X o. COOKS A.J COMPENSATING INJURED CRIMINALS.

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COMPENSATING INJURED CRIMINALS

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C O N T E N T S

1. INTRODUCTION

In 1972 the New Zealand Government passed the Accident Compensation Act. The legislation was derived from what was known as the Woodhouse Report[1]. This had as its purpose the establishment of a twentyfour hour insurance scheme for every member of the workforce and for the housewives who sustain them[2]. The Report recommended that compensation should be paid on a uniform basis of assessment and irrespective of the cause of the injury suffered[3]. Not only was this concept - complete social insurance for all personal accidents - a radical departure from the status quo, so was the recommendation that all existing remedies available to those suffering personal injury by accident be scrapped. The scheme as enacted has largely been faithful to the report: an essentially no-fault scheme now exists and existing remedies have been abolished[4].

The fact that the scheme is (subject to certain provisos) a no fault compensation scheme in which the actions of the injured person are largely irrelevant has led to some controversy. The principal question is whether or not the injured person has suffered personal injury by accident. Thus if two people are involved in an attempt to rob a post office, and one is shot and wounded due to negligence of the other, he suffers a personal injury by accident and is eligible for compensation[5]. The question is asked: Should people injured as a consequence of their involvement in an illegal activity

receive any compensation? Palmer noted the incredulity of Mahon J. when sentencing a man who had lost an eye while attacking a policeman with a knife:[6]

> The Accident Compensation Commission has apparently acknowledged that the prisoner is entitled to compensation. Thus a drunken illegal immigrant who is injured in the course of attacking a police officer becomes entitled to compensation. Pausing only to express my wonderment that such a law could exist....

The most recent proposals to deal with this question came from the Quigley Committee[7] which was looking for a means of improving the accident compensation scheme. The committee made the following recommendation:[8]

> That where a person suffers personal injury by accident in the course of committing certain crimes such as murder, rape, manslaughter, aggravated robbery, drunken driving etc., and is convicted of the offence and sentenced to a term of imprisonment, no compensation should be payable.

The committee noted that there was clearly a strong public feeling[9]

> that people injured as a result of committing certain crimes should not receive compensation and the public should not be called upon to support those who are the 'authors' of

their own misfortune where relatively serious criminal activity is involved.

The Woodhouse Report (as manifested) in the scheme and the Quigley Committee recommendations each represent a particular social interest, and at present the interest articulated by the Woodhouse Report - comprehensive entitlement for all personal injuries suffered as a result of an accident - is paramount. However, the very question of compensating injured criminals is a controversial one and as a consequence is well suited to emotional appeal (particularly by politicians) for reasons ostensibly unconnected with the actual point of controversy. On the assumption that such a proposal may be proceeded with[10] and criminals who are injured because of their illegal activity will be excluded from the scheme, the next question that arises is exactly how will this be done. It is the purpose of this paper to see whether or not there is any legal principle that can be derived from the common law that could be used to achieve this purpose.

Present Powers of the Corporation

The Accident Compensation Corporation does have a degree of flexibility in dealing with people who are injured as a consequence of their participation in illegal activity.

Section 129: this gives a discretion to reduce, postpone or cancel earnings related compensation while the claimant is being maintained otherwise than at his own expense in any mental hospital, hospital or penal institution. The Governor-General can also, by Order in Council, declare any other institution to be subject to the provisions of the Act.

Section 138: this provides that no compensation shall be payable by virtue of the operation of Section 121 (2) and (4) and Sections 123, 124 and 125 - to the spouse, child or dependants of any person convicted of murder or manslaughter. There is however a discretion to pay compensation to such people when the claimant has been convicted of manslaughter but it has been proved that the claimant had no intention of killing or causing grievous bodily harm.

Section 137: this provides that no compensation shall be paid to victims of self-inflicted injuries or where a person is injured when he has the intent to injure himself. The Corporation has a discretion to pay compensation to the dependants of suicide victims.

The effect of these provisions is that full benefits are paid except in the case of murder and manslaughter and self-inflicted injuries, with a flexible approach where the claimant is in prison. Hard information as to precisely how many people have been denied compensation

under these provisions has proven difficult to obtain. However the following points can be made: the Corporation does exercise its power to deny compensation to people who are 'kept otherwise than at their own expense' in an institution (under S129). This discretion is again exercised in respect to people coming within the ambit of Sections 137 and 138. There is however an important caveat to this. The Corporation tends only to exercise this discretion if the person involved has no dependants reliant on him for support. The Corporation clearly believes that there is a social interest involved in ensuring that such dependants are not deprived of necessary compensation.

People who are acquitted of murder or manslaughter (on whatever grounds - self defence, insanity) or who have been charged with such an offence but are found unfit to plead, do not have their rights in respect to compensation - lump sum or earnings related - affected in any way.

The Australian Report[11]

It is worth noting at this point how the Australians attempted to deal with the question of compensating injured criminals; to see in what way they tried to reconcile the competing social interests involved in this question. Like New Zealand it was thought desirable

to recommend a comprehensive scheme based on community responsibility and comprehensive entitlement. However, the Report, while it noted that disqualification from the concept of comprehensive entitlement should be kept to a minimum, also stated that people injured while committing "serious crimes of violence" should be excluded. It recommended that people injured during the commission of murder, piracy, hijacking, and wilfully doing grievous bodily harm would not be eligible for compensation.[12]

The Committee of Inquiry was aware of the extremes that could occur if it favoured either approach (compensate all injured criminals or refuse to all, any compensation for injury). Thus it noted that if it should opt for absolute disentitlement this could lead to a situation where a person who is injured in a highway accident would not receive compensation if he had been involved in a contemporaneous breach of the most minor traffic regulation.[13] There was also the consideration that to deprive them of possible compensation for injury would be to punish them twice for the same offence.[14] Equally untenable was the converse view that all people injured as a consequence of their involvement in criminal activity should be compensated for such injuries. A line had to be drawn between what was seen as two irreconcilable interests - exclusion for any injury that could be related to criminal activity and a complete no-fault scheme as in New Zealand (which went too far). Thus an arbitrary distinction was drawn between what the

Report considered as criminal offences of a sufficiently serious nature to warrant exclusion from the scheme. Ultimately, perhaps, the range of exclusions was sufficiently esoteric to provide in essence what would have amounted to a no-fault scheme.

