PLAINTIFF A WRONGDOER: JOINT COMPLICITY IN AN ILLEGAL ENTERPRISE AS A DEFENCE TO NEGLIGENCE

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"Neither the careful researches of counsel, nor such supplementary search as I have been able to make, have led to the discovery of any case elsewhere in the British Commonwealth, or in the United States of America, in which a question of the present sort arising as between two thieves, or others *in consimili casu,* has arisen for direct decision". Sugerman, J. in *Godbolt* v. *Fittock* [1963] S.R. (N.S.W.) 617 at 619.

"This matter involves consideration of a most novel point. I am assured by counsel that, so far as their researches go, they have been unable to discover any direct authority covering the matter, in any court in the English speaking world". Amsberg, D.C.J. in *Sullivan* v. *Sullivan* (1962) 79 W.N. (N.S.W.) 615 at 616.

Introduction

The effect of the plaintiff's own illegal conduct on his right to sue in tort is a question which appears to have perplexed judges wherever it has arisen for determination. Fortunately, but perhaps oddly, the cases are few where a defendant has argued that the plaintiff should be barred from suing in tort because he was himself engaged in some illegal (usually criminal) activity. However in a variety of contexts, the point has from time to time been taken. Thus a motorist may argue that he should not be liable for his negligence towards a passenger if the car in which they were travelling had been stolen by them,[1] or if the purpose of the journey was to dispose of stolen goods,[2] or if the vehicle was unregistered[3] or the driver unlicensed[4] and this was known to both parties. Or it may be argued that a workman's claim for compensation for a work injury should be barred because he was guilty of breach of a safety regulation;[5] and it has been suggested that persons

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[1] *Smith* v. *Jenkins* (1970) 119 C.L.R. 397; *Boeyen* v. *Kidd* [1963] V.R. 235; *Williams* v. *McEwan* [1952] V.L.R. 507.

[2] *Godbolt* v. *Fittock* [1963] S.R. (N.S.W.) 617.

[3] *Andrews* v. *The Nominal Defendant* (1965) 66 S.R. (N.S.W.) 85.

[4] *Jackson* v. *Harrison* (1977-78) 138 C.L.R. 438.

[5] *Progress and Properties Ltd.* v. *Craft* (1976) 135 C.L.R. 651; *Cakebread* v. *Hopping Brothers (Whetstone) Ltd.* [1947] 1 K.B. 641; *Hillen* v. *I.C.I.*

engaged in illegal brawls should have no claim to compensation *inter se*.[6] Then there are cases where plaintiffs suing for interference with chattels have been met with the argument that their claim should fail because establishing title involves reliance on an illegal transaction,[7] or where a plaintiff's claim for damages has been met with the argument that he should not be compensated for loss of a benefit which he was obtaining from illegal conduct.[8] Another context in which the plaintiff's illegality has been raised is the situation where the plaintiff sues the defendant claiming that the latter wrongfully induced him to commit a crime whereby he has suffered loss as a result.[9]

The clear disposition of the courts has been to disregard "unilateral"[10] illegality, that is to say, illegality on the part of the plaintiff alone,[11] but to pay more attention to the argument that the complicity of both plaintiff and defendant in an unlawful enterprise at the time the tort occurs, should preclude recovery. However it is far from the truth to assert that the law recognizes any general defence of "plaintiff a wrongdoer"[12] or even of joint complicity in an illegal enterprise. Cases where a claim in tort has failed because of the presence of an illegal element are few. And unfortunately when it comes to analysis there is a total absence of uniformity of reasoning. The approaches taken regarding the effect of the plaintiff's illegality on his right to sue in tort are almost as numerous as the cases themselves.

Sometimes it is said that the law of tort, like the law of contract, concedes that *ex turpi causa non oritur actio*.[13] Diplock, L.J. in *Hardy*

Footnote 5 (Continued).

(Alkali) Ltd. [1934] 1 K.B. 455; *Imperial Chemical Industries Ltd.* v. *Shatwell* [1965] A.C. 656; *National Coal Board* v. *England* [1954] A.C. 403; *Johnson* v. *Croggan & Co. Ltd.* [1954] 1 W.L.R. 195; *Tonelli* v. *Electric Power Transmission Pty. Ltd.* (1967) 85 W.N. (Pt. 2) (N.S.W.) 1.

[6] *Lane* v. *Holloway* [1967] 3 All E.R. 129; *Green* v. *Costello* [1961] N.Z.L.R. 1010; *Murphy* v. *Culhane* [1976] 3 All E.R. 533.

[7] *Thomas Brown & Sons Ltd.* v. *Deen* (1962) 108 C.L.R. 391; *Newcastle District Fishermen's Co-operative Society* v. *Neal* (1950) 50 S.R. (N.S.W.) 237; *Singh* v. *Ali* [1960] A.C. 167; *Taylor* v. *Chester* (1869) L.R. 4 Q.B. 309; *Gordon* v. *Chief Commissioner of Metropolitan Police* [1910] 2 K.B. 1080.

[8] *Burns* v. *Edman* [1970] 1 All E.R. 886; *Mills* v. *Baitis* [1968] V.R. 583; *Meadows* v. *Ferguson* [1961] V.R. 594; *LeBagge* v. *Buses Ltd.* [1958] N.Z.L.R. 630.

[9] *Colburn* v. *Patmore* (1834) 1 C.M. & R. 72; *Burrows* v. *Rhodes & Jameson* [1899] 1 Q.B. 816.

[10] Terminology of Amsberg, D.C.J. in *Sullivan* v. *Sullivan* (1962) 79 W.N. (N.S.W.) 615 at 617 and Kitto, J. in *Smith* v. *Jenkins, supra* n. 1 at 401.

[11] In *Henwood* v. *The Municipal Tramways Trust (South Australia)* (1938) 60 C.L.R. 438 at 446, Latham, C.J. said: . . . "there is no general principle of English Law that a person who is engaged in some unlawful act is disabled from complaining of injury done to him by other persons, either deliberately or accidentally. He does not become *caput lapinum*"; *Matthews* v. *McCullock of Australia Pty. Ltd.* [1973] 2 N.S.W.L.R. 331 (the fact that the plaintiff at the time of a collision was disqualified from holding a licence was no bar to an action against the other motorist).

[12] Terminology of Barrowclough, C.J. in *Green* v. *Costello* [1961] N.Z.L.R. 1010 at 1012.

[13] *Godbolt* v. *Fittock, supra* n. 2; *Andrews* v. *The Nominal Defendant, supra* n. 3; *Sullivan* v. *Sullivan, supra* n. 10; *Richters* v. *Motor Tyre Service Pty. Ltd.* [1972] Qd. R. 9 at 24; *Nettleship* v. *Weston* [1971] 2 Q.B. 691 *per* Megaw,

v. *Motor Insurers Bureau*[14] said:

> . . . ex turpi causa non oritur actio — is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right.[15]

Vaughan Williams, L.J. in *Gordon* v. *Chief Commissioner of Metropolitan Police*[16] said:

> . . . I do not think that the application of the maxim "Ex turpi causa non oritur actio" is limited to cases in which a plaintiff is seeking the assistance of a Court of justice for the purpose of enforcing an illegal contract or a contract springing out of an illegal transaction.[17]

On the other hand in *National Coal Board* v. *England*[18] it was said:

> . . . the adage itself is generally applied to a question of contract and I am by no means prepared to concede where concession is not required that it applies also to the case of a tort.[19]

and:

> The vast majority of cases in which the maxim has been applied have been cases where, there being an illegal agreement between A and B, either seeks to sue the other for its enforcement or for damages for its breach . . . Cases where an action in tort has been defeated by the maxim are exceedingly rare.[20]

Footnote 13 (Continued).

L.J. at 710; *Cummings* v. *Granger* [1977] 1 All E.R. 104 *per* Denning, M.R. at 109; *Hegarty* v. *Shine* (1878) 2 L.R. (Ir.) 273; *Murphy* v. *Culhane* (1976) 3 All E.R. 533; *Johnson* v. *Croggan & Co. Ltd.* [1954] 1 W.L.R. 195 at 200 and 202 (but *cf. Charles* v. *S. Smith & Sons (England) Ltd.* [1954] 1 W.L.R. 451 at 456); *Burns* v. *Edman, supra* n. 8; *LeBagge* v. *Buses Ltd.* [1958] N.Z.L.R. 630. The maxim is well entrenched in Canadian tort law: *Tallow* v. *Tailfeathers* (1973) 44 D.L.R. (3d) 55; *Schwindt* v. *Giesbrecht* (1958) 13 D.L.R. (2d) 770; *Rondos* v. *Wawrin* (1968) 68 D.L.R. (2d) 658; *Ridgeway* v. *Hilhorst* (1967) 61 D.L.R. (2d) 398; *Miller* v. *Decker* [1955] 4 D.L.R. 92 *per* Sidney Smith, J.A.; *cf. Foster* v. *Morton* (1956) 4 D.L.R. (2d) 269 *per* McDonald, J. and *Miller* v. *Decker* (1957) 9 D.L.R. (2d) 1 *per* Abbott, J.; for the view that there is no justification in policy or in law for introducing such a defence to the law of tort see D. Gibson, Comment (1969) 47 *Can. Bar Rev.* 89; E. J. Weinrib, "Illegality as a Tort Defence" (1976) 26 *Uni. of Toronto L.J.* 28.

[14] [1964] 2 Q.B. 745.
[15] *Id.* 767.
[16] [1910] 2 K.B. 1080.
[17] *Id.* 1087.
[18] [1954] A.C. 403.
[19] *Id.* 419 *per* Lord Porter.
[20] *Id.* 428 *per* Lord Tucker.

