GALA v *PRESTON*: THE DEFENCE OF ILLEGALITY TO AN ACTION IN NEGLIGENCE*

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INTRODUCTION

In the recent decision of the Full Court of the High Court in *Gala* v *Preston*,[1] it was unanimously held that a passenger injured by the careless driving of a drunken co-participant in the 'joy-riding' of a stolen vehicle could not recover damages in negligence.

The decision impacts upon two areas of the law relating to the tort of negligence. This first is the question of which elements are required to raise the defence of illegality so as to deny recovery to the plaintiff. The second issue is the requirements of the defence of reduced duty of care, for which the modern authority is the decision in *Cook* v *Cook*.[2] Central to both issues is the developing 'extended' concept of proximity, foreshadowed by Stephen J in *Caltex Oil Pty Ltd* v *The Dredge 'Willemstad'*[3] and subsequently brought to prominence in a series of decisions commencing with the judgment of Deane J in *Jaensch* v *Coffey*.[4]

This paper analyses the High Court decision in *Gala* v *Preston* and argues in favour of the approach taken in the joint judgment of Mason CJ, Deane, Gaudron and McHugh JJ, as compared to the various alternatives offered by, inter alia, Brennan J, and the majority in the earlier decision in *Smith* v *Jenkins*.[5] In our analysis we discuss the policy behind the defence of illegality and the appropriateness of its operation in the context of the developing concept of proximity. The paper also considers the way in which the doctrine would operate in varying fact situations.

It is questionable whether the decision in *Gala* v *Preston* does little more than to consolidate several lines of authority. However, a close examination of the dicta contained in the majority judgment — including their analysis of the facts — should be enlightening to legal practitioners, academics and students closely watching the direction of the law of negligence.

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1 (1991) 172 CLR 243.
2 (1986) 162 CLR 376.
3 (1976) 136 CLR 529, 569–81.
4 (1984) 155 CLR 549. See also *Sutherland Shire Council* v *Heyman* (1985) 157 CLR 424, 461–2, 506–7; *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 30, 50–2; *San Sebastian Pty Ltd* v *The Minister* (1986) 162 CLR 340, 354–5.
5 (1970) 119 CLR 397.

ANALYSIS

The justification for a defence of illegality to an action in negligence has always stood upon shaky foundations. On the one hand, there is some merit to the argument that the normative standards of conduct imposed upon society by the criminal law should not pervade the operation of the civil law. The modern perception of the criminal and civil law is that they have distinct purposes, even if historically their separation was not based upon jurisprudential reasons. While both establish some normative standard of conduct, the purpose of the criminal law is, stated generally, to protect society from immoral conduct by individuals, whereas tort law aims to provide legal redress to one individual who has suffered loss as the result of some 'wrong' committed by another. In the tort of negligence this 'wrong' centres around a particular conceptualisation of fault on the part of the defendant, in failing to conduct himself or herself reasonably to avoid a foreseeable risk of injury to the plaintiff. Ostensibly, the notions of social morality addressed by the criminal law bear no relationship to this risk-based conceptualisation of fault.

On the other hand, it is doubtful whether is it either possible or desirable to completely separate the purpose or policy lying behind these two branches of law. This is mainly because social morality inevitably pervades all branches of law, including the tort of negligence. The legitimacy of the law would be undermined if it did not. The authorities often refer to the example of two safe-blowers engaged in their craft, when one is injured by the careless detonation of the explosives by the other. To allow recovery in negligence by the injured party intuitively feels absurd. If that is accepted, then some principle for that denial must be determined *a posteriori*. Such a principle must balance the conflicting demands of social morality, on the one hand, and the primary focus of the law of negligence — the distribution of loss based upon a risk-based conceptualisation of fault — on the other.

