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STOP! I WANT TO GET OUT!—THE JOINT ILLEGAL ENTERPRISE WHICH CEASED TO BE

Miller v. Miller[1]

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I. INTRODUCTION

The defence of illegality, although long-established in tort law, is pleaded relatively infrequently, and—with some notable exceptions, particularly during the past few years[2]—rarely with success.[3] The courts are understandably cautious about accepting the application of any full defence, since the inevitable consequence of doing so is to destroy a claimant's action against a defendant whose tort has caused him harm. Some judges have also expressed discomfort about the sense of moral judgment which they see as an intrinsic component of illegality. In negligence actions, however, the special form of illegality which results in the plea of 'joint illegal enterprise' has been more widely accepted as a legitimate basis for refusing a claim. Although some have questioned the justification for treating a claimant who participates in a joint illegal enterprise with the defendant as particularly undeserving of compensation,[4] the courts have traditionally regarded—and continue to regard—this as one of the more appropriate situations in which to refuse to award damages.[5]

In the past forty years, the High Court of Australia has been called on to decide a number of cases—including *Smith v. Jenkins*,[6] *Jackson v. Harrison*[7] and *Gala v. Preston*[8]—involving injuries sustained by claimants engaged with defendants in

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1 [2011] HCA 9 [*Miller v. Miller*].

2 For two comparatively recent cases in which the defence succeeded, see the House of Lords' decisions in *Gray v. Thames Trains* [2009] 3 W.L.R. 167 and *Moore Stephens v. Stone Rolls Ltd* [2009] 1 A.C. 1391.

3 See *e.g.*, *Saunders v. Edwards* [1987] 1 W.L.R. 1116 (C.A.); *Revill v. Newbery* [1996] Q.B. 567 (C.A.); *Reeves v. Commissioner of Police of the Metropolis* [2001] 1 A.C. 360 (H.L.); and *United Project Consultants Pte Ltd v. Leong Kwok Onn* [2005] 4 S.L.R.(R.) 214 (C.A.).

4 See *e.g.*, James Goudkamp, "The Defence of Joint Illegal Enterprise" (2010) 34 Melbourne U.L. Rev. 425 at 440-446. For further discussion of this point, see *infra* text at note 51 *et seq*.

5 See *e.g.*, *Ashton v. Turner* [1981] 1 Q.B. 137 (Q.B.D.) and *Pitts v. Hunt* [1991] 1 Q.B. 24 (C.A.).

6 (1970) 119 C.L.R. 397 (H.C.A.).

7 (1978) 138 C.L.R. 438 (H.C.A.).

8 (1991) 172 C.L.R. 243 (H.C.A.).

the illegal use of motor vehicles. Recently, the Court revisited the issue of joint illegal enterprises in yet another motor vehicle case, *Miller v. Miller*. The distinguishing feature of *Miller v. Miller* was that before the accident in which the claimant was injured took place, she sought to leave the vehicle which was the subject of the criminal activity. By a majority of 6:1, their Honours held that the claim against the defendant driver was *not* defeated, since the claimant's request to leave had indicated her withdrawal from the joint illegal enterprise.

II. The Facts and the Judgments of the Lower Courts

In the early hours of the morning of 17th May 1998, the claimant, Danelle Miller, then aged 16, was outside a nightclub in a Perth suburb with her sister and a cousin. All three had been drinking. Since the last train had gone and they did not have sufficient money for a taxi, they decided to steal a car. The claimant managed to start one in a car park near the nightclub, and she asked her older sister to drive her and her cousin home. As they were leaving the car park, they encountered her mother's cousin, the defendant, Maurin, who was also intoxicated. Then aged 27, the defendant was something of a father figure to the claimant. He was aware that the car was stolen, but nevertheless offered to drive her and the others home, and they accepted his offer notwithstanding the fact that he was, to their knowledge, unlicensed. Once the defendant was in the driver's seat, five of his friends got in. This brought to nine the number of occupants in a sedan which was licensed to carry five people. As the journey to the claimant's house progressed, the defendant began to drive increasingly erratically and ignore red lights. The claimant expressed concern and asked him to slow down, but he said that they would be "all right".[9] She then twice asked him to stop so that she could get out of the car, but he refused to do so. Soon after this, he lost control of the vehicle and it struck a metal pole, killing one passenger and leaving the claimant with injuries which resulted in quadriplegia.

