legislature with power to do so, it still subsists.

The *Engineers'* doctrine is not relevant to the issue. It deals with the impact of the Commonwealth legislative powers, not upon a State's Constitution, but upon the scope of a State's legislative powers over the subject, powers supposedly insulated by s.107. Sir Owen Dixon himself explained the situation in *West's Case*, saying that the Commonwealth "cannot deal with a State . . . as if it were legislating for the subject. . . . It may be that section 106 provides the restraint upon the legislative power over the States, which differentiates it from the power over the subject, and that no law of the Commonwealth can impair or affect the Constitution of a State".[87]

If the situation be thus clarified the Bankruptcy Act will be seen, however unwelcome the prospect may be from a "practical" viewpoint, to be ineffective to deprive the Crown of a State of a prerogative right.

CONCLUSION

The resolution of the issue raised in *Cigamatic* "goes deeply into the nature and operation of the federal system".[88]

It illustrates the significance of the characterisation of the legislation whose constitutionality is challenged.

It involves the application of the principles propounded in the *Melbourne Corporation Case*. Those principles, with all their imprecision of definition, may now be taken to have a reciprocal operation.

It contains a tacit recognition by the Chief Justice of the theory of the divisibility of the Crown with all that that theory entails for the exercise of the prerogative by the components of the federation.

There are several complications. Once the divisibility of the Crown be accepted, there would seem, despite *dicta* given by the Chief Justice in the past, to be no justification for placing the Commonwealth prerogatives beyond the reach of the States, whilst abandoning those of the States to encroachment by the Commonwealth.

And, when dealing with federal conflict, the Chief Justice tends to circumscribe the permissible consequences of interaction between State and Commonwealth power. This tendency may be seen even to involve a denial of *Engineers'* principles, by a return in *Cigamatic* to an implied prohibition protecting the Commonwealth from State laws. This would have all the exaggeration of a canard. However, it is submitted that in the approach of the Chief Justice there seems to be a confusion of paramountcy of Commonwealth laws with an imputed paramountcy of the power under which its laws are made: this leads his Honour to decide that the Commonwealth is in an impregnable position and hence to place a curb on State power when the exercise of that power might qualify the position of the Commonwealth.

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ILLEGALITY IN THE LAW OF TORTS

GODBOLT v. *FITTOCK*[1]

A. Facts

Godbolt v. *Fittock* was described by Manning, J. as "a case in which a nice point of law has been brought to the surface of an unedifying contest between

[87] (1931) 56 C.L.R. 657 at 682.
[88] (1962) 108 C.L.R. 372 at 377 *per* Dixon, C.J.
[1] (1964) N.S.W.R. 22.

unmeritorious suitors".[2] Despite the unworthiness of the suitors and the comparative smallness of the amount involved (the action being brought in the District Court which has a jurisdictional limit of £3,000), the case concerns a matter of policy which is of great importance for a legal system.

The facts were that while two thieves, G. and F., were driving to market in a truck loaded with stolen calves, the truck, due to the negligent driving of F., collided with a tree and G. was injured. G. sued F. in the District Court[3] and His Honour, Judge Furnell, directed a verdict for the defendant, upholding a defence of "common illegal purpose". The plaintiff appealed to the Full Supreme Court[4] which unanimously dismissed the appeal, holding that the defence was justified on the instant facts by principles of public policy. An application to the High Court of Australia for special leave to appeal has been refused.[5]

B. Summary of Judgments

The judgment of Sugerman, J., with which Brereton, J. concurred, can be divided into three parts. In the first part[6] he rejected a number of possible defences raised by the respondent. The first was the defence that the plaintiff was engaged in an illegal act. His Honour applied the decision of the High Court in *Henwood* v. *Municipal Tramways Trust*[7] to show that no such defence existed. Secondly, His Honour considered the defence of "joint illegal enterprise" and stated that there was no British or United States authority for the use of this defence in any directly analogous case, except for an unreported decision of Ferguson, J. in the Supreme Court[8] and a decision of Amsberg, J. in the District Court,[9] both in 1962. Finally in this part, His Honour considered the cases in which a defence of *volenti non fit injuria* would be available, and decided that these cases were not applicable, both because different questions of consent there arose, and because in the present case there was not sufficient causal connection between the injury and the nature of the adventure for the defence to be relevant. It is submitted that, thus far, His Honour's judgment is unimpeachable.

