

THE DEFENCE OF ILLEGALITY IN NEGLIGENCE ACTIONS¹

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The question of how far a defendant to a civil action may plead that the plaintiff's illegal conduct, in the transaction out of which the cause of action arises, affords him a good defence has long perplexed courts both in Commonwealth countries and in the United States of America. Judicial policy has traditionally been embodied in such maxims as *ex turpi causa non oritur actio*² and *he who comes into Equity must come with clean hands*. These rules reflect a morality according to which plaintiffs were frequently denied any relief at all if their conduct had contained elements of illegality.³ Historically such statements of public policy have been invoked to disallow a plaintiff to recover property passing under an illegal contract or trust,⁴ at least where he is forced to rely on the illegal transaction and from which he has not repented or has repented too late.⁵ In such cases the loss is usually held to lie where it falls, the rationale being that a court of law should not lend its aid in adjusting monetary and proprietary interests between parties who have acted illegally.

In the present century the question of the validity of a defendant's plea that the plaintiff's conduct was illegal has assumed importance in relation to tort litigation. Such a plea may arise in two main types of cases. First, a plaintiff may have suffered injury due to his own breach of a statutory duty (whether such a duty is imposed for his own safety or otherwise). This, of course, may frequently be evidence of contributory negligence leading to the apportionment of damages, but in some cases the defence has sought to rely on the wider ground that it is improper for a court to render any assistance at all to plaintiffs in these cases since to do so is said to involve giving at least tacit approval to illegal conduct. Second,

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² An action does not arise from a base cause. For purposes of convenience the usual abbreviation *ex turpi causa* has been employed throughout this article.

³ See, for example, *Colburn v. Patmore* (1834) 1 C. M. & R. 73; *Holman v. Johnson* 1 Cowp. 341.

⁴ As in *Taylor v. Chester* (1869) L.R. 4 Q.B. 309; In *re Great Berlin Steamboat Coy.* (1884) 26 Ch. D. 616; *Gascoigne v. Gascoigne* [1918] 1 K.B. 223.

⁵ *Bowmakers v. Barnet Instruments Ltd.* [1945] K.B. 65; *Gray v. Southouse* [1949] 2 All E.R. 1019; *Taylor v. Bowers* (1876) 1 Q.B.D. 291; *Kearley v. Thomson* (1890) 24 Q.B.D. 742.

injury may have occurred to a plaintiff in the course of an enterprise that is undoubtedly criminal. While this distinction is not easily drawn it has been tacitly accepted in recent cases and although it is now clear that a plaintiff will not be totally denied recovery in tort merely because he has broken a safety regulation,⁶ different considerations may apply in the case of, say, one felon suing his accomplice for injuries caused by the latter's negligence in the course of a joint criminal activity. Both situations have historically attracted the *ex turpi causa* doctrine which defeated a plaintiff who had acted illegally in either sense, but its disappearance in the first type of case on the one hand, and strong authority requiring its retention in the second type of case on the other, demand separate treatment of them, particularly in view of the different approach adopted by the courts to each type of case. In the present article, therefore, it is proposed to examine the development of what I shall call the defence of illegality in negligence actions in relation both to the plaintiff who has been injured while violating statutory regulations and to the plaintiff who has similarly suffered whilst engaged in the commission of a crime.

Plaintiff's Violation of Statutory Regulations

The earliest cases in this field, which arose in America at the end of the last century, reflect a severe and uncompromising ethic and totally deny recovery where the plaintiff's unlawful act resulted in harm to himself. In several cases decided by the Supreme Court of Massachusetts⁷ recovery was disallowed where the plaintiff had been using a vehicle on the highway for secular purposes in breach of the Sunday Observance Acts and had suffered injury due to the defective condition of the road. Likewise in Wisconsin recovery was denied to a plaintiff who had driven a tractor of a weight exceeding the statutory maximum over a bridge which collapsed although it was shown that, due to the defendant's negligence, the bridge would have fallen even had the weight been within the legal limit.⁸ The rationale of these decisions appears to have been based on causation: the disrepair of the highway was said to be merely an 'antecedent condition' whereas the unlawful act of driving a vehicle over it on a Sunday was the efficient cause of the accident. As one commentator⁹ has put it, the plaintiff was denied recovery where the defendant's act

⁶ *Henwood v. Municipal Tramways Trust* (1938) 60 C.L.R. 438. *Vide infra*.

⁷ Especially *Bosworth v. Swansea* 10 Met. (Mass.) 363; Also *Jones v. Andover* 10 Allen (Mass.) 18; *Connolly v. Boston* 117 Mass. 64.

⁸ *Welch v. Geneva*. 110 Wisc. 388.

⁹ Harold S. Davis: 'The Plaintiff's Illegal Act as a Defence in Actions of Tort' 18 *Harvard Law Review* 505.

while blameworthy, served only to create a passive, antecedent condition, and the plaintiff's unlawful act was the active agency which finally brought about the result . . . because the unlawful act was the immediate cause of the damage.¹⁰

In an effort to overcome the injustices apparent in those uncompromising results, courts in numerous American states¹¹ developed a test which endeavoured to resolve the problem more in terms of fault. Thus recovery was allowed where it could be shown that the harm would have occurred regardless of whether the plaintiff had been acting illegally at the time or not. That is to say although both the plaintiff's presence and the defendant's negligence are necessary causes of the harm suffered, courts in the more progressive states tended to place the onus on the defendant of showing that the plaintiff was, in a real sense, the author of his own injury solely by virtue of the fact that he was acting illegally, and that had he not been acting illegally no harm would have resulted.¹² In *Kansas City v. Orr*,¹³ for example, the plaintiff succeeded against the highway authority in a fact situation similar to the earlier Massachusetts highway cases. By this time the rationale may be said to have shifted so that

the (plaintiff's) unlawful act is not a bar merely because it was a *sine qua non*. It is not enough that the unlawful act put the plaintiff or his property in a position to be affected by the defendant's negligent act: the unlawful act must be the active agent which finally produces the result.¹⁴

