HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

DANELLE EVELYN MILLER APPELLANT

AND

MAURIN ASHTON MILLER RESPONDENT

Miller v Miller [2011] HCA 9
7 April 2011
P25/2010

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 6 November 2009 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation

B W Walker QC with J A Thomson for the appellant (instructed by Kott Gunning Lawyers)

G M Watson SC with N J Owens and R A Yezerski for the respondent (instructed by Tottle Partners)

CATCHWORDS

Miller v Miller

Negligence – Duty of care – Illegality – Plaintiff and defendant illegally using stolen motor vehicle in contravention of s 371A of *The Criminal Code* (WA) ("Code") – Plaintiff twice asked defendant to be let out of vehicle – Requests not complied with – Whether plaintiff can recover damages for injuries sustained as result of defendant's negligent driving of vehicle – Whether defendant owed duty of care to plaintiff – Whether statutory purpose of s 371A of Code incongruous with duty of care between joint illegal users of vehicle – Whether plaintiff's requests sufficient to effect withdrawal from joint illegal enterprise – Whether reasonable steps available to plaintiff to prevent commission of offence.

Words and phrases – "duty of care", "illegal use", "joint illegal enterprise", "statutory purpose".

The Criminal Code (WA), ss 8, 371A.
Criminal Code Act Compilation Act 1913 (WA), Appendix B, s 5.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. Early in the morning of 17 May 1998, the appellant (Danelle Miller – "Danelle"), then aged 16 years, wanted to go from Northbridge, a Perth suburb, to her home in Maddington, another Perth suburb. She had been drinking, had tried unsuccessfully to enter a nightclub and was wandering in the streets with her sister and cousins. The last train had left. She did not have the money to pay for a taxi. So she decided to steal a car.

2 Having started a car in the car park near the nightclub, Danelle asked her older sister (Narelle) to drive her and her younger cousin (Hayley) home. Danelle knew that Narelle had been drinking and did not hold a driver's licence.

3 The respondent (Maurin Miller – "Maurin") was at a cab rank when he saw the car leaving the car park where it had been standing. Maurin was a cousin of Danelle's mother. He was aged 27 years. He said to Narelle: "I'm your uncle let me drive." Narelle moved out of the driver's seat and he took the wheel. Some of Maurin's friends who were waiting at the cab rank also got into the car. Nine passengers jammed themselves into the car with Maurin driving, and off they set. For a time, Maurin drove sensibly. But then he began to speed and to drive through red lights. Danelle asked him to slow down, and then she asked him to stop and let her and Narelle out. But Maurin drove on, saying that they were "all right", and should come with him to his house.

4 Near Maddington, the suburb where Danelle lived, Maurin slowed the car down and Danelle again asked to be let out. Maurin laughed off her concerns. Shortly afterwards, having sped up, he lost control of the car. The car struck a pole. One passenger was killed. Danelle was very seriously injured and is now a tetraplegic. She sued Maurin in the District Court of Western Australia claiming damages for negligence.

5 Can Danelle recover damages for negligence from Maurin? Does her theft of the car, or her subsequent use of the car (or some combination of both her theft and her use of the car), defeat her claim for damages for negligence?

6 In many Australian jurisdictions, these questions would require consideration of statutory provisions intended to regulate recovery of damages for personal injury suffered when the plaintiff was acting illegally[1]. There being

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1 See, for example, *Civil Liability Act* 2002 (NSW), s 54.

no relevant statutory provisions of this kind in Western Australia, the issues that arise in this matter turn upon the application of common law principles.

7 At trial in the District Court of Western Australia, the parties agreed that the only live issue in the proceeding was whether Maurin owed Danelle a duty of care. They agreed that, if he did, Danelle should be found guilty of contributory negligence and that her responsibility for her injuries should be assessed at 50 per cent. A pleaded defence of voluntary assumption of risk was not pressed. The denial of negligence in fact was not pressed. The primary judge (Schoombee DCJ) held[2] that Maurin owed Danelle a duty of care.

8 On appeal, the Court of Appeal of the Supreme Court of Western Australia (McLure, Buss and Newnes JJA) held[3] that Maurin owed Danelle no duty of care and that her action should therefore fail. As the case was argued at first instance, and on appeal, the denial of the existence of a duty of care rested entirely upon the assertion that Maurin and Danelle had engaged in a joint illegal enterprise of illegally using a motor car without the consent of the owner, contrary to s 371A of *The Criminal Code* (WA) ("the Code").

9 By special leave, Danelle appealed to this Court. The appeal should be allowed. By the time the accident happened, Maurin and Danelle were no longer engaged in a joint illegal enterprise. Danelle had stolen the car. She and Maurin and some, perhaps all, of the other passengers became parties to a joint illegal enterprise when they agreed to Maurin driving them in what they knew to be a stolen car. Danelle withdrew from that joint enterprise, of using the vehicle without the consent of its owner, when she asked to be allowed to get out of it.

10 To explain why Danelle's requests to get out of the car are important to the resolution of the issues in this matter, it is necessary to examine how the fact that a plaintiff has engaged in illegal conduct in the course of, or in connection with, events said to give rise to liability in negligence bears upon the liability of the defendant to the plaintiff. The examination of the significance that is to be attached to illegality of the kind described will take the following course. First, reference will be made to some preliminary considerations. Second, illegality in tort will be placed in the larger context provided by looking at the significance

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2 *Miller v Miller* (2008) 57 SR (WA) 358.

3 *Miller v Miller* [2009] WASCA 199.

that has been attached to illegality in the law of contract and trusts. Third, reference will be made to some of the cases that have considered the issue. Fourth, the relevant principles will be identified. Fifth, consideration will be given to the statutory provisions that were engaged in this matter, some reference made to their legislative history, and their purposes identified. Sixth, the principles will be applied to the facts of this case.

Preliminary considerations

11 It is convenient to begin examination of the issues in the case by making two preliminary points: first, the illegality of a plaintiff's conduct presents the question, but does not provide the answer to, whether the plaintiff can recover damages for negligence for injury suffered in the course of or as a result of that illegal conduct; and second, causation alone does not provide a satisfactory principle by which to resolve the issue, and was rejected as a determinative criterion by this Court in *Henwood v Municipal Tramways Trust (SA)*[4].

12 Over the last century, both in Australia and in other common law jurisdictions, courts have offered different statements of the principle or principles that govern whether and how the fact that a plaintiff acted illegally in the course of, or in connection with, events said to give rise to liability in negligence bears upon the liability of the defendant to the plaintiff. Academic commentators have offered not only different criticisms of those principles, but also several different alternative formulations of the principles.

13 One point that emerges with complete clarity from the cases and the commentary is that the relevant principles are not identified by stopping the inquiry at the point of observing that a plaintiff has contravened the criminal law in the course of the events that the plaintiff alleges render the defendant liable to the plaintiff in tort. Nor are the principles identified by asserting, without further explanation, that public policy "requires" that such a plaintiff have no claim. Likewise the principles are not identified by simply intoning the Latin maxim *ex turpi causa non oritur actio*. As Windeyer J demonstrated, in *Smith v Jenkins*[5], it is greatly to be doubted that the maxim, properly understood, has any

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4 (1938) 60 CLR 438; [1938] HCA 35.

5 (1970) 119 CLR 397 at 409-414; [1970] HCA 2; see also *Gollan v Nugent* (1988) 166 CLR 18 at 28, 46; [1988] HCA 59.

application in tort. Its intrusion into the debate "has caused a confusion which would not have occurred if the writers had condescended to translation and had not taken the maxim into territory where it does not belong"[6]. In any event, reference to the maxim does not reveal the reasoning that leads to the conclusion that liability is denied. The maxim "notwithstanding the dignity of a learned language, is, like most maxims, lacking in precise definition"[7].

14 None of these observations denies that questions of public policy are presented when a plaintiff sues another for damages sustained by the plaintiff in the course of, or as a result of, some illegal conduct of the plaintiff. They are. But it is important to identify not only what are the policy considerations that are engaged, and how they are said to be engaged in the particular case, but also, and more fundamentally, *why* policy considerations are engaged.

15 These reasons will show that the central policy consideration at stake is the coherence of the law. The importance of that consideration has been remarked on in decisions of this Court[8]. Its importance in this particular context was emphasised by the Supreme Court of Canada[9]. It is a consideration that is important at two levels. First, the principles applied in relation to the tort of negligence must be congruent with those applied in other areas of the civil law (most notably contract and trusts).

16 Second, and more fundamentally, the issue that is presented by observing that a plaintiff was acting illegally when injured as a result of the defendant's negligence is whether there is some relevant intersection between the law that made the plaintiff's conduct unlawful and the legal principles that determine whether the plaintiff should have a cause of action for negligence against the defendant. Ultimately, the question is: would it be incongruous for the law to

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6 *Smith v Jenkins* (1970) 119 CLR 397 at 410.

7 *Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197 at 219-220 per Lord Wright MR.

8 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42], 580-581 [53]-[55]; [2001] HCA 59; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 602 [100]; [2008] HCA 57; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 406-410 [39]-[42]; [2009] HCA 47.

9 *Hall v Hebert* [1993] 2 SCR 159 at 176-180.

proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct? Other questions, such as whether denial of liability will deter wrongdoers or advantage some at the expense of others, are neither helpful nor relevant. And likewise, resort to notions of moral outrage or judicial indignation[10] serves only to mask the proper identification of what is said to produce the response and why the response could be warranted.

17 The second preliminary observation to make is that the issue cannot be resolved by asking only whether there is a causal connection between the plaintiff's illegal conduct and the occurrence of the damage of which the plaintiff complains. Why not?

18 The fact that a plaintiff was acting contrary to law when he or she suffered damage of which the defendant's negligence is alleged to be a cause does not automatically preclude the plaintiff from recovering damages from the defendant. Pollock wrote[11], in 1887, that although "[l]anguage is to be met with in some books to the effect that a man cannot sue for any injury suffered by him at a time when he is himself a wrong-doer ... there is no such general rule of law." Rather, Pollock offered[12] the view that:

> "[i]t does not appear on the whole that a plaintiff is disabled from recovering by reason of being himself a wrong-doer, *unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction:* and even then it is difficult to find a case where it is necessary to assume any special rule of this kind." (emphasis added)

19 The notion of "connection" between the unlawful conduct and harm suffered was evidently drawn from the law that had developed during the 19th century in the United States, especially Massachusetts, concerning the relevance of the violation of Sunday observance laws to claims for injuries sustained while

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10 Glanville Williams, "The Legal Effect of Illegal Contracts", (1942) 8 *Cambridge Law Journal* 51 at 61-62.

11 Pollock, *The Law of Torts*, (1887) at 150.

12 at 151.

travelling for secular purposes on a Sunday. Pollock noted[13] the conflict of opinion in the United States in cases raising such a question, and concluded[14] that the decisions denying liability on account of breach of the Sunday observance statutes were "not generally considered good law".

20 Writing about the Sunday observance cases in the *Harvard Law Review* in 1905, Harold Davis saw[15] the principle engaged in such cases as depending upon questions of causation:

> "It seems plain that if the illegal act is the *immediate, active cause* of the damage, recovery is rightly refused. But it is by no means so clear that public policy demands that, if the illegal act was simply a *remote link in the chain of causation*, the action shall be barred, and the almost unanimous opinion of the authorities is strong evidence that it does not." (emphasis added)

The author explained[16] the distinction as being between an unlawful act that was a *causa sine qua non* (that put the plaintiff or his property in a position to be affected by the defendant's negligent act) and an unlawful act that was "the active agency which finally produces the result".

