PROXIMITY AND ILLEGALITY IN NEGLIGENCE*

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In the recent case of *Gala* v *Preston*,[1] the High Court was compelled to consider and re-evaluate the rationale and extent of the defence of illegality in an action for common law negligence. The case is of jurisprudential significance because four members of the Full Bench[2] sought to provide an analysis within the framework of the requirement of proximity in the duty of care. However, the result, and the process of reasoning employed to reach it, serve merely to highlight the Court's struggle to deal with this developing area of law.

In negligence cases where the plaintiff and defendant have jointly participated in an illegal act, the courts have had considerable difficulty in deciding upon the appropriate approach to take when considering whether to preclude recovery to an injured party.[3] In *Smith* v *Jenkins*,[4] it was held that no duty of care arises between the participants in the commission of an offence for injuries sustained in the actual performance of the criminal act. So stated, the case enunciated a broad-ranging principle that did not discriminate between various types of offences nor, indeed, degrees of participation by the plaintiff. It was mitigated somewhat in *Progress and Properties Ltd* v *Craft*,[5] where Jacobs J held that no duty of care will arise where the negligent act complained of

> . . . may itself be a criminal act of a kind in respect of which a court is not prepared to hear evidence for the purpose of establishing the standard of care which was reasonable in the circumstances.[6]

In so doing, his Honour implemented what he called the 'effect' of *Smith* v *Jenkins*, in a rule governed solely by dictates of public policy (thus gaining a welcome flexibility, but also sacrificing a measure of certainty). In effect, the decision established that the commission of an unlawful act was only relevant to a court's inquiry insofar as it could not be separated from the alleged negligence. This line of reasoning was subsequently followed in *Jackson* v *Harrison*[7] where, as in *Progress and Properties* but not in *Smith* v *Jenkins*, the

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1 (1991) Aust Torts Reports para 81–105; 65 ALJR 366.
2 Mason CJ, Deane, Gaudron and McHugh JJ (hereinafter referred to as the majority, although the appeal was unanimously allowed); Brennan, Dawson and Toohey JJ delivered separate judgments.
3 See generally W J Ford, 'Tort and Illegality: The *Ex Turpi Causa* Defence in Negligence Law' (1977–8) 11 MULR 32 and 164.
4 (1970) 119 CLR 397; the facts in that case were very similar to those in the instant case.
5 (1976) 135 CLR 651.
6 Id 668.
7 (1978) 138 CLR 438.

plaintiff was permitted to recover because the Court found that the standard of care could be established without regard to the illegality.

It was within this legal context that the instant case was to be decided. The plaintiff (respondent) and the defendant (appellant) had, on 14 August 1984, consumed an excessive amount of alcohol, before proceeding with two other parties to steal a motor vehicle for a long 'joy ride'. Such action was contrary to s 408A of *The Criminal Code* 1899 (Qld) (as amended) for which offence both were subsequently convicted. After a short stint of driving, the plaintiff retired to sleep in the rear seat of the vehicle while the defendant took over. Shortly before midnight, the vehicle left the roadway and struck a tree, severely injuring the plaintiff. In an action commenced by the plaintiff in the District Court, the trial judge found for the defendant on the basis that in light of the decisions in the cases mentioned above, the illegal nature of the parties' joint enterprise prevented him from ascertaining the appropriate standard of care and thus no duty arose. An appeal to the Full Court of the Supreme Court of Queensland was upheld, on the finding that the illegal use of the motor vehicle was not a causally relevant factor at the time of the accident. The defendant then appealed to the High Court.

After examining the previous decisions of the Court on the issue of illegality as a defence to negligence, the majority decided to reconsider the position '. . . to take account of developments affecting the concept of the duty of care' since those cases were decided, namely the requirement of proximity. Their Honours, in considering the general nature of the concept, stated:

> In determining whether the requirement is satisfied in a particular category of case in a developing area of the law of negligence, the relevant factors will include policy considerations. Where, as in the present case, the parties are involved in a joint criminal activity, those factors will include the appropriateness and feasibility of seeking to define the content of a relevant duty of care.[8]

As such, it was simply seen as a matter of examining the relationship between the plaintiff and defendant to determine whether it was proximate. In the result, the majority felt that the ordinary driver/passenger relationship of the parties was subsumed or transformed by the criminal activity, which '. . . gave rise to the only relevant relationship between the parties', so that it was neither 'possible [n]or feasible' for a court to ascertain the appropriate standard of care. This observation, it was contended, led to the conclusion that the requisite relationship of proximity failed to arise.[9]

It is difficult, however, to reconcile this reasoning with principle. When the modern notion of proximity was first espoused by Deane J in *Jaensch* v *Coffey*[10] as '. . . a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care',[11] his Honour proffered several factors, viz physical, circumstantial and causal proximity, as