The claimant brought an action in negligence against the defendant. In proceedings in the District Court of Western Australia, the defendant argued that at the time of the accident, the claimant was complicit in his violation of the *Criminal Code Compilation Act*, which prohibited the use of a motor vehicle without the owner's consent, and was thus engaged with him in a joint illegald enterprise.[10] The parties agreed that the only issue to be pursued was whether this would negate the defendant's liability to the claimant.[11] They also agreed that, if it did not, the claimant's damages should be reduced by 50% to take account of her contributory negligence. The trial judge, Schoombee D.C.J., found that the duty of care was not negated.

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[9] *Miller v. Miller*, *supra* note 1 at para. 3.

[10] The *Criminal Code Compilation Act 1913* (W.A.), s. 371A(1) [*Criminal Code*] provided that:

> A person who unlawfully:
> (a) uses a motor vehicle; or
> (b) takes a motor vehicle for the purposes of using it; or
> (c) drives or otherwise assumes control of a motor vehicle;
> without the consent of the owner or the person in charge of that motor vehicle, is said to steal that motor vehicle.

[11] The defendant initially argued both that he had not failed to exercise reasonable care, and that the claimant had voluntarily assumed the risk. However, he later waived these pleas.

In support of this conclusion, her Honour referred to a number of considerations, including the facts that the claimant expected the defendant to take good care of her and that she did not appreciate that the journey would be fraught with risk.[12]

In the Western Australian Court of Appeal,[13] the defendant's appeal was unanimously allowed. The principal opinions were delivered by Buss and Newnes JJ.A. Applying the two-stage test for joint illegal enterprises formulated by the High Court of Australia in *Gala v. Preston*[14]—that the claimant suffered damage while engaged in a criminal enterprise with the defendant, and that the nature of the enterprise was one which made it "impossible" or "not feasible" to ask how a reasonable person in the position of the defendant would have acted[15]—they concluded, *inter alia*, that the offence of unlawfully using a motor vehicle was a serious one[16] and that, in the circumstances, a reasonable person in the claimant's position would have realised that the journey would be extremely hazardous.[17]

III. The Decision of the High Court of Australia

In the High Court of Australia, the majority (French C.J., Gummow, Hayne, Crennan, Kiefel and Bell JJ.) based their judgment on the claimant's requests that the defendant stop the car so that she could get out. They held that, while the claimant and the defendant, and perhaps everyone else in the car, became parties to the joint illegal enterprise when they agreed to let the defendant drive them in the stolen vehicle, the claimant's participation in the enterprise ended when she asked to leave.[18]

In reaching this conclusion, their Honours examined a number of decisions involving joint illegal enterprises, the most relevant of which were the decisions of the High Court of Australia itself in *Smith v. Jenkins*,[19] *Jackson v. Harrison*[20] and *Gala*

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[12] *Miller v. Miller* (2008) 57 S.R. (W.A.) 358 at paras. 77–107 [*Miller v. Miller* (D.C.)].

[13] *Miller v. Miller* [2009] WASCA 199 [*Miller v. Miller* (C.A.)].

[14] *Supra* note 8 at paras. 22, 27.

[15] *Miller v. Miller* (C.A.), *supra* note 13 at paras. 67, 68. Their Honours held that the test had survived the demise of proximity in Australia.

[16] At the time, it was punishable by imprisonment for up to seven years. This was later increased under s. 378 of the *Criminal Code*, *supra* note 10, to eight years.

[17] *Miller v. Miller* (C.A.), *supra* note 13 at paras. 78-90 (Buss J.A.), 148-153 (Newnes J.A.).