21 Echoes of the distinctions drawn, and language used, when contributory negligence was a complete defence to an action in negligence[17] can be heard distinctly in this treatment of the defence of illegality. And as was rightly said of the former rules about contributory negligence, with their associated notions of

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13 at 152.

14 at 153.

15 Davis, "The Plaintiff's Illegal Act as a Defense in Actions of Tort", (1905) 18 *Harvard Law Review* 505 at 513 (footnote omitted).

16 at 515-516.

17 See, for example, the discussion of the "last opportunity rule" in *Wheare v Clarke* (1937) 56 CLR 715; [1937] HCA 7; *Alford v Magee* (1952) 85 CLR 437; [1952] HCA 3.

"proximate" or "substantial" cause, the law was a "logical and legal labyrinth"[18]. Developing the law relating to the significance of a plaintiff's illegal conduct to recovery by that plaintiff in negligence by reference only to notions of causation would inevitably lead the law into a similar "logical and legal labyrinth".

22 In *Henwood*[19], Dixon and McTiernan JJ rejected analysis of the significance of illegality to liability in tort by reference only to questions of causation. In *Henwood*, the plaintiffs sued under legislation enacted on the pattern of Lord Campbell's Act[20] in respect of the death of their son, allegedly as a result of the defendant's negligence. The son died as a result of injuries sustained when, contrary to a by-law made under statute, he leaned out of a tram on its off-side, and hit his head on poles erected by the defendant Tramways Trust in the centre of the road. As Dixon and McTiernan JJ pointed out[21], there was a direct connection between the illegal act and the injury. The illegal conduct of the deceased was a necessary cause of his injury. But their Honours were of the view[22] that the plaintiffs should succeed in their claim on the footing that it was not a "part of the purpose of the law against which the plaintiff has offended to disentitle a person doing the prohibited act from complaining of the other party's neglect or default, without which his own act would not have resulted in injury". The analysis made[23] by Latham CJ was to substantially similar effect.

23 In the present case, it is said that other considerations intrude when a plaintiff is shown to have been injured in the course of a joint illegal enterprise with the defendant. It is suggested that, because the conduct in question was part of a joint enterprise, attention can no longer be confined (as it was in *Henwood*) to whether the statute which penalised the particular conduct in which the

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18 Stallybrass (ed), *Salmond on Torts*, 9th ed (1936) at 484 quoted in *Wheare v Clarke* (1937) 56 CLR 715 at 737 per Evatt J.

19 (1938) 60 CLR 438 at 457-460.

20 *The Fatal Accidents Act* 1846 (UK) (9 & 10 Vict c 93).

21 (1938) 60 CLR 438 at 458.

22 (1938) 60 CLR 438 at 460.

23 (1938) 60 CLR 438 at 445-448.

plaintiff engaged is to be understood as affecting civil responsibility. Rather, the appellant submitted, the critical question is whether the illegal act materially caused the injuries to the appellant by increasing the risk of injury to her. The answer to that question was said to depend upon the purpose of the illegal use of the motor car and a contrast was drawn between cases of "joy-riding" and cases, such as the present was said to be, where the purpose of the illegal use was "simply to drive home". Neither the precise content of the two categories, nor the stability of a distinction between them, is self-evident. Difficulties of those kinds may be set aside for the moment. Instead, it is important to observe how illegality is dealt with in some other areas of the law.

Illegality in contract and trusts

24 It has long been established that a contract whose making or performance is illegal will not be enforced[24]. Often enough, however, the statute in question does not expressly prohibit the making of the relevant contract and does not expressly prohibit its performance. Whether such a statute "prohibits contracts is always a question of construction turning on the particular provisions, the scope and purpose of the statute"[25]. *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* identifies[26] considerations of the kind that are engaged in the task of statutory construction.

25 But in addition to, and distinct from, cases where a statute expressly or impliedly prohibits the making or performance of a contract, are cases "where the policy of the law renders contractual arrangements ineffective or void even in the absence of breach of a norm of conduct or other requirement expressed or

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24 *Cope v Rowlands* [1836] 2 M & W 149 at 157 per Parke B [150 ER 707 at 710].

25 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 425 per Mason J; [1978] HCA 42.

26 (1978) 139 CLR 410 at 425 per Mason J.

necessarily implicit in the statutory text"[27]. In cases of the latter kind the refusal to enforce the contract has been held[28] to stem:

> "not from express or implied legislative prohibition but from the policy of the law, commonly called public policy[29]. Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable[30]."

26 The same kinds of question have been identified as arising in relation to allegations of illegality in the constitution or performance of a trust. In *Nelson v Nelson*, Deane and Gummow JJ said[31] that authorities in contract law (including *Yango*) suggest drawing distinctions between three cases:

> "(i) an express statutory provision against the making of a contract or creation or implication of a trust by fastening upon some act which is essential to its formation, whether or not the prohibition be absolute or subject to some qualification such as the issue of a licence; (ii) an express statutory prohibition, not of the formation of a contract or creation or implication of a trust, but of the doing of a particular act; an agreement that the act be done is treated as impliedly prohibited by the statute and illegal; and (iii) contracts and trusts not directly contrary to the provisions of the statute by reason of any express or implied prohibition in the statute

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27 *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 179 [71] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; [2008] HCA 3.

28 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227 per McHugh and Gummow JJ; [1997] HCA 17.

29 *Yango* (1978) 139 CLR 410 at 429-430, 432-433; *Nelson v Nelson* (1995) 184 CLR 538 at 551-552, 593, 611; [1995] HCA 25.

30 *Yango* (1978) 139 CLR 410 at 434.

31 (1995) 184 CLR 538 at 551-552.

but which are 'associated with or in furtherance of illegal purposes'. The phrase is that of Jacobs J in *Yango*[32]."

Deane and Gummow JJ said[33] that, in the last of these three kinds of cases, "the courts act not in response to a direct legislative prohibition but, as it is said, from 'the policy of the law'".

27 As McHugh J explained[34] in *Nelson v Nelson*, to approach the doctrine of illegality in this way, in cases where the statute in question does not expressly or impliedly prohibit the contract or trust, or the doing of some particular act that is essential for carrying it out, recognises that the legal environment in which the doctrine now operates is much more regulated than once it was. Moreover, as McHugh J also pointed out[35], Lord Mansfield's statement in *Holman v Johnson*[36] that "[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act", by its all-embracing generality, fails to take sufficient account of the different ways in which questions of illegality may arise. Hence the emphasis given in *Nelson v Nelson*[37], and in both *Fitzgerald v F J Leonhardt Pty Ltd*[38] and *International Air Transport Association v Ansett Australia Holdings Ltd*[39] to the discernment, from the scope and purpose of the statute, of whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable. But implicit in, indeed at the very heart of, that process lies the recognition that there are cases where the breach of a norm of conduct stated expressly or implied in the statutory text requires the conclusion that an obligation otherwise created or recognised is not to be enforced by the courts.

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32 (1978) 139 CLR 410 at 432; see also at 430 per Mason J.

33 (1995) 184 CLR 538 at 552.

34 (1995) 184 CLR 538 at 611.

35 (1995) 184 CLR 538 at 611.

36 (1775) 1 Cowp 341 at 343 [98 ER 1120 at 1121].

37 (1995) 184 CLR 538 at 570, 616-618.

38 (1997) 189 CLR 215 at 227.

39 (2008) 234 CLR 151 at 180 [72].

28 As noted in the preliminary considerations set out earlier in these reasons, in *Henwood*, Dixon and McTiernan JJ approached the relationship between a plaintiff's illegal act and recovery in negligence for damage (of which the illegal act and the negligence of the defendant were each a cause) by identification of the purpose of the law against which the plaintiff offended. Their Honours said[40] that it may be that the same methods of statutory construction are engaged in determining whether the doing of an act forbidden by statute disqualifies the offender from recovery for negligence as are engaged when deciding whether a penal statute gives a private remedy in damages for breach of the duty it imposes. There is evident force in that proposition. But it is then necessary to observe the difficulties and dangers that attend that task.

29 The chief difficulty was described by Dixon J in *O'Connor v S P Bray Ltd*[41] in a passage to which reference was made in *Henwood*[42]. That difficulty is that "the legislature has in fact expressed no intention upon the subject"[43]. As explained in *Sovar v Henry Lane Pty Ltd*[44], care must therefore be taken lest the relevant legislative intention be "conjured up by judges to give effect to their own ideas of policy and then 'imputed' to the legislature". As McHugh and Gummow JJ explained in *Byrne v Australian Airlines Ltd*[45], quoting Kitto J in *Sovar*[46], the task is one that requires consideration of the whole range of circumstances relevant upon a question of statutory interpretation, including the nature, scope and terms of the statute, the nature of the evil against which it is directed, the nature of the conduct prescribed and the pre-existing state of the law.

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40 (1938) 60 CLR 438 at 463.

41 (1937) 56 CLR 464 at 477-479; [1937] HCA 18.

42 (1938) 60 CLR 438 at 463.

43 (1937) 56 CLR 464 at 477.

44 (1967) 116 CLR 397 at 405; [1967] HCA 31.

45 (1995) 185 CLR 410 at 460-461; [1995] HCA 24.

46 (1967) 116 CLR 397 at 405.

The decided cases

30 Argument of the present matter necessarily focused upon the decisions of this Court said to be most directly in point: *Henwood*, *Smith v Jenkins*[47], *Jackson v Harrison*[48] and *Gala v Preston*[49]. Neither party submitted that the applicable principle or principles that are engaged in this matter was authoritatively stated in any of those cases. Each party, to a greater or lesser degree, sought to have the court restate the relevant principles. It is therefore necessary to pay close attention to what is said in those cases.

31 Sufficient has been said, for present purposes, about *Henwood*. More must be said about the other three cases. Each of them (*Smith v Jenkins*, *Jackson v Harrison* and *Gala v Preston*) arose out of an action for damages for personal injury suffered by a person complicit in an offence committed by the driver. What is said in those cases, especially in *Smith v Jenkins* and *Jackson v Harrison*, must be understood against a background provided not just by the decision in *Henwood*, but also by the course of decisions in State courts after *Henwood*.

Decisions of State courts

32 In *Christiansen v Gilday*[50], the Full Court of the Supreme Court of New South Wales considered a case in which the master of a trawler sued the owner for damages for personal injury suffered at sea when the master fell against the moving parts of an inadequately guarded winch. Under the *Navigation Act* 1901 (NSW) it was a misdemeanour for the owner to send a ship to sea, and for the master knowingly to take it to sea, in a state so unseaworthy as to be likely to endanger life. The defects in the winch were of that kind and both the plaintiff as master, and the defendant as owner, were found to have contravened the *Navigation Act*.

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47 (1970) 119 CLR 397.

48 (1978) 138 CLR 438; [1978] HCA 17.

49 (1991) 172 CLR 243; [1991] HCA 18.

50 (1948) 48 SR (NSW) 352.

33 The Full Court held that the plaintiff could not recover damages. Jordan CJ agreed[51] with the conclusion of the trial judge that the plaintiff could not "recover damages for injuries sustained by him in the course of his doing an act which was not only illegal but criminal". The analysis of Street J was to substantially similar effect. By contrast, Davidson J referred to *Henwood* and looked[52] to the objects of the *Navigation Act*. Davidson J concluded[53] that the Act was not directed to saving employees or others from their own acts, or to protecting the owner or master against liability to actions by the crew. On the contrary, Davidson J continued[54], the object of the Act was "to impose rigid obligations, including criminal consequences, upon the owner and the master for the protection of everyone using the ship at sea". Accordingly, his Honour held that the master could not recover from the owner.