2. THE COMMON LAW RESPONSE

This whole area has been described as "a rather obscure corner of the law."[15] However there has in recent years been an increasing amount of both academic and judicial comment in respect to it, although there is unfortunately little unanimity of opinion as to whether or not there is any coherent guiding principle at work. As it was noted in one case, Tallow v Tailfeathers,[16] the courts have had trouble in determining the criteria to be used and that the opinions that have been expressed vary. This point had earlier been made in the Australian High Court in Smith v Jenkins by Walsh J. when he observed that there was no single rule by which, in all cases, the question raised by a plaintiff's commission of an illegal act, or his participation in it was to be answered.[17] There are two basic scenarios into which the various factual situations involved arise -

First - where the plaintiff is in breach of a statutory regulation which imposes on him a duty to act in a particular way for his own safety,[18] and, second where the plaintiff is guilty of some criminal act, usually

in conjunction with the defendant in the action whose negligence has caused the injury to the plaintiff.[19]

Th reaction of the law has been varied. This has been due to the fact that there was no suitable precedent for the courts to draw upon and as a consequence existing categories of law were (and still are) utilised to enable the courts to meet the situations in which the wrong doing plaintiff was injured. Thus two specific defences - contributory negligence and volenti non fit injuria - have been used. However, these have not proven sufficiently adequate to deal with the situations which have to be dealt with. This has occurred primarily as a consequence of events in the main stream of tort law as it has adapted to changes in society. Of particular note has been the increase in liability insurance and a steady increase in legislative enactments designed to lessen the impact of some of the more vigorous common law doctrines and to provide for the welfare of the individual. This has led to the ambit of the two defences being narrowed considerably from what they were, which has meant an increasing reliance on two concepts which are more appropriate to the broader picture which the courts are attempting to deal with. In some instances, therefore, the courts have denied the existence of a duty of care between the plaintiff and the defendant, while in others, the maxim ex turpi causa non oritur actio - there can be no legal action derived from a base cause - has been invoked to deny a remedy to an injured wrong-doing plaintiff.

As I noted earlier in respect to the Woodhouse Report and the recommendations of the Quigley Committee, what is involved here is a battle between competing social interests for precedence. In New Zealand the creative choice between these competing social interests has been made. In Australia, Canada and in the United Kingdom, the creative choice between the social interests vying for precedence is made by the court; it must weigh up the considerations of social benefit involved - should a person who is injured as a consequence of some illegal (and a fortiori an anti-social) act be compensated or not. Is there any social interest in allowing a remedy? Because there was no precedent, the various judicial decisions have clothed their rationale in categories of illusory reference[20] which can be presented as the ratio decidendi. As Julius Stone has stated:[21]

> ... the illusory categories may be resorted to, not because they are believed to determine creative decision making, but because they are felt, often, instinctively, to enable the contents of legal norms to change while ensuring that the legal order continues as an unbroken entity.

It is my submission that the courts make these creative decisions - on their assessment of which competing social interest should prevail, but that this can only be understood if the use of the illusory categories, the fictions, is exposed to show what is the actual basis of the decisions being made.

Contributory Negligence

This is the plaintiff's failure to meet the standard of care to which he is required to conform for his own protection, and which is a legally contributing cause, together with the defendant's fault in bringing about the injury. It connotes failure on the part of the person injured to take reasonable care of himself in his own interest.[22] Prior to the Contributory Negligence Act of 1947, contributory negligence was a complete defence denying any relief to the plaintiff if proved. Since 1947 the courts have been empowered to award damages in proportion to the extent of fault attributable to each party, and not on the basis of actual degree of fault. The effect of a finding of contributory negligence is that the burden of the loss is moved to the plaintiff.

The use of the defence is that it spares an individual defendant the injustice of being made to compensate a plaintiff who was partially to blame for his injury. It operates as a penal device[23] punishing the contributorily negligent plaintiff. The nature of the defence does mean that it can be an appropriate vehicle for a court to use, since it encompasses within its ambit a good deal of unlawful activity; for instance, a breach of a safety regulation,[24] being a party to an offence of dangerous driving,[25] encouraging reckless or dangerous driving,[26] or driving a vehicle without a licence[27] can be characterised as contributory negligence. In such instances the competing social interests can often be

accommodated within the doctrine. The court is thus able to present itself as dealing with the situation within a readily acceptable orthodox apparatus. The use of the doctrine does allow the court to avoid having to come to grips with the more difficult and substantive issue of the plaintiff's illegal act by concentrating on his apparent negligence.

Contributory negligence is of less use in instances where the injury is received in the very course of committing the crime. Fleming states that in such instances there will be absolute denial of a remedy and that it matters not what device is used,[28] a tacit acknowledgement that the means used are illusory, disguising the actual policy basis of the decision.

Volenti Non Fit Injuria

This defence is based on a party's express or implied consent to the legal risk inherent in any action or activity which he undertakes. The result of a successful plea of volens by a defendant is that the plaintiff is disentitled from pursuing his claim. It is because of this fact that in many instances the courts have been reluctant to admit volenti as a defence except in exceptional cases. (Usually the defence of contributory negligence is available; it does not have the same draconian effect on a plaintiff's claim as volenti). The

single dominant inhibiting factor for courts dealing with injured wrong-doing plaintiffs is the essential need (if volenti is pleaded) to prove that the plaintiff actually consented to assume the legal risk involved.

The need to prove express or implied consent is absolutely necessary, and the difficulty in so doing has evoked judicial comment to the effect that as a defence to negligence, volenti has almost disappeared. Guy J.A. noted the effect of the decision of the Supreme Court of Canada in the case of Lehnert v Stein[29] "That decision appears to make the defence of volens well nigh impossible to sustain from a practical standpoint"[30] In Lehnert v Stein the Supreme Court of Canada followed the decision in Dann v Hamilton[31] and held that to constitute the defence of volenti, there had to be an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence. (In both of the Canadian cases, the plaintiff accepted a ride in a car which later crashed due to the negligence of the driver. In Rondos v Wawrin the plaintiff knew the car to be stolen, while in Lehnert v Stein the plaintiff knew that the defendant had been drinking heavily).