Courts in Commonwealth countries, however, never took this view.¹⁵ Canadian, New Zealand and Australian courts have analysed these problems neither in terms of causation nor of fault but have rather viewed the purpose of the penal statute in question and in appropriate cases have allowed the plaintiff to recover, with apportionment of damages for contributory negligence of which the statutory breach may in some cases be evidence. In *Vancouver v. Burchill*,¹⁶ for example, the Supreme Court of Canada held that the plaintiff's failure to obtain a driver's licence and a permit, for the purpose of operating a motor vehicle for hire, as required by a city by-law and a provincial statute respectively, did not disentitle him to recover damages from the defendant authority for its negligence in failing to maintain the highway. The court unanimously

¹⁰ *Ibid.* 509. Italics supplied.

¹¹ *Ibid.* 510-512 Idaho, Kansas, New Hampshire, New York, Connecticut and Rhode Island.

¹² *Mechler v. McMahon* (1931) 184 Minn. 476. ¹³ 62 Kan. 61. ¹⁴ *Ibid.* 67.

¹⁵ In *Walton v. Vanguard Motor Bus Co.* (1908) 25 T.L.R. 13, it was held that in an action for damage to a lamp post due to the negligent driving of a motor vehicle it was no defence that the plaintiff had acted unlawfully in erecting it on the footpath.

¹⁶ [1932] 4 D.L.R. 200.

held that the purpose of the statutory provisions in question was to regulate the user of the highway for the protection of the public and to control the hiring of vehicles but not to affect the civil rights of persons committing breaches of them. Where the regulations provided their own penalty it would, said Duff J., be:

beyond the scope and intendment of the statute if we were to enlarge these sanctions by introducing an additional one having the effect of depriving such a person (in case of non-observance of this obligation) of his *prima facie* right to sue the municipality for negligence. . . .¹⁷

In many cases, however, statutory regulations may be more clearly designed to protect a class of persons of which the plaintiff is a member by attempting to reduce specific risks. This type of situation is, moreover, one in which there is scope for the well recognized defences of absence of duty of care, voluntary assumption of risk or contributory negligence. The latter especially may appear through the plaintiff's failure to comply with the regulations in question. In other cases the defendant may owe the plaintiff no duty of care, either, because it may be said to cast too great a burden on the defendant to foresee that a plaintiff will act in breach of certain statutory provisions or, in cases involving occupiers' liability, that the plaintiff has by his breach of statutory duty become a trespasser to whom no duty is owed other than a positive duty not to injure him deliberately.¹⁸

Motor traffic regulations, Factories Acts and municipal by-laws, for example, frequently exist for the protection of the person, and courts even in Commonwealth countries have displayed somewhat differing attitudes towards plaintiffs who have acted in breach of them. In *Canning v. The King*¹⁹ Sir John Salmond was prepared to hold that where the purpose of penal statutory provisions may clearly be characterized as the protection of a class of persons of which the plaintiff is a member a breach of the provisions by the latter is itself conclusive evidence of contributory negligence. On the other hand, in *Hillen v. I.C.I. (Alkali) Ltd.*²⁰ a similar breach of statutory duty was held by the Court of Appeal to negate the defendant's duty of care and consequently to defeat the plaintiff's claim for damages. In *Hillen's* case the plaintiffs were stevedores and

¹⁷ *Ibid.* 201. The appellant argued, *inter alia*, that by failing to comply with the regulations in question the respondent became a trespasser on the highway to whom no duty of care was owed. Although this plea was unsuccessful on the facts of the present case, since the municipality held the highway on trust for the public and subject to the right of the public to 'pass and repass', it should be noted that in many cases a plaintiff may become a trespasser by his breach of statutory provisions and cannot make an occupier responsible for the defective condition of his premises.

¹⁸ *Commissioner for Railways v. Quinlan* [1964] 2 W.L.R. 817.

¹⁹ [1924] N.Z.L.R. 118.

²⁰ [1934] 1 K.B. 455.

had used hatch covers as a stage for preparing a sling of cargo, an operation contrary to regulations made under the Factory and Workshops Act 1901.²¹ The hatch covers gave way and the plaintiffs were thrown into the ship's hold, sustaining injuries. Recovery was denied not on the general basis of the *ex turpi causa* doctrine, but for the specific reason that since the plaintiffs knew of the illegal nature of their conduct the defendant was excluded from any duty of care towards them other than to abstain from doing acts to injure them. Furthermore there was held to be no obligation on the defendant to make the illegal operation safe for the plaintiffs. Scrutton L.J. argued from the following analogy. He said:²²

An analogous case appears to be a joint adventure of smuggling. A owns a house to which his confederates B and C bring smuggled kegs of brandy, to be lowered into A's cellar by a rope which A knows to be defective. It breaks and injures B waiting in the cellar for the keg. It seems to me clear that B could not sue A for not warning him of the trap on the authority of *Indermaur v. Dames*²³ because the whole transaction is known by each party to be illegal and there is no contribution or indemnity between joint wrongdoers.²⁴ Though it could also be true, as suggested, that a burglar could not sue the houseowner for a defect in the staircase known to the houseowner but not to the burglar, and a cat burglar could not sue the houseowner for non-disclosure of the added risk of a defect in the waterpipe up which he was climbing, but which he did not know of, these analogies, though amusing do not help as there was no invitation bringing the burglar on the premises or common interest between houseowner and burglar raising reciprocal duties.