34 In 1952, Smith J of the Supreme Court of Victoria had decided, in *Williams v McEwan*[55], that a plaintiff's complicity in the illegal use of a motor car was not a bar to his recovery in an action for damages for negligence. The decision turned on the law of the place where the accident occurred – New South Wales. A New South Wales statute provided[56] that nothing in the Act (which, among other things, proscribed[57] the illegal use of a motor vehicle) "shall affect any liability of any person by virtue of any statute or at common law". The decision did not turn on the application of any common law principle about illegality.

35 Issues about illegality in tort were more frequently litigated in the 1960s. By then, the statute law of New South Wales and Victoria had altered. No longer was illegal use of motor vehicles dealt with by traffic legislation. It was an

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51 (1948) 48 SR (NSW) 352 at 355.

52 (1948) 48 SR (NSW) 352 at 356.

53 (1948) 48 SR (NSW) 352 at 356.

54 (1948) 48 SR (NSW) 352 at 356.

55 [1952] VLR 507.

56 *Motor Traffic Act* 1909 (NSW), s 17.

57 *Motor Traffic Act* 1909, s 8A.

offence dealt with by the general criminal statute of each jurisdiction, and the penalty prescribed was greater than had been the case when dealt with by traffic legislation. Because the offence of illegal use of a motor vehicle was dealt with in the relevant *Crimes Acts*, no legislative savings provision of the kind considered by Smith J in *Williams v McEwan* applied.

36 In *Boeyen v Kydd*[58], Adam J held, in the Supreme Court of Victoria, that there is no general principle of law that a person engaged in an unlawful act (there, the illegal use of a motor vehicle) cannot sue for damages for injuries sustained as a result of the negligence of his confederate. Adam J founded his conclusion on what had been held in *Henwood*, not upon a statutory savings provision of the kind considered by Smith J in *Williams v McEwan*.

37 By contrast, in New South Wales a defence of illegality to a claim in negligence was upheld by the Full Court of the Supreme Court of New South Wales in *Godbolt v Fittock*[59]. In that case, a vehicle being used to transport stolen cattle ran off the road and struck a tree. The passenger, who had stolen the cattle with the driver, sued the driver for damages for negligence. The Full Court held the plaintiff to be precluded from recovery, founding[60] the conclusion upon there being a direct connection between the journey during which the accident occurred and the execution of the relevant criminal purpose.

38 In *Andrews v The Nominal Defendant*[61] the New South Wales Full Court held that a passenger in a motor car which was owned by the passenger and which he had failed to insure could recover damages from the negligent driver despite the passenger's breach of the statutory requirement to insure. Applying *Henwood*, the Court held[62] that it was not a part of the purpose of the law against which the plaintiff offended to deprive him of his civil remedy.

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58 [1963] VR 235 at 237-238.

59 (1963) 63 SR (NSW) 617.

60 (1963) 63 SR (NSW) 617 at 624 per Sugerman J (Brereton J agreeing), 630-631 per Manning J.

61 (1965) 66 SR (NSW) 85.

62 (1965) 66 SR (NSW) 85 at 93.

39 A few years later, in *Bondarenko v Sommers*, the New South Wales Court of Appeal held that a defence of illegality defeated a claim in negligence by one illegal user of a motor car against another. Jacobs JA, who gave the principal judgment[63], identified the actual act complained of as done negligently as being "itself the criminal act in which both plaintiff and defendant were engaged". Because "[t]he legislation creating the criminal act shows no intention to preserve civil rights in the circumstances ... no cause of action would lie"[64].

Smith v Jenkins

40 This Court's decision in *Smith v Jenkins* was reached against the background provided by this division of outcomes and opinions in the State courts. The Court concluded, unanimously, that the plaintiff could not recover damages from the driver of the motor vehicle which both plaintiff and driver were illegally using at the time of the accident. Each member of the Court gave separate reasons.

41 Barwick CJ rested[65] his conclusion on there being no duty of care owed by one illegal user to another. But that conclusion was expressly founded upon attributing to the relationship between the parties only one of what were seen as two competing and singular characterisations of the relationship: as joint participants in an illegal act, rather than as passenger and driver.

42 Kitto J concluded[66] that a case of joint illegal enterprise could and should be distinguished from *Henwood*, because there only the deceased had acted illegally. In the opinion of Kitto J, the determinative consideration[67] was that the actual act done negligently was itself the criminal act in which both plaintiff and defendant were engaged. The acts which several persons knowingly contribute

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63 (1968) 69 SR (NSW) 269 at 277.

64 (1968) 69 SR (NSW) 269 at 277.

65 (1970) 119 CLR 397 at 400.

66 (1970) 119 CLR 397 at 401-402.

67 (1970) 119 CLR 397 at 404.

to the joint commission of a wrong were, in his Honour's view[68], legally inseverable.

43 The reasons of Windeyer J are as important for his Honour's rejection of some propositions as they are for their acceptance of others. First, Windeyer J rejected[69] formulation of the relevant principles in a way that made the critical question "whether the unlawful act has a causal connexion with the harm suffered and 'proximately contributed' to it". Second, Windeyer J rejected[70] formulation of the relevant principles in a way that depended upon the kind of crime in the course of which the tort occurred. As his Honour demonstrated[71], no satisfactory distinction can be drawn between breaches of statutory rules and violations of the criminal law, not least because most crimes are statutory. Nor can any other form of satisfactory distinction be made, at least for this purpose, between grades or types of illegal activity.

44 The step critical to the reasoning of Windeyer J was the manner of formulating the relevant question. Windeyer J stated[72] the question in the case as "whether when two persons are jointly engaged in a particular criminal enterprise – unlawfully taking or using a motor car – one can sue the other *because he has been negligent in the course of carrying out his part in their unlawful undertaking*" (emphasis added). The answer he gave to the question was stated[73] by applying a rule that: "If two or more persons participate in the commission of a crime, each takes the risk of the negligence of the other or others in the actual performance of the criminal act." This formulation, Windeyer J said[74], "can be regarded as founded on the negation of duty, or on some extension of the rule

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68 (1970) 119 CLR 397 at 404.

69 (1970) 119 CLR 397 at 420-421.

70 (1970) 119 CLR 397 at 422-424.

71 cf *Godbolt v Fittock* (1963) 63 SR (NSW) 617 at 623.

72 (1970) 119 CLR 397 at 416-417.

73 (1970) 119 CLR 397 at 422.

74 (1970) 119 CLR 397 at 422.

volenti non fit injuria, or simply on the refusal of the courts to aid wrongdoers", but which analysis or explanation was adopted was said[75] not to matter.

45 Owen J was of the opinion[76] that the relationship between two criminals engaged in carrying out a criminal venture gave rise to no duty of care owed by one to the other "in the execution of the crime". Walsh J concluded[77] that there is no "single rule by which, in all cases, the question raised by a plaintiff's commission of an illegal act, or his participation in it, is to be answered". His Honour accepted that in some cases the correct approach would be to ask, as in *Henwood*, about the intention of the relevant statute. In others he suggested[78] that "the inquiry is not whether the offender is disqualified from obtaining from the Court a remedy in respect of a wrong ... it is whether, in the circumstances, he will be treated as having suffered any civil wrong which is recognised by the law".

46 To the extent to which the Court's reasons depended upon assigning a single characterisation to the relationship of the parties, subsequent considerations of an approach of that kind to constitutional interpretation[79] show that the reasoning is flawed. In deciding a question of connection between a statute and a head of power, the fact that the law fairly answers the description of being with respect to two subject-matters, of which one is within power, is sufficient to answer the relevant question. But in deciding whether one person owes a duty of care to another, it is necessary to consider the *whole* of the

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75 (1970) 119 CLR 397 at 422.

76 (1970) 119 CLR 397 at 425.

77 (1970) 119 CLR 397 at 427.

78 (1970) 119 CLR 397 at 427.

79 For example, *Re F; Ex parte F* (1986) 161 CLR 376 at 387-388; [1986] HCA 41.

relationship between the parties[80]. As was said in *Graham Barclay Oysters Pty Ltd v Ryan*[81]:

> "[t]he totality of the relationship between the parties, not merely the foresight and capacity to act on the part of one of them, is the proper basis upon which a duty of care may be recognised."

Thus where the relationship between parties engaged in a joint illegal enterprise may be characterised in more than one way, there is no sound basis for choosing one characterisation to the exclusion of the other or others.

47 One aspect of the relationship between the parties in the present case was that they were joint participants in an illegal act. Another aspect of their relationship was that the plaintiff was a passenger in a motor vehicle being driven by the defendant. The relationship between the parties could therefore be described as a relationship of passenger and driver. But, just as it is wrong to describe the relationship between them only as that of participants in a joint criminal enterprise, it is wrong to describe their relationship only as that of passenger and driver. Both characterisations of the relationship are accurate, but neither is complete. Both characterisations must be applied to describe the relevant circumstances fully.

48 The importance of recognising that the relationship between the parties has more than one aspect is revealed by the reasons in *Smith v Jenkins*. Common to the reasoning of all members of the Court was the emphasis given to the facts that the negligence of which the plaintiff complained was the defendant's negligent execution of the relevant illegal act (using the motor vehicle) and that the plaintiff was committing the same crime as the defendant. This description of events and relationships did not stop short at observing that one was a

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80 See, for example, *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198] per Gummow J; [1999] HCA 36; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 41 [44] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ; [2001] HCA 44; quoting *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29 per Mason J; [1986] HCA 1; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 596 [145] per Gummow and Hayne JJ; [2002] HCA 54.

81 (2002) 211 CLR 540 at 596 [145].

passenger in a car driven by the other. It took account of the fact that the driving was a crime in which the passenger was complicit.

49 The significance given to the facts just described proceeded from the uncontroversial premise that it is necessary to determine whether the defendant owed a duty to a class of persons (including the plaintiff) to take reasonable care not to cause personal injury to those persons. Plainly, the driver of a motor car that the driver has taken and is using illegally owes other road users a duty to take reasonable care not to cause personal injury. But the question in *Smith v Jenkins* was more complex. The relevant question was as it is here: does the class of persons to whom the driver owes that duty of care include the driver's confederate in the crime of illegally using the vehicle? The emphasis given in the reasons for judgment to the negligence alleged being *in the execution* of the relevant illegal act for which both plaintiff and defendant were criminally responsible can be seen as founding the negative answer to the question about duty of care. For Windeyer J, that answer followed[82] not from public policy *precluding* the assertion of a right of action but rather from the conclusion that the law will not regulate, as between two wrongdoers, how each performs the tasks that fall to him or her in effecting their wrong[83]. For other members of the Court, public policy precluded the assertion of a right of action.

Jackson v Harrison

50 In *Jackson v Harrison*, the plaintiff, a passenger in a motor vehicle driven negligently by the defendant, sued for damages for personal injury. At the time of the accident the defendant was driving while disqualified. The plaintiff knew the defendant was disqualified and was found to be a joint participant in commission of the offence. In this Court, the plaintiff was held by majority (Mason, Jacobs, Murphy and Aickin JJ; Barwick CJ dissenting) to be entitled to recover damages. Again, no single view of the applicable principles commanded the assent of a majority of the Court.

51 Mason J concluded[84] that *Smith v Jenkins* did *not* establish a general rule that the participants in a joint illegal enterprise owe no duty of care to each other.

