

Judicial Colloquium, Vancouver 2017

JOINT CRIMINAL ENTERPRISE LIABILITY

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1. In *R v Jogee*,² decided in 2016, the UK Supreme Court abolished the common law doctrine which holds participants in a joint criminal enterprise liable for the criminal acts of the perpetrator of the primary offence committed in the course of the joint venture. It decided that liability for criminal complicity should be confined to traditional accessory liability principles, assigning culpability on the basis of the secondary party's intentional aiding, abetting, counselling or procuring of a principal offence.
2. Prior to *Jogee*, the joint enterprise doctrine, as laid down by the Privy Council in *Chan Wing Siu v R*,³ was accepted and applied in the highest courts of England and Wales,⁴ Australia⁵ and Hong Kong.⁶ The doctrine, with various modifications, also informs code and statutory provisions in

¹ Permanent Judge of the Hong Kong Court of Final Appeal. I would like to express my thanks to Judicial Assistants Amanda XI Yuan and HUI Sui Hang for their help in preparing this paper.

² [2016] 2 WLR 681, decided simultaneously with *Ruddock v The Queen*, an appeal to the Privy Council from Jamaica.

³ [1985] 1 AC 168.

⁴ Eg, *R v Ward* (1987) 85 Cr App R 71; *R v Slack* [1989] QB 775; *R v Hyde* [1991] 1 QB 134; *R v Powell (Anthony)* [1999] 1 AC 1 (HL); *R v Rook* [1993] 1 WLR 1005; *R v Rahman* [2009] 1 AC 129.

⁵ *McAuliffe v The Queen* (1995) 183 CLR 108; *Osland v The Queen* (1998) 197 CLR 316; *Gillard v The Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 81 ALJR 439.

⁶ *Hui Chin-ming v The Queen* [1992] 1 AC 34, *Sze Kwan Lung v HKSAR* (2004) 7 HKCFAR 475; *HKSAR v Chu Yiu Keung* Hartmann JA, Lunn and Barnes JJ, CACC 27/2009 (20 January 2011).

other common law-based jurisdictions.⁷ However, in *Jogee*, the UK Supreme Court held that the Privy Council had “taken a wrong turn” in *Chan Wing Siu*.

3. In *Miller v The Queen*,⁸ the High Court of Australia declined to follow *Jogee* and the Hong Kong Court of Final Appeal did likewise in *HKSAR v Chan Kam Shing*.⁹
4. This paper examines the context and significance of *Jogee*, discussing why it was not followed in *Miller* and *Chan Kam Shing* and considering certain controversial aspects of the doctrine.

The context

5. Since crimes are frequently committed with more than one person playing a part, principles are needed to determine the nature and level of involvement required to qualify a person as a culpable participant. Many such principles are relatively uncontroversial. Thus, rules constituting the inchoate offences of incitement and conspiracy; liability as joint principals; liability as a principal acting through an innocent agent and liability as an accessory after the fact all involve conduct of the defendant (D) concerning some other person or persons. But D’s liability in such

⁷ In Australian States and Territories (other than New South Wales and South Australia where liability is regulated by the common law): Criminal Code (Qld) s 8; Criminal Code (WA) s 8; Criminal Code (NT) s 8; Criminal Code (Tas) s 4; Criminal Code (ACT) s 45A; and Criminal Code (Cth) s 11.2A. See also the Canadian Criminal Code 1985 s 21(2); and the New Zealand Crimes Act 1961, s 66(2). The Singapore Penal Code (Chapter 224) has its origins in the Indian Penal Code, but in dealing with its ss 34, 111 and 113 the Singapore Court of Appeal has sought to apply a construction bringing them in line with the common law doctrine as explained in England and Wales and Australia: *Lee Chez Kee v PP* [2008] SGCA 20 at [248-250]; *Daniel Vijay s/o Katherasan v PP* [2010] 4 SLR 1119 affirming *Lee Chez Kee* at [42].

⁸ (2016) 90 ALJR 918.

⁹ (2016) 19 HKCFAR 640.

cases is as a principal offender if he or she satisfies the elements of the relevant offence. It arises independently of the other person's position.

6. The issues raised in *Jogee* are more complex. They involve situations where D is not the principal offender but may attract criminal liability because of the nature of his or her interaction with P, the perpetrator of the primary offence. Two overlapping but distinct doctrines may be engaged in this context, the first involving traditional accessory liability principles and the second, the doctrine of joint criminal enterprise.

Accessory liability principles

7. A person commits an offence as principal¹⁰ if he or she carries out the *actus reus* of the offence accompanied by the requisite *mens rea*. One is guilty as an accessory if one aids, abets, counsels or procures the commission of the offence by the principal.
8. A person¹¹ aids and abets an offence by being present and rendering assistance or encouragement to the principal in the commission of the offence with knowledge of the matters essential to committing the offence and with the intention of assisting or encouraging the principal to do the things which constitute the offence.
9. Counselling or procuring¹² an offence involves assisting or encouraging the principal to commit the crime, prior to its commission, by words or actions intended to give such assistance or encouragement with a view to facilitating or bringing about commission of the offence.

¹⁰ Also known as the principal in the first degree.

¹¹ Also referred to as an accessory at the fact (and in felony cases as the principal in the second degree).

¹² A counsellor or procurer is also called an accessory before the fact.

10. Accessorial liability only arises if the primary offence is committed by the principal.¹³ It is thus a form of derivative liability and D is a secondary party to P's offence.
11. It will be observed that the abovementioned principles require guilt to be established with considerable specificity. The prosecution must prove that an offence has been committed by a principal offender and prove the accessory's performance of intentional acts capable of assisting or encouraging that offence, with knowledge of the essential facts constituting that offence and an intention to render such assistance or encouragement. As further discussed below, these are demanding requirements which have given rise to difficulty in certain types of cases.

