A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort

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Abstract

Although the defence of illegality to liability in tort has a chequered history throughout the common law world and has been trenchantly criticised by judges and academic commentators alike, the legislatures of New South Wales, Queensland, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory have seen fit to enact, as part of their tort 'reform' packages, far more potent statutory analogues of this defence. This article offers an analysis of these statutory defences and their relationship with the common law defence. It will be argued that the statutory defences blight an already highly unsatisfactory body of law.

> [T]here 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*.[1]

> The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen: no record of crime, however long, makes one an outlaw.[2]

> The medieval concept of outlawry is unacceptable in modern society. An outlaw forfeited the protection of the law. He could not invoke the assistance of the court to enforce non-existent rights. In the United Kingdom today there are no outlaws. However abhorrent the crime, whatever the subsequent conviction, the protection of the law extends to the criminal who enjoys rights not only in theory but enforceable in practice.[3]

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1 *Henwood v Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438 ('*Henwood*') at 446 (Latham CJ).

2 *Olmstead v United States* 277 US 438 (1928) at 484 (Brandeis J). See also *Carroll v Staten Island R Co* 58 NY 126 (1874) at 136 (Andrews J); *Knowlton v Milwaukee City Ry Co* 18 NW 17 (Wis, 1884) at 18 (Lyon J); *Illinois Cent R Co v Dick* 15 SW 665 (Ky Ct App, 1891) at 665 (Holt CJ); *Palmer v Gordon* 53 NE 909 (Mass, 1899) at 910 (Holmes J).

3 *Cross v Kirkby* Times 5 April 2000 ('*Cross*') (Judge LJ). See also *Revill v Newbery* [1996] QB 567 ('*Revill*') at 577 (Neill LJ), 579 (Evans LJ); *Vellino v Chief Constable of Greater Manchester* [2002] 1 WLR 218 ('*Vellino*') at 231–232 [55] (Sedley LJ).

1. *Introduction*

In earlier times, those who were sentenced to death or outlawed for treason or felony were subject to the doctrine of attainder.[4] Attainder resulted in the deprivation of all rights and protections afforded under law. An attained person forfeited his or her property to the Crown and was prevented, through the concept of corruption of the blood, from inheriting or bequeathing property. They were *civiliter mortuus*. Blackstone offered the following description of the doctrine of attainder:

> For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of it's [sic] protection, and takes no farther care of him than barely to see him executed. He is then called attaint, attinctus, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law.[5]

Over the centuries, attainder came to be regarded as anachronistic and has been all but dismantled by statute.[6] However, certain provisions of some of the tort 'reform' statutes that were enacted in the wake of the 2001–2002 'insurance crisis' suggest a revival of the practice of imposing civil disabilities on offenders. For instance, in New South Wales the *Civil Liability Act* 2002 (NSW) provides for special limitations on the liability of the Crown and certain other defendants in respect of injuries suffered by individuals serving a sentence of imprisonment.[7] Furthermore, any damages that are recovered by such individuals are to be held in a 'victim trust fund' against which their victims, if any, may claim compensation.[8] More significant is the creation in New South Wales, Queensland, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory of a defence

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4 See Sir Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I* (2nd ed, 1898) vol I at 476–477; *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 ('*Dugan*') at 602, 609–610; *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82 at 85–86 (Court of Criminal Appeal).

5 Sir William Blackstone, *Commentaries on the Laws of England* (9th rev ed, 1978) vol IV at 380.

6 See, for example, *Inheritance Act* 1901 (NSW) s 16; *Trustee Act* 1925 (NSW) s 100; *Felons (Civil Proceedings) Act* 1981 (NSW). Although see *Dugan* (1978) 142 CLR 583 in which the High Court held that the doctrine of attainder remained part of the common law. In this case, the appellant had been sentenced to death in 1950 for the felony of wounding with intent to murder. The sentence was commuted to penal servitude for life. Subsequently, the appellant brought an action for defamation against the respondent. Barwick CJ, Gibbs, Stephen, Mason & Jacobs JJ, Murphy J dissenting, held that because the appellant had been sentenced to death he was subject to the doctrine of attainder and was consequently incapable of maintaining civil suits to enforce non-existent rights.

7 *Civil Liability Act* 2002 (NSW) Pt 2A, inserted by the *Civil Liability Amendment (Offender Damages) Act* 2004 (NSW) s 3, cl 3 of sched 1.

8 *Civil Liability Act* 2002 (NSW) Pt 2A, Div 6, inserted by the *Civil Liability Amendment (Offender Damages Trust Fund) Act* 2005 (NSW) s 3, cl 1 of sched 1. See *New South Wales v Bujdoso* [2007] Aust Torts Rep 81-876 (Court of Appeal of the Supreme Court of New South Wales).

that the plaintiff was committing a crime at the time of sustaining the damage of which he or she complains.[9]

When one reads the Parliamentary debates pertaining to these illegality defences, it is not difficult to detect attitudes towards offenders similar to those that were held during the heyday of the doctrine of attainder. Writing in 1883, Sir James Fitzjames Stephen declared that 'it is morally right to hate criminals'[10] and that 'the proper attitude of mind towards criminals is not long-suffering charity, but open enmity'.[11] Comparable opinions, although not articulated with the eloquence and erudition of Sir James, were widely expressed by the lawmakers responsible for the tort 'reform' statutes. Consider the following remarks:

> [T]he law has allowed criminals to sue for being assaulted or attacked by a dog while trying to rob your house or attack your children. That has been a stupidity [sic]. T[he Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW)] will go a long way towards correcting that kind of anomaly.[12]

> All honourable members are upset about people who engage in criminal activities and later claim a right to bring civil liability actions.... It is appalling that an action for civil liability may arise from injuries sustained while committing a crime...[13]

> [W]here [a] person is engaged in [a serious offence], it is monstrous if that person, falling down a stairway where one of the stairs is deficient, can then turn around and sue. No person should be entitled to claim damages arising out of criminal activity on which they have been engaged.[14]

Although the Negligence Review Panel,[15] the recommendations of which formed the basis of much of the tort 'reform' legislation, did not even consider the (de)merits of erecting an illegality defence as a suitable means of limiting awards of damages for personal injury and death, the introduction of an illegality defence was evidently a central plank in the tort 'reform' packages in the jurisdictions in which such defences were enacted.[16] For instance, in the second reading speech to the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW), the then Premier of New South Wales, the Hon Robert Carr, stated:

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9 *Civil Liability Act* 2002 (NSW) ss 54–54A; *Civil Liability Act* 2003 (Qld) s 45; *Civil Liability Act* 1936 (SA) s 43; *Civil Law (Wrongs) Act* 2002 (ACT) s 94; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 10. There is no equivalent provision in Victoria or Western Australia. However, s 14G(2) of the *Wrongs Act* 1958 (Vic) provides: 'In determining whether the plaintiff has established a breach of the duty of care owed by the defendant, the court must consider ... whether the plaintiff was engaged in an illegal activity.' This provision does not create a defence in the strict sense. Rather, the plaintiff's illegal act is merely a consideration to be borne in mind for the purposes of the negligence 'calculus'.

10 Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883) vol II at 81.

11 Id at 179.

12 New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002 (Alan John Ashton) at 6257.

13 New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002 (Diane Beamer) at 6205.

14 Tasmania, *Parliamentary Debates*, House of Assembly, 22 October 2002 (Michael Hodgman) at 70.

15 Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002).

> Very importantly, the bill will limit people claiming damages for injuries received while committing a crime. The general rule under the bill will be that no damages are payable if the injured person was engaged in conduct constituting a serious offence. Serious offences include a very wide range of crimes: entering a dwelling house, breaking and entering, and escaping lawful custody. People who engage in such criminal conduct should not sue for slipping over while they do so.[17]

The aim of this article is to elucidate the operation of the statutory illegal defences in relation to actions in tort.[18] It will be argued that the defences, like many of the provisions in the tort 'reform' statutes, introduce inconsistencies and anomalies. The defences aggravate the already unacceptably nebulous state of the law concerning the effect of a plaintiff's illegal conduct on his or her entitlement to a remedy. It will be further argued that they lack a convincing justification. However, before we examine the statutory defences, it is necessary to take our bearings by considering the position at common law.

2. *The Common Law Defence*[19]

A. *The Various Faces of the Common Law Defence*

Although there was some doubt as to whether illegality on the part of the plaintiff was an answer to liability in tort until fairly late in the day,[20] it is now well established that the fact that the plaintiff was committing an offence at the time of sustaining injury may result in the loss of a remedy in respect of that injury. This defence, which sometimes goes by the maxim *ex turpi causa non oritur actio*,[21] features in three conceptually discrete situations. In each of these situations, the defence assumes a rather different shape.

Its most practically important field of operation is where the plaintiff is injured while engaged in a joint illegal enterprise with the defendant. In this setting, if the nature of the enterprise is such that it would be 'impossible or not feasible' or

16 In one respect, the enactment of these illegality defences is a curious development. Unlike many of the newly created defences, such as those enjoyed by 'Good Samaritans' (*Civil Liability Act* 2002 (NSW) Pt 8; *Civil Liability Act* 2003 (Qld) ss 25–27 (see also *Law Reform Act* 1995 (Qld) s 16); *Civil Liability Act* 1936 (SA) s 74; *Wrongs Act* 1958 (Vic) ss 31A–31D; *Civil Liability Act* 2002 (WA) ss 5AB–AE; *Civil Law (Wrongs) Act* 2002 (ACT) s 5; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 8), 'volunteers' (*Commonwealth Volunteers Protection Act* 2003 (Cth); *Civil Liability Act* 2002 (NSW) Pt 9; *Civil Liability Act* 2003 (Qld) ss 38–44; *Volunteers Protection Act* 2001 (SA); *Civil Liability Act* 2002 (Tas) ss 44–49; *Wrongs Act* 1958 (Vic) ss 34–42; *Volunteers and Food and Other Donors (Protection from Liability) Act* 2002 (WA) Pt 2; *Civil Law (Wrongs) Act* 2002 (ACT) ss 6–11; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 7) and even 'food donors' (*Civil Liability Act* 2002 (NSW) Pt 8A; *Wrongs Act* 1958 (Vic) ss 31E–31H; *Volunteers and Food and Other Donors (Protection from Liability) Act* 2002 (WA) Pt 3), these illegality defences have a common law counterpart: see below Section 2(A).

17 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002 at 5766.

18 Although the statutory defences apply to personal injury actions brought in contract and pursuant to state and territory consumer protection legislation, an analysis of the effect of a plaintiff's unlawful behaviour outside the tort context cannot be conveniently accommodated in this article.

'grotesque' to inquire as to the standard of care that the reasonable person in the defendant's position would have exercised, any duty of care which the plaintiff would otherwise have been owed will be negated.[22] For example, the defence would apply in an action brought by a burglar in respect of injuries sustained while trying to blow open a safe due to his accomplice's negligent handling of the explosive charge.[23] Similarly, it would ordinarily prevent a passenger in a vehicle from recovering compensation in respect of injuries sustained due to the driver's negligence where the passenger and the driver had stolen the vehicle.[24] It should be observed that it seems that the plea of joint illegal enterprise, because of its dependence on two of the building blocks of the tort of negligence – the duty and standard of care – is only available in the context of that tort.[25] It is also necessary to keep in mind that involvement in a joint illegal enterprise does not furnish a defence *stricto sensu* but operates to forestall a duty of care from arising.

The second situation in which the defence features is where the plaintiff suffers damage while 'unilaterally' engaged in an illegal activity.[26] In the leading decision in *Henwood v Municipal Tramways Trust (South Australia)*,[27] the High Court declared that the application of the defence in this context depends upon the legislature's intention in enacting the statutory provision that the plaintiff contravened. Specifically, did the legislature intend to abrogate civil remedies which might otherwise have been enjoyed by those injured while engaged in the prohibited conduct? Considering that legislatures usually express no view when creating offences as to the consequences of committing such offences on civil

19 What follows in this Section is a necessarily abbreviated statement of the effect of a plaintiff's illegal conduct on his or her entitlement to redress in tort at common law. This account is truncated in so far as is consistent with perspicuity. It is far from comprehensive. Australian courts have adopted myriad and frequently contradictory approaches to the issue of illegality. It is impractical to discuss the universe of judicial opinion here. For further analysis see Jane P Swanton, '"Complicity in a Joint Illegal Enterprise" as a Tort Defence' (1993) 67 *Australian Law Journal* 866; Rande W Kostal, 'Currents in the Counter-Reformation: Illegality and Duty of Care in Canada and Australia' (1995) 3 *Tort Law Review* 100; 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; Margaret Fordham, 'The Role of *Ex Turpi Causa* in Tort Law' [1998] *Singapore Journal of Legal Studies* 238; Rick Glofcheski, 'Plaintiff's Illegality as a Bar to Recovery of Personal Injury Damages' (1999) 19 *Legal Studies* 6; Law Commission for England and Wales, *The Illegality Defence in Tort*, Consultation Paper No 160 (2001); Joseph H King, 'Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law' (2002) 43 *William and Mary Law Review* 1011; 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.

20 In *National Coal Board v England* [1954] AC 403 ('*England*') at 418 (House of Lords) Lord Porter declared that the defence of illegality 'is generally applied to a question of contract' and that he was 'by no means prepared to concede where concession is not required that it applies also to the case of a tort.' Glanville Williams, in a note on this case, concurred, stating that illegality 'is not one of the general defences recognised in tort': Glanville Williams, 'Contributory Negligence and Vicarious Liability' (1954) 17 *Modern Law Review* 365 at 365. See also *Betts v Sanderson Estate* (1988) 31 BCLR (2d) 1 at 8 (Court of Appeal).

21 '[N]o cause of action may be founded upon an immoral or illegal act' (*Revill* [1996] QB 567 at 576 (Neill LJ); 'an action arises not from a bad cause' (*Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 281 [75] n111 (Kirby J)).

remedies, it is not surprising that the defence has rarely been invoked successfully in this context.[28] One problem with this situation is that it means that a defendant who is 'innocent' in the sense of not being implicated in the plaintiff's illegal conduct is put in a worse position than a defendant who is jointly engaged with the plaintiff in a breach of the criminal law.

Although talk of a defence of unilateral illegality is commonplace, such language should be assiduously avoided because of its potential to mislead. Leaving aside the odd judicial garnish, the unilateral illegality defence involves nothing more than the application of ordinary principles of statutory interpretation.[29] The relevant issue is whether the legislature, in creating the offence committed by the plaintiff, intended to strip the plaintiff of civil remedies that he or she may otherwise have enjoyed. It is undesirable that statutory interpretation be dressed up as something other than what it is lest attention be diverted from the legislative text.[30] Indeed, it is also unhelpful to refer to a 'common law' defence of unilateral illegality. This is because the defence in this context is not located in the common law but depends upon the relevant penal legislation.

Finally, the illegality defence may preclude recovery under a particular head of damages. For instance, damages in respect of lost earnings that were concealed from the revenue authorities in order to fraudulently claim social security payments,[31] as well as for earnings which, but for the conduct of a tortfeasor, would have been derived from working as an illegal bookmaker,[32] as a crane

22 *Gala v Preston* (1991) 172 CLR 243 ('*Gala*') at 252–253. See also *Jackson v Harrison* (1978) 138 CLR 438 ('*Jackson*') at 455–456, 458. The important decision of the High Court in *Gala* was reached in reliance on the concept of proximity, which was then regarded as an integral component of a duty of care. In essence, the Court reasoned that if it would be 'grotesque' to ask what the reasonable person would have done in the position of the defendant due to the nature of the illegal enterprise, the requisite proximity between the plaintiff and defendant required to establish a duty of care would be absent. Now that the notion of proximity has been found deficient and banished from the realm of the tort of negligence (see *Sullivan v Moody* (2001) 207 CLR 562 at 578–579 [48]), an issue arises as to the status of the defence in the joint illegality context. In this author's view, the demise of proximity is more or less irrelevant in this regard: contrast *Joslyn v Berryman* (2003) 214 CLR 552 at 564 [30]. The joint illegality defence has been applied since the downfall of proximity (see, for example, *Wills v Bell* [2004] 1 Qd R 296 (Court of Appeal)). Furthermore, it is difficult to see why, if it is impossible in a given case to identify the standard of care, that fact should cease to be fatal to the plaintiff's action merely because of a change in the approach to the determination of the existence of a duty of care.

23 This classic example was supplied by Lord Asquith in *England* [1954] AC 403 at 429 (House of Lords). Consider also the example offered by Lord Mayfield in *Lindsay v Poole* [1984] SLT 269 at 270 (Scottish Court of Session (Outer House)): 'An obvious situation [where the defence would apply] would be where two persons embarked on violence towards a third. If one of those two persons struck a blow with a knife and the victim was the other person, his participant, it seems clear that the latter would not have a claim for damages for negligent use of a knife'. Further examples are offered by Scrutton LJ in *Hillen v ICI (Alkali) Ltd* [1934] 1 KB 455 at 467 and Windeyer J in *Smith v Jenkins* (1969) 119 CLR 397 ('*Smith*') at 419.