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82 (1970) 119 CLR 397 at 418.

83 (1970) 119 CLR 397 at 422.

84 (1978) 138 CLR 438 at 453.

Rather, Mason J said[85] that a general rule of that kind would lead to two distinct forms of difficulty. First, the rule would have unduly harsh operation in some circumstances, and it was not possible to formulate any criterion for engaging the principle that would avoid outcomes of that kind. Second, and more fundamentally, Mason J concluded[86] that to deny the existence of a duty of care was to discard foreseeability as a criterion for determining the existence of a duty. Mason J therefore proposed[87], as "[a] more secure foundation for denying relief", that a plaintiff "must fail when the character of the enterprise in which the parties are engaged is such that it is impossible for the court to determine the standard of care which is appropriate to be observed".

52 Jacobs J, with whom Aickin J agreed, adhered[88] to the view expressed, in the then recent decision of this Court in *Progress and Properties Ltd v Craft*[89], that "[a]n illegal activity adds a factor to the relationship [between plaintiff and defendant] which may either extinguish or modify the duty of care otherwise owed". A conclusion that no duty was owed was said[90] by Jacobs J to proceed by steps. First, it was observed that finding a duty presupposes that the relevant standard of care can be identified. Second, the courts should "decline to permit the establishment of an appropriate standard of care"[91] if the relationship between the act of negligence and the nature of the illegal activity is such that "a standard of care *owed in the particular circumstances* could only be determined by bringing into consideration the nature of the activity in which the parties were engaged"[92] (emphasis added). In those cases, Jacobs J concluded, the courts will not do this for reasons of public policy. And if no standard will be determined there can be no duty. But, in the case then under consideration, these difficulties

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85 (1978) 138 CLR 438 at 455.

86 (1978) 138 CLR 438 at 455.

87 (1978) 138 CLR 438 at 455-456.

88 (1978) 138 CLR 438 at 457.

89 (1976) 135 CLR 651 at 668; [1976] HCA 59.

90 (1978) 138 CLR 438 at 457.

91 (1978) 138 CLR 438 at 457.

92 (1978) 138 CLR 438 at 457.

were not seen as intruding. The facts that the driver was disqualified, that the passenger knew that to be so, and that the passenger aided and abetted the driver in driving whilst disqualified, were seen[93] as having no bearing at all upon the standard of care reasonably to be expected of the driver.

53 The fourth member of the majority in *Jackson v Harrison*, Murphy J, pointed out[94] that the cases in which a court cannot, as distinct from will not, determine an appropriate standard of care must be infrequent. The standard of care expected of the driver of a motor vehicle is well established. To conclude that one participant in a joint illegal enterprise owes no duty of care to the other would serve "the same purpose as a conclusive imputation of voluntary assumption of the risk [of tortious conduct by the other] by each participant"[95]. Accordingly, Murphy J concluded[96] that, apart from a controlling statute, policy considerations should not render a careless defendant immune from civil action because of illegality. (The reference to "a controlling statute" was linked expressly[97] to *Henwood* and it was said[98] that there should be "strict application of the test" referred to in that case.)

54 Three comments may be made about these different paths of reasoning. First, it should be accepted that it is not useful to speak of a court not being able to fix a relevant standard of care. Resort to the now well-worn example of safe breakers, and the posing of rhetorical questions about how a court would know what steps a reasonable safe breaker would take, are not helpful. The courts must deal with many difficult questions and with many forms of very discreditable human behaviour. Setting a norm of behaviour as between criminals may be difficult, but it is not impossible.

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93 (1978) 138 CLR 438 at 461.

94 (1978) 138 CLR 438 at 462-463.

95 (1978) 138 CLR 438 at 464.

96 (1978) 138 CLR 438 at 464.

97 (1978) 138 CLR 438 at 465-466.

98 (1978) 138 CLR 438 at 465.

55 Second, it follows that, instead of asking *how* the courts *can* set a relevant standard of care, attention must fall upon *whether* the courts *should* be doing that in the particular case. All of the judgments in *Jackson v Harrison* (and in *Smith v Jenkins*) accepted that there are cases where the courts should not permit recovery by a plaintiff who has acted illegally. And no party to the present appeal contended to the contrary.

56 Third, the cases in which a court should hold that there is no duty of care may be identified by reference to what Mason J described[99] as "the character and incidents of the enterprise and to the hazards which are necessarily inherent in its execution". But in the case of an enterprise which is the commission of a statutory offence, inquiries of that kind direct attention not only to what the statute prohibits, but also to the purposes of that statute. It is the statute and its purposes which will identify the relevant character and incidents of the enterprise and the relevant hazards inherent in its execution. More fundamentally, it is the statute and its purposes which will reveal whether it would be incongruous to hold that a participant in a joint enterprise to contravene the statutory prohibition owed a duty of care to another participant in the enterprise. And because it is the relevant statute and its purposes that must be the focus of attention, rather than discussion of public policy divorced from the particular questions of coherence that must be decided, the decisions in other jurisdictions which follow that different path[100] are of limited use.

Gala v Preston

57 In the early 1990s this Court considered again, in *Gala v Preston*[101], whether a driver of a stolen motor car owed a duty of care to a passenger who was injured as a result of the careless driving of the vehicle in the course of a joint criminal enterprise that included the illegal use of the vehicle. At that time, a majority of the Court favoured[102] the view that a relevant duty of care:

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99 (1978) 138 CLR 438 at 455.

100 See, for example, *Gray v Thames Trains Ltd* [2009] AC 1339.

101 (1991) 172 CLR 243.

102 (1991) 172 CLR 243 at 252-253 per Mason CJ, Deane, Gaudron and McHugh JJ.

> "will arise under the common law of negligence only in a case where the requirement of a relationship of proximity between the plaintiff and the defendant has been satisfied: see *Sutherland Shire Council v Heyman*[103]; *Stevens v Brodribb Sawmilling Co Pty Ltd*[104]; *San Sebastian Pty Ltd v The Minister*[105]; *Cook v Cook*[106]".

The Court had also held, in *Cook v Cook*[107], that exceptional facts may alter the relationship between a driver and passenger so as to impose a different standard of care adjusted to the relationship. The case of driving instructor and learner driver was identified as one such case.

58 All members of the Court held, in *Gala v Preston*, that a passenger who was criminally complicit in the illegal use of a vehicle by its driver could not recover damages for personal injury suffered as a result of the driver's careless driving. The plurality concluded[108] no duty of care was owed because "the parties were not in a relationship of proximity to each other". It was said[109] that *Cook v Cook* was "[a]n exemplification of the relationship of proximity which provide[d] particular assistance" in dealing with the circumstances under consideration in *Gala v Preston*.

59 The demise of proximity as a useful informing principle in this area is now complete[110]. The decision in *Cook v Cook* is no longer good law[111]. The

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103 (1985) 157 CLR 424 at 461-462, 506-507; [1985] HCA 41.

104 (1986) 160 CLR 16 at 30, 50-52.

105 (1986) 162 CLR 340 at 354-355; [1986] HCA 68.

106 (1986) 162 CLR 376 at 381-382; [1986] HCA 73.

107 (1986) 162 CLR 376.

108 (1991) 172 CLR 243 at 254.

109 (1991) 172 CLR 243 at 253.

110 *Hill v Van Erp* (1997) 188 CLR 159 at 210, 237-239; [1997] HCA 9; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 193-194 [7]-[10], 197-198 [25]-[27], 208-212 [70]-[82], 283-284 [280]-[282], 300-303 [330]-[335]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [3], 32 [73],

(Footnote continues on next page)

combination of these considerations may suggest that what was held in *Gala v Preston* should be set aside and the law should be developed as though the slate were clean. That is not right.

60 First, it is important to remember why proximity has been discarded from the Australian judicial lexicon. The expression is one which has been found not to be useful. It is not useful because it neither states, nor points to, any relevant principle that assists in the resolution of disputed questions about the existence of a duty of care, beyond indicating that something more than foreseeability of damage is necessary. Instead, "proximity" was used as a statement of conclusion. And, because it was used as a statement of conclusion, it is important to look to the reasoning that lay behind the conclusion, rather than the bare fact that the conclusion was expressed by using the terms "proximity" or "relationship of proximity".

61 In *Gala v Preston*, the plurality concluded[112] that the parties were not in a "relationship of proximity" because "[i]n the special and exceptional circumstances that prevailed, the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care". This was said[113] to follow from the fact that

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33-34 [77], 56 [149], 80 [222], 96-97 [270]-[272]; [1999] HCA 59; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 630-631 [316]; [2001] HCA 29; *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48]; *Tame v New South Wales* (2002) 211 CLR 317 at 355-356 [104]-[107], 405 [257], 408-409 [266]-[268]; [2002] HCA 35; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 583 [99], 624 [234]-[236]; *Joslyn v Berryman* (2003) 214 CLR 552 at 564 [30]; [2003] HCA 34; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 528-529 [18]; [2004] HCA 16; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 433 [28], 444-445 [66]-[68]; [2005] HCA 62; *Imbree v McNeilly* (2008) 236 CLR 510 at 524 [41], 552-553 [141], 564 [181]; [2008] HCA 40; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 260 [132]; [2009] HCA 15.

111 *Imbree v McNeilly* (2008) 236 CLR 510.

112 (1991) 172 CLR 243 at 254.

113 (1991) 172 CLR 243 at 254.

> "each of the parties to the enterprise must be taken to have appreciated that he would be encountering serious risks in travelling in the stolen vehicle when it was being driven by persons who had been drinking heavily and when it could well be the subject of a report to the police leading possibly to their pursuit and/or their arrest."

Accordingly, the plurality decided[114] that "[t]o conclude that he [the defendant-driver] should have observed the ordinary standard of care to be expected of a competent driver would be to disregard *the actual relationship* between the parties" (emphasis added) and that

> "[t]o seek to define a more limited duty of care by reference to the exigencies of the particular case would involve a weighing and adjusting of the conflicting demands of the joint criminal activity and the safety of the participants in which it would be neither appropriate nor feasible for the courts to engage."

The validity of this reasoning does not depend upon the use of the word "proximity" as a description of its outcome.

62 Likewise the reference to and reliance on *Cook v Cook* does not warrant ignoring all that was said or done in *Gala v Preston*. The references made by the plurality to *Cook v Cook* were made in aid of the proposition that there are cases in which the relationship between parties is not sufficiently described as that of driver and passenger.

63 This Court's overruling of *Cook v Cook* in *Imbree v McNeilly* focused upon the treatment in *Cook v Cook* of questions of *standard* of care rather than *duty* of care. As the plurality pointed out[115] in *Imbree*, in so far as the reasoning of the plurality in *Cook v Cook* depended upon the application of notions of proximity, it is reasoning that "does not accord with subsequent decisions of this Court denying the utility of that concept as a determinant of duty". But, as the plurality in *Imbree* also pointed out[116], that observation did not conclude the issues that arose in *Imbree*. The immediate question in *Imbree* was about the

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114 (1991) 172 CLR 243 at 255.

115 (2008) 236 CLR 510 at 526 [46].

116 (2008) 236 CLR 510 at 526-527 [46].

content of a duty of care, not whether any duty was owed. Further, the idea that, in determining the content of a duty of care, primacy must be given to identifying the relationship between the parties is a principle of long standing in the law of Australia, stemming as it does from the dissenting reasons of Dixon J in *The Insurance Commissioner v Joyce*[117].

