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The Wrongdoing Plaintiff

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I. The Problem and Some Possible Solutions

The effect of the plaintiff's illegality upon his rights of action in respect of harm suffered by him while acting illegally has been described as "a rather obscure corner of the law".[1] One Canadian judge required "authority of the clearest kind... before concluding that the mere fact that the conduct of a party to a civil action was wrongful as being in violation of the Criminal Code or a penal act constitutes a defence".[2] It would appear from a consideration of the many Canadian, English, Australian and American cases in which this issue has been raised that there is uncertainty about the relevance of such conduct as well as about the juridical nature of its effect if and when it should be relevant. My purpose in this essay is to examine what has been said about this in an attempt to identify the various issues that can arise and suggest how they may be resolved in a consistent and satisfactory manner. What is interesting is that so complex a question, legally speaking, can emerge from what may be a very simple and straightforward set of facts. For example, suppose that the ginger beer bottle in *Donoghue* v. *Stevenson*[3] had not been purchased and then given to the unfortunate plaintiff, but had been stolen by the plaintiff herself and then drunk with the consequences so well-known to every law student: would the theft of the bottle have affected the rights of the plaintiff? At first sight this seems to be an easily soluble conundrum. When the matter is considered in more depth, however, it can be appreciated that it gives rise to some difficult questions of legal policy, if not, indeed, some complicated questions of a more conceptual kind.

In the first place it might be argued that the conduct of the plaintiff should be legally relevant by virtue of the fact that it might constitute contributory negligence on his part, thereby reducing, perhaps even destroying his claim for damages. Secondly, it could be said that the conduct of the plaintiff is tantamount to an acceptance by him of the risk of being injured by the defendant: *volenti non fit injuria.* Thirdly, whether or not the act of the plaintiff is a tort against the defendant or some third party, as well as being a crime of some kind, his act might be causally irrelevant, in a legal sense, to the harm the plaintiff suffered, albeit that it is causally

[1] *Salmond on the Law of Torts,* (15th ed., London, 1969), at p. 678.
[2] *Foster* v. *Morton,* (1956), 4 D.L.R. (2d) 269, at p. 281 *per* MacDonald, J.
[3] [1932] A.C. 562.

relevant in an historical or physical sense. Any of these approaches would enable a court to deal with a problem of this kind without necessitating the adoption of some special principle, simply demanding the application of well-established ideas to a slightly novel situation. However, there are other possibilities that do invite a court to discuss and utilise broader concepts which might not else apply. Thus, it could be said that the illegality of the plaintiff's actions at the material time was a factor to be taken into account in determining whether or not a duty was owed to him by the defendant (at least where the plaintiff's cause of action, if any, is in negligence). Then there is the possibility that the plaintiff should be refused a remedy on the ground that the basis of his claim is "turpis causa", thereby entitling the court to invoke the maxim *ex turpi causa non oritur actio.* Or, by way of a wider application of the same notion, public policy might be invoked to withhold a remedy where to grant one would be to condone the commission of some illegal act by the plaintiff, at least to the extent of recognising his right to damages despite his own wrongdoing. All these possibilities have been raised, discussed, and from time to time, employed in the cases. Which is correct? Or, to put the query in a more acceptable way, which of these provides a satisfactory basis for coming to a decision in any individual case? In either formulation the question is not easy to answer. Indeed it is not surprising that the whole question has sometimes been said to be immaterial. That does not make inquiry inappropriate. Quite the contrary.

II. Assimilation with Some Special Defences

a. *Contributory Negligence*

The defences of contributory negligence, voluntary assumption of risk, and lack of causal connection, are very much intertwined in the modern law of torts. In numerous cases courts have adverted to the relation between the factors that must be taken into account if any one of these three defences, or limitations upon a liability that would otherwise arise, is to be considered as affecting the situation of the defendant. It is easy to see why a court would feel attracted to resolving the issue of the plaintiff's illegality in terms of contributory negligence, assumption of risk, or lack of causation. How simple to state that the real cause of the plaintiff's harm was his own improper conduct, for which not only might he suffer criminally but also, in the sense that it detracts completely or partially from his claim, in respect of his civil remedy against the defendant. For

example, in several cases in England, concerned with the effect of a breach by a plaintiff, an employee, of statutory regulations designed to ensure his protection while at work, such breach being a criminal offence, the courts said that the plaintiff's conduct, in breach of such regulations, was relevant in the sense that it qualified as contributory negligence, so leading to an apportionment of the damages under appropriate legislation. In one of these cases [4] Cohen, L.J. adverted to the policy of the legislation on factories which made it plain that while the conduct of the plaintiff might be relevant in terms of an available defence of contributory negligence, it was not to be taken to the extreme of making any action at all unavailable to the delinquent employee. While the same reluctance was not to be found in the judgment in a later decision (where, however, the plaintiff's contributory negligence virtually disqualified him from any claim, as it turned out),[5] the better view in such instances, *i.e.*, where legislation to protect employees is concerned, would seem to be that only in terms of possible contributory negligence is effect to be given to such conduct by the plaintiff. As Latham, C.J. of the High Court of Australia pointed out in *Henwood* v. *Municipal Tramways Trust* [6] as long ago as 1938, "... there is no general principle of English law that a person who is engaged on some unlawful act is disabled from complaining of injury done to him by other persons either deliberately or accidentally. He does not become *caput lupinum.*" In that case, which must rank as one of the leading decisions in this particular area of the law of tort, the High Court held that the conduct of the plaintiff in sticking his head out of the window of a tram in breach of a by-law promulgated by the defendants was material to, but not conclusive of the issue of contributory negligence when the result of this was that the plaintiff was struck and killed. Many other points were made in the course of the judgments delivered by the various members of the court, and reference thereto will be made from time to time in the present essay: but the central feature of this case is the extent to which the court emphasised that what was involved was a causation question, notably from the point of view of contributory negligence (which at that time had the effect of barring the plaintiff's remedy if it was established — a situation which has changed in Australia as it has

[4] *Cakebread* v. *Hopping Bros. (Whetstone) Ltd.*, [1947] K.B. 641, at p. 654.

[5] *Johnson* v. *Croggan & Co. Ltd.*, [1954] 1 W.L.R. 195, with which contrast *Charles* v. *S. Smith & Sons (England) Ltd.*, [1954] 1 W.L.R. 451, at p. 456, *per* Hilbery, J. See also *Williams* v. *Port of Liverpool Stevedoring Co. Ltd.*, [1956] 1 W.L.R. 551.

[6] (1938) 60 Comm. L.R. 438, at p. 446.

done in England and Canada). It is interesting to note that as recently as 1970 a Canadian court, in Manitoba, was able to deal with a case raising the issue of the plaintiff's alleged participation in illegality (namely the defendant's driving a vehicle without a licence), by invoking the doctrine of contributory negligence, so as to hold the plaintiff 50 per cent to blame for his own injury.[7] It would seem that, possibly to avoid having to come to grips with the more difficult and substantial issue, it is open to a court to qualify the plaintiff's claim by means of the plea of contributory negligence.

b. *Volenti*

An alternative, indeed stronger barrier to the plaintiff's success in cases where the moral worth, as it were, of the plaintiff's claim may be doubted, even though its legal strength is not otherwise open to question, is the plea of voluntary assumption of risk. This was one, and a very important ground upon which the court in the famous, and troublesome case of *Hegarty* v. *Shine*[8] decided against the plaintiff. She was infected by venereal disease when she had intercourse with the defendant, to whom she was not married. When she sued in trespass, alleging that the defendant had fraudulently concealed his physical state from her, thereby making the consensual intercourse into a trespassory act, the defendant was successful in maintaining that no action would lie, despite the concealment, since the plaintiff's conduct was entirely voluntary. Coming to more modern times, and somewhat different circumstances, Canadian courts have been willing to apply the maxim *volenti non fit injuria* to cases where the plaintiff was injured when being driven by a drunken driver and the plaintiff himself was a willing party to an evening of drinking and driving.[9] But it is only correct to point out that Canadian courts have not been prepared always to say that participation with knowledge in the performance of illegal acts by the defendant driver makes the plaintiff *volens* to the possibility of injury so as to deprive him of a remedy if and when he is hurt in consequence of the particular disability of the defendant which constitutes negligence (or indeed gross negligence where such is necessary). There would seem to be some hesitancy on the part of Canadian courts when it comes to finding and holding that the

[7] *Rodrigue* v. *Penner*, (1970), 74 W.W.R. 96.

[8] (1878) L.R. 2 Ir. 273; L.R. 4 Ir. 288.

