TORT AND ILLEGALITY: THE *EX TURPI CAUSA* DEFENCE IN NEGLIGENCE LAW

(Part Two)

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[*The 'illegality defence' is best explained as a refusal by the courts to entertain or enforce a right of action in negligence when they regard it as arising out of a sufficiently anti-social act. The author argues that until the importance of the gravity of the offence is explicitly acknowledged, and the public policy foundations of the special defence are openly and critically debated, the doctrinal formulations employed by the courts will remain unhelpful and confusing.*]

3. THE NATURE OF THE OFFENCE

The significance of the nature of the offence has frequently been adverted to by the Courts.[1] It is clear from those decisions that the defence of illegality is concerned solely with breaches of the positive law. It is not attracted by conduct which is characterizable as immoral only.[2]

One early theory distinguished breaches of statute law from violations of the criminal law.[3] The former fell to be determined by construction of the statute while the latter involved different considerations. The obvious weakness of this classification is that many crimes are statutory in form, both in the code states and also in the common law states, and for this reason it was expressly rejected by the High Court in *Smith v. Jenkins*.[4]

At the same time, however, since the majority of cases in which the illegality defence has been raised have concerned offences imposed by statute, the Courts have tended to rely upon formulations based on statutory construction to supply an answer to the problems those cases pose.[5] All such formulations have drawn on the notion of an implied legislative intent, and all reflect the courts' distaste of obvious judicial legislation.

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[1] *E.g. Godbolt v. Fittock* [1964] N.S.W.R. 22, 28; *Smith v. Jenkins* (1970) 119 C.L.R. 397, 422-5 *per* Windeyer J.; 434 *per* Walsh J. The High Court discussions were however unsatisfactory and inconclusive.

[2] See *Godbolt v. Fittock* [1964] N.S.W.R. 22 *per* Manning J. *but cf. Holman v. Johnson* (1775) 98 E.R. 1120, 1121.

[3] Crago, 'The Defence of Illegality in Negligence Actions' in (1964) 4 *M.U.L.R.* 534 *et seq.*

[4] (1970) 119 C.L.R. 397, 423.

[5] See Fridman, 'The Wrongdoing Plaintiff' (1972) 18 *McGill Law Journal* 275.

(i) *The Intention of the Legislature*

For present purposes the intention test may be regarded as having first been propounded in *Henwood v. The Municipal Tramways Trust (S.A.).*[6] In that case the plaintiffs' son had been killed when his head struck two steel standards while he was leaning out of the window of a tram car, in breach of a by-law, in order to vomit. The issue was whether the deceased's unlawful act — the breach of the by-law — barred his parents from recovering damages against the Trust.[7] The court held that it did not. In the course of their joint judgment Dixon and McTiernan JJ. put the view that

> in every case the question must be whether it is part of the purpose of the law against which the plaintiff has offended to disentitle that person doing the prohibited act from complaining about the other parties' neglect or default without which his own act would not have resulted in injury.[8]

The problem was taken up by the Full Court of the Supreme Court of New South Wales in 1965 in the case of *Andrews v. The Nominal Defendant.*[9] Andrews was injured whilst a passenger in his own car. The negligent driver was unlicenced and the car uninsured. Andrews was thus a party to breaches of the Motor Vehicles (Third Party Insurance) Act (N.S.W.) and the Motor Traffic Act (N.S.W.) in that he permitted an unlicenced person to use an unregistered motor vehicle.

Applying the *Henwood* test, Walsh J., with the concurrence of Sugerman and McClemens JJ., found for the plaintiff, concluding that the provisions against which he had offended disclosed no intention to deprive him of his common law right of action.[10] In doing so, however, he distinguished between this form of inquiry, turning as it did upon statutory construction, and an application of the public policy based *ex turpi causa* principle.[11]

Then came *Bondarenko v. Sommers.*[12] The plaintiff and defendant had jointly, and without the owner's consent, taken a motor car which Bondarenko later used to race a second vehicle, driven by Sommers, along a narrow and badly pot-holed back road. While both cars were racing side by side the stolen vehicle overturned and its driver, the plaintiff, was injured. The court found that the dangerous activity was the cause of the accident and the object of the illegal use.

The prohibited conduct the defendant relied upon in arguing his defence was a breach of the Crimes Act — unlawfully taking and using a motor vehicle. Once again the court took as its starting point *Henwood's* case. Jacobs J.A. emphasised that that case had clearly indicated that

[6] (1938) 60 C.L.R. 438.
[7] The action was brought under the Wrongs Act 1936 of South Australia.
[8] (1938) 60 C.L.R. 438, 460.
[9] (1965) 66 S.R. (N.S.W.) 85.
[10] *Ibid.* 90-1.
[11] *Ibid.* 93.

the defence of illegality was not brought into operation by any or every unlawful act. The terms of the Statute had to be considered in order to determine whether they affected civil liability.[13]

The Crimes Act, the court reasoned, placed illegal use of a motor vehicle in the same category of offences as larceny. The offence lacked only an intent to deprive permanently. Since the general approach of the common law was to treat larceny as the sort of offence which disentitled a person committing it from complaining of his accomplices' neglect or default, and since illegal use was a form of larceny, the presumption was that persons standing in the relationship of accomplices were civilly disentitled.[14]

The court was in no doubt at all that the case turned upon the question of legislative intent, for this much was established by *Henwood's* case. But, it held, the plaintiff was not entitled to recover because 'the legislation creating the criminal act shows no intention to *preserve* [*sic*] civil rights in the circumstances'.[15] The form of the *Henwood* test was effectively reversed.

Twelve months later, in *Jenkins v. Smith*,[16] Mr Justice Starke was called upon to choose between the two conflicting forms of the legislative intention test. He had no hesitation in deciding that *Bondarenko's* case was wrong. He argued that where the legislature provided a severe penalty for the commission of an offence, the imposition of any further penalty by way of depriving the offender of 'basic' civil rights could only be justified where the form of the legislation disclosed a clear intention to *disentitle* him in those circumstances.[17] That intention had to be 'spelled out' in the Act.[18]

The case went on appeal to the High Court and Starke J.'s decision was reversed.[19] Although the court was unanimous that the respondent (originally the plaintiff) had no cause of action against the appellant, unfortunately, as Barwick C.J. later observed with a classic *litotes,* '[it] was not entirely unanimous in its reasons for that conclusion'.[20] Extracting a ratio from among the several different judgments is a near impossible exercise, but the general analysis of Windeyer J. appears to best represent the majority view.[21] Directing his attention to the differing formulations that had been argued, he opined that:

[12] (1968) 69 S.R. (N.S.W.) 269.
[13] *Ibid.* 275, 277.
[14] *Ibid.* 277.
[15] *Ibid.*
[16] [1969] V.R. 267.
[17] *Ibid.* 275.
[18] *Ibid.*
[19] (1970) 119 C.L.R. 397.
[20] *Progress and Properties Ltd v. Craft* (1977) 12 A.L.R. 59, 63 Barwick C.J. continued: 'But nothing can turn, in my opinion, upon the *relatively small* divergence in those views when the actual decision in that case [*Smith v. Jenkins*] is sought to be applied in this case' (emphasis added). The outcome belies this belief.
[21] See *Smith v. Jenkins* (1970) 119 C.L.R. 397, 400 *per* Barwick C.J.; 425 *per* Owen J. for expressions of 'general agreement' with Windeyer J.'s analysis.

> To ask whether a statute which creates an offence exhibits an intention to deprive one offender of a right of action against the other is, I consider, to invert the proper inquiry. Rather, the inquiry should be whether the statute is to be read as abrogating the basic rule . . . that there is no right of action by one criminal against another if one takes the view — which I do not — that in juristic analysis the effect of illegality is, from considerations of public policy, privative, a taking away of a right. Whichever way it be approached, the question is not whether a statute creating an offence also denies a remedy. Rather it is whether it preserves a remedy which otherwise would be gone, or — as I think it is correct to say — recognizes an exception to the rule that a criminal cannot have the aid of the law in his complaint against his fellow. *Either way, the answer must be found in the terms and the subject matter and the purpose of the statute.*[22]

Windeyer J.'s remarks go a long way towards explaining the High Court's detailed treatment of the duty question in *Smith v. Jenkins.* With the exception of duties of care created by statute any plaintiff suing in negligence must rely upon the common law as the source of the duty claimed to have been breached.[23] A remedy presupposes a right of action founded on the particular circumstances. If the facts do not disclose a cause of action then the common law provides no remedy. The problem which the court faced was that the form of the test employed in *Henwood's* case proceeded upon the assumption that, in the absence of the by-law, the plaintiff would have had a cause of action.[24] In those circumstances the only question which could sensibly be asked in connection with the legislation was whether it disentitled him. Clearly the crucial issue involved the common law, for the plaintiff's position under it was treated as logically preliminary to, and in fact determinative of, the form of intention test to be employed in construing the statute.

