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NOT SO DIFFERENT AFTER ALL? A CAUSATION-BASED APPROACH TO JOINT ILLEGAL ENTERPRISES

Joyce v. O'Brien & Another[1]

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I. INTRODUCTION

In recent years, courts in the U.K. and Australia have decided a number of cases involving the concept of illegality,[2] or *ex turpi causa non oritur actio*.[3] Several of these cases have focused specifically on the branch of illegality relating to joint illegal enterprises. Although courts in both jurisdictions have always shown greater willingness to refuse claims which involve joint participants in criminal ventures than those which do not, the actual basis for the refusal of such claims has been uncertain—with some judges taking the view that the very nature of the enterprise negates the duty of care and others concentrating on whether it is impossible to establish an appropriate standard of care between joint wrongdoers. This uncertainty was resolved in Australia by the decision of the High Court in *Miller v. Miller*,[4] which rejected as artificial the "impossibility of setting a standard of care" approach, and effectively reverted to an approach based on duty. Given that the High Court of Australia has always been something of a trail-blazer where the law on joint illegal enterprises is concerned, the case gave rise to understandable speculation about the possibility of courts in other jurisdictions following suit.

Now, however, in *Joyce*, the English Court of Appeal has taken a different direction, re-casting in terms of causation rather than duty or standard the basis on which

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1 [2013] EWCA Civ 546 [*Joyce*].

2 Illegality is commonly labelled as a defence. However, in negligence actions this terminology is problematic, given that it is, in fact, always considered in connection with defeating one or more of the elements of negligence. For this reason, the expression "defence" will not be employed in this note.

3 Although a number of judges, including those in both the High Court and the Court of Appeal in *Joyce*, continue to refer to the Latin maxim, others prefer the more modern term "illegality", and in this note the latter term will primarily be used. While it could, in theory, be argued that *ex turpi causa* differs from illegality in its ability to cover immoral as well as illegal conduct, this is not, in practice, an issue in contemporary law, where all cases involve criminal conduct on the part of the claimant.

4 [2011] HCA 9 [*Miller*].

joint illegal enterprise cases should be determined. The Court based its analysis on the approach of Lord Hoffmann in *Gray v. Thames Trains*,[5] under which the success or otherwise of a claim depends on the extent to which the claimant's damage was caused by his own criminal act. Although *Gray* was a case involving separate wrongdoers rather than a joint criminal activity, the Court in *Joyce* nevertheless applied its own post-*Gray* decision in *Delaney v. Pickett*,[6] in concluding that "the same causation principle should apply whether the criminal is acting alone or as part of a joint enterprise."[7] In its erosion of the distinction between general illegality cases and those involving joint illegal enterprises, *Joyce* is a decision of potential significance, and one which may go some way to addressing concerns about the justification for treating those who participate in joint criminal ventures differently from other wrongdoing claimants. In addition, in marking a divergence in the approaches to joint illegal enterprise cases in the U.K. and Australia, *Joyce* raises questions about the approach that is likely to be preferred in Singapore[8] and elsewhere. However, for reasons which will be examined in this note, the practical significance of the decision is likely to be rather less far-reaching than its novel approach might suggest.

II. The Facts of *Joyce* and the Decision of the Trial Judge

In *Joyce*, the claimant, Mr. Joyce, was seriously injured when he fell from the back of a van being driven at speed by his uncle, the first defendant, Mr. O'Brien (the second defendant being the first defendant's insurers). The claimant and the first defendant, who had together just stolen some ladders, were attempting to get away from the scene of their crime. Since the ladders were too long to fit into the van, one of the rear doors had to be left open. The claimant was standing on the rear footplate, hanging on precariously to the ladders and the back of the van, when the first defendant took a sharp right hand turn, followed immediately by a sharp turn to the left. As a result, the claimant was unable to stabilize himself, and he fell from the van, sustaining a serious injury to his head. The first defendant (who subsequently pleaded guilty to a charge of dangerous driving) drove on, hid the ladders, and then returned to the scene of the accident.

