

## PART XII – DOCTRINES OF COMPLICITY

### I Introduction

#### A Paradigms of Complicit Criminal Responsibility

The various doctrines of complicity specify methods by which criminal liability may be extended to individuals concerned with or involved in the participation of the commission of crimes. It enables criminal liability to attach to persons whose actions and thoughts would not normally satisfy the physical and mental components of the offence charged.

Each method of attaching complicit liability caters for a different way in which parties can participate in the commission of an offence:

- Participants who undertake a joint criminal enterprise to commit a crime together may be said to be 'acting in concert' or have a 'common purpose' to commit offences within the scope of their enterprise
- A party who employs another non-responsible person to carry out their criminal intent may be said to have used an 'innocent agent' to commit the offence
- Those who encourage or assist the principal offender may have aided, abetted, counselled, or procured the commission of the offence
- Those who conceal or assist a known criminal to prevent their lawful arrest for a crime known to be committed may be 'accessories' to its commission

#### B Direct and Derivative Liability

Depending on the extent and nature of the accused's involvement with the principal offence, their liability may be direct (as a principal offender) or derivative (as a secondary offender):

- Participants who act in concert or have a common purpose may each be treated as principal offenders (direct liability)
- Parties employing innocent agents may likewise be principals to the crime whose actus reus the agent executes (direct liability)
- Abettors' liability depends on the commission of the actus reus of the principal offence (derivative liability)
- Criminal liability attaches to the actions of abettors and accessories under separate statutory offences in the *Crimes Act 1958* (Vic) – ss 324-6

Note that there is often significant overlap between the factual situations in which the various methods of attaching liability will be applicable. For example, two joint principals to an offence may also be said to have been acting in concert to commit the offence jointly.

### C Role and Structure of Complicity

'Complicity' is not a substantive crime. Rather, its doctrines provide alternative methods for attributing criminal responsibility where several potential defendants acted together with the effect of causing prohibited consequences. Typically, complicity will be applied in order to find parties liable for pre-existing offences (such as murder and theft) where they would not normally have been found to satisfy both *actus reus* and *mens rea*. The individual accused will normally still be required to possess the *mens rea* prohibited by the offence, but the *actus reus* may have been carried out by another party. Individual criminal liability is thus constructed by reference to the actions and mentalities of others in the group.

Confusingly, the common law vernacular of complicit liability is still widely employed by judges alongside its statutory counterpart. A brief explanation follows:

- At common law, there used to be three classes of offences: treasons (most serious), felonies (relatively serious), and misdemeanours (relatively minor)
- Each employed different terminology in relation to principal and secondary offenders
- Felonies:
  - 'Principal in the first degree' (a person who personally perpetrates the *actus reus* of the crime)
  - 'Principal in the second degree' or 'accessory at the fact' (a person who is present at the scene of the crime and aids and abets the commission of the felony)
  - 'Accessory before the fact' or 'principal in the third degree' (a person who has, though absent at the time of the offence, previously counselled or procured its commission)
  - 'Accessory after the fact' (a person who is absent at the time of the offence but assists the principal offenders *ex post facto*)
- Misdemeanours:
  - All parties were termed 'principals'

Complicity has an important role to play in criminal proceedings because criminal enterprises will frequently be undertaken jointly. As Ashworth notes:

*The question of complicity arises when two or more people play some part in the commission of an offence ... There are, of course, different degrees of involvement in a criminal enterprise, and one of the main issues in the law of complicity is the proper scope of criminal liability: how much involvement should be necessary, as a minimum?*<sup>1</sup>

Ashworth suggests that cooperative criminality should be taken more seriously than individual criminal responsibility:

- Joint criminal enterprise is more culpable
  - Individuals maintain responsibility for acts committed for and by the group
  - To act in support of a group is to condone the acts committed by others
  - An individual should not get carried away by the dynamics of a large group; they ought to maintain social and moral independence
- Group criminal activity poses a larger threat to victims and society
  - Rather than a single perpetrator, the victim faces a number of them, acting together
  - Greater threat also to the public peace, and the state

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<sup>1</sup> Andrew Ashworth, *Principles of Criminal Law* (2<sup>nd</sup> ed 1996) 409.

The doctrine of complicity allows criminal responsibility to extend beyond those who engage in criminal conduct to those who assist in or encourage the commission of crime. The primary issues with which its doctrines are concerned are the extent to which criminal liability will be widened and what, if any, are the relevant criteria for assessing the relative culpability of individuals providing differing degrees of assistance with or involvement in the principal crime.

## II *Liability as Principal*

### A *Individual Offender*

Where there is an individual sole principal ('principal in the first degree'), that person will be guilty of the relevant crime if they satisfy its actus reus by causing the prohibited consequence while possessing the prohibited mens rea.

The liability of a principal party is primary rather than derivative and direct rather than ancillary (see McHugh in *Osland*). This means that they can be found guilty independent of the result in respect of any other party. Individual offenders represent the localised focus of criminal law.

Laws of complicity are designed to apply in situations where the accused cannot easily be brought within the legal definition of the principal crime. They extend liability beyond an individual offender to the other categories of primary and secondary liability considered below.

### B *Joint Perpetrators*

Joint perpetrators are said to have committed the crime where it is the cumulative effect of their actions that cause the prohibited consequence. Where multiple accused act jointly, it is unnecessary for the prosecution to prove that an individual offender caused the prohibited outcome (eg, that the blows of D1 killed V beyond reasonable doubt, etc), and both offenders are treated as principals in the first degree. They will be guilty if they each have done the actus reus and possessed the mens rea of the principal crime.

For example, where one or more defendants attack a victim, who dies from the combined effect of their stab wounds, those defendants have acted jointly. This being the case, each defendant is treated as a principal in the first degree, and it is unnecessary to prove that each defendant's blows alone would have caused the victim's death. Assuming the victim dies from the cumulative effect of their actions (ie, that the blows of one accused would not by itself have been sufficient), and that the accused each possess the relevant mens rea, both will be liable for murder.

Important points:

- It must be the *cumulative effect* of the blows that causes the death
- It does *not* matter that the individual contribution of the co-accused would not on its own have been sufficient to cause the prohibited consequence
- No preconceived plan is necessary; one D can start and the others join in.
- If one of the parties is the substantial cause of death, then they will not be joint perpetrators
  - At common law, the cause of death is the principal in the first degree (and the other is a principal in the second degree: *Mohan*)

- Under Victorian legislation, the cause of death is the principal and the other is an abettor

### C Acting in Concert

The accused can be guilty of the principal offence even if he did not participate in the killing as a joint perpetrator (ie, did not cumulatively perform the actus reus). Where the accused acts in concert with another, the actions of the other are attributed to each party to the common enterprise. It does not matter which defendant performed the actus reus; they will all be guilty of the principal offence if they agree to perform it, and one of them does.

Where, for example, D1 kills V pursuant to a plan with D2, and D2 is present at the scene of the crime, D2 is also a principal – even if he does nothing while being present.

The doctrine was originally set out in *Lowery & King (No 2)* [1972] VR 560:

*if 2 or more people reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or agreement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission (per Smith J).*

This formulation has been subsequently approved by the High Court of Australia in *Osland*:

*The correct statement is that they are all equally liable for the acts that constitute the crime if the acts are performed in the presence of all and pursuant to the agreed plan (per McHugh J).*

#### 1 ‘Understanding or arrangement’

Importantly, there must be an agreement between the parties to commit the relevant crime:

- The agreement need not be express (it can be inferred from the circumstances)
- The agreement need not have been reached before the time the crime is committed
- The circumstances may themselves establish an unspoken understanding or agreement
- The agreement must be criminal (*Johns*, but cf *Miller*)

The agreement must be in operation at the time the crime is committed. The accused must be actually or constructively present at the scene (*Johns*).

#### 2 Effect of acting in concert

The effect of the acting in concert doctrine is as follows:

- A person may be found guilty of a crime even if they did not commit any of the acts that caused the death
- The person who committed the acts may be found guilty of a lesser offence if they can raise a defence
- All acts together committed are attributed to every participant
- However, mens rea is determined individually

The acquittal of the party who did perform the actus reus is *not* inconsistent with a guilty verdict for the other parties to the agreement (*Osland v R*)

### ***Osland v R* (1998) HCA:**

#### Facts:

- Osland and her son, David, are charged with the murder of Osland's abusive husband, Frank
- David had been the one to strike the fatal blow; the trial had been run on this basis
- The jury finds Osland guilty of murder
- The jury is unable to reach a verdict in respect of her son
- David is acquitted on a retrial
- Osland appeals to the High Court of Australia on the basis that her guilty verdict is inconsistent with the acquittal of her son

#### Issue:

- Is Heather Osland's conviction at trial consistent with the acquittal of her son, David, on his retrial?
- What is the basis of criminal responsibility when it is said that the two parties were acting in concert?

