Can tort law be used to deflect the impact of criminal sanctions? The role of the illegality defence

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The suggestion that persons convicted of criminal offences could obtain compensation or indemnity in tort in respect of penalties imposed by the criminal law would undoubtedly strike most people as bizarre and abhorrent. However, in recent years, an increasing number of actions have been brought seeking to do just this. While these actions have generally been unsuccessful as a result of the application of the illegality defence, the courts have failed to properly articulate the public policy considerations which support and militate against the invocation of this defence in this context. This article explores these considerations and concludes that sanction-shifting actions may be permissible in limited circumstances.

1 Introduction

A little over a century ago one commentator described the effect of the plaintiff's illegal conduct on his or her right to a remedy as 'one of the most disputed questions in the whole of the law of torts'.[1] Regrettably, with the modern case law on the subject presenting a labyrinth of disparate approaches, this statement remains accurate. It is thus fortunate, in light of the Byzantine nature of the illegality defence, that defendants rarely contend that claims should fail by reason of the plaintiff's illegality.[2] On occasions when the

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1 H Davis, 'The Plaintiff's Illegal Act as a Defense in Actions of Tort' (1904) 18 *Harvard L Rev* 505 at 505. The defence has also been described as 'exceedingly nebulous' (R W M Dias and B S Markesinis, *Tort Law*, 2nd ed, Clarendon Press, Oxford, 1989, p 506); posing an 'intractable' problem (J Swanton, 'Plaintiff a Wrongdoer: Joint Complicity in an Illegal Enterprise as a Defence to Negligence' (1981) 9 *Sydney L Rev* 304 at 331); a 'vexed issue' (*Winter v Commonwealth of Australia* (1992) 112 ACTR 10 at 22 per Higgins J); a 'conundrum' (C Debattista, 'Ex Turpi Causa Returns to the English Law of Torts: Taking Advantage of a Wrong Way Out' (1984) 13 *Anglo-American L Rev* 15 at 27); and a 'rather obscure corner of the law' (R F V Heuston, *Salmond on the Law of Torts*, 7th ed, Sweet & Maxwell, London, 1977, p 678).

2 The defence has been directly considered in the tort context by the High Court of Australia on only six occasions (*Thomas Brown & Sons Ltd v Fazal Deen* (1962) 108 CLR 391; [1963] ALR 378; *Henwood v The Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438; [1938] ALR 312; *Smith v Jenkins* (1970) 119 CLR 397; [1970] ALR 519; *Progress and Properties Ltd v Craft* (1976) 135 CLR 651; 12 ALR 59; *Jackson v Harrison* (1978) 138 CLR 438; 19 ALR 129; *Gala v Preston* (1991) 172 CLR 243; 100 ALR 29; by the House of Lords on two occasions (*National Coal Board v England* [1954] AC 403; [1954] 1 All ER 546; *Gardner v Moore* [1984] 1 AC 548; [1984] 1 All ER 1100); by the Supreme Court of Canada on three occasions (*Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd* [1983] 1 SCR 452; *Norberg v Wynrib* [1992] 2 SCR

defence is pleaded, judges have exhibited a marked tendency to sidestep consideration of it either by rejecting the plaintiff's action on the basis of causation,[3] remoteness,[4] or the absence of a duty of care[5] or fault,[6] or by taking account of the plaintiff's illegality through the more prosaic defences of contributory negligence[7] and *volenti non fit injuria*.[8]

Despite the illegality defence's marginal practical relevance, it has been the subject of considerable investigation.[9] The intensity of analysis is probably largely due to the fact that the defence provides a window to the little explored

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226; *Hall v Hebert* [1993] 2 SCR 159); and twice by the NZ Court of Appeal (*Le Bagge v Buses Ltd* [1958] NZLR 630; *Accident Compensation Corporation v Curtis* [1994] 2 NZLR 519). The recently created Supreme Court of New Zealand has not yet had the opportunity to examine the defence.

3 See, eg, *Beard v Richmond* (1987) Aust Torts Reports 80-129; *Yates v Jones* (1990) Aust Torts Reports 81-009; and *Anderson v Hotel Capital Trading Pty Ltd* [2003] NSWSC 1195 (unreported, 15 December 2003, BC200307731) (affirmed on other grounds in *Anderson v Hotel Capital Trading Pty Ltd* [2005] NSWCA 78 (unreported, 18 March 2005, BC200501467).

4 See, eg, *Meah v McCreamer (No 2)* [1986] 1 All ER 943 (discussed below in Section 3.3).

5 See, eg, *Vellino v Chief Constable of Greater Manchester* [2002] 3 All ER 78; *Sacco v Chief Constable of South Wales Constabulary* [1998] EWCA Civ 384 (unreported, 15 May 1998); and *Rundle v State Rail Authority of New South Wales* (2002) Aust Torts Reports 81-678 (discussed below at n 16). The dismissal of claims due to the lack of a duty of care is not to be confused with situations where, as in Australia, the invocation of the illegality defence may result in the sterilisation of any duty of care which would have otherwise arisen: see *Gala v Preston* (1991) 172 CLR 243; 100 ALR 29. The end result is the same, but the two situations are conceptually distinct. For one thing, a duty of care never existed in the former situation. However, in the latter, a duty arose only to be struck down. Additionally, in the former situation, the illegality defence is not specifically relied upon and a duty of care is found to be wanting according to the relevant principles of the tort of negligence. In the latter case, the illegality defence is the reason for the absence of a duty.

6 See, eg, *Marshall v Osmond* [1983] QB 1034; [1983] 2 All ER 225.

7 See, eg, *Teece v Honeybourn* (1974) 54 DLR (3d) 549; *Bigcharles v Merkel* (1972) 32 DLR (3d) 511; *Revill v Newbery* [1996] QB 567; [1996] 1 All ER 291; *Stapley v Gypsum Mines Ltd* [1953] AC 663; [1953] 2 All ER 478; *Zalewski v Turcarolo* [1995] 2 VR 562.

8 See, eg, *Schwindt v Giesbrecht* (1958) 13 DLR (2d) 770 at 776 per Egbert J; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656; [1964] 2 All ER 999; *Murphy v Culhane* [1977] QB 94 at 98; [1976] 3 All ER 533 at 535–6 per Lord Denning MR; *Cummings v Grainger* [1977] QB 397 at 405, 408 and 410–11; [1977] 1 All ER 104 at 108–9, 111 and 113 per Lord Denning MR, Ormrod LJ and Bridge LJ respectively; *Boeyen v Kydd* [1963] VR 235 at 237 per Adam J; *Tomlinson v Harrison* [1972] 1 OR 670 at 679–81 per Addy J; *Conrad v Crawford* (1971) 22 DLR (3d) 386 at 396–8 per Hughes J. For an analysis of the interplay between illegality, causation, contributory negligence and *volenti non fit injuria*, see, generally, G H L Fridman, 'The Wrongdoing Plaintiff' (1972) 18 *McGill LJ* 276.

9 Recent contributions include G Bosmans and F Lewis, 'Proximity and Illegality in Negligence' (1992) 18 *Monash University L Rev* 237; S Ginsbourg and B Newton, '*Gala v Preston*: the defence of illegality to an action in negligence' (1992) 18 *Monash University L Rev* 243; R W Kostal, 'Currents in the counter-reformation: illegality and duty of care in Canada and Australia' (1995) 3 *Tort L Rev* 100; R A Prentice, 'Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine be Revived to Dent the Litigation Crisis?' (1995) 32 *San Diego L Rev* 53 at 53; J Starke, 'Absence of Relationship of "Proximity" Generating a Duty of Care Between Co-participants in an Illegal Activity' (1991) 65 *ALJ* 505; F McGlone, 'Standard of Care, Proximity and Joint Illegal Enterprise (*Gala v Preston* and the Joy-Rider)' (1991) 7 *Queensland University of Technology LJ* 157; J P Swanton, '"Complicity in a joint illegal enterprise" as a tort defence' (1993) 67 *ALJ* 866; M Fordham, 'The Role of Ex Turpi Causa in Tort Law' [1998] *Singapore Jnl of Legal Studies* 238; B MacDougall, '*Ex Turpi Causa*: Should a Defence Arise From a Base Cause?'

interface between the criminal law and tort law.[10] The defence raises several intriguing theoretical questions, such as whether tort law should be used to reinforce the criminal law, whether tort law's compensatory function should be subjugated to considerations of punishment and deterrence, and the extent to which the moral deservedness of plaintiffs should exert an influence on their entitlement to a remedy in tort.

The preponderance of this analysis focuses on the role of the illegality defence in cases where the plaintiff claims compensation in respect of injuries sustained while engaged in some illegal course of action. A common scenario in which the defence is raised in this context is where the plaintiff was injured while engaged in a joint illegal enterprise with the defendant. For example, the defence has been applied to prevent the recovery of damages where the plaintiff was injured while a passenger in a vehicle which was being driven by the defendant and which they had stolen,[11] were using to flee the scene of a robbery,[12] were using to transport stolen property,[13] and where the plaintiff encouraged the defendant to drive recklessly knowing him to be intoxicated, uninsured and unlicensed.[14] The defence has also been applied where the plaintiff was injured while travelling in convoy with the defendant to stage a motor vehicle 'accident' for the purposes of committing insurance fraud.[15]

Less commonly, the defence is invoked to deny actions where the plaintiff was unilaterally engaged in the commission of a criminal offence at the time of sustaining injury.[16] A recent example where the defence was successfully

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(1991) 55 *Saskatchewan L Rev* 1; B Rodger, '*Ex Turpi*: A Location-driven Defence?' [1998] *The Juridical Review* 201; Law Commission for England and Wales, *The Illegality Defence in Tort*, Consultation Paper No 160, 2001.

10 Regarding this interface see T Hadden, 'Contract, Tort and Crime: the Forms of Legal Thought' (1971) 87 *LQR* 240.

11 See, eg, *Boeyen v Kidd* [1963] VR 235; *Bondarenko v Sommers* (1967) 69 SR (NSW) 269; *Smith v Jenkins* (1970) 119 CLR 397; [1970] ALR 519; *Holland v Tarlinton* (1989) 10 MVR 129; *Gala v Preston* (1991) 172 CLR 243; 100 ALR 29; *Kickett v State Government Insurance Commission* (1997) 26 MVR 321; *Tallow v Tailfeathers* (1973) 44 DLR (3d) 55; *Tomlinson v Harrison* [1972] 1 OR 670.

12 *Fabre v Arenales* (1992) 27 NSWLR 437.

13 *Godbolt v Fittock* [1963] SR (NSW) 617.

14 *Pitts v Hunt* [1991] 1 QB 24; [1990] 3 All ER 344. See also *Mack v Enns* (1983) 44 BCLR 145.

15 *Italiano v Barbaro* (1993) 40 FCR 303; 114 ALR 21.