From these facts, the trial judge, Cooke J., inferred that the claimant and the first defendant had been involved in a joint criminal enterprise to steal the ladders and that the accident had occurred during the course of the two men seeking to escape

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5 [2009] 1 A.C. 1339 (H.L.) [*Gray*]. Lords Phillips, Scott and Rodger agreed with Lord Hoffmann.

6 [2011] EWCA Civ 1532 [*Delaney*].

7 *Joyce*, *supra* note 1 at para. 27.

8 For the only two Singapore authorities to date on illegality, see *Ooi Han Sun v. Bee Hua Meng* [1991] 1 S.L.R.(R.) 922 (H.C.) [*Ooi Han Sun*] and *United Project Consultants Pte. Ltd. v. Leong Kwok Onn* [2005] 4 S.L.R.(R.) 214 (C.A.) [*United Project Consultants*]. Neither case involved a joint illegal enterprise, and in neither was the illegality argument successful. Indeed, in *Ooi Han Sun*, the then Chief Justice, Yong Pung How, suggested that the only situations in which the illegality argument was likely to succeed "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", in which respect he referred exclusively to cases involving joint illegal enterprises (at 930). In the subsequent case of *United Project Consultants*, the Court of Appeal recognized the possibility of illegality being argued in cases not involving joint illegal enterprises, but held that the concept would not apply where the claimant's wrong was the very thing the defendant was supposed to prevent.

the scene of the crime. Accepting that the concept of illegality (or *ex turpi causa*[9]) applied, Cooke J. considered it to be manifested in two related principles. The first was that the law would not recognize the existence of a duty of care by one participant in a crime to another participant in relation to an act done in connection with the commission of that crime—in which respect he concluded that, as the claimant's co-conspirator, the defendant could not have owed him a duty of care, and that the circumstances of the get-away made it impossible to set a standard of care. The second was that, as a matter of policy, a claimant could not recover compensation for loss suffered as a consequence of his own criminal act—in which respect he held that the claimant was causally responsible for his injury, since his own act was as intrinsic as that of the first defendant to the activity in which they were both engaged.[10]

III. The Decision of the Court of Appeal

The claimant appealed to the Court of Appeal, where the judgment was delivered by Elias L.J., with whom Rafferty L.J. and Ryder J. agreed.

Elias L.J. began by quoting Lord Hoffmann's opinion in *Gray* that *ex turpi causa* has more to do with policy than with principle, and that this policy is "not based upon a single justification but on a group of reasons, which vary in different situations."[11]

Dealing first with the existing law relating to joint illegal enterprises, Elias L.J. examined modern jurisprudence from the U.K. and Australia (almost all of which, like *Joyce*, related to claims for injuries sustained in motor vehicle accidents during the course of criminal activities). In this respect, he referred to the decisions of the High Court of Australia in *Smith v. Jenkins*[12] and the English High Court in *Ashton v. Turner*[13]—both of which had focused on the joint illegal enterprise negating the duty of care[14]—as well as those of the High Court of Australia in *Progress and Properties Ltd. v. Craft*[15] (the only case not involving a road accident) and *Jackson*

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9 The expression *ex turpi causa* was favoured in both the High Court and the Court of Appeal.

10 Cooke J.'s judgment was summarized by Elias J. in the Court of Appeal. See *Joyce*, *supra* note 1 at paras. 35-42.

11 *Joyce*, *supra* note 1 at para. 4, quoting Lord Hoffmann in *Gray*, *supra* note 5 at para. 30.

12 (1970) 119 C.L.R. 397 [*Smith*]. In *Smith*, the claimant was injured in a crash caused by the defendant, with whom he had stolen a car. The High Court of Australia unanimously concluded that he could not recover.

13 [1981] Q.B. 137 [*Ashton*]. In *Ashton*, the claimant failed to recover for injuries which he sustained in a car crash caused by the defendant as they were seeking to flee the scene of a burglary which they had committed after drinking heavily.