In *Smith* v. *Jenkins,* Windeyer, J. considered that ". . . properly understood, the maxim ex turpi causa non oritur actio should be confined to the law of contracts and conveyances . . ."[21]

In other cases it has been said that in *pari delicto potior est conditio defendentis,*[22] or that a court will not enforce rights directly resulting to the person asserting them from the crime of that person,[23] or simply that general considerations of public policy may debar the wrongdoing plaintiff.[24] Sometimes emphasis is placed on the intention of the relevant legislature which imposed a penalty on the plaintiff's conduct. The legislative intention has been said to be relevant in two ways, either as implicitly precluding an action in tort for offenders,[25] or implicitly preserving a cause of action which would otherwise be barred by the presence of the illegal element.[26] Other courts have considered the question to turn on causation,[27] that is, whether the illegal element was causally connected with the plaintiff's injury, or on the directness[28] of the connection between the injury and the illegality, or even to involve asking whether the plaintiff is to be regarded as the author of his own wrong.[29] Sometimes reference is made to the fact that the parties, being joint participants in an illegal enterprise, are joint wrongdoers, and the conclusion is sought to be drawn that there is no right to contribution or an indemnity between them or that they have no legal rights *inter*

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[21] *Supra* n. 1 at 414.

[22] *Taylor* v. *Chester* (1869) L.R. 4 Q.B. 309; *Sullivan* v. *Sullivan, supra* n. 10 at 618.

[23] *Per* Robertson, C.J.O. in *Danluk* v. *Birkner* [1946] 3 D.L.R. 172 and Adamson, C.J.M. in *Joubert* v. *Toronto General Trusts Corporation* [1955] 3 D.L.R. 685; argued in *LeBagge* v. *Buses Ltd.* [1958] N.Z.L.R. 630.

[24] *Boeyen* v. *Kidd* [1963] V.R. 235; *Meadows* v. *Ferguson* [1961] V.R. 594; *Mills* v. *Baitis* [1968] V.R. 583.

[25] *Henwood* v. *The Municipal Tramways Trust (South Australia), supra* n. 11; *Andrews* v. *The Nominal Defendant, supra* n. 3; *Bondarenko* v. *Sommers* (1968) 69 S.R. (N.S.W.) 269; *Matthews* v. *McCullock of Australia Pty Ltd.* [1973] 2 N.S.W. L.R. 331; *Mills* v. *Baitis* [1968] V.R. 583; *Jackson* v. *Harrison, supra* n. 4 at 459 *per* Jacobs, J. and at 465-6 *per* Murphy, J.; *cf.* Kitto, J. in *Smith* v. *Jenkins, supra* n. 1 at 401; Clement, J.A. in *Tallow* v. *Tailfeathers* (1973) 44 D.L.R. (3d) 55 at 64.

[26] *Smith* v. *Jenkins, supra* n 1 at 424 *per* Windeyer, J.; *Progress and Properties Ltd.* v. *Craft, supra* n. 5 at 659 *per* Barwick, C.J.; *Jackson* v. *Harrison, supra* n. 4 at 446-7 *per* Barwick, C.J.; *cf.* Kitto, J. in *Smith* v. *Jenkins, supra* n. 1 at 401. In *Bondarenko* v. *Sommers* (1968) 69 S.R. (N.S.W.) 269 at 277 Jacobs, J.A. thought that the statutory intention was relevant in both above-mentioned ways. In *Williams* v. *McEwan* [1952] V.L.R. 507 the statutory intention was made clear by a provision that "nothing in this Act shall affect any liability of any person by virtue of any statute or at common law".

[27] E.g. American cases such as *Meadow* v. *Hotel Grover* (1942) 9 So. 2d. 782; *Holcomb* v. *Meeds* (1952) 246 P. 2d. 239; *Havis* v. *Iacovetto* (1952) 250 P. 2d. 128; *Manning* v. *Noa* (1956) 77 A.L.R. 2d. 955; see N. H. Crago, "The Defence of Illegality in Negligence Actions" (1963-64) 4 *Melb. U.L.R.* 534 at 543-4; G.H.L. Fridman, "The Wrongdoing Plaintiff" (1972) 18 *McGill L.J.* 275; H. S. Davis, "The Plaintiff's Illegal Act as a Defense in Actions of Tort" (1904-05) 18 *Harv. L. Rev.* 505; *cf. Godbolt* v. *Fittock, supra* n. 2; *Bondarenko* v. *Sommers* (1968) 69 S.R. (N.S.W.) 269 at 275 *per* Jacobs, J.A.

[28] Per Sugerman, J. in *Godbolt* v. *Fittock, supra* n. 2 at 642; Clement, J.A. in *Tallow* v. *Tailfeathers* (1973) 44 D.L.R. (3d) 55 at 66.

[29] *Christiansen* v. *Gilday* (1948) 48 S.R. (N.S.W.) 352; *Imperial Chemical Industries Ltd.* v. *Shatwell* [1965] A.C. 656 *per* Lord Radcliffe at 677.

se.[30] Moreover in certain cases it has been possible to argue that the illegal element prevents the plaintiff establishing an ingredient of the tort such as title to sue in conversion[31] or a duty of care[32] or damage of a kind which the law recognizes[33] in negligence.

Finally it should be mentioned that where possible the courts will often prefer to avoid dealing with the issue of illegality at all and ground their decision on some well established and better understood defence. Thus where a plaintiff who was guilty of some criminal conduct at the time of the tort sues in negligence it may be possible to argue that the criminality goes to the question of whether the plaintiff was contributorily negligent[34] or *volens*[35] to the risk of injury.[36] Where a plaintiff sues for trespass to person in respect of injury suffered in a criminal affray the defence may be put in terms of consent or self defence.[37]

Negligence

It is in actions in the tort of negligence that the so-called defence of illegality has been most commonly raised and where the most thorough investigations of the nature of the defence have been made. The starting point may be taken as *Henwood* v. *The Municipal Tramways Trust (South Australia)*.[38] A unanimous High Court there rejected the contention that a passenger in a tram had no action in negligence against the tramway authority because he was in breach of a safety regulation at the time he was injured. The passenger, overcome by nausea, had put his head out of the window of the tram when he was struck on the head in succession by two standards which were situated only seventeen inches from the side of the tram. The fact that the passenger's conduct in projecting his head out the window subjected him to a penalty under a by-law made by the Trust, did not preclude a claim in negligence against the Trust for failure to construct sufficient barriers to prevent passengers leaning out.

The High Court stressed that "there is no rule denying to a person who is doing an unlawful thing the protection of the general law

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[30] *Smith* v. *Jenkins, supra* n. 1 at 403 *per* Kitto, J.; *Hillen* v. *I.C.I. (Alkali) Ltd.* [1934] 1 K.B. 455; *Gent-Diver* v. *Neville* [1953] St. R. Qd. 1; *Marshall* v *Batchelor and The State Government Insurance Office* (1949) 51 W.A.L.R. 68 *Miller* v. *Decker* [1955] 4 D.L.R. 92 *per* O'Halloran, J.A.

[31] See cases n. 7 *supra*.

[32] *Smith* v. *Jenkins, supra* n. 1; *Hillen* v. *I.C.I. (Alkali) Ltd.* [1934] 1 K.B 455; *Danluk* v. *Birkner* [1946] 3 D.L.R. 172.

[33] See cases n. 8 *supra*.

[34] *Cakebread* v. *Hopping Brothers (Whetstone) Ltd.* [1947] 1 K.B. 641 *National Coal Board* v. *England* [1954] A.C. 403; *Stapley* v. *Gypsum Mines Ltd* [1953] A.C. 663; *Canning* v. *The King* [1924] N.Z.L.R. 118; *Atwell* v. *Gertridg* (1958) 12 D.L.R. (2d) 669.

[35] *Imperial Chemical Industries Ltd.* v. *Shatwell* [1965] A.C. 656; *Miller* v *Decker* (1957) 9 D.L.R. (2d) 1.

[36] G.H.L. Fridman, "The Wrongdoing Plaintiff" (1972) 18 *McGill L.J.* 275

[37] See cases n. 6 *supra*.

[38] *Supra* n. 11.

imposing upon others duties of care for his safety".[39] Thus the fact that a person who is injured in a motor accident is "a child playing truant from school, an employee who is absent from work in breach of his contract, a man who is loitering upon a road in breach of a by-law, or a burglar on his way to a professional engagement",[40] is irrelevant for the purpose of deciding the existence or defining the content of the obligation of a motor driver not to injure him. Whether the plaintiff's breach of the by-law here disentitled him to succeed depended on the true construction of the by-law. The relevant question in every case is "whether it is 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".[41] In the present case there was no intention to be found in the by-law, to deprive the passenger of his civil rights as well as to impose a penalty on him. Thus breach of the by-law by the passenger did not affect the Trust's civil responsibility.

Since this time Australian courts have not queried the proposition that unilateral illegality on the part of the plaintiff does not in itself bar a claim in negligence unless it can be inferred that this was the intention of the law against which the plaintiff offended.