In the Australian case of Bondarenko v Sommers[32] Jacobs J.A. held he could not apply the maxim because he was bound by precedent to invoke it only if there was evidence that the plaintiff voluntarily assumed the risk in respect to the particular act of negligence com-

plained of. In Smith v Jenkins[33] which involved a joint adventure in a stolen automobile which crashed due to the negligence of the defendant and caused injury to the plaintiff both Kitto and Walsh JJ. expressed their disapproval of the principle. "I do not think that this principle... can provide a satisfactory solution to the problem which this case presents"[34] and[35]

> I must guard against being understood as thinking that each participant in a wrong-doing takes the risk of negligence on the part of his accomplice in the course of the wrong-doing, for I do not think that that principle rests upon any idea of assumption of risk.

The most notable instance where the doctrine has been used was in I.C.I. v Shatwell.[36] This involved the breach of a statutory regulation by both the plaintiff and the defendant. The House of Lords treated the breach by the plaintiff as constituting an assumption of risk by him. There was on the facts clearly no pressure on the plaintiff to adopt the course of action which he took. In this instance two workmen were in breach of their statutory duty. If however, only the injured workman had been in breach then he would not have got damages. Damages could only have been obtained by procuring another workman to commit the offence as well.[37] This fact prompted Lord Donovan to articulate the policy rationale behind the decision:[38]

> Considerations of public policy then work the other way: for if this situation were

> to obtain not only would the efficacy of the regulations be sensibly diminished, but the wholly unjust result would ensue that an innocent third party was made to compensate the injured offenders.

In a more recent case, Ashton v Turner[39] where two burglars (who had been drinking heavily earlier in the evening) attempted to flee from the police in a getaway car which crashed, seriously injuring the plaintiff, it was held that the plaintiff's claim could, if necessary, be denied on the basis of volenti. The factor of pursuit seemed to be the crucial factor and was compared with dicta in the Australian case of Godbolt v Fittock[40] which drew a distinction between a situation involving pursuit and an instance where there was no peculiar causal connection linking the accident with the criminal venture. Godbolt v Fittock involved two rustlers who were transporting stolen cattle in a truck. The driver fell asleep causing the truck to crash , injuring the plaintiff. In Ashton's case the court clearly perceived that the plaintiff's illegal and anti-social conduct was such that compensation by way of damages should not be awarded, and it was on the facts able to invoke an implied consent to assume the legal risk.

The present situation would seem to be that because of the difficulty in ascertaining consent the defence is generally not invoked unless the necessary inference can be unequivocally made. If the courts regard the conduct of the plaintiff as not being too serious, it can be

treated as evidence of contributory negligence.[41] Where the offence is seen as being more serious in terms of the plaintiff's conduct as in Ashton v Turner for example, the courts will, if possible, infer consent to waive any legal rights of the plaintiff, or else it will as Fleming noted, deny a remedy on some other ground.[42]

Duty of Care

One of the more important methods used to deny an injured wrong-doer a remedy has been to deny the existence of a 'duty of care' between him and the defendant. The concept of the 'duty of care' owed by one person to another in any particular situation describes the general relationship between the parties that must exist before liability will attach. It is derived from Lord Atkin's speech, "... you must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour."[43]

The 'duty of care' is a prerequisite to any negligence action and the criteria as to the circumstances in which it is applicable is undergoing a continuous process of evolution. The most recent statement of principle was enunciated by Lord Wilberforce in Anns v Merton London Borough where he instituted a new two tier test:[44]

> Through the trilogy of cases in this House Donoghue v Stevenson... Hedley Byrne & Co Ltd

> v Heller & Partners... and Dorset Yacht Co v Home Office..., the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of the situation within those of previous situations in which a duty of care has been held to exist. Rather, the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmitively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of the person to whom it is owed or the damages to which a breach of it may give rise.

The statement of principle in Anns case as to the duty of care was considered by the Court of Appeal in Scott Group Ltd v McFarlane.[45] In the case two of the three judges expressed their approval of it:[46]

> With respect I think the statement is a valuable and logical guide to the way in which a decision should be made as to whether a duty of

> care exists in an apparently novel situation. The mere absence of precedent will not be enough to protect the defendant.

> The statement of general principle in Anns case can be seen as an important simplification of the law, embodying an indication of emphasis but qualified sufficiently to prevent development from getting out of hand; and I would unhesitatingly apply them.

Prior to Anns case the courts had found duty to be an effective device in reconciling conflicting social interests without having to resort to overt statements of policy in reaching a decision. The duty concept enabled the courts to deal with the cases at a more specific level than would otherwise not have occurred had a more general approach been taken.

Thus in Hillen v I.C.I. (Alkali) Ltd[47] the English Court of Appeal held that a plaintiff who was in breach of the Dock Regulations and was injured as a consequence, could not recover compensation. The action taken by the plaintiff in wilfully breaching a regulation enacted for the purpose of ensuring his safety, excluded any duty on the part of the defendant's other than to abstain from doing acts to injure the plaintiff. It was of[48]

> ... great importance that the Docks Regulations, designed to ensure protection to life and property, should be strictly enforced, and that persons knowingly breaking them should not be entitled to escape the effects of their conscious breaking of the law.

Courts in Australia and Canada have either considered or utilised the duty question to deny a remedy to injured wrongdoing plaintiffs. In Henwood v Municipal Tramways Trust Dixon & McTiernan JJ. noted that "many duties arise out of relations which could not subsist when one of the parties is a wrongdoer or is engaged in an illegality".[49] In Smith v Jenkins Barwick C.J. succinctly noted the options facing the court in such instances lay[50]

> ... between a refusal of the law to erect a duty of care as between persons jointly participating in the performance of an act contrary to the provisions of a statute making their act a crime, (or, a refusal) ... upon grounds of public policy, to lend their assistance to the recovery of damages for breach in those circumstances of a duty of care by one to the other because of the criminally illegal nature of the act out of which the harm arose.