14 In *Smith*, while Windeyer J. left open the precise basis for the decision that each party to a joint criminal activity "takes the risk of the negligence of the other" (at 422), the majority of his colleagues preferred to base it on the principle that there was no duty of care between the parties, concluding that "the law regards the joint illegal conduct as the commission of a single wrong of which, as a whole, each participant is guilty" (see *e.g.*, the judgment of Kitto J. at 404). In *Ashton*, Ewbank J., applying *Smith*, concluded that "a duty of care did not exist… during the course of the burglary and during the course of the subsequent flight in the get-away car" (at 146).

15 (1976) 135 C.L.R. 651 [*Progress and Properties*]. In *Progress and Properties*, the claimant was a workman on a building site, who was injured after allowing himself to be carried to the top floor on a goods hoist. By a majority, the High Court of Australia held that he could recover damages against his employers, since the criminal conduct did not affect the standard of care required of the lift operator. This standard was the same whether transporting goods or people. Jacobs J., with whose judgment

v. Harrison,[16] in which the focus had shifted to the idea that in joint illegal enterprise situations the duty would be extinguished only where, in the words of Mason J. in *Jackson*, "the character of the enterprise… is such that it would be impossible to determine the standard of care which is appropriate".[17] Elias L.J. observed that the "impossibility of setting a standard" approach had subsequently been favoured by both the English Court of Appeal in *Pitts v. Hunt*,[18] and the High Court of Australia in *Gala v. Preston*.[19] However, in *Miller*[20] the High Court of Australia had recently revisited the issue, and had concluded that it was incorrect to say that a standard of care could not be set in such cases, since although it might be difficult to establish the standard owed by one criminal to another, this would not be impossible—with the standard in motor vehicle cases being that owed by any driver to other road users.[21] In so holding, the Court had essentially reverted to a duty of care approach to joint illegal enterprises.

Stephen, Mason and Kirby JJ. agreed, distinguished *Smith v. Jenkins* thus (at 668):

> A plea of illegality in answer to a claim in negligence is a denial that in the circumstances a duty of care was owed to the injured person… Where there is a joint illegal activity the actual act of which the [claimant] in a civil action may be complaining… 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. A court will not hear evidence nor will it determine a standard of care owing by a safe blower to his accomplice… [B]ut other cases can give difficulty in classification.

Barwick C.J. dissented on the ground that this represented an unwarranted departure from *Smith v. Jenkins*.

16 (1978) 138 C.L.R. 438 [*Jackson*]. In *Jackson*, the claimant was injured in a car accident caused by the defendant, whom the claimant knew to be disqualified from driving.

17 *Jackson*, *ibid*. at 455-456. Mason J. described this approach as "[a] more secure foundation for denying relief" on the basis that "though more limited in its application" it was "for that reason fairer in its operation." On the facts of *Jackson*, the majority held that the nature of the illegality did not affect the standard of care owed by the driver, and the claimant could therefore recover damages. In reaching this conclusion, the majority applied the reasoning in *Progress and Properties*, *supra* note 15, in which Jacobs J. had opined that a duty would be extinguished only where the claimant could not expect the defendant to comply with the normal standard of care. Barwick C.J. again dissented.

18 [1991] 2 Q.B. 24 [*Pitts*]. In *Pitts*, the claimant, a pillion passenger on a motor cycle, was injured in an accident which occurred after he encouraged the rider to perform reckless acts. His claim against the (deceased) rider failed. Both Balcombe and Dillon L.JJ. based their judgments on the impossibility of establishing an appropriate standard of care—although the latter somewhat confusingly considered this to be consistent with the basis for the decision in *Smith*.

19 (1991) 172 C.L.R. 243 [*Gala*]. In *Gala*, the claimant was injured when the defendant, with whom he had stolen a car, fell asleep at the wheel while drunk and crashed into a tree. The majority applied *Progress and Properties* and *Jackson* in holding that no duty of care existed, and concluded that "[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" (at 254).