Joint criminal enterprise liability

12. The doctrine of joint criminal enterprise is also referred to as the doctrine of "common intention", "common purpose", "acting in concert" or "common design". It arises in two forms which may be called the basic and the extended forms.
13. A basic joint criminal enterprise ("BJCE")¹⁴ involves the parties simply agreeing to carry out and then executing a planned crime. The joint judgment of French CJ, Kiefel, Bell, Nettle and Gordon JJ, in *Miller v The Queen* put it thus:¹⁵

"If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty,

¹³ If not, D may be guilty of an inchoate offence, but not as an accessory.

¹⁴ Referred to as "the plain vanilla version of joint enterprise" in *Brown v The State* [2003] UKPC 10, per Lord Hoffmann at [13].

¹⁵ (2016) 90 ALJR 918 at [4], citing *McAuliffe v The Queen* (1995) 183 CLR 108 at 114.

regardless of the part that each has played in the conduct that constitutes the *actus reus*.”

14. Liability as a participant in an extended joint criminal enterprise (“EJCE”) rests on what Sir Robin Cooke called a “wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend”.¹⁶ By way of elaboration, his Lordship stated:

“That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.”¹⁷

15. Such foresight, Sir Robin Cooke explained, had to be of P’s commission of the additional offence as a real possibility. Where the jury find that a reasonable possibility exists that:

“... a risk may have occurred to an accused’s mind - fleetingly or even causing him some deliberation - but may genuinely have been dismissed by him as altogether negligible ... taking the risk should not make that accused a party to such a crime of intention as murder or wounding with intent to cause grievous bodily harm”.¹⁸

16. In *McAuliffe v The Queen*,¹⁹ the High Court of Australia acknowledged the difference between the basic and extended versions of the doctrine and noted that they provide a basis for establishing criminal complicity additional to the principles of accessorial liability:

“... the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that

¹⁶ *Chan Wing-siu v The Queen* [1985] AC 168 at 175.

¹⁷ *Ibid.*

¹⁸ *Ibid* at 179.

¹⁹ (1995) 183 CLR 108 at 114, per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ.

person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission. Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose.”

17. As indicated in the last sentence of the quote, the EJCE doctrine applies to the situation where D and P embark upon a joint enterprise to commit crime A (such as a burglary or robbery) in the course of which P commits (generally a more serious) crime B (such as murder or manslaughter). The EJCE doctrine assigns liability to D for crime B if D foresaw the possibility of P committing crime B with the necessary *mens rea* in the course of executing the joint enterprise and D participated in the joint enterprise with such foresight. It is this doctrine, referred to as one imposing “parasitic secondary liability” that the UK Supreme Court found objectionable and abolished in *Jogee*.²⁰
18. The joint criminal enterprise doctrine and accessorial liability principles therefore rest on quite different foundations although the same facts may engage both doctrines, as pointed out by the Australian High Court in *Clayton v The Queen*:²¹

“... liability as an aider and abettor is grounded in the secondary party's contribution to another's crime. By contrast, in joint enterprise cases, the wrong lies in the mutual embarkation on a crime, and the participants are liable for what they foresee as the possible results of that venture. In some cases, the accused may be guilty both as an aider and abettor, and as participant in a joint criminal enterprise. That factual intersection of the two different sets of principles does not deny their separate utility.”

²⁰ No specific mention was made of BJCE and it seems likely that it was abolished alongside abolition of EJCE.

²¹ (2006) 81 ALJR 439 at §20, per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ (with Kirby J dissenting).

19. While accessorial liability is derivative, the liability of a participant in a joint criminal enterprise is independent and depends on that person's own state of mind, and so may differ from the liability incurred by other participants, as pointed out by Hobhouse LJ in *R v Stewart and Schofield*:

“The allegation that a defendant took part in the execution of a crime as a joint enterprise is not the same as an allegation that he aided, abetted, counselled or procured the commission of that crime. A person who is a mere aider or abettor, etc, is truly a secondary party to the commission of whatever crime it is that the principal has committed although he may be charged as a principal. If the principal has committed the crime of murder, the liability of the secondary party can only be a liability for aiding and abetting murder. In contrast, where the allegation is joint enterprise, the allegation is that one defendant participated in the criminal act of another. This is a different principle. It renders each of the parties to a joint enterprise criminally liable for the acts done in the course of carrying out that joint enterprise. Where the criminal liability of any given defendant depends upon the further proof that he had a certain state of mind, that state of mind must be proved against that defendant. Even though several defendants may, as a result of having engaged in a joint enterprise, be each criminally responsible for the criminal act of one of those defendants done in the course of carrying out the joint enterprise, their individual criminal responsibility will, in such a case, depend upon what individual state of mind or intention has been proved against them. Thus, each may be a party to the unlawful act which caused the victim's death. But one may have had the intent either to kill him or to cause him serious harm and be guilty of murder, whereas another may not have had that intent and may be guilty only of manslaughter.”²²

Jogee's abolition of “parasitic secondary liability”

20. Lord Hughes and Lord Toulson JJSC, writing for the Court in *Jogee*, did not think there was “any occasion for a separate form of secondary liability such as was formulated in *Chan Wing Siu*,” holding that “there is no reason why ordinary principles of secondary liability should not be of general application.”²³ In their view, participation in a joint criminal

²² [1995] 1 Cr App R 441 at 447. The Hong Kong Court of Final Appeal adopted the same approach in *Sze Kwan Lung v HKSAR* (2004) 7 HKCFAR 475, recognising the availability of a verdict of murder against a participant even where the actual killer was acquitted or convicted of manslaughter.

