MILLER v MILLER: CASE NOTE

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I INTRODUCTION

The High Court case of *Miller v Miller*[1] dealt with the defence of joint illegal enterprise, and in particular the effect of one party's withdrawal from the enterprise in establishing a duty of care. The decision undoes the approach of previous unanimous High Court decisions, which provide that one illegal user of a vehicle does not owe a duty of care to a passenger complicit in the illegal use.[2]

Previously, the Court has stated that to find a duty of care would 'impair the normative influence of the criminal law'[3] or that public policy 'militated against the erection of a duty'.[4] Previous decisions have been inconsistent and 'contaminated by serious confusion … [with] the potential to produce significant injustice.'[5] The finding of a duty of care in Miller rests on the idea that withdrawal from the joint enterprise is sufficient to establish a duty of care between the two parties.

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[1] *Miller v Miller* (2011) HCA 9.
[2] See: *Smith v Jenkins*; *Gala v Preston* below.
[3] *Gala v Preston* (1991) 172 CLR 243, 254-5.
[4] Ibid.
[5] J Goudkamp, 'The Defence of Joint Illegal Enterprise' (2010) 34 *Melbourne Law Review* 426.

II FACTS

In the early hours of 17 May 1998, the plaintiff (Danelle Miller 'Danelle'), aged 16 years of age at the time had been drinking and wandering in the streets in a Perth suburb with her sister and cousins. The last train had left, and Danelle did not have money to pay for a taxi home. So she decided to steal a car.

Having started a car in the car park near the nightclub, the plaintiff asked her older sister (Narelle) to drive her and her younger cousin (Hayley) home. The plaintiff was aware of the fact that Narelle had been drinking and did not possess a driver's license. At this time an older cousin, the defendant (Maurin Miller 'Maurin'), then aged 27 approached the car and offered to drive Danelle, Hayley and Narelle. He got into the driver's seat and several of his friends also entered the car. There were nine passengers in the car.

At first the defendant drove safely, before starting to speed and drive through red lights. As a result of this behaviour the plaintiff asked the defendant to slow down. She twice asked the defendant to stop so that she could be let out of the car. The defendant refused these requests stating that they were 'all right'.

The defendant lost control of the car near the suburb of Maddington. The car struck a pole, killing one passenger and injuring the plaintiff, leaving her a tetraplegic.

III ISSUE

The central issue in this case was whether the plaintiff could recover damages from the defendant.[6] While considering this issue, the High Court was largely influenced by the fact that the plaintiff had withdrawn from the joint illegal enterprise. The issue involved consideration of whether or not the defendant owed the plaintiff a duty of care and if 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), defeats her claim for damages for negligence.[7] In coming to their decision, the Court considered the statutory purpose of s 371A of the *Criminal Code* (WA) ('the Code'). This section makes it an offence to take or use a motor vehicle without the consent of the owner or person in charge of the vehicle.

IV TRIAL JUDGE'S DECISION AT FIRST INSTANCE

The plaintiff commenced proceedings in the District Court of Western Australia. The defendant relied on the joint illegal enterprise defence on the ground that, at the time of the accident, the plaintiff was complicit in his breach of s 371A(1) of the Code. The primary judge, Schoombee DCJ held that the defendant did owe the plaintiff a duty of care on the basis that:[8]

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[6] *Miller v Miller* (2011) HCA 9, [5].
[7] Ibid.
[8] J Goudkamp, above n 5.

1. the plaintiff expected the defendant to take good care of her;[9]
2. the defendant regarded himself as responsible for the plaintiff's welfare;[10]
3. the plaintiff did not appreciate that the journey would be fraught with risk;[11] and
4. the parties were not engaged in a 'joy-ride'. They were travelling to the plaintiff's home.[12]

V ON APPEAL

The Court of Appeal of the Supreme Court of Western Australia (McLure, Buss and Newnes JJA) held that the defendant owed the plaintiff no duty of care.[13] In their decision, their Honours emphasised:[14]

1. that the offence of unlawfully using a motor vehicle is a serious one;[15]
2. that the defendant was, to the plaintiff's knowledge, intoxicated and unlicensed;[16]
3. that the vehicle was grossly overloaded;[17] and

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[9] In his statement of defence, the defendant pleaded the defence of voluntary assumption of risk and denied that he failed to exercise reasonable care. Reliance on these pleas was later waived: *Miller v Miller* (2008) 57 SR (WA) 358, 2. (Schoombee DCJ).
[10] Ibid, [77].
[11] Ibid, [96]-[107].
[12] Ibid, [85]-[87].
[13] *Miller v Miller* (2009) WASCA 199.
[14] This summary of reasoning is drawn from J Goudkamp, above n 5.
[15] *Miller v Miller* (2009) 54 MVR 367, [78].
[16] Ibid, [78] (BussJA), 400, [149]-[150] (NewnesJA).
[17] Ibid, [78], [151].