The formal position now seems to be that where the parties to the action were, at the material time, jointly engaged in an illegal venture, then, if the connection between the illegality and the negligence is sufficiently close, the 'basic rule' negating a duty of care applies unless the situation can be successfully argued as forming one of the recognized exceptions. Where the offence is covered by statute the question is whether, in the light of their general conduct, the common law 'basic rule' is *prima facie* applicable, and then, if it is, whether the legislation covering the illegality discloses, in its terms, subject matter and purposes, an implied intention to revive or create an otherwise unavailable right of action.[25]

[22] *Ibid.* 424 (emphasis added). His formulation of the basic rule was: '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.' Both Kitto and Walsh JJ. expressed strong disagreement with this particular formulation. See below 180.

[23] '[A] statutory cause of action is a cause of action for breach of a duty, a duty imposed expressly or implied by Act or regulation. It does not follow that breach of every regulation gives rise to a cause of action. It seems to me that it is only those regulations which impose duties which give rise to a cause of action.' *Progress and Properties Ltd v. Craft* (1977) 12 A.L.R. 59, 67 *per* Barwick C.J.

[24] (1938) 60 C.L.R. 438, 457 *per* Dixon and McTiernan JJ.

[25] See *Smith v. Jenkins* (1970) 119 C.L.R. 397 *Craft v. Stocks and Parks (Building) Pty Ltd and Progress and Properties Ltd* [1975] 2 N.S.W.L.R. 156.

Since, however, the High Court made it clear in *Smith v. Jenkins*[26] that it was not overruling, but merely distinguishing, *Henwood's* case there would appear to be two broad approaches incorporating statutory construction presently available for negligence actions brought by a wrongdoing plaintiff. The first stipulates that the absence of a cause of action at common law is conclusive unless the statute displaces the 'basic rule'.[27] The second is its inverse. The recognition of a cause of action at common law is conclusive unless the legislation discloses a contrary intention.[28] Both treat the statute as a gloss, so to speak, on the common law, and seldom is either able to provide grounds for a rebuttal of the presumption first made.

(ii) *The Gravity of the Offence*

In making the issue turn upon an implied legislative intention there is generally little warrant for assuming that the legislature ever directed its attention to the matter,[29] a fact which had clearly concerned Adam J. in *Boeyen v. Kydd*[30] and may also explain Kitto J.'s sharp dissent on this particular point in *Smith v. Jenkins.*[31] The tests employed are artificial and quite unsatisfactory.

Instead it is suggested that the clearest and most convincing exposition of this area of the law was that offered by Diplock L.J. (as he then was) in *Hardy v. Motor Insurers' Bureau.*[32] In discussing the effect of issues of illegality on a party's legal rights he argued that:

> The rule of law on which the major premise is based, *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 . . . which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right.[33]

Expressed in these terms it is an approach which finds its closest Australian parallel in the decision of the New South Wales Supreme Court in *Godbolt v. Fittock*[34] where Sugerman J., in underlining 'the complexity of the whole subject', and although at great pains to emphasize that 'not every case in which the parties have acted together in a manner which is

[26] (1970) 119 C.L.R. 397, 401 *per* Kitto J. 416 *per* Windeyer J. 427 *per* Walsh J.
[27] See *Smith v. Jenkins* (1970) 119 C.L.R. 397.
[28] See *Henwood v. Municipal Tramways Trust (S.A.)* (1938) 60 C.L.R. 438.
[29] See the general remarks of Dixon J. in *O'Connor v. Bray* (1937) 56 C.L.R. 464, 477-8. See also Cross A. R. N., *Statutory Interpretation* (1976) 34-40.
[30] [1963] V.R. 235.
[31] (1970) 119 C.L.R. 397, 401: 'The determination of the appeal depends . . . not at all upon searching . . . for an intention to abrogate or preserve civil rights and responsibilities, but wholly upon the relevant general principle of the common law.' See also *Progress and Properties Ltd v. Craft* (1977) 12 A.L.R. 59, 65 *per* Barwick C.J.
[32] [1964] 2 Q.B. 745.
[33] *Ibid.* 767.
[34] [1963] N.S.W.R. 22.

illegal, for instance in mutual disregard of some statutory regulation of conduct, is necessarily subject to the same considerations of public policy or governed by the same principles',[35] was nevertheless firmly convinced that the special defence *was* attracted by 'criminality in its stricter and more limited sense'.[36] It was to the offence, its nature, form and (implicitly) its gravity that Sugerman J. directed attention: the more serious the offence the less likely that the wrongdoing plaintiff would be given a remedy.

The reception officially accorded this general approach has not been enthusiastic. Two major criticisms have been made. It has been argued by Barwick C.J.[37] that it is quite improper for the courts to distinguish between crimes in this way except perhaps in relation to the sanctions they attract. Dealing with the question in the context of a violation of an industrial safety regulation he concluded that

> the court is not warranted in treating a breach of such a regulation as in any different case [sic] from a breach of a provision of a Criminal Code or a Crimes Act. Both have the moral condemnation of the community, each being visited by punishment as a means of securing its observance. The degree of moral antipathy to their respective breaches is reflected in the extent of the punishment prescribed. *Beyond this I do not myself think there is any room for, as it were, a scale of significance for present purposes between breach of one law and another where each breach is subject to punishment.*[38]

It has also been argued, rather more compellingly, that in spite of the apparent significance of the test that Sugerman J. was attempting to advance in *Godbolt's* case, the aid it offers is illusory for 'how one distinguishes "criminality in its stricter and more limited sense" from other criminality is not clear'.[39] Windeyer J. saw it as disconcertingly close to an invitation to revive the discredited and unfashionable distinction between *mala prohibita* and *mala in se*.[40]

Of the first objection, fundamental though it purports to be, little will be said; it simply does not accurately reflect judicial practice.[41] Regarding the second and weightier objection, however, two observations need to be made. In the first place it cannot conceal the fact that it *is* both possible and reasonable to characterize certain laws as having, as their *primary* purpose, the establishment of a standard of conduct 'for the safe working or operation of a particular activity'.[42] Although penal consequences often attach to the breach of statutes designed for the broad purpose of preventing activities or dangerous situations the courts have

[35] *Ibid.* 28.
[36] *Ibid.*
[37] *Progress and Properties Ltd v. Craft* (1977) 12 A.L.R. 59, 66.
[38] *Ibid.* (emphasis added).
[39] *Smith v. Jenkins* (1970) 119 C.L.R. 397, 423 *per* Windeyer J.
[40] *Ibid.*
[41] *Progress and Properties Ltd v. Craft* 12 A.L.R. 59 itself illustrates this point.
[42] *Matthews v. McCullock* [1973] 2 N.S.W.L.R. 331, 334-5 Shephard J. See also Prosser W. L., *Handbook of the Law of Torts* (4th ed., 1971) 203.

shown themselves reluctant to treat these 'safety laws' as indistinguishable in nature from other 'criminal' offences.[43]

In the second place, while a precise and exhaustive *a priori* classification of offences into 'strictly criminal' and 'others' would certainly be impracticable, this is a very different exercise from evaluating the relative gravity of a particular offence in the light of its surrounding circumstances. The latter requires no *ex cathedra* cataloguing of every theoretically possible breach of law. Rather, being firmly rooted in fact, it involves case by case judgments analogous in form, if not in kind, to those undertaken daily by the courts in their determinations of questions of negligence. Such decisions are seldom simple and are not always greeted with unqualified approval, but to suggest that the gravity of an offence is a notion so vague as to be practically meaningless is 'tainted by the perennial fallacy that because something cannot be cut and dried, or nicely weighed and measured, therefore it does not exist'.[44]

This issue has surfaced once again in a particularly interesting way in the recent Canadian decision of *Tallow v. Tailfeathers*.[45] The detailed facts of that case bear elements of farce,[46] but briefly summarized they were as follows: both the plaintiff and the defendant were participants in an extended drinking party. In order to obtain more liquor they stole a motor vehicle belonging to another member of the Tailfeathers family and proceeded to drink in the car while travelling at high speed. The vehicle ran off the road and the plaintiff was very seriously injured. The defendant raised the plea of *ex turpi causa*. In allowing the illegality defence Clement J.A. of the Appellate Division of the Alberta Supreme Court suggested that it required proof of behaviour on the part of the plaintiff 'which, in its *nature* and *degree* is inimical to the interests of society':

> Judgment must be based, not on the social and legal structure of a past century, but on the present changed and changing conditions of society and the proliferating controls of conduct in the pervasive juridical system by which it is governed.[47]

[43] See *e.g., Progress and Properties Ltd v. Craft* (1977) 12 A.L.R. 59; *Matthews v. McCullock* [1973] 2 N.S.W.L.R. 331. Note also *Craft v. Stocks and Parkes (Building) Pty Ltd and Properties Ltd* [1975] 2 N.S.W.L.R. 156, 168 *per* Samuels J.A.: 'The regulation here in question was intended for the protection of those who, as the plaintiff was are engaged in building work. The prohibition was designed to protect him against injury which might ensue if he ignored it. . . The plaintiff's conduct in disobeying the regulation would not in ordinary parlance be described as criminal. We are not, of course, to decide problems of this kind by resort to definitions which have no place in the law; but we should beware of applying concepts too rigidly in areas where they do not properly belong.'

