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Criminal Complicity:
A Comparative Analysis of Homicide Liability

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CRIMINAL COMPLICITY: A COMPARATIVE ANALYSIS OF HOMICIDE LIABILITY

SUMMARY

The work considers the construction of homicide liability where two or more parties participate in a crime that culminates in a homicide collateral to the original criminal purpose. Under English law, this scenario is encountered in joint enterprise cases and, in 1997, the House of Lords gave a judgement intended to clarify the liability of participating non-perpetrators of homicides committed during the execution of joint criminal enterprises. In 1993, the Law Commission recommended amending the doctrinal basis of complicity. Omitting joint enterprise from the new framework, it was suggested that it be recognised as a separate doctrine. In order to assess the Law Commission's proposals and the House of Lords' judgement, the historical progress and socio-political context of complicity and homicide are examined prior to analysing the alternative doctrinal foundations for secondary liability, including the relationship between complicity, incitement and conspiracy.

In concluding that an amendment to the doctrinal basis of complicity fails to deliver convincingly comprehensive solutions to the existing problems and that joint enterprise cannot stand alone as a meaningfully discrete head of liability, attention is focussed upon the impact of the substantive law of murder and involuntary manslaughter upon secondary liability. It is submitted that the unpalatable theoretical solutions to secondary party homicide liability gain potency from the development of substantive homicide and from the uneven results achieved when applying the substantive law to accessories.

The principal comparative model is South African law. Having chosen to adopt common purpose liability from English law and develop the resulting liability alongside Roman-Dutch principles, South Africa provides both similarities and differences with English developments. Furthermore, consideration of the cases that pervaded the apartheid era provide a further insight into the socio-political context of this area of the law.

Both the English and South African material include cases up to and including 30 June 2002.

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INTRODUCTION

From the earliest days,¹ the law recognised that a party may be involved in the commission of a crime despite not having personally perpetrated the forbidden deed. Experience of social interaction provided the context against which moral censure could be attributed to parties who contributed to an offence by recruiting, inciting, prompting, urging, encouraging or helping the actual perpetrator.² It is therefore unsurprising to find that the law responded by applying legal sanctions against such secondary parties. Moreover, there is a fear associated with crimes involving multiple parties; there are a number of dimensions to the anxiety but group psychology is at the heart of the concern and all of the factors add up to a belief that crime is likely to be engendered when the scenario encompasses more than one individual putative criminal. Thus, it is posited that when individuals join to form a group they provide each other with the kind of cross-fertilisation of moral support and bravado that makes both the commission of an offence³ and the seriousness of the crime⁴ more likely. In addition, it is clear that the victim will be severely disadvantaged by the presence, and possible contribution, of several assailants. Not only will this increase the traumatic nature of the ordeal, it will have every possibility of dissuading the victim's employment of self help and the timely intervention of a good Samaritan. To provide a statistical context for the prevalence of murders and common law manslaughter that involve more than one party, between 1990 and 2000, on average, 22% of murders and 15% of involuntary manslaughter involved multiple parties.⁵

¹ See below, p.51.

² 'The moral culpability theory suggests that one who is intimately involved in a crime should be liable even though he or she did not personally perform the criminal act. On the other hand, one should not be found guilty of complicity unless a minimum degree of participation and hence moral culpability, is present.': Mueller, "The *Mens rea* of Accomplice Liability" [1988] 61 S. Cal LR 2169 at 2169.

³ Ashworth, *Principles of Criminal Law* (Clarendon Press, 1999), (hereafter, Ashworth, *PCL*) at 425: 'the criminal law regards offences involving more than one person as particularly serious – sometimes because they suggest planning and determination to offend and make it difficult for an individual to withdraw, and sometimes because group offences against an individual tend to be more frightening.'

⁴ 'The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed.': Powell; *English* [1997] 4 All ER 545 at 551 *per* Lord Steyn.

⁵ Figures extrapolated from data provided by Research Development and Statistics Directorate, Crime and Criminal Justice Unit, Home Office. Where there is a differential verdict whereby the convictions are split between murder and manslaughter, the homicide has been classified as murder.

However, while the reasons for criminalising secondary participation may be uncontroversial, the application of criminalisation is particularly fraught. The difficulties stem from the inevitable fact that the secondary party's actions are one step removed from the prohibited conduct or consequence of the substantive offence. For the censure of the accomplice to gain legitimacy, the secondary conduct must be meaningfully related to the crime, or perhaps more accurately, the principal offender's perpetration of the crime. In order to establish a sufficiently culpable connection between the accomplice and the offence, the imposition of complicity liability needs to incorporate the interrelationship between the conduct and fault of the secondary and primary parties. In terms of the criteria traditionally set by the substantive criminal law, this means relating the secondary party's conduct (*actus reus*) and fault (*mens rea*) to those of the perpetrator. The interconnection is made necessary by the fact that complicity is not an offence in its own right: it is, quite sensibly, not an offence simply to intentionally aid or abet another person; however, it is an offence to intentionally aid or abet another person to commit a crime. The distinction results in the imposition of secondary liability where the intentional assistance or encouragement relates to the commission of a substantive offence by the principal party. Furthermore, whilst it is possible to set the boundary of the relationship at intentional but ineffectual secondary activity, the history of criminal complicity developed so as to derive secondary liability from the actual commission of an offence. It is hardly surprising that the convoluted nature of complicity liability has not gone unnoticed. It has been declared that:

... anyone with even the most glancing and superficial acquaintance with English criminal law will have been struck by the sheer complexity of the rules relating to complicity. It is a complexity that, in large measure, springs from the inherent nature of the function that complicity law is required to perform: determining the criminality of one actor through an analysis of the various features of his association with the criminal behaviour of another.⁶

⁶ KJM Smith, "The Law Commission Consultation Paper on Complicity: (1) A Blueprint or Rationalism" [1994] Crim LR 239 at 239. Similar remarks, highlighting the difficulties of the interrelationship between secondary liability and the principal's offence commission include the following observations: 'The problems arise from the unusual features of complicity cases, where the referential object of the accessory's *mens rea* is not merely his own acts but also the acts and intentions of the principal.': Ashworth, "The Draft Code, Complicity and the Inchoate Offences" [1986] Crim LR 303 at 308; '[T]he central point in complicity is the relation of the accessory to the will or intention of the perpetrator to do those things which constitute the principal crime, rather than his relation to the principal crime as such, since the accessory differs from the perpetrator in that he interposes between himself and the legally prohibited harm the volition of another party.': Buxton, "Complicity in the Criminal Code" (1969) 85 LQR 252 at 270.

In addition, it is extremely difficult to uncontroversibly elucidate first principles in the law of criminal complicity.⁷ For this reason it is arguably more necessary to return to an investigation of the historical and contextual development of secondary liability than is perhaps usual in an examination of the existing criminal law.

The meagreness of a sound doctrinal foundation to criminal complicity also provides ample opportunity for radical reform proposals. In 1993, the Law Commission⁸ suggested that the derivative basis of liability be ejected and that existing criminal complicity be replaced with two new substantive secondary offences. It was proposed that the new offences, of assisting crime and encouraging crime, should be inchoate in the sense that there would be no need for the intended offence to be perpetrated. Consequently, liability would no longer depend upon the commission of a principal offence, but would crystallise upon the culpable rendering of assistance or encouragement to commit a crime. However, the Law Commission admitted that current joint enterprise liability could not be accommodated within the new structure. The paradigm joint enterprise case involves two or more parties who undertake a joint criminal enterprise to engage in a criminal activity (foundational⁹ crime X) for instance, burglary or assault, during the course of which a killing is perpetrated by one of their number. The homicide (collateral crime Y) is thereby collateral to the original activity. The pertinent legal question in these cases involves ascertaining and defining the criminal liability of the non-perpetrator(s) of the killing (see Fig. 1). In their consultation paper, the Law Commission queried whether joint enterprise exists as a doctrine that 'makes the co-adventurer liable on a theory that is separate from and extends beyond the boundaries of secondary liability'.¹⁰ If this is so then it provides an entirely different basis for liability to assisting, encouraging or procuring an offence. Following the suggestion that it has a separate identity, joint enterprise was not even considered within the consultation paper. This deliberate omission leaves an obvious gap in the law reform proposals for complicity, as these

⁷ In fact, the only undisputed foundation is the derivative nature of complicity liability (KJM Smith, *A Modern Treatise of Criminal Complicity* (Clarendon Press, 1991) (hereafter, *Treatise*) at 4 and Ashworth *PCL* at 456) and even this is now subject to qualification: see below, pp.130-140.

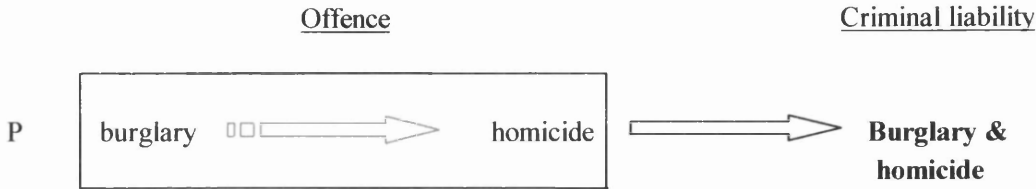
⁸ Law Commission, *Assisting and Encouraging Crime*, Consultation Paper No. 131, 1993 (hereafter, LCCP No. 131).

⁹ The terms 'basic accessory liability' and 'parasitic accessory liability' have been adopted to distinguish between liability for crimes X and Y respectively in JC Smith, 'Criminal Liability of Accessories: Law and Law Reform' [1997] 113 LQR 453 at 455. Dennis, 'The mental element for accessories' in *Essays in Honour of JC Smith*, describes crime X as the 'foundational' offence and crime Y as the 'incidental' offence.

¹⁰ LCCP No. 131, para 2.120. The separate doctrine theory was given further credence and impetus by the Court of Criminal Appeal in *Stewart and Schofield* [1995] 3 All ER 159.

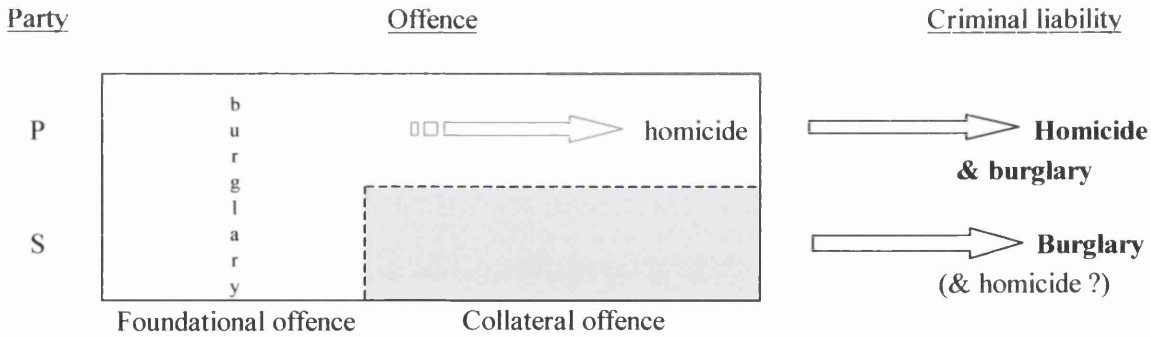
Fig. 1 Joint Enterprise Liability

1. Liability of the primary party (P) for a collateral death:



2. Paradigm common purpose scenario:

Is the secondary party (S) liable for the collateral death?



The shaded area illustrates the point at which secondary liability theory must be imposed to create homicide liability for the secondary party.

common purpose cases have not been included within the considerations. Consequently, the Law Commission proposals raise two main areas of debate. The first involves the question whether it is advisable to amend secondary liability from a derivative to an inchoate basis. The second surrounds the status of joint enterprise. In a related debate, the issue that must be decided is whether joint enterprise is indeed a self-contained doctrine or whether it could and should be elevated into one. Either way, an examination of joint enterprise liability reveals further complexities relating to the requisite degree of fault to be applied to a secondary party.¹¹ The problems are effectively illustrated by a recent appeal. In 1997, the House of Lords delivered a landmark judgment on secondary party liability in homicide and *Powell; English*,¹² provides an insight into the difficulties inherent in deciding the principles of joint enterprise. Two cases had been admitted for appeal: in the first three men, including the appellant Powell, were engaged upon a joint criminal enterprise to purchase drugs from a dealer. Having arrived at the appropriate house the dealer was shot dead when he came to the door. The killing was not the purpose of the joint enterprise and the prosecution were unable to prove which of the three men fired the gun that killed the dealer. Therefore, as it was not possible to identify the perpetrator, it was necessary to judge all three of the participants as secondary parties. Thus, the appeal required a decision on the extent of secondary liability for murder. The substantive law of murder requires the perpetrator to have caused the death of the victim having either intended to kill the deceased or having intended to cause him grievous bodily harm¹³. Let it be assumed that Powell did not fire the fatal shot and did not intend the dealer to be killed or grievously injured. The House of Lords concurred in the judgment that, having lent himself to the drug purchasing enterprise Powell had satisfied the *actus reus* of a secondary party by having provided assistance and encouragement. It was held that, thereafter, his liability rested on whether he knew that his co-enterpriser possessed the gun and foresaw the possibility that he might use it during the course of the joint enterprise to intentionally kill or cause grievous bodily harm to the victim. This was found to be so and the House accordingly upheld Powell's murder conviction. Suffice to say at this point, that foresight of a possibility of a risk occurring belongs within the territory of recklessness, a lesser form of fault than intention. Thus, a secondary party may be found guilty of murder despite having harboured no intention that grievous injury should befall the victim; the

¹¹ The Law Commission failed to conclusively decide on the appropriate fault element particularly for the proposed offence of assisting crime, see below, pp.190-193.

¹² *Op cit.* n.4.

¹³ *Cunningham* [1982] AC 566.

perpetrator, on the other hand, must be shown to have intended at least really serious bodily harm.¹⁴

In the English appeal the facts were significantly different in so far as the appellant had foreseen that his associate had intended to cause grievous bodily harm. English and his friend, Weddle, had jointly attacked a police constable using wooden posts as weapons. During the course of the assault, Weddle took out a knife and stabbed the policeman, thereby inflicting the mortal injury that was the immediate cause of death. At first instance, English had been found guilty of murder. This is perhaps hardly surprising. English had participated in the joint enterprise to assault the victim and by his own contribution had aided and abetted Weddle's attack. Furthermore, he had contemplated that his co-adventurer would act with sufficient *mens rea* to be liable for murder. Notwithstanding, the force of argument urging his liability, all five Lords found that English was not liable for murder and distinguished English from Powell on the basis that while Powell had foreseen the very act that caused the victim's death, English had foreseen the qualitatively different act of the victim's beating with a wooden post. Essentially, English was not criminally responsible because it had not been proved that he knew of Weddle's possession of the knife. Without this knowledge, English could not have foreseen that his cohort would stab the deceased and so incur murder liability, he needed to have foreseen the possibility that the knife may be used rather than the post. This requirement of specific foresight regarding the type of weapon was due to the far greater potential for fatality in the case of a knife attack. Yet, if English was not guilty of murder, then for which criminal offence did he remain liable? The House of Lords held that, as he was not complicit in the police constable's homicide, he was criminally responsible only to the extent of his own contribution in the assault.¹⁵

The decision produced a mixed reaction.¹⁶ The critics who objected to the Powell limb pointed out that the foresight test extended secondary murder liability into the territory of subjective recklessness.¹⁷ This it was argued was iniquitous because it widened murder liability for a secondary party who did not physically cause the death of the victim. By contrast, the fault required for the actual perpetrator was killing or causing grievous harm with intention.

¹⁴ 'Really serious bodily harm' was the definition given for grievous bodily harm in *D.P.P. v Smith* [1961] AC 290.

¹⁵ Presumably, causing grievous bodily harm with intent contrary to s.18 Offences Against the Person Act 1861.

¹⁶ For a detailed analysis of the case and its legacy see below, pp.237-260.

¹⁷ For the definitions and ambit of the fault terms, see below, pp.15-21.

However, the more concerted disagreement related to the English appeal. The response of the dissatisfied is of interest at this point because it provides yet another option for the imposition of criminal liability upon a secondary party who becomes associated in a homicide. Dissenters who were dissatisfied with English's exculpation from the policeman's homicide suggested cogent arguments for rendering accessories in a similar situation liable, not for murder, but for manslaughter.¹⁸ Thus, on this set of facts both intuition and reasoned legal argument can persuasively lead to three alternative bases of criminal liability, one of which results in a mandatory life sentence. Such indecision and inconsistency is insupportable in so important an area. Homicide liability with all its attendant aspects should be the clearest aspect of the criminal law. Instead, it is arguable that secondary party liability for homicide finds the criminal law at its most opaque. The undesirability of such a situation and the potential consequences attending its perpetuation cannot be overstated. In the words of the Law Commission,

Law that is muddled, irrational, unclear, or simply difficult to access, is almost certain to produce injustice. The need to take steps to avoid such injustice is especially great if it is the *criminal* law that suffers from such defects, since this part of our law embraces the vital matter of the exercise and control of coercive state power against the citizen.¹⁹

This warning was issued in the exposition of the problems related to working with the Offences against the Person Act 1861 and the universal agreement that it should be reformed. The difficulties emanate from the fact that the related offences have not been dealt with in 'logical and graded manner'.²⁰ In similar vein, it will be contended that the homicide offences have not been developed in a logical, graded manner. In considering joint enterprise cases and comparing the liability of accessories to non-common purpose homicide, the substantive law of murder and involuntary manslaughter provides the offence definitions against which primary and secondary liability is measured. Thus it becomes an integral issue in analysing and evaluating the law of complicity in this area.. It will be submitted that one of the consequences of the difficulties with the substantive law of homicide is the uncomfortable and contentious application of secondary party homicide liability. With the application of secondary liability deriving as it does from the principal offence, any latent problems with the substantive offence definitions will inevitably be amplified and distorted when attributed to an accomplice who is one step removed from the prohibited deed or result.

¹⁸ Clarkson, "Complicity, *Powell* and Manslaughter" [1998] Crim LR 556.

¹⁹ Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles*, Law Com No. 218, 1993 (hereafter, Law Com No. 218) paragraph 4.1.

²⁰ *Brown* [1993] 2 WLR 556 at 576 (adopting paragraph 7.4 of Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* Consultation Paper No 122, 1992 (hereafter, LCCP No. 122).

However, the Law Commission's recent approach to reform proposals is not particularly conducive to tackling problems of this nature. Parliamentary failure to implement the Law Commission's prodigious production of *A Criminal Code for England and Wales*²¹ in 1989, led to a fundamental change in the Commission's objectives. Henceforth, it was believed that law reform proposals were more likely to be acknowledged and implemented when submitted in manageable, self-contained areas of the criminal law.²² In furtherance of this new strategy, the last decade of the twentieth century witnessed the publication of consultation papers on involuntary manslaughter²³ and secondary party liability²⁴. Further suggestions for legislation included submissions proposing reform for offences against the person and general principles²⁵ and involuntary manslaughter²⁶. Elsewhere, the definition of murder and the efficacy and fairness of the mandatory life sentence have also been subjects to which reformers and their opponents have recently given considerable attention.²⁷

A significant disadvantage that accompanies the exposition of law reform discussions and proposals in discrete sections is the tendency to consider the particular subject in semi-isolation; that is to say, that whilst reference may be made to relevant kindred offences, such as murder in the discussion of involuntary manslaughter, there is no brief to attempt a structured and schematic offence definition that would seek to fully develop a correlation between fault elements and types of harm so that homicide offences relate to one another in a methodical and coherent fashion.²⁸ Furthermore, there is no consideration of whether the offence definition can be consistently applied to secondary parties in accordance with the requirements of complicity liability. If the

²¹ Law Commission, *A Criminal Code for England and Wales* No. 177, 1989 (hereafter Law Com No. 177).

²² Law Com No. 218 paragraph 1.3: 'Our objective now is to produce a series of Bills, each of which will be complete in itself and will contain proposals for the immediate reform and rationalisation of a major, discrete area of the criminal law.'

²³ Law Commission, *Involuntary Manslaughter*, Consultation Paper No. 135, 1994, (hereafter, LCCP No. 135).

²⁴ LCCP No. 131.

²⁵ Law Com No. 218.

²⁶ Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* No. 237, 1996 (hereafter, Law Com No. 237).

²⁷ See e.g. Criminal Law Revision Committee, 14th Report, *Offences Against the Person*, 1980 (hereafter, CLRC, 14th Rep) and Law Com No. 177 (Clause 54) and *Report of the Select Committee of the House of Lords on Murder and Life Imprisonment*, 1989 (hereafter, HL Paper 78-I). Certain members of the judiciary have also questioned the current definition of murder and the imposition of mandatory life sentences for example Lord Steyn in *Powell; English* [1997] All ER 545 at 551-2 and Lord Mustill in *A-G's Reference (No. 3 of 1994)* [1996] QB 581 at 592.

²⁸ See Yeo, *Fault in Homicide* (The Federation Press, 1997) (hereafter Yeo, *FH*) at 5-8.

definition of the principal offence is fraught with difficulty, the imposition of secondary party liability cannot but add a further layer of complexity.²⁹

The liability of secondary parties to a crime has tended to be an under-developed and overlooked area of the law³⁰, a status frequently disclosed by its location in the closing chapters of textbooks. However, examining the application of secondary liability may sometimes assist in uncovering areas of theoretical incoherence in the substantive law. As already mentioned, a principal will be liable for murder only if intention as to the requisite harm is proved whereas it is sufficient to establish that a secondary party foresaw the risk of murder being done. In other words, a lesser degree of fault will fix murder liability upon an accessory. On the other hand, in the case of gross negligence manslaughter, the required fault is higher for the secondary party than for the perpetrator. Secondary party culpability will only be satisfied if there is foresight, that is, actual advertence to the relevant risk, whereas the principal will be liable on the grounds of negligence which involves an unreasonable failure to advert to the risk. At face value, this inconsistency is deplorable. It is surely one of the least controversial arguments of the criminal law to assert that homicide is considered the gravest offence and so any inconsistency in homicide liability presents an inversion of expectation. The label of 'murderer' is reserved in the public consciousness for the most heinous killers.³¹ Furthermore, conviction for murder exacts the mandatory life sentence.³² As a secondary party does not directly cause the victim's death,³³ it would be

²⁹ A number of judicial statements highlight the impact of primary fault uncertainty upon secondary liability and bemoan the state of the law of homicide. E.g., 'There was no doubt that the law at that time in respect of foreseeability of consequence in murder or manslaughter was in a confused and uncertain state.': *Barr* (1989) 88 Cr App R 362 at 365 *per* Watkins LJ; 'Once again, an appeal to this House [of Lords] has shown how badly our country needs a new law of homicide, or a new law of punishment for homicide, or preferably both.' *Powell; English* [1997] 4 All ER 545 at 549 *per* Lord Mustill. 'It is a curious fact, considering the number of times in which the point arises where two or more people are charged with criminal offences, particularly murder or manslaughter, how relatively little authority there is in this country upon the point.': *Beccara and Cooper* [1976] 62 Cr App R 212 at 217, and referring to the historical authorities of *Saunders and Archer* (1577) Plwd. 473 and *Edmeads and others* (1828) 3 C. & P. 390.

³⁰ The paradigm of criminal liability is framed in terms of the principal offender. For example, the following statement is taken from Law Com No. 218 para 7.5: 'The concept of purpose is ideally suited to express the idea of intention in the criminal law, because that law is concerned with results that the defendant causes by his own actions.' The point at issue is that a secondary party does not cause the result by his own actions (unless an extended meaning in the concept of causation is applied). Thus, purpose is not necessarily an ideal fault element especially if parity of culpability between primary and secondary parties is sought. For further details on the secondary causation requirement see below, pp.144-171 for secondary fault, see pp.262-267.

³¹ See below, pp. 67-69.

³² 'Although the proof requirements are based on the personal culpability of the aider and abettor, punishment is derivative in the sense that it is based upon the *principal's* wrongdoing. The net effect of [knowledge based liability] is a very relaxed standard of proof for aiding and abetting with a very rigid and

reasonable to anticipate that, given the lesser degree of conduct the required fault for the secondary party would be at the least equivalent to that of the actual killer.³⁴

In fact, it is not especially surprising that secondary party homicide liability should be contentious and controversial. For several decades after the abolition of constructive malice in murder³⁵ the courts wrangled with the redefinition of the fault for murder.³⁶ The interrelationship between murder and involuntary manslaughter means that any shrinking of the murder category has the consequence of extending involuntary manslaughter. Thus, any unlawful death not deemed to satisfy the fault for murder will be reallocated as manslaughter by default. It is inevitable that confusion in primary liability will be reflected and exacerbated when superimposed upon secondary parties. Much of this work is concerned with secondary parties involved in homicide offences and the criminal liability that is imposed. Joint enterprise accounts for a significant number of homicide offences. However, secondary party homicide is not the exclusive domain of joint enterprise and so it is also necessary to consider non-common purpose liability. Moreover, as complicity liability is a means of attributing criminal responsibility rather than an offence *per se*, it is also instructive at times to consider other offences, otherwise there may be a danger that the examination will provide a distorted view of accomplice liability.

In addition to considering the theoretical basis to complicity, the work exposes the context of the criminal law. This includes the historical development of the relevant law and punishments alongside the socio-political and sometimes economic context of the developments. It is accepted that the criminal law has an existence and role beyond scientific theory. It is a means of social control, or at least of enforcing public order, but it is also symbiotic in the sense that it takes into

highly penal system of punishment.’: Westerfield, “The *Mens rea* Requirement of Accomplice Liability in American Criminal Law – Knowledge or Intent” [1980] 51 Mississippi LJ 155 at 169

³³ For secondary party causation requirement, see n.30.

³⁴ Since the act and cause requirements of accomplice liability are so minimal, and since all jurisdictions punish an accomplice the same as the perpetrator of the substantive offense, the *mens rea* requirement becomes more significant.’ Mueller, *op cit.* n.2 at 2171.

³⁵ Homicide Act 1957 s.1(1) where a person kills in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence. (2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course of furtherance of another offence.

³⁶ This included deciding upon the extent of harm that the fault should relate to (*Cunningham* [1982] AC 566) as well as the definition of intention (*Hyam v DPP* [1975] AC 55; *Moloney* [1985] 1 AC 905; *Hancock and Shankland* [1986] 1 AC 455; *Nedrick* [1986] 3 All ER 1; *Woollin* [1999] AC 82).

account public opinion and reaction. It is therefore necessary that there be an interface between the administration of the criminal justice system, in this case, specifically the role of the offence definitions and the imposition of liability, and the public demand or expectation.

Comparative law is frequently helpful not simply in highlighting the deficiencies of the examined jurisdiction but also in providing a wider context and comprehension of legal structure and framework. Comparison may also provide specific insights into detailed areas of offence definition and rationale. This work examines South African law³⁷ as a comparative model. There are a number of reasons for choosing South Africa. Firstly, joint enterprise, referred to as common purpose, was developed relatively rapidly and then heavily utilised as a separate doctrine within secondary liability to attribute homicide liability. Secondly, the development of secondary liability took place over a relatively short timescale which enables a detailed examination of the reasons and context for the changes. Allied with that, the development of common purpose liability took place against a backdrop of increasing social control and tightened public order, so highlighting the role of public policy in the changes; in any jurisdiction, reasons of public policy are invariably projected when the imposition of liability defies the expectation of doctrine or consistency. It is arguable that jurisdictions tend to introduce and/or develop an offence as a means of imposing a wide-ranging liability upon secondary parties that, whilst not desirable in the sense of its potential for creating a burgeoning class of putative criminals, can be utilised for “deserving” cases.³⁸ Finally, although the South African experience demonstrates a hybrid in the area of secondary liability, the study permits an insight into the approach of Roman-Dutch law and the merits and drawbacks of the different perspective. It also begs the question why South Africa should choose to employ a hybrid approach, essentially seeking to maintain the English law acquisition of common purpose while developing accessory liability in accordance with Roman-Dutch principles.

To summarise, secondary liability, primarily for homicide, will be analysed in accordance with the existing law and the Law Commission’s reform proposals. Further, if, following the Commission’s suggestion, joint enterprise is to be considered a separate doctrine, it is necessary to compare and contrast joint enterprise liability with what may be termed, for ease of reference, “general” complicity, that is, non common-purpose liability. Related secondary party areas, which provide a context for analysis, include incitement and conspiracy. The interest is made

³⁷ See, in particular, ch. 3 and ch 7 s.3.4. South African cases up to 30/06/02 are included within this work.

more relevant insofar as the Law Commission reform proposals centred on amending the existing law of complicity from a derivative to an inchoate basis. This would certainly obviate the continuing need for incitement as the current offence would be contained within the proposed new offence of encouraging crime. The future of conspiracy was not considered in the working paper but conspiracy is arguably closely aligned with joint enterprise liability.³⁹ One question that requires special attention is whether inchoate liability can adequately reflect responsibility in joint enterprise cases where death results. The basic difficulty in these cases is the fact that the collateral homicide is not the purpose of the criminal enterprise. Thus, the application of inchoate liability is vexed by the fact that secondary liability will be incurred for the intention to commit the commonly purposed foundational offence; but this prior crystallisation of liability for the foundational offence will fail to encompass the subsequent, collateral homicide.⁴⁰

Finally, the scope of this work is so large that, of necessity, some related areas must be excluded. Areas completely excluded from the work include accessories after the fact⁴¹ and secondary party defences such as withdrawal.⁴² Neither are general defences examined in any great detail, although this is not to suggest that there are no pertinent issues raised by the question of secondary liability when the principal has a justification or an excuse.⁴³ Similarly, secondary party liability for voluntary manslaughter and related areas such as a provoked accessory or the relevance of the relationship between the accessory and the principal who successfully pleads a provocation defence,⁴⁴ is not discussed. It is also beyond the ambit of the work to include an

³⁸ See below, pp.179-180.

³⁹ Although the criminal agreement could also provide evidence of encouragement. Below, pp.259-260.

⁴⁰ Below, pp.206-207.

⁴¹ An accessory after the fact is not complicit in the committed crime, rather the offence involves knowingly assisting an offender subsequent to the crime commission by offering help, relief, comfort, sanctuary etc.: s.4 Criminal Law Act 1967; KJM Smith, *Treatise* at 7-8, 22

⁴² For the English law position see KJM Smith, *Treatise*, Chap 10 General Defences and Withdrawal; KJM Smith, "Withdrawal from Criminal Liability for Complicity and Inchoate Offences" [1983] 12 *Anglo-Amer LR* 200-219 and KJM Smith "Withdrawal in Complicity: A Restatement of Principles" [2001] *Crim LR* 769-785. South Africa also permits a defence of dissociation: Parmanand and Ramaite, "Dissociation from a Common Purpose (1994) 1 *Stellenbosch LR* 82-85 and Khuluse, "Dissociation from Common Purpose – A Survey" (1992) 2 *SACJ* 173-179. Also see *S v Nomakhala and Another* 1990 (1) *SACR* 300 (A); *S v Beahan* 1992 (1) *SACR* 307 (ZS); *S v Singo* 1993 (1) *SACR* 226 (A); *S v Nduli and Others* 1993 (2) *SACR* 501 (A); *S v Mkhize* 1999 (2) *SACR* 632 (W) and *S v Lungile and Another* 1999 (2) *SACR* 597 (A).

⁴³ JC Smith, *Justification and Excuse in the Criminal Law – The Hamlyn Lectures* (Stevens & Sons, 1989). It is also an interesting conundrum whether secondary liability represents a crime of specific intent or basic intent when the fault is foresight, i.e. recklessness, rather than intention. The distinction is of interest for the defence of intoxication.

⁴⁴ *Pearson* [1992] *Crim LR* 193; *McKechnie* [1992] *Crim LR* 194; *Acott* [1996] 4 *All ER* 443; *Marks* [1998] *Crim LR* 676.

exhaustive examination of criminal procedure, except in so far as the exposition introduces specific points.

CHAPTER 1

TERMS AND DEFINITIONS

In order to provide access to the subsequent discussion, the work will begin by defining the parties to a crime and describing the possible ways of creating distinctions between modes of participation. However, firstly, the definitions to the different fault terms will be examined, with a view to providing an introduction to the applicability of culpability standards to primary and secondary parties. This chapter also include an introduction to the Roman-Dutch fault terms and the definitions and criteria employed to designate the possible parties to a crime under South African law.

1 INTRODUCTION TO FAULT TERMS

Murder and involuntary manslaughter involve faults ranging from intention to negligence. Thus, the following exposition is provided with a view to establishing the terms with which to establish a scheme of offence definitions, which permits both a logical gradation of fault and a correlation between primary and secondary party liability.

1.1 ENGLISH LAW

Before attempting a definition of the fault terms employed under English law it is important to point out firstly, that there are no statutory definitions¹ and secondly, that the consequence of this has been substantial and protracted debate upon the meaning of the terms. Inevitably, the definitions proffered below are also open to argument. However it is beyond the scope of this work to indulge in a detailed analysis of the practical, administrative, theoretical and

¹ There are also, historically, a great many words employed, which are possibly but not necessarily, synonymous and interchangeable. Bemoaning this circumstance and its impact upon the current law Lord Simon of Glaisdale declared in *D.P.P for Northern Ireland v Lynch* [1975] AC 653 at 688: 'A principal difficulty ... is the chaotic terminology, whether in judgments, academic writings or statutes. Will, volition, motive, purpose, object, view, intention, intent, specific intent or intention, wish, desire... – such terms which do indeed overlap in certain contexts, seem frequently to be used interchangeably, without definition, and regardless that in some cases the legal usage is a term of art differing from the popular usage.'

philosophical perspectives of the mental elements.² Therefore the following definitions mainly utilise dictionary meanings³ and the criteria suggested by codification and reform committees. Nevertheless, to avoid presenting an unduly restrictive and unbalanced appreciation of the problems that have been encountered in this area of the criminal law, judicial pronouncements and academic illustrations are also included where they help to illuminate the difficulties confronted in distinguishing between terms.

1.1.1 INTENTION

Under English law, intention is the highest degree of culpability and is reserved for a limited number of offences,⁴ most notably murder and the non-fatal offence of causing grievous bodily harm with intent⁵. It is the most heinous fault because, to use a colloquial phrase, the person positively meant to do it.

1.1.1.1 Direct Intention

Direct intention is the kind covered by the dictionary definition and popular usage. Thus, intention is defined as ‘a settled direction of the mind toward the doing of certain act; that upon which the mind is set or which it wishes⁶ to express or achieve; meaning; purpose conceived’ and synonyms include ‘aim’ and ‘design’. Applied to the elements of the *actus reus*, prohibited conduct may be deliberately or intentionally engaged in and a proscribed result aimed at, with the

² There is however a wealth of writing upon the subject. See, e.g., Ashworth ‘The elasticity of *mens rea*’ in *Crime, Proof and Punishment* (ed. Tapper, Butterworths, 1981); Ashworth, ‘Belief, Intent and Criminal Liability’ in *Oxford Essays in Jurisprudence* (ed. Eekelaar and Bell 3rd Series, Clarendon Press, 1987); Duff, “The Obscure Intentions of the House of Lords” [1986] Crim LR 771; Duff, *Intention, Agency and Criminal Liability* (Basil Blackwell, 1990); Duff, ‘Subjectivism, Objectivism and Criminal Attempts’ in *Harm and Culpability* (ed. Simester and Smith Clarendon Press, 1996); Duff, “Intentions Legal and Philosophical” [1989] OJLS 76-94; Simester, ‘Why distinguish intention from foresight?’ in *Harm and Culpability*; Simester and Chan, “Intention Thus Far” [1997] Crim LR 704-719; Stannard, “Subjectivism, Objectivism and the draft Criminal Code (1985) 101 LQR 540; Sullivan, GR, Intent, Subjective Recklessness and Culpability” (1992) 12 OJLS 380-391; Tur, ‘Subjectivism and Objectivism: Towards Synthesis’ in *Action and Value in Criminal Law* (ed. Shute, Gardner and Horder Clarendon Press, 1993); Williams, “Oblique Intention” [1987] CLJ 417; White, “Intention, Purpose, Foresight and Desire” [1976] 92 LQR 569-590.

³ Taken from The New International Webster’s Comprehensive Dictionary of the English Language, Encyclopedic Edition (Trident Press, 1996) and Chambers Concise Dictionary 1991.

⁴ Also treason: *Steane* [1947] KB 997, and, at least in theory, the inchoate offences of attempt, incitement and conspiracy, and complicity, but see below, pp.181-190, 196-197.

⁵ s.18 Offences Against the Person Act.

⁶ Wish in the sense of desire does not always equate with intention. White points out: ‘...sometimes people do intend to do things, such as giving up a prized possession, which they do not want to do, and often they want to do things, such as taking forbidden fruit, which for various reasons they have no intention of doing.’: *op cit.* n.2 at 576. An example might be a daughter reluctantly deciding to kill her terminally ill parent for reasons of love and compassion; she would intend the death but not desire it.

express purpose or intention of bringing it about.⁷ However, surrounding circumstances cannot be willed into existence. Therefore, the requisite state of mind with regard to specified circumstances is knowledge.⁸

To express the idea in a slightly different way that allows an introduction to the interrelationship between parties to a crime, intentional action involves individual volition. A number of parties may share the same aim but the willed action of any one person expresses the intention of that individual and no one else.⁹ Neither, except in the qualifications provided within innocent agency,¹⁰ can another party effectively obliterate the choices of the volitional actor to the extent of superimposing his own intention upon that actor.¹¹ Assistance and influence may contribute to the settling of the actor's purpose but ultimately the actor's state of mind becomes the equivalent of a surrounding circumstance; the secondary party can have knowledge of it but cannot in any meaningful way intend it, any more than he can intend the umbrella he is taking to belong to someone else.¹²

1.1.1.2 Indirect/Oblique Intention

The starting point for indirect intention is the realisation that there is an equivalent culpability to acting with the purpose of bringing about a particular unlawful objective, X, and that is aiming at a different result, Y, in the knowledge that X is also certain to happen.¹³ In other words, where

⁷ Degrees of probability in assessing the chances of success are made redundant where the result is the objective of the action. As Lord Goff explained in *Gollins v Gollins* [1964] AC 644 at 664: 'If I say I intend to reach the green, people will believe me although we all know that the odds are ten to one against my succeeding.'

⁸ With regard to 'direct' intention (although the term is not employed in the provisions) the Draft Code provided in Law Com No. 177 at Clause 18(b) provides that a person act "intentionally" with respect to (i) a circumstance when he knows or hopes that it exists or will exist; (ii) a result when he acts ... in order to bring it about...'. Law Com No. 218 at Part I Clause 1(a) of the Criminal Law Bill provides that 'a person acts ... "intentionally" with respect to a result when - (i) it is his purpose to cause it...'

⁹ Duff, *Intention, Agency and Criminal Liability op cit.* n.2 at 17 asserts: 'I 'intend' what I have decided to bring about: but I cannot intend a result which is 'wholly beyond' my control, or dependent upon so many other factors that my 'volition will have been no more than a minor agency collaborating with' those other factors.'

¹⁰ See below, pp.28-30.

¹¹ [E]very volitional actor is a wild card; he need never act in a certain way... Since an individual could always have chosen to act without the influence [of an accomplice], it is always possible that he might have.: Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine* [1985] 73 Cal LR 324 (hereafter Kadish, *Complicity, Cause and Blame*) at 359

¹² To satisfy the elements of theft in accordance with s.1 Theft Act 1968.

¹³ Williams, in "Complicity, Purpose and the Draft Code" [1990] Crim LR 4 at 8 suggested 'The ambiguity of the word "intention" means that it is often better for clarity, to prefer two separate terms, "purpose" (meaning direct intention) and "knowledge" (meaning knowledge whether or not accompanied by intention)'.)

the successful manifestation of Y entails the eventuality of X, then intending Y encompasses an intention to bring about X. This is so even though the actor might not wish X to happen; he may fervently pray that X will not eventuate.¹⁴ Nevertheless, the effecting of a plan for the bringing about of Y, knowing that, but for a miracle, X will also occur represents a culpability that is barely distinguishable from aiming at X for its own sake.

Two illustrations are useful in developing an extended meaning of intention. In the first, a man is standing inside the house, looking through the window when he sees a neighbour's cat on his recently planted vegetable plot. Picking up the air rifle that he has placed on the window sill for just such an opportunity, he takes aim and fires, without firstly opening the window due to the attendant risk of providing his feline antagonist with an early warning.¹⁵ The pertinent query does not concern the ailurophobic gardener's intentions towards the cat but whether he intended to destroy the window. Clearly, he did not intend it in the sense of acting with the express purpose of shattering the glass. However, it is appropriate to say that he intentionally broke the window: the window breaking was intentional in the sense that, as it was known to be an inevitable side effect of the ultimate objective, it was therefore an integral part of the intended transaction. From the standpoint of censure, most people would make no distinction in the blame attached to breaking the window in the circumstances described and shooting at the glass in order to break the pane of glass.

The second illustration involved a terrorist who plants a bomb in a busy concourse and then gives the authorities timely warning of its presence and planned detonation. The area is evacuated and the bomb squad sent to dispose of the incendiary device but one of their number is killed in the subsequent explosion while trying to make the bomb safe.¹⁶ What is the terrorist's intention? Presumably, he intended to cause disruption and so make a public declaration of his personal agenda. However, does he intend to kill? Arguably, had he intended to kill, he would not have given any warning so allowing the area to be evacuated. Yet, an argument has been urged that he intended the death of the bomb disposal member. Lord Bridge's argued in *Moloney* that the terrorist could be liable for murder. In an earlier illustration given to provide an example of a 'moral certainty', Lord Bridge suggested that,

¹⁴ Duff, *Intentions Legal and Philosophical op cit.* n.2 at 77 suggests that a crucial test that marks the difference between direct and indirect/oblique intention is the failure test: '...an effect is directly intended only if its non-occurrence would mark the (partial) failure of the agent's action.'

¹⁵ The example derives from Snyman's illustration of *dolus indirectus*, below, p.22.

¹⁶ Example provided by Lord Hailsham and Lord Bridge in *Moloney* [1985] AC 905 at 913 and 927.

A man who, at London Airport boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit. The possibility that the plane may have engine trouble and be diverted to Luton does not affect the matter. By boarding the Manchester plane, the man conclusively demonstrates his intention to go there, because it is a moral certainty that that is where he will arrive...¹⁷

However, it is submitted that, despite Lord Bridge's desire to impose murder liability upon the terrorist bomber, the same degree of certainty does not apply to the bomb disposal member's death in the terrorist example. It is not a moral certainty that the disposal expert will be killed. The best that can be said is that the terrorist would have foreseen that the bomb squad would be called and that the bomber's act makes him *deserving* of liability for murder rather than manslaughter, should a death eventuate.¹⁸ In fact, the death of a disposal expert is not even highly probable;¹⁹ instead, it is a *possible* outcome, and foresight of a possibility belongs in the territory of subjective recklessness²⁰ and results in manslaughter liability.²¹

This short exposition is intended to provide an introduction and insight into a debate that has led to so many words being written on the subject of intention,²² along with calls to amend the fault element of murder and arguments as to how this can best be achieved.

¹⁷ *Moloney* [1985] AC 905 at 926. Williams agreed with this idea of intention. In *Criminal Law: The General Part* (Stevens & Sons, 1961) (hereafter, *CLGP*) at 39-40 he answered the critics who protested against the nature of certainty: 'It may be objected that certainty is a matter of degree. In a philosophical view, nothing is certain; so-called certainty is merely high probability... This difficulty, though serious, is by no means fatal. We do in fact speak of certainty in ordinary life; and for the purpose of the present rule it means such a high degree of probability that common sense would pronounce it certain. Mere philosophical doubt, or the intervention of an extraordinary chance, is to be ignored.'

¹⁸ Norrie, *Crime, Reason and History* (Weidenfield & Nicolson, 1993) at 52: 'The virtual certainty that a squad would be called is not the same as the virtual certainty that the expert would be killed. Death in such an occupation is a possibility, not a virtual certainty. The liability of a bomber in this example is for the crime of manslaughter, for intention in the *Moloney* sense is lacking.'

¹⁹ The definition used in *Hyam v DPP* that was ostensibly the subject of amendment in *Moloney* on the grounds that it was encompassed too wide-ranging a test and consequent murder liability.

²⁰ See below, p.19.

²¹ *Woollin* [1998] 4 All ER 103; at 112 Lord Steyn expressed his belief that the terrorist would be liable for manslaughter rather than murder.

²² See for example the exchange between Dennis and Sullivan on intention and complicity: Sullivan, "Intent, Purpose and Complicity" [1988] Crim LR 641; Dennis, "Intent, Purpose and Complicity: A Reply" [1988] Crim LR 649; Sullivan, "Intent, Purpose and Complicity: Reply to Dennis" [1989] Crim LR 166; Dennis, "Intent, Purpose and Complicity: A Further Reply" [1989] Crim LR 168.

1.2.1 Recklessness

It has already been seen that intention suffers from a shimmering and uncertain boundary with the lesser fault of recklessness. However, recklessness not only shares an uncertain demarcation with oblique intention in the upper echelons of culpability, it also merges with negligence at the other end of the fault spectrum. The dictionary definitions²³ reveal that the ordinary meaning of the words creates an overlap between recklessness and negligence. “Reckless” is defined as ‘1. Foolishly heedless of danger; rash; careless; 2. Indifferent, neglectful’ and “negligence” as ‘1. The act of neglecting; 2. An act or instant of neglect; 3. Failure to exercise proper care and precaution.’ Consequently, the fault terms have been developed as a term of art, specific to their legal application.

1.2.1.1 Subjective Recklessness

Williams suggested that ‘recklessness occurs where the consequence is foreseen not as morally or substantially certain but only as “probable” or “likely” or perhaps merely “possible”.’²⁴ In other words, the standard is subjective in the sense that the defendant adverted to, or was conscious of, the risk (rather than the certainty) of a forbidden consequence occurring. The actor’s awareness is the key to defining subjective recklessness. In fact, this is the definition that has subsequently become known as subjective or *Cunningham*²⁵ recklessness: the defendant consciously takes an unjustified risk.