It would appear from this analogy that Scrutton L.J. recognized no distinction between breaches of statutory provisions, involving no essential criminal conduct, designed to protect the plaintiff and others from harm, and acts illegal solely in the criminal sense.

In *Hillen's* case the plaintiffs' conduct fell within the first category. In the analogy of Scrutton L.J. it falls clearly within the second. The later cases tend to show that the result may very well vary according to the category in which the plaintiff's conduct lies. An illegal act, by itself, should not generally negate a civil duty of care since, as Professor Glanville Williams has put it:²⁵

The duty not to smuggle is logically distinct from the duty to warn

²¹ *Ibid.* 457 Reg. 33(a) 'No deck-stage or cargo-stage shall be used in the *processes* unless it is substantially and firmly constructed and adequately supported, and, where necessary, securely fastened.'

Reg. 34(b) '*Hatch* coverings shall not be used in the construction of deck or cargo-stages, or for any other purpose which may expose them to damage'.

²² *Ibid.* 467.

²³ (1866) L.R. 1 C.P. 274.

²⁴ This, of course, is no longer so following an English statute of 1935 under which contribution and indemnity was allowed between joint tortfeasers. In Victoria see Wrongs Act 1958, s. 24.

²⁵ Joint Torts and Contributory Negligence 1951, 334.

invitees of traps, just as the duty not to operate a car without a licence is distinct from the duty not to drive a car negligently; breach of the one should not be a defence to an action for breach of the other.²⁶

Following *Hillen's* case, then, the question remained open as to whether a plaintiff's breach of statutory duty should necessarily amount to contributory negligence, whether it operated to negate the defendant's duty of care, or whether, although it might provide evidence to support either of these defences, it did not necessarily provide a complete defence. The High Court of Australia resolved the problem in *Henwood v. Municipal Tramways Trust*.²⁷ In that case a passenger travelling on one of the defendant's trams was overcome by nausea and, upon leaning over a guard rail on the off side of the tram, was struck on the head by two successive standards bearing overhead wires, as a result of which he died. His parents sued under the Wrongs Act 1936 (S.A.) alleging that the tram should have been made safe. The defence had been successfully raised at first instance that the deceased had acted unlawfully in breaking a by-law of the defendant authority²⁸ and that the *ex turpi causa* doctrine applied. The High Court (Latham C.J., Starke, Dixon and McTiernan JJ.) allowed the appeal and held that there is no general principle which denies to a person who is engaged in an unlawful act the protection of the civil law imposing upon others duties of care for his safety. As Latham C.J. said:²⁹

The person who is injured in a motor accident may be a child playing truant from school, an employee who is absent from work in breach of his contract, a man who is loitering upon a road in breach of a by-law, or a burglar on his way to a professional engagement—but none of these facts is relevant for the purpose of deciding the existence or defining the content of the obligation of a motor driver not to injure them. Thus it cannot be held that there is any principle which makes it impossible for a defendant to be liable for injury brought about by his negligence simply because the plaintiff at the relevant time was breaking some provision of the law.

The defendant further argued that the breach of a by-law aimed at securing the safety of a particular person necessarily amounts to

²⁶ This distinction raises the difficult and interesting question, discussed in the second part of this article, of how far a plaintiff's illegal conduct in the essentially criminal sense is a good defence to an action for negligence. The decision in *Hillen's* case was affirmed on appeal to the House of Lords on the grounds that the plaintiffs were trespassers and in any event were guilty of contributory negligence.

²⁷ (1938) 60 C.L.R. 438.

²⁸ *Ibid.* 439. Municipal Tramways Trust Act (1906) S.A. S.38A. 'No passenger shall project or lean his head or other portion of his body or limbs out of any window in any tram, or outside the barrier on the offside of the open portion of any tram. Penalty £5'.

²⁹ *Ibid.* 446.

negligence by that person and that, if it contributes to his injury, it is necessarily contributory negligence. Latham C.J. disposed of this argument by holding that such a by-law:

is not a provision designed to protect the (Tramways) Trust against damage which might be caused to the Trust by passengers leaning out of the vehicles. . . The by-law provides its own remedy for breach, namely a penalty of £5. It does not provide that the result of a breach of the by-law shall be that the offending passenger shall not be entitled to recover damages against the Trust or that his breach of the by-law shall necessarily amount to contributory negligence.³⁰

In the absence of English authority Dixon and McTiernan JJ. referred briefly to the American treatment of the problem. The early cases in that country had concluded that 'if the immediate cause of the injury is the unlawful act of the plaintiff, he cannot recover; but, if the unlawful act does no more than create a prior state of affairs upon which the defendant's negligence operates, he may recover.'³¹ It would seem that, applied to the present case, this test would debar recovery since the plaintiff's illegal act was in fact the 'immediate cause' of the injury.

Nevertheless the Court allowed the appeal, and said:³²

We do not think that, in the absence of English authority requiring us to do so, we ought to adopt as part of the law of torts a general principle that, if the damage suffered by the plaintiff has been directly brought about by an act of his which is unlawful, he can never complain of a wrongful or negligent act or omission on the part of the defendant from which the damage otherwise flows as a reasonable and probable consequence.

