David Securities v Commonwealth Bank (1992). In this seminal decision for the development of the law of **restitution** in Australia, all seven Justices of the High Court concluded that the traditional rule precluding the recovery of money paid under a mistake of law should be held not to form part of Australian law. The Court decided that payments made under a mistake of law should be *prima facie* recoverable in the same way as payments made under a mistake of fact. In so deciding, the Court adopted an analytical structure for approaching cases of unjust enrichment that provided significant guidance for all subsequent restitutionary claims, whether based on mistake or not. The decision was characteristic of a general thrust of the **Mason Court** to rationalise and simplify legal doctrine by abandoning inherited distinctions seen as artificial and difficult to justify.

The plaintiffs sued the Commonwealth Bank, among others, in the **Federal Court**, alleging that they had suffered significant losses by entering into foreign currency borrowing arrangements at the inducement of the bank. The bank cross-claimed for recovery of money due under the borrowing arrangements. The plaintiffs argued that they were entitled to set off against the amount claimed by the bank the money they had paid to the bank pursuant to clause 8(b) of the relevant loan agreements, on the ground that the clause was void by virtue of section 261 of the *Income Tax Assessment Act* 1936 (Cth).

The plaintiffs were unsuccessful at trial. On appeal, the Full Court of the Federal Court found that clause 8(b) was indeed rendered void by section 261 and that consequently, in paying moneys pursuant to clause 8(b), the plaintiffs had made a mistake of law or of mixed law and fact. However, by applying earlier authorities according to their traditional interpretation, the Full Court concluded that the plaintiffs were not entitled to a set-off for the reason that an action for money 'had and received' did not lie in cases of payment made under a mistake of law.

The plaintiffs appealed to the High Court. On appeal, the bank challenged the Full Court's findings both as to the applicability of section 261 and as to the existence of a relevant mistake. The Court unanimously rejected the bank's argument in relation to section 261, and, subject to the determination of the plaintiffs' appeal, unanimously ordered the **remittal** of the proceedings to the trial judge for further consideration of the issue of mistake. For the purpose of determining the principal issue raised by the plaintiffs' appeal, however, the Court proceeded on the basis that the alleged mistake was as to the existence of section 261 and its legal operation to render void the purported contractual obligation in clause 8(b).

The principal judgment of the Court was delivered by Chief Justice **Mason**, joined by **Deane**, **Toohey**, **Gaudron** and **McHugh**, with **Dawson** delivering a short, **concurring judgment** and **Brennan** dissenting in part. All Justices rejected the traditional rule precluding the recovery of money paid under a mistake of law. They did so for three main reasons. First, the Court showed that, notwithstanding its eventual acceptance as an immutable rule, the principle precluding recovery had sprung from clearly erroneous origins. Secondly, the Court concluded that three previous decisions of the Court (*York Air Conditioning v Commonwealth* (1949), *Werrin v Commonwealth* (1938) and *South Australian Cold Stores v Electricity Trust* (1957)), on which the bank relied as demonstrating acceptance of the traditional rule, could be reconciled with the narrower principle that payment made voluntarily in settlement of an honest claim is irrecoverable. Thirdly, the Court was influenced by the numerous calls from both judges and **commentators** for abolition of a rule that enshrined artificial distinctions and gave rise to numerous exceptions. In rejecting the traditional rule, the Court nevertheless emphasised that the burden lies on a plaintiff to identify and prove a mistake which is causative of the payment. The Court was not unanimous on the precise nature of the causative mistake that must be established.

Further, all members of the Court accepted, in principle, that the law should recognise a defence of 'change of position', to ensure that enrichment of the recipient of a payment is prevented only in circumstances where it would be unjust. The central element of this defence is that the recipient of the money has acted to his or her detriment on the faith of having received it. The existence of the defence had not previously been supported by any appellate court in Australia. The bank sought to rely on the defence. Determination of that question was included in the remitter to the trial judge.

Christopher Caleo

Further Reading

Peter Birks, 'Modernising the Law of Restitution' (1993) 109 *LQR* 164

Keith Mason and JW Carter, *Restitution Law in Australia* (1995) 117–125

Dawson, Daryl Michael (*b* 12 December 1933; Justice, 1982–97) was born in Melbourne and educated at Canberra High School. He graduated with a first class honours degree in law from the University of Melbourne, then attended Yale University with a Fulbright Scholarship and graduated LLM. He signed the Roll of Counsel of the Victorian Bar in 1957 and was appointed as a QC in 1971. He served as **Solicitor-General** for Victoria from 1974 to 1982 and was an active member of the Council for Legal Education during this time. In 1982, he was **appointed** as a Justice of the High Court. After **retirement** from the High Court, he was appointed as a Non-Permanent Judge of the Hong Kong Court of Final Appeal in 1998.