16 The defence is rarely successful in unilateral illegality cases. It has been found to be inapplicable in a claim by the parents of a passenger on a moving tram who was fatally injured when he illegally lent out of the window in order to vomit (*Henwood v Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438; [1938] ALR 312); in a claim by a passenger on a train in respect of injuries which he sustained while vandalising the exterior of the train (*Rundle v State Rail Authority of New South Wales* [2001] NSWSC 862 (unreported, 5 October 2001, BC200106003) (the issue of illegality was not dealt with in an appeal by the plaintiff against a finding that the defendant rail authority did not, independently of the fact of the plaintiff's illegal conduct, owe the plaintiff a duty of care: *Rundle v State Rail Authority of New South Wales* (2002) Aust Torts Reports 81-678); in a claim by a disqualified motorcyclist who was injured while fleeing from the police at high speed (*Winter v Commonwealth* (1992) 112 ACTR 10; 111 FLR 275); in a claim by the owner of an unregistered car who was injured while a passenger in the car (*Andrews v Nominal Defendant* (1965) 66 SR (NSW) 85) (the issue of illegality was not considered in appeals by the defendant to the NSW Court of Appeal (*Andrews v Nominal Defendant* (1968) 70 SR (NSW) 419) and the High Court (*Nominal Defendant v Andrews* (1969) 121

raised in this context is *Cross v Kirkby*.[17] In that case, the English Court of Appeal held that a hunting protester who attacked the defendant with a baseball bat, only to have the bat wrestled from him and used against him, could not recover damages for injuries sustained because his injuries arose out of the commission of an assault.[18]

In contrast with the attention bestowed upon cases where the plaintiff was injured while acting illegally, little thought has been given to the application of the defence in those comparatively rare cases where the plaintiff claims compensation or indemnity in respect of a criminal sanction. The following is a (deliberately) outlandish example of such a claim. A and B contrive to steal a motor vehicle. They successfully gain entry to their chosen vehicle and manage to start the engine. However, after driving a short distance, the police spot them and a pursuit ensues. Unfortunately for A and B, A fails to elude the police and they are stopped and apprehended. They are both convicted of the theft of a conveyance and receive custodial sentences. B then sues A for negligently failing to outrun the police, seeking damages in respect of the conviction and consequential loss of freedom. It is this type of case, which we may call a 'sanction-shifting action', with which this article is concerned. The first mentioned type of illegality case, in which the plaintiff claims compensation in respect of injuries sustained while acting illegally, will be referred to as 'routine illegality cases'.

Whatever the future may hold for the illegality defence in routine illegality cases,[19] it will be argued that the defence has a legitimate although limited role in denying actions which seek to shift criminal sanctions. At the outset, it is admitted that it may initially seem that sanction-shifting actions are hardly worthy of examination, particularly in light of the apparent absurdity of the earlier example of a car thief claiming compensation in respect of imprisonment from the accomplice.[20] Surely, one may think, punishment

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CLR 562; [1970] ALR 507)); in a claim by a disqualified rider of a motorcycle who was injured due to the negligent driving of another user of the road (*Matthews v McCullock of Australia Pty Ltd* [1973] 2 NSWLR 331); and in a claim by a burglar who was shot by the occupier of the premises which he was attempting to rob (*Revill v Newbery* [1996] QB 567; [1996] 1 All ER 291).

17 *The Times*, 5 April 2000; 2000 WL 530.

18 The court also found for the defendant on the grounds that he was acting in self-defence.

19 Naturally, this author has an opinion as to the appropriateness of the defence as it operates in routine illegality cases. However, a discussion of the defence in this context is beyond the scope of this article. It suffices to say that, in this author's view, it is regrettable that the decision of the Supreme Court of Canada in *Hall v Hebert* [1993] 2 SCR 159, which effectively eradicated the defence in routine illegality cases, has not been followed in other jurisdictions. Not only is the law governing the defence intractably chaotic, but the defence itself is unjustifiable: see E J Weinrib, 'Illegality as a Tort Defence' (1976) 26 *University of Toronto LJ* 28; G L Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions*, Stevens & Sons, London, 1951, pp 332–3, and Prentice, above n 9, at 105–31. The leading judicial critique of the defence is that proffered by Murphy J in *Jackson v Harrison* (1978) 138 CLR 438 at 464–5; 19 ALR 129 at 149–50.

20 This hypothetical example is reminiscent of the infamous decision of the Court of Chancery in *Everet v Williams*, noted in (1893) 30 *LQR* 197. That case involved a suit by one highwayman against another for an account of the ill-gotten gains which they jointly made. It was alleged that the plaintiff and defendant 'dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles and saddles, and other things'.

meted out by the criminal law cannot be separated from the individual who is held liable. As Denning J said in *Askey v Golden Wine Co Ltd*:

> 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.[21]

Similarly, in *Beard v Richmond*, Ambrose J asserted that the idea that the civil law could be used to escape the consequences of the criminal law should not be entertained.[22] Nevertheless, as we will see, not all actions that seek to shift criminal sanctions are so shocking to the conscience as the example of the car thieves. Indeed, in some situations, it may be regarded as morally appropriate that a criminal sanction be shifted on to a third party. Consider the follow examples, where it seems that shifting the sanction from the person on whom it is initially imposed to the other party would cause the sanction to rest upon the party to whom moral responsibility for the infraction of the criminal law would be assigned:

(i) A mechanic negligently performed work on a motor vehicle and, as a result, the speedometer underestimated the vehicle's velocity by 15 km/h. Subsequently, the driver of that vehicle is fined for travelling at 10 km/h over the designated speed limit.

(ii) B, a bushwalker, relies on a defective map drawn up by C which leads B to stray into private property believing it to be public land. B is convicted of trespassing and is fined.

(iii) D, a patron of a pub, offers to buy a companion, E, an alcoholic beverage. E asks for a drink with a reduced alcohol content because E intends to drive home. However, D forgets this instruction and buys E a drink with a normal alcohol content. E consumes this drink and then proceeds to drive home. On the journey, E is stopped by police and is recorded with an illegal amount of alcohol in the blood. E is fined. Pharmacological evidence establishes that E would not have exceeded the permissible concentration had the last drink had a low alcohol content.

(iv) F, a butcher, buys meat from G and sells it to consumers. Unbeknown to F, who exercised proper care in the circumstances, the meat is

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The court not only dismissed the suit, but ordered costs against the plaintiff's counsel personally and fined the plaintiff's solicitors for contempt of court. The plaintiff and defendant were subsequently hanged.

21 [1948] 2 All ER 35 at 38.

22 (1987) Aust Torts Reports 80-129 at 69 007. Ambrose J stated:

> there are members of our society whose personality, reactions and social and economic attributes may be such as to cause them to react to injury resulting in impairment of earning capacity in a very antisocial way. Some persons caused financial loss as a result of injuries inflicted upon them may decide to traffic in drugs or rob banks or engage in other criminal activity to put them in funds to make up for losses sustained by reason of their impaired or destroyed earning capacity. If such persons are apprehended and given custodial sentences and the proceeds of their criminal activities taken from them surely it cannot be seriously contended that as a matter of judgment a court when determining the measure of compensation properly payable by a negligent defendant ought regard any custodial sentence imposed upon such a plaintiff as an event causing the plaintiff financial loss which in turn has been caused by his reaction to the context of his social and economic attributes to the injury he has suffered at the hands of the defendant? [sic]

diseased. In due course, the relevant supervisory authority is alerted. F is fined for supplying meat which is unfit for human consumption.

In light of these examples, it is perhaps unsurprising that provisions exist in some penal statutes which expressly authorise the shifting of sanctions. However, before we come to examine these matters in detail, it is necessary to make two preliminary points about the scope of this article and to elaborate upon the distinction between routine illegality cases and sanction-shifting actions. First, this article is limited to investigating the application of the illegality defence to actions that purport to shift criminal sanctions in tort. Although sanction-shifting actions have also been brought in contract,[23] quite different considerations are raised in this context and it would be overly ambitious to venture an examination of these issues here.

Secondly, this article is only concerned with actions which attempt to deflect losses arising from the imposition of criminal sanctions[24] as opposed to losses resulting from other orders of criminal courts. One may think that the recent decision of the NSW Court of Appeal in *Hunter Area Health Service v Presland*[25] is central to this article. This is a mistake. This case, which attracted particular notoriety through the media,[26] concerned a claim by a plaintiff who had been admitted to the defendant hospital by police officers after exhibiting bizarre and aggressive behaviour. After conducting a psychiatric assessment of the plaintiff, the hospital's staff released him into the custody of his brother. Shortly afterwards, the plaintiff killed his brother's fiancée. The plaintiff was acquitted of a murder charge on the grounds of insanity but was detained in a psychiatric institution for several years. Subsequently, the plaintiff sued the defendant for damages in respect of his incarceration on the basis that it was negligent in not detaining him as an involuntary patient. He maintained that, had he been detained by the defendant hospital and treated, he would have spent less time as an involuntary mental patient. The plaintiff was successful at first instance and recovered $300,000.[27] This decision was overturned on appeal for reasons which are not presently

23 See, eg, *Campbell v Campbell* (1840) 7 Cl & F 166; 7 ER 1030; *Crage v Fry* (1903) 67 JP 240; *Cointat v Myham* [1913] 2 KB 220.

24 Sometimes it will be unclear whether a penalty constitutes a criminal sanction in the traditional sense. For instance, is penalty tax imposed by revenue authorities a criminal sanction? Consider *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR 214 (CA), in which the Singaporean Court of Appeal permitted a company director to recover damages from his tax agent in respect of penalty tax imposed for a failure to properly declare his assessable income. The court held that the illegality defence was inapplicable (see esp at [48]–[58]).

25 *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22.

26 See, eg, A Peterson and F O'Shea, 'Kelley's Law to Close Loopholes — Control the Damages: Giving a Senseless Death Meaning', *The Daily Telegraph*, 21 August 2003, p 7; 'Who's to Blame When a Killer Profits', *The Gold Coast Bulletin*, 30 August 2003, p 29; 'Compensation for a Killer is Not Justice', *The Australian*, 21 August 2003, p 12; B Williamson, 'How Can That Be Justice — Court Awards $300,000 payout to the man who killed Kelley-Anne', *The Daily Telegraph*, 20 August 2003, p 1; B Williamson, 'Brutal Killer to Get $300,000 Payout', *Sunday Herald Sun*, 20 August 2003, p 5.

