislative intervention to redress the “harm inflicted” by recent decisions sustaining “unconscionable arbitration agreements in the securities industry”).

155 499 US 585 (1991).

156 *Shute v Carnival Cruise Lines* 897 F2d 377 at 389 (9th Cir 1990), citing, inter alia, *The Bremen v Zapata Off-Shore Co* 407 US 1 (1972).

157 See note 156 at 593. Stevens and Marshall JJ dissented, citing, inter alia, unconscionability principles from *Henningsen v Bloomfield Motors* and *Williams v Walker-Thomas Furniture Co*. See text at notes 127-35 *supra*.

The US Congress overruled *Shute* a year later, invalidating by statute any agreement purporting to dictate a forum, or limit liability, for a cruise line passenger’s personal injury claim: 46 USCA App section 183c.

## B. Australia

Down Under, unconscionability has emerged quite dramatically in recent years as an "all-pervasive, yet oddly elusive, undercurrent in Australian contract law".<sup>158</sup> The principal breakthrough came in *Commercial Bank of Australia Ltd v Amadio*,<sup>159</sup> yet another remarkable 1980s High Court contract decision. An insolvent real estate developer had convinced his aged immigrant parents, who neither read nor spoke English well, that he was a highly prosperous entrepreneur. He also convinced them to guarantee repayment of his bank debt up to \$50 000 for six months. The bank manager, who knew the son's true financial condition, presented to the parents in their home an *unlimited* guarantee and mortgage, which they signed without reading. When the son's debt reached \$240 000, the bank demanded payment from the parents.

The South Australian trial court enforced the guarantee and mortgage, rejecting contentions of unconscionability, undue influence, misrepresentation, and concealment. However, the Full Court reversed that decision, ruling that (1) the bank had failed to reveal sufficiently to the guarantors facts material to the transaction; (2) under the circumstances, the bank was accountable for the son's misrepresentations; and (3) the transaction was unconscionable.<sup>160</sup> A High Court majority of four to one then affirmed that decision, with Mason, Deane, and Wilson JJ declaring the guarantee and mortgage unconscionable and Gibbs CJ concluding simply that the bank had breached its disclosure duty to a surety.

Mason J described unconscionability as an "underlying general principle", warranting relief whenever (1) one party "by reason of some condition or circumstance" is placed at a "special disadvantage", and (2) the other party takes "unfair or unconscientious advantage". The "special disadvantage" circumstances in *Amadio* included the parents' age, their limited grasp of English, and their inadequate understanding both of their son's precarious finances and of the documents they signed. Those circumstances were plainly evident to the bank manager who, though innocent of "moral wrongdoing", took "unconscientious advantage" of the parents.<sup>161</sup> Deane J then added that whenever a party takes such "unconscientious advantage", the court will place on it an onus to demonstrate that the transaction's *substance* was "fair, just and

158 NC Seddon and MP Ellinghaus, *Cheshire & Fifoot's Law of Contracts*, Butterworths (7<sup>th</sup> Australian ed, 1997) p 554. For useful overviews of the doctrine, see *ibid*, pp 554-73; JW Carter and DJ Harland, *Contract Law in Australia*, Butterworths (2<sup>nd</sup> ed, 1991) pp 457-74.

159 (1983) 151 CLR 447. *Amadio* was, of course, the principal *judicial* breakthrough. Unconscionability also has been the subject of very significant Australian legislative activity, especially in the field of consumer transactions. See generally treatises cited note 159 *supra*; *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610; *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 41 ATPR 269.

160 *Amadio ibid* at 454.

161 *Ibid* at 462. For academic commentary on *Amadio*, see M Seddon, "Unconscionability in Australian Law: Development and Policy Issues" (1992) 14 *Loyola LA International & Comparative Law Journal* 545. See also *Australia National Bank v Nobile* (1988) 100 ALR 227 (bank's misrepresentations together with other abuses of customer trust render guarantee and mortgage void).



reasonable".<sup>162</sup> Thus, in general at least, the High Court endorsed the same two-part conception of 'procedural' and 'substantive' unconscionability so evident in American law.

