

Statutory Reform of the Law of Mistake

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STATUTORY REFORM OF THE LAW OF MISTAKE

By DONALD J. LANGE*

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I. INTRODUCTION

The common law of contractual mistake has long been recognized as one of the most confused and complex areas of classical contract law, but only recently has there been a serious interest in the statutory reform of the area. The recent reform interest has come about because the common law approach to mistake has done little but create a body of legal knowledge that is fraught with definitional problems, with doctrinal difficulties and with remedial limitations. The courts, for example, continually grapple with mistake of fact and mistake of law distinctions, with different mistake classification systems and with the different tests applied to the different nature of the mistake. They work under the contradictory "double standard" of a common law doctrine and an equitable doctrine of mistake.¹ They are inhibited by the vast caselaw that sometimes defies rationalization, the most outstanding example of which is the trilogy of rogue cases.² They are restricted by an "all or nothing" approach to the resolution of mistake problems which only allows rescission *in toto* or no rescission at all. Recent critics, as a result, are turning to statutory reform as the answer to rebuilding the area.³

The object of this paper is to examine the various statutory models that have been put forward to reform the law of mistake, both in the area of the law of contractual mistake and in the area of 'mistake of law' generally. If the former area is to be reformed by a legislature, then it can be maintained that the latter area should also be reformed.

The subject of the law of contractual mistake is introduced by reviewing the recent work of three statutory reformers in the area, and by surveying the recent statutory reform measures that have occurred. A detailed examination of three statutory models of contractual mistake follows, with the investigation organized around eight subjects of concern. Each model has significant doctrinal differences and none is free of language difficulties. It is recommended that since none of the three models is suitable for adoption

¹ Some dissolution of this "double standard" may be forthcoming as a result of the recent decision of the House of Lords in *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1978] A.C. 904 at 925-26, [1977] 2 All E.R. 62 at 68-69, [1977] 2 W.L.R. 806 at 812-13 *per* Lord Diplock, at 940-45 (A.C.), 80-84 (All E.R.), 826-30 (W.L.R.) *per* Lord Simon of Glaisdale (H.L.). Their Lordships discussed and elaborated the relationship of common law and equity, and the rules produced by each, in respect to the law of contract, specifically in relation to the issue of time, as being essential in contracts, but not to the exclusion of other aspects of the law of contract.

² *Ingram v. Little*, [1961] 1 Q.B. 31, [1960] 3 All E.R. 332, [1960] 3 W.L.R. 504; *Lewis v. Averay*, [1972] 1 Q.B. 198, [1971] 3 All E.R. 907, [1971] 3 W.L.R. 603; *Phillips v. Brooks Ltd.*, [1919] 2 K.B. 243, [1918-19] All E.R. Rep. 246, 121 L.T. 249.

³ There is a current debate, however, on whether the judiciary or the legislature is the appropriate forum for the resolution of common law contract doctrinal problems. For a recent exchange, see Waddams, *Legislation and Contract Law* (1978-79), 17 U.W.O. L. Rev. 185 and Belobaba, "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention," in Swan and Reiter, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 423.

on its own, the salient features of each should provide the basis for future statutory reforms of the area.

In the discussion of the reform of 'mistake of law' generally, a brief overview is given of the problems involved in having a distinction between mistakes of law and mistakes of fact. This is followed by an examination of the various statutory models of reforming the area of 'mistake of law' generally and, in conclusion, it is recommended that one of the models, with minor revisions, is the most suitable model for adoption.

II. STATUTORY REFORMERS OF THE LAW OF CONTRACTUAL MISTAKE

One of the first persons to propose the statutory reform of the law of contractual mistake was Rabin whose "A Proposed Black-Letter Rule Concerning Mistaken Assumptions In Bargain Transactions" appeared in 1967.⁴ It was Rabin's ambition "to state a comparatively simple and concise test that will predict what courts will do with a better degree of accuracy than tests previously offered and that, if followed by a court, is more likely than other tests to produce a just result."⁵ To a considerable extent, his statutory model achieves this aim by rejecting many of "the time-honored distinctions"⁶ of the common law such as unilateral mistake or mutual mistake. He also focuses on the statutory articulation of fundamental principles underlying the equitable resolution of mistake problems that had been developed in the critical literature.

The second effort in the reform of this area appeared in 1975 with the American Law Institute's tentative draft on mistake for the *Restatement (Second) of the Law of Contracts*.⁷ The *Restatement* is a more satisfactory model than that of the *Restatement of the Law of Contract*.⁸ While showing

⁴ Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions* (1967), 45 Tex. L. Rev. 1273.

⁵ *Id.* at 1275-76.

⁶ *Id.* at 1276.

⁷ Am. L. Inst., *Restatement (Second) of the Law of Contracts*, Tentative Draft No. 10 (Philadelphia: Am. L. Inst., 1975), §§293-300 [hereinafter *Restatement*]. The foreword is dated April 16, 1975. The Director of the American Law Institute reminds us: "That the entire formulation still is tentative should be emphatically stated; it will continue so until the work has been completed and the Institute has given its approval to a proposed official draft. It is, however, fair to say that major changes in these formulations are unlikely, given the consideration they already have received." Wechsler, "Foreword," *Restatement (Second) of the Law of Contract*, Tentative Draft Nos. 1-7 (St. Paul: Am. L. Inst., (1973) at vii-viii. So far, §21A on the effect of misunderstanding has remained unchanged despite Palmer's trenchant criticism of it in *The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second* (1966-67), 65 Mich. L. Rev. 33. For a criticism of mistake provisions in the *First Restatement* where the "problem of relief for unilateral mistake is dealt with somewhat obliquely," see Newman, *Relief for Mistake in Contracting* (1968-69), 54 Cornell L. Rev. 232 at 233.

⁸ Am. L. Inst., *Restatement of the Law of Contracts* (St. Paul: Am. L. Inst., 1932) §§500-11 [hereinafter *First Restatement*].

the influence of Rabin,⁹ it advances the statutory reform of the area by providing consideration for the fault of the parties¹⁰ — a factor which Rabin rejects.¹¹ It also releases the courts to a more discretionary remedial system¹² — a factor which Rabin does not set out to address.¹³ The *Restatement*, however, lacks Rabin's clarity and brevity of thought and still suffers from the cumbersomeness of the *First Restatement's* language. This latter problem is partly a result of the mistake classification system that commands its outlook.

About the time that the *Restatement* was being published, the New Zealand scholar, Sutton, submitted a paper on the reform of the law of mistake in contracts to the New Zealand Contracts and Commercial Law Reform Committee. The substance of this paper appeared in an article published in April 1976,¹⁴ and it also formed the basis for the Committee's Report and Draft Bill¹⁵ which appeared in May of the same year. The Bill was revised by the Statutes Revision Committee and it is this version which is now the *Contractual Mistakes Act 1977*,¹⁶ the only comprehensive legislation in force in a common law jurisdiction in this area.

It should be noted at this point that both the New Zealand Legislature and Sutton are not new to the reform of the law of mistake. In 1958 the Legislature passed the *Judicature Amendment Act 1958*,¹⁷ which substantially reformed the area of payment under mistake of law and served, in some respects, to lay a foundation for the later reform of the law of contractual mistake. In 1965 Sutton published a critique of the amendment in which

⁹ See, e.g., text following note 190, *infra*.

¹⁰ *Restatement*, *supra* note 7, §299.

¹¹ Rabin, *supra* note 4, at 1283.

¹² The "Reporter's Note" to §300 of *Restatement*, *supra* note 7, at 73, refers the reader to *National Presto Industries v. United States*, 338 F.2d 99 (Ct. Cl. 1964) for "a discussion of the court's power to shape the remedy according to the circumstances of the case." Consider the following remarks from that case at 112:

For such a case it is equitable to reform the contract so that each side bears a share of the unexpected costs, instead of permitting the whole loss to remain with the party on whom it chanced to light. In contract suits courts have generally seemed loath to divide damages, but in this class of case we see no objection other than tradition. Reformation, as the child of equity, can mold its relief to attain any fair result within the broadest perimeter of the charter the parties have established for themselves. Where that arrangement has allocated the risk to neither side, a judicial division is fair and equitable. The division can follow from the special circumstances if there are any; in their absence an equal split would fit the basic postulate that the contract has assigned the risk to neither party .

For an amendment to §300 see note 229, *infra*.

¹³ Rabin, *supra* note 4, at 1276.

¹⁴ Sutton, *Reform of the Law of Mistake in Contract* (1976-77), 7 N.Z.U.L.R. 40.

¹⁵ Contracts and Commercial Law Reform Committee, *Report on the Effect of Mistakes on Contracts* (N.Z.: n.p., 1976) [hereinafter *Report*].

¹⁶ [1977] N.Z. Stat., No. 54. Assented to November 21, 1977.

¹⁷ [1958] N.Z. Stat., No. 40.

he argued that the new reform of the area was so substantial that it demanded "an entire reappraisal of the basis on which relief for mistake is granted."¹⁸

The *Contractual Mistakes Act* is also influenced by Rabin's analysis because Sutton freely draws "on his definitions in putting forward suggestions for the relevant factors to a judicial discretion."¹⁹ Sutton disagrees with Rabin, as will become evident, with regard to the need for a mistake classification system and, accordingly, the New Zealand model adopts such a system. Rabin does not. A factor of importance that is included in the New Zealand model,²⁰ but which is not recommended by Sutton, probably because Rabin rejects it, is the factor of fault. This factor was most likely included in the Act after the appearance of the *Restatement's* tentative draft which adopts it.²¹

Beyond doubt, the important contribution of Sutton's critique²² and of the New Zealand model to the reform of this area is the emphasis placed on providing the courts with a discretionary remedial system for the equitable resolution of mistake problems. The "all or nothing" approach of the common law is eliminated. Although the *Restatement* goes some way towards providing such a system, it does not articulate the matter with the clarity and the comprehensiveness of the New Zealand model. There is, in addition, the *Restatement's* continual use of the term "avoid," which appears to posture the old common law position. The principal provisions of the New Zealand model, on the other hand, are framed in terms of "relief."

The writing that apparently provided the New Zealand reformers with a remedial perspective on the difficulties encountered with the law of contractual mistake is a comparative law study undertaken by Dr. Sabbath.²³ He shows that the remedies for mistake are a great deal more flexible in certain civil law systems than the English system, which has remedies that are "too rigid."²⁴ He concludes that, where the remedies for mistake remain inflexible, the courts are likely to set strict standards in determining what constitutes operative mistake: "The principles upon which the courts intervene and the circumstances in which they do so are to a certain extent dependent upon the effects of mistake. [T]he scope of operative error remained restricted as far as its effects were too rigid and it evolved when its effects progressed."²⁵

¹⁸ Sutton, "Mistake of Law — Lifting the Lid of Pandora's Box," in Northey, ed., *The A.G. Davis Essays in Law* (London: Butterworths, 1965) 218 at 219.

¹⁹ Sutton, *supra* note 14, at 47n. 42.

²⁰ *Report*, *supra* note 15, s. 7(2).

²¹ *Restatement*, *supra* note 7, §299.

²² Sutton, *supra* note 14, at 52-57, 61-65.

²³ Sabbath, *Effects of Mistake in Contracts: A Study in Comparative Law* (1964), 13 I.C.L.Q. 798.

²⁴ *Id.* at 808-809.

²⁵ *Id.* at 828.

The result of the comparison of the common law and the civil law²⁶ is to give the court the power to award compensation (among other things) in lieu of rescission, to eliminate the "all or nothing" approach of the common law. The *Report* reasons in the following manner about the contribution that the rigidity of the remedial approach of the common law has made to the definitional and doctrinal difficulties in the area:

If . . . the remedies available in cases of mistake are too inflexible, the courts will be reluctant to commit themselves to a clear policy in defining mistake. It may occasionally be necessary to shelter behind an ambiguous or a meaningless definition where the court can see that, if it holds there is a mistake, the consequences on the parties would be unfair. It may also be tempted on occasion to adopt irrelevant considerations as a ground for refusing relief or, where there is earlier opposed authority, to refer to irrelevant criteria in order to distinguish the earlier case and allow relief. These tendencies which . . . are plainly discernible, must contribute to the generally unsatisfactory state of legal doctrine.²⁷

The most recent, albeit only partial, reform of the law of mistake appears in the 1979 statutory proposals for the reform of *The Sale of Goods Act*²⁸ by the Ontario Law Reform Commission.²⁹ Following the recommendations of a paper prepared for the Commission by McCamus,³⁰ the Commission recommends the adoption of a new statutory section which addresses the problem of the "[n]on-existence of or casualty to identified goods"³¹ to replace the *res extincta* provisions of sections 7 and 8. The Commission also agrees to support a recommendation made by McCamus³² to resolve the difficulty of determining what amounts to a mistake of identity and what is to be treated as a mistake about attributes "by abolishing the

²⁶ A further investigation of the civil law may reveal that there is still more to offer both in terms of resolving mistake problems and in terms of formulating statutory provisions. In a recent study by Hoff, *Error in the Formation of Contracts in Louisiana: A Comparative Analysis* (1979), 53 Tul. L. Rev. 329, a comparison is made of the mistake provisions of the Louisiana Civil Code and the principles of mistake under the common law. He concludes his study at 379 with the following observations:

The present weaknesses are, however, minor ones in a Code fully enunciating an extraordinarily explicit and detailed theory of contractual error that has been of continuing vitality since 1825. The law of conventional obligations in the other American states has long suffered from a lack of coherent doctrine, especially in the area of contractual error; to this is added the burden of a mass of case law so great. . . . the common law may well take note of the continued vitality of these institutions which . . . have a coherence within the legal system and a measure of predictability — attested to by Louisiana's relative paucity of case law — that the common law has yet to achieve.

²⁷ *Report*, *supra* note 15, at 8.

²⁸ *The Sale of Goods Act*, R.S.O. 1970, c. 421.

²⁹ Ont., *Law Reform Commission Report on the Sale of Goods* (Toronto: Ministry of the A.G., 1979) [hereinafter *O.L.R.C. Report*].

³⁰ McCamus, "Mistakes in Contracts for the Sale of Goods," *Ont. Law Reform Comm'n Sale of Goods Project*, Research Paper No. II.8, 1st Draft (Toronto: Ont. L.R. Comm'n, 1975) at 61. The paper is dated March 7, 1975.

³¹ See *O.L.R.C. Report*, *supra* note 29, Vol. III, Draft Bill, s. 8.13.

³² McCamus, *supra* note 30 at 79. This recommendation is also contained in a report by the English Law Reform Committee: *Law Reform Comm. Twelfth Report (Transfer of Title to Chattels)* (Cmd. 2958, 1966), para. 15 [hereinafter *Twelfth Report*].

distinction between void and voidable titles and treating all mistakes involving the other contracting party as making the contract only voidable."³³ The Commission, however, has some reservations about this proposal "that would give the courts broad discretionary powers to allocate the loss resulting from the buyer's fraud between the seller and the third party."³⁴ A similar recommendation is made by Sutton for "a more flexible discretionary remedy"³⁵ in this area but the *Contractual Mistakes Act 1977* maintains the position that the rights of third parties remain unaffected by the new legislation.³⁶

In addition to the reform articles by Rabin and Sutton, McCamus's work is the only comprehensive discussion of the reform of the law of contractual mistake. His recommendations,³⁷ moreover, cover areas also considered by the two other reformers. He recommends that all operative mistakes should be treated as equitable in character and that flexible remedies permitting restitutionary and reliance losses, and their apportionment,³⁸ should be adopted. He urges the elimination of "the time-honored distinctions"³⁹ of mistake of law versus mistake of fact and mutual mistake versus unilateral mistake. He points out that account must be taken of risk allocation in agreements. In addressing a peculiarly Canadian matter, he also recommends that legislation overrule the twenty-four year old decision of

³³ *O.L.R.C. Report*, *supra* note 25, Vol. I, at 106.

