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Citation: 34 Melb. U. L. Rev. 425 2010

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THE DEFENCE OF JOINT ILLEGAL ENTERPRISE

JAMES GOUDKAMP*

[The High Court has reserved judgment in an appeal against the decision of the Western Australian Court of Appeal in Miller v Miller *(2009) 54 MVR 367. This appeal calls into question the defence of joint illegal enterprise, which is an answer to liability in the tort of negligence. It is with this appeal that this article is concerned. Two main arguments are presented. The first is that the defence is framed in a highly unsatisfactory way. It is governed by nonsensical rules, many of which are inconsistent with fundamental principles of tort law. Accordingly, should the High Court retain the defence, it is submitted that it should reformulate it so that it blends in with the legal environment in which it resides. The second and more fundamental argument is that the defence should be abolished. It is a stain on the law of torts. Not only are there no convincing arguments in support of it, but there are powerful reasons against its existence.]*

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I INTRODUCTION

In *Smith v Jenkins* ('*Smith*'),[1] the High Court recognised a defence of joint illegal enterprise to liability in the tort of negligence. It affirmed the existence of this defence in a series of cases, the most recent and important of which is *Gala v Preston* ('*Gala*').[2] The correctness of this line of authority, which has proved highly influential in several other jurisdictions,[3] is presently being reconsidered by the High Court in an appeal against the decision of the Western Australian Court of Appeal in *Miller v Miller* ('*Miller*').[4] It is with this appeal that this article is concerned. It makes two central claims. First, in the event that the Court retains the joint illegal enterprise defence, it should perform radical surgery on it so as to render it less offensive to fundamental principles of tort law. The second contention is that the Court should break with its previous decisions recognising the defence — all of which are contaminated by serious confusion — and consign the defence to legal oblivion. It serves no useful purpose and is pregnant with the potential to produce significant injustice.

II THE JOINT ILLEGAL ENTERPRISE DEFENCE IN BRIEF

It is convenient to provide a short introduction to the joint illegal enterprise defence in order to set the scene for the analysis that follows. The defence, which

[1] (1970) 119 CLR 397.

[2] (1991) 172 CLR 243. The other authorities in this series are *Progress and Properties Ltd v Craft* (1976) 135 CLR 651 and *Jackson v Harrison* (1978) 138 CLR 438.

[3] The courts in the United Kingdom and Ireland have broadly accepted the law on this point as stated by the High Court: *Ashton v Turner* [1981] 1 QB 137; *Pitts v Hunt* [1991] 1 QB 24; *Lindsay v Poole* 1984 SLT 269; *Ashcroft's Curator Bonis v Stewart* 1988 SLT 163; *Wilson v Price* 1989 SLT 484; *Winnik v Dick* 1984 SC 48; *Weir v Wyper* 1992 SLT 579; *Taylor v Leslie* 1998 SLT 1248; *Currie v Clamp* 2002 SLT 196; *Anderson v Cooke* [2005] 2 IR 607.

[4] *Miller v Miller* (2009) 54 MVR 367. Special leave to appeal was granted in Transcript of Proceedings, *Miller v Miller* [2010] HCATrans 130 (28 May 2010). The appeal was heard on 3–4 November 2010: see *Miller v Miller* [2010] HCATrans 286 (3 November 2010); *Miller v Miller* [2010] HCATrans 287 (4 November 2010).

is only available in proceedings in negligence, will be enlivened when the following two-stage test is satisfied:

(i) the plaintiff suffered damage while engaged in a criminal[5] enterprise with the defendant;[6] and

(ii) the nature of the enterprise is such that it would be 'impossible' or 'not feasible' to ask how the reasonable person in the defendant's position would have acted.

If the joint illegal enterprise defence is engaged, no duty of care will arise. This test did not emerge Pallas-like from the decision in *Smith*. Rather, it evolved gradually, and was eventually settled by the High Court in *Gala*.

It is necessary to say a few words about *Gala* since it is the leading authority on the defence. The parties in *Gala* and two other men stole a motor vehicle after consuming massive quantities of alcohol (the defendant drank around 40 scotches and the others each imbibed an equivalent amount of beer). They set off in the vehicle towards a city in which they planned to commit breaking and entering offences. The defendant drove. En route, he fell asleep and the uncontrolled vehicle struck a tree. The plaintiff was seriously injured in the collision. The High Court unanimously held that the defendant did not owe the plaintiff a duty of care by virtue of the illegal venture in which they were engaged. A plurality consisting in Mason CJ, Deane, Gaudron and McHugh JJ reached this conclusion by applying the two-stage test set out above.[7] Brennan J, Dawson J and Toohey J delivered separate reasons. Brennan J held that no duty should be recognised on the ground that finding a duty would impair the normative influence of the criminal law.[8] Dawson J[9] and Toohey J[10] thought that public policy militated against the erection of a duty.

[5] The joint commission of inchoate offences can engage the defence: *Italiano v Barbaro* (1993) 40 FCR 303. An interesting issue is whether the venture must be illegal. Will sufficiently immoral enterprises enliven the defence? The 19th century decision in *Hegarty v Shine* (1878) 14 Cox CC 145 supports an affirmative answer to this question. The plaintiff in that case sued the defendant in battery for infecting her with a venereal disease. The Court rejected the claim on the basis that the parties were cohabitating extramaritally. However, judges and commentators have long looked askance at *Hegarty v Shine*. Windeyer J described it as a 'miserable case' in *Smith* (1970) 119 CLR 397, 413. Cory J said it was 'a notorious example of the unfairness' that the illegality defence can wreak in *Hall v Hebert* [1993] 2 SCR 159, 213. See also John G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 89. Nevertheless, the courts have always left the door open to the possibility that immoral conduct may activate the defence, and, in two recent decisions, the High Court of England and Wales held that conduct evincing moral turpitude is sufficient: *Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 (QB) (16 December 2009) [92] (Hamblen J); *Safeway Stores Ltd v Twigger* [2010] 3 All ER 577. It has not been decided whether breaches of foreign law will trigger the defence: see *K/S Lincoln v CB Richard Ellis Hotels Ltd* [2009] EWHC 2344 (TCC) (2 October 2009) [39] (Coulson J).

[6] It is essential that the defendant be a party to the enterprise. The joint illegal enterprise defence will be inapplicable if the plaintiff was engaged in the enterprise with a third party: *Smith* (1970) 119 CLR 397, 416–17 (Windeyer J).

[7] *Gala* (1991) 172 CLR 243, 254–5.

[8] Ibid 270–3.

[9] Ibid 277–80.

[10] Ibid 291–2.

A significant feature of the plurality's reasons in *Gala* is the recourse made in them to the concept of proximity[11] (Toohey J did not draw upon it while Brennan J[12] and Dawson J[13] expressly disclaimed reliance on it). At the time, it was thought that proximity was a touchstone for the existence of a duty of care. The logic embraced by the plurality was that if it was not 'possible or feasible'[14] to set a standard of care due to the illegal enterprise in which the parties were engaged, the relationship between the parties would lack the proximity required to generate a duty. Subsequently, the High Court, persuaded by trenchant criticism of the concept of proximity,[15] rejected it as a determinant for the existence of a duty.[16] This rejection prompted McHugh J to remark in *Joslyn v Berryman* that 'it may [now be that the Court] ... would no longer follow the reasoning in ... *Gala*.'[17] The status of the joint illegal enterprise defence is, therefore, somewhat uncertain.

III THE DISTINCTIVENESS OF THE JOINT ILLEGAL ENTERPRISE DEFENCE

The joint illegal enterprise defence is a distinct tort law defence. Unfortunately, however, it is sometimes suggested that it is analogous to, or a variant of, the plea of voluntary assumption of risk.[18] It is true that, when applicable, both defences deny the existence of a duty of care.[19] But they are different in numerous important respects. First, the defence of voluntary assumption of risk, unlike the joint illegal enterprise defence, does not require proof that the plaintiff

11 Ibid 252–4.

12 Ibid 259–63.

13 Ibid 276–7.

14 Ibid 254.

15 See especially Justice M H McHugh, 'Neighbourhood, Proximity and Reliance' in P D Finn (ed), *Essays on Torts* (Law Book, 1989) 5; Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford University Press, 1998) 59, 61–3.

16 The demise of proximity began, at the latest, in *Hill v Van Erp* (1997) 188 CLR 159, 176–8 (Dawson J), 189 (Toohey J), 210–11 (McHugh J), 237–9 (Gummow J). The coup de grâce was dealt in *Sullivan v Moody* (2001) 207 CLR 562, 578–9 [48] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ). Kirby J had long attempted to arrest the decline of proximity (see, eg, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 414–20 [238]–[245]; *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 476–7 [117]–[121]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 79–80 [221]–[222]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 274–5 [59]–[61]) but, following *Sullivan v Moody*, he conceded defeat in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 625–7 [237]–[238].

17 (2003) 214 CLR 552, 564 [30].