64 *Joyce* concerned a gratuitous passenger accepting carriage in a vehicle driven by a person known by the passenger to be drunk. In *Joyce*, Dixon J offered[118] three possible bases for concluding that the passenger's action should fail: no breach of duty, voluntary assumption of risk and contributory negligence (then a complete defence). Of them, Dixon J preferred[119] the first form of analysis. As the plurality in *Imbree* said[120], the conclusion that a defendant owed the plaintiff *no* duty of care is open in a case like *Joyce* if the drunken driver cannot be expected to act sensibly (an idea that would also underpin a conclusion that the plaintiff voluntarily assumed the risk of being driven by a drunken driver). And as Windeyer J said[121] in *Smith v Jenkins*, a conclusion that one illegal user owes no duty of care to a confederate "can be regarded as founded on the negation of duty, or on some extension of the rule volenti non fit injuria, or simply on the refusal of the courts to aid wrongdoers". But as is implicit in what was said in all three cases (*Joyce*, *Smith v Jenkins* and *Imbree*) the question whether A owes B a duty to take reasonable care is not to be answered by reference only to whether A was the driver of and B a passenger in a motor vehicle. A duty of care arises from the "relations, juxtapositions, situations or conduct or activities"[122] in question. All aspects of the relations between the parties must be considered.

65 Other members of the Court in *Gala v Preston* (Brennan, Dawson and Toohey JJ) analysed the matter in separate reasons in ways that differed in

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117 (1948) 77 CLR 39; [1948] HCA 17.

118 (1948) 77 CLR 39 at 56-58.

119 (1948) 77 CLR 39 at 59-60.

120 (2008) 236 CLR 510 at 536 [82].

121 (1970) 119 CLR 397 at 422.

122 *The Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 57.

important respects from the reasoning adopted by the plurality. For Brennan J, the decisive point[123] was that to admit a duty of care would destroy the "normative influence" of the statutory provision[124] which made the illegal use of a vehicle a crime. The destruction of "normative influence" was said[125] to occur where the effect of admitting a duty of care would be to "condone" a breach of the criminal law. But introducing the notion of "condonation" into the debate does not cast light upon the problem. Rather, it is important to observe the way in which Brennan J sought to identify when the admitting of a duty of care may "condone" a breach of the criminal law. It was said[126] to depend on the "nature of the offence". That was said[127] to be "not the same as seeking to divine the intent of a statute creating an offence". Instead, the matters to be considered were said[128] to include:

> "the gravity of the offence, the threat to public order or public safety or the infringement of the rights of third parties which the law seeks to prevent, any other mischief at which the law creating the offence is aimed, the penalties prescribed for breach of the law and the effectiveness of those penalties to secure obedience to the law if a duty of care be admitted".

66 In large part the considerations mentioned would be relevant to inquiries of the kind described by Dixon and McTiernan JJ in *Henwood* in determining the purpose of the law against which the plaintiff offended. What is added, however, in the catalogue of matters to which Brennan J referred, is an attempt at assessing the effectiveness of penalties in securing obedience to the law and, perhaps, some assessment of what is described as "the threat" which the law seeks to prevent, independent of whatever may be gleaned from the subject-matter, scope and purpose of the statute. Neither the way in which these tasks might be undertaken, nor any sound footing for undertaking them, is identified.

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123 (1991) 172 CLR 243 at 273.

124 *Criminal Code* (Q), s 408A.

125 (1991) 172 CLR 243 at 270-273.

126 (1991) 172 CLR 243 at 271.

127 (1991) 172 CLR 243 at 272.

128 (1991) 172 CLR 243 at 272.

67 Two points may be made about this form of analysis. First, as Windeyer J demonstrated in *Smith v Jenkins*[129], no satisfactory distinction can be made between breaches of statutory rules and violations of the criminal law and no satisfactory distinction can be made between grades or types of crime. Second, and no less fundamentally, reference to matters such as the "effectiveness" of penalties in securing obedience to the law appears to sever any connection between the conclusion reached and the legal and practical operation of the statute identified according to ordinary methods of statutory construction. More particularly, it may readily lead to an error closely analogous to that identified in *Sovar v Henry Lane Pty Ltd*[130] where legislative intention is "conjured up by judges to give effect to their own ideas of policy and then 'imputed' to the legislature".

68 In his reasons in *Gala v Preston*, Dawson J doubted[131] "that it is possible to gauge the extent to which allowing a civil remedy might impair the normative (especially the deterrent) effect of the criminal law". Instead, Dawson J concluded[132] that the relevant policy of the law "goes deeper than possible interference with the normative effect of the criminal law" and is founded in a notion that it is repugnant to the law to set a standard of care to be observed between accomplices "in the performance of their criminal venture". In the case of joint illegal users of a vehicle:

> "[t]he criminal nature of the activity with its concomitant lack of responsibility for the safety of the vehicle involved and the inevitable desire to avoid detection which might result in the imposition of a criminal penalty must mean that the participants in such a venture cannot be placed, as regards each other, in the position of ordinary, prudent users of the road. There is a special element in their relationship which, if a

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129 (1970) 119 CLR 397 at 422-423.

130 (1967) 116 CLR 397 at 405.

131 (1991) 172 CLR 243 at 278.

132 (1991) 172 CLR 243 at 278.

standard of care were to be set, would require its modification by reference to the criminal nature of their activity."[133]

69 In his reasons, Toohey J concluded[134] that *Smith v Jenkins* established that if two persons participate in the commission of a crime each takes the risk of the negligence of the other in the actual performance of the criminal act and neither participant owes a duty of care to the other. There being, in his Honour's view[135], nothing in later decisions which cut down that principle established in *Smith v Jenkins*, and[136] there being no sufficient reason shown to depart from what was decided in that case, it should be held that the defendant in *Gala v Preston* owed the plaintiff no duty of care.

Common threads in the decided cases

70 What has been said about the previous decisions in this Court shows that some propositions can be made. First, the fact that a plaintiff was acting illegally when injured as a result of the defendant's negligence is not determinative of whether a duty of care is owed. Second, the fact that plaintiff and defendant were both acting illegally when the plaintiff suffered injuries of which the defendant's negligence was a cause and which would not have been suffered but for the plaintiff's participation in the illegal act is not determinative. Third, there are cases where the parties' joint participation in illegal conduct should preclude a plaintiff recovering damages for negligence from the defendant. Fourth, different bases have been said to found the denial of recovery in some, but not all, cases of joint illegal enterprise: no duty of care should be found to exist; a standard of care cannot or should not be fixed; the plaintiff assumed the risk of negligence. Fifth, the different bases for denial of liability all rest on a policy judgment. That policy judgment has sometimes been expressed in terms that the courts *cannot* regulate the activities of wrongdoers and sometimes in terms that the courts *should not* do so.

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133 (1991) 172 CLR 243 at 280 per Dawson J.

134 (1991) 172 CLR 243 at 285.

135 (1991) 172 CLR 243 at 285-289.

136 (1991) 172 CLR 243 at 290-292.

71 Twice this Court has held (unanimously in each case) that one illegal user of a motor vehicle cannot recover damages for injuries sustained as a result of the negligent driving of another illegal user of the vehicle. Central to the conclusion in each of those cases was the observation that the negligence alleged was negligence by one criminal in carrying out his part in the unlawful undertaking in which both plaintiff and defendant were engaged.

72 The proposition that courts cannot regulate the activities of wrongdoers has already been rejected. In a case of illegal use of a motor vehicle there is a readily identified standard of care that could be engaged: the standard of care which road users other than the driver's criminal confederates are entitled to expect the driver to observe.

73 Why should courts not regulate the activities of the wrongdoers by requiring of the driver that he or she exercise reasonable care for the safety of other road users and any passenger in the vehicle, whether or not the passenger is complicit in the crime? As explained at the outset of these reasons, the answer must lie in whether it is incongruous for the law to provide that the driver should not be using the vehicle at all and yet say that, if the driver and another jointly undertake the crime of using a vehicle illegally, the driver owes the confederate a duty to use it carefully when neither should be using it at all.

74 Incongruity (whether described by that word or as "contrariety" or "lack of coherence") will not be demonstrated or denied by bare assertion of the answer. More analysis is required. If a statute has been contravened, careful attention must be paid to the purposes of that statute. It will be by reference to the relevant statute, and identification of its purposes, that any incongruity, contrariety or lack of coherence denying the existence of a duty of care will be found. That is the path that was taken in *Henwood*. It is the same as the path that has been taken in relation to illegality in contract and trusts. The same path should be taken in cases where the plaintiff sues the defendant for damages for the negligent infliction of injury suffered in the course of, or as a result of, the pursuit of a joint illegal enterprise.

Relevant statutory provisions

75 In this case, the centrally relevant provision was s 371A of the Code. That provision made it an offence to take or use a motor vehicle without the consent of the owner or person in charge of the vehicle. The only offence in which it was alleged that Danelle was complicit was the offence of taking and illegally using the vehicle. She had taken the vehicle; both she and Maurin used it illegally.

Maurin, the driver of the vehicle, was charged with, and pleaded guilty to, other offences arising out of his use of the car that night: dangerous driving causing death, dangerous driving causing grievous bodily harm, and driving under the influence of alcohol.

76 At the relevant time, s 371A provided:

> "(1) A person who unlawfully –
>
> (a) uses a motor vehicle; or
>
> (b) takes a motor vehicle for the purposes of using it; or
>
> (c) drives or otherwise assumes control of a motor vehicle,
>
> without the consent of the owner or the person in charge of that motor vehicle, is said to steal that motor vehicle.
>
> (2) This section has effect in addition to section 371 and does not prevent section 371 from applying to motor vehicles."

There is a substantial legislative history behind that provision and it will be necessary to consider some aspects of that history. Before doing that, however, note must also be made of two other provisions of the Code as it stood at the relevant time.

77 First, it will be observed that s 371A(2) provided that s 371A "has effect in addition to section 371 and does not prevent section 371 from applying to motor vehicles". Section 371 provided:

> "(1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person any property, is said to steal that thing or that property.
>
> (2) A person who takes anything capable of being stolen or converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:–
>
> (a) An intent to permanently deprive the owner of the thing or property of it or any part of it;

(b) An intent to permanently deprive any person who has any special property in the thing or property of such special property;

(c) An intent to use the thing or property as a pledge or security;

(d) An intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(e) An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(f) In the case of money, an intent to use it at the will of the person who takes or converts it although he may intend to afterwards repay the amount to the owner.

The term '**special property**' includes any charge or lien upon the thing or property in question, and any right arising from or dependent upon holding possession of the thing or property in question, whether by the person entitled to such right or by some other person for his benefit.

...

(6) The act of stealing is not complete until the person taking or converting the thing actually moves it or otherwise actually deals with it by some physical act.

(7) In this section, '**property**' includes any description of real and personal property ..."

78 Second, it will be observed that s 371A provided, in effect, that the person who illegally takes or uses a motor vehicle "is said to steal that motor vehicle". Section 378 prescribed the punishment for theft, if no other punishment was provided, as imprisonment for seven years. Section 378(2) made special provision for some cases of illegal use of a motor vehicle. It provided:

"(2) If the thing stolen is a motor vehicle and the offender –

(a) wilfully drives the motor vehicle in a manner that constitutes an offence under section 60 of the *Road Traffic Act 1974* (i.e. the offence known as reckless driving); or

(b) drives the motor vehicle in a manner that constitutes an offence under section 61 of the *Road Traffic Act 1974* (i.e. the offence known as dangerous driving),

the offender is liable to imprisonment for 8 years."