³⁴ *Id.* The well-known judicial statement on this recommendation is in the dissenting judgment of Devlin L.J. in *Ingram*, *supra* note 2, at 67 (Q.B.), 347-48 (All E.R.), 525-26 (W.L.R.). It was discussed and rejected by the English Law Reform Committee's *Twelfth Report*, *supra* note 32, para. 13. The notion of apportionment of loss which the Ontario and the English Law Reform Commissions find difficult to accept is the rational and logical corollary of the tort notion of fault or negligence, which Rabin, *supra* note 4, at 1283, rejected. It is true that early in this century Lord Carson in the House of Lords' decision of *R.E. Jones Ltd. v. Waring and Gillow Ltd.*, [1926] A.C. 670 at 702, [1926] All E.R. Rep. 36 at 50, 135 L.T. 548 at 558 (H.L.) absolutely rejected these notions when they were included in the lower court judgment of Sargent L.J. However, since that time, there has been the American observation that "[c]ontract is dead," and that there is an absorption of contract into tort and there has been the invasion of tort into the area of mistake itself. Gilmore, *The Death of Contract* (Columbus: Ohio State Univ. Press, 1974) at 87-88, 103. Recently the House of Lords in *Saunders v. Anglia Bldg Soc'y*, [1971] A.C. 1004, [1970] 3 All E.R. 961, [1970] 3 W.L.R. 1078, accepted that a party pleading *non est factum* may be estopped by his own negligence from relying on the plea. In other mistake problems, the fault of the allegedly mistaken party may have an effect on his remedy, especially if the equitable approach to mistake is that found in some judgments, most notably those of Lord Denning in *Solle v. Butcher*, [1950] 1 K.B. 671, [1949] 2 All E.R. 1107, 66 T.L.R. 448; *Grist v. Bailey*, [1967] Ch. 532, [1966] 2 All E.R. 875, [1966] 3 W.L.R. 618, and *Magee v. Pennine Ins. Co.*, [1969] 2 Q.B. 507, [1969] 2 All E.R. 891, [1969] 2 W.L.R. 1278. For a recent discussion of contract and tort, see Reiter, "Contracts, Torts, Relations and Reliance," in Swan and Reiter, *supra* note 3, at 235.

³⁵ Sutton, *supra* note 14, at 58.

³⁶ [1977] N.Z. Stat., No. 54, s. 8.

³⁷ McCamus, *supra* note 30, at 61, 79.

³⁸ See Dobbs, *Handbook on the Law of Remedies* (St. Paul: West, 1973) at 745 where the suggestion is canvassed that if the losses can be apportioned in contracts avoided for mistake so should windfall gains.

³⁹ Rabin, *supra* note 4, at 1276.

the Supreme Court of Canada in *Prudential Trust v. Cugnet*⁴⁰ in order to free the courts for the more sensitive handling of the *non est factum* problem that was provided by the House of Lords in the recent decision of *Saunders v. Anglia Building Society*.⁴¹

As a basis for drafting some of the above features, McCamus suggests that the Rabin model "elegantly embodies a very satisfactory scheme for analysing mistake problems."⁴² A comparative analysis of the three models shows that Rabin's model is deficient in one or two respects, but this does not result in a similar shortcoming in McCamus's recommendations. McCamus was writing at a time when the *Restatement* and the New Zealand models were unpublished.⁴³ In their report on *The Sale of Goods Act*, the Ontario Law Reform Commission decided that McCamus's general recommendations on the reform of the law of contractual mistake should be "deferred for further study as part of the Law of Contract Amendment Project"⁴⁴ so that they could be properly examined "in the context of their relationship to other questions of contract law."⁴⁵ No doubt at that time consideration will have to be given to the recent developments in the area.

In addition to the recent developments in the reform of the law of contractual mistake, a law reform commission contemplating reform, such as is contemplated under the Ontario Law of Contract Amendment Project, should address itself to the reform of the area of 'mistake of law' generally. If the statutory trend is to eliminate the distinction between the mistake of law and the mistake of fact in the area of contractual mistake, then it is inconsistent to retain the distinction in the area of 'mistake of law' generally, for the reasons that have already been accepted in the reform of the area of contractual mistake. A recommendation to the legislature in one area of necessity requires a recommendation in the other. The reforms must be enacted together. Accordingly, the third part of this paper discusses the various statutory models reforming 'mistake of law' generally and it recommends that with minor revisions the New Zealand model is the most suitable for adoption.

The next step is to proceed to a discussion of the three statutory models reforming the law of contractual mistake: the Rabin model, the *Restatement*, and the New Zealand model.

⁴⁰ [1956] S.C.R. 915, 5 D.L.R. (2d) 1.

⁴¹ *Supra* note 34. The effect of this decision is open to debate in Canada. See *Commercial Credit Corp. v. Carrol Bros.* (1971), 16 D.L.R. (3d) 201 (Man. Q.B.), *aff'd* 20 D.L.R. (3d) 504 (Man. C.A.); *cf. Hall's Estate v. Warton* (1973), 4 N. & P.E.I.R. 587 (Nfld. S.C.), *aff'd* 8 N. & P.E.I.R. 1 (Nfld. C.A.).

⁴² McCamus, *supra* note 30, at 58.

⁴³ McCamus's paper, *id.*, is dated March 7, 1975; the foreword to the *Restatement's* tentative draft, *supra* note 7, is dated April 16, 1975; the N.Z. model appeared in draft form in the *Report* in May 1976, see text accompanying note 15, *supra*.

⁴⁴ *O.L.R.C. Report*, *supra* note 29, vol. I, at 107.

⁴⁵ *Id.* at 103.

III. THE LANGUAGE OF REFORM: COMPARING THREE STATUTORY MODELS OF CONTRACTUAL MISTAKE

A. *Definitions of Mistake*

Each of the reform measures establishes a definition that determines whether the court has jurisdiction to entertain a case of mistake. There is unanimous agreement in the elimination of the distinction between a mistake of fact and a mistake of law; the court is to treat them equally.

Rabin dispenses with the mistake of law and mistake of fact distinction in six lines, noting that it is now generally conceded among the commentators "that mistakes of law should be correctable as readily but no more readily than mistakes of fact."⁴⁶ Following the general agreement in this area, both the New Zealand and the *Restatement* dispense with the distinction. This is expressed in the New Zealand model by the definition that a "[m]istake" means a mistake, whether of law or of fact⁴⁷ and in the *Restatement* by the definition that "[a] mistake is a belief that is not in accord with existing facts."⁴⁸ Although on its face the *Restatement* definition excludes mistakes of law, the commentary maintains that "the law in existence at the time of the making of the contract [is] part of the total state of facts at that time."⁴⁹

In regard to the New Zealand definition of mistake, a matter of some concern to the Committee was that the definition of the court's jurisdiction not be left solely to the court's own discretion. The fear was that there was a danger that the doctrine of mistake "could well supersede all other heads of relief, becoming a universal remedy in the case of contract disputes."⁵⁰ In its draft bill, therefore, the Committee defines mistake as one of law or fact but proceeds to guide the court by stating that mistake also includes "erroneous opinion," "erroneous calculation," and "error in the manner in which a document is expressed."⁵¹ The Committee noted that errors of this sort "may be equally disastrous"⁵² and that, as a result, no "arbitrary restriction should be placed upon the ambit of any proposed reform."⁵³ The draft bill also excludes frustration from the court's jurisdiction.⁵⁴

These inclusions in the draft bill are omitted in the final model and for good reason. The provision excluding the ambit of frustration, for example, is already adequately covered by the explicit recognition in section 6 of the *time* of the mistake; a mistake is defined as an operative factor "in entering

⁴⁶ Rabin, *supra* note 4, at 1284.

⁴⁷ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 2(1).

⁴⁸ *Restatement*, *supra* note 7, §293.

⁴⁹ *Id.* at 11.

⁵⁰ *Report*, *supra* note 15, at 10.

⁵¹ *Id.*, s. 2(1) (b).

⁵² *Id.* at 12.

⁵³ *Id.* at 13.

⁵⁴ *Id.*, s. 2(1)(c).

into the contract" as well as the cause of unjust enrichment "at the time of the contract." The frustration provision of the draft bill specifically refers to the exclusion of "an event occurring or failing to occur after a particular contract is entered into."⁵⁵ It is difficult to appreciate Sutton's statement that "the earlier draft made the matter clear"⁵⁶ while the present Act does not. Moreover, Finn is correct when he says that the frustration provision

seems, as the Report admits, to exclude from relief some cases where the parties have contracted on the basis of a shared expectation as to future events, and it would seem contrary to the general principles of the Act to refuse relief in these cases where it would otherwise be given. Certainly as this limitation on "mistake" was deleted from the Bill, the courts may feel themselves free to give relief in such cases. . . .⁵⁷

The other inclusions in the draft bill do nothing more than "flesh out" the primary definition of mistake as one "of law or of fact," as the use of the word "includes" indicates. The *Restatement* states that such inclusions merely "flesh out" the primary definition and are unnecessary. For example, its primary definition is that "[a] mistake is a belief that is not in accord with existing facts"⁵⁸ and the commentary describes a mistake relating "to the contents or effect of a writing that expresses an agreement" as "an important sub-category" of its primary definition of mistake.⁵⁹ Apparently there is no need to articulate this in the definition itself. The New Zealand draft bill, however, expressly includes in its definition "[a]n error in the manner in which a document is expressed."⁶⁰

In another example, the *Restatement* commentary maintains that the word "mistake" in the primary definition "is used to refer to an erroneous belief"⁶¹ although this is not specifically expressed in the primary definition. The New Zealand draft bill's definition, however, expressly includes an "erroneous opinion"⁶² although it is unnecessary to do so. Moreover, subsection 6(1)(c) already includes errors of opinion in the Act since it refers to the party's "belief about the matter in question." It is unlikely that a court will not consider whether relief should be granted for an error of opinion and yet it may consider whether the applicant had assumed the risk of his opinion ("belief") when determining whether an error of fact had occurred.

Sutton laments the loss of the draft bill's definition maintaining that the alterations "saw the seeds of uncertainty where previously the definition was tolerably clear."⁶³ Is this really so? Not only are the inclusions unneces-

⁵⁵ *Id.*

⁵⁶ Sutton, "The Contractual Mistakes Bill 1977," in *Papers from the Commercial Law Seminar* (Auckland: Legal Research Foundation, 1977) 45 at 47.

⁵⁷ Finn, *The Contractual Mistakes Act 1977* (1979), 8 N.Z.U.L. Rev. 312 at 316.

⁵⁸ *Restatement, supra* note 7, §293.

⁵⁹ *Id.* at 1.

⁶⁰ *Report, supra* note 15, Draft Bill, s. 2(1)(b)(iii).

⁶¹ *Restatement, supra* note 7, at 9.

⁶² *Report, supra* note 15, Draft Bill, s. 2(1)(b)(ii).

⁶³ Sutton, *supra* note 56, at 46.

sary, but terms such as "opinion" and "matter of expectation" serve only to prolong the intolerable terminological muddle of the pre-statutory era.

It may be clear why the inclusions of the draft bill are unnecessary in the final model. In his comments on the New Zealand Act,⁶⁴ however, Lang contends that problems will arise due to their omission, particularly in regard to "erroneous opinion." He observes⁶⁵ that the Act is to be regarded as a code⁶⁶ that "shall have effect in place of the rules of the common law and of equity governing" mistake.⁶⁷ He argues, therefore, that situations such as "the mistaken *belief* that the subject-matter existed at the time of the contract"⁶⁸ or where "both *believed* that the party held the legal title to the property in question"⁶⁹ do not come within the ambit of the Act. His reasoning is that the mistake, according to the definition, must be a mistake of fact or law and the common law where "such mistakes have been held to be mistakes of fact,"⁷⁰ does not apply. Obviously Lang does not accept that the primary definition of mistake is capable of including such sub-categories as erroneous belief and erroneous written expression.

In a matter related to his argument on "erroneous opinion," Lang, following in the Committee's error,⁷¹ argues that a "situation where the common law would provide little help"⁷² is the situation that arose in *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co.*⁷³ The Court views the case as one dealing with a mistake of opinion and not a mistake of fact; the consequence of this characterization is that the case is excluded from the ambit of the New Zealand model even if future courts do refer to common law decisions in resolving mistake problems under the Act. In

⁶⁴ Lang, *Joshua Williams Memorial Essay 1978: The Contractual Mistakes Act 1977* (1978), 4 Otago L.R. 245.

⁶⁵ *Id.* at 247.

⁶⁶ Compare the criticism of Sutton, *supra* note 56, at 47:

How can a statutory reform be a "code," and at the same time an integral part of a much larger body of case and statute law? That is the question posed by Clause 4. The law governing the setting aside of contracts generally is like a "seamless web." A number of different lines of doctrine converge on any particular case in which the defence of mistake is raised. Among the most important are the rules governing offer and acceptance, the doctrine of the "implied term" in contract law, and the law of innocent misrepresentation. A case of mistake may also be dealt with by these other doctrines. Indeed, according to some theorists "mistake" does not exist as an independent doctrine at all; cases which appear to be cases of mistake are dealt with entirely by these other doctrines, when the law is properly analysed. How then can the new law be a "code"? You cannot do away with these other doctrines altogether, since they are not confined in their operation to cases of mistake. On the other hand, you cannot ignore them since their unfettered application might cut across what you are trying to do with the new law of mistake.

⁶⁷ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 5(1).

⁶⁸ Lang, *supra* note 64.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Report*, *supra* note 15, at 12-13.

⁷² Lang, *supra* note 64, at 247.

⁷³ [1953] 2 Q.B. 450, [1953] 2 All E.R. 739, [1953] 3 W.L.R. 497.

Rose v. Pim the plaintiff's London merchants received from their Egyptian house an order for up to 500 tons of "Moroccan horse beans described here as feveroles."⁷⁴ The plaintiffs did not know what feveroles were and enquired as to their meaning from the defendants. The defendants informed them that they were simply horse beans so the plaintiffs orally contracted to buy from the defendants a quantity of horse beans to meet this order. A subsequent written agreement embodied the same terms. In fact, however, feveroles were another type of bean, and the plaintiffs claimed to have the written agreement rectified to read feveroles, intending to claim damages on the agreement if so rectified.

Both the Committee and Lang maintained that the case concerns the issue of horse beans being "sold on the basis of an opinion, held by both parties, that they would pass as 'feveroles' in another part of the world"⁷⁵ and that at "common law, the mistake was held to be one of opinion and relief was denied."⁷⁶ However, nowhere in the case is the mistake described as one of opinion. Singleton L.J. describes the mistake in the following manner:

The facts which I have stated raise nice questions on the law of mistake. It is quite clear on the evidence that the parties . . . were under a common mistake. The defendants, the plaintiffs, and the Port Said firm of buyers all thought that "feveroles" meant horse beans, and that horse beans meant "feveroles." . . . It was under the influence of that mistake that they entered into those contracts for horse beans. The defendants were, of course, the cause of all the trouble. Thinking that "feveroles" just meant horse beans, they asked their Algerian supplier to supply horse beans, and he did so.⁷⁷

There is no suggestion in this description that the parties were of the opinion that the horse beans "would pass as 'feveroles' in another part of the world,"⁷⁸ as the Committee and Lang maintain. Denning L.J. describes the mistake:

This contract was made under a common mistake as to the meaning of "feveroles" and "horse-beans." This mistake was induced by the innocent misrepresentation of the defendants made to the buyers and passed on to the sub-buyers. As soon as the buyers and sub-buyers discovered the mistake, they could, I think, have rejected the goods and asked for their money back. The fact that the contract was executed would not be a bar to rescission. But once the buyers and sub-buyers accepted the goods, and treated themselves as the owners of them, they could no longer claim rescission. . . .⁷⁹

Moreover, relief was not denied in the case because the mistake was one of opinion, as Lang and the Committee suggest. Relief was denied because the facts of the case failed to satisfy the requirements of rectification which was the remedy sought. Denning L.J. states that it is true that both parties were under a mistake and that the mistake was of a fundamental character with regard to the subject matter. Nevertheless, the parties, to all

⁷⁴ *Id.* at 451 (Q.B.), 740 (All E.R.), 498 (W.L.R.).

⁷⁵ *Report, supra* note 15 at 12-13; Lang, *supra* note 64, at 247.

⁷⁶ *Id.*

⁷⁷ *Rose v. Pim, supra* note 73, at 459 (Q.B.), 746 (All E.R.), 502-503 (W.L.R.).

⁷⁸ *Supra* note 75.

⁷⁹ *Rose, supra* note 73, at 460-61 (Q.B.), 747 (All E.R.), 504 (W.L.R.).

outward appearances, were in agreement regarding a contract for the sale of goods described as horse beans. Once they had done that, nothing in their minds could make the contract a nullity from the beginning:

Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract.⁸⁰

B. *Types of Mistake*

Each of the three models approaches the classification of mistake in a different manner with the consequence that each model conducts its equitable resolution of mistake problems differently. While Rabin has disposed of the need for a mistake classification system altogether, the drafters of the *Restatement* and the New Zealand models have found it necessary to maintain three-way classification systems. The effect of the Rabin model is that all mistake problems are resolved by reference to the same criteria. For the New Zealand model the area of unilateral mistake is subject to additional criteria. In the *Restatement* model the unilateral mistake situation and the situation where both parties make different mistakes are subject to stricter criteria than when both parties make the same mistake.