²³ [2016] 2 WLR 681 at [76].

enterprise would necessarily involve acts of assistance or encouragement sufficient to attract secondary liability “on ordinary principles”.²⁴

21. Those principles were expressed as follows: (i) “The requisite conduct element is that D2 has encouraged or assisted the commission of the offence by D1.” (ii) “... the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal...” (iii) “If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent...”²⁵ Their Lordships added: “If the crime requires a particular intent, D2 must intend (it may be conditionally²⁶) to assist D1 to act with such intent.”²⁷
22. Central to *Jogee*’s objection to the EJCE doctrine is its imposition of liability on the basis of D’s participation in the joint enterprise while *foreseeing* as a *possibility* P’s commission of the additional offence in the course of executing the joint venture. This was considered to “over-extend” criminal liability by treating D as culpable to the same extent as the principal offender when D did not intend its commission, but only foresaw the possibility that P might commit the crime in the course of the joint criminal enterprise. This was thought to create an anomaly by enabling an accessory to be convicted on the basis of a lower mental threshold for guilt than in the case of the principal.²⁸ Since the doctrine is

²⁴ *Ibid* at [78].

²⁵ *Ibid* at [8] to [10] (omitting references to authority).

²⁶ Difficulties with *Jogee*’s introduction of “conditional intent” are discussed in *Chan Kam Shing* at [75] to [93]. It is noteworthy that subsequent cases in the English Court of Appeal appear to involve drifting back to reliance on the joint criminal enterprise doctrine: *R v Anwar* [2016] EWCA Crim 551 and *R v Johnson and Others* [2016] EWCA Crim 1613.

²⁷ *Ibid* at [90].

²⁸ *Ibid* at [84].

frequently relied on by the prosecution in homicide cases, the objectionable character of the doctrine was considered to be exacerbated by the relatively low *mens rea* threshold of murder “which includes an intention to cause serious injury without intention to kill or to cause risk to life”.²⁹ An important aspect of this concern derives from the fact that in the UK (as in other common law countries) the sentence for murder is mandatory, denying the Court any discretion to reflect gradations of culpability in the sentencing process where all participants are found guilty of murder.

23. In his dissenting judgment in *Miller*, Gageler J expressed the same concerns, identifying two main criticisms of *Chan Wing Siu*:

“The first is that making a party liable for a crime which that party foresaw but did not intend disconnects criminal liability from moral culpability. The second is that making the criminal liability of the secondary party turn on foresight when the criminal liability of a principal party turns on intention creates an anomaly.”³⁰

24. The New South Wales Law Reform Commission report on Complicity,³¹ takes note of a similar argument:

“The subjective approach, that a person is only responsible for his or her own moral wrongdoings and shortcomings, and not for those of others, is reflected in the fundamental principle of criminal liability: that criminal actions (*actus reus*) and intentions (*mens rea*) must normally coincide. This has led, for example, to the criticism of the liability arising from extended joint criminal enterprise, and from constructive murder, that they cast the net too widely when they catch secondary participants, who did not perform the critical act giving rise to the additional offence or a death (in the case of constructive

²⁹ *Ibid* at [83].

³⁰ (2016) 90 ALJR 918 at [111], citing Kirby J’s dissent in *Clayton v The Queen* (2006) 81 ALJR 439.

³¹ Report 129, December 2010 at [1.17] citing Kirby J’s dissent in *Gillard v The Queen* (2003) 219 CLR 1 [62]. The Report recommended retention of EJCE in statutory form [Recommendation 4.1] and suggested special provisions differentiating between EJCE liability for murder and manslaughter [Recommendation 4.3].

murder), and who did not share with the primary participant the intention with which that act was done.”

25. In like vein, Professor Jeremy Holder in *Ashworth's Principles of Criminal Law*,³² notes that “the foresight of risk test ... has been widely considered too broad” and that “[the] simple fact that [a] foreseen attack took place during the course of a criminal joint enterprise to commit theft might seem too insubstantial a moral and legal basis for justifying D2’s liability for D1’s attack”.
26. *Jogee* went so far as to suggest that *Chan Wing Siu* created liability savouring of constructive crime:

“...in the common law foresight of what might happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite intention. It may be strong evidence, but its adoption as a test for the mental element for murder in the case of a secondary party is a serious and anomalous departure from the basic rule, which results in over-extension of the law of murder and reduction of the law of manslaughter. Murder already has a relatively low mens rea threshold, because it includes an intention to cause serious injury, without intent to kill or to cause risk to life. The *Chan Wing-Siu* principle extends liability for murder to a secondary party on the basis of a still lesser degree of culpability, namely foresight only of the possibility that the principal may commit murder but without there being any need for intention to assist him to do so. It savours, as Professor Smith suggested, of constructive crime.”³³

Jogee not followed in Miller and Chan Kam Shing

27. The reasons for the Courts in *Miller* and *Chan Kam Shing* declining to follow *Jogee* run along the same lines and can be dealt with together. They principally involve:

- (a) disagreeing with *Jogee*’s view that criminal complicity is sufficiently dealt with by applying traditional accessorial liability

³² OUP, 8th Ed (2016), at 449.

³³ [2016] 2 WLR 681 at [83].

principles and that there is no need for a separate doctrine of joint criminal enterprise; and

- (b) disagreeing with *Jogee*'s assessment of a relatively low level of culpability on the part of participants in an EJCE and its characterisation of the doctrine as anomalous and savouring of constructive crime.