Nine years after *Amadio*, the High Court decided *Louth v Diprose*,<sup>163</sup> a case one commentator suggested may establish "solicitors in love" as a "new category of unconscionability".<sup>164</sup> A male solicitor had suffered from a "deep and persistent, albeit unrequited" emotional attachment to a woman who told him she was about to be forced out of the house she was renting.<sup>165</sup> The woman "deliberately manufactured" a "crisis" atmosphere, including threats of suicide if required to move into public housing. The besotted solicitor gave her \$59 000, two-thirds of his net worth, to enable her to buy the house, but later sought a decree transferring it to himself.

The trial court issued such a decree. In its view, the donor had been "utterly vulnerable" and the donee "well aware" of that fact. Accordingly, her conduct was "dishonest and smacked of fraud", and it would have been "unconscionable" for her to retain such a large gift out of the donor's limited resources. The Full Court affirmed the decision by a majority of two to one.

A High Court majority then dismissed the donee's further appeal. All seven justices expressed great reluctance to disturb the trial court's factual findings, based as they were on the "immeasurable advantage in estimating the characters and capacities of those involved in the impugned transaction".<sup>166</sup> And once having accepted those findings, the six-member majority realistically could reach but one conclusion. Deane J reiterated the *Amadio* standard of (1) one party's special disability which is (2) sufficiently evident to the other party that it would be unconscionable for the transaction to stand. He then summarised the majority's view of the case before it as one in which the donee deliberately used the donor's love and infatuation, plus her own deceit, to "manipulate the respondent to part with a large proportion of his property".<sup>167</sup>

The High Court's latest extended foray into unconscionability territory occurred recently in the "Case of Sexually Transmitted Debt".<sup>168</sup> *Garcia v*

162 Note 160 *supra* at 474. One interesting sidelight of Justice Deane's judgment, with which Wilson J concurred, was his endorsement of remedy flexibility. A plausible result in *Amadio*, he suggested, might have been to require the parents to pay the \$50 000 they thought they were guaranteeing. In the end, however, Deane and Wilson JJ concluded that had the bank revealed the full truth to the parents they might well have signed no guarantee at all.

163 (1992) 67 ALJR 95.

164 Tina Cockburn, "Solicitors in Love: A New Category of Unconscionability?" (1995) 25 *Queensland Law Society Journal* 291.

165 *Diprose v Louth (No 1)* (1990) 54 SASR 438 at 439.

166 Note 164 *supra* at 101, per Deane J.

167 *Ibid* at 104. Toohey J disagreed that the solicitor's "emotional attachment" sufficed to create the required "special disability" or "special situation of disadvantage". Unlike, perhaps, the parents *Amadio*, solicitor *Diprose* was at all times "well aware of all the circumstances and of his actions and their consequences": *ibid* at 113. For another decision invalidating bank security documents, featuring the bank's "gross failure to monitor" the transaction, bank counsel's inattention to various "irregularities", and "untrue" testimony by the principal bank witness, see *Begbie v State Bank of NSW Ltd* (1994) 41 ATPR 288.

168 See generally N Howell, "Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-borrowers" (1994) 4 *Australian Feminist Law Journal* 93.

*National Australia Bank Ltd*,<sup>169</sup> like *Amadio*, involved the enforceability of a bank guarantee; it also required the Court to revisit a notorious earlier precedent suggesting that women sometimes need special legal protection.<sup>170</sup>

In 1979 a wife and husband had executed a home mortgage to secure first a small bank loan to the husband's gold trading business and then a personal loan to themselves. A decade later, the wife signed four guarantees of all the husband's business debts to the bank. She did so in "less than a minute", with no explanation, believing the guarantees related only to the business's modest periodic bank overdrafts and not understanding they were tied to the earlier home mortgage. The trial court also found that she signed because (1) the husband constantly "pressured" her, repeatedly calling her a "fool" in commercial matters, and (2) she was trying to save her marriage.

A year later, by then separated from her husband, the wife asked the bank to keep the husband's business overdrafts "within limits". But the inevitable happened: the business accumulated a very large debt to the bank, which then sought to collect from the wife by foreclosing the home mortgage.