The *Restatement* divides its three types of mistake into two descriptive situations: one where a mistake of both parties makes a contract voidable,⁸¹ and the other where a mistake of one party makes a contract voidable.⁸² This division appears to generate certain difficulties in interpretation which brings into question the usefulness of the provisions as models for statutory reform. According to the commentary, section 294 refers exclusively to the situation where both parties are under the same mistake and section 295 refers exclusively to the situation where either both parties are under different mistakes or only one party is under a mistake.⁸³ However, it can be argued that the language of the sections does not convey the commentary's meaning. Consider the language of section 294: "Where a mistake of both parties . . . was made as to a basic assumption . . . the contract is voidable by the adversely affected party." Unguided by the commentary, there is no indication that both parties must be under the same mistake. The language of the provision could possibly apply to a situation where both parties are mistaken about either the same basic assumption or different basic assumptions. In other words, the provision could be construed as the usual meaning of "mutual mistake." Whether the drafters of the provision and the commentators are relying on the word "both" to convey the exclusive meaning of "same" mistake is uncertain. It is used, however, in the *First Restatement* in the opposite context of "different" mistakes.⁸⁴ To remedy

⁸⁰ *Id.* at 461 (Q.B.), 747 (All E.R.), 504 (W.L.R.).

⁸¹ *Restatement*, *supra* note 7, §294.

⁸² *Id.*, §295.

⁸³ *Id.* at 24.

⁸⁴ *First Restatement*, *supra* note 8, §503.

the situation, it clearly would be preferable to have the word "same" added to the provision.

An argument might be put forward that reading section 294 together with section 295 will bring about the commentary's meaning of section 294. The argument would be that if section 295 clearly refers to the situations where either both parties are under different mistakes or one party is under a mistake, then section 294 must, by a process of elimination, refer exclusively to the situation where both parties are under the same mistake. This argument could be persuasive, but consider the language of section 295: "Where a mistake of one party . . . was made as to a basic assumption . . . that is adverse to him, the contract is voidable by that party." It is clear that the section applies to the case of unilateral mistake but it is less clear that it also applies to the situation where both parties make different mistakes. The more arguable position is that section 295, when read together with section 294, applies exclusively to cases of unilateral mistake. If the language of section 294 can be fairly construed to apply to the situation where both parties suffer the same mistake or different mistakes, then by a process of elimination the language of section 295 can only apply to cases of unilateral mistake.

The consequence of moving the situation where both parties make different mistakes from section 295 to section 294 is that the situation will be subject to fewer criteria than the *Restatement* intended in determining the avoidability of the mistake. In particular, section 294 has no knowledge or unconscionability requirement and may not have a fault requirement, though this is doubtful. The problematic inter-relationship of section 294 and section 295 and the ensuing results clearly do not make these provisions attractive candidates for statutory reform.⁸⁵

The New Zealand model defines its mistake classification system in unambiguous language such that no dispute will arise similar to that in the *Restatement*. It divides mistake into three distinct areas: (1) where one party was influenced by a mistake that was material to him,⁸⁶ (2) where all parties were influenced by the same mistake,⁸⁷ and (3) where at least two parties were each influenced "by a different mistake about the same matter of fact or of law."⁸⁸ The unilateral mistake situation differs from the other two with regard to the requirements that must be satisfied to make the section operative. In addition to the requirements shared with the others, it is necessary to prove that the "mistake was material to him" and that "the existence of the mistake was known to the other party."⁸⁹ These requirements are discussed under the headings "Materiality" and "Knowledge."⁹⁰

⁸⁵ Note that §§502-503 of the *First Restatement* are clearly expressed so as to avoid these problems.

⁸⁶ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 6(a)(i).

⁸⁷ *Id.*, s. 6(a)(ii).

⁸⁸ *Id.*, s. 6(a)(iii).

⁸⁹ *Id.*, s. 6(a)(i).

⁹⁰ Sections D and E, *infra*.

In classifying mistake under three areas, it is clear that the *Restatement* and the New Zealand models are employing, in descriptive terms, the mistake terminology of Cheshire and Fifoot:⁹¹ (1) unilateral mistake, (2) common mistake (where both parties share the same mistake), and (3) mutual mistake (where the parties are at cross-purposes). The adoption of these divisions in statutory reforms of the law of mistake goes some way to giving these models the status of orthodoxy, which they did not previously enjoy.⁹² Opposing the Cheshire and Fifoot divisions, which the New Zealand Legislature adopts, Sutton argues that "such distinctions may be found useful as a guide through the maze of the present law, [but] they hardly provide a rational basis for a statutory reform of mistake."⁹³ It is difficult to see how Sutton can argue this with regard to the three-way distinction employed by Cheshire and Fifoot but fail to see that the meaning of his statement applies equally well to the two-way distinction of unilateral and mutual mistake, which he tenaciously supports.

It is Rabin who provides the "rational basis" for the distinctions. He has no categories of mistake because he contends that the distinction between unilateral mistake and other types of mistake has no real bearing on the resolution of mistake problems.⁹⁴ The view he attacks is one exemplified by the position of the *First Restatement* and the *Restatement of the Law of Restitution*.⁹⁵ If A and B are mutually mistaken about a basic fact A may be relieved from his contract, but if only A is mistaken, he will not be granted relief unless B either knows or suspects A's mistake.

Rabin demonstrates the irrelevance of the distinction in resolving mistake disputes by comparing the results of certain examples from both a unilateral and a mutual mistake perspective.⁹⁶ Suppose A's store sells both cheap and expensive jewelry. A sells a stone to B for \$100 which B recognizes to be worth at least \$1,000 and which he suspects has been placed there by mistake. Rabin points out that, according to the *Restatement*, the mistake is unilateral since B was not mistaken but A was. A is entitled to relief, according to the *Restatements*, since B suspected A's mistake. Rabin argues, however, that this cannot be the reason for the relief because if B did not know the value of the jewel when he purchased it and did not suspect A's mistake, A would also be granted relief according to the *Restatements*. That mistake would have been a mutual mistake. Therefore, he concludes, under this type of case the unilateral nature of the mistake is irrelevant since A is entitled to relief whether the mistake is unilateral or not. Rabin goes on to

⁹¹ Cheshire and Fifoot, *Law of Contract* (London: Butterworths, 1976) at 206-207. The *Report*, *supra* note 15, at 15, states, however, that "[i]n adopting this terminology, we are aware that we are departing from the usage coined by Cheshire and Fifoot's *Law of Contract*, which will probably be more familiar to New Zealand lawyers."

⁹² McCamus, *supra* note 30, at 7.

⁹³ Sutton, *supra* note 14, at 50n. 51.

⁹⁴ Rabin, *supra* note 4, at 1277-79.

⁹⁵ *First Restatement*, *supra* note 8, §§502-503; Am. L. Inst., *Restatement of the Law of Restitution* (St. Paul: Am. L. Inst., 1937), §§9(3), 12 [hereinafter *Restitution*].

⁹⁶ For the following example, see Rabin, *supra* note 4, at 1278.

argue from the results of other examples that the characterization of mistake is equally unimportant when A is not entitled to relief.

If one applies the foregoing example to the Rabin model, there is no doubt that a more relevant and more acceptable explanation of the results arises. A would be entitled to relief because he did not assume the risk that the stone he sold was not costume jewelry and because the mistake resulted in an exchange that was grossly more unequal in B's favour than it would have been had the facts accorded with A's mistaken assumption. It is the fundamental principles articulated in the Rabin model rather than the bifurcation of mistake types, that provide, in Sutton's terms, "a rational basis for a statutory reform of mistake."⁹⁷

It appears that neither the drafters of the New Zealand model nor those of the *Restatement* were persuaded by Rabin's line of argument since both models employ mistake classification systems. Their approach, therefore, will have to be dealt with.

The *Report* upon which the New Zealand Act was based addresses the problem but does not go into sufficient detail to rebut Rabin's argument. It gives an example to substantiate its views.⁹⁸ If an insurance policy is sold and both parties believe that the person insured is alive when he is in fact dead, then there is a mutual mistake for which relief is likely to be given. If, however, the buyer of the policy knows that the person insured is dead or has no belief one way or the other, then the mistake is unilateral and the seller, according to the *Report*, will have much more difficulty in persuading a court to allow his relief, though in some instances he may succeed. The *Report* argues that this is logical because, in the first case, it is clear that "the price has been fixed upon an erroneous belief,"⁹⁹ resulting in the buyer's unjust enrichment because of the parties' mistake. In the second case it simply states, without going into detail, that "the buyer's unjust enrichment will be much less clear;" concluding that a distinction along these lines is "a justifiable basis for discriminating between deserving and undeserving claims for mistake."¹⁰⁰ The implication is that if the buyer knew that the person insured was dead, then the price was not "fixed upon an erroneous basis" (at least for one party), as it was in the first case; the buyer's unjust enrichment, therefore, would be much less clear.

An additional, and more explanative, support for the *Report's* adoption of mistake distinctions is to be found in Sutton's argument on this point in his research paper.¹⁰¹ Sutton takes up the discussion in the context of the knowledge factor which is discussed later. He argues that "[t]he state of mind of the opposite party is clearly relevant"¹⁰² to the equitable resolution

⁹⁷ *Supra* note 93.

⁹⁸ *Report, supra* note 15, at 15-16. The example is based on *Scott v. Coulson*, [1903] 2 Ch. 249, 72 L.J. Ch. 600, 88 L.T. 653.

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.*

¹⁰¹ Sutton, *supra* note 14, at 49-50.

¹⁰² *Id.* at 49.

of mistake problems; maintaining the position that the party against whom relief is sought must have either shared the mistake or known of it. If he does not, then obtaining relief is more doubtful: "On the other hand, where the error concerns a matter which is not in his mind, and is not relevant to him when he enters the contract, the contract will no doubt still appear to be a fair one as far as he is concerned, and there are stronger reasons to enforce it."¹⁰³

Sutton substantiates his position by an example which he says illustrates that there is "still some merit"¹⁰⁴ in the unilateral and mutual mistake dichotomy. Suppose A leases his premises to B who has some particular use of the premises in mind and he makes this known to A. Unknown to both parties a competing business is about to be set up nearby. Sutton argues that "there would probably be no operative mistake merely because, unknown to either party, a competing business is about to be set up nearby."¹⁰⁵ The reason he gives is that the "lessor has not 'shared' the lessee's mistake, because his rent is fixed without regard to the particular business the lessee has in mind."¹⁰⁶

Note how this observation relates to the two examples from the *Report*. In the first example, both parties believe that the insured is alive when he is in fact dead; relief is granted because "the price has been fixed upon an erroneous belief."¹⁰⁷ In the second example, the price is not fixed upon an erroneous belief and, therefore, there are stronger reasons to enforce the transaction.

Surprisingly, Rabin would not deny the results arrived at by Sutton and the *Report* in their examples. He agrees that "there are many cases where a unilateral mistake should not be corrected."¹⁰⁸ What he argues, however, is that these are the results "not *because* the mistake is unilateral"¹⁰⁹ but because of other reasons.

Take the example that Rabin employs in his demolition of the basic versus material distinction.¹¹⁰ It demonstrates how Sutton and the *Report* fail to emphasize the precise but obvious point before them. Suppose A sells B a wedding dress which B says is for his daughter D. Unknown to both parties D is at that moment dead. A refuses to take back B's dress. Suppose that at the same time B bought D's dress, he also bought an annuity for D on D's life, although D is at that moment dead.

Following the reasoning of the lease case, Sutton would argue that in the dress case there is a unilateral mistake. There would very likely be no operative mistake since A has not "shared" B's mistake because the price of

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 50.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Report, supra* note 15, at 16.

¹⁰⁸ Rabin, *supra* note 4, at 1279.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1282-83.

the wedding dress is affixed without regard to the state of being of B's daughter. If A sold the dress to someone else or if A leased his place to another person, he would fetch a very similar price, if not the same price. Contrarily, Sutton would no doubt argue, as the *Report* does, that in the insurance policy case there is a mutual mistake for which relief is likely to be given because it is clear that "the price has been fixed upon an erroneous basis."¹¹¹

Rabin's reasoning in his resolution of the two mistake problems is different. He argues that in "the annuity case the exchange would be unexpectedly unequal, and therefore A could get relief."¹¹² This conclusion accords with that of the *Report* when in using the same illustration it says that "the price has been fixed upon an erroneous basis and the buyer unjustly enriched as a result of the parties' mistake."¹¹³ In the dress case, however, contrary to Sutton and the *Report*, Rabin argues, consistent with his emphasis in the annuity case on the unjust enrichment factor, that "the mistake would not have affected the equality of the exchange, and therefore A could not get relief."¹¹⁴

The conclusion is that the results in these cases are the way they are *because* of the effect of the mistake on the price and not because the examples are characterized as either unilateral or mutual. Neither Sutton nor the *Report* sees this. Thus, both in Sutton's lease case and in Rabin's dress case the mistake did not affect the value of the exchange and therefore A could not get relief. However, in the insurance case the mistake did affect the value of the exchange and, therefore, B could get relief. The conclusions are arrived at, not because of the unilateral and mutual mistake distinction, but *because* of the unjust enrichment factor. Accordingly, the distinction is irrelevant to the equitable resolution of mistake problems.

C. Unjust Enrichment

In the Rabin model the factors that define the scope of unjust enrichment¹¹⁵ are: (1) that the mistake resulted in an exchange, (2) that the exchange was grossly unequal, and (3) that it was grossly more unequal than it would have been had the facts accorded with the parties' assumptions. According to Rabin, at some point in time, not necessarily at the time of the contract, the mistake must have caused an exchange that was grossly unequal, as measured by the difference between what the party "thought he was getting or giving because of his mistake and what he was actually getting or giving."¹¹⁶ Rabin specifically rejects the idea that the measurement of the gross inequality is to be "the disparity between what was given and what was received."¹¹⁷

¹¹¹ *Supra* note 107.

¹¹² Rabin, *supra* note 4, at 1283.

¹¹³ *Supra* note 107.

¹¹⁴ *Supra* note 112.

¹¹⁵ Rabin, *supra* note 4, at 1276-77 (I, B(2)).

¹¹⁶ *Id.* at 1289.

¹¹⁷ *Id.*

The difference between the two manners of measurement is significant and it is submitted that Rabin's adoption of one and his rejection of the other contradicts his general view of the irrelevance of a mistake classification system to the equitable resolution of mistake problems. This is suggested from the fact that he finds it important to examine what the *mistaken* party "thought he was getting or giving *because of his mistake*."¹¹⁸ This points to the context of a unilateral mistake situation. In support of his view, Rabin notes two American cases that show that "on occasion relief will be granted upon a mere showing that A received less or gave more than intended without any showing that the value of the things exchanged was actually unequal."¹¹⁹ An illustration will better clarify this point.¹²⁰

Suppose A and B contract for the sale of land whose fair price is \$100,000. Unknown to B the seller, A intends to develop the land and he mistakenly believes that it has access to the road. A's mistake has in no way been induced by B. A discovers that the land in fact does not have an access to the road and, thus, he wishes to rescind the contract. Under the manner of measurement that Rabin rejects, the contract would be enforced. B gave A a piece of land and in return A gave B the fair price of \$100,000. There is no "disparity between what was given and what was received."¹²¹ Under the manner of measurement that Rabin adopts, however, the analysis is different. Rabin would argue that to award B relief by way of specific performance would operate unduly harshly on A since A would be compelled to take a tract of land which he could not use for the purposes for which it was intended. In other words, Rabin would argue that the difference between what A received and what A thought he was receiving was so great that specific performance should be denied. This is, in fact, the decision of the case upon which this fact situation is based and it is one of the decisions upon which Rabin finds support for his approach.¹²²

Rabin's emphasis is clearly on what was intended by the unilaterally mistaken party. It is reliance on the mistaken classification system that Rabin rejects. Consider the discussion of the types of mistake in the previous section. The foregoing example is no different in fact from the lease case and the dress case previously analyzed. In these cases the mistaken party, according to Rabin, is not allowed to avoid the contract because the price of the dress or the rent of the premises is fixed independent of the parties. This can be no different than the sale of land case; B's price for the land is fixed independent of A's intended use of the land. Clearly, B could sell the land to someone else for the same price. What Rabin said of the dress case applies here too: A's "mistake would not have affected the equality of the exchange, and therefore A could not get relief."¹²³

¹¹⁸ *Id.* [Emphasis added.]

¹¹⁹ *Id.*

¹²⁰ The illustration is based on one of the American cases that Rabin notes, *id.* at 1289n. 78: *Perlmutter v. Bacas*, 219 Md. 406, 149 A.2d 23 (1959).

¹²¹ Rabin, *supra* note 4, at 1289.

¹²² *Supra* note 120.

¹²³ *Supra* note 4, at 1283.