#### Reasoning:

- Gaudron and Gummow JJ:
  - Causation
    - Osland's acts did not substantially contribute to V's death
      - Kirby and Callinan JJ held that they did
    - Osland cannot be guilty on the basis of her own contribution (as a matter of causation)
    - However, the case was not put on that basis
  - Innocent agency
    - Osland is not guilty on the basis that David Albion was her innocent agent
  - Secondary liability
    - Osland is not guilty as abetting David Albion under s 323
    - She only put the drug in the coffee
      - Osland put sedatives in V's coffee to quieten him down, not to make it easier to kill him
      - But cf Callinan J: the drug was put in V's curry, not coffee!
      - [She did hold V down while Albion hit him, though]
  - Osland's conviction can *only* be upheld on the basis left to the jury
    - That is, that V was killed pursuant to an understanding between Osland and Albion that they would kill V
  - Why was Albion not convicted?
    - The case for provocation or self-defence was stronger for Albion
    - The jury was hung in respect of Albion's conviction
    - Provocation excludes killing being pursuant to an understanding between the killer and another party
    - This means that, a fortiori, self-defence excludes the killing being likewise pursuant to such an understanding
      - [Note that, as McHugh J does: the understanding to kill V could have been entered into by Osland and Albion for reasons of self-defence]

- The failure to realise that self-defence must exclude killing being pursuant to an understanding between Osland and Albion is a flaw in reasoning which requires that Osland's conviction be set aside
  - With provocation and self-defence not negated, it cannot be determined that Albion was acting pursuant to an understanding or arrangement with his mother that they would together kill V
  - This is a flaw in the jury's reasoning which requires that Osland's conviction be set aside
- McHugh J:
  - Referring to the judgment of Gaudron and Gummow JJ:
    - They refer to the principle of causation, holding that there isn't a causal link between the understanding and arrangement between Osland and Albion to kill V and the actual killing of V
    - However, the causation principle has no application here
    - [Presumably, when acting in concert, the acts Albion are attributed to Osland; as Albion caused V's death, so too, did Osland]
  - Was there a flaw in reasoning by the jury?
    - The jury was never asked to apply the causation principle to which Gaudron and Gummow JJ referred (ie, that provocation and self-defence negative acting in concert)
    - There is no need for there to be a causal connection between Osland and Albion's understanding or arrangement to kill V and Albion's actual carrying out of that arrangement
    - The understanding, when coupled with Osland's presence, is sufficient
  - The jury was thus entitled to treat them as joint perpetrators
  - The case was conducted from beginning to end on the basis of acting jointly and in concert and that both accused were responsible for each other's acts
- Kirby J:
  - The argument of Gaudron and Gummow JJ that Osland did not substantially contribute to V's death bears an air of unreality
    - At no point did Osland make any suggestion disputing her active contribution to the acts causing the deceased's death
    - They said that there was only one ground on which to convict left to the jury (acting in concert) – that the only basis on which the jury could find Osland guilty was on the basis of acting in concert
    - However, Kirby J refers to other ground (as does McHugh J)
- Callinan J:
  - This is a case of actual participation in all phases of the crime
  - Osland's conviction can be upheld without considering complicity at all on the basis of a test of sufficient significant contribution (per Brennan J in *Royall*)

Decision:

- (3:2) Appeal dismissed

### 3 *Impact of insanity*

**Issue:** can there be a joint criminal enterprise when one party to the agreement is insane?

If the insanity prevented a common agreement from arising, then the doctrine of acting in concert does not apply. However, if a common agreement or understanding was made, and the crime

took place pursuant to that agreement, then all parties will be liable for the crime committed – even if the party that carried out the actus reus is acquitted on the basis of insanity.

### ***Matusevitch v R (1977) HCA:***

#### Facts:

- Matusevitch ('M') and Thompson are the only ones in a hospital ward, when Thompson takes an axe to W, killing him
- Thompson is not guilty because insane
- M is convicted of murder
- M appeals on a number of grounds

#### Issue:

- Is it possible to act in concert with an insane person?

#### Reasoning:

- Gibbs ACJ (with whom Stephen J agreed):
  - Consider three options
    - Common enterprise (acting in concert)
    - Innocent agency
    - Aiding and abetting
- Aiken J (with whom Mason, Stephen and Murphy JJ agreed):
  - Consider the nature of the insanity

#### Decision:

- Whether an agreement arises depends upon the nature of the insanity
- The relevant test is whether the parties are able to form an agreement to act in concert
  - If they can form an agreement to act in concert, insanity will not prevent the doctrine from operating normally
  - This means that all defendants can be liable for the conduct of parties to the agreement committing crimes in its furtherance, even if such parties are eventually acquitted on the basis of insanity
- A retrial is granted because of improperly admitted evidence

#### 4 *Further examples*

Another example of the application of acting in concert in relation to homicide is provided by the facts of *Siringui Biagwei*. There, the victim was hit by 8 spears, four of which were thrown by D1, and four of which were thrown by D2. Medical evidence establishes that the impact of one spear alone would be fatal to the victim (ie, V did not die from the cumulative impact of the 8 spears combined; therefore, D1 and D2 are not joint perpetrators – one of them is the significant cause of V's death).

However, under the acting in concert doctrine, because both defendants are acting in concert and both are present at the crime, it does not matter which threw the fatal spear. (Otherwise, the problem would be that it can neither be proved beyond reasonable doubt that D1 threw the fatal spear nor that D2 threw the fatal spear, so they would both escape conviction.) Because both acts are clearly in furtherance of the plan, to which both defendants contributed, liability under the acting in concert doctrine is established.

## 5 Summary

When two or more people agree to commit a crime and, in pursuit of that agreement, the crime is committed by one of the parties to the agreement, then all parties to the agreement are equally guilty of the crime actually committed.

D2 can be guilty of the principal crime if:

- D1 commits the actus reus
  - D1 need not be convicted of the principal crime (*Osland*)
  - D1 need not be sane or possess the mens rea [???] (*Matusevitch*)
- D2 is present pursuant to a plan to commit the principal crime
  - The plan need not be express or prior; it can be inferred (*Lowery & King*)
- What D2 does is ineffective
  - Either he does nothing more than be present (ie, stands and watches); or
  - His part of the attack is ineffective (ie, does not cause the actus reus) (*Siringui Biagwei*)

## D Common Purpose

The doctrine of common purpose applies when one party to a joint criminal enterprise commits a crime that goes beyond the original agreement. It thus provides a method for determining whether others can be held liable for the further crime, enlarging the scope of criminal responsibility to include other parties to the agreement.

The common purpose doctrine could be treated as an extension of the acting in concert doctrine. However, it also expands abettor liability by providing a different way for imposing criminal liability upon an abettor in respect of the substantive crime he abetted. Whereas abettor liability is focused on what the accused did or caused in respect of the commission of the principal offence, the doctrine of common purpose looks to what the accused *agreed* to do with others.

Note that under the *Crimes Act 1958* (Vic) s 323, it is not necessary that an accused be indicted with the principal crime to be found guilty of common purpose. He can be indicted as an abettor and subsequently be held to have been acting pursuant to an agreement with the principal (and thus charged with the primary offence; cf *Johns*).

### 1 Elements of the doctrine of common purpose

Not all situations of participation in crime will involve individuals acting in concert. Participants are only said to be acting with a common purpose when the following elements are present:

- **Agreement**  
Participants reach an agreement (or 'understanding' or 'arrangement') that criminal acts will be committed by one or more of the parties
- **Offence**  
While the agreement is in effect, a crime is committed by one or more of the parties to it



- **Scope**

The crime committed falls within the 'scope' of the agreement (the common purpose of the group)

The main feature of the doctrine of common purpose is that all parties to a criminal agreement are deemed equally liable for the criminal acts of the other parties within its scope (as in the case of the acting in concert doctrine of complicity).

The question, then, becomes one of scope. More relevantly, it is necessary to ask whether the additional crime is within the scope of carrying out the common purpose between D1 and D2.

## 2 Joint criminal enterprise

**Issue:** does the joint enterprise (common purpose) need to be a joint *criminal* enterprise?

[???

### **Miller v R (1980) HCA:**

Facts:

- The accused is a close friend of one Worrell
- On many occasions, Miller would drive around with Worrell to 'pick up girls'
- Miller would then drive Worrell and the girl to an isolated spot and would leave the car whilst Worrell has sexual intercourse with the girl
- On one occasion, Miller returns to the car to find that Worrell had strangled the girl, killing her
- Miller continues in their activities as before
- On most occasions, Worrell does not harm the girls whom he 'picks up'
- However, on six further occasions, Worrell murders the girls in question
- Miller is charged with seven counts of murder on the basis of being an actor in common purpose with Worrell
- Miller is found guilty of six out of the seven murders
- In a karmic quirk of fate, Worrell is killed in a car accident and never stands trial
- The case against Miller is put in two ways:
  - (1) Miller was acting in concert with Worrell; or alternatively
  - (2) Miller aided and abetted Worrell to commit the murders
  - There is no objection to the trial judge's direction concerning (2)
  - The objection in relation to (1) is that acting in concert or common purpose should not have been put to the jury because Miller and Worrell were acting in concert to do something perfectly legal (ie, 'to pick up girls')
  - This is not a case of liability for a further crime (eg, murder additional to robbery) in the course of carrying out the planned crime – unlike *Johns*
  - Even if the doctrine is used, a test of *probability* (not possibility) should be used, because this is the mens rea for the principal crime (murder)

Issues:

- Is this a case of common purpose?
- If so, given that escorting women for consensual sex is not illegal, what is the joint criminal enterprise?
- Would imposing direct liability on Miller be consistent with the rationale expressed in *Johns*?