18 For example, in his magisterial textbook, John Fleming dealt with the joint illegal enterprise defence within a chapter entitled 'Voluntary Assumption of Risk': Fleming, above n 5, ch 13.

19 There is an overwhelming case for thinking that a defendant who relies on the voluntary assumption of risk defence simply denies, in roundabout language, the existence of a duty of care (or, sometimes, other elements of the tort of negligence): see the penetrating analysis in Stephen D Sugarman, 'Assumption of Risk' (1997) 31 *Valparaiso University Law Review* 833. Unfortunately, however, it is often thought that voluntary assumption of risk is an affirmative defence: see, eg, *Winchester v Solomon*, 75 NE 2d 653, 655–6 (Mass, 1947) (Dolan J); Glanville L Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (Stevens & Sons, 1951) 295.

committed an offence. Secondly, the application of the voluntary assumption of risk defence is not contingent upon evidence that the parties worked together to achieve some common goal. Thirdly, the voluntary assumption of risk defence, unlike the joint illegal enterprise defence, incorporates a subjective element (relevantly, it asks whether the plaintiff consented to the risk of injury). Fourthly, the joint illegal enterprise defence is sensitive to the blameworthiness of the plaintiff's acts (only relatively serious offending enlivens it[20]) whereas the voluntary assumption of risk defence is not. Fifthly, in some jurisdictions, the voluntary assumption of risk defence is unavailable in actions arising out of the use of a motor vehicle[21] whereas most of the cases in which the joint illegal enterprise defence applies are motor vehicle cases.

It is worth quickly noting that the joint illegal enterprise defence and the provision for apportionment for contributory negligence are also different legal creatures. The most obvious difference is that only the joint illegal enterprise defence prevents liability from arising. The apportionment provision merely provides for the plaintiff's damages to be reduced.[22] The two rules also part company in that the joint illegal enterprise defence is not triggered unless the plaintiff commits a criminal offence whereas the apportionment provision is not similarly constrained. What matters for the purposes of the apportionment provision is a lack of reasonable care by the plaintiff that contributes to his or her damage rather than participation in criminal conduct.[23]

IV THE FACTS AND DECISIONAL HISTORY OF *MILLER*

A *The Facts*[24]

In the early hours of 17 May 1998, the plaintiff (the appellant before the High Court) was loitering in a car park outside a nightclub with her sister and her cousin. All three were intoxicated. They were tired and wanted to go home. But they had missed the last train and had insufficient money to pay for a taxi. Their predicament prompted them to steal a motor vehicle. While leaving the car park in the vehicle, they encountered the defendant (the respondent). The defendant, who was 27 years of age at the time, was something of a father figure to the

[20] For discussion of the authorities on this point, see *Griffin v UHY Hacker Young & Partners (a firm)* [2010] EWHC 146 (Ch) (4 February 2010) [49]–[60] (Vos J). See also *Van Hoffen v Dawson* [1994] PIQR 101, 106–7 (Russell LJ); *Taylor v Leslie* 1998 SLT 1248, 1250 (Temporary Judge Wheatley); *Currie v Clamp* 2002 SLT 196, 200–1 [21]–[22] (Lord Clarke); *Wok v O'Keefe* (2006) 46 SR (WA) 146, 152 [18] (Muller DCJ).

[21] See, eg, *Motor Accidents Compensation Act 1999* (NSW) s 140; *Road Traffic Act 1988* (UK) c 52, s 149.

[22] However, statutes in several jurisdictions authorise findings of 100 per cent contributory negligence: see, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 47; *Civil Liability Act 2002* (NSW) s 5S; *Civil Liability Act 2003* (Qld) s 24; *Wrongs Act 1954* (Tas) s 4(1); *Wrongs Act 1958* (Vic) s 63. These statutes also provide that such findings prevent liability from arising.

[23] See *Westwood v Post Office* [1974] AC 1, 17 (Lord Kilbrandon); *Froom v Butcher* [1976] QB 286, 291 (Lord Denning MR).

[24] This summary of the facts is drawn from the trial judge's reasons: *Miller v Miller* (2008) 57 SR (WA) 358, 360–2 [1]–[8] (Schoombee DCJ).

plaintiff,[25] who was then 16 years old. He insisted on driving the plaintiff to her home in the vehicle. The defendant had been drinking and was unlicensed and was aware that the vehicle had been stolen. Once the defendant assumed the driver's seat, five of his friends piled into the vehicle, thereby bringing the total number of occupants to nine. The vehicle, a sedan, was only licensed to carry five persons and was consequently grossly overloaded. The defendant began driving towards the plaintiff's house. Initially, he drove at or around the speed limit. But he soon began driving at an excessive speed and failed to stop at several red lights. Around this time, the plaintiff expressed concern for her safety and asked the defendant to slow down. The defendant was dismissive of her request. The plaintiff then asked twice to be let out of the vehicle. Again, the defendant refused to comply. A short time later, the defendant lost control of the vehicle and it struck a metal pole. The plaintiff suffered severe injuries in the collision, including quadriplegia. Another passenger died.[26]

B *The Decision of the Trial Judge*

The plaintiff commenced proceedings in negligence against the defendant in the District Court of Western Australia. The defendant relied on the joint illegal enterprise defence on the ground that, at the time of the accident, the plaintiff was complicit in his breach of s 371A(1) of the *Criminal Code Act Compilation Act 1913* (WA) ('*Criminal Code*'). This provision prohibits the use of a motor vehicle without the owner's consent. By agreement, the parties limited the issues to be tried to whether the joint illegal enterprise defence applied.[27] The trial judge, Schoombee DCJ, found that it did not and that the defendant therefore owed the plaintiff a duty of care.[28] Her Honour pointed to a number of considerations that she thought supported this conclusion. These considerations included the following:

(i) the plaintiff expected the defendant to take good care of her;[29]

(ii) the defendant regarded himself as responsible for the plaintiff's welfare;[30]

(iii) the plaintiff did not appreciate that the journey would be fraught with risk;[31]

25 The parties were related through the plaintiff's mother.

26 The defendant was charged with, and pleaded guilty to, dangerous driving causing death, dangerous driving causing grievous bodily harm, and driving under the influence of alcohol. He received a total head sentence of five years' imprisonment: *Miller* (2009) 54 MVR 367, 370 [15] (Buss JA).

27 In his statement of defence, the defendant pleaded the defence of voluntary assumption of risk and (incredibly) denied that he failed to exercise reasonable care. Reliance on these pleas was later waived: *Miller v Miller* (2008) 57 SR (WA) 358, 360 [2] (Schoombee DCJ).

28 Ibid 384–5 [114]–[116].

29 Ibid 378 [77].

30 Ibid.

31 Ibid 381–3 [96]–[107].

(iv) the defendant did not drive dangerously because the vehicle was stolen (he was not, for example, attempting to elude the police when the accident occurred);[32] and

(v) the parties were not engaged in a 'joy-ride'. They were travelling to the plaintiff's home.[33]

C *The Decision of the Court of Appeal*

The Western Australian Court of Appeal unanimously allowed an appeal by the defendant and entered a verdict in his favour. The principal opinions were delivered by Buss JA and Newnes JA (McLure JA gave brief reasons in which her Honour broadly concurred with Buss JA and Newnes JA[34]). Buss JA[35] and Newnes JA[36] found that the two-stage test articulated in *Gala* for determining when the joint illegal enterprise defence applies survived the demise of proximity. Their Honours concluded that this test was satisfied. In so holding, they emphasised, among other considerations:

(i) that the offence of unlawfully using a motor vehicle is a serious one[37] (it is an indictable offence punishable by seven years' imprisonment[38]);

(ii) that the defendant was, to the plaintiff's knowledge, intoxicated and unlicensed;[39]

(iii) that the vehicle was grossly overloaded;[40] and

(iv) that the reasonable person in the plaintiff's position would have realised that the journey would be extremely hazardous.[41]

D *Did the Court of Appeal Reach the Correct Decision?*

Consider the following paradigm case. P and D, both adults and heavily intoxicated, steal a motor vehicle. D drives the vehicle and P accompanies him in it. P is injured due to D's negligent driving. Plaintiffs such as P have consistently failed to recover compensation due to the joint illegal enterprise defence. Is *Miller* analogous to the paradigm case? One might think that the most significant feature in *Miller* is the fact that the parties were using a motor vehicle unlawfully when the plaintiff was injured. If this is correct, *Miller* is materially identical to the paradigm case and the Court of Appeal was, consequently, right

[32] Ibid 380–1 [89]–[94].
[33] Ibid 379–80 [85]–[87], 381 [95], 382 [98], [101].
[34] *Miller* (2009) 54 MVR 367, 368 [1].
[35] Ibid 383 [67]–[68].
[36] Ibid 399 [143].
[37] Ibid 384 [78] (Buss JA), 400 [148] (Newnes JA).
[38] *Criminal Code* s 378, as it was in force at the material time. The maximum penalty was later increased to eight years' imprisonment.
[39] *Miller* (2009) 54 MVR 367, 384 [78] (Buss JA), 400 [149]–[150] (Newnes JA).
[40] Ibid 384 [78] (Buss JA), 400 [151] (Newnes JA).
[41] Ibid 384–5 [79]–[81], [83], 386–7 [90] (Buss JA), 400–1 [149], [152]–[153] (Newnes JA).

to hold that the defence applied. Conversely, one might say that the nature of the relationship between the parties, specifically, that the defendant was an adult whereas the plaintiff was in her mid-teens and that the parties regarded the defendant to be responsible for the plaintiff's wellbeing, means that *Miller* is distinguishable from the paradigm case. If this is so, it is doubtful that the Court of Appeal reached the correct conclusion. To which fact should emphasis be given? It is strongly arguable that the relationship of dependency in *Miller* is a sufficiently significant circumstance to take *Miller* outside of the paradigm scenario. Tort law, after all, pays special attention to the fact that the parties were in such a relationship.[42]

V THE SIGNIFICANCE OF THE COURT OF APPEAL'S DECISION IN *MILLER*

Before considering the appeal to the High Court it is worth briefly noting three previously uncertain aspects of the joint illegal enterprise defence that were clarified by the Court of Appeal's decision.