1.2.1.2 Objective Recklessness

A second strand or species of recklessness was introduced by the House of Lords in 1981, in the judgments of *Caldwell*²⁶ and *Lawrence*²⁷. Recognising the liability lacuna that may exist in the insistence upon a requirement for conscious risk taking, Lord Diplock developed a further fault whereby a person was deemed to be reckless if ‘(1) he does an act which in fact creates an obvious risk... and (2) when he does the act he has either not given any thought to the possibility of there being any risk or has recognised that there was a some risk involved and has nonetheless gone on to do it’²⁸. In *Lawrence*, Lord Diplock developed the criterion of the risk to ‘obvious and

²³ n.4

²⁴ Williams, *CLGP* at 59.

²⁵ [1957] 2 QB 396.

²⁶ [1982] AC 341.

²⁷ [1982] AC 510.

²⁸ [1982] AC 341 at 354. Lord Diplock limited the act to one that risked criminal damage.

serious²⁹. However, the immediately noticeable difference in this new form of recklessness is that the defendant need not have thought about the risk being run. One interpretation therefore might be that the defendant need not have been aware that a risk existed. However, this lack of awareness can be further developed in two directions. One interpretation is that, since the defendant need not be conscious of the risk at the time of committing the act, there is no need for the individual to have ever been capable of advertent to the risk. This interpretation involves the application of an objective standard of fault whereby the defendant's actions are judged by the standard of the reasonably prudent person.³⁰ The second interpretation is that, although the defendant was unaware of the risk at the time of acting, the unconsciousness arose from a temporary lapse or a deliberate refusal to confront the risk. In such a situation, the defendant's lack of awareness would not be due to an inability to appreciate the risk, but would perhaps be better described as a latent awareness which, while lulled or dormant at the time of action, could be reawoken during moments of clear-headedness. Consequently, as the relevant risk would normally be equally as obvious to the defendant as to the reasonable man this interpretation has the effect of blending together the objective and subjective fault standards.³¹ Nonetheless, *Caldwell/Lawrence* recklessness introduces, if not an objective standard, then certainly a normative standard whereby the defendant's liability is based upon the imposition of an exoteric judgment of the defendant's conduct, and this circumstance has the effect of blurring the demarcation between recklessness and negligence.

1.3.1 Negligence

The Law Commission has suggested that 'a person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise'³². The widening of recklessness until it tends to meet the same objective standard provides a challenge to those who seek to differentiate between the fault terms of recklessness and negligence,³³ and particularly

²⁹ [1982] AC 510 at 526. *Lawrence* involved reckless driving contrary to sections 1 and 2 of the Road Traffic Act 1972 (now amended so as to define the offences as dangerous driving).

³⁰ Subsequent judgments interpreting the risk as one that will be obvious to the reasonably prudent person rather than the defendant include *Elliott v C.(A Minor)* (1983) 77 Cr App R 103 and *R (Stephen Malcolm)* (1984) 79 Cr App R 334.

³¹ Judicial mitigation of the severity of the objective standard is evident in *Reid* (1992) 95 Cr App R 393. Moreover, the examples held to constitute recklessness tend to uphold the argument of basing the fault on latent awareness: mental impairment through intoxication, blind rage, not caring whether a risk exists or not, wilful blindness and impetuous action.

³² Law Commission, *Report on the Mental Element in Crime* No. 89, 1978 (hereafter Law Com No. 89) para. 67 (citing Law Commission Working Paper No 31 p.57).

³³ See e.g. Norrie, "Subjectivism, Objectivism and the Limits of Criminal Recklessness" (1992) 12 OJLS 45.

gross negligence. However, with regard to homicide, there is no manslaughter by *Lawrence* recklessness; instead gross negligence is the requisite fault. Emerging in *Adomako*³⁴, the criteria for gross negligence manslaughter require that the defendant must have been in breach of a duty of care under the ordinary principles of negligence; the death must have resulted from the negligent act or omission; and the neglectful conduct must amount to gross negligence. As to the definition of gross negligence:

The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the [victim], was such that it should be judged criminal.³⁵

1.2 SOUTH AFRICAN LAW

Under South African law, there is a requirement to prove unlawfulness in addition to the requisite fault. The distinction between the two has led to a debate as to whether fault reflects culpability in the sense of moral condemnation or whether it merely designates the blame attached by law.³⁶ Thus, the culpable state of mind required by the criminal law has been defined in the following terms:

Intention is the blame that the law attaches to a criminally accountable actor, because he willed the result which he has caused, while being aware of the unlawfulness of his conduct.³⁷

Intention is here framed in terms of purposeful action yet *dolus* encompasses more than direct intention. Before turning to the sub-classifications of legal intention, it is instructive to begin by stating that South African fault is divided into two main classifications: intention (*dolus*) and negligence (*culpa*). Intention is required for all common law crimes except culpable homicide for which negligence is sufficient.³⁸ Both classifications are sub-divided and, whilst the natural layman's understanding of the concept is apparent for some of the terms, there is open acknowledgement that others are legally constructed and attributed a specialist meaning.

³⁴ [1995] 1 AC 171.

³⁵ *Ibid.* at 187.

³⁶ De Wet & Swanepoel [De Wet and Swanepoel *Die Suid-Afrikaanse Strafbeg* 4th ed (Durban Butterworth, 1985) (hereafter, De Wet & Swanepoel) at 136] states that the question whether the accused had the necessary intention involves two inquiries, to wit, firstly, his disposition toward the factual side of his conduct and secondly, towards the lawfulness of his conduct. If the accused therefore deliberately commits an act or causes a result without realizing the unlawfulness thereof, he will not have intention': Visser and Vorster, *General Principles of Criminal Law Through the Cases* (Butterworths, 1981) (hereafter Visser & Vorster) at 336. *S v De Blom* 1977 3 SA 513 (A) confirmed that knowledge of unlawfulness was a discrete requirement in the imposition of liability.

³⁷ Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 5th ed (Pretoria Van der Walt, 1985) at 114, cited in Visser & Vorster at 336 (in translation).

³⁸ Visser & Vorster at 336.

1.2.1 *Dolus* (Intention)

The basic premise supporting the fault of intention is that liability is properly incurred when a prohibited harm occurs via deliberate and wilful action. Developing the rationale further, criminal responsibility is imposed only when the protagonist knew of the unlawfulness of the conduct and nonetheless persisted in the course of action.³⁹ Intention is thus manifested by advertence to the risk of harm coupled with a determination to take the chance of its occurrence. Consequently, the concept of *dolus* is wider than the fault of intention under English law, embracing in addition English subjective recklessness.⁴⁰

1.2.1.1 *Dolus Directus*

This form of intention is the one that concurs with the dictionary definition. It entails engaging in purposeful action with the express object of achieving the actual outcome. Thus, applied to murder:

The accused directs his will to compassing the death of a person. He means to kill. The sole characteristic of this form of *dolus* is actual intent to kill. Its methods are legion, but poisoning is an example.⁴¹

In this situation, there need be no degree of certainty that the consequence will arise.⁴² Should the victim actually die it will not avail the accused to point out the infinitesimal chance of success. When purpose and outcome coincide liability is assured.

1.2.1.2 *Dolus Indirectus*

Indirect intention is where although not the actor's purpose, the consequence was known to be a certain result of his act. It thus involves foresight rather than design. In *Kewelram*⁴³, the occupant of a store set fire to his goods in order to obtain the insurance money. The store also burned and he was convicted of arson in respect of the destruction of the store. Clearly, the occupant's purpose (*dolus directus*) was to destroy the stock – only by so doing could the insurance money be obtained: he did not actually intend to destroy the store. The question, upon appeal, was whether specific intention needed to be established regarding the burning of the store.

³⁹ Burchell and Milton isolate intention and knowledge of the unlawfulness of the conduct as the two principle elements: Burchell and Milton *Principles of Criminal Law* (Juta, 1997) (hereafter Burchell & Milton) at 301.

⁴⁰ A statute may expressly limit the fault to *dolus directus* e.g. s.29(1) Black Administration Act 38 of 1927 (repealed) and s.54(1), (2) and (3) Internal Security Act 74 of 1982: *ibid.* at 333-4.

⁴¹ *S v De Bruyn* 1968 (4) SA 498 (A) at 510 *per* Holmes JA.

⁴² Burchell & Milton at 301.

⁴³ *R v Kewelram* 1922 AD 213.

Addressing the legal point Innes CJ declared that it was sufficient if the occupant had 'known and realised'⁴⁴ that the destruction of the store would result.

Snyman explains that indirect intention exists where 'the prohibited act or result is not X's main goal, but he realises that if he wants to achieve his main goal, the prohibited act or result will of necessity be committed or result from his act'⁴⁵. He gives the example of someone inside his neighbour's house shooting through the window at a bird outside. His objective is to kill the bird and he does not wish to destroy the pane of glass but he knows that it is the inevitable result of his action. Thus, if he determines to proceed he has intended to bring about both the death of the bird and the shattering of his neighbour's window. The point emphasised is that there are two elements; the first is cognitive, that is, the realisation that the window will be broken, which is not in itself blameworthy. The second is volitional: he decides to execute the plan regardless of the certain consequence. It is through the combination of the two factors that fault is imposed.⁴⁶

1.2.1.3 *Dolus Eventualis*

Dolus eventualis represents intention for the sake of legal proscription, but it extends intention beyond its natural meaning or dictionary definition. This, in conjunction with the recognition that 'since it is seldom possible to prove actual intention on the part of an accused, proof usually turns upon establishing *dolus eventualis* on the part of the accused'⁴⁷, explains the need for a detailed examination of the fault element.⁴⁸ It is a subjective standard⁴⁹: it involves foresight of a proscribed consequence occurring. With a similar root rationale to that of *dolus indirectus*, it has been posited that the concept of *eventualis* derives from the 'notion of the inevitability of the

⁴⁴ *Ibid.* at 216.

⁴⁵ Snyman, *Criminal Law* (Butterworths, 1995) (hereafter Snyman, *CL*) at 169.

⁴⁶ This captures the essence of the Law Commission's proposed definition of intention: '...a person acts "intentionally" with respect to a result when although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.' Part I clause 1(a) Criminal Law Bill in Law Com No. 218 at 890.

⁴⁷ Burchell & Milton at 305.

⁴⁸ For greater detail see Smith, "Recklessness in *Dolus Eventualis*" [1979] 96 SALJ 81-93; Whiting, "Thoughts on *Dolus Eventualis*" [1988] 1 SALJ 440-446 and Paizes, "*Dolus Eventualis* Reconsidered" [1988] 105 SALJ 636-644.

⁴⁹ 'Prior to 1945 South African law relied upon a presumption that persons intended the natural and probable consequences of their acts. This approach was, however, objectionable, since its effect could be to attribute intention to persons who in fact acted without intent. The consequences in such a case would be that a person who was without fault would suffer. The realization of this caused the South African courts to abandon the presumption and to replace it with the concept of *dolus eventualis*.' Burchell & Milton at 305. Innes CJ dissenting judgment in *R v Jolly* 1923 AD 176 at 180-2 preempted the nature of *dolus eventualis*.

occurrence of the consequence of actions⁵⁰. Be that as it may, it seems clear that the fault encompasses a wider ambit than foresight of an inevitable occurrence. Since *Horn*,⁵¹ *eventualis* has been satisfied by the accused's realisation that the prohibited consequence might possibly occur.⁵² Applied to homicide, the requisite fault for murder is met when two related elements are present: there must firstly be an appreciation that the act entails risk to life and secondly, recklessness as to whether death will ensue.⁵³

One point that South African commentators and judges are at pains to emphasise is that whilst recklessness is a component part of *eventualis*, subjective recklessness *per se* is not *eventualis*.⁵⁴

In *De Bruyn*,⁵⁵ Holmes JA analysed the 'multiple characteristics'⁵⁶ of *dolus eventualis* as:

1. Subjective foresight of the possibility however remote of his unlawful conduct causing death to another.
2. Persistence in such conduct, despite such foresight.
3. An insensitive recklessness (which has nothing in common with *culpa*)
4. The conscious taking of the risk of resultant death, not caring whether it ensues or not.
5. The absence of actual intent to kill.⁵⁷

Whether these characteristics are also cumulative criteria is open to question. It is not difficult to imagine that a person might recognise the remote possibility of his unlawful conduct killing someone while sincerely hoping that his offence will be consummated without causing death. Such a state of mind would fail to satisfy points 3 or 4, which both seem to point towards callous indifference. Moreover, it has been argued that '*dolus eventualis* is absent if X foresees the possibility only as remote or far-fetched'.⁵⁸ Professor Snyman's view is based on the premise that the rationale behind *eventualis* liability incorporates the accused's acceptance of the risk or,

⁵⁰ Burchell & Milton at 308. cf Snyman *CL* at 170: '*Dolus eventualis* differs from *dolus indirectus* in that X foresees the prohibited result not as one which will *necessarily* follow from his act, but only as a *possibility*.' (emphasis in the original).

⁵¹ *R v Horn* 1958 3 SA 457 (A).

⁵² *Ibid.* at 461.

⁵³ *Ibid.* Also *S v Mini* 1963 3 SA 188 (A) at 192: 'To constitute in law an intention to kill, there need not... be a set purpose to cause death or even a desire to cause death. A person in law intends to kill if he deliberately does an act which he in fact appreciated might result in the death of another and he acts recklessly as to whether such death results or not.'

⁵⁴ Visser & Vorster at 370; Burchell & Milton at 307.

⁵⁵ *S v De Bruyn* 1968 4 SA 498 (A).

⁵⁶ *Ibid.* at 509.

⁵⁷ *Ibid.*

⁵⁸ Snyman *CL* at 170 who goes on to argue: 'Any normal person foresees that there is a remote or exceptional possibility that an everyday activity, such as driving a motor car, may result in somebody else's death, and if he nevertheless proceeds with such an activity, it does not mean that he therefore has *dolus eventualis* in respect of the result which he foresees only as a remote possibility.'

expressed slightly differently, reconciliation with the possibility that the result might ensue.⁵⁹ Thus, although “possibility” as used in this context is elastic... there must be a substantial or reasonable possibility that the result may ensue⁶⁰ because ‘it is difficult to see how one can reconcile oneself to a far-fetched possibility of the result ensuing.’⁶¹

As a final point to this introductory exposition, the requirements of foresight of a possibility and acceptance of risk logically encompass a further criterion – the requirement for a correlation between the manner of the foreseen risk occurring and its actual manifestation. This imposes a limit on liability in that the defendant must have foreseen the possibility⁶² of the harm occurring in substantially the same way as it actually did.⁶³

1.2.1.4 *Dolus indeterminus*

Dolus indeterminus is the term applied where an accused has no specific intention in the sense that the act is not directed at a particular victim. Thus, a person who indiscriminately throws a bomb into a crowded concourse will be held to have ‘general’ intention. The term can be employed for *dolus directus*, *indirectus* or *eventualis*.⁶⁴ This was demonstrated in *Jolly* where Kotzé’s JA. confirmed that:

It is ... not necessary in a case of wilful derailment of a train to show an intent to kill any particular individual on the train, any more than it would be necessary to do so where a person, having deliberately fired a gun into a crowd of people in the street, is indicted for an assault with intent to murder.⁶⁵

1.2.2 *Culpa*

Culpa is a synonym for negligence: ‘generally speaking, these are cases where X fails to exercise the care required in the circumstances, or where he *should* foresee a prohibited result or

⁵⁹ In *S v Nkombani* 1963 4 SA 877 (A) at 877, Holmes JA asserted: ‘To reck means to take heed of something, so as to be alarmed or troubled thereby or so as to modify one’s conduct or purpose on that account.’ Arguably, the idea of acceptance of or reconciliation with the risk of the harm occurring separates and highlights the inference that one who fails to be troubled or to modify his conduct does so because he is willing to run the risk.

⁶⁰ Snyman *CL* at 170. See also Burchell & Milton at 306: ‘...the accused foresees the possibility that the prohibited consequence might occur... and he accepts this possibility into the bargain.’

⁶¹ Snyman *CL* at 171.

⁶² Determination of foresight may be satisfied by inferential reasoning. See Burchell & Hunt at 229; Visser & Vorster at 353.

⁶³ Burchell & Milton at 306.

⁶⁴ *Ibid.* at 303

⁶⁵ 1923 AD 176 at 185.

circumstance and guard against it, but fails to do so.’⁶⁶ The South African debate about whether negligence is a species of culpability that deserves to be punished or can be effectively deterred rehearses similar arguments to those expressed by English commentators.⁶⁷ The test for negligence is likewise familiar:

(a) Would the reasonable person (*diligens paterfamilias*) in the circumstances in which X found himself have foreseen the possibility that the particular circumstances might exist or that the particular consequences might result from his act? (b) Would the reasonable person have guarded against these possibilities? (c) Did X’s conduct deviate from what the reasonable person would have done in the circumstances?⁶⁸

This represents the mental state of inadvertence on the part of the accused with the conduct evaluated against the objective standard of a reasonably prudent person in the same situation. However, South African law, rather like English law has encountered difficulties in establishing a universally acceptable boundary between an defendant’s state of awareness of, as opposed to inadvertence to, the relevant risk. More specifically, there is disagreement as to how low-grade conscious risk-taking should be classified. On the one hand, as a subjective state of mind, it belongs in the classification of *dolus eventualis*.⁶⁹ On the other and certainly in the case of homicide, it is clear that there are strong grounds for concern that awareness of a remote or

⁶⁶ Snyman *CL* at 193.

⁶⁷ *Ibid.* at 194-199; Visser & Vorster at 397.

⁶⁸ Snyman *CL* at 199. Related to culpable homicide, Holmes JA set the following criteria and guidance in *S v Burger* 1975 4 SA 877 (A) at 878-9: ‘(i) Culpable homicide is the unlawful, negligent causing of the death of a human being;... (ii) Basically there must be some conduct on the part of the accused involving *dolus* (such as an assault), or *culpa* (such as an operation by a surgeon without due care, or the driving of a motor vehicle without keeping a proper look-out). (iii) Such conduct must cause the death of the deceased. (iv) In addition there must be *culpa* in the sense that the accused ought reasonably have foreseen the possibility of death resulting from such conduct; see *S v Bernardus* 1965 3 SA 287 (A). This is because culpable homicide is the unlawful, *negligent* causing of the death of a human being. (v) It follows... that causation of death, even as a result of an unlawful act which is criminally punishable, is not of itself sufficient to constitute the crime of culpable homicide... (vi) If the accused does foresee – as distinct from ought to have foreseen – the possibility of such resultant death and persists in his conduct with indifference to the fatal consequence (or if he actually intends to kill) the crime would be that of murder. Having regard to the requirements of foresight and persistence, the dividing line between (a) murder with *dolus eventualis* and (b), culpable homicide, is sometimes rather thin. (vii) *Culpa* and foreseeability are tested by reference to the standard of a *diligens paterfamilias* (“that notional epitome of reasonable prudence” – *Peri-Urban Areas Health Board* 1965 3 SA 367 (A) at 373F – in the position of the person whose conduct is in question. One does not expect of a *diligens paterfamilias* extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life’s pathway with moderation and prudent common sense...’

⁶⁹ For a discussion on the application of the degree of probability foreseen by the defendant within *dolus eventualis*, see above, p.24.

fanciful risk could be utilised to found a murder conviction. Consequently, South African law recognises a sub-class of *culpa* that comprises conscious negligence (*luxuria*).⁷⁰

1.2.2.1 *Luxuria*

Conscious negligence restricts the severity of *dolus eventualis* by setting a limit to liability with relation to the defendant's degree of foresight.⁷¹ Consequently, a defendant who foresees only a remote possibility of harm occurring and fails to take reasonable steps to guard against the foreseen occurrence will satisfy the requirements of conscious negligence rather than intention. Thus, if death results, the liability will be for culpable homicide rather than murder.⁷²

2 DISTINGUISHING BETWEEN PARTIES TO A CRIME

2.1 ENGLISH LAW

When the Law Commission published the Criminal Code for England and Wales in 1989, the provisions of the Accessories and Abettors Act were still largely in place. The Accessories and Abettors Act 1861 provides the statutory basis for secondary party liability; in accordance with section 8:

Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender.⁷³

Thus a secondary party will be treated like a principal in the sense that the extent of liability and punishment is shared and the only guidance given on designating a secondary party is via the conduct element.⁷⁴ However, since 1861, the law of criminal complicity had been amended by other statutes. The Criminal Law Act 1967 abolished the distinctions between felony and

⁷⁰ For an assessment of *dolus eventualis* and the concept of conscious negligence, see Burchell & Milton at 321-6; Burchell and Hunt *South African Criminal Law and Procedure Volume 1 General Principles of Criminal Law* (Juta, 1997) (hereafter Burchell & Hunt) at 241-5.

⁷¹ Snyman *CL* at 204-5 argues that, although, from a theoretical standpoint intention and negligence are entirely different concepts which should never coincide, the admission of an overlap into the criminal law (*S v Ngubane* 1985 3 SA 677 (A)) 'serves the interests of the practical administration of justice well'.

⁷² E.g. in *R v Hedley* 1958 (1) SA 362 (N), the defendant fired his rifle at a cormorant near the edge of a dam. The bullet ricocheted off the water surface, near some huts, which the defendant had seen before he fired, so killing a woman. Broome JP stated, at 363: 'He knew that the bullet he was firing would strike the water and might ricochet and that if it did ricochet it might pass near the huts and so might hit someone. It is true that the likelihood of harm was small, but on the other hand the harm, if it resulted, would be very serious.' The defendant was found guilty of culpable homicide.

⁷³ Parallel criminal responsibility for secondary parties involved in summary offences is ensured by section 44 of the Magistrates' Courts Act 1980.

⁷⁴ See below, pp.36-45.

misdemeanour.⁷⁵ This had the effect of removing the distinction between principal in the first and second degree as well as the distinctions between secondary participation.⁷⁶ The obvious corollary of this was that henceforth, parties should be designated either primary or secondary. Nevertheless, it was not entirely clear that the historical differences between accessory before the fact and principal in the second degree had vanished:

Since Parliament, when abolishing the distinctions between felonies and misdemeanours by section 1 of the Criminal Law Act 1967, did not avail itself of the opportunity to consider the substance of the law on complicity, the law remains difficult to expound... because the terminology used by the courts has not always been clear.⁷⁷

Thus, there was, and still is, no statutory definition of the parties to a crime. One means of entry into this potential source of difficulty is via the Law Commission's codification of existing law in their Draft Code of 1989⁷⁸ where the differentiation is between principal and accessory.

2.1.1 Primary Party: Principal or Perpetrator

The Criminal Code gives three variations⁷⁹ of activity that will result in the status of principal. Clause 26 (1) provides that

- A person is guilty as a principal if, with the fault required for the offence –
- (a) he does that act or acts specified for the offence; or
 - (b) he does at least one such act and procures, assists or encourages any other such acts done by another; or
 - (c) he procures, assists or encourages such act or acts done by another who is not himself guilty of the offence because –
 - (i) he is under ten years of age; or
 - (ii) he does the act or acts without the fault required for the offence; or
 - (iii) he has a defence.⁸⁰

Subsection (a) covers the relatively uncomplicated assignment of criminal liability to the individual who personally commits a criminal offence. So long as the act is voluntary and autonomous, the person who fulfils the requirements of a crime without a valid defence will properly be held responsible for it. Thus, anyone who intentionally kills another person will be guilty of murder because causing death is a consequence prohibited by law. Similarly, one who

⁷⁵ s.1. This makes s.8 Accessories and Abettors Act 1861 applicable to all offences whether formerly felonies or misdemeanours.

⁷⁶ For an historical survey of the designations of parties, see below, pp.58-65.

⁷⁷ Buxton, "Complicity in the Criminal Code" [1969] LQR 252 at 252.

⁷⁸ Law Com No. 177.

⁷⁹ There is also a fourth possibility: vicarious liability leads to the description of the person so liable as a principal (clause 26 (2))

⁸⁰ Clause 26 (3) addresses the special cases where the offence definition does not lend itself to a logical interpretation that the prohibited act can be performed by proxy, e.g. rape (see *Cogan and Leak* [1976] QB 217).

dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it⁸¹ satisfies the elements of conduct that comprises the offence of theft. The individual can be said to be the principal offender in the crimes of murder and theft respectively. Alternatively, such a person can be described as the perpetrator.⁸² Further, it is clear that in a situation where two persons inflict mortal wounds on the deceased, both are principals in accordance with the definition in subsection (a).

Subsection (b) refines article 50 by requiring that, in addition to performing the act that provides a partial fulfilment of the offence criteria, to become a principal one must procure, assist or encourage another to complete the remaining acts.⁸³ The example given involves D ordering P, a security guard, to drop the money he is carrying, threatening otherwise to shoot. When P drops the money, E takes it. In this case, both D and E are guilty as principals. Further, they are working together as is demonstrated by the description of E as 'D's accomplice'.⁸⁴ However, it may also be the case that D and E are both principals in the robbery if, opportunistic E whose presence was unknown to D, picked up the money without D's prior agreement and led the escape in the hope of being included in the pay-out. The point being made is that there is certainly no requirement of previous concert between the parties: assisting in the performance of the remaining offence elements will suffice and, as aid may be provided without the recipient's awareness,⁸⁵ consensus is not a necessary requirement.

Finally, a person will be designated a principal via innocent agency where the commission of the offence has been effected by an unwitting human agent, the accountability falling squarely upon the procurer in just the same way as if an animal⁸⁶ or a mechanical instrument had been employed to assure the result. In order that the blameworthy party is duly held responsible, the designation

⁸¹ Theft Act 1968, s. 1

⁸² "Perpetrator" is the term favoured by Williams, *op cit.* n.13 at 4-5, where he points out that the term 'principal' was never the accepted term for the person who commits the crime. Indeed, prior to 1967, a principal in the second degree was in fact an accessory. On the other hand, 'perpetrator' is a far more expressive and accurate description of the primary party's activity and has the added advantage, over the term 'principal', in allowing the employment of a verb (perpetrate) and an abstract noun (perpetration). The potency of this argument is conceded. Nevertheless, for the sake of linguistic variety, the terms 'perpetrator', 'principal' and 'primary party' will be used as interchangeable terms.

⁸³ Law Com No. 177 at 159.

⁸⁴ The term 'accomplice' is thereby rendered a generic description of any party to the crime, whether principal or accessory.

⁸⁵ This is emphasised in the Law Com No. 177: Draft Criminal Code – clause 27 (2).

⁸⁶ In the South African case, *S v Smith en Andere* 2002 (1) SACR 188 (T), police officers were found guilty of causing grievous bodily harm after ordering their police dogs to attack (presumed) illegal immigrants.

of principal ensures that liability will be imposed on the procurer even when the agent has a defence that excused rather than justified the action.⁸⁷

2.1.2 Secondary Party: Accessory or Accomplice

Clause 27 (1) provides that a party will be designated an accessory if:

- (a) he intentionally procures, assists or encourages the act which constitutes or results in the commission of the offence by the principal; and
- (b) he knows of, or (where recklessness suffices in the case of the principal) is reckless with respect to, any circumstance that is the element of the offence; and
- (c) he intends that the principal shall act, or is aware that he is or may be acting, or that he may act, with the fault (if any) required for the offence.

Thus, an accessory does not personally perform any of the elements of the *actus reus* of the offence. A secondary party is always one step removed from the actual offence perpetration. Consequently, complicity involves a distinct *actus reus*, that of procuring, assisting or encouraging the crime in question. Except for the use of the more expansive and accessible term ‘encourage’ to combine the concepts of ‘abet’ and ‘counsel’, this much is evident from s.8 of the Accessories and Abettors Act.⁸⁸ Where this definition goes so much further is in the addressing of the fault elements that combine to create secondary party culpability. This issue is of central importance.⁸⁹ However, it is sufficient at this point to highlight the declaration of separate fault requirements for all of the offence definition conduct elements – forbidden conduct, prohibited consequence and surrounding circumstances.

It is also evident that, having dispensed with the distinction between principal in the second degree and accessory before the fact,⁹⁰ liability as an secondary party is not dependent upon presence or absence at the scene of the crime commission. With this arbitrary element rendered redundant, equivalent responsibility is incurred in either situation.⁹¹

2.1.3 Parties to a Joint enterprise

The Code does not explicitly mention participants in a joint enterprise and, applying the criteria set out above, it is clear that the roles of the co-adventurers may vary. To briefly recapitulate, joint enterprise scenarios typically include a homicide that follows on from another

⁸⁷ *Bourne* (1952) 36 Cr App Rep 125.

⁸⁸ The conduct terms of s.8 are analysed, below, pp.36-45.

⁸⁹ See Chapter 6 for a comprehensive analysis.

⁹⁰ For the historical distinction between secondary parties, see below, pp.58-65.

⁹¹ Since confirmed by *Rook* [1993] 2 All ER 955.

planned/intended offence that lies at the heart of the common purpose.⁹² Thus, the participant might be a co-perpetrator in the foundational offence or he might be an accessory to it, such as in the case of a getaway driver for a burglary. Where the foundational offence is a violent assault that subsequently escalates, causing the victim's death, the same distinction applies. The participant may physically contribute to the assault, striking or holding the victim, or may stand some distance away, watching for the appearance of police or witnesses. The overlap in the designations of parties to a joint enterprise was recognised by Beldam LJ:

... an analysis of the risk [that is] appropriate in the case of criminals who agree together in advance to commit an offence such as armed robbery, does not readily fit the spontaneous behaviour of a group of irrational individuals who jointly attack a common victim, each intending severally to inflict serious harm by any means at their disposal and giving no thought to the means by which the others will individually commit similar offences on the same person. In truth each in committing his individual offence assists and encourages the others in committing their individual offences. They are at the same time principals and secondary parties.⁹³

At first sight, there is nothing particularly pernicious about this observation, and as long as primary and secondary parties are judged by the same standard, the difference in designation will have no effect upon the resultant liability of the participants. However, difficulties become apparent when different *mens rea* requirements are applied to primary and secondary parties, particularly when secondary parties are assessed by a lesser culpability than the fault required for the substantive offence.⁹⁴

2.2 SOUTH AFRICAN LAW

The following summary comprises the current legal principles regarding the designation of secondary parties and the conduct elements required for the imposition of criminal liability under South African law.

2.2.1 Perpetrator/principal

'A person commits an offence as a principal (dader) where he satisfies all the requirements of the offence'.⁹⁵ This is satisfied in a number of ways. This occurs most obviously, where a person

⁹² Above, p.3.

⁹³ *Uddin* [1998] 2 All ER 745 at 751.

⁹⁴ See chapters 6 & 7.

⁹⁵ Whiting, "Joining in" [1986] 103 SALJ 38 at 51, or as Joubert JA declared in *S v Williams* 1980 (1) SA 60 (A): 'A perpetrator complies with all the requirements of the definition of the relevant crime. Where co-perpetrators commit the crime in concert, each co-perpetrator complies with the requirements of the relevant crime.' at 63 (translation *per* Burchell & Milton at 409).

personally and directly satisfies the definitional elements of the crime⁹⁶ but also where a person does so indirectly:

An indirect perpetrator is somebody who commits a crime through the instrumentality of another. X, for example, hires Z to murder Y. X is then an indirect perpetrator and Z who plunges a knife into Y's chest, the direct perpetrator.⁹⁷

This example extends beyond perpetration through innocent agency, which is also recognised under South African law.⁹⁸ Z is not an innocent or unwilling agent but chooses his action voluntarily, motivated by the promise of money. Under English law, X would not be considered a principal but a secondary party who procured,⁹⁹ or possibly counselled¹⁰⁰ the murder of Y. However, South African law takes the view that the classification of accomplice is a last resort category only after a party has failed to satisfy the requirements of a perpetrator. Thus, X, having caused the death of Y, can appropriately be described as having perpetrated Z's murder. Finally, although not personally complying with the *actus reus* requirements of the offence, a party to a common purpose, who has the requisite capacity and fault for the relevant offence, is termed a perpetrator. In this instance, the conduct of the direct perpetrator is attributed to the other parties by virtue of either a prior agreement to a common purpose or active association with it, so where a homicide offence is involved there is no requirement that a party to the common purpose be proved to have caused death.¹⁰¹

⁹⁶ Burchell & Milton at 391.

⁹⁷ Snyman *CL* at 247 n.3, citing *S v Nkombani* 1963 (4) SA 877 (A) and *S v Smith* 1984 (1) SA 583 (A).

⁹⁸ Burchell & Milton at 391.

⁹⁹ *Rook* [1993] 2 All ER 955, see above, p.42.

¹⁰⁰ *Calhaem* [1985] QB 808, see p.40.

¹⁰¹ Highlighting the difficulties and objections to the apparently anomalous imposition of criminal responsibility, Whiting, *op cit.* n.94, explained at 45 n.31, the reasons for common purpose liability in the following terms: 'The reason for the existence of the doctrine of common purpose is surely that the law takes the view that there are certain circumstances in which a person can be said to have associated himself sufficiently closely (albeit not causally) with the commission of an act by another for the other's act to be regarded as the joint act of both of them. It is submitted, pace De Wet & Swanepoel in their *Strafeg...* and others who like them totally reject the doctrine, that, where A and B contemporaneously assault X, either in the same way, as where both pelt X with stones, or with the same purpose or object, as where both intend to kill X, the law would be unrealistic and indeed seriously deficient if it did not treat the acts of each A and B in assaulting X as the joint acts of both of them. On the other hand, it may well be considered debatable whether cases such as *Mgxwiti* (the majority judgment) and *Dladla* do not take the principle of attribution too far. It may also be mentioned that, influenced perhaps by what was said in *Thomo's* case, there has been an unfortunate tendency... to seek to explain in terms of causation cases which can only be explained by reliance on attribution in accordance with the doctrine of common purpose.'

2.2.1.1 Common purpose

There are two ways of becoming a party to a common purpose. The first means to be recognised as prior agreement whether expressed or implied.¹⁰² In this case a party will incur liability whether present or absent at the scene of the crime.¹⁰³ The second means, where there is no such agreement, is via active association.¹⁰⁴ Where the circumstances fall into the second category, the criteria for liability are more stringent. To be liable for murder, the accused must be present at the scene of the violence and he must have been aware of the assault on the victim. There must have been intention to make common cause with the actual perpetrator; in other words, a common purpose can only be found where there is conscious sharing of common cause rather than an incidental and independent adoption of the perpetrator's purpose. Finally, the accused must have performed an overt act of association and must have done so with the requisite *mens rea*.¹⁰⁵ In the case of murder, the *mens rea* includes either an intention that the deceased be killed or foresight of the possibility of the killing. In the latter situation, the act of association would be performed with recklessness as to whether or not death was to ensue.¹⁰⁶ Thus, homicide liability via common purpose may be incurred in one of two scenarios: firstly, where a person is a party to a common purpose to murder and secondly, where a person is a party to a common purpose to commit some other crime while foreseeing the possibility of causing death to someone in the execution of that crime.¹⁰⁷ There is no doubt that English law would also hold all parties to the purpose liable in the first scenario. However, it is the imposition of liability in the second type of scenario that is comparable with English law's joint enterprise, where homicide is the collateral crime that arises during the commission of another foundational offence.¹⁰⁸

2.2.1.1.1 Joining-in

'Joining in' was the term applied when a person, with intent to kill, but with no prior common purpose, acceded to an attack after the victim, as yet still alive, had been mortally wounded.¹⁰⁹ Liability was imputed despite the fact that the victim's fate was already sealed before the accused's contribution. The justification for imposing retrospective liability primarily involved

¹⁰² *S v Mgedezi* 1989 (1) SA 687 (A) at 705. Although never expressly disapproved, it seems that 'mandate' (and ratification) has been replaced by the terms 'agreement' and 'active association'. See also *S v Maelangwe* 1999 (1) SACR 133 (NC); *S v Mkhize* 1999 (2) SACR 623 (W).

¹⁰³ E.g. *S v Nzo* 1990 (3) SA 1 (A).

¹⁰⁴ *S v Safatsa* 1988 (1) SA 868 (A); *S v Nooroodien en Andere* 1998 (2) SACR 510 (NC).

¹⁰⁵ *S v Mgedezi* 1989 (1) SA 687 at 705-6.

¹⁰⁶ I.e. with *dolus eventualis*, see above, p.25.

¹⁰⁷ *S v Majosi and Others* 1991 (2) SACR 532 (A) at 537.

¹⁰⁸ See above, p.3.

the appeal of the public policy benefits. It provided a pragmatic aid to the criminal justice system by permitting the prosecution a formidable advantage in the prosecution of mob murders, particularly those arising from politically motivated public order offences. Quite how the legal sleight of hand was achieved has been the subject of considerable controversy.¹¹⁰ However, there were essentially two approaches, the first, the 'Schreiner rule' after the judge's ruling in *Mgxwiti*,¹¹¹ argued that the accused ratified the conduct of the parties who inflicted the fatal injury, thus becoming complicit in their criminal responsibility.¹¹² Botha AJA¹¹³ found it unnecessary to rely on (the fiction of) ratification as a foundation for liability, preferring to base liability on active association¹¹⁴. However, both were minority judgments and were subjected to considerable academic and judicial criticism. The demise of *ex post facto* liability was confirmed by unanimous decision in 1990. Hoexter JA concluded in *Motaung*¹¹⁵ that the imposition of retrospective liability contravened legal principle. Thus, the participant in a murderous attack, who joins after the victim has been mortally injured, will be responsible only for his conduct as a sole actor and not as a party to the common purpose. The possible offences for which he could be held liable include attempted murder, offences against the person and public order offences.¹¹⁶

2.2.2 Accomplice/Accessory

Williams, the case that set the standard for the distinction between the parties to a crime, provides the following definition of an accomplice:

An accomplice's liability is accessory in nature so that there can be no question of an accomplice without a perpetrator...[A]n accomplice is not a perpetrator or a co-perpetrator, since he lacks the *actus reus* of the perpetrator. An accomplice associates himself wittingly with the commission of the crime ... in that he knowingly affords the perpetrator ... the opportunity, the means or the information, which furthers the commission of the crime.¹¹⁷

¹⁰⁹ *S v Motaung and Others* 1990 (4) SA 485 at 509.

¹¹⁰ E.g. *S v Khoza* 1982 (3) SA 1019; *S v Thomo* 1969 (1) SA 385 (A) (*per* Wessels JA); *S v Motaung* 1990 (4) SA 485 (A); Whiting, *op cit.* n.94 at 38. For further details, see below, pp.107-121.

¹¹¹ *R v Mgxwiti* 1954 (1) SA 370 (A) at 382-3. See below, pp.100-103.

¹¹² In *S v Motaung* 1990 (4) SA 485 at 521, Hoexter JA rejected the ratification principle in the following terms: '...on any view of the true juridical basis of the Schreiner rule, the element of retrospectivity, alien to our principles of criminal responsibility, remains ineluctable.'

¹¹³ *S v Khoza* 1982 (3) SA 1019.

¹¹⁴ *Ibid.* at 1053.

¹¹⁵ *S v Motaung* 1990 (4) SA 485 (A)

¹¹⁶ *Ibid.* at 521.

¹¹⁷ *S v Williams e'n ander* 1980 (1) SA 60 (A) at 63 *per* Joubert JA. Translation *per* Burchell & Milton at 409.

Whiting offers a more succinct definition: 'where a person is not a principal in an offence but has knowingly furthered its commission by someone else, he is an accessory (medepligtige) in the offence'.¹¹⁸ Both definitions require an understanding of the term "further". According to Snyman, the term "further" includes 'any conduct whereby a person facilitates, assists or encourages the commission of an offence, gives advice concerning its commission, orders its commission or makes it possible for another to commit it'.¹¹⁹ His inclusion of ordering an offence is curious because he considers a person who "procures" an offence, for example, by hiring an assassin, to be a perpetrator.¹²⁰ It seems unlikely that the difference between classification as a perpetrator or an accomplice hinges purely on the promise of remuneration and it is suggested that the *actus reus* for an accomplice may essentially be summarised as help or influence. Thus far, there is a similar approach with English law. However, the potential difference between the substantive law of the two legal systems arises in the requirement for 'a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator'.¹²¹ It is not entirely clear that the same applies under English law¹²² but it is equally unclear how it should be applied in South Africa. There is division of opinion as to how a causal requirement can be applied to result crimes. Using homicide as an example, if X has a causal connection with Y's causing of Z's death, X is an indirect perpetrator. Thus, 'it is a logical impossibility for there ever to be an accessory in homicide'.¹²³ Nevertheless, Joubert JA quite obviously did not intend to eliminate the possibility, having asserted:

He is... liable as an accomplice to murder on the ground of his own act, either a positive act or an omission, to further the commission of the murder, and his own fault, viz the intent that the victim must be killed, coupled with the act (*actus reus*) of the perpetrator or co-perpetrator to kill the victim unlawfully.¹²⁴

However, should this be the case, the difficulty is the precise nature and definition of a causal connection that falls short of causation.¹²⁵ As for the judicial response, in 1991, the Appeal Court

¹¹⁸ Whiting, *op cit.* n.94 at 51.

¹¹⁹ Snyman *CL* at 257.

¹²⁰ See above, pp.31-32.

¹²¹ *S v Williams e'n ander* 1980 (1) SA 60 (A) at 63 *per* Joubert JA (translation *per* Burchell & Milton at 409).

¹²² Although there are exponents of the view that causation is pivotal in the rationale for accessorial liability, notably KJM Smith. See below, p.141.

¹²³ Whiting, *op cit.* n.94 at 51. This is an opinion shared by De Wet & Swanepoel at 201; Snyman *CL* at 262 and Visser & Vorster at 512.

¹²⁴ *S v Williams e' n ander* 1980 (1) SA 60 (A) at 63 *per* Joubert JA (translation *per* Burchell & Milton at 409).

¹²⁵ The same question needs to be answered with regard to English law. For an examination of whether there should be a causation requirement for secondary liability, see below, pp.144-174.

when listing the possible means of incurring murder liability included common purpose but made no mention of accomplice liability.¹²⁶

3 THE *ACTUS REUS* OF COMPLICITY

Section 8 of the Accessories and Abettors Act 1861 provides four conduct terms for complicity: aid, abet, counsel and procure. However, it is a moot point whether these four words were originally intended in a generic sense as examples of the type of conduct that would incur liability when offered in contribution to an offence commission, or whether they were intended as exclusive and specific definitions of proscribed conduct.¹²⁷

3.1 AID

According to Webster's dictionary¹²⁸ "aid" means 'to render assistance or to help'. Synonyms include 'abet, co-operate, encourage, foster, second, support and sustain'. It is worth noting that aiding and abetting are considered interchangeable terms. The following definition of "abet"¹²⁹, also reveals that the two words share several synonyms. On the other hand, the following illustrations establish the subtleties of distinction between the closest synonyms:

Help expresses greater dependence and deeper need than aid. To aid is to second another's own exertions but may fall short of the meaning of help. To co-operate or collaborate implies concrete or approximate equality; to assist implies a subordinate and secondary relation. One *assists* a fallen friend to rise; he *co-operates* with him in helping others.¹³⁰

Thus, there is a relatively wide range of conduct that may be encompassed within the meaning of the verb. That conduct may vary in its degree of collusion. In joint enterprise cases, it will invariably be appropriate to describe the activity of the participants as collaboration or co-operation, the strongest, most complicit form of conduct. The weakest form is provided by aid, which involves little reliance but the seconding of another's efforts. The Court of Appeal considered the meaning of the word "aid" in *National Coal Board (NCB) v Gamble*¹³¹, where the

¹²⁶ *S v Majosi and Others* 1991 (2) SACR 532 (A) at 537.

¹²⁷ In *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773 at 779, Lord Widgery CJ stated: 'We approach s.8 of the 1861 Act on the basis that the words should be given their ordinary meaning... We approach the section also on the basis that if four words are employed... the probability is that there is a difference between each of those four words and the other three, because if there were no such difference, Parliament would be wasting time in using four words where two or three would do.'

¹²⁸ *The New International Webster's Comprehensive Dictionary of the English Language Encyclopedic Edition* (Trident Press International, 1996).

¹²⁹ Below, at 3.2.

¹³⁰ *Op cit.* n.126.

¹³¹ *National Coal Board v Gamble* [1959] 1 QB 11.

NCB were held liable for a contractor driving an overweight lorry on the highway. The offence came about by an NCB employee issuing a weight ticket to a contractor driver. The NCB procedure consisted of drivers filling their empty lorries from a coal hopper. The vehicle was then weighed and a ticket produced stating the weight. If the vehicle was found to exceed the legal limit, the excess would be off-loaded at an adjacent facility. In this case, when the ticket demonstrated that the coal weight exceeded the legal maximum, the driver expressed his intention to take his chances, whereupon the weighbridge operator gave him the ticket. The critical point was that the driver could not leave without a weight ticket, so the offence of driving an overweight lorry upon the highway was consequent upon the weighbridge operator's action. Devlin J pronounced that a 'person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it'¹³². Thus, aiding entails voluntary conduct that permits the commission of an offence.

Aid may comprise something provided as in this case¹³³, or something done, for example, holding a woman while she is being raped¹³⁴. The difference between these two scenarios is that, in the latter illustration, the conduct implies the seconding of the perpetrator's rape: the concept of "seconding" entails the imposition of fault into the interpretation of action. The person who seconds another's act will generally have some interest or stake in the end result. At the very least "seconding" involves support or approval. Seconding the perpetrator "colours" the secondary party's conduct. On the other hand, Devlin's J definition of aid is a morally colourless concept. The provision of aid may be detached and disinterested¹³⁵ and the critical test is objective, simply asking whether the rendering of the aid allowed the perpetrator to commit the offence.¹³⁶

¹³² *Ibid.* at 20.

¹³³ Moreover, according to the Draft Code (Law Com No. 177), a person assists another to commit a crime when he supplies tools or labour or information to the principal or does any act which facilitates the offence: Code Report para 9.18, cited in LCCP No. 131 para 4.52. Buxton *op cit.* n.77 at 256, n.20 asserts that '...a distinction must be made between advising P to commit the principal offence, and advising him *how* to commit it; the latter activity will be considered as an aspect of "aiding" the commission of the principal offence.'

¹³⁴ *R v Clarkson* [1971] 3 All ER 344.

¹³⁵ See the example of the indifferent gun seller, discussed in detail below, pp.184-5.

¹³⁶ Of course, in accordance with *National Coal Board v Gamble*, the aid must be 'essential' to the execution of the crime. This raises the question of causation. To what extent must the aid be found to have caused the offence? See below, pp.156-160.