[44] *Ridge v. Baldwin* [1964] A.C. 40, 64-5 *per* Lord Reid commenting on natural justice.

[45] (1973) 44 D.L.R. (3d) 55.

[46] *Ibid.* The parties went to great lengths to thwart the lawful owner's efforts to immobilize the car. See also the discussion of this case in Weinrib, 'Illegality as a Tort Defence' (1976) 26 *University of Toronto Law Journal* 28, 30. Unfortunately this excellent article appeared too late to be fully considered.

[47] (1973) 44 D.L.R. (3d) 55, 61, 65; see also *Smith v. Jenkins* (1970) 119 C.L.R. 397, 432 *per* Walsh J.

Many of these controls are essentially regulatory in character and he suggested that to their breach 'no taint of turpitude is attached in law'.[48] Only 'behavioural acts' which disclose 'such a quality of turpitude that [they] must be regarded as anti-social' could justify the denial of a civil right.[49]

In a misguided effort to give added definition to 'the rule' he went on to attempt a reinstatement of the *mala prohibita/mala in se* distinction which, in the context of Canada's constitutional distribution of powers, led him to identify the latter with federal enactments and the former with provincial legislation.[50] But this specious and unfortunate elaboration should not detract from the general thrust of his thesis, the interest and significance of which rests upon its bold and explicit recognition of the relative seriousness of an offence as a crucial consideration in determining whether relief will be given to an injured plaintiff guilty of unlawful conduct.

The reality of the matter is that an evaluation of the gravity of the offence, when viewed in the context of each individual case, provides a far more reliable guide to decision than does any invocation of a fictional implied legislative intent. Thus, for instance, the cases show that any form of larceny is treated as being very serious by the courts. Most commonly the injury has arisen out of the illegal use of a motor vehicle,[51] and illegal use has certainly been regarded as an offence sufficiently serious to warrant the denial of a remedy in appropriate circumstances.[52]

The circumstances surrounding the illegal use of the vehicle are important. The recklessness with which the vehicle was driven,[53] the consumption of alcohol,[54] and the activeness of the plaintiff's participation in the offence[55] have all been treated as relevant. Premeditation[56] and the use of violence[57] appear to be particularly important considerations. When more than one of these elements was present there has been no reluctance to refuse relief.

In motor vehicle accident cases which do not involve illegal use, however, the likelihood of the defence succeeding is much reduced. Generally

[48] (1973) 44 D.L.R. (3d) 55, 65. He regarded them as possessing a 'mere aura of criminality'.
[49] *Ibid.*
[50] *Ibid.* 65. Criminal law in Canada is a federal legislative power. See Weinrib, *loc. cit.* 32-3.
[51] *E.g., Smith v. Jenkins* (1970) 119 C.L.R. 397; *Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) 269; *Boeyen v. Kydd* [1963] V.R. 235.
[52] *Ibid.*
[53] *Ibid.* See also *Conrad v. Crawford* (1971) 22 D.L.R. (3d) 386; *Ridgeway v. Hilhorst* (1967) 61 D.L.R. (2d) 398; *Rondos v. Wawrin* (1968) 68 D.L.R. (2d) 658.
[54] See *Smith v. Jenkins* (1970) 119 C.L.R. 397; *Tallow v. Tailfeathers* (1973) 44 D.L.R. (3d) 55.
[55] See *Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) 269; *Ridgeway v. Hilhorst* (1967) 61 D.L.R. (2d) 398; *Tomlinson v. Harrison* (1972) 24 D.L.R. (3d) 26.
[56] See *Tallow v. Tailfeathers* (1973) 44 D.L.R. (3d) 55.
[57] See *Smith v. Jenkins* (1970) 119 C.L.R. 397.

speaking the courts have not been disposed to treat either reckless driving or drunk-driving as heinous enough to warrant the denial of a remedy,[58] although when combined they may present a more difficult problem. These seem to be among the marginal cases on the penumbra of the illegality defence.[59] Particular facts may swing the issue however. Attempting to escape lawful apprehension[60] is one, and drinking while driving[61] may be another. Indeed, the former seems to be regarded as so reprehensible that its presence greatly increases the seriousness of any other offence committed.

By contrast the courts have gone out of their way to distinguish 'minor' traffic offences from these other forms of illegal activity.[62] Such breaches as driving without insurance or without a current licence,[63] or driving at night without proper lighting,[64] all seem to be regarded as unlawful conduct of a different order from that contemplated by the rule. Clearly underlying this distinction is the issue of moral culpability. The difficulty has been that this criterion does not lend itself to neat or precise classification.[65]

The same consideration, it is suggested, helps to explain another feature of the case law concerning illegality, for almost as striking as is the frequency with which the cases concerned have involved motor vehicles is the paucity of examples in the field of employment related activities. Indeed until recently the point had never been directly litigated in Australia, in large part perhaps a result of certain discouraging remarks made by Lord Porter in *National Coal Board v. England*.[66] But with *Smith v. Jenkins* the qualified approval of the defence opened up the possibility of an answer to negligence which, on the face of it, promised to apply, with at least equal force, to breaches of the industrial

[58] See *Shillabeer v. Koehn* U.S.A.S.R. 397.

[59] See Megaw L.J.'s remarks made in the context of a *volenti non fit injuria* argument in *Nettleship v. Weston* [1971] 2 Q.B. 691, 710: 'Different considerations may, indeed, exist when a passenger has accepted a lift from a driver whom the passenger knows to be likely, through drink or drugs, to drive unsafely. There may in such cases sometimes be an element of aiding and abetting a criminal offence; or, if the facts fall short of aiding and abetting, the passenger's mere assent to benefit from the commission of a criminal offence may involve questions of *turpis causa*.' See also *Cummings v. Granger* [1977] 1 All E.R. 104, 109 *per* Lord Denning M.R. (trespasser seriously injured by a guard dog), and *Harrison v. Jackson* (1977) A.C.L.D. 296 and (on appeal) 534. (plaintiff injured co-operating in the offence of driving while under disqualification.)

[60] See remarks in *Jenkins v. Smith* [1969] V.R. 267; *Rondos v. Wawrin* (1968) 68 D.L.R. (2d) 658; *Schwindt v. Giesbrecht, Doe and Doe* (1958) 13 D.L.R. (2d) 770.

[61] See *Tomlinson v. Harrison* (1972) 24 D.L.R. (3d) 26.

[62] See *Smith v. Jenkins* (1970) 119 C.L.R. 397, 423-5 *per* Windeyer J.; 434 *per* Walsh J.; *Godbolt v. Fittock* [1964] N.S.W.R. 22, 28 *per* Sugerman J.

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

[64] See *Smith v. Jenkins* (1970) 119 C.L.R. 397, 423-5 *per* Windeyer J. although note the qualifications he introduced.

[65] See the interesting remarks in *Smith v. Jenkins* (1970) 119 C.L.R. 397, 434 *per* Walsh J. The *utility* of the activity is clearly a consideration of major significance also.