A *Convictions and Criminal Law Defences*

The plaintiff in *Miller* has not, apparently, been charged with the offence in s 371A of the *Criminal Code* or with any other crime that she may have committed that was associated with the accident.[43] The Court of Appeal's decision is, therefore, authority for the proposition that the application of the joint illegal enterprise defence does not depend upon the plaintiff being convicted of a crime. In this respect, the Court's decision is uncontroversial. Several other cases support this position.[44] Somewhat more contentiously, however, the Court's decision suggests that the joint illegal enterprise defence is contingent on the plaintiff lacking a criminal law defence, or at least certain types of criminal law defences. Buss JA said that one of the 'critical facts and circumstances' of the case was that the plaintiff 'had attained the age of criminal responsibility'.[45] This implies that the joint illegal enterprise defence would not have been engaged if the plaintiff could have relied on the defence of infancy to avoid being held criminally liable.[46] His Honour also observed that the plaintiff would not have been able to avail herself of the defence of duress to escape from criminal liability.[47] Again, the implication is that had this defence been available to the plaintiff in criminal proceedings, the joint illegal enterprise defence would not have been triggered. Assuming that Buss JA intended these implications of his remarks, was he correct to commit himself to them? A strong case can be made

[42] See, eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 228 [124] (McHugh J).

[43] *Miller v Miller* (2008) 57 SR (WA) 358, 361 [5] (Schoombee DCJ).

[44] See, eg, *Ashcroft's Curator Bonis v Stewart* 1988 SLT 163; *Italiano v Barbaro* (1993) 40 FCR 303.

[45] *Miller* (2009) 54 MVR 367, 384 [78].

[46] The age of criminal responsibility in Western Australia, as in all Australian jurisdictions, is 10: *Criminal Code* s 29.

[47] *Miller* (2009) 54 MVR 367, 384 [78].

for answering this question in the affirmative.[48] The joint illegal enterprise defence is supposed to be sensitive to the blameworthiness of the plaintiff's illegal conduct.[49] Since those who commit crimes under duress or while below the age of criminal responsibility are typically morally innocent, the joint illegal enterprise defence should be excluded if the plaintiff could avoid being held criminally liable on the basis of the defences of duress or infancy. Indeed, the joint illegal enterprise defence ought to be inapplicable if the plaintiff enjoys any substantive criminal law defence. In contrast, possession of procedural criminal law defences — such as immunities, limitation bars and the doctrine of abuse of process — should have no bearing on whether the joint illegal enterprise defence applies. This is because procedural criminal law defences may be available even if an offender is fully responsible for his or her criminal acts.

B *Withdrawal*

In the criminal law, withdrawal from a joint illegal venture is an answer to liability for complicity.[50] What is the impact of withdrawal on the joint illegal enterprise defence? If a person enters into a joint illegal enterprise but, during its prosecution, has a change of heart and removes himself or herself from it and counteracts his or her prior assistance, will the defence still apply if he or she is subsequently injured by the negligence of his or her erstwhile confederate? The Court of Appeal's decision in *Miller* suggests that this question should be answered in the affirmative since the plaintiff failed even though she asked twice to be let out of the vehicle. Admittedly, though, the Court's decision cannot be taken as conclusive on this point. This is because the plaintiff's acts in this respect were arguably insufficient to counteract her earlier contribution to the illegal jaunt.

C *The Irrelevance of the Demise of Proximity*

Until *Miller* was decided, no superior court had considered whether the two-stage test enunciated in *Gala* still applies despite the downfall of proximity.[51] It is unsurprising that the Court of Appeal confirmed the test's continuing applicability. For one thing, *Gala* more or less merely approved of *Smith* and the line of cases that followed in its wake. It simply superimposed the proximity analysis on the existing law. Secondly, Brennan J, Dawson J and Toohey J reached the same conclusion as the plurality in *Gala* without making use of the concept of proximity. Thirdly, in the recent case of *Imbree v McNeilly*, the High Court said

[48] My discussion here has been influenced by Paul Robinson's classic taxonomic analysis of criminal law defences: Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199.

[49] See above n 20 and accompanying text.

[50] See, eg, *Criminal Code* s 8(2).

[51] In *Wills v Bell* [2004] 1 Qd R 296, 304–5 [11]–[18] (McMurdo P), 313–14 [57] (Mackenzie J), 321–2 [91] (White J), the Queensland Court of Appeal simply assumed that the two-stage test still applied. It did not discuss the demise of proximity. Inferior courts have applied the test on several occasions: see, eg, *Newton v Hill* [2000] SADC 53 (28 April 2000); *Wok v O'Keefe* (2006) 46 SR (WA) 146, 150–2 [15]–[18] (Muller DCJ).

that the demise of the concept of proximity did not necessarily mean that decisions which had recourse to that concept are no longer binding.[52]

VI Doctrinal Difficulties with the Joint Illegal Enterprise Defence

This Part of the article identifies several ways in which the joint illegal enterprise defence clashes with other parts of tort law. Two points should be borne in mind throughout. First, this survey is not exhaustive. It merely highlights a selection of ways in which the defence is unprincipled. Secondly, the concern here is not with the merits of denying claims on the ground that the plaintiff was injured while involved in a joint illegal enterprise with the defendant (this issue will be addressed later[53]). The purpose of this Part is to point out why *this* joint illegal enterprise defence is poorly constructed.

A *The Allocation of the Onus of Proof*

The plea of joint illegal enterprise is routinely described as a 'defence'.[54] Because this terminology is entrenched, it has been used in this article. However, it is not without difficulty. The problem is that it does not make it clear that the plea is a denial of one of the elements of the cause of action in negligence (the duty of care) rather than a rule that exempts the defendant from liability even if all of the elements of negligence are present (an 'affirmative defence'). It would be better to refer to the plea as an 'absent element defence'.[55] This would distinguish it from affirmative defences. One reason why it is important to remember that the joint illegal enterprise defence is an absent element defence is that the way in which defences are categorised has important consequences. Consider the allocation of the onus of proof. It is a fundamental rule of civil procedure that the plaintiff bears the onus of proving all of the elements of the wrong that he or she alleges the defendant committed and that it falls to the defendant to make out any affirmative defences. Because the joint illegal enterprise defence is an absent element defence, it ought to be up to the *plaintiff* to show that it does *not* apply. But this is not the case. In disregard of the established rule regarding the allocation of the onus of proof, the courts have consistently held that the defendant must prove[56] that the joint illegal enterprise

[52] (2008) 236 CLR 510, 526–7 [46]–[47] (Gummow, Hayne and Kiefel JJ). Gleeson CJ and Crennan J agreed with the plurality's reasons: at 513 [1] (Gleeson CJ), 565–6 [193] (Crennan J).

[53] See below Part VII.

[54] See, eg, *Joslyn v Berryman* (2003) 214 CLR 552, 573 [63] (Gummow and Callinan JJ); *Brown v Harding* [2008] NSWCA 51 (31 March 2008) [5] (Hodgson JA, Hidden and Hislop JJ); *Sangha v Baxter* [2007] NSWCA 264 (28 September 2007) [82] (Young CJ in Eq).

[55] The language is taken from Paul H Robinson, *Structure and Function in Criminal Law* (Clarendon Press, 1997) 12.