Under Rabin's unjust enrichment analysis, however, the analysis that he employed in disposing of the mistake classification system is outrightly rejected. The analysis is not to proceed on "the disparity between what was given and what was received."¹²⁴ He relies on cases where relief is given to the mistaken party "without any showing that the value of the things exchanged was actually unequal."¹²⁵ In other words, relief is to be granted *because* it is a unilateral mistake and not because of other factors. If these observations are correct, the approach that is more consistent with Rabin's general outlook is the one that he has rejected rather than the one he has adopted.

The *Restatement's* approach to the unjust enrichment factor is similar to Rabin's with respect to the situation where both parties are mistaken.¹²⁶ The contract is voidable by the adversely affected party provided that certain conditions are met, one of which is that the mistake must have "a material effect on the agreed exchange of performances."¹²⁷ What constitutes "a material effect" in a transaction is indicated in the commentary. The party must show "that the exchange is not only less desirable to him but is also more advantageous to the other party."¹²⁸ In other words, it must be shown "that the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out."¹²⁹ In effect, the language of the *Restatement* has the same meaning as the language of the *First Restatement* where the contract is voidable "if enforcement of it would be materially more onerous. . . ."¹³⁰ In discussing this identical language as it is found in *Restitution*, Rabin interprets the *Restitution* language as referring to a mistake that "results in an exchange materially more unequal."¹³¹

There may, however, be one slight difference between the language of the Rabin model and the language of the *Restatement*. Under Rabin there is the requirement that the exchange must be "grossly more unequal"¹³² in favour of the other party. Under the *Restatement* the reference point is less precisely expressed as affecting "the agreed exchange of performances."¹³³ This vagueness leaves room for variable circumstances. The commentary states that "in exceptional cases" the adversely affected party may show that the effect is material "simply on the ground that the exchange has become less desirable for him, even though there has been no effect on the other party."¹³⁴ In other words, the *Restatement* is possibly free of the Rabin

¹²⁴ *Id.* at 1289.

¹²⁵ *Id.*

¹²⁶ *Restatement*, supra note 7, §294.

¹²⁷ *Id.*, §§294, 295.

¹²⁸ *Id.* at 16.

¹²⁹ *Id.* at 17.

¹³⁰ *First Restatement*, supra note 8, §502.

¹³¹ Rabin, supra note 4, at 1282.

¹³² *Id.* at 1276-77 (I, B(1)).

¹³³ *Restatement*, supra note 7, §§294, 295.

¹³⁴ *Id.* at 17.

requirement that the exchange must be "grossly more unequal" in favour of the other party.

The real difference between the two approaches to unjust enrichment appears in the other mistake situation under the *Restatement* where one party makes a contract voidable.¹³⁵ Here, in addition to the fact that the party must satisfy that the mistake had a material effect on the exchange, the party may have to show that "the effect of the mistake is such that enforcement of the contract would be unconscionable."¹³⁶ He may not have to show this, however, if he can come within one of the other requirements of knowledge or fault.¹³⁷ These requirements do not relate to the unjust enrichment factor. The unconscionability requirement is new to the *Restatement* and is added, according to the commentary, to protect the non-aggrieved party in situations of unilateral mistake since the "avoidance of the contract will more clearly disappoint the expectations of the other party than if he too was mistaken."¹³⁸

Under the Rabin model it will be recalled that the gross inequality must be more unequal than it would have been had the facts accorded with the adversely affected party's assumptions. According to the commentary, the additional requirement of unconscionability in section 295 goes farther than the Rabin requirement. The mistaken party "must ordinarily show, not only the position he would have been in had the facts been as he believed them to be, but also the position in which he finds himself as a result of his mistake."¹³⁹

The unjust enrichment provision of the New Zealand model can be divided into three parts: the mistake (1) resulted at the time of the contract, (2) in a substantially unequal exchange of values or (3) in the conferment of a benefit or obligation substantially disproportionate to the consideration. The model's use of the term "substantially" accords with the similar terms of "material" and "grossly" of the two other models. All three, therefore, express agreement that "the mere fact that a contract has been somewhat different from what was intended ought not to warrant relief."¹⁴⁰ The similar

¹³⁵ *Id.*, §295.

¹³⁶ *Id.*, §295(a).

¹³⁷ *Id.*, §295(b).

¹³⁸ *Id.* at 29.

¹³⁹ *Id.*

¹⁴⁰ *Report, supra* note 15, at 20. But consider the comment on s.5(1)(b) of the *Report's* Draft Bill in Harrison, *The Effect of Mistakes on Contracts* (1977), 3 *Recent Law* (N.S.) 24 at 27:

It is suggested that problems may arise in fitting these words to particular circumstances. Take the well known case of *Raffles v. Wichelhaus* (1864) 2 H. & C. 906, where by contract goods were to be shipped "ex Peerless" from Bombay; it transpired that the Plaintiff had in mind one ship "Peerless" and the Defendant another "Peerless," both leaving Bombay although at different times. If one party intended "Peerless One" and the other intended "Peerless Two," it can be said that their mistake resulted in a "substantially unequal exchange of values"? [*sic*] Or did it rather result in no exchange of values at all. . . . There is no doubt that the Committee intended the *Raffles v. Wichelhaus* situation to be covered, but it is suggested that the provision be redrafted so as to make clear that situations in which there is effectively no exchange of values or benefits conferred, etcetera, are included.

terminology prevents "a too free undoing of contracts by the courts,"¹⁴¹ thereby safeguarding the policy need of security in commercial transactions. The New Zealand model cautions that the powers of the new Act "are not to be exercised in such a way as to prejudice the general security of contractual relationships."¹⁴²

Unlike the Rabin and the *Restatement*, the New Zealand model is explicit and precise as to the time at which the effect of the mistake is gauged. The section provides that "the mistake or mistakes, as the case may be, resulted at the time of the contract — (i) In a substantially unequal exchange. . . ."¹⁴³ Lang notes that the New Zealand courts will, therefore, "not grant relief if the exchange of values becomes unequal *after* the contract is entered into,"¹⁴⁴ as for example, "through inflation or decline in the value of one of the objects of exchange."¹⁴⁵ The explicit recognition of this is important since the only remedies that are available to the kind of inequality that results after the contract is entered into are in the area of frustration or commercial impracticability. Under the Rabin and *Restatement*, however, a literal rendering of their provisions possibly makes room for mistake situations where the exchange of values becomes unequal after the contract is entered into. Both models read ambiguously. The Rabin model reads: the party is under a mistake "concerning matters existing at the time of the transaction . . . [and] the mistake resulted in an exchange that was grossly more unequal. . . ."¹⁴⁶ The *Restatement* reads: "a mistake . . . at the time a contract was made . . . has a material effect on the agreed exchange."¹⁴⁷ It is true that both models clearly express the fact that the mistake must be at the time of the contract. Both are ambiguous, however, as to *when* the mistake makes an exchange grossly unequal.

The two other aspects of the New Zealand model may be dealt with briefly. In comparison with the language of Rabin and the *Restatement*, the language of "values" and "benefit or obligation" in the New Zealand provi-

¹⁴¹ Rabin, *supra* note 4, at 1289.

¹⁴² *Report, supra* note 15, Draft Bill, s. 4(2). In commenting on this section, Finn, *supra* note 57, at 318, writes that: "[w]hen the courts are given a very free hand in each individual case it is very strange to find such a provision. It was apparently inserted by the Statutes Revision Committee as a result of submissions by various concerned commercial groups." Compare Sutton, *supra* note 56, at 48-49:

There is, of course, the admonitory statement about the "general security of contract relationships" in the last line, but the import of that is obscure. A court, indeed, may make contract relationships more secure if it interferes freely in cases of mistake, since the parties are then secure against the risk of having the words of their contract turned against them in situations to which the parties never thought they would apply. Naturally the courts will want to take into account any acts that the other party has honestly taken relying on the contract, and they are given broad powers under the new legislation to conform their remedies to that end, so he too will be "secure" in his transaction.

¹⁴³ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 6(b)(i).

¹⁴⁴ Lang, *supra* note 64, at 253.

¹⁴⁵ *Id.* at 253n. 37.

¹⁴⁶ Rabin, *supra* note 5, at 1276-77, (I, B(2)).

¹⁴⁷ *Restatement, supra* note 7, §§294, 295.

sion is unacceptable. Employing the term "values," for example, may give cause for the court to limit its considerations to monetary values. Although the second part of the provision referring to "benefit or obligation" may permit the court the flexibility to consider unequal exchanges of a non-monetary nature, Lang argues that the part applies to situations "where there has been no actual exchange of goods or payment of money," namely, in situations "where a debt has been incurred or a credit has been extended as a result of the mistake."¹⁴⁸ The language of Rabin and the *Restatement* is, however, more acceptable because it is vaguer. Neither uses the term "values" and non-monetary considerations are in no way prohibited.

D. Knowledge

The knowledge factor, which is incorporated in all three models, does not pose problems of interpretation. There are, however, two significant differences between the models. First, the Rabin and the *Restatement* employ an 'actual versus constructive' knowledge approach while the New Zealand model does not. Under Rabin, the issue is whether the non-aggrieved party "knew or should have known"¹⁴⁹ that the aggrieved party was mistaken. Under the *Restatement* the issue is whether "the other party had reason to know of the mistake."¹⁵⁰

Unlike the Rabin and the *Restatement*, the New Zealand model employs a strict 'actual knowledge' requirement. It applies only to the unilateral mistake situation while the Rabin and the *Restatement* 'actual and constructive' requirements apply to the situation where both parties make different mistakes as well as to the situation where only one party is mistaken. Of course, no knowledge requirement is necessary in the situation where both parties make the same mistake.

Under the New Zealand model the issue is whether the existence of the mistake was known to the other party.¹⁵¹ There is no constructive knowledge criterion. The *Report*, leading up to the New Zealand model, addresses the actual versus constructive problem when it poses the question whether relief should be available in situations where the mistake "ought reasonably to have been apparent to the other parties, but where the evidence falls short of estab-

¹⁴⁸ Lang, *supra* note 64, at 253. Consider the point made by Finn, *supra* note 57, at 316:

Yet it is possible to think of cases of unfairness where this test will prevent relief being given. If A. seeks to purchase from B. a large house on a small section but by innocent error, of which B. is aware, signs a contract for a small house on a large section, it could certainly be contended that A. has been treated unfairly. Yet the properties may have roughly equal values, in which case the Act will not allow the relief that would have been available at common law. Perhaps this sort of case will see the courts inventing some element of obligation so as to apply the latter part of the subsection.

¹⁴⁹ Rabin, *supra* note 4, at 1276-77, (I, B(1)).

¹⁵⁰ *Restatement*, *supra* note 7, §295(b).

¹⁵¹ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 6(a)(i). Cf. Sutton, *supra* note 14, at 49: "The party against whom relief is sought must have *shared the mistake or known of it.*"

lishing actual knowledge of the mistake."¹⁵² Adopting Sutton's position, which has already been discussed, the *Report* concludes that relief should not be available in such a situation on the principle that contract law "is concerned with the enforcement of agreements independently of the question whether such agreements were prudently or imprudently made."¹⁵³ The *Report* argues that the appropriate inquiry is solely "whether or not the parties were in agreement."¹⁵⁴

It appears that the New Zealand position is not in accord with the reasons espoused in that country's reform writings on the law of mistake and that it should not be advocated. To exclude from the consideration of relief a party who ought to have known of the other party's mistake is to offend the stated purpose of the New Zealand Act, which is "to mitigate the arbitrary effects of mistakes."¹⁵⁵ Harsh consequences may result for the mistaken party regardless of whether the knowledge of the non-aggrieved party is actual or constructive and it is hard to see how it is not being arbitrary to limit the knowledge factor to situations of actual knowledge. Sutton, in a manner that contradicts his support for the adoption of actual knowledge alone,¹⁵⁶ argues against the *Report's* focus of inquiry. He maintains that in the law of mistake "the courts should not be concerned to advance a theoretical notion of 'consent' but to protect the parties to the contract against the unfortunate consequences of a mistake."¹⁵⁷ The *Report* claims that the appropriate inquiry is "whether or not the parties were in agreement."¹⁵⁸ The proper position is that adopted by Lang who recommends that knowledge should only be relevant to the "quantum or nature of relief."¹⁵⁹ Whether the knowledge is actual or constructive "is not relevant as a determinant of the court's jurisdiction to entertain an application for relief."¹⁶⁰

An additional concern of the *Report* is how a court is to tell whether a person did in fact know that the other party was mistaken. The *Report* notes that the courts will not be "precluded from granting relief by a self-serving protestation of ignorance of the mistake,"¹⁶¹ but it does not direct the courts as to how they are to distinguish between such protestations and genuine declarations of ignorance.

The second significant difference in the models is the fact that the New Zealand and the *Restatement* require that both the knowledge factor *and* the unjust enrichment factor be satisfied to qualify for consideration for relief. In the Rabin model, however, the party is required only to establish the

¹⁵² *Report*, *supra* note 15, at 17.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 4(1).

¹⁵⁶ Sutton, *supra* note 14, at 49.

¹⁵⁷ *Id.* at 50.

¹⁵⁸ *Report*, *supra* note 15, at 17.

¹⁵⁹ Lang, *supra* note 64, at 252.

¹⁶⁰ *Id.*

¹⁶¹ *Report*, *supra* note 15, at 17.

knowledge factor or the unjust enrichment factor, in addition to the consideration, unique to the Rabin model, of establishing "any equitable defense such as estoppel, or a change of position."¹⁶²

This is a difference that can be attributed to the fact that the New Zealand and *Restatement* support a mistake classification system while Rabin does not. Unlike Rabin, the concern of the *Restatement* and the New Zealand models is to permit avoidance in the unilateral mistake situation in only extreme cases, since avoidance will more clearly disappoint the expectations of the other party who is not mistaken.¹⁶³ The stricter requirement of a knowledge factor and an unjust enrichment factor achieves this end.

Rabin's approach is consistent with his view that mistake must be approached as a classless concept. By requiring knowledge or unjust enrichment, however, he no longer pays heed to the unjust enrichment factor which he says must be of a "gross" nature to "safeguard against a too free undoing of contracts by the courts."¹⁶⁴ If the knowledge factor is satisfied and if the requirements of the Rabin model are satisfied in other respects, then the contract is voidable by the party regardless of the fact that the contract may not be a grossly unequal exchange. The unjust enrichment factor does not apply at all to safeguard against a too free undoing of contracts by the courts.

E. Materiality

Under the Rabin model, before a mistaken party can get relief, it must be established that he entered into the contract under a mistake and that he would not have entered into it but for that mistake. According to Rabin this is how the mistaken party will establish "a material mistaken assumption."¹⁶⁵ The effect of this requirement is clearly supportable. It would be undesirable to allow a party to obtain relief from the burden of a contract which, notwithstanding his mistake, he would have entered anyway. Nor must he be permitted to resile from a contract which he suddenly decides is not to his advantage merely by using the mistaken assumption as an excuse.

The *Restatement's* requirement appears to be stricter. The mistake must be made as to "a basic assumption . . . which . . . has a material effect."¹⁶⁶ The language is similar to that of the *First Restatement*¹⁶⁷ and *Restitution*,¹⁶⁸ which Rabin attacks for two related reasons. He attacks it because of the basic 'fact and material fact' distinction that it employs. He also attacks it because the "basic assumption" requirement "rests in part upon a mere hostility to restitution for mistake."¹⁶⁹ This second reason for attacking the *Restatement's* language is clearly evident in the *Restatement's* commentary. The

¹⁶² Rabin, *supra* note 4, at 1276-77, (I, A).

¹⁶³ *Restatement*, *supra* note 7, at 29.

¹⁶⁴ Rabin, *supra* note 4, at 1289.

¹⁶⁵ *Id.* at 1276-77, (II, A).

¹⁶⁶ *Restatement*, *supra* note 7, §§294, 295.

¹⁶⁷ *First Restatement*, *supra* note 8, §502.

¹⁶⁸ *Restitution*, *supra* note 95, §9.

¹⁶⁹ Rabin, *supra* note 4, at 1281.

commentary refers to the "material effect" requirement in Rabin's terms but it goes on to add the "basic assumption" requirement. Even if party A proves beyond question that Party B and he laboured under a mistake and that he would not have entered into the contract but for the mistake, relief would still be denied unless the mistaken party could also show that the mistake was one which upset "the very basis for the contract."¹⁷⁰ According to the commentary "[r]elief is only appropriate in exceptional situations [*sic*]."¹⁷¹

This hostility to relief for mistake is persuasively attacked by Rabin who argues that, like the unilateral mistake and mutual mistake distinction, the basic fact and material fact distinction is irrelevant to the resolution of mistake problems. He uses as illustration the previous examples of a parent buying a wedding dress and an annuity for his daughter who unknown to him is at that moment dead. He observes that in both cases the daughter's "life was a 'basic' assumption of all parties"¹⁷² but that the results were different depending on the equality or inequality of the exchange. According to Rabin, the "basic assumption" requirement is intended only to ensure (1) the mistake is material, (2) it actually occurred, and (3) it resulted in an unequal exchange. He contends that his model focuses attention on these objectives without the need of a basic fact and material fact distinction.

