v. Fletcher rule as originally formulated does not really fit the facts. Not only is there the logical difficulty adverted to by Menzies J. of having a defence dependent upon the disproof of negligence in a strict liability tort but a company with statutory authority cannot really be said to be making a 'non-natural user' of land or to be bringing the dangerous thing on to land for its own purposes. There may be justification for modifying the rule so that these elements are no longer considered vital in all cases but such modifications should be openly recognized as such. Not to do so leads to the rather tortuous course adopted by Windeyer J. and to a lesser extent Barwick C.J. in reaching a conclusion which may be itself desirable. Would it not be better to outline at the start the reasons why a statutory body should be subjected to strict liability and then openly re-model the well grounded legal rule of *Rylands v. Fletcher* to achieve such a result?

ROSS MACAW

SMITH v. JENKINS[1]

Negligence—Duty of care to joint participants in illegal acts—Ex turpi causa non oritur actio

The High Court in *Smith v. Jenkins* had the opportunity of deciding what should be the effect of the joint illegality of the plaintiff and the defendant upon the law of negligence. The unanimous decision of the Court was, in the words of Windeyer J., '[i]f 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'.[2] The question arose on appeal from a judgment of Starke J. in the Supreme Court of Victoria. Starke J. had allowed the plaintiff recovery for injuries received when, due to the negligent driving of the defendant, the car in which they were travelling crashed into a tree, which car they were both illegally using under section 81(2) of the Crimes Act 1958.

Earlier in *Henwood v. The Municipal Tramways Trust (S.A.)*[3] the High Court had decided the effect of unilateral illegality on the law of negligence but the question of joint illegality had been canvassed only in various state Supreme Courts.[4] The Supreme Court decisions and what *dicta* there were on the subject were very conflicting. In general the New South Wales decisions would not allow recovery while the Victorian would, but the approach in these decisions and that of Starke J. was very different from the approach of the High Court and had very little bearing on the High Court decision. The decision in *Jenkins v. Smith*[5] was in the tradition of the earlier decisions; Starke J. presumed the existence of a course of action and then sought to discover if there was sufficient reason for depriving the plaintiff of his 'basic right' to a course of action. Starke J. found that there was no such deprivation

[1] (1970) 44 A.L.J.R. 78. High Court of Australia; Barwick C.J., Kitto, Windeyer, Owen and Walsh JJ.

[2] *Ibid.* 88.

[3] (1938) 60 C.L.R. 438.

[4] *Godbolt v. Fittock* (1963) 63 S.R. (N.S.W.) 617, Full Court of the Supreme Court of N.S.W.; *Boeyen v. Kydd* [1963] V.R. 235, Adam J. sitting alone in the Supreme Court of Victoria; *Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) Court of Appeal, Division of the Supreme Court of N.S.W. See also *Sullivan v. Sullivan* (1961) 79 W.N. (N.S.W.) 615; *Andrews v. Nominal Defendant* (1965) 66 S.R. (N.S.W.) 85 and *Mills v. Baitis* [1968] V.R. 583.

[5] [1969] V.R. 267.

here, as that he said, could be effected only by a clear legislative statement. Thus, in the absence of such statement His Honour rejected the 'public policy' argument that allowing recovery would be an encouragement to criminal activity, finding that to allow recovery would not be an encouragement to criminals and that there was a competing public policy to be found in compulsory third party insurance, that is that defendants should meet their liabilities.

The defendant appealed on the following grounds. First, that the joint illegality of the plaintiff and the defendant should ban recovery on public policy grounds. Second, that Starke J. was wrong in finding the maxim *ex turpi causa non oritur actio* did not apply. And third, that Starke J. was wrong in finding that the policy of compulsory third party insurance affected common law liability.