24 See, for example, *Gala* (1991) 172 CLR 243.

25 Compare *Emanuele v Hedley* (1997) 137 FLR 339 at 363–366 (Supreme Court of the Australian Capital Territory).

operator while unlawfully concealing a history of epileptic seizures,[33] in contravention of migration laws[34] and from illegal hawking[35] have been denied on the basis of the defence.[36] Similarly, damages claimed under Lord Campbell's Act by dependants in respect of a loss of financial support that would have been rendered to them had it not been for the defendant's tort have been rejected on the footing that the income would have been obtained through social security fraud,[37] burglaries[38] and unlicensed panel beating.[39] The circumstances in which the defence will apply to deny recovery under a head of damages are extremely difficult to state. The most that can be usefully said within a short compass is that it is likely that the defence will be engaged where the damages claimed are intimately connected with the illegal conduct.[40]

B. The Unjustifiably Wide Scope of the Common Law Defence

(i) Inadequate Rationales

Subject to two narrow exceptions, the common law illegality defence is indefensible.[41] While glittering endorsements of the defence are in plentiful supply,[42] no persuasive argument has ever been advanced to justify the defence as it presently exists. Attempts to support the defence on the basis that it bolsters the criminal law[43] quickly flounder. The defence undermines the criminal law's concern with achieving retributive justice as it is pregnant with the potential for imposing double punishment: a plaintiff who has been punished by the criminal

26 The phrase 'unilateral illegality' seems to have been first used by Amsberg DCJ in *Sullivan v Sullivan* (1961) 79 WN (NSW) 615 at 617.

27 (1938) 60 CLR 438 at 455, 460–461, 467.

28 See the authorities noted in Goudkamp, above n19 at 22 n16.

29 The position in England is arguably different. Although the English courts naturally pay regard to the legislature's intention (see *Revill* [1996] QB 567 at 577–580 (Court of Appeal)), various other factors are given substantial weight including the seriousness of the illegality (*Vellino* [2002] 1 WLR 218 at 222 [8]–[9], 226 [28], 234 [62] (Court of Appeal)), whether the defendant's tortious conduct was of disproportionate significance relative to the plaintiff's criminal behaviour (*Lane v Holloway* [1968] 1 QB 379 at 387, 389, 395 (Court of Appeal)) and whether the plaintiff's conduct is 'closely connected or inextricably bound up' or 'interwoven or linked' with the plaintiff's illegal conduct (*Saunders v Edwards* [1987] 1 WLR 1116 ('*Saunders*') at 1134 (Court of Appeal); *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR 225 at 238 [46], 248 [79] (Court of Appeal)). These factors do not seem to be used merely as a means of identifying the relevant legislative intent but are afforded weight in their own right. In other words, the English courts are prepared to deny actions contaminated by unilateral illegality without concluding that the legislature, by enacting the relevant offence provision, intended that result. This is impermissible in Australia, at least if one adheres strictly to the High Court's decision in *Henwood*.

30 *Victorian Workcover Authority v Esso Australia Limited* (2001) 207 CLR 520 at 544–545 [62]–[64]; *Regie Nationale des Usines Renault v Zhang* (2002) 210 CLR 491 at 542–544 [143]–[147].

31 *Kanu v Kashif* [2002] EWCA Civ 1620 ('*Kanu*'); contrast *Duller v South East Lines Engineers* [1981] CLY 585 (Queen's Bench) (damages for loss of income awarded although income was not declared for tax purposes); *Newman v Folkes and Dunlop Tyres Ltd* [2002] PIQR Q2 (Queen's Bench) (same); *Finnis v James Caulfield t/a James Car Hire* [2002] EWHC 3223 (same); *Frenette v Audet* (1988) 89 NBR (2d) 306 (Court of Appeal) (same).

32 *Meadows v Ferguson* [1961] VR 594 (Supreme Court).

law is liable to be punished a second time by having his or her action for damages denied. Moreover, because compensatory damages in tort are calculated by reference to the harm suffered by the plaintiff, the punishment meted out by the denial of damages is unlikely to bear any relationship to the culpability of the plaintiff.[44]

It is very difficult to accept claims[45] that the defence deters criminal behaviour. If the threat of criminal penalties fails to deter a plaintiff from committing an offence, it seems quite fanciful to think that the *potential* loss of a remedy in tort that *may* have otherwise been enjoyed *in the event of* sustaining injury while committing the offence will do so. If those who embark on an unlawful enterprise turn their mind to the law at all, it will be the criminal law that they will be concerned about, not the possible loss of a remedy in tort. The argument from deterrence breaks down completely in the context of joint illegal enterprises as withholding a remedy as between the participants is just as likely to encourage such enterprises as it is to deter them.[46]

Nor can the defence be justified on the grounds that it prevents the courts from having their integrity degraded by hearing evidence of illegal activities. This is for the obvious reason that criminal courts routinely hear such evidence.[47] It is equally unconvincing to argue[48] that the defence is needed to ensure that the courts will not be perceived as condoning unlawful conduct by awarding damages in illegality cases. For one thing, it seems that the courts do not believe that awarding damages in cases tainted by illegal conduct on the part of the plaintiff is liable to create the

33 *Hewison v Meridian Shipping Pte Ltd* [2003] ICR 766 ('*Hewison*') (Court of Appeal of England and Wales); compare *Major v Ministry of Defence* (2003) 147 SJLB 1206 (Court of Appeal of England and Wales) (plaintiff who illegally concealed psychiatric illness from employer able to claim damages for loss of income).

34 *Lee v McClellan* (1995) 127 FLR 383 (Supreme Court of New South Wales); compare *Tsang Siu Hong v Kong Hoi For* [2003] HKCFI 216 at [36]–[45] (tourist injured while working illegally awarded damages for lost income, although at the rate at which he would have derived income in his home country).

35 *Dhlamini en 'n ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A); contrast *Chung Man-Yau v Sihon Company Ltd* [1997] HKCA 426; *Chiu Wing Sze Karby v Chan Ying Wai* [2001] HKCFI 341.

36 Although see *Mills v Baitis* [1968] VR 583 (Supreme Court) (damages for loss of income awarded although the income was earned through a business that was operated in breach of planning laws: compare *McNichols v J R Simplot Co* 262 P 2d 1012 (Idaho, 1953)).

37 *Hunter v Butler* [1996] RTR 396 ('*Hunter*') (Court of Appeal of England and Wales).

38 *Burns v Edman* [1970] 2 QB 541 (Queen's Bench); compare *Biljanski v Smithwick* (2006) 56 BCLR (4th) 99 (Court of Appeal).

39 *Santam Insurance Ltd v Ferguson* 1985 (4) SA 843 (A). But see *LeBagge v Buses Ltd* [1958] NZLR 630 (Court of Appeal) (damages awarded notwithstanding that the deceased would have earned income in contravention of transportation regulations: contrast *Desmet v Sublett* 225 P 2d 141 (NM, 1950)). For criticism of the denial of claims under Lord Campbell's Act where the breadwinner provided support through illegal means see Mervyn Dendy, 'Damages for Loss of Support Out of Illegally Earned Income: Visiting the Sins of the Fathers' (1987) 104 *South African Law Journal* 243.

40 *Hewison* [2003] ICR 766 at 781–782 [36]–[38], 786 [50]–[51] (Court of Appeal of England and Wales).

impression that they are condoning that conduct. The courts regularly grant relief to plaintiffs who were injured while committing minor offences, such as breaches of the road rules. Damages are not infrequently awarded to plaintiffs who sustained damage while engaged in more serious offences, such as burglary[49] and assaulting police with a shotgun.[50] More significantly, this argument is self-defeating as the courts, by withholding a remedy, may be perceived as condoning the defendant's tort, which may also be an offence. In other words, this line of reasoning ignores the fact that the courts may be perceived as condoning the conduct of a wrongdoer regardless of whether or not the defence is applied.

The strongest argument that has been mounted in support of the defence is that it relieves the courts of the potentially demeaning task of investigating whether one criminal took reasonable care for his or her accomplice.[51] The concern is that the currency of justice is liable to be debased if the courts were required to adjudicate on whether, for instance, a safe blower who caused injury to his or her accomplice achieved the standard of care that would have been exercised by the reasonable safe blower. It is important to note that this argument only supports the defence in the context of joint illegality. This would seem to explain why the courts are far more willing to reject actions that are contaminated by joint illegality than by unilateral illegality.[52]

Critics of the illegality defence have never really grappled with this argument. They tend to sidestep it and instead emphasise the fact that the defence is objectionable because it subverts the criminal law's concern with achieving

41 It is necessary to emphasise that what follows here is only an outline of the case that can be mounted against the common law defence. A comprehensive critique of the defence cannot be accommodated in this article. For formidable attacks on the defence see Ernest J Weinrib, 'Illegality as a Tort Defence' (1976) 26 *University of Toronto Law Journal* 28 at 39–54 (consider also Ernest J Weinrib, *The Idea of Private Law* (1995) at 169 n53) and Prentice, above n19 at 105–131. The present author agrees with much, but not all, of what these commentators have to say about the defence.

42 '[N]o polluted hand shall touch the pure fountains of justice.' (*Collins v Blantern* (1767) 2 Wils 341 at 350 (Wilmot LCJ); 95 ER 847 at 852)); '[H]e who tramples on [the] law should fully understand that he has no right to call on a court for aid to enforce a claim founded on his own unlawful act.' (*Gregg v Wyman* 58 Mass 322 (1849) at 331 (Fletcher J)); '[N]o system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.' (*Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156 (Fry LJ)); 'Courts do not exist for the purpose of assisting persons damnified in criminal transactions.' (*Joubert v Toronto General Trusts Corp* (1955) 63 Man R 209 at 216 (Adamson CJM) (Court of Appeal)).

43 See, for example, Allen M Linden, *Canadian Tort Law* (5th ed, 1993) at 473. Linden asserts that '... tort law is not unwise to reinforce the criminal law by adding the civil sanction of denying tort recovery to whatever penal sanctions maybe imposed for the offence'. See also Fowler V Harper, Fleming James & Oscar S Gray, *The Law of Torts* (2nd ed, 1986) vol III at 618.

44 This point was made long ago by the Supreme Court of the United States in *Philadelphia, W & B R Co v Philadelphia & Havre de Grace Steam Towboat Co* 64 US 209 (1859) at 218–219.

45 See, for example, *Thackwell v Barclays Bank Ltd* [1986] 1 All ER 676 at 689 (Queen's Bench); Nelson Enonchong, *Illegal Transactions* (1988) at 15, 96.

46 *Gross v Miller* 61 NW 385 (Iowa, 1894) at 386; *Sayadoff v Warda* 125 Cal App 2d 626 (Ct App, 1954) at 631; *Jackson* (1978) 138 CLR 438 at 453; *Tinsley v Milligan* [1994] 1 AC 340 at 368 (House of Lords).

retributive justice by imposing indiscriminate punishment. The best attack on this argument that this author is able to devise draws upon the fact that the criminal courts, on hearing a charge of manslaughter by criminal negligence, are prepared to ask whether the defendant took reasonable care for his or her deceased accomplice despite the fact that they were engaged in outrageously dangerous behaviour at the relevant time. Consider the English case of *R v Willoughby*.[53] In this matter, the defendant and the deceased set a public house owned by the defendant on fire to enable him to make a fraudulent insurance claim. The deceased died in the conflagration. Although the criminal courts, in asking whether a defendant is guilty of gross negligence are supposed to apply the principles governing the tort of negligence,[54] the Court of Appeal dismissed the relevance of the fact that the defendant could not have been held civilly liable for the death of deceased due to the illegality defence and concluded that it was permissible to inquire as to whether the defendant took reasonable care for the deceased in the way in which he went about setting the house on fire. Cases such *Willoughby* seem to demonstrate that asking whether one criminal took reasonable care for his or her accomplice does not impugn the integrity of the courts.

Supporters of the illegality defence may try to prop up this argument in two ways. First, they may contend that considerations of retributive justice, which are central to the criminal law but which operate with much less force in the tort context (if at all),[55] override concerns about the temples of justice being sullied in the criminal context by investigating whether a defendant took reasonable care for his or her deceased accomplice. However, this proposition immediately collapses because maintaining public confidence in the law is the foundational principle of justice. The need to uphold confidence in the administration of justice can never be overridden by other objectives.[56]

Secondly, it may be claimed that this attack on this argument fails to pay proper regard to the different objectives of tort law and the criminal law. In a joint illegality case, the plaintiff asks the court to determine whether the defendant (his or her accomplice) took reasonable care for his or her safety while advancing their joint criminal designs. The ultimate issue for the court is whether the plaintiff should be left to shoulder the costs of his or her injuries or if those costs should be

47 *Smith* (1969) 119 CLR 397 at 432; *Jackson* (1978) 138 CLR 438 at 465; *Hall v Hebert* [1993] 2 SCR 159 at 217.

48 Consider *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 35 ('*Euro-Diam*') (Court of Appeal).

49 *Revill* [1996] QB 567 (Court of Appeal).

50 *Zalewski v Turcarolo* [1995] 2 VR 562 (Supreme Court).

51 *Holland v Tarlington* (1989) 10 MVR 129 at 136 (Court of Appeal of the Supreme Court of New South Wales).

52 See Section 2(A) above.

53 [2005] 1 WLR 1880 (Court of Appeal). See also *R v Wacker* [2003] QB 1207 (Court of Appeal).

54 *R v Adomako* [1995] 1 AC 171 at 187 (House of Lords).

55 Compare Peter Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in Peter Cane & Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 141; Tony Honoré, *Responsibility and Fault* (1999) at 85–87.

56 Consider *AWG Group Ltd v Morrison* [2006] 1 WLR 1163 at 1166 [6] (Court of Appeal).

borne by the defendant. On hearing a charge of manslaughter by criminal negligence, the trier of fact is required to reach a conclusion as to whether the defendant was grossly negligent with respect to the safety of the deceased. The essential purpose of this investigation is to determine whether the defendant should be punished. It may be thought that this difference in purposes is critical and that investigating whether one criminal took reasonable care for his or her accomplice in order to work out whether a right to compensation arises is liable to impugn the integrity of the judicial system while conducting such an investigation in order to determine whether punishment is warranted is not.

This line of reasoning is also unconvincing. It is conceded that the ultimate purpose of the investigation in the tort and criminal contexts is different. However, it is important to observe that the proximate purpose of the investigation is the same: to determine whether the defendant took insufficient care of his or her accomplice. Furthermore, it is not clear why the difference in the ultimate purpose should matter. According to the argument that is presently under consideration, without the illegality defence, the dignity of the courts would be threatened because they would be required to enter into an investigation as to whether the defendant lived up to the standard of the reasonable safe blower, the reasonable getaway driver, the reasonable arsonist and so on. The argument objects to the very fact that the court would, in the absence of the defence, be required to undertake such investigations. It is unconcerned with the ultimate purpose of doing so. Accordingly, cases such as *Willoughby* cannot be completely explained away by reference to the different functions of tort and crime. It is impossible to escape from the fact that *Willoughby* and like cases demonstrate that it is not degrading for the courts to investigate whether participants in a joint illegal enterprise took reasonable care for each other.

(ii) The First Exception – Sanction Shifting Actions

What are the two exceptions, referred to earlier, where denying an action on the grounds of illegality serves a legitimate function? The first exception concerns those relatively unusual cases where a plaintiff, by way of a claim for indemnity or compensation, attempts to harness tort law to deflect the impact of a criminal sanction.[57] The seminal case on sanction shifting is *Meah v McCreamer*.[58] In this matter, the plaintiff recovered compensation for the loss that he suffered as a result of being sentenced to life imprisonment for raping three women. The basis for the plaintiff's claim was that, but for sustaining a negligently inflicted brain injury which diminished his ability to resist desires for sexual violence, he would not have committed the rapes and, in turn, would not have been imprisoned.[59]

57 For a fuller discussion of such cases see Goudkamp, above n19.

58 [1985] 1 All ER 367 ('*Meah*') (Queen's Bench). The decision is noted in E K Banakas, 'Tort Damages and the Decline of Fault Liability: Plato Overruled, But Full Marks to Aristotle!' (1985) 44 *Cambridge Law Journal* 195.

59 For a recent example of an (unsuccessful) sanction shifting action see *Dorsett v Janeska* [2005] WASCA 215.

It is obvious that cases such as *Meah* are fundamentally different from illegality cases in which the loss complained of is not a criminal sanction. Allowing recovery in sanction shifting cases notionally nullifies the punishment imposed on the plaintiff.[60] However, in non-sanction shifting cases, awarding damages merely ensures that the plaintiff is not punished twice for his or her illegal conduct. This difference between sanction shifting and non-sanction shifting cases was elegantly captured by Weinrib when he said that withholding a remedy on the grounds of illegality in the former type of case simply denies the plaintiff a rebate, while in the latter type it may act as a surcharge.[61] Regrettably, the courts have largely failed to notice this important distinction.[62] So much is apparent from the fact that decisions denying sanction shifting actions are routinely cited in support of denying non-sanction shifting actions that are tainted by illegal conduct on the part of the plaintiff.[63]

The main objection to sanction shifting actions is that, by taking some (or all) of the sting out of criminal sanctions, they have the potential to stultify the operation of the criminal law.[64] If tort law facilitates the deflection of criminal penalties away from offenders it is less likely that retributive justice will be achieved and the probability of sentences having the desired deterrent effect will be reduced. Accordingly, the courts have generally insisted that the punishment meted out by the criminal courts should rest upon offenders personally[65] and have refused to entertain sanction shifting actions.[66]

However, it is important to be alive to the fact that this objection to sanction shifting actions does not apply to every case in which a plaintiff seeks to invoke tort law to mollify the impact of a criminal sanction.[67] Not all sanction shifting

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60 Of course, not all criminal sanctions can be effectively offset by the award of damages, imprisonment being the most obvious example. But some types of sanctions, such as a fine, can be almost completely offset by damages.

