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UNJUST LABELS – JOINT ENTERPRISE AND EXTENDED COMMON PURPOSE

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“This part of the common law is in a mess. It is difficult to understand. It is very hard to explain to juries. It involves a portion of the law made by judges.”

In 1995 Stephen Odgers, usually a regular at the CLANT conference, warned that the extension of accessorial liability to foresight was “one of the most regressive of the High Court’s judgements in the field of substantive law.”² Two decades later, nothing has changed. You could say that Odgers foresaw the inevitable. Suspects are convicted on the basis that they foresaw a principal might do something, without specificity. It could even be foresight of a range of possibilities. Liability is imposed not on an established subjective criminal fault element like intention or recklessness or knowledge but on a possible outcome or risk of a possible outcome. Sadly, the issue of foresight of risk has also infected the Criminal Codes. No State or Territory in Australia has escaped the disease of prosecution ease, although, at least the risk has to be substantial in the NT in relation to murder.

One could argue it is not Australia’s fault since it inherited a piecemeal failure to observe legal principle from the English. In 1950 English law was reasonably clear and had sound foundations:

- Basic accessorial liability (aid, abet, counsel and procure) where the accessory knows of the plans of the principal (P) and *intended*, by his acts, to aid or encourage P. Basic accessory liability does not require that the secondary offender (S) and P share a common purpose, though one might in fact be present in any given instance of basic accessorial liability. This is known as complicity in Australia.
- Actions in pursuance of a *common purpose* where each member of the common purpose had knowledge of the essential matters and intended that the actions within that illegal purpose to be carried out³.

¹ Clayton v The Queen [2006] HCA 58;(2006) ALR 500;168 A Crim R 174, at 184, per Kirby J.

² S Odgers, “Criminal Cases in the High Court of Australia: McAuliffe and McAuliffe,” (1996) 20 Crim LJ 43, at 44.

³ *Johnson v Youden and Others* [1950] 1 KB 544, 546, 547. Affirmed a year and a week later by the Court of Appeal, again led by Lord Goddard, C.J., *Ferguson v Weaving* [1951] 1 KB 814, 820.

If the evidence did not support basic accessorial liability or the ultimate offences were outside the common purpose then liability was excluded for the alleged accessory. This was the acceptable approach but it has not survived in its true form in either England or Australia.

In a series of piecemeal and unjustified decisions, the English law moved to joint enterprise: This has been identified as parasitical accessorial liability⁴. In Australia it is known as “extended common purpose”. Both labels subsume all accessorial principles and liability is imposed at the point that S takes the risk that P might commit a further crime⁵. In a sense it is a form of social engineering, not based on criminal acts but designed, as a matter of policy⁶ to control association and practicality for the prosecution. The fault element is so low that it is arguably not consistent with the concept of crime at all. In Australia Hayne J exposed the thinking behind the policy which seems to be that it is “unacceptable” not to impose liability on groups of people regardless of individual involvement:

“If liability is confined to offences for the commission of which the accused had previously agreed, an accused person will not be guilty of any form of homicide in a case where, despite foresight of the possibility of violence by a co-offender, the accused has not agreed to its use. The result is *unacceptable*. That is why the common law principles have developed as they have”⁷

In England Lord Hutton admitted that casting a wide net may not be logical but is a practical result:

“I recognise as a matter of logic there is force in the argument advanced on behalf of the appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. But the rules of the common law are *not based solely on logic* but relate to *practical* considerations and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs...In my opinion there are practical considerations of weight and importance

⁴ M Dyson, “Bases and baselessness in secondary liability’ University of Cambridge Faculty of Law Research Paper 31/2015 and M Dyson, Justifying Secondary Liability: Might does not Make Right [2015] Crim LR (forthcoming)

⁵ M Dyson, “Bases and baselessness in secondary liability’ University of Cambridge Faculty of Law Research Paper 31/2015 and M Dyson, Justifying Secondary Liability: Might does not Make Right [2015] Crim LR (forthcoming)

⁶ R v Powell; English [1999] 1 AC 1

⁷ Hayne J Gillard v The Queen (2003) 219 CLR 1,38

related to considerations of public policy which justify the principle...and which prevail over the considerations of strict logic”⁸

Of course, in practice this just gives rise to utility for the prosecution. Arguably it is a form of judicial prosecution as any Parliament would be expected to act on evidence of a need to enact new law and debate. The courts have proceeded on the basis of opinion and assumption that all the unacceptable types need to be swept up and imprisoned. Public concern was reflected in a recent work of fiction which referred to joint enterprise in the UK as an “easy sweep”.