[56] To the civil standard: *Hanes v The Wawanesa Mutual Insurance Co* [1963] SCR 154, 164 (Ritchie J for Kerwin CJ, Taschereau, Martland and Ritchie JJ); *Tomlinson v Harrison* [1972] 1 OR 670, 675 (Addy J); *Lindsay v Poole* 1984 SLT 269, 269 (Lord Mayfield); *Sloan v Triplett* 1985 SLT 294, 296 (Lord Allanbridge); *Wilson v Price* 1989 SLT 484, 486 (Lord Milligan).

defence applies.[57] The courts have sought to justify this state of affairs on the basis that the defence is rarely enlivened. However, this attempt falls short of the mark. The mere fact that an exception to the rule that the plaintiff must prove the elements of the tort in which he or she sues is infrequently enlivened does not justify that exception.[58]

B *The Joint Illegal Enterprise Defence Is Confined to the Tort of Negligence*

Illegality is a defence throughout the tort law universe.[59] It is a generally applicable answer to liability. However, negligence is the only action in which the two-stage test established in *Gala* is used to determine the impact of the fact that the plaintiff was injured while committing an illegal act. This situation is objectionable.[60] There is no obvious reason for approaching the issue of illegality from a different direction in the negligence context than in the setting of other torts. Moreover, it is incongruous that the method for determining the consequences of the plaintiff's illegal conduct depends upon the tort which the defendant is alleged to have committed. This is because, in cases that are tainted with illegal conduct on the part of the plaintiff, it is the fact that the *plaintiff* acted illegally that is important. Another problem with using a separate rule to determine the effect of the plaintiff's unlawful conduct in proceedings in negligence is that it can introduce unnecessary complexity in cases in which the plaintiff sues both in negligence and in another tort. If the defendant in such a case pleads illegality in answer to both causes of action, stock of the plaintiff's illegal conduct must be taken in different ways in each action. It is surprising that the courts were not required to do this in *Miller*. The plaintiff in *Miller* sued, apparently, only in negligence. It does not seem to have occurred to the plaintiff's lawyers that the plaintiff may have had a good cause of action in false imprisonment.[61] Recall that the plaintiff asked twice to be allowed to alight from

[57] *Gala* (1991) 172 CLR 243, 254 (Mason CJ, Deane, Gaudron and McHugh JJ); *Brown v Harding* [2008] NSWCA 51 (31 March 2008) [40] (Hodgson JA, Hidden and Hislop JJ); *Wills v Bell* [2004] 1 Qd R 296, 304 [12] (McMurdo P); *Miller* (2009) 54 MVR 367, 383 [74] (Buss JA).

[58] Arguably, the real reason why the courts require the defendant to bear the onus of proof in respect of the joint illegal enterprise defence is that they are aware that it is pregnant with the potential to inflict grave injustice (regarding this potential, see below Part VII(B)). Allocating the burden of proof to the defendant is a low visibility device for minimising the number of occasions on which it applies. However, it is abundantly clear that this is not a sufficient basis for departing from the normal rules regarding the assignment of the onus of proof. Richard Epstein rightly points out that the courts should not use procedural rules to hobble disfavoured defences: see Richard A Epstein, 'Pleadings and Presumptions' (1973) 40 *University of Chicago Law Review* 556, 579. If the drawbacks of a given defence outweigh the upsides, the proper course of action is to abolish it.

[59] See, eg, *Cross v Kirkby* [2000] EWCA Civ 426 (18 February 2000) [53]–[68] (Beldam LJ) (trespass); *Thackwell v Barclays Bank plc* [1986] 1 All ER 676 (conversion); *Thomas Brown and Sons Ltd v Deen* (1962) 108 CLR 391 (detinue); *Emanuele v Hedley* (1997) 137 FLR 339 (malicious prosecution and misfeasance in a public office).

[60] The argument that follows has been influenced by the reasons of McLachlin J in *Hall v Hebert* [1993] 2 SCR 159, 183–5 (McLachlin J for La Forest, L'Heureux-Dubé, McLachlin and Iacobucci JJ).

[61] Admittedly, there would have been problems with such an action given that when the plaintiff entered the vehicle, she must have known, or should have known, that the defendant might refuse to allow her to alight from it.

the vehicle and that the defendant refused those requests. Had the plaintiff sued in false imprisonment, the defendant could not have relied on the joint illegal enterprise defence to avoid liability since a duty of care is not an element of that action. Instead, he would have had to argue that the plaintiff's illegal act should be considered in another way (for example, via an affirmative defence).

C *The First Stage of the Test*

The first stage of the two-stage test asks whether the parties were engaged in a joint illegal enterprise when the plaintiff suffered damage. If they were not, the defence would not apply. This requirement is impossible to justify. Ernest Weinrib made this point well when he asked rhetorically: 'If the focus of the defence is the act of illegality on the part of the plaintiff, of what relevance can it be that the defendant rather than a third party is an accomplice in the illegality or indeed that there is any accomplice at all?'[62] No convincing reason has ever been identified for treating cases in which the plaintiff was injured while acting illegally with the defendant differently from cases in which the plaintiff was injured while committing an offence in which the defendant was not implicated. It is certainly not adequate to say that joint illegal enterprise cases call for a separate approach because the parties chose to act outside the law. This simply restates the factual difference between such actions and cases in which the plaintiff was injured while committing an offence in which the defendant was not complicit. It does not explain why this difference is important.

An example may help to illuminate the absurdity of this requirement if it is not already apparent. Suppose that P steals a car. While driving it, he sees D, a friend of his, walking on a footpath. P offers D a ride. D accepts and asks if he can drive. P acquiesces. D does not know the car is stolen and has no reason to believe that P does not own it. P and D are involved in an accident due to D's negligent driving. P is injured. The joint illegal enterprise defence would be inapplicable in proceedings brought by P against D since they were not jointly involved in the commission of an offence. Matters would (presumably) be otherwise, however, if D knew that P was using the car illegally. But why should D's knowledge in this respect matter in the slightest? P is in the same position morally no matter what knowledge D possesses. What D knows or does not know is irrelevant to P's culpability. Note also that, ridiculously, the fact that the application of the joint illegal enterprise defence is conditional upon the parties being complicit in the commission of an offence means that D would potentially stand in a better position in relation to his liability to P had he known that the car was stolen. Had D been aware that P had taken the car unlawfully, D would have been complicit with P in using it illegally and would thus probably not have been liable to P.

[62] Ernest J Weinrib, 'Illegality as a Tort Defence' (1976) 26 *University of Toronto Law Journal* 28, 34. Consider also the remarks in *Andrews v The Nominal Defendant* (1965) 66 SR (NSW) 85, 95 (Walsh J); *Hughes v Atlanta Steel Co*, 71 SE 728, 729 (Evans PJ) (Ga, 1911).

D *The Second Stage of the Test*

If the first stage of the test is satisfied, one proceeds to the second stage. This part of the test inquires whether the nature of the illegal enterprise renders it 'impossible' or 'not feasible' to determine how the reasonable person in the defendant's position would have acted. If it is impossible or not feasible to ascertain how the reasonable person would have behaved, the defence will apply.

1 *'Impossible' or 'Not Feasible' to Set a Standard of Care*

The second stage of the test is constituted by two alternative conditions. It will be satisfied if it is impossible to set a standard of care *or* if it is not feasible to do so. Let us inspect each condition more closely. By including the impossibility condition within the second stage of the test, the High Court must have been of the opinion that it cannot always be determined how the reasonable person would behave in a given situation. This view should be rejected.[63] Being reasonable, the reasonable person always does what there is the most reason to do. If the balance of reasons supports x-ing, the reasonable person will x. If y-ing is supported by an undefeated reason, the reasonable person will y. Since there are *always* reasons to act in one way or another, it is *always* possible to give an answer to the question: what would the reasonable person have done in the circumstances? (Of course, different people may give different answers to this question, but this is beside the point.) Accordingly, since the impossibility condition can never be satisfied, it should be jettisoned. In any event, it does not add anything to the feasibility condition.[64] If it is impossible to do something it will also be unfeasible to do it.

The feasibility condition is also problematic. What precisely makes it unfeasible to set a standard of care in cases in which the parties were involved in the commission of a serious joint criminal enterprise? We have not been told. Perhaps it is thought to be unfeasible to identify a standard in such cases because evidence of how (for example) the reasonable bank robber, the reasonable getaway driver and so on would have acted will be hard to come by. Such evidence is likely, for obvious reasons, to be very difficult or impossible to obtain. But this does not render it unfeasible for the court to ask how the reasonable person in the position of a participant in a joint criminal enterprise would have acted. The court's task is often made difficult, in the most mundane of cases, by a paucity of evidence. If the courts refuse to decide disputes whenever they are confronted by a want of evidence, few cases would be resolved. Another possibility is that the courts believe that it is unfeasible to set a standard of care in cases in which the parties were involved in a serious joint criminal enterprise because doing so would be embarrassing.[65] If this is what the courts

[63] For comments sympathetic to this proposition, see W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 18th ed, 2010) 1157; Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th ed, 2007) 702.

[64] *Italiano v Barbaro* (1993) 40 FCR 303, 329 (Neaves, Burchett and Whitlam JJ).