27 *Presland v Hunter Area Health Service* [2003] NSWSC 754 (unreported, 19 August 2003, BC200304853).

relevant.[28] It is obvious that *Presland* was not a sanction-shifting action. The plaintiff in that case never had a sanction imposed upon him because he was not convicted of any offence. The plaintiff's loss occurred as a consequence of an order which the Supreme Court of New South Wales was empowered to make under mental health legislation in the interests of the plaintiff and for the protection of the community.[29]

2 Routine illegality cases and sanction-shifting actions distinguished

It is a matter of some note that sanction-shifting actions and routine illegality cases are often treated as analogous.[30] However, it scarcely needs to be pointed out that sanction-shifting actions are fundamentally different from routine illegality cases. In routine illegality cases the plaintiff's damage consists of injuries sustained and consequential economic loss. Any punishment that the criminal law may mete out to the plaintiff is imposed on top of this loss. Thus, if the illegality defence is applied in such actions to prevent the plaintiff from recovering compensation in respect of the damage, the plaintiff's total loss consists of the damage plus any criminal sanction. If the defence is not applied, the compensation awarded to the plaintiff will erase their damage, leaving only the criminal sanction, if any. In contrast, in actions which seek to shift criminal sanctions, the plaintiff's punishment and damage are not separate; they are one and the same thing. If the illegality defence is applied to deny such actions, the plaintiff's loss consists only of the sanction.[31] However, if the defence is not applied and the action succeeds, the compensation awarded should notionally cancel out the sanction, leaving nothing.[32]

Because the distinction between routine illegality cases and sanction-shifting actions is central to this article, it is, despite the risk of

28 Before this appeal was heard, the NSW Government introduced legislation to foreclose the possibility of similar cases succeeding in the future: Civil Liability Act 2002 (NSW) s 54A.

29 Mental Health (Criminal Procedure) Act 1990 (NSW) s 38.

30 For instance, the Law Commission of England and Wales discussed routine illegality cases and actions which purported to shift criminal sanctions as if they are one of a kind: Law Commission of England and Wales, above n 9, pp 11–15. Similarly, many judges have apparently not thought twice about the appropriateness of importing comments made in sanction-shifting actions into routine illegality cases and vice versa. Take for instance, the classic sanction-shifting case of *Colburn v Patmore* (1834) 1 CM & R 72; 4 Tyr 677; 149 ER 999, which is discussed in detail below in Section 3.1. This case has often been cited and 'applied' in routine illegality cases: see, eg, *Smith v Jenkins* (1970) 119 CLR 397 at 404 and 422; [1970] ALR 519 at 522–3 and 535 per Kitto J and Windeyer J respectively; *Jackson v Harrison* (1978) 138 CLR 438 at 442; 19 ALR 129 at 131–2 per Barwick CJ; *Vellino v Chief Constable of Greater Manchester* [2002] 3 All ER 78 at 87 per Sedley LJ. One of the few judges to have recognised the danger of offhandedly applying the decision in *Colburn v Patmore* in routine illegality cases is Murphy J: see *Jackson v Harrison* (1978) 138 CLR 438 at 461; 19 ALR 129 at 147.

31 The loss could equally be seen to be just the damage, although this is a rather back-to-front way of thinking of criminal sanctions.

32 Needless to say, the remedies offered by tort law are incapable of perfectly shifting the losses which are incurred as a result of being held criminally liable. While the actual penalty may sometimes be susceptible to transfer, such as a fine, the finding of liability and the attendant stigma are immovable.

repetition, helpful to cast the difference in terms of economic cost to plaintiffs. For this purpose, the reader will be asked to assume that the costs of suffering personal injury and incurring a criminal sanction can be accurately expressed in monetary figures.[33] We will continue the example of the luckless car thieves.[34] Assume that the cost to B, the passenger, of being imprisoned is equivalent to $50,000. Accordingly, if B's sanction-shifting action is successful, B should be awarded $50,000, thereby nullifying the sanction. However, if the defence is invoked to deny the claim, B's loss stands at $50,000. Now suppose that A and B were captured by the police because A negligently crashed their car. Assume also that B was injured in the crash, and sues A for damages in respect of his injuries but not his conviction.[35] We will set the cost of B's injuries at $50,000. If B's claim for compensation is allowed, his total loss stands at $50,000, which represents the cost of being imprisoned. The cost of his injuries should ideally be completely offset by the award of compensation. On the other hand, if B's claim for compensation is denied by virtue of the illegality defence his total loss is $100,000: $50,000 for the cost of being imprisoned plus $50,000 in respect of having his claim for compensation denied. Ernest Weinrib summed up this difference between routine illegality cases and sanction-shifting actions well when he said that, if the illegality defence is applied in routine illegality cases it acts as a surcharge, while if it is applied to sanction-shifting actions, it merely denies the plaintiff a rebate.[36]

Although the conceptual division between routine illegality cases and sanction-shifting is clear-cut, it may, in practice, be difficult to tell the two types of cases apart. The fine distinctions that can be involved in this connection are illustrated by the decision of the NSW Court of Appeal in *State Rail Authority of New South Wales v Wiegold*.[37] The plaintiff in that case had been seriously injured in the course of his work as a rail maintenance worker due to his employer's negligence. The plaintiff's injuries prevented him from working and, as a result, he fell into financial difficulties and had trouble supporting his family. In a last ditch attempt to make ends meet, the plaintiff grew a large marijuana crop that he intended to harvest and sell. However, before he could supply any of his produce, police officers discovered his crop. As a result, the plaintiff was arrested, convicted and given a custodial sentence. The plaintiff then successfully sued the rail authority for damages for his injuries and consequential economic loss. He did not claim damages for income which he would have earned during the period of time for which he was incarcerated had it not been for the accident. The authority appealed against this decision on the basis that the trial judge did not take into account

33 The reader should note that the conversion of these costs into dollars is simply for the purpose of identifying a common standard to enable a comparison. Monetary figures have been chosen simply for convenience. It would have been equally possible to use another standard, such as a loss of happiness.

34 See above Section 1.

35 This is thus, a routine illegality case.

36 Weinrib, above n 19, at 51.

37 (1991) 25 NSWLR 500. Consider also *Bailey v Nominal Defendant* [2004] QCA 344 (unreported, 24 September 2004, BC200406250); *Beilgard v State of Alaska* 896 P 2d 230 (1995); *Braunstein v Jason Tarantella Inc* 450 NYS 2d 862 (1982); *Feld & Sons Inc v Pechner* 458 A 2d 545 (1983); *Glazier v Lee* 429 NW 2d 857 (1988).

the effect of the plaintiff's conviction and imprisonment on his earning capacity in calculating his entitlement to damages for future economic loss. It maintained that a reduction in earning capacity is a normal concomitant of being imprisoned and is hence part of the punishment. In its view, if this reduction were not taken into account in assessing the plaintiff's entitlement to compensation for his diminished earning capacity, the plaintiff would evade part of the criminal sanction. The plaintiff, on the other hand, contended that his claim should be characterised as a routine illegality case. In his view, he was merely seeking compensation for his injuries and consequential economic loss, and argued that he should be placed in the position which he would have occupied had his employer taken reasonable care for his safety. The defendant's argument (rightly in this author's opinion)[38] found favour with a majority of the Court of Appeal.[39]

3 Judicial treatment of sanction-shifting actions

3.1 The rule in *Colburn v Patmore*

Now that the tiresome task of taxonomy is behind us, we can move on to the more interesting part of this article. The first issue is to determine how the courts have received sanction-shifting actions. Even a cursory perusal of the relevant case law reveals that the courts have generally exhibited considerable hostility toward sanction-shifting actions. For instance, the courts have, by invoking the illegality defence, refused to shift sanctions imposed for crimes ranging from driving a motor vehicle while under the influence of alcohol,[40] affray and spraying tear gas,[41] cultivating marijuana[42] to manslaughter.[43]

The earliest reported sanction-shifting case is the decision of the Court of Common Pleas in *Colburn v Patmore*.[44] In that case, the plaintiff, who was a publisher, had been held vicariously liable and fined for criminal libel as a result of defamatory material that had been printed in his newspaper.[45] As the plaintiff lacked any knowledge of the defamatory material and had not been negligent in any respect, he thought it unfair that he should be made to bear the fine. Accordingly, he sought an indemnity from the editor. Although the court found in favour of the defendant due to a defect in the plaintiff's pleadings, the court made it clear that, had it not been for this defect, it would

38 Although see H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, Sydney 2002, pp 208–9.

39 Samuels and Handley JJA; Kirby P dissenting. Cf *Leschke v Jeffs* [1955] QWN 67.

40 *McNeill v Cavallaro* (1981) 96 LSJS 292. There was an appeal against this decision but the issue of whether or not the plaintiff was entitled to claim compensation in respect of the criminal sanction was not considered: *Cavallaro v McNeill* (1982) 102 LSJS 222.

41 *Cooper v Reed* [2001] EWCA Civ 224 (unreported, 15 February 2001).

42 *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500 (discussed above in Section 2).

43 *Clunis v Camden and Islington Health Authority* [1998] QB 978; [1998] 3 All ER 180 (discussed below in Section 3.3).

44 (1834) 1 CM & R 72; 4 Tyr 677; 149 ER 999.

45 Until the enactment of the Libel Act 1843 (Eng) (6 & 7 Vict c 96), publishers were held vicariously liable for criminal libel. The state of the law preceding this Act is discussed in *R v Lemon* [1979] AC 617; [1979] 1 All ER 898: see esp at AC 633–4; All ER 902 per Lord Diplock; AC 641–3; All ER 907–9 per Viscount Dilhorne; AC 648–50; All ER 913–16 per Lord Edmund Davies; and AC 664; All ER 926 per Lord Scarman.

have dismissed the plaintiff's action on the grounds of illegality. Lord Lyndhurst CB's comments on this point were the most explicit:

> The question . . . in this case . . . is one of very great importance. I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say, that I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission.[46]

This strict embargo on sanction-shifting actions advocated by Lord Lyndhurst, which may be referred to as 'the rule in *Colburn v Patmore*', has been endorsed on numerous occasions,[47] and has been extended to cases where the defendant had no involvement whatsoever in the commission of the crime[48] and where the plaintiff's crime required *mens rea*.[49] However, despite this wealth of support, the courts have carved out an exception to this rule which will be called the 'innocent instrument' exception.

3.2 The innocent instrument exception

In essence, the innocent instrument exception to the rule in *Colburn v Patmore* permits the deflection of a criminal sanction where the plaintiff, despite having incurred criminal liability, is, for the most part morally innocent of any wrongdoing and the defendant is the real culprit behind the plaintiff's infraction of the criminal law. The exception recognises that the criminal law sometimes fails to hit the blameworthy target and accordingly permits a reallocation of the sanction.