Of course, the inevitable has happened on both sides of the globe, the policy has demonstrably failed: The current state of the law in the common law states of Australia is clearly set out in a recent article by McNamara.⁹ It over criminalises secondary parties. In England, the recent Parliamentary Justice Committee enquiries and reports have exposed the “negative effects from the operation of the doctrine [of joint enterprise], for the reputation of the justice system and for wider society, as well as for the interests of some of those convicted under the doctrine and for the victims of crimes”¹⁰. All the available evidence is that the application of the current legal policy formulated by precedent in relation to group violence is demonstrably wrong and has created significant individual injustice¹¹. This is particularly so in relation to the crime of murder.

If the true purpose of the law on “joint enterprise” or “extended common purpose” is to ensure that individuals do not participate in serious / fatal violence by those moving in gangs or packs, the law is ineffective as it cannot hope to prevent people joining gangs which (of itself) is not unlawful, save for certain proscribed organisations. Moving in groups is what people naturally do. It is not for the courts to control association but to apply the common law to the evidence. A common law created by piecemeal failure and disregard of logic is no basis for any sort of liability, particularly not in crime.

⁸ Per Lord Hutton R v Powell; English [1999] 1 AC 1 at 18

⁹ A judicial contribution to over-criminalisation?: Extended joint criminal enterprise liability for murder (2014) 38 Crim LJ 104.

¹⁰ Justice Committee: Joint Enterprise (11th Report of Session 2010-2012, printed 11 January 2012(<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/1597/1597.pdf>) and Joint enterprise: follow-up ordered to be printed 10th December 2014 (<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/310/31002.htm>)

¹¹ Ibid n1

The reason that the policy has failed is because the courts lost sight of legal principle: Under the common law, both in England and Australia, the concept known as “extended common purpose” or “extended joint common enterprise” or “joint enterprise” liability continues to be applied, despite the lack of foundation and despite being based on serious doctrinal difficulties such as the following:

- i. It is highly favourable to the prosecution thoroughly undermining the burden and standard of proof.
- ii. It creates collective responsibility, convicting all (from encouragers to participants of any degree including those who remain present) without proving the acts or the intentions of each individual.
- iii. Liability of an accessory is greater than that of the principal to the extent that, for example, the accessory could be convicted of murder where a principal acting recklessly is acquitted, where there is continued presence and without aiding or abetting, counselling or procuring.
- iv. It makes no accommodation for those who are vulnerable. This is particularly unjust in those jurisdictions where duress is no defence to murder.
- v. The fault element is less than basic accessorial liability and therefore leaves proper principles of basic accessorial offending wrongly redundant.
- vi. It does not allow for consideration of alternative offending such as manslaughter or affray as all present are collected by the current formulation. This has led to a series of tortious exceptions such as “fundamentally different” and “innocent agency” and/ or a focus not on what the person knew or intended but whether they withdrew from a risky situation.
- vii. Concepts of risk have no foundation in criminal law for individual liability. An examination of “Enterprise Liability” principles in tort makes it plain that such concepts were developed in the context of loss spreading policy. Strict products liability and no fault compensation plans are aspects of a broader enterprise liability theory based on notions of insurability rather than notions of fault.¹²
- viii. Enterprise liability also appeared in copyright law in the 1970’s¹³ where a party was liable who, “with knowledge of the infringing activity, induces, causes, or

¹² Nolan V and Ursin E. Enterprise Liability Re-examined 75 Or L. Rev 467 1996.