And the new test proposed by the High Court is contained in the following sentence:

It appears to us 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 a person doing the prohibited act from complaining of the other party's neglect or default, without which his own act would not have resulted in injury.³³

This test, as Dixon and McTiernan JJ. pointed out is an 'extension of the test of Sir John Salmond in *Canning v. The King*'.³⁴ Whereas Sir John Salmond treated the statutory breach as conclusive evidence of contributory negligence Dixon and McTiernan JJ. pointed out that this need not be so, and that 'unless the statute so intends, no penal provision should receive an operation which deprives a person offending against it of a private right of action which in the absence of such a statutory provision would accrue to him'.³⁵

³⁰ *Ibid.* 447.

³¹ *Ibid.* 459.

³² *Ibid.* 460.

³³ *Ibid.* 460.

³⁴ *See ante.*

³⁵ *Ibid.* 461.

For present purposes, then, a penal statute may be characterized in either of two ways. It may first of all be intended merely to lessen the risk of injury by imposing a sanction for its breach, although it may also have other purposes. On the other hand it may be intended to disentitle the plaintiff acting in breach of it from recovering in tort for an injury to which he contributed by so acting. The task of the judge in cases of this kind is, according to the High Court, to determine into which class a particular statute falls.

In *Henwood's* case, Dixon and McTiernan JJ. went on to agree with the Chief Justice that since the Tramways Trust had power only to make by-laws 'generally for regulating passenger traffic' it would be beyond power for the Trust to attempt to exclude its civil liability. The by-law in question was therefore characterized as of the former kind, and the appeal by the plaintiff was allowed.

Two further English cases require discussion. In *Cakebread v. Hopping Bros. (Whetstone) Ltd*³⁶ the plaintiff had been injured when he refused to allow the defendants (his employers) to lower a safety guard on a woodworking machine as required by certain regulations. The defendant pleaded, *inter alia*, that the plaintiff had aided and abetted his employers in their breach of statutory duty and that since this constituted an illegal act the *ex turpi causa* doctrine should apply. The Court of Appeal held the defendant liable for negligence and apportioned damages of 50% against each party. Cohen L.J. referred to the defence of illegality as follows:³⁷

The maxim *ex turpi causa* is based on public policy, and it seems to me plain on the facts of this case that public policy, far from requiring that this action shall be dismissed, requires that it shall be entertained and decided on its merits. The policy of the Factories Act makes it plain that such a defence as that put forward here would be inconsistent with the intention of Parliament.

The reference to legislative intention in *Cakebread's* case is a somewhat similar test to that laid down by Dixon and McTiernan JJ. in *Henwood's* case; but it is by no means identical with the latter test, and the distinction may well be important. In *Henwood's* case the appeal to legislative purpose allowed recovery because the statute was characterized as one not intended to disentitle the plaintiff acting in breach of it to recover. But the test of Cohen L.J. in *Cakebread's* case apparently required a clear, or at any rate constructive legislative intention in terms of policy that to apply the *ex turpi causa* rule would be inconsistent with that policy. The distinction may be important where a statute is neutral either specifically or constructively in its 'policy' as to recovery in tort where a plaintiff has acted in breach of it. Take, for example, the law requiring motor

³⁶ [1947] K.B. 641.

³⁷ *Ibid.* 654.

vehicles to be lit at night, and for the breach of which penal consequences flow. If a plaintiff is injured whilst driving a motor vehicle in breach of this law, due to the defendant's negligence, it seems as if he would recover (with probable apportionment of damages for contributory negligence) under the test in *Henwood's* case, since there is no apparent legislative intention disentitling him to recover. However, on a strict application of the test in *Cakebread's* case, he would not, since to apply the *ex turpi causa* maxim would not, in the words of Cohen L.J. 'be inconsistent with the intention of parliament' because, on the point of recovery or no recovery in tort, the 'purpose' of the statute is quite neutral. There is little doubt that the test in *Henwood's* case is to be preferred since, at least where the plaintiff's conduct is morally blameless, it would in effect involve a regression to the absurdities of the nineteenth-century American position to allow recovery only when the policy of the statute required it. Applying the test in *Henwood's* case to the facts of *Cakebread's* case the result of course would be the same but for a reason which, it is submitted, is sounder in principle.

Finally, the House of Lords in *National Coal Board v. England*³⁸ allowed recovery, with apportionment for contributory negligence, to a mineworker who was injured partly as a result of a breach of his own and partly as the result of a breach of his employer's statutory duty. Three of their Lordships dealt with the *ex turpi causa* maxim at some length. Lords Porter and Reid both held that the maxim did not apply to breaches of statutory provisions of this kind since the apportionment legislation, which provides that a claim shall not be defeated by reason of the fault of one person where damage is partly caused by the fault of another, defines 'fault' as meaning 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this act, give rise to the defence of contributory negligence.' Both their lordships pointed out that this definition makes no distinction between a criminal breach of statutory duty and a non-criminal breach and would therefore seem, in its terms, to exclude the *ex turpi causa* rule. Lord Asquith of Bishopstone agreed in this view but went on to add that he would have reached the same result in the absence of the definition. He said, *inter alia* on this point:³⁹

... it seems to me in principle that the plaintiff cannot be precluded from suing simply because the wrongful act is committed after the illegal agreement is made and during the period involved in its execution. The act must . . . at least be a step in the execution of the common illegal purpose. If two burglars A and B, agree to open a safe by means of explosives, and A so negligently handles the ex-

³⁸ [1954] A.C. 403.