In agreeing with Rabin's argument, McCamus singles out the third objective: "Rabin's defence of his draft is persuasive however; the 'basic' or 'fundamental' requirement commonly found in current judicial statements of mistake doctrine have as their purpose restriction of relief to cases where severe unjust enrichment problems arise."¹⁷³

It is only Rabin who establishes a specific burden of proof requirement in regard to his requirement of a "material mistaken assumption."¹⁷⁴ He argues that the aggrieved party must prove his error to be material "by clear and convincing evidence"¹⁷⁵ rather than by the usual civil standard of a balance of probability. He gives two reasons for this requirement.¹⁷⁶ First, the aggrieved party's state of mind is a matter concerning which the other party is at a distinct disadvantage. Second, the aggrieved party is seeking to avoid a contract that he has freely entered into, and he is seeking to take from the other party the benefit of a bargain on which that party had every right to rely.

Rabin notes that the authorities agree¹⁷⁷ that there is the need for a standard of "clear and convincing evidence." He points out that when "it is seen that a heavy burden of proof is appropriate the reason behind many of

¹⁷⁰ *Restatement, supra* note 7, at 13.

¹⁷¹ *Id.*

¹⁷² Rabin, *supra* note 4, at 1283.

¹⁷³ McCamus, *supra* note 30, at 60.

¹⁷⁴ Rabin, *supra* note 4, at 1276-77, (II, A).

¹⁷⁵ *Id.*

¹⁷⁶ Rabin, *supra* note 4, at 1287.

¹⁷⁷ *Id.* at 1286n. 70.

the conventional rules in this area becomes evident."¹⁷⁸ The rules, he says, "are attempts to impose a heavy burden of proof."¹⁷⁹ Among the examples given, he argues that the basic fact and material fact distinction and the palpable versus impalpable distinction, both of which he discards, tend to ensure that the existence of the mistake be proved by very strong evidence.

The problem of materiality arises in the New Zealand model in the particular language of the unilateral mistake situation: "That party was influenced in this decision to enter into the contract by a mistake that was *material to him*."¹⁸⁰ The phrase "material to him" is an addition to the Act after the draft bill and it may be a problematic addition. For one thing, it is less precise than the *Restatement's* "a material effect on the agreed exchange"¹⁸¹ and, it may not carry the equivalent meaning. Conceivably, the mistake that is material in influencing a party to enter a contract will either not have a material effect on the transaction or not be the mistake that does have a material effect on the transaction if the party makes more than one mistake. The language puts the emphasis on how the mistake is material to the party (a subjective evaluation) rather than, as in the *Restatement*, how the mistake is material to the transaction (an objective evaluation). Neither of the other two types of mistake in the New Zealand model have this problem, however, since there is no requirement of materiality in these provisions.

An additional problem in the New Zealand model is created by the requirement that the party be "*influenced* in his decision to enter into the contract"¹⁸² by a mistake. This is a change from the draft bill where it was required that the party prove that he "*relied*"¹⁸³ on the mistake and it is a change that applies to all three types of mistake. Replacing "relying on a mistake" with "influenced in his decision" definitely discloses a shift in emphasis to the effect of a mistake on the decision to enter a contract. If in entering a contract the party relied on the mistake, he is in a position analogous to that of Rabin's party who was under a material mistaken assumption. To show that he relied on the contract he would have to show that he would not have entered into the contract but for this mistake. If in entering the contract, however, the party was merely "influenced" in his decision to enter it by a mistake, the party must only show that the mistake was one of the factors which he considered in deciding whether to enter the contract. In the New Zealand model there is, therefore, no requirement that the party prove that he would not have entered the contract but for the mistake. This requirement may expose the model to abuses similar to those the Rabin model sought to prevent. For example, if a party enters the contract while not relying on the mistake, he may still obtain relief from the burden of the contract.

¹⁷⁸ *Id.* at 1287.

¹⁷⁹ *Id.*

¹⁸⁰ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 6(a)(i).

¹⁸¹ *Restatement*, *supra* note 7, §§294, 295.

¹⁸² *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 6(a)(i).

¹⁸³ Report, *supra* note 15, Draft Bill, s. 5(a)(i).

F. Risk of Error

Each of the three models addresses itself to the risk of error factor and although none of them poses serious problems of interpretation each has a different ambit of applicability.¹⁸⁴

The narrowest of the three is the New Zealand model, which provides that the court may grant relief to any party where the party "seeking relief . . . is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken."¹⁸⁵ A similarly intended, but more succinct, expression is found in one of the sub-sections to the new risk of error section of the *Restatement*.¹⁸⁶ It maintains that the party bears the risk when "it is allocated to him by agreement of the parties."¹⁸⁷ As the *New Zealand Report* states, the reasoning that lies behind this condition is that if "the parties have provided for the events that have occurred, then it seems impossible to argue that their contract has become inappropriate to the real situation, which they did not know."¹⁸⁸ "If the parties have provided for a mistake, they must have seen that it was at least a possibility."¹⁸⁹ The only foreseeable problem with regard to this condition is effectively interpreting the contract to discern the express or implied assumption of risk. "In the case of the implied assumption of risk, strict requirements must be satisfied before such an implication is made."¹⁹⁰

While the New Zealand model has only one condition where a risk of error applies, the *Restatement* has two additional conditions, one of which shows the influence of the Rabin model both in form and expression. Section 296(b) of the *Restatement*, like Rabin,¹⁹¹ states that a party cannot get relief for mistake when he knows that certain facts are uncertain but he elects to proceed in any case, thereby assuming the risk of those facts turning out contrary to his expectations. It is sometimes said that in such a situation the party proceeds under "conscious ignorance."¹⁹²

The *Restatement's* third condition includes Rabin's similar but narrower condition reflecting the concern of security and finality of commercial transactions.¹⁹³ Under Rabin, the risk may be imposed "by custom or necessity . . . regardless of the actual awareness of the risk, in the absence of any ex-

¹⁸⁴ For a recent discussion of risk in mistake, see Swan, "The Allocation of Risk in the Analysis of Mistake and Frustration," in Swan and Reiter, *supra* note 3, at 181.

¹⁸⁵ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 6(c).

¹⁸⁶ *Restatement*, *supra* note 7, §296.

¹⁸⁷ *Id.*

¹⁸⁸ *Report*, *supra* note 15, at 19.

¹⁸⁹ Lang, *supra* note 64, at 254.

¹⁹⁰ *Id.* Note 41 refers the reader to *B.P. Refinery (Westernport) Pty Ltd. v. Shire of Hastings* (1977), 52 A.L.J.R. 20 at 26, 16 A.L.R. 363 at 376 *per* Lord Simon of Glaisdale (P.C.).

¹⁹¹ Rabin, *supra* note 4, at 1276-77, (II, B(1)).

¹⁹² See *e.g.*, McTurnan, *An Approach to Common Mistake in English Law* (1963), 41 Can. B. Rev. 1 at 3.

¹⁹³ *Cf.* text accompanying notes 140-41, *supra*.

press contrary understanding."¹⁹⁴ Under the *Restatement*, a party bears the risk when "it is allocated to him by a term supplied by the court on the ground that it is reasonable in the circumstances to do so."¹⁹⁵ To illustrate this condition, both Rabin and the *Restatement* employ the example¹⁹⁶ of the seller of farmland who later learns that the land has valuable mineral deposits. The seller did not consciously assume the risk that these existed since he never even considered the possibility; however, the court allocates the risk to him "because the possibility of undiscovered minerals existing on the land is always present."¹⁹⁷

Under the Rabin model there are two other conditions in which the risk factor may operate that are not explicitly canvassed by the *Restatement*. First, the risk factor operates subject to "countervailing social policies."¹⁹⁸ For example, public policy may intervene and demand that relief be awarded where, in a personal injuries case, a party, knowing that the full extent of his injuries is uncertain, signs a form releasing an insurance company from further liability.¹⁹⁹ This Rabin condition may be implied in the *Restatement* in section 296(c).

The second condition is that the party assumes the risk when he "makes certain representations" to the other party and "expressly or impliedly promises that [he] will make good any loss if the facts are not as represented."²⁰⁰ Rabin bases this provision on the well-known case of *McRae v. Commonwealth Disposals Commission*²⁰¹ where the defendant had contracted to sell to the plaintiff an oil tanker that did not exist. It is likely that this condition is covered by the provision shared by both the New Zealand and *Restatement* models where the party bears the risk of the mistake when "it is allocated to him by agreement of the parties."²⁰² This broader condition failed to be canvassed by Rabin in his model.

G. Fault

Rabin in his model disregards the relevancy of fault in mistake altogether, agreeing with Patterson that "the negligence of the mistaken party is really irrelevant," that it is a "vituperative epithet" often rationalizing a court's decision reached on other grounds.²⁰³ Rabin's position, however, is no longer tenable in view of the recent application of carelessness as a criterion in the law of mistake relating to *non est factum* and in view of the growing

¹⁹⁴ Rabin, *supra* note 4, at 1276-77, (II, B(2)).

¹⁹⁵ *Restatement*, *supra* note 7, §296(c).

¹⁹⁶ Rabin, *supra* note 4, at 1295; *Restatement*, *supra* note 7, at 42.

¹⁹⁷ Rabin *supra* note 4, at 1295.

¹⁹⁸ *Id.* at 1276-77, (II, B(3)).

¹⁹⁹ *Id.* at 1294-95.

²⁰⁰ Rabin, *supra* note 4, at 1276-77, (II, B(3)).

²⁰¹ (1951), 25 A.L.J. 425, [1951] A.L.R. 771, 84 C.L.R. 377 (H. Ct. Aust.).

²⁰² *Restatement*, *supra* note 7, §296(a).

²⁰³ Rabin, *supra* note 4, at 1283n. 59; Patterson, *Equitable Relief for Unilateral Mistake* (1928), 28 Colum. L. Rev. 859 at 885.

application of other aspects of tort to the resolution of contract problems generally.²⁰⁴

The introduction of fault is a welcomed development simply because a party can often avoid a mistake by the exercise of reasonable care. Suppose B invites bids for the construction of a building and A submits an offer to do it for \$150,000.²⁰⁵ In totalling the figures, A inadvertently omits a \$50,000 item and in fact the total is \$200,000. On finding that A's bid is the lowest, B asks A to check his figures to make certain that there has been no mistake. A replies that he has done so even though he really has not and although the check would have revealed his mistake. B then accepts A's bid. Under Rabin's rule, A's carelessness would not be taken into account by the court when deciding whether to grant relief to A or to what extent it should grant him relief.

The two other models do, however, address the problem. The *Restatement* formulates its requirement quite narrowly, maintaining that the mere fact that a mistaken party is at fault "in failing to know or discover the facts before making the contract" does not preclude "avoidance or reformation under the rules stated in this chapter."²⁰⁶ It only does so where "fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing."²⁰⁷ Although fault is only expressly mentioned in section 295(b) as a consideration to be assessed by the court, section 299 indicates that it applies to all "the rules stated in this Chapter," namely, avoidance under section 294 and section 295 and reformation under section 297.

According to the commentary to the *Restatement*, the terms "good faith" and "fair dealing" are meant to hold each party "to a degree of responsibility appropriate to the justifiable expectations"²⁰⁸ of the other party during the pre-contractual negotiations. Thus, in the above example, A's careless conduct would preclude his avoidance of the contract under the requirement of section 299. Suppose, however, that A's mistake is caused by his failure to exercise reasonable care in totalling his figures. According to the commentary,²⁰⁹ A's carelessness does not amount to a failure to act in good faith and in accordance with reasonable standards of fair dealing. He is, therefore, not precluded from avoiding the contract. The court is not permitted to weigh this failure to exercise reasonable care in order to help alleviate what may be a harsh result for the other party.

The New Zealand model couches its fault provision in more open-ended language: "The extent to which the party seeking relief . . . caused the mistake shall be one of the considerations . . . in deciding whether to grant relief."²¹⁰ Although the court is required to take the fault factor into consideration, it is not clear where the focus of the provision is. One suggestion could

²⁰⁴ Gilmore, *supra* note 34.

²⁰⁵ *Restatement*, *supra* note 7, at 66, illustration 2 (§299).

²⁰⁶ *Id.*, §299.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 66.

²⁰⁹ *Id.* at 66, illustration 1.

²¹⁰ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 7(2).

be that if the extent of the party's fault in causing the mistake is great enough, it will be a factor in deciding whether to grant or to deny relief. The provision does not mean that the party whose fault caused the mistake will be denied relief outright. The provision, rather, can be viewed in a manner similar to that of the *Restatement*, which bars relief only where there is a failure to act in good faith and in accordance with reasonable standards of fair dealing.

A second suggestion arises from the New Zealand Committee's *Report*; the Committee does not include a fault provision in its draft bill but it does address the problem. It argues that in order to refuse relief altogether where there is carelessness, regard must be given "to whether that carelessness has caused loss, and, if so, what the extent of that loss was."²¹¹ This is in accord with the underlying spirit of the New Zealand model that requires the courts to look at the fact of the mistake and the consequences that flow from it. It also singles out the essential weakness of the *Restatement* approach. The operation of its fault provision depends not on the effect of the fault on the transaction but on the degree of the fault involved. Thus, in the bid example, the Committee would not focus on the fact that A did not re-check his figures upon request, though he said he did, but rather it would focus on what effect this had on the transaction. The examination of the extent of the fault's effect is clearly the better focal point. The other view appears to penalize the person rather than remedy the transaction. In answering the *Restatement's* question: "Is the use of the 'good faith and fair dealing' standard of section 231 appropriate here?"²¹² The answer is definitely in the negative.

The Committee makes another worthwhile point and one that should be addressed in any future fault provision. It argues that the criterion of carelessness "may be relevant in apportioning any loss that has been occasioned to the parties as a result of their transactions."²¹³ In other words, carelessness should go to the extent of the granting of relief and not, as in the present New Zealand model and in the *Restatement* provision, to whether there will be any relief. This is an extension of the views, already referred to, regarding apportioning loss in third party situations.²¹⁴ It is also in accord with the general resistance to the "all or nothing" approach which "sometimes makes it difficult for the courts to do complete justice."²¹⁵

Thus, the *Report* argues that where a contract is avoided because of mistake the court should look to its effect on the parties and determine to what extent one of the parties has suffered loss as a result of the carelessness of the other party.²¹⁶ In such a situation the party at fault should make recompense to the other party as a condition of being granted relief from the contract. In the bid example, if A's mistake is caused by his failure to be careful in totalling the figures, then this should be a factor in considering the extent of relief. If A, however, is careful in his totalling, then the relief should

²¹¹ *Report*, *supra* note 15, at 6.

²¹² *Restatement*, *supra* note 7, at xi.

²¹³ *Supra* note 211.

²¹⁴ See text accompanying note 34, *supra*.

²¹⁵ Sutton, *supra* note 14, at 45.

²¹⁶ *Supra* note 211.

be more in A's favour than it would have been had he been careless. The scale of measurement is, therefore, the following: extremely careless, careless, and careful.

H. Nature of Relief

The Rabin model does not set out to establish a relief system that frees the courts to resolve mistake problems in a more equitable manner. Its aim is to deal "only with A's right to rescind the contract,"²¹⁷ and, as a result, it does not question the "all or nothing approach of relief characteristic of the common law where a court's discretion to determine whether to allow rescission is not entirely free but specifically limited to either allowing rescission *in toto* or not at all." The New Zealand and *Restatement* models, however, do confront the issue by providing the courts with comprehensive discretionary relief systems.

In the New Zealand remedial system, which is found in section 7 of the model, the court is given the discretion to resolve mistake problems "as it thinks just"²¹⁸ and "as [it] thinks fit."²¹⁹ The particular techniques that are subsumed under the general power are not restrictive of this discretion whatsoever, but rather serve to illustrate the models' reply to the "all or nothing" approach. Thus, a court may declare a contract to be valid "in whole or in part or for any particular purpose."²²⁰ It may vary or cancel²²¹ a contract, or grant relief by way of restitution or compensation. It may also vest in any party to the proceedings any property forming the subject-matter of the contract or in consideration for the contract.