28. These are reasons with which I would respectfully agree. While the doctrine undoubtedly requires difficult questions to be addressed, simply abolishing it does not appear to me to be the answer.

Traditional accessory liability principles alone are insufficient

29. As noted above, accessory liability principles are exacting in the specificity they require. Those rules function well in cases where one is able to identify who acted as principal and who as secondary parties; what offence the former committed and what acts of assistance or encouragement were performed by the latter in circumstances permitting their criminal mental states to be inferred. But experience shows that in many cases, these essential elements cannot be proved beyond reasonable doubt.

30. As pointed out in *Chan Kam Shing*,³⁴ there have been problems applying traditional accessory liability principles in cases where D provided P with requested assistance, suspecting P of having criminal intentions but not knowing what exactly P had in mind, making it difficult to prove an intention on D's part to assist or encourage P in the commission of any particular offence. This occurred, for instance, in *R v Bainbridge*,³⁵

³⁴ (2016) 19 HKCFAR 640 at [15] to [20].

³⁵ [1960] 1 QB 129.

where the accessory bought oxyacetylene cutting equipment for someone else claiming that he had no idea that it would be used six weeks later to break into a bank and saying that he thought it was to be used for breaking up stolen goods. The English Court of Appeal was driven to upholding the conviction on the basis that it was enough that the accessory knew “that a crime of the type in question was intended” but not explaining how that had been proved in the instant case.³⁶

31. In other cases (which have been referred to as ones involving evidential uncertainties) the prosecution may be unable to prove which member of a group was the perpetrator of the primary offence and which members were accessories. In such cases, the defendants might all have to be acquitted.³⁷ Applying traditional accessorial liability principles, the courts have sometimes been able to apply what has been called “the pragmatic solution of being able to charge D with being either an accessory or a principal”.³⁸ That approach was endorsed in *Jogee*,³⁹ where it was suggested that “it is sufficient to be able to prove that [D] participated in the crime in one way or another.” But for this to succeed, there must be evidence to show that D was either the principal or an accessory, in other words, that D did indeed act *at least* as an accessory.⁴⁰

³⁶ Similarly, in *Maxwell v DPP for Northern Ireland* [1978] 1 WLR 1350, the defendant drove members of a terrorist organization to a destination believing that some kind of attack was planned but not knowing what offence was intended. It was held to be enough that the crime eventually perpetrated fell within a range of offences that D suspected might be committed.

³⁷ *R v Abbott* [1955] 2 QB 497 at 503.

³⁸ D Ormerod QC and K Laird, *Smith and Hogan's Criminal Law* (OUP, 14th Ed), p 206. This is facilitated by section 8 of the Accessories and Abettors Act 1861 which procedurally allows defendants to be charged as principals whether they are eventually proved to be principals or accessories.

³⁹ [2016] 2 WLR 681 at [88].

⁴⁰ As discussed in *Chan Kam Shing* at [25] to [27].

The proposed solution falls short where that cannot be demonstrated. In such cases, the BJCE doctrine has provided an alternative approach to establishing liability where D's participation in a joint criminal enterprise as a member of the group intending to commit the offence can be proved even though his or her precise role in perpetrating the crime cannot be shown.⁴¹

32. Most importantly, traditional accessory liability principles are particularly inadequate for dealing with dynamic, changing circumstances frequently encountered when things do not go as planned by the partners in crime or in volatile circumstances, such as in cases involving rapidly evolving gang violence.
33. Thus, as Stephen J pointed out in *Johns v The Queen*,⁴² one or more of the co-adventurers may commit an unplanned offence “as a reaction to whatever response is made by the victim, or by others who attempt to frustrate the venture, upon suddenly being confronted by the criminals.” And as Lord Steyn pointed out in *R v Powell (Anthony)*:⁴³ “Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences.” Traditional accessory liability principles – requiring proof of particular acts of intentional assistance or encouragement in aid of a principal's primary offence – are ill-equipped to cope with multi-party dynamic situations, such as a burglary or robbery or an affray which turns into a murder case. In contrast, the EJCE doctrine caters for change. It focusses on the parties' mutual embarkation upon a criminal enterprise with D foreseeing the possibility that

⁴¹ As illustrated by *Brown v The State* [2003] UKPC 10, discussed in *Chan Kam Shing* at [42] to [43].

⁴² (1980) 143 CLR 108 at 118.

⁴³ [1999] 1 AC 1 at 14.

circumstances might evolve so as to embrace additional offences being committed by other participants in the course of executing the criminal plot.

34. Another reason why the law should not confine itself to the traditional accessory liability principles turns on the difference between the derivative nature of accessory liability and the independent liability arising under the doctrine of joint criminal enterprise. As we have seen, Hobhouse LJ pointed out⁴⁴ that where a principal has committed the crime of murder, the liability of the secondary party can only be for aiding and abetting murder. But parties may be convicted under the joint criminal enterprise doctrine in accordance with the individual state of mind proved against each of them so that some may be liable for manslaughter while others are convicted of murder. This enables the law, especially where the sentence for murder is mandatory, to differentiate to that extent between levels of culpability according to each participant's mental state. *Jogee* holds⁴⁵ that the alternative verdict of manslaughter in group homicide cases remains available, but, having abandoned the doctrine of joint criminal enterprise, the principle upon which such availability is based is unclear.
35. To be sure, there is ample room for discussion as to whether the principle requires refinement, a matter touched upon below. However, the point for present purposes is that a doctrine going beyond the traditional accessory liability principles *is* needed to deal with evidential uncertainties and the dynamic situations often encountered in real life, especially where group violence is involved.