[9] *Car & General Insurance Corp. Ltd.* v. *Seymour and Maloney*, [1956] S.C.R. 322; *Miller* v. *Decker*, [1957] S.C.R. 624; *Lehnert* v. *Stein*, [1963] S.C.R. 38; *Conrad* v. *Crawford*, (1972), 22 D.L.R. (3d) 386.

acceptance of a ride in such circumstances of itself makes the plaintiff a volunteer for this purpose. Referring to the decision of the Supreme Court of Canada in *Lehnert* v. *Stein*,[10] which followed and supported earlier Supreme Court decisions, Guy, J.A. of the Court of Appeal of Manitoba [11] said that it appeared to make the defence of *volens* well nigh impossible to sustain from a practical standpoint. This statement was quoted, and presumably approved more recently by Matas, J. of Manitoba in a case in which *volenti* was rejected, while contributory negligence was accepted, as a ground for limiting the plaintiff's remedy in a situation involving participation in a criminal offence.[12] Some suggestion that the plea of *volenti* could be raised in such a case can be found in the judgment of Adam, J. of the Supreme Court of Victoria in *Boeyen* v. *Kydd*.[13] But the joint criminal venture of the plaintiff and the defendant in that case (which was the illegal use of the car which the defendant drove negligently thereby causing a collision in which the plaintiff was injured) did not provide the defendant with a defence to the plaintiff's negligence suit, for reasons which will later emerge. On the other hand the House of Lords in *Imperial Chemical Co.* v. *Shatwell* [14] treated the breach of statutory regulation by the plaintiff, which was a criminal offence on his part, as constituting an assumption of risk by him, thereby preventing him from maintaining an action when the result of his, and his brother's conduct was an explosion in which they were both injured. Their Lordships seem to have dealt with the issue of liability entirely from the standpoint of causation without considering the wider question of the plaintiff's illegality as constituting a potential reason for denying any recovery, much as in *Lane* v. *Holloway* [15] where the Court of Appeal tackled the problem of provocation as affecting damages for assault on the basis of voluntary assumption of risk or consent, and contributory negligence, and not in any way as dependent upon the possible criminality of the plaintiff's own conduct, in that he assaulted the defendant, indeed assaulted him first. There, however, reliance was placed upon the relative strengths and ages of the parties in order to establish the incongruity of depriving the plaintiff of a remedy because of his acts, when the defendant's retaliation was fiercer,

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[10] *Op. cit.*, n. 9.

[11] In *Rondos* v. *Wawrin*, (1968), 64 W.W.R. 690, at p. 695.

[12] *Rodrigue* v. *Penner*, *op. cit.*, n. 7, at p. 104. And see an Ontario case, *Tomlinson* v. *Harrison*, (1972), 24 D.L.R. (3rd) 26.

[13] [1963] V.R. 235, at p. 237.

[14] [1965] A.C. 656.

[15] [1968] 1 Q.B. 379.

more violent, and far more effective and damaging physically than the plaintiff's original attack.

This melange of cases, from different jurisdictions, if it establishes anything, establishes the improbability of the plea of *volenti* being a satisfactory way of dealing with this particular problem, at least advertently. If the deeper issue of the relevance or importance of the plaintiff's own illegality is forgotten, concealed, or submerged, for whatever reason, whether it be, as Cohen, L.J. put it, that the policy of the statutes out of which the right of action arose made it necessary to put such considerations out of mind, or that some other, possibly sentimental urge to ignore what the plaintiff himself had done, in comparison with the seriousness of the defendant's conduct vis-à-vis the plaintiff, operated upon the court to such end, then it is possible to determine the exact scope of the defendant's liability by reference to the more limited notion of assumption of risk, bearing in mind that, in modern times, there has been considerable reluctance to use that notion widely. The illegality of the plaintiff may not be as easily overlooked as the alleged voluntary nature of his conduct. The policy of the law may demand that illegal conduct be met with retribution, or at least recognition, when the plaintiff seeks a remedy from the defendant. There is less compulsion upon a court to take notice of, and give effect to what the defendant says is an assumption of risk by the plaintiff, unless out of the plaintiff's conduct there can be spelled, expressly or by implication, some agreement to the prospect of harm to the plaintiff from what the defendant is doing, or is proposing to do.

c. *Causation*

Refuge might be taken in the doctrine of causation as a source of possible solutions for such problems. Or, rather, in a somewhat specialised doctrine of causation refined for the purposes of this particular type of situation. This was the approach favoured by Australian courts, at least until the most recent case of *Smith* v. *Jenkins*.[16] It has also been propounded by courts in the United States,[17] where there has been significant development from the days when illegality by the plaintiff virtually automatically disbarred

[16] (1970), 119 Commw. L.R. 397.

[17] For some illustrative cases see: *Grapico Bottling Co.* v. *Ennis*, 106 So. 97 (Miss. 1925); *Johnson* v. *Boston & Mass. R.R.*, 143 Atl. 576 (N.H. 1928); *Meador* v. *Hotel Grover*, 9 So. 783 (Miss. 1942); *Holcomb* v. *Meeds*, 246 P. 2d 239 (Kans. 1952); *Havis* v. *Iacovetto*, 250 P. 2d 129 (Colo. 1952); *Manning* v. *Noa*, 345 Mich. 130 (1956).

him from any action in respect of injuries incurred by him while perpetrating the illegality in question (such as driving a car on a Sunday in breach of statutes which prohibited such activity).[18] There is also some Canadian authority for such an approach,[19] though the validity of such authority in view of modern developments is open to question at the present time. Two basic ideas or distinctions have emerged in this regard. The first is the difference between illegal conduct which simply precedes the wrongful and injurious conduct of the defendant and, as it were, has resulted in the plaintiff's being placed in a situation in which the former's acts could cause the latter injury; and illegal conduct which effectively operates to help bring about the plaintiff's harm. The second is between illegality, especially illegality under statute, the commission of which it is the policy of the law, *viz.*, the statute, should result in the deprivation of civil rights as well as the imposition of criminal responsibility or liability: and illegality which is effective only for the purposes of the criminal law and not otherwise. These matters require clarification and amplification.

As to the first, Lord Asquith of Bishopstone expressed the dichotomy succinctly in *National Coal Board* v. *England*[20] when he said:

> it seems to me in principle that the plaintiff cannot be precluded from suing simply because the wrongful act is committed after the illegal agreement is made and during the period involved in its execution. *The act must... at least be a step in the execution of the common illegal purpose* [italics added].

Then he gave his famous hypothetical examples of the two burglars and the possible injuries which one might inflict upon the other with consequent differences in respect of the concomitant liabilities.[21] This statement was picked up in one of the earliest of the

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[18] Davis, *The Plaintiff's Illegal Act as a Defence in Actions of Tort*, (1904), 18 Harv. L. Rev. 505; *cf.* Glanville Williams, *Joint Torts and Contributory Negligence*, (1951), at p. 333.

[19] See: Cronkite, *Effect of the Violation of a Statute by the Plaintiff in a Tort Action*, (1929), 7 Can. Bar. Rev. 67.

[20] [1954] A.C. 403, at p. 428.

[21] *Ibid.*, at p. 429:

> if two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaiuing an action for negligence against A. But if A and B are proceeding to the premises which they intend burglariously to enter, and before they enter therein, B picks A's pocket and steals his watch, I cannot prevail upon myself to believe that A could not sue in tort... The theft is totally unconnected with the burglary.

more modern Australian cases, *Sullivan* v. *Sullivan*,[22] in which the question was whether a special defence could be filed setting out that the plaintiff and defendant at the material time were engaged upon using the motor car negligently driven by the defendant in the commission of a crime. In holding that such defence could be raised, Amsberg, D.C.J. pointed to the need to show that there was "a definite and plain causal connexion between the criminal and illegal act and the negligence which would be ... alleged and complained of".[23] In the case before him it was alleged that the driving of the motor car in question was a step in the execution of the common illegal purpose. If this could be established by proof, then it would afford a good defence. But it was necessary to establish the requisite causal connexion, a proposition which was clearly founded upon what had been said in Australia, even earlier than by Lord Asquith, in the *Henwood* case. As Adam, J. said in *Boeyen* v. *Kidd*,[24] "It may happen that the illegal conduct on the part of the plaintiff is in substance the real cause of his own damage and then on general principles that plaintiff could not recover from any other party". The learned judge then went on to consider some other situations in which, given the requisite element of causation, the illegal conduct of the plaintiff would bar his action on other grounds or for other reasons, *e.g.*, on the basis of the *volenti* principle. But he clearly recognised that, without more, lack of causation, so far as the defendant's acts were concerned, would be a material ground for holding the defendant not liable.

Some doubt as to the relevance of causation as a basis for differentiation was expressed by Walsh, J. of the Supreme Court of New South Wales in *Andrews* v. *Nominal Defendant*.[25] However, the learned judge also pointed out that at the very least before the plaintiff's illegality could be regarded as affecting in any way his possible rights of action, it had to be shown that there was a causal relationship of a direct kind between the illegal act and the injury: and this was not satisfied by showing that such illegal act created "a passive antecedent condition" upon which the defendant's act operated. A more detailed analysis is to be found in the judgment of Jacobs, J.A. in the later New South Wales case of *Bondarenko* v. *Sommers*.[26] The plaintiff and defendant were involved in unlawfully

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[22] (1961), 79 W.N. (N.S.W.) 615.
[23] *Ibid.*, at p. 618.
[24] [1963] V.R. 235, at p. 237.
[25] (1965), 66 S.R. (N.S.W.) 85, at pp. 94-95.
[26] (1967), 69 S.R. (N.S.W.) 269.

taking a third person's car, which was subsequently raced against another car, as a result of which there was an accident in which the plaintiff was injured. At the trial the judge directed the jury that if a number of persons were jointly engaged in the theft of a car and one of their purposes was that they would race that car against another car on a public street, then, if one of them was injured in an accident arising in such a race, he could not recover against any of the others. It was held that this direction was correct, because the stealing of the car, *i.e.*, the unlawful taking and using of it, included the act alleged to have been done negligently, *viz.*, using the stolen car. Jacobs, J.A.[27] referred to the need for a relation between the criminal act and the act of negligence complained of. This relationship he preferred to put not in terms of causation but in terms of a relationship between the plaintiff and the defendant in the criminal enterprise. "It is in this way", he said,[28] "that the joint criminal enterprise comes to be considered."