Thus in Smith v Jenkins the court refused relief on the

basis of Barwick CJ.'s first stated option. The effect of the decision was that a plaintiff in an action arising from a criminal act relieves his fellow participants of any responsibility towards him; each takes the risk of negligence of the others in the actual performance of the criminal act. In the case, the leading judgment was given by Windeyer J. He held that a right of action only arose if there also existed a duty of care. He found the necessary duty of care did not exist. He used as a comparison an action for negligent misstatement which requires the existence of a special relationship between the parties for the action to stand. "If a special relationship be held in some cases a prerequisite of a duty of care,... in other cases a special relationship can exclude a duty of care."[51] Both Owen and Walsh JJ. agreed with this in their judgments. Thus Owen J. stated that:[52]

> ... the law does not recognise the relationship between two criminals who are jointly engaged in carrying out a criminal venture as being one which gives rise to a duty of care owed by one to the other in the execution of the crime.

It is worth noting briefly that in the course of his discussion on the duty question, Windeyer J. stated that, "it seems to me a mistake to approach the case by asking whether the plaintiff is precluded by considerations of public policy from asserting a right of action for negligence".[53]

While there are other cases in both Australia and Canada[54] (decided prior to Smith v Jenkins) which considered the duty question, the recent English case of Ashton v Turner is more instructive. There Ewebank J. held that[55]

> ... the law of England may in certain circumstances not recognise the existence of a duty of care by one participant in a crime to another participant in the same crime, in relation to an act done in connection with the commission of that crime. The law is based on public policy, and the application of the law depends on a consideration of all the facts.

Although this is only a first instance decision, it does acknowledge that the ultimate arbiter as to whether or not a duty of care shall be found to exist is public policy - i.e. a creative decision made by the court on its assessment of the competing social interests that are involved. In that case the flight from the police by the two drunken burglars was sufficient.

What these cases indicate is that the role of duty is to limit the liability of the defendant, or more correctly, to disentitle the plaintiff from any claim. The courts by utilising the duty concept have been able to disguise the policy factors that have motivated them. Thus in Smith v Jenkins only Walsh J. was prepared to state that policy considerations were involved when he noted that

he saw the dispute as being another example of a more general problem concerning the circumstances in which the law gives no right of action to a person while he is engaged in unlawful acts.[56] A further indication of the reality of the situation can be seen in the following statements of Lord Denning M.R:[57]

> At bottom I think the question of recovering is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do so as to limit the responsibility of the defendant....
>
> Sometimes I say 'there was no duty'. In others I say 'the damage is too remote'. So much so that I think the time has come to discard these tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not as a matter of policy... the loss should be recoverable...

Ford quotes Dean Prosser on this point:[58]

> There is a duty if the court says there is a duty; the law... is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability: it necessarily begs the essential question.

The decision in Anns case now directs the court to have in mind the competing social interests that are involved and to make a creative decision as to whether or not

the duty of care shall be mitigated either in part or in full. In respect to the cases mentioned, the courts in those instances have often examined the[59]

> ...considerations mentioned by Lord Wilberforce as properly forming part of the second question first; and sometimes they loom so large that the primary issue as to whether the defendant ought properly to be regarded as within a prima facie situation of responsibility is given little attention or not answered at all.

Whether or not the courts follow the lead given by Lord Wilberforce remains to be seen. In Ashton v Turner the court steadfastly kept to existing concepts and categories not withstanding a certain candour as to the policy basis of the decision on the duty question. It is possibly open to the courts to deny any general application of Lord Wilberforce's two tier test, as Richmond P. did in Scott Group Ltd v McFarlane[60] and in this way circumvent its general intention.

Ex Turpi Causa Non Oritur Actio

With the duty of care, this is the other major device used to deny an injured wrong-doing plaintiff a remedy. The principle embodied in the maxim is a manifestation

of public policy and its essence is that a criminal act cannot be made the foundation of an action. The principle is derived from the law of contract and therein lies much of the controversy surrounding its use in this area of law. However the notion embodied in the maxim, has a superficial logic in its application to tort and its use in this context does provide a convenient form of speech.[61] The maxim was employed in a tort case as early as 1834 in Colburn v Patmore, where Lord Lyndhurst C.B. noted:[62]

> I know of no case in which a person who has committed an act declared by the law to be criminal has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime... I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission.

Since then it has proven a useful device for the courts to utilise when other more orthodox categories are not available. However, it should be noted that the principle does not apply to breaches of statutory regulations. This point was discussed in Cakebread v Hopping Bros (Whetstone) Ltd[63] where Cohen L.J. stated that as the maxim was based on public policy it seemed that public policy required the case to be decided on its

merits. The policies of the Factories Acts (which were the statutes in question) made it plain that the ex turpi causa defence doctrine would be inconsistent with the intention of Parliament. This was approved by the House of Lords in National Coal Board v England[64] and its effect is that where there are breaches of such legislation by the plaintiff (and the defendant) then there was no scope for the operation of the doctrine.

Although the applicability of the maxim in tort has been severely criticised this is a consideration somewhat extraneous to this paper.[65] Suffice to say that there are cases in which the maxim has been invoked to deny a remedy to a plaintiff injured as a consequence of his involvement in an illegal act. What is indicated by these cases is a consideration by the courts of the merit or otherwise of compensating injured wrongdoers.

In Tallow v Tailfeathers which involved joint illegal use of a motor vehicle, the defendant raised the defence of ex turpi causa in respect to the plaintiff's claim for compensation for injury caused by the negligence of the defendant. The plaintiff had participated in the theft of a motor vehicle and in its subsequent illegal use. All parties involved were also drunk. The defence was accepted by the court on the basis that the success of its application in any case depended on proof of "behaviour on the part of the plaintiff which, in its nature and degree is inimical to the interests of

society and on his claim against the defendant arising out of that behaviour."[66] Not only does this show the courts role in making a creative choice from the competing social interests involved, but it also indicates that the test involves an assessment of what the degree of behaviour acceptable to society is. The test utilised by the court, 'behaviour which in its nature and degree is inimical to the interests of society' - was taken from a dictum of Diplock L.J. in Hardy v Motor Insurers Bureau:[67]

> The rule of law on which the major premise is based, ex turpi causa..., is concerned specifically with the lawlessness of contracts, but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the rights ... which is regarded by the courts as sufficiently anti-social to justify the court refusing to enforce that right.