The trial court granted the wife relief under the "principles referred to in *Yerkey v Jones*". It concluded that those principles, relating generally to legal protection for a married woman surety, rendered Ms Garcia's guarantees unenforceable. It also ruled, however, that the wife's alternative theory, unconscionability, failed because under *Amadio* the bank itself had taken no "unfair or unconscientious advantage" of her. For example, the bank had had "no notice" of the husband's unconscionable conduct.

The New South Wales Court of Appeal allowed the bank's appeal.<sup>171</sup> It declined to follow *Yerkey v Jones*, both because in its view "one judge only" had endorsed the gender based principles expressed there and because those 'principles' inaccurately stereotyped modern married women.

So the High Court confronted a difficult dilemma: how to recognise the reality that Ms Garcia in fact *had* acted with neither complete volition nor full knowledge, but to do so without perpetuating social or legal stereotypes that demean and disadvantage women? In an admirable judgment by Gaudron J, the Court majority<sup>172</sup> finessed that dilemma. Allowing Ms Garcia's further appeal, it reasoned that the "principles spoken of...in *Yerkey v Jones*" are simply "particular applications of accepted equitable principles which have as much

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169 (1998) 194 CLR 395.

170 *Yerkey v Jones* (1939) 63 CLR 649. See also *Blomley v Ryan* (1956) 99 CLR 362 at 405 (traditionally, characteristics of disadvantaged parties have included "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy, or lack of education"). One also is reminded here of Professor Arthur Leff's deliberately naughty description of cases in which equity courts have denied specific performance of one-sided bargains: "Certain whole classes of presumptive sillies like sailors and heirs and farmers and women continually wander on and off stage." A Leff, note 134 *supra* at 532 (footnotes omitted).

171 *National Australia Bank v Garcia* (1996) 39 NSWLR 577.

172 McHugh, Gummow, and Hayne JJ joined Justice Gaudron's judgment. Kirby J concurred in the result, on the ground that (1) the husband had misrepresented the transaction to the wife and (2) the bank had had 'constructive notice' of the misrepresentation. Callinan J concurred as well, preferring simply to reaffirm *Yerkey*.

application today as they did then". True, there remain even today a "significant number" of Australian women in relationships marked by "disparities of economic and other power". But *Yerkey* was *not* based on any real or imagined female "subservience or inferior economic position" or "vulnerability to exploitation". Rather, *Yerkey's* fundamental rationale was simply a breach of the "trust and confidence" normally existing between marriage partners.

The *Yerkey* judgments themselves do not mention 'unconscionability'. However, in a case like *Garcia* where (1) a surety "did not understand the purport and effect of the transaction" and (2) the lender "did not itself take steps" to explain it, enforcing the guarantee would indeed be "unconscionable". Moreover, declining to enforce it represented to the Court "no departure from accepted principle".

Finally, and briefly, consider the recent High Court judgments in *Bridgewater v Leahy*.<sup>173</sup> The facts were complex, but essentially an aged grazier with a wife and four daughters (whose place, he thought, was "in the home, not on the land or engaged in business affairs") sold land worth \$697 000 for \$150 000 to his favourite nephew ("the son he always wanted but never had"). Following the grazier's death a few months later, his widow and daughters sued to set aside the transaction, urging, among other theories, unconscionability. They lost at trial, then lost again 2-1 in the Queensland Court of Appeal.

A High Court majority of three to two, however, reversed that decision, setting aside the sale as unconscionable under *Blomley v Ryan*,<sup>174</sup> *Amadio*, and *Louth*.<sup>175</sup> Gaudron, Gummow, and Kirby JJ concluded that the seller had suffered from an "emotional attachment to and dependency upon" his nephew, and that the nephew had "[taken] advantage of this position" to benefit from a "grossly improvident transaction". It mattered not that the seller "knew and understood what he was doing"; rather, the determinative questions were, as in *Louth*, (1) whether he suffered from a disabling emotional dependency and (2) whether his nephew took unconscientious advantage.

Somewhat ominously for future unconscionability claimants, the two most recent High Court appointees, Gleeson CJ and Callinan J, dissented. In their view, the correct inquiry was simply whether the uncle had been "unable to judge for himself". Because the trial court found otherwise, that the uncle had comprehended adequately the nature of his action, the dissenters concluded he had *not* suffered from any "special disability". Apparently the immediate future of unconscionability in Australia is nearly as uncertain as it is in the United States.