The exception has its origin in the celebrated decision in *Burrows v Rhodes*[50] which, surprisingly, is not a sanction-shifting case. In that case, the plaintiff, who was an employee of the British South Africa Company, participated in the ill-fated Jameson Raid into the Transvaal at the defendants' instigation. The defendants, one of whom was a director of the company, had fraudulently led the plaintiff to believe that the invasion had the support of the British Government. In the course of the hostilities the plaintiff sustained severe injuries. He subsequently brought an action in deceit against the defendants. The defendants argued that the plaintiff could not maintain his action on the basis that his involvement in the illegal invasion constituted an offence under the Foreign Enlistment Act 1870 (UK), 33 & 34 Vict, c 90. The court unanimously held that the defence was inapplicable as the plaintiff had

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46 (1834) 1 CM & R 72; 4 Tyr 677; 149 ER 999 at 1003. See also at ER 1003-4 per Alderson B. Lord Lyndhurst's reference to the plaintiff and defendant acting jointly in the commission of the crime is somewhat perplexing considering the plaintiff's lack of involvement. Presumably, he used this phrase in its loosest possible sense.

47 See, eg, *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652 at 658–60 per Rowlatt J.

48 See, eg, *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500 (discussed above in Section 2); *Cooper v Reed* [2001] EWCA Civ 224 (unreported, 15 February 2001).

49 See, eg, *Clunis v Camden and Islington Health Authority* [1998] QB 978; [1998] 3 All ER 180 (discussed below in Section 3.3).

50 [1899] 1 QB 816; [1895-9] All ER 117.

not been charged with any offence and that, in any event, it was doubtful he possessed the necessary mental element to have committed an offence under that Act. However, Kennedy J indicated that, had the plaintiff been charged with and convicted of an offence, he would have been entitled to claim an indemnity in respect of the consequences of being held criminally liable. His Lordship stated that such an entitlement arose where a person had been induced by a fraudulent misrepresentation to commit a criminal offence and that, had that misrepresentation been true, no offence would have been committed.[51] In support of this exception, Kennedy J supplied the following hypothetical example:

> Suppose A by a fraudulent representation of the sobriety of B, who gives no indication of intoxication, but whom A knows to be drunken, authorises and induces a licensed victualler, who has no reason to disbelieve and does honestly believe the truth of the representation, to sell drink to B, and the licensed victualler is convicted and fined, upon what consideration of public policy should a man who, if the representation as to sobriety had been true would have committed no offence either against law or morals, be debarred from redress against the man who had by fraud inflicted upon him what might be a very serious injury?[52]

While Kennedy J's judgment has received much praise,[53] his formulation of the innocent instrument exception has had two glosses applied to it. The first gloss, which was applied by Denning J in *Askey v Golden Wine Co Ltd*,[54] narrowed the scope of the exception by excluding it where the plaintiff was negligent. In that case, the plaintiff wholesaler had incurred a substantial fine for selling alcoholic beverages which were unfit for human consumption. The beverages had been deliberately contaminated by the defendant manufacturers with methylated spirit in order to reduce the costs of production. The plaintiff's suspicions regarding the legitimacy of the defendants' business had been aroused when the defendants were convicted of several criminal offences. However, the defendants allayed his concerns in this regard with fraudulent misrepresentations to the effect that the convictions did not relate to the quality of their produce and that there was nothing underhand about their business. Acting on these misrepresentations, the plaintiff continued to deal with the defendants until he was convicted and fined. The plaintiff then sued the defendants in deceit, seeking an indemnity in respect of the fine. The plaintiff also sought damages for the adverse consequences of the conviction on his reputation. However, Denning J refused to apply the innocent instrument exception on the basis that the plaintiff had been grossly negligent in failing to take steps to determine whether or not the beverages were fit for human consumption, stating:

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51 Ibid, at QB 829–34; All ER 124–7.

52 Ibid, at QB 831; All ER 125.

53 See, eg, *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525 at 531–2; [1955] 3 All ER 90 at 93 per Denning LJ; *Marles v Philip Trant & Sons Ltd (No 2)* [1954] 1 QB 29 at 39; [1953] 1 All ER 651 at 659 per Denning LJ; *Clunis v Camden and Island Health Authority* [1998] QB 978 at 987–9; [1998] 3 All ER 180 at 186–8 per Beldam LJ. Cf *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652, in which Rowlatt J criticised Kennedy J's dictum but reluctantly applied it (at 659–61).

54 [1948] 2 All ER 35.

> [the plaintiff] was not himself a party to the [defendants'] conspiracy, but I am satisfied he was much to blame in that he did not take proper steps to see that the liquid was fit for sale. Even after he knew that [the defendants] had been convicted and two of [the defendants] had gone to prison, he went on dealing with the third [defendant] and dealt on a large scale. He did not even have the stuff analysed. He was, I find, tempted by the large profits he was making to take a risk on it. It suited him to accept the assurances of [the defendants] at face value without taking any steps to verify them. . . .
>
> What are the consequences of this finding? I am clearly of opinion that the plaintiff cannot recover any of the fines imposed on him . . . Nor can he recover damages for the consequences of the convictions so far as they affected his reputation.[55]

The second gloss, which widened the ambit of the exception, was added by the English Court of Appeal in its decision in *Osmand v J Ralph Moss Ltd*.[56] The court held that the exception may apply where the defendant had only been guilty of gross negligence as opposed to fraud.[57] In that case, the plaintiff, who was a Turkish migrant with limited comprehension of English, asked the defendant insurance brokers to arrange for a contract for third-party property insurance to be effected in respect of his motor vehicle. The defendant organised for insurance to be provided by Belvedere Motor Policies Ltd which, to the knowledge of those in the insurance business, was teetering precariously on the verge of insolvency. Shortly after the plaintiff entered into the insurance contract, a court made an order to wind up Belvedere Motor Policies Ltd. The defendant then sent the plaintiff a badly drafted letter which misled the plaintiff into believing that he was still insured. A few months later, the plaintiff's motor vehicle was involved in an accident with another car. The plaintiff contacted the defendant indicating an intention to make a claim, whereupon he discovered that he was not insured. The plaintiff was then fined for driving without insurance. Subsequently, the plaintiff sued the defendants claiming, among other things, indemnity in respect of the fine. The Court of Appeal unanimously allowed the plaintiff's appeal, finding that the defendant had been grossly negligent, and that this was sufficient to attract the innocent instrument exception. Sachs LJ, whose views regarding the exception were

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55 Ibid, at 38.

56 [1970] 1 Lloyd's Rep 313 (*Osmand*).

57 Although gross negligence may often be properly regarded as involving a high degree of culpability (see *R v Lavender* (2005) 218 ALR 521 at [127] per Kirby J), the extension of the exception to gross negligence on the part of the defendant renders it significantly easier for the plaintiff to show that the exception should apply. Fraud has an entirely different and generally far more odious moral character than negligence, however gross. At common law, fraud consists of the making of a representation without an honest belief in its truth with the intent that another will rely on it. Accordingly, fraud necessarily involves an element of moral delinquency: see *Nocton v Lord Ashburton* [1914] AC 932 at 970–1; [1914-15] All ER 45 at 61 per Lord Shaw; *Farley (Aust) Pty Ltd v J R Alexander & Sons (Queensland) Pty Ltd* (1946) 75 CLR 487 at 492 per Williams J. Conversely, because negligence is not a state of mind but conduct that is of a standard which falls below that expected from a reasonable person (see H W Edgerton, 'Negligence, Inadvertence and Indifference: The Relation of Mental States to Negligence' (1926) 39 *Harvard L Rev* 849; J Goudkamp, 'The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence' (2004) 28 *MULR* 342 at 350–2), a person may be guilty of negligence — even gross negligence — without being open to blame: see *R v Lavender* (2005) 218 ALR 521 at [128] per Kirby J.

materially identical to those expressed by the other members of the court, stated that:

> where the person fined was under an absolute liability, it appears that such fine can be recovered in circumstances such as the present as damages unless it is shown that there was on the part of the person fined a degree of *mens rea* or of culpable negligence in the matter which resulted in the fine.[58]

The innocent instrument exception has spawned several difficulties which are worth noting. One obvious preliminary point is that the exception is rather ill-equipped to discharge its apparent purpose of correcting perceived errors in the operation of the criminal law where an essentially blameless individual has been held liable for an offence instead of the real culprit. The use of labels such as negligence and fraud to define the scope of the exception forces the courts into conceptual boxes which hinder rather than assist the enquiry into whether or not criminal liability was fixed upon the true perpetrator. Both fraud and negligence capture an incredibly varied assortment of behaviour encompassing a wide range of moral culpability.[59] Accordingly, not all instances of fraud or gross negligence on the part of the defendant may entail sufficient moral obloquy to justify invoking the exception. Equally, it is theoretically possible that gross negligence on the part of the plaintiff, because it does not require any culpable mental state,[60] may not involve the requisite degree of moral wrongdoing to warrant the exception's exclusion.

A further problem with the exception is that it is somewhat unclear whether, as the decisions in *Askey* and *Osmand* seem to imply, the exception is limited to cases where the penalty imposed is a fine.[61] If the exception is indeed restricted to such cases, it is difficult to justify this position. Of course, it is obvious that, of all the sentencing options available to the criminal courts, a fine is perhaps the most susceptible to being shifted by a damages award.[62] Yet this fact seems to be neither here nor there in light of the ostensible policy rationale for the innocent instrument exception, namely, to correct targeting errors in the operation of the criminal law.

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58 [1970] 1 Lloyd's Rep 313 at 316. See at 318 per Edmund Davies LJ and 320 per Phillimore LJ.

59 For instance, Lord Macnaughten noted that 'sometimes [fraud] is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it': *Reddaway v Banham* [1896] AC 199 at 221; quoted in J Glover, *Equity, Restitution & Fraud*, Butterworths, Sydney, 2004, p 21 n 136. Likewise, concerning negligence, it has been said that '[t]he behaviour of individuals is so incalculable in its variety, and the possible combination of circumstances giving rise to a negligence issue so infinite, that it has been found undesirable, if not impossible, to formulate precise rules of conduct for all conceivable situations': J G Fleming, *The Law of Torts*, 9th ed, LBC Information Services, Sydney, 1998, p 117.

60 See above n 57.

61 Cf *Burrows v Rhodes* [1899] 1 QB 816; [1895-9] All ER 117.

62 A sentence which requires offenders to pay compensation to their victims would seem to be equivalent to a fine in terms of its susceptibility to being transferred. Such orders can be made in all Australian jurisdictions: see Crimes Act 1900 (ACT) s 350; Crimes (Sentencing Procedure) Act 1999 (NSW) ss 34(4), 82(1), 90(1) and 95(c)(ii); Sentencing Act (NT) Pt 5; Penalties and Sentencing Act 1992 (Qld) s 35; Criminal Law (Sentencing) Act 1988 (SA) s 53; Sentencing Act 1997 (Tas) s 68; Sentencing Act 1991 (Vic) s 85B; Sentencing Act 1995 (WA) s 117.