(i) *Smith* v. *Jenkins*

The next landmark case is of course *Smith* v. *Jenkins*[42] in which the High Court recognized for the first time that the parties' joint participation in an illegal enterprise at the time when the plaintiff was injured by the defendant precluded an action in negligence. The parties had unlawfully taken a motor car without the consent of the owner (after having robbed and assaulted him) and were driving in the vehicle when a crash occurred due to the defendant's negligence. A unanimous Court comprising Barwick, C.J., Kitto, Windeyer, Owen and Walsh, JJ. held for the defendant. The reasoning of the judges is by no means uniform or easy to comprehend, and the *ratio* of the case has already been much in issue.[43] Barwick, C.J. considered that the choice as a basis for denying recovery was between refusing to erect a duty of care between persons jointly participating in an illegal act, or refusing, on grounds of public policy, to assist the plaintiff to recover damages for breach of an acknowledged duty of care.[44] He concluded that the former was the proper basis. It would seem that this general approach in terms of whether there was a duty of care was also

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[39] *Id.* 462 *per* Dixon and McTiernan, JJ.
[40] *Id.* 446 *per* Latham, C.J.
[41] *Id.* 460 *per* Dixon and McTiernan, JJ.
[42] *Supra* n. 1.
[43] *Progress and Properties Ltd.* v. *Craft, supra* n. 5 at 656 *per* Barwick, C.J.; *Jackson* v. *Harrison,* supra n. 4 at 443 *per* Barwick, C.J. and at 453-5 *per* Mason, J.; W. J. Ford, "Tort and Illegality: The *Ex Turpi Causa* Defence in Negligence Law" (1977) 11 *Melb. U.L.R.* 33 at 36-41; H. Luntz, Comment 44 *A.L.J.* 280.
[44] *Supra* n. 1 at 400.

preferred by at least a majority[45] of the members of the High Court. This is borne out especially by the fact that two of the five members of the Court, namely Barwick, C.J. and Owen, J. expressly aligned themselves with the reasons for judgment of Windeyer, J. who said at one point:

> It seems to me a mistake to approach the case by asking whether the plaintiff is precluded by considerations of public policy from asserting a right of action for negligence. The proper inquiry seems to me to be simply: is there for him a right of action? That depends upon whether in the circumstances the law imposed a duty of care; for a right of action and a duty of care are inseparable. The one predicates the other. Duty here does not mean an abstract and general rule of conduct. It is not the duty to God and neighbour of the catechist's question. It is a concept of the law, a duty to a person, which he can enforce by remedy at law. Lord Atkin's famous generalizations need some qualifications and require some exceptions. For instance, negligent misstatements are now actionable, but the duty of care in that field depends, it has been held, not simply on foreseeability of harm but on a special relationship between the parties. If a special relationship be in some cases a prerequisite of a duty of care, it seems to me that in other cases a special relationship can exclude a duty of care.[46]

Smith v. *Jenkins* was not the first decision of an appellate court in Australia upholding a defence of illegality in an action in negligence. In three New South Wales cases the plaintiff's illegality had operated to defeat his claim. However there was a disparity of reasoning in these cases. In *Christiansen* v. *Gilday*[47] the plaintiff, who was the master of a small trawling vessel, sued the owner for negligence in allowing his ship to be in an unseaworthy condition as a result of which he was injured. The plaintiff's claim failed because the dangerous state of affairs which resulted in his injury was his own responsibility. The plaintiff was in breach of a statutory duty in allowing the vessel to put to sea in an unseaworthy condition. In these circumstances the Court felt bound to refuse to lend its aid to a person who founded his cause of action on his own illegal act. The Court held, in effect, that the plaintiff's claim was a *turpis causa*.

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[45] *Cf.* Kitto, J., *Id.* 402-3, who argued that though the parties were "neighbours" in the *Donoghue* v. *Stevenson* sense of the word, they were joint wrongdoers between whom there is no contribution or indemnity.

[46] *Id.* 418. It must be acknowledged that he also said (at 422): "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. That formulation 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. How it be analysed and explained matters not".

[47] *Supra* n. 29.

In *Godbolt* v. *Fittock*[48] plaintiff and defendant were engaged in a joint venture of stealing cattle and transporting them in a truck to a town where it was intended that they would be sold and the proceeds divided between the parties. In the course of the journey an accident occurred due to the defendant's negligent driving. The Court's ruling for the defendant was clearly based on the considerations of public policy embodied in the maxim *ex turpi causa non oritur actio*. When two persons are engaged in a criminal venture of this kind[49] and one is injured by the carelessness of the other, it is contrary to the policy of the law to assist the injured person to recover damages from the other. This was qualified by Sugerman, J. by the requirement that the journey in question should be "directly connected with the execution of the criminal purpose"[50] and by Manning, J. by the requirement that the injury should be suffered "either in the course of an activity which is in preparation for or as a consequence of a criminal activity in which both parties either are about to or have participated".[51] In the latter judge's view it was a further condition that "the activity is one which would not have been performed at all or would not have been performed in the way in which it was performed had the actors not been about so to participate or so to have participated".[52]

Bondarenko v. *Sommers*[53] concerned a plaintiff and a defendant who, with two other young men, had unlawfully taken a car. When the accident occurred the plaintiff was an occupant of this car and was engaged in racing the car side by side along a rough and fairly narrow road with another car driven by the defendant. The defendant cut sharply in front of the plaintiff's car, causing it to overturn and the plaintiff was injured. The Court of Appeal approved the trial judge's direction to the jury that if a number of persons were jointly engaged in the theft of a car and one of their purposes was that they would race that car against another car on a public street, then, if one of them was injured in an accident arising in such a race, he could not recover against any of the others. The Court of Appeal, applying *dicta* of the High Court in *Henwood* v. *Municipal Tramways Trust*,[54] considered that the vital question was whether "it is 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".[55] Under the Crimes Act, 1900 (N.S.W.) (as amended) the illegal act was the taking and using of a motor vehicle without the

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[48] *Supra* n. 2.
[49] Sugerman, J., *id.* 623, limited his remarks to cases of "criminality in its stricter and more limited sense".
[50] *Id.* 624.
[51] *Id.* 630.
[52] *Ibid.*
[53] (1968) 69 S.R. (N.S.W.) 269.
[54] *Supra* n. 11 at 460 *per* Dixon and McTiernan, JJ.
[55] *Supra* n. 53 at 277.

consent of the owner and it was the using of the motor vehicle which was complained of as having been done negligently. Thus the actual act complained of as done negligently was itself the criminal act in which both plaintiff and defendant were engaged. Hence a statutory intention could be inferred to preclude any civil actions between participants for negligently carrying out the illegal activity.

It is clear that the reasoning in these cases differed from that adopted in *Smith* v. *Jenkins*. The High Court in *Smith* v. *Jenkins* did not rest its decision on the maxim *ex turpi causa non oritur actio* and Windeyer, J. forcefully argued that the maxim has no place in the law of torts.[56] Nor did the High Court consider that the case was to be decided by asking whether the intention of the legislature was to debar the wrongdoing plaintiff. In the view of Windeyer, J. the intention of the legislature would be relevant, if at all, only where the legislation implicitly preserved rights which, because of the absence of a duty of care between wrongdoers, the common law would regard as gone.[57]

(ii) *Developments since Smith v. Jenkins*

It might have been supposed that *Smith* v. *Jenkins* established firmly the proposition that where the plaintiff and defendant are jointly engaged in an illegal enterprise and the defendant's negligence in doing an illegal act results in injury to the plaintiff, then, at any rate in cases of serious illegality, a claim in negligence will fail. It might have been expected that a body of case law would soon evolve giving guidance about the types of illegal enterprise participation in which would have this consequence. In fact no cases can be found in Australia in the decade since *Smith* v. *Jenkin* was decided, where a plaintiff has failed in an action in negligence because of illegality. More important is the fact that in the two cases where the High Court has been invited to apply its own decision in *Smith* v. Jenkins, a newly constituted Court has beaten an almost indecently hasty retreat from the position apparently taken in that case.

The first case to come before the High Court was *Progress and Properties Ltd.* v. *Craft*[58] concerning an industrial accident on a construction site. The plaintiff was a plumber employed by a sub-contractor to the defendant in connection with the erection of a twenty-five storey building. The plaintiff was injured when a hoist on which he had entered for the purpose of doing work on the twentieth floor crashed to the ground. The hoist was designed for carrying materials not men and both the plaintiff and the defendant's servant, the hoist operator, were acting in breach of a regulation which made it an offence to ride on the hoist or permit others to do so. The accident occurred when, in the course of descent, the hoist operator's foot slipped off the

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[56] *Supra* n. 1 at 409 ff.
[57] *Id.* 424.
[58] *Supra* n. 5.

brake pedal and the hoist platform crashed to the ground before control was fully regained. The plaintiff sued both in negligence and for breach of a statutory duty not to lower loads at a speed exceeding 600 feet per minute. The defendant pleaded contributory negligence, voluntary assumption of risk and participation in an illegal venture. On the issue of illegality the Court held, by a majority of four to one, that the plea could not be sustained. The judgment of Jacobs, J. was concurred in by Stephen, Mason and Murphy, JJ. who delivered no separate opinions. As his Honour's treatment of the illegality point was relatively short it may be set out here in full:

> The act or omission of the hoist operator which was claimed to be negligent was not the act of allowing or permitting the respondent to ride upon the hoist but the act of negligently failing properly to operate the foot brake and control the descent of the hoist. A plea of illegality in answer to a claim of negligence is a denial that in the circumstances a duty of care was owed to the injured person. A duty of care arises out of the relationship of particular persons one to another. An illegal activity adds a factor to the relationship which may either extinguish or modify the duty of care otherwise owed. A joint illegal activity may absolve the one party from the duty towards the other to perform the activity with care for the safety of that other. That, it seems to me, is the effect of *Smith* v. *Jenkins* (1970), 119 C.L.R. 397. Where there is a joint illegal activity the actual act of which the plaintiff in a civil action may be complaining as done without care may itself be a criminal act of a kind in respect of which a court is not prepared to hear evidence for the purpose of establishing the standard of care which was reasonable in the circumstances. A court will not hear evidence nor will it determine a standard of care owing by a safe blower to his accomplice in respect of the explosive device. This is an example which gives no difficulty, but other cases can give difficulty in classification.
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> In the present case the illegal activity was the riding by the respondent on the hoist driven by the appellant's servant, Mr Facer, and the permitting and allowing of him so to ride. However, the relation of the illegality to the negligence complained of does not require an examination of any special aspect of the relationship between the participants which could affect the standdard of care to be expected in the circumstances. Whether or not it was legal to ride on the hoist platform the same standard of care in operating the hoist would be expected of the operator, and the court would not be obliged to embark on an inquiry whether the act of the operator was reasonable, having regard to the illegality of the enterprise. On this ground alone the plea of illegality fails.[59]

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[59] *Id.* 668-9.