As both Solicitor-General and Justice of the High Court, Dawson was involved in some of the most critical formative events in the development of Australian law. His period as Solicitor-General for Victoria began during the **Whitlam era**. This was a time of change in Australian law and constitutional practice. Federal legislation and administration challenged the boundaries of **Commonwealth legislative powers**. Divisions between the government and the opposition in the Parliament produced a spate of litigation. As Solicitor-General, Dawson argued some of the central constitutional cases of the time. These included challenges to the validity of the Australian Assistance Plan in the ***AAP Case*** (1975), the validity of Commonwealth claims over offshore areas in the *Seas and Submerged Lands Case* (1975), and defence of the constitutionality of Commonwealth electoral boundaries in *A-G (Cth); Ex rel McKinlay v Commonwealth* (1975). The issues

Daryl Dawson, Justice 1982–97

raised in these and other cases foreshadowed themes that were to be significant for the High Court over the next two decades: the scope of the **nationhood power** of the Commonwealth, the meaning and operation of the Commonwealth power with respect to **external affairs**, and the extent to which principles of representative **democracy** are embodied in the Constitution.

Changes in Australian law and the context in which it operates were no less dramatic during Dawson's 15 years on the Bench. The passage of the ***Australia Acts*** 1986, by both Australia and the UK, to sever the final, formal colonial links between the two, precluded any practical possibility of further Australian appeals to the **Privy Council**. The High Court thus became the ultimate court of appeal in Australian law. With hindsight, this also was the period during which the forces of globalisation and internationalisation began to have a major impact on Australia. A new range of issues, including the **environment**, human rights and national treatment of **Aboriginal peoples** became subjects of international debate. Australia ratified the International Covenant on Civil and Political Rights and, subsequently, the First Optional Protocol. During this period, also, the forces of international economic competition placed particular pressure on federations, such as Australia, where power is divided between different spheres of government and responses inevitably are slower and more complex. Inevitably, these developments were reflected in issues raised before the Court and in the Court's responses to them.

Dawson's approach to judicial **decision making** was in the best classical tradition of the Court. His judgments were highly regarded for their breadth of legal understanding, technical legal analytical skill and clarity of expression. He was a masterful exponent of the **common law** method in the sense that he sought resolution of each case before the Court through rigorous application of existing rules involving, at most, incremental judicial development of the law. He was a strong defender of judicial **independence**, but believed that this required courts to confine their own **role**, leaving both law reform and public **policy** to the legislature.

On the Bench, Dawson had a reputation as a conservative, though he might not have been perceived that way in earlier times. In a Court that typically reflected a diversity of views, he was generally to be found at the end of a spectrum that was less **activist** and more supportive of what previously had been assumed to be the status quo. Thus, in ***Mabo*** (1992) he was the sole dissentient from the view that the common law now recognised the **native title** of Australia's indigenous inhabitants, despite the long-held Australian assumption of *terra nullius*. Similarly, in the ***Free Speech Cases***, beginning with *Australian Capital Television v Commonwealth* (1992), in which a majority of the Court accepted that the Constitution placed limits on power to restrict freedom of **political communication**, Dawson took the more narrow ground. He agreed that some limitation on power might be drawn from the requirement in sections 7 and 24 of the Constitution that the Parliament be directly 'chosen' by the people. At the same time, however, he rejected any suggestion that the Constitution provided more generally for representative democracy or **representative government**, from which constitutional implications might be derived. Ironically, he applied the narrower limitation more rigorously than the majority: see his dissent in ***Langer v Commonwealth*** (1996). To a degree, his view of the narrower basis of the principle ultimately prevailed, in the unanimous decision of the Court in *Lange v ABC* (1997), which drew this line of authority to a close, at least for the time.

Dawson took a similar approach to the related development of a concept of **proportionality** as an analytical tool for determination of the scope of legislative power by reference to unexpressed rights. With characteristic thoroughness, he undertook a study of the doctrine in European law as a basis for repudiating its broad application in Australia, other than in relation to powers that clearly were purposive or to give effect to express constitutional limits on power (*Cunliffe v Commonwealth* (1994); see also *Nationwide News v Wills* (1992)). His views were influential in the decisions of the Court in *Cunliffe* and *Leask v Commonwealth* (1996), which substantially restricted the use of the doctrine in circumstances that might encourage further implied limits on power.

Dawson sometimes was typecast also by the trend of his decisions on issues affecting the constitutional power of the states. Soon after his appointment, he joined a minority who would have invalidated the World Heritage Conservation legislation of the Commonwealth in the ***Tasmanian Dam Case*** (1983). In taking that position, he refused to accept that the power with respect to 'external affairs' authorised the implementation by the Commonwealth of all international treaties that imposed obligations on Australia. He also would have required a more substantial connection between a law and the

corporations power, in which the fact that a constitutional corporation was subject to the law was significant in the way the law related to it. He was a consistent critic of the more expansive definition of 'external affairs' thereafter, even where, in form, he followed what had become established **precedent** (*Richardson v Forestry Commission* (1988)). And in *Re Dingjan; Ex parte Wagner* (1995), his views on the corporations power prevailed to the extent that he was a member of a majority which invalidated a law for insufficient connection with the power. Famously, Dawson also was a consistent member of a minority of Justices who espoused a narrower view of the Commonwealth's exclusive power to impose **excise duties**, until the battle was lost in *Ha v NSW* (1997); atypically, in this area he was prepared to depart from precedent and to give effect to his view of basic principle.