The learned judge then discussed what in effect was the difference between causation, strictly speaking, as a ground for refusing the plaintiff a remedy, and causation in the sense of the joint criminal enterprise as providing a bar to recovery. He referred to the argument of counsel for the plaintiff, relying upon the judgment of Walsh, J. in the *Andrews* case, that for a plea of illegality to succeed, the illegality of the plaintiff must be directly related to the tortious act complained of, in the sense that the tort would not have occurred if the plaintiff's act had not been illegal. This approach Jacobs, J.A. thought was too narrow, and too limiting. In many cases it might be appropriate: but it was not exhaustive of the effect in tort of illegality. Despite this argument, however, the learned judge stated that:

> the existence of the joint criminal enterprise in respect of the very act of which the plaintiff complains as having been done negligently seems to me to lie at the foundation of the present defence.[29]

Subsequent language indicates that the judge had in mind the second differentiation already referred to, namely, that between criminal conduct within the purview of the statute as affecting civil rights and such conduct which is intended only to regulate criminal liability. Before considering this matter in greater detail, however, reference must be made to two later cases in which causation, *per se*, has been discussed.

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[27] *Ibid.*, at p. 275.
[28] *Ibid.*, at p. 276.
[29] *Ibid.*, at p. 277.

In one, *Mills* v. *Baitis*,[30] which raised a novel point with respect to measure of damages rather than basic liability for tort, Gowans, J. said at one point: [31]

> The public interest is not concerned to relieve the defendant wrongdoer. It directs its concern to the question of the deprivation of the plaintiff wrongdoer. Where the plaintiff's wrongdoing has had no causal connexion with the defendant's wrongdoing which has caused the damage, it is less probable that the purpose of the law will be to treat the plaintiff's wrongdoing as affecting the plaintiff's relief than where there has been a causal connexion.

The emphasis in that case, in part at any rate, was upon the necessary connexion between the illegality of the plaintiff and his eventual harm or loss at the hands of the defendant. Finally, however, in the recent decision in *Smith* v. *Jenkins*,[32] Windeyer, J. was very critical of the language of Australian, and American courts which stressed the importance of cause or causation in this context. To allow the question of liability or not to be answered in such terms meant that the question was "bogged down in phrases about causal relations, 'proximate cause', 'causa causans', 'causa sine qua non', 'novus actus' ".[33] The discussion about cause and the conclusion with respect to something being a 'sine qua non' might be relevant and inevitable if the whole test of the bearing which criminal conduct had on tortious liability was a purely causal relationship. But was that the right test? Windeyer, J. certainly thought it was not.[34]

To some extent the learned judge was being unfair to earlier discussions of this topic. As already indicated, the issue of causation has sometimes been considered not as it were in the abstract, in other words, purely and simply in terms of whether the illegal act caused the harm to the plaintiff in any, or in any substantial degree, but in terms of the causal relevance of the legislation, where a statutory offence was involved, the breach of which constituted the specific illegality of the plaintiff. Just as, when an action is brought for damages in respect of an injury suffered through the defendant's breach of a statutory duty which involves the commission of an offence, the issue for the court is whether the statutory provision can be interpreted to give rise to civil liability, which depends upon the scope of the provision and the purpose intended thereby, so, in

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[30] [1968] V.R. 583.
[31] *Ibid.*, at pp. 590-591.
[32] *Op. cit.*, n. 16.
[33] *Ibid.*, at p. 420.
[34] *Ibid.*, at p. 421.

this context, reference has been made to the need for establishing that the statutory provision breached by the plaintiff was intended to do more than create a criminal offence. It was necessary to show that the purpose of the statute would be foiled if its breach were ignored in determining the question of the availability of a remedy to the plaintiff. This approach is illustrated very fully in the judgments delivered by the High Court of Australia in the *Henwood* case.[35] Thus Starke, J., speaking of the by-law in that case said: [36]

> The manifest purpose of the by-law is to prohibit acts that are or are regarded as dangerous or careless acts on the part of passengers. It is a punitive provision... Nor does it, in express words, deprive passengers of their civil rights against the trust in case of a breach of its duty to exercise care and forethought for securing their safety. All that can be inferred from the terms of the by-law is that it prohibits certain acts and provides a specific penalty.

Dixon and McTiernan, JJ. concluded their discussion of this problem by stating [37] that:

> unless the statute so intends, no penal provision should receive an operation which deprives a person offending against it of a private right of action which in the absence of such a statutory provision would accrue to him.

In considering what the effect or purpose of any such statute was the learned judges thought [38] that possibly "the court should pursue the methods of interpretation which have been followed in some of the decided cases where an intention has been found in a penal statutory provision to give a private remedy in damages for breach of the duty it imposes" — the converse case as Starke, J. called it.[39] The same approach, *inter alia*, was adopted by Walsh, J. in *Andrews* v. *Nominal Defendant*,[40] in which it was said that there was no general rule that a person suing upon a statutory cause of action is disqualified by his own breach of it, even where there is a direct causal connection between the act constituting the breach and the injury. "It all depends upon what is taken to have been intended by the statute". And again: "The question is whether it is part of the purpose of the law against which the plaintiff has offended to deprive him of his civil remedy". The answer in the instant case was that it was not: hence that plea by the defendant could not be

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[35] *Op. cit.*, n. 6.
[36] *Ibid.*, at p. 453.
[37] *Ibid.*, at p. 461.
[38] *Ibid.*, at p. 463.
[39] *Ibid.*, at p. 452.
[40] *Op. cit.*, n. 25, at p. 93.

sustained. On the other hand in *Bondarenko* v. *Sommers*,[41] the legislation creating the criminal act showed no intention to preserve civil rights in the circumstances. Therefore if the facts as proved at the trial established the negligence which took place in the course of commission of the illegal act upon which plaintiff and defendant in that case were engaged, no cause of action would lie. Hence the judge's direction to the jury was upheld and the plaintiff's appeal failed.

This approach has sometimes been said to be based upon the desire to spell out some policy with regard to depriving an otherwise worthy plaintiff of his rights of action. But it could also be said to involve the causation issue, in that the reason for investigating the meaning and scope of the legislation infringed by the plaintiff is to discover whether that infringement is causally relevant in a legal, as well as a factual sense, much as the similar question is raised whenever a plaintiff is suing for damages in respect of some injury inflicted upon him as a consequence of a criminal breach of statute by the defendant. As seen in such cases the issue is one of remoteness of damage.[42] Can, in law, the damage to the plaintiff be traced to the wrongdoing of the defendant? So, here, the question may be put: Should, as a matter of law, the damage to the plaintiff be traced to his own, or the defendant's wrongdoing? One way of avoiding the niceties of an inquiry as to causation, which troubled Windeyer, J. in the more recent case, is to look at the construction of the statute in terms of its policy and intent, so that, if it can be interpreted appropriately it can be used to deny the plaintiff a remedy on such basis. But even then, I would suggest, it would not be possible completely to ignore the causation aspects of the inquiry.

A Canadian writer, over forty years ago, discussed this problem, at least when it arose as a result of a plaintiff's breach or violation of a statute, along the same lines, even before the *Henwood* case[43] The purpose of that discussion was to show how Canadian cases had adopted the same attitude as was later suggested by the Australian decisions. More recent Canadian decisions indicate a change in emphasis in this matter. There is greater discussion of the rights and disabilities of the plaintiff on other grounds than that the statute he has infringed deprives him of a remedy. The nature of

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[41] *Op. cit.*, n. 26.

[42] *E.g. Gorris* v. *Scott*, (1874) L.R. 9 Ex. 125; *Grant* v. *N.C.B.*, [1956] A.C. 649; *Donaghey* v. *Boulton & Paul Ltd.*, [1968] A.C. 1.

[43] Cronkite, *op. cit.*, n. 19.

those grounds will be considered in more detail later. For the moment, however, it is sufficient to say that causation is not a popular or accepted basis for differentiating between instances when the issue arises. And, *a fortiori*, causation in terms of statutory policy is even less favoured.

It would seem that the utility of *any* doctrine of causation, however formulated for the purpose of resolving this problem, is very much in doubt. Apart from the difficulties inherent in the notion of causation as it has been developed, to which reference was validly made by Windeyer, J., there is the additional question of the complexities of statutory interpretation in this context. Decisions concerned with a plaintiff's rights arising out of breach of some statute reveal the difficulties inherent in any attempt to create civil rights and liabilities out of criminal statutes. It does not seem desirable to import those difficulties into another area or make them occur with respect to an entirely different question. It has been suggested that, in this respect, the question is really only another way of putting the issue which otherwise occurs positively, as it were, in a negative way, denying rather than engendering a remedy. But are these questions exactly the same? In one the issue is whether a remedy should exist alongside criminal sanctions. Although this has been said to be a question of policy, in the light of the general purport of the statute, might it not be better to regard this as a strict matter of statutory construction? With regard to the latter, *i.e.*, the effect of the plaintiff's wrongdoing or criminality, perhaps the issue of policy is more in evidence, and should be accepted and recognised as such without attempting to obfuscate the decision that has to be made by a court by any attempt to regulate it by the canons of construction or the principles of statutory interpretation. Moreover, the problem of the effect of the plaintiff's wrongdoing is more widespread than cases where the plaintiff is in breach of a statute. Admittedly most of the reported cases concern such a breach. But it is possible for the problem to arise in a non-statutory way. How useful, then, is an approach based upon the interpretation of a statute? It would seem mors desirable to treat this issue in a more general way.