Two different approaches have been taken by the High Court. In the rule formulated in *Smith* v *Jenkins*,[6] the particular circumstances of the relationship between plaintiff and defendant are irrelevant. As long as the plaintiff was injured while carrying out the illegal activity with the defendant, the plaintiff cannot recover. The approach taken by the majority in *Gala* v *Preston* is less strict. It is not enough merely to show that the injury arose through the joint execution of an illegal act between plaintiff and defendant; the existence of the illegality will only deny recovery to the plaintiff where, in the particular circumstances of his or her relationship with the defendant, the risks inherent in the illegality were sufficiently relevant to that relationship. This rule is broader than the defence of voluntary assumption of risk, because it is not necessary for the plaintiff to have 'assented' to the risk of *carelessness by the defendant* in order for the illegality to deny recovery;[7] once a sufficient connection between the risks inherent and the relationship has been established, public policy dictates that the plaintiff cannot recover damages.

[6] Ibid.
[7] Id 422 per Windeyer J.

Precisely what are the policy considerations which are served by the defence of illegality? The deterrence argument has been roundly discredited, because its critics doubt that anyone considering criminal activity would be persuaded to desist by a looming threat of being denied recovery from a negligent accomplice.[8] Furthermore, this supposed disincentive to prospective criminals would at least be balanced by the attractiveness of being immune to claims arising from their own carelessness towards accomplices.

The High Court has not been particularly clear in articulating the policy that justifies the existence of the defence. To say, in the language of Barwick CJ, that the law of negligence does not recognise the relationship between joint wrongdoers[9] is to beg the question. The originators of the narrower rule have confined the operation of the doctrine to circumstances where it is 'impossible' or 'not feasible' and 'inappropriate' or 'repugnant' to determine a standard of care. This is only partly helpful. Firstly, there are circumstances where the narrow doctrine will operate despite the fact that a lower standard might be formulated without much difficulty, or at least where it is patently obvious that the defendant has fallen below any low standard that might be determined.[10] Secondly, a reference to a repugnancy or inappropriateness in allowing recovery is vague and has given rise to some disagreement as to where exactly this so-called repugnancy lies. It has been suggested that the repugnancy lies in the court's reluctance to hear evidence about the sordid scenario surrounding the injury to the plaintiff, but this does not reflect the heart of the law's concern.[11] Rather, the law is more ill at ease in entering judgment for the plaintiff *after* this scenario has been accepted by the tribunal of fact than it is in simply hearing evidence; it is repelled from allowing recovery to a plaintiff who has engaged in an inherently risky activity condemned by another branch of the law.

It is doubtful whether the policy considerations can be stated more precisely than this. In *Smith* v *Jenkins*,[12] Windeyer J considered that illegality

> 'can be regarded as founded on the negation of duty, or on some extension of the rule *volenti non fit injuria*, or simply on the refusal of the courts to aid wrongdoers. How it be analysed and explained matters not.'[13]

Nevertheless, three strands emerge as the basis behind the rule. The first is the repugnancy in the result of the civil law allowing recovery to a plaintiff who has been engaged in an activity considered morally culpable by the criminal law. The second strand arises from the fact that the commission of a criminal offence is often a risky activity. Finally, the majority of serious offences inherently require some appreciation (by the offender) of the moral condemnation and risks attached to their commission.

[8] See for example, *Jackson* v *Harrison* (1978) 138 CLR 438, 453 per Mason J; *Gala* v *Preston* (1991) 172 CLR 243, 278 per Dawson J.

[9] *Smith* v *Jenkins* (1970) 119 CLR 397, 400; see also *Jackson* v *Harrison* (1978) 138 CLR 438.

[10] *Jackson* v *Harrison* (1978) 138 CLR 438, 463–4 per Murphy J; cf 457–8 per Jacobs J.

[11] *Smith* v *Jenkins* (1970) 119 CLR 397, 431–2 per Walsh J.

[12] (1970) 119 CLR 397.

[13] Id 422 per Windeyer J.

However, it is an oversimplification to suppose that moral culpability and increased risk are separate factors to be considered. While a certain degree of moral culpability will attach to any plaintiff jointly engaged in an illegal activity with a defendant by reason of their status as criminals alone, the increased risk also adds to the moral repugnancy of allowing recovery. As we have mentioned, the tort of negligence is intimately concerned with the risks of injury to the class of persons of which the plaintiff is a member, arising from the defendant's conduct. If an illegality gives rise to such added risk, then a detailed enquiry into the nature and extent of those risks is necessary. Since this detailed enquiry is required, it greatly adds to the repugnancy of the result if the plaintiff can recover in circumstances where there is a strong connection between the illegality and the risk of injury to the plaintiff arising from his or her relationship with the defendant.