61 Weinrib, 'Illegality as a Tort Defence', above n41 at 51.

62 Although see *Jackson* (1978) 138 CLR 438 at 461 (Murphy J).

63 For example, in *Jackson* (1978) 138 CLR 438, which involved an action for damages in respect of personal injuries sustained while the plaintiff and defendant were jointly committing the offence of driving a motor vehicle while disqualified, Barwick CJ cited (at 442) the classic sanction shifting decision in *Colburn v Patmore* (1834) 1 Cr M & R 73; 149 ER 999 in support of his conclusion that the illegality defence should be applied. In *Colburn*, the plaintiff unsuccessfully sought to use tort law to deflect a fine that he had incurred for criminal libel.

64 This is the same reason why the courts refuse to enforce contracts to insure against criminal penalties.

65 As Denning J remarked in *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at 38 (King's Bench): 'It is, I think, a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment'.

66 *Cole v Taylor* 301 NW 2d 766 (Iowa, 1981); *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500 ('*Wiegold*') (Court of Appeal); *Lord v Fogcutter Bar* 813 P 2d 660 (Alaska, 1991); *Clunis v Camden and Islington Health Authority* [1998] QB 978 ('*Clunis*') (Court of Appeal); *Worrall v British Railways Board* [1999] CLY 1413 ('*Worrall*') (Court of Appeal of England and Wales); *DN v London Borough of Greenwich* [2005] 1 FCR 112 (Court of Appeal of England and Wales); *HL v Canada (A-G)* [2005] 1 SCR 401; *Gray v Thames Trains Ltd* [2007] EWHC 1558. See further Goudkamp, above n19 at 28-36.

actions are as repugnant as *Meah*.[68] Sometimes, a person may breach the criminal law without fault on his or her part because of the wrongdoing of another. For example, it is suspected that many people would think that an individual who relies on an accountant to attend to his or her tax affairs but who, because of the gross negligence of the accountant, incurs a criminal penalty for non-compliance with the taxation rules, should be able to pass the penalty on to the accountant.[69] In such situations, sanction shifting actions may actually help to ensure that liability coincides with blameworthiness. They may also result in the sanction falling upon the individual who is able to avoid the commission of the offence most efficiently.

Of course, this does not mean that sanctions should be shifted whenever it seems that such shifting is morally or economically appropriate. Sanction shifting actions constitute collateral attacks on verdicts of criminal courts.[70] They are collateral in the sense that they seek to challenge verdicts other than via the appeal system. There are obvious reasons for refusing to permit collateral attacks. Collateral attacks have the potential to undermine public confidence in the administration of justice because they may result in inconsistent verdicts.[71] They also run counter to the public interest in the finality of litigation.[72]

It may also be argued that it is irrational to shift sanctions.[73] If a criminal court had not considered a particular offender deserving of a penalty, it would not have imposed one on him or her. It is bizarre and wasteful for the law to take with one hand and give back with the other. Finally, there is much that can be said in favour of the view that it would be best for the legislature to target more precisely those who it wishes to penalise under the criminal law than for tort law to attempt to rectify apparent targeting errors. Tort law, after all, has no shortage of serious problems of its own to worry about[74] without having to concern itself with remedying apparent shortcomings in the criminal law.

67 Weinrib, 'Illegality as a Tort Defence', above n41 at 52–54.

68 Although it is strongly arguable that the trial judge in *Meah*, Woolf J, awarded damages so as to ensure that the plaintiff's victims could obtain compensation from him: see *W v Meah* [1986] 1 All ER 935 (Queen's Bench). It is suspected that had the plaintiff's victims not brought proceedings against him, he would not have succeeded in his action. This view is supported by the fact that Woolf J subsequently held that the defendant was not liable to indemnify the plaintiff in respect of his liability to his victims: *Meah v McCreamer (No 2)* [1986] 1 All ER 943. The plaintiff was therefore essentially reduced to a conduit through which his victims could access the defendant's insurance funds.

69 Consider *Worman v Carver* 44 P 3d 82 (Wyo, 2002); *United Project Consultants Pte Ltd v Leong Kwok Onn* [2006] 3 LRC 85 ('*United Project Consultants*') (Supreme Court of Singapore (Court of Appeal)).

70 For further discussion of collateral attacks see Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd ed, 2006) at 948–953.

71 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 222 (House of Lords); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 ('*D'Orta-Ekenaike*') at 63 [190], 120 [380].

72 *D'Orta-Ekenaike* (2005) 223 CLR 1 at 17–18 [34]–[36], 120 [380].

73 Jules Coleman, *Risks and Wrongs* (1992) at 207, 223–224

74 One is reminded of Glanville Williams' remark that if perfection is a form of death then 'the law of tort is a lusty infant': Glanville Williams, 'Some Reforms in the Law of Tort' (1961) 24 *Modern Law Review* 101 at 101.

(iii) The Second Exception: Wrongful Profiting

The second situation where the illegality defence serves a legitimate purpose is where the plaintiff, by bringing an action, seeks to profit from his or her wrongdoing. Remarkably, it seems to be widely believed that all successful tort actions, including run-of-the-mill personal injury actions, would confer a plaintiff who was engaged in a breach of the criminal law at the time of sustaining injury with a profit.[75] This belief is obviously false. In the overwhelming majority of cases, the plaintiff does not aim to improve on his or her pre-tort position. Rather, he or she merely asks to have the loss inflicted by the defendant made good. Indeed, any hopes that plaintiffs may have once entertained of receiving full compensation have been dashed by the restrictions on damages awards imposed by the tort 'reform' legislation. Because of these reductions, which include increased discount rates[76] and the setting of thresholds and caps on damages for a loss of earnings,[77] for the need for gratuitous care[78] and for pain and suffering,[79] plaintiffs will usually receive substantially less than that required to restore them to the position in which they would have stood but for the defendant's tort. Thus, the concern to prevent plaintiffs from profiting in the wake of their wrongdoing does not justify the defence as it presently operates.

However, notwithstanding the foregoing, there are limited circumstances in which actions contaminated by illegality may entail the possibility of wrongful profiting. For example, the award of punitive damages may place the recipient of such damages in an economically superior position to that which he or she would

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75 See, for example, *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283 ('*Kirkham*') at 295 (Court of Appeal of England and Wales); *Wackwitz v Roy* 244 Va 60 (1992) ('*Wackwitz*') at 64; *Manning v Brown* 91 NY 2d 116 (1992) at 120; *Alami v Volkswagen of America, Inc* 739 NYS 2d 867 (Ct App, 2002) at 869–871.

76 The default discount rate has been increased from the 3 per cent rate set by the High Court in *Todorovic v Waller* (1981) 150 CLR 402 to 5 per cent in New South Wales (*Civil Liability Act* 2002 (NSW) s 14), Queensland (*Civil Liability Act* 2002 (Qld) s 57), South Australia (*Civil Liability Act* 1936 (SA) ss 3, 55), Victoria (*Wrongs Act* 1958 (Vic) s 28I) and the Northern Territory (*Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 22). These increases were contrary to an express recommendation by the Negligence Review Panel to retain the common law discount rate: Commonwealth of Australia, above n15 at 208–210. In Western Australia, the discount rate already stood at 6 per cent: *Law Reform (Miscellaneous Provisions) Act* 1941 (WA) s 5. This is unchanged. In Tasmania, an incredibly high default rate of 7 per cent was lowered to 5 per cent: *Civil Liability Act* 2002 (Tas) s 28A. In the Australian Capital Territory, the common law rate continues to apply.

77 *Civil Liability Act* 2002 (NSW) s 12; *Civil Liability Act* 2003 (Qld) s 54; *Civil Liability Act* 1936 (SA) ss 3, 54; *Civil Liability Act* 2002 (Tas) s 26; *Wrongs Act* 1958 (Vic) s 28F; *Civil Liability Act* 2002 (WA) s 11; *Civil Law (Wrongs) Act* 2002 (ACT) s 58; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 20.

78 *Civil Liability Act* 2002 (NSW) s 15; *Civil Liability Act* 2003 (Qld) s 59; *Civil Liability Act* 1936 (SA) s 58; *Civil Liability Act* 2002 (Tas) s 28B; *Wrongs Act* 1958 (Vic) ss 28IA–28IF; *Civil Liability Act* 2002 (WA) ss 12–13; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 23. There is no equivalent restriction in the Australian Capital Territory.

79 *Civil Liability Act* 2002 (NSW) s 16; *Civil Liability Act* 2003 (Qld) ss 61–62; *Civil Liability Act* 1936 (SA) s 52; *Wrongs Act* 1958 (Vic) ss 28G–28H; *Civil Liability Act* 2002 (WA) ss 9–10; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) ss 27–28. There is no equivalent restriction in the Australian Capital Territory.

have occupied but for the defendant's tort.[80] Consequently, the desire to prevent wrongful profiting affords a legitimate foundation for invoking the illegality defence to preclude the recovery of punitive damages.[81] Of course, it would be much simpler for a court to exercise its discretion to refuse to award such damages rather than to invoke the illegality defence in order to reach the same end.

Another situation where the potential for wrongful profiting exists in illegality cases is where the plaintiff has received collateral benefits (such as sick leave payments from his or her employer) as a result of the defendant's tort that were not offset against the defendant's liability. If the plaintiff walks away with both the collateral benefits and the damages, he or she may be better placed economically than if he or she had not been injured. Accordingly, the defence discharges a legitimate function in preventing the recovery of damages to the extent necessary to ensure that the receipt of collateral benefits does not allow the plaintiff to improve on his or her pre-tort position.

It has been claimed that awarding damages in respect of lost income that would have been derived by illegal means would also facilitate wrongful profiting.[82] However, this position is rather undeveloped. On the whole, proponents of this view have simply regarded it as axiomatic that compensating a plaintiff for the loss of income that he or she would have derived from unlawful activities constitutes wrongful profiting and have stopped short of providing a full account of why this is so. For instance, Weinrib supplied only the following short passage in support of this standpoint:

> Assume for instance that a person is injured by an automobile as he is crossing the street and that he claims that his resulting incapacitation prevented him from pursuing his vocation as a bank robber. A court would surely be justified in responding that this type of profit-making can no more receive judicial sanction in a tort context than it can in a contractual one.... It would create an intolerable fissure in the law's conceptually seamless web if a party was prevented from recovering lost profits on an illegal conduct but was allowed to recover those profits in tort for prospective transactions that evinced an identical illegality.[83]

80 The power of the courts to award punitive damages has been severely restricted in recent years: *Trade Practices Act* 1974 (Cth) s 87ZB(1); *Civil Liability Act* 2002 (NSW) s 21; *Defamation Act* 2005 (NSW) s 37; *Motor Accidents Compensation Act* 1999 (NSW) s 144; *Workers Compensation Act* 1987 (NSW) s 151R; *Civil Liability Act* 2003 (Qld) s 52; *Defamation Act* 2005 (Qld) s 37; *Workers' Compensation and Rehabilitation Act* 2003 (Qld) s 309; *Civil Law (Wrongs) Act* 2002 (ACT) s 139H; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 19; *Defamation Act* 2005 (SA) s 35; *Defamation Act* 2005 (Tas) s 37; *Defamation Act* 2005 (Vic) s 37; *Transport Accident Act* 1986 (Vic) s 93; *Accident Compensation Act* 1985 (Vic) s 134AB(22)(c).

81 Surprisingly, punitive damages have been awarded in illegality cases: see, for example, *Katko v Briney* 183 NW 2d 657 (Iowa, 1971). In this case, the plaintiff was injured by the discharge of a spring gun while breaking into the defendant's house. He was awarded US$10,000 in punitive damages.

82 Weinrib, 'Illegality as a Tort Defence', above n41 at 42; Prentice, above n19 at 107.

83 Weinrib, 'Illegality as a Tort Defence', above n41 at 42.

This passage hardly sustains Weinrib's view that awarding damages in respect of lost illegal earnings would enable a plaintiff to profit from his or her wrongdoing. In the first half of this passage, Weinrib simply states his position. He does not explain why that position is correct. In the second half, Weinrib switches to an entirely different argument, namely, the need to maintain doctrinal tidiness in the law. This argument points to the desirability of the law operating as a cohesive unit. This is a convincing reason, as noted earlier,[84] for refusing to entertain sanction shifting actions. Sanction shifting actions threaten the integrity of the law because they purport to give the plaintiff back what the criminal law took away. However, the same threat is not posed simply by allowing recovery in tort but not in contract.

One hurdle that must be overcome by those who contend that remedying a loss of illegal earnings would enable a plaintiff to profit from his or her wrongdoing stems from a difference between undoing this loss on the one hand and permitting the recovery of punitive damages and the retention of collateral benefits in illegality cases on the other. Awarding a plaintiff punitive damages in circumstances where he or she was injured while in breach of the criminal law may enable the plaintiff to do better, economically, than he or she would have done had he or she not been injured. The same consequence may follow if such a plaintiff is awarded full compensation although he or she has received collateral benefits. However, awarding damages in respect of lost illegal earnings does *not* allow the plaintiff to improve upon the position in which he or she would have stood but for the defendant's tort. It simply ensures that he or she stands in that position despite the accident. The full height of this hurdle is revealed when it is remembered that, in theory, tort law does not compensate for a loss of earnings as such but for a loss of earning capacity.[85] Needless to say, it is not easy to describe damages awarded in respect of a lost or diminished earning capacity as facilitating profiting. The purpose of awarding such damages is merely to restore the plaintiff's capacity.

This is not to say that it is a mistake to think that awarding damages for lost illegal earnings can never enable a plaintiff to profit from his or her wrongdoing. That view holds obvious intuitive appeal. Furthermore, it may be possible to find an example that lends greater support to it than Weinrib's bank robber example. Suppose that P, a drug dealer, is negligently injured by D and is thereby disabled from buying and selling drugs. P's pre-accident income was $2X. Had P derived his income by lawful means, his earnings would have only been $X. If P is awarded compensation in respect of his lost earnings in excess of $X, he would be put in a better economic position than he would have been in had he been lawfully employed. Because awarding P with full compensation has this effect, one who is not convinced that awarding Weinrib's bank robber with compensation in respect of his lost earnings would facilitate wrongful profiting may think that awarding P with full compensation would.

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84 See Section 2(B)(ii).

85 *O'Brien v McKean* (1968) 118 CLR 540 at 545–546; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 4, 16.

In the end, it is not necessary to reach a firm conclusion on the issue of whether or not awarding damages in respect of lost illegal earnings would facilitate wrongful profiting. What has been said should reveal that it is a complex matter that requires detailed consideration. This cannot be provided in this article. Ultimately, what may be needed is a detailed account of what is meant by 'wrongful profiting'.

Before moving on, it is necessary to emphasise that simply because it is legitimate to invoke the illegality defence to prevent wrongful profiting, it does not follow that the defence should be automatically invoked to stamp out wrongful profiting. Although the law abhors wrongful profiting,[86] where it is thought that the benefits secured by permitting wrongful profiting outweigh the downsides of doing so, wrongful profiting is allowed. Indeed, the law, through the doctrine of adverse possession, actually facilitates wrongful profiting.[87] Accordingly, it would be a mistake to think that the defence of illegality should be unwaveringly invoked to preclude wrongful profiting. The question of whether or not it should be brought into play depends upon one's view as to whether the undesirability of wrongful profiting is offset by the advantages obtained by permitting the plaintiff to improve on his or her pre-tort position.

3. The Statutory Illegality Defences

Now that we have examined the ways in which the common law takes account of unlawful behaviour on the part of the plaintiff, we can turn our attention to the statutory illegality defences. Like many of the provisions that feature in two or more of the civil liability statutes, none of the statutory illegality defences is formulated in the same terms. Accordingly, it is necessary to consider each defence separately.[88] This lack of consistency in the legislation is regrettable. It has properly provoked complaints.[89] Whatever other opportunities were missed by the legislatures in enacting statutes that dramatically altered the morphology of the law of torts,[90] one opportunity that was passed over was to create a substantially uniform system. Drafting statutes that share common goals in disparate language for no good reason merely confuses, limits the precedential value of decisions,[91] drives up legal costs and generates the potential for injustice.

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86 The law's distaste for wrongful profiting is manifested in myriad ways. Consider, for instance, the rule that a person cannot 'slay his benefactor and thereby take his bounty' as an inheritance: *Re Hall (Deceased)* [1914] P 1 at 7 (Court of Appeal). See *Riggs v Palmer* 115 NY 506 (Ct App, 1889); *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 (Court of Appeal); *Troja v Troja* (1994) 33 NSWLR 269 (Court of Appeal). Similarly, a person who unlawfully causes the death of his or her joint tenant is barred from acquiring the latter's interest through the doctrine of survivorship: *Re Barrowcliff* [1927] SASR 147. These examples could easily be multiplied.