[65] See, eg, the comments in *Jackson v Harrison* (1978) 138 CLR 438, 457–8 (Jacobs J); *Gala* (1991) 172 CLR 243, 275–6, 278 (Dawson J).

have in mind, they would do well to jettison the tag 'unfeasible'. It is unhelpful. The courts should instead say that a standard of care will not be set when it would be demeaning for the courts to ask how the reasonable person in the defendant's position would have acted.

2 *The Dangerousness of the Parties' Activity*

It has often been stressed that a pivotal factor to consider in relation to the second stage of the test is the dangerousness of the parties' activity.[66] However, looking to the dangerousness of the parties' activity to decide whether the joint illegal enterprise defence applies does not make sense.[67] In the first place, the fact that the plaintiff put himself or herself in harm's way is taken into account through various other rules, especially the provision for apportionment for contributory negligence. The apportionment provision is a much more subtle and sophisticated way of taking stock of unjustified risk-taking by the plaintiff than the joint illegal enterprise defence, which operates in an all or nothing way. Secondly, if the parties were jointly engaged in a relatively danger-free but very serious criminal enterprise, the small risk of injury would militate against the defence applying. This result is counterintuitive. Thirdly, if it is the dangerousness of the venture that matters, why is it not also the law that all individuals who are jointly engaged in high risk but lawful activities do not owe reciprocal duties of care? For these reasons, the joint illegal enterprise defence should be insensitive to the dangerousness of the parties' activity.

3 *Could the Plaintiff Have Reasonably Expected the Defendant to Exercise Proper Care?*

The courts have said that an important consideration to take into account in applying the second stage of the two-stage test is whether the plaintiff could have reasonably expected the defendant to exercise reasonable care. This factor was given considerable weight in *Gala*[68] and by the Court of Appeal in *Miller*.[69] It is doubtful, however, whether this factor should be relevant in this connection. It has not been explained why it should not also be important in cases that do not raise the joint illegal enterprise defence. A passenger travelling in a motor vehicle that is being controlled by a person who has never driven a car before obviously cannot reasonably expect that the driver will achieve the standard of the reasonably competent driver. But the learner driver nevertheless owes a duty of care to the passenger.

E *Withdrawal*

It was noted earlier that the Court of Appeal's decision in *Miller* arguably supports the proposition that withdrawal by the plaintiff from a joint criminal

[66] See, eg, *Gala* (1991) 172 CLR 243, 254 (Mason CJ, Deane, Gaudron and McHugh JJ).

[67] On this point see the useful discussion in *Italiano v Barbaro* (1993) 40 FCR 303, 309–10 (Black CJ and Beazley J), 330 (Neaves, Burchett and Whitlam JJ).

[68] (1991) 172 CLR 243, 254 (Mason CJ, Deane, Gaudron and McHugh JJ).

[69] (2009) 54 MVR 367, 384–7 [79]–[81], [83], [90] (Buss JA), 400–1 [149], [152]–[153] (Newnes JA).

enterprise will not exclude the joint illegal enterprise defence.[70] Is this position sound? I do not think that it is for two reasons. First, accepting that withdrawal can oust the joint illegal enterprise defence gives those who sign up to joint criminal enterprises an incentive to withdraw. Admittedly, this argument is of fairly limited force. For one thing, there are already powerful reasons to abandon joint criminal enterprises. Withdrawal prevents criminal liability from arising. Moreover, by withdrawing from such an enterprise one will also often extricate oneself from a situation of physical danger. Finally, this argument assumes, surely unrealistically, that were the defence qualified by the doctrine of withdrawal, this fact would become known to the public. The second argument has to do with the consistency with which tort law has recourse to the criminal law's doctrines. The civil courts seem to make use of criminal law principles to determine what constitutes a joint criminal enterprise for the purposes of the joint illegal enterprise defence.[71] Does it not follow that tort law should also accept the criminal law's position in relation to the effect of withdrawal?

F *Does the Joint Illegal Enterprise Defence Defy the Sequence in Which Issues in an Action in Negligence Should Be Addressed?*

This section discusses a feature of the joint illegal enterprise defence that I initially thought was objectionable on doctrinal grounds. I previously believed that the defence could be impugned on the basis that it flouts the sequence in which the elements in the action in negligence should be addressed. My reasoning was as follows. Two of the elements that constitute the tort of negligence are a duty of care and a breach of that duty. In asking whether the plaintiff can succeed in proceedings for this tort, one should begin by inquiring whether the defendant owed the plaintiff a duty of care. If no duty was owed, that is the end of the process. The plaintiff will fail. If, however, a duty was owed, the next step is to ask whether the defendant breached that duty. The main reason why the inquiry into the duty element logically precedes that into the breach element[72] is that it is nonsensical to talk of a breach without first deciding that a duty was owed. Without a duty, there is nothing that can be breached.[73] The joint illegal enterprise defence defies this sequence. Its application is conditional on it being possible or feasible to ascertain how the reasonable person in the position of the defendant would have behaved. This is an issue that goes to the breach element. Accordingly, the question of whether the defence applies should only be encountered *after* a duty has been found to exist. Yet, illogically, when the defence applies, it prevents a duty from being erected. The gist of this reasoning can be

[70] See above Part V(B).

[71] Consider the remarks in *Pitts v Hunt* [1991] 1 QB 24, 49 (Beldam LJ).

[72] For authority that the duty and breach elements should be analysed in this sequence, see *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431, 475 [115] (Kirby J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 274 [59] (Kirby J).

[73] For elaboration, see John C P Goldberg and Benjamin C Zipursky, 'The *Restatement (Third)* and the Place of Duty in Negligence Law' (2001) 54 *Vanderbilt Law Review* 657, 684–5.

captured by saying that the defence, when engaged, denies that which must exist in order for it to be a live issue.

I am no longer convinced that this criticism of the joint illegal enterprise defence holds water. The main difficulty with it is that it seemed to commit me to the view that it is possible for a duty to exist that does not have any content. I am not eager to embrace this unattractive proposition since the existence of a duty surely presupposes that it can be determined what it demands of those who owe it.[74] Where, then, does my argument go wrong? I am tentatively of the view that the problem is with my claim about the serial order of the duty and breach elements. This proposition may be in need of revision. I still believe that a duty must exist before there can be a breach and, consequently, that one should address the duty issue before that of breach. However, it may be possible to *provisionally* hold that a duty of care exists and then, once one gets to the breach stage and finds that it is impossible or not feasible to set a standard of care, to reopen the duty issue and conclude that, because a standard cannot be set, no duty was actually owed. If such provisional findings are permissible, the joint illegal enterprise defence is consistent with the sequential ordering of the duty and breach elements.

G *Conclusion*

For the foregoing reasons, the two-stage test that governs the joint illegal enterprise defence sits uncomfortably with important principles of the law of tort. Accordingly, if the High Court concludes that joint illegal enterprise should remain a tort defence, it is submitted that the two-stage test that governs it should be reformulated.

VII CAN THE JOINT ILLEGAL ENTERPRISE DEFENCE BE JUSTIFIED?

In the previous Part, some doctrinal difficulties with the joint illegal enterprise defence were discussed. The analysis now shifts gear. The focus here is on whether it is defensible to deny claims on the basis that the plaintiff was injured while committing a serious criminal offence with the defendant. A disturbing feature of the jurisprudence on the joint illegal enterprise defence is that most judges and commentators who have considered the defence have simply assumed that it is defensible. Take, for instance, Walsh J's remark in *Smith*:

> I think it is a sufficient explanation and justification of such a result [namely, denying a remedy to a plaintiff injured in the course of a joint illegal enterprise with the defendant] to say that the relationship in which the parties have placed themselves is not one to which the law attaches a right of action for negligence.[75]

This is no explanation or justification at all, let alone a sufficient one. It is merely a description of what happens when the joint illegal enterprise defence is

[74] See especially *Jackson v Harrison* (1978) 138 CLR 438, 457 (Jacobs J).
[75] (1970) 119 CLR 397, 433.

enlivened. It identifies no reason for recognising it. Likewise, consider Jacobs J's comment in *Jackson v Harrison*:

> Before the courts will say that the appropriate standard of care is not permitted to be established there must be such a relationship between the act of negligence and the nature of the illegal activity that a standard of care owed in the particular circumstances could only be determined by bringing into consideration the nature of the activity in which the parties were engaged. ... The courts will not engage in [such an] invidious inquiry. The reason is no doubt based on public policy.[76]

Notice that Jacobs J did not say why public policy demands that a duty of care should not be erected as between co-offenders. He said nothing at all on this crucial issue. These examples could be multiplied many times over.[77]

The truth of the matter is that it is doubtful that there is a sound rationale for the joint illegal enterprise defence.[78] It will now be demonstrated that the main rationales that have been offered in support of it are unconvincing.