Reasoning:

- Trial judge's direction:
  - 'If Miller and Worrell were acting in concert to pick up girls, and Miller had driven Worrell to the place of the murder, and it was within Miller's contemplation that the particular girl might be murdered, then the jury should find him guilty of murder'
- Gibbs, Stephen, Mason, Murphy and Aickin JJ:
  - The objection was that, as here, the common design was not unlawful
  - However, after the first murder, there was a 'meeting of the minds', and M knew of the possibility that the girl might be murdered
  - The common purpose must normally be intention to commit a crime (as in *Johns*)
  - However, there are situations not covered by the general principle
  - Here, the agreement is transformed into a criminal one after the first murder
  - The agreement is to *possibly* commit a crime (not intentionally)
  - [Effectively, the court deals with these facts by applying the doctrine of common purpose in the absence of a criminal enterprise]
- The jury apparently held that the scope of the common purpose altered after the first murder – this explains why the jury acquitted Miller of the first murder
  - Before then, Miller was not aware of what Worrell might do, but after it he certainly was
  - It is not necessary that an accomplice foresees that it is 'probable' that the victim would be killed on the occasion in question
  - It was significant that Worrell's murderous moods were thoroughly unpredictable
  - On no single occasion could Miller believe a killing was probable
  - But on every occasion it could be predicted that there was 'a substantial risk' (ie, a possibility) of Worrell killing the girl
- If Miller has foresight of the possibility of the addition crime, then what was the nature of their original agreement?
  - The agreement does not need to be express, and may be inferred from the circumstances
  - It was open to the jury to conclude that, after the first murder, the scope of the common purpose altered to extend to the possibility that the girl may be murdered (this being criminal)
  - This explains why the jury acquitted on the first of seven murders
  - Before this time, Miller was not aware of what Worrell might do and the common purpose was not criminal
  - However, after it, Miller certainly was aware

Decision:

- The conviction is upheld
- Unanimous verdict: the common purpose doctrine is applicable after the first murder
- Arguably, this *is* consistent with *Johns*, as the common purpose has become criminal only after the first murder, from which point liability attaches to Miller for Worrell's conduct under the common purpose doctrine (the common purpose was now to pick up girls with the possibility of murdering them and disposing of their bodies)

The Court in *Miller* appears to skip the 'joint criminal enterprise' requirement, moving straight to the test of 'foreseeability of a possibility'. That test being clearly satisfied on the facts, no issue is made as to its actual applicability. This approach suggests that the nature of the original enterprise is not as important as the foreseeability of the additional crime.

**Issue:** do the parties acting in concert need to be present at the scene of the crime?

Presence must be either actual (within sight and sound), or constructive (although not within sight and sound, sufficiently near to be able to render assistance). Three examples of constructive presence follow:

- A keeps watch while B burgles (A is constructively present)
- Waller and Williams: C, a decoy, attracts the victim of a burglary 30 miles away from his house while D engages in the burglary (C is constructively present)
- Street CJ: the driver of a getaway car who drives around the block while the robbery takes place and before picking up the robbers is constructively present at the robbery
- However, if the driver just drops off the robbers and then leaves, he is not present and is only an accessory before the fact (*Johns*)

This indicates that presence can be quite broadly construed; however, it is unlikely that an absent accused could be considered to have been acting jointly (though aiding and abetting may succeed).

### 3 Mental state of participants

The mental standard required of an accused alleged to have acted with common purpose of another is 'foresight of the *possibility* that the further offence would be committed as a consequence of the common purpose' (*Johns v R* per Stephen J). A possibility is a 'substantial risk' – an act contemplated as a possible incident of the originally planned venture.

#### ***Johns v R* (1980) HCA:**

##### Facts:

- Johns, Dodge and Watson plan an armed robbery of Morris (a well-known receiver of stolen property)
- Johns drives Watson to his meeting with Dodge, which is quite some distance from the scene of the shooting
- Johns waits whilst they commit the robbery; it was envisaged that he would conceal the proceeds
- In fact, Morris is shot and killed by Watson, with Dodge present
- Johns is charged as an accessory before the fact
- Dodge is indicted as a principal in the second degree
- Watson is shot dead, but would have been a principal in the first degree

##### Issue:

- Is the doctrine of common purpose applicable to accomplices before the fact?

##### Reasoning:

- Street CJ (trial judge, NSW):
  - Test: was the party aware of the contingency or possibility of the further crime?
  - The same standard is to be applied for accessories at and before the fact of the crime
- Murphy, Mason, Wilson JJ:
  - '[T]he question for the jury in cases of common purpose is whether the [additional] crime committed in furtherance of the criminal plan was jointly

- o contemplated as a *possibility*'
  - o 'The accused was charged as accessory before the fact to murder. The trial judge directed the jury that an accessory may be held liable for acts performed by the principal offender if those acts, whilst differing from what was directly and specifically intended by the accessory, were within the contemplation of the parties as acts which might be done in the course of carrying out their primary criminal intention'
  - o Drawing a distinction between accessories before and at the fact is arbitrary and unnecessary
  - o For example, the driver of a getaway car is a principal in the second degree because he is constructively present, but the driver who merely drops the perpetrators off outside the bank and drives off is an accessory before the fact
    - To require probability in relation to the latter and not the former is somewhat artificial
- Stephen J:
  - o Two claims were made by Johns' counsel:
    - First: that there are different standards of liability for accessories before the fact and accessories at the fact
    - Second: that the test for the former is one of probability, not possibility
  - o Rejects both claims, holding that the possibility test applies equally to accessories before the fact and principals in the second degree
  - o '[The common purpose doctrine requires] foresight of the *possibility* that the further offence would be committed as a consequence of the common purpose'
  - o The standard of possibility is defined as a 'substantial risk'
- Is the doctrine of common purpose applicable in the case of an accessory before the fact?
  - o The test of liability does *not* depend on the physical presence of the person at the scene of the crime but rather, where appropriate, his or her participation in the fulfilment of the common purpose
  - o The question is one of complicity in the commission of the offence rather than one of whether he was present throughout the entire time when the injuries were inflicted
- Are the participants in a common design only responsible for the probable, as distinct from the possible, consequences of execution of the common purpose?
  - o No
  - o '[T]hat an accessory before the fact bears ... a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention – an act contemplated as a possible incident of the originally planned particular venture'

Decision:

- The High Court of Australia unanimously dismiss the appeal
- Foresight of a possibility is required

The *Johns* test is confirmed in *McAuliffe & McAuliffe*. What is required for liability under the common purpose doctrine is that at least one of the parties has foresight of the further crime as a *possible* incident of the joint enterprise.

**McAuliffe & McAuliffe v R (1995) HCA:**Facts:

- The appellants, Sean and David McAuliffe, are brothers, aged 17 and 16, respectively
- They appeal against convictions for murder, committed as part of a common purpose of three individuals to 'roll', 'rob' or 'bash' someone
- Davis, a friend of the McAuliffes, pleaded guilty to the murder of the deceased
- On the evening of Friday, 20 July 1990, the three had consumed a large amount of alcohol, and smoked some marijuana
- They decided to go to a park near Bondi Beach for a purpose which was variously described as being to 'roll' or 'rob' or 'bash' someone
- Sean armed himself with a hammer, and David with a baton or stick
- Sean was aware that David had the stick, and so was David
- The three find two men, the deceased and Sullivan, near a lookout at the top of a cliff
- The three set upon them, severely injuring Sullivan (who reports the incident to police)
- The deceased's body is found at the bottom of the cliff
- The deceased died from drowning, but had already sustained severe injuries caused by the three youths
- Sean McAuliffe is also convicted of robbing, striking and wounding him
- David McAuliffe is also convicted of maliciously wounding Sullivan with intent to do grievous bodily harm
- The NSW Court of Criminal Appeal dismisses their appeals against conviction
- The appellants submitted that they possessed no intention to cause grievous bodily harm
- Davis confesses to murder, so does not stand trial

Issue:

- Is the trial judge's direction on the point of David and Sean McAuliffe's complicit liability for Davis' actions correct?

Reasoning:

- Trial judge's direction:
  - 'Did each brother either share the common intention of inflicting grievous bodily harm [acting in concert] or contemplate that the intentional infliction grievous bodily harm was a possible incident of the joint enterprise [common purpose]?'
  - The jury must be satisfied beyond reasonable doubt that *either* the accused in question 'shared the common intention of inflicting GBH upon [the victim]' *or* 'contemplated [that] the intentional infliction of GBH by one of [the three parties to the common purpose] upon him was a possible incident in the common criminal enterprise'
  - On appeal, it is argued that the prosecution needs to establish that the possibility of committing murder was within the contemplation of *all* (and not just one of the) parties to the common purpose
  - This argument is rejected by the High Court of Australia
- Brennan, Deane, Dawson, Toohey and Gummow JJ:
  - Not all participants in the criminal purpose need to be aware of this possibility
  - It is sufficient to convict any individual D who foresees the possibility that crime Y may be committed in the course of carrying out the planned crime X (applying *Johns*)
  - The subjective approach to the common purpose doctrine in *Johns* is endorsed, as is the possibility test
  - '[W]here one party foresees, but does not agree to, a crime other than one which is planned, and continues to participate in the venture with a common criminal

purpose, he is also a party to that crime. In other words, the criminal culpability lies in the participation in the joint criminal enterprise with necessary foresight *whether the foresight is that of an individual party or is shared by all parties*' (emphasis added)

Decision:

- The infliction of grievous bodily harm as a possible incident of the venture is a sufficient intention to be guilty of the principal offence
- Liability is direct: if a defendant has foresight of a further crime as a *possible* incident of the joint enterprise, then he is liable regardless of the foresight of the other parties
- The direction of the trial judge is sound

*McAuliffe* confirms that foresight of the additional crime's possibility is an individual assessment. Such contemplation does not need to be shared by all participants – only the accused.