³⁹ *Ibid.* 428-429.

plosive charge so as to injure B, B might find some difficulty in maintaining an action for negligence against A. But if A and B are proceeding to the premises which they intend burglariously to enter, and before they enter them, B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort (provided he had first prosecuted B for larceny). The theft is totally unconnected with the burglary. There is, however, a surprising dearth of authority on this point.⁴⁰

In view of subsequent cases it is perhaps a cause for regret that the House of Lords here did not take the opportunity carefully to examine and clarify the application of the *ex turpi causa* maxim to actions in tort. In purporting to make a statement of principle Lord Porter said that he agreed with the test of Cohen L.J. in *Cakebread's* case, a test which has been shown to be of very limited application.

It thus seems, following *Henwood's* case, that there is no reason why, in Australia, a plaintiff violating a statutory regulation should not succeed (a) where the purpose of the regulation is irrelevant to the type of harm suffered, or (b) if the purpose of the legislation is relevant in this sense, where the statutory provisions in question do not on their face specifically prohibit recovery for loss suffered as a result of their breach. The normal defences of absence of duty of care, voluntary assumption of risk and contributory negligence would appear to remain unaffected by the decay of the *ex turpi causa* rule and remain applicable in appropriate cases.

Plaintiff's Violation of the Criminal Law

In Commonwealth countries there exists surprisingly little authority on the question of how far parties in a joint criminal activity are tortiously liable to one another for harm inflicted in the course of that activity. The matter has arisen in England and Canada historically in cases of illegal prize fights⁴¹ and in modern times in relation to assaults and public affrays to which the parties consent, and it has been accepted, at least since 1694, that no action for assault will lie and that the defendant can rely either on the ground of consent or on the general doctrine of *ex turpi causa*.⁴²

In negligence actions, in the absence of any guidance from Commonwealth countries, American courts overcame a general reluctance on public policy grounds to disallow recovery by reference to a test of causation. In *Meador v. Hotel Grover*⁴³ the Supreme Court

⁴⁰ The observations of Lord Asquith are included at this point for purposes of completeness. They are more fully discussed in the following section.

⁴¹ See *Matthew v. Ollerton* (1693) Comb. 218. *Boulter v. Clark* (1747) Buller N.P. 16.

⁴² *Wade v. Martin* [1955] 3 D.L.R. 635. An action by a plaintiff who had participated in a fight with the defendant was disallowed specifically on the ground of *volenti non fit injuria*, or more generally on the basis of the *ex turpi causa* rule.

⁴³ (1942) 9 So 2d. 782.

of Mississippi allowed recovery to the dependants of a man who was fatally injured at an elevator in an hotel whilst going to the room of a prostitute for immoral purposes on the nebulous ground that the injury was not traceable to the deceased's breach of the law:⁴⁴ 'such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and not a contributory cause of the injury recovery may be permitted'. Likewise in *Holcomb v. Meeds*⁴⁵ on facts materially similar, the Supreme Court of Kansas allowed recovery for the same reason, since it was shown that the use of a room for immoral or unlawful purposes had no causal connection with the death. In *Havis v. Iacovetto*⁴⁶ a passenger was allowed recovery by the Supreme Court of Colorado against a driver with whom he had made an illegal contract of hire because the illegal act did not contribute to the accident.

Another American case, *Manning v. Noa*,⁴⁷ is reminiscent of nothing more than the writing of A. P. Herbert. In this case the plaintiff's illegal act consisted of going to a cathedral to play 'bingo', an illegal card game, which according to the report, was regularly sponsored by the church. On leaving the cathedral at the conclusion of the game the plaintiff fell into a hole on the church property and was injured. In rejecting the defence of *ex turpi causa* and giving damages to the plaintiff the Michigan Supreme Court affirmed the test of causation as follows:⁴⁸

The evening has come to a close and the day's pursuits wicked and pure, are over. The plaintiff is proceeding by normal means of egress, and, it is asserted, in the exercise of due care, towards her domicile, when she is hurt while still on the church premises. Will the action lie? Or is it barred by the evil range of the evening's activities? . . . Assuming, but not deciding, that as Mrs. Manning abandoned her evening's diversions and started for home, she still wore a halo of illegality, or, as the defendant puts it still 'was tarred with the illegal transaction', is she outside the law, precluded from recovery? We find no warrant for the position. It goes too far. In order to have such an effect an unlawful act must be one which the law recognizes as having a *causal connection* with the injury complained of. If the unlawful act was merely collateral to the cause of action sued upon, and did not proximately contribute to the injury, recovery is not barred.

Finally in *Danluck v. Birkner*⁴⁹ the Ontario Court of Appeal and the Full Supreme Court of Canada declined to countenance an action for damages by a plaintiff who, being on premises operated as an illegal betting establishment, was injured during a police raid when he fell from a second floor door which opened out of a wall with

⁴⁴ *Ibid.* 785. ⁴⁵ (1952) 246 P. 2d. 239. ⁴⁶ (1952) 250 P. 2d. 128.

⁴⁷ (1956) 77 A.L.R. 2d. 955. ⁴⁸ *Ibid.* 958.

⁴⁹ [1946] 3 D.L.R. 172; [1947] 3 D.L.R. 337.

no attached staircase. The reasons given in the judgments are disappointing. The main judgment in the Ontario Court of Appeal, that of Roach J.A., rests on the grounds first, that the plaintiff was neither an invitee nor a licensee since he was on the premises for an illegal purpose and consequently that the defendant's only duty was not to injure him deliberately or recklessly and second on the authority of the old case of *Colburn v. Patmore*,⁵⁰ on policy grounds. In the Supreme Court of Canada the action was rejected for the brief and quite nebulous reason that, assuming the plaintiff should be characterized as an invitee 'we do not think that the duty on the part of the respondents toward the appellant even as an invitee can be extended to include responsibility in the circumstances surrounding the manner in which the appellant used the premises in making his exit'.⁵¹ Whether the 'manner' of exit refers to his criminality, his contributory negligence or both is not explained, and the case is the more unsatisfactory since the Supreme Court said,⁵² 'We must not be taken as approving the grounds upon which the Court below proceeded'.