4. that the reasonable person in the plaintiff's position would have realised that the journey would be extremely hazardous.[18]

This denial of a duty of care rested upon the principle that Maurin and Danelle had engaged in a joint illegal enterprise when they illegally used a motorcar without consent of the owner contrary to s 371A of the Code.

VI THE HIGH COURT

French, Gummow, Hayne, Crennan, Kiefel and Bell found a duty of care to exist.[19] This decision was on the basis that by the time the accident occurred the defendant and plaintiff were no longer engaged in a joint illegal enterprise.[20] Although the plaintiff had stolen the car, she had withdrawn from that joint enterprise when she asked the defendant to slow down before saying that she wanted to get out of the car.[21]

Heydon J, in dissent, argued that the plaintiff's expression of withdrawal was not sufficient, pursuant to the requirements of s 8(2) of the Code.[22] Section 8(2) states that

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[18] Ibid, [79]-[81] (BussJA), 387, [90] (NewnesJA).
[19] *Miller v Miller* (2011) HCA 9, [107].
[20] Ibid, [106].
[21] Ibid, [103].
[22] 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.

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b) took all reasonable steps to prevent the commission of the offence.

In addressing s 8(2)(b) Heydon found that the plaintiff in simply asking to be let out, had not taken all reasonable steps to prevent the commission of the crime.

VI RELEVANT COMMON LAW

Their Honours established that the current law did not clearly deal with the applicable principles in *Miller*. A summary of the following cases was provided as a means of facilitating a background to the law and examining past application of the relevant principles.

A *Henwood v Municipal Tramways Trust*[23]

In *Henwood*, the plaintiffs sued in respect of the death of their son, who contrary to a by-law made under statute leaned out of a train and hit his head on poles erected by the defendant, Tramways Trust.[24] Dixon and McTiernan JJ pointed out in *Henwood* that there was a direct connection between the illegal act and the injury.[25]

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[23] *Henwood v Municipal Tramways Trust* (1938) 60 CLR 438 (SA).
[24] *Miller v Miller* (2011) HCA 9 at 22.
[25] *Henwood v Municipal Tramways Trust* (1938) 60 CLR 438, 458.

Henwood was not reffered to in detail by their Honours. It was mentioned briefly in order to establish that causation alone is not a determinative criterion when finding a duty of care.

B *Smith v Jenkins*[26]

In *Smith*, the Court concluded that the plaintiff could not recover damages from the driver of the motor vehicle, which both the plaintiff and driver were illegally using when an accident occurred.[27] Each member of the Court gave different reasons for this conclusion, influenced by public policy considerations. Some have viewed the case as saying that people involved in illegal activity owe no duty of care to each other.[28]

Of particular note, it was stated in *Smith* that in considering whether one party owes a duty of care to another, it is necessary to consider the *whole* of the relationship between the parties.[29] When establishing a duty of care, consideration must involve '[t]he totality of the relationship between the parties, not merely the foresight and capacity to act on the part of one of them.' [30]

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[26] *Smith v Jenkins* (1970) 119 CLR 397.
[27] *Miller v Miller* (2011) HCA 9, [40].
[28] See the reasoning of Barwick CJ and Owen J in *Smith v Jenkins* (1970) 119 CLR 397.
[29] *Miller v Miller* (2011) HCA 9, [46], referring to *Graham Barclay Oysters Pty Ltd v Ryan* (2002) HC 54.
[30] *Miller v Miller* (2011) HCA 9, [46], referring to *Graham Barclay Oysters Pty Ltd v Ryan* (2002) HC 54.

C *Jackson v Harrison*[31]

In *Jackson*, the plaintiff was a passenger in a motor vehicle driven negligently by the defendant. The plaintiff was injured due to the negligent driving of the defendant and sued for damages for personal injury. At the time of the accident the defendant was driving while disqualified, the plaintiff knew this and was found to be a joint participant in commission of the offence.[32]

It was held by majority (Mason, Jacobs, Murphy and Aickin JJ; Barwick CJ dissenting) that the plaintiff was entitled to recover damages,[33] with each judge providing their own discussion of the relevant principles that led to their finding. Such principles included policy issues, and those raised in previous cases. Importantly, Mason J concluded 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.[34]

D *Gala v Preston*[35]

In *Gala*, the court considered 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 which included the illegal use of the vehicle.[36] At that time, a majority of the court favoured the view that a relevant duty of care

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[31] *Jackson v Harrison* (1978) 138 CLR 438.
[32] *Miller v Miller* (2011) HCA 9, [50].
[33] Mason, Jacobs, Murphy and Aickin JJ (Barwick CJ dissenting).
[34] *Jackson v Harrison* (1978) 138 CLR 438, 453.
[35] *Gala v Preston* (1991) 172 CLR 243.

involved consideration of a relationship of proximity between the plaintiff and the defendant.[37]

It was concluded that there is no reason to depart from the reasoning in *Smith v Jenkins* (which suggested that participants in a joint illegal enterprise owe no duty of care to each other)[38] and the defendant in *Gala v Preston* therefore owed the plaintiff no duty of care.[39]

VIII COMMON THREADS IN THE DECIDED CASES[40]

The decided cases should be used as a means of understanding the background behind the decision in *Miller*. Ultimately in *Miller*, the plaintiff was owed a duty of care based on the fact that the she had withdrawn from the joint illegal enterprise. This is an issue that the cases mentioned above do not deal with, rather they focus closely on the themes listed below.