¹³ *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.* 443 F.2^d 1159 (2d Cir. 1971),

materially contributes..... may be held liable as a contributory infringer.”¹⁴ It seems remarkable that the test for liability is more stringent in civil proceedings than in crime. That alone exposes that the criminal law on joint enterprise is an improper formulation.

In October 2015, in the Appeal of *Jogee*¹⁵, the UK Supreme Court will have a much needed opportunity to simplify, rationalise and re-express the common law principles governing liability of secondary parties in criminal cases involving violence and death, currently governed by the doctrine of “joint enterprise” in consolidated appeals from the English Court of Appeal and a Jamaican appeal via the Privy Council which sat in the court at Buckingham Palace.

It begs the question, what should Australia do?

The justice of the Australian law of extended common purpose was doubted by Kirby J in *Gillard v The Queen*,¹⁶ in his dissenting judgement in *Clayton v The Queen*¹⁷ and at this conference in 2007¹⁸. As you will all know, he questioned the development of the law across the federation and raised the concern that the current state of the law is guided by tactics rather than principle:

To hold an accused liable for murder merely on the foresight of a possibility is fundamentally unjust. It may not be truly a fictitious or ‘constructive liability’. But it countenances what is ‘undoubtedly a lesser form of mens rea’. It is a form that is an exception to the normal requirements of criminal liability. And it introduces a serious disharmony in the law, particularly as that law affects the liability of secondary offenders to conviction for murder upon this basis.

This comment was noted in England by Toulson LJ in *Mendez*,¹⁹ showing the contact between England and Australia continues to flow in both directions. *Clayton* concerned an attack by three defendants on the victim, in the victim’s house, in order to “get back at him”. As Kirby J pointed out, the jury could convict all three defendants of murder even if one, two or all three

¹⁴ *ibid*

¹⁵ R v Jogee; Criminal Appeal Office Reference Number: 201202515 C1. Felicity Gerry QC is instructed on behalf of Jogee.

¹⁶ (2003) 219 CLR 1.

¹⁷ [2006] HCA 58.

¹⁸ Michael Kirby, ‘Remote Justice’ (2008) 1 NTLJ 6.

¹⁹ [2011] QB 876, [35].

of them had not actually intended the deceased's death or had not regarded it as a virtually certain or a probable outcome. Kirby J was the dissenting judgement and the rest, as they say, was history.

After the apparent result of the failure of English law, there was a window of opportunity to sort out the mess in *Osland v The Queen*²⁰ but the focus began to turn to derivative liability. Australia was ultimately left with *McAuliffe*²¹ where the High Court created a new head of secondary liability so that S is liable for an offence committed by P which is outside the scope of the common purpose so long as S participated in the common criminal venture with foresight of the possibility that offence might take place. In cases of murder, the consequences may well be a life sentence. Odgers coined the term "reckless accessoryship" but it is certainly even less than that. It is foresight of a risk, although in the NT there is one provision which refers to an awareness of a substantial risk (see below). Neither foresight nor awareness is defined. From the cases, foresight appears to be a form of suspicion and awareness something greater but it is not clear and juries are being left without direction on this issue. Contrast the original law that required intention or knowledge thus giving a clear moment for a party to withdraw or for a jury to conclude that s/he had participated. Such clarity is never present when the fault element of foresight or un-defined awareness is applied.

So it is that the conduct of each of the participants in a joint enterprise is attributed to each of the others, all are taken to be principal offenders²². Sadly, even more recently in *Huynh v The Queen*²³ the High Court held that in order to be convicted as a joint principal offender it is only necessary for the prosecution to prove that S was party to a pre conceived plan and was actually or constructively present when the same was committed, still failing to address the current injustices and largely focussing on an agreement rather than fault elements in accessorial liability.

Of course, one of the issues arising from the lack of uniformity in this area across Australia is that it depends what is being appealed and from where and now that there are various pieces of legislation, the opportunity for the High Court to correct its errors may be long gone.

²⁰ (1998) 197 CLR 316.

²¹ (1995) 183 CLR 108

²² 314 Ibid, 189 (McHugh J), 238 (Callinan J).