III. Defences of a Broader Nature

This suggests that more fundamental questions are raised than those already discussed. Instead of causation, assumption of risk, and contributory negligence, perhaps a more satisfactory way of arriving at a solution for problems of this nature would be along

the lines of an investigation of the propriety or otherwise of allowing the plaintiff an action when his illegal conduct has been "instrumental", to use a more neutral term, in bringing about his injury. To pose the question in some such way is to meet head on the true issue: namely, what ought to be the policy of the law with regard to such cases? As will be seen, the courts have not been unwilling to deal with such cases in this way. But they have not always been entirely clear as to the precise ground upon which they should proceed. Moreover, they have not always been able to state with precision or clarity the true differentiation of deserving and undeserving claims by a wrongdoing plaintiff. It has earlier been suggested that three main grounds have been put forward as providing a method of resolution: these must now be considered.

a. *Ex turpi causa*

The first, perhaps historically the earliest to be propounded, and, in one sense, the most obvious, is that the plaintiff must fail since *ex turpi causa non oritur actio.* Indeed, as Glanville Williams explained twenty years ago,[44] the notion that it is an effective riposte in tort to show that the plaintiff was a wrongdoer has lingered on in some cases aided by the oftrepeated maxims such as *ex turpi causa.* The attraction of this doctrine in this context is not hard to find. Close at hand, as it were, well-understood in the law of contract, and having a superficial logic in its application, is the doctrine that a plaintiff who has to found his case upon the commission of some unlawful act on his part should lose in limine, irrespective of whatever merits his case otherwise might possess. This was the basis of the court's decision in *Hegerty* v. *Shine,* the venereal disease case. It was also discussed, though its application was rejected, in another fairly early case, *Gordon* v. *Chief Commissioner of Metropolitan Police.*[45] Money which was the product of illegal street betting was seized by the police in a raid on certain premises. The plaintiff claimed it from the Chief Commissioner. The latter sought to defend liability by pleading *ex turpi.* It was held that this was inappropriate in the circumstances. There was no illegal transaction on the basis of which the plaintiff was seeking to substantiate his claim. He was the owner of the money: and it was not necessary for the purpose of determining his rights to it as against the defendant to discuss how he had acquired such ownership, whether by illegal acts or

[44] Williams, *op. cit.,* n. 18.
[45] [1910] 2 K.B. 1080.

otherwise. The subject of the action must have been acquired directly through the medium of a transaction which was prohibited as illegal before the defence of *ex turpi* could apply.[46] It is interesting that in this case the plaintiff's cause of action was related to the recovery of property alleged to be unlawfully detained by the defendant. It was not of the kind with which courts became more familiar in recent times, namely, an action for personal injuries based on the defendant's negligence or breach of statutory duty. A distinction could be made between the *Gordon* case and these more "usual" ones, in that a claim for property raised more "absolute" questions than an action for personal injuries. In the latter there may be issues of policy based upon the application of the duty concept. With respect to the former, it is only necessary to consider questions of title, or at the very least, right to possession, or better claims to possession. This could very well make a difference to the relevance and application of any such maxim or doctrine as *ex turpi causa.* Indeed it might be possible to go further and argue that there was a difference in this respect between negligence/breach of statutory duty cases on the one hand and all *other* kinds of torts, such as trespass to the person, on the other. This would mean that cases such as *Hegerty* v. *Shine* and those in which the issue has been whether one person engaged in a fight, whether a prize-fight or a mere brawl, was entitled to sue another in respect of injuries received therein, could properly be held to invite the application of the *ex turpi* doctrine, whereas, if negligence was in issue, other considerations should apply. Certainly some of the text-book writers[47] appear to have approached this question from the standpoint of, or beginning with cases involving a fight of some kind, and to have reasoned from these that participation in a criminal offence, *e.g.,* a fight, prevented recovery, or, in the case of Pollock,[48] that wrongdoing on the part of the plaintiff did not as a general rule of law prohibit recovery. In a modern case involving a fight, *Lane* v. *Holloway,*[49] the Court of Appeal rejected the application of *ex turpi* (as well as the *volenti* maxim), where the plaintiff suffered severe injuries in a fight which he had commenced with someone younger and stronger than himself, on the ground that the defendant's reaction to the plaintiff's "provocation" was quite inordinate. Hence

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[46] *Ibid.,* at p. 1090 *per* Vaughan Williams, L.J.

[47] Salmond, *op. cit.,* n. 1, at pp. 678-679; *Winfield and Jolowicz On Tort,* (9th ed., London, 1971), at p. 639: *cp.* 8th ed. 1967, at p. 748. See also: *Green* v. *Costello,* [1961] N.Z.L.R. 1010.

[48] Pollock's Law of Torts, (15th ed., London, 1951), at p. 113.

[49] *Op. cit.,* n. 15: *cf. Hartlen* v. *Chaddock,* (1958), 11 D.L.R. (2d) 705.

the mere fact that the plaintiff himself was possibly guilty of a criminal offence should not prevent any action or diminish his claims. If this argument is acceptable, then perhaps the correct approach is to say that sometimes the fact that the plaintiff is engaged in an illegal activity, such as a fight, may well have an effect upon his rights, possibly through the operation of some such doctrine as *ex turpi*: whereas when negligence is in issue different questions arise.

Thus, in *Cakebread* v. *Hopping Bros. (Whetstone) Ltd.*[50] in which the plaintiff was suing in respect of a breach of statutory duty, the defence was raised that the plaintiff was himself in breach of such a duty in not using a proper guard on the machine. In this context the court considered the application of the doctrine *ex turpi causa.* Cohen, L.J. discussing this said that the maxim was based on public policy: hence it seemed plain on the facts of the case before the court that public policy, far from requiring that the action be dismissed, required that it should be entertained and decided on its merits. The policy of the Factories Acts, which were involved in that case, made it plain that such a defence would be inconsistent with the intention of Parliament.[51] A similar point of view, in the same kind of situation, was expressed by several members of the House of Lords in *National Coal Board* v. *England.*[52] In other words, where what might be termed mutual breaches of statute by plaintiff and defendant were concerned, and the action arose out of alleged breaches of factories legislation, there was no scope for the operation of this doctrine. Could it be said that this was virtually the same approach as that adopted by the High Court of Australia, for instance, in the *Henwood* case? Or is this a separate point? If the latter, then is it based upon an analysis of the *ex turpi* doctrine, or is it more closely associated with the more general concept of public policy of which more will be said later? In view of what was said in the *England* case, notably by Lord Porter, as to the relevance of the *ex turpi* doctrine in tort, it might be argued that the objection to applying the maxim to the particular situation in cases like *Cakebread* and *England* is not the same as that propounded in the *Henwood* decision, but is founded upon judicial reluctance to extend the juridical scope of the maxim *ex turpi causa non oritur actio.* In this respect it is worth noting that in 1954, about the same time

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[50] [1947] K.B. 641.

[51] *Ibid.*, at p. 654.

[52] [1954] A.C. 403, at pp. 419, *per* Lord Porter, 422 *per* Lord Oaksey, 424, *per* Lord Reid, 428 *per* Lord Asquith of Bishopstone.

as the *England* case, at least one English judge was still prepared to apply the *ex turpi* doctrine to a breach of statutory duty case similar to *Cakebread*: [53] but this was questioned the same year by another judge of equal jurisdiction in a case which, as it happened, did not require any decision on this point.[54]

In two Australian cases in the 1960's there appears to have been some reliance on the maxim to provide a ground or reason for disposing of the argument that the plaintiff's illegality deprived him of a remedy. Amsberg, D.C.J. seems to have approved the application of the maxim to a case of what he called "unilateral turpis causa" in *Sullivan* v. *Sullivan*.[55] On the other hand, in *Andrews* v. *Nominal Defendant*,[56] the Supreme Court of New South Wales did not apply the doctrine to a case where the plaintiff's wrongdoing consisted of a failure to register or insure the vehicle the negligent driving of which resulted in the plaintiff's injuries. Canadian authority seems to be equally divided on this issue. In 1957 Abbott, J. of the Supreme Court of Canada expressed the view [57] that the maxim did not apply in a case in which the plaintiff was injured while participating in an evening of drinking while he and the defendant were out driving. The decision against the plaintiff was based on other considerations, in particular the notion of *volenti*. On the other hand, Hunt, J. of Manitoba [58] applied the maxim to defeat a plaintiff whose claim arose out of participation as a passenger in two cars being raced on the public highway in breach of the law. In coming to this conclusion the learned judge [59] relied heavily upon the following statement by Adamson, C.J.M.: [60]

> Where two persons are engaged in a joint contravention and one is injured by negligence of the other in the execution of the common purpose the court will not enforce a claim by the injured person. Courts do not exist for the purpose of assisting persons damnified in criminal transactions.

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[53] *Johnson* v. *Croggan & Co. Ltd.*, [1954] 1 W.L.R. 195.
[54] *Charles* v. *S. Smith & Sons (England) Ltd.*, [1954] 1 W.L.R. 451.
[55] (1961), 79 W.N. (N.S.W.) 615, at p. 617.
[56] (1965), 66 S.R. (N.S.W.) 85.
[57] In *Miller* v. *Decker*, [1957] S.C.R. 624, at p. 627.
[58] In *Ridgeway* v. *Hilhorst*, (1967), 59 W.W.R. 309.
[59] *Ibid.*, at p. 312.
[60] In *Joubert* v. *Toronto General Trust Corp.*, (1955), 15 W.W.R. 654, adopting language of Fry, L.J., approved by the Supreme Court of Canada in *Lundy* v. *Lundy*, (1895), 24 S.C.R. 650. See *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, at p. 156.