[18] *Miller v. Miller*, *supra* note 1 at para. 9. The Court observed (at para. 6) that if the case had arisen in a number of other Australian jurisdictions, it would have been necessary to refer to legislation regulating the recovery of damages for personal injuries suffered when a claimant was acting illegally. However, since no such provisions existed in Western Australia, the issue turned upon the application of common law principles.

[19] *Supra* note 6. In *Smith v. Jenkins*, the High Court of Australia unanimously held that a claimant could not obtain damages from the driver of a motor vehicle which both parties were using illegally when the claimant was injured. The judgments of Barwick C.J. (at 400), Kitto J. (at 404), Windeyer J. (at 422) and Owen J. (at 425) focused primarily on the claimant and defendant as joint participants in the crime, although Walsh J. (at 427) stated that there was "[no] single rule" for determining such cases. The majority in *Miller v. Miller* (H.C.A.), *supra* note 1 at para. 46, observed that insofar as the decision depended on assigning a single characterisation to the relationship of the parties, it was flawed.

[20] *Supra* note 7. In *Jackson v. Harrison*, a passenger's claim for injuries sustained while travelling in a car with a driver whom he knew to be disqualified was allowed by the majority (Mason, Jacobs, Murphy and Aickin JJ., Barwick C.J. dissenting). In the most-widely cited judgment, Mason J. (at 453, 455, 456) suggested that actions in joint illegal enterprise cases should fail only when it was "impossible for the court to determine the standard of care which is appropriate to be observed." However, the majority in

v. Preston.[21] Although each of these decisions had involved separate judgments raising various policy considerations, the majority of their Honours drew from them (and from earlier cases)[22] a number of common threads:[23]

> First, the fact that a [claimant] was acting illegally when injured as a result of the defendant's negligence is not determinative of whether a duty of care is owed. Second, the fact that [claimant] and defendant were both acting illegally when the [claimant] suffered injuries… is not determinative. Third, there are cases where the parties' joint participation in illegal conduct should preclude a [claimant] recovering damages for negligence from the defendant. Fourth, different bases have been said to found the denial of recovery in some, but not all, cases of joint illegal enterprise: no duty of care should be found to exist; a standard of care cannot or should not be fixed; the [claimant] assumed the risk of negligence. Fifth, the different bases for denial of liability all rest on a policy judgment.

Noting that this policy judgment had sometimes been expressed in terms that the courts *cannot* regulate the activities of wrongdoers and sometimes in terms that the courts *should not* do so, the majority held that the former proposition, founded on the impossibility of identifying a standard of care between those engaged in criminal activities, must be rejected given that there is "a readily identified standard of care that could be engaged: the standard of care which road users other than the driver's criminal confederates are entitled to expect the driver to observe."[24]

The majority considered the central policy consideration in this case to be legal coherence, the most fundamental issue in determining which was whether it would be "incongruous for the law to proscribe the [claimant's] conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct."[25] An examination of s. 371A of the *Criminal Code*,[26] under which anyone illegally taking or using a motor vehicle was treated as stealing it, in conjunction with s. 378, under which a longer sentence of imprisonment was imposed

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Miller v. Miller criticised this approach (*supra* note 1 at para. 72). For further discussion, see *infra* text at note 24.

[21] *Supra* note 8. In *Gala v. Preston*, Mason C.J., Brennan, Dawson, Deane, Gaudron, McHugh and Toohey JJ. all agreed that an injured passenger's claim against the driver of a stolen car must fail. The reasoning of the plurality (Mason C.J., Deane, Gaudron and McHugh JJ.) was summarised in *Miller v. Miller* (*supra* note 1 at para. 61, citing *Gala v. Preston* at 254) as being based on the parties not having a "relationship of proximity" because "[i]n the special and exceptional circumstances… the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care." Although *Gala v. Preston* was decided when proximity was still the touchstone for the duty of care, and when the decision in *Cook v. Cook* (1986) 162 C.L.R. 376 (H.C.A.) (since overruled by *Imbree v. McNeilly* (2008) 236 C.L.R. 510 (H.C.A.)) held that exceptional facts could alter the relationship between a driver and a passenger so as to impose a different standard of care, the majority in *Miller v. Miller* nevertheless concluded (at para. 59) that the basis for the decision remained valid.