Problems in respect of the mental state of participants typically arise in two circumstances: either the plan is not a criminal plan (see, eg, *Miller*), or the crime committed (and with which the accused is now charged) is different to the crime planned (see, eg, *Johns* and *McAuliffe*).

Actual foresight of the possibility that the crime charged will be committed as part of the criminal venture is sufficient to establish the mens rea required by the doctrine of common purpose (*Johns*). Foresight must be the actual foresight of the accused (a subjective standard). It can be proven in two ways:

- By evidence which explicitly or inferentially establishes a common purpose to commit the crime charged
  - *Johns* method (as interpreted by the High Court in *McAuliffe*)
  - In *Miller*, a 'new extended purpose' arose and the last 6 murders were within the scope of this new extended purpose
- By evidence which explicitly or inferentially establishes the individual purpose of the accused
  - Irrelevant whether the accused agrees with the joint criminal venture's purpose, so long as the accused foresees the *possibility* of the crime charged being committed as part of the joint criminal venture and nevertheless continues to participate in it
  - *McAuliffe* method

In some factual situations, the doctrine of abettors and the doctrine of common purpose are equally applicable. Common purpose provides a lower mental standard for the prosecution to prove, and may thus be a more appropriate starting point in certain circumstances.

Note that the mental requirement in respect of the principal remains that of the principal offence. However, conviction of other parties to the agreement only requires foresight of the possibility that the actus reus of the further crime would be committed. Further, liability of participants is direct (and not derivative), so accomplices can be convicted notwithstanding acquittal of the principal.

#### 4 Example of the doctrine's application

Suppose that D1 and D2 decide to rob V. They act in concert to rob V. It is their common purpose to rob V (terminology is interchangeable). However, D1 does not just rob V; in fact, D1 kills V with the relevant mens rea. Here we are concerned with the question of whether D2 can

be held liable for D1's crime additional to that agreed.

Insofar as D1 killed V, and did not just rob him, D1 was off on a frolic of his own. However, *Johns* suggests that D2 will be criminally responsible for the death of V under the common purpose doctrine if D2 foresaw the possibility that D1 might kill V. This being the case, the death of V is said to be falling within the 'scope' of the common purpose.

Thus, if D2 had knowledge that D1 possessed a gun, had an intention to use it, was known to have a problem with self-control when committing crimes, and was angry at V for involvement with an ex-partner, it would seem clear that the killing of V is a possible consequence of the robbery and thus within its scope. D2 would, in such a case, be guilty of the murder of V under the common purpose doctrine.

## 5 Reform proposals

Lanham: for *Johns* to hold that an additional crime is within the scope of the common purpose if the accused foresees its commission as possible is a legal fiction. The problem of scope only arises *because* there is no common purpose to commit the additional crime. The common purpose doctrine should be abandoned and a test of recklessness used instead.

Fisse and Howard also suggest abandoning the doctrine of common purpose, which they view as 'a pointless complication to mens rea'. *Johns* should have been decided on the basis that Johns was reckless in taking an unjustified risk he foresaw as substantial. Thus, by assisting the principal offenders to commit the robbery, Johns foresaw the possibility that the principals might kill or seriously injure someone.

David Wood: the distinctions seem fine. There is probably still a role for the doctrine of common purpose in distinguishing the agreed from the additional crime. Both models ultimately require subjective foresight of the possibility of the further crime.

## E Innocent Agency

Where the actus reus is committed by McHugh J in *Osland* calls a 'non-responsible agent' (someone not guilty of the offence), it will be necessary to treat the party who causes the innocent agent to act as a principal offender. For this to be done, two things must be established:

- The innocent agent must have committed the actus reus of the offence; and
- The behaviour of the innocent agent must be such that, if done by the accused, he would be guilty of the principal offence (ie, the accused must have the necessary mens rea).

If these two elements are established, then the behaviour of the innocent agent is attributed to the accused and, together with the accused's mens rea, such attribution will make the accused guilty as a principal party of the principal crime.

Innocent agency arises in situations like the following: a postman unknowingly delivers a letter bomb. The postman is certainly not liable, but instead treated as the innocent agent of the person who sent the letter. As another example, consider the facts of *White v Ridley*: there, the airline was the innocent agent which imported the prohibited drugs. Further, consider the example of *Matusevitch*, where the accused uses an insane person to commit murder.

Innocent agency should be used if it appears that no principal offender exists, but another party has the relevant mens rea.

***R v Cogan & Leak (1976) UK:***Facts:

- Leak invites Cogan to his home, telling him that Leak's wife is willing to have sexual intercourse with him
- This is actually untrue; Leak forces his wife (who did not resist but sobbed and cried throughout) to have sex with Cogan
- Cogan is charged with rape and Leak is charged as an accessory.
- Cogan's appeal is allowed (following the recent decision in *Morgan*) because he believed in the wife's consent (albeit unreasonably)
- Leak is not charged as principal perpetrator (though not because the doctrine of intra-spousal immunity still applied – it didn't extend to inducing third parties to have non-consensual intercourse with the wife); however, he is charged as a secondary (abettor)

Issue:

- Can Leak be convicted for aiding and abetting the rape notwithstanding Cogan's acquittal?

Reasoning:

- It is clear that Mrs Leak had been raped, even though Cogan was not guilty of rape
  - Mr Leak had the mens rea of rape
  - 'His intention [was] that Cogan should have sexual intercourse with [Mrs Leak] without her consent'
  - Cogan was thus his 'means' or 'instrument' of committing the rape
    - Mr Leak was unable to carry out the crime himself (being married to the victim)
    - However, Cogan was Mr Leak's 'innocent agent'.
- Leak should have been indicted as a principal offender (in the first degree)
  - Had this been done, the case against Leak would have been clear and 'beyond argument'
  - Leak should not be allowed to go free simply because he was charged with being an 'aider and abettor'
  - Convictions 'should not be upset because of mere technicalities of pleading in an indictment'

Decision:

- Had Mr Leak been indicted as the principal offender he would definitely be guilty
- Mr Leak can be treated as being principal because he had used Cogan's body as the 'instrument' of the rape (applying the doctrine of innocent agency)

Innocent agency is thus one of several ways to overcome the derivative nature of secondary liability or an incorrect indictment as secondary. In *Cogan & Leak*, Leak should have been indicted as a principal offender; had this been done, he would surely have been guilty. However, because of the prosecutors' mistaken belief that the doctrine of spousal immunity would prevent conviction as principal, he is specifically charged as an abettor. Innocent agency would normally apply to an abettor, but the case was run in this fashion because of the incorrect indictment.

Note, however, that under s 323, every party is now able to be charged as a principal without legal complication, and their actual roles worked out at trial.

The doctrine of innocent agency in Victoria is set out in *R v Hewitt*, applying *Cogan & Leak*.



**R v Hewitt (1977) Vic SC:**Facts:

- Hewitt and Powell are charged with three counts of rape of a 15 year old girl
- Powell is aided and abetted by Hewitt; Powell perpetrates the rape; however, Powell is acquitted
- Hewitt orchestrated the offence after being informed by Powell that he wished to have intercourse with her
- Hewitt approaches the victim, telling her of Powell's intentions; she makes it clear that she does not want to
- Hewitt drives her to meet Powell for the purposes of committing the offence
- Hewitt opens the door and pulls her out of the car
- The victim has intercourse with Powell
- Hewitt is subsequently convicted; it is argued that he used Powell as an instrument (innocent agent)

Reasoning:

- Trial judge:
  - Misdirects on mens rea (required belief in consent to be reasonable); however, not relevant since Powell nevertheless acquitted (*despite* the additional requirement)
  - Powell must have been acquitted on the basis of mens rea, since the jury found that the victim had been raped (actus reus)
  - There are three possible bases on which Hewitt could be guilty:
    - (1) Hewitt aided and abetted Powell
    - (2) Hewitt and Powell acted in concert to commit the rape
    - (3) Powell was Hewitt's innocent agent
  - It can't be (1), since Powell was acquitted of aggravated rape (and abettor's liability is derivative)
  - It can't be (2), since Powell's acquittal for lacking mens rea entails that there was no agreement to commit the crime
  - Therefore, it must be (3)

Issue:

- The objection raised is that, because of its personal nature, rape could not be committed by an innocent agent or instrument
- Is this a case where innocent agency applies?