The High Court is not a specialist constitutional court and deals with appeals in a wide variety of other matters, in both federal and state jurisdiction. Dawson's legal skills and broad professional experience served him well across all fields. In particular, his deep understanding of **criminal law** and practice, derived from his period as a state Solicitor-General, made him a valuable member of a Court in which not all Justices have acquired experience of this kind. Decisions of note include *Zecevic v DPP* (1987), in which he delivered a **joint judgment** with **Wilson** and **Toohey**, *Wilson v The Queen* (1992), in which with **Brennan** and **Deane** he was in dissent, and his individual dissent in ***Dietrich v The Queen*** (1992). Service as Solicitor-General also provided Dawson with an understanding of the workings of executive government, evidenced in some of his decisions in **administrative law**, including *Haoucher v Minister for Immigration* (1990) and *A-G (NSW) v Quin* (1990).

It would be a mistake to exaggerate Dawson's position as a dissentient in the courts of which he was a member. The point can be demonstrated by reference to constitutional decisions, typically most likely to give rise to differences of view and to attract public interest and attention. At a rough estimate, approximately a hundred such cases were decided by the High Court during 1982 and 1997. In half of these, the Court was in broad agreement. These included landmark cases on the meaning of the freedom of **interstate trade** for which the Constitution provides (***Cole v Whitfield*** (1988)); on **discrimination** on the grounds of state residence (*Street v Queensland Bar Association* (1989)); on the position of government under statute (*Bropho v WA* (1990); *Jacobsen v Rogers* (1995)); and on the need for a unanimous verdict to satisfy the **jury trial** requirement of section 80 of the Constitution (*Cheatle v The Queen* (1993)). In another thirty cases or so, Dawson was with the majority, in outcome if not in reasoning. He was in clear dissent in only about twenty constitutional cases over a period of 15 years. His dissents were often a salutary reminder of alternative viewpoints, and his position in some of these cases, at least, appears to have influenced other Justices in subsequent cases.

Dawson was on the Bench at a time of vigorous intellectual debate about future directions for Australian law, particularly **constitutional law**, and the **role** of the High Court in relation to it. Dawson espoused a traditional approach, at a time when some other Justices were attracted by new ideas and new approaches, sometimes drawn from international experience, in response to new challenges. The rigour of his analysis earned respect for his judgments, irrespective of outcome. They contributed to the intellectual calibre of the distinguished courts of which he was a distinguished member.

Cheryl Saunders

Further Reading

Daryl Dawson, 'The Constitution: Major Overhaul or Simple Tune-up?' (1984) 14 *MULR* 353

Daryl Dawson, 'Judges and the Media' (1987) 10 *UNSWLJ* 17

Daryl Dawson, 'Intention and the Constitution: Whose Intent?' (1990) 6 *Aust Bar Rev* 93

Daryl Dawson, 'Recent Common Law Developments in Criminal Law' (1991) 15 *Crim LJ* 5

Daryl Dawson, 'Do Judges Make Law? Too much?' (1996) 3 *Jud Rev* 1

Deakin, Alfred (*b* 3 August 1856; *d* 7 October 1919). As first **Attorney-General** and second **Prime Minister** of the new Commonwealth, Deakin's influence on the early High Court was profound, particularly in relation to the first five **appointments** and, above all, the successful enactment of the ***Judiciary Act*** 1903 (Cth) (see **Constitutional basis of Court**).

Born in Melbourne, Deakin was the son of English immigrants of modest means. He was educated at Melbourne Grammar School and the University of Melbourne, from which he graduated with an LLB. He commenced practice as a barrister, but preferred journalism, and established a relationship with David Syme, publisher of the *Age*. (Later, from 1900 to 1910, he was to write an anonymous column for the London *Morning Post*, often commenting upon events in which he played a leading role.) Entering the Victorian Legislative Assembly in 1879, Deakin held office from 1883 to 1890. He took up the cause of federation, becoming a member of the federal Conventions of 1891 and 1897–98 and a member of the Australian delegation which went to the UK to promote the passage of the Constitution Bill. Deakin was elected to the first federal Parliament in 1901 as member for Ballarat. As deputy to **Barton** and as Attorney-General in that Parliament, on 18 March 1902 Deakin introduced the second reading of the Judiciary Bill. The Bill, which sought to fulfil the **establishment** of the High Court as laid down by the Constitution, was Deakin's most 'cherished measure'.

O'Connor described Deakin's three and a half hour speech as: 'Magnificent. The finest speech I have *ever heard*.' The acting Leader of the Opposition, William McMillan, in immediate response, said a 'more comprehensive speech … both in regard to the principles and details of a great Bill, has not been heard in the House'. Deakin's address was not only a superb piece of oratory and advocacy; it was also a masterly analysis of the principles of **federalism**.

He began by describing the Bill as 'a fundamental proposition for a structural creation which is the necessary and essential complement of a federal Constitution'. He then went on to outline, with great subtlety and prescience, the reasons why the Court would be 'necessary and essential'. He pointed out that the Constitution had deliberately been drawn on 'large and simple lines … because it was felt to be an instrument not to be lightly altered, and … to apply under circum-