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HIGH COURT OF AUSTRALIA

PROGRESS & PROPERTIES LTD v CRAFT

Barwick CJ, Stephen, Mason, Jacobs and Murphy JJ

18 November 1976 — [1976] HCA 59; (1976) 135 CLR 651; 51 ALJR 184; 12 ACR 59

NEGLIGENCE – DUTY OF CARE – CLAIM FOR PERSONAL INJURY – WORKMAN INJURED WHEN HE RODE ON A LIFT WHICH FELL AND CAUSED INJURY TO THE WORKMAN – ILLEGAL FOR PERSON TO RIDE ON LIFT – AT TRIAL ILLEGALITY ADVANCED TO COURT – DAMAGES ORDERED – WHETHER ERROR.

Lift operator of a goods lift permitted a fellow workman to ride the lift. Regulations prohibit the carriage of passengers. Regulation reads "NO person, shall instruct, permit, or allow any other person to ride upon the hoist platform." The operator concurred with a workman riding the hoist to the top floor. The operator's foot slipped off the brake and the lift fell at speed. The injured workman commenced action for negligence against his employer, who made the plea of illegality.

HELD: (Barwick CJ dissenting) the plea failed. The original award of damages was a proper order.
1. The relationship of the alleged joint illegal activity to the negligence did not absolve the operator from a duty towards the other workman to operate the hoist with due care for his safety. The standard of care required in the operation of the lift was the same whether or not it was legal for a workman to ride on the hoist platform. Further, the rule or principle by which the law refrains from imposing a duty of care by a person engaged in a joint illegal enterprise towards another engaged in it in respect of the enterprise does not apply where the illegality arises from the breach of a specific statutory duty designed for the safety of one of the participants.
***Smith v Jenkins* [1970] HCA 2; (1970) 119 CLR 397; [1970] ALR 519; 44 ALJR 78, distinguished.**

2. That a person who is injured in consequence of the breach of the regulation by a builder or a person for whose acts a builder is responsible, including a person who is injured while on a hoist in breach of the regulation, has a right of action for damages for injuries sustained as a result of the breach.

BARWICK CJ: First, as to the plea of illegality. Breach of reg 139 (25) carries a penalty: there is a criminal sanction for the breach of the regulation. It is none the less so because the punishment is pecuniary. In that connexion, it may be observed that the breach of s81(2) of the *Crimes Act*, 1958 (Vict.) ('the Crimes Act', with which the Court dealt in *Smith v Jenkins* [1970] HCA 2; (1970) 119 CLR 397; [1970] ALR 519; 44 ALJR 78, attracted a pecuniary penalty and/or imprisonment, or both.

A breach of this regulation can consist of permission or allowance of a person, not being a workman engaged in maintaining the hoist, to ride on the hoist. The person so permitted or allowed also commits a breach of the regulation by his exercise of that permission or allowance by riding on the hoist. In the present case, clearly he was permitted or allowed by the hoist driver to use the hoist. Nor can there be any suggestion that either the driver or the respondent was unaware of the prohibition. Both, in my opinion, were co-operatively engaged in breaking the regulation.

Both the driver and the respondent were unlawfully using the hoist, and it was the manner of that use which was a cause of the respondent's injuries. In *Smith v Jenkins* [1970] HCA 2; (1970) 119 CLR 397; [1970] ALR 519; 44 ALJR 78 the Court took the view that the plaintiff and the defendant in that case were jointly engaged in a breach of s81(2) of the *Crimes Act*. The breach was the use of a motor car without the consent of its owner. The driver was involved in an accident on which his passenger was injured. The majority, expressed the view that a right of action in negligence was not available to the plaintiff because the plaintiff and the defendant were joint participants in the unlawful act out of which, because of the manner of the performance of that act, the injuries to the plaintiff arose.

This Court has authoritatively decided that, where a plaintiff and a defendant have joined in the commission of an illegal act, neither has a cause of action against the other in negligence in respect of the manner in which the one has acted towards the other in the course of the commission of that act.

After much consideration, I cannot find any distinction in point of basic fact or principle between this case and *Smith v Jenkins*. True it is that in the latter the driver was in the car and using it, as it were, from within, whereas in the present case the driver of the hoist was outside the platform upon which the respondent was riding. That, it seems to me, is an immaterial distinction. The entry of the respondent upon the hoist was the counterpart of the permission given, perhaps tacitly, by the driver of the hoist. The use of the hoist by the respondent involved his participation in that use, both in allowing the respondent's entry upon it and by driving the hoist.