Reasoning:

- Winneke J:
  - Has 'some difficulty' supporting the proposition in *Cogan* that someone can be convicted as an abettor when the principal offender has been acquitted
    - This runs counter to the basic proposition of the common law that the liability of an accessory is derivative
    - [However, in *Cogan* the accused was only an 'abettor' because he was mistakenly charged as such; the correct indictment would have been as principal]
    - Innocent agency is not a form of derivative liability
    - *Cogan* is criticised on the basis that it is an artificial doctrine and a questionable way to attribute criminal liability
    - The suggestion is made that 'sexual offences' are only committable 'personally' (unlikely)

- Here, Hewitt caused the act, which was perpetrated by the agent Powell
- It is not necessary that the agent be 'morally innocent'
- There is no need that Hewitt use force or coercion
- Callaway JA:
  - *Cogan* held that the conviction could stand notwithstanding the form of indictment presented
  - '[I]f the defendant intended the intercourse to take place and his conduct so manipulated the actions of the agent or the victim it would have been open to the jury to be satisfied beyond reasonable doubt that he caused her to be sexually penetrated without her consent, intended the penetration to take place and was aware that she was not or might not be consenting'
  - Hewitt thus possesses the mens rea of rape
  - The acts of Powell can be attributed to Hewitt, such as to complete the offence, by reason of his manipulation of the perpetrator

Decision:

- Applying *Cogan and Leak*, Hewitt is a constructive principal
- A subsequent application for leave to appeal to the High Court of Australia is rejected

In *Osland*, the High Court of Australia distinguishes innocent agency from acting in concert.

***Osland v R* (1998) HCA:**Reasoning:

- McHugh J:
  - It is more accurate to describe the person who escapes liability in an acting in concert case where the other person is convicted as a 'non-responsible agent'
  - The doctrine of innocent agency is a distinct doctrine from acting in concert
  - It applies where the person who does the harm-causing act is innocent in a moral sense
    - Cf Winneke J in *Hewitt*
  - The acts of the innocent person are attributed to the defendant who is guilty of the crime because he or she has the necessary mens rea
- Gaudron and Gummow JJ:
  - No doubt a person may be convicted of murder and the person whose acts caused the death acquitted if that second person was the 'innocent agent' or 'innocent instrument' of the first
    - Affirm *Hewitt*
    - However, reject the *Cogan* approach in principle

The legal institution needs a doctrine of innocent agency to extend liability for acts intentionally carried out through another, morally non-responsible agent. Without it, a child below the age of criminal responsibility could, for example, be used by his master to commit wanton acts of theft. The master would go unpunished, while the child would be too young to convict. Even if the child could be convicted, it would seem morally repugnant that the agent face conviction for the will of their oppressor.

## F Vicarious Liability

Under the doctrine of vicarious liability, a third party can be criminally responsible for the acts of the principal without personally perpetrating the offence. It is defined and regulated by statute, and applied only where expressly provided for by the relevant legislation. See further *Giorgianni*.

## II Liability as Secondary

### A Secondary Liability

Were the accused individual does not perform or agree to perform the actus reus of the principal crime, he or she cannot be treated as a principal offender. However, criminal liability may still attach to the accused if he or she can be found liable as a secondary party.

At least the actus reus of the principal crime must have been committed before liability can attach to secondaries (the 'offence condition'). That is, the legally prohibited act or consequence must have been performed or caused. However, the principal need not be convicted (they may lack the prohibited mens rea, or successfully raise a defence: *Osland* per McHugh J).

This approach suggests that, in the law of complicit liability, the definitive feature of a crime is the actus reus (whereas the definitive feature of personal liability is the mens rea).

### B Abettors

#### 1 Statutory structure

Under s 323, proof of *any one* of the four activities of aiding, abetting, counselling or procuring will satisfy the actus reus of being an abettor. A prohibition of these activities in respect of an indictable offence is set out in s 323.

Section 323 makes it clear that, although the substance of the case against an accused may be that he abetted the principal offence, he is nevertheless charged, presented and convicted for the principal crime (and not aiding and abetting that crime):

***s 323 – Abettors in indictable offences triable as principal offenders:***

A person who aids, abets, counsels or procures the commission of an indictable offence may be tried, indicted or presented and punished as a principal offender.

Section 323 is mirrored in relation to summary offences in s 324. This is unlike criminal liability for attempts, which do not extend to summary offences under the *Crimes Act 1958* (Vic). Here, note that an accused will be liable for all instances of the crime subsequent to the first two occurrences that are abetted:

**s 324 – Abettors in summary offences triable as principal offenders:**

A person who aids, abets, counsels or procures the commission of an offence which is by this Act punishable on summary conviction either for every time of its commission or for the first and second time only shall be liable for every first, second or subsequent offence of aiding, abetting, counselling or procuring to the same punishment as a principal offender.

Liability for secondaries (abettors) attaches to those who aid, abet, counsel or procure the commission of an offence, but where – unlike the methods for finding direct liability above – the collective quality of the criminal enterprise is lacking. Secondary liability is derivative; that is, the offence condition must first be established before a conviction for abetting will be possible.

The effect of section 323 is that abettors in indictable offences are triable as principal offenders. However, McHugh J in *Osland* regards ss 323-5 as more than merely procedural provisions: they create a method for attributing secondary criminal liability, and have a substantive effect on the criminal law. The sections distinguish liability as an abettor from the liability of those who are present and acting in concert. They have led to the creation of a new category of liability by way of preconcert or assistance.

2 *Offence condition*

Abettor liability is derivative in Victoria, but is not a form of inchoate liability. This means that the offence condition must first be satisfied; otherwise, complicit liability would be reduced to an inchoate crime of assistance or encouragement (though reforms of this nature have been proposed).

Originally, the offence condition required that the principal be convicted before or with the abettor. Today, the requirement is simply that the crime with which the secondary accused is charged actually occurred. This has the effect of rendering the conviction of an accomplice independent from the principal offender's conviction (cf *Osland* per McHugh J; *Hewitt* per Winnecke P).

The reasons why the principal offender may not be convicted are various:

- They may not have been apprehended or brought to trial
- They may have been killed or died before trial (in *Miller*, Worrell had been killed in a car accident prior to Miller's trial)
- They may not be fit to stand trial (ie, insane)
- There may not be sufficient evidence to convict them (but the accomplice may have confessed)

However, there must *be* an offence, even if the principal is not convicted of it.

3 *Actus reus: the meaning of 'aids, abets, counsels or procures'*

Aiding, abetting, counselling and procuring have been collectively defined in *Russell* as

*all instances of one general idea, that the person charged ... is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission.*

This statement was approved in *Giorgianni* (per Mason J), who commented that the 'one idea' is 'secondary participation'. It thus appears that the differing requirement of presence is all that distinguishes the categories of secondary liability.

### ***R v Russell* (1933) Vic SC:**

#### Facts:

- Russell appeals against a conviction of manslaughter in relation to his wife and two infant children
- The evidence shows that they died by drowning in a public swimming pool
- Russell's evidence:
  - His wife had said she was going to kill herself and the children
  - He had tried to dissuade her and followed her to the pool
  - He had then walked away, and, finding that she did not follow him, returned to the poolside, where he had seen his wife and the pram hit the water
- The Crown case is that Russell had deliberately drowned all three
- Russell claims he had eventually tried diving into the pool to save them
- The jury returns with a question of law:
  - Foreman: if the wife drowned herself and children while her husband watched on, what is the legal position?
  - Trial Judge: if simply standing, no encouragement?
  - Foreman: Yes
  - Trial Judge: asked to hear argument. Jury to retire
  - Trial judge then directs jury:
    - In relation to the children, because of the duty of the parent to care for their safety, merely standing by would make him guilty of manslaughter
    - But if he was encouraging his wife to commit suicide, and kill the children – the defendant would be guilty of murder, as a secondary party
  - Jury convicts Russell of the manslaughter of all three victims

#### Issue:

- What is the meaning of 'aiding, abetting, counselling or procuring' in relation to the criminal liability of secondaries?
- Had Russell aided, abetted, counselled or procured the deaths of his wife and their children?

#### Reasoning:

- Trial judge:
  - (1) If X is present and shows assent, then he is guilty as a principal (in the second degree);
  - (2) Assent may in some cases be shown by absence of dissent
    - Ie, where there is a duty to act; parent-child relationship, etc
- Cussen ACJ:
  - Words found in authorities include aiding, abetting, comforting, concurring, approbating, encouraging, assenting, countenancing
  - 'All the words abovementioned are, I think, instances of *one general idea*, that the person charged as a principal in the second degree is in some way *linked in purpose* with the person actually committing the crime, and is by his words or conduct doing something to bring about, or *rendering more likely*, such commission'
  - The words 'aiding' and 'abetting' should be given a wide meaning
  - Silence in some circumstances amounts to acquiescence and gives consent

- Mann J: agrees with Cussen ACJ
- McArthur J:
  - Trial judge made two positions clear: if Russe;; did nothing, he was guilty of manslaughter; if he offered encouragement, he was guilty of murder
  - The jury's manslaughter verdict negated encouragement
  - McArthur J would have quashed Russell's conviction of manslaughter of his wife (the parental duty does not there apply)
    - Surely McArthur J is correct

Decision:

- The convictions are upheld

The *Crimes Act 1958* (Vic) clearly treats the words of the actus reus as all instances of the general idea of 'abetting'. The meaning of the section is not to be defined by reference to the ordinary meaning of the words, but rather the common law concept of secondary participation (*Giorgianni v R*).