This last sentence seems to express succinctly and very pointedly the whole basis of the *ex turpi* doctrine. It is unseemly for a court to help a criminally acting plaintiff injured through his criminality. In the older language of Lord Lyndhurst, C.B. in *Colbourn* v. *Patmore*[61] (a case concerned with claims between two tortfeasors — which has always been an area in respect of which the wrongdoing of the person seeking indemnity or contribution has been relevant to the success of his claim, at least until legislation made siguificant changes):

> 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... 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.

Lord Lyndhurst's lack of doubt has not been shared at all times and on all occasions by other judges. It is certainly true that the court in Manitoba, on another, more recent occasion, saw fit to apply the *ex turpi* doctrine to deny recovery to a plaintiff who was a gratuitous passenger in a car stolen by the defendant, to the plaintiff's knowledge, when the plaintiff was injured by reason of the defendant's negligent driving.[62] However, the same result did not eventuate in another Manitoban case, *Rodrigue* v. *Penner*,[63] though this may have been because the facts did not indicate that the plaintiff aided and abetted the defendant's illegality, *viz.*, drunken driving, to such an extent as to make him liable to be considered as being *in pari delicto* with the defendant.

However, the cases which suggest *ex turpi causa non oritur actio* as a ground for rejection of a plaintiff's claim must now be read in the light of the comments and strictures raised by Windeyer, J. in *Smith* v. *Jenkins*.[64] These must surely make it difficult to accept that maxim as a satisfactory basis for decision-making in this area, if indeed, in the light of the comments in the *England* case any further critique was necessary.

Windeyer, J. began his discussion by a consideration of the role of the maxim, and its appropriateness in the law of contract.

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[61] (1834), 1 C.M. & R. 73, at p. 83.

[62] *Rondos* v. *Wawrin*, *op. cit.*, n. 11.

[63] (1970), 74 W.W.R. 96.

[64] [1970] 119 Commw. L.R. 397, at pp. 409-417. It is worthy of note that Glanville Williams wished to confine the application of the doctrine to plaintiffs who were guilty of "grave breaches of the criminal law", *e.g.* smuggling, not an infringement of the Docks Regulations. See: Williams, *op. cit.*, n. 18, at p. 335, note. 6.

The question then arose whether the maxim had a place in the law of tort. This necessitated taking the maxim as referring not to *turpis causa*, in the sense previously explained by the learned judge, as meaning an illegal or immoral consideration, or a purpose that was unlawful or immoral, but to a "turpitudo". This the learned judge found hard to do, despite, or perhaps because of the curious cases in the nineteenth century, such as *Hegerty* v. *Shine* (the "miserable" case as the Australian judge called it).[65] Moreover, in the contract cases, the rationale behind denying the plaintiff an action was that *he* had to rely upon an illegal or immoral activity or arrangement as the basis for his claim. In cases such as *Smith* v. *Jenkins*, and indeed all those which are now under consideration, "it was the defendant, not the plaintiff, who asserted the illegality of the proceedings in the course of which the negligence sued upon occurred. The plaintiff did not have to say that the defendant was driving the car in breach of the law, only that he drove it negligently".[66] Thus, from a purely pleading point of view, if this was in any way conclusive or even persuasive, there was a vast difference between the notion *turpis causa* in contract and the use of the doctrine that was suggested in the context of a claim in tort. While the law had accepted the idea that if a plaintiff has to rely upon an unlawful transaction to establish his cause of action, the court will dismiss his case (for reasons explicable in English or Latin), there was a wide gap between recognition of such idea and extension thereof to a case where the *defendant* was the one raising possible illegality on the part of the *plaintiff*, as well as on his own. On that basis the maxim was properly confined to the law of contracts and conveyances. Hence Windeyer, J., in a characteristically military metaphor, was prepared to "march it off and dismiss it from this case".[67] But the judge went further, and discussed the possible relevance of the maxim in view of the way it had been cited and relied upon by parties and indeed by some courts. The latter had not approached this question consistently: in fact the judgments were conflicting (as indeed has been pointed out in this essay). Therefore a solution was not to be found in the cases, but in principles. The passage in which the learned judge disposes of this question on principle merits citation at length: [68]

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[65] *Ibid.*, at p. 413.
[66] *Ibid.*, at p. 414.
[67] *Id.*
[68] *Ibid.*, at pp. 416-417.

> Speaking generally, a person is not disqualified from suing in tort merely because at the time when he suffered the injury he was engaged in some form of wrongdoing, unless it appears that the law against which he offended precludes him from complaining of the conduct which caused him harm... If the plaintiff's own conduct was a contravention of a law designed to ensure that he, and others similarly situated, would be safe from danger, and if this conduct was a factor in producing his injury he may be found guilty of contributory negligence or of being the author of his own misfortune. That however is very different from saying that, simply because a man was a wrongdoer, he can have no remedy at law for harm done him...
>
> ...The question here is not, Is the plaintiff precluded from recovering because he was a wrongdoer? It is, Had the defendant a duty to the plaintiff to carry out carefully the unlawful enterprise on which they were jointly engaged? The problem is circumscribed by the facts. It is not a wide-ranging general question of the bearing that unlawful conduct has on liability in tort. It is whether when two persons are jointly engaged in a particular criminal enterprise — unlawfully taking or using a motor-car — one can sue the other because he has been negligent in the course of carrying out his part in their unlawful undertaking.

Windeyer, J. made it clear that he was concerned only with the tort of negligence and that as regards other torts different principles might obtain. Nonetheless,, in view of the way that this problem has arisen largely in connection with negligence claims, what the learned judge has to say must be most influential when it comes to deciding upon any general policy in this regard. For this reason the rejection of the doctrine *ex turpi causa* in this context is highly important. And the reasoning upon which such rejection is based is equally vital. Slavish emulation of the contract principles in an altogether different situation could lead to a confusion of the real issue before a court faced with the tort problem. What Windeyer, J. was attempting to do, it is respectfully suggested, was to place the illegality of the plaintiff's actions in the right perspective vis-à-vis his claim: namely, by identifying the relevance of such conduct in relation to the tort duty, whether of care or otherwise, though in the particular case the judge was concerned with a potential duty of care, alleged to be owed by the defendant to the plaintiff. In a sense, this is the analogy in tort terms of the treatment of a *turpis causa* in the context of contract. But it is not quite the same. Hence the need to repudiate the treatment of the tort problem along the same lines as somewhat similar situations in contract. Unlike the position is contract, there is no general principle in tort whereby a court can deny a claim to *any* plaintiff once his participation in, or commission of a wrongful act is established as being in the background of his claim for damages against the defendant. Each case, or at least

each cause of action, must be considered in isolation. To quote Windeyer, J. again: [69]

> Torts differ, and I do not intend to propound any general principle to cover cases other than negligence, such as if one thief committed an assault and battery on his fellow, or slandered him to another member of their gang while they were criminally engaged.

b. *Public Policy*

A more general point now arises. In several cases the suggestion has been made that the true basis for determining whether or not the plaintiff's wrongdoing should affect his claim is some vague notion of public policy not necessarily limited by the doctrine of *ex turpi causa.* Such, indeed, is the background to the expression in cases like *Henwood* v. *Municipal Tramways Trust* [70] of the idea that the relevant statute must be interpreted in the light of its policy so as to decide whether that policy extends so far as to affect potential claims brought by an offender against the statute. Public policy, in this sense, has already been discussed. Clearly, if this approach is correct, at least where the plaintiff is in breach of some statute, it could be argued that it is founded upon some such basis as that the public interest, or the policy of the statute (if, indeed, that means anything different), require taking the plaintiff's own illegality into account in determining his rights. However, in other cases, the language employed by courts suggests that the expression "public policy" is being used in a different way, or with a different meaning. Indeed, if breaches of the common law on the part of a plaintiff are to be considered as relevant as breaches of statutory provisions, there would need to be some more general concept of public policy that is applicable in this context for a satisfactory solution to be found, or to be capable of being found in all cases of this type.[71] What could be the formulation of such a general concept of public policy? It would seem to be along the lines suggested by Lord Lyndhurst in *Colburn* v. *Patmore,* to which reference has already been made, or to quote the language of Bayley, B. in *Stephens* v. *Robinson,*[72] on the ground that, "a civil court will not make itself ancillary to the commission

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[69] *Ibid.,* at p. 417.

[70] *Op. cit.,* n. 6.