87 Ronald Dworkin, *Taking Rights Seriously* (1977) at 25.

88 A comparative table of the defences is included in the appendix to this article.

89 See, for example, Harold Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (2006) at xii; Barbara McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence' (2006) 14 *Torts Law Journal* 268 at 268.

To the best of this author's researches, none of the statutory defences have been the subject of judicial exposition.[92] Because the defences have not yet acquired a patina of curial pronouncements, the following analysis is necessarily skeletal. It is limited to identifying the main features of the defences and some of the problems of interpretation to which they may give rise. Considering the fundamentally restrictive nature of the civil liability legislation, it may take some time before a body of case law is developed that fills out the interstices in the defences.

A. New South Wales

The *Civil Liability Act* 2002 (NSW) provides for two illegality defences. One of the defences is of general application and is contained in s 54. The other, found in s 54A, is only relevant to cases in which the plaintiff would have committed an offence but for the fact that he or she was labouring under a mental illness at the relevant time. It is convenient to begin our analysis with s 54.

(i) Section 54

Section 54[93] relevantly provides:

> (1) A Court is not to award damages in respect of liability [for personal injury damages or property damage][94] if the court is satisfied that:
>
> (a) the death of, or the injury or damage to, the person that is subject of the proceedings occurred at the time of, or following, conduct of the person that, on the balance of probabilities, constitutes a serious offence, and
>
> (b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.
>
> (2) This section does not apply to an award of damages against a defendant if the conduct of the defendant that caused the death, injury or damage concerned constitutes a criminal offence (whether or not a serious offence).

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90 Consider Harold Luntz, 'Reform of the Law of Negligence: Wrong Questions — Wrong Answers' (2002) 25 *University of New South Wales Law Journal* 836 at 838-841; Harold Luntz, 'A Personal Journey through the Law of Torts' (2005) 27 *Sydney Law Review* 395 at 414-415. Luntz argues that the common law of torts should be replaced with a social insurance system. To similar effect see Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7th ed, 2006) at 488–493. But compare with Patrick Atiyah, who favours the expansion of first-party insurance: Patrick S Atiyah, 'Personal Injuries in the Twenty-First Century: Thinking the Unthinkable' in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996); Patrick S Atiyah, *The Damages Lottery* (1997) at 173–193.

91 See McDonald, above n89 at 269.

92 The defence in s 54 of the *Civil Liability Act* 2002 (NSW) (see Section 3(A)(i) below) was pleaded by the defendant in *Houda v The State of New South Wales* [2005] Aust Torts Rep 81–816 but ultimately did not fall for consideration.

93 Section 54 was inserted into the *Civil Liability Act* 2002 (NSW) by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) s 3, cl 5 of sched 1.

94 See s 51(1). 'Personal injury damages' is defined as 'damages that relate to the death of or injury to a person' (s 11). 'Injury' is in turn defined as 'personal injury and includes ... (a) pre-natal injury, (b) impairment of a person's physical or mental condition, (c) disease' (s 11).

(3) A 'serious offence' is an offence punishable by imprisonment for 6 months or more.

(4) ....

(5) This section operates whether or not a person whose conduct is alleged to constitute an offence has been, will be or is capable of being proceeded against or convicted of any offence concerned.

There are six points which should be observed about this section. First, for the defence to be attracted, the plaintiff must have committed a 'serious offence'. This phrase is defined in s 54(3), rather inappropriately, as an offence punishable by six months' imprisonment or more.[95] As a consequence of the tremendous growth in the number of offences in recent decades, s 54 is capable of being enlivened by an incredibly wide assortment of crimes. A cursory conspectus of the principal penal statutes in New South Wales reveals the existence of a vast number of offences punishable by six months' imprisonment or more. The objective seriousness of many of these offences would not, it is submitted, be generally regarded as all that great. 'Serious offences' include stealing shrubs, plants, rocks, gravel or soil[96] and damaging property by the use of spray paint.[97] The possession or consumption of any quantity of illegal drugs, including cannabis, is a 'serious offence'.[98]

Secondly, it is not necessary, in order for s 54 to apply, for the plaintiff to have actually been convicted of an offence, let alone receive a custodial sentence. The requirements of s 54(1)(a) are satisfied if a plaintiff commits an offence punishable by at least six months' imprisonment *simpliciter*. This is stated expressly in s 54(5). Obviously, the fact that the application of the defence is not contingent upon a conviction being entered or the imposition of a custodial sentence gives it a far broader scope than it would possess if this were the case.

Thirdly, it is noteworthy that the commission of a 'serious offence' need only be proved to the civil standard. Despite the ostensible unfairness involved in providing that a court can be satisfied of the commission of a criminal offence on the civil standard, closer analysis reveals that this is not objectionable. It is in keeping with the common law rule that where proof of the existence of facts that disclose the commission of an offence is in issue in civil proceedings, the court may be satisfied of such facts on a consideration of the probabilities.[99] Furthermore, it would be incongruous if proof to the criminal standard were required considering that other defences to liability in tort, including the common law defence of illegality,[100] turn on the civil standard of proof.

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95 Compare with the definition of 'serious indictable offence' in s 4(1) of the *Crimes Act* 1900 (NSW).

96 *Crimes Act* 1900 (NSW) ss 140, 513, 520–521A.

97 *Summary Offences Act* 1988 (NSW) s 10A.

98 *Drug Misuse and Trafficking Act* 1985 (NSW) Pt 2; *Poisons and Therapeutic Goods Act* 1966 (NSW) s 16.

99 *Helton v Allen* (1940) 63 CLR 691; *Rejfek v McElroy* (1965) 112 CLR 517; *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (House of Lords).

Fourthly, the defence's application is dependent upon the existence of a sufficiently proximate temporal connection between the plaintiff's transgression and his or her damage. Section 54(1)(a) provides that the damage must have occurred 'at the time of, or following', the illegal conduct. As originally enacted, s 54(1)(a) demanded temporal coincidence of the criminal behaviour and the damage. The reach of the defence was extended by the subsequent inclusion of the words 'or following'.[101] This amendment was effected in response to the controversial decision of the Supreme Court of New South Wales in *Presland v Hunter Area Health Service*.[102] The plaintiff in this case, Mr Kevin Presland, had been admitted to a psychiatric hospital by police officers after he exhibited eccentric and belligerent behaviour. After conducting an assessment of the plaintiff and providing him with some treatment, the hospital's staff discharged him into the custody of his brother. Approximately six hours later, the plaintiff killed his brother's fiancée. The plaintiff was charged with murder. A judge sitting alone on the trial of the plaintiff returned a special verdict of not guilty by reason of mental illness.[103] As a consequence of that verdict, the plaintiff was detained as an involuntary mental patient for approximately two and a half years.[104] The plaintiff subsequently commenced proceedings against the statutory body responsible for operating the hospital. He submitted that had he been detained and competently treated by the hospital's staff, he would not have committed the homicide and would have ultimately spent less time in involuntary detention than he in fact did. At first instance, the plaintiff was awarded $369,300.[105] This verdict was overturned by a majority in the Court of Appeal[106] on assorted grounds including for want of a relevant duty of care, the absence of the requisite causal relationship and on considerations of public policy.[107] Had the *Civil Liability Act* 2002 (NSW) been in force when the plaintiff's action was commenced,[108] it seems that s 54

100 *Hanes v Wawanesa Mutual Insurance Co* [1963] SCR 154 at 164; *Tomlinson v Harrison* [1972] 1 OR 670 at 675 (High Court of Justice); *Lindsay v Poole* [1984] SLT 269 at 269 (Scottish Court of Session (Outer House)); *Sloan v Triplett* [1985] SLT 294 at 296 (Scottish Court of Session (Outer House)); *Wilson v Price* [1989] SLT 484 at 486 (Scottish Court of Session (Outer House)).

101 *Civil Liability Amendment Act* 2003 (NSW) s 3, cl 4 of sched 1.

102 [2003] NSWSC 754 ('*Presland*').

103 In New South Wales, the defence of insanity has been renamed 'mental illness': see *Mental Health (Criminal Procedure) Act* 1990 (NSW) s 38(1).

104 See *Mental Health (Criminal Procedure) Act* 1990 (NSW) s 39.

105 It would not have been difficult to predict the response to this decision in the media: see, for example, Brooke Williamson, 'How Can that be Justice: Court Awards $300,000 Payout to the Man who Killed Kelley-Anne' *Daily Telegraph* (20 August 2003) at 26; Ian Gerard, 'Psycho-Killer Payout to Cause "Chaos"' *The Australian* (21 August 2003) at 12.

106 (2005) 63 NSWLR 22 (Sheller & Santow JJA, Spigelman CJ dissenting), noted in Kathryn Peterson, 'Where is the Line to be Drawn? Medical Negligence and Insanity in *Hunter Area Health Service v Presland*' (2006) 28 *Sydney Law Review* 181.

107 In a like case, the High Court of New Zealand reached similar conclusions: *Ellis v Counties Manukau District Health Board* [2007] 1 NZLR 196.

108 The *Civil Liability Act* 2002 (NSW) came into force, retrospectively, on 20 March 2002 (s 2). It applies to actions commenced after this date (cl 2(2) of sched 1). Proceedings in *Presland* were commenced in 1998.

would not have applied because the plaintiff, due to his mental state at the time he caused the death of his brother's fiancée, had not committed a criminal offence. However, the case exposed the fact that a person may commit a 'serious offence' and, some time later, sustain damage in circumstances where the commission of that offence materially contributed to that damage. As originally enacted, s 54 would not, it seems, have applied to actions in which the damage complained of is divorced in time from the 'serious offence'.

However, the inclusion of the words 'or following' in s 54(1)(a) introduces an obvious difficulty. It is unclear how much time can elapse between the commission of the 'serious offence' and the damage before the defence is rendered inapplicable. At what point does conduct amounting to an offence recede sufficiently in the temporal rear-vision mirror that subsequent damage can no longer be said to 'follow' that conduct? Pointing in favour of a liberal construction is the absence of any qualifying adverb, such as 'immediately' or 'directly', before the word 'following'. Certainly, the word 'following' is considerably more expansive than the oft-used drafter's phrase 'at or about the same time'.[109] The fact that the word 'following' was inserted in s 54(1)(a) for the purpose of lowering what was perceived to be an unduly high barrier to the application of the defence also favours a wide interpretation. However, a consideration arguing for a restrictive reading is the time-honoured principle that legislation depriving plaintiffs of common law entitlements should be narrowly construed.[110] Presumably, much will depend on the facts in individual cases. The effluxion of a certain period of time may result in the damage no longer 'following' the offence for the purpose of s 54(1)(a) in one case but not in another. In any event, the inclusion of the words 'or following' in s 54(1)(a) is of limited practical significance because, the greater the separation in time between the commission of the offence and the damage, the less likely it is that the conduct constituting the offence will have materially contributed to the damage.

Fifthly, s 54(2) provides that the defence is inapplicable if the conduct of the defendant that caused the plaintiff's damage constituted a 'criminal offence'. If this subsection is satisfied, the defence is excluded, irrespective of the gravity of the plaintiff's 'serious offence' and the strength of the causal connection between the conduct constituting that offence and the plaintiff's damage. It is also irrelevant whether or not the plaintiff and defendant were accomplices. Despite the apparent simplicity of this qualification of the defence, it admits a host of uncertainties. Whilst it is expressly stated that the exception does not depend upon the defendant's transgression constituting a 'serious offence', there is no explicit instruction on related matters. For instance, does the defendant need to have been convicted of an offence? Section 54(5) arguably calls for a negative answer to this question considering that the word 'person' is used rather than the word 'plaintiff' or

109 Regarding this phrase see *R v A (No 2)* [2002] 1 AC 45 at 55 [12], 78 [80], 79 [82], 95 [132], 103 [156] (House of Lords).

110 See, for example, *Potter v Minahan* (1908) 7 CLR 277 at 304. This principle, despite its antiquity, has been under siege in recent years. In *Waugh v Kippen* (1986) 160 CLR 156 at 165 it was described as a rule 'of last resort'.

'claimant'. On the other hand, it can be maintained that s 54(5) is aimed at s 54(1) on the basis that the word 'person' appears in that subsection but not in s 54(2) and, more importantly, because the introductory words of s 54(5) – '[t]his section operates' – suggest that that subsection is directed at the defence itself in s 54(1) rather than to the exception carved out by s 54(2).

It is no easy task to identify the policy rationale supporting the exception adumbrated by s 54(2). Considering that Parliament has determined that, prima facie, those injured in the course of, or following, the commission of a 'serious offence' where the commission of that offence materially contributes to their injury cannot recover damages, why should recovery in such circumstances be permitted where the defendant, through his or her criminal conduct, also contributed to the plaintiff's damage? It is very hard to see how, all other things being equal, such a plaintiff is more morally deserving than a plaintiff who sustains damage to which s 54(1) applies but in circumstances where s 54(2) is not attracted.

Read in the context of the surrounding provisions, it is arguable that the exception in s 54(2) is aimed at preserving the operation of ss 52 and 53.[111] These provisions concern liability for injuries inflicted in self-defence. Section 52 confers an immunity on defendants who cause harm in the course of certain acts of self-defence.[112] Section 53 provides that, notwithstanding s 52, limited damages[113] may be awarded if the conduct performed in self-defence was not a reasonable response in the circumstances as perceived by the defendant, the circumstances are exceptional and a failure to award damages would be harsh and unjust.[114] In other words, the immunity may be limited if the self-defence was excessive. But for the exception to s 54(1) created by s 54(2), s 54(1), where engaged, may deprive the plaintiff of the benefit of the gap in the s 52 self-defence immunity created by s 53. This reasoning can perhaps be rendered marginally more digestible by way of example:

(i) Assume that P attempts to steal property from D's person.

(ii) D thwarts P's attempt by beating P. P is injured as a result.

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111 A drafter's note to s 54(2) refers the reader to these sections. The note, which does not form part of the Act (see s 4(3)), states that 'Sections 52 and 53 can apply to prevent or limit recovery of damages even though the defendant's conduct constitutes an offence.' Sections 52 and 53 have no counterparts in other jurisdictions.

112 The definition of 'self-defence' mirrors that set out in s 418 of the *Crimes Act* 1900 (NSW).

113 By s 53(2), damages for 'non-economic loss' may not be awarded and the restrictions on damages set out in Pt 2 the *Civil Liability Act* 2002 (NSW) apply. Proceedings brought in respect of an intentional trespass to the person are ordinarily exempt from the restrictions in Pt 2: see s 3B(1)(a).

114 The primary motivation for the enactment of these provisions was a decision of the District Court of New South Wales (*Fox v Peakhurst Inn Pty Ltd* (Unreported, District Court of New South Wales, McGuire DCJ, 29 August 2002)) awarding nearly $50,000 to an inebriated teenager who had been badly beaten by an occupier with a metal bar. This attack occurred when the teenager, having been denied entry into a night club, endeavoured to find alternative access to the club via the occupier's premises. The teenager's mother recovered $18,578 in a nervous shock action. The decision was set aside by New South Wales Court of Appeal on procedural grounds: *Fox v Peakhurst Inn Pty Ltd* [2004] NSWCA 74.

(iii) Let us suppose that P's attempt at stealing amounts to a serious offence which materially contributed to his damage under s 54 and that D's response constitutes self-defence within the meaning of s 52 but was not reasonable within the terms of s 53.

(iv) P sues D in trespass for damages.[115]

(v) Because D acted in self-defence, D is prima facie immune from liability in respect of P's damage pursuant to s 52.

(vi) However, because D's response was not reasonable his immunity under s 52 is limited by s 53 and he may be liable for some of P's loss.

(vii) P, on the other hand, committed a serious offence which materially contributed to his damage. P is thus prima facie unable to hold D liable in respect of his damage because of the illegality defence set out in s 54(1).

(viii) Therefore, were it not for the exception to the illegality defence in s 54(2), which is enlivened because D's attack on P amounts to a criminal assault,[116] P could not obtain any benefit from the qualification of the self-defence immunity in s 52 wrought by s 53.

Now, it is obvious that if the purpose of the exception in s 54(2) is to shelter s 53 from the illegality defence, there could hardly be a more ill conceived means of realising this goal. It would have been a simple matter to have included a short qualifying provision in s 54 to the effect that s 54 is inapplicable when s 53 is enlivened. This would have ensured the mutual exclusivity of ss 53 and 54 and afforded plaintiffs whose actions are tainted by unlawful behaviour on their part with the benefit of s 53. Instead, the legislature enacted s 54(2) which, although accomplishing the rather opaque goal of shielding s 53 from the illegality defence, has created a sizeable rift in the illegality defence as s 54(2) applies irrespective of whether or not there is any relevant act of self-defence that could pick up ss 52 and 53! This is a depressing example of how legislation cobbled together with alacrity in response to ill-informed protests emanating from the 'echo-chamber inhabited by journalists and public moralists'[117] can result in the enactment of self-defeating provisions.

