

STANDARD OF CARE, PROXIMITY AND JOINT ILLEGAL ENTERPRISE

(*Gala v. Preston and the Joy-Rider*)

by

Frances McGlone*

In *Gala v. Preston*¹ the High Court considered for only the fourth time the question whether a plaintiff's and a defendant's joint involvement in an illegal activity will negate any duty of care the defendant would otherwise owe the plaintiff. In *Smith v. Jenkins*² the Court held that the joint unlawful use of a motor vehicle did negate such a duty. However, in two subsequent cases, *Progress and Properties Ltd v. Craft*³ and *Jackson v. Harrison*⁴, the Court held that the duty of care was unaffected where the joint illegal activity involved a breach, respectively, of a safety and a traffic regulation.

In *Gala v. Preston* all seven Justices agreed that the three previous decisions of the Court were authority for basically two propositions. First, that in establishing whether a duty of care existed it is necessary to look at the relationship between the negligence complained of and the joint illegal enterprise. Where those two factors are sufficiently inter-connected, the Court will decline to hear evidence to determine the appropriate standard of care. Hence, no duty of care will exist between the parties involved in the joint illegality. Secondly, that "in cases of illegality arising from infringement of statutory provisions which are designed to promote safety, . . . there is no reason why illegality of that kind should negate the existence of a duty of care"⁵.

In the present case the Court was requested to reconsider these authorities and specifically the decision in *Smith v. Jenkins* because in *Gala v. Preston* the joint illegal activity was also the unlawful use of a motor vehicle; pursuant to s.408A of the *Queensland Criminal Code*. However, an additional factor in *Gala v. Preston* was that at the time of the accident both the plaintiff and the defendant had a blood alcohol concentration in excess of 0.2%.

At first instance the judge found that the plaintiff was 60% contributorily negligent because his own inebriated state prevented him from assessing the alcohol-impaired condition of the defendant and also because of his failure to wear a seatbelt. The trial judge specifically rejected a volenti defence. However, the judge ultimately dismissed the plaintiff's action because the High Court authorities prevented him from determining the appropriate duty of care owed by the defendant to the plaintiff when they were jointly involved in the unlawful use of the motor vehicle.

The Queensland Full Court reversed this decision on the basis that the concept of proximity and specifically the decision in *Cook v. Cook*⁶ had modified the approach to be taken in such cases. Accordingly, in looking at the details of the relationship of the parties,

* B.A., Dip. Ed, LL.B., Barrister, Lecturer, Queensland University of Technology.

1. (1991) 65 ALJR 366.
 2. (1970) 119 CLR 397.
 3. (1976) 135 CLR 651.
 4. (1978) 138 CLR 438.
 5. *Supra* n.1 at 370.
 6. (1986) 162 CLR 376.

the Full Court did not think that the illegal venture "necessitated the vehicle being driven otherwise than in accordance with the ordinary reasonable standard expected of an experienced, skilled and careful driver"⁷. Hence the Court held that the respondent did owe, and had breached, the normal driver-passenger duty of care subject to the trial judge's finding of the appellant's 60% contributory negligence.

The appeal to the High Court was on the issue of whether the joint illegal activity negated the duty of care owed. All seven Justices held that the appeal should succeed but their reasons for that result varied.

The majority joint judgment written by Chief Justice Mason and Justices Deane, Gaudron and McHugh considered that proximity as developed by that Court and specifically the decision in *Cook v. Cook* was relevant to the instant case. Nevertheless the majority reached the *opposite* conclusion to that of the Queensland Full Court. The explanation for the contrasting result lies in the differing approaches taken to the issue of the parties' intoxication and its relevance to the proximate nature of their relationship. In looking at the parties' relationship the Full Court ignored the intoxication evidence and viewed the illegality as a separate and discrete issue. Hence they looked at such factors as that it had been several hours since the vehicle was stolen, that the parties were some hundreds of kilometres from where the vehicle was stolen and that there was nothing to suggest that the vehicle was being driven in an attempt to avoid capture by the police. Only McPherson J referred to the amount of alcohol ingested, saying: "the influence of liquor was not raised as a defence in the defendant's pleadings and, whatever its legal effect might have been in this case, cannot now be entertained as a reason in law for denying the plaintiff the right to pursue his action for the injuries he sustained"⁸.

In contrast, the four High Court Justices regarded the parties' intoxication as relevant to the circumstances of their relationship. This factor taken together with the unlawful use of the motor vehicle, which involved the possibility of police pursuit and/or arrest, was sufficient to displace "the ordinary standards of competence and care expected of a driver"⁹. The Justices then declined to determine what was the appropriate standard of care on the basis that to do so "would involve a weighing and adjusting of the conflicting demands of the joint criminal activity and the safety of the participants"¹⁰. They held that it was "neither appropriate nor feasible for the courts to engage"¹¹ in such an exercise. Consequently the majority reached the decision that in the circumstances of the present case there was no "relationship of proximity which would generate a duty of care"¹².