3.2 ABET

The dictionary definition of “abet” includes to encourage and support, instigate or countenance. Unlike aiding, abetting implies wrongdoing. Nevertheless, suggested synonyms include aid, assist, embolden, help, incite, promote and sanction. As noted above the overlap between aiding and abetting is clearly apparent. Context of meaning is provided by the following illustration:

Abet and *instigate* are used almost without exception in a bad sense; one may incite either to good or evil. One *incites* or *instigates* to the doing of something not yet done, or to further increased activity or further advance in the doing of it; one *abets* by giving sympathy, countenance or substantial aid to the doing of that which is already projected or in the process of commission.¹³⁷

Abet is the only one of the four conduct terms in s.8 of the Accessories and Abettors Act that readily incorporates culpability within the conduct. In addition, abetting an action involves supporting conduct which has already been decided upon. Applying this sense of meaning leads to the conclusion that abetting comprises the strengthening rather than the creation of resolution.

It is interesting that in the case law since 1975, reference to abetting is made alongside aiding rather than in isolation.¹³⁸ The difference between the two terms was considered in *NCB v Gamble*: ‘If [a person aids] knowingly and with intent to aid he abets it as well.’¹³⁹

Abetting was held to provide the mental element to aiding rather than being a separate species of conduct. Certainly, unlike aiding which can be altruistic, it is usual to infer from the act of abetting the existence of fault. Although, *NCB v Gamble* was decided in 1958 when aiding and abetting were used in conjunction to comprise the conduct of a secondary party present at the scene of the crime, the same suggestion was made in 1975. In *DPP for Northern Ireland v Lynch*, it was asserted:

As regards the *actus reus*, ‘aiding’ and ‘abetting’ are ... synonymous. But the phrase is not a pleonasm; because ‘abet’ clearly imports *mens rea*, which ‘aid’ may not.¹⁴⁰

However, according to *A-G’s Reference (No 1 of 1975)*, aiding and abetting must have different meanings; otherwise, two words would not have been used. Is it possible to comply with this

¹³⁷ *Op cit.* at n.126.

¹³⁸ In *Royce* (1767) 4 Burr. Rep. 2073 the indictment employed “abetting” was used without the usual addition of “aiding”. Nevertheless, it was held to be sufficient to designate the party a principal in the second degree (cited in JC Smith, ‘Aid, Abet, Counsel or Procure’ in *Reshaping the Criminal Law* (ed Glazebrook, Stevens & Son, 1978) at 126).

¹³⁹ [1958] 1 QB 11 at 20.

¹⁴⁰ [1975] AC 653 at 681.

requirement? In 1997, the Court of Appeal when considering the case for forfeiture, was required to decide whether certain conduct constituted complicity in suicide¹⁴¹. Notwithstanding the application of s.2 of the Suicide Act 1961 rather than s.8 of the Accessories and Abettors Act, the terminology remains the same. Liability is incurred by 'a person who aids, abets, counsels or procures the suicide of another'. The facts involved a suicide pact between two lovers. The woman had expressed her intention to kill herself but not attempted to persuade the man to commit suicide as well. Nevertheless, he decided to join her in death and set about acquiring the necessary materials to redirect the fuel emissions into the interior of the car. The attempt at carbon monoxide poisoning failed, whereupon the two tried to hang themselves in the loft. The man made wire nooses and after declaring their mutual love, both counted to three before jumping off a ladder together. The wires broke and sheets were used instead. This time the suicide attempt resulted in the man's death. Realising her lover was dead, the woman unsuccessfully tried to take her own life by cutting her wrists and throat.

The Court of Appeal agreed with the judge at first instance that, whilst the woman had not counselled or procured the suicide of her lover, she had aided and abetted it. Aiding and abetting was established by the shared intention to commit suicide, the emotional support of companionship and the verbal encouragement provided by counting to three before leaping from the ladder. This conduct certainly realises the requirement for abetting the man's action. However, the facts do not establish any conduct beyond emotional and oral encouragement. The woman does not seem to have performed any physical act of assistance. In reality, it is quite feasible that she did and simply holding the ladder for the man to mount would have been sufficient to comprise aid. Nevertheless, it is possible to apply a restrictive meaning whereby abetting does not necessarily entail actual aid. Similarly, if a person stands watching a fight intending to assist when needed he has not given aid until he joins the affray.¹⁴² However, if the combatants are aware that they can rely on the on-looker's timely intervention, he is abetting the assault by providing support and encouragement.

Notwithstanding, the possibility for a narrow interpretation of abetting, the usefulness of such an approach is open to serious doubt. In most cases the terms aid and abet will need to be employed to avoid latent difficulties of interpretation. Moreover, there is no place in the law for such sterile pedantry.

¹⁴¹ *Dunbar v Plant* [1997] 2 All ER 289.

3.3 COUNSEL

The verb “counsel” means to advise or recommend. In contrast to abetting, counselling is a far more ambivalent term. Indeed, the word is often used to suggest good judgment or prudence. This is demonstrated by the priority given to the synonyms ‘admonition’, ‘caution’ and ‘warning’. More relevant to legal context are the synonyms ‘persuade’ and ‘suggest’. Example of context is provided by the following illustrations:

Advice is an opinion suggesting or urging some course of action ... *Counsel* implies mutual conference. *Advice* may be unsought or even unwelcome; *counsel* is supposed to be desired.¹⁴³

The case law supplies a definition with a different emphasis. In *Calhaem*¹⁴⁴ the Court of Appeal attempted to determine the difference between counselling and procuring an offence. Complying with the House of Lords’ directive, Parker LJ confirmed the ordinary meaning of “counsel” to be to ‘incite, solicit, instruct or authorise. Perhaps to use a more common phrase “to put somebody up to something”’,¹⁴⁵ which perhaps suggests that “instigate” may be preferred to “counsel”.¹⁴⁶

Calhaem considered the difference between counselling and procuring which involved the examination of the role of causation in complicity¹⁴⁷. However, at this stage it is more interesting to compare “counselling” with “abetting”. In accordance with the historical distinction between secondary parties, counselling would be performed by an accessory before the fact whereas an abettor would be present at the scene of the crime.¹⁴⁸ Developing the context and definition provided by *Calhaem*, counselling involves instigation. The counsellor introduces the suggestion, creates the resolution of the potential perpetrator, in colloquial terms “sets the ball rolling”. This attempt to generate the commission of offence suggests purpose. However, in *Giannetto*¹⁴⁹ the judge advised the jury that if a man was told “I am going to kill your wife” and he responded by patting the person on the back and saying “Oh goody”, that would be enough to make him an accessory to the subsequent murder. The husband’s liability would presumably be incurred on the grounds of having counselled the offence. Thus the slightest evidence of encouragement or approval will be sufficient.

¹⁴² *Allan* [1963] 1 QB 130.

¹⁴³ *Op cit.* n.126.

¹⁴⁴ *Calhaem* [1985] QB 808.

¹⁴⁵ *Ibid.* at 813.

¹⁴⁶ Cf. Buxton who suggested that ‘disinterested advice’ will suffice: *op cit.* n.77 at 257.

¹⁴⁷ For the analysis of *Calhaem* in terms of causation and consensus requirements, see below at pp.155-157.

¹⁴⁸ See below, pp.58-65.

¹⁴⁹ [1997] 1 Cr App R 1 at 13.

Similarly with abetting, in *Wilcox v Jeffrey*¹⁵⁰ it was held that the defendant's presence at a public performance by H, a celebrated musician who had been granted leave to enter the UK on condition that he take no employment, was sufficient to make the defendant liable for aiding and abetting H in his contravention of the Aliens Order 1920. Further evidence of encouragement was provided by the fact that he met H at the airport and reported the performance in his periodical. Moreover, without using presence as a factor, it is impossible to identify where counselling ends and abetting begins. If suggestion and persuasion are continuing acts, counselling will also include bolstering resolve. In this sense it begins to overlap with abetting an action. As the Law Commission pointed out:

The difficulty is that the natural meaning of "aid" is to give help or assistance, but "abet" has the distinctly different meaning of "incite, instigate or encourage". Moreover, as so defined, "abet" seems indistinguishable from the ordinary meaning of "counsel".¹⁵¹

3.4 PROCURE

*A-G's Reference (No 1 of 1975)*¹⁵² dealt most specifically with the conduct entailed in procuring an offence. Accordingly,

Procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.¹⁵³

The facts of the case involved the secondary party's furtive lacing with alcohol of the principal offender's drinks. Unaware that he was "over the limit" the principal drove home. During the course of the journey, he was apprehended and charged with the strict liability offence.¹⁵⁴ If the secondary party was to be held liable, the principal's lack of knowledge led to the corollary that an offence may be procured unknown to, and therefore without the principal's collaboration.¹⁵⁵

Moreover, if consensus is unnecessary, the role of causation is pivotal:

Causation here is important. You cannot procure an offence unless there is a causal link between what you do and the commission of the offence.¹⁵⁶

This has led to "procuring" being held to be a peculiarly specific method of complicity.¹⁵⁷ It is separated from the other verbs by the greater culpability involved in purposefully setting out to

¹⁵⁰ [1951] 1 All ER 464.

¹⁵¹ LCCP No. 131 para 2.12.

¹⁵² [1975] QB 773.

¹⁵³ *Ibid.* at 779. The dictionary definition confirms this interpretation. According to Webster's (n.118) definition to procure means 'to obtain by some effort or means, to bring about or cause'.

¹⁵⁴ Road Traffic Act 1972 s.6(1).

¹⁵⁵ [1975] QB 773 at 779-780.

¹⁵⁶ *Ibid.* at 780.

achieve the crime commission.¹⁵⁸ *Blakely v DPP*¹⁵⁹ also considered procurement in the context of a strict liability motoring offence where the crime was brought about without the principal's knowledge. As the perpetrator would be found guilty in spite of his lack of fault, this definition of procurement ensured the criminal responsibility of the accessory who sought to effect the crime and was thereby the more culpable party. The Law Commission have suggested that "procuring" may be dealt with by confining it to strict liability offences, where the causation issue is clear-cut and uncomplicated:

[A] principal's liability depends, in most crimes, on his subjective state of mind towards the consequences of his own acts, and the principal's willed human action is therefore interposed between the conduct of the accessory and the completion of the principal crime on which the accessory's liability depends. In such cases it is not in fact possible to assert a causal relationship, in the legal sense of causation, between the accessory's actions and the commission of the principal's crime. Where by contrast the principal's liability does not depend on the existence of any subjective state of mind on his part, as in the case of crimes of strict liability, it may still be possible to see the accessory as having caused the commission of that crime.¹⁶⁰

Indeed, the emphasis on a causal requirement without the need for communication or consensus, narrows the gap between liability as a secondary party and as a principal under innocent agency to a degree where the boundary is indistinguishable.

However, it is arguable that this definition of "procure" is unnecessarily restrictive. In *Rook*,¹⁶¹ a husband promised three men cash and jewellery in return for the murder of his wife. One of the men, Rook, recruited a fourth man and also participated in the planning. The murder took place according to the plan, even though Rook deliberately absented himself. The husband was held to have procured the offence and Rook to have 'assisted, encouraged or counselled the commission of the crime'.¹⁶² By no stretch of the imagination were the hirelings "innocent" or unknowing and so, applying the reasoning of the Law Commission, the husband could not be held the legal cause of his wife's murder. Putting to one side the question of whether the concept of causation is broad enough to accommodate the husband's conduct, it surely puts no undue strain on the

¹⁵⁷ LCCP No. 131 clause 2.22: 'Procurement, when properly analysed, would seem to fall into a separate category of liability.'

¹⁵⁸ The Law Commission recommends the abolition of 'procuring' in this limited meaning and context. LCCP No. 131 paras 2.10-2.14; 4.1924.197 apply only to strict liability offences. For an analysis of how procuring strict liability offences extends traditional complicity and overlaps with innocent agency, see below, pp.130-135.

¹⁵⁹ [1991] RTR 405.

¹⁶⁰ LCCP No. 131 para 2.18. For examination of Hart and Honoré's theory of causation, on which this statement relies, see below, pp.145-151.

¹⁶¹ [1993] 2 All ER 955.

ordinary meaning of the word to assert that the husband did, in fact, “procure” his wife’s murder: he deliberately set about making it happen.¹⁶³ Following this line of reasoning, it is appropriate that the procurer of a “semi-innocent” agent,¹⁶⁴ should be liable for a more serious offence to reflect the greater culpability of the secondary party.¹⁶⁵

3.5 CHOICE OF CONDUCT TERMINOLOGY

A great deal of effort has been expended on exploring the results obtained by applying the ordinary meanings of “aid”, “abet”, “counsel” and “procure”. The main questions must be whether a restrictive interpretation ultimately makes any difference, and whether an improvement can be made upon the current conduct terms. Firstly, it must be conceded that it is possible to narrowly define each verb, particularly if examples of context are used to delimit the shades of meaning. However, it has been seen that introducing synonymous terminology blurs the edges. This is further aggravated by the fluidity involved in providing definition to a factual context. This merging of definition is particularly true of “aiding” and “abetting”.¹⁶⁶ Furthermore, to give the words “abet” and “counsel” their ordinary meaning in the criminal context tends to make them virtually indistinguishable, unless an additional factor, such as presence at the scene of the crime, is superimposed. However, employing this criterion would reintroduce the unwelcome distinction between a principal in the second degree and an accessory before the fact. Finally, there is no evidence, beyond the assertion in *A-G’s Reference*, that the conduct elements of complicity have ever been interpreted in so restrictive a way:

Until very recently, the conduct that constitutes aiding and abetting had been thought to fall into two, albeit sometimes overlapping, categories: conduct that encourages or influences the perpetrator; and conduct that helps to perpetrator to carry out the offence. It is not possible to regard that as a complete or accurate statement of the present law, because such analytical questions have never been definitively confronted in the common law authorities and the question has in any event been clouded in recent years by ... *AG’s Reference (No 1 of 1975)*.¹⁶⁷

¹⁶³ *Ibid.* at 959.

¹⁶³ You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.’: *A-G’s Reference (No.1 of 1975)*[1975] QB 773 at 779.

¹⁶⁴ The issue of a semi-innocent agent raises questions as to the appropriate role of causation when there is a knowing and consenting principal. In this case the informed action of the perpetrator dilutes the causal link between the accessory’s conduct and the crime. See below, pp.136-139.

¹⁶⁵ For discussion on differential verdicts see below, pp.136-139.

¹⁶⁶ LCCP No. 131 para 2.12.: ‘The injunction to give the four words their ordinary meaning is in any event difficult to obey, since at least the word “abet” can hardly be said to be in ordinary usage.’ LCCP No. 131 para 2.12. Williams, *op cit.* n.13 at 7, appreciated the verb “abet” as a ‘useful technical term in the commission of a crime (“help” by itself is morally colourless), but it is poor for instructing juries, or for in a code.’

¹⁶⁷ LCCP No. 131 para 4.9.

However, having argued that attempting to apply the natural meanings of “aid”, “abet”, “counsel” and “procure” leads down a cul-de-sac of fruitless pedantry, the emphasis upon the meaning of the verbs has achieved the positive result of focussing attention upon finding a better terminology. It has been suggested that the types of conduct involving secondary liability can be effectively reduced to “influence” and “help”:

Two kinds of action render the secondary party liable for the criminal actions of the primary party: ...influencing the decision of the primary party to commit a crime, and... helping the principal actor commit the crime, where the helping actions themselves constitute no part of the actions prohibited by the definition of the crime.¹⁶⁸

Although this passage was cited with approval by the Law Commission,¹⁶⁹ the verbs “assisting and encouraging”¹⁷⁰ were chosen in their consultation paper, without explaining the rationale for the choice.

It is submitted that that “influence” rather than “encouragement” is the more appropriate word to encompass the various types of conduct included within incitement.¹⁷¹ Under South African law, an inciter is one who:

reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other’s mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity.¹⁷²

Moreover, English law has held that threats and pressure comprise incitement.¹⁷³ Again, coercive conduct can be accommodated within the concept of influence but would not naturally be described as encouragement, except perhaps in the kind of euphemistic sense that has no place in the criminal law.

¹⁶⁸ Kadish, *Complicity, Cause and Blame* at 342.

¹⁶⁹ LCCP No. 131 n.469. It was also noted thereat that Williams had already approved of Kadish’s terms. Indeed, Williams had made critical comments upon the use of the verbs “assist” “encourage” and “procure” in the Draft Code. Deeply unsatisfied with the employment of “assist”, Williams *op cit.*n.13 at 7, stated that “help” was his favoured verb and commented tersely: ‘As to the word “assist”, the codifiers had the choice of “help”, “aid” and “assist”, and they chose the worst.’

¹⁷⁰ LCCP No. 131 para 4.10.

¹⁷¹ LCCP No. 131 The law commission proposed that there should be two new inchoate offences, to take the place both of the present law of aiding and abetting and of the present law of incitement: para 4.12.

¹⁷² *S v Nkosiyana* 1966 (4) SA 655 AD at 658.

¹⁷³ *Race Relations Board v Applin* [1973] QB 815 at 827.

Finally, Williams was particularly unimpressed by employing the word “procure”,¹⁷⁴ preferring Kadish’s verb “influence”:

“Influencing says what it means: “procuring” perpetuates mysticism. Why use an unhelpful and misleading term when an apt one is ready at hand. [Furthermore,] the notion of influencing in this sense is so wide that it includes encouraging.¹⁷⁵

Moreover, it is seriously questionable whether either “assist” or “encourage” satisfactorily describe the conduct revealed by the facts of *A-G’s Reference* and *Blakely*.¹⁷⁶ “Assistance” implies a secondary role that supports the efforts of the perpetrator, whereas in both cases the unknowing principal actor made no effort to contravene the law, and the secondary party played the pivotal role in the offence commission. “Encourage” suggests the need for communication with the primary party. The dictionary meaning is ‘to inspire with courage, hope or resolution’¹⁷⁷ and a principal cannot be said to have been inspired by facts of which he is entirely unaware. On the other hand, applying “influence” to the facts of *A-G’s Reference* and *Blakely* also fails to provide satisfaction. “Influence” involves ‘the power or process of producing an effect upon a person’¹⁷⁸ and, although the meaning edges closer to the required context, it is submitted that it still fails to include “procure” in its restricted meaning of ‘producing [a result from an unwitting party] by endeavour’.

¹⁷⁴ Williams, *op cit.* n.13 at 6-7.

¹⁷⁵ *Ibid.* at 7.

¹⁷⁶ Although the Law Commission admitted as much and recommended the termination of this restricted meaning. See above, pp.41-43.

¹⁷⁷ *Op cit.* n.126.

¹⁷⁸ *Ibid.*

CHAPTER 2

HISTORICAL DEVELOPMENTS IN COMPLICITY AND HOMICIDE

1 INTRODUCTION

In 1883, Sir James Stephen declared that a comprehensive account of any branch of law could not be achieved without the following three parts: firstly, its history; secondly, a statement of it as an existing system and finally a critical discussion of its component parts with a view to its improvement.¹ Fifty years ago, referring specifically to murder, the Royal Commission stated:

The law of murder is not easy to ascertain or to formulate precisely, and any attempt to do so demands some examination of its historical development.²

This statement is equally valid when applied to complicity liability and involuntary manslaughter. The historical origins and development still reverberate in contemporary judgments and certain issues remain tacitly unresolved or ambiguous. It is therefore, essential to include in such an enterprise, a considered exposition and exploration of the history, its influence and continued presence in current law and the rationale behind it.

A final object of this work is to attempt to formulate proposals for the offences of murder and involuntary manslaughter, which provide a structured, integrated and consistent approach for both perpetrators and secondary parties. Mindful of Professor Williams rather terse caveat that 'when you make a reform proposal it is always worth knowing whether it has been made before, what was its reception and what were the objections to it',³ the history will also provide an invaluable backdrop to the suggestions for reform. Indeed without it, there is a strong possibility that examination of the current law will seem incomplete and lacking the context and substance required for a thorough appraisal. Any reform proposals would be seriously circumscribed by such a condition.

¹ Stephen, *History of the Criminal Law of England* in 3 volumes (Macmillan & Co. Ltd., 1883) Vol 1 at 1 (hereafter Stephen, [Volume No.] *History*).

² Royal Commission, Report on Capital Punishment 1949-53 Cmd 8632 (hereafter Cmd 8632) at para 71.

In fact, the broader social context has played a dramatic part in the development of homicide and complicity liability. These various influences and their resulting impact upon the direction of criminal law amendment provide a necessary background to the detailed examination of the actual offences.

2. THE RELEVANCE OF PUNISHMENT AND HISTORICAL CONTEXT

It has been stated that 'the history of homicide reflects an unceasing effort to limit liability'.⁴ This is especially true of murder. The common denominator in all killings is the causing of death. Therefore, liability can be restricted in two ways. One means is to specify attendant circumstances which aggravate the killing and so elevate it to murder. For example, in the United States it is relatively common to treat all killings with a deadly weapon presumptively as murder.⁵ The other method is to refine the culpability requirements so that murder liability is incurred by killers who act with a requisite fault which demonstrates their blameworthiness. For example, in English law, murder involves intentionally causing a person's death. From this it can easily be appreciated that the fault element in the crime does not exist in an abstract form but relates to the consequence. However, it is possible to develop the relationship between fault and consequence further. So, in addition, the fault may be connected to stages of attaining the forbidden result. This is the case with murder under English law. A person need not have intended to kill the deceased. It is murder if the victim dies although the perpetrator intended to cause only grievous bodily harm. When an offence is constructed in such a way there are two separate factors inter-linking to create responsibility, it is therefore necessary to examine both the fault and the harm-type (or harm-degree) requirements.

Homicide includes all unlawful killings and it is inevitable that the exposition of the origins of murder, particularly in the earliest stages, involves an overlap with involuntary manslaughter. Indeed, the degree of killing that is now known as manslaughter did not originally exist and the establishment and extension of this offence in its different guises is the primary means by which murder liability has been restricted. Therefore, the areas of interest in the history of murder include discovering the parameters which distinguish murder from other killings, particularly those unlawful homicides, which subsequently become known as manslaughter. This

³ Williams, 'The *Mens Rea* for Murder: Leave it Alone' [1989] LQR 387-397 (reprinted in HL 78-I at 123).

⁴ Fletcher, *Rethinking Criminal Law* (Little, Brown & Co., 1978) (hereafter Fletcher) at 236.

⁵ *Ibid.* at 266.

examination naturally begs the question why the particular method of distinction was chosen. For example, one of the means developed is the establishment of culpability and the assignment of malice as a requirement for murder. Another is the type of punishment allotted to murderers. An especially severe punishment highlights murder as an offence apart. This may stem from a cultural need to mark out murderers as wicked and depraved killers and therefore deserving of the particular fate: it has been suggested that,

What makes homicide unique is ... the uniqueness of causing death. While all personal injuries and destruction of property are irreversible harms, causing death is a harm of a different order. Killing another human being is not only a worldly deprivation; in the Western conception of homicide, killing is an assault on the sacred, natural order. In the Biblical view, the person who slays another was thought to acquire control over the blood – the life force – of the victim. ... In this conception of crime and punishment, capital execution served to expiate the desecration of the natural order.⁶

This goes beyond social denunciation or moral outrage. According to this account, the punishment is necessary to restore the balance of the natural order. It is, to some degree, supported by Hale. Writing in the seventeenth century, he declared:

No man hath the absolute interest of himself but 1. God almighty hath an interest and propriety in him, and therefore self-murder is a sin against God. 2. The King hath an interest in him.⁷

Hale was referring to suicide (*felo in se*), but the rationale is equally relevant to the murder of others. In fact, in giving the two reasons, it is revealed that whilst, the first is based on religious grounds, the second is arguably more pragmatic. The king was interested in human life as a commodity.

On the other hand, it should be appreciated that the perception of murder as the most heinous of crimes depends upon complementary cultural values. Tacitus reveals that the early Germanic tribes inflicted capital punishment for crimes such as treason and cowardice, whilst homicide was compensated by a payment of horses or oxen.⁸ It is not difficult to understand how a social structure established upon communal values of aggressive conquest would tolerate killing but hate and fear cowardice and betrayal.

⁶ *Ibid.* at 235-6.

⁷ Hale, *Historia Placitorum Coronae* 1736 (London Professional Books, 1971) (hereafter Hale [Vol No.] PC) at 411-2.

⁸ Pollock and Maitland, *The History of English Law Before the Time of Edward I Vol II* 2nd ed. (Cambridge University Press, 1911) (hereafter Pollock & Maitland, *II History*) at 451.

Tacitus' history implies that the development of the homicide offences relies on the development of cultural values. It is therefore likely that the substantive law will progress as a product of the political, social and economic context. That is not to say that the two areas will progress simultaneously; indeed it is almost inevitable that changes in the law will take place far more slowly, particularly if they need to occur through the courts. The point is that cultural changes will tend to galvanise amendments to the criminal law.

In addition, the allotted punishment for homicide necessarily plays a significant role in reflecting and reinforcing social attitudes. It is the means of emphasising the heinousness and disapproval of the offence. Depending upon its efficacy, punishment may help or hinder the development of substantive law. It is perhaps to be expected that during the history of homicide, attempts have been made to provide exemplary or aggravated punishments for certain classes of killing. During the reign of Henry VIII, poisoning was singled out as an offence which deserved a particularly excruciating death. However, the resulting practice of boiling the culprit alive did not survive for long. In this instance, the aggravated sentence went too far and succeeded in offending even the sensibilities of even hardened Tudor onlookers.⁹ During the eighteenth century murderers were targeted as the recipients of aggravated forms of the death penalty.¹⁰ In addition to forfeiting lands and goods, the murderer's corpse was refused Christian burial but was instead destined to be dissected or gibbeted.¹¹ This was done to better effect both general¹² and individual deterrence:

...offenders who were unmoved by the sentence of death were terrified at the idea that their bodies might be dissected, and still more that they might be hung in chains.¹³

The offender unaffected by the possibility of the death penalty was probably so disposed because capital punishment was so common as to breed contempt. This leads into a related though contrary point. If there is no difference in punishment between offences the refinement of substantive distinctions becomes less urgent or relevant. This was the case by the beginning of the nineteenth century. Over two hundred offences carried the death penalty.¹⁴ Most had been

⁹ It was introduced in 1530 (22 Hen. 8, c.9) and repealed in 1547 (1 Edw. 6, c.12, ss.2 and 13). See Radzinowicz , *A History of English Criminal Law and its Administration from 1750* Volume 1 (Stevens & Sons, 1948) (hereafter, Radzinowicz, *I History*) at 238-239 and Coke, *Third Part of the Institutes of the Laws of England* (1979, Garland Publishing) (hereafter Coke *3 Inst*) at 48.

¹⁰ 25 Geo. 2, c.37 (1752).

¹¹ See Radzinowicz , *I History* at 206-9 and Stephen, at *I History* 477.

¹² Rather than provide a lesson in deterrence, public executions were treated as public holidays. For the reactions of the populace to "Tyburn Fair", see Radzinowicz , *I History* at 168-194.

¹³ Radzinowicz , *I History* at 215 (details of the practice of gibbeting at 216-220).

¹⁴ Below p.67.

passed during the eighteenth century, an era of legislative frenzy as Parliament attempted to control the dramatic social and economic changes precipitated by the Industrial Revolution. Under the notorious Waltham Black Act,¹⁵ it was a capital offence to break down the mound of fish ponds¹⁶ or to wound cattle.¹⁷ At that time it was murder if a person was accidentally and unforeseeably killed during the course of a felony such as burglary. Clearly, there will be no reason to even consider the injustice of imposing this kind of constructive malice, if burglary is a capital offence anyway. The rational inquiry would be centred on removing the death penalty from the offences that obviously do not merit such a severe outcome. Developments in substantive law must therefore be examined with these issues in mind, otherwise only a partial picture will emerge.

2.1 EARLY PUNISHMENT

The social order of the Anglo-Saxon tribes revolved around the family group. A slow change followed the arrival of Christianity¹⁸, when the adoption of the Judaic 'outlook on moral questions which was strictly individualistic'¹⁹ moved responsibility for actions away from the group to centre on the individual who performed the act. As with Tacitus' Germanic tribes, Anglo-Saxon homicide was a deed that could be paid for and was thus "emendable".²⁰ Therefore the penalty took the form of pecuniary reparation organised at a local level. The killing was a wrong against the victim's family and a breach of the peace.²¹ Thus, unless it was a specially aggravated form of homicide, the slayer could buy the peace that he had broken:

To do this he had to settle not only with the injured person but also with the king; he must make *bót* to the injured person but also *wíte* to the king.²²

The *bót* for homicide was the *wergild* or *wer* of the deceased: the price established in accordance with the deceased's rank in life. Along with money compensation there was recourse to feuding. Thus, the homicide had two options; he could "buy off the spear" or "bear it".²³ The local custom of monetary reparation ran parallel with the attempts of embryonic state control and the

¹⁵ 9 Geo. 1, c.22 (1723). '[N]o other single statute passed during the eighteenth century equalled [it] in severity, and none appointed the punishment of death in so many cases.': Radzinowicz, *1 History* at 51.

¹⁶ *Ibid.* at 60.

¹⁷ *Ibid.* at 66.

¹⁸ Introduced with the arrival of St Augustine in 597.

¹⁹ Plucknett, *A Concise History of the Common Law* 4th ed. (Butterworth & Co., 1948) (hereafter Plucknett, *History*) at 9.

²⁰ Pollock & Maitland *II History* at 451.

²¹ *Ibid.*

²² *Ibid.*

²³ Plucknett, *History* at 401.

'institution of true punishment'.²⁴ The most prevalent of these was outlawry. An outlaw was expelled from society, forfeiting everything: life, limb, lands and goods.²⁵ However, a death sentence may have been imposed in certain cases, in the form of human sacrifice.²⁶ By a gradual process state-sanctioned punishments become a viable alternative: royal pleas are first encountered in the reign of Canute.²⁷

With regard to the participants liable for punishment, it is noteworthy that ancient law recognised that liability needed to extend beyond the actual perpetrator of the forbidden deed. With punishment based on the idea of reparation, the occurrence of harm was an indispensable element.²⁸ However, it was appreciated that harm could be caused by words as well as by actions and Anglo-Saxon law included the 'slayer by rede as well as the slayer by deed'.²⁹ Thus, a person who instigated or encouraged a killing committed no crime until the victim was dead, but then he was guilty of murder. There is evidence that from the seventh century onwards the criminal law imposed liability for a variety of modes of participation.³⁰ In essence these can be distilled into rendering physical assistance during the commission of the offence and procuring, counselling or commanding the crime.

Whilst it is clear that secondary liability has an ancient lineage, it is less easy to discover the prevailing attitude demonstrated through the imposition of punishment. For example, was the person who applauded the killer's succession of blows allowed to make a lesser contribution to the total of the *wer*, thereby reflecting his minor contribution to the death? In fact the lack of contemporary information makes it impossible to infer whether accomplices were as a rule treated more leniently than perpetrators although 'the slim evidence available suggests generally not'.³¹ Nevertheless, this suggestion does not explain whether the equivalent punishment was necessarily due to a perception of moral equivalence for the harm rendered. It is possible that it was instead the corollary of the existing sanctions being unable to manifest satisfactorily any gradations of responsibility. After all, there can be no degrees of outlawry or feud.

²⁴ Pollock & Maitland *II History* at 451.

²⁵ *Ibid.* at 451, 461.

²⁶ *Ibid.* at 451.

²⁷ Plucknett, *History* at 402; Stephen, *III History* at 25.

²⁸ There was therefore no basis of liability in harm threatening behaviour because there had been no harm to be repaired: Pollock & Maitland *II History* at 409.

²⁹ *Ibid.*

³⁰ See the examples discussed by KJM Smith, *Treatise* at 2 n.4. References to secondary liability in *Leges Henrici Primi* ed. and translated by Downer (1972) include c.68,10, c.70,16, c.72,1a and c.85,3.

³¹ KJM Smith, *Treatise* at 2 n.4.

2.2 CAPITAL PUNISHMENT

2.2.1 The advent of capital punishment

Gradually the State acquired the right to punish. By the mid twelfth century, homicide, mayhem, robbery, arson and rape were pleas of the crown, that is violations of the king's peace punishable or pardonable by him alone.³² During the reign of Henry II, the compensation system still existed. Thus,

A mere wilful homicide, when there has been no treachery, no sorcery, no concealment of the corpse, no sacrilege, no breach of royal safe conduct, is not unemendable. It still if not duly paid for, exposes the slayer to the vengeance of the slain man's kin. But it can be paid for.³³

However the tariff was now very complicated and expensive and it has been suggested that by the beginning of the twelfth century the whole system had become 'delusive, if not hypocritical'.³⁴ It appeared to reconcile the demands of retributive justice with a Christian reluctance to shed blood so that money was exacted instead of life. However, so much money was demanded that few were able to pay and so were reduced to outlaws or slaves.³⁵

By the reign of Richard I capital punishment was being employed³⁶ but the significant fact is not merely that wilful homicide had become a capital crime but that the deceased's kin lost their right to a *wer*.³⁷ Indeed, one of the features of the late eleventh and twelfth centuries was the arbitrariness of the designated punishment. The execution and type of punishment depended upon the king's discretion:

The Conqueror would have no one hanged; emasculation and exoculation were to serve instead. Henry I would now take money and now refuse it ... Loss of hand and foot became fashionable under Henry III; but we are told that he hanged homicides and exiled traitors.³⁸

During the course of the thirteenth century, the death penalty took the place of mutilation and under the rule of Henry III and Edward I, capital punishment became the common punishment for

³² Pollock & Maitland *II History* at 455.

³³ *Ibid.* at 458.

³⁴ *Ibid.* at 460.

³⁵ The interplay between the criminal law and the political and socio-economic position is exposed in the effects of this institution. 'When we reckon up the causes which make the bulk of the nation into tillers of the lands of lords, *bót* and *wíte* should not be forgotten.': Pollock & Maitland *II History* at 460.

³⁶ Stephen, *I History* at 458.

³⁷ Plucknett, *History* at 402; Pollock & Maitland *II History* at 459.

³⁸ Pollock & Maitland *II History* at 461.

felony.³⁹ This continued into the first half of the nineteenth century 'subject to the singular and intricate exceptions introduced by the law relating to the availability of pardons and the benefit of clergy'.⁴⁰

2.2.2 Exemptions

2.2.2.1 Pardons

'It is in the history of pardons ... that the gradual growth of a classification of homicides is to be sought.'⁴¹ The granting of royal pardons became a corollary prerogative from Edward I's adoption of homicide and other felonies as pleas of the Crown in the late thirteenth century, in his attempt to administer the criminal law more efficiently with a greater degree of central control. Pardons were an essential element in ensuring justice since, as any unjustified killing incurred strict liability, 'the man who commits homicide by misadventure or in self defence deserves but needs a pardon'⁴². Similarly, any other mitigating circumstance could only be urged during an appeal for a pardon and not before the court as 'the prerogative of mercy was the only point at which our mediaeval law was at all flexible'⁴³. Between 1290 and 1390, the granting of royal pardons changed from being a needful measure of mercy to a pernicious, pervasive practice of evading just punishment.⁴⁴ In 1390, the Commons petitioned against the issuing of pardons, arguing that pardons for murder, treason and rape had been granted too freely and that forthwith general all felony pardons and pardons for culpable homicide should not be issued. The Statute of 1390⁴⁵ curbing the royal prerogative provides evidence of the progression of the substantive law of homicide.⁴⁶ Nevertheless, pardons remained readily available to murderers and ambushers

³⁹ Stephen, *I History* at 458.

⁴⁰ *Ibid.*

⁴¹ Plucknett, *History* at 420.

⁴² Pollock & Maitland *II History* at 479. By the Statute of Gloucester (6 Edw. 1, c.9 (1278)) suspects found to have killed *per infortunium* or *se defendendo* were expected to be granted a pardon as a matter of course (Stephen, *III History* at 26; Fletcher at 237).

⁴³ Plucknett, *History* at 420.

⁴⁴ Edward I set the precedent by issuing pardons for all felonies to those who accompanied him on his Scottish campaigns. His son and grandson followed his example of gaining support through abuse of the pardon system in a century which was dominated by dramatic socio-economic changes following the Black Death in 1348-9. The general feeling that the whole social order was on the verge of collapse was exacerbated by the appearance of mafiosi-style members of the nobility leading organised criminal bands, who were frequently exonerated by the gratuitous issue of pardons, which effectively guaranteed the receiver immunity from criminal action. For further details, see Kaye, 'The Early History of Murder and Manslaughter' [1967] 83 LQR 365-395 and 569-601.

⁴⁵ 13 Rich. 2 stat. 2, c.1.

⁴⁶ The existence of gratuitous pardons tended to preclude the development of mitigation and defences within the substantive law.

into the fifteenth century, and furthermore, could be obtained prior to the criminal proceedings,⁴⁷ which led to an anomalous situation in determining secondary liability.

2.2.2.2 *Benefit of clergy*⁴⁸

Benefit of clergy was essentially a legal device by which capital punishment could be avoided: the death penalty was excused those who claimed it successfully. Its importance therefore lies in the fact that its existence shaped the response of the legislature on the whole subject of punishment for serious offences.⁴⁹ Stephen denounced the privilege in the following terms:

[T]he rule and the exception were in their origin equally crude and barbarous, that by a long series of awkward and intricate changes they were at last worked into a system which was abolished in a manner as clumsy as that in which it was constructed.⁵⁰

Thus, it is possible to trace the development of benefit of clergy, demonstrating its restriction followed by its extension, its impact on the criminal justice system, particularly in relation to the homicide offences and finally the reasons for its ultimate retraction.

The benefit originated in the right of clergy to be free from the jurisdiction of the lay courts and subject only to the ecclesiastical courts.⁵¹ Restrictions were gradually imposed by the legislature so that in 1275⁵² it was necessary for the clerical prisoner to be indicted by a lay court before he could be claimed as a cleric and sentenced by an ecclesiastical court. By the early fifteenth century the clerk had to be convicted prior to asserting the privilege.⁵³

Thus the lay courts had succeeded in circumscribing the operation of the privilege, so that the accused was subject to their judgment if not their punishment. To diminish its value to the clergy

⁴⁷ Kaye, *op cit.* n.44.

⁴⁸ For the full history of benefit of clergy see Stephen *I History* at 458-473 and Plucknett, *History* at 414-6.

⁴⁹ Stephen, *I History* at 463.

⁵⁰ *Ibid.* at 458.

⁵¹ The problem of competing jurisdiction became evident after the Conquest. William I established a system of ecclesiastical and secular courts so that 'the Church and State which had been inextricably connected in the Anglo-Saxon age henceforth were strictly separate': Plucknett, *History* at 12. The Normans asserted that any clergy who had a lay capacity for example, earls and feudal tenants, could be tried for misdeeds committed in their lay capacity, by the King. By the Constitutions of Clarendon 1164, a "criminous clerk" was to be charged in the King's court, tried by the Church and if found guilty degraded, then returned as a layman, to the secular court for punishment. However, the popular revulsion subsequent to Becket's murder prevented the Crown from attempting to enforce the Constitutions. Clerks were surrendered unconditionally to ecclesiastical jurisdiction (*ibid.* at 44).

⁵² Statute of Westminster the First (3 Edw. 1).

⁵³ Stephen, *I History* at 460.

as a separate class, in 1350 the courts extended the benefit to all who could read.⁵⁴ As murder was at this time a clergyable offence, any man⁵⁵ who knew how to read might adopt the life of serial killer with impunity.⁵⁶ The effectiveness of claiming the benefit was reduced in 1487⁵⁷ when it was legislated that every person convicted of a clergyable offence was to be branded⁵⁸ and denied benefit of clergy a second time, unless evidence was produced to demonstrate that he was actually a member of the clergy.⁵⁹ Anyone not in holy orders was now only excused the death sentence once.⁶⁰

Whilst amendments to the scope and effect of claiming benefit of clergy⁶¹ provides one means of insight into the operation of the developing criminal justice system, it is equally enlightening to focus on the relationship of clergy with the homicide offences. High treason, highway robbery and the wilful burning of houses had never been clergyable⁶² and 1496⁶³ marked the beginning of the exclusion of homicide. Laymen were denied clergy for the petty treason of 'premeditatedly murdering their lord, master or sovereign immediate'.⁶⁴ Following an increase in robberies, murders and felonies resulting from the law being held in contempt through the ease of escaping punishment by pleading clergy⁶⁵, other homicides were removed from benefit of clergy in 1512⁶⁶. By 1547⁶⁷ it was removed from all classes of murder. However, the measure was rendered less effective by requiring the presence of the word "murdravit" in the indictment. Failure to observe this technicality led to a manslaughter charge, which remained clergyable. The real significance of the measure was that by withdrawing clergy from murder but not manslaughter, it converted an administrative difference into one of substance.⁶⁸ The courts redefined murder and manslaughter,

⁵⁴ By their interpretation of 25 Edw. 3 st.3.

⁵⁵ Benefit of clergy was denied all women except, until the Reformation, professed nuns, because they could not be ordained. All restrictions were removed from benefit of clergy at the beginning of the eighteenth century so it was extended to women and people who could not read. Stephen, *I History* at 461, 468.

⁵⁶ Stephen, *I History* at 463.

⁵⁷ 4 Hen. 7, c.13.

⁵⁸ On the brawn of the thumb, with M for murder, T for theft.

⁵⁹ Kaye *op cit* n.44 at 569.

⁶⁰ In 1576 (18 Eliz. c.7 ss.2, 3), power was given to imprison for up to one year a person who claimed the privilege having been convicted for the first offence.

⁶¹ Benefit of clergy was eventually abolished in 1827 (7 & 8 Geo. 4 c.28).

⁶² Stephen, *I History* at 464.

⁶³ 12 Hen. 7, c.1 ss.2, 3.

⁶⁴ Stephen, *I History* at 464.

⁶⁵ Kaye, *op cit*. n.44 at 572.

⁶⁶ 4 Hen. 8, c.1 ss.3, 4. Although this only applied to murder or robbery committed on hallowed ground or in a dwelling place.

⁶⁷ 1 Edw. 6, c.12 s.10

⁶⁸ Kaye, *op cit* n.44 at 368, 576.

making the distinction depend upon presence or absence of premeditation; consequently manslaughter or chance medley came to mean a deliberate killing “upon sudden occasion”.⁶⁹ Towards the end of the seventeenth century, murder was excluded from benefit of clergy whether the person could read or not. Murder was thus made a completely capital offence.⁷⁰

One of the points of interest in tracing the history of this legal curiosity is the attempt to discover whether the perceived gravity of murder, compared to other offences, was inscribed on the public consciousness as a result of a special punishment. In other words, were murderers set apart from other felons and punished in a way that reinforced the denunciation of the crime? Clearly, as long as benefit of clergy enabled disparity of punishment for the same offence there was little chance that this could occur in any principled way. However, there was a further obstacle impeding such an end, namely the impact of the administrative devices of pardons and benefit of clergy upon secondary liability.

2.2.2.3 Effect of the Exemptions on Secondary Liability

With regard to the effect of pardons and benefit of clergy on the liability and punishment of secondary parties, the pertinent inquiry divides into two: the first involves the situation when the fate of the perpetrator fell within an exemption and the second, whether the accomplice, but not the perpetrator, could be excused the death penalty.

As to the first conundrum, the foundation had been set by the thirteenth century.⁷¹ An accomplice could not be brought to trial until the perpetrator had been convicted and outlawed.⁷² This rule was the inevitable outcome of Medieval logic. Secondary liability arose only when the crime occurred. The accessory’s liability therefore depended upon the perpetrator’s commission of the crime. Taken a stage further, secondary liability relied upon firstly finding principal liability for the offence. So, if the principal was awarded a defence no crime had taken place. The potential accomplice was thereby rendered simply a party to a non-felonious act. It was therefore essential to elicit the guilt of the perpetrator before considering the position of a secondary party. This

⁶⁹ *Ibid.* at 369-70.

⁷⁰ *Stephen I History* at 467. At the same time clergy was excluded from manslaughter for anyone who could not read.

⁷¹ It was established by the time of Bracton. However, it is difficult to pinpoint exactly the date when the rule was accepted. KJM Smith mentions a case from 1221 where it appears that an accomplice could be tried despite the acquittal of the perpetrator: *Treatise* at 22 n.17.

⁷² *Pollock and Maitland II History* at 509.

procedural safeguard ensured that the 'sacral and supernatural process of proving guilt or innocence'⁷³ was protected from possible fallibility:

If you convict the accessory while the principal is neither convicted nor outlawed, you beg a question that should not be begged. The law will be shamed if the principal is acquitted after the accomplice has been hanged.⁷⁴

The introduction of pardons and benefit of clergy added a new layer of complexity to secondary liability. Principal liability and conviction were no longer sufficient to activate accessory liability because the convict may either obtain an advance pardon or successfully plead his clergy prior to the imposition of sentence.⁷⁵ It therefore became necessary for the principal to be attainted, that is, formally sentenced to death before any question of accessory liability could arise. Thus, the decisive factor in secondary liability depended upon the timing of the principal's presentation of his exculpatory trump card: it was possible for an accomplice to be tried convicted and put to death though the principal avoided the execution of the death penalty via *subsequent* pardon or pleading of clergy,⁷⁶ but the secondary party remained immune from prosecution if the principal's exemption was demonstrated *prior to* formal sentencing. This ridiculous and unjust technicality was remedied in 1702 when it was enacted that the accessory could be convicted 'notwithstanding that [the] principal felon shall be admitted to the benefit of clergy, pardoned or otherwise delivered before attainder'.⁷⁷

However, in the meantime, the courts had developed an alternative solution to the injustice, a solution that encompassed a moral response in grading the guilt involved in specific modes of participation. In 1553, rather than seeking to extricate accessory liability from the sterile procedural quagmire in which it so often lay dormant, the court in *Griffith*⁷⁸ devised a strategy which in effect created a legal by-pass. By elevating and re-designating participants from accessory to principal the administrative technicalities could be sidestepped. Principal offenders now included all those present aiding and abetting the commission of the felony:

Notwithstanding there is but one wound given by one only, yet it shall be adjudged in law the Wound of every one, that is, it shall be looked upon as given by him who gave it, by himself and given by the rest by them as their Minister and Instrument. And it is as much the Deed of the others as if they had all jointly holden with their hands the Club or other Instrument with which the wound was given as if they had all together struck the Person

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Coke, 2 *Inst* at 183.

⁷⁶ Hale, 1 *PC* at 625.

⁷⁷ Anne st. c. 9.