[66] [1954] A.C. 403, 419; see also *Cakebread v. Hopping Brothers (Whetstone) Ltd* [1947] 1 K.B. 641, 654 *per* Cohen L.J.; *cf. Hillen v. I.C.I. (Alkali) Ltd* [1934] 1 K.B. 455.

law, and its scope in this respect was duly tested in the High Court in *Progress and Properties Ltd v. Craft*.[67]

The facts of *Craft's* case were straight forward enough. The accident in question occurred on a building site. The plaintiff, a plumber, was injured when, as a result of a hoist operator's negligence, the goods lift in which he was unlawfully travelling crashed to the ground. By permitting the plaintiff to ride in the lift, in clear breach of the regulations, the operator, and through him the defendant company, was held to have jointly participated in the illegal activity.[68]

The Full Court of the Supreme Court of New South Wales unanimously found for the plaintiff, reasoning that the conduct in question did not attract the basic rule at all, or, alternatively, that it constituted one of the exceptions to that rule.[69] On appeal to the High Court the decision was affirmed,[70] Barwick C.J. recording the only dissent. The majority judgment, delivered by Jacobs J., seems to suggest that 'illegality' has little or no application to negligence actions arising out of a breach of a statutory duty of care, at least where the obligations imposed by the legislation are in the 'interests of the safety of the workman or of a class of which he is a member':

> 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.[71]

While it does not necessarily follow from this decision that breaches of the industrial law can never attract 'the basic rule' it does seem that they will do so only in the most exceptional of circumstances.

In summary, despite the many reservations and qualifications that the courts have expressed about extending the disabling or no-duty 'rule' to certain sorts of unlawful conduct, they have deliberately eschewed formulations which rely explicitly upon the gravity of the offence committed. Why should this be so? Perhaps in some cases the reason has been that its significance was more 'sensed' or 'felt' than clearly apprehended and articulated. In others one suspects that quite different explanations apply. Decisions based upon the turpitude of an offence too clearly acknowledge the element of judicial discretion inherent in the reasoning by which they are reached. 'The rule' employed can then no longer be made to appear self-applying or mechanical. Obvious value judgments attract attention and criticism. More comfortable formulae are preferred when they are to hand.

[67] (1977) 12 A.L.R. 59. *Sub nom. Craft v. Stocks and Parkes (Building) Pty Ltd and Progress and Properties Ltd* [1975] 2 N.S.W.L.R. 156.

[68] Note the reservations expressed on this point in the New South Wales Supreme Court by Samuels J.A., *Craft v. Stocks and Parkes (Building) Pty Ltd and Progress and Properties Ltd* [1975] 2 N.S.W.L.R. 156, 166.

[69] *Ibid.*

[70] *Progress and Properties Ltd v. Craft* (1977) 12 A.L.R. 59.

[71] *Ibid.* 73 (emphasis added).

A preference for taking refuge in fictions of one kind or another is not uncommon in the law.[72] Ultimately however the point is often reached where the fiction obscures by explaining liability, or its absence, in terms which 'can no longer command an intellectual assent'.[73] Explanation must then be referred to a basal principle. The basal principle behind the denial of liability in cases of illegality is one of public policy and not statutory interpretation. It is the gravity of the offence and its proximity to the negligence alleged which explain decisions in this area of the law, at least where both parties to the action co-operated in the commission of the unlawful act.

4. THE RELATIONSHIP BETWEEN THE PARTIES

The negligence cases in which the plaintiff has been denied relief because he acted illegally have involved situations where both parties to the dispute were together engaged in some unlawful enterprise.[74] Perhaps because of this a special emphasis has been placed on the fact of joint participation as opposed to unilateral illegality. Thus Shephard J. in *Matthews v. McCullock*[75] began his analysis:

> Broadly speaking there are two classes of case where illegal conduct on the part of plaintiffs injured in accidents on the highway or at their places of employment have been dealt with by the courts. The first of these is where the plaintiff has been engaged in a joint criminal enterprise with the defendant and sues the defendant in respect of negligent conduct committed by him in the course of carrying out the illegal enterprise. Cases which fall into this category include *Godbolt v. Fittock; Bondarenko v. Sommers* and *Smith v. Jenkins*. The rule is that the plaintiff in such circumstances will fail against the defendant either because the law finds no duty of care to arise in the circumstances or because the plaintiff is denied relief because of considerations of public policy. On the basis of the decision in *Smith v. Jenkins* it would seem that the former view is the preferred one in Australia. The other class of case is where a plaintiff has been guilty of some illegal conduct; usually breach of a statute or regulation laying down a code for the safe working or operation of a particular activity. Two cases dealing with this type of situation are *Henwood v. Municipal Tramways Trust (South Australia)* and *National Coal Board v. England*. In this class of case the breach of regulation will only be relevant if it is causally connected with the damage which the plaintiff has suffered, and, even then, it is likely that it will not be held to disentitle the plaintiff from succeeding, but will amount to evidence of contributory negligence upon his part.

The criminality of the relationship between the parties has been treated as peculiarly important to the duty issue. The proposition which seems to have emerged from these cases is that, as a *complete* defence, illegality applies only where the plaintiff and defendant acted in concert.

[72] See Fuller L., *Legal Fictions* (1967).

[73] The phrase is from *Cardy v. Commissioner for Railways* (1960) 104 C.L.R. 274, 285 *per* Dixon C.J.

[74] The important recent cases are: *Godbolt v. Fittock* [1964] N.S.W.R. 22; *Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) 269; *Smith v. Jenkins* (1970) 119 C.L.R. 397; *Tomlinson v. Harrison* (1972) 24 D.L.R. (3d) 26; *Tallow v. Tailfeathers* (1973) 44 D.L.R. (3d) 55.

[75] [1973] 2 N.S.W.L.R. 331, 334-5.

The point has already been made[76] that although duty normally arises out of 'relations, juxtapositions, situations or conduct or activities',[77] policy and not proximity is the ultimate determinant. On occasions the standard, even the very existence, of a duty of care may depend upon some special aspect of the relationship between the parties. Liability for economic loss[78] and nervous shock[79] provide illustrations of this. Sometimes it matters very much just who is suing or being sued.[80] On yet other occasions, although the notion of a special relationship is not explicitly mentioned, the outcome can only be rationalised on the basis that one exists.[81] There is little doubt, for instance, that *volenti non fit injuria* is based on the concept of a relationship involving the appreciation and acceptance of special and obvious risks.[82]

In whatever context the notion of special relationship appears, however, the particular feature which is treated as making the relationship special must be demonstrably relevant and important to negligence inquiries. Even accepting, for the moment, that unlawful conduct *generally* satisfies this requirement,[83] why does the law distinguish between joint and unilateral illegality? This is a matter which concerned Walsh J. in *Andrews v. Nominal Defendant*:[84]

> A question which is suggested by some statements in the authorities . . . is the question whether the *ex turpi causa* principle is more readily applicable where both the plaintiff and the defendant are at the same time engaged in an unlawful activity. In principle it is perhaps difficult to see why this should be so. If the plaintiff is to be refused relief in an action founded upon tortious conduct of another because he is required to assert his own wrongdoing in order to establish his case, it might be thought that the decision should rest upon a judgment concerning the plaintiff's own conduct and should be unaffected by the presence or absence of criminal or illegal conduct on the part of the defendant . . . But the fact that another party is in breach of the law cannot, I think, be decisive of the right of a plaintiff to sue, not for an injury caused by the other party's breach of a criminal or penal law, but by the breach of a duty owed by him to the plaintiff independently of any Act.

[76] Ford, 'Tort and Illegality' (Part One) (1977) 11 *M.U.L.R.* 34.

[77] *Insurance Commissioner v. Joyce* (1948) 77 C.L.R. 39, 57 *per* Dixon J.

[78] *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465; *Mutual Life and Citizens Assurance Co. v. Evatt* [1971] A.C. 793.

[79] See *Storm v. Geeves* [1965] Tas. S.R. 252; *Benson v. Lee* [1972] V.R. 879; *Boardman v. Sanderson* [1964] 1 W.L.R. 1317; see also Fleming, *The Law of Torts* (5th ed., 1977) 152-7.

[80] See *Rondel v. Worsley* [1969] 1 A.C. 191 (action for negligence brought against a barrister by a dissatisfied client). *Hanratty v. Lord Butler of Saffron Walden* (1971) 115 S.J. 386 (action against the Home Secretary for negligence in advising the Crown on the exercise of the prerogative of mercy); see also Winfield and Jolowicz, *Tort* (10th ed., 1975).

[81] Weir T., *A Casebook on Tort* (3rd ed., 1974) 7.

[82] See below 178.

[83] See below for a discussion of public policy; see also Weinrib, 'Illegality as a Tort Defence' (1976) 26 *University of Toronto Law Journal* 28.