A *Deterring Criminal Conduct*

It is utterly implausible to suggest that the joint illegal enterprise defence can be upheld on the basis that it deters offending.[79] For one thing, the general public is unlikely to be aware of the defence's existence. More importantly, any deterrent impact made by the defence surely pales in comparison with other disincentives to commit criminal acts, such as the threat of incurring criminal penalties and the risk of suffering serious personal injury (the criminal conduct typically in issue in joint illegal enterprise cases — using a motor vehicle without the owner's consent — is usually fraught with danger).

[76] (1978) 138 CLR 438, 457–8.

[77] In its recent report on the defence of illegality, the Law Commission of England and Wales also bemoaned that 'it was rare for the court to refer explicitly to any of the policy reasons that justified the application of the defence': Law Commission, *The Illegality Defence*, Law Com No 320 (2010) 43 [3.9].

[78] I have previously argued that claims in tort should not, in the ordinary course of things, fail on the grounds of illegality: James Goudkamp, 'A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort' (2007) 29 *Sydney Law Review* 445, 451–5; James Goudkamp, 'The Defence of Illegality: *Gray v Thames Trains Ltd*' (2009) 17 *Torts Law Journal* 205, 212–13; James Goudkamp, 'Self-Defence and Illegality under the *Civil Liability Act 2002* (NSW)' (2010) 18 *Torts Law Journal* 61, 67–8. In this article, I focus on the justifiability of the joint illegal enterprise defence. This examination, like my previous work, builds on the groundbreaking and highly persuasive treatment offered in Weinrib, above n 62. Consider also the convincing analysis in Robert A Prentice, 'Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?' (1995) 32 *San Diego Law Review* 53.

[79] John Fleming perceptively noted that the defence may actually be counterproductive in this respect since it makes joint illegal enterprises cheaper for defendants: Fleming, above n 5, 342.

B *Punishment*

The joint illegal enterprise defence cannot be justified on the basis that it punishes offenders.[80] This is obvious from *Miller*. As was already noted,[81] the plaintiff in *Miller* was not convicted of unlawfully using a motor vehicle or any other offence as a result of her acts in connection with the accident. Presumably, she was not prosecuted. It can be inferred, therefore, that the authorities decided that punishment was not warranted. Yet the Court of Appeal held that the defence applied. Even if a plaintiff deserves punishment, the defence is a spectacularly inappropriate mechanism for dispensing it. This is primarily because the penalty that it imposes depends on the extent of the loss suffered by the plaintiff rather than on his or her culpability. It is also because the defence may result in double punishment since it is not excluded by the fact that the plaintiff has been or is likely to be punished under the criminal law.[82] In short, far from promoting the goal of achieving retributive justice, the joint illegal enterprise defence undermines it.

The foregoing was realised long ago by the Supreme Court of the United States in *The Philadelphia, Wilmington, and Baltimore Railroad Co v The Philadelphia and Havre de Grace Steam Towboat Co*.[83] This case concerned a claim arising out of damage that the defendants tortiously caused to the plaintiffs' ship. At the time the damage was sustained, which amounted to $7000, the ship was being used for commercial purposes by the plaintiffs' servants on a Sunday, contrary to a Maryland statute. Grier J, who delivered the reasons of the Court upholding a verdict in the plaintiffs' favour, remarked: 'We do not feel justified … in inflicting an additional penalty of seven thousand dollars on the [plaintiffs] … because their servants may have been subject to a penalty of twenty shillings each for breach of the statute.'[84]

C *Preventing Wrongful Profiting*

What about the idea that the law should not countenance wrongful profiting? It is certainly a general principle of the law that wrongdoers should not profit from their transgressions. Does this policy support the joint illegal enterprise defence? Clearly it does not. Contrary to what one reads in newspapers, plaintiffs do not

[80] Allen Linden attempted to defend the joint illegal enterprise defence on this basis: Allen M Linden, *Canadian Tort Law* (Butterworths, 5th ed, 1993) 473.

[81] See above Part V(A).

[82] An interesting contrast can be drawn here between the joint illegal enterprise defence and the principles that govern the availability of exemplary damages. Exemplary damages will not be awarded where the plaintiff has been punished for his or her conduct in question by the criminal law: *Archer v Brown* [1985] QB 401, 423 (Peter Pain J); *AB v South West Water Services Ltd* [1993] QB 507, 527 (Stuart-Smith LJ); *Gray v Motor Accident Commission* (1998) 196 CLR 1, 13–17 [38]–[56] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 31–4 [92]–[98] (Kirby J), 51 [144] (Callinan J). Cf *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397, 407 [79] (Caulfield J). The joint illegal enterprise defence is not subject to any such requirement.

[83] 64 US 209 (1859).

[84] Ibid 218–19.

stand to profit from damages awards in tort.[85] They merely seek to undo their loss. Had the plaintiff in *Miller* been awarded compensation, she would not have been placed in a better economic position than that which she would have been in prior to the accident. She simply would have been returned, to an extent,[86] to the position that she would have occupied but for the defendant's tort.

D *Upholding the Dignity of the Courts*

One might seek to support the joint illegal enterprise defence on the ground that it preserves the dignity of the courts. It is, of course, a basic principle of justice that the integrity of the judicial system must be upheld. It is also true that if the courts come to the aid of wrongdoers, their standing may be diminished in the eyes of the public (even if in doing so they are not facilitating wrongful profiting). All of this is readily accepted. But the need to uphold the dignity of the courts does not justify the defence. This is because a wrongdoer is benefited whether or not the defence applies. For every wrongdoing plaintiff that is denied a remedy in tort via the joint illegal enterprise defence, a defendant who engaged in the same criminal activity is benefited. *Miller* exemplifies this point. In holding that the defence applied, the Court of Appeal conferred a benefit on the defendant (of course, the real beneficiary was almost certainly the third-party liability insurer of the owner of the stolen vehicle but, nominally at least, the defendant was assisted). What is more, the defence benefited the more culpable party since the defendant's wrongdoing was far more serious than the plaintiff's (recall that the defendant was sentenced to five years' imprisonment[87] whereas the plaintiff was not (apparently) even prosecuted[88]).

The argument here can be taken further. Public confidence in the courts and tort law should actually be increased if the defence did not exist. At present, if the defence applies, the defendant will be absolved of civil liability. There is nothing that the courts can do through the medium of tort law to reflect the fact that the defendant is a wrongdoer.[89] Now imagine a system of tort law identical in all respects to our own save for the fact that it does not recognise the joint illegal enterprise defence. In such a system, a defendant who commits a tort against his or her co-offender will be held civilly accountable (unless another defence applies) and the latter's damages will invariably be reduced in proportion to his or her culpability pursuant to the apportionment provision. Which system deserves more respect? Our system of tort law is manifestly inferior. It lets wrongdoing defendants get off scot-free. In contrast, the hypothetical system

[85] There are some minor and presently irrelevant exceptions to this position. For example, the potential for profiting exists if exemplary damages are awarded.

[86] The parties agreed that the plaintiff was guilty of contributory negligence in the order of 50 per cent: *Miller v Miller* (2008) 57 SR (WA) 358, 360 [2] (Schoombee DCJ). Accordingly, had the joint illegal enterprise defence not applied, the plaintiff would only have recovered half her loss (at best).

[87] See above n 26.

[88] See above Part V(A).

[89] Of course, the defendant may be punished under the criminal law, but this is by no means guaranteed.

that is not burdened by the defence is able to reflect the fact that both parties in joint illegality cases committed a wrong.[90]

E *Not Condoning Breaches of the Criminal Law*

What about the idea that tort law should not condone breaches of the criminal law? Newnes JA mentioned it as a possible rationale for the joint illegal enterprise defence in *Miller*.[91] But it requires little thought to see that this idea does not sustain the defence. By awarding a plaintiff damages in tort, the court does not necessarily approve of his or her behaviour. Consider the following cases:

(i) In *Reeves v Commissioner of Police of the Metropolis*,[92] police officers negligently failed to prevent a man who was in their custody from committing suicide. The House of Lords upheld actions under *Lord Campbell's Act*[93] by the deceased's dependants. Are we really to infer that the House thereby condoned suicide?

(ii) In *Revill v Newbery*,[94] the plaintiff was shot by an occupier of a property that he was attempting to burglarise. The English Court of Appeal upheld an action for compensation. Can it really be inferred that, in so holding, the Court approved of burglaries?

(iii) In *Fontin v Katapodis*,[95] the plaintiff struck the defendant several times with a piece of wood. The defendant retaliated by throwing a piece of glass at the plaintiff. The glass struck the plaintiff causing him serious injury. The High Court held that the plaintiff was entitled to compensation. Can it really be inferred from this holding that the High Court approved of violence of the kind in which the plaintiff engaged?