An alternative rationale for the exception in s 54(2) is that it gives effect to an intention on the part of the legislature to preserve the common law illegality defence as it operates in the context of joint illegal enterprises.[118] However, it is hard to accept that this was the motivation for the enactment of s 54(2). The exception goes much further than is necessary to stake out separate territory for the common law defence as it applies in the setting of joint illegal enterprises and the

115 By s 3B(1)(a)(ii), ss 52–54A apply to actions in trespass.

116 The plea of self-defence is not available (outside the murder context) if the self-defence was excessive: see *Crimes Act* 1900 (NSW) s 418.

117 *Vellino* [2002] 1 WLR 218 at 233 [60] (Sedley LJ).

118 See Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Sydney Law Review* 443 at 459 n114; contrast with Joachim Dietrich, 'Duty of Care Under the "Civil Liability Acts"' (2005) 13 *Torts Law Journal* 17 at 34-35 who thinks that this provision *qualifies* the common law defence.

defence in s 54(1) as the exception catches cases in which the plaintiff and defendant were not accomplices. Furthermore, even if s 54(2) had not been enacted, the common law defence would have been preserved by s 3A(1), which provides that the *Civil Liability Act* 2002 (NSW) does not limit restrictions on liability conferred by any other law.[119]

Sixthly, the work performed by s 54(5) is rather unclear. Taken at its widest, s 54(5) unshackles the defence in s 54(1) to the point where it has the potential to deny the entire universe of actions to which the *Civil Liability Act* 2002 (NSW) applies: the defence applies so long as it is 'alleged' that the plaintiff has committed an offence, as it does not matter whether the plaintiff 'is capable of being proceeded against or convicted' of that offence. Obviously, however, such a construction was not intended. When s 54(1) is given due weight, specifically the requirement that the court be satisfied that the plaintiff committed a 'serious offence' on the balance of probabilities, s 54(5) must, by inference, effect some lesser extension. But what is this extension?

The portion of s 54(5) that provides that it does not matter whether the plaintiff 'is capable of being proceeded against' in respect of any offence directs attention to the issue of procedural bars to prosecution. Procedural bars are conceptually distinct from defences to criminal liability. Unlike defences, which are concerned with taking account of the moral blameworthiness of defendants, procedural bars prevent prosecutions on public policy grounds. Procedural bars are entirely indifferent to the moral character of the defendant's behaviour. Furthermore, it is only necessary for the trier of fact to consider the issue of defences once it is satisfied of the existence of the definitional elements of an offence.[120] Procedural bars, on the other hand, are adverted to before considering whether an offence has been committed. Procedural bars include the 6-month limitation period within which charges for summary offences must be laid,[121] the doctrine of *autrefois acquit*,[122] abuse of process and unfitness to stand trial.[123] It seems clear from s 54(5) that the fact that the plaintiff is not susceptible to prosecution due to the existence of a procedural bar would not prevent the application of the defence in s 54(1).

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119 This point is discussed further in Section 4(C) below.

120 A majority of the High Court failed to grasp this elementary point in *Stevens v The Queen* (2005) 222 ALR 40. In this case it was held that the 'defence' of accident should have been left to the jury on a charge of murder. The Court reached this conclusion in the face of a long line of authority which held, correctly, that accident is not a defence to murder because it is no more than an assertion that the elements of the offence of murder have not been proved (see, for example, *R v Mullen* (1938) 59 CLR 124 at 127). To plead accident is simply to say that there has been a failure of proof: see *Stevens* (2005) 222 ALR 40 at 46 [19] (Gleeson CJ & Heydon J dissenting); Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199 at 205, 208; Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) at 202. By holding that accident is a defence to murder, the majority in *Stevens* necessarily committed itself to the proposition that is is possible to simulteneously intentionally and accidentally kill a person. The absurdity of this proposition speaks for itself.

121 See *Criminal Procedure Act* 1986 (NSW) s 179(1).

122 The doctrine of *autrefois convict* is not a relevant procedural bar for present purposes. If the plaintiff has been convicted of a 'serious offence' there is obviously no need to consider s 54(5).

123 See *Mental Health (Criminal Procedure) Act* 1990 (NSW) s 14.

The next question is what is accomplished by the portion of s 54(5) that provides that it is irrelevant whether the plaintiff 'has been, will be or is capable of being ... convicted' of any offence. These words clearly establish that if a plaintiff has committed a 'serious offence' that the application of the defence in s 54(1) is not conditional upon the plaintiff being convicted of that offence. However, the words 'is *capable* of being ... convicted' may be read as suggesting that some further work is done. Do these words facilitate the application of s 54(1) in circumstances where, although the court is satisfied that the definitional elements of an offence are present, the plaintiff would, if prosecuted, be able to rely on a defence to criminal liability? It is clear that s 54(5) is not concerned with partial defences to murder, such as provocation, substantial impairment[124] and excessive self-defence.[125] This is because these partial defences lead to a conviction of manslaughter, which is a 'serious offence'.[126] The issue is, therefore, whether the words 'is capable of being ... convicted' make the application of the defence in s 54(1) possible despite the fact that the plaintiff would, if prosecuted, be able to rely on a complete defence. It is submitted that it does not. If a complete defence would be available to the plaintiff, the plaintiff could not be said to have engaged in 'conduct ... that constitutes an offence'.

Finally, it is necessary to say a few words about s 54(5) and the effect of an acquittal. If a plaintiff has been acquitted of an offence, the doctrine of *autrefois acquit* prevents the plaintiff from being prosecuted for that offence a second time. As has just been discussed, by virtue of s 54(5), the existence of procedural bars poses no impediment to the operation of the defence in s 54(1). Furthermore, the fact of an acquittal is obviously by no means inconsistent with a finding under s 54(1) that the plaintiff committed a 'serious offence'. Accordingly, the defence in s 54(1) will not be excluded simply because the plaintiff has been acquitted of the 'serious offence' in question.

(ii) Section 54A

We can now turn our attention to the discrete, and much narrower, illegality defence provided for by s 54A. This cruel provision prevents the recovery of damages in respect of 'non-economic loss'[127] and a 'loss of earnings' where the plaintiff's conduct materially contributed to his or her damage and that conduct would have constituted a 'serious offence' but for the fact that the plaintiff was suffering from a 'mental illness' at the time. Section 54A, which fortunately has no counterpart in any other jurisdiction, was inserted into the *Civil Liability Act* 2002 (NSW) by the *Civil Liability Amendment Act* 2003 (NSW)[128] in response to the first instance decision in *Presland*.[129] It provides:

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124 In New South Wales, the defence of diminished responsibility has been reincarnated, in a modified form, as the defence of substantial impairment: see *Crimes Act* 1900 (NSW) s 23A.

125 *Crimes Act* 1900 (NSW) s 421.

126 *Crimes Act* 1900 (NSW) s 24.

127 'Non-economic loss' is defined in s 3 of the *Civil Liability Act* 2002 (NSW) as comprising of pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement.

128 Section 3, cl 5 of sched 1.

(1) This section applies to [liability for personal injury damages or property damage[130]] in circumstances where:
   (a) the liability arises out of the death of, or injury or damage to, a person, and
   (b) that death, injury or damage occurred at the time of, or following, conduct of the person that, on the balance of probabilities, would have constituted a serious offence if the person had not been suffering from a mental illness at the time of the conduct, and
   (c) that conduct contributed materially to the death, injury or damage or the risk of death, injury or damage.

(2) If a court awards damages in respect of a liability to which this section applies, the following limitations apply to that award:
   (a) no damages may be awarded for non-economic loss, and
   (b no damages for economic loss may be awarded for loss of earnings.

(3) A 'serious offence' is an offence punishable by imprisonment for 6 months or more.

(4) This section does not apply to an award of damages against a defendant if the conduct of the defendant that caused the death, injury or damage concerned:
   (a) constitutes an offence (whether or not a serious offence), or
   (b) would have constituted an offence (whether or not a serious offence) if the defendant had not been suffering from a mental illness at the time of the conduct.

(5) This section operates whether or not a person whose conduct is in issue was acquitted of an offence concerning that conduct by reason of mental illness or was found by a court not to be fit to be tried for an offence concerning that conduct by reason of such an illness.

The first thing to note about s 54A is that it probably fails to provide a defence in cases such as *Presland*, despite that being its sole purpose. Through a series of definitions, s 54A's application is relevantly restricted to liability in respect of the death or injury to a person.[131] Needless to say, it is difficult to see how a court order committing a person to involuntary detention can be characterised as an injury to that person. It is hard to suppress a wry smile in light of the apparent failure of the legislature to find its way through its labyrinthine definitions.

The next thing to observe is that, in most respects, s 54A is, *mutatis mutandis*, equivalent to s 54. For instance, both sections employ identical definitions of

129 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2003 (Morris Iemma) at 4992. The decision in *Presland* is discussed in Section 3(A)(i) above.

130 See s 51(1). 'Personal injury damages' is defined as 'damages that relate to the death of or injury to a person' (s 11). 'Injury' is in turn defined as 'personal injury and includes ... (a) pre-natal injury, (b) impairment of a person's physical or mental condition, (c) disease' (s 11).

131 See, in turn, ss 54A(1), 51(1) and 11.

'serious offence'. Both sections use the same test for deciding the existence of the requisite causal connection between the conduct in question and the damage sustained. However, there are some notable differences. The most obvious distinction is that s 54A, unlike s 54, is a partial defence. Section 54A only precludes recovery of damages in respect of 'non-economic loss' and a 'loss of earnings'. The legislature's decision to deny these particular heads of damages is, of course, entirely arbitrary.[132]

The defences also part company in terms of their respective exceptions in ss 54(4) and 54A(4). Unlike s 54(4), s 54A(4) operates, by virtue of paragraph (b), where the defendant's conduct 'would have constituted an offence ... if the defendant had not been suffering from a mental illness at the time of the conduct'. The inclusion of paragraph (b) makes no sense whatsoever. If, as argued above,[133] the purpose of this exception is to preserve the entitlement to limited damages under s 53 where the damage is sustained as a result of excessive self-defence, why is paragraph (b) needed, as a defendant who labours under a mental illness has a complete defence to a claim for damages in trespass?[134] There is no possibility of a limited entitlement to damages arising in consequence of s 53 where paragraph (b) is enlivened.

Furthermore, s 54(5) is ostensibly broader than s 54A(5). Section 54(5) is an open-ended provision. It does not enumerate specific procedural bars to prosecution the existence of which do not stand in the way of the defence in s 54(1). Conversely, s 54A(5) merely provides that the fact that the plaintiff was acquitted or was unfit to stand trial on the grounds of mental illness does not preclude the application of the defence in s 54A. Because s 54A(5) only refers to two bars to the plaintiff's prosecution that do not block the operation of the defence in s 54A, it is arguable that that defence is excluded by the existence of other bars. If this is so, a lacuna exists in 54A(1). This lacuna cannot be filled by s 54(1) because, if the plaintiff was mentally ill at the relevant time, the plaintiff has not committed a 'serious offence'.

The offensiveness of s 54A cannot be overemphasised. Its brutal pointlessness is obvious. Plaintiffs to whom s 54A applies are not responsible for their conduct. It is irrational to blame such plaintiffs for their actions.[135] One may feel anger towards someone who is mentally ill for the harm that he or she has caused. But this is a very different thing to attributing blame. Accordingly, s 54A, by stripping plaintiffs to whom it applies of some of their damages, punishes although punishment is unwarranted.

Nor can s 54A claim to be an instrument of specific deterrence. For the reasons given earlier, withholding compensation in respect of injuries suffered while acting illegally does not deter unlawful behaviour.[136] These reasons apply a

132 Similar arbitrary restrictions feature in ss 33 and 53 of the *Civil Liability Act* 2002 (NSW).

133 See Section 3(A)(i).

134 *Morriss v Marsden* [1952] 1 All ER 925 ('*Morriss*') (Queen's Bench).

135 See Oliver Wendell Holmes, *The Common Law* (1881) at 109.

136 See Section 2(B)(i).

fortiori in the case of a person who is mentally ill in the sense that he or she is not cognisant of 'the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'.[137] Such a person is no more susceptible to being deterred from engaging in particular conduct by s 54A than by the penalties prescribed by the criminal law. He or she is a legally inert being, unaffected by whatever coercive force the law may otherwise possess.[138]

Can an argument based on the prevention of improper gains justify s 54A? The fact of mental illness is a convincing reason for withholding attributions of blame from an individual who brings about an undesirable outcome, but it cannot justify the retention of gains derived as a result of conduct that would be blameworthy if performed by a sane individual. Lon Fuller explained this well when he said:

> A lunatic, let us suppose, steals my purse. His mental condition may be such that it is impossible for him to understand or to obey the laws of private property. This circumstance furnishes a good reason for not sending him to jail, but it offers no reason at all for letting him keep my purse. I am entitled under the law to get my purse back, and he is, in this sense, under a legal liability to return it, even though in taking it he acted without fault and without any intention of doing wrong.[139]

However, it is clear that the situation with which s 54A deals is fundamentally different to that contemplated by Fuller. Plaintiffs who are awarded compensatory damages do not, ordinarily, make any gain at the defendant's expense.[140]

B. Queensland

The position in Queensland is complicated by the fact that there are two overlapping statutory illegality defences. One defence, enacted in 1997,[141] is contained in s 6 of the *Criminal Code Act* 1899 (Qld).[142] This provision is unique among the code jurisdictions. The other is found in s 45 of the *Civil Liability Act* 2003 (Qld). The Queensland Parliament, in enacting s 45 of the *Civil Liability Act*, appears to have been oblivious to the existence of the defence in the *Criminal Code Act*. The Parliamentary Hansard and Explanatory Memorandum to the Bill that became the *Civil Liability Act* make no mention of it. This embarrassing oversight could well prove to be of some significance. Because of the length of the Queensland criminal calendar and the break-neck speed at which offences are being added to it, defences to liability in tort that depend upon the commission of an offence may have far-reaching consequences for tort litigation.

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137 *M'Naghten's Case* (1843) 10 Cl & F 200 at 210; 8 ER 718 at 722 (House of Lords).

138 *R v Porter* (1933) 55 CLR 182 at 186.

139 Lon L Fuller, *The Morality of Law* (rev ed, 1969) at 73. See also *Morriss* [1952] 1 All ER 925 at 927 (Queen's Bench).

140 See the discussion of wrongful profiting in Section 2(B)(iii) above.

141 *Criminal Law Amendment Act* 1997 (Qld) s 4(2).

142 Note that this reference is to s 6 of the body of the *Criminal Code Act* 1899 (Qld) not to s 6 of the *Criminal Code* (Qld) itself. It is often thought that the Code is a freestanding statute. However, it is set forth in a schedule to this Act.

This legislative slip can be attributed to the fact that s 45 is the product of hasty legislative experimentation. The speed at which the Australian legislatures enacted the civil liability statutes, relative to the characteristically glacial pace of law reform, has been widely criticised. Not only was the Negligence Review Panel allowed inadequate time in which to prepare its reports,[143] but there was only a short interval between the publication of the Final Report and the ensuing torrent of legislation.[144] Another probable cause of this oversight is the piecemeal nature of the changes effected by the *Civil Liability Act*. Like all of the civil liability statutes, the *Civil Liability Act* does not constitute a code.[145] In all jurisdictions, fundamental aspects of tort law escaped direct legislative alteration.[146] It seems safe to say that legislation that makes scattered changes to an existing body of law is more likely to fail to mesh with that body than legislation which provides a substantially complete restatement of an area of the law.[147]

(i) Section 6 of the Criminal Code Act 1899 (Qld)

Section 6 of the *Criminal Code Act* 1899 (Qld) provides:

> (1) ....
>
> (2) A person who suffers loss or injury in, or in connection with, the commission of an indictable offence of which the person is found guilty has no right of action against another person for the loss or injury.
>
> (3) Subsection (2) applies whether or not a conviction is recorded for the offence.
>
> (4) ....

For the defence in s 6(2) to apply, it is necessary for the plaintiff to have been found guilty of an indictable offence. It may be asked whether the defence applies only where the plaintiff is found guilty following a trial on indictment or if it is also

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143 See Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *Melbourne University Law Review* 649 at 667–669; Harold Luntz, 'The Australian Picture' (2004) 35 *Victoria University Wellington Law Review* 879 at 892–893; Peter Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 *Oxford Journal of Legal Studies* 393 at 395, 415.

144 See McDonald, above n118 at 444–445. Indeed, the New South Wales Government considered the need for 'reform' so pressing that it enacted the first stage of its legislation before the Negligence Review Panel released its First Report. The *Civil Liability Act* 2002 (NSW) was assented to on 18 June 2002. The First Report was published on 2 September 2002.

145 This is expressly stated in s 7(5). See also *Civil Liability Act* 2002 (Tas) s 3A(5).

146 For instance, none of the civil liability statutes provide any guidance as to the circumstances in which a duty of care will arise.

147 There may have been other causes of this legislative oversight including the fact that the Queensland Government enacted s 45 of the *Civil Liability Act* 2002 (Qld) without the benefit of guidance from an expert body, the distinct possibility that the Queensland Government merely mimicked the decisions of governments in other jurisdictions to create a illegality defence without giving attention to the local legal environment and the fact that the *Criminal Code Act* 1899 (Qld) is not the most obvious place in which to look for an illegality defence to civil liability.

enlivened if the plaintiff is found guilty of an indictable offence which is dealt with summarily.[148] It is suggested that the fact that a plaintiff was found guilty of an indictable offence that was dealt with summarily[149] is irrelevant for present purposes as s 6(2) refers only to the 'commission of an indictable offence'. It is silent as to the manner in which the proceedings were conducted.