⁴⁴ In *R v Stewart and Schofield* [1995] 1 Cr App R 441 at 447.

⁴⁵ *Jogee* at [96].

The culpability of participants in a joint criminal enterprise

36. As we have seen, one argument against the EJCE doctrine involves the proposition⁴⁶ that it is somehow inconsistent with the fundamental principle that “a person is only responsible for his or her own moral wrongdoings and shortcomings, and not for those of others ... reflected in the ... principle of criminal liability: that criminal actions (*actus reus*) and intentions (*mens rea*) must normally coincide.” A related argument is that the doctrine produces the “anomaly” of enabling an accessory to be convicted on the basis of a lower mental threshold for guilt than that applicable to the principal.
37. With respect, I do not think these are well-directed arguments. For P and D to be found guilty, different *mens rea* and *actus reus* elements constituting liability respectively for each of them – P as primary offender and D under the EJCE doctrine – have to be proved. As Professor Simester points out:

“... there is no *a priori* reason why S and P should have identical *mens rea* requirements. The basis of P’s is different: he is liable because he satisfies the *actus reus* and *mens rea* requirements of the relevant crime. S was liable because she satisfies the *actus reus* and *mens rea* requirements of common purpose liability (and note that this meant she must foresee not only the prospect of P’s acts, but also that they will be done with *mens rea*; it is not enough even to foresee, say, the possibility of death). Since the *actus reus* requirements are different, logic does not compel the *mens rea* requirements to be the same. Quite the opposite: even after *Jogee*, S still does not have to possess the ‘same’ *mens rea* as P to be convicted of murder...”⁴⁷

38. In an EJCE case, the wrongdoing of the participants “lies in the mutual embarkation on a crime with the awareness that the incidental crime may

⁴⁶ Made by Kirby J and noted by the NSW Law Reform Commission (see footnote 30).

⁴⁷ Simester and Sullivan’s Criminal Law (Bloomsbury, 6th Ed, 2016) at 248.

be committed in executing their agreement.”⁴⁸ D agrees to carry out a criminal venture with others, foreseeing a real possibility that one or more of them might, in certain contingencies, commit some further, more serious offence – where that further offence is murder, might kill someone with intent to kill or to cause grievous bodily harm – and proceeds with the criminal enterprise nonetheless. As the joint judgment in *Miller* emphasises:

“It is to be appreciated that in the paradigm case of murder, the secondary party's foresight is not that in executing the agreed criminal enterprise a person may die or suffer grievous bodily harm – it is that in executing the agreed criminal enterprise a party to it may commit murder. And with that knowledge, the secondary party must continue to participate in the agreed criminal enterprise.”⁴⁹

39. Put another way, by persisting in the joint criminal enterprise in such circumstances D may be seen as tacitly agreeing to or authorising the crime by the actual perpetrator which he foresaw as a possible incident of a joint criminal enterprise.⁵⁰
40. Viewed either way, it is difficult to accept that the EJCE doctrine disconnects criminal liability from moral culpability or that it savours of constructive crime.

Policy reasons for maintaining the doctrine of EJCE

41. There are strong policy reasons, particular in cases involving group violence, for assigning culpability on the basis of participation in an EJCE. In *Miller*,⁵¹ Keane J put it thus:

⁴⁸ *Miller* at [34], citing *Clayton* at [20].

⁴⁹ *Miller* at [45].

⁵⁰ See *Chan Wing Siu* at 175, citing *R v Anderson and Morris* [1966] 2 QB 110 at 118-119.

⁵¹ (2016) 90 ALJR 918 at [143].

“... it is well-recognised that the pursuit of a joint criminal enterprise necessarily involves a substantial element of unpredictability, which exposes the participants, their victims and the general public to the unacceptable risk that a crime additional to that which motivated the enterprise might be committed. It is perfectly intelligible, as a matter of policy, that the law should expose each participant in a joint criminal enterprise to punishment for an incidental crime if he or she actually foresees the risk of the commission of the incidental crime and authorises the eventuation of that risk as part of his or her continued participation in the enterprise.”

42. It is significant that in all three reports published by the Law Commission of England and Wales⁵² in a comprehensive review of criminal complicity conducted in 2006 and 2007, retention of joint criminal enterprise liability was favoured. Thus, in its July 2006 report, the Commission stated:

“... we also believe that if P in the course of a joint venture commits a collateral offence that D foresaw that P might commit, account should be taken of D’s connection with the harm that results from P committing the offence. It is true that D does not intend that P should commit the collateral offence and may even be opposed to the commission of the offence. However, D, by participating in the joint venture, contributes to the circumstances giving rise to the commission of the collateral offence. Further, by contemplating the collateral offence as a possible incident of the unlawful venture and nevertheless deciding to participate, D consciously accepts the risk that such an offence might be committed.”⁵³

43. The Commission’s November 2006 report⁵⁴ stated that retention of the doctrine was “was strongly supported by most of our consultees who addressed the issue”. Its view continued to be:

“... that this foundation for liability is fully justifiable, on the following basis:

- (1) ... The prosecution would have to prove beyond reasonable doubt, first, that both D and P were parties to a joint criminal venture and, secondly, that D foresaw that P or another party might act with the intention to

⁵² LAW COM No 300, *Inchoate Liability for Assisting and Encouraging Crime* (July 2006); LAW COM No 304, *Murder, Manslaughter and Infanticide* (November 2006); LAW COM No 305, *Participating in Crime* (May 2007).

⁵³ LAW COM No 300 at [2.24]. Interestingly, the Law Commissioners were chaired by Toulson J, as Lord Toulson JSC then was.