In Australia several important cases have arisen in this field since 1961 and reflect considerable judicial uncertainty as to the present scope of the *ex turpi causa* doctrine which, if it exists as an independent defence at all, must be construed very narrowly following the decision in *Henwood's* case.⁵³ In *Sullivan v. Sullivan*⁵⁴ the parties were son and father who had used a motor car in pursuance of a burglary. They were carrying gelignite and detonators in the car for that criminal purpose at the time when the plaintiff was injured due to the defendant's negligent driving of the car. The defence of illegality was raised in the District Court before Amsberg D.C.J. on a motion seeking leave to add it, out of time, as a special defence. The learned judge found for the defendant and relied on the test suggested by Lord Asquith in *National Coal Board v. England*:⁵⁵

The test to be applied is this: 'Is the act, the doing of which was done in a negligent fashion, a step in the execution of the common illegal purpose?' If so, no action lies. If not, the wrong suffered is compensable.

⁵⁰ (1834) 1 Cr. M. & R. 73. The case provides an example of the early uncompromising attitude of courts towards plaintiffs guilty of criminal conduct. The plaintiff employed the defendant to edit a publication, and the latter, without the plaintiff's knowledge and consent, published a criminal libel for which the plaintiff, as owner, was convicted and fined £100. His action to recover against the defendant damages sustained by the conviction was unsuccessful. Lord Lyndhurst said, at p. 83, 'I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. . . . I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission'.

⁵¹ [1947] 3 D.L.R. 337 at 338.

⁵² *Ibid.* 337. ⁵³ See *ante*. ⁵⁴ (1962) 79 W.N. (N.S.W.) 615. ⁵⁵ *Ibid.* 618.

This test, said Amsberg D.C.J., is to be supported on three grounds of principle. First, to allow recovery would amount to a tacit approval of the criminal activity by the civil court and such approval is contrary to public policy which is the foundation of the *ex turpi causa* rule. Second, the relationship of the parties was such as to preclude any legal duty of care from arising in the performance of the illegal act. Third, in this case there was said by Amsberg D.C.J. to be a clear causal connection between the plaintiff's illegal act and the defendant's negligent act.⁵⁶ The next case, *Morris v. Smith* is unreported. In this case the parties had agreed to steal a motor car for the purpose of illegally using it and were in fact illegally using it when the plaintiff was injured in circumstances in which, in the view of Ferguson J., a jury would have been entitled to find that the defendant's driving had been negligent. The judge nevertheless held that the *ex turpi causa* rule was applicable to the facts and found for the defendant.

The Full Court of the Supreme Court of New South Wales reviewed all the law relating to the defence of illegality in negligence actions when the matter was squarely raised in *Godbolt v. Fittock*.⁵⁷ In this case the plaintiff and the defendant were driving in a motor truck to a country town to dispose of six calves which they had immediately before stolen from three separate farms. The truck ran off the road and struck a tree causing injury to the plaintiff. The District Court judge found for the defendant on a direct application of the *ex turpi causa* doctrine since, as he found, the defendant's negligence occurred whilst he was performing an act which was a step in the execution of a common illegal purpose. In the Supreme Court, Sugerman J. (with whom Brereton J. concurred) in finding for the defendant, was concerned to review the whole body of law in this area, including the American cases. In those cases, as we have seen, the rigour of the *ex turpi causa* rule had been modified by reliance on a test of causation: the illegal act itself must have directly 'caused' the accident in order for the plaintiff to be defeated. In *Godbolt v. Fittock* the Court, including Manning J. on this point, abandoned causation and frankly denied relief to the plaintiff on public policy grounds. Thus Sugerman J. said:⁵⁸

The question is not one of causation as between the specifically criminal ingredient in the circumstances and the injury, but one of public policy, operating in this instance in a disabling sense by way of avoiding the encouragement to crime which would follow if the law lent its aid to the resolution of disputes of the present kind between its practitioners and bent its powers of ensuring that one should receive compensation from another for injuries sustained

⁵⁶ *Ibid.* 619.

⁵⁷ [1964] N.S.W.R. 22.

⁵⁸ *Ibid.* 29.

by negligent acts and omissions in the course of activities directly connected with the execution of a joint criminal purpose.

Henwood's case was distinguished by Manning J. on the grounds of the criminal and morally culpable nature of the present facts. Manning J. also thought the question of causation should be relevant but only for the purpose of deciding the primary question of the defendant's duty of care. If a duty is thus established public policy, may, he thought, in cases like the present nevertheless operate so as to debar relief. On the facts of this case His Honour thought the law relating to duty was uncertain whereas the public policy issue was clear, and that recovery should be denied for the latter reason.

It is submitted that several important criticisms may be made of the decision in *Godbolt v. Fittock*. The whole question of recovery or no recovery was made by the Court to turn on the ground of public policy reflected in the *ex turpi causa* doctrine, namely that the civil courts should not allow recovery of damages in these cases since that is said to involve the court in tacitly approving the criminal activity out of which the cause of action arises. It is, however, submitted that to say that criminally guilty parties are not beyond the cognisance of the law, and to allow recovery of damages for negligence, is not to give approval to the illegal enterprise in question: it is merely to maintain the otherwise accepted legal distinction between the breach of the duty owed to the public at large under the criminal law and the breach of a private duty to take reasonable care for another's safety. As Professor Glanville Williams has shown⁵⁹ there is no logical reason why a breach of the criminal law should provide a defence to an action for the breach of a duty owed in private law.