3.3 The *Meah* litigation and its aftermath

No analysis of sanction-shifting actions could be complete without mention of the decision of the Queen's Bench Division in *Meah v McCreamer (No 1)*.[63] The plaintiff in this remarkable case had suffered a severe brain injury while a passenger in a motor vehicle being driven by the defendant. Both the plaintiff and defendant were grossly intoxicated at the time of the accident. The brain injury caused the plaintiff to undergo a significant personality change and, approximately four years after the accident, he sexually assaulted three women. As a result, he was sentenced to life imprisonment. He then sued the defendant for damages in respect of his physical injuries and his imprisonment, alleging that the brain injury had robbed him of his ability to suppress previously dormant tendencies towards sexual violence and that, but for the injury, he would not have committed the sexual assaults. Woolf J accepted this argument (without any discussion of the rule in *Colburn v Patmore*) and awarded the plaintiff £61,000. An unspecified amount of this figure was awarded in respect of the plaintiff's loss of freedom. The award was reduced by 25% to £45,750 on account of the plaintiff's contributory negligence in accepting a ride from a driver whom he knew to be intoxicated.

The courts have been decisive in denouncing the decision in *Meah (No 1)*.[64] The English Court of Appeal labelled it as wrongly decided in *Clunis v Camden and Islington Health Authority*.[65] In that case, the plaintiff had a long history of serious mental illness and had been detained as an involuntary patient in a psychiatric institution. Upon his discharge, he was placed in the care of Dr Sergeant, who was a psychiatrist and an employee of the defendant health authority. Two months later, the plaintiff killed a man in a spontaneous and unprovoked attack. He was charged with murder, but a plea of manslaughter on the basis of diminished responsibility was accepted. As a result, he was ordered to be detained in a psychiatric hospital. The plaintiff then sued the defendant for damages in respect of his detention on the basis that Dr Sergeant had been negligent in failing to provide him with adequate medical treatment and that, had proper treatment been provided, the plaintiff would not have committed the homicide. Beldam LJ, who delivered the court's opinion, applied the rule in *Colburn v Patmore* and struck out the plaintiff's claim stating:

> we consider the defendant has made out its plea that the plaintiff's claim is essentially based on his illegal act of manslaughter; he must be taken to have known what he was doing and that it was wrong, notwithstanding that the degree of his culpability was reduced by reason of mental disorder. The court ought not to allow itself to be made an instrument to enforce obligations alleged to arise out of the plaintiff's own criminal act . . .[66]

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63 [1985] 1 All ER 367 (*Meah No 1*). For an analysis see E K Banakas, 'Tort Damages and the Decline of Fault Liability: Plato Overruled, But Full Marks to Aristotle!' [1985] *Cambridge LJ* 195.

64 It has also received criticism in academic circles: see, eg, Luntz, above n 38, p 208.

65 [1998] QB 978; [1998] 3 All ER 180 (*Clunis*). For an analysis, see C A Hopkins, '*Ex Turpi Causa* and Mental Disorder' (1998) 57 *Cambridge LJ* 444.

66 [1998] QB 978 at 990; [1998] 3 All ER 180 at 189. Clunis subsequently brought an application before the European Court of Human Rights complaining that the Court of

The English Court of Appeal followed *Clunis* in its unreported decision in *Worrall v British Railways Board*.[67] The material facts of this case are similar to those in *Meah (No 1)*. Worrall had received a severe electric shock while he was carrying out his duties as an employee of the defendant. Approximately three years after the accident, the plaintiff sexually assaulted two prostitutes and, as a result, was sentenced to six years' imprisonment. The plaintiff claimed that he would not have committed these offences but for the fact that the electric shock caused him to undergo a radical personality change, and sought damages from the defendant in respect of economic loss sustained as a result of his incarceration. The defendant successfully applied to have this section of the plaintiff's claim struck out. The Court of Appeal unanimously refused an appeal by the plaintiff on the grounds that it would be contrary to public policy to allow the claim.

However, the English Court of Appeal has recently cast a shadow over the correctness of the approach in *Clunis* in *KR v Bryn Alyn Community (Holdings) Ltd*.[68] The plaintiffs in this case sued the defendant children's home in respect of physical, sexual and psychological trauma which they had suffered while they were in the defendant's care. After leaving the defendant's custody, some of the plaintiffs had engaged in illegal behaviour and incurred criminal sanctions. These plaintiffs also claimed damages in respect of these sanctions. At first instance, this component of the claim was denied in reliance on *Clunis*. Although the plaintiffs did not challenge this finding on appeal, Auld, Waller and Mantell LJJ asserted that '[n]otwithstanding anything said by this court in *Clunis* an argument may survive that damages are recoverable in respect of tortious acts that have resulted in a law-abiding citizen becoming a criminal'.[69] Unfortunately, their Lordships offered no elaboration on this rather confusing statement.

The Court of Appeal's apparent reluctance to embrace *Clunis*, expressed in *KR v Bryn Alyn Community (Holdings) Ltd*, seems to have disappeared in its decision in *DN v London Borough of Greenwich*.[70] In that case, the plaintiff, who was a young man who had suffered brain trauma as a child, brought proceedings alleging negligence on the part of a school psychologist whom he had consulted when a primary school student. The negligence alleged was a failure to properly identify his educational needs. His claim for damages included an amount for the consequences of a conviction of arson. According to the plaintiff, had it not been for the negligence of the psychologist, he would have been placed in a more suitable educational environment and this would have precluded the development of his interest in and propensity to start fires. In turn, the plaintiff asserted that he would not have been convicted of arson.

Appeal, in striking out his action on the basis of the illegality defence, had denied him the right to a fair hearing which is guaranteed by Art 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953). It was held that his application was inadmissible on the basis that the illegality defence did not have the status of a blanket immunity and that he was given a proper opportunity to have his claim heard before a court: *Clunis v United Kingdom*, Third Section Decision as to Admissibility, 11 September 2001.

67 [1999] EWCA Civ 1312 (unreported, 29 April 1999).

68 [2003] QB 1441; [2004] 2 All ER 716.

69 Ibid, at QB 1490; All ER 761.

70 [2004] EWCA Civ 1659 (unreported, 8 December 2004).

At first instance the plaintiff succeeded and recovered damages for the consequences of his conviction. The Court of Appeal unanimously allowed the defendant's appeal on quantum. Their Lordships considered that *Clunis* barred claims for loss arising out of criminal convictions and that it was binding on them.[71]

3.4 The disposition of sanction-shifting actions in the United States

Comparatively few sanction-shifting actions have been brought before the courts in the United States. This is unsurprising in light of the fact that the courts have generally rejected such actions. One of the leading sanction-shifting actions in the United States is *Adkinson v Rossi Arms Co*.[72] The plaintiff in that case, who had fatally wounded a man with a shotgun, had been convicted of manslaughter.[73] He sued the manufacturer of the shotgun for negligence, alleging that the shotgun was defective and that, as a result, it had accidentally discharged. The plaintiff claimed, among other things, damages in respect of his conviction and 10-year prison sentence. Although the plaintiff, on appeal against summary judgment for the defendant, conceded that this portion of his claim could not be sustained, the court indicated that it would have rejected it in any event because it would have undermined the objects of the criminal justice system.

The issue arose again in the decision in *Lord v Fogcutter Bar*.[74] Lord, the plaintiff, had consumed more than 14 alcoholic beverages in a nine-hour drinking binge at the defendant's establishment. After consuming these drinks, Lord left the premises in the company of a woman whom he subsequently kidnapped and sexually assaulted. As a result, Lord was convicted of several offences and sentenced to 30 years' imprisonment. Lord then sued the defendant on the basis that its employee had breached statutory provisions prohibiting the service of alcoholic drinks to intoxicated persons, and that had it not been for the breach, he would not have committed the offences. Although the court found that the defendant's employee had acted with gross negligence, it held that Lord's claim was barred by public policy. It was emphasised that the courts do not exist to aid those whose claims are based on illegal acts.[75]

Another decision of note is *Burcina v City of Ketchikan*,[76] the facts of which bear some resemblance to those in *DN v London Borough of Greenwich*, discussed above.[77] In *Burcina*, the plaintiff, who was mentally ill and addicted to drugs, set fire to a building and was convicted of arson. He explained that he had set fire to the building because he believed that aliens were trying to attack him and that he thought that the fire would attract the attention of the authorities. The plaintiff was sentenced to eight years' imprisonment

71 Ibid, at [79].
72 659 P 2d 1236 (1983).
73 See *Adkinson v Alaska* 659 P 2d 1236 (1980).
74 813 P 2d 660 (1991).
75 Ibid, at 663 per Compton J.
76 902 P 2d 817 (1995).
77 See Section 3.3.

suspended for five and a half years. Subsequently, he sued the defendant for negligence on the basis that it had provided him with substandard medical treatment which had aggravated his illness. The court held that public policy precludes a person who has been convicted of a crime from imposing liability on others for the consequences of their conduct.[78]

4 The public policy considerations

In light of the longstanding endorsement of the rule in *Colburn v Patmore*, it is somewhat surprising that the courts have been reticent about revealing the policy considerations which sustain it. On the whole, explanation given for the rule consists of little more than a perfunctory incantation of jejune emotive slogans to the effect that to allow sanction-shifting actions would be contrary to public policy. Accordingly, in this section, an attempt will be made to tease out the relevant policy arguments.

4.1 Would refusing sanction-shifting actions result in 'double punishment'?

The denial of routine illegality cases on the grounds of illegality raises the spectre of so called 'double punishment'.[79] The concern is that a plaintiff who has been punished by the criminal justice system and who subsequently has a tort claim denied for illegality is effectively being punished again for the same conduct.[80] Does this concern also apply to sanction-shifting actions? Before considering this question, it is helpful to outline the potential for double punishment more fully in the context of routine illegality cases.

The double punishment concern is a convincing argument against applying the illegality defence in routine illegality cases. If the defence is invoked to find in favour of the defendant in such cases, the plaintiff will be made to bear

78 Other sanction-shifting actions in the United States which have been rejected include *Worman v Carver* 44 P 3d 82 (2002) (plaintiff who had been convicted of and imprisoned for tax fraud unable to recover compensation in respect of his conviction and attendant damage to his reputation as a result of negligence by his tax accountant); *Feltner v Casey Family Program* 902 P 2d 206 (1995) (plaintiff who had been convicted of sexually assaulting a foster child placed in his parents' custody unable to recover compensation in respect of his conviction on the basis that the defendant had been negligent in placing a sexually active child in his parents' care); *Rimert v Mortell* 680 NE 2d 867 (1997) (plaintiff who had been convicted of four murders unable to claim compensation in respect of a sentence of life imprisonment on the basis that he would not have committed the murders had he not been negligently discharged from a mental hospital) (*contra* the decision in *Boruschewitz v Kirt* 554 NE 2d 1112 (1990), which involved materially identical facts); and *Cole v Taylor* 301 NW 2d 766 (1981) (plaintiff who had been convicted of murdering her husband unable to recover damages from the defendant psychiatrist in respect of her imprisonment on the grounds that the defendant was negligent in failing to prevent her from committing the murder).