[22] These included *Henwood v. Municipal Tramways Trust* (1938) 60 C.L.R. 438 (H.C.A.); *Christiansen v. Gilday* (1948) 48 S.R. (N.S.W.) 352 (N.S.W.S.C.); *Williams v. McEwan* [1952] V.L.R. 507 (Vic. S.C.); and *Godbolt v. Fittock* (1963) 63 S.R. (N.S.W.) 617 (N.S.W.S.C.).

[23] *Miller v. Miller*, *supra* note 1 at para. 70.

[24] *Ibid*. at para. 72.

[25] *Ibid*. at paras. 15, 16.

[26] *Supra* note 10.

in cases of reckless and dangerous driving,[27] suggested that the twin purposes of the applicable legislation were to protect property rights and encourage road safety. In addition, s. 8(1) of the *Criminal Code* provided that where two or more persons formed a common intention to prosecute an unlawful purpose together, each would be deemed to have committed any resulting offence which was a probable consequence of that purpose. This meant that:[28]

> [I]f, as here, the driver of the illegally used vehicle drove dangerously, and driving in that manner was a probable consequence of the prosecution of the joint illegal purpose, a person complicit in the crime of illegal use would also be complicit in the offence of driving dangerously.

In the light of these provisions, the majority concluded that it would indeed be incongruous to recognise a duty of care by one co-offender in the commission of the offence to another.[29]

However, under s. 8(2) of the *Criminal Code*, a person who (a) withdrew from a joint illegal enterprise; (b) communicated this withdrawal to the others involved in it; and (c) took all reasonable steps to prevent the commission of the relevant offence, would no longer be a participant in the offence, and the incongruity would, at that stage, fall away. In circumstances such as these, where there were no reasonable steps available to prevent the offence, withdrawal from the enterprise and communication of this fact would suffice. Thus, by expressing her desire to leave the car and asking the defendant to stop so that she could do so, the claimant in this case had ceased to be a party to the joint illegal activity when the accident took place.[30]

Heydon J. agreed with the majority that, at least up until the time when the claimant asked to be let out of the car, the defendant owed her no duty of care.[31] He did not, however, share their conclusion that the claimant had withdrawn from the joint illegal enterprise. The possibility of withdrawal had been touched on only in the briefest terms by counsel during the course of their arguments, and even then only in response to a question by a member of the Court.[32] In his opinion—especially given the precedent which this decision would set in both tort and criminal law—the parties, and the defendant in particular, should have been afforded the opportunity to make a reasoned submission on whether withdrawal had taken place.[33] In this respect, the defendant might have focused on s. 8(2) and the prerequisites for withdrawing from a joint illegal enterprise, perhaps arguing that while the claimant could effectively have terminated the enterprise by declining to get into the car in the first place, or by getting out when it became overloaded before the defendant drove off, a request to be let out later was insufficient.[34] He might also have argued that since the requirement in s. 8(2)(c) was designed to terminate or hamper commission of the offence, a

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[27] Under s. 378(2), the maximum sentence was eight years, as opposed to seven years for straight theft under s. 371A.

[28] *Miller v. Miller*, *supra* note 1 at para. 93.

[29] *Ibid*. at para. 101.

[30] *Ibid*. at para. 106.

[31] *Ibid*. at para. 108.

[32] *Ibid.* at para. 117.

[33] *Ibid*. at paras. 118-121. Since the finding on the withdrawal point was predominantly factual, Heydon J.'s concern about the binding nature of the decision was perhaps overstated.

[34] *Ibid*. at paras. 126, 127.

claimant would remain a party to an enterprise which no reasonable steps could be taken to terminate or hamper.[35]

IV. Discussion

The defence of joint illegal enterprise is not without its complications, or its critics, and the decision of the High Court of Australia in *Miller v. Miller* will not silence its detractors. It does, however, illuminate some of the policy considerations which underpin joint illegal enterprise decisions.