If this policy behind the doctrine of illegality is to be set in the context of the primary focus of the law of negligence — the risks of injury to the plaintiff arising from his or her relationship with the defendant — than a rule denying liability in all cases of joint illegality is too Draconian because it fails to strike a proper balance. This is the problem with the rule in *Smith* v *Jenkins*. Recall the earlier example of the safe-blower injured when his or her accomplice carelessly detonates the explosives, and compare it to the following hypothetical fact situation: a passenger ship is being used to smuggle certain goods. The captain and crew plan to share in the profts of this activity. The ship is carelessly navigated by the captain, collides with a reef, and sinks. Under *Smith* v *Jenkins*, the crew have no recourse in tort against their careless captain in the event of personal injury or damage to their personal belongings aboard the ship. This is because the loss was sustained during the commission of the joint illegal activity of smuggling goods.

However, the narrower doctrine employed by the majority in *Gala* v *Preston* would only apply to the safe-blowers example. In the other example, the risk of careless navigation by the defendant in an attempt to avoid detection by law enforcement authorities does not bear sufficiently upon the relationship between defendant and plaintiff of navigator and passenger. Alternatively, in the language of *Cook*, the risks inherent in the joint commission of the illegality do not sufficiently alter the circumstances of the relationship between plaintiff and defendant so as to make it unreasonable for the former to expect the latter to maintain the normal standard of care of the reasonable, experienced navigator.

From these examples it can be seen that the narrower doctrine applied by the majority in *Gala* yields fairer outcomes than the strict rule in *Smith*. This is because the narrower rule focusses upon the considerations which justify the denial of recovery in some cases of joint illegality; the rule is flexible in its ability to discriminate between the degrees of moral culpability that should attach to a plaintiff to an action in negligence in different situations, and to only deny recovery where policy necessitates it.

It remains necessary to examine the appropriateness of using the extended concept of proximity as a schema for the operation of the defence of illegality. Firstly, this use of the concept was by no means an aberration in the devel-

opment of the law. The notion was indirectly telegraphed in the judgment of Deane J in *Jaensch* v *Coffey*.[14] In breaking down the elements which determined the existence of a duty of care under *Donoghue* v *Stevenson*,[15] his Honour included the 'absence of any ... other common law rule (eg *that relating to hazards inherent in a joint illegal enterprise*)'.[16] While it might be argued that this element was listed separately from other factors including proximity, the result of his Honour's reasoning was to subsume all these elements listed under the general head of the requirement of proximity.

In addition, the development of the concept in *Cook* v *Cook*[17] has more or less necessitated the application of illegality in this way. This is because *Cook* v *Cook* decided that once sufficient proximity of relationship had been established to raise a prima facie duty of care, the quality of that proximity was to be assessed in order to determine whether the standard of care, or the content of the duty of care, ought to be modified or extinguished as a result of the particular factors in the relationship between plaintiff and defendant.[18] The decisions of *Progress and Properties* v *Craft*[19] and *Jackson* v *Harrison*[20] had established that illegality was a defence which operated by extinguishing that standard of care and hence the duty of care because of the special circumstance introduced into this relationship. It was therefore natural that subsequent to *Cook*, the High Court would consider an illegality as a factor affecting the quality of proximity and hence the standard of care, or the scope of the duty.