It is significant that the only remaining member of the *Smith* v. *Jenkins* Court who sat on the appeal in *Progress and Properties Ltd.* v. *Craft* was Barwick, C.J. and his was the only dissenting voice. He considered that the plaintiff and the hoist driver were co-operatively engaged in breaking the regulation and hence the act of which the plaintiff complained was the act of his co-operator in the illegal use of the hoist. His Honour conceded that if the cause of the plaintiff's injuries had been an act of some third person who owed a duty of care to the plaintiff, the illegality of the plaintiff's presence on the hoist would afford that person no defence if sued in negligence. But here, as in *Smith* v. *Jenkins,* the plaintiff and defendant were joint participants in the unlawful act out of which, because of the manner of performance of that act, the injuries to the plaintiff arose. In his Honour's opinion *Smith* v. *Jenkins* "has authoritatively decided that, where a plaintiff and a defendant have joined in the commission of an illegal act, neither has a cause of action against the other in negligence in respect of the manner in which the one has acted towards the other in the course of the commission of that act".[60] His Honour could not find any distinction in point of basic fact or principle between the instant case and *Smith* v. *Jenkins.* The Court, in his view, was not warranted in treating breach of such a regulation as in any different case from breach of a "traditional" provision of the criminal law.

Despite the Chief Justice's forceful dissent it might be thought that the views of the majority in this case on the illegality point are uncontroversial. As pointed out by Jacobs, J. the act of the hoist operator which was claimed to be negligent was not the act of allowing the plaintiff to ride upon the hoist, but the act of negligently failing properly to operate the foot brake and control the descent of the hoist. Thus it could be argued that, unlike *Smith* v. *Jenkins* this was not a case where the illegal act itself in which both parties were participating was alleged to be done negligently. Moreover to many minds the type of illegality involved in *Craft,* namely, breach of an industrial safety regulation, may appear to differ materially and justify different treatment from the "traditional" criminality of the parties in *Smith* v. *Jenkins.* This was certainly the view of Jacobs, J. Having explained, in the passage extracted above, that there was no difficulty in this situation in determining the standard of care which was reasonable between the parties, hence the plaintiff's illegality did not defeat him, he then went on to express the view that, in any event, mere breach of a safety regulation designed for his protection was not the kind of illegality which would defeat a plaintiff. He said:

> Further, I do not think that the fact that the law declines to impose a duty of care towards a person engaged in a joint illegal enterprise in respect of that enterprise can be applied in a case

[60] *Id.* 656.

where the illegality, if it be assumed to be so, is one which arises from the breach of specific statutory duties of care for the safety of one of the participants. The reason for the law declining to raise a duty of care towards a joint participant in an illegal enterprise in respect of the manner in which that enterprise may be carried out is wholly inapplicable to the circumstances of regulations designed to enforce a high specific duty to ensure the safety of that participant.[61]

However the facts of the next case which came before the High Court in this connection are less easily distinguishable from those of *Smith* v. *Jenkins*. Nonetheless the High Court, again by a majority of four to one (Barwick, C.J. again in dissent), declined to treat the illegality as disabling. In *Jackson* v. *Harrison*[62] the plaintiff was, as in *Smith* v. *Jenkins,* a passenger in the defendant's car when an accident occurred due to the defendant's negligence. At the time both parties' driving licenses had been suspended for traffic offences. Though each knew of the other's disqualification from driving they had taken a car on a weekend jaunt with the idea of sharing the driving. It was accepted that the parties were engaged in a joint venture so that throughout the journey and at the time of the accident each was committing the offence of driving a motor vehicle while under disqualification. However, a majority comprising Mason, Jacobs (with whom Aickin, J. agreed) and Murphy, JJ. found for the plaintiff. Mason, J. was quite impatient of the suggestion that *Smith* v. *Jenkins* bound the Court to disentitle the plaintiff. He said:

> It is quite incorrect to assert that *Smith* v. *Jenkins* decided that the participants in a joint illegal enterprise owe no duty of care to each other. It decided no such thing. The case was limited to its particular facts. They involved the illegal use of a motor vehicle contrary to s. 81(2) of the Crimes Act 1958 (Vic.). The members of the court assigned a variety of reasons for arriving at this result, no particular reason commanding universal or even majority acceptance.[63]

Mason, J. thought that there were insuperable problems with the duty of care approach. Firstly, if the rule were that whatever the degree of illegality, no duty of care was owed between joint participants in an illegal enterprise, its application would, in some instances at least, be draconian. If, on the other hand, the rule were that only serious illegality would have this consequence, then the difficulty would arise, insoluble in his view, of formulating a criterion for distinguishing cases of major and minor illegality. He concluded that:

> A more secure foundation for denying relief, though more limited in its application — and for that reason fairer in its

[61] *Id.* 669.
[62] *Supra* n. 4.
[63] *Id.* 453-4.

> operation — is to say that the 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. . . . I consider the law to have been correctly stated by Jacobs J. in *Progress and Properties Ltd.* v. *Craft.* A plaintiff will fail when the joint illegal enterprises in which he and the defendant are engaged is such that the Court cannot determine the particular standard of care to be observed. It matters not whether this in itself provides a complete answer to the plaintiff's claim or whether it leads in theory to the conclusion that the defendant owes no duty of care to the plaintiff because no standard of care can be determined in the particular case.[64]

Jacobs, J. (with whom Aickin, J. agreed) adhered to his *dicta* in *Progress and Properties Ltd.* v. *Craft* and said that a "legal duty of care presupposes that a tribunal of fact can properly establish a standard of care in order to determine whether there has been a breach of the duty of care. If the courts decline to permit the establishment of an appropriate standard of care then it cannot be said that there is a duty of care".[65] In determining this question he thought it relevant, in the case of statutory offences, to take account of the intention of the legislation, that is, to ask whether it was "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".[66] *Smith* v. *Jenkins* and *Godbolt* v. *Fittock* are to be explained as cases where no standard of care could be determined for the course of criminal activity present there.

Thus far it is apparent that three members of the Court were in substantial agreement with respect to the nature of the illegality defence and the proper approach which is to be taken in cases where it is raised. The other member of the majority, Murphy, J. took up a more extreme position. In a most persuasive judgment his Honour expressed very serious misgivings about the soundness of the policy behind the decision in *Smith* v. *Jenkins* which he evidently believed to have been wrongly decided, and concluded that "the defence of illegality should be confined strictly".[67] In his view, where a plaintiff's offence is statutory, recovery should be denied by reason of illegality, only where denial of recovery is statutory policy. Otherwise recovery should be denied only where there is a voluntary assumption of risk.

At the opposite end of the spectrum on this matter from Murphy, J. stood Barwick, C.J. who strongly reaffirmed the views which he had

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[64] *Id.* 455-6.
[65] *Id.* 457.
[66] *Id.* 459; this passage is from the judgment of Dixon and McTiernan, JJ. in *Henwood* v. *Municipal Tramways Trust, supra* n. 11 at 460.
[67] *Id.* 465.

expressed in *Smith* v. *Jenkins* and in *Progress and Properties Ltd.* v. *Craft*. He considered that a clear majority of the Court in *Smith* v. *Jenkins* was in favour of the explanation that the relationship between the participants in the commission of the offence was not such as to give rise to a duty of care *inter se* in relation to acts done in the commission of the offence. The principle extends to "acts directly related to the commission of the offence and to the gathering of the fruits thereof".[68] What was not decided in *Smith* v. *Jenkins,* was, he acknowledged, a definitive description of the nature of the offences to which the *Smith* v. *Jenkins* principle relates. But in his Honour's opinion the offence, in the commission of which these parties participated, was in socially essential respects of the same order as the offence in *Smith* v. *Jenkins*. The offence was a serious one since a motor car on a public road in unqualified or irresponsible hands can be a lethal instrument. He was unable to accept that the protection of property or possession of a motor vehicle is of more consequence to the community than the safety and health of its citizens: that the principle of *Smith* v. *Jenkins* extends to theft or its equivalent but not to conduct endangering health or life. Though conceding that there are offences to which the principle does not apply he confessed himself unwilling and unable to specify by a verbal formula what offences are outside the scope of the principle of *Smith* v. *Jenkins*. At least offences which have been created to protect the safety and health of individuals or property would be in general within its scope.