The majority's single-minded focus on legal coherence led it to conclude that it would be incongruous to recognise a duty of care when the parties first drove off. By getting into the car with the defendant in circumstances where it was foreseeable that he would drive dangerously, the claimant became party to a more serious wrong than merely taking a motor vehicle, and for this reason public policy dictated that no duty of care could be owed. The layered or twin nature of the offence of taking and then using the car under these circumstances was thus critical to the finding that a duty of care could arise only when the claimant withdrew from the entire enterprise. The majority's subsequent conclusion that in order to effect withdrawal, she need only take such reasonable measures to prevent the commission of the offence as were actually available, was a common sense interpretation of the legislation in response to the situation in which the claimant found herself. As the non-driving participant in the joint criminal enterprise of unlawfully using the car, there really was nothing—apart from asking the defendant to stop—which she could have done to prevent its continuance. Had the Court refused to recognise this reality, it would have led to a harsh result[36]—albeit one which Heydon J., in his stricter approach to the legislation, would apparently have favoured. For while, in theory, Heydon J.'s analysis was based only on what the defendant *might* have argued, his judgment came close to suggesting that a claimant who seeks to withdraw from a joint illegal enterprise must actually be able to prevent, terminate or hamper its completion. Taken literally, such an approach would make withdrawal impossible for a claimant to whom no practical steps to end a joint illegal enterprise were reasonably available. This seems both unfair and counter-intuitive.

Since all the judges in the High Court of Australia in *Miller v. Miller* focused so specifically on the purpose behind the relevant criminal law provisions—holding that "the application of the relevant principle" turned exclusively on "the proper application of the statute"[37]—the actual decision will not be directly applicable in jurisdictions which have different provisions on common purpose (and it will be of even less relevance in jurisdictions such as Singapore, which have no provisions

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[35] *Ibid*. at paras. 130-132.

[36] Goudkamp, *supra* note 4 at 433, in discussing the implications of the decision of the Western Australian Court of Appeal on the withdrawal point in *Miller v. Miller* (C.A.) (*supra* note 13), suggests that on the actual facts of the case, "the [claimant's] acts in this respect were arguably insufficient to counteract her earlier contribution to the illegal jaunt", and concludes (at 439) that a claimant should be able to withdraw for the purposes of civil law in circumstances where withdrawal could be effected in criminal law.

[37] *Miller v. Miller*, *supra* note 1 at para. 98.

at all on withdrawal).[38] There is, nevertheless, plenty in the case to stimulate thought.

One point of interest relates to the relationship between the parties. As the trial judge observed,[39] the claimant, who was then only in her mid-teens, relied on the defendant, whom she viewed as something of a father figure, to take care of her. Their relationship was thus quite different from those in cases where claimants and defendants participate in criminal activities on more or less equal terms.[40] In the High Court of Australia, the majority specifically acknowledged that "in deciding whether one person owes a duty of care to another, it is necessary to consider the *whole* of the relationship between the parties,"[41] but since their Honours concluded that the duty issue was to be determined purely by reference to the legislation, which took no account of the disparity in the participants' age and experience, they did not pursue the point. However, it might be possible—certainly in jurisdictions with less tightly worded legislation—to argue that a much younger and more vulnerable claimant who was apparently persuaded to enter into a joint illegal enterprise by someone to whom he or she looked up was, at least from a moral standpoint, not truly a party to the common purpose in the first place. A court considering a negligence claim in such circumstances might plausibly conclude that it would not necessarily be incongruous to recognise a duty of care.[42]

The second observation relates to the majority's views on the standard of care. Among the complications associated with the joint illegal enterprise defence—which is not really a defence in the true sense of the word at all, but rather a means of preventing a claimant from establishing a *prima facie* case—is judicial disagreement about the stage at which the nature of the enterprise should be taken into account. In the Australian motor vehicle cases, most judges have treated joint illegal enterprise as a ground for negating the duty of care, while some, notably Mason J. in *Jackson v. Harrison*,[43] whose reasoning was later adapted and applied in *Gala v. Preston*,[44] have suggested that such enterprises prevent an applicable standard of care from being established. The English courts have broadly adopted the approaches of their Australian counterparts, with judgments based both on duty[45] and standard.[46] In *Miller v. Miller*, the majority focused squarely on duty and criticised the standard of