The *Restatement* model has a similar effect on the "all or nothing" approach by virtue of section 300(1). This sub-section permits the court to employ any of the techniques provided for in the remedies chapter²²² in order to achieve justice in a claim for relief. It also specifically mentions the techniques on restitution²²³ that are a part of the remedies chapter and the rule

²¹⁷ Rabin, *supra* note 4, at 1276.

²¹⁸ *Contractual Mistakes Act, 1977*, [1977] N.Z. Stat., No. 54, s. 7(3).

²¹⁹ *Id.*, s. 7(6).

²²⁰ *Id.*, s. 7(3)(a).

²²¹ Lang, *supra* note 64, at 256 makes the following suggestion as to the meaning of "cancel" (s. 7(3)(b)) under the New Zealand model:

"Cancellation" will probably have the effects of "cancellation" as laid down in the draft Contractual Remedies Bill which is now before the Statutes Revision Committee. This Bill is based upon a draft Bill prepared by the Contracts and Commercial Law Reform Committee as part of the *Report on Misrepresentation and Breach of Contract*. Under clause 8(3) of the Bill, cancellation has the following effects:

- (a) So far as the contract remains unperformed at the time of the cancellation, no party shall be obliged or entitled to perform it further;
- (b) So far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract.

²²² Am. L. Inst., *Restatement (Second) of the Law of Contracts*, Tentative Draft No. 14 (Philadelphia: Am. L. Inst., 1979) §§358-99 [hereinafter *Tent. Draft 14*].

²²³ *Id.*, §§384-91.

on part performances as agreed equivalence.²²⁴ Thus, for example, a court may require the "restoration of a specific thing" or it may award "a sum of money to prevent unjust enrichment"²²⁵ or it may give a judgment declaring the legal rights of the parties.²²⁶

If the judicial techniques available for the resolution of mistake problems by virtue of section 300(1) "will not avoid injustice the courts may grant relief on such terms as justice requires including protection of the parties' reliance interests."²²⁷ This general discretionary power is a recent amendment to the sub-section²²⁸ which previously limited the court's discretion to the more restrictive duty of supplying a term to the contract²²⁹ which is reasonable in the circumstances. Under the new amendment, the court's ability to resolve mistake problems is advanced beyond the stage of applying the numerous techniques of a remedies chapter to a discretionary relief system such as that enjoyed under the New Zealand model.

I. Concluding Remarks

This investigation of the three statutory models shows that none of the models is suitable for adoption on its own. Any reform body, such as the Ontario Law Reform Commission, which is considering an improvement of the area through statutory intervention, must proceed toward reform by recognizing all three of the models' imperfections and their individual salient features. Accordingly, a new model for reform will have to be developed.

The results of this investigation indicate that in developing a new model for reform the most fundamental issue is whether to adopt a mistake classification system. It is argued that Rabin persuasively demonstrates the irrelevance of a mistake classification system to the equitable resolution of mistake problems. It is, accordingly, recommended that this approach be adopted.

The other problem of distinctions in the models is easily disposed of. Following general authority, each of the reform models eliminates the distinction between a mistake of fact and a mistake of law. The only caution here is the importance of choosing the most suitable definitional formulation by which the distinction is to be eliminated in order to avoid creating latent technical problems like those posed by the critics in the New Zealand model.

In developing a new model for reform, considerable attention must be given to the factors to be employed in arriving at the equitable resolution of mistake problems. While it is clear that the New Zealand model provides a more comprehensive discretionary relief system than the recent amendment to the *Restatement*, it is impossible to implement such a system properly

²²⁴ Am. L. Inst., *Restatement (Second) of the Law of Contracts*, Tentative Draft No. 8 (Philadelphia: Am. L. Inst., 1973) §265.

²²⁵ *Tent. Draft 14*, *supra* note 222.

²²⁶ *Id.*

²²⁷ *Supra* note 222, at 306.

²²⁸ *Id.*

²²⁹ *Restatement*, *supra* note 7, §300(2).

without a clear understanding of the nature of the factors involved and the extent to which they are to be applied.

With regard to the unjust enrichment factor it is clear from the analysis that none of the present models offers a problem-free provision. Indeed, the manner of measurement of unjust enrichment that Rabin adopts is inconsistent with his general view of mistake; the one he rejects should be adopted. Although both Rabin and the *Restatement* provide open-ended phraseologies, neither enjoys the precision of the New Zealand provision as to the time at which the effect of the mistake is to be gauged for the purpose of determining unjust enrichment. Thus, a future reform endeavour should accept that the measurement of unjust enrichment is to be the disparity between what was given and what was received and this measurement is to be gauged at the time of entering the contract.

In regard to the materiality factor, the adoption of the provision of the Rabin model, which requires that a party show by clear and convincing evidence that he would not have entered into the contract but for the mistake, is recommended. The *Restatement* requirement suffers from the basic fact and material fact distinction and the New Zealand model, with its requirement that a party only be influenced by a mistake to enter a contract, does not place sufficient emphasis on the effect of the mistake on the decision to enter a contract.

Among the remaining factors there are two formulations in the models' provisions which should be considered. The *Restatement* formulation of the risk of error factor has the careful, succinct expression and comprehensive ambit of applicability to recommend it over the other two. The fault factor, which is in only two of the models, is better expressed in the New Zealand provision than in the *Restatement* provision because it has more open-ended language focusing attention on the effect of the fault on the transaction rather than on the degree of the fault involved. In neither of the fault provisions, however, is the role of the fault factor broad enough; it is recommended that if the New Zealand provision is adopted, it should be broadened to include "quantum of relief." This recommendation applies equally to the knowledge factor in the new reform model. It is maintained that in any future reform the knowledge factor should also be relevant to the quantum of relief and, therefore, should include both actual and constructive knowledge.

IV. STATUTORY MODELS REFORMING MISTAKE OF LAW GENERALLY

A. *Background to the Statutory Models*

The foundation of the modern rule that precludes relief on the basis of a mistake of law is the 1802 decision of Lord Ellenborough in *Bilbie v. Lumley*.²³⁰ In that case underwriters paid a claim with full knowledge of all the facts, including the fact that the assured had previously withheld material

²³⁰ (1802), 2 East 469, 102 E.R. 448 (K.B.). This is the traditional view. Sutton argues "that the judgments delivered in *Kelly v. Solari* created and justified the rule as it is known today." Sutton, *Kelly v. Solari: The Justification of the Ignorantia Juris Rule* (1966-67), 2 N.Z.U.L.R. 173 at 174.

information at the time of formation. The underwriters were under the mistaken belief that the assured's withholding constituted no legal defence against the claim. Relief from the money payment was denied by Lord Ellenborough on the ground that although the underwriters knew the facts they were in error as to the applicable law. He applied to the case the criminal law maxim that "[e]very man must be taken to be cognizant of the law."²³¹

The decision has been accepted by the courts since that time²³² despite various criticisms against the distinction between mistakes of law and mistakes of fact. Attacking the historical accuracy of the decision, Keener²³³ and Woodward,²³⁴ for example, have pointed to at least five antecedent decisions that might have been cited by Lord Ellenborough; for example, in *Lansdown v. Lansdown*,²³⁵ the application of the criminal law maxim to any civil suit was expressly denied by Vice-Chancellor King.²³⁶ Keener also argues for the social undesirability of such an application: "The very phraseology of the rule that ignorance of the law excuses no one, implies a charge of delinquency. . . . but where one is seeking to recover money paid under mistake of law, he is not trying to excuse a delinquency on his part; he is not trying to throw a loss on anyone."²³⁷

The disfavour with which the rule has been viewed has given rise to many exceptions, the extent of which are indicated in *Restitution*.²³⁸ Commenting on the exceptions to the rule, Corbin, with whom Williston agrees on this point,²³⁹ specifically suggests that "the time has come to say that the

²³¹ *Bilbee, id.* at 471 (East), 449 (E.R.).

²³² The Judicial Committee of the Privy Council, however, has recently held that a plaintiff may recover money paid on a mistake of law provided that he is not *in pari delicto* with the defendant: *Kiriri Cotton Co. v. Dewani*, [1960] A.C. 192, [1960] 1 All E.R. 177, [1960] 2 W.L.R. 127. In *Eadie v. Corporation of Brantford*, [1967] S.C.R. 573, 63 D.L.R. (2d) 561, the Supreme Court of Canada adopted and extended Lord Denning's observations in the *Kiriri Cotton* case. In the United States restitution has been given for mistake of law, without the aid of legislation, in Connecticut, Kentucky and Minnesota and there are scattered decisions in other states to the same effect: Palmer, *3 Law of Restitution* (Toronto: Little, Brown, 1978) at 344.

²³³ Keener, *Treatise on the Law of Quasi-Contracts* (New York: Baker, Voorhis, 1893) at 85-86.

²³⁴ Woodward, *The Law of Quasi-Contracts* (Boston: Little, Brown, 1913) §§34-35.

²³⁵ (1730) Mos. 364, 25 E.R. 441 (L.C.).

²³⁶ See Goff and Jones, *The Law of Restitution* (2nd ed. London: Sweet & Maxwell, 1978) at 90-91n. 5, where the historical accuracy argument of Keener and Woodward is attacked.

²³⁷ *Supra* note 233, at 90-91.

²³⁸ *Restitution* states the general rule in §45: "Except as otherwise stated in §§46-55, a person who, induced thereto solely by mistake of law, has conferred a benefit upon another to satisfy in whole or in part an honest claim of the other to the performance given, is not entitled to restitution." The sections cited as exceptions indicate the extent to which the rule has been judicially modified: §46, satisfaction of non-existent obligation, when restitution granted; §47, payment upon a void agreement; §48, failure of purpose; §49, gratuitous transactions; §50, mistake as to size of grantor's interest; §51, mistake as to legal effect of grant; §52, purchase of non-existent interest; §53, services and improvements; §54, performance of another's duty or discharge of lien against his property; §55, benefit obtained by fraud or misrepresentation.

²³⁹ Williston, *13 A Treatise on the Law of Contracts* (3d ed. Rochester: Baker, Voorhis, 1970) §1582.

exceptions now make the rule, that social policy requires that mistake of law and mistake of fact be treated alike, and that in granting relief for mistake the attention of the court should be directed to the other factors in the case."²⁴⁰ It is the conclusion of the Reporters to the *Restatement*, moreover, in the course of an extended review of the decisions, that "aside from the cases involving the extinguishment of a supposed obligation, there is no large mass of cases denying recovery."²⁴¹

When a case does not fall within the exceptions to the rule, the distinction between a mistake of law and a mistake of fact can be largely evaded by the decision of the court to treat the case as one of mistake of fact when it might well have been categorized as a mistake of law.²⁴² Sometimes, however, the distinction has caused great practical difficulties for the court in trying to determine whether a mistake is one of law or of fact.²⁴³ This may be due to the illogical nature of the distinction.²⁴⁴

²⁴⁰ Corbin, 3 *Corbin on Contracts* (St. Paul: West, 1960) §616.

²⁴¹ Seavey and Scott, *Notes on Certain Important Sections of Restatement of Restitution* (St. Paul: Am. L. Inst, 1937) at 37.

²⁴² As in *George (Porky) Jacobs Enterprises Ltd. v. City of Regina*, [1964] S.C.R. 326, 44 D.L.R. (2d) 179, 47 W.W.R. 305, where a misunderstanding occurred over a by-law requiring payment of licence fees. In giving the judgment of the Supreme Court of Canada, Hall J. reasoned at 329-30 (S.C.R.), 182 (D.L.R.), 307-308 (W.W.R.):

Dealing, first, with the question of whether the mistake was one of fact or of law, I am of opinion that it was a mistake of fact. I agree with Brownridge J. when he states that the distinction between what is a mistake in law and what is a mistake in fact is often one of difficulty but I do not see the distinction here as being a difficult one. Interpretation of the amending by-laws 2741 and 3043 was never in question in the action. These by-laws never purported to stipulate for a per day fee. There was no mistake either of fact or of law in respect of what the by-laws actually said. The mutual mistake of fact here was as to the existence of one or more by-laws calling for a licence fee on a per day basis. Both the licence inspector and Jacobs believed that such by-laws existed in fact but they did not actually exist at all so the mistake is one as to the fact of the existence of the by-laws and not one of interpretation of by-laws that in any way purported to stipulate for a per day fee.

²⁴³ See Winfield, *Mistake of Law* (1943), 59 L.Q. Rev. 327.

²⁴⁴ Consider the remarks in *Northrop's Executors v. Graves*, 19 Conn. 548 at 554 (1849), quoted in Cameron, *Payments Made Under Mistake* (1959), 35 N.Z.L.J. 4 at 5, where the Connecticut Court departed from the rule and granted relief:

But we mean distinctly to assert, that, when money is paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law; and this we insist, may be done, both upon the principle of Christian morals and the common law. And such only was the doctrine of the charge to the jury, in the present case. In such a case as we have stated, there can be no reasonable presumption that a gratuity is intended; nor is the maxim *Volenti non fit injuria*, at all invaded. The mind no more assents to the payment made under a mistake of the law, than is made under a mistake of the facts; the delusion is the same in both cases; in both alike, the mind is influenced by false motives.

Cf. Note, *Mistake of Law: A Suggested Rationale* (1931), 45 Harv. L. Rev. 336 at 338, where it is argued that the distinction between mistake of fact and mistake of law is justifiable because mistake of fact is likely to be "objectively ascertainable," whereas "the evidence of mistake of law must be found almost entirely within the minds of the parties."

The statutory reform of the law of contractual mistake, as has been seen, requires that the distinction between a mistake of law and a mistake of fact be eliminated because, among other things, the distinction does not contribute to the equitable resolution of contractual mistake problems. The reasons for the elimination of the distinction apply no less to mistake problems arising from a mistake of law generally. If the law of contractual mistake is to be reformed, then 'mistake of law' should also be reformed. Accordingly, the various statutory models of reform in this area are investigated.

B. Pomeroy's Model

In *Cooper v. Phibbs*,²⁴⁵ a decision of the House of Lords in 1867, one party leased land from another in the mistaken belief that the latter was the owner when in fact the former was the owner. This mistaken belief arose out of a mistake of law by reason of the effect of a public statute upon a private settlement. In holding that the party who leased the land was entitled to a decree setting aside the lease, Lord Westbury formulated an exception where the ignorance is not of the general or ordinary law of the country but of some private right or *jus*. He maintained that in the maxim "*ignorantia juris haud excusat*" "when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application" and he concluded that "[p]rivate right of ownership is a matter of fact."²⁴⁶

Pomeroy observed that Lord Westbury's distinction "would furnish a clear, definite, and in some respects a desirable criterion."²⁴⁷ Thus, he formulated a statutory model from it that disregarded the rule disfavouring restitution of benefits conferred under mistake of law where the mistake can be categorized as a mistake as to the claimant's own antecedent and existing private legal right, interests or estate. The text, the language of which remained the same through all five editions, reads as follows:

Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact.²⁴⁸

Although Pomeroy regarded the model as a limited rule for relief to be distinguished from a pure and simple mistake as to the general law of the land,²⁴⁹ it has been suggested that the model "is broad enough to encompass *all* mistakes that originate in the mistake of law."²⁵⁰ According to Palmer, a party entering into or carrying out a transaction that has legal consequences

²⁴⁵ (1867), L.R. 2 H.L. 149, 16 L.T. 678, 15 W.R. 1049.

²⁴⁶ *Id.* at 170 (L.R.), 683 (L.T.), 1053 (W.R.).

²⁴⁷ Pomeroy, *2 A Treatise on Equity Jurisprudence* (4th ed. Rochester: The Lawyers' Pub. Co., (1918) §843.

²⁴⁸ *Id.*, §849.

²⁴⁹ *Id.*, §843.

²⁵⁰ Palmer, *supra* note 232, at 478.

invariably never makes a mistake as to a general rule of law. "It will always be, in Pomeroy's formulation, a mistake as to 'private legal rights, interests, estates, duties, liabilities, or other relation'."²⁵¹ In reviewing the case-law that has applied the Pomeroy formulation, Palmer observes, however, that while the courts have applied it when the mistake relates to interests in property, they have either ignored or rejected it when the mistake relates to rights or liabilities under a contract.

A case-law which already provides an "arbitrary and sometimes erratic application of the Pomeroy formula"²⁵² may create problems if the model is adopted as a statutory reform of the area. More importantly, however, the essential weakness of the Pomeroy model is its oblique way of resolving the problem, even if it is, as Palmer suggests, "broad enough to encompass *all* mistakes that originate in a mistake of law."²⁵³ Since Pomeroy himself regarded it only as a limited rule for relief, the model does not expressly reject the view that relief will be denied merely because the mistake is one of law. Nor does it expressly adopt the view that relief will not be denied merely because the mistake is one of law rather than of fact. Such guidance for the court is essential to the resolution of the problem.