Thus, different maximum penalties were prescribed for the illegal taking or use of a motor vehicle and the illegal taking or use of a motor vehicle accompanied by one or other of two aggravating circumstances: driving in a manner that constitutes either the offence of reckless driving or the offence of dangerous driving.

79 Reference must also be made to s 8 of the Code, which dealt with offences committed in prosecution of a common purpose. Section 8 provided:

"(1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

(2) A person is not deemed under subsection (1) to have committed the offence if, before the commission of the offence, the person –

(a) withdrew from the prosecution of the unlawful purpose;

(b) by words or conduct, communicated the withdrawal to each other person with whom the common intention to prosecute the unlawful purpose was formed; and

(c) having so withdrawn, took all reasonable steps to prevent the commission of the offence."

It is to be noted that the hinge about which s 8 turns is the formation of "a common intention to prosecute an unlawful purpose" and that s 8(1) makes those

who have that common intention criminally liable for an offence committed "of such a nature that its commission was a probable consequence" of the prosecution of the common purpose. If one of those who was party to the common purpose withdraws from its prosecution in the manner described in s 8(2), that person is not responsible for offences committed subsequently, even if their commission was a probable consequence of the prosecution of the common purpose.

The legislative history

80 Larceny was an offence in Western Australia from the time of establishment of the Colony. The path by which that was effected need not be described. The first Western Australian codification of the criminal law, made by the *Criminal Code Act* 1902 (WA), provided for offences of stealing which would encompass stealing a motor vehicle but, as had been the case with earlier larceny offences, an element of the offence[137] was the intention, in effect, to permanently deprive the owner of the relevant thing. And *The Criminal Code* provided for by the *Criminal Code Act Compilation Act* 1913 (WA) made like provision[138].

81 Use of a motor vehicle without consent was first made an offence in Western Australia by the *Traffic Act* 1919 (WA)[139]. No intention to permanently deprive the owner of the vehicle had to be shown. The offence was punishable by fine of up to £50 or imprisonment, with or without hard labour, for three months.

82 In 1932, the *Criminal Code (Chapter XXXVII) Amendment Act* 1932 (WA) introduced s 390A into the Code. That section made it a misdemeanour, punishable by imprisonment with hard labour for up to three years, to unlawfully use, or take for the purpose of using, or drive or otherwise assume control of, any vehicle as defined in the *Traffic Act* 1919 without the consent of the owner or the person in charge of the vehicle. Again, no intention to permanently deprive the owner of the vehicle had to be proved. The provision for an offence of illegal

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137 s 369(2).

138 s 371(2).

139 s 50.

use made by the *Traffic Act* 1919 was not then repealed. That provision remained in force until the *Traffic Act* 1919 was repealed and replaced by the *Road Traffic Act* 1974 (WA). And the latter Act made like provision (by s 89(1)) to that made by s 50 of the *Traffic Act* 1919. In 1974, the punishment provided under the *Road Traffic Act* for illegal use of a motor vehicle contrary to s 89 of that Act was, for a first offence, a fine of not less than $200 or more than $1000, or imprisonment for not less than one month or more than 12 months, and for a second or subsequent offence, imprisonment for not less than three months or more than two years. Both the *Traffic Act* 1919[140] and the *Road Traffic Act* 1974[141] contained savings provisions which provided that nothing in the Act "shall take away or diminish any liability of the driver or owner of a vehicle by virtue of any other Act or at common law".

83 In 1991, the *Criminal Law Amendment Act* 1991 (WA) repealed both s 390A of the Code and s 89(1) of the *Road Traffic Act* 1974 and inserted s 371A into the Code. As has been observed, the new s 371A, unlike the former s 390A, provided that the person who illegally took or used a motor vehicle "is said to steal that motor vehicle" and the offence of illegal use then became a species of theft, regardless of whether the user had an intention to permanently deprive the owner of the vehicle.

Savings provisions

84 As noted earlier, both the *Traffic Act* 1919 and the *Road Traffic Act* 1974 contained a savings provision expressly preserving any liability of the driver of a vehicle "by virtue of any other Act or at common law". Section 5 of Appendix B of the *Criminal Code Act Compilation Act* 1913 provides, and has provided since first enacted, that:

> "When, by the Code, any act is declared to be lawful, no action can be brought in respect thereof.
>
> Except as aforesaid, the provisions of this Act shall not affect any right of action which any person would have had against another if this Act had not been passed; nor shall the omission from the Code of any penal

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140 s 59.

141 s 99.

provision in respect of any act or omission, which before the time of the coming into operation of the Code constituted an actionable wrong, affect any right of action in respect thereof."

85 The extent of the operation of s 5 may be controversial. It is to be observed that it provides that "the provisions of this Act" shall not affect certain rights of action: "any right of action which any person *would have had* against another if this Act had not been passed" (emphasis added). And it is further to be observed that, in all other respects, s 5 refers to "the Code" as distinct from "this Act". Another introductory provision of Appendix B to the *Criminal Code Act Compilation Act* 1913 (s 7 dealing with contempt of court) provides that "[n]othing in this Act or in the Code" shall have an identified consequence. It is neither necessary nor desirable to attempt to identify all of the issues presented by these features of s 5 or to explore where the boundaries of s 5 may lie.

86 What are the rights of action spoken of in s 5, and which are not affected by the provisions of "this Act"? It may greatly be doubted that those rights of action are confined to rights that existed before the enactment of the legislation in 1913. The use of the expression "would have had" suggests an ambulatory operation for the provision. Assuming that to be so, s 5 preserves rights of action that would otherwise exist. It does not determine, one way or the other, whether a person who has contravened a provision of "this Act" (assuming that "this Act" includes the provisions of the Code) owed a duty of care to a confederate in crime. By contrast, the savings provisions of the *Traffic Act* 1919 and the *Road Traffic Act* 1974 provided that nothing in those Acts took away or diminished any liability of the driver of a vehicle by virtue of any other Act or at common law.

87 It is not necessary to decide in this matter what consequences follow from the repeal of the *Road Traffic Act* 1974 with its savings provision that (among other things) making illegal use of a vehicle a crime did not take away or diminish the driver's liability at common law. Nor is it necessary to decide whether the savings provision of s 5, on its proper construction, denies that it is a statutory purpose of s 371A to preclude finding that one illegal user owes a duty of care to another. Instead, the decision in this case should be reached by consideration, first, of the statutory purposes of s 371A, and finally of the significance to be attached to Danelle's twice asking to be let out of the car before the accident happened.

The purposes of the legislation

88 Savings provisions apart, the legislative history behind s 371A of the Code demonstrates that the offence of illegal use of a motor vehicle soon passed from the relatively minor offence created by the *Traffic Act* 1919 to a more serious crime (with the enactment of s 390A of the Code in 1932) and thence (by the enactment of s 371A of the Code, and repeal of s 89(1) of the *Road Traffic Act* in 1991) to a still more serious crime equated with theft. An association between the illegal use of a motor vehicle and driving in a manner that was reckless or dangerous was reflected by the introduction of aggravated forms of the offence of illegal use.

89 These changes in the legislation reflected not only a rise in the incidence of illegal use of motor cars, but also a recognition of the dangers to life and limb that often attended the commission of that crime. No doubt the legislation, both as it now stands and as it stood in earlier times, must be understood as effecting a purpose of protecting the property interests of vehicle owners. But in more recent years the legislature also recognised the fact that those who took and used vehicles without the permission of their owners often drove (as Dawson J pointed out[142] in *Gala v Preston*) with a "concomitant lack of responsibility for the safety of the vehicle involved and the inevitable desire to avoid detection". The legislative purposes of s 371A are not confined to protection of property rights. They include the advancement of road safety.

90 If expressed only as the protection of property rights and the promotion of general road safety, the statutory purposes of s 371A, standing alone, appear not to speak to any question of the liability for negligence of one illegal user to another. But there is a further question that must be considered before concluding that one illegal user can sue another in negligence.

91 As noted earlier, a critical step in the reasoning in earlier cases in this Court considering the liability in negligence of one illegal user of a vehicle to another was that the negligence has been committed *in the performance*[143] of the joint criminal venture. That manner of expressing the issue should not be

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142 (1991) 172 CLR 243 at 280.

143 *Gala v Preston* (1991) 172 CLR 243 at 278 per Dawson J; see also *Smith v Jenkins* (1970) 119 CLR 397 at 416-417 per Windeyer J.

permitted to mask the significance of the proper identification of the venture and its nature. More particularly, it is a description of the circumstances that directs attention to questions about what is the venture and what, if any, criminal responsibility the passenger may have for the manner of the confederate's driving that is a cause of the passenger's injury.

92 The venture between the parties may be described as a venture to use the vehicle illegally. But, as has already been seen, s 8(1) of the Code provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose "an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose", each is deemed to have committed that offence. If two or more persons agree to take and use a vehicle illegally, and one of them drives it unsafely, it will likely be concluded that "a probable consequence of the prosecution of such purpose" is the driving of the vehicle with a "lack of responsibility for the safety of the vehicle", its occupants and other road users, and in a way that departs markedly from a standard of driving with reasonable care. The cases in which those are not probable consequences of two or more persons joining in the taking and illegal use of a vehicle will likely be rare. It is the recognition of that fact that lies beneath the conclusions reached in both *Smith v Jenkins* and *Gala v Preston*. The joint criminal venture to which reference was made in those cases was a venture in which reckless or dangerous driving was a probable, but not inevitable, incident of the venture.

93 If, in a particular case, it were to be shown that a probable consequence of commission of an offence of taking or using a vehicle illegally was the commission of other driving offences (including reckless or dangerous driving) those who were complicit in the initial offence would be criminally liable for the subsequent offences as well. More particularly, if, as here, the driver of the illegally used vehicle drove dangerously, and driving in that manner was a probable consequence of the prosecution of the joint illegal purpose, a person complicit in the crime of illegal use would also be complicit in the offence of driving dangerously. And if, as a result of the dangerous driving, the complicit passenger were injured, it would evidently be incongruous to decide that the offender who drove the vehicle owed that passenger a duty to drive with reasonable care. The passenger would have committed the offence of dangerous driving and yet, if the driver owed the passenger a duty to take reasonable care, the passenger (who would be criminally responsible for the driver's dangerous driving) might sue the driver for damages for driving negligently.

94 The incongruity identified stems immediately from the injured passenger's complicity, not only in the illegal use of the vehicle, but also in the driver's commission of the offence of driving dangerously. To conclude that the driver owed the passenger a duty to take reasonable care when driving would not be consistent with the purpose of the statute proscribing dangerous driving.

95 Does the conclusion of incongruity apply in every case of joint illegal use? Does the conclusion depend upon whether, in the particular case, the driver drove recklessly or dangerously and the passenger was complicit in that further offence?

96 In many cases in which an illegal user of a vehicle seeks to recover damages from a driver complicit in that crime, the passenger and the driver will also be complicit in a further offence proscribing driving in the manner which was a cause of the passenger's injury. But some cases may not be of that kind. An example may be where the driver of a stolen car, affected by alcohol, makes an error of judgment which causes an accident. In such a case, the fact that the vehicle was being used illegally would seem not to be immediately relevant to the liability of driver to passenger. Would it be inconsistent with the statutory purposes of the proscription of illegal use of a vehicle to hold that the driver owed the passenger a duty to drive with reasonable care? Should not the significance attached to the driver being affected by alcohol fall for consideration only as a question about contributory negligence?