In the second part of the judgment,[10] His Honour cited eleven cases as authority for a proposition that the principle *ex turpi causa non oritur actio*, which he did not distinguish from a general principle of public policy, has an operation wider than the field of contract; and in the third part[11] he considered the effect of this principle of public policy on the case. He argued that if the plaintiff were allowed to succeed, one of two car-thieves injured in a collision while the car was being driven by an accomplice, could sue the owner by virtue of the Motor Vehicles (Third Party Insurance) Act[12] and thereby cause the loss to fall on the authorized insurer, or even on the owner himself.

> . . . it would at least seem strangely opposed to sound notions of public policy that gangs of thieves or burglars should be encouraged to use motor vehicles in the execution of their nefarious plans (even including the theft

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[2] *Ib.* 29. Quoting Dixon, J. (as he then was) in *Psaltis* v. *Schultz* (1948) 76 C.L.R. 547 at 557.
[3] The District Court of the Northern District holden at Taree.
[4] Comprising Sugerman, Brereton and Manning, JJ.
[5] (1963) 37 A.L.J.R. 178.
[6] At 23-5.
[7] (1938) 60 C.L.R. 438.
[8] *Morris* v. *Smith*, 5th November 1962, Bathurst Circuit Court.
[9] *Sullivan* v. *Sullivan* (1961) 79 W.N. (N.S.W.) 615.
[10] At 25-7.
[11] At 27-9.
[12] (1942-1962).

> of motor vehicles) by the comfortable assurance that untoward consequences to any of their number, resulting from the careless driving of another of them, would be compensated by the owner's insurer.[13]

As a result of this, His Honour stated his general principle that "when co-adventurers, in a joint criminal venture of a nature comparable with that in question in the present appeal, use a motor vehicle in the pursuit of their common purpose, damages are not recoverable by one, being a passenger, against another, being the driver, in respect of injuries suffered as a result of want of due care in driving on a journey which is directly connected with the execution of the criminal purpose",[14] but he was careful to exclude from this principle cases of *volenti non fit injuria*, technical illegality resulting from breaches of minor regulations and deliberate injury. He further qualified his principle by defining "directly" by reference to a connection between the criminal purpose and the journey rather than between the specifically criminal character of the venture and the journey. On these grounds, His Honour dismissed the appeal.

The judgment of Manning, J.[15] is similar in its reasoning but reaches a slightly different conclusion. His Honour distinguished the question of duty and the question of public policy and dismissed the United States authorities on the ground that they were all concerned with the first question, whether the defendant owed a duty to the plaintiff, rather than the second question of whether it was contrary to public policy to grant relief. His Honour, however, found it unnecessary to discuss the duty question fully, as he found against the appellant on the ground of public policy. He did this by quoting a number of cases showing that the principle *ex turpi causa non oritur actio* (hereinafter called "the *ex turpi* principle") is applicable to the law of tort; and finally he formulated a general rule that "where a man participates with another in a criminal activity, and one of them is injured by the carelessness of the other, the injured man's right to recover damages for personal injuries may be lost to him when the injury complained of is suffered either in the course of an activity which is in preparation for, or as a consequence of, a criminal activity in which both parties either are about to, or have, participated".[16] He then applied this to the facts by finding that the nature of the journey would have been different if the theft had never taken place and he therefore agreed with the decision of Sugerman, J. in dismissing the appeal.

C. The U.S. Principle

Before attempting any criticism of the judgments of the Supreme Court, it is desirable to set out the principles applied in the United States to cases where the defendant in a tort action pleads that there was a "joint illegal enterprise".

A long string of United States cases has established that where plaintiff and defendant are engaged in a joint illegal enterprise and the defendant negligently injures the plaintiff, the plaintiff is only debarred from recovery if there is a direct causal connection between the illegal aspect of the crime and the injury. Unfortunately, however, every case in the United States on this area is concerned with offences which would correspond with misdemeanours rather than felonies in British common law systems. Thus in *Havis* v.

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[13] At 28.
[14] *Ibid.*
[15] *Id.* 29-35.
[16] *Id.* 34.