⁷⁸ (1553) 1 Plwd. 97, 75 ER 152, cited in KJM *Treatise* at 23.

that was killed. So that it cannot be well termed that they who have the Wound, are Principals in Deed, and the others Principal in Law, but they are all Principals in Deed, and in the same degree.⁷⁹

Hereafter, secondary parties were divided into two categories: accessories before the fact and principals in the second degree and, for the latter, the common purpose rules were developed.⁸⁰

The second situation involves the possibility of the secondary party avoiding conviction or punishment regardless of the perpetrator's guilt. As a preliminary, it was accepted that, despite the principal's guilt, an accomplice should be exculpated by means of a separate defence. Thus, confirmation from the fourteenth century also contains a note of caution:

When both are present and the principal has been convicted, the accessory though present is not to be convicted on that accord since he may have his independent defence.⁸¹

Of course, pardons and benefit of clergy operated as exemptions from attainder not conviction, and an accomplice may obtain succour from either device. However, the availability of benefit of clergy was now further complicated by the division of secondary parties. Accessibility to the benefit frequently depended on the courts' interpretation of statute. As the courts were complicit in mitigating the excesses of the penal law, so statutory interpretation was 'an indiscriminate pragmatic exercise'⁸² which extended the differences between accessories before the fact and principals in the second degree. Any moral distinctions between different modes of participation inevitably disappeared under the weight of arbitrariness and petty technicality.⁸³

2.2.2.3.1 Designations of the Parties to a Crime in Stephen's Digest⁸⁴

At the end of the nineteenth century, Stephen gave considerable attention to enunciating the differences between the possible parties to a crime.⁸⁵ Statute provided little assistance in the

⁷⁹ *Ibid.*

⁸⁰ For details of the distinction, see below pp.58-64.

⁸¹ YB 19 Ed. III (RS) 174, cited in KJM Smith, *Treatise* at 22 n.17.

⁸² KJM Smith, *Treatise* at 24.

⁸³ English law was not alone in imposing arbitrary and severe punishment. The excesses of the Continent galvanised Beccaria's *On Crime and Punishments*, 1764 (trans H Paolucci, 1963). It may be argued that English law had at least the merit of humanity introduced by the court system. Radzinowicz cites an example of punishment for multi-party offences from Swedish law prior to the Code of 1734: 'Punishments were not only most severe but also almost impersonal. When, for instance, a number of assailants inflicted grievous bodily harm as a result of which their victim died, and it was not possible to ascertain which of the assailants gave the blow that caused the death, the decision as to which of them was to be executed was arrived at by means of a ballot.' *A History* at 289 n.89.

⁸⁴ *Stephen A Digest of the Criminal Law* 7th ed. (Sweet & Maxwell, 1926) first published in 1877 (hereafter, Stephen, *Digest*).

⁸⁵ This exposition considers the parties to a felony.

undertaking and so it is upon case law that the distinctions are based, distinctions which had been recognised since the time of Coke.⁸⁶

2.2.2.3.1.1 *Principal in the first degree*

It logical to begin with the principal without whom there would be no principal offence on which to base secondary liability. Thus,

Whoever actually commits or takes part in the actual commission of a crime ... whether he is on the spot when the crime is committed or not; and if the crime is committed partly in one place and partly in another, every one who commits part of it at any place is a principal in the first degree.⁸⁷

These assertions are illustrated with two examples:

- (1) lays poison for B, which B takes in A's absence ...
- (2) A steals goods from a ship, and lays them in a place at some distance, whence B by previous concert, carries them away for sale.⁸⁸

The first illustration emphasises that a person need not actually be present at the time when the commission of the offence became effectual. This accentuation by Stephen and earlier commentators⁸⁹ was almost certainly due to the fact that presence or absence at the scene of the crime is pivotal in deciding the designation of secondary parties. A more concise contemporary definition describes the principal as 'the person who directly and immediately causes the *actus reus* of a crime'⁹⁰ This can be satisfied by more than one individual and the second illustration demonstrates that there can be more than one principal in the commission of a crime.⁹¹ Thus, where two people stab another simultaneously thereby killing the victim, both are principals due

⁸⁶ s.1 Criminal Law Act 1967 abolished the distinctions between felony and misdemeanour. This makes s.8 Accessories and Abettors Act 1861 applicable to all offences whether formerly felonies or misdemeanours. This had the effect of removing the distinction between principal in the first and second degree as well as the distinctions between secondary participation. The obvious corollary of this was that henceforth, parties should be designated either primary or secondary. . Nevertheless, it was not entirely clear that the historical differences between accessory before fact and principal in the second degree had vanished: 'since Parliament, when abolishing the distinctions between felonies and misdemeanours by section 1 of the Criminal Law Act 1967, did not avail itself of the opportunity to consider the substance of the law on complicity, the law remains difficult to expound,... because the terminology used by the courts has not always been clear.': Buxton, "Complicity in the Criminal Code" [1969] LQR 252 at 252. Thus, there was, and still is, no statutory definition of the parties to a crime. One means of entry into this potential source of difficulty was remedied by the Law Commission in 1989, see above, pp.27-30.

⁸⁷ Stephen, *Digest* article 50.

⁸⁸ *Ibid.* illustrations 1 and 2 at 53.

⁸⁹ Furthermore, in Coke's time poisoning was considered 'so odious' it was made high treason: Coke, *3 Inst* at 46.

⁹⁰ Smith JC, *Smith and Hogan Criminal Law* 9th ed. (hereafter *Smith & Hogan*) at 121.

to their equal contribution to the death. It is possible that the two perpetrators act independently in which case liability is based on their autonomous action. Should they be working together, perhaps executing a pre-arranged plan, it is convenient to describe them as 'joint principals', 'co-principals' or 'co-enterprisers'. In this instance, it would also be appropriate to describe the parties as joint principals where the sum of the individual contributions satisfies the elements of an offence. This situation would occur where, for example A holds V whilst B takes his wallet. At first sight, it may appear that A is liable for an assault or battery and B for theft. However, aggregating their conduct results in robbery, the victim having suffered theft with the use of force.⁹² Consequently, A and B are principals in the robbery.⁹³

Finally, it was possible to be adjudged a principal when a crime is committed by innocent agency.⁹⁴ As the illustrations demonstrate, an innocent agent may be one who lacks the capacity for legal responsibility. Stephen provides the example of a child under seven⁹⁵ being told to steal money for A.⁹⁶ A, the instigator, is a principal in the first degree. The second illustration entails a person who lacks culpability and in this sense is used as a mere instrument: A, knowing a note to be forged, asks B who does not know it to be forged, to get it changed for him. B does so, and gives A the money⁹⁷.

In both examples, A, with the requisite fault, has caused the offence to be committed. Thus, the innocent agent can be metaphorically removed leaving A as the culpable party. Essentially, there is no secondary party and it is logical to term A the principal in the first degree. In fact, A can only be designated a principal in this situation as long as the remaining persons are not party to the offence. As Stephen is at pains to point out if, 'B in the last illustration knows that the note is forged. A is an accessory before the fact'⁹⁸. B then becomes the principal in the first degree.

⁹¹ KJM Smith explores the difficulty of applying the correct label of principal, when the central factor is the act that provided the most direct cause of death, in varied examples where two people poison a third: *Treatise* at 80.

⁹² s.8(1) Theft Act 1968.

⁹³ KJM Smith, *Treatise* at 28.

⁹⁴ Stephen, *Digest* article 51.

⁹⁵ Updating to reflect the current law would involve under the age of 10 years.

⁹⁶ Stephen, *Digest* illustration (1) at 43.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

2.2.2.3.1.2 *Principal in the second degree*

Stephen divided the criteria for principal in the second degree into separate articles. The essence of article 52 is that,

Whoever aids or abets the actual commission of a crime, either at the place where it is committed, or elsewhere, is a principal in the second degree.⁹⁹

In fact, although the employment of the word “elsewhere” seems to suggest that an absent party who had aided or abetted the offence would be designated a principal in the second degree that was not so. Hale insisted that to become a principal in the second degree an man must fulfill two requirements: he must be present and he must have been aiding and abetting the felony.¹⁰⁰ On the other hand ‘[i]f he were ... abetting, and absent, he is accessory in case of murder, and not principal’.¹⁰¹ That Stephen appreciated this fact, is suggested by his illustrations which involve at least constructive presence.

Presence had been held to include being in a different room of the house in which a felony was committed¹⁰² and in the grounds of a private park for a poaching enterprise during the course of which a gamekeeper was killed.¹⁰³ Stephen submitted that *Kelly*¹⁰⁴ ‘perhaps marks the limit between a principal in the second degree and an accessory’.¹⁰⁵

In that case B stole horses and brought them to A, who was waiting half a mile off; A and B then rode away on them. It was held that A was an accessory before the fact.¹⁰⁶

It seems, therefore, that he used “elsewhere” to signify the broad interpretation of presence applied by the courts. However, although great store is put by the establishment of presence as a factor in designating the secondary party, mere presence does not in itself incur liability ‘even if [a person] neither makes any effort to prevent the offence or to cause the offender to be apprehended’.¹⁰⁷

⁹⁹ *Ibid.* article 52.

¹⁰⁰ Hale *1 PC* at 438 (confirmed to be unchanged in 1803 by East, *Pleas of the Crown* Vol 1 (London Professional Books, 1972) (hereafter *East 1 PC*) at 351-3.

¹⁰¹ Hale, *1 PC* at 439. It was not possible to be an accessory to manslaughter. (This too remained the same in the nineteenth century: *East 1 PC* at 353.)

¹⁰² *Ibid.*

¹⁰³ *Lord Dacre's case: ibid.*

¹⁰⁴ (1820) R. & R 421, cited in *Stephen Digest* n.8 at 43.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* article 52. See also Hale *1 PC* 439: ‘If he be present, and not aiding or abetting to the felony, he is neither principal nor accessory.’

Stephen's subsequent Article was entitled 'common purpose' and provided:

When several persons take part in the execution of a common purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose.¹⁰⁸

Thus, a principal in the second degree included someone whom either, aided and abetted a crime or, was a party to a common purpose: Separating the articles begs the question whether a distinction was drawn between the methods of complicity.¹⁰⁹ Thus, two illustrations, representing the two modes of participation will be compared and analysed. The first illustration of aiding and abetting states:

A, B, and C go out with a common design to rob. A commits the robbery; B stands ready to help; C is stationed some way off to give the alarm if anyone comes. A is the principal in the first degree, B and C are principals in the second degree.¹¹⁰

Common purpose was demonstrated with the following scenario:

Three soldiers go to rob an orchard. Two get into the fruit tree. The third stands at the door with a drawn sword, and stabs the owner, who tries to arrest him. The men in the tree are neither principals nor accessories, unless all three came with a common resolution to overcome all opposition.¹¹¹

The first example, illustrating aiding and abetting involves a "common design". As there is no meaningful difference between "purpose" and "design", it is clear that aiding and abetting could involve a common purpose. The difference between the two scenarios comprised the degree of liability incurred by a secondary party for the offences subsequently committed. In the first example the discussion of secondary liability is limited to the primary object of the enterprise. In this case it was robbery. Robbery was the offence aimed at by all three parties. Thus, B and C provided aid and abetment to A's perpetration of the intended robbery. The offence that comprises the specific purpose of the criminal enterprise will be referred to, for ease of

¹⁰⁸ *Ibid.* article 53. The illustrations of common purpose demonstrate that the principle applied to two parties as well as to 'several' see illustrations 4 & 5.

¹⁰⁹ In 1993, the very same question was raised by the Law Commission in LCCP No. 131. The Commission analysed the law relating to secondary parties but joint enterprise (or common purpose) was separated from the main discussion due to its 'uncertain status' (para 2.108). The specific dilemma was expressed thus: 'The uncertainty relates, in particular, to whether the doctrine extends liability to cases that would not be caught by the law of aiding and abetting.' Furthermore, it was suggested at para 2.120 that joint enterprise was a separate doctrine. If this is true, then it must stem from the historical differentiation of parties to a crime. The question to be addressed, with reference to Stephen's illustrations, is whether aiding and abetting was the common denominator for all principals in the second degree or whether aiding and abetting was simply one possible mode of participation as a principal, and common purpose another.

¹¹⁰ *Ibid.* illustration 1 at. 44.

¹¹¹ *Ibid.* illustration 2 at 44-45.

exposition, as the “foundational offence”,¹¹² and the resulting liability as “foundational liability”. It is not difficult to find the necessary aiding and abetting in these scenarios. The common purpose illustration, on the other hand, sought to explain the liability of the parties for a further, collateral crime that was committed during the execution of the specific design. In this instance, the foundational offence was theft. Using the same application of criminal responsibility from the burglary scenario, liability for theft would be as follows: the two people that climbed the tree are principals in the first degree and the appointed sentry is a principal in the second degree. However, the crux of the illustration involved the tree climbers’ liability for the lookout’s assault on the owner. The sentry, a principal in the second degree to the theft, was a principal in the first degree to the assault. The same role reversal would occur for the tree climbers, if they were found liable for the sentry’s offence against the person. Thus, Stephen applied the term ‘common purpose’ to identify the imposition of liability for a further or collateral crime committed during the execution of the foundational offence. As this collateral crime was outside the original purpose,¹¹³ the liability of the non-perpetrators was not a foregone conclusion:

If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree or accessories unless they actually instigate or assist in its commission.¹¹⁴

Looking at this from a different angle, a participant in a common purpose was liable for the commission of any additional offences, unless the additional crime was “foreign” to the foundational offence. If the further crime was found to be alien to the common purpose it produced independent liability for the perpetrator alone. However, the answer to the question posed, that is, whether common purpose liability was incurred by a different route to aiding and abetting, can be answered. Stephen confirmed that liability for a foreign offence would be incurred by express assistance or instigation. It, therefore, seems implicit that, once the additional offence was found to be within scope of the common purpose, the principal in the second degree would be held to have aided and abetted it. In other words, by determining an offence as parasitic upon the foundational liability, aid and encouragement was held to extend to the relevant offences, and remained the basis of liability.

¹¹² The terms ‘basic accessory liability’ and ‘parasitic accessory liability’ have been adopted to distinguish between liability for crimes X and Y respectively in JC Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ [1997] 113 LQR 453 at 455. Dennis, ‘The mental element for accessories’ in *Essays in Honour of JC Smith*, describes crime X as the ‘foundational’ offence and crime Y as the ‘incidental’ offence.

¹¹³ For an examination of the joint enterprise liability and the scope of purpose, see chapter 6.

¹¹⁴ *Ibid.* article 53.

2.2.2.3.1.3 Accessory before the fact

An accessory before the fact was defined as 'one who directly or indirectly counsels, procures or commands any person to commit any felony.'¹¹⁵ Moreover, Stephen insisted that liability be dependent upon the committed crime being a consequence of the accessory's action. This requirement suggests that causation is a prerequisite for liability.¹¹⁶ Of crucial importance is the emphasis that knowledge is an insufficient mental state to result in culpability:

Knowledge that a person intends to commit a crime, and conduct connected with and influenced by such knowledge, is not enough to make a person who possesses such knowledge, or so conducts himself, an accessory before the fact to any such crime, unless he does something to encourage its commission actively.¹¹⁷

Added to this is the fact that absence from the scene of the crime renders a person an accessory before the fact. The criteria combined to restrict the liability of an accessory before the fact in a manner that may seem almost arbitrary. This is borne out by the illustrations provided:

A supplies B with corrosive sublimate, knowing that B means to use it to procure her own abortion, but being unwilling that she should take the poison, and giving it to her because she has threatened to kill herself if he did not. B does so use it and dies. Even if B is guilty of murdering herself, A is not an accessory before the fact to such a murder.¹¹⁸

Clearly, this is an emotive set of facts and there may be good reasons cited for not holding A liable. It is not entirely certain whether liability fails to be incurred because A had not counselled, procured or commanded the offence, or whether he was exculpated because knowledge of the offence was insufficient to ground liability without active encouragement to commit it. However, the fact that the prohibited conduct may be performed indirectly favours the latter interpretation. Yet, the more basic question at issue is whether the result would be the same if A had been present when B took the abortifacient. It is arguable that, despite his strong disinclination to be involved in the proceedings, this change in the circumstances would render the supply of the potion 'aiding' and, as knowledge of P's intent now becomes incriminating factor, A would be liable as a principal in the second degree.

The second illustration provides stronger grounds for disapproving the distinction between an accessory before the fact and a principal in the second degree:

B and C agree to fight for a sum of money; A knowing of their intention, acts as stakeholder. B and C fight and C is killed. A is not present at the fight and has no

¹¹⁵ *Ibid.* article 54.

¹¹⁶ For the role of causation in secondary liability, see below, pp.144-174.

¹¹⁷ Stephens *Digest* article 54.

¹¹⁸ *Ibid.* at 46 citing *Fretwell* (1862) L & C 161.

concern with it except being stakeholder. Even if in such a case there can be an accessory before the fact, A is not accessory before the fact to the manslaughter of C.¹¹⁹

A's conduct provided moral support, encouragement and assistance to B and C in their endeavour, especially as the object of the fight was the prize money. Had A been present his action would satisfy the requirement of aiding and abetting.¹²⁰ Furthermore, although not explicitly mentioned, it seems probable that A was acting in concert with the other parties insofar as he either offered or agreed to be the stakeholder with knowledge of the illegal fight. By so doing, he entered into a common purpose with B and C. As the manslaughter was committed in execution of the purpose, A would be liable for this offence in these slightly amended circumstances. Yet, A's culpability remains the same whether he was designated an accessory before the fact or a principal in the second degree and this must be accounted a serious failure in the distinctions.

2.2.2.3.2 Procedural and Substantive Differences between Principal in the Second Degree and Accessory before the Fact

The distinction between participants into accessory before the fact and principal in the second degree resulted from Mediaeval procedural technicalities, and the need to overcome the injustices that were perpetrated by the court system. However, it could be argued that the arbitrariness of secondary party conviction that was originally dependent upon the successful criminal processing of the perpetrator, was replaced with an arbitrariness that depended on the secondary party's proximity to the actual scene of the crime. Indeed, Hale admitted that the distinction failed to reflect the moral culpability of secondary parties:

In case of murder, he, that counselled or commanded before the fact, if he be absent at the time of the fact committed, is accessory [sic] before the fact, and tho he be in justice equally guilty with him, that commits it, yet in law he is but accessory [sic] before the fact, and not principal.¹²¹

Nevertheless, whilst it is clear that reliance on presence introduced an arbitrary element to the distinctions, whether the consequent injustice was equal to the previous situation must be answered in the negative. It was obviously preferable to be able to complete proceedings against a blameworthy second party in all cases, rather than just those where the perpetrator had been

¹¹⁹ *Ibid.* citing *Taylor* (1875) 2 CCR 147.

¹²⁰ A's acting as stakeholder provides far more tangible assistance and encouragement than the members of the audience considered in *Coney* (1882) 8 QBD 534.

¹²¹ Hale 1 PC 435.

identified convicted and subject to punishment. In any event, the difference was only relevant if there was likely to be a difference of outcome based upon the classification.

In fact, there was a difference, and it was established on the premise that principals in the second degree were identified as principals not as accessories. Liability was divided into principal liability and accessory liability and, whilst both accessories before the fact and principals in the second degree were secondary parties, in the case of the latter, it was principal liability that applied. In order to enunciate the significant features of the separate forms of liability, it is necessary to take a brief look at the foundations of accessory liability. It has been stated that,

Despite a pedigree tailing off into Anglo-Saxon times, certain theoretical features of complicity have never been openly nor authoritatively articulated. Complicity's derivative nature coupled with the principle for equal punishment of all parties have been the only clear and enduring foundational requirements of liability.¹²²

It is the derivative nature of complicity that was affected by the division of secondary parties. Strict derivativeness was required for accessory liability. Thus, an accessory before the fact could not be held liable if there was no guilty principal.¹²³ Nor could an accessory be found guilty of a more serious offence than the one perpetrated by the principal. Thus, where a wife procured the assassination of her husband, she would be liable for murder only, despite the fact that the marital relationship would result in the graver offence of petty treason had she herself killed the husband.¹²⁴

The designation of principal in the second degree released the requirement for such strict derivation. The procedural effect was that all principals in the second degree could be arraigned and sentenced although the principal in the first degree 'neither appear, nor be outlawed'.¹²⁵ Taken to its logical conclusion, identification of the actual perpetrator was no longer necessary, even if the incorrect party was indicted for having given the fatal stroke. As long as all were present aiding and abetting it was imputed to be the stroke of all.¹²⁶ Finally, principals were liable to the extent of their individual culpability rather than the offence committed by the perpetrator. Therefore, differential verdicts, whereby the secondary party could be liable for a different offence than that committed by the primary party, were possible:

¹²² KJM Smith, *Treatise* at 4.

¹²³ Coke, *3 Inst.* at 139.

¹²⁴ *Ibid.*; East, *1 PC* at 338.

¹²⁵ Hale, *1 PC* at 437, citing *Gyttyn's Case*; Stephen *Digest* article 59.

¹²⁶ Hale, *1 PC* at 438, citing *Mackally's case*.

If A. have malice against B. and lies in wait for to kill him, and C. the servant of A. being present, but not privy to the intent of his master, finds his master fighting with B. takes part with his master and the servant or master kill B, this is murder in A. because he had malice forethought, but only homicide [manslaughter] in C.¹²⁷

This transmuted the basis of complicity liability by an essential change of focus. Liability was entirely dependent upon the secondary party's blameworthiness. Thus, the principal in the second degree could be liable for a more serious offence, such as petty treason, when the perpetrator was guilty of the lesser homicide crime of murder¹²⁸ or, as in the example above, murder when the perpetrator's liability was restricted to manslaughter.

Returning to the original point concerning the differences in consequential liability depending upon secondary party designation, there was clearly a far greater likelihood of arraignment and punishment for those parties present, aiding and abetting. That there was a dichotomy, and that this was established upon the secondary party's presence or absence, cannot be doubted. However, the point of interest in the later analysis of the underlying legal theories, is that the results for principals in the second degree permitted greater justice than was the case for accessories before the fact. This was particularly noticeable where the secondary party evidenced greater personal blameworthiness than the primary party. Perhaps the problem was rather that liability for accessories retained a theoretical and procedural straitjacket from which the principal in the second degree had been set free.

2.3 A SPECIAL PUNISHMENT FOR MURDER?

The death sentence was the sanction for those unable to avail themselves of clergy. However, by the early nineteenth century the death sentence was the penalty for so many other offences that it is difficult to enumerate them with any degree of certainty although they were in the region of two hundred.¹²⁹ In 1810, Sir Samuel Romilly declared:

[T]here is probably no other country in the world in which so great a variety of human actions are punishable with loss of life as in England.¹³⁰

The great majority of capital statutes had been enacted in the previous century. Originally the common law reserved capital punishment for a few very serious offences such as treason, murder,

¹²⁷ Hale, *1 PC* at 438, citing *Salisbury's case*.

¹²⁸ East, *1 PC* at 338.

¹²⁹ Radzinowicz, *1 History* at 4.

¹³⁰ *Parl. Deb.* (1810) Vol. 15 366 cited in Radzinowicz, *1 History* at 4.

rape and burning dwelling houses. Even after the 'exceptionally rigorous'¹³¹ laws passed during the Tudor and Stuart reigns, only approximately fifty offences attracted the death penalty.¹³² The obvious problem with a penal approach of this nature is that it fails to focus attention on any offences as particularly deserving of censure:

The indiscriminate imposition of capital punishment for numerous widely differing offences is incompatible with the principle that requires that ... a certain balance should be maintained between the gravity of the offence and the severity of the corresponding penalty.¹³³

Further, its arbitrariness undermined any respect for the criminal law. The importance of a correlation between the criminal law and the attitude of the populace is evidenced by a contemporary report written by Elizabeth Fry after speaking to prisoners. She relayed their strong sense of injustice at the punishing of mere thefts and forgery in the same way as murders:

[I]t is frequently said by them, that the crimes of which they have been guilty are nothing when compared with the crimes of Government towards themselves: that they have only been thieves, but that their governors are murderers.¹³⁴

Moreover, the judiciary, jury and even witnesses for the prosecution responded to the harshness of the penal law by effectively colluding to enable a more lenient result than the rigour of the criminal law would permit.¹³⁵ Thus, the more excessively severe the punishment, the higher the chance of impunity. The corollary of all this was interpreted by Fowell Buxton with the following statistical submission:

It is five to one [the offender] will not be detected; fifty to one he will not be prosecuted; one hundred to one he will not be convicted, and one thousand to one that the sentence pronounced by the law will never be carried into effect.¹³⁶

The deterrent value of the death penalty was thus greatly reduced. Indeed, Bentham called for the abolition of capital punishment for all crimes, including murder, as early as 1830.¹³⁷ The demise of the death penalty for murder eventually occurred in 1965 since which time murder has attracted the mandatory life sentence. Prior to its abolition,¹³⁸ capital punishment had been so restricted in 1861 that murder was one of only four offences punishable with death.¹³⁹ Therefore,

¹³¹ Radzinowicz, *I History* at 4.

¹³² *Ibid.*

¹³³ *Ibid.* at 8

¹³⁴ Evidence collected for the Report of the Select Committee of 1819, cited *ibid.* at 544 n.66

¹³⁵ See for example the incidence and operation of 'pious perjury': *ibid.* at 94-97.

¹³⁶ Buxton's speech (Parl Deb. (1819) Vol. 39, cols. 806-824), cited *ibid.* at 538.

¹³⁷ 'On Death Punishment' *Works* (Bowring, 1843) Vol. 1 at 525-532, cited *ibid.* at 599.

¹³⁸ Murder (Abolition of the Death Penalty) Act 1965.

¹³⁹ Stephen, *I History* at 475. In 1877, the punishment for manslaughter was penal servitude for life or a fine: Stephen, *Digest* article 324.

putting aside the aggravated death sentences of the eighteenth century,¹⁴⁰ the sentence for murder has been exemplary or special for nearly a hundred and forty years. By this process murder has been singled out as the most socially condemned of all the crimes.

3 THE DEVELOPMENT OF THE SUBSTANTIVE HOMICIDE DISTINCTIONS

3.1 ONE DEGREE OF CULPABLE HOMICIDE

In Anglo-Saxon England¹⁴¹ any killing, whether intentional or not, was treated as a wrong which was “emendable”. Yet, despite the fact that no mental element appears to have been necessary to incur liability¹⁴² there developed a rudimentary distinction between the legal blame attached to accidental or negligent killings and other forms. Stephen recognised that there were ‘hardly any definitions of crimes in the early laws’¹⁴³ but suggested:

The laws of Alfred embody the provisions of Exodus xxi 12-15. They also provide for cases of accident or negligence. “If at their common work one man slays another unwilfully, let the tree be given to the kindred...”- a provision which assumes that the commonest case of accidental death was the felling of timber. “If a man have a spear over his shoulder and any man stake himself upon it that he (the man with the spear) pay the were [sic] ... without the wite”.¹⁴⁴

Moreover, even before the Norman Conquest, deliberately planned assassinations were distinguished from other homicides and incorporated into the list of Crown pleas under the designation of *forsteal*.¹⁴⁵ The designation “morth” or “murdrum”¹⁴⁶, from which “murder” is ultimately derived, also makes its first appearance in this era and was used to denote a secret killing.¹⁴⁷ Following the Norman Conquest, this was extended to a fine payable by a hundred for anyone found slain when the killer was not caught,¹⁴⁸ however this was not due if evidence was

¹⁴⁰ Above, p.49.

¹⁴¹ The early Norman kings progressed the administration of the criminal law but the substance remained much the same. In Henry I’s reign the law was still substantially Anglo-Saxon: Plucknett, *History* at 15.

¹⁴² *Ibid.* at 419. Inanimate objects as well as beasts were also held legally responsible for killing although they clearly cannot experience a mental state. See the law on deodands Hale, *I PC* ch. 32 and Coke, *3 Inst.* ch. 9.

¹⁴³ Stephen, *I History* at 53.

¹⁴⁴ *Ibid.* at 55.

¹⁴⁵ Plucknett, *History* at 419.

¹⁴⁶ “Murdrum” as the latinised form of “morth” first occurs under Edward the Confessor: Stephen, *III History* at 25.

¹⁴⁷ Cmd 8932 Appendix 7, para 1.

¹⁴⁸ “Murdrum” was the fine imposed on a hundred by William I for the secret killing of a Norman. Unless it could be proved otherwise, it was presumed – not unrealistically in light of the unpopularity of the new

presented that the dead man was English.¹⁴⁹ By 1267 it was officially recognised that accidental deaths provided an exception, insofar as it was enacted¹⁵⁰ that the *murdrum* would not be imposed under these circumstances. In 1340¹⁵¹ presentment to Englishry was abolished and with it the *murdrum* fine. Henceforth, the word murder gradually became linked with “malice aforethought”.¹⁵²

However, the distinction between murder and what eventually came to be called manslaughter, does not begin to materialise until the early sixteenth century.¹⁵³ Prior concerns involve the distinction between felonious and non-felonious killings. Justified killings were acknowledged and would include, for instance, killing an outlaw or performing the execution of a death sentence.¹⁵⁴ Other killings were excusable but needed a pardon.¹⁵⁵ Every other killing was, in Bracton’s age, felonious¹⁵⁶ with the law recognising only one degree of homicide¹⁵⁷:

Culpable homicide, in the later thirteenth century, was a single undivided offence, and its *mens rea* consisted simply of an intention to kill or to inflict serious bodily harm, or, rather more doubtfully, of an intention to do an act of violence to the person of the party killed.¹⁵⁸

The distinction in degrees of culpable homicide becomes apparent in the reign of Henry VIII, when benefit of clergy was redistributed among the crimes. One statute¹⁵⁹ uses ‘probably for the first time’¹⁶⁰ the words “wilful murder”. From this point onwards it is clear that the single felony of homicide had been divided into two separate offences. One was “wilful murder or malice aforethought” which was not clergyable and therefore a capital offence. The other clergyable offence included those homicides that were caused neither in self defence nor by misadventure.¹⁶¹

ruling class among the indigenous population – that the victim was a Norman, which in effect meant that the hundred was fined if anyone was found slain and the killer was not caught: Plucknett, *History* at 420.

¹⁴⁹ This was known as “presentment to Englishry”.

¹⁵⁰ 52 Hen. 3 c.25. Plucknett, *History* at 420; Kaye, *op cit* n.44 at 366.

¹⁵¹ 14 Edw. 3 st.1, c.4. Plucknett, *History* at 420.

¹⁵² *Ibid.*

¹⁵³ See Kaye, *op cit* n.44 at 369 and Plucknett, *History* at 421.

¹⁵⁴ Pollock & Maitland, *II History* at 478.

¹⁵⁵ See above, p.53.

¹⁵⁶ Pollock & Maitland *II History* at 485.

¹⁵⁷ To this extent the twelfth century bears witness to a levelling process. “In Glanvill’s day one still had to distinguish that secret homicide which is *murdrum* from a mere *homicide*.” Pollock & Maitland, *II History* at 486.

¹⁵⁸ Kaye, *op cit* n.44 at 370.

¹⁵⁹ 23 Hen .8 c.1 (1532). Plucknett, *History* at 421.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

However, whilst it is clear that two distinct offences were established, the substantive differences between them were rather more opaque:

Some such division was obviously necessary but unfortunately the boundary was generally sought in glossing the ancient formula “malice”. Manslaughter, as it came to be called, exercised the analytical skills of writers on pleas of the Crown for a century and more before very much order could be introduced, and even [in the early twentieth century] serious questions as to the import of “malice” in murder [were] raised.¹⁶²

3.2 DISTINCTION BETWEEN MURDER AND INVOLUNTARY MANSLAUGHTER

3.2.1 The Establishment of the Murder Definition and the Birth of Manslaughter

In order to examine the development of the substantive law of homicide, particularly the crimes of murder and involuntary manslaughter, between the early seventeenth and the late nineteenth centuries, the law stated by Coke will be used as a starting point.¹⁶³ The exposition will then move to the logical construction of homicide definitions provided by Stephen.¹⁶⁴ Stephen’s definitions and illustrations will be examined with the assistance of any special illumination provided by the writings and cases that occurred in the intervening period.

By the early seventeenth century culpable homicide was divided into petty treason,¹⁶⁵ murder¹⁶⁶ and manslaughter or chance-medley (see fig. 2a). The gravity of the killing was signified both by the surrounding circumstances and by the actor’s culpability. Illustrations of the former include killing with poison, which was considered so “detestable” and “odious” that it was elevated from a felony to high treason.¹⁶⁷ Similarly, petty treason was an aggravated form of murder due to the relationship of the killer with the victim, for example, wife-husband and servant-master. The rationale behind petty treason was condemnation, not only of the killing but of the inherent betrayal involved in the act. The establishment of such offences provides reflections on the social order and contemporary preoccupations and fears.

¹⁶² *Ibid.* The twentieth century reference is to *Woolmington v DPP* [1935] AC 462.

¹⁶³ Sir Edward Coke summarised the rules that had developed after 1547. However, whilst acknowledging the importance of the *Institutes* for English law, Stephen found him ‘not ... very accurate’ and further declared ‘[a] more disorderly mind than Coke’s and one less gifted with the power of analysing common words it would be difficult to find.’: *II History* at 205.

¹⁶⁴ Stephen, *Digest*.

¹⁶⁵ Petty treason was reduced to murder in 1828 by 9 Geo. 4, c.31 Plucknett, *History* at 419. Thus, petty treason applies in the writings of Hale, Foster and East, but not the work of Stephen.

¹⁶⁶ Suicide or *felo de se* was included under murder: Coke, *3 Inst* at 54.

¹⁶⁷ *Ibid.* at 47.

Fig. 2a Categories of homicide in Coke's *Third Institute*

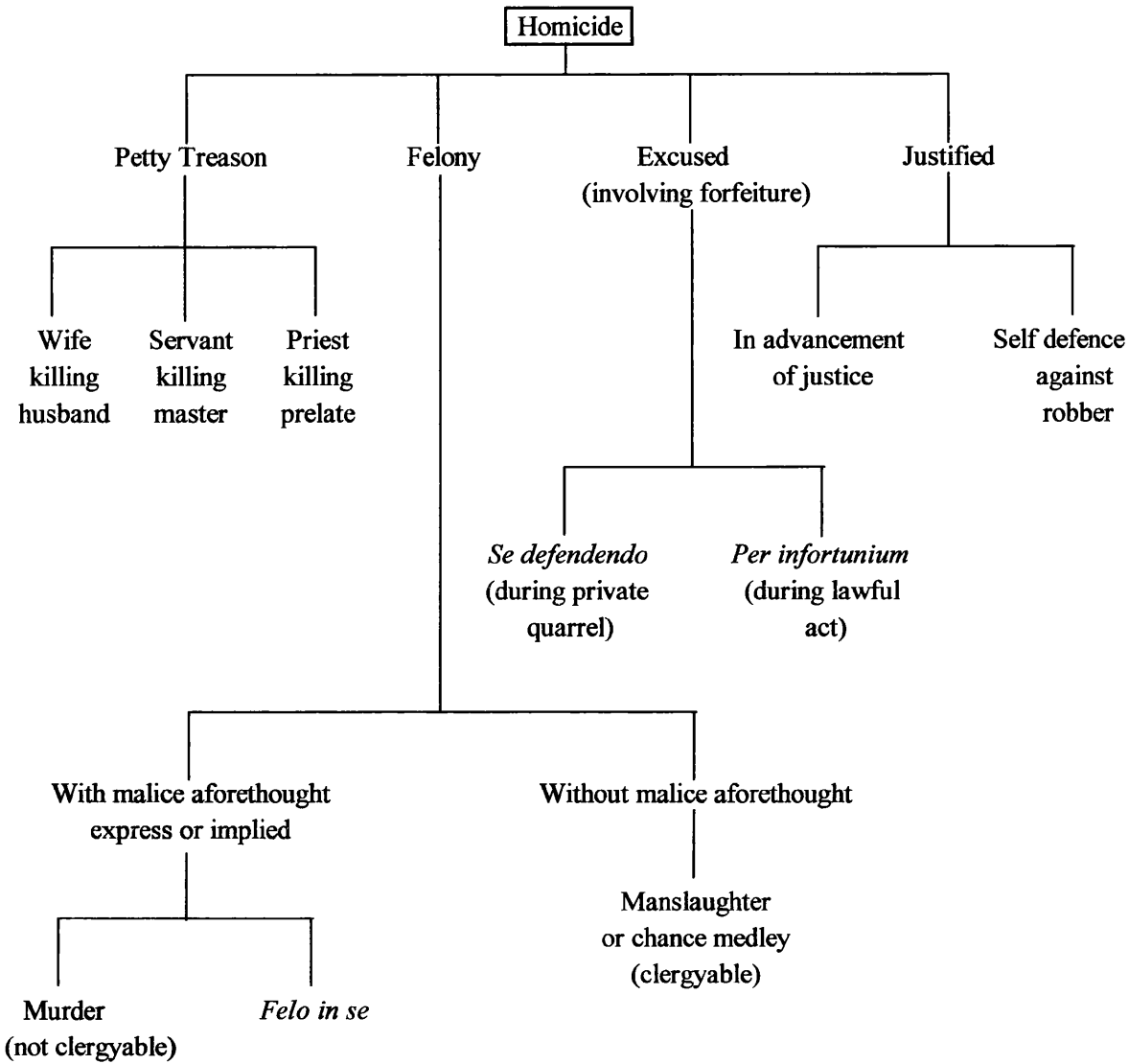
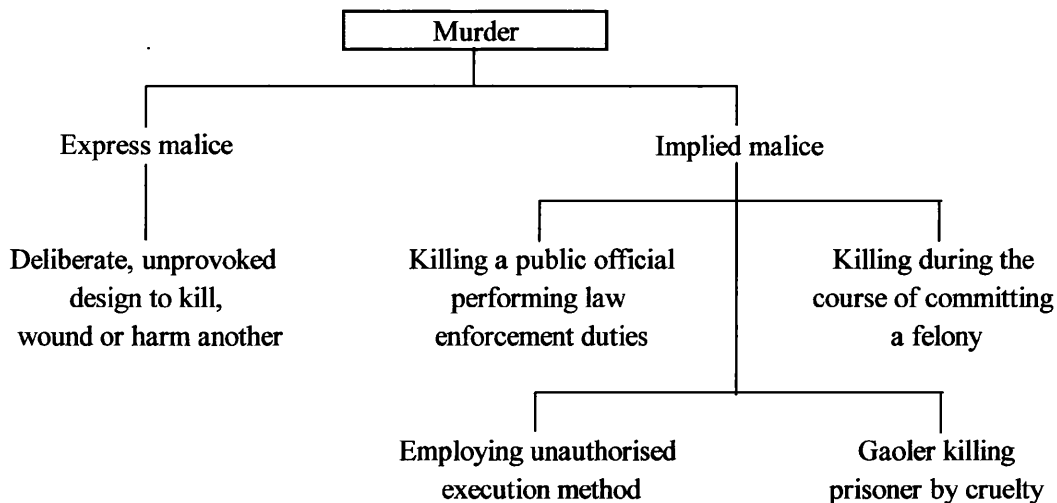


Fig. 2b Classifications of murder in Coke's *Third Institute*



Murder was described as the most heinous of the felonies¹⁶⁸ and was distinguished from manslaughter by the culpability requirement in the following definition:

Murder is when a man of sound memory, and the age of discretion, unlawfully killeth ... any reasonable creature ... with malice fore-thought, either expressed by the party, or implied by law...¹⁶⁹

Before considering the meaning of malice and the consequent difference between the felonies murder and manslaughter, it is pertinent to concentrate briefly upon the line drawn between felonious and non-felonious killings. The significance of this parameter increases as later commentators recognise that manslaughter included killings other than those mitigated from murder by the establishment of provocation. Lawfulness was a relevant factor. As long as the killing was justified there was no comeback upon the perpetrator. Justified killings included killing a person whilst advancing the cause of justice and killing a robber or burglar in self defence.¹⁷⁰ On the other hand, certain killings were merely excused and, though criminal liability was not imposed, forfeiture of goods was the corollary.¹⁷¹ These homicides were those that in earlier times had required a pardon, that is, killing *per infortunium* or *se defendendo*. In the former instance the killing was only attributed to misadventure if it occurred during the perpetrator's performance of a lawful act and in the absence of "evil intent".¹⁷² Killing *se defendendo* applied when the death occurred during a private quarrel.¹⁷³

Felonious homicide was divided into two offences with the presence or absence of "malice forethought" providing the line between murder and manslaughter. The distinction thereby revolves around this concept of malice. By way of introduction Coke explained:

Malice prepensed is, when [one] compasseth to kill, wound or beat another, and does it *fedato animo*.¹⁷⁴

Compass suggests design or purpose and as such is the highest grade of fault. However, the type of harm aimed at need not be the taking of life or even, it seems, serious harm. The actor need only have compassed the wounding or beating of the victim to be liable for murder when death resulted. Furthermore, malice aforethought need not be express; if death occurred during the

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* at 54.

¹⁷¹ *Ibid.* at 55 and 56.

¹⁷² *Ibid.* at 56.

¹⁷³ *Ibid.* at 55.

¹⁷⁴ *Ibid.* at 51. Synonyms include "malice forethought, prepensed, *malitia praecognitata*".

existence of certain circumstances, the necessary malice would be implied and the perpetrator would be liable for murder (see fig. 2b).

The categories of implied malice¹⁷⁵ included cases where the killing was deliberate: an executioner using an unauthorised method to perform the death penalty and a gaoler killing a prisoner by cruel treatment. Although it is possible to argue that the deaths may be caused by negligence or neglect, it seems more convincing to explain that their inclusion was based on a knowing abuse of official position and responsibility. However, in certain circumstances, malice was implied where death was caused as an accidental by-product of another purpose. Those circumstances involved the killing of a public official during the performance of his law enforcement duties,¹⁷⁶ or of any person during the course of committing any felony. Finally, malice could be transferred. If 'it be extended against one, it shall be extended towards another'.¹⁷⁷ So, for example,

[I]f a man lay poison to the intent that *B.* should take it, ... and *C.* by mistake takes it, and is poisoned to death, this is murder, tho it were not intended for him.¹⁷⁸

These elements remain legal constants during the eras of the subsequent commentators although, as will be seen, they become more clearly illustrated and the underlying principles explored and developed or criticised and restricted during the following two centuries.

Whilst the definition of murder was established by the time of Coke, the same was not true of manslaughter, which is found in the embryonic stages of its definition. In introducing the idea of concurrence of fault and deed, Coke provided an illustration that demonstrated where the legal line was drawn beneath murder:

It must be malice continuing [until] the mortal wound, or the like be given. Albeit there had been malice between two, and after they are pacified and made friends, and after this upon a new occasion fall out, and the one [kills] the other; this is homicide but no murder, because the former malice continued not.¹⁷⁹

¹⁷⁵ *Ibid.* at 52.

¹⁷⁶ The significance of protecting those enforcing the law is still evident in s.18 Offences Against the Person Act 1861: "Whoever shall unlawfully and maliciously wound or inflict grievous bodily harm to any person ... with intent to resist or prevent the lawful apprehension or detainer of any person shall be ... liable... to imprisonment for life" The ease with which the wound criterion is satisfied makes this branch of the offence particularly onerous. The whole skin must be broken and one drop of blood will be sufficient: *Moriarty v Brookes* (1834) 6 C & P 684.

¹⁷⁷ Coke, *3 Inst* at 51. However, transferred malice was not applied to an accessory. See below, p.164-167.

¹⁷⁸ Hale, *1 PC* 431, citing *Agnes Gore's Case* Plwd. Com 474 and *Saunders's Case* (1575) 2 Plwd 473.

¹⁷⁹ Coke, *3 Inst* at 51.

Indeed, Coke's appreciation of culpable homicide less than murder entailed only such deaths as were caused during such a physical altercation. Manslaughter was 'voluntary, and not of malice forethought, upon some sudden falling out':

There is no difference between murder and manslaughter, but that the one is upon malice forethought, and the other upon a sudden occasion; and therefore is called chance-medley. As if two meet together, and striving for the wall, the one kill the other, this is manslaughter and felony.¹⁸⁰

The lack of malice aforethought was therefore made synonymous with lack of premeditation. Moreover, it was limited to the occurrence of a specific scenario. Coke's differentiation between murder and (voluntary) manslaughter was based upon his employment of the term "chance-medley" as an alternative description of the offence. He explained:

Homicide is called chance-medley ... for that it is done by chance (without premeditation) upon a sudden [brawl] ... or contention.¹⁸¹

It seems that Coke was correct in his exposition of the definition.¹⁸² However, the merging of manslaughter with chance-medley restricted the development of a lesser homicide offence. Manslaughter was released from its semantic straightjacket when the two terms were divided (although ironically, chance-medley became re-employed with an entirely different meaning). Chance-medley is encountered in the work of Hale describing excusable killings caused through misadventure or accident, which though not felonious, constituted a trespass and incurred liability for damages. However, although Hale inaccurately altered the meaning of chance medley, he introduced an appreciation of what is now recognised as constructive act manslaughter and negligent manslaughter.

The boundary between murder, manslaughter or chance medley and accident is not particularly clear but it is evidently based upon the presence or absence of unlawfulness and intention. Consequently, it is found that an assault that led to death was not necessarily classified as murder, but may instead be described as manslaughter despite the lack of the mitigating circumstance of falling out or provocation.¹⁸³ Thus, in *Sir John Cichester's Case*¹⁸⁴ Sir John and his manservant,

¹⁸⁰ *Ibid.* at 55.

¹⁸¹ *Ibid.* at 56.

¹⁸² East, *1 PC* at 221: 'The ancient legal notion of homicide by chance-medley was, when death ensued from a combat between the parties upon a sudden quarrel.'

¹⁸³ Hale *1 PC* at 474: 'he that voluntarily and knowingly intends hurt to the person ..., tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least, as if A. intends to beat B. but not to kill him, yet if death ensues, this is not *per infortunium*, but murder or manslaughter.'