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[38] Section 34 of the *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.) provides:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

It does not refer to the possibility or circumstances of withdrawal. (Note that following the decision in *Daniel Vijay s/o Katherasan v. Public Prosecutor* [2010] 4 S.L.R. 1119, a co-participant in Singapore is liable only for crimes which are intended, and not, as in Australia and the United Kingdom, for those which are merely the probable or foreseeable consequences of the enterprise.)

[39] *Miller v. Miller* (D.C.), *supra* note 12.

[40] It is notable, too, that while the defendant was prosecuted, convicted of dangerous driving causing death, dangerous driving causing bodily harm and driving under the influence of alcohol, and imprisoned for five years, no action was brought against the claimant.

[41] *Miller v. Miller*, *supra* note 1 at para. 46 [emphasis in original].

[42] For further discussion of this point in the context of the decision of the Western Australian Court of Appeal in *Miller v. Miller* (C.A.), *supra* note 13, see Goudkamp, *supra* note 4 at 432.

[43] *Supra* note 7 at 455, 456.

[44] *Supra* note 8.

[45] See *e.g.*, Ewbank J. in *Ashton v. Turner*, *supra* note 5.

[46] See *e.g.*, Balcombe L.J. in *Pitts v. Hunt*, *supra* note 5.

care approach, concluding that although it might be difficult to establish the standard of care to be exercised by the driver of a stolen vehicle to his criminally complicit passenger, it would certainly not be impossible, with the yardstick being the standard owed by any driver to other road users.[47] There is much to be said for this view,[48] and for the adoption of a single criterion for determining illegality which the decision is likely to augur.

On the other hand, the problems inherent in using the value-laden concept of duty as the only touchstone should not be discounted. In the past, judges in a number of jurisdictions have expressed serious concerns about the assessment of a claimant's moral culpability, which they have seen as closely connected with the determination of duty of care in cases involving pleas of illegality.[49] Although the current judicial climate is more disposed to determining such cases by more overt reference to public policy considerations,[50] it is by no means clear exactly what these considerations should be, or the relative weight which each should be accorded in any given circumstance. The seriousness of the claimant's wrong is, for example, often seen as an important factor in determining his culpability—and thus the question of whether his claim should be defeated. However, in *Miller v. Miller*, there was no obvious connection between this factor and the High Court of Australia's conclusions with respect to the incongruity of recognising a duty of care in light of the relevant legislation. In addition, while not having to evaluate the moral blameworthiness of a claimant's conduct in a case which involves the application of statutory provisions might hold some attraction, it also serves as an example of the innate vagaries of the duty criterion.

A final—and connected—observation concerns the rationale for treating claimants who suffer harm during the course of joint illegal enterprises more harshly than those in other illegality situations. Although in 'ordinary' illegality cases claims are

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[47] *Miller v. Miller*, *supra* note 1 at para. 72. See also *supra* text at note 24.

[48] See *e.g.*, Goudkamp, *supra* note 4 at 437, 438.

[49] See *e.g.*, the judgment of Mason J. in *Jackson v. Harrison*, *supra* note 7 at 142, 143:

> If a joint participant in an illegal enterprise is to be denied relief against a co-participant for injury sustained in that enterprise, the denial of relief should be related not to the illegal character of the activity but rather to the character and incidents of the enterprise[.]

See also the judgment of Buxton L.J. in the Court of Appeal in *Reeves v. Commissioner of Police of the Metropolis* [1998] 2 W.L.R. 401 at 414, who, in dealing with the notion that it would affront the public conscience to allow a claim by a wrongdoing claimant, observed that:

> When a judge is asked to hold that a particular outcome would affront the public conscience or shock the ordinary citizen it behoves him to proceed with caution… No evidence will be available to him on which to base such conclusions, and therefore the exercise must be one of speculation[.]