It was clearly unlawful for the hoist to be used with the respondent upon it. To use my own language in *Smith v Jenkins* [1970] HCA 2; (1970) 119 CLR 400; [1970] ALR 519; 44 ALJR 78, the relationship of the driver and the respondent 'was that of joint participants in the very act, itself unlawful in the sense I have mentioned, out of which the mischief to the respondent arose'.

There then arises the question, not resolved in *Smith v Jenkins*, whether breach of a regulation, and particularly a regulation designed for the safety of workmen, can be differentiated from the breach of the provisions of the *Crimes Act*, such as that dealt with in *Smith v Jenkins*, so that joint participants in an act proscribed by regulation and visited with punishment in case of its breach either yet stand in relationship to one another as neighbours so as to attract a general duty of care and are not within the policy of the law which would deny a cause of action to such joint participants in the case of a breach of a provision of a *Criminal Code* or a *Crimes Act*.

I am all too aware that to hold that a workman, who has been injured by the negligence of a fellow workman, has no cause of action because his injuries spring out of an illegal act jointly undertaken presents features of harshness which are not readily acceptable in the present-day world. The abolition of the doctrine of common employment had vast consequences for workmen who suffered by the negligence of their fellow workmen.

The basic rule is that there is no right of action for negligence by one such co-operator against another: that is to say, they are joint participants in an illegal act and the result of the conduct of one of them in the course of the performance of that act is the source of injury. ... the question is not whether a statute creating an offence also denies a remedy. Rather it is whether it preserves a remedy which otherwise would be gone, or as I think it is correct to say recognises an exception to the rule that a criminal cannot have the aid of the law in his complaint against his fellow. Consequently, bearing in mind the existence of what is called the basic rule, not to apply it in the case of a breach of a regulation is to diminish the punishment which the law requires in its desire to procure the observance of the law.

After a good deal of consideration, I have come to the conclusion that the Court is not warranted in treating a breach of such a regulation as in any different case from a breach of a provision of a *Criminal Code* or a *Crimes Act*. I am unable to find any distinction between such a case as *Smith v Jenkins* and this case either because of the nature of the subject matter of the respective statutory provisions or in the nature of the punishment prescribed. The Court, in my opinion, is not entitled to do what the legislature, if it wishes may of course do: that is to say, allow a course of action in negligence between co-operators in some breaches of statutes which carry punishment of one kind or another. There seems to me no room for thinking that there is any less significance in the observance of what I will call broadly the industrial law than there is in the observance of those traditional crimes which are usually found in a *Crimes Act* or *Criminal Code*.

JACOBS J: I turn to the plea of illegality. The act or omission of the hoist operator which was claimed to be negligent was the act of negligently failing properly to operate the foot brake and control the descent of the hoist. A plea of illegality in answer to a claim of negligence is a denial that in the circumstances a duty of care was owed to the injured person. A duty of care arises

out of the relationship of particular persons one to another. An illegal activity adds a factor to the relationship which may either extinguish or modify the duty of care otherwise owed. A joint illegal activity may absolve the one party from the duty towards the other to perform the activity with care for the safety of that other. That, it seems to me, is the effect of *Smith v Jenkins*. Where there is a joint illegal activity the actual act of which the plaintiff in a civil action may be complaining as done without care 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 in respect of the explosive device.

In the present case the illegal activity was the riding by the respondent on the hoist driven by the appellant's servant, and the permitting and allowing of him so to ride. Whether or not it was legal to ride on the hoist platform the same standard of care in operating the hoist would be expected of the operator, and the court would not be obliged to embark on an enquiry whether the act of the operator was reasonable, having regard to the illegality of the enterprise. On this ground alone the plea of illegality fails.

Further, I do not think that the fact that the law declines to impose duty of care towards a person engaged in a joint illegal enterprise in respect of that enterprise can be applied in a case where the illegality is one which arises from the breach of specific statutory duties of care for the safety of one of the participants. The reason for the law declining to raise a duty of care towards a joint participant in an illegal enterprise in respect of the manner in which that enterprise may be carried out is wholly inapplicable to the circumstances of regulations designed to enforce a high specific duty to ensure the safety of that participant.

I am satisfied that a breach of reg 139(7) affords a private right of action to a person injured by an act done in breach of the regulation. The hoist here in question was not designed and constructed in accordance with the regulations for the raising and/or lowering of men but this does not mean that sub-reg (7) cannot be breached in respect of a hoist on which contrary to the sub-reg (25) a workman is allowed or permitted to travel; and, if it can be breached, and it being a regulation designed to ensure the safety *inter alia* of persons travelling on the hoist, there is nothing in the sub-regulation or its context to suggest that there should be no right of civil action as a consequence of its breach by the person carrying out building work or by a person for whose acts the builder is vicariously liable.