⁵⁴ LAW COM No 304 at [4.11].

kill (or with the intention to cause serious injury allied with awareness of a serious risk of death). What justifies D's liability for first degree murder is not simply that D was aware that P might act with extreme violence in the course of their joint venture, but that P might do so with one of these intentions."

- (2) D carries additional fault on account of being involved in a joint venture with P to commit a crime. Individuals who perform criminal acts in groups have been shown to be more disposed to act violently than those who act alone, and this can be taken to be common knowledge."
- (3) A test of foresight of a realistic possibility is the only practical test."

44. In the May 2007 report,⁵⁵ the Commission did not seek to elaborate on its recommendations made in November 2006 on complicity in relation to homicide and reiterated its acceptance of EJCE liability generally:

"... there will be cases where, pursuant to the joint criminal venture, P commits an offence that D did not intend P (or another participant in the joint venture) to commit. In the context of a joint criminal venture between D and P, it is our view that the principle of parity of culpability does not require that D actually intend the conduct element of a particular offence to be committed by P. D's agreement (or shared joint intention) to participate in the joint criminal venture itself provides a substantial element of culpability, meaning that there can be parity of culpability between D and P even if D did not in addition intend P to engage in the conduct element of an offence. There will be such parity of culpability if, for example, D foresaw that P might engage in the conduct element of a particular offence. In such circumstances, it is acceptable to label and punish D and P in the same way."

45. As part of the background to the *Jogee* decision in the UK, an inquiry into EJCE was undertaken by a House of Commons Justice Committee,⁵⁶ prompted by campaigning groups who objected to the doctrine. The Committee noted anecdotal complaints that EJCE:

⁵⁵ LAW COM No 305 at [1.11] and [1.25]. It proposed a draft Bill which would preserve liability for participation in a joint criminal venture: Clause 2. See Report at [1.51].

⁵⁶ HC Justice Committee, *Joint Enterprise*, Eleventh Report of Session 2010-2012 (17 January 2012) at [1] and [4].

“may be used disproportionately in cases involving children and young adults and can act as a drag-net, bringing individuals and groups into the criminal justice system who do not necessarily need to be there ...”⁵⁷

46. It recommended the collection of statistics, guidelines from the Crown Prosecution service as to when EJCE would be invoked and legislation to clarify the doctrine. In its follow-up report,⁵⁸ the Committee noted that while many witnesses to the inquiry considered the EJCE threshold “so low as to be unjust, with its effects particularly harsh in murder cases given the mandatory life sentence”, others, including the Law Commission, thought it sound.
47. In its response,⁵⁹ speaking for the UK Government, the Lord Chancellor and Secretary of State for Justice⁶⁰ declined to launch the suggested review, stating:

“It is worth emphasising that the law on joint enterprise only applies when a group of people are already engaged in criminal activity (sometimes very serious criminal activity) and in the course of that activity another offence is committed. The law means that all those who foresaw that the ‘collateral’ offence might be committed in the course of the original criminal activity can be prosecuted for that offence. The law certainly does not criminalise innocent bystanders as has been portrayed in some sections of the media.”

Adding:

“I recognise that families of convicted offenders and academics believe that the ‘foresight’ principle is too harsh, particularly where the conviction is for murder and a mandatory life sentence is imposed. However, there are many law-abiding citizens and families of victims who disagree and who may be concerned if the changes suggested by academics meant that certain offenders could no longer be prosecuted for murder.”

⁵⁷ *Ibid* at [16].

⁵⁸ HC Justice Committee, *Joint enterprise follow-up*, Fourth Report of Session 2014-15 (17 December 2014) at [30] and [31].

⁵⁹ HC Justice Committee, *Joint enterprise - Government response to the Committee’s Fourth Report of Session 2014-15* (5 February 2015).

⁶⁰ Rt Hon Chris Grayling MP.

48. The New South Wales Law Reform Commission⁶¹ also came out strongly in favour of retaining EJCE as a basis for liability:

“... there is, in our view, a core policy justification for its retention that is based on the inevitable risks that are associated with entry into a joint criminal enterprise. For example, when embarking on an armed robbery there is a clear risk of someone being shot; when joining in a group attack there is a clear risk that it could get out of hand and result in a more serious injury than was planned; when joining a group to extort money by threats there is a clear risk that one participant may become violent and attack a victim. In these situations there is, in our view, a clear and established case for making a secondary participant liable for the actions of others, notwithstanding that the secondary participant did not intend or desire the additional offence. The challenge for law reform is to define the limits of that liability in a way that is clear and fair.”

Different ways of defining the limits of liability

49. EJCE liability is regulated by the common law in Hong Kong, New South Wales and South Australia, *Miller* being a decision on appeal from the latter State. At common law, such liability rests on D foreseeing a real possibility that in the course of the joint enterprise, P might commit an additional offence with the requisite *mens rea*. It is in relation to this threshold of liability that the doctrine has attracted the greatest controversy. Arguments have been made from time to time aimed at raising that threshold and it may be instructive to examine the positions taken in code and statutory provisions of the other jurisdictions taking part in this Colloquium as illustrating possible bases of culpability that might be adopted instead of abolishing the doctrine altogether.
50. It would appear that four variants which differ from the common law combination of “subjective awareness of possibility” exist. First, in the Northern Territories,⁶² while EJCE is conditioned on that same “foresight

⁶¹ Report 129, December 2010 at [4.233].

⁶² Criminal Code (NT) s 8(1).

of possibility” combination, a reverse onus is placed on D to negate such subjective awareness.