On this basis it would not be every act prohibited by law that is sufficient to constitute behaviour on which the rule operates.

In determining the proof of behaviour on the part of the plaintiff which satisfies the test laid down in Tallow

v Tailfeathers, the judge said[68]

> judgment must be based, not on the social and legal structure of a past century but on the present changed and changing conditions of society and the proliferating controls of conduct in the pervasive judicial system by which it is governed.

While many of these controls are regulatory, they can be contrasted with behavioural acts which disclose such a quality of turpitude that they must be regarded as sufficiently anti-social to justify the denial of civil rights. It is to these latter cases that the maxim is applied. What is involved is a moral culpability; that it is repugnant for the law to assist a wrongdoer. Typical of the situations in which the ex turpi causa maxim has been invoked involve the illegal use of a motor vehicle and the injury to one of the participants because of the negligence of one of his accomplices. Very often alcohol is involved as is flight from the police.[69]

What is to be noted is that the maxim is but another device for the court to utilise to deny a plaintiff a right of action. It achieves exactly the same purpose as denying that a duty of care exists between the plaintiff and the defendant. Both seek to do the same thing only different labels are given to the rationale that is utilised. Clearly, in either Smith v Jenkins or in Tallow v Tailfeathers the result sought by the court could have been achieved by any of the above de-

vices. This point was made clear by Clement J.A. in Tallow v Tailfeathers when he observed that the plaintiff could have been disentitled by invoking the volens maxim[70] while in Ashton v Turner it was held that the plaintiff could be disentitled by first, denying the existence of a duty of care, second, by the operation of the volens maxim and third, (if he was wrong on the first two points) that the plaintiff was guilty of contributory negligence (to the extent of fifty percent).

The point that has now been reached is that it is to be seen that what the courts are doing in this area of law has been to resolve the disputes before them not by the means of any established legal principle (although the actual decision may have that appearance) but rather by an evaluation of the particular offence in its own context. In this way they ascertain whether or not behaviour is in its nature and degree inimical to the interests of society; an assessment of the degree of moral culpability involved is made.

Thus if an offence consists of the illegal use of a motor vehicle and includes any of the following factors - consumption of alcohol by the participants, an attempt to flee from the police, or the presence of violence - then relief would be denied, such behaviour being of a sufficiently anti-social nature to warrant this result. The attitude of the court is that such behaviour is con-

sidered by the community to be so reprehensible that all rights to compensation are lost.

This reflects two inter-dependant influences. The first is a recognition of the symbolic value of the court as an embodiment of the moral law. In order for law to be accepted by a society or community it must have the support of that society and in turn it must accept the morality of that society. There may be at any time divergence between the society and the law in their respective perceptions of morality but ultimately they must be mutually supportive. Thus it is quite possible on this basis to distinguish between degrees of illegality; between, for instance, a breach of a statutory regulation[71] and the breach of a provision of the substantive criminal law,[72] conduct in the latter instance displays an unnecessary degree of moral turpitude which in contrast, is not possessed by the former. To allow recovery in such instances would be an affront to conscience and common sense. This is the (at least) tacit underlying assumption.

The second influence at play here is that of punishment. Obviously to deny a right of action to a plaintiff is to punish and in this context is used to signify to such a person that his conduct has fallen below the standard required by society. Such a plaintiff is in effect, "beyond the pale".[73] To deny a remedy to an injured wrong-doing plaintiff is analogous to an award of exemplary damages against a defendant in a mainstream

torts case, for not only is such a person punished by his injury which can often have very serious consequences, he is also liable to be subject to the rigor of the criminal law in respect of his illegal conduct.[74] To then deny a remedy in tort is a reaffirmation of the role of tort in sanctioning conduct, in teaching a moral lesson, and to encourage responsibility. (The validity of such a role as well as its efficacy is however, subject to doubt).

A further implicit factor involved here is the reluctance of the courts to allow any person to use the law to benefit or profit from their own wrongful action. This in part represents a further social interest - the need to maintain the integrity of legal and judicial institutions.

3. ACCIDENT COMPENSATION IN NEW ZEALAND

The Historical Context

New Zealand has had a long tradition of state humanitarianism[75] representing the willingness of the state to play an active role in promoting the economic and social well-being of its citizens. This process really began in the period 1891 - 1900 under the Liberals and has been continued by successive governments which

have recognised that there is a significant social interest in maintaining minimum standards of individual life. Social security was an investment in the future of the country:[76]

> It was created by the general will - a will which had sought expression from the earliest days; which had been inspired... by the humanitarianism of the missionaries and by the utilitarian creed, 'the greatest good of the greatest number'.

It was this humanitarianist creed which had been adopted by the state and which resulted in the welfare state. It produced free hospital treatment, the far-reaching social and industrial legislation of the 1890's [77] the Social Security Act of 1938 and the abolition of the means test for the family benefit in 1946. New Zealand had a system of organised communal welfare and it is within this tradition that accident compensation must be placed. The Woodhouse Report intended that its proposals should be seen in that light and its philosophy of community responsibility is indicative of this; it was not presenting any alien view by using this as its initial statement:[78]

> This first proposal is fundamental. It rests on a double argument. Just as a modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to

> work but prevented from doing so by physical incapacity. And, since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on a basis of equity by the community.

The accident compensation scheme thus is part of a welfare ethic which exists in the body politic and is an acknowledgement of the value to the community of ensuring the social and economic well-being of its members.