Iacovetto,[17] a passenger in a motor car was injured due to the negligence of the driver and, when sued, the driver pleaded that he and the plaintiff were returning from operating an illegal gambling concession. The Supreme Court of Colorado reversed a finding for the defendant on the ground that the gambling operations were not a "contributing cause" to the accident but were "wholly disconnected" with it. In *Bagre* v. *Daggett Chocolate Co.*,[18] the plaintiff broke a tooth when he bit into a hard metallic substance in a piece of candy manufactured by the defendant. He had won the candy in an illegal bingo game but this was held to be no defence because there was no causal relationship between the illegal aspect of the crime and the consequence. In *Meador* v. *Hotel Grover*,[19] the plaintiff was injured in a hotel lift and a defence by the hotel that the hotel was used for the purpose of prostitution and that the plaintiff had just visited a prostitute in one of the rooms was rejected for the same reason. Other cases which repeat the same principle are *Manning* v. *Noa*,[20] *Moone* v. *Smith*[21] and *Holcolm* v. *Meeds*.[22] Sugerman, J. referred to some of this American authority (and to the indecisive Canadian case of *Danluk* v. *Birkner*)[23] in his judgment.

The American rule, therefore, is that the defence of joint illegal enterprise may only be raised where there is a "direct causal connection" between the illegal aspect of the crime and the injury. It will be apparent that this is far from being a precise test as it depends upon an indeterminate phrase, "direct causal connection". It will be submitted, however, that this is not a disadvantage, for such indeterminacies are the means by which judges are enabled to use a certain amount of discretion in deciding difficult cases. Such a phrase, without going as far as words like "just" and "reasonable", is a convenient method of introducing sufficient leeway to decide each case in the way which seems just to the particular judge without throwing the door open too wide to completely subjective criteria. The question is, of course, always one of degree. Even phrases like "just" and "reasonable" are not wholly indeterminate, as they give some suggestion of the type of criterion a judge should apply. On the other hand, "direct" as in the phrase "direct causal connection" makes the best of both worlds insofar as it comes nearer to precision than "just" and "reasonable" without being absolutely unyielding and inflexible.

D. Public Policy

The words "public policy" are used in two senses.

In the first sense, public policy consists of a number of rules of law (sometimes called "heads" of public policy) which have a comparatively fixed operation in certain comparatively fixed circumstances. Clustered under each "head" is a large number of cases which give substance and precision to these "heads" in a degree no less (though, of course, no more) than that of any other rule of law. With regard to this sense, it is submitted, first, that the *ex turpi* principle is narrower than public policy, being merely one of its many "heads", that is, merely one example of its operation. Second, it is submitted that the *ex turpi* principle has no application outside the law of contract. Third, it is submitted

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[17] (1952) 250 P. 2d 128 (Colo.). This case is wrongly cited in the Report as "*Harris* v. *Iacovetto*".

[18] (1940) 126 Conn. 659, 13 A. 2d 757.

[19] (1942) 193 Miss. 392, 9 So. 2d 782.

[20] (1956) 345 Mich. 130, 76 N.W. 2d 75. See *infra* at n. 37.

[21] (1910) 7 Ga. App. 675, 67 S.E. 836. This case involved a brawl at an illegal pool game unconnected with the gambling.

[22] (1952) 173 Kan. 321, 246 P. 2d 239. Here a man visiting a tourist camp with a woman for the purpose of extramarital relations was killed by gas poisoning. The immorality was held to be no defence in his estate's action against the camp proprietor.

[23] (1946) 3 D.L.R. 172; (1947) 3 D.L.R. 377.

that none of the established "heads" of public policy covers the situation in *Godbolt* v. *Fittock* and therefore that public policy in this sense is not relevant to that case.

In their second sense, the words "public policy" refer to an adjustment of the *de facto* interests involved so as to reach a creative decision in cases where public policy in the first sense is not applicable.[24] It is submitted that while the extension of this type of public policy is desirable, it is unfortunate that the Supreme Court should have used it without distinguishing it from the other type. Second, it is submitted that in fact general principles of public policy (in this second sense) were wrongly applied, as "true" public policy (if there can be such a thing) required a verdict for the plaintiff.

1. *The First Sense*

Neither Sugerman, J. nor Manning, J. draws any distinction between the *ex turpi* principle and public policy and, in fact, Manning, J. refers to "what is sometimes termed *ex turpi causa non oritur actio* and at other times public policy".[25] This apparent equation is somewhat surprising in view of the obviously wider ambit of the latter. The rule forbidding contracts in restraint of trade as exemplified in *The Nordenfeldt Case*[26] and a number of following cases is always referred to as a rule of public policy and it is today a well-defined legal principle, yet it could hardly be said that the rule had any relation to the *ex turpi* principle. Contracts with alien enemies and gaming contracts (where they are not illegal) likewise involve no legal or moral turpitude, yet there are clearly laid down rules of public policy rendering them unenforceable. To imply that any of these rules can be equated either with any other such rule, or with "public policy" *simpliciter*, can only be confusing. On the other hand, it is conceded that all applications of the *ex turpi* principle can be described as *applications* of public policy in at least one sense.