[50] The U.K. Law Commission, in its long-running review of the illegality defence in tort, contract, unjust enrichment and trusts, considered the possibility of legislation to remove the defence from the field of common law due in part to judicial unwillingness to articulate policy considerations. However, as a result of the more open articulation of public policy in decisions such as *Gray v. Thames Trains* and *Moore Stephens v. Stone Rolls Ltd* (both *supra* note 2), the Commission recommended in its report dated March 2010 (U.K., Law Commission, *The Illegality Defence* (Law Com. No. 320) (London: The Stationery Office, 2010)) at para. 1.8 that, except in limited aspects of trusts, illegality should remain a common law defence.

usually refused only in extreme circumstances involving the most serious crimes,[51] in joint illegal enterprise cases the courts appear more willing to treat the fact that the claimant and the defendant have committed a crime together (whether or not that crime is particularly heinous) as justification for the claimant's action failing. To the extent that joint illegal enterprise cases share a common element, that element is the physical danger which is often inherent in the criminal activity.[52] While no specific link between the dangerousness of the enterprise and the incongruity of recognising a duty of care was articulated in *Miller v. Miller*, the element of danger has, in the past, influenced the courts in a number of joint illegal enterprise cases.[53] There is no obvious justification for placing such emphasis on the jointly committed wrong, and no clear reason for linking the destruction of the claim with the danger of the activity—especially since the defence of contributory negligence already provides for the apportionment of damages to take account of the danger to which a claimant in a joint illegal enterprise case has exposed himself. It is, of course, possible that if the High Court of Australia's espousal of the incongruity principle in *Miller v. Miller* finds favour elsewhere and is applied in other illegality situations, we may see a shift to a more even-handed, across-the-board approach. However, if such a shift does not occur, a re-evaluation of the treatment accorded to participants in joint illegal enterprises may be called for.[54]

V. Conclusion

The decision in *Miller v. Miller* is unlikely to have a direct or immediate impact in other jurisdictions—and certainly not in Singapore, where although the validity of the joint illegal enterprise defence to actions in negligence has been recognised,[55] no cases have yet turned on the defence, and there are no statutory provisions on withdrawal from a common criminal purpose.[56]

That being said, the views of the High Court of Australia on the importance of legal coherence—and, in particular, the need to avoid incongruity between the criminal and civil law—may be far-reaching. Also of potential significance is the High Court's conclusion that joint illegal enterprise cases should be decided on the basis that no duty of care is owed, rather than that no standard of care can be established. In both respects, the decision is likely to be of considerable influence, particularly in the English courts, which have hitherto taken their lead from Australia.

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[51] See *e.g.*, *Gray v. Thames Trains*, *supra* note 2, and *Clunis v. Camden and Islington Health Authority* [1998] Q.B. 978 (C.A.). Both cases involved manslaughter. An illegality plea also succeeded in the case of *Moore Stephens v. Stone Rolls Ltd*, *supra* note 2, which involved a serious fraud.

[52] Although, of course, the element of danger will not be relevant in all joint illegal enterprise situations. For example, financial crimes rarely involve physical risk.

[53] See *e.g.*, *Gala v. Preston*, *supra* note 8 at 254, per Mason C.J., Deane, Gaudron and McHugh JJ.

[54] For further discussion, see Goudkamp, *supra* note 4 at 438 *et seq*.

[55] See the judgment of Yong Pung How C.J. in *Ooi Han Sun v. Bee Hua Meng* [1991] 1 S.L.R.(R.) 922 (H.C.). While stating (at 930) that the mere fact of a claimant's involvement in wrongdoing would not in itself provide the defendant with a good defence, the Chief Justice observed that the only exceptions "would appear to be the limited range of cases in which… an injury can be held to have been directly incurred in the course of the commission of a crime." As examples, he referred to *Godbolt v. Fittock* (*supra* note 22), *Smith v. Jenkins* (*supra* note 6) and *Pitts v. Hunt* (*supra* note 5)—all joint illegal enterprise cases.

[56] See *supra* note 38.