Proximity is a concept which embraces the considerations which constitute the policy justifying the existence of the doctrine of illegality. The concept centres upon the nature of the relationship between plaintiff and defendant. Similarly, the defence of illegality operates to transform this relationship to one which is not recognised as giving rise to a duty of care. Further, proximity focusses attention upon the risks arising from that relationship and recognises that unusual or special factors giving rise to increased risks transform the quality of the proximity and so adjust the standard of care. The facts of *Cook* provide an immediate example. In that case the increased risk of careless driving from the defendant's inexperience, coupled with the defendant's awareness of these circumstances, amounted to special factors in the proximity of relationship between plaintiff and defendant. Finally, proximity is cognisant of the type of public policy that the defence of illegality operates to recognise. This is implicit in the dicta in *Jaensch* v *Coffey*,[21] referred to above,[22] and made explicit by the High Court in *Gala* v *Preston*.[23] Indeed, in *Jaensch*, Deane J employed the notion to limit the circumstances of plaintiffs

[14] (1984) 155 CLR 549.
[15] [1932] AC 562.
[16] (1984) 155 CLR 549, 586 (emphasis added).
[17] (1986) 162 CLR 376.
[18] Id 382–4.
[19] (1976) 135 CLR 651.
[20] (1978) 138 CLR 438.
[21] (1984) 155 CLR 549.
[22] See fn 16.
[23] (1991) 172 CLR 243, 253.

who could recover damages for purely nervous shock, recognising that an unqualified reasonable foreseeability test for duty of care would be unduly oppressive upon defendants.[24] In cases of negligence involving a join illegality, proximity is able to legitimately respond in denying recovery where policy considerations dictate as much. In all these respects the considerations underlying the doctrine of illegality are closely tied up with the considerations addressed by the extended concept of proximity. Thus, the doctrine of illegality provides a good example of the way in which proximity has served to unify the usual elements of negligence with a doctrine which otherwise operated over and above these elements.

The outstanding concern of the operation of proximity, at least in relation to the defence of illegality, is that it lacks clarity and certainty. There is no doubt that some degree of certainty has been lost with the arrival of the extended concept of proximity. While there could be some argument that the extent of that sacrifice is overstated, the critique must be viewed in the context of the overriding objectives of the law of negligence, and the practical consequences of its use. In *Sutherland Shire Council* v *Heyman*,[25] Deane J said:

> 'There is an incontestable element of truth in [the] statement [that] the notion of proximity is obviously inadequate to provide an automatic or rigid formula for determining liability . . . [I do not] think that either the validity or the utility of common law concepts or principles is properly to be measured by reference to whether they can be accommodated in the straitjacket or some formularized criterion of liability. To the contrary, it has been the flexibility of fundamental concepts and principles which has enabled the common law to reflect the influence of contemporary standards and demands . . .'.[26]

The foremost objective of any common law principle is to provide justice, and central to this objective is substantive fairness in the result. *Smith* v *Jenkins* fails miserably in this regard, and must be discarded in favour of a narrower rule. An alternative approach formulated by Brennan J in this regard — to limit the operation of the defence of illegality to circumstances where the normative standard of the criminal law would be threatened — does not address the 'risk component' of policy that we have argued is a necessary consideration. Yet Brennan J concedes that his own formulation of a narrower principle 'cannot be expressed in a way which is self-executing in the sense that there is no evaluation to be made.'[27] If his critique of proximity presupposes that principles which produce fair results can be formulated with precision and certainty, then this assumption is yet to be proved by his own efforts to formulate these principles.

The objections to proximity must also be viewed in the context of effects of the principle upon legal practice. The outcome of common law claims for damages hinge much less upon the legal merits of the cases advanced by the

[24] (1984) 155 CLR 549, especially 602–4.
[25] (1985) 157 CLR 424.
[26] Id 497.
[27] (1991) 172 CLR 243, 273.

parties, than they do upon other considerations — the severity of injury or damage suffered, the financial position of the defendant including the existence of insurers on risk at the time of the accident, the willingness of the parties to negotiate a settlement, as well as the strength of the evidence available to support either case. Undoubtedly these factors weigh upon all types of litigation, but it is particularly in the area of personal injury claims that practices involve a high turnover of matters which are rarely subject to a detailed analysis of the legal positions of the parties, but are instead driven by an impetus to settle claims quickly and cost-effectively. Under such circumstances it is undesirable that decisions by trial judges may so frequently be vulnerable to appeal that litigation becomes costly and interminable — a likelihood which is exacerbated when the law consists of complex doctrines which involve a myriad of legal niceties. It is, on the balance, better that the law is tolerant of a weighting of the factors particular to the case, and that it is amenable to a common sense solution.