Significantly, the defence's operation is not dependent upon the plaintiff's criminal conduct contributing to his or her loss or injury. It is sufficient if the damage is sustained 'in, or in connection with' the commission of the offence. Thus, a plaintiff who is found guilty of an indictable offence cannot recover damages in respect of injuries sustained 'in, or in connection with' the commission of that offence even if he or she would have sustained those injuries had he or she not committed that offence. It is irrelevant that the criminal conduct did not increase the likelihood of the damage being incurred.

Section 6(3) is directed at s 12 of the *Penalties and Sentences Act* 1992 (Qld). Section 12 of that Act confers a discretion on the courts not to record a conviction despite the trier of fact being satisfied as to the defendant's guilt. Section 6(3) is superfluous as s 6(2) does not turn on whether or not a conviction has been recorded, but on whether a guilty verdict is returned.

(ii) Section 45 of the Civil Liability Act 2003 (Qld)

We can now move on to consider the defence in s 45 of the *Civil Liability Act* 2003 (Qld). That section provides:

> (1) A person does not incur civil liability if the court is satisfied on the balance of probabilities that –
>
> (a) the breach of duty from which civil liability would arise, apart from this section, happened while the person who suffered harm[150] was engaged in conduct that is an indictable offence; and
>
> (b) the person's conduct contributed materially to the risk of the harm.
>
> (2) Despite subsection (1), the court may award damages in a particular case if satisfied that in the circumstances of the case, subsection (1) would operate harshly and unjustly.
>
> (3) If the court decides to award damages under subsection (2), the court must assess damages on the basis that the damages to which the injured person would be entitled, apart from this section, are to be reduced, on account of the injured person's conduct, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
>
> (4) It does not matter whether the person whose conduct is alleged to constitute an indictable offence has been, will be or is or was capable of being proceeded against or convicted of an indictable offence.

148 Compare *Civil Liability Act* 2003 (Qld) s 45(5).

149 See *Criminal Code* (Qld) s 651.

150 'Harm' is defined in the Dictionary to the Act as harm of any kind including personal injury, damage to property and economic loss.

(5) If the person has been dealt with for the offence, it does not matter whether the person was dealt with on indictment or summarily.

It is useful to look at how the defence in s 45 stacks up against the defence provided for by s 6 of the *Criminal Code Act* 1899 (Qld). Section 45 is simultaneously wider and narrower than s 6. It is wider than s 6 in that it does not require the plaintiff to have been found guilty of an offence.[151] It only requires the civil court to be satisfied, on the balance of probabilities, of conduct that constitutes an indictable offence. It is explicitly stated in s 45(5) that, if the plaintiff has been prosecuted, the mode of trial is irrelevant. However, s 45 is narrower than s 6 in three important respects. First, as discussed above, there is no causal requirement embodied in s 6. Section 6 merely states that the loss or injury must be sustained 'in, or in connection with, the commission of an indictable offence'. In other words, mere temporal coincidence between the commission of the indictable offence and the damage sustained will suffice. Section 45, on the other hand, demands that the illegal conduct 'materially contribute' to the damage.

Secondly, s 45 is limited to denying liability arising from a 'breach of duty' while s 6 operates to deny 'right[s] of action' generally. The phrase 'breach of duty' is a slippery one, as demonstrated by the long line of cases in which that expression has been considered in the context of legislation governing limitation of actions.[152] On a strict construction, the phrase refers only to a breach of a duty of care in negligence, as that is the only tort in which 'breach of duty' is an element. If the phrase is read more liberally as corresponding loosely with carelessness,[153] s 45 would be triggered where liability arises as a result of the defendant's negligence. Thus, an action brought in trespass or nuisance in circumstances where the defendant failed to exercise reasonable care would be within the scope of s 45. Read at a still higher level of generality, the phrase refers to a failure to live up to any obligation imposed by the law of torts.[154] On such a construction, s 45 encompasses all actions in tort, including actions brought in respect of faultless conduct by the defendant.

Unfortunately, the definitions in the *Civil Liability Act* 2003 (Qld) are of limited assistance in determining which of these interpretations was intended. 'Duty' is defined as:[155]

(a) a duty of care in tort; or

(b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or

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151 Section 45(4).

152 See, for example, *Billings v Reed* [1945] KB 11 (Court of Appeal); *Letang v Cooper* [1965] 1 QB 232 (Court of Appeal); *Stubbings v Webb* [1993] AC 498 (House of Lords); *Stingel v Clark* (2006) 228 ALR 229 ('*Stingel*').

153 In *Devlin v Roche* [2002] 2 IR 360 at 367 (Supreme Court of Ireland) Geoghegan J stated '[a] breach of duty of care is really the same thing as negligence'.

154 In *Kruber v Grzesiak* [1963] VR 621 at 623 (Supreme Court) Adam J rhetorically asked '[a]fter all, do not all torts arise from breach of duty – the tort of trespass to the person arising from the breach of a general duty not to inflict direct and immediate injury to the person of another either intentionally or negligently in the absence of lawful excuse?'

155 Section 8, sched 2.

(c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b).

'Duty of care' is in turn defined as 'a duty to take reasonable care or to exercise reasonable skill (or both duties)'.[156] This series of clumsy definitions seems to exclude the widest interpretation. The issue then is whether the phrase 'breach of duty' refers to the tort of negligence (the strict interpretation) or to all torts that are capable of commission by negligence (the intermediate interpretation). Three considerations point in favour of the strict view. First, the overarching objective of the Act is to address what was perceived to be the unduly wide scope of the tort of negligence. Secondly, the words 'duty of care' direct attention to the tort of negligence. Thirdly, s 9(2) recites the familiar considerations that feature in the negligence 'calculus' for the purposes of determining whether there is a 'breach of duty'.[157] Nevertheless, there are considerations that support the intermediate interpretation, including the fact that s 17(1), which concerns liability arising while engaged in a 'dangerous recreational activity', refers explicitly to 'liability in negligence', thereby suggesting a difference between that phrase and the words 'breach of duty'. Ultimately, the haphazard use of terms coupled with imprecise and awkward definitions renders it impossible to say with confidence whether the strict or intermediate interpretation was intended by the legislature.

Thirdly, s 45(2) confers a discretion on the court to award damages where the operation of s 45(1) would be harsh and unjust. This provision, which does not have a counterpart in s 6 of the *Criminal Code Act* 1899 (Qld), may initially seem to be eminently sensible. Unfortunately, it places judges in an impossible position. Subject to the narrow exceptions discussed earlier,[158] denying a plaintiff a remedy in tort by reason of the plaintiff's illegal conduct is *always* unjust and, depending on the quantum of the plaintiff's claim, harsh. When can imposing 'double punishment' be anything but unjust? When can meting out punishment the severity of which is insensitive to the moral blameworthiness of the plaintiff be other than unjust? Yet it is clear that judges cannot routinely invoke the discretion in order to avoid the draconian results that s 45(1) is liable to produce. While the invocation of the discretion as a matter of course would be most welcome, the legislature did not intend it to be so utilised. Section 45(2) is an exception to the general rule in s 45(1). It cannot be used to swallow s 45(1). This situation reveals the fundamental error committed by the legislature in enacting s 45. Rather than enacting a law that requires the rejection of claims tainted by illegality subject to a discretion to award damages where the rejection would be harsh and unjust, the rational approach would have been to enact a provision which provides that illegality shall not defeat claims unless withholding a remedy serves a justifiable function.

If the court decides to exercise the discretion, damages must be reduced by a minimum of 25 per cent.[159] This reduction may be augmented to the extent that

156 Id.

157 Compare McDonald, above n89 at 272–278.

158 See Sections 2(B)(ii) and (iii).

the court determines 'to be appropriate in the circumstances of the case'.[160] Needless to say, the requirement for a mandatory minimum reduction is baseless. It is no more just to deny a plaintiff part of his or her damages for no good reason than it is to improperly deny a claim entirely.

From the foregoing, it is apparent that if the plaintiff has been found guilty of an indictable offence, the width of s 6 of the *Criminal Code Act* 1899 (Qld) is such that s 45 of the *Civil Liability Act* 2003 (Qld) is essentially irrelevant. If s 45 is simultaneously satisfied, it seems that the plaintiff, bizarrely, would not be able to obtain the benefit of the discretion in s 45(2). Although s 45(2) provides that the 'court *may award damages in a particular case* if ... subsection (1) would operate harshly and unjustly', it could not be seriously argued that this authorises the court to award damages in circumstances where s 6 applies. Section 45(2) is directed at the defence in s 45(1). It says nothing about the defence in s 6. This interpretation is fortified when it is noticed that s 7(2) of the *Civil Liability Act* 2003 (Qld) provides that nothing in the Act limits the protection from liability afforded by another law.

C. South Australia

The statutory illegality defence in South Australia is found in s 43 of the *Civil Liability Act* 1936 (SA). Section 43, which was inserted into that Act by the inappropriately styled *Law Reform (Ipp Recommendations) Act* 2004 (SA),[161] provides:

> (1) Liability for damages[162] is excluded if the court –
>
> (a) is satisfied beyond reasonable doubt that the accident[163] occurred while the injured person was engaged in conduct constituting an indictable offence; and
>
> (b) is satisfied on the balance of probabilities that the injured person's conduct contributed materially to the risk of injury.
>
> (2) However, the court may award damages despite this exclusionary principle if satisfied that –
>
> (a) the circumstances of the particular case are exceptional; and

159 Section 45(3).

160 Similar provisions for the mandatory reduction of damages exist in relation to cases involving intoxication: *Civil Liability Act* 2003 (Qld) ss 47–49.

161 Section 27. As mentioned above in Section 1, the Negligence Review Panel, chaired by Justice Ipp, did not even canvass the option of enacting an illegality defence. Nor did it recommend the enactment of several other provisions in this Act. Indeed, the Panel expressly recommended against some of the provisions that ultimately appeared in this Act and in some of the other tort 'reform' statutes: see E W Wright, 'National Trends in Personal Injury Litigation: Before and After "Ipp"' (2006) 14 *Torts Law Journal* 233 at 241–242.

162 'Damages' is defined in s 3 as 'compensation or damages for harm and includes solatium but does not include — (a) workers compensation; or (b) compensation under a statutory scheme for compensating victims of crime.'

163 'Accident' is defined in s 3 as 'an incident out of which personal injury arises and includes a motor accident.'

(b) the principle would, in the circumstances of the particular case, operate harshly and unjustly.

(3) For the purposes of subsection (1)(a), a relevant conviction or acquittal is to be accepted as conclusive evidence of guilt or innocence of the offence to which it relates.

(4) This section –

(a) applies where damages are claimed for personal injury[164] –

(i) arising from a motor accident (whether caused intentionally or unintentionally); or

(ii) arising from an accident caused wholly or in part –

(A) by negligence; or

(B) by some other unintentional tort on the part of a person other than the injured person; or

(C) by breach of a contractual duty of care; and

(b) ....

(c) does not affect the operation of a rule of law relating to joint illegal enterprises.

The South Australian defence has several interesting features. It is the only statutory illegality defence that requires proof of the commission of an (indictable) offence beyond reasonable doubt.[165] This requirement has the merit of limiting the application of the defence, but it is anomalous in that it is the only defence to liability in tort an element of which must be proved to the criminal standard.[166] Another matter of note is that s 43, like the defence in s 45 of the *Civil Liability Act* 2003 (Qld)[167] and the statutory defences in the Australian Capital Territory[168] and the Northern Territory,[169] provides for a discretion to mollify the operation of the defence. In the case of s 45 of the *Civil Liability Act* 2003 (Qld), the application of the defence must be unjust and harsh before the discretion may be exercised. The South Australian defence (as with the defences in the Territories) adds a rider: that the case is an exceptional one. The problem with this rider is that it makes it more likely that the very cases which should not be denied on the grounds of illegality will be denied. For the reasons set out above,[170] *un*exceptional actions in tort should *not* be rejected for illegality on the part of the plaintiff.[171]

Section 43(3) states that a relevant conviction or acquittal furnishes conclusive evidence of a plaintiff's guilt or innocence of an offence for the purposes of s 43(1).[172] However, what relevance, if any, is it that the plaintiff cannot be prosecuted for his or her allegedly criminal conduct because of the existence of a

164 'Personal injury' is defined in s 3 to include mental harm and death.

165 Interestingly, it also requires the court to be satisfied beyond reasonable doubt that the damage was sustained while the plaintiff was committing the offence. It seems is doubtful that this was intended by the legislature

166 See above Section 3(A)(i).

167 See above Section 3(B)(ii).

168 See below Section 3(E).

169 See below Section 3(F).

170 See Section 2(B).

171 Consider *Vellino* [2002] 1 WLR 218 at 229 [48] (Court of Appeal).

procedural bar other than the doctrine of *autrefois acquit*? On its face, s 43(1) is unconcerned with such matters. It simply states that the defence applies if the court is satisfied beyond reasonable doubt that the plaintiff's accident occurred while he or she was engaged in conduct which constitutes an indictable offence. It seems beside the point whether or not a plaintiff is capable of being proceeded against or convicted.

On the other hand, s 54 of the *Civil Liability Act* 2002 (NSW),[173] s 45 of the *Civil Liability Act* 2003 (Qld)[174] and the defence in Tasmania[175] expressly provide that whether or not a plaintiff is liable to prosecution is of no consequence. As the enactment of the defences in those jurisdictions preceded the enactment of the defence in South Australia,[176] it may be argued that the omission of the South Australian legislature to address this matter was deliberate and, therefore, by inference, the fact that a plaintiff cannot be proceeded against precludes the defence's application. However, it is suggested that the better view is that whether or not a plaintiff is liable to prosecution is immaterial. This construction adheres more closely to the statutory language. Moreover, the belief that legislatures are alert to relatively minor details of the legislation in other jurisdictions involves a degree of velleity. It is quite unrealistic to attribute omniscience to a Parliament[177] and assume that it is aware of every provision in other jurisdictions and thereby intends to attach significance to every discrepancy between legislation that it enacts and legislation elsewhere.

D. Tasmania

The Tasmanian defence is found in s 6 of the *Civil Liability Act* 2002 (Tas). Section 6 provides:

> (1) A court is not to award damages [for personal injury, death or damage to property][178] if the court is satisfied that –
>
> (a) the person whose death, injury or damage is the subject of the proceedings was, at the time of the incident that resulted in the death, injury or damage, engaged in conduct that (on the balance of probabilities) constitutes a serious offence; and

172 Section 43(3) is redundant in so far as it relates to convictions. Section 34A of the *Evidence Act* 1929 (SA) had abolished the rule in *Hollington v Hewthorn* [1943] KB 587 (Court of Appeal) that convictions are inadmissible in civil proceedings as evidence of the facts on which the conviction is founded.

173 See above Section 3(A)(i).

174 See above Section 3(B)(ii).

175 See below Section 3(D).

176 The Bills that resulted in enactment of the statutory illegality defences in New South Wales, Queensland and Tasmania were respectively introduced in the Parliaments in these jurisdictions on 23 October 2002, 11 March 2003 and 1 October 2002. The Bill that became the *Law Reform (Ipp Recommendations) Act* 2004 (SA) was introduced in the South Australia Parliament on 2 April 2003.

177 Consider *Stingel* (2006) 228 ALR 229 at 233 [12]; compare *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 324–325 [8].

178 See s 5A.

(b) the conduct contributed materially to the risk of the death, injury or damage that was suffered.

(2) This section operates whether or not a person whose conduct is alleged to constitute an offence has been, will be or is capable of being proceeded against or convicted of any offence relating to the conduct.

(3) In this section, "serious offence" means an offence punishable by imprisonment for a term greater than 6 months.

It is unnecessary to say much about the Tasmanian defence as its central features substantially appear in other defences that have already been discussed. As is the case in jurisdictions in which an illegality defence has been enacted other than South Australia,[179] the Tasmanian defence requires the conduct alleged to constitute a 'serious offence' to be proved to the civil standard. Like the defences in New South Wales[180] and the defence in s 45 of the *Civil Liability Act* 2003 (Qld),[181] it expressly confirms the irrelevance of whether or not the plaintiff has been, will be or is capable of being proceeded against or convicted. As with the defences in New South Wales, there is no discretion to award damages where the application of the defence would be harsh and unjust.

One matter worth noting, however, is that the Tasmanian defence only applies to conduct constituting an offence that is punishable by imprisonment for a term greater than six months. The Bill which became the *Civil Liability Act* 2002 (Tas) originally adopted a threshold of '6 months or more'. This threshold was increased as a result of submissions made by the Chief Justice of Tasmania, the Bar Association and the Law Society.[182] The shared concern was that much conduct which constitutes an offence punishable by six months' imprisonment may be quite venial. The example was given of a child injured by the negligence of an occupier while trespassing on the latter's property in order to retrieve a ball. But for this amendment, such a child would have been unable to recover damages (unless he or she had not attained the age of criminal responsibility)[183] as the basic trespass offence attracts a sentence of up to six months' imprisonment.[184]

E. Australian Capital Territory

The defence in the Australian Capital Territory is contained in s 94 of the *Civil Law (Wrongs) Act* 2002 (ACT). This section states:

(1) Liability for damages is excluded if the court—

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179 See above Section 3(C).