Only Windeyer J. considered each ground in any detail. Windeyer J. found that the comment of Starke J. on third party insurance had been misinterpreted in that His Honour did not intend the policy behind third party insurance to affect common law liabilities, though if he had he would have been clearly wrong. Mr. Justice Starke's reference to third party insurance was merely a comment on an argument he had already rejected. Windeyer J. also rejected the defendant's second ground of appeal, finding that the maxim had a place only in the law of contract and conveyancing saying 'the expression "turpi causa" cannot apply in the law of torts. One may as well ask whether the principle of valuable consideration has any place there'.[6] The maxim will apply to torts only where 'a plaintiff has to rely upon an unlawful transaction to establish his course of action'.[7] This is not a tort case within the scope of the maxim as the plaintiff need say only that the defendant was driving the car negligently not that he was doing so illegally. The defendant's first ground of appeal would seem also to have been rejected by the court with all members save Walsh J. denying that theirs were 'public policy' decisions. Since his arguments so closely parallel those of the other members of the court it would seem likely that his unstated public policy is the same as the intuition that led the other members of the court to their unanimous decision.

Thus, while the High Court upholds none of the defendant's grounds of appeal they find in his favour nevertheless. The High Court's premise is different from that of Starke J. They argue that the plaintiff has no 'basic right' to a cause of action, that he has a cause of action only if the common law has given him a cause of action or in negligence terminology has found the defendant to owe him a duty of care. The question then is, does the defendant owe the plaintiff a duty of care, given that both were engaged in a joint illegality? The Chief Justice, Owen J. and probably Walsh J., answer 'no' because, they say, the only relevant relationship between the parties is the criminal relationship which does not give rise to a duty of care. Kitto and Windeyer JJ., on the other hand, argue that it is not any special relationship which is in question but rather whether the law will found a general duty of care arising out of the 'proximity' of criminals. The common law, they find, will not impose a duty of care in these circumstances. There would seem to be little effective difference in the two enquiries. Walsh J. states the basis for this decision to be 'public policy' while the other members of the court talk of general principles of the common law. Whether the

[6] (1940) 44 A.L.J.R. 78, 83.
[7] *Ibid.* 84.

plaintiff had voluntarily assumed the risk of injury was raised and rejected by Starke J. There was no appeal on this point and little reference to it in the High Court, suggesting it was not the basis of the rule. Thus it seems that the general principle of the common law which constrained the Court to make its decision is that which finds its most notable expression in the civil law in the policy of the maxim *ex turpis causae non oritur,* that is, that it is not the function of the civil courts to supervise the actions of those who flaunt the law.

The sphere of operation of the rule is demarked vaguely by Windeyer J. The rule he insists, as do the other members of the Court, is made in respect of negligence, having no general application to the law of torts, and even in respect of negligence will apply only where the plaintiff and defendant are engaged in a joint criminal activity. Windeyer J. refused to accept insignificant distinctions as to the type of criminality which would attract the rule, for example, felony or misdemeanour, summary or indictable offences, saying these questions should be decided as they arose. Though His Honour suggests the rule will not generally apply to offences of the nature of traffic regulations, for example driving an unregistered vehicle unless the accident occurred simply through the 'quality of the thing' not the 'user of the thing'.[8] The Court also made it clear the rule did not require a causal link between the injury and the criminality. The tort must 'arise out of the crime',[9] but there need be no strict causal link. 'The question is whether the harm arose from the manner in which the criminal act was done.'[10] Thus the width of the rule has yet to be determined — it will turn on the interpretation of 'joint criminals' and criminal activity for the purposes of the rule. For example, can one be jointly guilty of drunken driving? If so, what is the requisite *mens rea*? This lack of definition of the width of the rule must be the main argument with the High Court decision.

The decision was inevitably an intuitive one and that the intuition of each member of the Court led to the same result and for substantially the same reasons despite the Court's semantic quibbles, gives the decision considerable authority. Thus the feeling of the High Court is that recovery should be barred to the joint criminals who negligently injure one another. Nevertheless the decision seems regrettable. Within the bounds of fault liability there seems to be no reason to deny recovery to the injured plaintiff because he was criminally engaged at the time of the injury. The issue of criminality seems extraneous to the question being dealt with, that of negligence.

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Blood alcohol content—Victoria and England

The purpose of this note is to outline the approach of the Supreme Court of Victoria to breathalyser legislation and to contrast it briefly with the judicial approach of English courts to Part I of the Road Safety Act 1967 (U.K.).

[8] *Ibid.* 88.
[9] *Ibid.* 87.
[10] *Ibid.* 87.