'whom he very well loved', were playing, the servant with a bedstaff and Sir John with a rapier enclosed in the scabbard. During the sport, the bedstaff broke the scabbard so that the rapier tip was exposed and, following a poorly defended parry, struck the servant in the groin causing mortal injury. Sir John Chichester was indicted for murder and tried at the king's bar. Hale explained the reasoning behind the ultimate manslaughter conviction:

[I]t was ruled 1. that this was not murder, tho the act itself was not lawful, because there was no malice or ill will between them. 2. That it was not barely chance-medley, or *per infortunium*, because although the act, which occasioned the death, intended no harm, nor could it have done harm, if the chape had not been stricken off by the party [killed], and tho the parties were in sport, yet the act itself, the thrusting at the servant, was unlawful, and consequently the death, that ensued thereupon was manslaughter.¹⁸⁵

As lawfulness played a focal role in the establishment of liability, it was an accidental killing if the owner of a deer park killed a person with a misfired arrow when hunting on his own grounds. It was otherwise if the same consequence arose when the perpetrator had no licence to be hunting in the park. In this instance it was manslaughter because the act was unlawful.¹⁸⁶ This heralds the appearance of misdemeanour-manslaughter, reducing the severity of felony-murder.¹⁸⁷ Moreover, it is the precursor of the constructive fault that is still present in involuntary manslaughter liability.¹⁸⁸

Furthermore, the existence of homicide liability where culpability was based on negligence is encountered in the illustrations of Hale. The difficulty that he tackled was the means by which culpable homicide could be differentiated from excusable homicides. Killings judged non-felonious were those which occurred accidentally and were termed homicide *per infortunium* or chance medley. However, although punishment was not imposed by the criminal law, the killer's

¹⁸⁴ *Ibid.* at 472.

¹⁸⁵ *Ibid.* at 473.

¹⁸⁶ *Ibid.* at 475.

¹⁸⁷ Hale was a particular advocate of reducing the severity of murder liability. He disagreed with Coke's murder conclusion in the following example, arguing rather that: 'if [A.] had thrown a stone to kill the poultry or cattle of B. and the stone hit and kill a passer-by, it is manslaughter, because the act was unlawful, but not murder, because he did it not maliciously, or with an intent to hurt the passer-by.': *IPC* at 475. Cf. Stephen, below, p.81. Furthermore, Hale suggested a limitation to the misdemeanour-manslaughter rule: 'By the statute of 33 H. 8. Cap 6. "No person not having land &c. of the yearly value of one hundred pounds *per infortunium* may keep or shoot in gun upon pain of forfeiture of ten pounds". Suppose ... such a person ... shoots with a gun at a bird, or at [crows], and by mischance it kills a bystander by the breaking of the gun, or some other accident, that in another case would have amounted only to chance medley, this will be no more than chance-medley in him, for tho the statute prohibit him to keep or use a gun, yet the same was but *malum prohibita*, and that only under penalty, and will not [enhance] the effect beyond its nature.': *ibid.* at 475-6.

¹⁸⁸ *DPP v Newbury and Jones* [1977] AC 500.

goods were forfeit for homicide *per infortunium*¹⁸⁹. Moreover, the killer committed a trespass and damages were due the injured party.¹⁹⁰ Hale provided the following illustrations to demonstrate the perimeters of non felonious homicide and (negligent) manslaughter:

[I]f a carpenter or mason in building casually let fall a piece of timber or stone and kills another [it is homicide *per infortunium*]. But if he voluntarily let it fall, whereby it kills another, if he give not due warning to those that are under, it will be at least manslaughter; *quia debitam diligentiam non adhibuit*.¹⁹¹

Homicide *per infortunium* involved a killing where the perpetrator was engaged in lawful activity without intention of bodily harm.¹⁹² This was differentiated from the manslaughter example where the killer acted 'voluntarily'. The difference between the volition of the actor in the two examples is not clear. Presumably, 'voluntarily' is not intended to be equated with 'deliberately' as this would elevate the fault to malice and thereby incur murder liability.¹⁹³ It seems more likely that in the second example the actor, though accidentally initiating the course of events, was aware of the falling projectile.¹⁹⁴ Thus, the failure to give due warning resulted in liability based on his culpable negligence. Based on this interpretation the fault rested on failing to try to avert a self-created and foreseen danger. In support of this interpretation and by way of contrast, Hale suggested that there should be no liability imposed 'if a man lay poison to kill rats, and a man casually take it, whereby he is poisoned'.¹⁹⁵

In summary, the delimitation between excusable killing and felonious homicide permitted the development of manslaughter based on alternative premises to mitigated murder. Put another

¹⁸⁹ Hale *1 PC* at 477.

¹⁹⁰ Hale *1 PC* at 472. Manslaughter was a clergyable offence and by this time a first offence was punished by branding on the brawn of the thumb and one year's imprisonment. See above, p.55.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

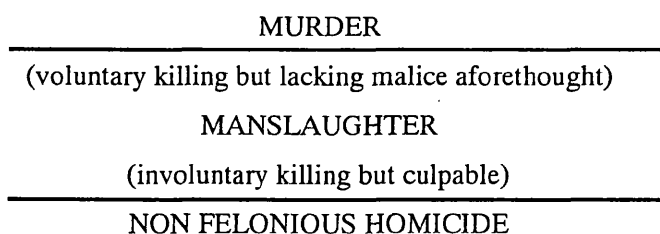
¹⁹³ This is apparent from Hale's example based on a case before the Newgate sessions in 1672: 'A. drives his cart carelessly, and it runs over a child in the street, if A. had seen the child, and yet drives upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had not run cross the way, and the cart run over the child before it was possible for the carter to make a stop, it is *per infortunium*'. *ibid.* at 476. Stephen also comments upon the difficulty in interpreting Hale's meaning of "voluntary": 'It cannot have meant intentional ... nor can it have meant "voluntary" in the strict sense of accompanied or caused by an act of the will, for that ... would apply to nearly every imaginable case of homicide.': *III History* at 63.

¹⁹⁴ This interpretation is given weight by a later illustration where Hale described the difference between homicide *per infortunium* and manslaughter. In both cases the tiler "lets a tile fall knowingly" with the difference relying on the presence or absence of a warning. Hale *1 PC* at 475.

¹⁹⁵ *Ibid.* at 431. However, at the start of the nineteenth century, East took issue with correctness of exculpating the rat poisoner in such a case. Although the act was lawful and the death accidental it was suggested that it would only be admitted as misadventure if the poison had been 'laid in such manner and place as not to be easily mistaken for proper food'. If it could be so mistaken then 'that would betoken great inadvertence, and might in some cases amount to manslaughter': East, *1 PC* at 226.

way, manslaughter can be approached from two different angles. The one involves deciding the boundary between the two felonies, murder and manslaughter, and the other the line between manslaughter and the killings that fall outside the ambit of the criminal law. The murder-manslaughter dividing line focuses upon voluntary killings that are deserving of less severe censure and should therefore be reduced to the lesser offence. On the other hand, the dynamics at the manslaughter-non-felonious homicide cusp revolve around the elements that operate to elevate an involuntary killing into a culpable homicide:

Delimiting manslaughter



3.2.2 Conceptual Changes in the Criminal Law by the End of the Nineteenth Century

The nineteenth century developments in the criminal law continue to reverberate within contemporary conceptual frameworks. Furthermore, up until 1957 and the abolition of constructive malice in murder,¹⁹⁶ the substantive definitions of the degrees of homicide provided by Stephen remained essentially intact. By the time Stephen wrote his *Digest* in the last quarter of the nineteenth century, there had been a modification in approach to the criminal law. Penal policy in particular had been placed under intense scrutiny and there had been a general progression in substantive law centred on understanding and developing the general principles and underlying rationale.¹⁹⁷ Furthermore, strong arguments had been enunciated for the

¹⁹⁶ s.1 Homicide Act 1957 provides '(1) Where a person kills in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence. (2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course of furtherance of another offence.'

¹⁹⁷ When the criminal law Commissioners began their work in 1832 'few general principles could be abstracted from judgments or text books, there were considerable discrepancies in works of authority and

codification of the criminal law which addressed the need for accessibility and transparency to ensure efficacy in this public branch of law.¹⁹⁸ The first attempt to consolidate criminal law statutes occurred between 1826 and 1832.¹⁹⁹ However, in 1833 a far more ambitious project was undertaken with the appointment of five commissioners whose terms of reference entailed producing a digest of the entire criminal law, including procedure and punishment. Ultimately, eight reports were produced between 1834 and 1845 with negligible success in terms of resulting amendment to the existing law.²⁰⁰ Nevertheless, despite being described as ‘the largest and most abortive codification enterprise yet seen in this country’,²⁰¹ the significance of the Commissioners’ work should not be overlooked. They set the scene for a systematic examination of the criminal law in terms of the relationship between penal policy and criminal responsibility leading to considerations of proportionality of punishment and degrees of blameworthiness. Moreover, in seeking to make the criminal law accessible and thereby potentially deterrent they espoused the employment of non-technical terminology. In his *Digest*, Stephen built definitions in logical steps and developed concepts and definitions with illustrations.²⁰²

many contradictions in the unwritten law’ Cross, ‘Reports of Criminal Law Commissioners (1833–1849) and the Abortive Bills of 1853’ in *Reshaping the Criminal Law* (ed Glazebrook, Stevens & Son, 1978) at 7.

¹⁹⁸ The First Report of His Majesty’s Commissioners on Criminal Law, 1834 (537) XXVI stated at 25: ‘So long as a large proportion of the penal law is merely oral and dependent on the examination and consultation of precedents, it must be, to the mass of society, inaccessible, and unintelligible in its rules and boundaries. [Consequently] it cannot possess the efficacy of written and certain rules and specific penalties in deterring men from the commission of crimes. For the law cannot be said to be promulgated till after the offence committed, where, previously it cannot be known even to the most experienced lawyers, except by laborious research, and the aide of legal reasoning and analogy.’ (cited in KJM Smith, *Lawyers, Legislators and Theorists* (Clarendon Press, 1998) (hereafter Smith, *LL&T*) at 129).

¹⁹⁹ Cross, *op cit.* n.198 at 5. For details of the growth of the criminal law reform movement prior to 1820 see Radzinowicz, *1 History*, Part V.

²⁰⁰ The immensity of the task led to diversions particularly regarding penal policy and capital punishment. The Fourth Report (1839) included digests of the law for offences against the person and property offences which in turn included analysis of fault and the concept of liability: see Smith *LL&T* at 130. For an exposition of Criminal Law Commissioners progression and details of the contents of the Reports, see Cross, *op cit.* n.198.

²⁰¹ Cross, *op cit.* n.198 at 5.

²⁰² Stephen was a dedicated advocate of codification and revived the impetus for a criminal code in 1872. Indeed, the *Digest* was written as the basis for such a code. By that time, although England and Wales had refused to adopt codification, the quest had led to the production and acceptance of the Indian Penal Code, which remains fundamentally unchanged to this day. Stephen was profoundly influenced by the Indian Code which was predominantly the work of Thomas Babington Macauley. Macauley sought and, by and large, achieved a logical systematic approach to the criminal law, unencumbered by technical terminology and consistent in its use of terms: ‘Remarkable stylistically, structurally and substantively, the Code marked a radical and express departure from the approach of any English statutory provision before or since. Its style was strenuously and self-consciously clear and as free from complexity as language and conceptual restraints would permit. Technical terms, some with pedigrees stretching back hundreds of years, were generally taboo.’ KJM Smith, *LL&T* at 140. Macauley’s draft was submitted in 1837 and after the rejection of suggested amendments received the assent of the Governor-General in 1860, becoming law in India 1862. For further details, see KJM Smith *LL&T* at 138-143 and Yeo, *FH* at 96-99.

3.2.3 Stephen's Definition of Homicide: Murder and Involuntary Manslaughter

Stephen stated '[k]illing is causing the death of a person by an act or omission but for which the person killed would not have died when he did, and which is directly and immediately connected with his death.'²⁰³ Furthermore, homicide is unlawful:

- (1) when death is caused by an act done with the intention to cause death or bodily harm, or what is commonly known to be likely to cause death or bodily harm, and when such act is neither justified nor excused...
- (2) when death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm;
- (3) when death is caused accidentally by an unlawful act.²⁰⁴

As these three categories denote culpable homicide they include both murder and manslaughter. However, it is immediately noteworthy that in discussing fault terms Stephen avoided using the morally charged term "malice",²⁰⁵ employing instead the word 'intention'. Moreover, there is no significant suggestion of a subjective-objective fault division; there is no indication of recklessness in the sense of either foresight, indifference or callous disregard. On the other hand, an objective standard is implied by the phrase 'commonly known to be likely' which seems to refer to the common knowledge of an ordinary, prudent individual rather than the understanding of the defendant. Furthermore, negligence was a sufficient fault element, although it is arguable that the use of 'culpable' as an additional factor, elevated it from the blameworthiness of standard negligence by suggesting a normative rather than a simply objective standard.

3.2.3.1 Murder

The definition of murder still differed from manslaughter because the former included malice aforethought²⁰⁶ and the latter did not. Stephen emphasised that premeditation was not a

²⁰³ Stephen, *Digest*, article 311.

²⁰⁴ *Ibid.* article 314.

²⁰⁵ Stephen referred to the expression "malice aforethought" as: "... a striking example of the misleading generalisations with which the English Law abounds. "Malice" in the popular use of the word connotes spite or evil design. In its present legal context no such meaning is attached. It is simply a term of art, a formula under which are included the various forms of guilty intention required to constitute murder. The second word "aforethought" is equally misleading. No preconceived design is necessary save in the obvious sense that the culpable state of mind must accompany the act of death. In the words of Holt 'he that doth a cruel act voluntarily doth it of malice prepensed': *Stephen's Commentaries on the Laws of England* (ed. Warmington, Butterworth & Co., 1950) (hereafter, *Stephen's Commentaries*) at 43.

²⁰⁶ The development of the concept of malice is key to understanding the development of murder liability. Ancient law, rather than adopting the principle that a man is answerable only for the results that he

prerequisite of murder liability and defined malice aforethought as any of the following states of mind:

- (a) An intention to cause the death of, or grievous bodily harm to, any person...;
- (b) Knowledge that the act, which causes death will probably cause the death of, or grievous bodily harm to, some person, ... although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by any wish that it may not be caused;
- (c) An intent to commit any felony whatever;
- (d) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of ... duty ... provided that the offender has notice that the person killed is such an officer so employed.²⁰⁷

3.2.3.1.1 Constructive Malice

Categories (c) and (d) encompass the constructive fault that has since been abolished from the English law of murder.²⁰⁸ The fault is constructive in the sense that culpability is constructed from an intent that aims at something less than death or grievous bodily harm: in these classifications, either a felony²⁰⁹ or the forceful resistance of an enforcement officer performing his duty²¹⁰. The rationale behind this kind of murder liability is that the defendant's culpability in

intended, starts by holding him responsible for all the evil he has done and slowly begins to accept arguments of mitigation. Nevertheless, an appreciation of differences of blameworthiness for intentional rather than unintentional homicide can be found. Whilst the law of absolute liability was not abolished, the penalties were amended to distinguish between moral differences. For example, 'the old code of the Swabian race declares that if you are slain by the bite of my dog I must pay half your *wer*. In strictness your whole *wer* can be demanded; but if a kinsman of yours is unreasonable enough to extract this, he must submit to have the corpse of the dog hanging over his door-way until it rots and perishes.' Pollock & Maitland, *II History* at 468. Perhaps unsurprisingly thirteenth century ideas about premeditated malice were essentially ecclesiastical. *Malice prepense* meant little more than intentional wrongdoing; it therefore excluded harm done by misadventure but laid no strong emphasis on the intention of the party and made no special reference to spite or hatred (which might be considered synonymous terms). Nevertheless, 'in the tortuous history of homicide, planning and calculating the death of another have always stood out as a particularly heinous form of killing. Lying-in-wait and ambushing stood out even in the early English law as paradigmatic forms of murder': Fletcher at 253. Thus, Bracton viewed premeditation or waylaying as circumstances of aggravation: Stephen, *III History* at 24. Yet, it soon became evident that premeditation was not the only feature that contributed to the perceived heinousness of a culpable homicide. Consequently, at the start of the nineteenth century, East, *1 PC* at 214-5, urged that 'malice is not only confined to a particular ill will to the deceased, but it is intended to denote... an action flowing from a corrupt or wicked motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief. And therefore malice is implied from any deliberate cruel act against another, however sudden'. Similarly morally charged language is found in twentieth century accounts; Fletcher made a similar point, at 254, when he pointed out that: '[w]anton killings are generally regarded as among the most wicked and the feature that makes a killing wanton is precisely the absence of detached reflection before the deed.'

²⁰⁷ Stephen, *Digest* article 315.

²⁰⁸ s.1 Homicide Act, see n.197.

²⁰⁹ It is murder if 'A shoots at a domestic fowl, intending to steal it, and accidentally kills B': Stephen, *Digest* Illustration (9) at 228. Cf. Hale, above p.76, n.188.

²¹⁰ It is murder if: 'A, a thief, pursued by B, a policeman, who wishes to arrest A trips up B, who is accidentally killed.': Stephen, *Digest* illustration (11) at 228.

killing during the commission of the designated event is sufficiently blameworthy to deserve the label and punishment of a murderer.

In 1868, Lord Chief Justice Cockburn publicly recognised the severity of the felony-murder rule. Despite applying it in *Barrett's Case*, he admitted, '...if a person seeking to commit a felony should in the prosecution of that purpose cause, although it might be unintentionally, the death of another, that ... was murder. There were persons who thought and maintained that where death thus occurred ... it was a harsh law which made the act murder. But the Court and jury were sitting there to administer law, not to make or mould it'.²¹¹ Since then felony-murder has been continued to be subjected to ferocious criticism but still remains a reality, particularly in the United States.²¹² However, it is categories (a) and (b) that provide the focal interest for this work. Since 1957, express and implied malice remain the fault elements for murder.²¹³

3.2.3.1.2 Express or Implied Malice

Categories (a) & (b) may be further divided into essentially three limbs whereby it was murder to cause death when: (1) intending to kill or; (2) intending to cause grievous bodily injury or; (3) performing an act in the knowledge that death (or grievous bodily harm) will probably eventuate.²¹⁴ The fault is subjective, centring around the defendant's conscious aim or appreciation of the risk, but whilst the first two faults have survived the judicial interpretation of the Homicide Act, the third has since been reclassified as involuntary manslaughter.²¹⁵ Consequently the existing law of homicide is no longer able to accommodate Stephen's culpable knowledge and indifferent attitude as a sufficient fault for murder.²¹⁶

²¹¹ *The Times*, April 28, 1868, cited *op cit.* n.2 at 227.

²¹² There is a wealth of writing on the subject. See e.g. Fletcher, "Reflection on Felony-Murder" [1981] 12 Southwestern Univ LR 413-429; Lanham, "Felony Murder – Ancient and Modern" [1983] 7 Crim LJ 90-101; Noyes, "Felony-Murder Doctrine Through the Federal Looking Glass" [1992] 69 Indiana LR 533-579; Roth & Sundby, "The Felony-Murder Rule: A Doctrine at Constitutional Crossroads" [1985] 70 Cornell LR 446-492; Tomkowicz, "The Endurance of the Felony Murder Rule: A Study of the Forces that Shape our Criminal Law" [1994] 51 Washington & Lee LR 1429-1480.

²¹³ s.1 Homicide Act, n.197.

²¹⁴ This, including the still current constructive malice, remained the position in the first half of the twentieth century: Kenny, *Outlines of Criminal Law* (ed Turner, Cambridge, 1952) (hereafter *Kenny*) at 153-7.

²¹⁵ See above, p.19.

²¹⁶ For arguments regarding the sufficiency of the fault, see Mitchell, "Culpably Indifferent Murder" (1996) (1) 25 Anglo-American LR 64.

3.2.3.2 *Involuntary manslaughter.*

The vague status of involuntary manslaughter was made manifest by Stephen's negative definition: 'manslaughter is unlawful homicide without malice aforethought'²¹⁷. It has been asserted that involuntary manslaughter differs from the majority of offences because it is a "dustbin" offence²¹⁸ that accommodates the unlawful causing of death by an uncertain ambit of behaviours and accompanying states of mind. There is a large degree of validity in this viewpoint. Due to the way that homicide offences have been developed in English law, manslaughter expands by default whenever murder is restricted. This comes about from emphasis on the construction of the homicide ladder. Blackstone highlighted the emphasis when he declared that,

Killing another human being is *prima facie* murder. Killing 'amounts to murder unless where *justified ... , excused* on the ground of accident or self preservation; or *alleviated* into manslaughter'²¹⁹

In this scheme the basic homicide offence is murder²²⁰ with manslaughter a mitigated version.²²¹ Consequently, manslaughter takes on an amorphous quality with the elements of the offence expressed in negative or vague, rather than positive, terms.

Thus, the criteria comprise an unlawful act²²² with no malice aforethought. A typical example of involuntary manslaughter scenario is provided by the following illustration:

A waylays B, intending to beat, but not intending to kill him or do serious bodily harm. A beats B and does kill him. This is manslaughter at least, and may be murder if the beating were so violent as to be likely, according to common knowledge, to cause death.²²³

²¹⁷ Stephen, *Digest* article 228.

²¹⁸ Wilson, *Criminal Law* (Longman, 1998) at 393: '[m]anslaughter was the common law's untheorized concession to mercy. In a very real sense, then involuntary manslaughter is not a 'pigeon-hole' crime like murder, theft or assault, but a 'dustbin' crime in which killings accompanied by various states of blameworthiness are thrown together for reasons of expedience.'

²¹⁹ Blackstone, *Commentaries on the Laws of England Vol 4* (1767) at 201, emphasis in original.

²²⁰ The alternative is to reverse the expectation. Thus, 'If act X is sufficient for manslaughter, then X plus an aggravating factor would be the way to define murder.': Fletcher at 239.

²²¹ Moreover, from 1862 until 1934 the burden of proving the mitigating circumstances was upon the defendant. For the history of the presumption see *Woolmington v DPP* [1935] AC 462. For confirmation of the presumption, see Stephen, *Digest* article 322.

²²² Thus, 'if A laid his hand gently on B to attract his attention, and by doing so startled and killed him, A's act would be no offence at all': Stephen, *Digest* Illustration (2) at 226. It is not manslaughter because the conduct did not constitute an unlawful act.

²²³ *Ibid.* at 227.

The eventuating of the same facts would result in involuntary (constructive act) manslaughter today.²²⁴ Similarly twenty-first century liability meets nineteenth century law where,

A, from wanton mischief, throws stones down a coal pit and knocks away a scaffolding. The absence of the scaffolding causes an accident by which B is killed. A commits manslaughter.²²⁵

A's liability arises from the deliberate act of damaging the integrity of the scaffolding so the unlawful act is criminal damage rather than an offence against the person. Furthermore, there is no need for the defendant to foresee the risk of bodily harm resulting from the relevant conduct.²²⁶

Finally, involuntary manslaughter liability was satisfied by the fault of negligence or reckless disregard: Moreover, Stephen's illustration also provides an embryonic insight into corporate manslaughter:

It is A's duty to put a stage at the mouth of the shaft of a colliery. A omits to do so. A truck falls down the shaft in consequence and kills B. If by omitting to erect the stage A intended that B's death should be caused, A is guilty of murder. If the omission was caused only by the culpable negligence of A, and without any intention to kill or injure B, or a reckless disregard to the chance of his being killed, A is guilty of manslaughter.²²⁷

Thus, the existence of manslaughter liability for an omission where the defendant owes the victim a duty of care and the failure was accompanied by sufficiently culpable negligence was already recognised in the nineteenth century.²²⁸

²²⁴ The current law has been amended slightly to the extent that constructive act manslaughter requires a subjectively-based fault (either intention or recklessness) with regard to an unlawful and objectively dangerous act: 'The unlawful act must be such as all sober and reasonable people would invariably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm': *Church* [1966] 1 QB 59 at 70 *per* Edmund Davies J.

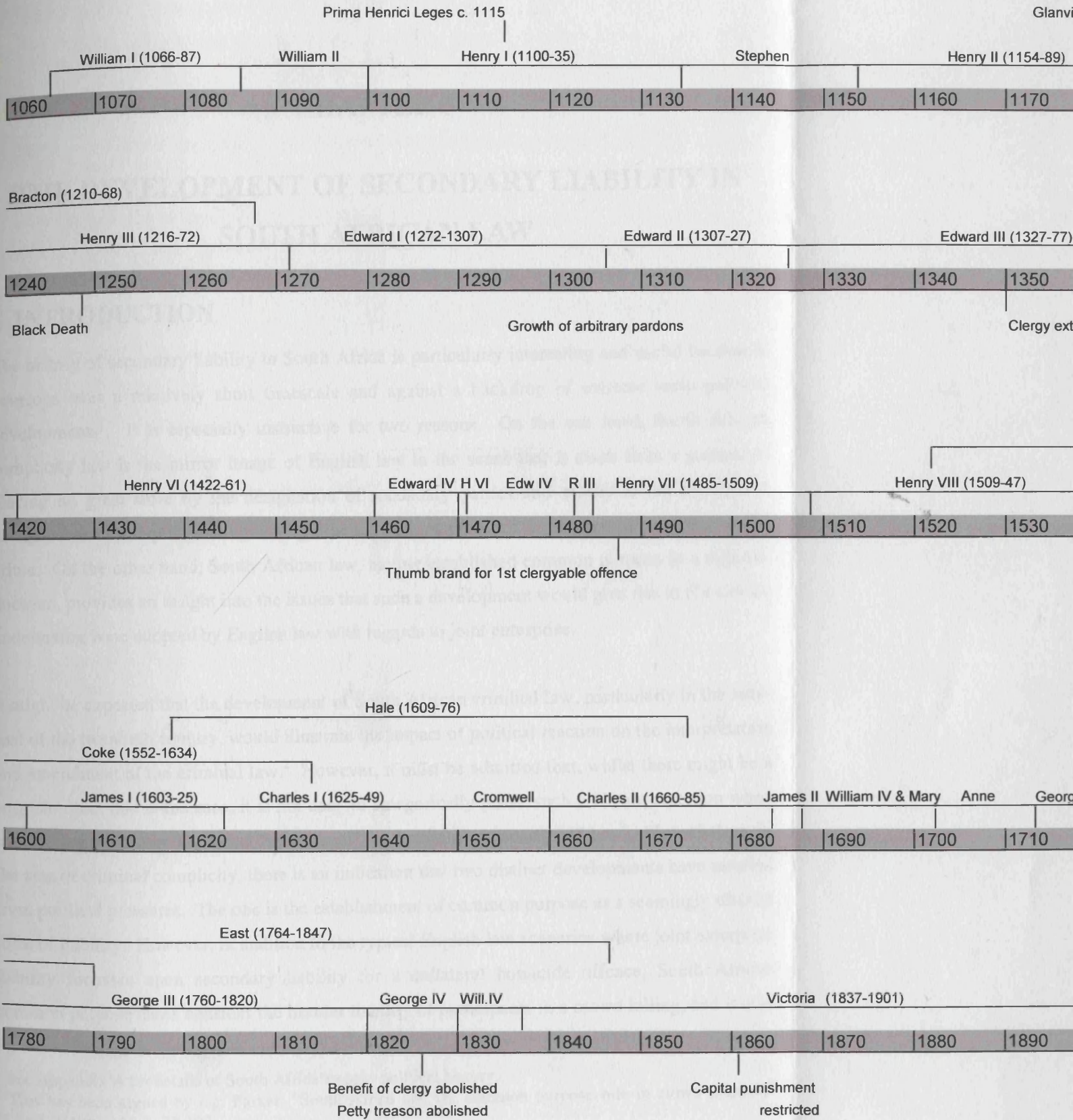
²²⁵ Stephen, *Digest* illustration (10) at 228.

²²⁶ *DPP v Newbury and Jones* [1977] AC 500 provides recent authority for the fact that the unlawful, dangerous act is not limited to offences against the person. In this case, two youths threw a piece of paving stone from a bridge onto a railway track in the path of an oncoming train. The stone fell into the driver's cab and killed a guard. The defendants were found liable for manslaughter: it was not necessary that they should have foreseen the risk of death or bodily harm resulting from their action.

²²⁷ Stephen, *Digest* illustration (7) at 227, citing *Hughes* (1857) D & B 248. East suggested, *1 PC* at 262, that '[a]ccidents frequently occur amongst persons following their lawful occupations, especially such from whence danger may probably arise. If they saw the danger, and yet persisted without sufficient warning, it will be murder. If the act was such as was likely to breed danger, and they neglected the ordinary cautions, it will be manslaughter at least, on account of such negligence; making due allowance for the nature of the occupation, and the probability of the danger; which if very remote, and in the particular instance not reasonable to be expected, may reduce the act to misadventure. The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.'

²²⁸ *Adomako* [1995] 1 AC 171, see above p.20.

Timeline showing significant points in the development of homicide



CHAPTER 3

THE DEVELOPMENT OF SECONDARY LIABILITY IN SOUTH AFRICAN LAW

1 INTRODUCTION

The history of secondary liability in South Africa is particularly interesting and useful because it develops over a relatively short timescale and against a backdrop of extreme socio-political developments¹. It is especially instructive for two reasons. On the one hand, South African complicity law is the mirror image of English law in the sense that it starts from a position of placing no great store by the designation of secondary parties and moves to the creation of designations that require distinguishing criteria, such as presence or absence at the scene of the crime. On the other hand, South African law, having established common purpose as a separate doctrine, provides an insight into the issues that such a development would give rise to if a similar undertaking were adopted by English law with regards to joint enterprise.

It might be expected that the development of South African criminal law, particularly in the latter part of the twentieth century, would illustrate the impact of political reaction on the interpretation and amendment of the criminal law.² However, it must be admitted that, whilst there might be a suspicion that this is the case, it is not easy to categorically prove such a blatant assertion when considering what may be called “mainstream”, as opposed to “apartheid” law³. Nevertheless, in the area of criminal complicity, there is an indication that two distinct developments have resulted from political pressures. The one is the establishment of common purpose as a seemingly distinct form of liability. However, in addition to the typical English law scenarios where joint enterprise liability focusses upon secondary liability for a collateral homicide offence, South African common purpose cases consider the murder liability of participants in a crowd killing, and it is in

¹ See Appendix A for details of South Africa’s socio-political history.

² This has been argued by e.g. Parker, “South Africa and the common purpose rule in crowd murders” [1996] 40 (1) Jo Afr L 78-102.

this latter area that the most pernicious developments have been progressed. The defendants who fell foul of the judicial developments were usually, but not always, black. The second development was the Afrikaner attempt to purify South African law of its English influence and apply instead Roman-Dutch legal principles. This push towards didactic theory led to a blurring of the distinction between principal and accomplice in cases of homicide, and ironically rendered a separate doctrine of common purpose more necessary, in order to provide the flexibility that was surrendered by fixing the alternative complicity parameters too rigidly. South African law, therefore, provides an insight into the consequences of the dedicated application of doctrine or theory without regard for the wider context of the criminal law, and also the perils of creating flexibility by means of vague definition and alternate premises of liability, whereby judicial or political discretion becomes the pivotal issue. Finally, it is possible to appreciate the unwillingness of the jurisdiction to catapult an area of liability that accommodates "hard, but deserving" cases. This becomes apparent under South African law in the inherent tensions of imposing a new, highly logical and theoretical order of Roman-Dutch principles into the legal framework alongside the temptation to, not only retain, but extend bastard appendages from English law in order to cover policy driven social control.

Due to the controversy that surrounded the new developments and the difficulty in categorically naming heads of liability that originally emerged as scions of orthodox complicity, the following exposition is chronological in order to permit an appreciation of the arguments for and resistance to the progress of secondary liability.⁴ Moreover, a chronological order better demonstrates the faltering process of legal creation and development.

³ For an insight into the arsenal of statutes that were passed by the National Party and created the foundation of the apartheid law, see below, p.324.

⁴ It is conceded that such an approach risks a loss of clarity in the resulting position of the law. To address this potential weakness and to provide a comparison with the English law position, the ultimate designations of the parties is provided above, p.31-35.

2 THE DEVELOPMENT OF SECONDARY LIABILITY TO HOMICIDE

2.1 CLOSE OF THE NINETEENTH CENTURY AND START OF THE TWENTIETH CENTURY

Early in its history, English law introduced highly technical differences between the designation of participants, eventually removing them by the mid-twentieth century.⁵ Conversely, under South African law, the difference between perpetrator and accessory had little relevance⁶ until 1980⁷, when a clear theoretical, if not always practical, difference was drawn between the parties to a crime. Until then, the term *socius criminis* had provided a blanket description of all parties to a crime, whether accessory or co-perpetrator.⁸ Prior to 1980, the parties were divided into principal and *socius criminis*.⁹ The term *socius criminis* literally means 'partner in crime'. Thus, it is only capable of use in a generic form, rather than providing information on a specific mode of activity. In 1906, comparing the position with English law, Chief Justice Innes declared:

In the case of common law offences, any person who knowingly aids and assists in the perpetration of a crime is punishable as if he had committed it. The English law calls such a one a principal in the second degree; and there is much curious learning as to when a man is a principal in the second, and when in the first degree. Our law knows no distinction between principals in the first and second degrees, or between principals in the second degree and accessories. It calls a person who aids, abets, counsels or assists in a crime a *socius criminis* – an accomplice or partner in crime. And being so, he is under Roman-Dutch law as guilty, and liable to as much punishment, as if he had been the actual perpetrator of the deed.¹⁰

As a result, the common purpose rule, which in England and Wales had side-stepped the obstacles posed by the procedural technicalities that beset the prosecution of an accessory,¹¹ was a superfluous addition to South African law. This assertion is borne out by the fact that, though common purpose was introduced into South Africa in 1886,¹² the courts found no occasion to make use of it until 1917, and then in a civil case.¹³ However, by 1991, the Appeal Court asserted

⁵ See above, pp.27-30, 58-65.

⁶ In South Africa, crimes were never divided into treasons, felonies or misdemeanours: Parker *op cit.* n.2 at 81.

⁷ *S v Williams en 'n Ander* 1980 (1) SA (A).

⁸ As defined under English law.

⁹ Sometimes *particeps criminis* as an alternative term Snyman, *CL* at 245.

¹⁰ *R v Peerkhan and Lalloo* 1906 TS 798 at 802.

¹¹ Above pp.56-58.

¹² By the Native Territories' Penal Code (Act 24 of 1886 (C)).

¹³ *McKenzie v Van der Merwe* 1917 AD 41 (A).

that there are three ways in which a person can be liable for murder (and, by the same logic, culpable homicide). Firstly, as the actual perpetrator of the killing, secondly, as a party to a common purpose to murder, and thirdly, as a party to a common purpose to commit some other crime while foreseeing the possibility of causing death to someone in the execution of that crime.¹⁴ There is no mention of liability arising as an accessory, that is, one who helps or influences the offence. Thus, over the course of the century, common purpose, which had begun life 'bereft of a function',¹⁵ had become the sole means of imputing responsibility for homicide to a secondary party. The object of the following account is to examine how and why this change came about.

2.2 THE DISCOVERY OF A ROLE FOR COMMON PURPOSE

Section 78 of the Native Territories' Penal Code provides:

If several persons form common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.¹⁶

In *McKenzie v Van der Merwe*¹⁷ armed Boer rebels, defying the government's support of the Crown during the war, had damaged property on the plaintiff's farm, and stolen stock. The farmer sued the rebel officer but the claim for damages was unsuccessful. Chief Justice Innes held that the officer was liable only for the unlawful acts of his troops when those acts were carried out in accordance with his orders. At the very least the acts must have been within the realm of expectation, in the sense that the activity would be accepted as a necessary part of pursuing the rebellion. At the turn of the century, it had been cause for self-congratulation that the law was 'void of any technicality',¹⁸ regarding secondary liability. The reasoning of Innes CJ in *McKenzie* is, therefore, all the more interesting in that he specifically rejected the application of conventional accessory conduct to the officer, and introduced, in his opinion, a different basis of responsibility.

To establish liability for delicts which the person concerned neither instigated, perpetrated, aided nor abetted, facts must be shown from which it follows without doubt that he authorised them.¹⁹

¹⁴ *S v Majosi and Others* 1991 (2) SACR 532 (A) at 537.

¹⁵ Parker, *op cit.* n.2 at 82

¹⁶ Cited in Rabie, "The doctrine of common purpose in criminal law" [1971] 88 SALJ 227 at 229.

¹⁷ *McKenzie v Van der Merwe* 1917 AD 41 (A).

¹⁸ *R v Peerkhan and Lalloo* 1906 TS 798 at 803 *per* Wessels J.

¹⁹ *McKenzie v Van der Merwe* 1917 AD 41 at 45.

He considered that the basis of common purpose liability under English law was agency.²⁰ Whether his interpretation is sustainable or not, is rendered largely immaterial by the fact that he proceeded by announcing that 'its place in our law must be that of an application of the doctrine of implied mandate': it was sufficient to find 'the inference of authority to do the deed',²¹ and, apparently, this was to be implied from the circumstances.²²

Another period of unrest witnessed the extension of the common purpose rule to the criminal law.²³ During the strike of 1922, a number of persons, including one Garnsworthy, formed a commando unit. Their common objective was to halt the working of the mine and they set about achieving their purpose via an armed attack on the mine. Eight defenders were killed in the ensuing fight, but only one during the assault: the other seven were killed upon their surrender. The court accepted that there had been no common purpose to kill the captured defenders and there was no evidence that any of the accused had killed the victim who died during the attack. Nevertheless, the court held that all were guilty of murder based on the doctrine of common purpose. There is no mention of the requirement for proof of mandate, express or implied. Instead, Dove Wilson JP expressed the grounds of liability in the following terms:

Where two or more persons combine in an undertaking for an illegal purpose, each one of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what he knew, or ought to have known, would be a probable result of their endeavouring to achieve their object.²⁴

Although the objective fault element has since been replaced, and the mental element now required is that of the substantive offence,²⁵ the attribution of liability remains the same. In murder and culpable homicide, liability does not depend upon personal causation: the causing of death by the actual perpetrator is imputed to the other participants.²⁶ However, the difficulty with

²⁰ *Ibid.* at 46.

²¹ *Ibid.*

²² Rabie, *op cit.* n.16 at 230.

²³ *R v Garnsworthy and Others* 1923 WLD 17. However, Parker, *op cit.* n.2, at 82 n.22, cites an earlier case: 'In 1920 the common purpose rule was used to convict over 160 pupils of public violence, following a disturbance at Lovedale Training Institution, a mission school founded by the Free Church of Scotland. The index to the South African Law Reports discloses that this case was only cited once between 1947 and 1990 (and then in Southern Rhodesia), perhaps because the convictions were based on very thin and creatively interpreted evidence.' It seems that this case provides a further example where the court used artistic licence to extend the application of the rule.

²⁴ *Ibid.* at 17.

²⁵ Burchell & Milton at 399.

²⁶ Common purpose is not restricted to homicide cases. Burchell & Milton at 397 n.41 cite e.g. *S v Banda* 1990 (3) SA 466 (B) (treason); *R v Bayat* 1947 (4) SA 18 (N) (assault) and *R v Grobler* 1918 EDL 124 (housebreaking).

the *Garnsworthy* case is that there was no evidence that the perpetrator of the killing was associated with the common purpose. It was quite possible that the victims had been killed by someone unconnected with the plan. All that could conclusively be stated was that 'the accused had had the common unlawful object of bringing activities at the mine to a halt and in the furtherance of this purpose a number of persons had been killed'.²⁷ Unable to impute responsibility directly to the killings, the court constructed an elaborate chain of causation linking the deaths with the participation of the accused in the 'final act which ultimately overwhelmed the mine'.²⁸ It was argued that, upon the firing of the first shot, everyone who took part in the attack must have, or should have, known that the use of lethal force might result in someone being killed.

From now on, where two or more persons were involved in a crime, the courts had at their disposal two potential means by which liability could be imposed. A secondary party could be found responsible for aiding, abetting, counselling or assisting, as confirmed in *Peerkhan and Lalloo*. Alternatively, and sometimes interchangeably, liability could be imposed under the common purpose rule. In the latter case, it was unclear whether the basis of liability rested upon authorisation/mandate in accordance with *McKenzie*, or participation/association as *per Garnsworthy*. In the light of the confusion, it is hardly surprising that secondary liability was not applied consistently.

That group murder could be substantiated without recourse to the common purpose rule was demonstrated by *Ngobo*.²⁹ The accused was one of a group which ambushed another man. The victim died but it was unclear whether the defendant had rendered him any physical violence. The accused was found guilty of murder, but although the facts are customised to the common purpose rule, the Court cited, and based the decision on, *Peerkhan and Lalloo*.³⁰ That said, there are a significant number of cases where the common purpose rule was applied to impose liability on participants when it was impossible to determine the dealer of the fatal blow.³¹ However, the invocation of common purpose was not limited to instances where the perpetrator was unknown.

²⁷ Rabie, *op cit.* n.15 at 230.

²⁸ *R v Garnsworthy*, *op cit.* n.23 at 22.

²⁹ *R v Ngobo* 1928 AD 372 (cited in Parker, *op cit.* n.2 at 82-3).

³⁰ *Ibid.* at 376.

³¹ See e.g. *R v Ndhlangisa & Another* 1946 AD 1101; *R v Sikepe & others* 1946 AD 745; *R v Morela* 1947 (3) SA 147 (AD); *R v Ncube & Koza* 1950 (2) PH H211 (AD). These cases involved a variety of theft offence as the foundation of the common purpose. The participants were found liable of murder on the grounds that they must have, or actually did, foresee the possibility of lethal violence being used by one of

In *Nsele*,³² the appellant and one Philip entered a store to steal some money. The appellant left to check the street and, as he re-entered, a shot was fired. Both parties fled but it was established that Philip had shot the storekeeper. The accused's conviction for murder was upheld on the grounds that he knew that Philip had a firearm that he may use during the unlawful enterprise. Therefore the appellant had been reckless as to the resultant killing. The common purpose rule in the case of murder has, therefore, been stated thus:

[W]here a number of persons have a common purpose to commit a crime and they assist one another in the commission of that crime, all are guilty of murder if someone is killed in the process and if all had the intent, usually in the form of *dolus eventualis*,³³ in regard to the victim's death.³⁴

As an accomplice is judged on his individual fault, Nsele could equally validly have been found guilty of murder under the *Peerkhan and Laloo* formula: assisting and abetting a robbery (*dolus directus*) with the foresight that a death may occur (*dolus eventualis*).

The previous examples involve the employment of the common purpose rule in accordance with *Garnsworthy*. However, the idea of incurring liability via the extension of a mandate had not disappeared. The fact that the mandate could be implied may be especially useful in cases where there was no evidence of prior agreement to carry out a particular plan often involving robbery or theft. Thus in *Mkize*³⁵ it was stated that a 'mandate can be implied even if there is no previous conspiracy between the persons concerned... it is sufficient if they act in concert with the intention of doing an illegal act, even though this co-operation has commenced on an impulse without any prior consultation or arrangement'³⁶. In *Mkize*, the victim was attacked and assaulted with sticks, by the appellant and another. The deceased was killed by a blow with a stirrup iron, an opportunistic weapon that the appellant feasibly did not know had been either obtained or used by his partner. Nevertheless, the court asserted that the appellant was 'at least guilty of culpable homicide' because common purpose liability extended to the act of one who 'unexpectedly and without prior consultation with the others uses a different kind of weapon and causes death'.³⁷

their number, and were therefore reckless as to the occurrence of the resultant death: Rabie, *op cit.* n.16 at 231-2.

³² *R v Nsele* 1955 (2) SA 145 (AD).

³³ To recapitulate, *dolus* takes a variety of forms. *Dolus directus* describes the state of mind where an object is specifically aimed at or is the purpose of the action. *Dolus eventualis* roughly equates to the English concept of subjective recklessness, where a person foresees the possibility of a consequence occurring. The fault for murder encompasses both mental states. See above, p.22.

³⁴ Rabie, *op cit.* n.16 at 233.

³⁵ *R v Mkize* 1946 AD 197 (A).

³⁶ *Ibid.* at 206. Confirmed in *R v Mtembu* 1950 (1) SA 670 (A).

³⁷ *Ibid.*

In *Shezi*, it was confirmed that the culpability of participants ‘depends on whether the result produced by the perpetrator of the act falls within the mandate and is not concerned with the means by which the result is produced’³⁸. However, there was an important qualification. Culpable homicide would be the correct result if a lethal weapon were used when the mandate involved only the infliction of corporal punishment. On the other hand, the use, by one of the party, of an unknown but equally deadly weapon, during the course of an armed assault, would result in imputed responsibility for murder for all of the parties.³⁹

In the course of the judgment in *Mkize* and the refinement in *Shezi*, the Court cited the precedent of *Duma*.⁴⁰ This case was particularly significant because it extended the existing concept of common purpose and provided the platform from which murder liability for crowd killings would be elaborated. Before considering the facts and reasoning of *Duma*, it is pertinent to pause and explain the South African position on the minimal conduct of a secondary party. Referring to the English case *Coney*,⁴¹ Gardiner AJA confirmed that ‘mere knowledge that a crime is to be committed, or mere presence at a crime, coupled in either case with an abstention from any endeavour to prevent the crime is not of itself aiding and abetting’.⁴² He continued that physical assistance is not required; ‘the fact that help is at hand is of great comfort and assistance to the actual perpetrator, and facilitates the commission of the crime’.⁴³ In other words, there needs to be some evidence of assistance or co-operation between the perpetrator and the accomplice.⁴⁴

In *Duma*, a crowd of approximately thirty guests had chased the victim in the aftermath of a brawl at a wedding. The man had been caught and beaten but eventually died from a stab wound.

³⁸ *R v Shezi and others* 1948 (2) SA (AD) 119 at 128.

³⁹ ‘If A gives a mandate to B to kill C by shooting him with a pistol, I can see no ground on which his liability in law will be any the less because B chooses to use a dagger and not a pistol.’: *ibid.* at 127 per Greenburg JA. In this case the perpetrator used a screwdriver, and, though it was possible that the possession of the screwdriver was unknown to the other parties, two other members of the group of four were known to possess an axe and an iron bar, which they had proceeded to use in a series of assaults and robberies that day. The position is the same under English law: liability is not imposed upon the secondary party if the perpetrator’s fatal act was qualitatively or materially different to that foreseen by the accessory, and this introduces an evaluation of the relative lethality of the weapon actually used (compared with the weapon contemplated by the accessory). See *Powell; English* [1997] 4 All ER 545 and the subsequent cases, *Uddin* [1998] 2 All ER 744, *Greatrex and Bates* [1999] 1 Cr App R 127 and *Crooks* [1999] NI 226 but cf. *Gilmour* [2000] 2 Cr App R 207, below pp.252-254.

⁴⁰ *R v Duma* 1945 AD 410.

⁴¹ (1882) 8 QBD 534.

⁴² *R v Mbande & others* 1933 AD 382 at 392-3 (cited in *R v Chenjere* 1960 (1) SA 473 (FC) at 478).

⁴³ *Ibid.* at 393.

⁴⁴ See *R v Jackelson* 1920 AD 486 at 491 (cited in *S v Khoza* 1982 (3) SA 1019 (A) at 1033).