79 The term 'double punishment' is apt to mislead in so far as it suggests that denial of a tort action subsequent to a conviction has a more or less identical punitive impact to the conviction. It would be more accurate to speak of additional punishment.

80 An interesting question, but one which cannot be considered here, is whether the denial of a tort action can ever be properly referred to as 'punishment': consider Hart's definition of punishment: H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Clarendon Press, Oxford, 1968, pp 4–5.

both the criminal sanction and the cost of their injuries.[81] Furthermore, the punishment that flows from a denial of the tort action may be utterly disproportionate to the culpability of the plaintiff's wrongdoing. This is a product of the fact that compensatory damages in tort law are calculated solely by reference to the plaintiff's loss.[82] The culpability of the plaintiff (or defendant) is irrelevant. Thus, if the plaintiff is catastrophically injured, the punishment meted out as a consequence of the denial of the tort action may equate to several million dollars. However, it is difficult to imagine a situation in which punishment of such severity would not be grossly disproportionate to the gravity of the plaintiff's wrongdoing. Therefore, in short, applying the illegality defence in routine illegality cases is an arbitrary form of punishment which pays no regard whatsoever to the moral quality of the plaintiff's actions. Needless to say, this situation conflicts spectacularly with the fundamental sentencing principle,[83] which is recognised in numerous other jurisdictions[84] as well as in international criminal law,[85] that sanctions should be roughly proportionate to the moral gravity of the transgression in question.[86]

Of course, any unfairness resulting from the denial of a tort action by reason of the plaintiff's illegality may be ameliorated to some extent if the criminal court anticipates the denial and takes this into account in fixing the sentence.[87] However, it seems doubtful that such a concession would be made very often considering that, at the time of sentencing, whether or not the plaintiff has an actionable claim in tort, the amount of damage which they have sustained, and whether or not the illegality defence would be applied may be open to considerable speculation. The criminal court would be understandably

81 As explained above in Section 2.

82 See Goudkamp, above n 57, at 364–5.

83 *Veen v R (No 2)* (1988) 164 CLR 465 at 472–3 and 488; (1988) 77 ALR 385 at 389–90 and 401 per Mason CJ, Brennan, Dawson and Toohey JJ, and Wilson J respectively; *Hoare v R* (1989) 167 CLR 348 at 354; 86 ALR 361 at 365 per Mason CJ, Deane, Dawson, Toohey and McHugh JJ.

84 Criminal Code RSC 1985 c C-46 s 718.1; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 32 per McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ; Sentencing Act 2002 (NZ) s 8(a); Criminal Justice Act 2003 (UK) s 143(1).

85 This principle is enshrined in several treaties (see, eg, Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 37 ILM 999, entered into force 1 July 2002, Art 78(1)) and United Nations Resolutions (see, eg, Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res 827, UN SCOR (3217th mtg), UN Doc S/RES/827 (1993), Art 24(2); Statute of the International Tribunal for Rwanda, SC Res 955, UN SCOR (3453 mtg), UN Doc S/RES/955 (1994), 31 ILM 1598, Art 23(2); United Nations Standard Minimum Rules for Non-Custodial Measures, GA Res 45/110, 45 UN GAOR (68th plen mtg), UN Doc A/45/49 (1990), Art 3.2), and has been affirmed on numerous occasions by international criminal tribunals (see, eg, *Kambanda*, Case No ICTR 97-23-S (4 September 1998) at [58]; *Todorovic*, Case No IT-95-9/1 (31 July 2001) at [29]; *Plavsic*, Case No IT-00-39&40/1 (27 February 2003) at [23]).

86 For a detailed discussion of the proportionality principle, see A Ashworth, *Sentencing and Criminal Justice*, 3rd ed, Butterworths, London 2000, Ch 4. For an analysis of the proportionality principle from a human rights perspective see D van Zyl Smit and A Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 *MLR* 541.

87 It is a well recognised sentencing principle that the courts may reduce a sentence to take account of the collateral consequences of a conviction on the offender: *Cosgrove* (1988) 34 A Crim R 299 at 306–7 per Street CJ; *T* (1990) 47 A Crim R 29 at 32 per Campbell J, 38–40 per Allen J. See further Ashworth, above n 86, pp 151–5.

reluctant to engage in the guessing exercise which would be involved in offsetting a sentence to take account of the impact of the illegality defence.[88] In any event, the potential for offsetting is extremely limited due to the fact that the collateral consequences of a sentence on the offender are only a subsidiary sentencing consideration,[89] and the sentence must still reflect the objective seriousness of the offence.

While the 'double punishment' concern is a sound reason against applying the illegality defence in routine illegality cases, it clearly has no application in relation to sanction-shifting actions. As mentioned above,[90] in routine illegality cases there is a difference between the plaintiff's damage and punishment, if any, imposed by the criminal justice system. However, this is not so in relation to actions that seek to deflect criminal sanctions, where the plaintiff's damage and punishment are one and the same thing. Thus, there is simply no potential for double punishment in sanction-shifting actions.

4.2 Compensating the victims of the plaintiff's crime

Shortly after the judgment in *Meah (No 1)*[91] was delivered, two of the plaintiff's rape victims successfully sued him for battery.[92] The plaintiff subsequently sought an indemnity in respect of his liabilities in this connection from the driver.[93] In the course of denying the plaintiff's claim on the basis that his loss in this regard was too remote a consequence of the driver's negligence, Woolf J suggested that his earlier decision in *Meah (No 1)*, in which he awarded the plaintiff compensation in respect of his imprisonment, could be justified on the grounds that it provided the plaintiff with the resources to in turn compensate the victims of his crimes.[94] In other words, Woolf J saw sanction-shifting actions as merely a means to an end, with the plaintiff in a sanction-shifting action being transformed into a conduit through which their victims can obtain compensation.

This is a convoluted argument in support of countenancing sanction-shifting actions which requires careful consideration. At the outset, there are two observations which need to be made about it. The first is that Woolf J's argument will only be applicable in fairly limited circumstances. In many cases, the plaintiff's crime will not have caused (actionable) harm to any other person.[95] Even if there is a victim, he or she may have died as a result of the plaintiff's crime.[96] The second observation is that Woolf J's argument calls for considerable speculation on the part of the judges determining

88 Of course this problem would not arise where the civil action precedes the criminal proceedings. However, it seems that this would rarely occur, notwithstanding the ostensible demise of the felonious tort rule: see *Williams v Spautz* (1991) 174 CLR 509 at 544–5 n 112; 107 ALR 635 at 664 n 112 per Deane J; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 15; 158 ALR 485 at 495–6 per Gleeson CJ, McHugh, Gummow and Hayne JJ. *Pathways Employment Services v West* (2005) 212 ALR 140 at 156 per Campbell J.

89 *R v Radich* (1954) 73 NZLR 86 at 87 per Fair J.

90 See Section 2.

91 Discussed above in Section 3.3.

92 *W v Meah* [1986] 1 All ER 935.

93 *Meah v McCreamer (No 2)* [1986] 1 All ER 943.

94 Ibid, at 951.

95 See, eg, *McNeill v Cavallaro* (1981) 96 LSJS 292.

96 See, eg, *Clunis*, which is discussed above in Section 3.

sanction-shifting actions. For instance, it will sometimes be a matter of pure guesswork as to whether the plaintiff's victims will sue the plaintiff if the plaintiff is awarded damages.

We may now turn to consider the cogency of Woolf J's argument. It is of course obvious that allowing a sanction-shifting action will increase the probability that the victims of the plaintiff's crime will be able to obtain compensation from the plaintiff, as it is well known that victims of crime usually cannot recover damages from criminals because criminals are often impecunious.[97] However, notwithstanding this point, there is a constellation of serious shortcomings in this argument.

First, allowing sanction-shifting actions seems to be an extremely circuitous and inefficient method of compensating victims of crime. In light of the transaction costs which would be incurred in the two bouts of litigation which would be required before any money reached the plaintiff's victims,[98] it is open to debate whether it is worthwhile keeping this avenue of compensation open.

Secondly, if the plaintiff in a sanction-shifting action possesses sufficient means to satisfy a judgment in favour of their victims, Woolf J's argument in support of allowing the sanction-shifting action would not apply. However, it would surely be absurd if legal entitlements were to depend upon the individual wealth of plaintiffs.

Thirdly, it would be incongruous if plaintiffs in sanction-shifting actions were able to hold a defendant liable for damages in respect of sanctions imposed on them as a result of their crime where they inflicted actionable harm on another, but not where no one was injured as a result of their unlawful behaviour. One would think that the courts should be less willing to assist someone by relieving them of a sanction where they have harmed another through their criminal conduct.

Fourthly, there is no guarantee that the damages to which the plaintiff in a sanction-shifting action may be entitled would be commensurate to the plaintiff's liability to their victims. If the loss suffered by the plaintiff as a result of their conviction exceeds the cost of the injury which they inflict on their victim, the plaintiff will retain some of their damages. However, this could assuage the impact of the sanction imposed on the plaintiff and, as a result, the objects of the criminal law may be undermined.[99]

Finally, it is unclear why the courts should go to additional lengths to ensure that judgments in favour of victims of crime are satisfied. The courts do not appear to manifest any such concern for other types of claimant. Is there any logical reason why victims of crime deserve curial favouritism? Some commentators have returned an affirmative answer to this question on the basis that this will facilitate the distribution of the costs of crime over a

97 F Trindade and P Cane, *The Law of Torts in Australia*, 3rd ed, Oxford University Press, Melbourne 1999, p 6; New South Wales Task Force on Services for Victims of Crime, *Criminal Injuries Compensation in New South Wales: Report & Recommendations*, The Task Force, Sydney, 1986, p 5.

98 The plaintiff in the sanction-shifting action would need to recover money from the defendant and the plaintiff's victims would then need to sue the plaintiff.

99 The potential of sanction-shifting actions to undermine the goals of the criminal law is discussed below in detail in Section 4.4.

cross-section of society,[100] and will help to restore victims to their pre-injury status and alleviate financial hardship on their part.[101] However, these arguments are defective because they do not explain *why* victims of crime should be singled out for special treatment: they only tell us what will happen if victims of crime are afforded special treatment. Moreover, such arguments do not discriminate between victims of crime and other members of society who suffer loss. Because they apply equally to support the compensation of anyone who incurs a loss, they do not furnish any justification for singling out victims of crime for preferential treatment.

Accordingly, in sum, it does not seem that sanction-shifting actions can be rationalised on the basis that they tend to promote the compensation of victims of crime.