The decided cases establish that 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.

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[36] *Miller v Miller* (2011) HCA 9, [57].
[37] *Gala v Preston* (1991) 172 CLR 243, 252-253 per Mason CJ, Deane, Gaudron and McHugh JJ.
[38] *Jackson v Harrison* (1978) 138 CLR 438, 453.
[39] *Miller v Miller* (2011) HCA 9, [57].
[40] See *Miller v Miller* (2011) HCA 9, [70] for a full discussion of these findings.

The denial of recovery in cases of a joint enterprise has been for varied reasons including:

1. The non-existence of a duty of care;
2. Inability to fix a standard of care; and
3. The fact that the plaintiff assumed the risk of negligence.

The different reasons for a denial of recovery all rest on a policy judgement suggesting that:

1. The court *cannot* regulate the activities of wrongdoers; or
2. The court *should not* regulate such activities.

Contrary to the decision in *Miller,* the High Court has twice held 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.[41]

VIII RELEVANT STATUTORY PROVISIONS

A Illegal use of the car

In jointly using the stolen car, the plaintiff and the defendant together contravened s 371A of the Code which makes it an offence to take or use a motor vehicle without the consent of the owner or person in charge of the vehicle.

[41] Ibid.

At the relevant time, s 371A provided:

> 1) A person who unlawfully –
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> a) uses a motor vehicle; or
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> b) takes a motor vehicle for the purposes of using it; or
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> 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.

The purposes of s 371A encompass not only the protection of property rights, but also road safety and the prevention of dangerous driving.[42]

It was held in *Miller* that this section proscribes and punishes the taking and use of a vehicle illegally in such a way, because it recognises that it is often a probable consequence of the commission of the crime that the driver will drive recklessly or dangerously.[43]

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[42] Ibid, [89].

[43] Ibid, [99] provides that '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.'

B Common purpose

Section 8 of the Code deals with offences committed in prosecution of a common purpose. Section 8 provides that:

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

In dealing with s 8(1), the High Court held that the defendant's dangerous driving was a *probable consequence* of the theft of the car.[44]

The requirement in s 8(2)(c) of the Code turns on what the plaintiff could reasonably have done in the case at hand to prevent the continued illegal use of the car. The majority in *Miller* held that there were 'no reasonable steps' the plaintiff could have taken to prevent the continued illegal use of the vehicle.[45]

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[44] See fn 43.
[45] *Miller v Miller* (2011) HCA 9, [104].

X WITHDRAWAL

In the criminal law, withdrawal from a joint illegal venture can remove liability for complicity.[46] Prior to the decision in *Miller* it was unclear whether or not withdrawal by the plaintiff from a joint criminal enterprise would result in a duty of care being owed by one party to another. The current decision in *Miller* rests firmly on the idea that withdrawal from the joint enterprise is sufficient to establish a duty of care between the two parties. This case sets precedent for the fact that a duty of care will be owed by a driver of a stolen vehicle to a passenger who has withdrawn from the crime of illegally using the car.

Recognising that an action in negligence does exist in this situation turns on issues including:[47]

1. the deterrence of criminal conduct;
2. punishment;
3. the prevention of wrongful profit;
4. not condoning breaches of the criminal law; and
5. distributive justice.

These issues will undoubtedly be the subject of subsequent comments relating to the decision in *Miller.*

[46] See for example *Criminal Code* s 8(2).
[47] See J Goudkamp, above n 5, 442-446.

XI CONCLUSION

The decision in *Miller* provides clarification in relation to the joint illegal enterprise defence. *Miller* suggests that where one has sufficiently withdrawn from partaking in a joint enterprise, a duty of care may be found to exist. This decision undoes previous aproaches which suggest that a duty of care cannot be found between those involved in an illegal activity.[48] What sufficiently amounts to a 'withdrawal' is contentious, and must be considered on a case by case basis. In dealing with the definition of 'withdrawn' in the case at hand, their Honours held that the fact that the plaintiff asked the defendant to 'slow down' and twice to be let out of the car amounts to her having withdrawn from the crime.[49]

[48] See for example *Smith v Jenkins* (1970) 119 CLR 397.
[49] Pursuant to s 8 of the Code. It must be noted that Heydon was in dissent on this issue suggesting that more was required in order to satisfy the requirement that all reasonable steps are taken to prevent the commission of the crime. See *Miller v Miller* (2011) HCA 9, [108]-[133].