180 See above Section 3(A).

181 See above Section 3(B)(ii).

182 See Tasmania, *Parliamentary Debates*, House of Assembly, 23 October 2002 (Judith Jackson) at 41.

183 The age of criminal responsibility in Tasmania, as in all other jurisdictions, is 10 years: *Criminal Code Act* 1924 (Tas) s 18. There is a presumption against criminal responsibility where the child is 10 but less than 14 years old.

184 *Police Offences Act* 1935 (Tas) s 14B(2)(b).

(a) is satisfied on the balance of probabilities that the accident happened while the injured person was engaged in conduct that is an indictable offence; and

(b) is satisfied on the balance of probabilities that the injured person's conduct contributed materially to the risk of injury.

(2) Despite this exclusion, the court may award damages in a particular case if satisfied that—

(a) the circumstances of the case are exceptional; and

(b) in the circumstances of the case, the exclusion would operate harshly and unjustly.

All of the elements of the Australian Capital Territory defence are found in the defences that have already been discussed. Like s 45(1) of the *Civil Liability Act* 2003 (Qld),[185] s 94(1) requires proof of the commission of an indictable offence on the balance of probabilities that contributed to the plaintiff's damage. The Bill that became the *Civil Law (Wrongs) Act* 2002 (ACT) originally adopted the criminal standard of proof.[186] The Bill was amended, however, to bring the defence into line with s 54 of the *Civil Liability Act* 2002 (NSW).[187] The discretion in s 94(2) is identical to that in s 43(2) of the *Civil Liability Act* 1936 (SA). The absence of a provision stating that the defence applies regardless of whether or not the plaintiff has been, will be or is capable of being proceeded against or convicted does not mean, for the reasons stated earlier,[188] that s 94 should be read as only applying where the plaintiff has been, or is able to be, prosecuted or convicted.

F. Northern Territory

The defence in the Northern Territory is contained in s 10 of the *Personal Injuries (Liabilities and Damages) Act* 2003 (NT). Section 10 provides:

(1) A person does not incur civil liability for a personal injury if the court is satisfied on the balance of probabilities –

(a) that the injury occurred while the injury person was engaged in conduct constituting an offence punishable by imprisonment; and

(b) that the injured person's conduct contributed materially to the risk of that injury.

(2) Subsection (1) does not apply if the court is satisfied —

(a) that the circumstances of the particular case are exceptional; and

(b) that to exclude liability in the circumstances of that particular case would be harsh and unjust.

It would be superfluous to say much about the Northern Territory defence as its components feature in the defences in other jurisdictions. However, it is worth

185 See above Section 3(B)(ii).

186 Civil Law (Wrongs) Bill 2002 (ACT) cl 34.

187 Australian Capital Territory, *Parliamentary Debates*, 26 September 2002 (Bill Stefaniak & Jon Stanhope) at 3344–3347.

188 See the analysis of the South Australian defence in Section 3(C).

noting that the Northern Territory legislature, unlike that of Queensland,[189] realised that it had already made provision for an illegality defence. Section 10A of the *Law Reform (Miscellaneous Provisions) Act* 2001 (NT)[190] relieved the occupier or owner of residential property of a duty of care that he or she may otherwise have owed to a person who had entered his or her property and committed, or had the intention of committing, an offence punishable by imprisonment. Section 10A was repealed by the *Personal Injuries (Liabilities and Damages) (Consequential Amendments) Act* 2003 (NT).[191]

Another point of interest is that the defence in s 10 of the *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) is unique among the statutory illegality defences in that it requires the commission of an offence punishable by imprisonment per se. It does not require that the offence in question be punishable by imprisonment for a particular term. When the Personal Injuries (Liabilities and Damages) Bill 2002 (NT) was introduced in the Northern Territory Legislative Assembly, a threshold to the application of the defence of the commission of an offence punishable 'by imprisonment for 12 months or more' was adopted. This provision for a minimum term was omitted during the gestation of the Bill on the footing that it was inappropriate for the defence in s 10 to be narrower than the previous defence in s 10A of the *Law Reform (Miscellaneous Provisions) Act* 2001 (NT).[192] Rather remarkably, the Government contemplated with apparent equanimity the fact that a person who is injured by a spring gun or other trap would be unable to recover damages if that person was an accidental trespasser.[193] Thus, it seems that the successful plaintiff in the celebrated case of *Bird v Holbrook*,[194] who, having entered the defendant's property in order to retrieve an errant peahen, was grievously wounded as a result of triggering a spring gun set by the defendant, would fail if he had been so injured in the Northern Territory today. It is astonishing that those who intentionally caused injury to trespassers by setting spring guns and other traps were liable in England in 1828 to pay compensation in respect of those injuries but would not be liable in the Northern Territory in the present day.

189 See above Section 3(B).

190 Section 10A was inserted into this Act by the *Law Reform (Miscellaneous Provisions) Amendment Act (No 2)* 2001 (NT) s 2.

191 Section 3.

192 Northern Territory *Parliamentary Debates*, Legislative Assembly, 27 February 2003, the exchange between the Hon Peter Toyne and Mr Peter Maley <http://notes.nt.gov.au/lant/hansard/hansard9.nsf/WebbySubject/58DF3B92118FEAD069256D050009A710?opendocument> accessed 15 August 2007.

193 The basic trespass offence in the Northern Territory is punishable by 20 penalty units or six months' imprisonment: *Trespass Act* 1987 (NT) s 5.

194 (1828) 4 Bing 628; 130 ER 911 (Court of Common Pleas).

4. *Some Issues and Problems*

Now that we have examined each of the statutory defences, it is necessary to turn our attention to some of the questions and difficulties that the defences collectively present. We will also briefly look at recent developments in the United Kingdom.

A. Insensitivity to the Seriousness of the Plaintiff's Wrongdoing

One feature that is common to the statutory defences is that their application depends on how the offence that the plaintiff is alleged to have committed is triable or punishable. Five discrete thresholds to the application of the defences have been adopted:

(i) Where the offence is triable on indictment (used in the defence in s 45 of the *Civil Liability Act* 2003 (Qld) and in the defences in South Australia and the Australian Capital Territory);
(ii) Where the plaintiff is found guilty of an indictable offence (used in the defence in s 6 of the *Criminal Code Act* 1899 (Qld));
(iii) Where the offence is punishable by imprisonment (used in the defence in the Northern Territory);
(iv) Where the offence is punishable by at least six months' imprisonment (used in the defences in New South Wales); and
(v) Where the offence is punishable by more than six months' imprisonment (used in the defence in Tasmania).

The stated purpose of these thresholds is to ensure that the defences do not apply to actions brought by plaintiffs who, although having breached the criminal law, are not so blameworthy that they 'deserve' to lose an entitlement to damages.[195] However, it scarcely needs to be pointed out that these five litmus tests for blameworthiness are horribly crude. The manner in which an offence is triable or punishable bears only the most tenuous relationship to the culpability of a person who commits it. The legislatures that enacted statutory illegality defences have thus failed to give effect to their professed intention that only plaintiffs who have engaged in serious criminality will be denied redress in tort.

Despite several false starts, the courts realised some time ago that attempting to distil a sharp distinction between plaintiffs who were sufficiently blameworthy as to 'warrant' stripping them of a remedy in tort from plaintiffs who were not was an exercise in futility. Immutable formulae are bound to produce results that are out of kilter with a plaintiff's blameworthiness. As Mason J remarked in *Jackson*:

> there arises the difficultly, which I regard as insoluble, of formulating a criterion which would separate cases of serious illegality from those which are not serious. Past distinctions drawn between felonies and misdemeanours, malum in se and malum prohibitum, offences punishable by imprisonment and those which are not, non-statutory and statutory offences offer no acceptable discrimen.[196]

195 See, for example, New South Wales, *Parliamentary Hansard*, Legislative Assembly, 23 October 2002 (Robert Carr) at 5766.

196 (1978) 138 CLR 438 at 455. See also at 451 (Barwick CJ).

The legislatures that enacted statutory illegality defences did not heed this warning and, consequently, the defences that they enacted will be engaged in cases that do not evince serious criminality on the part of the plaintiff.

It is important to note that the point being made here is simply that the legislatures that enacted the illegality defences have failed, quite dramatically, to accomplish their goal of ensuring that the defences are only available if the plaintiff is guilty of serious wrongdoing. Nothing said here should be taken to support the assumption on which this goal is premised, namely, that it is justifiable to deny a remedy to plaintiffs who sustain damage while committing a serious infraction of the criminal law. It is not justifiable for the reasons set out earlier.[197] Denying a remedy in such cases does not promote any beneficial purpose. On the contrary, withholding redress on this basis is unjust as it has the potential to inflict punishment that is out of all proportion to blameworthiness.

B. Illegality and the Apportionment Legislation

In Canada and England, debates have taken place as to whether the apportionment legislation, in addition to abolishing the defence of contributory negligence, did away with the common law defence of illegality. In view of the attention that this issue has received in these jurisdictions, it is strange that it has never been discussed in a reported decision of an Australian court. Accordingly, in this part of this article, a few words will be said about it. The impact of the apportionment legislation on the statutory illegality defences will also be commented upon. In order to properly contextualise this discussion it is necessary to first have regard to the *Law Reform (Contributory Negligence) Act* 1945 (UK), on which the apportionment legislation in Australia is based. Section 1(1) of that Act provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage...

For present purposes, the central term in this provision is fault, which is defined in s 4 as:

> negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

The impact of the Act on the common law defence of illegality arose for consideration in *National Coal Board v England* before the House of Lords.[198] In this case, the respondent mineworker was severely injured by the premature explosion of a detonator. Shortly before the explosion the respondent told a co-worker, a shot-firer, that he would connect the cable running from the firing

197 See Section 2(B)(i).

198 [1954] AC 403.

apparatus to the detonator. The respondent connected the cable while the co-worker walked to the firing apparatus. Before the respondent could take shelter, the co-worker triggered the firing apparatus. The arrangement between the respondent and the co-worker contravened safety regulations. For obvious reasons, those regulations provided that shot-firers had to personally attend to the coupling up of firing apparatuses to detonators. Their Lordships unanimously held that the respondent's employer was liable for the respondent's injuries. Significantly, Lord Porter, Lord Reid and Lord Asquith found that the Act ousted the illegality defence as the words 'breach of statutory duty' in s 4 encompassed breaches that constitute offences.[199] As committing an offence will invariably constitute 'negligence ... [or conduct] that would give rise to liability in tort or would, apart from th[e] Act, give rise to the defence of contributory negligence', this case supports the proposition that the Act drove the illegality defence out of the domain of tort law altogether.

Although the decision in *England* is the only occasion on which the House of Lords considered the defence of illegality at any length,[200] that decision has been almost completely ignored in England in illegality cases. Indeed, the Court of Appeal has found the illegality defence alive and well.[201] This led Sedley LJ in *Vellino v Chief Constable of Greater Manchester* to suggest that decisions upholding the existence of the defence were decided *per incuriam*.[202] One commentator described this suggestion as a 'daring line of reasoning'.[203]

The view that the axe fell on the defence with the enactment of the apportionment legislation has garnered some support in Canada. In *Lewis v Sayers*, which involved a claim in respect of negligently inflicted property damage, Gould DCJ stated:

> It appears to me that in a case to which, by reason of its facts, [the apportionment legislation] applies, the Ontario Legislature has quite deliberately substituted for the *ex turpi causa* rule a positive direction that the Court shall make a finding as to the degree of fault or negligence to be attributed to each party and shall apportion the damages accordingly. I realize of course [that the apportionment legislation] was enacted primarily to do away with the absolute defence formerly available in cases of contributory negligence, but the wording is equally apt in relation to the defence now under discussion... The defence *ex turpi causa non oritur actio* seems necessarily to involve a situation where both parties are alleged to be at fault, and so long as it is remembered that [the provision for

199 *Id* at 419–420 (Lord Porter), 424–425 (Lord Reid), 428 (Lord Asquith). The other law lords did not comment on the effect of the *Law Reform (Contributory Negligence) Act* 1945 (UK) on the illegality defence.

200 The only other case in which the defence of illegality to liability in tort has been considered by the House of Lords is *Gardner v Moore* [1984] AC 548. However, in that case, the defence's application was quickly rejected with minimal discussion.

201 *Pitts v Hunt* [1991] 1 QB 24; *Hunter* [1996] RTR 396; *Clunis* [1998] QB 978; *Worrall* [1999] CLY 1413; *Vellino* [2002] 1 WLR 218; *Kanu* [2002] EWCA Civ 1620; *Hewison* [2003] ICR 766.

202 [2002] 1 WLR 218 at 231 [54].

203 Jonathan Morgan, '*Jus Suum Cuique*' (2002) 118 *Law Quarterly Review* 527 at 527–528.

> apportionment] applies only where the fault of each has contributed to the damages, in my opinion the section leaves no room for the application of the maxim.[204]

This passage was referred to with approval by Seaton JA in *Funk v Clapp*.[205] Similarly, in *Hall v Hebert*, Cory J remarked:

> The [legislation introducing] the principle of apportionment of responsibility [is] aimed at achieving that fairness which the tort remedy seeks to provide. It might have reasonably been thought that this legislation would spell the end of the ex turpi causa defence. Yet despite the passage of apportionment legislation, the doctrine of ex turpi causa stubbornly and somewhat irrationally has survived. Like many noxious weeds, it appears to be difficult to eradicate.[206]

In light of the foregoing, there is certainly a serious argument that can be made that the Australian apportionment legislation which, when enacted, differed only semantically from the *Law Reform (Contributory Negligence) Act* 1945 (UK), sounded the death knell for the common law illegality defence. However, this argument can perhaps be made more forcefully in light of amendments made to the apportionment legislation in response to the High Court's decision in *Astley v Austrust Ltd*.[207] In this case, the Court held that the apportionment legislation did not apply to awards of damages for breach of contract.[208] The State and Territory legislatures moved quickly to overcome the effect of this decision. The ensuing amendments substituted the definition of the term 'fault', taken from the English Act,[209] for the phrase 'a failure to exercise reasonable care'.[210] This enlarged definition would seem to leave correspondingly less room for the common law illegality defence.

As the focus of this article is the statutory illegality defences, it is unnecessary to express a firm conclusion about the effect of the apportionment legislation on the common law defence. The important thing to note for present purposes is that, whatever the effect of the legislation in this connection, it could not be seriously contended that the legislation extends to cases to which the statutory illegality

204 [1970] 3 OR 591 at 598 [22] (District Court).

205 (1986) 35 BCLR (2d) 222 at 233 [40] (Court of Appeal).

206 [1993] 2 SCR 159 at 206.

207 (1999) 197 CLR 1.

208 This ruling was met with considerable criticism: see, for example, J L R Davis, 'Contributory Negligence and Breach of Contract: *Astley v Austrust Ltd*' (1999) 7 *Torts Law Journal* 117; Michael Tilbury & J W Carter, 'Converging Liabilities and Security of Contract: Contributory Negligence in Australian Law' (2000) 16 *Journal of Contract Law* 78.

209 The Western Australia legislature had adopted a slightly different definition: see *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) s 4 (as enacted).

210 *Law Reform (Miscellaneous Provisions) Amendment Act* 2000 (NSW); *Law Reform (Contributory Negligence) Amendment Act* 2001 (Qld); *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA); *Tortfeasors and Contributory Negligence Amendment Act* 2000 (Tas); *Wrongs (Amendment) Act* 2000 (Vic); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act* 2003 (WA); *Law Reform (Miscellaneous Provisions) Amendment Act* 2001 (ACT); *Statute Law Revision Act* 2001 (NT).

defences apply. All of the statutory defences post-date the legislative activity that followed in the wake of *Astley*. Furthermore, the statutory defences provide that damages must either be denied or apportioned under a specific provision for apportionment. It would be inappropriate to read the apportionment legislation, which is of general application, as qualifying the more specific provisions in the statutory illegality defences.

C. *The Effect of the Statutory Illegality Defences on the Common Law Defence*

Assuming that the common law illegality defence weathered the enactment of the apportionment legislation and the amendment of that legislation following the decision in *Astley*, it is worth considering two questions. First, how do the statutory defences compare with the common law defence? Secondly, if the statutory defences do everything that is done by the common law defence and more, did the statutory defences abolish the latter?