The Accident Compensation Act represents the success of an advanced system of social insurance in the place of tort claims for personal injuries.[79] The common law action while it had "performed a useful function in the past... had become increasingly unable to grapple with the present needs of society."[80] It was becoming more difficult to prove the requisite element of fault, and fault itself as a concept was becoming less relevant to the conditions of a modern society, especially under the impact of insurance which had the effect of spreading the economic costs of accidents throughout the community. "In a modern world of many accidents and community-wide insurance to cover them the fault theory

has developed into a legal fiction"[81] The common law action was also expensive for those involved and it meant delays of months (if not years) before the matter would be finally concluded. Because of the inherent wastage, successful plaintiffs would receive only a fraction of any damages award, the bulk having been absorbed into the system. These shortcomings of the then existing system were noted in detail in the Woodhouse Report.[82] The reasons for reform were clear and were accepted.

What has proven controversial was the proposal for an all-embracing scheme, including even those injured because of their illegal activity. The Woodhouse Report recommended that only self-inflicted injuries should be excluded from the scheme and in 1969 the Department of Labour's commentary on the report noted a number of arguments which could be made against depriving individual wrongdoers of compensation:[83]

(a) As the Commission emphasised, an injury has identical social, personal, and economic effects regardless of how it was caused.

(b) The wife and family of a man who injures himself through his own fault are just as dependent on him as they would have been in other circumstances. The denial of compensation would, therefore, punish all members of the family. The penalty would have its most serious impact in the case

of a fatal injury.

(c) As a member of the workforce the individual concerned ought to be rehabilitated and encouraged to get back to work.

(d) Anti-social activity causing injury should be punished through the criminal law. The withholding of compensation where the injury results from a wrongful act would constitute double penalty.

That the question of compensating criminals and those injured by virtue of their own reckless conduct was not considered to be an overwhelming problem given the basic acceptance in New Zealand of the social and economic wellbeing ethic can be seen in the introduction to the 1969 commentary by the then Minister of Labour - when he said[84]

> ... it has been pointed out that a person injured through his own reckless conduct would recover compensation. This would happen in only a small minority of cases and the argument does not carry much weight when we are dealing with a proposal to provide real compensation for all twentyfour hours of the day, whatever the cause of the injury.... Certainly the existence of an anomaly at the margin cannot be allowed to block proposals, if otherwise acceptable, to improve our social legislation.

Possible Means of Exclusion

However, if it were to be decided that an injured criminal should be excluded from the scheme, how could this be achieved? The basis of the decisions of common law turn on questions of public policy - the refusal to enforce a right of action that arises out of an act that is of such a serious nature to justify it being characterised as anti-social. Is there any practical way to achieve this?

It could be possible to distinguish between summary and indictable offences. Anyone convicted of the latter would be refused compensation. Palmer has illustrated quite clearly the pitfalls inherent in any such blanket disqualification,[85] the problem being that some indictable offences are quite capable of producing far less drastic results for those involved than some summary offences which conversely can have very serious consequences (especially those concerning the careless use of a motor vehicle or the use of a motor vehicle while under the influence of alcohol - offences under the Transport Act 1962). The range of alternatives in any attempt to distinguish between offences is considerable and no matter where the line is drawn anomalies and exceptions will arise. For instance, one could adopt as a minimum, offences which carry a maximum penalty of three months imprisonment. This would include within its ambit serious driving offences which clearly could be categorised as anti-social, but which would also produce a possible wide range of anomalies

and absurdities. For instance, a person could be injured while committing an offence against Section 46 of the Police Offences Act 1927 - "Prostitute Importuning Passengers or being Riotus", or equally unlikely, injury could occur in an instance were a person is guilty of an offence against Section 12(1A) of the Police Offences Amendment Act (No.2) 1952 - "Fortune Telling for Reward with Intent to Deceive". In both instances compensation would be denied.

Problems again arise should it be decided that actual benefits received under the accident compensation scheme be reduced if the recipient was injured in the course of the commission of a crime. Palmer[86] notes three possible devices for reducing compensation benefits. First, in the instance of serious crimes[87] removal of the right to lump sum compensation under Sections 119 and 120 of the Act. Secondly, a flat rate benefit could be substituted in place of the earnings related payment, and thirdly, payment of compensation on a scale related to the term of imprisonment imposed. The following points can be noted in respect to this. What is a serious crime, how is it defined and who defines it? This raises the same issues discussed above in relation to the summary/indictable offence dichotomy; at which point is the line to be drawn? At a more basic level, the seriously disabled criminal must be able to provide for his family once he has finished his sentence. A further point is that to reduce possible benefits that he may be entitled to in effect adds to the disabilities

imposed by the criminal law, and that to reduce benefits takes no account of the position of possible dependants who are reliant on the injured offender for support. It should not be forgotten that the Accident Compensation Corporation has the discretion to refuse to pay compensation to injured criminals (by virtue of Sections 129, 137 and 138). This discretion is exercised by the Corporation in respect to unmarried offenders and those who do not have dependants reliant on them for support. In this respect the Corporation is mindful of the social interests that are involved in each particular instance.

The most practical approach would possibly be to follow the recommendations of the Australian report and accept the fact that the dividing line between offences which would be included and those which would be excluded from the scheme is purely arbitrary. But again exceptions and anomalies arise depending on where the line is to be drawn. If the Australian recommendation as to those offences which would not be within the ambit of the scheme were to be adopted then the range of exclusions would in practice not be much different from what it is now under the existing scheme.

The end result is that there is no practical method of excluding from the scheme those who are injured as the result of their involvement in criminal activity. Whatever device is used serious anomalies and exceptions result which serve to negate the effectiveness of that particular device. As was noted in the 1969 commentary

this is so even if the behaviour leading to the injury is sufficiently anti-social to be regarded by the community "to be so reprehensible that the claimant for compensation indulging in such behaviour might be considered ineligible for all or some of the benefits of the scheme."[88]

What is often overlooked in debates concerning accident compensation and the question of whether or not injured wrongdoers should be compensated is that the Accident Compensation Act accepts as a fundamental premise the concepts of community responsibility and of comprehensive entitlement irrespective of cause. As the Woodhouse Report stated, it was[89]

> In the national interest and as a matter of national obligation, that the community protect all citizens... from the burden of sudden individual losses when their ability to contribute to the general welfare has been interrupted by physical incapacity.