Furthermore, to deny a person redress in the civil courts because he has committed a crime imposes, in effect, a further sanction beyond that prescribed by the law for his criminal conduct. Most criminal offences are the subject of clearly specified maximum penalties and where a person has paid that penalty it would seem pointless to impose upon him a disability which may prove much more onerous than the criminal sanction itself. In some cases, moreover, the criminal's inability to sue for damages may cast upon others a sanction which should attach to him personally. Suppose, for example, that in *Godbolt v. Fittock* the plaintiff had been killed in the motor accident instead of merely injured. If his dependants had subsequently brought an action under Lord Campbell's Act⁶⁰ they could have recovered nothing against the defendant (or his

⁵⁹ Joint Torts and Contributory Negligence 1951, 334.

⁶⁰ Vic.: Wrongs Act 1958 s. 16.

insurance company) since, because of his criminal act, the deceased would have had no cause of action at the time of his death. In these circumstances the innocent wife would be forced to bear the consequent financial loss where a remedy would have been available to her had her husband not been engaged in a criminal activity. Such a disability, when cast on the dependants of a deceased criminal, amounts to a vicarious criminal responsibility which is contrary to the very basis of criminal jurisprudence.

The 'encouragement to crime' which Sugerman J. foresaw in *Godbolt v. Fittock* if recovery were allowed is scarcely, it is submitted, a reality, for even where criminals are engaged in a joint enterprise an action for damages merely compensates one as against the other. On the other hand the knowledge that his criminality did not render him immune from an action for damages by his partner might act, if at all, as a restraining influence on the otherwise reckless criminal.

If a defendant is simultaneously both criminally guilty and civilly liable it is surely incongruous to allow him successfully to plead his criminal act by way of defence to the civil action, yet this is in effect what happened in *Sullivan v. Sullivan*, *Morris v. Smith* and *Godbolt v. Fittock*. The plaintiff, moreover, would not necessarily be forced to plead his own criminality since he may well be able to make out his case without relying upon his criminal conduct or intent. In such cases as *Godbolt v. Fittock* the plaintiff need not, it is suggested, necessarily have to rely on the *animus* he had at the time of the accident to commit a crime: he should merely have to plead the facts which establish a tortious breach of duty by the defendant towards him. If anyone, it is the defendant who would be required to plead, against the plaintiff, the illegal nature of the enterprise in which they were both involved in order to invoke the *ex turpi causa* rule. As a matter of pleading there is clear authority for the proposition that a defendant may not rely on his own wrongdoing by way of defence;⁶¹ but a plaintiff injured in a joint criminal activity with the defendant need not run foul of the rule forbidding a cause of action to be brought upon the illegal transaction because the defendant's breach of duty towards him is logically distinct from his own criminal act.

As the law stands it seems necessary for courts to distinguish morally innocent from morally culpable wrongs committed by a plaintiff. It is clear that where two parties are acting illegally in the first sense recovery will not be denied.⁶² The question thus arises

⁶¹ *Montefiori v. Montefiori* 1 Black. W. 363; Cf. *Press v. Mathers* [1927] V.L.R. 326.

⁶² *Henwood's case*, *Ante*.

as to where the line is to be drawn if *Godbolt's* case is followed and what sort of test should be employed for this purpose.

A suitable solution, it is submitted, would be to apply the legislative purpose test proposed in *Henwood's* case even where a plaintiff has committed a grave crime. If the test in *Henwood's* case is applicable to the breach of a penal safety statute, why not also in cases of the joint commission of minor statutory offences? And if to these acts, which may or may not involve moral culpability, why not even to conduct amounting to a felony? Such an application of the legislative purpose test would dispense with this difficult, and it is submitted, pointless implied distinction between morally innocent and morally culpable breaches of the law.

The last, and perhaps the most significant, of the Australian cases is *Boeyen v. Kydd*,⁶³ a decision of Adam J. in the Supreme Court of Victoria. Although the case was decided on circuit and therefore does not contain a detailed review of all the relevant authorities, it is nevertheless one which, it is respectfully submitted, provides for the first time in Australia a correct analysis in principle of the law relating to the limits of the defence of illegality in tort.⁶⁴ In this case Adam J. was prepared to allow the recovery of damages for negligence in circumstances in which the plaintiff had suffered injury whilst travelling as a passenger in a motor car driven by the defendant and which was being illegally used by both of them at the time of the accident. The defendant pleaded that it was contrary to public policy to allow the plaintiff to recover, and he relied upon *Sullivan v. Sullivan*. In rejecting the defence, the learned judge regarded it a clear law after *Henwood's* case that 'the mere fact that the plaintiff may have been illegally using this car, and so committing an offence under the Crimes Act, does not in itself preclude him from claiming damages if the driver of the car was guilty of negligence'.⁶⁵ The question, said Adam J., was whether it made any difference that both parties, plaintiff and defendant—as also in *Sullivan v. Sullivan* and *Godbolt v. Fittock*—were engaged in a criminal activity at the time of the accident. His Honour held that it did not, and thought there was no justification for rendering a plaintiff in these circumstances 'virtually an outlaw without any legal protection from the conduct of his companion in crime'.⁶⁶ Adam J. was not, however, prepared to take the view that in no circumstances could the plea of the plaintiff's illegal conduct be a

⁶³ [1963] V.R. 235.