***Giorgianni v R* (1985) HCA:**Issue:

- What is the meaning of 'aids, abets, counsels or procures'?

Reasoning:

- The terms are merely declaratory of the common law; we must therefore look at the common law concept of secondary participation and not to the ordinary meaning of the words themselves
- Each of the four terms is employed to refer to the conduct of a secondary participant, but the terms are descriptive of a single concept
- Mason J:
  - 'The terms "aids, abets, counsels or procures" require some comment'
  - In England (following *A-G's Reference*), they are treated as four separate words, to be given their ordinary meanings
  - In Australia, judges treat the phrase as declaratory of common law meanings
    - One should have regard to the common law concept of secondary participation, not the words themselves
  - With felonies, there appears to be no distinction, beyond presence, between a principal in the second degree and an accessory before the fact
    - The words, 'aids, abets, counsels or procures' add nothing
    - One ignores any differences in meaning between the terms; eg, that procures is different, and does not require a meeting of minds]
  - The four terms are descriptive of a single concept
    - One can extend Cussen ACJ's description of them as being 'linked in purpose' to all four terms
    - However, as *Russell* illustrates, there is *no* need for agreement or consensus
  - Distinguishes 2 approaches:
    - (1) Treat the terms as four separate words and give them their ordinary

- meaning (*A-G's Reference* – England)
    - (2) Treat the terms as declaratory of the common law and have regard to the common law concept of secondary participation (and not to the ordinary meaning of the words themselves)
  - Approach (2) is to be preferred; treat the terms as descriptive of a single concept
- In summary:
  - The four terms are descriptive of a single concept
  - It is possible to apply Cussen ACJ's idea that they are in some way 'linked in purpose' to all four terms (*Russell*)
  - The actus reus is:
    - By words or conduct D does something to bring about, or render more likely, the commission of the principal crime
  - Per *Russell*, there is no need for agreement or consensus between the parties for the secondary to have abetted the principal

Despite the common conceptual foundation, it is still necessary to use the term appropriate to the particular factual situation (eg, 'procuring' in *Giorgianni*; 'abetting' in *Russell*). However, the terms 'aids, abets, counsels or procures' are simply declaratory of the common law, and it is unnecessary to consider them individually or according to their literal meaning (*Giorgianni* per Mason J).

#### 4 *Illustrations of the common law concept of secondary participation*

The concepts of aiding and abetting are illustrated by *Stokes & Difford*, what Hunt J there described as a 'classic case of principal offender and accessory'.

- **Aiding**  
Being present at the scene of the crime and supporting, helping or assisting in the doing of the principal crime (*Stokes & Difford*)
- **Abetting**  
Being present at the scene of the crime and encouraging the doing of the crime (*Stokes & Difford; Russell*)

**Issue:** how much assistance and encouragement must be given? Is presence sufficient?

The prosecution must prove that the accused intended to encourage the commission of the offence and has, in fact, had such an effect (*R v Clarkson*). Mere presence is insufficient.

#### ***R v Clarkson & Carswell (1971) UK:***

Facts:

- Clarkson and Carswell, a soldier, hear a noise and enter a room, where they find several fellow soldiers raping a woman
- They stand and watch; there is no evidence that either does any physical act or utters any word of encouragement

**Issue:**

- Can Clarkson and Carswoll be said to have aided and abetted the commission of the rape, despite not actively encouraging it?

**Reasoning:**

- The defendants' presence is not accidental
  - However, this does not mean that they were aiding and abetting
  - It is at most evidence from which a jury could draw this conclusion
  - They had heard noises
  - However, this is insufficient grounds for assuming that their mere presence had in fact given encouragement to the perpetrators
- Further, to be convicted of rape as a principal in the second degree, it must be shown that the defendant intends to encourage and has in fact encouraged the commission of the offence
  - It is not enough that his presence did actually encourage the others
  - Presence by itself is insufficient

**Decision:**

- The presence of a defendant must have encouraged the commission of the offence
- The defendant must at any rate have intended to encourage the offence's commission, which was not the case here
- Conviction quashed

**Issue:** can a party 'aid' another without their knowledge?

Given that there is no need for agreement or consensus between the parties (*Russell*), it seems possible that aid can be given without knowledge or agreement about its provision. However, if *A-G's Reference* is followed, there needs to be knowledge of the abettor in respect of 'aiding, abetting and counselling', but not 'procuring'.

**Issue:** can a victim be an accessory?

Yes; unless it is expressly or impliedly excluded by the statute creating the offence, the 'victim' of an offence can be charged as an abettor to its commission.

**Keane v Police (1997) SASC:****Facts:**

- A restraining order is issued against Keane's ex-husband
- The accused contacts him to arrange to mind the children
- The arrangement was that he would collect them from a third party's house
- However, the husband goes to Keane's house instead
- She allows him inside
- An argument ensues, during which the police attend the scene
- Keane is charged as being an accessory to the violation of the restraining order

**Issue:**

- Can a victim also be an abettor to the commission of the offence of which she is the victim?



Reasoning:

- The *Domestic Violence Act* is not aimed at protecting people from their own willing participation in the offending conduct, but at protecting them from unwanted conduct of a type intended to inspire fear
- On this construction of the Act, there is *no* implication that ordinary accessorial liability is excluded

Decision:

- Her conviction is upheld

- **Counselling**

Advising or encouraging or urging or instigating the doing of the principal crime by another and, doing so, prior to the commission of the principal crime

- **Procuring**

Conduct which amounts to something more than encouragement and which actually causes or brings about the doing of the principal crime

***A-G's Reference (No 1 of 1975) (1975) HCA:***Facts:

- Facts of reference:
  - The accused surreptitiously laces his friend's drink, knowing that the friend would drive home
  - The friend does not know his drink has been laced

Issue:

- Can the accused be guilty of aiding, abetting, counselling or procuring the statutory offence of driving with excess quantity of alcohol?

Reasoning:

- Question 1: procuring the statutory offence
  - It is vital that D laces the drink surreptitiously (if the victim had known, it becomes his own responsibility)
  - Where the victim does not know, the accused will be guilty of procuring the commission of the offence
  - Does this create a problem of the convivial or generous host, who keeps on topping up a guest's glass? Is he liable to be convicted for procuring the blood-alcohol offence?
    - No, because the grateful guest knows his or her glass is being filled up
    - His or her drink is not being laced
    - This saves the 'generous host' from conviction (ie, because the principal, the guest, does know and it becomes his responsibility)
- Question 2: meaning of 'aid, abet, counsel or procure'
  - A different view from that expressed in *Russell*:
    - These four words should be given their 'ordinary meaning'
    - Aiding, abetting, and counselling each require contact between principal and secondary offenders, a 'meeting of minds'
    - But not 'procuring'; this is different

- 'To procure means to produce by endeavour'
- You cannot procure an offence unless there is a causal link between what you do and the commission of the offence
- Knowledge is not required
- This suggests that an accused cannot aid, abet or counsel without the knowledge of the principal, but an accused *can* procure without it

The accused is not required to be present at the scene of the crime to have procured the offence. However, there needs to be a causal link between the accused and the doing of the principal crime (*Giorgianni; A-G's Reference*).

## 5 Presence

Where presence is required, it includes both 'actual' and 'constructive' presence. Constructive presence refers to situations where the accused is 'sufficiently near as to be able readily to go to the assistance of the principal offender should the occasion arise' (see *McCarthy and Ryan* per Hunt CJ).<sup>2</sup> Constructive presence would typically be established in a circumstance where the accused functions as a 'lookout' while the principal assaults another or burgles a warehouse.

**Issue:** is presence at the scene of the crime always required for the accused's conduct to amount to the actus reus of being an 'abettor'?

The doctrine of the authority to control states that where a defendant knows of the offence's commission, has the ability to prevent it, but nevertheless chooses not to intervene, they can be guilty as an abettor notwithstanding the fact that they are not physically present at the location at which the offence takes place (*JF Alford Transport*).

### ***R v JF Alford Transport Ltd (1997) UK:***

#### Facts:

- The defendant is a transport company, which operates a fleet of lorries
- The police seize records, including tachograph records and daily and weekly time sheets
- Drivers plead guilty to making false entries
- The appellant (the company) is convicted of aiding and abetting the making of the false entries

#### Issue:

- Can the company have abetted the commission of the offence despite not being physically present when the false entries were inserted into the ledgers?

#### Reasoning:

- What matters is the defendant's knowledge of the principal offence coupled with its ability to control the action of the offender and its deliberate decision to refrain from doing so
- An offence can be abetted if:
  - The defendant has knowledge of the principal offence (but need not intend that it be committed)

<sup>2</sup> See above Part II, Section D(2).

- The defendant is able to control the actions of the offenders (eg, where they are employees)
- The defendant makes the deliberate decision to refrain from doing so

Decision:

- Appeal allowed

On this point, see also *R v Kypri* [2002] VSCA 196 per Ormiston J at [32]-[38].

## 6 Omissions

Can mere presence at the scene of a crime be classified as conduct or does it fall within the category of omissions?