Too often this principle has been lost sight of and it in part explains the actions of various groups who propose changes to the scheme to remove injured wrongdoers from its ambit. Such a view ignores "the need for an integrated solution with comprehensive entitlement for every man and woman, and coverage in respect of every accident. This is the central recommendation of our report".[90] In compensating injured wrongdoers the

accident compensation scheme fulfils a complementary function to the free public health service and to social welfare. Injured wrongdoers are entitled as of right to free medical treatment for the injuries irrespective of how they occurred. If they are imprisoned then their families are entitled as of right to social welfare benefits during the period of imprisonment while upon release the injured wrongdoer himself receives social welfare benefits. This is an important point that is often neglected. The state is not, by the means of accident compensation, providing injured wrongdoers and/or their dependants with unjustified largesse. The accident compensation scheme is but one aspect of the overall social welfare framework which is designed to ensure that members of the community maintain minimum economic and social standards. This is a particular social interest that has long been recognised as desirable and has been an important motivating force in the social and economic development of New Zealand.

4. CONCLUSION

Is there then any principle that can be derived from the common law which would enable us to exclude injured wrongdoers from the accident compensation scheme? As I have shown the common law response has in the final analysis been based on policy reflecting the court's

perception of particular social interests. Policy has been resorted to largely because existing legal categories have proved both inadequate and inappropriate to deal with the questions involved. There is also a further contributing factor in that the courts have been caught between the demandsof stare decisis on the one hand and on the other by the need to adapt to meet the requirements of a rapidly changing society. In this respect neither demand has been satisfied. While it is correct that in recent years there has been an increasing movement towards judicial candour in the acknowledgement of the role played by policy, this only serves to highlight the point being made that policy is the rationale by which cases in this area of law are decided.

Policy factors are not a sufficient foundation for deciding whether or not in any given situation compensation should be payable. The reason for this is simply that the inherent degree of creative judicial discretion involved in determining questions on a policy basis would result in justice once more being dispensed in a piecemeal fashion 'according to the length of the judge's foot'. Compensation would very probably become again a question of lottery there being no guarantee of either certainty or of uniformity in decision making.

The other side of the dichotemy is presented by the existing accident compensation scheme and the philosophy

which underlies it. Since 1890 New Zealand has developed a tradition which has accepted the organised and deliberate use of the power of the state to first, ensure that individuals and families are able to live at a satisfactory minimum economic standard, and secondly, to narrow the extent of insecurity by enabling members of society to meet a variety of social contingencies which lead to individual and family crisis.[91] These include for example, sickness, old age, unemployment and now, injury. Thus the context in which the accident compensation scheme must be seen is that of the welfare state, accident compensation being but one aspect of its manifestation in New Zealand. It is a logical and complementary extension of the existing welfare framework. The immediate concepts behind the scheme of community responsibility for the injured and comprehensive entitlement to treatment, rehabilitation and compensation are not now seriously challenged[92] once they have been placed in the proper perspective and context. The accident compensation scheme has since its inception in 1974 been a success and the period has seen the welcome eclipse of the common law action, an occurrence regretted by very few. The Accident Compensation Act itself is one of the hallmark pieces of social legislation of recent years and has ushered in an era of rational compensation. It has also allowed New Zealand to once again grasp the mantle of being the social laboratory of the world.[93]

5. Footnotes

1 Report of the Commission of Inquiry, Compensation for Personal Injury in New Zealand, December 1967.

2 Ibid., para. 18.

3 Ibid., para. 484 (2).

4 Areas in which the scheme as enacted varies from the recommendations in the report are not relevant to this discussion. For my purposes this question does not arise.

5 This example actually occurred in 1980: an attempt to rob the Manurewa Post Office ended with one of the robbers being shot and wounded by his accomplice.

6 G. Palmer, Compensating Criminals (1975) N.Z.L.J. 608.

7 THE NEW ZEALAND ACCIDENT COMPENSATION SCHEME: A REVIEW. Government Cabinet/Caucus Committee Report 1980.

8 Idem.

9 Idem.

10 The proposals were drafted into a Bill. The Bill is not being proceeded with having been referred back to the Accident Compensation Corporation for twelve months.

11 Report of the National Committee of Inquiry, Compensation and Rehabilitation in Australia, July 1974.

12 Ibid., para. 364(d).

13 Ibid., para. 364(c).

14 Ibid., para. 364(b).

15 Heuston. Salmond on Torts P508.

16 (1973) 44. D.L.R.(3d) 55.

17 (1970) 119 C.L.R. 397, 427.

18 For example: Canning v The King [1924] N.Z.L.R. 118; Hillen v I.C.I. (Alkali) Ltd [1934] 1 K.B. 455; Henwood v Municipal Tramways Trust (1938) 60 C.L.R. 438; National Coal Board v England [1954] A.C. 403; Progress and Properties Ltd v Craft [1977] 12 A.L.R. 59.

19 For example: Smith v Jenkins op.cit. supra n.15;

Tallow v Tailfeathers op.cit. supra n.16; Godbolt v Fittock (1963) S.R. (N.S.W.) 617 (FC); Bondarenko v Sommers (1968) 69 S.R. (N.S.W.) 269 (CA); Ashton v Turner [1980] 3 All E.R. 870.

20 These are the product of the dualism that exists between the demands of stare decisis and the adaption of the law to social change. The categories serve as devices which in the final analysis permit a creative decision to be made, based upon the court's evaluation of the social system confronting it. Such a result occurs because in the initial syllogism as presented to the court no answer is produced. Julius Stone Legal Systems and Lawyers' Reasoning. ch7.

21 Ibid., p25.

22 Fleming. The Law of Torts p215.

23 Atiyah. Accidents, Compensation and the Law. p154.

24 Cakebread v Hopping Bros (Whetstone) Ltd [1947] K.B. 641; National Coal Board v England op. cit supra n.18; Hillen v I.C.I. (Alkali) Ltd op. cit supra n.18; Progress and Properties Ltd v Craft op. cit. supra n.18.