⁶⁴ *Boeyen v. Kydd* was in fact decided slightly prior in time to *Godbolt v. Fittock* but was not referred to in that case where the Full Court of New South Wales relied upon *Sullivan v. Sullivan*, a case which Adam J. declined to follow.

⁶⁵ *Ibid.* 236.

⁶⁶ *Ibid.* 237.

good defence to an action in tort, and three specific classes of cases were referred to in support of this view.

First, His Honour considered that where the plaintiff's illegal conduct is 'in substance the real cause of his own damage . . . then on general principles that plaintiff could not recover from any other party'.⁶⁷ Thus, for example, it seems that a criminal injured in a safe cracking enterprise could scarcely be heard to allege his colleague's negligence in firing the charge, although, as we have seen, he may recover damages where the defendant is not a co-felon but a person falling within the ambit of the normal rules for fixing tort liability.⁶⁸ Where the defendant is a co-felon and injury is caused in the very act of committing a dangerous crime it is clear that in many cases the defence of *volenti non fit injuria* will apply, since a criminal plaintiff performing dangerous or desperate actions may frequently be regarded as accepting whatever risk of injury arises as an integral part of his conduct. Where, on the other hand, a complete defence of *volenti non fit injuria* does not appear from the facts, participation in a dangerous operation may well be evidence of contributory negligence leading to the apportionment of damages according to fault. In both situations the proper ground of defence is not that of *ex turpi causa*; it stems from the plaintiff's actual conduct rather than from a moral judgment arising out of it.

In the second place Adam J. was prepared to see the defence of illegality as operating on public policy grounds to defeat a plaintiff in tort where his injury arises through an illegal act which is 'a step in the execution of an illegal purpose common to himself and the defendant'.⁶⁹ Here also the grounds of public policy mentioned by Lord Asquith in *National Coal Board v. England*, and referred to by Adam J., are, it is submitted, better seen as the result of applying the normal defences of *volenti non fit injuria* and contributory negligence as the basis for disallowing recovery rather than as resulting from a blanket application of the *ex turpi causa maxim*.

As a corollary to these grounds of defence Adam J. specifically referred to the situation where in the commission of a joint crime with the defendant, a plaintiff 'suffers a harm which may be regarded as a necessary or contemplated incident of the crime',⁷⁰ and it is important to notice that His Honour went on to add that 'where a defence does not come within any of the well recognized defences such as contributory negligence or *volenti non fit injuria*, I would

⁶⁷ *Ibid.* 237.

⁶⁸ *Henwood's* case, seen *ante*, supports the view that a defendant will not be relieved from the consequences of his negligence merely because the plaintiff was acting illegally or even, it seems, criminally, at the time when the injury occurred to him. This view was affirmed by Adam J. in the present case. See *ante* at 236.

⁶⁹ *Ibid.* 237.

⁷⁰ *Ibid.* 237. See *Platz v. City of Cahoes* [1889] N.Y. 219.

be very reluctant, in the absence of authority, to allow it on the basis of some supposed principle of public policy'.⁷¹

In the result Adam J. considered that none of these circumstances was operative in *Boeyen v. Kydd*, and found for the plaintiff. The case is therefore in conflict with *Sullivan v. Sullivan* and *Godbolt v. Fittock* but would seem clearly to be better law since the logical distinction is maintained between questions of criminal guilt, negligence and the normal defences to actions for negligence.

There is little historical evidence that the doctrine of *ex turpi causa* was ever intended to apply in tort⁷² and where neither the defences of contributory negligence nor voluntary assumption of risk are applicable to cases of joint criminal activity it is submitted that recovery should normally be allowed where one criminal is injured by the other's negligence.

One special type of case may, however, be seen as constituting an exception to this rule. Consistent with it the dignity of the court and the integrity of the judicial process may, in some cases, be endangered. Where, for example, evidence is required of the details of gravely felonious conduct of the plaintiff and defendant and from expert witnesses—who may themselves be criminals—relating to questions such as the duty and standard of care in illegal activities, the proceedings may tend to bring the legal system, the courts and their officers into public disrepute. In these cases, it is suggested, the court should always enjoy the residual power to refuse to entertain the action, and this would enable a defendant to avoid liability even in cases where the ordinary substantive defences are unavailable on the facts. Here the defence would succeed, not because the court will always decline to countenance an action arising out of an illegal activity but because where the dignity of judicial proceedings is endangered by evidence likely to arise in the hearing of such a case it would be inconsistent with the integrity of the court to entertain it. Such instances will be rare since, as in every one of the recent Australian decisions for example, a plaintiff will normally be able to make out his case without necessarily having to rely on his own illegal conduct.

⁷¹ *Ibid.* 237.

⁷² See *National Coal Board v. England* [1954] A.C. 403. *Per* Lord Asquith at 428. 'The vast majority of cases in which the (*ex turpi causa*) maxim has been applied have been cases where, there being an illegal agreement between A. and B., either seeks to sue the other for its enforcement or for damages for its breach. . . . Cases where an action in tort has been defeated by the maxim are exceedingly rare. Possibly a party to an illegal prize fight who is damaged in the conflict cannot sue for assault (*Boulter v. Clark* (1747) Bull. N.P. 16). But it seems to me in principle that a plaintiff cannot be precluded from suing simply because the wrongful act is committed after the illegal agreement is made and during the period involved in its execution. The Act must, I should have supposed, at least be a step in the execution of the common illegal purpose.'