The appellant was seen with a stick moving from the place where the victim had died. However, his part in the beating and stabbing was unclear. It was quite possible that he had joined the crowd surrounding the deceased and played no further part in the attack. Nevertheless, he was held guilty of assault. He would only be guilty of murder if he had foreseen that the victim would be stabbed. The question remains as to why Duma was liable for the assault. There had been no evidence of an agreement to assault the victim, and neither was there any evidence that he had assisted in the assault. The evidence supported only Duma's participation in the chase and his possession of a stick at the scene of the crime: flimsy proof of a common purpose and the parties to it. Although Duma was exculpated from the murder on the grounds that the victim had been stabbed, Judge Tindall reasoned rather more ominously that, if the victim had died from a blow struck with a stick, the appellant would have been guilty of murder since he had joined the chase in possession of a stick and 'must have foreseen that, if the deceased were caught, he would be beaten to death; for this result is what one would expect when a large number of excited natives chase a single native with the intention of assaulting him with their sticks'.⁴⁵ Whether the judge would have harboured the same expectation of a large number of excited Europeans is a moot point and demonstrates the arbitrariness of the normative standard when applied by an arbiter who is unattractively partisan.

It has been suggested that 'this was an attempt to create a presumption of intent, which could both extend and limit the current basis of liability'⁴⁶; whilst desiring to stretch liability to include the assault, the judge was uncomfortable in expanding it so far that it would encompass the murder. Indeed, in *Shezi*, Judge Tindall confirmed his reluctance to inculcate the crowd members for murder in *Duma*. However, his explanation also illustrates the logical tensions of the judgment:

In a case like *Rex. v Duma*, one of concerted action on the spur of the moment without any previous plan, the doctrine of mandate, if expressed to extremes, may lead to most artificial results; it seems to me at least doubtful whether it is correct in such a case to saddle every one of the pursuers, who thronged around the deceased when he was attacked, with liability for the stab wound on the ground of contemplation to be attributed to them of the likelihood of a fatal result from an attack with sticks.⁴⁷

Yet, he had expressed his willingness to draw just that inference if the deceased had died from a beating. Moreover, the artificiality of pressing the concept of mandate to extremes is similarly revealed in the decision to include the assault within its ambit.

⁴⁵ *R v Duma* 1945 AD 410 at 416.

⁴⁶ Parker, *op cit.* n.2 at 84.

⁴⁷ *R v Shezi and others* 1948 (2) SA (AD) 119 at 128.

To summarise, Judge Tindall's judicial creativity extended the law of complicity liability in two ways. He had interpreted the doctrine of implied mandate, which had been explained in negative terms in *McKenzie v Van der Merwe*: authorisation was a form of encouragement and taken a step further, evidence of implied authorisation was held sufficient to satisfy the conduct element of secondary liability.⁴⁸ Furthermore, there need be no evidence of a conspiracy or prior agreement to constitute a common purpose. A common purpose could arise spontaneously without need for consideration or communication. Alternatively, a person could spontaneously join an existing common purpose. Once a common purpose was found to have crystallised, the mandate could be inferred from the common intent or co-operative action.

2.3 THE DEVELOPMENT OF "JOINING IN" LIABILITY FOR MOB KILLINGS

The judgment in *Duma* permitted the rise of a new subset of common purpose. The terminology was amended: 'ratification' was tried in place of 'mandate'⁴⁹ and 'active association'⁵⁰ became the phrase used to describe the lack of prior agreement. The law of criminal complicity took a particularly pernicious turn when the Appeal Court sought to hold a party who had joined in, only after a mortal blow had been inflicted upon the victim, subsequently liable for murder. *Mtembu*⁵¹ was the first case to witness the canvassing of the arguments for and against imposing secondary liability post mortal wounding. The crux of the case facts was that by the time the appellant arrived and struck the victim with a stick, the perpetrator had already fatally stabbed the deceased. The question to be answered was whether the appellant thereby became liable as a party to the common purpose of murderous assault and could be held guilty of murder.

Before considering the issues involved in secondary party association after the infliction of a fatal injury, it is instructive to examine the reasoning which stretched still further the parameters of common purpose established by *Duma*. Schreiner JA confirmed that a party who joined in a spontaneous common purpose could be liable for murder although the common purpose did not aim at killing. He also re-employed the term "mandate" and discussed the areas of liability covered by common purpose with the following explanation:

[A]s a rule assistance and agreement go together but there may be cases where the assister is liable for the act of the perpetrator without any agreement with the latter at all, even such an agreement as may have arisen on the spur of the moment and may be

⁴⁸ Parker, *op cit.* n.2 at 85.

⁴⁹ *R v Mgxwiti* 1954 (1) SA 370 (A). See below, p.100.

⁵⁰ *S v Khoza* 1982 (3) SA 1019 (A). See below, p.109.

⁵¹ *R v Mtembu* 1950 (1) SA 670 (A).

inferred from the fact of more or less simultaneous assault upon the victim. If, for instance, A is pursuing C manifestly intending to assault him dangerously or kill him and B joins in the pursuit without A's knowledge but wishing to associate himself with and aid in achieving A's manifest object, B is also liable if A in consequence of their pursuit succeeds in killing C. The notion of "mandate" would obviously have to be given an extended meaning in cases where the "mandatory" is unaware of the "mandator's" very existence must be brought under it.⁵²

In *Duma*, "mandate" had been linked to the idea of encouragement. The act of encouragement implies the existence of consensus and shared intent, which permitted the inference of a common purpose between the parties. Schreiner JA very clearly stepped outside these boundaries. Instead of encouragement, he chose the term aid that, as his example illustrated, may include assistance that is unknown to the perpetrator. In this scenario, there is obviously no consensus or shared intent. The best that can be said is that the secondary party is aspiring to a would-be common purpose. Moreover, in Schreiner's JA example, B has provided neither assistance nor encouragement. He has simply run after the chase, albeit with a secret intention of joining in. To hold B liable for murder on these facts ignores the minimum conduct requirement for a *socius*, which requires evidence of co-operation where no actual assistance or encouragement is rendered. Presumably, the finding is permitted by the fact that the mandate may be implied. However, it demonstrates just how mutable the common purpose rule could become if this line of reasoning was followed.

In fact, though the allure of its promising flexibility can be detected, it is deceiving to claim that common purpose had been accepted as definitive doctrine. The haziness of the distinction between liability as a *socius* and a party to a common purpose was still evident. That the differences, if there were any,⁵³ had still not been satisfactorily worked out and defined was highlighted by Greenburg JA who procrastinated upon the appropriate use of terminology and suggested:

It may be that if two persons set out, in possession of only one lethal weapon, and this weapon is passed from the one to the other to enable the latter to attack a third party, then the former will be liable, for the consequences of any such attack, as a *socius criminis* on the ground that he has assisted in the commission of the deed.⁵⁴

⁵² *Ibid.* at 677-8

⁵³ It was disputed whether there was a separate doctrine of common purpose: *R v Chenjere* 1960 (1) SA 473 (FC) at 476 and *S v Thomo and others* 1969 (1) SA 385 (A) at 399.

⁵⁴ *R v Mtembu* 1950 (1) SA 670 at 677 per Greenburg JA (citing *R v Mlooi* 1925 AD 131 at 134).

In this case, there was no need to resort to the discovery of an implied mandate; the fact that aid was rendered was sufficient, in itself, without the further requirement for consensus between the parties.

The arguments surrounding secondary liability when the accused associated with a purpose to “murderously assault”⁵⁵ or kill the victim only after the mortal injury had been inflicted, cannot be appreciated without a basic understanding of the concept and legal rules of causation. The substantive homicide offences require that the perpetrator caused the death of a human victim. This is usually satisfied by showing that, but for the perpetrator’s conduct, the victim would not be dead. Thus, the perpetrator caused the death of the victim. The difficulty with applying causation to secondary parties whose conduct extends to help and/or influence is that it is rarely possible to state categorically that, but for the secondary party’s behaviour, the victim would not be dead. Conversely, a direct chain of causation often links the victim’s death with the perpetrator’s action. The secondary party’s conduct is, by necessity, one step removed from the *actus reus* of the substantive offence. Furthermore, the volitional act of the perpetrator intervenes to break any direct causal nexus between the secondary party and the proscribed consequence. Whether or not causation should play a role in defining the liability of secondary parties, is an issue that will be deferred until later.⁵⁶ Suffice to say, at this point, that South African law, like English law, accepted the premise that it is not necessary to prove causation in the case of a common purpose. Instead, liability is based on attributing, or imputing, the act of the perpetrator, whether identified or not, to all other parties to the enterprise. Consequently it is unnecessary to show that the secondary party’s conduct actually caused the death, either by causing the perpetrator’s lethal act or by making a direct, significant contribution to the victim’s death, perhaps by holding the victim down to enable a fatal stabbing. For simplicity of exposition, this will be described as first stage causation. However, as accomplice liability arises through helping or influencing the commission of a crime, it is necessary, in homicide offences, to show that the secondary party aided or encouraged the principal prior to or at the time of the act that caused the victim’s death. This will be called second stage causation and without it, a prospective secondary party will be rendered an accessory after the fact, because the crime has already been completed.

The essence of this reasoning is encapsulated in Murray’s AJA conclusion:

⁵⁵ *Ibid.* at 678 *per* Schreiner JA.

⁵⁶ Causation is examined in further detail below, pp.168-171.

[T]here seems... to be no justification for imputing liability for actions which had occurred prior to [the appellant] associating himself with [the perpetrator] in that assault.⁵⁷ It may, of course, be said that the crime of murder was not completed in the present case at the time the appellant struck his blow, for the deceased was still alive. But the essential act had been completed. In the stabbing itself the appellant had no part, nor could he have had *mens rea* in relation to the infliction of the fatal wound before his intervention.⁵⁸ The appellant's assistance to [the perpetrator] by active participation in the subsequent and non-fatal portion of the assault is entirely unconnected with the infliction of the fatal wound which rendered the [perpetrator] guilty of murder.⁵⁹

Murray AJA was adamant that a *socius* could not incur murder liability without providing an act of assistance or encouragement prior to or contemporaneous with the primary act that caused death:

[I]f, after inflicting the stab, the second accused had released the first deceased and left him to linger on and die and the appellant on reaching the wounded man had struck a blow such as the present one, a blow not shown to have expedited the death of the victim, such a blow would have been an independent act constituting no assistance to the [perpetrator of the stabbing] in the commission of the offence of murder.⁶⁰

This assertion was made with the qualification that it 'assum[ed] the absence of a common purpose'.⁶¹ Even if there was a common purpose, this is unproblematic as long as the common purpose was established, or acceded to, prior to or contemporaneous with the act causing death, because co-operation would suffice to satisfy the secondary conduct element. The difficulty occurs where the secondary party attempts to join the common purpose afterwards. In this instance, the would-be participant simply joins the spontaneous common purpose too late to share responsibility for the murder.

However, the alternate argument is also evident. If homicide is viewed as a continuing crime, which is not completed until the victim's actual expiry, then a secondary party may accede to the perpetrator's liability by joining in between the fatal wound and the moment of death. Schreiner JA, after initially declining to express opinion as to whether the secondary party would be guilty of murder upon joining the common purpose after the fatal wound had been administered⁶², went on to state the difficulties encountered in proving a causal link between the secondary party's actions and the perpetrator's act. He continued,

⁵⁷ *R v Mtembu* 1950 (1) SA 670 at 685.

⁵⁸ *Ibid.* at 686.

⁵⁹ *Ibid.* at 687.

⁶⁰ *Ibid.* at 686

⁶¹ *Ibid.*

⁶² *Ibid.* at 677.

These and similar considerations raise a doubt in my mind whether an analysis based on causality may not in these cases be pushed beyond utility, and whether liability should not depend upon the accused person's having taken part, even without agreement and merely by way of assistance, in an assault which is *known* by him to be murderous and which results in the death of the victim irrespective of whether the fatal wound was causally connected with the conduct of the assister or not. On this view adherence resulting in the assister's being liable only as an accessory after the fact would be confined to cases where he took part only after the assault by the killer had been wholly finished; then, indeed, he would not an assister in the assault that resulted in the death.⁶³

This analysis blurs the edges between first stage and second stage causation, as defined above. Furthermore, it is an argument that benefits greatly from the vantagepoint of hindsight. The law of murder is concerned with an actual death and the ascertaining of the mortal wound that caused it. It therefore matters not that the victim may as yet be alive when the prospective secondary party intervenes. The victim has already been condemned to death, and unless the later act accelerates the process (in which case he becomes a perpetrator because his act is the immediate cause of death), the question of contribution or participation is spurious.

To summarise, to create liability for a secondary party who joins a common purpose only after the mortal blow has been struck, involves obliterating, not just first stage causation but, where the substantive offence involves causation in its *actus reus*, second stage causation as well. In other words, it removes the requirement firstly, for a causal connection between the secondary party's contribution and the primary party's act and secondly, the causation requirement of the substantive offence. This is achieved by making homicide a continuing crime, which, despite the guarantee of an inevitable resultant death, is not complete until the victim actually expires, so that, in the interim, a secondary party can become implicated in the offence. Schreiner JA included acts of assistance only, but whether there was purposeful restraint in excluding acts of encouragement provided after the mortal wounding is not clear. Indeed, as mandate had already been held to encompass encouragement, there is every reason to expect both forms of conduct to incur liability.⁶⁴ Thus, by the same logic, secondary liability would be imposed upon someone who walked over and said to the perpetrator, "Oh well done, I've always hated him. Stab him again." Furthermore, this would be so even if the knifeman completely ignored the remark, knowing his work to be already done. The only possible limitation on the expanding liability that would be created by the adoption of Schreiner's JA opinion was the assertion that the "joiner in"

⁶³ *Ibid.* at 678-9 (emphasis added).

⁶⁴ *R v Duma*, see above pp.93-95.

must have known that the attack was murderous, which might suggest that the mental requirement be limited to *dolus directus* with regard to the murder.

Although in *Mtembu*, the appeal had been dismissed, the suggestions for expanding common purpose liability provided an attractive argument for implicating “deserving” secondary parties. In 1954, the appellate division, again including Judges Greenburg and Schreiner, revisited secondary liability for crowd killings. In the case of *Mgxwiti*,⁶⁵ there was a political dimension and a thoroughly unpleasant mob murder. The appellant and seven others were charged with the murder of a white nun, who was driving her car when she was attacked by a mob. The attack involved stone throwing at the car and occupant, and, after her car had been stopped by one of the accused, an assault with a stick through the broken windscreen. Once the car was stationary, the victim was stabbed several times. Finally, the car was set alight and left to burn with the victim still inside. The precise cause of death was unknown due to the destructive effects of the extreme heat on the victim’s remains. However, the appellant had stabbed, or at least stabbed at, the deceased when the car had been brought to a halt, after the stone throwing and the blows to her forehead with a stick. He had been seen walking purposefully towards the scene to join in the attack and, according to one witness, taking out his knife, in readiness, on the way. On the facts, it is clear that the appellant could have been found guilty of attempted murder, though not necessarily of murder due to the uncertainty about the cause and, therefore the time, of the mortal injury. However, ‘this technicality jarred’.⁶⁶ The validation of the death sentence required a finding of murder.

All three appeal judges agreed that the appeal be dismissed, but on different grounds, with Greenburg JA and Schreiner JA again in opposition. De Beer AJA concurred with Greenburg JA who reviewed the witness statements and, based on the chronology of events and the medical evidence, concluded that there was sufficient evidence to demonstrate that the appellant became a party to the common purpose before the deceased was fatally injured.⁶⁷ He implicitly agreed with the trial court assertion that had stated that ‘in a case of this sort an accused person who joins in an attack after the victim of the attack has received the fatal injury should not and could not ... be convicted of the crime of murder’.⁶⁸ However, despite the refusal to condone the imposition of liability post mortal wound, Judge Greenburg’s justification stretches the scope of common

⁶⁵ *R v Mgxwiti* 1954 (1) SA 370 (A)

⁶⁶ Parker, *op cit.* n.2 at 87.

⁶⁷ *R v Mgxwiti* 1954 (1) SA 370 at 379.

purpose liability. Regarding the question whether or not there was sufficient evidence to substantiate the claim that the appellant took out the knife as he proceeded past a witness on his way to the scene of the crime, he concluded:

But, even if at the stage when the appellant passed [the witness] he is not proved to have had the open knife in his hand, his unexplained conduct in going right up to the car that was the centre of a hostile throng, when he arrived he must have known what was going on, and immediately on his arrival stabbing at the deceased, is not open to any reasonable inference other than that he had associated himself with the obvious common purpose at the latest from the time that he passed [the witness] on his way towards the car.⁶⁹

Bringing forward the appellant's accession to the common purpose arguably added weight to the decision to uphold the murder conviction, but it is surely theoretically suspect. Certainly, common purpose would be seriously circumscribed if it were not possible to infer intention from spontaneous acts. However, the inference can only be made from a physical manifestation of that intention, and there is, therefore, a strong argument for asserting that the accession to the common purpose should be contemporaneous with that act. In other words, a common purpose can only be joined via an act of association, which in this case occurred when Mgxwiti actually assisted or encouraged the assault by stabbing at the victim. Otherwise, there is a serious risk of inculcating passive spectators.

Judge Schreiner placed the implausibility of Judge Greenburg's announcement in sharp perspective. He disagreed that there was sufficient evidence to prove beyond reasonable doubt that the appellant joined in before the infliction of the fatal wound and also disagreed with the inference that the appellant had acceded to the common purpose before reaching the car. He supported his argument by pointing out that the witnesses had also walked over to car, to attempt to dissuade attackers from killing the victim or from mere curiosity. Therefore, he concluded that the appellant joined the common purpose when he stabbed at the deceased.⁷⁰ Nonetheless, Judge Schreiner upheld the murder conviction. Though unconvinced that mortal injury had not already been inflicted, he was satisfied that 'the deceased was not yet dead'⁷¹ when the appellant struck. Sidestepping the problems that he had previously discovered with the concept of mandate,⁷² he resurrected an older idea, that of ratification. In *Mlooi*,⁷³ Kotzé J had approved an eighteenth

⁶⁸ *Ibid.* at 376.

⁶⁹ *Ibid.* at 375.

⁷⁰ *Ibid.* at 380.

⁷¹ *Ibid.* at 381.

⁷² Above p.96.

⁷³ *R v Mlooi* 1925 AD 131.



century description of ratification as “an exploded notion”.⁷⁴ Despite deferring to the existence of the precedent, Judge Schreiner, nevertheless, provided the following exhortation:

[I]n general there is no place for liability by ratification in the criminal law... But where an accused person has joined a murderous assault upon one who is then alive but who dies as a result of the assault, it seems to me that no good reason exists why the accused should be guilty of murder if at the time when he joined in the assault the victim, though perhaps grievously hurt, was not yet mortally wounded, but should not be guilty if the injuries received at that time can properly be described as mortal or fatal. The alternative view is to hold that so long as the accused joined the assault while the deceased was alive he is responsible with the others for the death.⁷⁵

There is a seductive appeal to the reasoning, and there would perhaps be a reason to distinguish between grievous injury and mortal injury if there was no alternative offence available but there is – attempted murder or assault. Attempted murder fills the void where the *actus reus* falls short of the substantive offence of murder, but the accused has manifested the intention to commit it. It is incontrovertible that a person cannot be liable for murder for joining in a common purpose to ‘kill’ a corpse. Neither can a person be liable for murder for joining in after death has been caused via the infliction of the mortal injury. In the first example, the offence definition is not satisfied because death has already been caused. In the second case, though there is still a living human being, the act that satisfies the causation requirement has already been consummated. In both cases, the joiner in arrives too late to participate in the commission of the offence. However, Judge Schreiner introduced a fallacious argument to overcome the difficulties in the second example, announcing that:

Looked at from the point of view of the accused who has joined in a murderous assault there seems to be no reason for making his guilt depend upon what he could scarcely know about – whether any injuries already received by the victim were mortal or something less than that – instead of basing it on whether the victim was actually alive or not, a matter on which the accused might well be able to form an opinion.⁷⁶

Using the same logic, a party could be held guilty of murder for ‘killing’ a corpse, if he believed that the ‘victim’ was still alive. Moreover, as it will not be possible to form a meaningful opinion if the victim is unconscious, does this involve an investigation into the victim’s probable state of

⁷⁴ *Ibid.* at 152. Criticising the concept of mandate and ratification as grounds for criminal liability, Rabie, *op cit.* n.16 at 237 states: ‘According to Schreiner JA in *R v Mgxwiti*, it must be assumed that everyone who joins in a murderous assault upon another has ratified the injuries which have already been inflicted. This kind of mandate is thus... construed fictitiously. The objection to the whole mandate basis, despite the fact that the mandate is virtually always construed fictitiously, is that criminal liability, viewed scientifically cannot arise *ex mandato*: a mandate to commit an unlawful action is, as Carpzovius and Voet point out, itself unlawful and therefore invalid.’

⁷⁵ *R v Mgxwiti* 1954 (1) SA 370 at 382.

consciousness so as to justify the belief that the victim was still alive? Surely, the homicide offence definitions are intended to avoid such spurious investigations by basing the evidence on objective and validated fact.

On the other hand, it is certainly true that the evidential difficulties overcome by this approach include the impossibility, in a combined assault, of stating categorically which of a succession of injuries was mortal.⁷⁷ However, in order to do this, the legal creation needs to sidestep derivative liability due to the late entrance of any tangible manifestation of the shared intention. Liability is created by taking the attribution benefits of common purpose, adopting an inchoate foundation centred on culpability and then forging a link to the actual fulfillment of the substantive harm, albeit by one or more unidentified assailants. In colloquial terms, the appellate division wanted the penny and the bun. That Judge Schreiner recognised this fact, is implicit in his avowal that this was a special case of liability, which should be limited to special facts:

I can see no objection, however, to according, in this narrow field, recognition to the principle of ratification – that whoever joins in a murderous assault upon a person must be taken to have ratified the infliction of any injuries which have already been inflicted, whether or not in the result these turn out to be fatal either individually or taken together.⁷⁸

Even so, the theoretical shortcoming of the rule is further glossed by his choice of terminology, which would, more accurately, be described as post ratification⁷⁹ and the resulting responsibility as *ex post facto* liability.

In summary, as a consequence of *Mgxwiti*, there were two premises for imposing common purpose liability for joining in. Both extended the possibilities for creating secondary parties. The employment of implied mandate meant that an inference of association could be based, with the benefit of hindsight, on subsequent conduct and the unfolding of events, rather than the actual point of providing assistance or encouragement. In addition, the idea of ratification meant that a secondary party could be implicated in the unlawful events and consequences that occurred prior

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* Cf. the English case of *Reardon* No 9601499 Z4 19/02/1998; Crim LR [1993] 302, where P shot two men in a public house then carried the dying victims into the garden. Returning to the bar, he told S that one man was still alive and asked to borrow S's knife, which S duly lent him. Medical evidence established that the victims would have died from the gunshot wounds but in fact died from the stab wounds inflicted with S's knife. S was thereby convicted as a secondary party to the murders. Unlike in the South African joining in cases, in this scenario S rendered his assistance to the act that was proved to have accelerated the inevitable deaths and was therefore a substantial and operating cause of death.

⁷⁸ *Ibid.* at 383.

⁷⁹ Rabie, *op cit.* n.16, at 237, describes it as a 'mandate with retrospective effect'.

to his arrival and contribution at the scene of the crime. As alternative or combined foundations of criminal responsibility, they increased the scope of complicity liability to a formidable degree.

The full extent of the potential expansion was revealed in the Federal Supreme Court case of *Chenjere*.⁸⁰ Schreiner's JA conclusion was cited with approval by two of the three judges. Briggs FJ emphasised that 'the crimes of murder and culpable homicide are essentially different from other offences against the person, in that they are complete only at the moment of death'⁸¹. However, *ex post facto* liability was not confined to the participants in a common purpose. It was held to encompass all secondary parties when Tredgold CJ took issue with the idea that common purpose created a separate basis of liability:

In applying the principles they have evolved in relation to those who act upon a common criminal purpose, the Courts are not acting upon a "doctrine". They are simply drawing inferences as to the responsibility each person involved must have known he was accepting when he embarked upon that criminal enterprise. Where a person acts in concert with another in the commission of a criminal act this is only one example of common purpose, though the common purpose is inferred from his action and not directly proved.⁸²

This case did not involve a mob murder. Neither was there an unidentified perpetrator. The appellant had persuaded his married lover to leave her husband. Knowing that her new man had an aversion to her child but rejecting his suggestion to leave the youngster in the bush, the woman told Chenjere of her intention to kill her daughter. Requesting his assistance, she knelt on the child's stomach and set about strangling her. When the appellant joined in there was a reasonable possibility that the child had already received the internal injuries that had caused her death.

There was no suggestion that the facts be employed to infer a common purpose, though clearly, following Judge Greenburg's precedent, there is scope to do so. Instead, the appellant was treated as a *socius criminis*. Clayden FJ was in the minority by dissenting from applying retrospective responsibility. He interpreted the case by drawing a line between a passive spectator and an accessory. Thus, he upheld the appellant's conviction on the grounds that he encouraged his lover's murder of her child. In a similar quest to enunciate the parameters of complicity liability on the borderline of inaction, Briggs FC tentatively suggested an alternative to the retrospective liability that he favoured. He submitted that liability might have been incurred by the appellant's duty to care for the infant. He opined that this duty arose from taking mother and child from their

⁸⁰ *R v Chenjere* 1960 (1) SA 473 (FC).

⁸¹ *Ibid.* at 480.

⁸² *Ibid.* at 476.

existing protective family relationship and thereby assuming responsibility by supplanting that protection with his own.⁸³

However, the majority judgment imposed liability upon the appellant for assisting the murder before the dying victim was dead. Schreiner's JA ratification theory was therefore rendered unnecessary. The *socius* was held guilty of homicide for the acts of assistance or encouragement, after the infliction of a mortal wound, as long as the victim was not already dead. This was justified in practical terms by the following illustration:

Suppose that a jury was trying a group of people involved in a mob killing, and that they were directed that they could convict a number, who were in at the beginning of murder, and a number who only assisted after the victim was dead, as accessories after the fact to murder, but that there was an intermediate group, that had murderously assaulted the still living victim, and that these, on the medical evidence, could only properly be convicted of attempted murder. I venture to think that the situation would be regarded as so incomprehensible that a confused verdict might well result.⁸⁴

However, this plea comprises an emotional response to blameworthiness rather than a valid evaluation of a jury's intellectual understanding of the definition of attempted murder. Furthermore, the practical benefits must be questioned. It is surely no easier, and may, on occasion, be more difficult, to conclusively state the exact time of death rather than isolate the fatal wound.⁸⁵ If so, there is a risk that would-be participants could be found liable for murder having joined in an attack after the victim had actually expired. Indeed, further development of the Chief Justice's emotive justification reveals no apparent reason for differentiating between the blameworthiness of those who contribute to the assault just as the unconscious victim is imperceptibly sighing her last breath and those who strike afterwards. Assuming that all of the parties have equal culpability in terms of murderous intention and lack of knowledge of the victim's state of mortality, would not the jury be just as confused when faced with attributing responsibility on this set of facts?

2.4 DISSENT ABOUT THE STATUS OF COMMON PURPOSE AS A SEPARATE DOCTRINE

In South Africa, the Appellate Division also expressed doubt as to the position of common purpose as a separate doctrine within complicity liability. However, unlike the Federal Supreme

⁸³ *Ibid.* at 482.

⁸⁴ *Ibid.* at 477.

⁸⁵ As with English law, South African law includes controversy over defining the precise moment of death. See e.g. Burchell and Milton at 467-8.

Court, in *Thomo*⁸⁶ all three South African judges declined to follow the conclusion of Schreiner JA. Rather, his substitution of causality with ratification was openly criticised. Wessels JA asserted that Schreiner's ratification concept described the law as he thought it ought to be, but pointed out that though it may have practical advantages, '[t]he rule is contrary to accepted principles and authority, which have consistently required that on a charge of murder it must be established that, intending the death of the victim, the accused, irrespective of the fact whether he is charged as principal or *socius*, is guilty of unlawful conduct which caused or causally contributed to the death of the deceased'.⁸⁷

Furthermore, he provided the alternative verdicts available in a case of participation after the infliction of mortal injury upon the victim. These included attempted murder, assault with intent to murder or to do grievous bodily harm or common assault.⁸⁸ In addition, contrary to Tredgold's CJ claim of perceived injustice due to the failure to reflect individual blameworthiness,⁸⁹ Wessels JA was at pains to point out that this would be reflected in the sentence:

[T]he accused, who is found guilty of attempted murder because of the lack of proof that his assault contributed to the cause of death, might conceivably be punished more severely than his co-accused, who is found guilty of the murder of the deceased, but whose moral blameworthiness might be slight by reason of the presence of substantial mitigating circumstances.⁹⁰

Consequent to this reasoning, *ex post facto* liability was effectively bereft of a role. Moreover, in accordance with Wessels JA's requirements for secondary liability, common purpose was also stripped of its unique position and once again assimilated within a single doctrine of complicity. It was deemed to be insufficient to demonstrate merely that the parties were 'imbued with the same evil purpose'⁹¹ and then invoke the 'so-called doctrine of common purpose'.⁹² Instead,

[T]he conduct of the *socius* must at least consist of some form of conscious instigation or of assistance or guidance to the principal actor which is directed to the achievement of the purpose present to the mind of the *socius* at the time he so conducted himself.⁹³ In every case the focus is on the conduct of the *socius*, its causal relationship with the results flowing from the principal actor's conduct and the former's state of mind when he engaged in the conduct complained of.⁹⁴

⁸⁶ *S v Thomo & Others* 1969 (1) SA 385 (A).

⁸⁷ *Ibid.* at 399-400.

⁸⁸ *Ibid.* at 400.

⁸⁹ See above, p.104.

⁹⁰ *S v Thomo & Others* 1969 (1) SA 385 at 400.

⁹¹ *Ibid.* at 399.

⁹² *Ibid.*

⁹³ *Ibid.* at 398.

⁹⁴ *Ibid.* at 399.

2.5 REDEFINITION OF PARTIES TO A CRIME AND THE IMPACT ON COMPLICITY LAW

In 1980, complicity liability underwent a potentially dramatic change. Whereas parties to a crime had previously been divided in a generic sense into primary and secondary parties, definite distinctions were now drawn between the modes of participation.⁹⁵ *Williams*⁹⁶ witnessed a new triumph for the Afrikaner “purists” whose ‘mission [was]... to purge South African law of its English influence.’⁹⁷ In accordance with the judgment, it was necessary to identify the party as either a “mededader” or a “medepligtige”.⁹⁸ The Afrikaans terms and definitions were translated into English in *Khoza*.

[T]he most convenient term in the English language to convey the concept of “mededaders” is “co-perpetrators”, and correspondingly, when the crime is actually committed by only one person, the appropriate equivalent of “dader” would be perpetrator. In regard to “medepligtiges” there are two possible equivalent terms in English, viz. “accomplices” and “accessories”. Each has certain advantages and disadvantages, but on the whole, I prefer the term “accomplices”.⁹⁹

To qualify as a perpetrator the accused must satisfy all the requisites of the definition of the relevant crime. The most obvious manifestation occurs when the accused personally fulfills the definitional elements of the offence.¹⁰⁰ Thus, Joubert JA declared:

A perpetrator complies with all the requirements of the definition of the relevant crime. Where co-perpetrators commit the crime in concert, each co-perpetrator complies with the requirements of the relevant crime.¹⁰¹

⁹⁵ Nevertheless, clarity of terminology is still lacking, as acknowledged in Snyman, *CL*, at 245: ‘The word “accessory” is sometimes given a broader meaning and used as a synonym for *socius criminis*, and sometimes given a narrower meaning and used as a synonym for accomplice. The same may be said of the word “accomplice”.’

⁹⁶ *S v Williams en ‘n Ander* 1980 1 SA 60 (A).

⁹⁷ Parker, *op cit.* n.2 at 80: ‘From the 1960s [they] had considerable success, the Appellate Division abolishing the law of nuisance; turning the law of defamation inside out and back again...; making ignorance of the law a complete defence to any crime where foresight is the prescribed form of *mens rea*; and abolishing the *versari* presumption that people intend the natural and probable consequences of their actions’.

⁹⁸ The necessity for classification was acknowledged by Botha AJA in *S v Khoza* 1982 (3) SA 1019 at 1054: ‘*S v Williams*... has introduced ... a conceptual distinction between liability as a perpetrator and liability as an accomplice. Formerly the Courts did not find it necessary to draw such a distinction in relation to murder and common purpose; the generic term *socius (criminis)* was used to embrace both forms of liability.’

⁹⁹ *Ibid.* at 1031 *per* Corbett JA.

¹⁰⁰ Burchell & Milton at 391 describes the accused in this case as ‘a perpetrator in his or her own right’.

¹⁰¹ *S v Williams e’n Ander* 1980 (1) SA 60 (A) at 63, (translation *per* Burchell & Milton at 409).

Additionally, as in English law, a person is designated a perpetrator for causing the commission of an offence through the actions of an innocent agent.¹⁰² Only when a party fails the criteria for a perpetrator does the possibility of being classed an accomplice arise.¹⁰³

It may seem ironic that the first test of an accomplice entails a failure, but as the above discussion makes clear, the first stage of classification is to ensure that the party does not meet the requirements of a perpetrator. *Williams* provided the following definition of an accomplice:

An accomplice's liability is accessory in nature so that there can be no question of an accomplice without a perpetrator... [A]n accomplice is not a perpetrator or a co-perpetrator, since he lacks the *actus reus* of the perpetrator. An accomplice associates himself wittingly with the commission of the crime ... in that he knowingly affords the perpetrator ... the opportunity, the means or the information, which furthers the commission of the crime.¹⁰⁴

The term "further" has been interpreted to include 'any conduct whereby a person facilitates, assists or encourages the commission of an offence, gives advice concerning its commission, orders its commission or makes it possible for another to commit it'.¹⁰⁵ The *actus reus* for an accomplice is thus rendered much the same under South African law as under English law. However, there is a potential difference between the substantive law of the two legal systems. Joubert JA insisted in *Williams* that 'according to general principles, there must be a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator'.¹⁰⁶ It is not entirely certain that the same applies under English law.¹⁰⁷ Indeed, it is not clear exactly what is entailed in the idea of 'causal connection'. It may mean no more than that the accomplice's conduct made a contribution or made a difference to the commission of the offence. On the other hand, it is possible to interpret it as a strict causation requirement. The interesting question, which this issue raises, is whether it is possible to be an accomplice to homicide. If causation is a requirement of accomplice liability and the person is shown to have intentionally caused death – the offence definition for murder – is he not thereby properly classified as a perpetrator? This is the reasoning and result achieved in the following illustration:

¹⁰² Whether human or non-human. 'The rule *qui facit per alium facit per se* (he who does an act through another, does it himself) ... would apply in such a case': Burchell & Milton at 391-2. 'This rule, however, does not apply to crimes which can be committed only with a person's own body, such as rape.': Snyman *CL* at 246.

¹⁰³ Burchell & Milton at 392 and n.10, citing *S v Williams*.

¹⁰⁴ *S v William*, 1980 1 SA 60 at 63 *per* Joubert JA, (translation *per* Burchell & Milton at 409).

¹⁰⁵ Snyman *CL* at 257.

¹⁰⁶ *S v Williams* 1980 1 SA 60 at 63 *per* Joubert JA, (translation *per* Burchell & Milton at 409).

¹⁰⁷ Although there are exponents of the view that causation is pivotal in the rationale for accessorial liability, notably KJM Smith. See below, p.141.

[C]onvictions of complicity to result crimes are far less likely than convictions of complicity to conduct crimes. This may be illustrated by the following example: Where X holds down Y so that Z can slit Y's throat, X is clearly a co-perpetrator of murder as he intentionally causally contributes to Y's death. If, however, X were to hold down B, a woman, so that Z can rape B, X cannot possibly be a co-perpetrator of rape as his conduct does not conform with the conduct element required of rape (i.e. penetration).¹⁰⁸

The case for this conclusion is especially strong since Joubert JA insisted that the first stage of designation is eliminating the possibility of perpetrator status. Yet, later in his judgment, he specifically addressed the admissibility of accomplice liability in murder:

He is ... liable as an accomplice to murder on the ground of his own act, either a positive act or an omission, to further the commission of the murder, and his own fault, viz. the intent that the victim must be killed, coupled with the act (*actus reus*) of the perpetrator... to kill the victim unlawfully¹⁰⁹

The doctrinal logic of this position has been the subject of intense debate in South Africa.¹¹⁰ However, one result of the uncertainty has been the reinstatement of a specific role for common purpose liability. Although, the participants in a common purpose are termed co-perpetrators, the basis of liability is not causation,¹¹¹ as is arguably the case with all other parties to a crime. Instead, it is generally agreed that criminal responsibility is imputed to the protagonists.¹¹² However, there was early disagreement on this point. Moreover, the immediate effect of the successful argument that causation was not a prerequisite allowed the resurrection of retrospective secondary liability.

In 1982, and in light of the new distinctions, the Appeal Court had occasion to reconsider liability of parties who joined in an assault after the victim had been mortally wounded. *Khoza*¹¹³ permitted a re-examination of the arguments expressed in *Mgxwiti*, *Chenjere* and *Thomo*. Of the five judges, only Botha AJA aligned himself with Schreiner AJ and Tredgold CJ in upholding the appellant's murder conviction.¹¹⁴ Three judges decided that the appropriate finding was common

¹⁰⁸ Visser & Vorster at 512.

¹⁰⁹ *S v Williams op cit.* n.100 at 63 per Joubert JA, (translation per Burchell & Milton at 409).

¹¹⁰ Much depends upon how causation is interpreted and applied. See below, p.141-174.

¹¹¹ That said, there have been various judgments that stress the need for a participant to have made a causal contribution: e.g. *R v Mtembu* 1950 (1) SA 670 (A) (per Murray AJA); *R v Masuka* 1965 (2) SA 403; *S v Chimbamba and Another* 1977 (4) SA 803; *S v Thomo and Others* 1969 (1) SA 385 (A); *S v Motaung and others* 1990 (4) SA 485 (A) (per Wessels JA).

¹¹² *R v Mtembu* 1950 (1) SA 670 (A) (per Schreiner JA); *R v Mgxwiti* 1954 (1) SA 370 (A) (per Schreiner JA); *R v Chenjere* 1960 (1) SA 473 (FC) (per Tredgold CJ and Briggs FC) *R v Mneke* 1961 (2) SA 240 (N); *S v Khoza* 1982 (3) SA 1019 (A) (per Botha AJA) *S v Safatsa and Others* 1988 (1) SA 868 (A). Snyman CL at 249; Burchell & Milton at 393.

¹¹³ *S v Khoza* 1982 (3) SA 1019 (A).

¹¹⁴ *Ibid.* at 1057.

assault¹¹⁵ and one that the accused was guilty of attempted murder.¹¹⁶ Much of the argument revolved around the position and role of causation in common purpose. Corbett AJA refuted the majority decision in *Chenjere* that the act of murder is not complete until death.¹¹⁷ Instead, he associated himself with the *Thomo* rejection of the Schreiner rule.¹¹⁸ Corbett AJA argued that, in accordance with *Williams*, to be guilty of homicide, a perpetrator's act must have had a causal connection with the victim's death, and this applied equally to co-perpetrators in a common purpose. However, having explored some of the possible definitions suggested by academics and judges,¹¹⁹ he declined to decide on the type of causal connection required in a common purpose.¹²⁰

Of course, the difficulty with asserting that a causal requirement existed, was that there were numerous cases where liability had been imputed to the parties to a (usually previously agreed) common purpose, despite uncertainty as to the identity of the perpetrator or definitive proof that the accused ultimately gave any physical assistance. Botha AJA pounced upon this failure to enunciate the causal requirement. He pointed to the example of *Dladla*,¹²¹ where the appellant's murder conviction had been upheld on the grounds that, although there was no proof that he actually struck a blow, the accused had actively associated himself with a mob who pursued and killed two policemen. He therefore concluded:

[I]n cases of [this] kind... the *actus reus* of the accused, in which his criminal responsibility for the murder is founded, consists, not in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill.¹²²

Despite having cited *Dladla*, a case in which there was satisfactory evidence that the appellant participated in the attacks prior to the infliction of a mortal wound, Botha AJA then proceeded to take Schreiner's JA, Tredgold's CJ and Briggs' FC theoretical leap to encompass liability for an intervener who arrived after the striking of the death blow. He agreed that 'in fact and in law the

¹¹⁵ *Ibid.* at 1045 and 1047 per Holmes AJA, Joubert AJA and Hoexter AJA.

¹¹⁶ *Ibid.* at 1040 per Corbett AJA.

¹¹⁷ 'At the stage of intervention the perpetrator has done all that is necessary to achieve his object and the realisation of that object... is merely a matter of time. Nothing, thereafter done by the intervener (which does not hasten the death of the deceased) can therefore, be regarded as providing assistance to the perpetrator': *ibid.* at 1036.

¹¹⁸ *Ibid.* at 1038.

¹¹⁹ *Ibid.* at 1033-5.

¹²⁰ *Ibid.* at 1035.

¹²¹ *R v Dladla and Others* 1962 (1) SA 307 (A).

¹²² *S v Khoza* 1982 (3) SA 1019 at 1052.

crime of murder is not complete until the victim dies';¹²³ therefore, it is possible to join the common purpose in the interim. He confirmed that assaulting a corpse was not murder. However, the effect of his proposal would be to shift the inquiry, in a homicide case, to whether there was a reasonable possibility that the victim was still alive at the time of the accused's participation¹²⁴ - an exercise in conjecture that, in Judge Botha's opinion provided a 'pragmatic' approach, 'soundly based on considerations of policy and practical exigency in the administration of criminal justice.'¹²⁵ As a final point, he expressed a preference for the use of the term 'active association' to replace ratification as the basis of liability.¹²⁶

Although in the minority, Botha's AJA conclusion had an allure for at least one of his fellow judges. Although concurring with the common assault decision, Hoexter AJA agreed that there was no binding authority to preclude Botha's AJA conclusion that joining in after infliction of fatal injury may lead to liability for murder.¹²⁷ In choosing to commit his considerations to paper, he revealed that once again it was the public policy advantages of the approach that were especially seductive:

In this sort of situation... the legal position may be that the proof of guilt of an accomplice requires no more from the intervener than some positive act of association by him in a project of murder sufficient to proclaim his intention to make common cause with the perpetrator in killing the deceased; and that the fortuity that the intervener's intervention is physically ineffective either to cause or to hasten the deceased's death is irrelevant. There is, in my opinion, a great deal to be said for the view that to allow the intervener to escape conviction as an accomplice by reason of the adventitious circumstance that the victim has already sustained fatal injury at the hands of the perpetrator is somewhat illogical, and moreover unsatisfactory when considered from the angle of the broad policy of our criminal law.¹²⁸

However, it was Botha JA's judgment in *Safatsa*¹²⁹ that 'shocked the world'.¹³⁰ The case involved events that occurred in Sharpeville, in 1984, when the deputy mayor of the town council

¹²³ *Ibid.* at 1053

¹²⁴ 'Of course, it must be postulated that the deceased was still alive at the time of the accused's participation, because no civilised legal system will hold a man guilty of murder on the ground of having taken part in an assault on a corpse.': *ibid.*

¹²⁵ *Ibid.* at 1049.

¹²⁶ *Ibid.* at 1053.

¹²⁷ *Ibid.* at 1044.

¹²⁸ *Ibid.* at 1044-5. Hoexter AJ, as he became, eventually decided against accepting *ex post facto* liability in *S v Motaung and Others* 1990 (4) SA 485 (A). See below, pp.121-2.

¹²⁹ *S v Safatsa and Others* 1988 (1) SA 868 (A). Botha JA gave the leading judgment and Hefer JA, Smallberger JA, Boshoff AJA and M T Steyn AJA concurred.

¹³⁰ Parker, *op cit.* n.2 at 98.

of Lekoa was murdered outside his house. The political and public order dimension to the case cannot be overlooked. Lekoa was a regional Black local authority and the council had adopted a capital expenditure programme to improve and expand amenities in the area. To do so, it was necessary to increase the service levies payable by inhabitants. However, there was strong opposition to the increases and the deceased was known to have favoured the plan. The events unfurled against a background of previous unrest that included protest meetings, rioting and violence. 'A senior police officer with many years' experience in riot control described the events as the most violent, the most widespread, and also the best-organised riots that he had ever experienced.'¹³¹ A mob of about one hundred people had attacked the official's house, throwing stones and hurling petrol bombs that set the house alight. The victim's car was removed from the garage and set on fire. Eventually, the deputy mayor fled from the burning building towards a neighbouring house but was intercepted, disarmed of the pistol he was carrying (and had previously used to shoot one of the crowd) and assaulted. Stones were used as missiles and blunt weapons to directly strike at his head. When he was motionless, he was dragged into the street, covered in petrol and set alight. 'A medical post-mortem examination revealed that the deceased was still alive when set alight but that he had sustained two sets of injuries, each of which was fatal by itself'.¹³² The victim would have died from head injuries inflicted by stones if he had not been set on fire. Equally, he would have died from the burns had he not sustained the head injuries.

Eight people were prosecuted and tried on two counts. The first count was murder and the second, subversion under s 54(2) of Internal Security Act 74 of 1982. All eight were convicted of subversion and six were convicted of murder with the outstanding two being convicted of public violence. Those found guilty of murder were sentenced to death.¹³³ When the Appellate division upheld the convictions, international calls for clemency were widespread.¹³⁴ Moreover, 'Lord Scarman examined the evidence against one of the accused for Granada television and said that had he been trying the case, he would have withdrawn it from the jury and directed an acquittal, and would have quashed the conviction had it come before the appeal court'.¹³⁵ In the final analysis,

¹³¹ *Safatsa* 1988 (1) SA 868 at 888, *per* Botha JA.

¹³² *Ibid.* at 890.

¹³³ *Ibid.* at 871.

¹³⁴ See Parker, *op cit.* n.2 at 98 for a list of the parties, including religious leaders, governments and international organisations.