(iii) *The new analysis*

These new pronouncements from the High Court mean that the actionability of the defendant's conduct in cases of joint illegality depends on whether the court is prepared or able, in view of the nature of the illegal enterprise, to determine what standard of care is appropriate between the parties. If the court cannot or will not do so, then it is thought to follow that no duty of care is owed and the plaintiff fails. This represents a new and almost unprecedented[69] method of determining the vexed question of the effect of the plaintiff's illegality on actions in tort. The High Court is of course only addressing itself to the tort of negligence and to cases of joint rather than unilateral illegality.

It seems clear that the approach in terms of standard of care denotes a contraction of the scope of the defence of illegality from what might have appeared to be its extent in the light of *Smith* v. *Jenkins*. It appears that the High Court in *Progress and Properties Ltd.* v. *Craft* and *Jackson* v. *Harrison* was endeavouring to arrive at a formula for determination of cases of joint illegality, which would

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[68] *Id.* 446.

[69] *Cf.* Owen, J. in *Smith* v. *Jenkins, supra* n. 1 at 425; Jacobs, J. in *Bondarenko* v. *Sommers, supra* n. 53 at 275.

accommodate the possibility of cases arising where considerations of public policy would impel a court to refuse recovery, but which would not, at the same time, leave open the possibility that all manner of offences, of a more or less serious nature, might, if jointly committed, preclude actions in negligence between participants. The latter eventuality is considered to be both arbitrary and apt to cause severe and unjust consequences. That an approach in terms of duty of care rather than standard of care can lead to a defence which is too far-reaching is borne out by the fact that Barwick, C.J., who rejects a reinterpretation of the *Smith* v. *Jenkins* principle in terms of standard of care, and adheres to the older formula in terms of duty of care, upheld the defence of illegality in *Progress and Properties Ltd.* v. *Craft* and *Jackson* v. *Harrison,* whereas the other judges did not.

The High Court has given little guidance as to the types of case where the courts would be unable to fix a standard of care and hence would be impelled to deny recovery. However it seems that the kind of situation where the High Court would be most disposed to deny recovery is illustrated by the hypothetical examples given from time to time by judges about safecrackers, smugglers, burglars and murderers. In *Progress and Properties Ltd* v. *Craft* Jacobs, J. said: "A court will not hear evidence, nor will it determine a standard of care owing by a safe blower to his accomplice in respect of the explosive device".[70] In *Jackson* v. *Harrison* the same judge, having reaffirmed his view that a claim in negligence will fail if the courts decline to permit the establishment of an appropriate standard of care, said:

> The two safe blowers provide the simplest illustration. What exigencies of the occasion would the tribunal take into account in determining the standard of care owed? That the burglar alarm had already sounded? That the police were known to be on their way? That by reason of the furtive occasion itself a speed of action was required which made it inappropriate to apply to the defendant a standard of care which in lawful circumstances would be appropriate? The courts will not engage in this invidious inquiry.[71]

Jacobs, J. also gave an example of a burglar, saying that if the burglar in the act of breaking in was so negligent that he injured his accomplice, the accomplice could not sue for negligence. In *Smith* v. *Jenkins* Windeyer, J. thought that if A and B set out to murder C and B was to hold C while A stabbed or shot him, then if A by carelessly handling the knife or firearm, wounded B, B could not get damages from A in negligence. His Honour opined that there would be no duty

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[70] *Supra* n. 5 at 668; see also to this effect Owen, J. in *Smith* v. *Jenkins, supra* n. 1 at 425; the example of the safebreakers was first offered by Asquith, L.J. in *National Coal Board* v. *England* [1954] A.C. 403 at 429; cited in *Godbolt* v. *Fittock, supra* n. 2 at 622, *per* Sugerman, J.

[71] *Supra* n. 4 at 457-8.

of care between A and B.[72] The present High Court would no doubt consider it impossible to fix an appropriate standard of care between the parties.

Another hypothetical situation where it has been suggested that no action in negligence would lie is that which was originally proffered by Scrutton, L.J. in *Hillen* v. *I.C.I. (Alkali) Ltd.*[73] He posited a situation where A owns a house to which his confederates, B and C, bring smuggled kegs of brandy, to be lowered into A's cellar by a rope which A knows to be defective. If the rope breaks and injures B waiting in the cellar for the keg, B could not sue A for not warning him of the trap in the rope because the whole transaction is known by each party to be illegal and there is no contribution or indemnity between joint wrongdoers. No doubt the present High Court would be disposed to reach the same conclusion though necessarily nowadays by a different route.

It may be that it was only the possibility of such extreme cases as these coming before the courts which restrained the majority from joining with Murphy, J. in refusing to recognize any defence of illegality except where required by statute. Clearly the judicial mood is to deny recovery in hypothetical situations involving safecrackers, smugglers, burglars and murderers, and the standard of care approach would normally yield a satisfactory explanation for denial of recovery. To be contrasted with these examples are situations where the illegal element is a breach of the traffic law such as the requirement for licensing of drivers[74] or the requirement that vehicles should be registered, insured[75] and properly equipped,[76] or breach of industrial safety regulations.[77] Here the courts see no difficulty in fixing a standard of care, and actions in negligence are not barred.

One problem which arises is in accommodating within the new formula the three existing Australian cases where appellate courts have denied recovery on the ground of illegality. *Smith* v. *Jenkins, Godbolt* v. *Fittock* and *Bondarenko* v. *Sommers* were all negligent driving cases and as they were not expressly overruled or even disapproved in the two recent High Court cases, and in fact were expressly affirmed as correct by Jacobs, J., it becomes necessary to reinterpret them and regard them as examples of situations where the courts could or would not determine an appropriate standard of care. It is relatively easy to analyze *Bondarenko* v. *Sommers* in these terms. The parties unlawfully took a car without the consent of the owner, with the intention

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[72] *Supra* n. 1 at 419.

[73] [1934] 1 K.B. 455 at 467; this example was also given by Owen, J. in *Smith* v. *Jenkins, supra* n. 1 at 425 and Sugerman, J. in *Godbolt* v. *Fittock, supra* n. 2 at 622.

[74] *Jackson* v. *Harrison, supra* n. 4.

[75] *Id.* 460-1 *per* Jacobs, J. approving *Andrews* v. *Nominal Defendant, supra* n. 3.

[76] *Id.* 453 *per* Mason, J.

[77] *Progress and Properties Ltd.* v. *Craft, supra* n. 5.

of engaging in a speed contest for personal sport and enjoyment between that car and another. It was in the course of such a race along a back road that the accident occurred. One can appreciate the difficulty of determining what standard of care was appropriate to such an activity. However in *Smith* v. *Jenkins* the parties were merely engaged in unlawfully using a motor vehicle without the consent of the owner and in *Godbolt* v. *Fittock* they were transporting stolen cattle to market when the accident occurred. In these cases there were no circumstances of flight from pursuit or any other factor which might affect the assumption that the passenger expected the driver to use the normal degree of reasonable care for his safety. It is hard to see why the courts should have more difficulty in determining the appropriate standard of care in cases such as these than they had in *Jackson* v. *Harrison.*

The attempt to accommodate these cases poses the important question whether the new test enunciated by the High Court in *Progress and Properties Ltd.* v. *Craft* and *Jackson* v. *Harrison* precludes recovery only where the courts *cannot* determine an appropriate standard of care or where they *will not* do so. The question is whether the High Court envisages that a plaintiff will be precluded only where, because of the nature of the illegal enterprise, it is *impossible* for a court to say what standard of care was reasonable, or whether he is also precluded where, because of the nature of the illegal enterprise the court *declines* to inquire into or refuses to hear evidence to enable it to determine, the appropriate standard of care. The judgments are not entirely unambiguous. But it seems clear that the High Court must be taken to be saying that in certain cases the courts will refuse to address themselves to the question of what standard of care was appropriate even though it would be possible for them to determine the matter. Mason, J. is not so obviously of this opinion as he speaks of situations where it is "impossible" for the Court or where the Court "cannot" determine the particular standard of care to be observed.[78] However he also expressly asserts that in his opinion the law was correctly stated by Jacobs, J. in *Progress and Properties Ltd.* v. *Craft,* thereby approving the passage in which Jacobs, J. says that "the actual act of which the plaintiff in a civil action may be complaining as done without care may itself be a criminal act of a kind in respect of which a court is not prepared to hear evidence for the purpose of establishing the standard of care which was reasonable in the circumstances".[79] In *Jackson* v. *Harrison* Jacobs, J. makes even more explicit his opinion that where joint illegality precludes recovery it is because the courts will not, rather than cannot, determine an appropriate standard of care. For instance at one point he observes:

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[78] *Supra* n. 4 at 456.

[79] *Supra* n. 5 at 668; a similar statement was made by the same judge in *Bondarenko* v. *Sommers, supra* n. 53 at 275.