[84] (1965) 66 S.R. (N.S.W.) 85, 95-6. As the second paragraph reveals however, he proceeded on the footing that, on the facts, the defendant did owe the plaintiff a common law duty of care. It was to this assumption that the High Court's examination of the preliminary cause of action question was directed in *Smith v. Jenkins*. Compare this with the approach and remarks in *Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) 269, 276 *per* Jacobs J.A., also quoted in *Smith v. Jenkins* (1970) 119 C.L.R. 397, 433 *per* Walsh J.: '[It] is often the criminal relationship between the plaintiff and the defendant which is the starting point . . .'

In fact the distinction is even more emphatic than his observations suggest. The courts have regularly treated joint participation as a necessary, rather than a preferred, pre-condition to the availability of illegality as a complete defence.[85] Of course there may well be occasions when the defendant's participation is the very factor which makes the activity illegal,[86] but it is quite clear that the defence extends beyond this rather narrow category of offences.

None of the current judicial approaches to the problem, however, provides any rational policy argument on which the distinction between joint and unilateral illegality may be founded. Indeed strict adherence to 'joint participation' as a necessary condition would produce curious results.[87] Consider, for instance, the following variations on the facts of *Smith v. Jenkins*.[88] Had the stolen and carelessly driven car collided with another vehicle also being driven carelessly but by an otherwise innocent third party it would seem rather anomalous if the driver of the stolen vehicle were able to set up a defence while the 'innocent' driver could not. A similar 'anomaly' would arise if a defendant who was carelessly driving a car which he did not know to be stolen, and in which the thief was a passenger, were to be placed in a worse position, in terms of his liability to the thief, than if he had been a party to the illegal use. Finally, while a thief who carelessly injures an accomplice during their escape from the scene of the crime would not appear to be liable, apparently the reverse applies in the case of a criminally innocent but careless third party. Why, in each of these instances should a negligent but criminally innocent defendant be in a *worse* position than a careless and guilty accomplice? Justice hardly seems to be served by a rule which penalizes a defendant for his innocence but not for his guilt.

This is not to say that the lawfulness of the relationship between the plaintiff and defendant may never be a relevant factor in determining the availability of the defence. The presence or absence of a criminal agreement between the parties may well affect the weight given to the other considerations of 'connection' and 'offence'; it might, for example, make the plaintiff's criminal conduct more reprehensible.[89] But there would seem to be little logic, and even less justice, in making it a necessary or decisive condition of the defence.

Perhaps it is true that in the emphasis that has been given to joint participation 'it is important to realise that the doctrine was developed primarily in relation to actions in contract and frequently the reason for the court's refusal to give redress was that both parties had agreed to

[85] See for instance the judgments in *Craft v. Stocks and Parkes (Building) Pty Ltd and Progress and Properties Ltd* [1975] 2 N.S.W.L.R. 156.
[86] *Andrews v. Nominal Defendant* (1965) 66 S.R. (N.S.W.) 85, 96 *per* Walsh J.
[87] But see Weinrib, *op. cit.* 37-8.
[88] (1970) 119 C.L.R. 397.
[89] See *Andrews v. Nominal Defendant* (1965) 66 S.R. (N.S.W.) 85, 96 *per* Walsh J.

commit a crime or to do some other unlawful act'.[90] Consciously or unconsciously the requirement has operated as a limiting device confining an unpopular and widely criticized defence to a relatively narrow range of fact situations. It has also served to rather effectively mask the exercise of a public policy based judicial *discretion*.[91] Be that as it may it is quite clear that the confusion surrounding the illegality principle has only been made possible by the failure to openly and critically examine and articulate the policy base upon which it stands.

5 ILLEGALITY AND OTHER DEFENCES TO NEGLIGENCE

Many of the difficulties thrown up by discussions of the effect of a plaintiff's unlawful conduct on his right to maintain an action in negligence have their origins in the frequency with which the factual situations that give rise to the defence in question seem equally to support one or other of the more traditional tort defences of contributory negligence or voluntary assumption of risk, and descriptions of the doctrine in terms which appear to make it identical with one of these 'alternative' defences have not made for analytical clarity.

In Australia there has been a reluctance to admit 'illegality' to the status of an independent and separate defence which is at least traceable to *Henwood's* case.[92] There, in the course of disapproving the doctrine of statutory negligence, the High Court went out of its way to emphasize the absence of any general principle of English law whereby 'a person 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 lupinum*.[93] Although that proposition has so often since formed the starting point for judicial discussions of illegality in negligence its universal acceptance has still left more than enough room for fundamentally important disagreement and dispute.

It was Adam J. in *Boeyen v. Kydd*,[94] however, who unwittingly laid the foundations for much of the recent confusion. After explicitly accepting that the illegal conduct of a plaintiff might nevertheless sometimes provide a defence he proceeded to discuss cases which, he suggested, could well 'be brought within the general principle of *volenti non fit injuria*, the risk of such injury being treated as voluntarily undertaken by the plaintiff having regard to all the circumstances of the enterprise. But where a defence does not come within any of the well recognised defences, such as contributory negligence or *volenti non fit injuria*, I would be very reluctant . . . to allow it on the basis of some supposed principle of

[90] *Ibid.*
[91] Note *Godbolt v. Fittock* [1964] N.S.W.R. 22, 28 *per* Sugerman J. and *Smith v. Jenkins* (1970) 119 C.L.R. 397, 434 *per* Walsh J.
[92] (1938) 60 C.L.R. 438.
[93] *Ibid.* 446
[94] [1963] V.R. 235.

the public policy'.[95] His remarks, susceptible of different interpretations, have played no small part in the ensuing debate about the applicability of the maxim *ex turpi causa non oritur actio* to actions in tort generally. Rather than being understood, as it is suggested that they were intended, as simply qualifying the occasions when illegality is open as an independent defence based on public policy, they have too often been construed as denying that defence's separate existence altogether.[96] But in spite of the apparent overlap and confusion of illegality, contributory negligence and *volenti non fit injuria* there *are* important differences between them. A brief comparison must suffice to demonstrate this.

(i) *Contributory Negligence and the Defence of Illegality*

Contributory negligence is conduct by the plaintiff which shows an unreasonable disregard for the safety of his own interests, and which, as a consequence, contributes to the harm he suffers.[97] It does not require that the conduct of the plaintiff be unlawful, nor does it require the mental state of willingness necessary in a voluntary assumption of risk. It implies no more than a failure on the part of the plaintiff to exercise due care, which failure contributed to his injury. Moreover, whereas *volenti* and 'illegality' are complete defences which, successfully argued, are fatal to a plaintiff's claim, contributory negligence now results only in an apportionment of damages, conferring upon the court an equitable discretion to reduce the amount awarded to the plaintiff in proportion to his share in the responsibility for the injury. This is a matter of considerable significance and is the major reason for the courts being more favourably disposed towards it than towards the complete defences.

A good deal of unlawful activity, for example breach of a safety regulation,[98] being a party to the offence of driving while intoxicated[99] or encouraging reckless or dangerous driving,[1] can be, and often is, characterised as contributory negligence. But, as Jacobs J. pointed out in *Craft's* case, 'a plea of illegality in answer to a claim in negligence is a *denial* that in the circumstances a duty was owed to the injured person'.[2] Although the most commonly offered explanation is that 'an illegal activity adds a factor to the relationship which may either *extinguish* or *modify* the duty of care otherwise owed',[3] it is clear that however it be explained, illegality, as a distinct defence, is a complete defence. It is unnecessary and con-

[95] *Ibid.* 237.
[96] This point is made by Walsh J. in *Smith v. Jenkins* (1970) 119 C.L.R. 397, 430-1.
[97] See Fleming J. G., *The Law of Torts* (4th ed., 1971) 214-29.
[98] *Progress and Properties Ltd v. Craft* (1977) 12 A.L.R. 59; *Matthews v. McCullock* (1973) 2 N.S.W.L.R. 233; *Cakebread v. Hopping Brothers (Whetstone) Ltd* [1947] 1 K.B. 641; *National Coal Board v. England* [1954] A.C. 403.
[99] *Foster v. Morton* (1956) 4 D.L.R. (2d) 269.
[1] *Miller v. Decker* (1957) 9 D.L.R. (2d) 1.
[2] (1977) 12 A.L.R. 59, 73.
[3] *Ibid.*

fusing to describe the contributory negligence situations as examples of the illegality defence operating less draconically.