[90] Against the foregoing, one may point out that public outcry typically ensues whenever a plaintiff who is injured while committing an offence recovers compensation. This admittedly reveals a dilemma. For the reasons that I have given, we should respect tort law more if the illegality defence did not exist. The layperson, however, plainly does not hold this view. Does this mean that the law should be framed so as to promote confidence in it among the minority who think deeply about it, or should it pander to the irrational views and prejudices of the majority? Unfortunately, it is not practical to offer a comprehensive answer to this question within the confines of this article. It is worth observing that an analogous problem arises in relation to the law governing judicial bias. Setting aside decisions that are infected with bias (actual or apparent) should instil public confidence in the law since it publicly demonstrates that measures for detecting and eradicating bias exist and are effective. Unfortunately, however, the public may not appreciate this fact and illogically conclude that findings of bias reveal a serious problem with the legal system's integrity. Given this possibility, how should the courts wield the rule against bias? I discussed this conundrum in James Goudkamp, 'Facing up to Actual Bias' (2008) 27 *Civil Justice Quarterly* 32; James Goudkamp, 'Apparent Bias: *Helow v Secretary of State for the Home Department*' (2009) 28 *Civil Justice Quarterly* 183.

[91] (2009) 54 MVR 367, 400 [147]. See also *Gala* (1991) 172 CLR 243, 270–3 (Brennan J), 277–9 (Dawson J); *Hohn v King* [2004] 2 Qd R 508, 521 [54] (Chesterman J).

[92] [2000] 1 AC 360.

[93] *Fatal Accidents Act 1976* (UK) c 30.

[94] [1996] QB 567.

[95] (1962) 108 CLR 177.

These examples demonstrate that short shrift should be given to the suggestion that the joint illegal enterprise defence is needed to ensure that tort law does not condone breaches of the criminal law.

F *Distributive Justice*

Judges have sought to justify the joint illegal enterprise defence by pointing to perceived distributive injustices that would occur in its absence. For instance, in *Gray v Thames Trains Ltd* Lord Hoffmann wrote that the defence 'has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct.'[96] This line of reasoning faces a number of formidable obstacles. It will suffice to mention three of them. First, it does not explain why the joint illegal enterprise defence requires proof of complicity between the parties in a criminal act. Why should this be a precondition to the availability of the defence if the concern is to withhold compensation from those unworthy of receiving it? Secondly, it myopically focuses on plaintiffs. It ignores the fact that the joint illegal enterprise defence might enable defendants to undeservedly acquire a greater share of society's resources at the plaintiff's expense. Thirdly, it assumes that tort law is concerned with ameliorating distributive injustices. Plainly, this is not on tort law's agenda. If it were, tort law would not, for example, award earnings-linked compensation.

G *Forfeiture*

An attempt might be made to support the joint illegal enterprise defence on the basis of a theory of forfeiture, that is, the notion that one who breaks the law thereby forfeits his or her legal rights. This theory was important to the law in earlier times. It was exemplified by the doctrine of attainder.[97] Pursuant to this doctrine, outlaws and those convicted of capital offences were declared dead in the eyes of the law in anticipation of their execution. They had no legal rights. It hardly needs to be said that the law no longer embraces the notion of forfeiture.[98] This being the case, it cannot be used to sustain the joint illegal enterprise defence.

H *Summary*

To summarise, the arguments that have been offered in support of the joint illegal enterprise defence are unsatisfying. They all quickly descend into confusion. It is doubtful that a convincing rationale for the defence exists. Even

[96] [2009] AC 1339, 1376 [51]. See also *Cusack v Stayt* (2000) 31 MVR 517, 522 [26] (Heydon JA).

[97] For discussion of the doctrine, see Sir William Blackstone, *Commentaries on the Laws of England* (9th ed, 1783) vol IV, 373–82.

[98] See, eg, *Henwood v The Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438, 446 (Latham CJ): 'there is no general principle of English law that a person who is engaged in some unlawful act is disabled from complaining of injury done to him by other persons, either deliberately or accidentally. He does not become *caput lupinum*.'

if a decent justification for it is identified, the fact remains that the defence has the potential to inflict serious injustice on plaintiffs by punishing them indiscriminately and disproportionately. An overwhelming case exists, therefore, for its abolition. This step was taken by the Supreme Court of Canada in its landmark decision in *Hall v Hebert*.[99] This case involved a claim by a passenger who was injured in a motor vehicle accident that was caused by the negligence of the vehicle's driver. The driver contested liability on the ground that both he and the plaintiff had consumed large quantities of alcohol in the hours before the accident and had done so in a public place (which was unlawful). The Supreme Court held that the defence does not apply in the tort context save in very exceptional circumstances.[100] It is submitted that the High Court should reach the same conclusion.[101]

VIII THE STATUTORY ILLEGALITY DEFENCES AND THEIR RELEVANCE TO THE APPEAL IN *MILLER*

Since *Gala* was decided, the legislatures in several jurisdictions have enacted statutory illegality defences.[102] The aim of this Part of the article is to determine the relevance of these statutory defences to the appeal in *Miller*. Before coming to this issue, however, it is necessary to provide an outline of the defences.

A *An Outline of the Statutory Illegality Defences*

It is unnecessary for me to review the statutory illegality defences in great detail since I explored them at some length in other contributions.[103] I will simply provide a sketch of them. The following points capture their main features:

(i) Statutory illegality defences of general application exist in all jurisdictions except for Western Australia and Victoria. It is true that the Victorian legislature has provided for a provision, unique in Australia, which states that the fact that the plaintiff was committing an offence at the time of suffering damage is a factor to take into account in considering whether the defendant acted negligently.[104] However, this provision does

[99] [1993] 2 SCR 159. See also *British Columbia v Zastowny* [2008] 1 SCR 27.

[100] For discussion of exceptional situations in which the defence may serve a useful function, see below Part IX.

[101] The joint illegal enterprise defence is not recognised in the United States. It is not mentioned in the leading treatise in the United States on tort: W Page Keeton et al (eds), *Prosser and Keeton on Torts* (5th ed, 1984).

[102] *Civil Law (Wrongs) Act 2002* (ACT) s 94; *Civil Liability Act 2002* (NSW) ss 54–54A; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 10; *Criminal Code Act 1899* (Qld) s 6 (as inserted by *Criminal Law Amendment Act 1997* (Qld) s 4(2)); *Civil Liability Act 2003* (Qld) s 45; *Civil Liability Act 1936* (SA) s 43; *Civil Liability Act 2002* (Tas) s 6.

[103] See Goudkamp, 'A Revival of the Doctrine of Attainder?', above n 78; Goudkamp, 'Self-Defence and Illegality', above n 78.

[104] *Wrongs Act 1958* (Vic) s 14G(2)(b).

not alter the common law, at least not in any significant way.[105] It is a far cry from the statutory defences that exist in other jurisdictions.[106]

(ii) Most of the statutory illegality defences were created in the wake of the 2001–02 insurance crisis.[107] However, some were enacted earlier. For example, the Queensland legislature provided for an extremely potent statutory defence in 1997.[108] This defence, which is superbly concealed in the Act that promulgates Queensland's criminal code, has gone unnoticed in all quarters.[109] The Queensland legislature promptly forgot that it had enacted it. No hint can be found that it realised that it had already created a statutory illegality defence when it enacted a second statutory defence in the *Civil Liability Act 2003* (Qld).[110]

(iii) The statutory illegality defences vary wildly from each other. Consequently, it is extremely difficult to make general statements about them without glossing over some not insignificant ways in which they differ.

(iv) The statutory illegality defences all require proof that the plaintiff committed an offence at the time of suffering damage. Except in the case of one of the Queensland defences, it is not necessary, however, for the plaintiff to have been charged with or convicted of an offence.[111]

(v) In contrast with the joint illegal enterprise defence, the statutory illegality defences are generally capable of being triggered by the commission of relatively trivial offences.

(vi) Except in South Australia, the defendant need only show that the plaintiff committed an offence to the civil standard to engage the statutory illegality defences. In South Australia, the defendant must adduce evidence that satisfies the criminal standard.[112]

(vii) Generally speaking, the statutory illegality defences do not apply unless the plaintiff's criminal conduct materially contributed to his or her dam-

[105] *Marshall v Osmond* [1983] QB 1034, 1038 (Sir John Donaldson MR) suggests that the common law is materially identical.

[106] I note in passing that the Victorian legislature has also provided for a statutory illegality defence that applies in the context of its motor vehicle accidents compensation scheme: see *Transport Accident Act 1986* (Vic) s 40.

[107] Many of the statutory 'reforms' made to the law of torts following the insurance crisis have their provenance in recommendations made by Panel of Eminent Persons, *Review of the Law of Negligence: Final Report* (2002). This is not true of the statutory illegality defences. These defences are the product of legislative experimentation. The case for and against enacting them was not even considered by the Panel.

[108] *Criminal Law Amendment Act 1997* (Qld) s 4, amending *Criminal Code Act 1899* (Qld) s 6.

[109] It is not mentioned in any of the leading torts textbooks.

[110] The Northern Territory legislature created a statutory illegality defence in *Law Reform (Miscellaneous Provisions) Act 2001* (NT) s 10A. This section was repealed by *Personal Injuries (Liabilities and Damages) (Consequential Amendments) Act 2003* (NT) s 3.