> A legal duty of care presupposes that a tribunal of fact can properly establish a standard of care in order to determine whether there has been a breach of the duty of care. If the courts decline to permit the establishment of an appropriate standard of care then it cannot be said that there is a duty of care.[80]

No doubt courts would be more comfortable in denying recovery in situations where they could truthfully assert their inability rather than their disinclination to determine an appropriate standard of care. But as Murphy, J. points out such cases must be infrequent.[81] Perhaps the suppositive situations concerning actions in negligence between safecrackers, smugglers, burglars and murderers mentioned above would be examples of such cases (though the case of the smugglers is not so obvious), as might the situation in *Bondarenko* v. *Sommers.*[82] However, the leading exponent of the new analysis of illegality cases in terms of standard of care, Jacobs, J., makes it clear that denial of recovery is not limited to cases of impossibility of fixing the standard. The courts also apparently have a discretion to decline, even if this could be done, to permit the establishment of an appropriate standard of care, where the nature of the illegal enterprise persuades them that this is the proper course. Presumably in exercising this discretion the courts have nothing to guide them but considerations of public policy. This is acknowledged by Jacobs, J. when, having expressed the opinion that the courts will not engage in the "invidious inquiry" of what standard of care is owed between safe-breakers he grants that the "reason is no doubt based on public policy".[83]

It seems unlikely that Jacobs, J., in saying that the courts in certain cases will not hear evidence to determine what standard of care is appropriate, is postulating a degree of squeamishness on the part of the civil courts which makes them shrink from hearing evidence of vile and degrading criminal conduct, to which criminal courts must listen every day. In *Smith* v. *Jenkins* Walsh, J. said: "I do not think that the essential reason for a rule by which the courts refuse to recognize a right of action in some cases of criminality is a shrinking by the court from the seamy facts of life or a scrupulous regard for its dignity and reputation".[84] It seems more likely that Jacobs, J., in referring to judicial policy, was alluding to the self-same considerations, whatever they were (usually they have not been made explicit), which have persuaded courts in the past to refuse recovery to a participant in an illegal enterprise on the grounds of absence of duty[85] or application of the maxim *ex turpi causa non oritur actio.*[86]

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[80] *Supra* n. 4 at 451.
[81] *Id.* 462-3.
[82] *Supra* n. 53.
[83] *Jackson, supra* n. 4 at 458.
[84] *Supra* n. 1 at 432.
[85] E.g. *Smith* v. *Jenkins, supra* n. 1.
[86] E.g. *Godbolt* v. *Fittock, supra* n. 2.

If this is so it may be queried whether the new analysis of the problem of illegality in terms of whether an appropriate standard of care can be determined, serves any useful purpose or represents an improvement in or simplification of the law. The new analysis might give an appearance of greater objectivity than the older approaches either by way of asking whether a duty of care was owed or whether the case was a *turpis causa*. But is not this appearance illusory if the true inquiry is whether the courts should, on grounds of public policy, refuse to permit the establishment of an appropriate standard of care? Is it not the case that all three methods of approach involve determination of the same question, namely, whether, for good reasons of policy, the courts should refuse their aid to a participant in an illegal enterprise who was injured at the hands of a negligent fellow wrongdoer? If this is so then the proponents of the new approach have a heavy onus to discharge in choosing to depart from analysis solely in terms of the presence or absence of a duty of care, that concept being, after all, the traditional tool for determining large questions of policy in the law of negligence.

(iv) *The Policy Question*

Though in most cases in tort where illegality has been raised as a defence, judges have acknowledged that the decision whether to uphold the defence is a matter for intuitive judgment on their part rather than the application of any fixed rules of law, it is unusual to find any advertence to specific considerations of policy which sway the courts' judgment one way or the other.[87] Attention has been drawn to the failure of the High Court in *Smith* v. *Jenkins*[88] to refer to the reasons of policy which induced it to refuse the claim.[89] The same charge could be levelled at the judgments of Jacobs, J. in *Progress and Properties Ltd.* v. *Craft*[90] and *Jackson* v. *Harrison*.[91] However the other members of those courts were considerably more frank and informative. Barwick, C.J., who upheld the defence in both cases, adverted in *Progress and Properties Ltd.* v. *Craft* to the weakening of the sanction of the law in question which would result from allowing actions between wrongdoers. This outweighed the consideration that to leave an injured workman without a common law remedy might appear harsh and out

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[87] *Cf.* Sugerman, J. in *Godbolt* v. *Fittock*, *supra* n. 2 at 623 who said: ". . . it would at least seem strangely opposed to sound notions of public policy that gangs of thieves or burglars should be encouraged to use motor vehicles in the execution of their nefarious plans (even including the theft of motor vehicles) by the comfortable assurance that untoward consequences to any of their number resulting from the careless driving of another of them would be compensated by the owner's insurer"; *cf.* Starke, J. in *Jenkins* v. *Smith* [1969] V.R. 267 at 275 who thought such an approach "unrealistic and artificial in the extreme".

[88] *Supra* n. 1.

[89] W. J. Ford, "Tort and Illegality: The *Ex Turpi Causa* Defence in Negligence Law" (Part One) (1977) 11 *Melb. U.L.R.* 32 at 37, 40; H. Luntz 44 *A.L.J.* 280 at 281.

[90] *Supra* n. 5.

[91] *Supra* n. 4.

of line with the steady expansion of the law to protect workmen and their dependants against the consequences of industrial injuries. He permitted himself the observation that "there is a growing tendency . . . for it to be thought that laws . . . may be broken with impunity. It would be wrong . . . because of the hardship that the application of the basic rule [in *Smith* v. *Jenkins*] in a case such as this would involve, to appear to encourage the view that there are some laws breach of which the community through the legislature has thought fit to visit with punishment which do not attract the application of that basic law".[92] He also pointed out that even if the plaintiff was denied a remedy at common law the benefits of the Workers Compensation legislation would remain available to him.

Mason, J. in *Jackson* v. *Harrison* was swayed by the severe and unjust consequences which would flow from embracing an inflexible doctrine that in a joint criminal enterprise no duty of care is owed to each other by the participants, and by the consideration that such a doctrine would be inconsistent with the view adopted by the High Court in *Henwood* v. *Municipal Tramways Trust*[93] that unilateral illegality does not in itself disentitle a plaintiff. He declined to accept that elimination of civil liability between participants in a joint criminal enterprise could be sustained on the ground that it is a deterrent against criminal activity; it might with equal force be put forward as an inducement to such activity. He thought that "a policy of deterrence directed against the participants in a joint criminal enterprise but not against the individual criminal makes very little sense".[94] Here however Mason, J. is at variance with the strongly held views of Barwick, C.J. who considers that a "defence of illegality, that is, that the plaintiff at the time his cause of action arose was in breach of a statute", is in a different field of discourse from a "defence that the plaintiff has no cause of action against a defendant because of their joint participation in an illegal activity". Reasoning apt in the former connection is not, in his Honour's opinion, directly appropriate to the latter. "The public policy of depriving a plaintiff of the benefit of an acknowledged cause of action because of illegality on his part has been left to the expression of the legislature".[95] In the case of joint illegality the statutory intention is relevant only in so far as the statute might give or preserve a remedy rather than withdraw one.

It is obvious that Barwick, C.J. considers that different policy considerations apply in cases of joint illegality from those which apply

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[92] *Supra* n. 5 at 660.

[93] *Supra* n. 11.

[94] *Supra* n. 4 at 453; Walsh, J. in *Andrews* v. *Nominal Defendant, supra* n. 3 at 95-6 also doubts the justification for distinguishing joint and unilateral illegality; presumably these judges would have difficulty in accepting that a motorist who in all innocence gives a lift to an escaping convict, owes him a duty, but one who knows of the circumstances does not (*Smith* v. *Jenkins, supra* n. 1 at 403 *per* Kitto, J.).

[95] *Jackson, id.* 448.

in cases of unilateral illegality. It is less obvious what these considerations are and why such a distinction should be drawn. Murphy, J. suggests that the reason the decided cases have generally concerned illegality to which the plaintiff and defendant were party is the implicit notion in many of them that, as the illegality is joint, the plaintiff has agreed to take the risk of the defendant's tortious conduct.[96] He refers to a suggestion made by a commentator that: "One explanation of the relevance of the defendant's participation in the illegality is that the court has in effect elided the illegality and volenti defences".[97]

It is Murphy, J. who must receive the highest accolade for judicial candour on the policy question. In *Jackson* v. *Harrison* he clarifies in a succinct yet thorough form the policy issues involved in the question before the Court. His remarks must be set out in full:

> I see no reason why policy consderations should render the careless defendant immune from civil action because of illegality. The policy considerations which seem to me to be important are:
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> (1) It is not a rational development of the common law to attempt to supplement the criminal law by an additional sanction which is uncertain in its application and when applied can have such extremely variable penalties. . . .
>
> (2) A participant in a joint illegal enterprise remains liable for the criminal consequences of killing or injuring accomplices in the course of the enterprise. Why should he not remain liable for the non-criminal consequences? . . .
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> (3) The injured participant does not "profit from his own wrong" by allowing him recovery in simple negligence which is compensatory only. If punitive damages were sought, the question of "profit" would arise.
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> (4) Where the injury is serious and the defendant is able to pay the damages, wholly or partly, public interest is not advanced by relieving the wrongdoer from the consequences of his carelessness and perhaps forcing the injured accomplice to use social services.
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> (5) Carelessness which causes injury may often be much more serious in its social consequences than the offence (for example stealing sheep or robbing a bank) in which the plaintiff was engaged when injured. Those engaged in such operations should not be immune from the civil consequences of their careless conduct even in regard to their accomplices. I doubt that the law of negligence has any effect on their behaviour, but it is more likely to do so if it operates to require the participants to observe the normal standards of care towards each other rather than to relieve them, thus putting them outside the civil law.

[96] *Id.* 464.

[97] E. J. Weinrib, "Illegality as a Tort Defence" (1976) 26 *Uni. of Toronto L.J.* 28 at 34.

(6) Allowing a plaintiff's illegality as a complete defence is counter to the trend of the common law in favour of compensation for injury, which is reflected in the confinement of the defence of voluntary assumption of risk, and the reduction of contributory negligence from a complete defence to a ground for apportionment.

(7) It is anomalous for a defendant to escape liability to which he would have been exposed but for his own criminal conduct.