THE FUTURE OPERATION OF THE DOCTRINE

The operation of the defence of illegality will depend upon a consideration of both the relevant policy considerations and the risks inherent in the joint illegality, placed in the context of the relationship between the parties that determines the existence of a duty. However, an examination of the majority's application of these principles to the facts shows an emphasis upon the risk. This is consistent with the application of *Cook* v *Cook*[28] principles which attach importance to the existence of knowledge, on the part of the defendant, of increased risks arising from the particular circumstances of the relationship. In their analysis of the facts in *Gala*, the majority placed great weight upon the risk of injury to the passengers arising from the insobriety of the defendant. The risk of the defendant being compelled to drive recklessly in the event of pursuit by the police was clearly foreseeable, but by the same token it was minimal on the facts.

Thus, if the facts in *Gala* had not involved the theft of a motor car, the appellant would still have been unlikely to recover. The plaintiff's knowledge of the consumption of large amounts of alcohol by the defendant would most likely be considered to amount to 'special and exceptional circumstances' which would remove the relationship from the general class to the particular. In such an event, it would be difficult for the court to set any lower standard such as that of the 'reasonable intoxicated driver' (unlike *Cook* where the standard of the 'reasonable learner driver' was postulated), and the outcome of this inability would be to deny the existence of a duty because a standard cannot be determined. The response would not be to leave the standard of the reasonable skilled driver intact, because the application of *Cook* principles to such a case does not hinge upon the ability of the court to set a lower

[28] (1986) 162 CLR 376.

standard.[29] Rather, it is the fact that the particular circumstances of the relationship make it unreasonable for the plaintiff to expect the ordinary standard of care. The ability of the court to determine some lower standard will determine whether any standard of care is set at all.

A more difficult case would have arisen if the parties in *Gala* had not drunk alcohol before making off in the stolen vehicle. In these circumstances, the plaintiff would probably have been able to recover. These facts are closer to those in *Jackson* v *Harrison* (where the joint illegality was driving with a disqualified licence). Although the majority in *Gala* v *Preston* considered that the illegality 'constituted the whole context of the accident' and was 'fraught with serious risks', the risks arising from the wrongful use of the vehicle were minimal, and indeed the majority does not place great emphasis upon these risks.[30] In all cases of joint illegality this risk will be present to some degree, and so the outcome of such a case would probably depend upon the specific facts, in particular, the likelihood of, and the apprehension by the parties (at the time of the accident) of pursuit by the police.

CONCLUSION

Gala v *Preston* makes no substantive contribution to the law of negligence in Australia. Rather, it provides a useful example of the operation of the 'extended' concept of proximity in an area where the concept has not previously been applied. The use of proximity in this new sense has divided the members of the High Court bench. What is interesting in this regard is just how firmly entrenched the reasoning of the majority will remain as the composition of the bench changes over time. The likely outcome is that as proximity plays an increasingly central role in the development of the tort of negligence, the notion that the concept can be applied to these sorts of cases will appear more acceptable.

Whether or not Deane J, when he first expounded his ideas in *Jaensch* v *Coffey*, foresaw the scope for the application of proximity beyond its use as a determinant of the existence of a duty of care, the concept has proven to be highly versatile. It has provided a structure under which a diversity of doctrines, developed by earlier decisions, could be brought together in a logically coherent and organised manner. As well as this, the concept is one which has a number of practical consequences arising from its use.

It is ultimately from these considerations that the concept of proximity has been formulated and has received judicial acceptance from those who understand its function. The operation of the defence of illegality under this schema demonstrates the good sense behind the proximity approach.

[29] *Insurance Commissioner* v *Joyce* (1948) 77 CLR 39, 46 per Latham CJ, 56–7 per Dixon J; *Cook* v *Cook* (1986) 162 CLR 376, 384–5. Cf *Radford* v *Ward* (1990) Aust Torts Reports 81-064 (Full Court, Supreme Court of Victoria).

[30] *Gala* v *Preston* (1991) 172 CLR 243, 254.