[71] It is to be noted that a distinction was drawn between these two types or categories of illegality, for this purpose, in Crago, *The Defence of Illegality in Negligence Actions,* (1964), 4 Melbourne U.L. Rev. 534. Note the restriction of the scope of that essay to *negligence.*

[72] (1872), 2 C. & J. 209, at p. 211.

of a crime". That this is something different from the *ex turpi* doctrine is indicated in several cases, in which a differentiation has been made between that doctrine and the more general notion of public policy now under discussion. It seems to have been one basis upon which the lower court decided against the plaintiff in the Canadian case of *Danluk* v. *Birkner*[73] (which, interestingly enough, was cited with approval and utilised in a Michigan case, *Manning* v. *Noa*).[74] In the Ontario case the plaintiff was in a disorderly house owned by the defendant and run by him in contravention of the Criminal Code. By being on those premises the plaintiff was also guilty of an offense. There was a raid on the premises in consequence of which the plaintiff ran away. While doing so, he fell to the ground through a door which was not reasonably safe. He sued the defendant, claiming that the latter was liable as an occupier to him as a visitor. The Ontario court held that the plaintiff was not a ninvitee to whom the normal duty owed by an occupier to an invitee was owed, which would have resulted in liability in this case, because the plaintiff was on the defendant's premises in pursuit of business that was unlawful. This ground was upheld on appeal to the Supreme Court of Canada.[75] But the Ontario court also decided against the plaintiff on the more general ground already indicated and this second reason for dismissing the plaintiff's claim was not discussed or determined on appeal. However, further Canadian support for this approach may be found in the more recent case of *Ridgeway* v. *Hilhorst*,[76] in which the learned trial judge relied heavily upon some general concept of public policy, reinforcing, if not altogether replacing the *ex turpi* doctrine, to refuse recovery on the part of the criminal plaintiff.

In Australia there has also been some consideration of this point. Thus in *Godbolt* v. *Fittock*,[77] Sugerman, J. referred to the possibility of the plaintiff being debarred from recovery, where he was injured by the defendant's negligent driving of a vehicle which the two of them were using to steal and dispose of cattle for their mutual profit, "only if it would be contrary to some recognised head of public policy that he should be awarded damages in the circumstances stated". The succeeding language of the learned judge's judgment leave ambiguous whether he regarded the *ex turpi* doctrine as such a "recognised head of public policy" or as an

[73] [1946] 3 D.L.R. 172.
[74] 345 Mich. 130 (1956); 77 A.L.R. 2d 955.
[75] [1947] 3 D.L.R. 337.
[76] (1967), 59 W.W.R. 309.
[77] (1963), 63 S.R. (N.S.W.) 617, at p. 620.

alternative ground for debarring the plaintiff from recovery. However after considering in detail both the *ex turpi* doctrine and the general concept of public policy, the learned judge concluded that the question was always one of the sufficiency of the connection to require a conclusion "that it would be contrary to public policy that damages should be awarded for the injury *or* that the injury had its origin in a *turpis causa*".[78] In the same case Manning, J.[79] referred to the invocation of what sometimes termed *ex turpi causa non oritur actio* and at other times public policy as a defence to tort actions in such instances. The learned judge did not want to generalise about this since the application of the rules of public policy in such cases would provide almost as much difficulty as controlling the "unruly horse" which the policy itself has been said to resemble.[80] He was satisfied to deal with the particular facts and deny a remedy. The idea that some abstract notion of public policy should be relied upon to solve the question was considered by Adam, J. in *Boeyen* v. *Kydd*.[81] But that judge was loathe to admit any defence of the plaintiff's own illegal act on the basis of what he termed "some supposed principle of the public policy". While there might be cases where public policy did operate in such manner, to reason from these that there was a general doctrine applicable to all cases was to go too far. "The law does not deprive criminals, and even if they are engaged in criminal enterprises, of civil remedies merely on that account".[82] That judgment received some critical consideration by Walsh, J. *in Smith* v. *Jenkins*,[83] in which it was said that the suggested instances in which Adam, J. had admitted the operation of public policy to provide a defence to liability could not be isolated from other possible instances. As Walsh, J. said: [84]

> ...if public policy provides a bar to recovery where the illegal act is a step in the execution of an illegal purpose common to the plaintiff and the defendant, it seems difficult to regard public policy as having no application to a case in which the illegal acts being committed by the plaintiff and the defendant at the time of the injury constitute the actual fulfillment of the illegal purpose which they had in common.

A stronger decision supporting the possibility that public policy is the basis for deciding these instances is that of the Supreme

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[78] *Ibid.*, at p. 624.
[79] *Ibid.*, at pp. 627-628.
[80] *Ibid.*, at p. 630.
[81] [1963] V.R. 235, at p. 237.
[82] *Ibid.*, at p. 238.
[83] *Op. cit.*, n. 64, at p. 430.
[84] *Ibid.*, at p. 431.

Court of Victoria in *Mills* v. *Baitis*.[85] In that case the plaintiff was claiming for loss of earnings resulting from the negligence of the defendant. It was not suggested that at the time the plaintiff was doing anything illegal which helped to bring about the accident or his personal injuries. In this respect this case was very different from all those which have been considered in this essay. But the plaintiff's business was being carried on in contravention of an Act which regulated town and country planning. His business of automotive engineer was being carried on in what was designated as a residential zone. The defendant accordingly argued that the loss of earnings in connection with this business ought to be disregarded by reason of the plaintiff's illegality in conducting such an operation in such a place. The defendant's argument did not succeed. It was based in the first place upon the *ex turpi* doctrine and, secondly, should such doctrine prove to be too narrow, on general considerations of public policy. The Court had no difficulty in rejecting the "narrower" doctrine as a ground of defence. Having dealt with this point Gowans, J., who delivered the leading judgment, proceeded to discuss the more general principles of public policy. While, apparently, accepting the possibility that, in appropriate circumstances, public policy, in terms of the purposes of the common law or the particular intent of an individual statute, could be invoked to deny a remedy otherwise available, the learned judge had no difficulty in finding that no such doctrine could apply in the instant case for such purpose.[86] In coming to such conclusion the judge cited two cases, in one of which, a New Zealand decision, *Le Bagge* v. *Buses Ltd.*,[87] the court disregarded the fact that the decedent, on behalf of whose estate the widow was suing, had been in breach of regulations with respect to the earnings loss of which was being claimed: while in the other of which, a decision of the Supreme Court of Victoria in *Meadows* v. *Ferguson*,[88] the plaintiff's earnings in the illegal employment of a street bookmaker were disregarded in an action by him for damages for personal injuries, in which part of the damnum alleged to have been suffered was the earnings he would have made had he not been incapacitated as a result of the defendant's negligence. The latter was distinguished, by Gowans, J. and Lush, J. It would seem that the ground for distinction was a very narrow one and related to the policy of the statutory provisions being infringed. But certainly Gowans,

[85] [1968] V.R. 583.
[86] *Ibid.*, at pp. 586-591.
[87] [1958] N.Z.L.R. 630.
[88] [1961] V.R. 594.

J. left open the possibility of a reconsideration of the earlier Victorian decision. It is interesting to note that, while many other decisions were seriously and lengthily discussed by the High Court of Australia in *Smith* v. *Jenkins*, this latest case was left virtually unmentioned. It is possible to isolate this case as dealing with its special facts, and raising a problem only in connection with a particular statute. I would suggest that it is at the very least interesting in that the court had seriously to contend with the idea that public policy of some general kind could apply to this sort of problem so as to deprive the plaintiff of a remedy that otherwise would have been his by entitlement.

These few judicial dicta on the subject of public policy, in contrast with the *ex turpi* doctrine, suggest that while there is some support for such a notion, it has not met with widespread approval among the judges who have had to contend with this issue, at least outside the discussion of such notion in relation to statutory infringements. It would appear that, in their search for some governing principle in this area of the law, the courts have not been very willing to reach out for such a nebulous, and oft-criticised doctrine to provide the basis for their decisions. In truth it may be said that such a doctrine would provide a very weak and shifting foundation for any general principle of law in this context. Enough has been said in the context of the law of contract to indicate the undesirability of calling any such general idea to solve concrete legal problems. It opens up the law to all kinds of influences: it leads to inconsistent and sometimes unjustifiable decisions: and it obfuscates true legal doctrine. I would suggest that any resort to some broad based notion of public policy is illadvised and not likely to meet with general favour.

c. *A Question of Duty*

This conclusion leads back to the third, and final suggestion which has been propounded, and that, in effect, is the rationale put forward by Windeyer, J. and other members of the High Court of Australia in *Smith* v. *Jenkins*.[89] One way of solving this problem is to take the plaintiff's illegal conduct, or his illegal situation, into account with defining what duty, if any, is owed to him by the defendant. This certainly is workable if the plaintiff's cause of action is framed in negligence, or alleged negligence in some way. Whether it is capable of producing a satisfactory answer in

[89] *Op. cit.*, n. 64.

other instances is more debatable. So far as the negligence question is concerned, an early case in which this kind of approach appears to have been adopted is *Hillen* v. *I.C.I. (Alkali) Ltd.*[90] This concerned a plaintiff workman who was himself in breach of the Docks Regulations at the time he was injured while working on a barge. He sued the owners of the barge being unloaded, alleging negligence and breach of statutory duty. In the Court of Appeal (in which this question arose, though it was not dealt with on further appeal to the House of Lords),[91] it was held that the defendants were not liable. The reason given by Scrutton, L.J.[92] was that the illegal act of the plaintiff prevented any duty arising as between defendant and plaintiff (other than to abstain from deliberately committing any act designed or calculated to injure the plaintiff while he was performing his work). The whole tenor of the judgments in the Court of Appeal was to the effect that by behaving in the illegal manner in question the plaintiff put himself outside the protection of the law of negligence. In thinking this way, the court was very much moved by the importance of maintaining and enforcing the provisions of the Docks Regulations, particularly from the point of view of those for whose benefit they had been passed.[93] A similar attitude can be seen operating in the Ontario case of *Danluk* v. *Birkner*,[94] to which reference has earlier been made. Once again the fact that the plaintiff was behaving illegally rendered the defendant immune from any duty or obligation with respect to negligent, as contrasted with deliberate conduct.