¹³⁵ *Ibid.*

The case did severe damage to the reputation of South Africa's judiciary. An editorial in *The Times* described the Six as "victims of a disgraceful piece of legal chicanery", and concluded that "such a judicial system hardly deserves the name. It is little more than a charade designed to deter and intimidate – terror tailored to the purposes of the State."¹³⁶

Nevertheless, the Sharpeville Six case has been described by a leading academic commentator as 'the leading case on common purpose'¹³⁷. Lord Scarman's opinion as to the insufficiency of evidence, whilst a potent argument as to the politicised nature of the decision, is a tangential issue. In the following examination of the substantive law, it is incumbent to consider the contribution of the 'Sharpeville Six' case to complicity liability including the problems that were newly raised or left unreconciled from previous judgments.

Before embarking upon an analysis of the case, it is important to stress that it did not involve *ex post facto* ratification.¹³⁸ All of the eight accused made contributions that were held sufficient to satisfy their active association with the murder, prior to the infliction of either set of fatal injuries.¹³⁹ However, those contributions were not sufficient to have been a cause of death and this issue was an accepted ground for appeal. Human J, the trial judge, in permitting leave to appeal, stated that 'the question of causality is in the melting pot and should once and for all be decided authoritatively by the Appellate Division.'¹⁴⁰ Moreover, although not specifically mentioned, since *Williams*, it was quite possible that the entire role of common purpose was in the melting pot. If there was a requirement for a causal nexus between accomplice and perpetrator, it was not unreasonable to expect that causation would be a necessary element for co-perpetrators. As to this, Botha JA was clear and unequivocal. He asserted that 'the Court in *Williams*' case was not dealing with the law relating to common purpose at all... For practical purposes, in applying the law relating to cases of common purpose, the judgment in the *Williams*' case can safely be left out of consideration altogether.'¹⁴¹ He then supported his argument for common purpose liability based on imputation rather than causation by stressing the myriad common purpose cases where there had been no establishment of a direct causal connection between the act of the co-perpetrator and the homicide.¹⁴²

¹³⁶ *Ibid.* at 98-99, citing *The Times*, 16 March 1988

¹³⁷ Snyman, *CL* at 251.

¹³⁸ The future of *ex post facto* liability was decided in *S v Motaung and others* 1990 (4) SA 485 (A). See below, pp.121-122.

¹³⁹ The two accused who were not found guilty of murder, but of public violence, were not found to have manifested the necessary *mens rea* for the homicide offence.

¹⁴⁰ *Safatsa* 1988 (1) SA 868 at 874.

¹⁴¹ *Ibid.* at 898.

¹⁴² *Ibid.* at 896-7.

In fact, despite Botha's devoting so much time to discussing causation, the problem with *Safatsa* is not so much the question of the causal nexus between the act of the accused and the perpetration of the homicide, as the foundation and criteria of common purpose liability. Botha JA reasserted the relevance of earlier precedents where a common purpose could be acceded to before the infliction of the mortal wound. When *ex post facto* liability was excluded from the ambit of common purpose, the basis of South African common purpose liability conformed with joint enterprise liability under English law,¹⁴³ and indeed, the cogency of this was not lost upon the originator of the leading judgment. Judge Botha confronted the issue and 'turned upon his critics, the ones who mattered, the Afrikaner purists who said that unsullied legal principle was paramount',¹⁴⁴. The pragmatism of English law should not be maligned, he argued, but should be readily and willingly incorporated in South African law when it met the exigencies of criminal justice:¹⁴⁵ 'what is more important is that the authors who are critical of the practice of the Courts do not appear to have problems with the actual results achieved in the vast majority of cases.'¹⁴⁶

In fact, this passage also serves to illustrate the weakness in the judgment. Botha JA adopted a defensive, at times almost derisory, tone and based his conclusions on negative argument rather than providing positive terms of definition. This dearth of defined concepts and criteria has the advantage of allowing the flexibility to achieve the desired results that, he claimed, were secretly lauded by the Afrikaner purists. However, it also permitted a potentially insidious employment of the law to persecute a chosen selection of the prosecuted. In this sense the judgment concealed the 'piece of legal chicanery' alluded to by critics.¹⁴⁷ "Active association" was again chosen to describe the prohibited conduct of common purpose but again the term "association" was not defined. There seemed to be a promise that this would be remedied when the appeal judge pronounced:

In the main the criticism is based on the argument that causation is a fundamental element in the definition of the crime of murder which cannot be ignored; and it is also

¹⁴³ The Privy Council decision in *Chan Wing-Sui v The Queen* [1985] AC 168 had confirmed that a secondary party in a joint enterprise incurred murder liability for aiding or abetting with the foresight that a co-adventurer might kill the victim with the requisite fault of murder, see below, pp.225-229.

¹⁴⁴ Parker, *op cit.* n.2 at 97.

¹⁴⁵ '[T]he much maligned notion of implied mandate seems to me not to be without merit... the English origin of the practice is no reason per se for rejecting it, if it satisfies the exigencies of the administration of our own criminal law.': *Safatsa* 1988 (1) SA 868 at 901 *per* Botha JA.

¹⁴⁶ *Ibid.*

¹⁴⁷ Parker, *op cit.* n.2 at 98.

said that the concept of active association with the act of the killing by another is too vague to serve as a touchstone for liability.¹⁴⁸

However, by the time he had criticised the restrictions of the causation requirement and derided possible extensions of the concept through the introduction of 'psychological causation' as being so unrealistic 'as to border upon absurdity',¹⁴⁹ he finally arrived at active association, only to assume the concept to be self-evident:

In the present case... there can be no doubt... that the individual acts of the six accused convicted of murder manifested an active association with the acts of the mob, which caused the death of the deceased.¹⁵⁰

His only comment upon the vagueness of the idea was a rebuttal based on the premise that relying on so-called 'psychological causation' presented a 'greater measure of vagueness and uncertainty' than active association.¹⁵¹ In order to attempt to unravel the mystery, it is pertinent to consider the individual acts of the six accused.

Of those convicted of murder, one man was a member of the group who grabbed the victim as he fled his house and wrestled with him for possession of the pistol. He also threw the first stone at the deceased, which struck his head and felled him. A further accused was part of this group and succeeded in wresting the pistol from the victim. A third man was one of the mob which stoned the house and also threw a stone at the victim, hitting him on the back. The fourth accused, a woman, had been part of the crowd that originally converged on the deceased's house. She had shouted repeated exhortations to kill the deputy mayor after he fired upon the assembly. She had also slapped the face of another woman who had urged the crowd not to burn the official. Another man had made petrol bombs, set the house on fire and helped to push the car into the street and set it alight. The final accused had remonstrated with a bystander for failing to become involved in the violence. He had also made petrol bombs and handed them out with instructions for their use, incited the mob to set fire to the house and helped in pushing the car into the street. In addition, he was seen carrying stones. The conduct, therefore, covered a whole range of activities.¹⁵² The culpability requirement was satisfied: 'these accused shared a common purpose with the crowd to kill the deceased and each of them had the requisite *dolus* in respect of his

¹⁴⁸ *Safatsa* 1988 (1) SA 868 at 901.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² For further details of the circumstances surrounding the activities, see *ibid.* at 890-893.

death'.¹⁵³ As to the adequacy of the acts as a basis for murder liability, leading South African academics have expressed their doubt:

The common-purpose principle has come in for severe criticism, particularly since the 'Sharpeville Six' decision... It is controversial whether the participation of the ...Six in the murder of the deputy-mayor constituted sufficient 'active association' in the crime to satisfy the element of unlawful conduct which is necessary before the doctrine of imputation can be invoked.¹⁵⁴

The problem again lies in employing hindsight to impose the deceptive appearance of coherent strategy upon the disparate jumble of activities that resulted in the victim's death.

Consequent to *Safatsa*, one fact was clear. The interpretation of *Williams* asserting a distinction between the liability of an accomplice and a co-perpetrator in a common purpose, confirmed that common purpose provided a separate genus of complicity. The difference was the lack of a causation requirement in common purpose. However, the details of the distinction had not been enunciated: Botha JA had avoided the sticky problem of the logical conclusion that accomplice liability was impossible if proof of causing death was an necessary element in homicide and, therefore, whether an alternative definition of causality was to be used to permit a distinction between accomplice and perpetrator. Furthermore, the criteria for active association had not been described and neither had the concept of implied mandate been categorically replaced.

It has been pointed out that the word "association" is particularly insidious because it spreads across three elements that build up a case for the imposition of liability, blurring the differences of context:

First it relates to the creation of the common purpose, and answers how it was formed. By prior (or since 1946 spontaneous) agreement, by participation or association? Secondly, the word association leaks into the different question of whether the accused's deed fell within the category of an act of association. Thirdly, association can refer to the quality of intention.¹⁵⁵

Its use in the first context regarding the creation or existence of a common purpose, and its scope, will be considered below in the examination of another politically sensitive case.¹⁵⁶ Moreover, it is surely correct that "association" provides a broad term of definition that simply engulfs the ideas of agreement and participation. In Professor Snyman's words, 'agreement, whether express

¹⁵³ *Ibid.*

¹⁵⁴ Burchell & Milton at 406; Burchell & Hunt at 320.

¹⁵⁵ Parker, *op cit* n.2 at 95.

¹⁵⁶ *S v Nzo* 1990 (3) SA 1 (A), below, p.119-120.

or implied, is merely one form of active association'.¹⁵⁷ As to the effect upon considerations of culpability, employment of the term association 'surreptitiously imports an objective component into the test for the mental element of the crime.'¹⁵⁸ Manifested in practical terms, rather than considering the accused's subjective state of mind as a separate issue from the objectively decided basis of unlawful conduct, 'a court will say murder was going on and the accused associated himself with it'.¹⁵⁹ There was a serious need to fix criteria to the term 'active association' and so avert the potential for this leaching effect, especially in the wake of the onslaught of international vituperation against the *Safatsa* judgment. Help for Botha JA was at hand: prior to the 'Sharpeville Six' case, Professor Whiting had coined the phrase 'joining in' to describe the liability of participants who acceded to a common purpose without prior agreement.¹⁶⁰ Furthermore, he had considered the role of common purpose liability in the light of the *Williams* case.

Whiting proposed that there were two distinct bases to common purpose. The first was where there is an express or implied agreement between the parties: 'here any act done by one of them which is within the common purpose on which they have agreed will be attributed also to the others, regardless of whether they are present at the scene of its commission and regardless also of whether they themselves have done anything towards the carrying out of the common purpose.'¹⁶¹ Thus, the conduct element comprises, at the least, a conspiracy. The second type of common purpose case involves a 'common object'¹⁶² but no agreement. In this type of situation, there were three requirements:

Firstly, the party to whom the act is attributed must be present at the scene at the time of [the commission of the crime]. Secondly, he must intend to associate himself with the commission of the act by the other party or to make common cause with the other party in its commission. And thirdly, he must give expression to this intention by some overt conduct, such as joining a crowd obviously intent on the commission of the act in question and showing solidarity with whomever it is who actually commits it.¹⁶³

¹⁵⁷ Snyman *CL* at 252.

¹⁵⁸ Parker, *op cit.* n.2 at 95.

¹⁵⁹ *Ibid.*

¹⁶⁰ Whiting, "Joining in" [1986] 103 SALJ 38.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.* at 39 n.8. Whiting considered that attribution on this basis would 'apply only in respect of crimes such as murder, culpable homicide and assault (and perhaps malicious injury to property) and not to crimes of formal definition.

The judicial retreat occurred in less than a year. Common purpose liability via active association was refined in September 1988, in *Mgedezi*¹⁶⁴, although Botha JA, who again gave the leading judgment, placed on record his lack of repentance over his previous decision.¹⁶⁵ *Mgedezi* concerned the public violence and resultant deaths of several team leaders at a mine compound. A crowd of mine workers was led by union representatives who, accusing the team leaders of being informers, incited their murder. Property damage and the chanting of inflammatory songs accompanied the disparate assaults. Botha JA took care to enunciate the baseline for secondary liability. He confirmed that a 'mere spectator' amongst a crowd cannot be held liable for the violence.¹⁶⁶ Furthermore, he recognised that the assembly of persons into a crowd does not transmogrify the members into the constituents of a new totality from which a mass liability could be inferred and applied to the different parties. Instead, a crowd comprised individuals each with a separate consciousness, whose liability must be considered in accordance with their individual awareness.¹⁶⁷ This new insight found practical application in the case of accused no.6. Botha JA confirmed that no.6 had not been party to a prior agreement, either express or implied. Therefore, the only alternative was to found his common purpose liability on the *Safatsa* decision. Acknowledging the debt to Professor Whiting for the first four requirements, Botha JA enunciated the criteria for liability based on active association.¹⁶⁸ To be liable for murder, firstly, the accused must be present at the scene of the violence. Secondly, he must have been aware of the assault on the victim. Thirdly, there must have been intention to make common cause with the actual perpetrator. Fourthly, the accused must have performed an act of association with the common purpose. Fifthly, the accused needed to have had the requisite *mens rea*.¹⁶⁹ In summary, consequent to enunciating these requirements, a finding of common purpose was appropriate only where there was a conscious sharing of common cause rather than an incidental and independent adoption of the perpetrator's purpose, and this aligns the active association species of common purpose with the prior agreement species. However, there is a significant difference between the two types of common purpose. Joining in or active association requires

¹⁶⁴ *S v Mgedezi and Others* 1989 (1) SA 687 (A). (*Safatsa* was decided in November 1987.)

¹⁶⁵ Taking a swipe at his critics Judge Botha announced with seemingly characteristic abrasiveness, 'I ignore the misguided comments of hysterical politicians masquerading as lawyers, following upon the judgment delivered in ... *Safatsa*': *ibid.* at 702.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.* at 702 and 705-6. Parker, *op cit.* n.2 at 98, agreed: '[P]eople in crowds do not act with a single intention... even aggressive actions... may not be indications of a shared purpose to kill but individual atomized acts unrelated to those of the murderers.'

¹⁶⁸ *S v Mgedezi* 1989 (1) SA 687 at 705-6. See also *S v Nooroodien en Andere* 1998 (2) SACR 510 (N).

¹⁶⁹ As a result of applying the criteria, accused no.6 was exculpated of murder liability and convicted, instead, of public violence.

presence at the scene of the crime. The idea of presence was not developed, as in English law, which once accepted that a person might be constructively present when almost half a mile away.¹⁷⁰ Most interesting, however, is the reversal of complicity development in South African law compared to English law. In England and Wales, the relevance of presence or absence at the scene of the crime was expunged because it permitted an unnecessarily arbitrary dimension into the imposition of secondary liability. South Africa, on the other hand, chose to adopt the previously unrecognised distinction.¹⁷¹

However, despite the narrowing of common purpose liability via the defining criteria of active association, there was still room for legal manoeuvre in the finding of a common purpose. It has been seen that, to be liable for homicide under the common purpose rule, there need not be a common purpose to kill. It is sufficient that the common purpose encompassed a crime such as an assault or burglary, the commission of which, the secondary party foresaw, may give rise to a killing.¹⁷² The decision in *Nzo*¹⁷³ arguably extended liability by extending the scope of common purpose.¹⁷⁴ The two accused were convicted of murder under the common purpose rule. An insight into the rather complex background details is required to understand the reasoning behind the imputation of secondary liability in this case, which contains an overtly political dimension. The appellants were members of the ANC. Between mid-1981 and mid-1983, the Port Elizabeth cell, to which they belonged, had been involved in terrorist activity that, primarily, involved the sabotage of public buildings. Just before his violent death in January 1983, a member of the cell had been harboured at the home of the deceased and her husband. The husband was also an ANC member and the marriage had suffered as a result of his association. Thus, the deceased had threatened to lay a charge against her husband for the harbouring. After the first appellant, also lodging in the house, overheard this, he repeated it to a further associate, Joe, who initially menaced, then subsequently killed, the wife. The second appellant was arrested as a result of information given to the police by the first accused when he was questioned about his identity documents. Meanwhile, Joe managed to evade the authorities and escape the country. Both appellants were convicted of the murder of Joe's victim on the following reasoning: '[the murder]

¹⁷⁰ Due to the context of joining in cases, it seems likely that agreement would be necessary to sustain liability in such a case.

¹⁷¹ Botha JA did not consider the history of English law with regard to this point.

¹⁷² Above, pp.90-91.

¹⁷³ *S v Nzo and Another* 1990 (3) SA 1 (A).

¹⁷⁴ *Nzo* involves liability grounded in the culpability of an individual in voluntarily associating with a terrorist organisation, for a similar situation under English law, see *DPP for Northern Ireland v Maxwell* [1978] 3 All ER 1140.

was committed... in the execution of the common purpose. Since the murder had been foreseen by the appellants and since they had associated themselves with and persisted in furthering the common design despite such foresight, it was an act for which they were legally responsible.¹⁷⁵

The difficulty that needs to be faced is the fact that, though the two appellants may have foreseen Joe's murder, it does not automatically follow that they furthered it.¹⁷⁶ Again 'associated' is used in a nebulous context. Yet, there must be some overt conduct that connects them to the commission of the murder otherwise active association cannot be established under the *Mgedezi* criteria.¹⁷⁷ Therefore, the common purpose, presumably, was based upon (implied) agreement. However, it is not immediately obvious that there was a common purpose to kill or assault the victim. According to the judgment, 'their design was to wage a localised campaign of terror and destruction'.¹⁷⁸ Thus, had the victim died as a result of an explosion, it would clearly have been within the ambit of the common purpose. However, this not being the case, the judgment needed to go further. Hefer JA asserted that 'it was in the furtherance of this design and for the preservation of the unit and the protection of each of its members that the murder was committed'.¹⁷⁹ This justification was given in response to the argument of the appellant's counsel that foresight of a crime being committed was insufficient without specific association with the crime in question. The essence of the defence argument was that to frame liability so widely would result in the victim's murder being imputed to every member of the ANC.¹⁸⁰ In fact, in upholding the murder convictions, Hefer JA declined to comment on the validity of the counsel's reasoning stating that the mass liability of the ANC was an 'irrelevant matter... [that] only serves to cloud the issue'.¹⁸¹

¹⁷⁵ *Nzo* 1990 (3) SA 1 at 4.

¹⁷⁶ In the case of the first appellant, it may be argued that he incited or encouraged Joe's action by providing him with the information of the victim's intention to report her husband. However, that is not to say that he joined with Joe in an agreement that she be killed.

¹⁷⁷ Above, p.118.

¹⁷⁸ *Nzo* 1990 (3) SA 1 at 7, *per* Hefer JA

¹⁷⁹ *Ibid.*

¹⁸⁰ 'The ANC is an organisation with thousands of members in this country and several others. Some of its members are known to have committed a multitude of crimes in the execution and furtherance of its objectives. It is foreseeable that they might also do so on the future. But, since liability cannot conceivably be imputed to every member for every unforeseen crime so committed by all other members, the imputed liability of a member is limited to crimes which with he specifically associates himself...In the present case, although the appellants were actively involved in the campaign, there is no evidence that they associated themselves with Mrs Tshiwula's murder.'; *ibid.*

¹⁸¹ *Ibid.* Tracing back an offence and creating a connection to an existing common purpose provides the courts with a further opportunity to impute secondary liability. Indeed, the promising possibilities of resorting to this kind of sophistry had already been employed in the sphere of public order offences where s.1 of the Riotous Assembly Act 17 of 1956 defines a prohibited gathering of people as one having 'a

2.6 THE END OF EX POST FACTO HOMICIDE LIABILITY

On a more positive note, 1990 also witnessed the demise of *ex post facto* secondary liability for homicide. *Motaung*¹⁸² was concerned with acts that occurred during 1985, when rioting and, often violent, police suppression were a regular feature of township life. The case involved a mob killing of a woman believed to be the lover of a local policeman and informer. The brutality of the 'prolonged and utterly barbaric attack'¹⁸³ was captured on video by journalists and it was clear that the victim was still alive in the early section of the film.¹⁸⁴ However, medical evidence pronounced a reasonable possibility that the mortal wound had been inflicted before the filming began. In the leading judgment of the unanimous decision, Hoexter JA considered the murder liability of the eleven appellants, and, by way of introduction into the difficulties posed by the common purpose rule, announced:

A 'common purpose' is a purpose shared by two or more persons who act in concert towards the accomplishment of a common aim.¹⁸⁵ In the past convictions for murder in group violence cases have led to much debate... on two related but distinct and separate areas. The one ('the causality issue') raises the question whether a participant in a common purpose to kill who accedes to the common purpose before the deceased has been fatally injured may be found guilty of murder in the absence of proof that his own conduct caused or contributed causally to the death of the deceased. The other ('the joining-in issue') raises the question whether what may conveniently be referred to as 'a late-comer' may be found guilty of murder. A late-comer is one who becomes a participator in a common purpose for the first time at a stage when the deceased is still alive but after he has been fatally injured.¹⁸⁶

As to the first issue, he referred to and confirmed the decisions of *Safatsa* and *Mgedezi*: there was no requirement of secondary party causation in common purpose liability. As to the second, he surveyed the case law and academic criticisms¹⁸⁷, and ultimately agreed that the utilitarian approach of Schreiner rule¹⁸⁸ had 'much to commend it'.¹⁸⁹ However, he also emphasised the

common purpose, whether such purpose is lawful or unlawful'. Thus, in *Ziggolo* 1980 (1) SA 49 (A), a group of young blacks who had been waiting to pay their respect to the body of the PAC leader, Mangaliso Robert Sobukwe, were held to have formed and thereby attended a prohibited gathering. The vagueness of the term 'common purpose' was highlighted by Rumpff CJ who pointed out, at 57, that 'if a man and woman wish to procreate a child and apply the natural process to do so, there is a gathering of two persons having a common purpose and there is a common act to achieve this purpose'. However, the Chief Justice chose to describe the term not as unjustifiably vague but as 'only tremendously wide'. (Cited in Parker, *op cit.* n.2 at 91.)

¹⁸² *S v Motaung and others* 1990 (4) SA 485 (A).

¹⁸³ *Ibid.* at 491.

¹⁸⁴ *Ibid.* at 495-8.

¹⁸⁵ Note the absence of a requirement that the common aim also be unlawful.

¹⁸⁶ *Motaung* 1990 (4) SA 485 at 509.

¹⁸⁷ E.g. Whiting, *op cit.* n.160 at 49-50.

¹⁸⁸ Above, p.99.

¹⁸⁹ *Motaung* 1990 (4) SA 485 at 519.

'one-sidedness' of the policy-driven approach and enunciated three objections that defeated its quest for admittance into South African law. Firstly, it 'favour[s] the prosecution and burden[s] the accused'; secondly, the argument that the point of late comer's joining in is fortuitous in terms of whether he is to be guilty of murder or attempted murder applies equally to many other situations where the accused is found guilty of attempted murder rather than the completed offence; thirdly the claim that criminal justice would be frustrated without the application of the Schreiner rule is not substantiated because there are a variety of alternative offences, at least one of which the accused will have contravened.¹⁹⁰

2.7 REFINEMENTS TO PRIOR AGREEMENT COMMON PURPOSE

The latter part of the 1990s witnessed the reemergence of prior agreement common purpose, the equivalent of the English paradigm for joint enterprise liability, where a homicide is committed during the course of executing another offence.¹⁹¹ The judicial attention given to reenunciating and refining homicide liability in this species of common purpose apparently owes much to the social concern with the 'prevalence of armed robberies'¹⁹² in the new South Africa.¹⁹³ Like English joint enterprise, the parties are co-perpetrators with direct intention (*dolus directus*) with regard to the foundational offence. The common purpose rules of imputing homicide liability arise where the non-perpetrator of the homicide foresaw the occurrence of an unlawful killing as a possible consequence (*dolus eventualis*) of committing the foundational offence. Thus, in *Maelangwe*¹⁹⁴, it was confirmed that the criteria of active association common purpose¹⁹⁵ do not arise in the typical case of a robbery during the course of which murder is committed. In this case, the common purpose to rob was established when the parties were actually in the shop. However, the murder liability of the non-perpetrator was still based on prior agreement whereby

¹⁹⁰ *Ibid.* at 519-20. These include attempted murder, assault with intent to murder or do grievous bodily harm or common assault, citing *Thomo*'s case see above, pp.105-6.

¹⁹¹ While the following cases deal with murder liability, it is possible for a party to a common purpose to be liable for culpable homicide: *S v Nkwenja en'n ander* 1985 (2) SACR 560 (A). For the distinction between murder and culpable homicide, see below, pp.281-286.

¹⁹² *S v Lungile and Another* 1999 (2) SACR 597 (SC) at 606.

¹⁹³ Common purpose cases involving aggravated robbery leading to homicide in the 1990s and opening years of the twenty-first century include *S v Majosi and Others* 1991 (2) SACR 532 (A); *S v Nduli and Others* 1993 (2) SACR 501 (A); *S v Mahlangu en Andere* 1995 (2) SACR 425 (T); *S v Lungile and Another* 1999 (2) SACR 597 (SC); *S v Maelangwe* 1999 (1) SACR 133 (N); *S v Mkhize* 1999 (2) SACR 632 (W); *S v Riekert* 2002 (1) SACR 566 (T) (housebreaking resulting in murder) and *S v Mansoor* 2002 (1) SACR 629 (W).

¹⁹⁴ *S v Maelangwe* 1999 (1) SACR 133 (N).

¹⁹⁵ See above, pp.117-119.

the act and intent of the perpetrator in killing the victim during a robbery was imputed to the accused because he foresaw that act and resigned himself to its consequences.¹⁹⁶

In *Mkhize*,¹⁹⁷ it was confirmed that a secondary party's foresight that someone might be killed during the execution of a common purpose to rob is not limited to a specific place. Therefore, murder liability is not excluded simply because the murder took place at different place to that planned, just so long as the non-perpetrator foresaw and was resigned to its possible occurrence.¹⁹⁸ Further clarification of secondary party fault is contained within *Maelangwe*¹⁹⁹, where it was held that the accused's state of mind (i.e. foresight and resignation to the occurrence of an unlawful killing) need not be determined solely with reference to the facts existing at the commencement of the criminal purpose. The important question concerns the accused's state of mind at the time of the killing itself and it is permissible to draw that conclusion from an inference of the facts proved to have existed during the murder commission.²⁰⁰

3 CONCLUSION

Surveying South African complicity law illustrates both similarities and differences with English law. In essence, the type of activity that incurs secondary liability is the same in both jurisdictions, although the South African system has avoided creating pedantic distinctions between plausible verbs²⁰¹ and instead employed conduct descriptions in a generic sense. It is submitted that the concept of 'participation' and 'association', in requiring the evidence of an overt act, boil down to assistance, influence or encouragement. Moreover, common purpose liability, where the primary purpose does not involve a killing, provides parallels with English law. Although English law has not adopted the terminology of 'prior agreement' and 'active association', it is apparent that it recognises the possibility of the creation of a joint enterprise in both situations. The kind of 'spontaneous attack' that materialised in *Uddin*²⁰² is comparable to the mob attacks that provide the South African paradigm for active association. However, the contrasts between the two systems provide particular interest because they beg the question as to the reason and justification for the difference in emphasis or approach. Unlike English law,

¹⁹⁶ *S v Maelangwe* 1999 (1) SACR 133 (N) at 139.

¹⁹⁷ *S v Mkhize* 1999 (2) SACR 632 (W).

¹⁹⁸ *Ibid.* at 638.

¹⁹⁹ *S v Maelangwe* 1999 (1) SACR 133 (N) at 139.

²⁰⁰ For further details on the permissibility of inferential reasoning to establish *dolus eventualis*, see below, pp.281-284.

²⁰¹ As in *A-G's Reference (No 1 of 1975)* [1975] QB 773, see above, p.41.

²⁰² [1998] 2 All ER 744, see below, p.234.

which began the twentieth century in a welter of technical differences between secondary parties before shedding them in exchange for an approach that promised uniformity of liability, South Africa chose to adopt distinctions at much the same time that England and Wales expelled them. In the differences that were developed, South African law provides a cautionary tale about, on the one hand, too great a reliance on theory at the expense of pragmatism, as with the obstacles in the logic of accomplice liability for result crimes, and on the other hand, the introduction of too great a vagueness in terms of definition and doctrine, in order to enable the flexibility of discretionary judgments that may be grounded in political or flawed normative standards. Especially pertinent to the investigation into the status and purpose of joint enterprise liability is the South African quandary as to the appropriate allocation of a role for common purpose that is seen in the first part of the twentieth century. As well as highlighting the question of what common purpose liability is specifically intended to achieve, it demonstrates the problems with delineating the boundaries between two different bases of secondary liability, where extending the inferences creates a possible overlap with non-common purpose accomplice liability.²⁰³ Under South African law the query whether common purpose has a meaningful and specific role to play outside general aiding and abetting liability has been superseded by the difference in the causation criterion between common purpose and accomplice liability. The roles of causation and imputation in criminal complicity therefore require greater analysis.

²⁰³ e.g. *R v Chenjere* 1960 (1) SA 473 (FC), see above p.104.

CHAPTER 4

DERIVATIVE LIABILITY AND THE ROLE OF CAUSATION

1 INTRODUCTION

It was seen in the previous chapter that South African law of criminal complicity has, to a large extent, been developed in a random and piece-meal fashion to accommodate the social and political problems that were manifested in such a way as to bring them to the attention and judgment of the courts. However, there is no place for smugness when comparing secondary liability under English law. It has been asserted that,

[T]he English law of complicity is replete with uncertainties and conflicts. It betrays the worst features of the common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, usually extending the law, and resulting in a body of jurisprudence that has little coherence.¹

If this is a valid criticism, then English law has much in common with South Africa. The purpose of this section is to test the truth of the condemnation by seeking to define and analyse the theoretical underpinnings of secondary liability with a view to segregating those areas that are inadequate, in readiness for suggesting possibilities for reform.² However, having made such an impetuous claim, the situation that requires immediate confrontation is the sparsity of theoretical principle in this area of the law. In fact, the only undisputed foundation of complicity liability is its derivative nature³ and, as will be seen, even this is now subject to qualification. It has also been suggested that the fault requirement of intention or purpose is 'usually assumed'⁴ to be a fundamental basis of secondary liability. Again, this needs to be re-evaluated in light of judicial

¹ Ashworth, *PCL* at 457.

² This approach has been subjected to criticism by Norrie, "A Critique of Criminal Causation" [1991] 54 *MLR* 597 at 686: 'Traditionally, lawyers and academics have sought to resolve the problems of legal doctrine by engaging in deeper conceptual rationalisation and reconciliations of the surface tensions and contradictions of the law... More recently, however, some academics have begun to question the value of such an approach, and argue that it would be more fruitful as a means of understanding the nature and development of legal doctrine to recognise that the surface contradictions of the law are not to be overcome by a more sophisticated ratiocination, but are rather founded upon deeper tensions and contradictions within the form of the law itself.'

³ KJM Smith, *Treatise* at 4 and Ashworth, *PCL* at 457.

⁴ Ashworth, *PCL* at 457.

developments. It is unsurprising that from this unstable foundation the theoretical difficulties begin to radiate. Thus, at the other end of the scale:

[T]he most disputed areas of complicity are those where theoretical expectation of both causal and mental culpability are seen to suffer the distorting effects of broader policy demands; variation rules and conspiracy based complicity are two prominent examples of this effect.⁵

Consequently, this chapter will consider the basis of derivative, as opposed to inchoate, liability, the role of causation in the law of complicity and an introduction into secondary party fault. However, a constituent integral to all three areas' concerns is the public demonstration of censure. Therefore, it is important, firstly, to consider the role of blame in the criminal law to permit an appreciation of the possible ways in which it might be manifested in the case of secondary parties.

1.1 THE ROLE OF BLAME IN THE CRIMINAL LAW

Blame is a complex concept.⁶ It clearly plays a central role throughout the course of our lives in defining our actions and thoughts and creating our sense of personal responsibility. We learn not only to blame others, but to blame ourselves and the permissible scope, in terms of personal development and social interaction, may be extremely wide.⁷ The scope might encompass direct actions that involve or culminate in an unfortunate result; conduct that, though it does not directly cause the result, can be traced or connected to it⁸; an omitted act that, if done, might have avoided the result; even wicked or uncharitable thoughts, although not acted upon. We are also well equipped to judge the contribution of several parties to a given occurrence. Parents will probably reserve their harshest criticism for the child who manipulates group peer pressure to instigate and insist that his reluctant friend throw a stone at his neighbour's greenhouse in fulfillment of a

⁵ Smith KJM, *Treatise* at 87.

⁶ It has been suggested that 'blame entails a judgment of responsibility... The notion of responsibility that underlies the concept of blame is an elusive one... [We] may say generally that blame imports the notion of choice.': Kadish, *Complicity, Cause and Blame* at 330

⁷ In Professor Kadish's words: 'Attributing blame is a pervasive human phenomenon. It is one way in which we order and make sense of social experience.': *ibid.* at 329.

⁸ 'A consequence of a person's action may be of two general kinds. It may consist of subsequent events. If I light a match in an area containing explosive vapors that ignite; starting a fire that burns down a building, I may be blamed for the burning of the building because I can be said to have caused it. I started a chain of events that led to the burning of the building through cause and effect governed by nature. But a consequence of a person's action may also consist of the actions of other people. I may have persuaded another responsible person to light the match or helped him by giving him the match for the purpose. The other person then caused the burning of the building but whether I am to be blamed for the other person's action would not be assessed by asking whether I caused this action in the same sense that his lighting the match caused the fire. Rather, my responsibility would be determined by asking whether my persuasion or help made me accountable for the other person's actions and what they caused.': *ibid.* at 332.

forfeit.⁹ However, the protestations of the stone thrower will also receive short shrift. Well-remembered parental retorts of the ilk: 'If Johnny told you to jump off a cliff, would you do it?' underline the fact that in a social context, blame is attached to action that, although influenced, was otherwise freely chosen.¹⁰

Superimposed upon the assessment of the conduct is the state of mind that accompanied it. This added layer creates various permutations of blame. The condemned act or omission may have been engaged in deliberately with full knowledge of, or with the actual aim of achieving, the inevitable consequence. This is, undoubtedly, recognised to be the most reprehensible mental state. On the other hand, the protagonist might have been aware that there was a risk of producing the wrongful consequence during the course of the chosen conduct, and continued anyway. In this case, the attribution of blame will involve an evaluation of the degree of risk involved and the degree of harm actually risked.¹¹ For extremes of harm, the awareness of even the remotest chance of bringing it about may be viewed unsympathetically. The same balancing act is involved where the perpetrator fails to appreciate that his behaviour involves a risk of harm. The blame attached to inadvertent conduct will depend on whether the state of unawareness was itself blameworthy, such as when the person has chosen to become, or to risk becoming, intoxicated or acted in the throes of a temper tantrum. There will also be an evaluation as to whether the conduct was simply thoughtless and could have been avoided by taking greater care. This will arise where, despite the lapse, the person had latent awareness, which, inevitably with the benefit of hindsight, allows him to admit to possessing sufficient mental faculties to have realised the risk at the time. On the other hand, someone judged to be incapable of appreciating the risk will be judged less severely and may not be blamed at all. An additional state of mind that will probably be subject to serious condemnation is indifference, when the person in colloquial terms, simply could not care less about the risk involved. Cultural expectation requires that we should concern ourselves with the way our action impacts upon others. Again, in the

⁹ This scenario demonstrates one of the main public policy concerns over criminal complicity. See above, p.1 and below, p.212.

¹⁰ It has been argued that no one is really free to engage in autonomous action but that our choices are circumscribed by our experience and conditioning, e.g. Norrie, "The Limits of Justice: Finding Fault in the Criminal Law" (1996) 59 MLR 540 at 552. However valid the point, a deterministic rationale of human behaviour would leave the criminal law, in its present role, largely inoperable. Though it is possible to point to exceptions, such as strict liability offences, the notion of free will and voluntary choice is a pivotal concept that underlies the attribution of blame and punishment in the criminal law.

¹¹ It also involves an assessment of whether knowingly taking the risk is justifiable, as where a surgeon operates upon a critically injured patient, foreseeing a high likelihood that the patient will die. For further

final analysis, the degree of censure will depend upon the seriousness of the consequence. This provides insight into the final point. Whilst engaging in conduct that threatens harm is subject to censure, the actual causing of harm elicits an entirely different response. There is no longer room for an austere reprimand combined with a huge sigh of relief, because the damage has been done. Moreover, the reaction of the perpetrator is also coloured by similar considerations. Even faultless conduct will usually be accompanied by self-reproach if a victim has been killed as a consequence. Furthermore, there will usually be an expectation of peer judgment of the result.

The criminal law follows this familiar social phenomenon of attributing blame and responsibility, and thereby participates in social control. In place of the variety of restraints that are employed in the social context of family, education, religion, employment and peer groups, the criminal law provides public censure accompanied by state controlled sanctions. In general terms, the activities that are subject to criminalisation are those that threaten the security of the individual members of society or those that are believed to threaten the stability of society as a whole by compromising instilled values. In order to reflect and reinforce normative values, the criminal law must be grounded in a popular understanding of blame. Thus, causation and culpability play pivotal roles in the assignment of criminal responsibility. In cases involving more than one party, there are two possible bases of liability but the causation/culpability dichotomy is slanted to create a different emphasis in the alternative options.

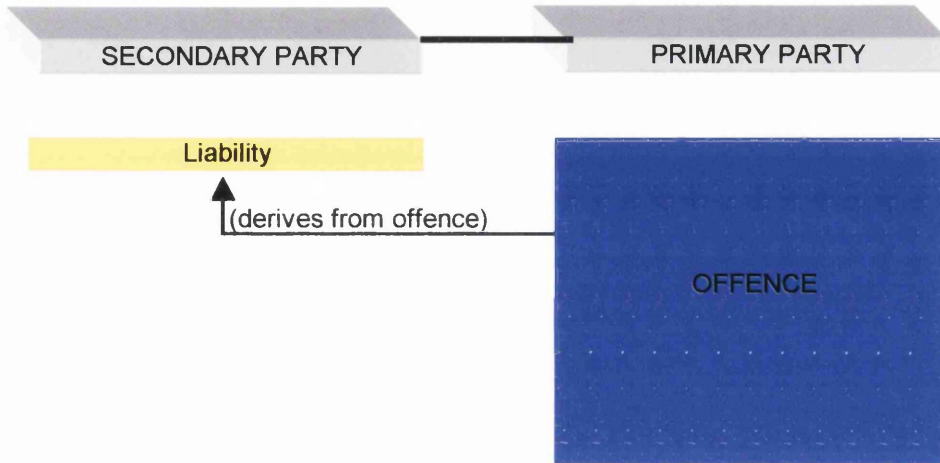
2 POSSIBLE FOUNDATIONS FOR SECONDARY LIABILITY: INCHOATE AND DERIVATIVE FORMS OF LIABILITY

Derivative liability and inchoate liability comprise the two possible foundations for the imposition of secondary liability. Secondary parties, in this extended sense, include all persons whose contribution to the crime falls short of actual perpetration within the terms of the offence definition. Essentially, the fundamental difference between the two theoretical models is that derivative liability is parasitic in nature. Secondary liability derives from the commission of a principal offence (fig. 3a). Put pithily, no offence means no liability. On the other hand, inchoate liability is not parasitic: it stands alone. Inchoate offences are substantive offences in their own right and therefore need no further principal offence from which to derive liability, although a purported complete offence is required as a reference point (fig. 3b). Thus inchoate liability is

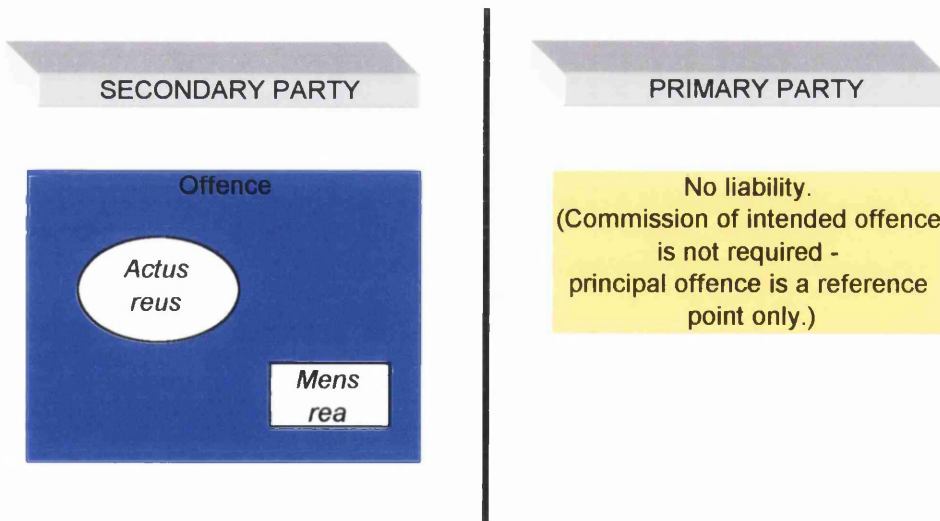
consideration of the relationship between foresight of consequences and unjustifiable risk taking see Yeo, *FH* at 81-87.

Fig. 3 Theoretical Foundations of Secondary Liability

a. Derivative liability



b. Inchoate liability



incurred for encouraging another to steal, regardless of whether the person so encouraged goes on to commit theft.

Derivative liability has antiquity on its side. The need to impose criminal responsibility upon persons who contributed to an actual crime commission by word or deed has been appreciated since Anglo-Saxon times. The origins of the criminal law demonstrate a sole concern with the reparation of actualised harm,¹² and derivative liability was born in these early stages. The more recent genealogy of inchoate liability is reflected in the jurisprudential advances, which realised the social dangers of allowing incipient crime to go unpunished.

2.2 SECONDARY LIABILITY AND DERIVATIVENESS

It has been suggested that the derivative nature of complicity liability is one of its few bedrock requirements that remained consistent across the span of the centuries.¹³ The Law Commission's proposal to supersede derivative with inchoate liability for all secondary parties¹⁴ therefore marks a major departure. Of course, a break with tradition, however drastic, is not, in itself, a reason to resist the push for a new initiative. Indeed, the suggestion has the beneficial effect of forcing a reappraisal of the existing framework and, implicitly, insisting upon a justification for retaining the old order, based on its particular merits. Indeed the application of derivative liability is not without difficulties and tensions¹⁵ and it is important to consider whether the disadvantages outweigh the benefits in evaluating the wisdom of a fundamental change of emphasis in the imposition of secondary liability.

¹² See above pp.50-51.

¹³ KJM Smith, *Treatise* at 4.

¹⁴ LCCP No. 131 para 4.7. The proposition includes a possible exception in the case of joint enterprisers, para 2.120.

¹⁵ Historically, derivativeness was applied more vigorously to accessories before the fact than to principals in the second degree. An accessory's liability was strictly derivative. Thus, '[i]f the principall before attainder hath his clergy, the accessory is discharged ... where the principall before attainder is pardoned, or his life otherwise saved, the accessory is discharged': Coke, *3 Inst* at 139. Similarly the possibility of a differential verdict, where the principal was guilty of manslaughter and the accessory of murder was obviated for the reason that murder had not occurred: Hale *1 PC* at 437; Coke makes the same observation using a differential verdict of (principal) murder and (accessory) petty treason as the example: *3 Inst* at 139. Neither was it possible for an accessory before the fact to be liable for (voluntary) manslaughter: Coke *3 Inst* at 55; Hale *1 PC* at 233 and 437. Whilst an accessory could be liable only for the exact offence committed by the principal in the first degree, a principal in the second degree (because assessed as a principal rather than an accessory) could be liable for a different degree of homicide to the principal in the first degree: 'the circumstances of the case may vary the degree of the offence in those that ... are [principal] parties to the homicide': Hale *1 PC* at 438. For further details of the historical developments in complicity and homicide, see chapter 2.

2.2.1 Derivative versus Primary Liability

In contrast to inchoate liability, being an accessory has never been, and is still not, a substantive offence in its own right. An accessory's liability depends, firstly, upon the actual perpetration of an offence and only then upon a culpable connection with its commission.¹⁶ Consequently, without the occurrence of an offence a person cannot not be criminally responsible as an accomplice regardless of how much effort, influence or pressure had been brought to bear to assist,¹⁷ persuade or command the potential principal to commit the act of villainy. That said, there is, within the idea of derivativeness, scope for the exercise of flexibility depending upon the choice of interpretation. It may be argued that, ideally, accessory liability should arise only when the perpetrator is liable for the relevant offence. Generally, this is the case, well illustrated in the Australian case of *Demirian*¹⁸:

A and B planned to blow up a consulate. B caused the "bomb to detonate prematurely" and was killed in the explosion. A was charged as accessory before the fact to the murder of B. The full Court of Victoria held that as B was not guilty of murder, A could not be found guilty as an accessory.¹⁹

However, under certain circumstances, the perpetrator might escape liability, whilst the secondary party is blatantly deserving of censure. Such instances leave the law with two options: to uphold the general rule and apply the logic that results in the regrettable exculpation of the secondary transgressor or to qualify the rule so as to extend the ambit of secondary liability. The former option exposes the criminal law to public criticism and denunciation while the latter creates theoretical anomalies within the law. Given these choices, it is perhaps unsurprising that the latter approach has been adopted. However, it is unfortunate that the qualifications have not been posited with any firm degree of clarity.

¹⁶ It has always been accepted that offence definitions need not specifically reference secondary party liability as it is implicitly included. 'When any offence is felony either by the common law, or by statute, all accessories both before and after, are incidently included.' Coke, *3 Inst* at 59.

¹⁷ Although the inchoate offences of incitement and conspiracy cover acts of encouragement, influence and agreement, there is no inchoate offence to criminalise a person who intentionally, but ineffectually, assists the commission of a crime. A compelling case for introducing an offence of facilitation to bridge this gap in the law has been made by Spencer, 'Trying to help another person commit a crime' in *Criminal Law Essays in Honour of J.C. Smith* ed Peter Smith (Butterworths, 1987).

¹⁸ [1989] VR 97, cited in Lanham, "Primary and Derivative Criminal Liability: An Australian Perspective" [2000] Crim LR 707 at 708.

Under English law, *Thornton v Mitchell* [1940] 1 All ER 339 asserts the need for secondary liability to be derived from a principal offence. However, there is an alternate interpretation that secondary liability depends, not upon the commission of the offence, but on the *actus reus*, and *Thornton v Mitchell* will be examined within this context, below p.133.

¹⁹ Lanham, *op cit.* n.18 at 708.