20 *Supra* note 4. In *Miller*, the claimant was a sixteen year-old girl who stole a car after an evening out. Her older cousin, the defendant, who was something of a father figure to her, offered to drive her home. He started to drive very erratically and dangerously, and the claimant twice asked him to stop the car so that she could get out. He refused to stop, and subsequently caused a crash in which one person was killed and the claimant was rendered a tetraplegic. The High Court of Australia held that although the parties were originally participants in a joint illegal activity—which would have prevented the claim from succeeding—that activity ceased when the claimant sought to leave the car. For this reason, her claim was not destroyed and she was entitled to compensation (although her damages were reduced by 50% to reflect her contributory negligence).

21 *Ibid*. at para. 72.

Having considered the cases relating specifically to joint illegal enterprises, Elias L.J. then turned to other illegality situations—those in which a person who suffers injury as a result of criminal activity claims damages against a person who is not a party to that activity. With respect to this category of cases, his Lordship observed that, whatever might have been the position in the past, the current law had been authoritatively enunciated by Lord Hoffmann in *Gray*—in which a man convicted of manslaughter had brought an action against the defendant who had negligently caused him to suffer from the mental condition but for which he would not have committed the crime.[22] Holding that the claimant's action for the consequences of his criminal act must fail, Lord Hoffmann had distinguished what he described as the narrow and the wide manifestations of the *ex turpi causa* principle. Under the narrow rule—and the one on which *Gray* primarily turned[23]—a civil court would not award damages to compensate a claimant for the injury or disadvantage imposed by a criminal court as punishment for a criminal act. The justification for this his Lordship had considered to be self-evident. However, the justification for the wide rule, which merely stated that a person would not be entitled to compensation for his own criminal act, was less self-evident.[24] Under this rule, a court would have to apply a broader policy analysis in refusing claims. It would also have to establish the operative cause of the claimant's damage. In this respect, his Lordship had concluded that the normal test for causation should apply, with a court simply asking:[25]

> Can one say that although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant?… Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?

In *Gray*, Lord Hoffmann had of course been concerned with situations involving distinct wrongs by claimant and defendant, rather than situations involving joint participants in a crime. For this reason, Elias L.J. acknowledged the possibility of arguing that joint illegal enterprise situations ought to be subject to a different analysis—one in which the older authorities, "with the focus on duty rather than causation" might "better catch the particular feature which justifies the application of the *ex turpi* principle in these cases."[26] However, he noted that, two years after

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22 In *Gray*, *supra* note 5, the claimant was convicted of manslaughter by reason of diminished responsibility for killing someone while suffering from post-traumatic stress disorder as a result of injuries sustained in a serious rail accident caused by the defendants' negligence.

23 *Ibid*. In *Gray* it was held that the claimant's action for damages for loss of liberty, loss of earnings and loss of reputation must fail under the narrow rule, since these claims arose from the sanctions imposed on him for his criminal act by a criminal court. The claims for feelings of guilt and remorse also failed, though under the wide rule.

24 *Ibid*. at para. 51, referred to by Elias L.J. in *Joyce*, *supra* note 1 at para. 23.

25 *Gray, ibid*. In this respect, his Lordship compared *Vellino v. Chief Constable of the Greater Manchester Police* [2002] 1 W.L.R. 218 (C.A.) [*Vellino*], in which the claimant's action for damages for injuries sustained when he jumped through the kitchen window of his flat while trying to evade capture by the police failed, with *Revill v. Newbery* [1996] 1 Q.B. 567 (C.A.), in which the claimant's action for damages against the defendant, who shot him while he was attempting to break into the defendant's shed, succeeded (although his damages were reduced to take account of his contributory negligence).