(ii) *Voluntary Assumption of Risk and the Defence of Illegality*

The relationship between the defences of illegality and *volenti non fit injuria* is, in one sense, even closer.[4] Since both result in a denial of a remedy there can be no preference on the ground of practical effect for they are equally radical. The only preference can be doctrinal.

Volenti is a long recognised defence at one time quite commonly pleaded and frequently successful.[5] It is not, as a matter of definition, concerned solely with conduct which is illegal, and ostensibly, therefore, it is a wider defence than illegality. It is based upon a party's express or implied consent to the legal (as distinct from physical) risk. In most instances there is no reality of consent; it is inferred from the circumstances. But the issue of consent is usually in the form of a reply to a *prima facie* case of negligence. This is so despite the fact that in analysis it is treated as a negation of duty and therefore of negligence itself, and not a 'justification' of negligent conduct.[6]

In deciding whether the necessary consent can be inferred, the courts have regard to all the circumstances of the case. But it is quite evident that, because of the radical nature of *volenti's* effect on the plaintiff's legal rights, generally the courts are loath to draw that inference of consent except in the clearest of cases. This is especially so where the claim relates to personal injury. When *volenti* is open so too usually is contributory negligence, and apportionment is preferred to denial.

As a result of the strictness with which the appellate courts in particular have defined the necessary conditions of that defence in recent years, as *Rootes v. Shelton*[7] illustrates, *volenti* is seldom open and even more rarely successful. In this respect the position in England[8] and Canada[9] differs

[4] 'Each of the defences . . ., if successful, leads to the same conclusion that the claims of the Plaintiffs fail; but they reach that result upon considerations that are mutually exclusive. One moves upon public policy and its application to the circumstances of a case as a matter of law, determinable by the court even upon its own motion. The other rests upon a finding of fact that brings the case within a principle of the law of negligence. The other denies recovery irrespective of the merits of the case as between the parties: in the other, the plaintiff fails because he has, in essence, waived the duty of care that would otherwise be owing to him by the defendant.' *Tallow v. Tailfeathers* (1973) 44 D.L.R. (3d) 55, 59 *per* Clement J.A.

[5] See Salmond, *The Law of Torts* (16th ed., 1973) 507-19.

[6] There has been a good deal of discussion concerning this matter. On various occasions different writers and judges have treated *volenti* as going to:
(i) existence of a duty;
(ii) the standard of care owed;
(iii) as a defence by way of a bar to a *prima facie* case of negligence.
See, for instance, the Canadian case of *Schwindt v. Giesbrecht, Doe & Doe* [1958] 13 D.L.R. (2d) 770 at 773-4. See also *The Insurance Commissioner v. Joyce* (1948) 77 C.L.R. 39, 57 *per* Dixon J.; *Nettleship v. Weston* [1971] 2 Q.B. 691.

[7] (1969) 116 C.L.R. 383.

[8] *Nettleship v. Weston* [1971] 2 Q.B. 691.

[9] *Conrad v. Crawford* (1971) 22 D.L.R. (3d) 386; *Lehnert v. Stein* (1963) 36 D.L.R. (2d) 159.

little from Australia. One Canadian judge recently complained that as a defence to negligence,[10] it has almost disappeared, and similar sentiments have been expressed in Australia.[11]

In contrast to *volenti* the defence of illegality, whether regarded as exclusionary (no duty) or privative (disabling), is by definition concerned only with conduct which is unlawful. Unfortunately, however, some of the judicial discussions of the defence have done little to maintain this distinction. Thus, for instance, Windeyer J.'s 'consent' formulation of the rule applicable to joint illegal enterprises, put forward in *Smith v. Jenkins*,[12] might too easily be interpreted as simply a particular illustration of the *volenti non fit injuria* rule. Indeed, rather ironically in view of the substance of his lengthy judgment, he went on to express a certain impatience with the theoretical debate as to which category of defence the rule properly belonged:

> [the] 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 Court to aid wrongdoers. How it be analysed and explained matters not.[13]

The notion that the defence of illegality is in reality one of *volenti* had been much earlier discussed and rejected by the New South Wales Supreme Court in *Godbolt's* case.[14] Sugerman J. had taken that opportunity to distinguish as quite different the issues raised by the two defences. He was of the opinion that too often 'what happened was outside the scope of any consent which could be taken as having been given by the plaintiff's participation . . .'[15] His view commended itself to Kitto and Walsh JJ. in *Smith v. Jenkins*[16] both of whom felt unable to share Windeyer J.'s indifference to the precise form of explanation adopted. Kitto J. put the matter thus:

> I must guard against being understood as thinking that each participant in a joint wrongdoing takes the risk of negligence on the part of his accomplices in the course of the wrongdoing, for I do *not* think that that principle rests upon any idea of assumption of risk.[17]

Walsh J. was equally explicit:

> I do not think that this principle [*volenti non fit injuria*] . . . can provide a satisfactory solution to the problem which this case [*Smith v. Jenkins*] presents.[18]

More recently the judgments in *Craft's* case,[19] whatever other criticisms can be made of them, seem to have laid to rest, once and for all, attempts to incorporate illegality into assumption of risk analyses.

[10] *Rondos v. Wawrin* (1968) 68 D.L.R. (2d) 658, 662 *per* Guy J.A.
[11] *Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) 269, 279-80 *per* Jacobs J.A. See also *Shillabeer v. Koehn* S.A.S.R. 397.
[12] (1970) 119 C.L.R. 397, 422.
[13] *Ibid.*
[14] [1964] N.S.W.R. 22.
[15] *Ibid.* 25.
[16] (1970) 119 C.L.R. 397.
[17] *Ibid.* 431.
[18] *Ibid.* 431.
[19] (1977) 12 A.L.R. 59.

Nonetheless, because illegality is more obviously based on that notoriously unruly horse public policy, the courts have shown an instinctive doctrinal preference for the defence of *volenti*. When the facts are equally able to support an inference of 'consent' the judicial attitude has been in favour of a denial of liability on that ground. Thus for instance, in *Imperial Chemical Industries v. Shatwell*[20] breach of a statutory regulation by the respondent, although a criminal offence, was treated instead as evidence of a voluntary assumption of risk.

But not all situations in which a plaintiff has been engaged in unlawful conduct now permit the necessary inference of *volens*, as *Smith v. Jenkins*[21] and *Craft's* case[22] both illustrate. In such cases the courts, if they are to deny liability, have no option but to base their decisions upon the illegal nature of the activity being carried on by the plaintiff. Indeed it does not seem unwarranted to conclude that the contraction of the defence of *volenti non fit injuria* has, together with the apportionment 'reform' of contributory negligence, in large part been responsible for the recent increased significance of the 'defence' of illegality.[23]

The position currently seems to be that where a plaintiff's unlawful conduct is not regarded as being very serious, the courts treat it as evidence of contributory negligence.[24] Where, however, his offence is seen as especially grave, they are prepared to deny liability altogether either by inferring consent to waive legal rights when that is possible,[25] or otherwise by relying upon the illegality defence.[26]

6. ILLEGALITY AND PUBLIC POLICY

The cases illustrate that in some circumstances a plaintiff who has suffered negligently inflicted injury whilst engaged in unlawful conduct has no right of action. Many of these cases cannot be explained on the basis that the wrongdoing plaintiff was the 'author of his own misfortune' or had consented to the risk of injury involved. Whether that denial of redress be expressed in terms of the absence of a duty of care or of a refusal by the courts to aid wrongdoers cannot conceal the fact that the

[20] [1965] A.C. 656.
[21] (1970) 119 C.L.R. 397.
[22] (1977) 12 A.L.R. 59.
[23] Nor should the significance of insurance provisions be underestimated. See *Godbolt v. Fittock* [1964] N.S.W.R. 22, 24 *per* Sugerman J., '[It] may be, although it is only a matter of speculation, that the recent occurrence of three such actions . . . in this state within a span of one year is indicative of a belated recognition of possibilities latent in the Motor Vehicles (Third Party Insurance) Act 1942'. See also *Smith v. Jenkins* (1970) 119 C.L.R. 397, 409 *per* Windeyer J., 'It is a matter of common experience for courts that nowadays many negligence actions are brought against the owners or drivers of motor cars by passengers who in earlier days would have been deterred from doing so by benevolence, or by knowledge that a verdict would be fruitless. Goodwill does not extend to insurance companies'.
[24] *Matthews v. McCullock* [1973] 2 N.S.W.L.R. 233; *National Coal Board v. England* [1954] A.C. 403; *Foster v. Morton* (1956) 4 D.L.R. (2d) 269.
[25] *Imperial Chemical Industries v. Shatwell* [1965] A.C. 656.
[26] See *e.g., Smith v. Jenkins* (1970) 119 C.L.R. 397; *Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) 269.

decision is one of public policy. The subsumption of the unlawfulness into the duty question is nothing more than the application of the *ex turpi causa non oritur actio* principle under another name.