- (a) In an ordinary situation, an omission or failure to act will not be sufficient to establish the actus reus of an abettor;
- (b) However, in exceptional situations, 'mere presence' may sometimes be construed by law as amounting to the conduct of secondary participation;
  - (i) If presence aids participation (*Coney*); or
  - (ii) If presence is deliberate and for a reason related to the offence
- (c) Whether or not mere presence will amount to conduct legally depends on whether either –
  - (i) The presence of the accused encourages the principal party; or
  - (ii) The accused was under a duty to act in relation to the victim of the principal crime (*Russell*)

However, if the accused is present at the scene of the crime for a particular purpose (rather than just wandering past), and if presence happens to aid the commission of the principal offence in some way (as in *Coney*, where the accused was a spectator to a fist fight, urging on the assault), then this may be evidence supporting prosecution as an abettor.

## 7 Sentencing abettors

**Issue:** is there a difference when sentencing as an abettor instead of as a principal?

No, there is no requirement that the sentence of an abettor be less than that of the principal; the appropriate sentences for each are matters to be weighed up in light of all the circumstances (*SJK & Gas*).

### ***DPP v SJK & Gas* (2002) Vic CCA:**

Reasoning:

- The notion that, as a general proposition, an abettor would be expected to receive a lower sentence is one which must be approached with considerable circumspection
- There are many circumstances where the culpability of an abettor could be properly regarded as being at least equal to, if not significantly greater than, the principal
- The sentence must be determined in light of all the circumstances bearing on the offence

and the offender involved

## 8 Mens Rea

Under s 323, it must be established that:

- (a) The accused subjectively knew of the facts which correspond to the principal crime
- The accused does not have to know that what they are actually abetting is legally prohibited
    - To require such would have the effect of creating a defence of ignorance of law
    - If the law says the facts of which they know correspond to a principal crime, then subjective knowledge is established
  - It must be established that the accused knew of the facts of the principal party's conduct
    - This applies in situations where the principal crime is a crime of strict liability (*Giorgianni*);
    - Where the principal crime is a crime of negligence (the accused does not have to know that the conduct is negligent, simply that the principal party was doing the actual conduct); and
    - Where the principal crime is 'constructive' such as constructive murder or UDA manslaughter (ie, the accused does not have to know that the act would cause death but simply that the principal party is engaging in the act that does in fact cause death)
  - Where the principal crime is defined to include a subjective fault element, the accused must also know the facts of the principal party's state of mind (*Stokes & Difford*)
- (b) The accused intentionally abetted (or aided or counselled or procured) the conduct of the principal party
- Relates the accused's mental state to their conduct
  - The required state of mind is intention; recklessness will not suffice (*Giorgianni*)

Generally, both knowledge and intention are able to be inferred from proof of the accused's acts of aiding, abetting, counselling or procuring.

### ***Giorgianni v R* (1985) HCA:**

#### Facts:

- A heavily loaded coal truck loses control on the Bulli Pass when travelling down a steep decline
- It collides with several vehicles, killing five and causing grievous bodily harm to another
- *Giorgianni* is charged under the *Crimes Act* (NSW) s 52A (as provided for by s 351)
- The brakes were last inspected 12 days before the accident by *Giorgianni*, *Renshaw* (the driver) and *Fitzpatrick*
- Police evidence is that anyone who worked on the brakes should have realised that the defects were evident; one brake is completely ineffective, and tied on with wire
- *Renshaw* had reported a leaking seal to *Giorgianni* on the day of the accident

- It is alleged by prosecutors that Giorgianni had procured the commission of the offence under s 52A by employing Renshar to drive with reckless indifference to the state of the brakes of the vehicle and the danger that this posed to the public
- It is held to be open to the jury to infer that Giorgianni is aware of the defective condition
- The charge is 5 counts of culpable driving causing death and 1 count of culpable driving causing grievous bodily harm
  - Culpable driving is a strict liability offence that requires that death or grievous bodily harm be caused through the impact of a motor vehicle being driven in a manner that is dangerous to the public
- Trial judge's direction:
  - The defendant is guilty if he knew or was reckless as to whether the brakes were defective and could fail
  - Giorgianni must either know (on May 18), when he sent Renshaw out on the road, that the brakes were dangerous and could fail and could constitute driving in a manner dangerous of the public, or Giorgianni must have acted recklessly, not caring whether these facts existed or not
  - Ie, the trial judge says that 'recklessness' is sufficient mens rea for abettor liability
- Giorgianni is convicted at trial
- He appeals to the Court of Criminal Appeal unsuccessfully
- He subsequently appeals to the High Court of Australia

Issues:

- Does s 351 (liability as a secondary party) apply to s 52A?
- What mens rea is required to aid, abet, counsel or procure an offence under s 52A?
- Must the secondary party have knowledge of all essential facts or is it enough that he was aware of the possibility of their existence?

Reasoning:

- What is the mens required of an abettor?
  - All judges agree:
    - There is no basis for treating an abettor any differently where the principal offence is one of strict liability
    - Recklessness is not sufficient mens rea (if Giorgianni knew the brakes were probably or possibly defective), so the trial judge's direction is in error
    - The abettor must possess knowledge and intent in respect of all crimes – whether they impose strict liability or not
    - Negligence is, of course, insufficient mens rea
  - Wilson, Deane and Dawson JJ:
    - Involves intentionally participating (a/a/c/p) based on knowledge of essential facts (ie that brakes defective)
  - Gibbs CJ:
    - D must have knowledge of essential facts/circumstances and intention to a/a/c/p D to bring about the forbidden result
  - Mason J:
    - D must have knowledge of all the essential facts giving rise to the commission of the offence
    - Makes no reference to intention
- Will wilful blindness suffice?
  - Wilson, Deane and Dawson JJ:
    - Not sufficient unless an inference of actual knowledge can be made
  - Gibbs J; Mason J: apply *Crabbe* (just evidence that can go towards mens rea)

- Sufficient where virtually equivalent to knowledge, following *Crabbe*
  - Essentially, there needs to be evidence going towards actual knowledge
- Trial judge's direction
  - Unanimously: the second limb was incorrect (recklessness is not sufficient)
  - There is no reason in principle why s 351 does not apply to s 52A
- Wilson, Deane and Dawson JJ:
  - Renshaw was still 'driving' when the two impacts occurred
  - For Giorgianni to have aided, abetted, counselled or procured Renshaw's offences, Giorgianni 'must have intentionally participated in' them
  - This requires knowledge (not recklessness)
    - The trial judge was therefore in error in allowing the alternative of recklessness
    - The trial judge based his direction on *Glennan* (which held that for strict liability offences it is sufficient if the secondary party is reckless or wilfully blind; however, negligence is insufficient)
  - There is no basis for treating offences imposing strict liability differently from those requiring mens rea
    - Intent is an essential ingredient of an abettor's liability
    - Knowledge of the essential facts of the principal offence is necessary for intent
    - *Glennan* was incorrect: wilful blindness and recklessness are not sufficient (need intention)
    - Appeal allowed; retrial ordered
- Gibbs CJ:
  - There can be secondary liability under s 52A
  - Knowledge is required to be an abettor (and not reckless indifference to the actual facts), but wilful blindness can amount to knowledge
  - Disapproves the passage from *Glennan* relied upon by the trial judge (which said that recklessness was sufficient)
  - Secondary participation requires:
    - Knowledge of all essential facts
      - Wilful blindness can be equivalent to knowledge, but recklessness and negligence are not
    - Intentionally aiding, abetting, counselling or procuring the offence
  - Allows the appeal, ordering a retrial
  - However, it is suggested that the retrial should not take place because the case against Giorgianni was 'not a particularly strong one' and that he had already been tried twice
- Mason J:
  - Section 351 does apply to s 52A
  - Secondary participation is possible in relation to statutory offences of strict liability
  - Knowledge is required, but wilful blindness is sufficient for knowledge
  - However, recklessness falls short of the required standard
  - The trial judge's direction was defective
  - Disapproves *Glennan*

Decision:

- Giorgianni did not intend that the offence be committed, though he may have been reckless as to its eventuation; appeal allowed

In order to be convicted, *Giorgianni* would have needed to have knowledge of all the essential facts (ie, knowledge of the extent of the defectiveness) and intention to aid and abet the commission of the offence. However, the scope of the knowledge considered 'essential' remains unclear. Is it just knowledge of the factual elements which give rise to the offence, or knowledge of the principal offender's intention to carry it out as well (at least in the case of mens rea crimes)?

The effect of *Giorgianni* is that the liability of secondary participants is restricted by reference to their intention to aid and abet the offence. This is similar to the approach taken in the context of offences. It can result in secondaries being held to higher standards of mentality than principals.

Some commentators have argued that *Johns* and *Giorgianni* are inconsistent. Lanham suggests that the doctrine of common purpose should be abandoned and instead decided purely on the basis of recklessness. Fisse agrees (at 340) that the doctrine is a 'pointless complication'. However, since *Giorgianni*, recklessness is a clearly insufficient foundation for an abettor's liability. How then can the principal's liability be decided on the basis of recklessness only?

Several possibilities for reform exist. For example, it might be possible to use common purpose in both cases – where there is some possibility or substantial risk of criminal activity (as in *Miller*, *Johns*), and also in situations like *Giorgianni*. A coal truck with faulty brakes posed a substantial danger and it was a possible risk that an offence would occur as a result. Others have argued that abettors should be able to recklessly aid, abet, counsel or procure an offence and that *Giorgianni* was wrong at law.