26 *Joyce*, *supra* note 1 at para. 26.

the decision in *Gray*, the Court of Appeal in *Delaney*[27] had applied Lord Hoffmann's causation principle to a joint illegal enterprise case. Although at trial level in that case—which concerned a claimant who was injured in a car accident while he and the defendant driver were transporting cannabis—*ex turpi causa* had been held to apply on the basis that the purpose of the journey was to transport illegal drugs, the Court of Appeal had held that, as a matter of causation, the claimant's damage was caused not by the criminal activity, but by the defendant's negligent driving.[28]

Based on *Gray* and the reasoning in *Delaney*, Elias L.J. concluded that the same principle "should apply whether the criminal is acting alone or as part of a joint enterprise."[29] The former focus in joint illegal enterprise cases should now "be re-cast to give effect to the causation principle."[30] The consequence would be that:[31]

> [W]here the character of the joint enterprise is such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objectives, and the risk materializes, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise.

Elias L.J. stressed, however, that this did not mean that the established jurisprudence on joint enterprise cases would cease to be relevant. The existing cases reflected "the underlying policy even if the rationale for denying liability must now be cast in terms of causation rather than duty",[32] and they would therefore continue to provide assistance in determining whether or not a claimant's injury could be treated as having been caused by his own conduct.

Applying Lord Hoffmann's causation analysis to the facts, Elias L.J. upheld Cooke J.'s finding on the basis that "[t]he injury resulted both from [the claimant's] personal conduct in placing himself in such a dangerous position; and because he took the heightened risk of dangerous driving by [the first defendant] and that risk materialized."[33] The appeal was therefore dismissed.

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27 *Delaney*, *supra* note 6. The decision was delivered by Ward L.J., with whom Richards and Tomlinson L.JJ. agreed.

28 *Ibid*. at para. 37, referred to by Elias L.J. in *Joyce*, *supra* note 1 at para. 26.

29 *Joyce, ibid*. at para. 27.

30 *Ibid*. at para. 37.

31 *Ibid*. at para. 29. While acknowledging that this would not necessarily exhaust all situations in which the *ex turpi causa* principle could apply to joint illegal enterprises, Elias L.J. nevertheless considered that it would "cater for the overwhelming majority of cases" (*ibid*.)

32 *Ibid*. at para. 28.

33 *Ibid*. at para. 47. Elias L.J. went on to reject an argument by counsel for the clamant based on the principle of proportionality (at paras. 49-52). While accepting that, as a doctrine of public policy, there should indeed be some flexibility in the application of *ex turpi causa*—so that the doctrine would not, for example, apply to minor traffic cases—he concluded that in cases involving co-conspirators the issue of proportionality would rarely be an issue, and that on the facts of this case, where theft of the ladders was an offence which carried a seven year maximum sentence, it would certainly not apply.

IV. Discussion

As Lord Hoffmann observed in *Gray*, the concept of illegality is grounded in policy rather than principle.[34] And as his Lordship also observed, there is no single policy justification for denying a claim on the basis of illegality, since the relevant considerations vary from case to case. It is, however, true that while courts have traditionally exercised considerable caution when applying the notion of illegality to actions where claimant and defendant have committed separate wrongs—with such claims failing in only the most egregious cases[35]—they have shown far less reticence about its application to joint illegal enterprises. The harsher attitude towards those who participate in joint criminal pursuits has often been linked to the supposition that, given the blameworthy nature of the joint criminal activity, each party must be held responsible for the acts of the other, and that it would therefore be an affront to the "public conscience" to recognize a duty of care in such cases.[36]

Some commentators have questioned the justification for singling out joint illegal enterprises in this way, with one, for example, observing that "[a] disturbing feature of the jurisprudence on the joint illegal enterprise defence is that most judges and commentators who have considered the defence have simply assumed that it is defensible."[37] Such commentators suggest that there is no readily apparent rationale to justify depriving participants in joint illegal enterprises of actions against one another, given that any argument based on the need to punish or deter will be overshadowed by the fact that punishment and deterrence are already amply catered for by the criminal law. For similar reasons these commentators also reject arguments associated with, *inter alia*, the undesirability of condoning breaches of the criminal law, the desirability of those who break the law forfeiting their legal rights, the need to prevent wrongful profiting and the demands of distributive justice.[38]