In a New South Wales case, *Christiansen* v. *Gilday*[95] the plaintiff's claim arose out of injuries resulting from a faulty winch on a ship on which he went to sea. Both plaintiff and defendant, the owner of the ship, were in breach of the *Navigation Act* in allowing the ship to proceed in such an unseaworthy or dangerous condition. It was held that the plaintiff had no remedy in respect of his injuries: and the reason for this was that he was owed no duty in the circumstances. On the other hand, in the later case of *Boeyen* v. *Kydd*[96] where the plaintiff's illegality was raised as a

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[90] [1934] 1 K.B. 455.

[91] [1936] A.C. 65.

[92] [1934] 1 K.B. 455, at p. 467.

[93] *Ibid.*, at p. 468. Note the criticism of Glanville Williams, who would not have been so strict in this regard: *op. cit.*, n. 64. Contrast the later attitude in the *Cakebread* case, *op. cit.*, n. 4.

[94] *Op. cit.*, n. 73.

[95] (1948), 48 S.R. (N.S.W.) 352.

[96] *Op. cit.*, n. 81.

defence to negligent driving by the defendant, Adam, J. would not allow such illegality to affect the duty of care which would have been owed by the defendant in "normal", i.e. non-criminal circumstances, unless it would have been against public policy to give the plaintiff the relief he sought; a proposition which necessitated the earlier considered discussion of the role of public policy in this context. The notion that, in the words of Dixon and McTiernan, JJ. in the *Henwood* case,[97] "many duties arise only out of relations which could not subsist when one of the parties is a wrongdoer or is engaged in an illegality", and therefore in appropriate cases the illegality of the plaintiff affects his situation in terms of ousting a duty that might otherwise arise, was taken up and developed in detail by the court in *Smith* v. *Jenkins*.[98] Barwick, C.J., in a very short judgment, expressed the dilemma of the law very well when he wrote: [99]

> The choice... is between a refusal of the law to erect a duty of care as between persons jointly participating in the performance of an act contrary to the provisions of a statute making their act a crime... and a refusal of the courts, upon grounds of public policy, to lend their assistance to the recovery of damages for breach in those circumstances of a duty of care owed by the one to the other because of the criminally illegal nature of the act out of which the harm arose.

The learned Chief Justice came to the conclusion that the former was the proper basis for the law's response. Where there was a relationship arising out of joint participation in an illegal act, then the law would not hold that a duty of care arose out of that relationship. Kitto, J. put it in a rather different way when he said [100] that the general principle of law was that:

> persons who join in committing an illegal act which they know to be unlawful (or... which they must be presumed to know to be unlawful) have no legal rights inter se by reason of their respective participations in that act.

It must be noted that the Chief Justice and Kitto, J. seem to be referring to a situation in which the illegal act by the plaintiff is committed in concert with the wrong of the defendant (as indeed emerges from the judgment of Scrutton, L.J. in the *Hillen* case).[101]

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[97] *Op. cit.*, n. 6, at p. 465.

[98] *Op. cit.*, n. 64.

[99] *Ibid.*, at p. 400.

[100] *Ibid.*, at p. 403.

[101] This is comparable to the *contract* situation where the plaintiff is barred from a remedy on grounds of *ex turpi*, or because he is *in pari delicto*. The consideration is illegal (or immoral) and is inextricably interwoven with the entire transaction: *c.p. Smith* v. *Jenkins*, *op. cit.*, n. 64, at pp. 411-412 (*per* Windeyer, J.).

What they said would seem to be inapposite where the illegal act of the plaintiff is quite severable from any tortious, and *a fortiori* any criminal act of the defendant. Windeyer, J., in a more full-blown analysis, discussed the whole concept of negligence, in Atkinian terms, and asked whether the plaintiff and defendant in a case such as *Smith* v. *Jenkins* were "neighbours".[102] The answer which is to be found in his judgment is that, for the purposes of the general law of negligence, such parties, *i.e.* those engaged in a mutual criminal activity, are not in that sort of relationship. But a lot depends upon whether the harm arose from the manner in which the criminal act was done. This was not causation in the old scholastic sense but one of connexion and relationship and involvement. For that the modern jargon (the expression is that of Windeyer, J.) [103] of remoteness and proximity was more useful. In other words, it may be suggested, the criminality of the plaintiff is a relevant factor in determining the scope of the defendant's duty out of which his liability is alleged to arise. In this respect an illegally acting plaintiff, though foreseeably likely to be injured, is not one in respect of whom the defendant undertakes, or is obliged to undertake any responsibility. It is true that at one point in his judgment [104] Windeyer, J. appears to be suggesting that the rationale of the denial of any liability is negation of duty, some extension of the *volenti* principle, or the refusal of the courts to aid wrongdoers. But the general intent of that judgment seems to be that a participant in a criminal offence relieves his fellows from any responsibility towards. The learned judge then went on to consider [105] whether there were any exceptions of qualifications of this principle, in the sense that there might be crimes which did not have the effect of depriving a plaintiff of his remedy.[106] Any distinction between statutory and other crimes was rejected as reviving the old difference between *mala prohibita* and *mala in se.* Other types of differentiation were also fraught with difficulty in their application. Any generalisation was avoided by the judge. But he did go so far as to consider what had been suggested with regard to the way in which statutory offences might be interpreted in this regard. On this he concluded that the right inquiry to

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[102] *Op. cit.*, n. 64, at pp. 417-419. Hence "special relationships", such as were considered in *Hedley Byrne* v. *Heller*, [1964], A.C. 465, may *create* duties or *negate* them.

[103] *Op. cit.*, n. 64, at p. 421.

[104] *Ibid.*, at p. 422.

[105] *Ibid.*, at pp. 422-425.

[106] *Cf.* Crago, *op. cit.*, n. 71.

make was "whether the statute is to be read as abrogating the basic rule . . . that there is no right of action by one criminal against another for negligence".[107] The answer to this was to be found in the terms and the subject-matter and purpose of the statute. The judgments of Owen and Walsh, JJ. also support the general proposition that no duty arises in this kind of situation rather than that the plaintiff is deprived of his right of action on some such principle as *volenti, ex turpi,* or public policy. The vital issue was the nature of the relationship between the parties. Illegality made the plaintiff someone other than a neighbour.[108] But again I raise the query whether in this context the court was confining its remarks to a case in which the illegality was common to plaintiff or defendant. The burglarious drinker of the ginger beer, in the example I gave at the outset, would seem not to be comprehended within the scope of the judgments in this case. What is the answer so far as he is concerned?

IV. Compromise and Resolution

This does lead to an important question. The judges in *Smith* v. *Jenkins* all appear to have accepted that there was some general principle denying liability in a case such as that before them. That principle appears to have been that the law of negligence does not always permit a wrongdoing plaintiff to succeed in his action.[109] At the same time the judges in that case definitely accepted the other proposition that, in the words of Walsh, J.,[110] "a plaintiff is not necessarily out of court because he was committing an unlawful act when he was injured". In saying this the court was simply following what had earlier been adopted by the High Court of Australia in the *Henwood* case. It was also a principle of law which was accepted by Barrowclough, C.J. in New Zealand in *Green* v. *Costello* [111] a case involving a fight. Some Canadian cases of the same sort also appear to have accepted that mere criminality does not deprive a plaintiff of an action.[112] Indeed in *Foster* v. *Morton* [113] the court seems to have required some clear common purpose or intention, if not indeed active mutual participation in a crime with

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[107] *Op. cit.*, n. 64, at p. 424.
[108] *Ibid.*, at pp. 426, *per* Owen J., 432-433 *per* Walsh J.
[109] *Ibid.*, at pp. 428-429 *per* Walsh, J.
[110] *Ibid.*, at p. 428.
[111] [1961] N.Z.L.R. 1010, at p. 1012: *c.p. Lane* v. *Holloway, op. cit.*, n. 15.
[112] *Hartlen* v. *Chaddock,* (1958), 11 D.L.R. (2d) 705; *Wade* v. *Martin,* [1955] 3 D.L.R. 635.
[113] (1956), 4 D.L.R. (2d) 269.

the defendant, before any recognition would be accorded to the plaintiff's criminality for this purpose. There is thus a respectable line of authority, in several jurisdictions, which is loathe to import into considerations of civil liability any question or issue of criminality. We come back to the fundamental issue, therefore: which is, whether there are legitimate grounds for ever taking such criminality into account outside the confines of the criminal law? If the answer is that there are, then the further question arises: should any differentiations be made between types, kinds, degrees, or effects of criminality? The foregoing discussion of how courts have attempted to resolve these issues, it is suggested, does not provide any satisfactory answer to the problems just posed. While there are indications in the judgments that have been examined of possible grounds for a principle (and even for the nature of any such principle), the law is as yet too diffuse. Anyone who seeks to write on this subject is therefore compelled to make his own suggestions as to a suitable way for the courts to cope with the issue of the wrongdoing plaintiff.

