

## Duty of care in cases of illegality

*Miller v Miller* [2011] HCA 9; (2011) 85 ALJR 480

The High Court has provided a statement of the principles governing how the fact that a plaintiff acted illegally in connection with events said to give rise to liability in negligence bears upon the liability of a defendant. The judgment of the court not only clarifies whether and when a duty of care will arise in cases of illegality and joint illegal enterprise between plaintiff and defendant, but is likely to have wider implications for cases of illegality in contract and trusts and, potentially, for the criminal law.

After a night of drinking the plaintiff decided to steal a car. Shortly after the car was stolen the defendant took control of the vehicle and drove through the suburbs of Perth with the plaintiff one of nine passengers. The defendant began to drive in a dangerous manner and the plaintiff made a number of requests of the defendant to be let out of the car. The defendant drove on and subsequently the car hit a pole leaving the plaintiff a quadriplegic.

The plaintiff had taken the vehicle and both she and the defendant used the vehicle illegally contrary to s 371A of The Criminal Code (WA). The WA Court of Appeal held that the defendant owed the plaintiff no duty of care as the parties had engaged in a joint illegal enterprise, allowing the defendant's appeal.

In determining the question of how the plaintiff's illegal acts bore upon the defendant's liability in negligence, the High Court was faced with differing statements of the relevant principle from courts, including the High Court.<sup>1</sup> The decided cases exposed different bases upon which courts have, in some cases, denied recovery to a plaintiff who has engaged in a joint illegal enterprise, including that no duty of care should be found to exist, a standard of care cannot or should not be fixed and that the plaintiff assumed the risk of negligence.<sup>2</sup>

The majority concluded that, where a plaintiff sues another for damages sustained in the course of, or as a result of, some illegal act by the plaintiff, the central policy consideration is 'the coherence of the law'. The question that a court is to ask in such circumstances is 'would it be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct'.<sup>3</sup>

Demonstrating such incongruity, contrariety or lack of coherence requires careful attention to the statute



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that the plaintiff has contravened and the purposes of that statute. The majority held that this approach was consistent with authority<sup>4</sup> and consistent with the approach taken as to illegality in the context of contracts and trusts.<sup>5</sup>

Having decided that the relevant principle 'turns upon a search for statutory purposes'<sup>6</sup>, the majority turned to consider the statutory purposes of s 371A of The Criminal Code, together with s 8(1) of the Code dealing with offences committed in prosecution of a common purpose. Where, in the prosecution of such a purpose an offence is committed which 'was a probable consequence of the prosecution of such purpose' each person is deemed to have committed the offence'. The majority held that where a driver of an illegally used vehicle drove dangerously, and such driving was a probable consequence of the prosecution of the joint illegal purpose, a person complicit in the illegal use would be complicit in the dangerous driving and it would be incongruous to decide that the offending driver owed the passenger a duty to drive with reasonable care. Any alternative conclusion would be inconsistent with the purpose of the statute proscribing illegal use which is to deter and punish using a vehicle in circumstances that often lead to dangerous driving.<sup>7</sup>

As a consequence of the above, it was clear that, when the defendant began to illegally use the car that the plaintiff had decided to steal, the defendant did not owe the plaintiff a duty of care. The majority noted that s 8(2) of the Code provided for a person to withdraw from the prosecution of an unlawful purpose by communicating that withdrawal and taking all reasonable steps to prevent the commission of the offence. The majority held that, by her requests

to be let out, the plaintiff had withdrawn from the common purpose prior to the accident and there were no reasonable steps that she could take to prevent the continued illegal use of the vehicle.<sup>8</sup>

The consequence of the majority finding an effective withdrawal from the unlawful common purpose was that, from the time of that withdrawal, it could no longer be said that the defendant owed the defendant no duty of care. As a consequence, the majority allowed the appeal.

*His Honour set out a possible submission for the defendant that the request to stop the vehicle was insufficient to terminate the joint illegal enterprise as it could not be said she took all reasonable steps to prevent the commission of the offence in circumstances where her conduct had rendered it impossible for any reasonable steps to be taken.*

While the importance of the majority judgment in *Miller v Miller* in the area of tort is clear on the face of the judgment, it was the impact of the judgment on the criminal law that appeared to trouble the dissenting judge, Heydon J. His Honour agreed with the majority that no duty of care was owed up to the time of the plaintiff's request to be let out of the car, however his Honour held that the plaintiff had failed to demonstrate that her requests amounted to a withdrawal, particularly in circumstances where the

'withdrawal point' was not substantively argued before the court or the courts below.<sup>9</sup>

Heydon J noted that the withdrawal point was difficult, complex and of 'very great importance in criminal law'. His Honour set out a possible submission for the defendant<sup>10</sup> that the request to stop the vehicle was insufficient to terminate the joint illegal enterprise as it could not be said she took all reasonable steps to prevent the commission of the offence in circumstances where her conduct had rendered it impossible for any reasonable steps to be taken.

It remains to be seen whether Heydon J is correct and the majority's brief treatment of the application of s 8(2)<sup>11</sup> will result in the legacy of *Miller v Miller* being felt as much in the criminal law as in the law of tort.

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#### Endnotes

1. See *Smith v Jenkins* (1970) 119 CLR 397, *Jackson v Harrison* (1978) 138 CLR 438 and *Gala v Preston* (1991) 172 CLR 243.
2. [2009] HCA 9 at [70].
3. [2009] HCA 9 at [15] – [16].
4. In particular, *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438.
5. [2009] HCA 9 at [74].
6. [2009] HCA 9 at [98].
7. [2009] HCA 9 at [93] – [94] and [101].
8. [2009] HCA 9 at [104].
9. [2009] HCA 9 at [117].
10. [2009] HCA 9 at [122] – [131].
11. [2009] HCA 9 at [103] – [106].