[8] *Gala* v *Preston* (1991) Aust Torts Reports 68,945, 68,951; 65 ALJR 366, 370.
[9] Id Aust Torts Reports 68,952; ALJR 371.
[10] (1984) 155 CLR 549.
[11] Id 584.

relevant to the general notion of the closeness of the parties' relationship. These elements, along with 'reliance', introduced in cases of nonfeasance and pure economic loss,[12] have as an underlying theme some positive, intimate aspect of the association between the parties. Conversely, illegality, and its concomitant considerations of policy, are factors unrelated to this general conception. While certainly 'an illegal activity adds a factor to the relationship' in general of the parties, it has no bearing upon an inquiry into whether the plaintiff is 'so closely and directly affected' by the act of the defendant (at least as far as physical or causal proximity is concerned) so as to give rise, where reasonable forseeability is satisfied, to a duty of care.[13] In a similar way, other aspects of the relationship between the parties are irrelevant to the determination of proximity — the notion is not all-encompassing.

Nonetheless, the idea of proximity utilised and developed by various members of the High Court, in this and several previous cases, '. . . embraces considerations unrelated to closeness or nearness'.[14] It is these considerations which, in the context of a particular case, the courts have taken account of in their determination as to whether a relevant duty of care is recognised. Ironically, this approach gives rise to a 'miscellany of disparate and largely unrelated rules' which, by its very use, Deane J sought to avoid. In this way, it renders itself open to the criticism that

> . . . it cannot be applied directly to the facts of any given case nor does it of itself identify the particular propositions of law that the proximity test will embody in these different categories of case: in this sense the proximity criterion is empty.[15]

Widening the principle to include 'considerations of public policy' that are unrelated to the ordinary meaning of proximity[16] is untenable, because it serves merely to 'espouse a broad theory . . . unembarrassed by precise content';[17] the rule no longer preserves the decisive nature of a touchstone and thus adds nothing to the analysis of a court.

Employing this process to determine the legal texture of the parties' relationship when considering proximity, solely by reference to any illegal act

12 See *Sutherland Shire Council* v *Heyman* (1985) 157 CLR 424.

13 Cf the comments of Dawson J in *Gala* v *Preston* (1991) Aust Torts Reports 68,945, 68,965; 68 ALJR 366, 380.

14 Ibid.

15 J F Keller, 'The Proximity of Past and Future: Australian and British Approaches to Analysing the Duty of Care' (1989) 12 *Adel L R* 93, 98; cf Brennan J's objection in *San Sebastian* v *The Minister* (1986) 162 CLR 340, 368:

> If proximity were misunderstood as being a *particular* proposition of law expressing a touchstone for resolving a *particular* case, the judge would be required to define its legal content according to some notion of whether it was appropriate to impose a duty of care in that case. A rule without specific content confers a discretion . . . Damages in tort are not granted or refused in the exercise of a judicial discretion.

See also *Caparo Plc* v *Dickman* [1990] 2 WLR (HL) 358, 379 per Lord Oliver of Aylmerton.

16 And that meaning attributed to it by Lord Atkin in *Donoghue* v *Stevenson* [1932] AC 562, 580–1, not an inconsequential consideration, since Deane J purported to extract the proposition in *Jaensch* directly from his Lordship's famous 'neighbour dictum'.

17 *Gala* v *Preston* (1991) Aust Torts Reports 68,945, 68,957; 65 ALJR 366, 374 per Brennan J.

by the parties at the relevant time, is superficial and inappropriate. This is especially so when it involves ignoring other aspects of their association which do render it proximate. There is a logical inconsistency in determining proximity, a component of the duty of care, by reference to an element of the factual matrix of a case — the illegal conduct — that is treated as relevant to whether or not it is '... possible or feasible for a court to determine ... an appropriate *standard* of care'. Different considerations are involved and the two processes remain distinct, as was recognised explicitly in *Cook* v *Cook*:[18]

> *Assuming the requirement of proximity remains satisfied*, the standard of care, while remaining an objective one, must be adjusted to the exigencies of the relevant relationship in that ... more precisely confined category of case[19] (Emphasis added).

Hence the question of illegality is only material when considering the circumstances between the parties in deciding, and perhaps modifying, the standard of care owed.[20] The majority in *Gala*, in their determination to analyse illegality in terms of proximity, have attempted to avoid this result by holding that the illegal enterprise of plaintiff and defendant was the '... only relevant relationship between the parties and constituted the whole context of the accident', ignoring the ordinary relationship of driver and passenger.