25 Foster v Morton (1956) 4 D.L.R. (2d) 269; Ashton v Turner op. cit. supra n.19.

26 Miller v Decker (1957) 9 D.L.R. (2d) 1.

27 Rodrique v Penner (1970) 74 W.W.R. 96.

28 Fleming. Op. cit. p233.

29 (1963) 36 D.L.R. (2d) 159.

30 Rondos v Wawrin (1968) 68 D.L.R. (2d) 658, 662.

31 [1939] 1 K.B. 509.

32 Supra n.19.

33 Supra n.17.

34 Ibid., 431. per Walsh J.

35 Ibid. 404. per Kitto J.

36 1965 A.C. 656.

37 Ibid., 693.

38 Idem.

39 Supra n.19. However being only a case at first instance its authority is slender.

40 Idem.

41 National Coal Board v England Op. cit. supra n.18.

42 Op. cit. p233.

43 Donoghue v Stevenson [1932] AC 562, 680. The 'neighbourhood' test: "... those people who are so clearly and directly affected that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the act or omissions which are in question." p680.

44 [1978] A.C. 7.28. 751-752. Lord Wilberforce's speech was expressly approved by Lords Diplock, Simon of Glaisdale and Russell of Killowen.

45 [1978] 1 N.Z.L.R. 553.

46 Ibid. 573, per Woodhouse J; 584 per Cooke J.

47 Supra n.18.

48 Ibid. 468, per Scrutton L.J.

49 Supra n.18. at 465.

50 Supra n.19. at 400.

51 Ibid. 418. Windeyer J. then quoted Lord Atkin in Donoghue v Stevenson for support for this statement.

"But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy", at 580. Windeyer J. is wrong to use this statement as support since Lord Atkin was there emphasising that not all moral breaches can be seen as legal breaches, clearly not what Windeyer J. was intending.

52 Ibid. 425. Walsh J. stated much to the same effect at 428 - 429 and at 432.

53 Ibid. 418.

54 For example: Christiansen v Gilday (1948) 48 S.R. (N.S.W.) 352; Boeven v Kidd [1963] V.R. 235; Danluk v Birkner (1946) 3 D.L.R. 172.

55 Supra n.19. 877. Note that Ewebank J. made no reference to Anns v Merton London Borough. Op. cit. supra n.49.

56 Supra n.17 428 - 429.

57 Sparton Steels and Alloys v Martin [1973] Q.B. 27, at 36,37. While this is an instance of negligently caused economic loss, it is at least worth observing the candid acknowledgement of the reality of judicial

decision making in respect to questions of duty in tort.

58 W.J. Ford. 'Tort and Illegality: The Ex Turpi Causa Defence in Negligence Law'. (Part One) 11 M.U.L.R. 32, 40 'Palsgraf Revisited' (1953).

59 Scott Group Ltd v McFarlane Op.cit. n51. 574, per Woodhouse J.

60 Supra n.51, 565.

61 J.A. Jolowicz. Winfield and Jolowicz on Tort p.669. Eleventh ed.

62 (1834) 1 CM and R 72 149 E.R. 999. 83.

63 Supra n24, 654.

64 Supra n.18, especially Lord Porter at 419.

65 This paper here is concerned with how the courts have justified their decisions to deny compensation to those people who have suffered injury as a consequence of their illegal activity. The ex turpi causa maxim is but one of the means used to achieve the desired end. The merit or otherwise of the use of such means is outside the ambit of this paper. For a criticism of the use of the maxim see Smith v Jenkins 409 - 414, per Windeyer, J.

66 Tallow v Tailfeathers Op. cit. Supra n.16, 61.

67 [1964] 2 All E.R. 742, 750.

68 Supra n.16. 61.

69 For example: Tallow v Tailfeathers Supra n.16; Ashton v Turner Supra n.19; Rondos v Wawrin Supra n.30; Ridgeway v Hilhorst (1967) 59 W.W.R.309.

70 Supra n.16, 68.

71 As done in National Coal Board v England Supra n.18; and Progress and Properties Ltd v Craft Supra n.18.

72 As for example in Smith v Jenkins Supra n.17; Tallow v Tailfeathers Supra n.16; Ashton v Turner Supra n.19.

73 This point is illustrated by the judgement of Ewebank J. in Ashton v Turner. Idem.

74 Though compare the comments of Lord Reid in Cassell & Co. v Broome [1972] A.C.1027, 1086. "It is confusing the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties".

75 The phrase was used by K. Sinclair in his A History of New Zealand to describe the legislative achieve-

ments of the Liberal Government elected in 1890. Penguin 1969. P268.

76 Ibid., p.271.

77 For example: Factories Act 1891 (and its later amendments); Truck Act 1891; Land for Settlements Act 1892; Shop and Shop Assistants Act 1892; Electoral Act 1893; Industrial Conciliation and Arbitration Act 1894, etc.

78 Op. cit. para 56.

79 T.G. Ison. Accident Compensation. Croom Helm. 1980. p.13.

80 Compensation for Personal Injury in New Zealand Op cit. para 83.

81 Ibid., para 88.

82 Ibid., refer paras 84 - 125.

83 Personal Injury A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand. October 1969, para 326.

84 Ibid., p.6 - 7.

85 Op. cit. p.610.

86 Idem.

87 Emphasis added.

88 Personal Injury Op. cit. para 323.

89 Op. cit. para 484 (1).

90 Ibid., para 7.

91 Asa Briggs The Welfare State in Historical Perspective p.228.

92 Ison, Op. cit. n.79. quotes Mr K.L. Sandford then Chairman of the Accident Compensation Commission: "I believe that there would be few, if any people in New Zealand who would wish to return to the legal lottery of the common law process, which benefitted so few, ignored so many. The New Zealand system is regarded as based on nobler social objectives, on less hypocrisy and fewer anomalies", Views on Compensation, K. Sandford, The Dominion, Wellington 15 August 1979, p.9.

93 This phrase is taken from Sinclair, op. cit, n.75. p.187. "At the Eighty Club in London Asquith described it (New Zealand) as 'laboratory in which political and social experiments are every day

made for the information and instruction of the older countries of the world'."