Arguably, however, it is the original common purpose which separates the mental state required for a principal to be liable for an additional crime from that required for an abettor to be liable: in the case of the former, the common purpose is already criminal, whereas in the latter, no such agreement exists. It may thus be possible to reconcile *Johns* and *Giorgianni* on the basis that in the former, there was a substantial 'link in purpose' between the robbery and the murder, whereas in the latter, no such link existed between *Giorgianni*'s recklessness and *Renshaw*'s commission of the offence. A different approach may thus be appropriate in common purpose cases and aiding, abetting, counselling or procuring cases.

At any rate, the *Giorgianni* approach has since been affirmed and applied in *Davis v R* (per McHugh J).

### ***Davis v R* (1991) HCA:**

#### Facts:

- D permits her de facto husband and two other persons to place a large quantity of cannabis in the vehicle that she is driving
- She admits that she knew 'what was in the drums and the plastic bag'
- She is charged with aiding and abetting the strict liability offence of being in possession of cannabis with intent to sell or supply (intent deemed once possession proved)
- She is tried as a principal and convicted; D appeals

#### Issue:

- Did *Davis* intend to aid and abet her husband's selling or supply of the cannabis (following *Giorgianni*)?

#### Reasoning:

- McHugh J:
  - Agrees that Davis' knowledge of her husband's intention to sell or supply needs to be proven in order to establish liability as an abettor
  - If Davis was charged as an accomplice, the Crown would have had to prove knowledge
  - However, on the evidence, this would have been proven
- Wilson, Deane and Dawson JJ:
  - The practice of charging an accessory as a principal offender is 'an undesirable practice because it does not make clear the real nature of the case against the defendant'
  - However, Davis is guilty of the offence – whether as an accessory or a principal – and it does not matter that she had been wrongly charged

Decision:

- Appeal dismissed

9 *Withdrawal*

**Issue:** in what circumstances does withdrawal negate accessorial liability?

There are two main views about the effect of withdrawal on criminal participation:

- a) Irrelevance (as in attempt)

On this view, if the defendant has done the actus reus and possesses the mens rea of a secondary party, no amount of changing of his mind, recanting, or countermanding, can help.

- b) Neutralisation

According to the approach currently favoured, if the defendant is able to neutralise the effect of his encouragement or assistance, he will escape criminal liability.

This second approach has been endorsed unanimously by the High Court of Australia in *White v Ridley*. However, it is there stressed that the withdrawal must be effective.

***White v Ridley (1978) HCA:***Facts:

- The applicant, while in Singapore, and using a false name, arranges to air freight a container to Australia
- He travels to Australia in advance of the shipment
- Using the false name of the consignee, the applicant sends a telex marked 'urgent' to stop the consignment
- However, the telex arrives too late, and the box is still sent
- He is convicted of importing prohibited goods into Australia in contravention of s 233B of the *Customs Act 1901 (Cth)*
- He appeals against the conviction given his attempted cancellation

Issue:

- Was the applicant's withdrawal effective to negative criminal responsibility?



Reasoning:

- Gibbs CJ:
  - There must be a timely countermand manifested by words or conduct that make it clear that the accused no longer wants the agent to do as previously requested
  - The countermand cannot be vague or perfunctory, and it cannot have been timely if it is too late to actually prevent the train of events from eventuating
  - Concludes that the accused must have done or said whatever was reasonably possible to countermand his request to the airline
    - This he had not done, because he did not tell (though he could have told) the airline that the box contains cannabis
- Stephen J (also in majority):
  - Only the intervention of a new cause would be sufficient to displace the original arrangement
  - The defendant's ineffective efforts to stop the shipment of the consignment did not give rise to a new cause of importation
- Jacobs and Murphy JJ (dissenting)
  - The accused had done all that he reasonably could to prevent the commission of the offence
  - It was not reasonable to expect the accused to tell the airline that the box contained cannabis

Decision:

- (3:2) Appeal dismissed

The British Court of Criminal Appeal adopts a less stringent view of withdrawal (*R v Rook*).

***R v Rook* (1993) UK CCA:**Facts:

- Rook ('R'), A, and L agree with M to kill M's wife for £20 000
- The four men met and planned the killing and it was arranged that they would put the plan into effect the next day
- They decide that the next day M would drive the other three to a lake, and that then M would bring his wife to them
- However, R (the appellant) does not turn up, and the killing is carried out by A and L independently
- His defence is that he had never intended to go through with the killing and that he had deliberately absented himself on the day because he thought that if he was not there they would not go through with the killing

Issue:

- Is Rook's withdrawal effective?

Reasoning:

- R must have unequivocally communicated his withdrawal to the other parties:
  - 'A person who has changed his mind about participating in the commission of an offence but who failed to communicate his intention to the other persons engaged in the offence did not thereby effectively withdraw from the commission

of the offence and was liable as a secondary party. In order to escape liability he had to at least unequivocally to communicate his withdrawal to the other party'

- Absence on the day of the murder is not unequivocal communication:
  - 'The fact that the appellant absented himself on the day of the murder did not amount to unequivocal communication of his withdrawal from the murder.'
  - The court did not decide whether where an unequivocal withdrawal had been made, the accused must take some steps to neutralise the assistance already given

Decision:

- Court of Criminal appeal dismissed his appeal against the conviction for murder

The view taken in *R v Rook* (that a secondary party must at least unequivocally communicate his withdrawal to the other party or parties) appears weaker than the requirement of reasonable measures to countermand the assistance imposed by the majority in *White v Ridley*. According to *White*, not only would the accused in *Rook* have had to communicate withdrawal, but also to convince the others to call off the murder (or else alert the police to the plan so that the victim's life could be saved).

## C Accessories

In contrast to ss 323 and 324, s 325 defines a distinct offence of being an accessory (as opposed to a method of finding liability for existing crimes defined elsewhere).

It covers situations where the accused is absent from the scene of the crime and provides assistance after its commission. In providing assistance, it must be established that the accused knew or believed the crime had been committed and does anything to prevent the apprehension, prosecution, conviction or punishment of the principal:

### **s 325 – Accessories:**

- (1) Where a person ('the principal offender') has committed a serious indictable offence ('the principal offence'), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.
- (6) In this section, 'serious indictable offence' means an indictable offence which, by virtue of any enactment, is punishable on first conviction with imprisonment for life or for a term of five years or more.

The statutory offence of being an accessory replaces the common law offence of being an accessory after the act to a felony.

Section 326 replaces the common law offence of 'misprision of felony' with the narrower offence of concealing an offence for benefit:

**s 326 – Concealing offences for benefit:**

- (1) Where a person has committed a serious indictable offence, any other person who, knowing or believing that the offence, or some other serious indictable offence, has been committed and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts any benefit for not disclosing that information shall be guilty of a summary offence and liable to level 8 imprisonment (1 year maximum).

Requirements for conviction under s 326:

- Principal offender commits a serious indictable offence
- The accused
  - Knows or believes that the offence has been committed (need not be an actual offence)
  - Has information which might be of 'material assistance' to conviction
  - Accepts any benefit for not disclosing that information
    - The benefit is not reasonable compensation for loss
    - The benefit is for himself or another and is not restricted to money

If these requirements are met, the accused will be guilty of a summary offence under s 326.

**s 321R – Application of Division (laws of attempt):**

- (1) This Division applies to and in respect of an offence under any other enactment of attempting to commit an offence.
- (2) The preceding provisions of this Division do not apply to an attempt-
- (a) to aid, abet, counsel or procure the commission of an indictable offence; or
  - (b) to commit the offence of conspiracy whether that offence is a statutory offence or an offence at common law.

Note: it is still possible to abet an attempt. Section 321R just prevents attempting to abet.

## D Reform Possibilities

It has been argued that laws of complicity as they relate to secondary liability should be abolished and replaced with two new inchoate offences: encouragement and assistance. Proponents contend that this simplifies liability as secondary with much the same effect. Of course, complicit liability as between principals still remains.

Arguably, however, such a reform only complicates matters. It may even have the adverse effect of *encouraging* secondary participation, since imposing lesser inchoate offences would widen the division in criminal liability between principals and secondaries to an even greater extent, possibly to the point where the secondary offences are ineffective deterrents against participation in the commission of crimes by principals. It may also reintroduce problematic common law distinctions between principals in the first degree and other types of complicit participation.

### **III Exam Strategies**

#### **A Order of Inquiry**

- 1 Look for multiple defendants
- 2 Start with the liability of the principal
- 3 Then, go through the possibilities for other defendants
  - (a) Joint perpetrators
    - A and B both harm V, who dies as a result of the combined effect of their conduct
  - (b) Acting in concert
    - A kills V pursuant to a common (criminal) plan with B, who is present
  - (c) Common purpose
    - A and B plan to rob V; A kills V; B is aware of the possibility of V being killed during the robbery
  - (d) Innocent agency
    - A uses C, a non-responsible agent, to kill V
  - (e) Aiding and abetting
    - B makes and intends to make it more probable that A will succeed in committing the offence against V
- 4 Finally, note any other relevant offences (accessories, concealment)
  - (a) Accessories
    - B helps A escape and avoid capture after finding out that A has committed the offence against V
  - (b) Concealment
    - A pays B not to say anything to the police