97 A complaint frequently made[144] in the cases and academic commentary is that the law relating to illegality in tort wields too broad an axe to provide a satisfactory principle that will not have unintended and unjust consequences

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144 *Jackson v Harrison* (1978) 138 CLR 438 at 453, 455 per Mason J, at 464-465 per Murphy J; *Gala v Preston* (1991) 172 CLR 243 at 270, 271 per Brennan J; *Nelson v Nelson* (1995) 184 CLR 538 at 611 per McHugh J; Law Commission for England and Wales, "The Illegality Defence in Tort", Consultation Paper No 160 (2001) at 84-85 [4.73]-[4.74] and Pt V generally; Fleming, *The Law of Torts*, 7th ed (1987) at 278; Weinrib, "Illegality as a Tort Defence", (1976) 26 *University of Toronto Law Journal* 28 at 33, 38-39, 45-46; Swanton, "Plaintiff a Wrongdoer: Joint Complicity in an Illegal Enterprise as a Defence to Negligence", (1981) 9 *Sydney Law Review* 304 at 317-319, 323, 325-328; Goudkamp, "A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort", (2007) 29 *Sydney Law Review* 445 at 451-455.

(often described as "Draconian"[145]). Another complaint frequently made[146] is that one wrongdoer is given an unjust and unjustifiable advantage if a defence of illegality is recognised. Both criticisms have been levelled at the decisions, in *Smith v Jenkins* and *Gala v Preston*, that one illegal user of a vehicle does not owe a duty of care to a passenger complicit in the illegal use. The rule is said to be too broad and undiscriminating in its application.

98 Two points may be made in answer to the criticisms. First, if the relevant principle turns, as it must, upon a search for statutory purposes, most if not all of the asserted difficulties fall away. The application of the relevant principle is the consequence of the proper application of the statute. The balance of advantage or disadvantage to criminal participants is a matter for the legislature.

99 Secondly, and of more particular relevance to the immediate matter, whether or not the criticisms are expressed in this way, they must assume that the

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145 *Jackson v Harrison* (1978) 138 CLR 438 at 453, 455 per Mason J; *Gala v Preston* (1991) 172 CLR 243 at 265, 270, 271 per Brennan J; Law Commission for England and Wales, "The Illegality Defence in Tort", Consultation Paper No 160 (2001) at 84-85 [4.73]-[4.74].

146 *Jackson v Harrison* (1978) 138 CLR 438 at 465 (7) per Murphy J; cf the seminal statement of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 at 343 [98 ER 1120 at 1121] that the policy behind the courts' refusal to enforce an illegal contract, "which the defendant has the advantage of, contrary to the real justice", is "not for the sake of the defendant, but because [the courts] will not lend their aid to such a plaintiff"; see also the discussion of "windfall gain" to the defendant in the context of trust and contract in *Nelson v Nelson* (1995) 184 CLR 538 at 610 per McHugh J and *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 252 per Kirby J; see also Law Commission for England and Wales, "The Illegality Defence in Tort", Consultation Paper No 160 (2001) at 69 [4.17]; Law Commission for England and Wales, "The Illegality Defence", Consultation Paper No 189 (2009) at viii; Weinrib, "Illegality as a Tort Defence", (1976) 26 *University of Toronto Law Journal* 28 at 50-51; Ford, "Tort and Illegality: The *Ex Turpi Causa* Defence in Negligence Law (Part One)", (1977) 11 *Melbourne University Law Review* 32 at 40; Swanton, "Plaintiff a Wrongdoer: Joint Complicity in an Illegal Enterprise as a Defence to Negligence", (1981) 9 *Sydney Law Review* 304 at 330; Goudkamp, "A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort", (2007) 29 *Sydney Law Review* 445 at 450.

relevant legislative purposes of s 371A are completely stated as being the protection of property interests and the promotion of road safety. A purpose described only as the promotion of road safety may well be said not to affect whether a duty of care should be found. But the statutory purposes of s 371A are more particular than a general concern with road safety. The section proscribes and punishes the taking and use of a vehicle illegally as it does because it recognises that, in a case where two or more persons form a common intention to prosecute that unlawful purpose, it is often a probable consequence of the commission of the crime that the driver will drive recklessly or dangerously.

100 Whether one participant should be held to owe the other a duty to take reasonable care in the performance of the common purpose of using the car illegally cannot depend upon whether the possibility of reckless or dangerous driving eventuates. It would be absurd to hold that one owed the other a duty to take reasonable care unless and until he or she departed markedly from observing that standard of care.

101 The refusal to find a duty of care between those complicit in the offence follows from the more precise identification of the way in which the statutory proscription of illegal use of a vehicle seeks to promote road safety. The offence of illegally taking and using a vehicle is dealt with as it is because of its association with reckless and dangerous driving. The statutory purpose of a law proscribing dangerous or reckless driving is *not* consistent with one offender owing a co-offender a duty to take reasonable care. And in a case where two or more are complicit in the offence of illegally using a vehicle, the statutory purpose of the law proscribing illegal use (here, s 371A) is not consistent with one offender owing a co-offender a duty to take reasonable care. The inconsistency or incongruity arises regardless of whether reckless or dangerous driving eventuates. It arises from the recognition that the purpose of the statute is to deter and punish using a vehicle in circumstances that often lead to reckless and dangerous driving.

102 These conclusions accord with the way in which the courts approach questions of illegality in contract and in relation to trusts. Whether an analogy can be drawn with the rule that a contract whose making or performance is expressly or impliedly made illegal by statute, or is better drawn with those cases "where the policy of the law renders contractual arrangements ineffective or void even in the absence of breach of a norm of conduct or other requirement

expressed or necessarily implicit in the statutory text"[147], may be open to debate. Whichever analogy may be the more apt, the root principle that is engaged is, as noted earlier, sufficiently captured by any of the expressions "incongruity", "contrariety" or "lack of coherence".

The circumstances of this case

103 As noted at the outset of these reasons, Danelle twice asked to be let out of the car before it ran off the road. She was not.

104 Reference has already been made to the provisions of s 8 of the Code concerning liability for offences committed in prosecution of a common unlawful purpose and to the provisions made by s 8(2) for withdrawal from a joint criminal enterprise. It was not disputed, in this Court, that it was open to Danelle to submit that she had withdrawn from the common purpose of illegally using the vehicle before the accident, and no positive argument was advanced to demonstrate that she had not done so in the manner required by s 8(2) of the Code. The requirement, in s 8(2)(c) of the Code, that an offender, having withdrawn from an enterprise and communicated that fact to his or her confederates, take "all reasonable steps to prevent the commission of the offence" invites attention in this case to what Danelle could reasonably have done to prevent the continued illegal use of the car. Section 8(2)(c) does not require that there have been some steps available to her of the kind specified in that paragraph. And in this case there were none. There were no *reasonable* steps she could take to prevent the continued illegal use of the vehicle.

105 As Buss JA records[148], a submission that Danelle had withdrawn from the common purpose of illegally using the vehicle was not made, in terms, in the Court of Appeal, or at trial. It was accepted that this did not prevent Danelle from advancing the argument in the appeal to this Court.

106 Because Danelle had withdrawn from, and was no longer participating in, the crime of illegally using the car when the accident happened, it could no longer be said that that Maurin owed her no duty of care. That he owed her no duty earlier in the journey is not to the point. When he ran off the road, he owed

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147 *International Air Transport Association* (2008) 234 CLR 151 at 179 [71].

148 *Miller* [2009] WASCA 199 at [86]-[89].

a passenger who was not then complicit in the crime which he was then committing a duty to take reasonable care.

Conclusion and orders

107 The appeal should be allowed with costs, the orders of the Court of Appeal of the Supreme Court of Western Australia set aside, and the appeal to that Court dismissed with costs.

108 HEYDON J. I agree with the conclusion of the majority that, at least up to the time when the appellant made two requests to be let out of the car, the respondent owed the appellant no duty of care. However, there has not been a satisfactory demonstration by the appellant, in the circumstances of this case, that those requests constituted a withdrawal by the appellant from the common purpose of using the car without the owner's consent, and that thereafter a duty of care arose.

109 In relation to the withdrawal point several issues arise.

It was open to the appellant to rely on the withdrawal point

110 Was it open to the appellant to take the withdrawal point in this Court? Yes.

111 The withdrawal point was arguably pleaded in par 2(c) of the appellant's Reply. The relevant contention of the appellant was put in answer to the respondent's allegation that he owed no duty of care because he and she "were jointly engaged in an illegal enterprise". Her Reply averred:

> "the plaintiff expressly denies that she and the defendant were engaged in a joint illegal enterprise and says that:
>
> …
>
> (c) the defendant refused the requests of the plaintiff to stop the vehicle and let her out, thereby rendering the plaintiff an unwilling passenger".

112 Counsel for the appellant in this Court appeared to concede that the trial had not been run on the basis of the withdrawal point[149]. In the Court of Appeal a member of the bench raised a question about whether withdrawal from the joint illegal enterprise was relied on. Counsel for the appellant specifically disavowed it. The trial judge was able to find that a duty of care was owed to the appellant for reasons other than the withdrawal point. Though she mentioned the appellant's requests that the respondent stop the car, she said nothing about the withdrawal point.

113 Paragraph 2(c) of the appellant's Reply made it difficult for any point based on *Suttor v Gundowda Pty Ltd*[150] to be taken by the respondent in this Court. It may be[151] that that pleading was insufficient in law to make out

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149 See below at [117].

150 (1950) 81 CLR 418; [1950] HCA 35.

151 See below at [122]-[131].

withdrawal, and that more was needed than the appellant's requests. It might have been arguable that more evidence could have been called at the trial in relation to the additional factual material needed. However, counsel for the respondent both expressly and properly declined to take any *Suttor v Gundowda Pty Ltd* point.

The respondent did not concede the withdrawal issue in argument in this Court

114 Did the respondent concede the proposition that the appellant had in fact withdrawn from the common purpose? No.

115 Counsel for the respondent submitted: "To suggest that any criminality in terms of either the using or the taking would cease at the instant of expressing a willingness or desire to get out of the car, with respect, would not be so." It is true that a little earlier counsel for the respondent said that "at its most extreme level, a statement that 'I wish to get out of the car' might indicate an indication that there was no longer a wish to participate" in using the car. But he did not concede either that the appellant gave that indication or that it amounted to withdrawal in law.

Argument about the withdrawal issue in this Court

116 Was there argument in this Court about whether the requests to leave the car constituted a withdrawal from the common illegal purpose? This demands a lengthier answer.

117 The proposition that a duty of care owed by the respondent to the appellant sprang up when the requests to leave the car were made is a proposition favourable to the appellant. It was a proposition which she had a duty to plead, and as to which she bore the burden of proof and the burden of demonstration. It is a proposition which, arguably, she pleaded in the Reply. But it was not a proposition which was dealt with by the Courts below. Nor did it find a place in the notice of appeal to this Court. Her written submissions in chief said nothing about it. The respondent's written submissions revealed no awareness of it. Her written submissions in reply said nothing about it. In oral argument in chief her counsel said nothing about it before he was asked the following question by a member of the Court:

> "What is the position in respect of the appellant using the motor vehicle at the time of the accident, having regard to the finding as to the request to be let out?"