Yet even if this assertion is accepted, other difficulties emerge. Exactly when the relationship of the parties may be lifted out of that which would normally, in the absence of illegality, be attributed to them and be characterised solely as that of participants engaged in an unlawful exercise is not made clear in the judgment. This shortcoming cannot be excused on the basis that the circumstances in which this step should be made depends solely upon the facts of any particular dispute because, as Deane J said in *Jaensch*, the process of classification is one arrived at through legal reasoning.[21] Moreover, even if one were able to both categorise the relationship in this way, and accept the consequent and implicit conclusion that circumstantial proximity is absent, there is no elucidation by the majority as to the reasons why causal and physical proximity, obviously existing in fact, fail in this context to have any legal significance. Instead, their Honours prefer to rely on the 'feasibility' policy consideration as the determinative factor, notwithstanding that it is entirely unrelated to the notion of nearness or closeness of relationship in the concept of proximity. This decision is in reality merely a return to the principle of *Jackson* v *Harrison* under the veil of proximity — a retrograde step because it serves only to further obscure the application of the law in this area. The entire approach employed by the majority lacks principle and coherency.

18 (1986) 162 CLR 376.
19 Id 383–4.
20 Even to the extent of refusing to arrive at an appropriate standard, so that the duty, otherwise present, cannot be said to continue to exist — 'If ... no standard of care can legally be determined, it cannot be said that there is any duty of care': *Jackson* v *Harrison* (1978) 138 CLR 438, 458 per Jacobs J.
21 (1984) 155 CLR 549, 585.

In contrast, Brennan J,[22] maintaining his position of 'persistent dissent', preferred to resolve the issue of illegality devoid of any reference to what he called 'the extended concept of proximity'. Instead, his Honour stated the appropriate test as being the refusal to admit a duty of care between joint offenders in a criminal act where that admittance '... would condone the [offender's] breach of the [criminal] law ...'.[23] In determining whether such a condonation would follow from establishing a duty, his Honour considered two questions to be relevant: (1) the materiality of the illegal conduct to the relationship out of which the duty is said to arise, and (2) whether the admission of a duty would impair the normative influence of the criminal law. In the latter inquiry, matters to be examined would include the gravity of the offence and the mischief or threat it is designed to prevent.

It will be seen that in this approach Brennan J further modifies the rules in *Jackson* and *Progress and Properties* in that he also takes account of the policy objectives behind the existence of the offence of which the plaintiff is in breach, arguably allowing for a fairer utilisation by the courts of the illegality defence. While his formulation still involves notions of public policy (which he recognises), the explicit enunciation of these considerations by the courts, instead of retreating behind the mask of the wider notion of proximity, will allow for a more coherent handling of illegality in negligence through *stare decisis*. For these reasons it is the preferred rationale.[24]

Nonetheless, Brennan J's explicit rejection of proximity[25] as a separate conception in law, viewing it as nothing more than reasonable foreseeability, is unfounded. While his criticism of it as 'too amorphous a concept' is undoubtedly true when applied to the formulation adopted by the majority of the High Court in this and prior cases, it is yet to be seen whether that observation is appropriate when directed to the concept as asserted herein. Granted, the concept may have been enunciated by Lord Atkin as *part* of his test of reasonable foreseeability, but the phenomenal expansion of the extent of that notion has meant that, particularly in 'hard' cases,[26] a further control is required. Proximity, encompassing an identifiable notion of closeness, in a physical and an intangible sense, of the relationship between the parties, may, through development of its content *in accordance with and in furtherance of that view*, prove to be another unifying component in the determination of the existence of a duty of care. Whether it may be refined to the point where it might be applied as a self-contained principle (in the manner of forseeability),

[22] In substance, Dawson J's reasoning proceeded in a similar vein; Toohey J merely applied directly *Smith* v *Jenkins*.

[23] *Gala* v *Preston* (1991) Aust Torts Reports 68,945, 68,961; 65 ALJR 366, 377.

[24] However, his Honour's formulation still fails to eliminate the wide scope for judicial discretion in the principle's operation, the very danger which he perceived as the downfall of proximity.

[25] In accordance with his position in all cases since *Jaensch*: see, eg, *Sutherland Shire Council* v *Heyman* (1985) 157 CLR 424, 477–9 and *San Sebastian* v *The Minister* (1986) 162 CLR 340, 367–9.

[26] Such as those for nervous shock, nonfeasance and pure economic loss.

or whether it is best viewed as just a superfluous '... means of expressing the proposition that ... reasonable forseeability ... is not enough',[27] is unclear.

What *is* clear, however, is that illegality is a consideration which bears no relevance to proximity. It now remains to be seen whether the High Court is able in future decisions to return to these issues and re-analyse each in ways that accord more with logic and legal principle. Until it does, the 'wilderness of single instances' seems set to proliferate.

[27] *Gala* v *Preston* (1991) Aust Torts Reports 68,945, 68,965; 65 ALJR 366, 380 per Dawson J.