In relation to the first question, it is necessary to observe that, in some respects, the statutory defences are narrower than the common law defence. For example:

(i) The statutory defences are only engaged if it is proved, to the prescribed standard, that the plaintiff committed a relevant offence.[211] However, the common law defence is capable of being actuated by breaches of the criminal law and by grossly immoral behaviour. Thus, in *Hegarty v Shine*[212] the Irish Court of Appeal held that the defence barred an action in trespass brought by the plaintiff in respect of a venereal disease that she contracted from the defendant through extra-martial sexual intercourse.[213] The plaintiff claimed that the defendant had fraudulently concealed the fact that he was infected with the disease and that this vitiated her consent to sexual intercourse. The Court regarded the relationship between the parties as sufficiently immoral to enliven the defence.[214] Although it is difficult to imagine a case that would be denied on the grounds of immorality today,[215] the courts have consistently affirmed that the defence is capable of being engaged by immorality.[216]

(ii) The defence in s 54 of the *Civil Liability Act* 2002 (NSW) does not apply where the defendant's tort constitutes an offence.[217] Similarly, the

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211 The defence in s 6 of the *Criminal Code Act* 1899 (Qld) is different. It requires the plaintiff to have been found guilty of an indictable offence: see above Section 3(B)(i).

212 (1878) 14 Cox CC 145.

213 Windeyer J described this as a 'miserable' decision in *Smith* (1969) 119 CLR 397 at 413.

214 Similar actions have, however, succeeded in the United States: see, for example, *Panther v McKnight* 125 Okla 134 (1926); *De Vall v Strunk* 96 SW 2d 245 (Tex Civ App, 1936); *Long v Adams* 333 SE 2d 852 (Ga Ct App, 1985); *Martin v Ziherl* 607 SE 2d 367 (Va, 2005).

215 The proposition that suicide is so morally turpitudinous that it engages in the defence has been rejected: *Kirkham* [1990] 2 QB 283 (Court of Appeal); *Reeves v Commissioner of Police of the Metropolis* [1999] QB 169 (Court of Appeal).

defence in s 54A does not apply if the defendant's tort constitutes an offence or would have constituted an offence but for the fact that he or she was suffering from mental illness at the relevant time.[218] However, it is well established that the common law defence may be engaged where the defendant's tort amounts to an offence.[219]

(iii) Some of the statutory defences confer a discretion on the court to award damages if the denial of damages would be harsh and unjust[220] or if the case is exceptional and the denial of damages would be harsh and unjust.[221] No equivalent discretion exists in relation to the common law defence.

(iv) With the exception of the defence in s 6 of the *Criminal Code Act* 1899 (Qld),[222] none of the statutory defences apply unless the plaintiff's illegal conduct materially contributed to his or her damage. Although the fact that the plaintiff's illegal conduct contributed to his or her dammage may result in the common law defence being attracted,[223] the absence of such contribution does not necessarily preclude its application.

(v) It would be unusual for the statutory defences to prevent the recovery of damages in respect of lost illegal earnings. As has just been mentioned, the defences are only enlivened if the plaintiff has engaged in illegal conduct that materially contributes to his or her damage. This condition would rarely be satisfied in relation to lost illegal earnings.[224] The defences would not, for instance, prevent a professional burglar who was paralysed when crossing a road by the negligence of a motorist from obtaining damages in respect of his lost income. The fact that he worked as a burglar did not contribute to his damage. However, in such a case, the common law defence would preclude such a plaintiff from obtaining compensation in respect of that loss.[225]

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216 See, for example, *Euro-Diam* [1990] 1 QB 1 at 35 (Court of Appeal); *Kirkham* [1990] 2 QB 283 at 291, 296 (Court of Appeal); *Wackwitz* 244 Va 60 (1992) at 64; *Clunis* [1998] QB 978 at 987 (Court of Appeal); *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* [2000] 1 Lloyd's Rep 218 at 227–228 [44]–[45], 231 (House of Lords); *Vellino* [2002] 1 WLR 218 at 236 [70] (Court of Appeal); *United Project Consultants* [2006] 3 LRC 85 at 102 [54], 103 [57] (Supreme Court of Singapore (Court of Appeal)).

217 Section 54(4). See above Section 3(A)(i).

218 Section 54A(4). See above Section 3(A)(ii).

219 See, for example, *Cross* Times 5 April 2000 (Court of Appeal).

220 *Civil Liability Act* 2003 (Qld) s 45(2). See above Section 3(B)(ii).

221 *Civil Liability Act* 1936 (SA) s 43(2) (see above Section 3(C)); *Civil Law (Wrongs) Act* 2002 (ACT) s 94(2) (see above Section 3(E)); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 10(2) (see above Section 3(F)).

222 See above Section 3(B)(i).

223 See for example, *Hewison* [2003] ICR at 781–782 [36]–[38], 786 [50–[51] (Court of Appeal of England and Wales).

224 The application of s 6 of the *Criminal Code Act* 1899 (Qld) is conditional upon the plaintiff suffering damage 'in, or in connection with, the commission of an indictable offence': see above Section 3(B)(i). This condition is also unlikely to be satisfied in respect of lost illegal earnings.

225 *Burns v Edman* [1970] 2 QB 541 (Queen's Bench).

(vi) The statutory defences do not squarely address sanction shifting actions, that is, actions that seek to deflect the impact of a criminal sanction imposed on the plaintiff to the defendant.[226] Take, for instance, s 54 of the *Civil Liability Act* 2002 (NSW).[227] That section is only enlivened in respect of liability for 'personal injury damages'[228] and property damage. It would be difficult to describe a sanction imposed by a criminal court as constituting either of the foregoing types of damage. Equally, consider the defences in s 45 of the *Civil Liability Act* 2003 (Qld)[229] and in South Australia,[230] Tasmania[231] and the Territories.[232] These defences cannot possibly extend to sanction shifting cases because they only apply to damage sustained 'while' the plaintiff was engaged in the commission of a relevant criminal offence.[233] However, the harm suffered by a plaintiff in a sanction shifting action is suffered when the sentence is carried out. This is invariably a considerable period after the plaintiff's breach of the criminal law. However, the common law illegality defence is usually applied with little hesitation to prevent sanction shifting actions from succeeding.[234]

The fact that the statutory defences are narrower in some respects than the common law defence is ironic considering that the legislatures that enacted the statutory defences evidently thought that the common law defence afforded insufficient protection to defendants. Nevertheless, by and large, the statutory defences have a substantially broader field of operation than the common law defence, principally for the simple reason that they may be enlivened by relatively innocuous breaches of the criminal law. The common law defence, on the other hand, tends to be applied only where the plaintiff has committed a fairly serious transgression.[235] Accordingly, it seems that the common law defence has been rendered largely redundant in jurisdictions which suffer from a statutory defence.

In light of this conclusion, might it be argued that the common law defence has been abolished in these jurisdictions? Did the legislatures that enacted the statutory defences intend to bring about a virtual *tabula rasa*? This is an easy question to answer in the case of New South Wales and Tasmania. The civil liability legislation in those jurisdictions expressly provides that the legislation does not limit the

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226 See above Section 2(B)(ii).

227 See above Section 3(A)(i).

228 'Personal injury damages' is defined as 'damages that relate to the death of or injury to a person' (s 11). 'Injury' is in turn defined as 'personal injury and includes ... (a) pre-natal injury, (b) impairment of a person's physical or mental condition, (c) disease' (s 11).

229 See above Section 3(B)(ii).

230 See above Section 3(C).

231 See above Section 3(D).

232 See above Sections 3(E) and (F).

233 The Tasmanian defence uses the phrase 'at the time of': *Civil Liability Act* 2002 (Tas) s 6(1)(a).

234 See above Section 2(B)(ii).

235 *Saunders* [1987] 1 WLR 1116 at 1134 (Court of Appeal); *Wiegold* (1991) 25 NSWLR 500 at 504 (Court of Appeal); *Orzel v Scott Drug Co* 537 NW 2d 208 at 214 (Mich, 1995).

protection from liability given by another law.[236] The same goes for Queensland in so far as the defence contained in s 45 of the *Civil Liability Act* 2003 (Qld) is concerned.[237] A partial answer is afforded in relation to South Australia by s 43(4)(c) of the *Civil Liability Act* 1936 (SA). This provision states that the statutory illegality defence housed in s 43 'does not affect the operation of a rule of law relating to joint illegal enterprises'. No explicit guidance is given in the other jurisdictions or in relation to s 6 of the *Criminal Code Act* 1899 (Qld).

It is submitted that where the legislature has not expressly evinced an intention to preserve protections from liability afforded by the common law, the better view is that that the common law defence nonetheless survived the enactment of the statutory defences. It is unrealistic to think that the legislature of the Australian Capital Territory, for instance, would have been aware of the inclusion in the *Civil Liability Act* 2002 (NSW) of the provision saving limitations on liability in other laws, and that, by providing for an illegality defence without also enacting a savings provision, therefore intended to abolish the common law defence. It is far-fetched to expect legislatures to be cognisant of every provision in the enactments of other legislatures.[238]

D. Developments in the United Kingdom

In 2001, the Law Commission of England and Wales released a voluminous Consultation Paper on the effect of a plaintiff's illegality in tort.[239] In its Paper, the Commission suggested that the common law illegality defence should be replaced by a 'structured discretion' to disallow claims tainted by illegality on the part of the plaintiff. The exercise of this discretion would turn on considerations such as the seriousness of the illegality, the knowledge and intention of the plaintiff, whether denying relief would act as a deterrent, whether denying relief would further the purpose of the rule which renders the plaintiff's conduct illegal and whether denying relief would be proportionate to the illegality involved.[240] Importantly, the Commission contemplated that this discretion would result in actions failing less frequently for illegality than under the common law defence.[241]

In light of the current hostile attitude towards tort law in the United Kingdom,[242] it seems unlikely that the Government would act upon anything along the lines of the Law Commission's preliminary recommendations. The Consultation Paper was met with a derisive and characteristically ill-informed

236 *Civil Liability Act* 2002 (NSW) s 3A(1); *Civil Liability Act* 2002 (Tas) 3A(2).

237 *Civil Liability Act* 2003 (Qld) s 7(2).

238 See above Section 3(C).

239 Law Commission, *The Illegality Defence in Tort*, Consultation Paper No 160 (2001). The Law Commission has not yet published a Report.

240 Id at [6.30].

241 Id at [6.56].

242 See Annette Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 *Modern Law Review* 349 at 350–355 commenting upon the widespread (and empirically unsound) view perpetuated by the media that England is suffering from a 'compensation culture'. See also Richard Lewis, Annette Morris & Ken Oliphant, 'Tort Personal Injury Claims Statistics: Is there a Compensation Culture in the United Kingdom?' (2006) 14 *Torts Law Journal* 158.

response from the media.[243] Furthermore, the Government has made it clear that it believes that the common law defence is too lenient to claimants. It recently provided for a statutory illegality defence in s 329 of the *Criminal Justice Act* 2003 (UK). In essence, this cumbersome provision prevents claimants from recovering damages in trespass if they were injured while committing an offence punishable by imprisonment and were later convicted of that offence. The defence does not apply if the defendant, in injuring the claimant, did not believe that it was necessary to do that which he or she did in self-defence or if the defendant's self-defence was grossly disproportionate.

The enactment of this defence was precipitated by several cases involving burglars suing occupiers who had injured them. An important case is the well-known decision of the Court of Appeal in *Revill v Newbery*.[244] In this case the Court upheld an award of £4,100 to a burglar who was shot by the respondent while he was attempting to break into a shed owned by the latter. Another significant piece of litigation is the widely publicised case of Mr Tony Martin.[245] Mr Martin shot Mr Brendan Fearon and his teenage accomplice as they were attempting to break into his farmhouse. The teenager was fatally injured and Mr Martin was found guilty of his manslaughter. There was a public outpouring of sympathy for Mr Martin.[246] This sympathy was accompanied by resentment towards Mr Fearon. These emotions intensified when Mr Fearon, with the support of legal aid,[247] brought proceedings for damages.[248]

Section 329 is a relatively harmless provision. It is doubtful that it places any restriction of practical significance on the circumstances in which compensation may be recovered. As such, the United Kingdom Parliament has exercised far more self-restraint than the Australian legislatures that enacted statutory illegality defences. Similar restraint can be seen in the *Compensation Act* 2006 (UK).[249] Although this Act curtails the circumstances in which damages in tort may be obtained in certain ways, these restrictions are nowhere near as extensive as those imposed by the Australia tort 'reform' statutes. However, there are ominous signs that far ranging modification is imminent.[250] It is hoped that, before the United Kingdom legislature crosses the Rubicon and engages in full-blown alteration of the common law, it will take stock of the abysmal mess created in Australia by the tort 'reform' statutes, particularly in relation to the effect of the plaintiff's unlawful behaviour.

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243 Noted by Sedley LJ in his carefully considered reasons in *Vellino* [2002] 1 WLR 218 at 233 [60].

244 [1996] QB 567, noted in Tony Weir, 'Swag for the Injured Burglar' (1996) 55 *Cambridge Law Journal* 182.

245 See, eg, Steven Morris, 'Burglar has Right to Sue Tony Martin, Judge Rules' *Guardian* (14 June 2003) at 7.

246 Noted in *R v Martin* [2003] QB 1 at 2 [1]–[3] (Court of Appeal).

247 Clare Dyer, 'Burglar Shot by Farmer Wins Right to Legal Aid' *Guardian* (6 July 2002) at 9.

248 This action was eventually abandoned: Stewart Tendler, 'Buglar to "Drop Case" Against Tony Martin' *The Times* (28 July 2003) at 6.

249 For discussion of the *Compensation Act* 2006 (UK) see Rebecca Herbert, 'The Compensation Act 2006' (2006) 4 *Journal of Personal Injury Law* 337; Kevin Williams, 'Politics, The Media and Refining the Notion of Fault: Section 1 of the Compensation Act 2006' (2006) 4 *Journal of Personal Injury Law* 347.

7. *Conclusion*

The doctrine of attainder met its demise with the fall of the statutory axe some time ago. One would have hoped that this bane of the law had been finished off for good. However, with the resurgence of the practice of imposing civil disabilities on those who contravene the criminal law through the enactment of the statutory illegality defences, the doctrine continues to haunt the law from the grave. These defences rank among the most obscure and unjust provisions in statutes that can hardly be described as models of clear and well considered law reform.

At its core, this article has sought to make two points. The first is that not only have the legislatures that enacted the statutory defences failed to improve upon the common law defence of illegality, for which there is much room, but they have rendered the law concerning the effect of unlawful behaviour on the part of the plaintiff dramatically more unsatisfactory. There are now three illegality defences in New South Wales and Queensland (two statutory and one at common law) and two in South Australia, Tasmania and the Territories (one statutory and one at common law). The operation of the statutory and the common law defences is clouded, as is their relationship with each other.

Secondly, it has been argued that, except where the plaintiff seeks to realise a profit from his or her criminal transgression or attempts to deflect the impact of a criminal sanction, the denial of actions in tort on the grounds that the plaintiff was acting illegally at the relevant time is unjustifiable. An evaluation of the relevant policy considerations indicates that the common law defence is far wider than is appropriate. However, rather than reining in the common law defence, the legislatures in the aforementioned jurisdictions have enacted statutory illegality defences that are generally far more potent than that at common law.

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250 In introducing the Bill which became the *Compensation Act* 2006 (UK), the Hon Bridget Prentice remarked that the Bill (*Parliamentary Debates*, House of Commons, 8 June 2006 at column 419): 'is part of a much wider set of initiatives that we are promoting: we are determined to tackle practices that might stop normal activities, because people either fear litigation or have become risk-averse. We want to stop people being encouraged to bring frivolous or speculative claims for compensation, and the provisions in the Bill will help us to do just that.' These assertions are reminiscent of comments made in Parliaments throughout Australia at the height of the 'insurance crisis'.

Appendix: Comparative Table of the Statutory Illegality Defences

Jurisdiction		Standard to which commission of offence must be proved	Offences that enliven the defence	Damage to which the defence applies	Defence inapplicable/Discretion to exclude the defence if:
New South Wales	*Civil Liability Act* 2002 s 54	Balance of probabilities	Offences punishable by 6 months' imprisonment or more	Personal injury, death and property damage	Defendant's tortious conduct constitutes an offence
	Civil Liability Act 2002 s 54A	Balance of probabilities	Conduct that would have constituted an offence punishable by 6 months' imprisonment or more had the plaintiff not been suffering from a mental illness at the time	Personal injury, death and property damage	Defendant's tortious conduct constitutes an offence or would have constituted an offence had the defendant not been suffering from a mental illness at the time.
Queensland	*Criminal Code Act* 1899 s 6	Plaintiff must have been found guilty by criminal court	Indictable offences	Any damage	
	Civil Liability Act 2003 s 45	Balance of probabilities	Indictable offences	Any damage	Denying liability would be harsh and unjust (although damages must be reduced by a minimum of 25 per cent)
South Australia: *Civil Liability Act* 1936 s 43		Beyond reasonable doubt	Indictable offences	Personal injury and death	Case is exceptional and denying liability would be harsh and unjust
Tasmania: *Civil Liability Act* 2002 s 6		Balance of probabilities	Offences punishable by more than 6 months' imprisonment	Personal injury, death and property damage	
Australian Capital Territory: *Civil Law (Wrongs) Act* 2002 s 94		Balance of probabilities	Indictable offences	Personal injury and death	Case is exceptional and denying liability would be harsh and unjust
Northern Territory: *Personal Injuries (Liabilities and Damages) Act* 2003 s 10		Balance of probabilities	Offences punishable by imprisonment	Personal injury and death	Case is exceptional and denying liability would be harsh and unjust