While no court has gone so far as actually to reject the idea that joint illegal enterprises offer a particular justification for the refusal of claims, a number of judges in the decades before *Miller* did move from a purely duty-based approach—under which the possibility of successful claims was almost nil[39]—to one which placed greater emphasis on the less morally-condemnatory criterion of whether it was impossible in the circumstances to set an appropriate standard of care.[40] With its focus on the particular facts of a case rather than on the inherent policy objections

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34 *Gray*, *supra* note 5 at para. 30.

35 For examples of the comparatively rare cases in which illegality pleas have succeeded before the English courts in cases not involving joint illegal enterprises, see *Vellino*, *supra* note 25, *Moore Stephens v. Stone Rolls Ltd* [2009] 1 A.C. 1391 (H.L.), and *Gray*, *supra* note 5. (Note, too, an earlier case involving facts not dissimilar to those in *Gray*, *Clunis v. Camden and Islington Health Authority* [1998] 1 Q.B. 978 (C.A.).)

36 See *e.g.*, *Smith*, *supra* note 12 and *Ashton*, *supra* note 13.

37 James Goudkamp, "The Defence of Joint Illegal Enterprise" (2010) 34 Melbourne U.L. Rev. 425 at 440.

38 *Ibid*. at 440-446.

39 For criticism of the notion of the "public conscience", see *e.g.*, the judgment of Buxton L.J. in the Court of Appeal in *Reeves v. Commissioner of Police of the Metropolis* [1999] 1 Q.B. 169 at 185:

> When a judge is asked to hold that a particular outcome would be an affront to 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.

40 See *e.g.*, the judgments of Mason J. in *Jackson*, *supra* note 16, and Balcombe L.J. in *Pitts*, *supra* note 18.

to joint illegal enterprises, this created a legal climate in which such claims were not automatically doomed to fail.

Against this backdrop, the decision of the Court of Appeal in *Joyce* to adopt a test for joint illegal enterprises which focuses neither on duty nor on standard is potentially significant. Its significance lies in two separate—although related—features. The first is that, in eliding the distinction between ordinary illegality cases and those involving joint illegal enterprises, the Court of Appeal has apparently streamlined the law and leveled the playing field. The second is that, by extending to joint illegal enterprises a test based on causation, with the focus on whether a claimant is in reality the author of his own harm, the Court has implicitly removed from the picture some of the more value-laden policy considerations associated with the duty analysis. While the causation question is itself governed by policy—the notion that the law should not award compensation for damage which a person has caused to himself—this policy can be regarded as being of more general application, since it does not require overt consideration of the blameworthiness of a particular claimant's conduct.

However, nothing is ever completely clear-cut, and there is, in reality, a considerable degree of overlap between duty, causation and the other elements of negligence. Elias L.J.'s test in *Joyce* refers to the character of the joint enterprise being "such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm."[41] Given that causation generally does not depend on foreseeability, this actually suggests that the inquiry is substantially based on the scope of risk, which is primarily a duty or a remoteness question. In addition, in the period since Lord Hoffmann's judgment in *Kuwait Airways Corporation v. Iraqi Airways* Company,[42] causation has been driven by a purposive approach—as decisions such as *Fairchild v. Glenhaven Funeral Services Ltd.*[43] and *Chester v. Afshar*[44] make clear. Thus, in determining causation, a court will consider the scope of the duty and whether a particular claimant ought to be compensated. Realistically, therefore, it is likely that determination of whether the claimant's damage was causally connected with the relevant enterprise will involve a court reasoning backwards from the question of whether the claimant deserves to be compensated. So the same problems—and the same policy issues—will exist whether the analysis is one of duty, standard or causation.