C. American Models

An example of the clear guidance that is lacking in the Pomeroy model is the provision formulated by the American Law Institute in *Restitution* where "a person who has paid money or otherwise conferred a benefit" under a mistake of law is to be denied restitution only if "he would not have been so entitled had the mistake been one of fact."²⁵⁴ Much of the enacted U.S. legislation, however, is not so clear. In particular, there are a number of states that have adopted the same legislative provision. This legislation is discussed in some detail. Additionally, there is the unique position held by Georgia.

In Georgia²⁵⁵ a distinction is drawn between a mistake of law and ignorance of law since "[m]ere ignorance of the law . . . shall not authorize the intervention of equity."²⁵⁶ The inference is that if the mistake was made in ignorance of the law, relief is barred; yet if in mistake of law, relief is permitted. The distinction between mistake of law and ignorance of law is well illustrated in *American Surety Co. v. Groover*²⁵⁷ where the court quotes from the Georgian decision of *Culbreath v. Culbreath*:²⁵⁸ "Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is

²⁵¹ *Id.*

²⁵² *Id.* at 479.

²⁵³ *Supra* note 250.

²⁵⁴ *Restitution*, *supra* note 95, §44.

²⁵⁵ See *Equity*, 12A Ga. Code Ann., §§37-203, 37-204, 37-205 and 37-209 (1979).

²⁵⁶ *Id.*, §37-209.

²⁵⁷ 64 Ga. App. 865, 14 S.E.2d 149 (1941).

²⁵⁸ 7 Ga. 64 at 70, 50 Am. Dec. 375 at 379 (1849).

criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake, but a mistake always involves ignorance, yet not that alone."²⁶⁰

Unlike Georgia, however, a number of states²⁶⁰ have all adopted statutory language²⁶¹ similar to that first adopted in California in 1872:

Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
2. A misapprehension of the law by one party, of which the others are aware at the time of the contracting, but which they do not rectify.²⁶²

The language of the Californian provision is modelled on that of the Field Code, which was a civil code completed in 1865 by Field and his associates. His code, which was passed by the New York Legislature, but later vetoed by that State's governor, was adopted by California with some changes in 1872.²⁶³

It is generally agreed that the results of this statutory attempt to reform the general area of 'mistake of law' have been less than startling. Goff and Jones observed that "the decisions of these 'exceptional' American jurisdictions differ little from those of their more conservative neighbours."²⁶⁴ Another writer states that the results "have not been very satisfactory, because of the stringent and narrow judicial interpretations the statutes have received."²⁶⁵ Particular examples abound. On the one hand, the North Dakota court held that the provision only applied to rescission of contracts entered into under mistake of law,²⁶⁶ while on the other hand, Montana declined to follow the North Dakota position and held the provision to apply to recovery

²⁵⁹ *Supra* note 257, at 152, (S.E.2d), 870 (Ga. App.).

²⁶⁰ Montana, Oklahoma, North Dakota and South Dakota.

²⁶¹ *Contracts*, 6 Mont. Code Ann., §§28-2-408, 28-2-410 (1979); *Contracts and Obligations*, 1 N.D. Cent. Code Ann., §§9-03-12, 9-03-14 (1975); *Contracts*, Okla. Stat. Ann., §§15-62, 15-64 (1972); *Contracts*, 15 S.D. Comp. Laws Ann., §§53-4-8, 53-4-10 (1967).

²⁶² *Civil Code*, 8 West's Cal. Code Ann., §1578 (1973).

²⁶³ Lewinsohn, *Contract Distinguished From Quasi Contract* (1913-14), 2 *Cal. L. Rev.* 171n. 1. In another article, Lewinsohn, *Mutual Assent in Contract Under the Civil Code of California* (1913-14), 2 *Cal. L. Rev.* 345 at 366n. 94, reference is made to the criticism of the Field Civil Code in Pollack, *Indian Contract Act* (3d ed. n.p., n.d.) at ix.

This code is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced. It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsmen's more or less satisfactory understanding of them. The clauses on fraud and misrepresentation in contracts . . . are rather worse, if anything, than the average badness of the whole.

²⁶⁴ *Supra* note 236, at 91n. 9.

²⁶⁵ Comment, *Relief for Mistake of Law* (1935), 4 *Fordham L. Rev.* 466 at 469.

²⁶⁶ *Chrysler Light and Power Co. v. City of Belfield*, 58 N.D. 33, 224 N.W. 871, 63 A.L.R. 1337 (1929); Dawson and Palmer, *Cases on Restitution* (New York: Bobbs-Merrill, 1969) at 872n. 107.

of payments made under mistake of law.²⁶⁷ Whereas Oklahoma²⁶⁸ has taken the provision to be merely declaratory of the common law rule in *Bilbie v. Lumley*,²⁶⁹ California has held that recovery will be permitted only if the payment is involuntary.²⁷⁰

In addition to the courts' reactions to the provision, one writer singles out its essential weakness; a flaw which discredits any serious recommendation of it as a model for reform. Speaking in the context of the California Civil Code,²⁷¹ Marean²⁷² discusses the definition of mistake of law together with the definition of mistake of fact. Both definitions provide the ambit in which relief for mistake can be granted under other sections in the Code;²⁷³ anything that does not fall within this ambit is ineligible for relief.

Marean notes that mistake of fact is defined under section 1577 as "[a]n unconscious ignorance or forgetfulness of a fact" or as a "[b]elief in the present [or past] existence of a thing." Mistake of law has its ambit as well. While "sub section 2 contains an element of fraud which affords an obvious ground of relief," Marean observes that the ambit of mistake of law in subsection 1 excludes unilateral mistake as a ground of relief. He states that the "modification which the statute makes is that it allows rescission and restitution where the mistake of law was *mutual*; its weakness is that it confines relief to such a case."²⁷⁴ This observation does not accord with Williston's remark that the distinctions between mistakes of law and fact seem also wholly abolished by the Civil Code of California, the provisions of which have been copied in Montana, North Dakota, Oklahoma, and South Dakota.²⁷⁵

In a manner very much like Rabin's handling of the unilateral mistake and mutual mistake distinction, Marean articulates an approach to the reform of 'mistake of law' generally, which is consistent with the contemporary approach to the reform of contractual mistake. He writes that "the result should not turn on whether the mistake was mutual or unilateral, rather that the true basis for a recovery lies in the principle of unjust enrichment, and the enrichment is no less unjust where the mistake is one of law."²⁷⁶ He, therefore, recommends a reform of the 'mistake of law' area similar to the broader New York provision as a possible model.

²⁶⁷ *McFarland v. Stillwater County*, 109 Mt. 544, 98 P.2d 321 (1940); Camp, *Quasi Contracts: Recovery of Money Voluntarily Paid Under Mistake of Law* (1950), 3 Okla. L. Rev. 338 at 340.

²⁶⁸ *Palmer v. Cully*, 52 Okl. 1454, 153 P. 154 (1915); Camp, *id.*

²⁶⁹ *Bilbee*, *supra* note 230.

²⁷⁰ *Gregory v. Clabourgh's Executors*, 129 Cal. 475, 62 P. 72 (1900); Palmer, *supra* note 230, at 345.

²⁷¹ *Civil Code*, 6-12 West's Cal. Code Ann (1973).

²⁷² Marean, *Restitution for Money Paid Under Mistake of Law* (1968), 19 Hastings L.J. 1225.

²⁷³ *Civil Code*, 9 West's Cal. Code Ann., §§1689, 1692 (1973).

²⁷⁴ *Supra* note 272, at 1228.

²⁷⁵ *Supra* note 239.

²⁷⁶ *Supra* note 272, at 1231.

The New York provision was adopted in 1942²⁷⁷ following a report and recommendation of the New York Law Revision Commission.²⁷⁸ That Commission, in recommending the modification of the rule denying recovery in cases of mistake of law, argued that the rule was "arbitrary" and had "no sound basis."²⁷⁹ The approach that they recommended was to remove the handicap of the distinction between mistakes of fact and of law, cautiously noting, however, that "[r]elief may not be justified in every case involving a mistake of law, and the rules which have been developed in cases of mistake of fact may not be properly applicable in their entirety."²⁸⁰ Yet, they wisely did not attempt the almost impossible task of laying down the cases in which relief against a mistake of law should or should not be recoverable. They left this task to the courts: "If the maxim which precludes relief, however, is abrogated, the courts will be afforded a freedom to act which is now denied, and general rules, appropriate to cases involving a mistake of law, may be developed."²⁸¹ Accordingly, what is now section 3005 of the New York *Civil Practice Law and Rules* reads as follows: "When relief against a mistake is sought in an action or by way of counterclaim, relief shall not be denied because the mistake was one of law rather than one of fact."²⁸²

In addition to section 44 of *Restitution*, this is the first reform model expressly articulating the essential guiding rule for the courts. In reviewing the caselaw prior to the 1957 decision of the New York Court of Appeals in *Mercury Machine Importing Corp. v. City of New York*,²⁸³ one commentator concludes that the "judicial decisions that have cited this statute have displayed a liberal attitude in favor of giving effect to its purpose."²⁸⁴ As a result of the *Mercury* decision, however, this liberal attitude has declined to the point that "[t]he approach of the New York courts is equally [as] cautious"²⁸⁵ as that of their counterparts in regard to the Field Code.

The *Mercury* case involved an action by three taxpayers to recover taxes paid under a New York taxation law. The taxpayers had paid the taxes prior to a decision of the United States Supreme Court that held the law to be unconstitutional. Among their submissions the taxpayers relied on what was then section 112-f of the New York *Civil Practice Act*²⁸⁶ contending that, since the distinction between mistakes of law and mistakes of fact was abolished by the provision, the taxes were recoverable. The taxes, it was accepted

²⁷⁷ Originally adopted as §112-f of the *Civil Practice Act*, 1942, it is now *Civil Practice Law and Rules*, 7B McKinney's Consol. Laws N.Y. Ann., §3005 (1973).

²⁷⁸ N.Y., Law Revision Comm'n, *N.Y. Legis. Doc.*, 1942, No. 65B.

²⁷⁹ *Id.* at 31; Note, *Mistake of Law* (1958), 4 N.Y. L.F. 431 at 433.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Civil Practice Law and Rules*, 7B McKinney's Consol. Laws N.Y. Ann., §3005 (1973).

²⁸³ 3 N.Y. 418, 144 N.E.2d 400, 1655 N.Y. Supp. 2d 517.

²⁸⁴ Patterson, *Improvements in the Law of Restitution* (1954-55), 40 Cornell L.Q. 667 at 676.

²⁸⁵ Goff and Jones, *supra* note 236.

²⁸⁶ *Supra* note 277.

by the Court, were paid under a mistake of law and under New York law recovery may be had where the tax has been paid due to mistake of fact.

The Court of Appeal, with two judges dissenting, concluded that section 112-f did not apply. The dissentients, however, felt that the provision did apply and justified a recovery for the taxpayers. In the course of the majority opinion, the Court maintained a position similar in manner to the Law Revision Commission's caution that "the rules which have developed in cases of mistake of fact may not be applicable in their entirety"²⁸⁷ to a mistake of law situation. In emphasizing the use of the word "merely" in section 112-f, they stated that the provision "is not drafted in such manner as to place mistakes of law in all respects upon a parity with mistakes of fact. . . it removes technical objections in instances where recoveries can otherwise be justified by analogy with mistakes of fact."²⁸⁸ The essential purpose of the statute is to "afford to the court . . . the power to act in appropriate cases involving mistake of law."²⁸⁹ As summarized by the annotator of the *Civil Practice Law and Rules*, the result of the *Mercury* case for the new provision is "that one cannot draw a total parallel between a mistake of law and a mistake of fact and permit undoing of the transaction for a law mistake whenever it is shown that a fact mistake would undo it."²⁹⁰

The effect of the *Mercury* case, and the essential disadvantage of the New York provision, is the fact that it does not do away with the mistake of law and mistake of fact distinction. It brings reform no closer to the Rabin contemporary view as articulated by Marean:²⁹¹ first, "that the true basis for a recovery lies in the principle of unjust enrichment" and second, that "the enrichment is no less unjust where the mistake is one of law"²⁹² than it is where the mistake is one of fact. Instead of doing away with one distinction, the reform provision has compounded the matter such that the court is now obliged to follow a two-stage procedure. First, the court must decide whether the mistake is a mistake of law or a mistake of fact, and second, if it is decided that the mistake is a mistake of law, the court then must decide whether it is one of the "appropriate cases" within the area of mistake of law that justifies recovery. This new artificiality will either create a further "hair-splitting" distinction to get the case to fit into that "appropriate" area of mistake of law, or it will be ignored altogether and the old trick of arguing that the mistake of law is in fact a mistake of fact²⁹³ will be used to arrive at the same conclusion.

A better support for the *Mercury* decision is one that prevents the necessity of interpreting the reform provision at all. In considering the unsatis-

²⁸⁷ *Supra* note 278.

²⁸⁸ *Mercury*, *supra* note 284, at 427 (N.Y.), 404 (N.E.), 521-22 (N.Y. Supp. 2d).

²⁸⁹ *Id.* at 427 (N.Y.), 404 (N.E.), 522 (N.Y. Supp. 2d).

²⁹⁰ Commentary C3005:1, *Civil Practice Law and Rules*, 7B McKinney's Consol. Laws N.Y. Ann., §3005, at 558.

²⁹¹ *Supra* note 272, at 1231.

²⁹² *Id.*

²⁹³ See, e.g., *supra* note 242.

factory consequences of holding that whenever a reversal of law occurs (settlements made on the faith of pre-existing law might be upset) it could be maintained, on policy grounds, that relief cannot be claimed on the basis that as the result of a court's decision the law as it was commonly understood to be, has now been mistaken by the parties. Indeed, this is the solution adopted by the New Zealand model which is examined next. It is upon the New York provision that the New Zealand model bases its reform.

D. *New Zealand Model*

The most recent attempt to reform 'mistake of law' has been made by the New Zealand Legislature when it enacted the *Judicature Amendment Act 1958*.²⁹⁴ By this legislation two new sections were inserted into the *Judicature Act 1908* to provide relief in respect of payment made under mistake of law.²⁹⁵ These sections were subsequently adopted, with some changes, by Western Australia in the *Law Reform (Property, Perpetuities and Succession) Act, 1962*.²⁹⁶

The wording of sub-section 1 of section 94A follows substantially that of the New York section:

Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any Court whether in an action or other proceeding or by way of defence, set-off, counterclaim, or otherwise, and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact.²⁹⁷

Unlike the New York provision, the operation of the New Zealand section is restricted to "payments made under mistake of law" likely because "the most frequently encountered situation in which the rule is applied is that of voluntary payment of money under mistake."²⁹⁸ Cameron, in his brief note explaining the purpose and effect of sections 94A and 94B, observes that the "use of this phrase rather than the term 'money paid' should make it clear beyond argument that the section covers payment made by way of cheque or

²⁹⁴ [1958] N.Z. Stat., No. 40.

²⁹⁵ *Id.*, ss. 94A, 94B.

²⁹⁶ [1962] W. Aust. Acts, No. 83. There are two significant changes. The latter part of s. 24(1), which is the equivalent of s. 94B, reads differently from the New Zealand provisions in the following way: "[h]aving regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief, or to grant relief in full." There is also an additional subsection (s. 24(2)), which is not present in the New Zealand provision: "Where the Court makes an order for the repayment of any money paid under a mistake, the Court may in that order direct that the repayment shall be by periodic payments or by instalments, and may fix the amount or rate thereof, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit." For a brief discussion of the latter part of s. 24(1) see Braybrooke, *Review of Legislation* (1963-64), 6 U.W. Aust. L. Rev. 224 at 233.

²⁹⁷ *Judicature Amendment Act 1958*, [1958] N.Z. Stat., No. 40.