The first thing that can be said is that to adopt any rigid theory that makes the plaintiff's criminality a reason for denying him a remedy would be unacceptable not only on the basis of the authorities as they stand, but also having regard to general legal theory. It is clear that the courts will not take kindly to any notion that a criminal is *ipso facto* an outlaw when it comes to the protection of the law of torts. Nor is there any valid reason why they should. The days are long past when contributory negligence on the part of a plaintiff put him out of court when it came to a remedy in respect of the defendant's negligence or other wrongful conduct. Even when it is alleged that the plaintiff voluntarily assumed the risk of injury, the attitude of the courts is very stringent: clear proof must be adduced to establish a case of express or implied consent (especially the latter). The relevance of the plaintiff's own conduct, even when it does not amount to contributory negligence or assumption of risk, but might otherwise disrupt the connection between the defendant's wrongdoing and the plaintiff's harm, is also something that requires very careful analysis before it can be established to the satisfaction of a court. In short, therefore, the law of torts has advanced to the stage at which there is a greater tendency to provide compensation for an injured plaintiff, than to allow or admit of any excuse for an otherwise tortious defendant. If that is a correct assessment of the current philosophy of the courts in tort cases, it would seem reasonable to infer that, so far as the wrongdoing plaintiff is concerned, a similar lenient

attitude ought to apply. Unless compelled for very good reasons, therefore, a court should be in a position to ignore the nature of the plaintiff's conduct, where it is alleged to be criminal, and determine the case as though whatever the plaintiff had done, albeit that it was relevant in legal terms on some other basis, had not been criminal. The fact that the plaintiff had committed a crime might be of interest to the State: so far as the defendant is concerned it should be regarded as *res inter alios acta*. Taking this to its extreme, therefore, it could be concluded that the courts should never pay heed to allegations that the plaintiff was guilty of committing a criminal offence, by statute or at common law, at the time a tort was committed against him by the defendant.

By many, including judges, this would be considered far too extreme an attitude to adopt. Surely some notice should be taken of the fact of the plaintiff's criminality at the material time? The judgments that have been referred to above manifest a desire to recognise, at least sometimes, that a plaintiff who is in the wrong criminally ought not to be allowed to profit or obtain compensation in the same way as a plaintiff who is entirely innocent in the criminal sense. The question, therefore, resolves itself as being one of finding a basis for discriminating between the cases in which notice should, and those in which it should not be taken of the plaintiff's criminality. This is where the decisions already discussed reveal not only inconsistency, but also a bewildering array of suggestions. It is clear that many of these suffer from illogicality or inappropriateness. It is hard to accept that a plaintiff guilty of some criminal activity should be denied a remedy on the ground of so-called contributory negligence or voluntary assumption of risk. To apply without qualification any notion of causation, as Windeyer, J. validly pointed out in *Smith* v. *Jenkins*, is to introduce some difficult and artificial distinctions into yet another area of the law. That leaves the idea of public policy, in its "crude" state or in some more refined or limited manifestation. The comment scarcely needs to be made that the idea of public policy is sufficiently nebulous, and indeed dangerous, to render it undesirable to encourage its even wider application. All too easily can a court slip into the comfortable answer of "public policy" by way of response to the query, on what basis, or how can one justify the denial of a remedy to an otherwise deserving plaintiff. The maxim *ex turpi causa non oritur actio* is no more satisfying or helpful. Apart from the point made by Windeyer, J.,[114] that this maxim applies in con-

[114] *Smith* v. *Jenkins, op. cit.*, n. 64, at pp. 413-414.

tractual situations, not tortious ones, there is the further consideration that it is just as vague and undefined as the more basic concept of public policy, of which it is a product. The most attractive suggestion would seem to be that contained in the recent Australian case, namely, that, in defining the scope of a particular tort, the conduct of the plaintiff can and should be a material factor. This perhaps is most apposite, and possibly most easily incorporated in cases of negligence, in respect of which it has been applied.[115] Possibly it could also be utilised in relation to other torts. From what was said in *Smith* v. *Jenkins*,[116] however, it would appear that there are still some problems involved in the acceptance and application of this approach. It was left very much in the open which crimes would and which would not be relevant in determining whether, in negligence cases, for instance, the prospect of some criminal activity on the part of the plaintiff was foreseeable and should be disregarded in deciding whether a duty was owed. Yet this is a most important question: whether any classification should be made could have a world of difference on the ultimate result of litigation. In this regard there would seem to be necessity for some limited application of the doctrine of public policy, in terms of the statutory policy intrinsic in the provision of the law which the plaintiff has infringed. This does seem to be an integral part of the reasoning of Windeyer, J.[117] Therein, possibly, lies the flaw in this approach.

Insofar as this approach necessitates some reference to public policy for its proper application, not necessarily on the facts of *Smith* v. *Jenkins*, but, from what was said therein, on other, suitable occasions, there would still appear to be something indefinite and nebulous inherent in determining problems on this basis. Indeed there is uncertainty, even in the language used in that case, as to the extent of the application of Windeyer, J's. approach. What crimes are included, and what outside its scope? This is not answered expressly or otherwise. What, if any, difference is there between statutory and other crimes? That raises another problem. Is it as simple a matter to determine the public policy inherent in a common law crime as it is in respect of one created by statute? That question pre-supposes that the latter task is an easy one to perform, which, itself is debatable. The conclusion which I would suggest, therefore, is that, while the approach indicated recently by the

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[115] In the *Hillen* case, *op. cit.*, n. 90, and *Smith* v. *Jenkins, op. cit.*, n. 64.
[116] *Op. cit.*, n. 64, at pp. 423-425 (*per* Windeyer, J.).
[117] *Ibid.*, at 424; *c.p.* Walsh, J. *ibid.*, at pp. 433-434.

High Court of Australia is superficially attractive, and seems to be capable of resolving the problems that arise in this area of the law, on closer examination the answer therein provided is as uncertain, and as fraught with difficulty, as many another.

The truth would seem to be that no one approach is altogether satisfactory. On the contrary elements of several different ones can be combined to provide a reasonable and rational basis tackling the problem of the wrongdoing plaintiff, without the need for resort to any general, or even more specific doctrine of public policy, rejection of which has already been argued and urged. I would suggest that properly understood and intelligently combined, the ideas of *causation, remoteness* and *blameworthiness* can provide the answer. Causation, here, refers to the notion that the plaintiff's act is historically relevant to what happened to him. If he had not done what he did then he might not have been injured as he was. Remoteness, as indeed Windeyer, J. indicated in his judgment,[118] refers to the legal relevance of the plaintiff's act. In other words, his conduct must have been foreseeable as a possibility, and therefore as being something against which a reasonable man could and should have guarded (if the case is one of negligence) or as being a factor which could operate with the defendant's own wrongdoing to produce harm to the plaintiff. This notion is well understood and accepted in modern law in the light of the various cases which have considered the concept of remoteness in relation to negligence, nuisance, and other torts. Blameworthiness, here, means or infers what it would seem to mean or infer in the context of apportionment legislation dealing with contributory negligence. I would say that this has reference to the moral relevance of the plaintiff's act. Should what the plaintiff did be treated as involving himself in some sort of responsibility for his injury? Cases on the proper way to interpret and apply apportionment legislation reveal that what is involved is not historical or physical causation but moral responsibility or blameworthiness. It is the plaintiff's share in this which determines the extent to which he will lose his claim to damages. Fault, not causation is the test.[119]

Thus the effect of this suggestion is that in order to determine whether a wrongdoing plaintiff should be deprived of his remedy his conduct should be investigated from three aspects. Was it causally relevant? Was it not too remote a possibility? Was the plaintiff

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[118] *Ibid.*, at p. 421.

[119] See: *e.g. Pennington* v. *Norris,* [1956] 96 Commw. L.R. 10; *The Miraflores and The Abadesa,* [1967] 1 A.C. 826; *Brown* v. *Thompson,* [1968] 1 W.L.R. 1003; *Winfield and Jolowicz on Tort, op. cit.,* n. 47, at pp. 115-118.

at fault in respect of his own injury? If these three questions can be answered affirmatively, then the plaintiff should not succeed. If negatively, then his conduct should be treated as legally irrelevant to the issue of the defendant's liability. If some, but not all, are answered affirmatively, then it will be a matter of weighing the importance of the affirmative factor or factors as against the factor or factors which are negative or operate in favour of the plaintiff. Such an assessment is not unfamiliar to courts, and is not impossible for courts to make. Consequently it should be possible for a proper decision to be achieved in any given case.

The value of such an approach, it is respectfully suggested, is that it does not involve a court in testing issues of liability by reference to some notional public policy, or by making intelligent guesses as what a legislature would have intended had its mind been drawn to the particular question. Nor are questionable concepts brought into play. On the contrary a court will be able to decide a particular instance by reference to well-defined and understood legal concepts which give effect to *legal* policy (which is much more accepted and stable than so-called public policy). Just as courts have been able to work out rational principles upon which to decide cases where the plaintiff's conduct is alleged to be material to the issue of his recovery so in cases of the kind now under consideration the same result can be achieved. It is the contention of the present writer that this kind of approach to this problem can provide a means of reconciling the contradictory and inconsistent judgments that have been delivered over the years: enable courts to follow, without having to indulge in ingenious distinctions, or questionable niceties, what has been said and done before: and provide a satisfactory guide for the future. To indicate what is meant, reference can be made, in the end as well as the beginning of this essay, to the classical problem of the felonious drinker of the ginger-beer in the *Donoghue* v. *Stevenson* situation. The theft of the ginger beer is only thinly relevant historically to the plaintiff's injury: it is not especially foreseeable as a way in which injury can be incurred: and, however illegal the thief's conduct, it is not morally related to his injury from the contents of the bottle, in that he could just as easily have been affected had he come by the bottle legitimately. Consequently, a court could, and should conclude that the plaintiff must succeed as against the manufacturer. A more interesting exercise, which can be left to the reader, is to take the facts of all the decided cases which have been discussed herein, and compare the actual results against the results that would or might have been reached by an application of the test which has been propounded.