In *Joyce*, Elias L.J. specifically acknowledged the potential for overlap when he stated that, due to issues of "underlying policy",[45] the old duty cases would still be of assistance in determining a claimant's causal responsibility for his own harm. And it is certainly the case that some factors—most notably the hazard inherent in a joint illegal enterprise—will be equally important regardless of the approach applied. Thus, just as in *Joyce* the causation test adopted by Elias L.J. was based on the materialization of an "unusual or increased risk of harm",[46] so in *Jackson* (which focused primarily on circumstances which prevented a standard of care from being

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41 *Joyce*, *supra* note 1 at para. 29.
42 [2002] UKHL 19.
43 [2002] UKHL 22.
44 [2004] UKHL 41.
45 *Joyce*, *supra* note 1 at para. 28.
46 *Ibid*. at para. 29.

established) the High Court of Australia referred to "the character and the incidents of the enterprise and the hazards which are necessarily inherent in its execution,"[47] and, more recently, in *Miller* (which, of course, reverted to a duty analysis) the High Court also referred to the need to take into account the character of the enterprise and its hazards.[48]

Hazardous activities are a feature of most joint illegal enterprises, and, as the decision in *Joyce* demonstrates, it is unlikely that a claimant who takes serious risks in the course of participating in a criminal activity with a co-conspirator will have any better chance of success under a causation approach than one based on duty or standard.[49] However, some joint illegal enterprises—such as those involving white-collar crimes—involve no physical danger at all, and in others the physical risk might be slight. In these cases, a court which, rather than looking at the claimant's wrongdoing under a duty approach, instead applies a strictly causal analysis to determining liability, might legitimately regard the claimant's damage as flowing from the defendant's negligence rather than from the joint criminal activity. Such was the analysis favoured in *Delaney*, where the Court of Appeal considered it to be merely incidental that the parties were engaged in a joint illegal enterprise.[50] While it is difficult to imagine the courts taking a similar view in relation to more serious crimes (where the hazards are, anyway, likely to be greater, thus bringing them within Elias L.J.'s framework of the foreseeability and materialization of risks), the application of a causation approach to claims which arise from "minor", and comparatively unhazardous, joint illegal enterprises does certainly seem likely to increase their chances of success.

V. Conclusion

In principle, the Court of Appeal's decision in *Joyce* to adopt an across-the-board approach by extending Lord Hoffmann's causation-based test in *Gray* to joint illegal enterprises has brought welcome consistency to the concept of illegality. The extension of the causation approach to joint illegal enterprises also suggests a theoretical departure from some of the more morally-charged policy considerations which have so often characterized such cases, and a move to the less specifically judgmental notion that a person who is substantially responsible for his own harm cannot expect to receive compensation. In practice, however—as Elias L.J. acknowledged in *Joyce*—very similar underlying policy considerations are likely to be relevant under either a duty or a causation analysis. As a result (except perhaps in the case of minor criminal enterprises where there really is no connection between the negligence and the activity) the outcome of cases is likely to be the same, regardless of the

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47 *Jackson, supra* note 16 at 455, 456, *per* Mason J.

48 *Miller*, *supra* note 4 at para. 93. Note, however, that in *Miller*, the Court did not actually make a specific link between the dangerous nature of the activity and the incongruity of recognizing a duty of care.

49 Although note that Goudkamp, *supra* note 37 at 438, suggests that the dangerousness of the parties' activity could more properly be dealt with in terms of apportionment under the defence of contributory negligence, which is "a much more subtle and sophisticated way of taking stock of unjustified risk-taking."

50 *Delaney*, *supra* note 6.

approach taken. These are early days, and it could be some time before the Singapore courts have the opportunity to decide whether they prefer the U.K.'s consolidated causation-based approach of *Joyce* to the more traditionally duty-based Australian position exemplified by *Miller*. For the reasons discussed above, though, it might not ultimately make much difference which approach they choose.