51. Secondly, the Commonwealth Criminal Code,⁶³ reproduced in the Australian Capital Territory,⁶⁴ conditions EJCE liability on subjective awareness of a “substantial risk”⁶⁵ as to the commission of an offence. This is similar to the common law combination, the difference, if any, being between “foresight of a real risk” and “awareness of a substantial risk”.
52. Thirdly, there is a variant requiring proof of D’s subjective awareness of the “probability” of P’s commission of the offence.
 - (a) Thus, in Victoria’s recently enacted provision,⁶⁶ the requirement is to prove that D “was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence”.
 - (b) That appears also to be the position in Canada⁶⁷ in relation to the offences of murder and attempted murder after the Code provision which provides for liability if D “ought to have known” that the commission of the offence would be a probable consequence was read down to impose a subjective requirement.⁶⁸

⁶³ Criminal Code (Cth) s 5.4, s 11.2A.

⁶⁴ Criminal Code (ACT) s 20, s 45.

⁶⁵ Using the language of “recklessness” defined in s 5.4 to mean awareness of substantial risk.

⁶⁶ Crimes Amendment (Abolition of Defensive Homicide) Act 2014, ss 323(1)(b), 323(1)(d) and 323(2) (Vict).

⁶⁷ Canadian Criminal Code 1985, s 21(2).

⁶⁸ *R v Logan* [1990] 2 SCR 731. It was considered unconstitutional as a disproportionate infringement of section 7 of the Canadian Charter of Rights and Freedoms

- (c) It also seems to be the position on the face of the New Zealand Crimes Act 1961, s 66(2) although the construction which the New Zealand courts have given to the word “probable” in the requirement that the commission of the additional offence “was known to be a probable consequence of the prosecution of the common purpose” qualifies the rule and is further discussed below.
- (d) It also seems to be the position under the Singapore Penal Code⁶⁹ which appears to cater for EJCE by the combined effect of ss 107(b), 110 and 111. Section 111 deals with D’s liability where D has abetted an act but a different act is done, provided that the act done “was a probable consequence of the abetment and was committed” under its influence. The Courts have construed this to require D to have been subjectively aware that the doing of the act was a probable consequence of the abetment.⁷⁰

53. The fourth variant involves an objective approach. D is made liable if, looking objectively at the nature of the additional offence committed in the course of the joint enterprise, that offence can be said to be the probable consequence of the prosecution of the common purpose.⁷¹ That

when applied to offences carrying “severe social stigma and grave penalties” like murder and attempted murder. The constitutionality of an objective test was, however, upheld in relation to manslaughter: *R v Jackson* [1993] 4 SCR 573.

⁶⁹ (Chapter 224).

⁷⁰ *Lee Chez Kee v PP* [2008] SGCA 20 at [248] to [250]; *Daniel Vijay s/o Katherasan v PP* [2010] 4 SLR 1119 at [42] and [74].

⁷¹ *R v Keenan* (2009) 236 CLR 397 at [83] and [133].

appears to be the law of Queensland,⁷² Tasmania⁷³ and Western Australia⁷⁴.

54. Attempts have been made in Hong Kong and New Zealand to raise the threshold for EJCE liability to one requiring awareness of the *probability* rather than the *possibility* of P committing the additional offence. In *Chan Wing Siu*, it was submitted that it had to be proved that D had foreseen that if a given contingency eventuated, “it was more probable than not that one of his companions would use a weapon with intent to kill or cause grievous bodily harm.”⁷⁵ Sir Robin Cooke considered probability a wholly unacceptable criterion for liability since it would make the guilt of an accomplice depend on “whether on considering in advance the possibility of a crime of the kind in the event actually committed by his co-adventurers he thought that it was more than an even risk”. His Lordship added:

“Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance upon a nuance of prior assessment, only too likely to have been optimistic.”⁷⁶

55. Similarly, in New Zealand, where s 66(2) of the relevant Act⁷⁷ makes a participant in an EJCE liable “if the commission of [the additional] offence was known to be a probable consequence of the prosecution of the common purpose”, it was argued in *R v Gush*⁷⁸ that the word

⁷² Criminal Code (Qld) s 8.

⁷³ Criminal Code (Tas) s 4.

⁷⁴ Criminal Code (WA) s 8.

⁷⁵ *Chan Wing Siu* at 175.

⁷⁶ *Ibid* at 177.

⁷⁷ New Zealand Crimes Act 1961.

⁷⁸ [1980] 2 NZLR 92.

“probable” should be construed to mean “more probable than not”. This was rejected, Richmond P being much influenced by the judgment of Stephen J who refused a similar argument in *Johns v The Queen*.⁷⁹ His Honour held that the criterion of “probability” was “singularly inappropriate” since the wide range of possible spontaneous actions taken by victims and third parties when confronted by criminals would make it difficult to characterise any reaction to actions of such unpredictability as probable. More importantly, probability was not an appropriate standard for judging the co-adventurer’s blameworthiness because:

“... it would mean that an accessory before the fact to, say, armed robbery, who well knows that the robber is armed with a deadly weapon and is ready to use it on his victim if the need arises, will bear no criminal responsibility for the killing which in fact ensues so long as his state of mind was that, on balance, he thought it rather less likely than not that the occasion for the killing would arise. Yet his complicity seems clear enough; the killing was within the contemplation of the parties, who contemplated ‘a substantial risk’ that the killing would occur...”⁸⁰

56. In *Johns*, as held in the joint judgment of Mason, Murphy and Wilson JJ, D was held liable for acts “foreseen as a possible incident of the execution of their planned enterprise.” No doubt constrained by the language of s 66(2), it was not open to Richmond P to adopt “possibility” as the criterion. However, he rejected “more probable than not” as the standard and construed “probable consequence” to mean “an event that could well happen”.⁸¹ The *Gush* construction has since been regarded as well-established.⁸²

⁷⁹ (1980) 143 CLR 108 at 118.