4.3 The theory of free will and the internal consistency of the law

In this section, it will be argued that, subject to one qualification, sanction-shifting actions disturb the internal consistency of the law by reason of their incompatibility with the criminal law's reliance on the theory of free will. However, before coming to this argument it is necessary to make a few introductory remarks about the theory of free will and its role in morality and law.

There is probably no idea that is more basic in morality than the belief that human beings enjoy freedom of will.[102] Regardless of whether a deterministic account of human behaviour (which is the view that everything we do is determined by a confluence of antecedent causes over which we have no control) is in fact true, we take it for granted in our day-to-day lives that we are autonomous entities capable of making meaningful choices between alternate courses of action.[103] Conventional philosophic wisdom has it that freedom of will is essential to the concept of personal responsibility. The basis for this understanding is that we do not, it seems, regard conduct to be of moral significance except in so far as it is an expression of an inner act. For instance, we do not attribute responsibility to a person in respect of their conduct where they lacked the capacity to act otherwise,[104] such as where their behaviour in question was a so-called 'reflex action'[105] or was performed while they were unconscious.[106] The dependency of judgments of responsibility on inner acts is also demonstrated by the fact that we would

100 R D Childres, 'Compensation for Criminally Inflicted Personal Injury' (1964) 39 *New York University L Rev* 444 at 457.

101 The Community Law Reform Committee of the Australian Capital Territory, *Victims of Crime*, Report No 6, The Committee, Canberra 1993, at [273].

102 The literature concerning the debate between free will and determinism is voluminous and, as Hume so aptly put it, a 'labyrinth of obscure sophistry' to the uninitiated: P H Nidditch, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals: by David Hume*, 3rd ed, Clarendon Press, Oxford, 1975, p 81. For an accessible account of this dispute, see A Kenny, *Freewill and Responsibility*, Routledge & Kegan Paul, London, 1978.

103 See P Cane, *Responsibility in Law and Morality*, Hart, Oxford, 2002, pp 23–4.

104 S Perry, 'Risk, Harm and Responsibility' in D Owen (Ed), *Philosophical Foundations of Tort Law*, Clarendon Press, London, 1995, p 321 at pp 341–2.

105 *Ryan v R* (1967) 121 CLR 205 at 216–17; [1967] ALR 577 at 584–5 per Barwick CJ.

106 An exception to this general rule is where the agent was at fault at some prior time. For

regard a person as blameworthy where we are confident that they chose to pursue an evil course of action, but were prevented from implementing or actualising that choice due to external circumstances. For instance, a person who fails to bring a wicked plan to fruition as a result of circumstantial luck is clearly deserving of blame. Indeed, some commentators who adopt a strict agent centred account of responsibility argue that such a person is just as culpable as if they had been successful in their evil endeavour.[107]

Law, like morality, proceeds on the assumption that human beings are capable of making meaningful choices and that it is thus appropriate to hold people responsible for the consequences of their choices. As McHugh J stated in *Perre v Apand Pty Ltd*, '[o]ne of the central tenets of the common law is that a person is legally responsible for his or her choices'.[108] Law's endorsement of the theory of free will is evinced most clearly from the general rule that there is no liability, criminal or civil, in the absence of fault,[109] which emerged at around the time of the Industrial Revolution.[110] One aim of the requirement of fault is to ensure that people are held liable only for outcomes which they chose to bring about. Of course, there is room to dispute the extent to which the requirement of fault lives up to this purpose. For instance, negligence, which is a standard of conduct rather than a state of mind,[111] clearly cannot ensure that liability is only imposed upon those who chose to bring about the proscribed result. The influence of the free will theory on the law is also

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instance, a driver who crashes their car into an innocent bystander as a result of an epileptic fit would not be morally responsible for the injuries caused to the bystander. However, the situation would clearly be different if the driver had warning of the onset of the fit but failed to take preventative action (see *Leahy v Beaumont* (1981) 27 SASR 290 at 292 per Sangster J, 297 per White J, 299–300 per Legoe J (coughing fit)), or if the driver failed to take medication which would have prevented the fit (see *Derdiarian v Felix Contracting Corporation* 434 NYS 2d 166 at 170 (1980) per Cooke CJ). For a discussion of the doctrine of prior fault, see T Honoré, *Responsibility and Fault*, Hart, Oxford, 1999, pp 21–3.

107 Ashworth argues that '[a] person who tries to cause . . . harm and fails is, in terms of moral culpability, not materially different from the person who tries and succeeds: the difference in outcome is determined by chance rather than by choice, and [judgments of responsibility] should not [be] subordinated . . . to the vagaries of fortune by focusing on results rather than on culpability': see A Ashworth, *Principles of Criminal Law*, 4th ed, Oxford University Press, Oxford, 2003, p 446. *Contra* R A Duff, *Criminal Attempts*, Clarendon Press, Oxford, 1996, Ch 12.

108 (1999) 198 CLR 180 at 223; 164 ALR 606 at 635. See also *Agar v Hyde* (2000) 201 CLR 552 at 583; 173 ALR 665 at 687 per Gaudron, McHugh, Gummow and Hayne JJ; *R v Falconer* (1990) 171 CLR 30 at 42; 96 ALR 545 at 552 per Mason CJ, Brennan and McHugh JJ; *Havenaar v Havenaar* [1982] 1 NSWLR 626 at 627–8 per Hutley JA; *State of New South Wales v Gee* [2002] NSWCA 326 (unreported, 25 September 2002; BC200205648) at [21] and [32]–[33] per Hodgson JA; *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 394–5; [1999] 3 All ER 897 at 926–7 per Lord Hobhouse; *Gregg v Scott* [2005] 2 AC 176 at [82] per Lord Hoffmann.

109 See Hart, above n 80, pp 47–9.

110 Prior to this time, a regime of strict liability generally prevailed in both the criminal and civil contexts: see W Holdsworth, *A History of English Law*, Vol 8, Methuen & Co, London, 1926, pp 446–7; J B Ames, 'Law and Morals' (1908) 22 *Harv L Rev* 97 at 99; cf P Winfield, 'The Myth of Absolute Liability' (1926) 42 *LQR* 37 at 50. Regarding the transition from strict liability to fault-based liability, see D Kretzmer, 'Transformation of Tort Liability in the Nineteenth Century: The Visible Hand' (1984) 4 *OJLS* 46. Of course, this general rule has been weakened in recent times, particularly in the criminal setting, where strict and absolute liability offences have proliferated under statute.

111 See above n 57.

apparent from defences to criminal and tortious liability which recognise the absence of a meaningful choice such as automatism, insanity, and duress.

A serious difficulty besetting sanction-shifting actions is that they are seemingly incompatible with the earlier finding that the plaintiff is liable for their conduct under the criminal law. On one hand, sanction-shifting actions make the allegation that the plaintiff's conduct was not the product of a choice which they made, but was caused by the defendant's tort. Yet, on the other hand, the fact that the plaintiff was held criminally liable in respect of their conduct dictates that their conduct was the expression of a choice on their part. Therefore, in short, sanction-shifting actions raise the question as to how it can be said that a person is capable of making choices and is thus responsible for the outcome of their choices in the criminal context but that, in the tort context, they succumbed, inevitably, to the laws of physics that govern a deterministic world.

Is there any way of resolving this apparent contradiction posed by sanction-shifting actions? One attempt at a reconciliation turns on the fact that neither tort law nor the criminal law requires, in order for it to be shown that a person caused an event, that their conduct was the sole cause of the event.[112] In the ordinary course of things, it is sufficient for it to be proved that their conduct was a necessary condition of the occurrence of the event.[113] Accordingly, this means that, notwithstanding that the plaintiff in a sanction-shifting action was previously held to have caused an infraction of the criminal law, there may be room left for the defendant's behaviour to be found to be a cause of the plaintiff's criminal conduct. In other words, both the plaintiff and defendant may be regarded as causing the plaintiff's criminal conduct. However, an obvious riposte to this argument is that while the law admits the coexistence of causes, this is subject to the proviso that voluntary human conduct which intervenes between a wrongful act and harm generally negatives any causal connection which would otherwise exist between the wrongful act and the harm.[114] Thus, the fact that the plaintiff has freely

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112 See *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 509; 99 ALR 423 at 425 per Mason CJ; *Royall v R* (1990) 172 CLR 378 at 398 and 441; 100 ALR 669 at 682 and 714 per Brennan J and McHugh J respectively; *Smith v Auckland Hospital Board* [1965] NZLR 191 at 221 per Gresson J.

113 Civil Law (Wrongs) Act 2002 (ACT) s 45(1)(a); Civil Liability Act 2002 (NSW) s 5D(1)(a); Civil Liability Act 2003 (Qld) s 11(1)(a); Civil Liability Act 1936 (SA) s 34(1)(a); Civil Liability Act 2002 (Tas) s 13(1)(a); Wrongs Act 1958 (Vic) s 51(1)(a); Civil Liability Act 2002 (WA) s 5C(1)(a). In exceptional circumstances, a less demanding test of causation may be adopted. For instance, in *Fairchild v Glenhaven Funeral Services Pty Ltd* [2003] 1 AC 32; [2002] 3 All ER 305 the plaintiffs developed mesothelioma as a result of exposure to asbestos dust while working for successive employers. Due to limitations in medical science, the plaintiffs were unable to show in relation to any one of their employers, that but for that employer's negligence, they would not have contracted mesothelioma. However, the House of Lords held that it was sufficient in this case to establish causation for it to be shown that an employer had materially increased the risk of developing mesothelioma as a result of their negligence. See J Stapleton, 'Lords A'leaping Evidentiary Gaps' (2002) 10 *TLJ* 276.

114 H L A Hart and A M Honoré, *Causation in the Law*, 2nd ed, Clarendon Press, Oxford, 1985, pp 136–62; *Haber v Walker* [1963] VR 339 at 358 per Smith J; *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1999] 2 AC 22 at 30–1; [1998] 1 All ER 481 at 488 per Lord Hoffmann. There are a number of exceptions to this general rule. Perhaps the most important exception is that voluntary action will not be regarded as an intervening

engaged in criminal behaviour ought to oust the defendant's conduct as a legal cause of the crime.

There is an important caveat which needs to be attached to this argument against sanction-shifting actions. A substantial number of crimes in existence today are so called 'regulatory offences', which seek to achieve economic and social goals in the interests of the welfare of society, rather than to allocate personal responsibility.[115] Accordingly, because such crimes do not discharge any ethical function, it is generally maintained that they are inexplicable by reference to the rules of morality.[116] The upshot of this understanding is that these offences do not depend upon the theory of free will. Accordingly, this argument against sanction-shifting cases is inapplicable where the crime in mention is a regulatory offence.