In general there has been a reluctance to concede this point. In *Smith v. Jenkins* for instance, only Walsh J. was prepared to do so without prevarication: 'The refusal to recognise . . . [the right of action] may be regarded, . . . as an application in a particular situation, of the concept of public policy.'[27] If this accurately describes the defence what, then, are the public policy principles upon which it rests? Several have been suggested, among the most important of them being the following:

(i) *'Clean Hands': Equity at Law*

The defence may be seen as the common law's equivalent of equity's requirement that 'He who comes into equity must come with clean hands'. Whereas the latter maxim, however, covers conduct which is legally improper but not necessarily unlawful, *ex turpi causa non oritur actio* refers exclusively to breaches of the positive law. For this reason the courts have treated the equitable principle as quite distinct from the defence of illegality. When the latter has been present there has been no reliance on the former.[28] Certainly the High Court, in *Smith v. Jenkins*,[29] showed little sympathy for the attempts to import notions foreign to tort into the law of negligence. In spite of this, however, one cannot help but notice an underlying sentiment that the courts do not exist for the settlement of disputes between confederates in crime.[30]

(ii) *Prevention of Profiting From One's Own Wrong*

An overlapping consideration, drawing heavily upon the law of contract but finding application elsewhere,[31] is the policy aimed at preventing persons from using the law to benefit or profit from their own wrong. In the present context of course the wrongdoing plaintiff is normally asking for compensation in the form of *restitution* rather than for some profit or positive gain. This matter has recently been examined at length elsewhere, with the conclusion that it leads to 'slim pickings'.[32]

(iii) *Deterrence*

Denial of a right of action in cases of illegality has also been rationalised on the basis of its deterrent effect, both specific and general, on anti-social behaviour. Refusal to compensate, it is argued, discourages the

[27] (1970) 119 C.L.R. 397, 433-4; but *cf. per* Barwick C.J., 418 *per* Windeyer J.
[28] See Meagher R. P., Gummow W. and Lehane J., *Equity: Doctrines and Remedies* (1975) 67; *Halsbury's Laws of England* (3rd ed.) vol. 14,531 n (r).
[29] (1970) 119 C.L.R. 397, 410-4 *per* Windeyer J.
[30] *Ibid.*
[31] See Weinrib, 'Illegality as a Tort Defence' *University of Toronto Law Journal* 28, 39-40. His discussion of public policy issues is particularly valuable.
[32] *Ibid.* See also Gibson D., 'The Illegality of a Plaintiff's Conduct as a Defence in Tort' (1969) 47 *Canadian Bar Review* 91.

guilty plaintiff from repeating his misdeeds, and, by its example, deters other potential offenders from embarking upon similar enterprises.

Thus, in *Godbolt's* case,[33] Sugerman J. insisted that in lending its aid to the resolution of disputes between criminals the courts could be accused of encouraging criminal behaviour. In the context of the particular circumstances of that case he was of the opinion that:

> . . . whatever else might be said, it would at least seem strongly 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 crime (even including the theft of motor vehicles) by the comfortable assurance that untoward consequence to any of their number, resulting from the careless driving of another of them, would be compensated [by the owner's insurer].[34]

Clearly, there is no good reason why this view of the matter ought logically to be confined to the illegal use of motor vehicles, or indeed to 'gangs of offenders'.

The deterrent effect of civil disentitlement on criminal activities was described by Starke J. in *Jenkins v. Smith* as 'unrealistic and artificial in the extreme'.[35] Criminals, he argued, 'like honest citizens, when undertaking a journey in an automobile, confidently expect that they will arrive at their destination safe and sound'.[36] Referring specifically to the crime of illegally using a motor vehicle, he went on to say:

> I cannot imagine that the fact that compensation may be available if disaster overtakes . . . would in any significant way increase the incidence of this very serious offence . . . I cannot bring myself to believe that they would be deterred, or further deterred from their criminal activity by having regard to the possibility of future litigation.[37]

In the absence of empirical evidence it is difficult not to agree with Mr Justice Starke's view that few criminals, when planning or executing their offences, turn their minds to the problem of whether any injury they sustain will be compensable at law. Desirable as it might be to discourage unlawful conduct, it is questionable whether denial of compensation is either a necessary or effective means of doing so.

(iv) *The Moral Law*

If the thrust of Mr Justice Sugerman's remarks was that the actual incidence of crime was likely to be affected by denying guilty plaintiffs a remedy that contention might well be thought rather implausible. If, however, he was more concerned to make the point that even to entertain such an action is in itself, and without more, to aid, albeit loosely and indirectly, criminal behaviour, he might be considered to be on firmer ground.

[33] [1964] N.S.W.R. 22, 29.
[34] *Ibid.* 28.
[35] [1969] V.R. 267, 275.
[36] *Ibid.*
[37] *Ibid.* See also Atiyah P. S., *Accidents, Compensation and the Law* (1970) 565-600.

By taking his remarks too literally it is possible that the real import of his comment is missed. It is arguable that, in speaking as he did, he was directing his attention to the symbolic value of the courts as the embodiment of the moral law which, if not always based upon popular notions of morality, should at least avoid running counter to them:

> When the grant of justice would cause public scandal the merits of the individual case must yield to the necessities of the law. The law needs moral support and in return it must be prepared to support public morality; and where that would be outraged by the use of the law, then but only then should the law refuse its aid.[38]

Put in this form, it becomes an expression of opinion as to the relationship between law, morality and society, itself the subject of an ongoing debate of major significance in modern jurisprudence, but one which cannot be pursued in this paper.[39]

While a refusal to entertain actions which would have the effect of shocking the public conscience might be defensible,[40] it is often difficult to distinguish between public and merely judicial outrage, a problem which lends added force to Starke J.'s warning that 'moral indignation must not be mistaken for public policy'.[41]

Closely related to this view of the moral law is the argument that to permit litigation in certain circumstances of unlawful conduct would endanger the dignity of judicial proceedings and 'bring the courts into public disrepute' because of the nature of the evidence heard and required.[42] In *Smith v. Jenkins*,[43] Walsh J. took up that point only to dismiss it peremptorily however:

> It is true that it might be considered inconsistent with its dignity to entertain an action for a civil wrong, alleged to have been committed when both parties were engaged in such conduct and when it is invited at the suit of one of them to investigate the details of it *for his benefit*. However, 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.[44]

(v) *Punishment*

Whatever formulation of the rule is employed the denial of a right of action is, in one sense, clearly punitive. Quite apart from the retributivists there is a school of thought which contends that tort law sanctions teach

[38] Devlin P., *The Enforcement of Morals* (1965) 59.

[39] The literature on the Hart-Devlin debate is voluminous. Hart's view can be found in *Law, Liberty and Morality* (1963).

[40] See *Stocks and Parkes (Building) Pty Ltd and Progress and Properties Ltd v. Craft* [1975] 2 N.S.W.L.R. 156, 167 *per* Samuels J.A., 'The rule may be regarded ... perhaps, as an example of the community's moral sense. In the case of certain crimes, to permit recovery by one participant against another would affront conscience and common sense alike. But other considerations may well apply to conduct of a different order'.

[41] *Jenkins v. Smith* [1969] V.R. 267, 276.

[42] See the discussion in Crago, 'The Defence of Illegality in Negligence Actions', 4 *Melbourne University Law Review* 534, 551.

[43] *Smith v. Jenkins* (1970) 119 C.L.R. 397.