⁸⁰ *Ibid* at 119.

⁸¹ [1980] 2 NZLR 92 at 94-95.

⁸² *R v Piri* [1987] 1 NZLR 66 at 78; *R v Ahsin* [2015] 1 NZLR 493 at [100]-[101]; *Uhrle v The Queen* [2016] NZSC 64 at [5].

57. This brief survey demonstrates that there is room for the adoption of different thresholds for joint criminal enterprise liability. Those espousing a reverse onus or objective standards may be thought to impose more onerous burdens on D than does the common law. Others, requiring foresight of probability or “substantial risk” may be thought more favourable to participants in an EJCE. Arguments can undoubtedly be made in favour of each variant. For the reasons given by Sir Robin Cooke, Stephen J and others, in the absence of carefully calibrated legislative reform, it appears to me that there are principled and compelling reasons to retain the common law combination of foresight of possible commission as the foundation of EJCE liability.

“Fundamental difference” and other criteria

58. The foregoing discussion has focussed on D’s subjective foresight, or the objective foreseeability, of P’s commission of the additional offence in the course of the joint criminal enterprise as possible criteria for assigning liability to D. One might think that choice of one or other would provide a sufficient criterion for the doctrine’s operation. However, I shall close this discussion by drawing attention to a question which has not yet been fully resolved, namely: Whether, and if so, to what extent the criterion of foresight has to be further refined. Applying the common law rule,⁸³ the prosecution must prove that D foresaw P’s commission of the primary offence as an incident of their joint criminal enterprise, but what does such foresight consist of?

59. An extensive discussion cannot be accommodated in this paper. However, valuable analyses of the issues can be found in the Report of

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And in so far as appropriate, the equivalent code or statutory provision.

the New South Wales Law Reform Commission⁸⁴ and in the judgment of William Young J for the New Zealand Supreme Court in *Edmonds v R*.⁸⁵ To give a flavour of some of the issues arising, one may begin with the example of the Northern Irish case of *R v Gamble*.⁸⁶ There, four members of a para-military group agreed to punish a fellow member for an alleged wrongdoing. In carrying out the punishment, the man was shot, beaten up and then had his throat cut by one of their number. It was (somewhat surprisingly, successfully⁸⁷) argued for two of the participants that while they had foreseen some degree of grievous bodily harm (including kneecapping or fracture of the limbs), they should not be held guilty for a deliberate killing by P slitting the victim's throat. This case throws up the question: does foresight of P committing grievous bodily harm suffice to ground the participants' liability for murder on the EJCE basis even though P may have deliberately acted with intent to kill? In other words, is the foresight requirement met if conduct satisfying the legal ingredients of P's offence is foreseen even though P's actual conduct and specific intent may differ from what was contemplated?

60. A different approach has led to development of the concept of "fundamental difference" by the English courts.⁸⁸ This involves comparing the conduct of P as foreseen by D with P's actual conduct and (somehow) deciding whether P's acts were "fundamentally different" from what D contemplated. Such typological rules naturally cause

⁸⁴ Report 129, December 2010 at [4.69] to [4.120].

⁸⁵ [2012] 2 NZLR 445.

⁸⁶ [1989] NI 268.

⁸⁷ The NSW LRC opined that "The Gamble case is one of the most generous to secondary participants in excluding them from liability" [at 4.72].

⁸⁸ *R v Powell* [1999] 1 AC 1; *R v Rahman* [2009] AC 129; *R v Mendez* [2011] QB 876;

problems and the “fundamental difference” approach has led to various attempts to refine that concept. Thus, the “knowledge-of-the-weapon” approach has attracted much discussion as an aspect of the “fundamental difference” rule, involving arguments as to whether lack of knowledge that P possessed the lethal weapon necessarily meant that P’s conduct was “fundamentally different” from that contemplated; and whether in turn it made a difference if the weapon which D foresaw might be used was potentially just as dangerous; and so forth. Such arguments have sometimes been taken to unrealistic extremes, as in the case of *R v Yemoh*,⁸⁹ where it was (unsuccessfully) argued that D’s foresight that P might use a Stanley knife (said to be adapted to slashing rather than stabbing) whereas P actually used a different kind of knife to inflict a stabbing wound, meant that P’s conduct fell into the “fundamentally different” category, exculpating D.

61. In *Jogee* the UK Supreme Court’s version of the “fundamental difference” qualification involved a somewhat puzzling reliance on causation concepts:

“... it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.”⁹⁰

62. It may be relevant to note that in *R v Mendez and Thompson*,⁹¹ Toulson LJ had expressed the view (in the accessory liability context) that:

“At its most basic level, secondary liability is founded on a principle of causation, that a defendant (D) is liable for an offence committed by a

⁸⁹ [2009] EWCA Crim 930.

⁹⁰ [2016] 2 WLR 681 at [97].

⁹¹ [2011] QB 876 at [18].

principal actor (P) if by his conduct he has caused or materially contributed to the commission of the offence (with the requisite mental element) ...”

63. It might be suggested that the more orthodox approach would be to regard P’s conduct as autonomous and not “caused” by assistance or encouragement from D.
64. It is tempting to think that one should not subscribe to the “fundamental difference” or any similar typological approach and that one should ground D’s liability firmly on what he foresaw as the crime (defined in terms of its essential ingredients rather than manner of execution) which P might commit in the course of their joint enterprise, eschewing any further attempts at refinement.