4.4 Undermining the objects of the criminal law

Judges have often contended that sanction-shifting actions should be denied because they have the potential to undermine the aims of the criminal law, especially retribution and deterrence. For instance, in *Adkinson v Rossi Arms Company*[117] Rabinowitz J stated:

> allowing a criminal defendant . . . to impose liability on others for the consequences of his own anti-social conduct runs counter to basic values underlying our criminal justice system. The goals of general deterrence as well as individual deterrence would undoubtedly be undercut. Obviously, other . . . goals of the criminal justice system are implicated.[118]

Similarly, in *Askey v Golden Wine Co Ltd*[119] Denning J said:

> In every criminal court the punishment is fixed having regard to the personal responsibility of the offender in respect of the offence, [and] to the necessity for

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cause when the defendant's wrongful conduct gave rise to the risk that injury would ensue from that voluntary conduct: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 518–19; 99 ALR 423 at 432 per Mason CJ; *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1999] 2 AC 22 at 30–2; [1998] 1 All ER 481 at 488–9 per Lord Hoffmann; Hart and Honoré, above n 114, pp 194–204. Thus, in *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360; [1999] 3 All ER 897 the House of Lords held that the fact that a prisoner committed suicide while in police custody did not preclude an action brought against the police on behalf of his estate on the basis that the prisoner was only able to commit suicide because the police had failed in their duty to exercise reasonable care to prevent prisoners from committing acts of self-harm. See also *Beard v Richmond* (1987) Aust Torts Reports 80-129 and *Yates v Jones* (1990) Aust Torts Reports 81-009.

115 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; 209 ALR 271 at [69] per Kirby J; Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, Report No 95, Canberra, 2002, at [2.8]–[2.14].

116 M Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal LJ* 184 at 189–90. *Contra* K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23 *MULR* 440.

117 The facts of this case are discussed above in Section 3.4.

118 659 P 2d 1236 at 1240 (1983).

119 The facts of this case are discussed above in Section 3.2.

> deterring him and others from doing the same thing again, . . . [T]hese objects would be nullified if the offender could recover the amount of the fine . . . from another by process of the civil courts.[120]

It is, of course, axiomatic that the attenuation of sanctions may stultify the operation of the criminal law. However, as it stands, this point does not constitute a convincing case against sanction-shifting actions. In order to transform it into a credible argument it needs to be explained *why* it is important to immunise the criminal law from the potentially disruptive influence of tort law.

One reason for sheltering the criminal law from the ravages of tort law which seems initially attractive is that the criminal law discharges a more socially important function than tort law. Brennan J aligned himself with this position in *Gala v Preston*, stating that '[a]s the criminal law is the chief legal means by which the peace and order of society are protected, no doctrine of the civil law can be allowed to impair the criminal law's normative influence'.[121] However, it is, perhaps somewhat unexpectedly, no easy task to justify the proposition that tort law plays second fiddle to the criminal law in terms of its social utility. It is true that many crimes are often more harmful and affect a greater number of people than some torts. But against this one can point without any difficulty to many torts which are manifestly more harmful and have far more widespread consequences to society than most crimes.[122] The criminal law's purported hegemony over tort law is cast into further doubt once it is observed that tort law is capable of fastening on to a far wider range of human behaviour than the criminal law. This is a product of the fact that tort law is not constrained to the same extent as the criminal law is by the higher premium which the latter places on certainty and the preservation of individual liberty because of the more serious consequences which attend being held criminally liable. To this we may add the fact that many of the criminal offences which the general public regard as particularly important for the preservation of social order, such as murder, are comparatively infrequent and atypical.[123] Conversely, the mainstay of tort law is concerned with routine incidents of life, such as motor vehicle accidents and industrial injuries.

A much better rationale for immunising the criminal law from the potentially disruptive effects of tort law is the interest in keeping the legal system operating as a cohesive whole. This goes well beyond the superficial attraction of doctrinal tidiness: it concerns the preservation of public confidence in the legal system. It is not difficult to appreciate the fact that if two basal bodies of law such as the criminal law and tort law were to cancel each other out, faith in the law would be jeopardised. This concern resonated strongly with McLachlin J in *Hall v Hebert*, where her Ladyship stated:

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120 [1948] 2 All ER 35 at 38. See also *Lord v Fogcutter Bar* 813 P 2d 660 at 663 (1991) per Compton J.

121 (1991) 172 CLR 243 at 271; 100 ALR 29 at 49.

122 Consider, eg, the torts perpetrated by the tobacco companies against smokers (see T H Koenig and M L Rustad, *In Defense of Tort Law*, New York University Press, New York, 2001, pp 209–10) and by the manufacturers of products containing asbestos against consumers of those products.

123 R Hogg and D Brown, *Rethinking Law and Order*, Pluto Press, Sydney, 1998, p 8.

> It is particularly important [in the case of the illegality defence] that we bear in mind that the law must aspire to be a unified institution, the parts of which — contract, tort, the criminal law — must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to create an intolerable fissure in the law's conceptually seamless web.[124]

Likewise, in *State Rail Authority of New South Wales v Wiegold* Samuels JA noted:

> If [a] plaintiff has been convicted and sentenced for a crime, it means that the criminal law has taken him to be responsible for his actions, and has imposed an appropriate penalty. He or she should therefore bear the consequences of the punishment, both direct and indirect. If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at nought. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.[125]

This is an appropriate point to pause and take stock of the discussion so far. It has been noted that sanction-shifting actions have the potential to undermine the objects of the criminal law because they take some of the sting out of being held criminally liable. It has also been shown that this may justify denying sanction-shifting actions because it is desirable that a degree of concordance between the criminal law and tort law be achieved. However, it is important to realise that this argument should not be overstated. Judges have sometimes regarded it as something of a truism that sanction-shifting cases subvert the operation of the criminal law. Yet, as Weinrib points out, sanction-shifting actions do not necessarily have this effect.[126] It seems that there are at least two situations in which the objects of the criminal law would, paradoxically, be promoted by sanction-shifting actions.

The first is where the criminal offence in question is designed to discharge a moral function and some person other than the actual offender is the person who is truly to blame for the breach of the criminal law. A good example of such a situation is the facts in *Colburn v Patmore*.[127] Recall that in this case the plaintiff, who owned a newspaper, was held vicariously liable for a defamatory imputation published by his editor. It seems self-evident that the objects of the criminal law would have been best served in this case had the fine been transferred from the plaintiff who, lacking any knowledge of the editor's conduct, was free from any suggestion of wrongdoing, to the defendant editor. Of course, because, today, offences that are rooted in moral blameworthiness nearly invariably require proof of fault of some kind, it is difficult to imagine a situation where a person convicted of an offence which discharges a moral function is not the real wrongdoer.

The second and more important situation involves offences that are primarily directed at discharging a market function, such as trade practices offences. Transferring sanctions imposed by such offences from the actual offender to the individual who is able to most efficiently avoid the commission

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124 [1993] 2 SCR 159 at 176.
125 (1991) 25 NSWLR 500 at 514.
126 Weinrib, above n 19, at 52–4.
127 Discussed above in Section 3.1.

of the offence is obviously consistent with the objectives of the offence. In light of this, it is not surprising that some criminal offences which perform a market function expressly authorise the shifting of sanctions in a fashion which promotes the objectives of the offence.[128]

It is important to note that merely because sanction-shifting actions may, in the situations identified, promote rather than hinder the attainment of the objectives of the criminal law, does not necessarily mean that sanction-shifting actions should be allowed in such circumstances.[129] Whether or not they should be involves a deeper and more profound question concerning the clouded relationship between tort law and the criminal law. Specifically, is it proper for the law of torts to be put to work to supplement the criminal law? It is arguable that tort law is already sufficiently occupied with problems of its own without taking on the additional task of looking out for the outcomes produced by the operation of the criminal law. This is not an issue which can be properly addressed in this article. The relevant point to note from the analysis in this section is that while sanction-shifting actions may undercut the criminal law (and this is a valid reason for refusing them), such actions will not always have this effect, and this will be a relevant factor to consider in deciding how they should be determined.

4.5 Summary of analysis of policy considerations

It is convenient to summarise the conclusions of our analysis of the policy considerations. First, unlike the situation in respect of routine illegality cases, it is clear that plaintiffs in sanction-shifting actions would not be punished twice if their actions were refused. Because the damage in a sanction-shifting action consists only of a criminal sanction, nothing additional would be imposed on plaintiffs if the illegality defence were invoked to keep the sanction fixed upon them. Secondly, although sanction-shifting actions may, in limited circumstances, promote the compensation of victims of crime, this is not a convincing reason for allowing sanction-shifting actions. Thirdly, a persuasive argument against countenancing sanction-shifting actions is that they are irreconcilable with the reliance of many criminal offences on the theory of free will. Finally, because it is desirable that criminal law and tort law are not at loggerheads with each other, a strong case exists for denying sanction-shifting actions where they jeopardise the relationship between criminal law and tort law by subverting the objects of the criminal law.

In light of these conclusions, what should the future hold for sanction-shifting cases? Given the strength of the arguments against tolerating sanction-shifting actions where they clash with the criminal law's reliance on the theory of free will or may subvert the operation of the criminal law, it seems that the rule in *Colburn v Patmore* with necessary changes should be retained. However, it is clear that the relevant public policy considerations do

128 Consider, eg, Health Act 1911 (WA) s 217. This section provides for a number of offences designed to guard against the adulteration and spoilage of milk. Subsection 5 expressly authorises an employee or agent of the owner of the milk in mention who has been convicted of an offence under s 217 to recover the amount of any fine imposed on him or her from the owner.

129 Cf Weinrib, above n 19, at 53 who appears to assert that there is no reason for refusing sanction-shifting actions where they advance the purposes of the criminal law.

not sustain the innocent instrument exception. This exception asks the wrong question and should be discarded. The pertinent issue is not whether 'an error' has occurred in the criminal process and liability has been fixed upon an innocent instrument rather than the blameworthy individual. Rather, what matters is whether the sanction-shifting action would contradict the dependence of the criminal law on the theory of free will and whether it would undermine the criminal law's goals.

5 Conclusion

Public outcry often results when criminals or those who, according to prevailing opinion, are otherwise undeserving of the law's assistance are granted compensation in respect of personal injuries. Accordingly, it seems that there is little doubt that public disapproval of the law would be amplified if individuals who had been convicted of a criminal offence were able to obtain compensation in respect of sanctions imposed upon them without restraint. In view of this, the development and resounding endorsement of the rule in *Colburn v Patmore* is hardly surprising. Unfortunately, however, the public policy considerations which sustain the rule have not been properly ventilated. This article has sought to expose these considerations. The analysis indicates that while sound arguments exist to justify the curial frigidity towards sanction-shifting actions in particular circumstances, there are certain situations in which sanction-shifting actions may be permissible.