²³ [2013] HCA 6

Referring to extended common purpose as extended joint common enterprise (EJCE), McNamara suggests a number of solutions to the common law injustice, citing foresight of a probability as the simplest²⁴:

“The first and most radical option is the abolition of the discrete EJCE rule. This approach was countenanced, if not expressly recommended, by the Weinberg Report: “Serious thought needs to be given to whether the doctrine of extended common purpose should be retained in any statutory reform of complicity.” The Report recommended codification of complicity and its draft legislation includes definitions of joint criminal enterprise and accessorial liability, but not EJCE. The second option is the approach preferred by Kirby J in *Clayton*, where he embraced the formulation proposed by English criminal law scholar JC Smith:

In the place of telling the jury, relevantly, that they might convict a secondary offender for a crime actually committed by another in the course of a common enterprise if it was proved that that offender participated or continued to participate in the enterprise aware that it was *possible* that another participant might commit murder, the judge would explain the need for the jury to be sure that the secondary offender either *wanted* the principal offender to act as he or she did, with the intention which he or she had, or knew that it was virtually certain that the principal offender would do so.

The weakness of this formulation, at least in the Australian context, is that it would introduce into the Australian common law yet another way of expressing a test of subjective appreciation – “virtual certainty” – an addition that risks causing further confusion, for judges and juries alike. The third and simplest option would be to change the foresight threshold from possibility to probability. This would ensure that a secondary participant against whom the prosecution sought to rely on EJCE would only be guilty of murder if he or she foresaw that it was *probable* that any other member of the group might commit murder. This was the approach preferred by the NSWLRC in its 2010 report on complicity. The Commission recommended that in the case of murder, the test for the liability of a secondary participant where the Crown seeks to rely on EJCE should be a foresight of probability test.

²⁴ A judicial contribution to over-criminalisation?: Extended joint criminal enterprise liability for murder (2014) 38 Crim LJ 104

D will be liable for murder if D foresaw that it was *probable* (that is, likely) that a death would result from an act of P that was done with intent to kill or cause grievous bodily harm, in the course of carrying out the JCE in which D was participating.

Although it did not embrace the NSWLRC's overall approach (and was unimpressed by the Commission's articulation of two versions of a new rule for EJCE – one for murder and one for all other offences), the Weinberg Report did offer support for a probability-based test:

If the doctrine is to be retained, it would surely be preferable to recast the fault element required in order for it to be made out. At the very least, there ought to be a requirement of foresight of a “probability” (or even “strong probability”) rather than a mere “possibility”.⁷³

This approach would bring the EJCE into closer alignment with the individual responsibility culpability standard for murder by reckless indifference to human life, and for this reason is the preferred outcome²⁵.

McNamara recognises that this would be a compromise, not least because the fault element would still be different from basic accessory liability. It is the suggestion of a probability test which has been certified as a question for the UK Supreme Court in October this year.

So, has the time come as Kirby J suggested it should; “to re-express the law of joint enterprise and the Australian law of extended common purpose liability so as, at least in homicide cases where those rules are most important, to restore greater concurrence between moral culpability and criminal responsibility; to reduce doctrinal anomalies and asymmetries; and to reduce the risk of miscarriages of justice”?

Since the High Court has so flatly refused to consider the issue, despite Kirby J's observations and the continuing recognition that there is complexity, those Territories and States applying the common law are stuck unless something turns on the English appeal to the UK Supreme Court in October. In the meantime, Australia is proceeding with a remarkable lack of uniformity:

²⁵ McNamara 114 (2014) 38 Crim LJ 104 at 115

- (i) Criminal Code (Qld) /s 8/ Offences committed in prosecution of common purpose
When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a *probable consequence* of the prosecution of such purpose, each of them is deemed to have committed the offence.
- (ii) There two systems of criminal law operating in the ACT: Chapter 2 in the *Criminal Code* prescribes criminal responsibility and criminal complicity in relation to all offences contained in the *Code* and all offences enacted in it or in other legislation since the enactment of the *Code* in 2002 (1 January 2003). Section 45 deals with accessory liability for those offences. Section 45 is in similar terms to the Commonwealth provision dealing with accessory liability Section 11.2 *Criminal Code Act 1995*²⁶. For all other offences in the ACT created before 1 January 2003 common law principles of accessory liability apply. Accessory liability for the vast majority of offences in the *Crimes Act* (other than those enacted after 1 January 2003) is governed by the common law. This category includes murder.
- (iii) In NSW, despite the 2010 NSW Law Reform Commission report, much accessory liability is still based on the common law. There are provisions in the Crimes Act which sit alongside the common law: Part 9 deals with *Abettors and accessories*: Section 345 provides for equivalent punishment for “every principal in the second degree in any serious indictable offence...to which the person would have been liable had the person been the principal in the first degree” and other provisions deal with timings of trying accessories before or after the fact, other penalties and abolishing marital immunity.

In the NT, sadly in relation to many offences there is a presumption of guilt for accessories, reversing the burden of proof²⁷. Whilst we can breathe a sigh of relief that such an injustice was not pursued in Part IIAA, section 43BG sets out accessory liability for murder (paragraph Section 56 *Criminal Code*). Section 43BG in part IIAA of the *Criminal Code* is almost in identical terms to Section 11.2 of the Commonwealth Criminal Code. It is headed “*Complicity and Common Purpose*”. Leaving aside the fact that there is no real need to have a separate test for accessory liability for murder, s43BG raises the bar above mere foresight at common law

²⁶ An example of Section 45 at work is *Regina v Kremisis* [2014] ACTSC 322 (2 December 2014, Murrell CJ)

²⁷ See ss8 and 12

to undefined awareness. However, it still relies on the concepts of risk developed in English law.

These provisions both permit criminal responsibility for an offence that is committed by one person to be extended to another person. For example, in a prosecution of an accessory on a count of murder the prosecution will have to prove the following:

1. The offence of murder was committed by another person (P)
2. S's conduct in fact aided or abetted the commission of the offence of murder committed by P;
3. S intended his/her conduct would aid or abet the commission of an offence;
4. S was aware of a substantial risk that P would engage in conduct with intention to cause at least serious harm;
5. Having regard to the circumstances known to S it was unjustifiable for S to take that risk.

In *Mulkatana* (28 NTR 31) the Court said that in aid and abet murder "...the Crown (must) prove not only knowledge of the particular act, but knowledge of an intention on the part of EM (the PO) to cause serious harm". (at 69). The court went onto say that the Crown was required to prove that GM (the accomplice) was reckless as to the commission of the offence of murder "...recklessness in this context required that the Crown prove that at the time EM (PO) struck the blows to the decease, GM (A) not only intended that his conduct would aid and abet EM (PO) but he was aware of substantial risk that death would happen. Again, this involved an assessment of the state of mind of GM (A)...".

It seems therefore in the NT that trials should not be referring to common purpose at all as a matter of law. However, in any given case there may be evidence of a common purpose, which seems a more logical approach and much more consistent with the foundational law. Those who aid and abet may also be doing so as part of a joint plan. The NT has the potential for simplicity but unfortunately it is overcomplicated by the awareness of a substantial risk test. Looming on the horizon is legislative change. The Commonwealth Criminal Code was amended to add s11.2A "Joint commission". This imposes criminal liability when an

agreement is executed and where another offence is committed in the course of carrying out the agreement where the person is reckless about the commission of the joint offence that another party in fact commits in the course of carrying out the agreement. Recklessness is set out in s5.4 separately in relation to results and circumstances but essentially amounts to liability where the person is “aware of a substantial risk” that the result will occur or the circumstance exists or will exist; and having regard to the circumstances “known” to him or her, it is unjustifiable to take the risk. It doesn’t get any simpler mixing awareness of risk and knowledge in the context of recklessness and juries must be utterly confused.

The ongoing lack of clarity means, whether at common law or applying the Codes, there is a consequential necessity for the judges to sort out the basis of any conviction on sentence. It seems remarkable that the basis for a conviction is sorted out after a verdict. The consequence was recently highlighted (where the defendant denied presence) in a limerick by CLANT

President Russell Goldflam:

Understandably, Grieve is aggrieved.
Though for sentencing, not disbelieved
("Wasn't there!"), he copped more
Than his mate. That's the law²⁸.
As for justice, that's hardly achieved.