Counsel said the matter was "a little awkward", and referred to his predecessor's disavowal of the point in the Court of Appeal[152]. He then submitted that although "it is a little awkward for us", the failure to take the point "should not be a bar". He went on: "Certainly all the evidence was in. I cannot say, it is not the case, that the trial was run on that basis, but I am not aware that there is any circumstance that would" prevent the point being taken in this Court. His submission on the point was:

> "it is not protest in general terms, it is not even the protest along the lines of 'slow down', it is the request to be let out, in our submission, in that context, preceded by those protests, should have been held, perhaps I should say should have been argued, to have produced a cessation of her use and thus a cessation of her membership of, to use the jargon, a joint criminal enterprise. Now, clearly enough, there has to be some close analogy between that kind of argument and arguments in a true criminal case, such as a conspiracy case or another complicity case, but, in our submission, these facts would easily match that for a criminal case as well.
>
> If people, in the enthusiasm of youth, late at night take a car to use it for a joyride and shortly thereafter decide this is the worst idea they have ever had and they wish it to cease, so long as they take reasonable steps, both by communication and as circumstances permit other action of avoidance or removal, then, in our submission, they will be able to rely upon that (a) in crime and (b) therefore, in this civil case, to say the use had finished, therefore, the complicity or membership of the joint criminal enterprise had finished."

These passages assert a conclusion favourable to the appellant, but say nothing about why it should be reached. They preserve a position, but do not state its grounds. Counsel for the appellant thereafter briefly alluded to the withdrawal point on two occasions but added nothing.

118 Counsel for the respondent did not deal with the withdrawal point more fully than his opponent, and, like him, did not descend into the strengths and weaknesses of possible underlying reasons for competing conclusions[153]. This was scarcely surprising, since counsel for the respondent had not been put on notice that the withdrawal point would be taken in this Court. This is so despite the existence of a formal forensic structure, to be found in the requirements for a notice of appeal and written submissions, which is designed to give adequate notice to the parties and the Court.

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152 See above at [112].

153 See above at [117].

119 The decision of the majority on the withdrawal point is certainly a decision of some importance in tort cases of which this appeal is an illustration. But it is of very great importance in criminal law. The withdrawal point turns on the *Criminal Code* (WA) ("the Code"), s 8(2)[154]. There are provisions similar to, though not identical with, s 8(2) in other jurisdictions in this country[155]. The problem with which the legislation – and the corresponding common law – deals is difficult. It is complex. Various solutions have been proposed, but they have been controversial[156]. The decision of the majority that s 8(2) applies in the present circumstances is the ratio decidendi of this case – the fulcrum on which the appellant's success turns. It will bind every court in this country in the law of tort and the criminal law. It is plain from the silence of counsel for the appellant in written submissions, from the fact that no oral argument was advanced until the matter was raised by a member of this Court, from counsel's position that the point was "a little awkward", from the brevity of the submissions advanced, and from the fact that those submissions advanced a conclusion but offered no supporting reasoning, that counsel for the appellant had not intended to take the withdrawal point and was certainly not equipped to provide detailed argument in its support.

120 One purpose of having a prior exchange of written submissions in this Court is to ensure that, when points of law are raised, the parties and the Court have full notice of the specific arguments being deployed. That notice enables thorough legal research, by both the parties and the Court, to take place before oral argument. That is particularly necessary where this Court is, by reason of the parties' conduct, unassisted by any examination of the topic by the trial court

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154 See above at [104].

155 Section 8(2) was introduced in 1986. In 1995, when the *Criminal Code* (Cth) was enacted, it included s 11.2(4):

> "A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
>
> (a) terminated his or her involvement; and
>
> (b) took all reasonable steps to prevent the commission of the offence."

In 2002, when the *Criminal Code* (ACT) was enacted, it included s 45(5), a provision in the form of s 11.2(4). The *Criminal Code* (NT) was enacted in 1983; in 2005 the legislature inserted s 43BG(5), a provision also in the form of s 11.2(4).

156 See the debates recorded and analysed in Smith, "Withdrawal in Complicity: A Restatement of Principles", [2001] *Criminal Law Review* 769.

and the intermediate appellate court. It is the duty of the courts of this country to expound, and where legitimate to develop, the law of Australia – whether it be the common law, the resolution of doubts about statutory construction, or constitutional law. It is a necessary condition for the carrying out of that duty of exposition and development that there be a clash of adversaries well prepared to conduct detailed forensic debate. That necessary condition was amply satisfied in this appeal by the thoughtful and full submissions of the parties in relation to the problem thrown up by the *Gala v Preston* line of cases. It was not satisfied in relation to the withdrawal point.

121 Had counsel for the respondent been given adequate notice that the withdrawal point, which apparently had had no role in the case after the pleadings closed, was to be revived in this Court, he might have been able to construct a submission along the following lines.

A possible submission for the respondent

122 The appellant was 16 and had been drinking at intervals since the previous evening. So had the respondent's companions. She chose to get into a car which she had stolen, and which she had managed to get started. She asked her sister, Narelle, who had been drinking and who had no driver's licence, to drive her home in that car. She accepted the offer of the respondent, who had been drinking, and whom she correctly assumed not to have a driver's licence, to drive her home. He was to do so in a dangerously overloaded car, for there were, as well as himself, nine passengers in it. Just as the appellant was tired and affected by drink, so was the respondent, and so were at least several of the others in the car. The respondent had been involved in a verbal altercation with a man named Shanelle, who in turn had been involved in an ongoing argument with his girlfriend until he jumped into the car, followed by a bottle of perfume flung at the car by the girlfriend.

123 In those circumstances the following findings of the trial judge – which are not based on acceptance of the appellant's testimony but on inferences from the circumstances – must be rejected.

> "Neither the plaintiff, nor for that matter a reasonable hypothetical plaintiff, had any reason to appreciate that she would be encountering serious risks. … [T]he mere fact that they were driving in a stolen car would not of itself have made the plaintiff concerned about any risk of the defendant driving recklessly. … [U]nless there is evidence which shows that the parties were about to embark on a joy-ride and to have some fun in flaunting the law, the mere fact that they are driving in a stolen vehicle does not mean that this would necessarily be associated with an encounter of a serious risk."

124 Did the appellant have "any reason to appreciate that she would be encountering serious risks"? The trial judge's language turns not on whether the appellant did appreciate the existence of serious risks, but on what reason she had to appreciate them. Accepting the trial judge's finding that no joy-ride was initially contemplated, the facts are that she had stolen the car and managed to get it started; that she had no control over the respondent, her "uncle", in view of his age, 27, and apparent authority over her; that she knew he had been drinking and assumed he was unlicensed; that the theft of cars is often speedily reported and the police often speedily identify those stolen cars in the streets; that even if a car is not being driven recklessly it is likely to attract the attention of passing police officers if it is so grossly and dangerously overloaded that some passengers were not able to wear seatbelts; that the presence of excessive numbers of young people who have been drinking in a car increases the risk of the driver showing off or being distracted; and that if the respondent driver saw police officers he would be likely to flee at high speed. That is because the driver was unlicensed, he had been drinking, his car was very overloaded, and he knew that the car had been stolen by the appellant. No dangerous and speedy flight from police officers did in fact take place, but there were good reasons known to the appellant to appreciate that the journey was, to use the words of the majority in *Gala v Preston*[157], "fraught with serious risks". Among the risks which existed, whether the appellant actually appreciated it or not, was the one which eventuated – that the respondent might not exercise the degree of care and skill to be expected of a reasonably careful and competent driver.

125 Against the background of those circumstances, can it be said that by reason of her requests for the car to be stopped the appellant had withdrawn from the illegal joint enterprise?

126 There is no doubt that the appellant could effectively have terminated the joint illegal enterprise by declining to get into the car, or getting out of it, as it became overloaded and before the respondent drove it off. The question is whether her later expressions of desire to leave the car satisfy s 8(2).

127 A request that the vehicle stop and that she be let out by itself was insufficient to terminate the joint illegal enterprise. It would not have sufficed at common law, which required, in addition to a countermand or withdrawal, the carrying out of whatever action the party claiming to have withdrawn "can reasonably take to undo the effect of his previous … participation."[158] And, in any event, in Western Australia what applies is not the common law, but a similar regime established by s 8(2).

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157 (1991) 172 CLR 243 at 254 per Mason CJ, Deane, Gaudron and McHugh JJ; [1991] HCA 18.

158 *White v Ridley* (1978) 140 CLR 342 at 351 per Gibbs J; [1978] HCA 38.

128 The function of the requirement in s 8(2)(c) that, after the relevant person has withdrawn from the prosecution of the unlawful purpose, that person take "all reasonable steps to prevent the commission of the offence" is to prevent or hamper the effectuation of the unlawful purpose. That is, its function is to prevent or hamper the future commission of the offence, or, if it is a continuing offence, its commission by continuance. Section 8(2)(c) has the same function as the equivalent common law rule. In a United States case on the common law[159], it was said that:

> "A withdrawal from a conspiracy cannot be effected by intent alone; it must be accompanied by some affirmative action which is effective. A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse."

If conspirators have lit the fuse, an announcement by one of them of withdrawal from the conspiracy is ineffective if it is too late for that person to step on the fuse, or otherwise avert the explosion.

129 When two or more persons have formed a common intention to prosecute an unlawful purpose, there cannot be a withdrawal from the prosecution of the unlawful purpose, and there cannot be the taking of reasonable steps to prevent the commission, or further commission, of any offence which is the probable consequence of the prosecution of the purpose, unless the circumstances are such as to give an opportunity for those steps to be taken. There are some enterprises which, once they are embarked on, give no opportunity for instant withdrawal. In relation to enterprises of that kind, a decision to withdraw, even if clearly communicated, cannot have immediate effect. The facts of the present case illustrate one of these enterprises. "The execution of the purpose had reached the stage when it would not be possible to withdraw from it in the terms of the section."[160]

130 When the appellant indicated that she wanted to be let out of the car, it may be that she could be said to have withdrawn from the prosecution of the unlawful purpose within the meaning of s 8(2)(a) of the Code, and also to have communicated that withdrawal in the manner described in s 8(2)(b). But could it be said that, "having so withdrawn", she "took all reasonable steps to prevent the commission of the offence" within the meaning of s 8(2)(c)? No. She took no

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159 *Eldredge v United States* 62 F 2d 449 at 451 (10th Cir, 1932) per Judge McDermott (Judge Phillips concurring).

160 *Seiffert v The Queen* (1999) 104 A Crim R 238 at 259 per Pidgeon J (Kennedy and White JJ concurring).

steps. It might have been submitted on her behalf (although it was not) that s 8(2)(c) was complied with on the ground that there were no reasonable steps which, by that time, could have been taken. The difficulty is that her conduct had rendered it impossible for any reasonable steps to be taken. The fundamental factual problem for the appellant is that, despite all the findings by the trial judge in her favour, there is no finding that she expected that the respondent would comply instantly with any request she made of him to stop. Since none of the evidence admitted at the trial is in the appeal book, it is not possible to say whether any finding of that kind could be made by this Court. The appellant could only have taken reasonable steps within the meaning of s 8(2)(c) if, taking into account what she had reason to know when the journey started, she had put herself in a position to ensure that an expression of her wishes later in the journey would be instantly complied with. This she had not done.

131 Since the appellant had disabled herself from taking reasonable steps, it was not open to her to have contended that there were no reasonable steps she could have taken.

Conclusion

132 What has just been set out is an outline of a possible submission which counsel for the respondent might have advanced had he had proper notice of the withdrawal point and of the manner in which his client might lose on it. His ingenuity and skill would have led him to put it better, and might have suggested other submissions worthy of consideration. Whether any of these submissions would have been worthy of acceptance cannot be determined in the absence of a thorough appellate examination of the issue. Without that examination it cannot be said that the appellant has demonstrated compliance with s 8(2).

Order

133 The respondent's application is only that the appeal be dismissed. That order should be made.