Thus the relationship between the *ex turpi* principle and public policy is one not of co-extension but of inclusion.

Both Sugerman, J. and Manning, J. were at pains to establish that the *ex turpi* principle and public policy (which they allowed themselves to treat as co-extensive) were not restricted to cases where the plaintiff sued on a contract but were of more general application and, in particular, applied to the law of torts. Sugerman, J. cited eleven cases as authority for this proposition and Manning, J. cited a further six (only one case being common), but it is submitted that only one of the sixteen cases cited, albeit the only one they both referred to, can really be used as authority for that proposition and that case can probably be distinguished.

Three of the cases cited by Sugerman, J., namely *Everet* v. *Williams* (*The Highwayman's Case*),[27] *Holman* v. *Johnson*[28] and *Stephens* v. *Robinson*[29] and three of the cases cited by Manning, J., namely *Taylor* v. *Chester*,[30] *Alexander* v. *Rayson*[31] and *Siveyer* v. *Allison*,[32] are in fact cases in which the *ex turpi* principle was applied where the plaintiff sought to enforce a contract. In *Everet* v. *Williams*, one highwayman sued his partner for his share of the

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[24] See J. Stone, *The Province and Function of Law* (1946) 494.
[25] (1964) N.S.W.R. 34.
[26] *Nordenfeldt* v. *Maxim Nordenfeldt Guns & Ammunition Co.* (1894) A.C. 535.
[27] 1725. No authorized report exists; but see (1893) 9 *L.Q.R.* 197.
[28] (1775) 1 Cowp. 341.
[29] (1832) 2 Cr. & J. 209.
[30] (1869) L.R. 4 Q.B. 309.
[31] (1936) 1 K.B. 169.
[32] (1935) 2 K.B. 403.

spoils, which was presumably alleged to be due under a partnership contract. In *Holman* v. *Johnson*, the plaintiff sued on a contract which the defendant claimed was illegal as a smuggling contract and the Court, after stating the *ex turpi* principle in general terms, held that it was not applicable as the contract was only illegal by French Law and that the applicable law was English. In *Stephens* v. *Robinson*, an editor sued his publisher for wages owing under a contract for service and was met with the defence that the plaintiff had made a false statutory declaration for the Stamp Office stating that he was both editor and publisher. In *Taylor* v. *Chester* the plaintiff deposited half a banknote with a brothel mistress as security for the cost of "divers debauches" and his action in detinue for the note failed. Although Manning, J. classifies this as a detinue case, the action had obviously a strong contractual element. Similarly, in *Alexander* v. *Rayson*, where the Court of Appeal suggested that a lessor could not sue in ejectment if the lease was illegal, the reason could be that the relationship of lessor and lessee is primarily a contractual one, thus attracting the maxim. Finally, in *Siveyer* v. *Allison*, the plaintiff sued for breach of promise of marriage, which action is purely contractual.

The cases of *Colburn* v. *Patmore*[33] and *Burrows* v. *Rhodes*,[34] cited by Sugerman, J., are justifiable on a different principle. These cases were actions by persons convicted of crimes for an indemnity from accomplices in respect of the criminal consequences involved. In a system which until recently has refused indemnities to joint tortfeasors (*Merryweather* v. *Nixon*),[35] it is hardly surprising that such actions should be refused, although in *Burrows* v. *Rhodes*, the plaintiff succeeded on different grounds.

The second example given by Scrutton, L.J. in *Hillen* v. *I.C.I. (Alkali) Ltd.*,[36] that of a burglar being unable to sue a houseowner for a defect in a staircase or waterpipe which causes him injury, is not, as Scrutton, L.J. himself points out, an application of the *ex turpi* principle, but an example of the operation of the rule that the only duty of an occupier to a trespasser (at that time) was the duty not to set a trap. It is submitted that a burglar injured by a spring gun deliberately set to shoot a trespasser could sue the houseowner as well as prosecuting him criminally.