There is no merit in the contention that a civil court would be degraded by hearing evidence which is given every day before criminal courts (see Walsh J. in *Smith* v. *Jenkins* [at p. 431]).[98]

With such powerful factors obviously weighing in their minds, if not in every case expressed in their judgments, it is not surprising that the majority of the High Court is presently seeking vigorously to narrow the floodgate which *Smith* v. *Jenkins* appears to have left too widely ajar. Arguably, too, the type of accident which was involved in the recent High Court cases is not without significance. It might be true to suggest that one of the primary concerns of the Court is that, because of the proliferation of traffic laws and industrial safety regulations, the circumstances where some element of joint engagement between a plaintiff and a defendant in an illegal activity will most commonly occur, are likely to be in relation to industrial accidents (as in *Progress and Properties Ltd.* v. *Craft*) and road accidents (as in *Jackson* v. *Harrison*). Yet these are the very areas where the law, with full community approval, has been steadily expanding the protection given to injured persons, even to the extent sometimes of imposing liability without fault.[99] The scope of the illegality defence being acknowledged to be a question of public policy, the duty of the judges is to mould the law to conform with prevailing community attitudes; they are therefore both entitled and bound to take account of public opinion favouring full compensation for victims of road and industrial accidents.[100] Hence the urgent need closely to circumscribe the situations where joint engagement with the defendant in an illegal activity disentitles a plaintiff.

(v) *A plea for reinstatement of the duty of care analysis*

It has been suggested above that the High Court's reinterpretation

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[98] *Supra* n. 4 at 464-5; see also Weinrib, *supra* n. 97; W. J. Ford, "Tort and Illegality: The *Ex Turpi Causa* Defence in Negligence Law" (Part Two) (1977) 11 *Melb. U.L. Rev.* 164 at 182 ff.

[99] E.g. Motor Accidents Act, 1973 (Vic.); Motor Accidents (Liabilities and Compensation) Act, 1973 (Tas.); Workers' Compensation schemes for industrial injuries.

[100] Orthodox doctrine, however, precludes the courts from being swayed by the existence of compulsory third party insurance in determining common law liabilities. In *Smith* v. *Jenkins, supra* n. 1 at 409 Windeyer, J. said: "the policy behind statutes which make insurance against liability for negligence compulsory must be seen as to ensure that all defendants meet their liabilities: it is not that all plaintiffs are to be compensated for their sufferings".

of *Smith* v. *Jenkins* in terms of whether an appropriate standard of care could be fixed appears to have been induced by a desire to facilitate contraction of the scope of the illegality defence. It is envisaged that cases will be rare where courts cannot or will not fix a standard of care which is appropriate between the parties. Yet it appears that as the grounds for defeating a plaintiff under the new test are not limited to cases of impossibility of determining an appropriate standard of care, but extend to circumstances where the courts refuse, for reasons of public policy, to permit a standard of care to be established, the application of the new test does not necessarily have the desired limiting effect. Under the new formula the inquiry will be whether the court should, on grounds of public policy refuse to "hear evidence for the purpose of establishing" or "permit the establishment of"[101] an appropriate standard of care which was reasonable in the circumstances. If a standard is not established, no duty of care is owed and the plaintiff will fail. It seems unlikely that the sole concern of the courts from the point of view of public policy would be to avoid polluting the pure fountain of justice or endangering the dignity of judicial proceedings or bringing the courts into public disrepute, by admitting evidence of depraved criminal activity.[102] If this is so, then, it has been suggested above, no doubt the same policy considerations would be pertinent to the question whether a standard of care should be permitted to be established as would be canvassed under the old formula in terms of whether a duty of care exists.

Under the old formula, that is, the *Smith* v. *Jenkins* formula, the inquiry starts at the point where the court is called on, as it always is in negligence litigation, to determine whether the relationship between the parties gives rise to a duty of care. Considerations of public policy are of course always relevant to this issue. The new formula appears simply to add an unnecessary and artificial step to the investigation and to yield a test which is more convoluted and less in accordance with the traditional functions of the elements of the tort of negligence. The task which the judges are required to perform in connection with the standard of care issue is that of determining whether there is evidence from which the tribunal of fact is entitled to infer negligence; this obligation is placed on the court in order to reduce the likelihood of perverse verdicts by juries. By contrast, the whole purpose of imposing an obligation on judges to determine as a matter of law whether a duty of care exists, is to ensure that proper consideration is given in negligence cases to the wider implications of a decision on a particular set of facts; to ensure that attention is directed to the question whether, from the point of view of social policy, it is desirable that the law should be taken in the direction suggested.[103]

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101 *Jackson, supra* n. 4 at 457 *per* Jacobs, J.
102 See *per* Walsh, J. in *Smith* v. *Jenkins, supra* n. 1 at 431-2.
103 In *Dorset Yacht Co. Ltd.* v. *Home Office* [1969] 2 All E.R. 564 at 567

Apart from being inherently more logical, the main benefit to be gained from approaching these questions in terms of whether a duty of care is owed is that this is likely to induce the judges to feel an inclination, or even a compulsion, to articulate the specific considerations of policy which pertain to the question.[104] Such a course is more easily avoided on the standard of care approach. In earlier cases courts were inclined to conceal policy questions involved in the duty of care issue under the cloak of the test of foreseeability. However there is a salutary tendency on the part of judges today, to acknowledge the law-making function which they are performing in connection with the duty of care issue, and openly to canvass the considerations which weigh for or against the imposition of a duty in a particular case.[105] This usually involves asking whether and, if so, what adverse consequences would flow from an extension of the law of negligence into a new area. Thus in *Home Office* v. *Dorset Yacht Co. Ltd.*[106] the House of Lords considered whether imposing a duty of care on the Home Office in the circumstances would unduly fetter the discretion of custodial authorities, thereby placing an undesirable restraint on future experimentation with respect to treatment and rehabilitation of offenders, and whether it might place an intolerable burden of liability on the Home Office by opening the door to innumerable claims for damage done by ex-prisoners. In *Rondel* v. *Worsley*[107] the House of Lords considered whether imposing a duty of care towards their clients on barristers would interfere with the duty which barristers owe to the court, or make trials unduly lengthy by inducing excessive caution, or result in a virtual retrial of the original action. In *Dutton* v. *Bognor Regis U.D.C.*[108] the Court of Appeal was concerned about whether imposing a duty on the Council there might lead to undue harassment of councils generally, induce baseless claims, lead to excessive caution by councils or involve a crippling economic burden in the future for ratepayers.

Thus many courts now regard it as their duty to weigh openly the benefits and detriments when deciding how far the protection of the law of negligence should extend. It is suggested that if a straightforward

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Footnote 103 (Continued).

Lord Denning said: "It is, I think, at bottom a matter of public policy which we, as judges, must resolve. This talk of 'duty' 'no duty' is simply a way of limiting the range of liability for negligence".

[104] Admittedly this was not the case in *Smith* v. *Jenkins*, but a decade has passed since that decision was handed down and a number of important developments have occurred in the law of negligence since then; it may be noted that the Canadian judges, who generally approach cases of this kind by applying the maxim *ex turpi causa non oritur actio* where appropriate, show little disposition to enunciate specific considerations of public policy which sway their judgment.

[105] E.g. *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willemstad"* (1976) 136 C.L.R. 529; *cf. Rootes* v. *Shelton* (1967) 116 C.L.R. 383 at 387 *per* Kitto, J.; C. R. Symmons "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 *Mod. L.R.* 394, 528.

[106] [1970] A.C. 1004.

[107] [1969] A.C. 191.

[108] [1972] 1 Q.B. 373.

duty of care approach were to be taken to illegality cases, courts would be more likely to give frank consideration to whether undesirable consequences which might flow from allowing actions in negligence between wrongdoers, outweigh the factors which would otherwise favour recovery.

Giving reasons of social policy for decisions on the duty of care issue has now become imperative for English courts because of the new approach to the use of Lord Atkin's neighbour principle which has been adopted by the House of Lords. The preponderating opinion until recently was that the neighbour principle could be used as a guide for the purpose of defining new categories of negligence[109] and that it should be used to determine the question of "duty in fact" as opposed to "notional duty".[110] Yet it was not to be applied directly in order to determine if a duty of care exists; to quote Viscount Dilhorne: "Lord Atkin's answer to the question "who, then, in law, is my neighbour?" while very relevant to determine to whom a duty of care is owed, cannot determine, in my opinion, the question whether a duty of care exists".[111] However the House of Lords has now pronounced differently. Lord Wilberforce was stating the unanimously held view of the Court in *Anns* v. *Merton London Borough Council*[112] when he said:

> . . . the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht case* [1970] A.C. 1004, *per* Lord Reid at p. 1027. Examples of this are *Hedley Byrne's* case [1964] A.C. 465 where the class of potential plaintiffs was reduced to those shown to have relied upon the correctness of statements made, and *Weller & Co.* v. *Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569; and (I cite

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[109] See *per* Lord Diplock in *Home Office* v. *Dorset Yacht Co. Ltd., supra* n. 106.

[110] *Winfield and Jolowicz on Tort* (11th ed., 1979 by W. V. H. Rogers) Ch. 5.

[111] *Home Office* v. *Dorset Yacht Co. Ltd., supra* n. 106 at 1043; see also *per* Windeyer, J. in *Hargrave* v. *Goldman* (1963) 110 C.L.R. 40 at 65-6.