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173 (1998) 194 CLR 457.

174 (1956) 99 CLR 362.

175 On *Amadio* and *Louth*, see text at notes 162-70 *supra*.

#### IV. CONCLUSION

So what conclusions, and aspirations, does this brief comparison of contemporary American and Australian contract law suggest? As we all ask ourselves and our students so often, what does this material teach us about our legal systems and about the societies we design them to serve?

First, of course, there are the decisions themselves. In both the United States and Australia today, restitution, promissory estoppel, and unconscionability are prominent features of the contract law landscape, meriting the close attention of transactional lawyers and litigators alike.

The precise contours of these features, not to mention their future prospects, remain at this writing somewhat uncertain in both countries. Parties and their lawyers who benefit most from the strict application of traditional, well defined rules have reason to hope that especially American courts will further restrict rather than expand restitution, promissory estoppel, and unconscionability, at least in the near term. Equally, however, legal 'underdogs' and their advocates also may hope that courts in both countries will at least sustain, if not strengthen, their longer term modern traditions of invoking such doctrines more readily to help ensure reasonable levels of disclosure, fairness, and compensation for harm. Much will depend, as always, on prevailing political and social attitudes and events: on whom we elect to appoint our judges, and why; and on how those judges choose to answer in contract disputes the abiding judicial questions of freedom, equality, and the institutional role.

Second, and more broadly, the mid to late twentieth century emergence of restitution, promissory estoppel, and unconscionability in both the United States and Australia confirms once again the so-called "Death of Contract".<sup>176</sup> The decline of nineteenth century prejudices against implied contracts, the discarding of bargain consideration as the sole criterion for promise enforcement, and the greater judicial willingness to police bargains overtly all stand as prime exemplars of the modern evolution of Anglophone contract law from classical, rule oriented regimes emphasising logic and predictability toward modern standard oriented systems emphasising flexibility and fairness.<sup>177</sup>

Perhaps the most remarkable aspect of this 'death' in Australia is how very quickly it occurred. In less than a decade, the High Court revolutionised not only the three important doctrinal areas examined here, but also such additional stalwarts as privity, unilateral mistake, and relief from forfeiture.<sup>178</sup> All interested Australians should be mindful, however, that what Grant Gilmore

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176 G Gilmore, note 9 *supra*.

177 On the contrasting jurisprudences of 'rules' and 'standards', see KM Sullivan, "Foreword: The Justices of Rules and Standards" (1992) 106 *Harv L Rev* 22; JR Grodin, "Are Rules Really Better Than Standards?" (1994) 45 *Hastings Law Journal* 569. See generally D Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harv L Rev* 1685.

178 See *Trident General Insurance Co Ltd v McNiece Brothers Pty Ltd* (1988) 165 CLR 107; *Taylor v Johnson* (1983) 151 CLR 422; *Legione v Hateley* (1983) 152 CLR 406. See generally authorities cited note 7 *supra*.

wrote about the American contract law future surely applies to your own as well: "...who knows what unlikely resurrection the Easter-tide may bring?"<sup>179</sup>

Finally, and most centrally to this paper, the recent history of restitution, promissory estoppel, and unconscionability in the United States and Australia certainly confirms Mr Justice Priestley's prediction a decade ago that the two nations' contract law would continue to converge. It also demonstrates, I believe, the very great value of comparative law study. The constant need for new ideas to improve one's own legal system simply for its own sake, together with today's increasingly urgent need to adapt each such system to new globalised realities, make such study essential for us all.

Here, in contract law at least, full marks to the Australian High Court. During and since the 1980s that Court, perhaps more than any other in the common law world, has exhibited exemplary vision and courage in looking beyond its own shores for occasional assistance in fashioning a new, distinctive "Australian law of contract". As an American, I can but hope and believe that lawyers, judges, and academics in my own country will begin to adopt a similarly broad perspective in instances where even the experience of 50 state courts seems somehow inadequate or incomplete. And may I conclude this paper by thanking once again the Dean and Faculty of Law at the University of New South Wales for the opportunity to spend a year myself learning and teaching about such a broader perspective.

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179 G Gilmore, note 9 *supra*, p 103.