Thus throughout all these cases, whatever wide *dicta* may have been used concerning the application of the *ex turpi* principle outside the law of contract, there is no case in which it was necessary for the decision to apply the principle outside the law of contract, and certainly none purport to apply it to the law of tort.

The remaining five examples given by Sugerman, J., namely *Manning* v. *Noa*,[37] *Gilmore* v. *Fuller*,[38] the first example in *Hillen* v. *I.C.I. (Alkali) Ltd.*,[39] *National Coal Board* v. *England*[40] and *Boulter* v. *Clark*,[41] are all cases which either applied or are reconcilable with the United States principle that an action in tort is subject to a defence of joint illegal enterprise only if the injury itself arose out of the illegal aspect of the crime. In *Manning* v. *Noa*, a woman was injured on a dangerous footpath in a cathedral after leaving an illegal bingo game there, but she was successful in her action against the cathedral because the injury did not arise out of the illegal aspect of her activity. Presumably it would have been otherwise had she suffered nervous shock on suddenly winning

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[33] (1834) 1 Cr., M. & R. 73.
[34] (1899) 1 Q.B. 816.
[35] (1799) 8 T.R. 186.
[36] (1934) 1 K.B. 455.
[37] *Supra* n. 20.
[38] (1902) 198 Ill. 130, 65 N.E. 84.
[39] *Supra* n. 36.
[40] (1954) A.C. 403.
[41] (1747) Bull N.P. 16.

a large sum at the game. Similarly, in *Gilmore* v. *Fuller*, where it was held that a participant in a charivari could not recover damages for injury resulting from the negligent discharge of a pistol, the reason was that the firing of a pistol was itself an illegal act within the meaning of the statute and the plaintiff was a participant in that illegality. The quotation in the judgment from *Cooley on* Torts[42] emphasizes this by stating that the rule applies "where two persons are engaged in the same unlawful enterprise or action and in prosecuting it one is injured by the negligence of the other".

The first example in *Hillen* v. *I.C.I. (Alkali) Ltd.*, that of a smuggler being injured by a defective rope while lowering smuggled kegs of brandy into a cellar owned by the owner of the rope, is a clear case of injury arising out of the illegal part of the activity—the physical smuggling of the brandy—and therefore it, too, is reconcilable with the United States principle.

The judgment of Lord Asquith in *National Coal Board* v. *England* is direct English authority supporting the American principle. His Lordship distinguishes the case of a burglar injuring another by negligently using the explosive they are using to blow open a safe and that of the same burglar picking his accomplice's pocket on the way to the scene. In His Lordship's opinion the injured burglar could successfully sue in the second case but not the first. The case of *Boulter* v. *Clark* cited by His Lordship which states that one illegal prizefighter could not sue another for injuries is also an application of this principle.

The two other cases relied on by Manning, J. are *Glyn* v. *Weston*[43] *Feature Film Co.* and *Leather Cloth Co.* v. *American Leather Cloth Co.*[44] In the former case an action for breach of copyright was defeated on the ground that the subject of the copyright was obscene and in the latter case it was said that an action for infringement of a Trade Mark would not lie if the proprietor of the Trade Mark had made certain untrue representations. These cases can be rested on special principles of copyright law and trade mark law which apply independently of the *ex turpi* principle.

The only case cited by both Sugerman, J. and Manning, J., and the strongest case in support of their position, is *Hegarty* v. *Shine*.[45] In that case a man seduced a woman without telling her that he had a venereal disease. She contracted the disease and sued him for assault, the basis being that the act of intercourse is an assault if no consent is given and that her consent was vitiated by the defendant's fraud in not warning her about his condition. The Court of Appeal unanimously found for the defendant by applying the *ex turpi* principle. At first sight the case seems decisive on the question of whether the *ex turpi* principle extends to the law of tort. Ball, C. said:[46]

> Courts of justice no more exist to provide a remedy for the consequences of immoral or illegal acts and contracts than to enforce those acts or contracts themselves. Thus judges have refused to partition the plunder obtained by robbery; protect property in an indecent book or picture, to compel payment of the wages of unchastity.

Palles, C.B. added:[47]

> Whether in the form of a contract or tort an action in a Court of Justice will not lie on such a transaction nor can it be pleaded as a matter of defence.