In *Grieve*, the NT Supreme Court was faced with conflicting evidence as to presence, largely based on the evidence of a co-accused, who had earlier pleaded guilty to the murder and was called as a Crown witness. The focus of the summing up was almost inevitably on evidence of aiding before the fact and whether withdrawal was sufficient, not on state of mind or fault. The sentencing remarks indicate sentence was imposed on the basis that the defendant was not present. Judges clearly doing their best in complicated circumstances would clearly be better assisted by clearer law.

All this apparently means that the NT and the Commonwealth may be doing it better than ACT, the common law States and Queensland because judges ought to be directing juries in accordance with the Code terminology. However, the tortuous need to try and direct juries outside of the 2 principles of basic accessorial liability and common purpose means there is an inevitable injustice and risk assessments linger from the historic failure of foresight.

²⁸ *Grieve v The Queen* [2014] NTCCA 2

In November 2014, Victorian legislation sought to solve the complexities by making a list for potential liability and adopting a probability test: The new provisions came into operation from 1 November 2014 and, like the NT only apply to serious indictable offences: The relevant statutory provisions are in Division 1 of Part II of the *Crimes Act 1958* (Vic). Interpretation is dealt with in s323.

323 Interpretation

- (1) For the purposes of this Subdivision, a person is involved in the commission of an offence if the person—
 - (a) intentionally assists, encourages or directs the commission of the offence; or
 - (b) intentionally assists, encourages or directs the commission of another offence where the person was ***aware that it was probable*** that the offence charged would be committed in the course of carrying out the other offence; or
 - (c) enters into an agreement, arrangement or understanding with another person to commit the offence; or
 - (d) enters into an agreement, arrangement or understanding with another person to commit another offence where the person was ***aware that it was probable*** that the offence charged would be committed in the course of carrying out the other offence.
- (2) In determining whether a person has encouraged the commission of an offence, it is irrelevant whether or not the person who committed the offence in fact was encouraged to commit the offence.

Although the idea of a list of potential conduct gives less flexibility to the prosecution, it is important to note that the factual questions of what might constitute encouragement are not answered and in addition, there is no definition of the words “aware that it was probable”, a phrase which still leaves wide scope for prosecutorial utility, perhaps unless awareness is defined as knowledge.

In our view, it is unlikely that this form of words will be as effective as a return to the 2 part test of basic accessorial liability and/or common purpose formulated before the English changes. These two would cover most factual matrices any court is likely to come across in any event and be a lot more understandable than the any legislative attempt so far in this area.

Overall, what can be said at this stage is that the law must have legal effect at the point that the individual chooses to take part or not in what they recognise as a matter of certainty will happen thus having a clear opportunity to withdraw, an opportunity based on knowledge of the essential matters upon which a jury can reliably conclude that continuance is agreement with the enterprise and withdrawal is not.

In criminal law there are participants and accessories. In practical terms it is perfectly simple to separate the two on any factual scenario if the prosecution make their case clear at trial. If the facts are not clear then alternative counts can be made available for the jury. The development of “extensions” to legal foundation to criminalise those with unsavoury friends ignores these simple practicalities and has created a nebulous void into which those who do not make any material contribution to the acts of violence or death (and have no subjective intention) are swept up, convicted (often of murder) and dealt disproportionate punishment. It is a nonsense (as Lord Hutton would say – illogical) to suggest that an individual should avoid potentially risky friends as we encourage the risky to mix with the well behaved. This is basic human behaviour (even Hayne J would see this as acceptable) and should not be a basis for criminal liability for any offence.

The solution to these foundational issues is not to create some sort of policy shift or to artificially substitute manslaughter but to ensure that legal principle is clear, for, Kirby J was right, and to hold an accused liable for murder or any other offence merely on the foresight of a risk is fundamentally unjust. Only then will individuals know when to withdraw and judges will be able to give juries clear directions on the law.