[111] The defence in s 6 of the *Criminal Code Act 1899* (Qld) is only enlivened if the plaintiff was found guilty of an indictable offence committed at the time of the tort.

[112] *Civil Liability Act 1936* (SA) s 43(1)(a).

age.[113] Accordingly, the mere fact that the plaintiff was committing an offence at the time of the defendant's tort is insufficient to engage them.

(viii) In several jurisdictions, the statutory illegality defences are subject to a safety-valve discretion.[114] This discretion is exercisable when the circumstances of the case are exceptional and it would be harsh and unjust for the defence to apply.[115]

(ix) It has sometimes been assumed that the statutory illegality defences ousted the common law on illegality.[116] This assumption is wrong. The statutory defences and the common law on illegality exist concurrently.[117]

(x) The statutory illegality defences do not merely parrot the common law on the subject of illegality. They deviate dramatically from it. Generally speaking, they provide significantly greater protection to defendants. They apply in many situations in which the joint illegal enterprise defence does not.

B *Relevance of the Statutory Illegality Defences to the Appeal in* Miller

Let it be assumed that the central arguments that have been presented to this point are sound, and that tort law would be in better shape if the joint illegal enterprise defence did not exist. Does this mean that the High Court should abolish it? It might be argued that, since all Australian legislatures save for those in Western Australia and Victoria enacted statutory illegality defences, it would be inappropriate for the High Court to remove a common law limitation on the circumstances in which those who are injured while committing an offence can recover compensation. There are several fatal defects in this argument. However, it is unnecessary to delve into them all in detail since the High Court has made it clear that looking to statutes for guidance in determining what the common law should be is possible only when there is a measure of uniformity throughout

[113] This is not a precondition to the application of the defence in s 6 of the *Criminal Code Act 1899* (Qld).

[114] This is true of the defence in s 45 of the *Civil Liability Act 2003* (Qld). It is also true of the defences in South Australia, the Australian Capital Territory and the Northern Territory: see *Civil Liability Act 1936* (SA) s 43(2); *Civil Law (Wrongs) Act 2002* (ACT) s 94(2); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 10(2).

[115] The case need not be exceptional in order to trigger the discretion in s 45 of the *Civil Liability Act 2003* (Qld).

[116] This is implicit in Young CJ in Eq's reasons in *Sangha v Baxter* [2007] NSWCA 264 (28 September 2007). The plaintiff's claim in this case was contaminated by unlawful conduct on his part. Young CJ in Eq considered the New South Wales statutory illegality defence and found that it was inapplicable: at [74]–[87]. Significantly, his Honour left matters there insofar as the relevance of the plaintiff's illegal conduct was concerned. He did not proceed to consider whether the plaintiff's illegal conduct afforded the defendant with an answer to liability at common law. Presumably, this was because he thought the relevant common law had been abolished.

[117] This is expressly stated in some jurisdictions: see, eg, *Civil Liability Act 2002* (NSW) s 3A(1); *Civil Liability Act 2003* (Qld) s 7(2); *Civil Liability Act 2002* (Tas) s 3A(2). See also Goudkamp, 'A Revival of the Doctrine of Attainder?', above n 78, 487–90.

Australia in the approaches taken in a particular field.[118] Plainly, the necessary consistency is absent here. As has been mentioned, no statutory illegality defence exists in Western Australia or Victoria. Moreover, the statutory illegality defences in those jurisdictions that suffer from them are far from uniform. The New South Wales defence, for example, is extremely heavy-handed. It exemplifies the worst excesses of populist legislation. In contrast, the defences in South Australia and the Australian Capital Territory are far more moderate.

Are there any other reasons for the High Court to retain the defence? Two further arguments might be made in this regard:

(i) *Abolishing the defence would retrospectively create a new area of liability*. This argument is weak. In the first place, those who would benefit from the joint illegal enterprise defence were it retained could hardly complain about being retrospectively saddled with tort liability. This is because the criminal law will have put them on notice that their conduct in question might be met with legal sanctions. Secondly, it is unlikely that the removal of the joint illegal enterprise defence would increase the net of liability considerably since, in some jurisdictions at least, the statutory illegality defences cover much the same terrain as the joint illegal enterprise defence.[119]

(ii) *The circumstances in which persons injured while committing an offence should be permitted to recover compensation is a politically charged issue (as is apparent from the creation of the statutory illegality defences)*. This is true. But this argument cannot explain why the High Court has made numerous changes to politically sensitive areas of the law of tort (such as abolishing the immunity of highway authorities for nonfeasance[120]).

In summary, if, as has been argued earlier in this article, the joint illegal enterprise defence is unjustifiable, the High Court would seem to be free to abolish it.

IX SHOULD A PLEA OF ILLEGALITY EVER BE ADMITTED AS A DEFENCE?

I have argued in this article that the joint illegal enterprise defence should be abolished. However, I do not want to be taken as suggesting that illegality should never be a tort defence. This would be going too far. Consider, for example, what I have called elsewhere 'sanction shifting actions'.[121] A sanction shifting action is a proceeding in which the plaintiff seeks damages in respect of the imposition of a criminal sanction. They typically have the following factual matrix. P is

[118] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 61–3 [23]–[28] (Gleeson CJ, Gaudron and Gummow JJ).

[119] The main exception to this proposition relates to New South Wales. The statutory illegality defence in New South Wales is inapplicable if the joint illegal enterprise defence is engaged: *Civil Liability Act 2002* (NSW) s 54(2).

[120] *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

[121] See James Goudkamp, 'Can Tort Law Be Used to Deflect the Impact of Criminal Sanctions? The Role of the Illegality Defence' (2006) 14 *Torts Law Journal* 20; Goudkamp, 'The Defence of Illegality', above n 78.

injured by D's tort. As a result of this injury, P undergoes a personality change. Due to this change, P commits an offence for which he is convicted. P sues D for the consequences of his conviction (for example, loss of liberty while in gaol, loss of the capacity to earn an income while in gaol, damage to reputation etc). Sanction shifting actions have usually failed on the grounds of illegality.[122] Generally speaking, this is how they should be disposed of. This is because sanction shifting actions, unlike actions brought in respect of injuries sustained during a joint illegal enterprise, have the potential to stultify the criminal law by taking some of the sting out of criminal sanctions.[123]

X CONCLUSION

The joint illegal enterprise defence is unprincipled. It suffers from the following doctrinal difficulties:

(i) The defence derogates without justification from established rules regarding the allocation of the onus of proof.

(ii) The defence is confined without justification to the tort of negligence.

(iii) Without justification, the defence only applies when the plaintiff was engaged in a joint illegal enterprise with the defendant at the time of suffering injury.

(iv) The defence assumes that it is sometimes impossible or not feasible to inquire as to how the reasonable person would act. However, it is always possible to reach a conclusion as to what the reasonable person would do in a particular situation. It is not sufficiently clear what the courts mean when they say that it can be unfeasible to determine how the reasonable person would have behaved.

(v) The defence wrongly takes account of the dangerousness of the parties' joint illegal enterprise.

(vi) The defence wrongly takes account of whether the reasonable person in the plaintiff's position would have expected the defendant to achieve the objective standard of care.

(vii) Withdrawal by the plaintiff from a joint illegal enterprise should, but (apparently) does not, prevent the defence from applying.

In addition to suffering from this welter of doctrinal defects, public policy does not sustain the defence. Arguments that have been offered in support of denying liability on the grounds of joint participation with the defendant in a criminal

[122] See, eg, *Adkinson v Rossi Arms Co*, 659 P 2d 1236 (Alaska, 1983); *Lord v Fogcutter Bar*, 813 P 2d 660 (Alaska, 1991); *Clunis v Camden and Islington Health Authority* [1998] QB 978; *Worrall v British Railways Board* [1999] EWCA Civ 1312 (29 April 1999); *Gray v Thames Trains Ltd* [2009] AC 1339.

[123] See *Hall v Hebert* [1993] 2 SCR 159; *Gray v Thames Trains Ltd* [2009] AC 1339; *British Columbia v Zastowny* [2008] 1 SCR 27. Cf American Law Institute, *Restatement (Second) of Torts* (1979) § 871A. This rule relevantly provides: 'One who intentionally creates … criminal liability against another is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.'

enterprise at the time of suffering injury are nothing more than a flimsy construct of logical falsehoods. Indeed, far from supporting the joint illegal enterprise defence, public policy actually militates strongly against it. This is principally because it is prone to punish indiscriminately and disproportionately.

The High Court dug itself into a hole when it recognised the joint illegal enterprise defence in *Smith* (into which the courts in several other jurisdictions, following blindly in the High Court's footsteps, promptly fell[124]). It dug itself deeper in the subsequent cases, with the decision in *Gala* representing the nadir. The Court has been thrown a rope by the appeal in *Miller*. It is hoped that it will grasp this rope and lift itself out of the pit that is the joint illegal enterprise defence.

124 See above n 3.