There are three matters about this decision, however, which should be

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[42] 2 ed. 151.
[43] (1916) 1 Ch. 261.
[44] (1863) 4 De G. J. & Sm. 137; (1865) 11 H.L.C. 523.
[45] (1878) 14 Cox C.C. 124.
[46] *Id.* 148.
[47] *Id.* 151.

noted. First, the case concerned not illegality as a defence but illegality as a replication to a defence of consent. Second, there was a contractual element insofar as the plaintiff also sued for breach of promise of marriage and the two causes of action were therefore together in the Court's mind. Third, insofar as the case decided that the *ex turpi* principle applied to torts, it is inconsistent with a number of earlier cases.[48] Also, as previously indicated, the aspect of the decision here relevant has only been followed in wide *dicta* and not in the *ratio decidendi* of any later common law cases.

For these reasons it is submitted that *Hegarty* v. *Shine* ought not to have been followed in *Godbolt* v. *Fittock*.

Perhaps the strongest argument in favour of the non-application of either the *ex turpi* principle or any well-defined principle of public policy to the facts of *Godbolt* v. *Fittock* is the fact that the Full Supreme Court cited seventeen cases to show that there was some such application and yet that only one of them had that effect. It is submitted that no other case can be found in which the *ex turpi* principle has been applied to the law of torts—or even outside the law of contracts. There is no authority at all on the question of joint illegal enterprise (except some United States cases which adopt an independent principle) and on the question of joint illegal enterprise as applied to a felony, Sugerman, J. himself states:[49]

> Neither the careful researches of counsel, nor such supplementary search as I have been able to make, have led to the discovery of any case elsewhere in the British Commonwealth, or in the United States of America, in which a question of the present sort arising as between two thieves, or others *in consimili casu*, has arisen for direct decision.

Thus there are no cases on the defence of joint illegal enterprise which could be used to justify an application of rules of public policy to that situation. The absence of authority for the application of the *ex turpi* principle to the law of tort itself indicates that there is no common law rule that it can so apply, and none of the other recognized heads of public policy covers the question of illegality (since any principle of public policy involving illegality is itself an example of the *ex turpi* principle). The result is that public policy in the first sense, the sense in which it is a rule of law applying in certain fixed situations to oust certain rules of law which would otherwise apply, should not have been applied in *Godbolt* v. *Fittock* to prevent the plaintiff from recovering the damages to which he would otherwise have been entitled as a result of the defendant's negligence.

2. *The Second Sense*

In its second sense, that arising in the situation where public policy in the first sense does not apply and there is a conflict of *de facto* interests which the court is required to adjust by a creative decision, public policy is not really a rule of law at all. It is submitted that public policy in this sense can never be used as the *ratio decidendi* for a decision but only as a motive in the mind of a judge for exercising a judicial choice in a particular way. This type of public policy is no more than the use of general considerations of social benefit and where there is a situation involving a category of illusory reference so that the court has an effective choice, there is no reason why the judge should not take such factors into consideration. Julius Stone in *The Province and Function of Law* has shown that the use of such choices in such a way has been one of the

[48] Including *R.* v. *Bennett*, 4 F. & F. 1105 and *R.* v. *Sinclair*, 13 Cox C.C. 28.
[49] At 24.

principal methods by which the common law has developed. In his recent revision of Part I of that work, he now states:

> The role of the illusory categories . . . is by no means merely negative. They may serve, even while imaginative judicial innovation is proceeding, to give to the legal craftsman a certain assurance arising from the belief that innovations are but a rediscovery of or an inference from existing legal norms . . . In short, the illusory categories may be resorted to, not because they are believed to *determine* creative decision-making, but because they are felt, often instinctively, to enable the content of legal norms to change while ensuring that the legal order continues as an unbroken unity. The need for such assurance is felt by the lawyer; with the layman, it may be so axiomatic that general disturbance of it would be a serious blow to the basis of general social cohesion. This need for assurance is a psychological counterpart of the very awareness of instability and movement in the law.[50]

These considerations, and a certain increase of explicit concern for the value of legal certainty in addition to that of legal flexibility, seem to carry Professor Stone rather closer than he stood in 1946 to the position that the essence of this method of developing the law is that it is done clandestinely and in such a way as to make it appear that the doctrine of *stare decisis* is the decisive factor. He himself, however, still emphatically rejects this position. However strong the arguments in favour of such concealment, they are for him still outweighed by the advantages of frank attention to what actually goes on in the judicial process.[51]