However, there are several difficulties with the majority's approach to the issue. First, they have not addressed the illegality issue *per se*. They have not indicated what weight they attached to the respective elements of illegality and intoxication. In their judgment, the Justices twice said that they found the trial judge's rejection of the *volenti* defence "surprising"¹³. The effect of the majority judgment was to reinstate the *volenti* defence in the guise of proximity or rather, in the lack thereof. In any event, the question remains whether the majority would have reached the same conclusion if the parties had been unaffected, or even less affected, by alcohol.

Secondly, although both the majority in the High Court and Wilson J. (with whom

7. [1990] 1 Qd.R. 170 at 179.

8. *Ibid* at 172.

9. *Supra* n.1 at 371.

10. *Ibid*.

11. *Ibid*.

12. *Ibid*.

13. *Ibid* at 367 and 371.

Connolly J. agreed) in the Full Court referred to Justice Jacob's comments in *Jackson v. Harrison* that at some point of time "the circumstances of taking the vehicle"¹⁴ will cease to have "any significant relationship to the manner in which the vehicle was being driven"¹⁵, the majority gave no indication of how it is to be determined when, if ever, this point of time is reached. As the Full Court obviously thought that, in the circumstances of Gala's and Preston's relationship, that point of time had been reached, it is unfortunate that the High Court majority did not provide more guidance on this issue.

In contrast, in their respective judgments, Justices Brennan, Dawson and Toohey each addressed and attempted to resolve these difficulties. All three Justices ignored the blood alcohol readings of the parties and addressed the illegality issue per se. Each came to the conclusion that public policy dictated that throughout the course of an illegal venture, no duty of care will be owed between the participants in that venture. This is not because of the difficulty in establishing an alternate standard of care but rather as a reflection of community values.

Justice Brennan based his decision on the need to maintain the normative influence of the criminal law. He rejected the standard of care approach on the basis that this would "allow a co-offender, even in the most serious of crimes, to recover if he could show that the illegality did not affect the [standard of] care which could be expected in the execution of the crime"¹⁶. Both the proximity and the normative influence approaches were rejected by Justice Dawson who said rather that as a matter of policy it was repugnant "[t]o give validity to the criminal enterprise by using it as a foundation for erecting a standard of care"¹⁷. Justice Toohey approached the present case as falling squarely within the principles established in *Smith v. Jenkins* and there being no policy reason why the decision should not be upheld¹⁸.

All three Justices agreed that a distinction must be drawn between those illegal acts which won't negate a duty of care (eg. breaches of statutory regulations) and those that will (eg. unlawful use of a motor vehicle, murder, etc). However none was able to provide further guidelines at this stage as to where the line should be drawn. Justice Toohey also foreshadowed problems which might arise in the "sufficiency of the connection between that [illegal] conduct and the act or omission said to give rise to the cause of action"¹⁹.

One further difficulty raised by the High Court majority judgment is the sufficiency of the test of proximity in determining whether a duty of care exists in situations such as that raised in *Gala v. Preston*. As indicated, the majority judgment does leave several important issues unresolved. Also the fact that the three Justices in the Full Court reached the opposite conclusion to the four High Court Justices whilst purportedly applying the same test is a matter of concern. As Brennan J said in his own judgment "[t]he law must keep an order and form which admit of practical application, for justice requires both consistency in decisions and discrimination between cases on bases that can be articulated and applied"²⁰.

It is not surprising, in the light of his previous decisions, that Brennan J. again rejected proximity as a basis for establishing whether a duty of care existed. More surprising is Dawson J's statement that in the present case "I do not derive any great help from the notion of proximity as it has been developed in recent decisions of this Court"²¹. He goes on

14. *Ibid.* at 370.

15. *Ibid.*

16. *Ibid.* at 377.

17. *Ibid.* at 381.

18. *Ibid.* at 387.

19. *Ibid.*

20. *Ibid.* at 374.

21. *Ibid.* at 380.

to say that in looking at the relationship of the parties “[m]erely to describe it as a matter of proximity is to mask the problem”²².

Justice Toohey also impliedly rejected the utility of the proximity test in the circumstances of this case when he described *Cook v. Cook* as having no relevance to the “resolution of this appeal”²³.

If proximity is to develop as the unifying rationale that many have hoped then the High Court will have to be more forthright in explaining what are the principles on which proximity is based. Where those principles relate to matters of policy these should be explained for what they are and proximity not be allowed to serve as a “mask” for the underlying reasoning of the Court.

22. *Ibid.*

23. *Ibid.* at 386.