²⁹⁸ *Supra* note 265, at 467.

other negotiable instrument."²⁹⁹ Sutton, in his examination of these sections, does not make this precise distinction but agrees with Cameron that the phrase "disregards transfers of other forms of property."³⁰⁰ He goes on to make an important point on how the phrase alters the relationship between sections 94A and 94B: "what have been identical causes of action are now to be differently treated depending on whether they arise from money claims or not."³⁰¹ An additional restriction on the New Zealand provision is that the "*relief would be granted if the mistake was wholly one of fact.*"³⁰² This stipulation is lacking in the New York provision "where an entirely free hand is given to the court."³⁰³

As has already been mentioned, sub-section 2 of section 94A addresses the issue of relief where the mistake is the result of a change in the law:

Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.³⁰⁴

Because of the derivation of section 94A(1) from the New York provision, it is suggested that section 94A(2) was added to cover cases like the decision in *Mercury* where a party makes a payment under existing law and later that existing law is either voided or changed. This suggestion appears to be challenged by Northey, the New Zealand editor of Cheshire and Fifoot's *Law of Contract*. He argues that the "section is concerned with the case where an individual makes a mistake as to the law, not with the case where a Court decision shows that there has previously been a common misunderstanding of the law."³⁰⁵ Under this approach, the taxpayers in the *Mercury* case would not be barred from relief under section 94A(2). One writer opposing this approach notes that there can be no relief "where benefits are conferred in reliance on a judicial decision, subsequently overruled" since any other approach "could open the courts to a flood of restitutionary claims."³⁰⁶

The wording of the section does not support Northey's approach. In *Mercury* the taxpayers' "payment [was] made at a time when the law requires [it]" and at that time the law was not held unconstitutional. After the payment "the law is subsequently . . . shown not to have been as it was commonly understood to be at the time of the payment." The use of the word "changed" and the phrase "shown not to have been" work to disqualify

²⁹⁹ Cameron, *supra* note 244, at 5.

³⁰⁰ Sutton, *supra* note 18, at 242.

³⁰¹ *Id.*

³⁰² *Id.* at 230.

³⁰³ *Id.*

³⁰⁴ *Judicature Amendment Act 1958*, [1958] N.Z. Stat., No. 40.

³⁰⁵ Cheshire and Fifoot, *Law of Contract*, ed. Northey (Wellington: Butterworths, 1961) at 535.

³⁰⁶ Douthwaite, *Attorney's Guide to Restitution* (Indianapolis: Allen Smith, 1977) at 50. See also Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions* (1933-34), 47 Harv. L. Rev. 1403.

Northey's approach because there are only two ways to alter the law: judicially or legislatively. The phrase implies that the change of law is demonstrated, by a reasoned judgment of the judiciary, to be contrary to what was commonly understood at the time of payment. The word "changed" refers to a legislative enactment that creates new law or repeals old law without showing anything. The only conceivable problem is in the case of a judicial alteration where one must establish what was "commonly understood" at the time of the payment. The legislative alteration does not have this requirement.

Additional support for this view is found in the brief note by Cameron. In commenting on the effect of section 94A(2) on a judicial alteration of the law, he states that the section "makes it clear that relief cannot be claimed on the ground that perhaps as a result of the decision of a higher court overruling an earlier decision, the law as it was commonly understood to be is no longer the law."³⁰⁷ He goes on to make the interesting point that the section is probably unnecessary since "in such cases it can hardly be said that there was any mistake in the law at the time the payment was made."³⁰⁸ While section 94A(2) may be unnecessary, it should be noted that New Zealand adopted its provisions just after the *Mercury* decision and this must certainly have been influential. This creates a strong presumption that section 94A(2) militates against the legal fiction, as exemplified by the *Mercury* problem, that the law has always been what the latest decision has decided that it is.

The validity of this approach to section 94A(2), moreover, is confirmed by the Western Australian decision in *Bell Bros. Pty Ltd. v. Shire of Serpentine-Jarrahdale*,³⁰⁹ a case interpreting the analogous provision of New Zealand's section 94A(2), namely, section 23(2) of the *Law Reform (Property, Perpetuities and Succession) Act, 1962*.³¹⁰ In that case the plaintiff company paid licence fees over a period of years to the defendant municipality in compliance with a by-law. At the time of the payments both parties thought that the fees were lawfully demanded, but at a later date the by-law was declared invalid. The plaintiff subsequently sought a refund of the fees paid, but the defendant relying on section 23(2), argued that when the plaintiff made the payments the law was "commonly understood" to require them and that, therefore, section 23(2) operated to prohibit recovery.³¹¹

At trial,³¹² the presiding judge agreed with the defendant's argument and on appeal the decision was affirmed. Speaking for the court, Hale J. maintained that the burden of proving the common understanding was upon the defendant and he concluded:

[b]ut once it is accepted . . . that one is not speaking of the entire community but of a class within the community who are in some way concerned with the

³⁰⁷ Cameron, *supra* note 244.

³⁰⁸ *Id.*

³⁰⁹ (1969), 121 C.L.R. 137, [1972] A.L.R. 715, 19 L.G.R.A. 85 (H. Ct. Aust.) (Full Ct.).

³¹⁰ [1962] W. Aust. Acts, No. 83.

³¹¹ *Supra* note 309.

³¹² *Bell Bros. Pty. Ltd. v. Shire of Serpentine-Jarrahdale*, [1969] W.A.R. 104, 19 L.G.R.A. 70 (S.C.).

subject-matter of the inquiry, then one must look at what is the common understanding in that class and the fact that the class is small is not relevant. In the present case the facts before us suggest that in the only class of which we know or can presume anything there was not merely a common but a unanimous understanding that this by-law was valid.³¹³

The High Court of Australia later reversed the finding of Hale J. on the ground that the plaintiff's payment was not voluntary. The court did not feel obliged to discuss the lower court's interpretation of section 23(2).³¹⁴ Accordingly, Hale J.'s remarks on the Western Australian section are possibly applicable to the analogous provision in the New Zealand statute.

The most far-reaching part of the New Zealand model and the precursor of the New Zealand *Contractual Mistakes Act 1977* is section 94B, which provides:

Relief, whether under section 94A of this Act or in equity or otherwise in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.³¹⁵

Obviously going way beyond the New York model, this provision is much more than a mere qualification of section 94A. It formulates a general principle applicable to all classes of payments made under mistake. "The wider result" of the provision, Sutton writes, "is an entirely new doctrine of mistake, based not on strictly legal considerations arising out of the payment itself, but upon the surrounding circumstances and subsequent events."³¹⁶

In recognizing section 94B, Sutton is sensitive to the demand of the provision for "an entire reappraisal of the basis on which relief for mistake is granted."³¹⁷ He achieves this reappraisal much later when his paper on contractual mistake formed the recommendations which culminated in the *Contractual Mistakes Act 1977*. Sections 94A and 94B are, however, unaffected by the coming into force of that Act³¹⁸ and remain an effective force in the area of payment under mistake, if not in the area of mistake generally. While the Act has so far produced no litigation, one difficult case has been decided under section 94B.³¹⁹

³¹³ *Bell Bros. Pty Ltd. v. Shire of Serpentine-Jarrahdale*, [1969] W.A.R. 155 at 160, 19 L.R.R.A. 79 at 84 (S.C.).

³¹⁴ *Supra* note 309.

³¹⁵ *Judicature Amendment Act 1958*, [1958] N.Z. Stat., No. 40.

³¹⁶ Sutton, *supra* note 18, at 238.

³¹⁷ *Id.* at 219.

³¹⁸ *Contractual Mistakes Act 1977*, [1977] N.Z. Stat., No. 54, s. 5(2)(d).

³¹⁹ The case is *Thomas v. Houston Corbett and Co.*, [1969] N.Z.L.R. 151 (C.A.). In *Southland Savings Bank v. Anderson*, [1974] 1 N.Z.L.R. 118 at 122 (S.C.), the Court referred to s. 94A but sent the matter back to the magistrate "for determination by him under ss. 94A and 94B after the taking of such additional evidence as may be necessary." Knutson overlooks the *Thomas* case in his survey of statutory reform in *Mistake of Law Payments in Canada: A Mistaken Principle?* (1979), 10 Man. L.J. 22 at 43-47.

Before examining that case, however, one point that Sutton makes on section 94A demands attention. In attempting a reappraisal of relief for mistake under that section, he argues that the "function of the court is to determine what rules are peculiarly appropriate to errors of law as distinct from errors of fact."³²⁰ This question arises, he says, because section 94A(1) states that relief "shall not be denied by reason *only* that the mistake is one of law" and because the similar New York provision allows the court to act in "appropriate cases."³²¹ In order to establish when the court is to act in "appropriate cases" it is necessary, he argues, to state "the principles upon which it does so."³²²

There are two criticisms of Sutton's approach. First, although he does not misconstrue section 94A(1) itself, his approach is subject to the same criticism as was made of the New York provision. The distinction between mistake of law and mistake of fact has not been abandoned. Instead, a new second stage distinction has arisen between mistakes of law that are worthy of relief and mistakes of law that are not worthy of relief. In "formulating rules for recovery under error of law,"³²³ he discusses the requirements of fundamentality and negligence. These accord with principles in the contemporary reform of contractual mistake in the *Restatement* and in New Zealand. He also argues, as he does later in his contractual mistake analysis, for a mistake classification system. The mistake of law must be a common mistake and not a unilateral mistake.³²⁴ This does not accord with Rabin's arguments—the latter being more persuasive. Marean is closer to the true principle when he argues that the result should not turn on whether the mistake of law is common or unilateral. Although there are other considerations as well, Marean argues that the result should turn on unjust enrichment and "the enrichment is no less unjust where the mistake is one of law."³²⁵

The second criticism of Sutton's approach is that the meaning of section 94B contradicts the apparent demand of section 94A(1) to develop separate rules for establishing the "appropriate cases" of mistake of law. The meaning of section 94B is very explicit. If relief is to be granted under section 94A, the rules that establish whether or to what extent it is to be granted are set out in section 94B and these rules apply to payments made under a section 94A mistake of law as well as to those made under a mistake of fact. Relief shall be denied (1) wholly or in part, if the payment is received (2) in good faith, and the payee (3) so altered his position, that it is (4) inequitable to grant relief, (5) having regard to all possible implications in respect of other persons. The strength of section 94B is that it really abandons the distinction between a mistake of law and a mistake of fact while providing at the same time a broad conceptual framework for the courts to work in and develop. Sutton was aware of this when he stated that section 94B released

³²⁰ Sutton, *supra* note 18, at 238.

³²¹ *Id.* at 232 [Emphasis added.]

³²² *Id.*

³²³ *Id.* at 243.

³²⁴ *Id.* at 234.

³²⁵ *Supra* note 272.

the courts from "the tumour of *ignorantia juris*."³²⁶ The contradiction between sections 94A(1) and 94B, however, eluded him. If the New Zealand model is to be considered seriously as a model for reform, it is recommended that omitting the word "only" from section 94A(1) will create harmony between the two provisions. The additional concerns of the restrictive phraseology of the sections and the questionable need of section 94A(2) have already been addressed.³²⁷

The only case to arise under the New Zealand reform measures is *Thomas v. Houston Corbett and Co.*,³²⁸ where section 94A "was generously applied."³²⁹ In that case Thomas was induced by an employee of Houston Corbett to invest £400 with them, but the employee deposited the money in his own account. Later, the employee, after inducing Houston Corbett to sign a cheque in favour of Thomas for £1,381, deposited the sum in Thomas' account but requested that Thomas give him a cheque for £840, which the employee said was owing to other investors. Thomas did so and later gave the employee another cheque for £200. On discovering the employee's fraud, Houston Corbett sought the recovery of the £1,381. Thomas denied any obligation to repay this amount and further counterclaimed for £1,440 (£400 plus £840 plus £200).

At trial, Speight J. held that the £1,381 was paid under a mistake of fact and was entirely recoverable by Houston Corbett. On appeal his decision was modified by virtue of the Court's interpretation of section 94B. Of the general remarks made on the section, North P. noted that "[n]ow the Court is entitled to look at the equities from the point of view of both sides."³³⁰ Consistent with this notion he observed, no doubt with Thomas in mind, that the section may benefit the payee if it is equitable to do so: "It is now possible for a defendant who brings himself within the provisions of this section to resist recovery of the money paid to him under a mistake of fact or law."³³¹ McGregor J. summarized the section in the broadest terms, foreshadowing the character of section 7 of the later *Contractual Mistakes Act 1977*. He stated that "[t]he Court has a wide discretion to do what to it seems to be just."³³²

The Court of Appeal's interpretation of the facts in light of section 94B led to the conclusion that Thomas "received the payment in good faith"³³³ since he was "trusting" and "innocent in business affairs."³³⁴ The requirement of section 94B that Thomas alter "his position in reliance on the validity of the payment" was satisfied by reference to the joint account between Thomas

³²⁶ Sutton, *supra* note 18, at 231.

³²⁷ See text accompanying notes 299-303, *supra*.

³²⁸ *Thomas*, *supra* note 319.

³²⁹ *Supra* note 236, at 546n. 12.

³³⁰ *Supra* note 328, at 164 *per* North P.

³³¹ *Id.*

³³² *Id.* at 176.

³³³ *Id.* at 164.

³³⁴ *Id.*

and his wife. In rejecting the argument of Speight J., who maintained that Cook's cheque did not induce Thomas' change of position, North P. stated that Thomas "knew perfectly well that his cheque could not be met save out of the money which [the employee] assured him had been paid into his account."³³⁵ Likewise, McGregor J. stated that "[a]part from the £1,381 received or to be received, the appellant had insufficient funds to his credit with the bank to meet the cheque for £840."³³⁶

While there was general agreement that Thomas could resist complete recovery of the money paid to him by virtue of section 94B, there was disagreement as to the quantum of relief to be withheld from the respondents. The judges assessed the equities between the two innocent parties to apportion the loss and each concluded that Houston Corbett must accept the greater responsibility since the employee was theirs and since they were in a far better position to judge his character than was Thomas. Accordingly, North P. concluded that Thomas could withhold two-thirds of the £840 cheque (£560) from the respondents. The judgment was, therefore, reduced from £1,381 to £821.³³⁷ Turner J. concurred with North P. although he "would have divided the loss of the £840 equally between the two parties, treating the maxim 'equality is equity' as the soundest guide in apportioning the results."³³⁸ McGregor J. also concurred with North P. although he had "felt disposed to give to the appellant somewhat greater relief than that suggested by the learned President."³³⁹

What is the result of this decision in terms of the demand section 94B places on the court? Does it relate to the factors on mistake, distilled from the cases and critics, now embodied in the *Contractual Mistakes Act 1977*?

The most obvious result of section 94B, and one in accord with the later Act, is that the court is now freed from the "all or nothing" approach of the common law. The inevitable effect of such a result is that the members of the court, in weighing all the factors, may disagree as to the quantum of relief. As McGregor J. stated: "The *quantum* is not capable of precise calculation. It is a matter of discretion on which opinion may differ to some extent."³⁴⁰ The uncertainty of quantum is perhaps the price that must be paid for a more equitable determination of the issues. In the *Thomas* case, however, there was no great divergence in the assessment and those members of the court who were on the outer extremes in their assessments settled on the middle road of North P.

The less obvious result of section 94B is that it possibly conceives of reappraisal in two of the ways set out in the *Contractual Mistakes Act 1977*: the touchstones of knowledge and materiality. First, there was the question of

³³⁵ *Id.*

³³⁶ *Id.* at 176.

³³⁷ *Id.* at 165.

³³⁸ *Id.* at 171.

³³⁹ *Id.* at 178.

³⁴⁰ *Id.*

Thomas' "good faith;" it revolved around the questions "Did he know?" and "Should he have known?" Second, there was the decisive question whether Thomas had "altered his position in reliance on the validity of the payment."³⁴¹ The question is one of materiality: would Thomas not have changed his position but for the mistaken payment? While the section demands this much, the facts of *Thomas* demanded more. There was also the imputation of fault. As Turner J. put it: "Can it be said that [Thomas] was any more blameworthy, in trusting [the employee], than was Mr. Houston, who apparently trusted him? . . ."³⁴²

How will a court conceive of the reappraisal of relief for mistake under section 94B in the future? The inevitable answer is that the *Contractual Mistakes Act 1977* will affect the scope of a court's enquiry. If there is strength in the argument that the equitable resolution of mistake problems leads to an enquiry of a number of factors native to the problem, then the ambit of reappraisal of relief set out in the *Contractual Mistakes Act 1977* will affect the ambit of reappraisal under section 94B, provided the facts demand it.

E. Concluding Remarks

From this examination of the statutory models reforming the area of 'mistake of law' one can recommend that the New Zealand model provides the best basis for a future statutory reform of the area. Pomeroy's model fails to provide the courts with a clear articulation that relief will be granted for a mistake of law. Relief under the statutory language of the California Code turns on whether the mistake was mutual or unilateral. The New York model is a broader provision, but the interpretation of its language has created a new distinction of relief for mistakes of law in "appropriate cases." In comparison with these models the New Zealand model has only minor defects. More importantly, it views the reform of the area in a manner that is similar to the reform of the law of contractual mistake.

³⁴¹ The Supreme Court of Canada has recently accepted that it is a defence to a claim to recover the money paid under a mistake that the defendant "had materially changed its circumstances as a result of the receipt of the money." *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147 at 164, 55 D.L.R. (3d) 1 at 13, [1975] 4 W.W.R. 591 at 605 per Martland J. On the facts the Court held that the defendant had not done so.

³⁴² *Supra* note 328, at 170.