Yet the present writer, though adopting Stone's general analysis, would respectfully insist that the value of illusory certainty can only be retained if the illusion is *not* frankly exposed and abandoned. It is submitted that insofar as the Full Court in *Godbolt* v. *Fittock* is relying on "public policy" in the second sense outlined above, it is only introducing a subjective and arbitrary criterion into the law and that while there is little danger in such criteria as long as they are concealed in the folds of illusory references, if they are allowed to be publicly stated as criteria for decisions, a serious blow is struck at the basis of social cohesion through the law. In other words, public policy may be used in the types of case where it has long been established at common law and public policy in the more subjective sense may be used in the judge's mind to determine the exercise of a judicial choice; but if in the latter sense it is used openly, the whole stability of the common law as established by the doctrine of *stare decisis* is threatened. The more desirable solution is the adoption of a veiled indeterminacy enabling judges to apply subjective criteria while appearing to employ a definite test; and on the present view the United States principle of direct causal connection between the illegal aspect of the crime and the injury (which, while itself not definite, is notably more so than the solution in *Godbolt* v. *Fittock*) is greatly to be preferred.

E. The Application of "Public Policy" to the Facts

Even in its application of "general principles of public policy" to the situation before it, it is submitted that the Full Court reached an unsatisfactory result. It is obvious that the commission of a crime does not permanently debar the criminal from suing in the Queen's Courts. On the other hand, it is equally

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[50] See J. Stone, *Legal System and Lawyers' Reasonings* (1964) 25.

[51] See *id.* 284-85; and for a rejection of continental espousals of concealment (by Saleilles, Wurzel and Demogue) see *id.* c. 6, n. 48.

obvious that a criminal should not be allowed to use those courts for the purpose of furthering his illegal enterprise, as by suing for a share of the profits which was the situation in *Everet* v. *Williams*.[52] The question is where a legal system is to draw the line. The United States test draws it where there is a "direct causal connection" between the illegal aspect of the crime and the injury. Sugerman, J.'s test, which is limited to motor vehicle accidents, draws it where the journey is "directly connected with the criminal purpose".[53] Manning, J.'s test is more temporal and refers to injuries suffered "in the course of an activity which is in preparation for or is a consequence of a criminal activity".[54] These tests are not intended to be based on precedents and both judges quite freely admit that they are their own formulations of "public policy".

While any appraisement of respective merits of these tests must be somewhat in the nature of a moral judgment, it is submitted that the United States test is preferable on general logical principles.

Where a criminal is injured in a motor vehicle accident on the way to or from the crime, to attribute the injury to the crime is analogous to a host feeling responsible for his guest's death in a motor vehicle accident on the way to his party on the basis that if he had not invited him he would not have been killed. The relationship is purely fortuitous and, on the assumption that the accident is of a type that could have occurred otherwise than on an illegal journey, there would seem to be no reason to penalise a criminal by depriving him of the protections offered by the civil courts. The argument is a nice one and one which could generate a great deal of discussion but it is submitted that a close consideration of the problem will show that the United States test is the most desirable.

A similar solution can be reached by means of the "insurance principle". Basically this is the policy underlying such legislation as the Workers' Compensation Act and the Motor Vehicles (Third Party Insurance) Act, that the loss resulting from certain types of activity should be borne by those indulging in that type of activity as a whole rather than by those individual members who cause the particular losses. This policy is effectuated by means of compulsory insurance with a strict limitation on exemption clauses. On the facts of *Godbolt* v. *Fittock* this policy comes into conflict with the type of public policy referred to by the Full Court, namely the public policy in the discouraging of illegal activity. However, it is submitted that this latter public policy goes beyond what is necessary, as a criminal is already given a punishment which relates directly to his crime and there would seem no reason to punish him further by obliging him to bear certain injuries for which he would otherwise be compensated. The result is that the first policy, that arising out of the "insurance principle", should prevail.

F. Conclusion

For the foregoing reasons the judgment of the Full Court in *Godbolt* v. *Fittock* would appear to be unfortunate. It employs inconclusive authority to show that the *ex turpi* principle applies to the law of torts; it assumes that the *ex turpi* principle is synonymous with general principles of public policy; it wrongly assumes that "public policy" is a phrase with only one meaning and finally it applies "general principles of public policy" in a somewhat surprising manner. In view of this it is regrettable that the High Court did not take the opportunity of granting the plaintiff special leave to appeal.

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[52] *Supra* n. 27.
[53] At 28.
[54] At 34.