[112] [1978] A.C. 728.

these merely as illustrations, without discussion) cases about "economic loss" where, a duty having been held to exist, the nature of the recoverable damages was limited.[113]

If this is to be the correct approach to duty of care questions henceforward then surely it is ideally suited, as a method of analysis, to cases involving joint complicity in an illegal enterprise.[114] The question should be whether, despite there being a relationship of neighbourhood, and hence *prima facie* a duty of care, the illegal element is a consideration which ought to negative the duty which would otherwise be owed. In conducting this inquiry the court would advert to the general considerations of policy referred to by Murphy, J. in *Jackson* v. *Harrison* (set out *supra*) and also to specific aspects of the particular case such as how anti-social the offence is,[115] how close is the connection between the negligence and the unlawful conduct, whether "the tort can be said to arise out of the crime",[116] whether the wrongful act is a "step in the execution of the common illegal purpose"[117] and the intention of the legislation of which the parties are in breach.[118] The evolution of a body of case law would in time elicit those factors which are most significant, just as is happening with respect to the other "considerations which ought to negative or reduce or limit the scope of the duty"[119] such as the fact that the negligence is in word rather than deed or the loss financial rather than physical.

The approach in terms of duty of care also makes it possible for courts, if they see fit, to deal with certain cases of unilateral illegality in the same way as cases of joint illegality. Such a possibility would not be open on the standard of care approach as that test only fits cases of joint illegality. Conceivably cases may arise where a court might feel that sound policy requires denial of a remedy in a case of

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[113] *Id.* 751-2; a similar view had been expressed by Lords Reid, Morris and Pearson in *Home Office* v. *Dorset Yacht Co. Ltd.*; *cf.* Walsh, J. in *Smith* v. *Jenkins, supra* n. 1 at 429 who said: "I do not think that the answer to the question whether or not the respondent was entitled to succeed in his action is to be found by postulating a general rule that a right of action is conferred upon every person who sustains by the negligent act or omission of another an injury which is reasonably foreseeable by that other and by then considering whether the respondent should be deprived of his right of action".

[114] It also seems to overcome the problem which Mason, J. had in *Jackson* v. *Harrison* with the *Smith* v. *Jenkins* approach, namely that it "discard[s] foreseeability as a criterion", *supra* n. 4 at 455; Lord Wilberforce's *dicta* also seem apt to cover cases where plaintiffs have sought to recover compensation for loss of earnings which were being obtained through an illegal activity; see cases n. 8 *supra*.

[115] The vital importance of this consideration is convincingly argued by W. J. Ford, *supra* n. 98.

[116] *Per* Windeyer, J. in *Smith* v. *Jenkins, supra* n. 1 at 421.

[117] *Per* Asquith, C.J. in *National Coal Board* v. *England* [1954] A.C. 403 at 429.

[118] It is relevant to ask whether the statute denies a remedy according to Jacobs, J. in *Jackson* v. *Harrison, supra* n. 4 at 459; *cf.* Windeyer, J. in *Smith* v. *Jenkins, supra* n. 1 at 424 and Barwick, C.J. in *Jackson* v. *Harrison, supra* n. 4 at 446-7 who think it is relevant to ask whether the statute preserves a remedy.

[119] *Per* Lord Wilberforce in the passage cited in the text from *Anns* v. *Merton London Borough Council* see n. 113 *supra*.

unilateral illegality despite the fact that application of the construction test enunciated in *Henwood* v. *Municipal Tramways Trust*[120] would not give such a result, either because the offence is not statutory or because no statutory intention can be found to abrogate common law rights. One example might be that of the burglar who is injured by a defect in a staircase of which the occupier knows but the burglar does not. Even though today a trespasser is not necessarily without a remedy, Windeyer, J. in *Smith* v. *Jenkins*[121] doubted whether a person who combined the characters of trespasser and burglar could complain of the condition of the occupier's premises even if visits by burglars were known to be extremely likely. The burglar could not complain simply because burglars are not to be regarded as the "neighbours" of the occupier of the premises which they break and enter.

The case of the fleeing prison escapee who is given a lift by an innocent motorist is another judicial example of unilateral illegality. Whereas Kitto, J.[122] appears to contemplate with equanimity the position that the law might impose a duty on the motorist if innocent but absolve him if he has full knowledge of the circumstances, this has been considered elsewhere to be an anomaly.[123] Yet unless *Henwood's Case* is taken as laying down that unilateral illegality can never debar a plaintiff absent a statutory intention,[124] this anomaly does not necessarily follow from the duty of care approach. Whether the motorist is innocent or guilty the court could, on grounds of public policy, absolve him from a duty of care. However on the standard of care approach it could never be argued that the motorist if innocent should be absolved. This "anomaly" therefore would seem better to illustrate a "doctrinal weakness" in the standard of care rather than the duty of care approach.[125]

Thus it is suggested that it is an advantage of the duty of care approach that it makes it less vital to determine whether a given case in fact involves unilateral or joint illegality. This determination is vital to the applicability of the standard of care test. That is not always obvious which type of illegality is involved in a given case, is illustrated by the fact that Barwick, C.J., who sees the two types of case as being in different "fields of discourse",[126] believes that he and the majority were in disagreement with respect to the interpretation of the situation in *Progress and Properties Ltd.* v. *Craft*.[127] While he considered that the plumber and the hoist driver were engaged in a joint illegal activity,

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[120] *Supra* n. 11.
[121] *Supra* n. 1 at 419.
[122] *Smith* v. *Jenkins, id.* at 403.
[123] W. J. Ford, *supra* n. 89 at 40.
[124] Walsh, J. in *Smith* v. *Jenkins, supra* n. 1 at 427 said: "I do not think there is a 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".
[125] *Cf.* Ford, *supra* n. 123.
[126] *Jackson* v. *Harrison, supra* n. 4 at 447.
[127] *Supra* n. 5.

he believes the majority to have taken the view that there was no common action between them but only separate acts on the part of each.[128]

Finally, the duty of care, rather than the standard of care analysis avoids the difficulty referred to by Murphy, J. in *Jackson* v. *Harrison* with respect to statutory standards of care. He points out that courts often adopt a statutory prescription of a certain standard of conduct as evidence of the requisite common law standard of care. If in such circumstances recovery is to be denied it is difficult to justify it by absence of a standard and hence absence of a duty of care; to do so puts the court in the position of refusing to accept the legislative prescription. Noting that it is often said by the courts that no action would lie between safebreakers for negligence in the handling of explosives, he pertinently asks what the position would be if a statutory provision required any person using explosives not to explode them while anyone unprotected was in the vicinity. In these circumstances it would be difficult to attribute denial of recovery to an inability to establish a standard of care. Yet it would not be easy to refuse to recognize the prescribed standard.[129]

Conclusion

The problem of the effect of illegality of the plaintiff in tort has proved to be as intractable,[130] and the cases as difficult to catalogue, as that of illegality in the law of contract. Fortunately the courts have generally kept firmly in view the consideration that the law of tort is designed to compensate plaintiffs and that it is not part of its purpose to supplement the criminal law by imposing a second penalty on offending plaintiffs in the form of deprivation of civil remedies. A defence based on the plaintiff's illegality has but rarely succeeded; for the most part the "unruly horse"[131] has been kept firmly harnessed. The suggestion has been made above that the law of negligence contains, in the duty of care requirement, a ready-made concept for dealing with cases of joint, or even unilateral illegality, so far as that tort is concerned. But there is no reason to suppose that questions of illegality will always be limited to the tort of negligence. Given that judges have already recognized in decided cases and hypothetical fact situations that a plaintiff's illegality may sometimes disentitle him, there surely seems to be a need for an escape route, even though rarely used,

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[128] *Jackson, supra* n. 4 at 449; although Barwick, C.J. does not think so, it may be suggested that *Cakebread* v. *Hopping Brothers (Whetstone) Ltd.* [1947] 1 K.B. 641 and *National Coal Board* v. *England* [1954] A.C. 403 also contain elements of ambiguity.

[129] *Jackson, id.* 463-4.

[130] R.F.V. Heuston, the editor of *Salmond on Torts* (17th ed., 1977) at 508, favours the adoption of a statutory enactment similar to the Irish Civil Liability Act 1961, s. 57(1), providing that it shall not be a defence in an action of tort merely to show that the plaintiff is in breach of the civil or criminal law.

[131] The phrase derives from Burrough, J. in *Richardson* v. *Mellish* (1824) 2 Bing, 229 at 252.

to deal with extreme or unforeseen cases in the law of tort generally. The maxim *ex turpi cause non oritur actio* could still have a role to play in torts other than negligence, if the maxim is interpreted in a loose sense rather than the strict sense upon which Windeyer, J. insisted.[132] It could be regarded just as a shorthand expression of the view that for reasons of public policy the court thinks it improper that a wrongdoer should receive the benefit of adjudication of his claim in court; therefore the loss lies where it falls. The need for a method of refusing relief in respect ot torts other than negligence is made especially apparent when it is considered that actions for negligence and for breach of statutory duty often co-exist. If in such situations it is thought proper to refuse the claim in negligence for reasons of public policy, the same reasons should bar a claim for breach of statutory duty.[133] There seems no obvious reason why the relatively familiar Latin maxim should not be invoked.

[132] *Smith* v. *Jenkins, supra* n. 1 at 409-414. Mason, J. in *Jackson* v. *Harrison, supra* n. 4 at 452 said that "*Smith* v. *Jenkins* proceeded on the footing that the maxim *ex turpi causa non oritur actio* has no place in the law of torts"; however he also said that that case was "limited to its particular facts" (*id.* 453). The case may be taken as rejecting the applicability of the maxim in the law of negligence rather than in the law of tort generally.

[133] See *per* Murphy, J. in *Jackson* v. *Harrison, supra* n. 4 at 463-4.