[44] *Ibid.* 431-2.

a moral lesson and encourage responsibility.[45] The rationale behind this view has much in common with the theory of punishment outlined by Hadden, in a rather different context, in an article entitled 'A plea for punishment'.[46] In that article he suggested that:

> . . . punishment itself may not only be important as an integral part of the whole concept of responsibility, but may also, if regarded as a token to foster a sense of guilt, be the most important practical preventive force at our disposal.[47]

Appropriately imposed:

> It is not retribution in the sense of an enforced expiation to wipe out the evil which has already been done, nor punishment for the sake of punishment, but a token to make it known to the offender and to others that he has not lived up to the standard set by the society in which he lives.[48]

To this general view several objections have been made. It is argued that denying a remedy to a wrongdoing plaintiff *because* of his unlawful behaviour is to punish without affording him the substantive and procedural protection of the criminal law.[49] It is also criticised as constituting a form of double jeopardy[50] while at the same time providing a negligent defendant, at least equally deserving of moral censure, with an inappropriate and unjust windfall.[51]

There can be no doubt that, in theory, the effect of depriving a plaintiff of a remedy is to relieve the defendant of an obligation otherwise imposed, although 'not for the sake of the defendant but because [the courts] will not lend their aid to such a plaintiff'.[52] In fact, however, the prevalence of insurance has much weakened this objection, just as it has also undermined those arguments based on the deterrent and educative value of tort law. In the case of motor vehicle accidents for instance, compulsory third party insurance has effectively removed liability for personal injury from the driver or owner of the vehicle and spread it over the entire motoring public so that 'injured persons do not become a charge on the state as they otherwise might'.[53] Starke J. in *Jenkins v. Smith*,[54] and perhaps also Adam J. in *Boeyen v. Kydd*,[55] regarded this legislatively endorsed policy as displacing all other considerations.

[45] See Williams G., 'Aims of the Law of Tort' (1951) *Current Legal Problems* 419; see also Linden A. M., *Canadian Negligence Law* (1972); *Froom v. Butcher* [1975] 3 W.L.R. 379, 385 *per* Lord Denning M.R.

[46] (1965) *Cambridge Law Journal* 117.

[47] *Ibid.* 125-6.

[48] *Ibid.* 122.

[49] See for instance Fridman, 'Punitive Damages in Tort' (1970) *Canadian Bar Review* 373, 405.

[50] Gibson D., 'The Illegality of a Plaintiff's Conduct as a Defence in Tort' (1969) 47 *Canadian Bar Review* 91.

[51] Fridman, *op. cit.*, 407-8.

[52] *Holman v. Johnson* 98 E.R. 1120, 1121 *per* Lord Mansfield.

[53] *Jenkins v. Smith* [1969] V.R. 267, 276.

[54] *Ibid.*

[55] [1963] V.R. 235. Passenger suffered injury while participating in the illegal use of a motor vehicle. In the event Adam J. appears to have actually decided the case on 'general principles'.

In essence many of the objections to the defence of illegality, or *ex turpi causa non oritur actio* as it is more appropriately termed, are simply objections to any claim by the law of tort to punish. The latter, so the argument runs, is the exclusive preserve of the criminal law.

As a statement of the law as it presently stands, such a contention is clearly wrong. There is recent high authority, both in England[56] and Australia,[57] supporting the proposition that, on occasions, tort law has, and ought to have, a delictual element which contemplates some penalty for the defendant. If this view is accepted then although that delictual element is normally manifested in the quantum of damages awarded against a *defendant* whose conduct is regarded as amounting to 'conscious, contumelious and calculated wrongdoing',[58] by parity of reasoning it would seem equally applicable to penalize a plaintiff whose behaviour is regarded as being sufficiently anti-social. In this sense the controversy concerning illegality is but the obverse of the older debate over exemplary damages. Fundamentally both are debates about the proper function of the law of tort, the validity of its claim sometimes to punish as well as compensate.[59]

But of course many persons who suffer injury are left without a remedy at law. The success of most claims in tort is dependent upon the attribution and proof of negligence. The problem that this often entails has led to the expression of grave doubts as to the social value of the whole tort process.[60] Ison, for example, has described it as a 'forensic lottery'.[61] Viewed in this light the *ex turpi causa* principle might be at least arguably less exceptionable in its operation than many other more fundamental features of fault based liability.[62]

7. CONCLUSION

While there can be no doubt that the courts recognize a defence of illegality[63] a review of the case law only confirms Walsh J.'s conclusion in

[56] *Broome v. Cassel & Company* [1972] A.C. 1027, especially 1114 *per* Lord Wilberforce.

[57] *Uren v. John Fairfax* (1968) 117 C.L.R. 118; *Australian Consolidated Press v. Uren* (1968) 117 C.L.R. 185.

[58] *Australian Consolidated Press v. Uren* (1968) 117 C.L.R. 185, 215 *per Windeyer* J. In England the House of Lords, in *Rookes v. Barnard* [1964] A.C. 1129, confined the availability of exemplary damages to a very narrow category of cases. In Australia the High Court, in *Uren v. John Fairfax*, refused to follow the House of Lords on this point, and its decision was upheld by the Privy Council in *Australian Consolidated Press v. Uren* [1969] 1 A.C. 590.

[59] Winfield and Jolowicz, *op. cit.*, 555-9.

[60] See *Da Costa v. Cockburn Salvage and Trading Pty Ltd* (1970) 124 C.L.R. 192, 210 *per* Windeyer J.

[61] Ison T. G., *The Forensic Lottery* (1967).

[62] Note, 'Exemplary Damages in the Law of Torts', 70 *Harvard Law Review* 517, 523, 'The argument for compensation explains what the plaintiff in a tort action receives. It does not explain why the defendant pays. The compensatory theory of tort law also fails to explain why a plaintiff injured through the "fault" of a defendant is compensated while other plaintiffs are not'.

[63] Whether the public policy principles upon which it is based remain — or indeed ever were — appropriate to questions of tortious liability is another matter. See

Smith v. Jenkins, that 'there is . . . [no] single rule by which, in all cases, the question raised by a plaintiff's commission of an unlawful act, or his participation in it, is to be answered'.[64]

Any analysis is limited by the materials available. Illegality is not a regularly encountered defence nor, when it has been raised and argued, have the courts always been prepared to discuss it with the necessary candour. Attempts to distinguish between an application of the *ex turpi causa non oritur actio* principle and a refusal to recognize a duty of care have generated some heat but very little light. Confusion has been further compounded by an apparent insensitivity to the policy issues the defence involves.

In spite of these difficulties, however, it is possible to isolate those general considerations which do influence decision. It is suggested that the factors which weigh most heavily with the courts are:

(1) the nature of the relationship between the plaintiff and defendant.

(2) the nexus between the negligence and the illegality.

(3) the nature and gravity of the offence.

There has been a tendency for discussions of the defence either to be too closely tailored to the particular facts in issue, treated in isolation from the more general problem they illustrate, or, at the other extreme, to propound doctrine at the expense of fact and policy. The courts continue to vacillate between Scylla and Charybdis.

And yet the predictive value of the cases can be easily underestimated. The actual decisions of the courts are more consistent and helpful than the explanations they have offered in support. Useful indicators exist but, presently at least, they are seldom doctrinal. A *degree* of particularism is one of the strengths of the common law. 'If you are tied to the facts you will not produce fanciful theories.'[65] While a careful reading of the cases shows that certain patterns do emerge[66] it equally demonstrates that, in

Weinrib, 'Illegality as a Tort Defence' (1976) 26 *University of Toronto Law Journal* 28 for a powerful critique of the defence.

[64] (1970) 119 C.L.R. 397, 427.

[65] Weir T., 'Abstraction in the Law of Torts — Economic Loss', (1974) 2 *City of London Law Review* 15.

[66] In this connection Weir's observation, made in the context of liability for economic loss, is particularly illuminating:
'The forms of action have taken a rough knocking from legal scholars — they are derided as chains clanked by ghosts — but actually they have quite a modern flavour. The forms of action provided a remedy for typical fact situations: to discover whether you had a remedy you matched the facts of your case against the type of template offered by the law. This is a rather different process from seeing whether your case can be subsumed under a rule in conceptual terms. It is a question of types rather than classes, of seeking congruence rather than coverage. I say that this has a modern flavour because the types of Weber's sociology speak to us more forcefully nowadays than do the categories of Kant's metaphysics. Even lawyers, always the last to be affected by changes in modes of thought, are becoming impatient with 19th century conceptualism and are moving towards a fact-based grouping of the rules of law.' *Ibid.* 16.

the application of the illegality principle, the courts possess a broad discretion. Serviceable formulations of doctrine for the wise and sensitive application of this discretion demand, however, a greater awareness of, and responsiveness to, those wider considerations of policy that have led to the evolution of the special defence. As Keeton observed elsewhere, in developing and disputed areas of law the more generalized considerations need to be 'brought to the foreground . . . [and] explicitly relied upon in testing and re-affirming, modifying, or abandoning the more particular, categorical formulations. The interplay of the general and the particular, of the rules and the reasons, is essential to an ideal accommodation of creativity and continuity, and it is desirable that it occur openly in judicial opinions'.[67]

[67] Keeton R. E., *Venturing to do Justice* (1969) 67.