At its simplest, it is fair to say that criminal liability derives from some tangible and proscribed wrongdoing. However, this is the case whether the party is a principal or an accessory and so it covers any overlap that might arise between the two designations. It will become clear in the course of following examination that there is a potential blurring between the designations. This means that the usual descriptions of parties as 'primary' or 'secondary' become less useful without the addition of qualifications. To preempt any complexities that might arise, the terminology will be amended for the following discussion. The party who satisfies the *actus reus* of the offence will be termed the 'direct' party and a party who does not, the 'indirect' party.²⁰

The potential difficulties with derivativeness are brought into sharp relief in cases that involve secondary parties where the offence comprises a prohibited action that is capable of commission only by a specified person or group of people. Bigamy is a clear example. It cannot be committed by anyone who does not go through a marriage ceremony with another, when already married.²¹ A similar context arises in cases of driving offences and certain sexual crimes.²² The application of secondary party liability to such instances is most clearly illustrated in *Cogan*²³. Cogan's friend, Leak, urged him to have sexual intercourse with Mrs. Leak. Though he did not inform Cogan of the fact, it was intended as a punishment to his wife and, indeed, in a series of previous assaults, Leak had himself had intercourse with his unconsenting wife. At that time, marital rape was not an offence²⁴ but Leak was found guilty as the perpetrator of physical assault and attempted buggery and as a secondary party to Cogan's rape. There is nothing anomalous in this result. The fact that it was possible to aid and abet a 'non-proxyable' offence had long been recognised.²⁵ Furthermore, the difference in culpability was reflected in the fact that Cogan was sentenced to two years' and Leak to seven years' imprisonment for the rape. The difficulties appeared when Cogan successfully appealed against his rape conviction on the grounds that he honestly believed Mrs. Leak to have been consenting.²⁶ If the offence had been obviated how then could Leak's conviction as an indirect party to rape be upheld?

²⁰ These useful distinctions have been poached from Lanham: *ibid.* at 707.

²¹ S.57 Offences Against the Person Act 1861.

²² Kadish introduced the useful shorthand of 'nonproxyable action' to describe offences of this nature: *Complicity, Cause and Blame* at 373.

²³ [1976] 1 QB 217.

²⁴ It became an offence in 1991: *R v R* [1992] 1 AC 598.

²⁵ E.g. *Coke 3 Inst* at 59: 'if any be present aiding and abetting any to do the act, although the offence be [personal], and to be done by one only, as to commit rape, not only he that [does] the act is a [principal], but also they that be present, abetting and aiding the misdoer are [principals] also.'

Also *Ram* (1893) 17 Cox CC 609.

During the course of the judgment which quashed Leak's appeal, it was asserted that 'had Leak been indicted as a principal offender, the case against him would have been clear beyond a doubt'²⁷. Under this analysis, Leak used Cogan as an innocent agent: Cogan's body was the instrument used to effect the rape of Mrs. Leak.²⁸ Under innocent agency, the *actus reus* is completed by the direct party whilst the indirect party is the repository for the *mens rea*. Indeed, even when the offence requires a lesser degree of culpability, the indirect party will generally act purposefully.²⁹ It is fairly easy to understand the rationale behind the doctrine. The indirect party caused the commission of the offence by deliberately procuring the unwitting aid of another and it is fair and logical that he be held accountable. It seems perfectly clear that it was this reasoning that Lawton LJ had in mind:

In the language of the law the act of sexual intercourse without the wife's consent was the *actus reus*: it had been procured by Leak who had the appropriate *mens rea*, namely his intention that Cogan should have sexual intercourse with her without her consent. In our judgment it is irrelevant that the man whom Leak had procured to do the physical act himself did not intend to have sexual intercourse with the wife without her consent. *Leak was using him as a means to procure a criminal purpose.*³⁰

It has been argued that the innocent agency template does not fit squarely with the facts of the case. In innocent agency cases, the liability of the indirect party is based on the premise that once the direct party has performed the *actus reus* of the offence he, or it,³¹ can be removed from the equation leaving the indirect party to supply the *mens rea* and so fulfill the missing requirements of the offence definition. In Leak's case 'it was the first occasion on which a person was convicted of a crime as a perpetrator for doing something through an innocent agent when he could not have been convicted had he done it himself'³².

²⁶ In accordance with *DPP v Morgan* [1976] AC 182.

²⁷ [1976] 1 QB 217 at 223.

²⁸ *Ibid.*

²⁹ Williams suggested that 'the doctrine of innocent agency probably applies... only when the perpetrator intended the offence to be committed, not when he was merely negligent. *Textbook of Criminal Law* 2nd ed (Stevens & Sons, 1983) (hereafter *TCL*) at 369 (but cf. *Thornton v Mitchell*, below p.133) Indirect liability is incurred even when the subsequent train of events differs from that planned or anticipated, so long as the result is the one originally intended. Thus, in the 19th century case of *Michael* (1840) 9 C & P 356, a mother gave a bottle of medicine containing a lethal quantity of laudanum to her child's nurse in the hope and expectation that the nurse would administer a fatal dose to the child. In fact, the nurse's young daughter gave the intended victim the medicine. The mother was found guilty of her child's death.

³⁰ [1976] 1 QB 217 at 223 (emphasis added).

³¹ It would be possible to employ, for example, a trained dog or a remote-controlled robot in place of the innocent person.

³² Williams, *TCL* at 371. Further emphasising the problems with the logic, Williams argued that the decision was rendered possible only because the defendant was a man and therefore possessed the physical attributes necessary to fulfill the *actus reus* of penile penetration. 'As it is, the position is that if the duress is applied by a man, he can be convicted of rape on facts like *Cogan*, whereas if the duress is applied by a

However, the Court of Appeal, also upheld a second explanation for Leak's liability. It was confirmed that he was liable for aiding and abetting the rape. Despite the fact that the direct party had successfully appealed that the offence definition had not been satisfied, the Court declared:

[O]ne fact is clear – the wife had been raped. Cogan had had sexual intercourse with her without her consent. The fact that Cogan was innocent of rape because he believed that she was consenting does not affect the position that she was raped.³³

The fact that this argument would be of little avail to a ravished woman whose assailant managed to convince a jury that he had believed her to be a willing participant indicates that secondary liability is being derived from something less than the commission of the offence. In a judicial sleight of hand, the formula for innocent agency has been transferred to complicity liability. The culpable indirect party is made liable for the direct party's commission of the *actus reus*. Thus, secondary liability has been extended so that it derives, not from the principal offence, but from the performance of its *actus reus* (fig. 4).

In *Thornton v Mitchell*³⁴, a bus driver reversed his vehicle, relying upon the signal of his conductor that all was clear behind him. This was the usual practice of the driver but on this occasion, the conductor was negligent and failed to notice two pedestrians. The bus hit the pedestrians, killing one of them. The driver was charged with driving without due care and attention, with the conductor charged with abetting his offence. The charge against the driver was dismissed and it was held that the charge against the conductor was no longer viable. He could not have abetted an offence that had not occurred. It can be argued that, though the Court of Appeal did not detail the reasoning so precisely,³⁵ this case can be distinguished from *Cogan* on the grounds that there was no *actus reus* from which to derive the indirect party's liability.³⁶ Nevertheless, both the basis and the scope of this new species of secondary liability have been

woman it would need an even greater degree of hawkishness... to call her a constructive man. Yet it is highly illogical that a man can commit rape through an innocent agent, when a woman cannot...': *ibid.* Cf. *D.P.P. v K and B* [1997] 1 Cr App R 36.

³³ [1976] 1 QB 217 at 223.

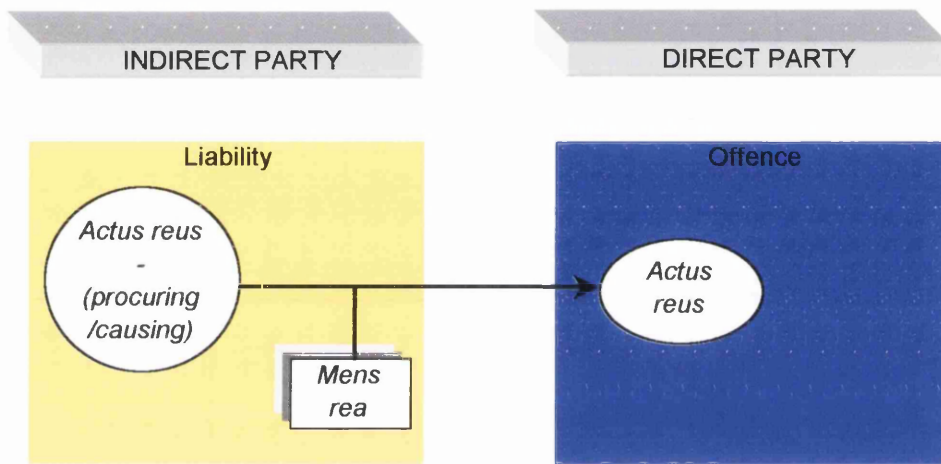
³⁴ [1940] 1 All ER 339.

³⁵ The reasoning was adopted in *Millward* [1994] Crim LR 527 when the facts of *Thornton v Mitchell* were distinguished.

³⁶ Also in *Loukes* [1996] 1 Cr App R 444, it was held that there was no dangerous driving and so no *actus reus* for the offence of causing death by dangerous driving.

Fig. 4 Indirect Liability Where the Direct Party is Not Liable

- a. Where the principal offence definition is framed in personal terms and the direct party is acquitted; or**
- b. Where the direct party is an innocent agent.**



subjected to criticism.³⁷ The employment of the term direct party tends to conceal the fact that in cases where the indirect party procures the *actus reus* of an offence, there is, technically, no principal offender. Thus, there is no question of secondary liability being explained in terms of sharing the principal's accountability. Rather, the courts have created a new form of liability of procuring an *actus reus*.³⁸ Furthermore, there is a query over the degree of culpability that will suffice. "Procure" suggests purpose and endeavour. However, in *Millward*, an employer, knowing his vehicle to be in a dangerous condition, instructed his employee to drive it on the road. Subsequently, the vehicle was involved in a fatal collision. The *actus reus* of reckless driving comprised the driving of the vehicle on the road.³⁹ However,

while [Millward] was "endeavouring" to have the dangerous vehicle driven on the road, which was assumed to amount to reckless driving, [he] was certainly not endeavouring to have anyone killed. If the driver had been guilty of reckless driving, then both he and Millward should be guilty of causing death by reckless driving; but it does not necessarily follow that Millward should be guilty of that offence when the driver is not guilty.⁴⁰

The extension of culpability for *mens rea* less than intention opens up the potential for indirect liability in homicide where the death is caused unintentionally. This is more potent when the offence is framed in terms of involuntary manslaughter. Under these circumstances, the *actus reus* is fulfilled by unlawfully causing death, regardless of the means. Thus, it is arguable that in *Millward* and *Thornton v Mitchell*, it would be possible to construct secondary liability for homicide via the fact that the indirect parties caused the *actus reus* of involuntary manslaughter.⁴¹ Certainly, if innocent agency rather than complicity was invoked as a ground for liability, the indirect party would be held responsible: in accordance with the Draft Code, the fault required is the one specified in the substantive offence.⁴² Thus, constructive fault or negligence would be

³⁷ *Smith & Hogan* at 153-5.

³⁸ It has been successfully utilised in *Millward* [1994] Crim LR 527; *Wheelhouse* [1994] Crim LR 756; *D.P.P. v K and B* [1997] 1 Cr App R 36. See also *Bourne* (1952) 36 Cr App R 125 where a husband was liable as a secondary party to his wife's buggery, having compelled her to have carnal knowledge of a dog. It was assumed that, had the wife been charged, she could have successfully pleaded a duress defence. Thus, the husband's liability was, in effect, derived from the *actus reus*. Whether a justificatory defence would have the same effect is a moot point. Logically, there should be no secondary liability for the commission of an offence that is subsequently held to have been justified because the unlawfulness of the *actus reus* has been nullified. For an examination of the differences between defences see JC Smith, *Justification and Excuse in the Criminal Law* (The Hamlyn Lectures) (Steven and Sons, 1989). For specific application see Husak, "Justifications and the Criminal Liability of Accessories" [1989] 80 (2) Jo CL & Crim 491-520.

³⁹ See commentary [1996] Crim LR 527, which casts doubt on whether this was adequate conduct to comprise the *actus reus*.

⁴⁰ *Smith & Hogan* at 154.

⁴¹ Moreover, this becomes an essential means of imposing homicide liability if corporate manslaughter is ever to be effective. I am indebted to Richard Townshend-Smith for making this pertinent observation.

⁴² Law Com. No. 177 clause 26.

sufficient. On the other hand, complicity liability requires that the accessory be at least subjectively reckless⁴³ as to the commission of the offence (or, following the present argument, the *actus reus* of the offence). It will later be argued that this *mens rea* differential is a critical issue in the imposition of indirect liability. However, there is still more to be highlighted on the difficulties of drawing a coherent line between primary and secondary liability.

Even if secondary liability derived from the *actus reus* of the offence is limited to cases of procuring, there is a linguistic and logical difficulty in differentiating between “causing” an offence – which arguably results in primary liability – and “procuring” it – which applies to accessoriness. This is particularly acute in homicide where the *actus reus* involves causing death. Thus, an indirect party who causes the direct party to cause the death of the victim is better classified as a principal because in so doing he has caused the death of the victim and satisfied the elements of the *actus reus*. It follows that the degree of homicide should be determined by the indirect party’s culpability and the justice of this position is not diminished whether the indirect party uses an innocent agent or a “semi-innocent”⁴⁴ agent, as in the following judicial example in *Howe*,

A hands a gun to D informing him to go and scare X by discharging it. The ammunition is in fact live, as A knows, and X is killed. D is convicted only of manslaughter, as he might be on those facts. It would seem absurd that A should thereby escape conviction for murder.⁴⁵

This pronouncement on complicity liability marked the uncoupling of exact derivativeness by overruling *Richards*⁴⁶. In that case, it had been held that an accessory could not be found liable of an offence greater than the one actually committed. A closer inspection of the facts is required to analyse the objections to this apparent truism. Mrs Richards recruited two men to assault her husband. She intended the husband to suffer grievous bodily harm and, she was convicted of the wounding with intent provision of s.18 of the Offences against the Person Act 1861. However, the two men were convicted of the lesser s.20 offence. The wife’s contribution, beyond the procuring of the assailants, had been to provide a signal for the commencement of the attack.⁴⁷

⁴³ *Callow v Tillstone* (1900) 8 LT 411.

⁴⁴ This term is used by Williams, *TCL* at 373.

⁴⁵ *Howe* [1987] 1 AC 417 at 458 *per* Lord Mackay.

⁴⁶ [1974] QB 776.

⁴⁷ The judgment demonstrates confusion over a number of conflicting elements. The reliance on the offence actually committed to establish the liability of the accessory harks back to the pre-1967 liability of accessories before the fact (see above, n.16). However, Mrs Richards provision of the signal would have rendered her a principal in the second degree (above, p.60) and, as such, her liability would not be strictly delimited by the degree of the offence committed by the perpetrators.

On appeal the Court held that, as an accessory, she could not be liable for a greater offence, than had actually occurred.

The overruling in *Howe*, accepts that the degree of liability may also be derived, not from the commission of the offence, but from the commission of the *actus reus*. This permits differential verdicts whereby the secondary party is liable for a more serious offence than the primary party. However, logic dictates that the possibility for differential verdicts of this nature arises only where related crimes include a common *actus reus* and the degree of seriousness is dependent upon a further aggravating factor. This includes not only unlawful homicide where the common denominator is the *actus reus* of causing death and the gravity of the offence is determined by the degree of culpability (fig. 5), but also assault offences which result in grievous bodily harm. In accordance with the Offences against the Person Act 1861, s.18 and s.20 share the common denominator of grievous bodily harm. The aggravating factor that distinguishes s.18 from s.20 is the specific intent to cause the *actus reus*. As in the homicide offences of murder and involuntary manslaughter, it is equally plausible that a differential verdict might be found, based on the different *mens rea* requirements. For an example of related offences that involve a distinguishing factor other than the degree of fault, a differential verdict of robbery/theft or burglary might also be sustained on the basis that the aggravating factor in robbery is the threat or use of violence during the theft/burglary.⁴⁸

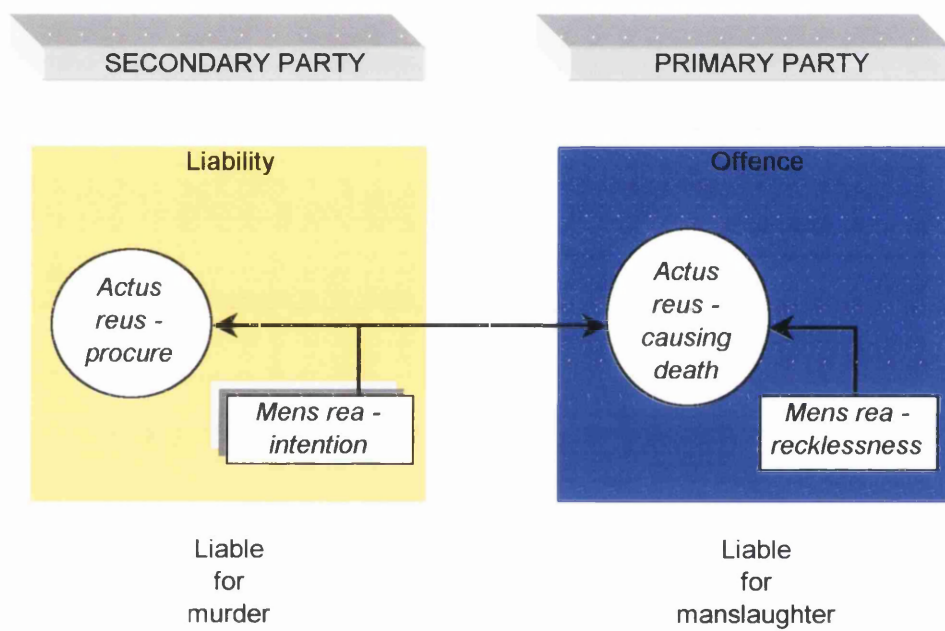
However, while the exceptions demonstrate a flexibility in the interpretation of derivativeness, they nonetheless confirm that, ultimately, liability must still derive from the commission of a wrongful act. In this sense, complicity liability remains a long way distant from inchoate liability. To pose two illustrations to support this affirmation, firstly, suppose that the victim in *Richards* had suffered actual bodily harm and the assailants were found guilty of the lesser s.47 offence. It would strain credibility to impose liability upon the wife for the s.18 offence that she undoubtedly intended. Although she intended grievous bodily harm, there was no such harm caused and it seems nonsensical to hold her liable as a party to an offence that was not, in the event, manifested. On the other hand, it is perfectly sensible for her to incur liability for the

⁴⁸ *Maxwell* [1990] 1 All ER 801.

Fig. 5 Secondary Liability for a More Serious Offence than the one Committed by the Primary Party

Where the offence definition of related crimes includes a common actus reus with a distinguishing aggravating factor

(e.g. murder/involuntary manslaughter)



inchoate offences of inciting and/or conspiring with her hirelings regarding the s.18 offence.⁴⁹ The second example is perhaps still more convincing. Suppose, this time, that the wife had instructed the men to kill her husband and they had decided merely to badly beat him, with the intention of causing grievous bodily harm. In this scenario, all three of the parties have sufficient *mens rea* for murder.⁵⁰ However, until death actually occurs there is no *actus reus* for murder. It would, therefore, be absurd to hold the wife liable for murder, despite the fact that it was the offence that she intended; in actuality she is not party to an unlawful death. Neither is she party to an attempted murder⁵¹ because the men, not intending to kill the victim,⁵² did not commit that offence; the wife is a party to the s.18 offence that, in fact, occurred.

2.2.2 The Relevance of the Designation of the Parties to a Crime

The preceding examination of amended derivativeness is not intended to be exhaustive. It is included to highlight the difficulties that exist in defining the species of liability, that is, primary or secondary. Under South African law, as in the English law examples considered above, there is little cause for concern in the designation of the parties because complicity liability derives from contribution to the commission of the *actus reus* while individual accountability is judged by the culpability of each party. Thus, there is equality before the law. Difficulties arise where the *mens rea* for a secondary party differs from the fault requirement for a primary party and this situation arises under English law, notably in offences that specify intent as the fault element. In crimes such as murder that provide for the *mens rea* of intent to kill or to cause grievous bodily harm, the primary offender is judged by a more restricted standard and therefore incurs a narrower liability than a secondary party. The secondary party needs only to have intended his own secondary act of assistance or encouragement, while foreseeing the principal's murderous fault, to be liable for murder.⁵³

⁴⁹ Ashworth, in "The Draft Code, Complicity and the Inchoate Offences" [1986] Crim L.R. 303 at 312, queries whether 'the whole concept of semi-innocent agency should... be dispensed with, in favour of the offence of incitement.'

⁵⁰ *Cunningham* [1982] AC 566.

⁵¹ Or for soliciting murder under s.4 of the Offences against the Person Act.

⁵² *Fallon* [1994] Crim LR 519; cf *Walker and Hayles* (1990) 90 Cr App R 226 where it was held that foresight of a high degree of probability that prohibited result might occur is sufficient *mens rea* for attempted murder.

⁵³ For a detailed examination of the secondary fault in homicide, see chapters 6 & 7.

This insight seriously qualifies the conclusion that designations of the parties to a crime do not matter.⁵⁴ At face value, differentiation is unimportant because the Accessories and Abettors Act 1861 provides that all parties will be treated as principals. However, this provision ensures equality of administrative and sentencing procedures, not equality of liability. Once found liable, secondary parties are treated as principals but they are not initially judged by the same standards and criteria as principal offenders. Moreover, as has been seen, the difference between the designations may be blurred. In innocent agency cases the indirect party is the principal and therefore the *mens rea* requirement for murder is intention. However, the overlap between procuring and innocent agency leads to the possibility that the indirect party might be designated a secondary party. To pose a possibly far-fetched example, suppose that IP bribes a child to put lighted fireworks through the letterbox of IP's house, intending to set fire to the house for the insurance money. IP instructs the child, firstly, to knock on the front door, and to carry out the dangerous prank only if there is no one at home, as he does not want his wife to be injured. However, he foresees the possibility that the child will deliberately seek the chance to kill the spouse in the resulting blaze. His worst fear is realised and his wife dies of smoke inhalation following the child's malicious act. The age of the child will govern IP's liability for murder. If the child is nine years old, IP is a principal using an innocent agent and therefore must have foreseen the death of his wife as a *virtual certainty*⁵⁵ to be liable for murder. If the child is ten years old, IP is liable for murder as a secondary party on the grounds that he procured the arson offence while foreseeing the *possibility* of his wife's consequent death.

However, in neither of the alternative conclusions is IP liable for inciting murder or for attempted murder. Inchoate liability⁵⁶ crystallises IP's criminal responsibility at the point of the arson.⁵⁷ Furthermore, IP's liability for his wife's death arises only when the victim's death occurs. At that point the inquiry into causation will be introduced to decide upon the applicability and degree of homicide liability; causation criteria will be employed to ascertain who, if anyone, unlawfully caused the victim's death and incurs liability for homicide. Causation, therefore, plays no role in inchoate liability but it is relevant to derivative liability: the extent of its relevance is the subject of the following section.

⁵⁴ 'The law no longer concerns itself with niceties of degrees of participation in crime': *Cogan* [1976] 1 QB 217 at 223 *per* Lawton LJ.

⁵⁵ For fault elements particularly oblique intention, see above p.19.

⁵⁶ See above, pp.127-9.

⁵⁷ s.1(2) Criminal Damage Act 1971.

3 THE ROLE OF CAUSATION⁵⁸

Before looking specifically at the question of causation in secondary liability, it is worth stressing that causation is by no means a simplistic and uncontroversial concept even when applied to a primary party. It is worth considering some of the difficulties that have been highlighted. The issue that is central to an understanding of causation is the role that it is required to play in the criminal law. In answer, Hart and Honoré draw a distinction between causation in science and in history or law and argue that while the object of scientists is to establish laws and generalisations, the interest in history and law is the application of 'known and accepted generalizations to particular cases'⁵⁹. However, law, unlike history, requires causation to perform a role with a specific, public policy related result. Essentially, causation is a means of attributing blame to the person who is perceived to be justly held responsible for the unlawful result: we select from a series of factors and thereby, with the benefit of hindsight, identify the one deserving of censure.⁶⁰ In this sense, it involves a value judgment⁶¹ and a 'voluntary human action intended to bring about what in fact happens'⁶². In 'easy' cases, this will be concealed behind the scientific equation that the consequence is a *sine qua non* of the actor's action. Thus, but for P not pointing a loaded gun at V's head and pulling the trigger, V would not have been killed. Therefore, P caused V's unlawful death. In this scenario, the immediate cause and effect is patently self-evident and satisfies the requirements of the criminal law by inculcating P for V's murder. Of course, a psychologist would be interested in pursuing the distantly related causes that ultimately led to P's homicidal reaction, much as an historian would be unsatisfied with the explanation that the German invasion of Poland in 1939 caused World War II. Therefore, it is not that human experience is incapable of appreciating, assimilating or prioritising the different causes of the same effect; it is simply that, under the criminal law, causation is required to perform a different role. Applying this modified role to the historical illustration, the fact that there were a variety of causes for World War II does not prevent the conclusion that Adolf Hitler was the person most

⁵⁸ For a detailed analysis of causation that is beyond the scope of this work see Hart, & Honoré, *Causation in the Law* 2nd ed. (Oxford Clarendon Press, 1985) (hereafter Hart & Honoré).

⁵⁹ *Ibid.* This is still the definitive work on causation. For a scholarly explanation of the differences between an actual cause of an event as opposed to its 'occasion', a 'mere condition' or 'part of the circumstances' in which the cause operated, see pp. 11-13.

⁶⁰ *Ibid.* at 17, 39-40.

⁶¹ Hart & Honoré provide the following example at 12: 'If we are puzzled by someone's sudden death and ask for the cause there seem to be natural limits forbidding us to give in answer, on the one hand events which are too near in time to the death, and on the other events which are too remote in time. If a man has been shot by another it would usually be stupid or inappropriate, though not false, to give as the cause of his death the fact that his blood-cells were deprived of oxygen, and equally inappropriate to give the manufacturer's action in selling the gun to the killer's father from whom the killer had inherited it.'

directly responsible for it. Nevertheless, the consideration of multiple causes in criminal law tends to muddy the water, particularly when new causes intervene between the act of the defendant and the proscribed result. Moreover, the attempts at clarification reveal the, not necessarily consistent, policy approach that lurks behind the paradigmatic formula.⁶³

Less difficulty is encountered when the intervening cause is non-human. Thus, if P assaults V and leaves him lying unconscious in the local park, such an unexpected cause of death as V being struck by lightning or mauled by an escaped lion⁶⁴ would be considered sufficient to supersede P's action as the cause of death. P would be exculpated from blame for V's death because he did not foresee it occurring. Furthermore it would not have been objectively foreseeable. Conversely, P would be held accountable for non-human agency where the reverse was true. Thus, if unconscious V had been abandoned in Kruger National Park and was killed by a lion, or if he had been left on a beach at the mercy of the incoming tide, these (presumably) foreseen and foreseeable events would not serve to supervene.

These illustrations serve to demonstrate that the physical and mental elements of an offence cannot be clearly separated.⁶⁵ In difficult causation cases, it is necessary to introduce a mental

⁶² *Ibid.* at 42.

⁶³ Norrie, *op cit.* n. 2; Padfield, "Clean Water and Muddy Causation" [1995] Crim LR 983.

⁶⁴ The owner of the escaped lion might be liable for negligent manslaughter.

⁶⁵ The Model Penal Code (proposed official draft, The American Law Institute, 1962) (hereafter MPC) incorporates culpability within the definition of causation. S.2.03 states that:

- (1) Conduct is the cause of a result when:
 - (a) it is an antecedent but for which the result in question would not have occurred; and
 - (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offence.
- (2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:
 - (a) the actual result differs from that designed or contemplated, ... only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or
 - (b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense. (square brackets in original)
- (3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should have been aware unless:
 - (a) the actual result differs from the probable result only in the respect that different purpose or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
 - (b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have been a [just] bearing on the actor's liability or on the gravity of his offense.

approach to supplement and explain the justice of the finding. Of course, it is also possible to use the culpability approach in the 'easy' cases. Thus, in the shooting scenario, V's death is foreseen and foreseeable. In fact, the death was intended but the greater culpability is contained within the lesser. Whether the correct test should be subjective (foresight) or objective (foreseeability) or a combination of both is a question that will not be decided in this work. Suffice to say that there is no consistency in the judgments.⁶⁶ Of greater interest, is the realisation that the employment of both standards may sometimes fail to produce the desired result, without the addition of fine-tuning to attain the preferred outcome. Thus, it is not generally the foreseen or foreseeable action of a gravely injured young woman to refuse life-saving medical treatment and so doom herself to death.⁶⁷ However, in *Blaue*,⁶⁸ the victim of a knife attack did just that. Unknown to her attacker, she was a Jehovah's Witness and she rejected the offer of a blood transfusion on religious grounds. Her voluntary action was therefore an independent intervening cause, which might have been expected to break the chain of causation. However, this result would exculpate the assailant. Consequently it is not particularly surprising to discover that the court chose to adopt a line of reasoning that ensured legal as well as moral censure for the attacker. This they achieved by categorising the deceased's belief system as a subsisting condition. Therefore, just as the defendant would have been liable if, unbeknown to him, his victim was a haemophiliac,⁶⁹ he remained liable for the subsisting psychological reason that had precipitated her death.

The attempt to provide a workable definition of the causation rules in the Draft Code simply highlights the complexity. The general rule offers no more guidance than that the defendant must have made a 'more than negligible contribution' to the occurrence of the prohibited result.⁷⁰ On the other hand,

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

⁶⁶ E.g. escape cases: *Roberts* (1971) Cr App R 95 (reasonably foreseeable) *Mackie* (1973) 57 Cr App R 453 *Williams and Davis* [1992] 2 All ER 183 (foresight).

⁶⁷ See the example for Clause 17(2)(iv) in Law Com No. 177: 'D stabs P who is taken to hospital. P refuses the blood transfusion which he is told is necessary to save his life. The refusal of the transfusion may be unforeseen by D and not reasonably foreseeable, but it is not sufficient in itself to cause death. The death would not have occurred without the wound inflicted by D.'

⁶⁸ [1975] 3 All ER 466.

⁶⁹ This is not the case under Indian law: the Indian Penal Code s.300(2) requires that, to be guilty of murder, the defendant intended to cause such bodily injury as the offender knows to be likely to cause death. It was interpreted in *Govinda* (1876) 1 Bom 342 at 346 *per* Melvill J to require that the defendant knew of the subsisting condition that rendered it more likely that the victim would die (cited in *Yeo, FH* at 120).

⁷⁰ Law Com No. 177 clause 17(1): a person causes as result which is an element of an offence when –

- 17 – (2) A person does not cause a result where, after he does an act or makes such an omission, an act or event occurs –
- (a) which is the immediate and sufficient cause of the result;
 - (b) which he did not foresee; and
 - (c) which he could not in the circumstances reasonably have been foreseen.

As to the position of secondary parties, the requirement for causation is specifically excluded.⁷¹ Thus, clause 17(3) provides:

- A person who procures, assists or encourages another to cause a result that is an element of the offence does not himself cause that result so as to be guilty of the offence as a principal except when
- (a) section 26(1)(c) [innocent agency] applies; or
 - (b) the offence itself consists in the procuring, assisting or encouraging another to cause the result.

However, why is this so? After all, it does not seem a particularly onerous requirement that the secondary party should have made a ‘more than negligible contribution’ to the commission of the offence.

3.1 CAUSATION AND SECONDARY PARTIES

If causation creates difficulties in primary liability, it is hardly surprising that it should be still more vexing when applied to secondary parties. Consequent to the realisation that a paradigm for the consistent affixing of a causation requirement to a secondary party is a highly improbable discovery, there is a compelling argument, espoused by a number of eminent academics,⁷² that causation is not a requirement in complicity⁷³. On the other hand, it has been pointed out that, while the attribution of causation to an accessory is by no means a simple concept, it is a mistake to eschew its relevance.⁷⁴ Indeed, antiquity seems to side with the dissenting view. Historically, complicity co-existed with the prevailing basis of criminal law that censured the actual

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- (a) he does an act which makes a more than negligible contribution to its occurrence; or
 - (b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence.

⁷¹ On the other hand, the MPC s.2.06(4) provides that, ‘...when causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.’

⁷² Most notably JC Smith (*Smith & Hogan* at 126-9; ‘Aid, Abet, Counsel and Procure’ in *Reshaping the Criminal Law* at 131-134) and Kadish, *Complicity, Cause and Blame* at 324-410.

⁷³ Except in procuring, in the circumscribed sense of the term created by *A-G’s Reference (No. 1 of 1975)* [1975] QB 773 where producing a strict liability offence by endeavour is little different to using an innocent agent, see above, p.41.

⁷⁴ KJM Smith “Complicity and Causation” [1986] Crim LR 663 and *Treatise*, ch. 3.

materialisation of harm.⁷⁵ Inchoate liability and its associated risk endangerment rationale is a far more recent phenomenon.⁷⁶ Moreover, the accomplice's liability derived from the commission of the offence – the materialised harm. Therefore, the role of causation must be considered a significant factor in the decision whether secondary liability is better placed in the derivative or inchoate liability category. Derivativeness implies the integral importance of causation. We are blaming the secondary party for the end result. If, on the other hand, causation plays no role, we are blaming the secondary party for his culpability alone, which is the territory of inchoate based liability. Should this be the case, there is every reason to adopt the reform proposals suggested by the Law Commission, which would amend the basis of liability and create two new inchoate offences of assisting and encouraging crime.⁷⁷

Thus, before turning to inchoate liability and the Law Commission proposals,⁷⁸ the areas that need to be addressed with reference to causation include the following inquiries. Does and should causation have a role in the existing scheme of secondary liability? If it should, how should it be defined? The study of South African law demonstrated that there are two possible places where causation may apply. In the first place, causation is relevant as a factor in the commission of the substantive offence, i.e. has the accessory caused the offence to be committed? In the second, causation is a criterion of the substantive offence definition. Taking homicide as an example, the question then is, could the accessory's contribution have caused the death of the victim? The following examination deals exclusively with the first issue since a party who complies with the second will logically be deemed a perpetrator and the concern is with the existence of a secondary party causal connection.

3.1.1 Theoretical Shortcomings

It has been asserted that 'the theoretical state of the law is so undeveloped as to make impossible any confident principled explanation of even simple cases of complicity liability.'⁷⁹ Whilst the judiciary have not tended to accept the challenge to consider the theoretical foundations of causation, there have been notable academic endeavours to this end.⁸⁰ Therefore, before considering the case law and attempting to decipher the underlying rationale behind the

⁷⁵ See above, pp.50-51.

⁷⁶ See below, pp.176-177.

⁷⁷ See above, p.3.

⁷⁸ For a critique of the proposals, see below pp.190-193, 202-206.

⁷⁹ Smith, *op cit.* n.74 at 663.

judgments, it is important to understand the potential applications of causation theory. In particular, it is essential to appreciate the objections to the utilisation of causation in relation to secondary parties.

To summarise the position so far, traditional causation is discussed in terms of *sine qua non*. In other words, *but for* the action the result would not have occurred. However, in the sphere of human activity, it is rarely so easy to ascribe just one cause to an effect. There will tend to be many factors that contribute, collectively or individually, to any given occurrence. Moreover, some causes will be more potent than others. The criminal law responds to this complexity by requiring that the conduct be a 'substantial'⁸¹ cause of the crime.⁸² Employing this for the principal's conduct provides a means by which actions creating a remote or negligible (*de minimis*) contribution will be discounted. Furthermore, a supervening event that breaks the chain of causation establishes grounds for exculpation. Applying the same rationale to impose secondary party liability is more troublesome because, as long as the perpetrator's conduct is voluntary and willed, the accessory's action cannot be one without which the crime would not have been committed. Of course, the act need not be the only *sine qua non* of the event, but even the more lenient 'substantial' cause criterion circumscribes the scope of accessory liability very narrowly. In truth, it is the principal's willed action that is the substantial cause.

Thus, the central obstacle arises due the importance given, in law, to a voluntary and wilful human action. The role attributed to causation means that judgment is based upon a trawl through the causes and conditions that led to a proscribed event, in search of the most blameworthy cause, which, generally, will be satisfied upon the discovery of a direct culpable human intervention. Consequently, 'a voluntary action is regarded both as a limit and also still the cause even though other later abnormal occurrences have provisionally been recognised as causes'⁸³. In other words, once the most direct and blameworthy human cause has been located, the inquest is halted. There is no further search for earlier causes. Thus, the contribution of a secondary party, who provided assistance or encouragement prior to the unlawful action of the

⁸⁰ Hart & Honoré and Kadish, Complicity, Cause and Blame form the foundation for the following exposition.

⁸¹ *Smith* [1959] 2 All ER 193 at 198.

⁸² Referred to as legal or proximate causation and applied as a second stage test/filter once actual causation has been established.

⁸³ Hart & Honoré at 42.

primary party, will have been superseded by the later and more direct cause provided by the perpetrator:

The voluntary action of the principal actor cannot appropriately be said to have been caused (in the physical sense of cause) by the action of the secondary party... A voluntary action is treated as the terminal point of the inquiry beyond which the inquiry does not proceed. No one and nothing caused the principal's action. He freely and voluntarily chose to act.⁸⁴

This has been described as the 'central type' of causation.⁸⁵ Nevertheless, as has already been illustrated,⁸⁶ we are well equipped through our social experience to appreciate multiple causes. Thus, whilst one person might be the direct cause of a given result, there may also be others who contributed significantly, though indirectly, and so, would be, colloquially, described as one of the 'causes' of the consequence.⁸⁷ However, the language of the 'central type' of legal causation needs to be modified to accommodate this concept. The paradigm does not sit comfortably with an assertion that the gun owner who lent her weapon to the killer 'caused the death of the victim'. Clearly, while the lending of the gun was an essential condition in the ultimate homicide scenario, it was the killer rather than the owner who 'caused', in the central meaning of the term, the victim's violent demise. So, although there is clearly a strong causal nexus between the two events, the concept of causation is rendered more subtle and 'tenuous'⁸⁸, when applied to the secondary party. Furthermore, 'in the same sense and for the same reasons that a person's genes, upbringing, and social surroundings are not seen as the cause of his actions, neither are the actions of another seen as the cause of his actions'⁸⁹: the criminal law is based on the premise of personal autonomy so that individuals are held responsible for voluntary, willed actions.

However, despite the strength of the theoretical protest, it remains conceivable that secondary parties are, in fact, blamed for their participation in the commission of a crime precisely because they are perceived to have caused, albeit indirectly, the resulting offence. Indeed, if this is not the case, it begs the question, on what grounds are secondary parties considered blameworthy? And,

⁸⁴ Kadish, *Complicity, Cause and Blame* at 327; or in the oft quoted words of Hart & Honoré: '...a deliberate human act is therefore most often a barrier and a goal in tracing back causes... it is often something *through* which we do not trace the cause of the later event and something *to* which we do not trace the cause through intervening causes of other kinds. (Italics in original at 44)

⁸⁵ Hart & Honoré at 42-3.

⁸⁶ See above, pp.125-127.

⁸⁷ Thus, Hart & Honoré concede, at 42, that 'a causal relationship of *some sort* may indeed be established between the conduct of the person who supplies the advice or means and the death of the victim. The latter can properly be described as a consequence of the persuasion or the provision of the poison.' (Italics in original.)

⁸⁸ *Ibid.*

historically at least, there is support for the concept of secondary responsibility via causal connection in the doctrine of derivativeness. Why should the law compel a secondary party to share the full extent of the perpetrator's punishment for the ultimate result if there was no sense of the accomplice's action having been a cause of the offence?⁹⁰ Indeed prior to the inception of the offences of incitement and conspiracy, the provision of aid or encouragement incurred no liability whatsoever, unless the principal committed the crime.⁹¹ In such instances, there was a clear indication that the offer of help or influence was causally ineffective.

3.1.2 Possible Causal Relationships between Primary and Secondary Parties

The causal relationship between the secondary party and the perpetrator's commission of the offence can be distilled into two possibilities. The first involves the accomplice providing assistance that is essential for the crime commission (fig. 6(a)). In other words, the secondary party provides assistance *without which* the offence could not have been committed. As such, this is causation of the 'central type', which complies with the formula of *sine qua non*. Consequently, it is not necessary that the primary party be aware of the rendition of aid, although the fact that he is will not damage the proposition (fig. 6(b)). The second type of relationship is more complex and extends the idea of causation beyond its core expression.⁹² This involves an inter-relationship between the parties because, in such 'interpersonal transactions'⁹³ 'we have to deal with the concept of *reasons* for action rather than *causes* of events'⁹⁴.

⁸⁹ Kadish, *Complicity, Cause and Blame* at 333.

⁹⁰ KJM Smith, *Treatise* at 73.

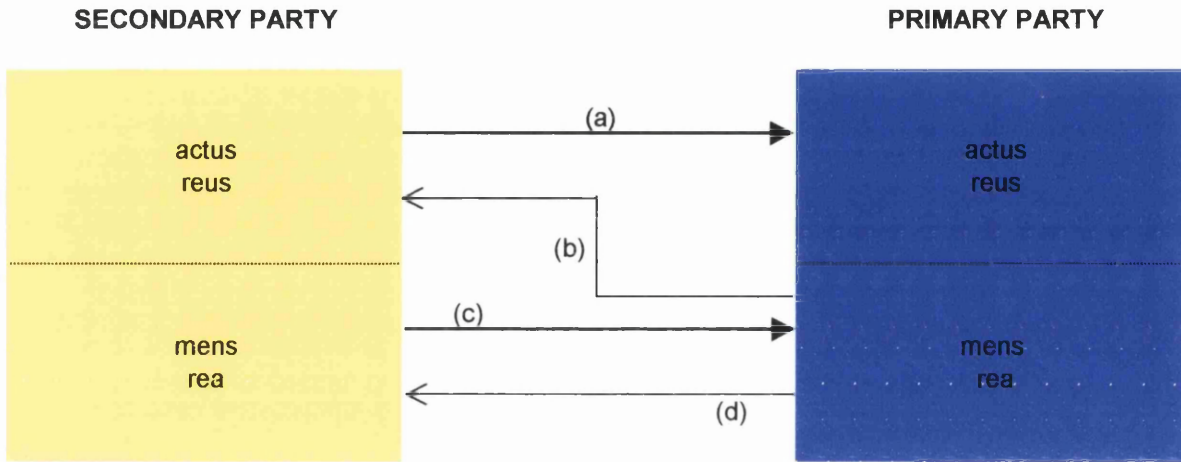
⁹¹ See above, p.51.

⁹² Cf Sayre, "Criminal responsibility for the acts of another" (1930) 43 Harv LR 689 at 695 and 723: 'From the beginning there has never been the slightest doubt that one who commands, counsel or procures another to commit another to commit a crime is himself guilty of the crime. In such a case there is no difficulty of causation.'; 'Criminal liability being essentially personal and individual has always depended upon proof of causation. Causation may be proved (a) by authorization or (b) by knowledge and acquiescence on the part of the defendant.'

⁹³ Hart & Honoré at 51.

⁹⁴ *Ibid.* italics in original. Hart & Honoré at 52, describe a reason for action as just a cause 'looked at from the inside'.

Fig. 6 Possible Inter-Relationships in the Causal Links Between the Secondary Party and the Primary Party's Commission of the Offence



- (a) The secondary party's action is an essential prerequisite to the principal's commission of the offence.
- (b) The principal party is aware of the secondary party's contribution.
- (c) The secondary party seeks to influence the mind of the principal. This need not involve the reaching of consensus.
- (d) The principal party reciprocates and agreement is reached between the two parties.

Hart and Honoré consider that four features are central to this kind of causal relationship:

- (i) in all of them the second actor knows of and understands the significance of what the first actor has said or done;
- (ii) the first actor's words or deeds are at least part of the second actor's reasons for acting;
- (iii) the second actor forms the intention to do the act in question only after the first actor's intervention;
- (iv) except in the case where the first actor has merely advised the second act, he intends the second actor to do the act in question.⁹⁵

This version, necessarily, involves shared fault for both parties. It supports the idea that secondary liability is founded upon the belief that the involvement of more than one party produces a greater chance of an offence being committed, due to the agency of moral support or peer pressure etc.⁹⁶ At first sight, such a concept seems to presume consensus between the parties (Fig. 6(d)) but, of course, reasons for action need not be based upon a true understanding. It is possible that the perpetrator's erroneous belief that his fellow is providing partisan assistance or encouragement provides a reason for his action. In such a case the unwitting catalyst for the crime commission would be entirely undeserving of blame. Hence the need for the secondary party's individual culpability. On the other hand, the secondary party might secretly desire the perpetrator to act and provide him with the reason to do so, whilst disavowing any such intention (fig. 6(c)). Again there is no consensus between the parties and any sense of understanding is shrouded within the secondary party's unspoken motives.⁹⁷ However, the crucial point in this reason-based causal nexus is the absolute need that the perpetrator's act be performed in consequence of the secondary party's words or deeds. It is clear that a primary party who is already resolved to act is not acting on the reason provided by the secondary party's intervention.⁹⁸ Hence, any potential causal connection is obviated.

⁹⁵ *Ibid.* at 53.

⁹⁶ '[T]he criminal law regards offences involving more than one person as particularly serious – sometimes because they suggest planning and determination to offend and make it difficult for an individual to withdraw, and sometimes because group offences against an individual tend to be more frightening.' Ashworth, *PCL* at 425.

⁹⁷ Cf. Hart & Honoré at 53. '[W]ords spoken or actions done by one person must have been known to the second person, and in the case of words, they must not only have been known but understood.' As understanding involves an act of interpretation, it is possible that the words will not have been understood correctly. Nevertheless, it remains true, even in such cases of secondary party deception, that '[a]ll cases of interpersonal transaction involve the notion of one person intentionally providing another with a reason for doing something, and rendering it eligible in his own eyes' (at 55).

⁹⁸ *Ibid.* at 55.

3.1.3 The Application of Causation in Case Law

In light of the previous considerations, it is an unfortunate, though not unexpected, circumstance that '[s]uch limited authority as there is provides both support for and opposition to the view that some form of general causal requirement exists for all modes of complicity.'⁹⁹ Nevertheless, the time has come to consider the judicial pronouncements on the application of causation to secondary liability and to elicit the reasons that underlie the decisions.

Stephen was in no doubt that an accessory's criminal responsibility was due to his conduct having a causal connection with the committed crime. Thus, an accessory before the fact was criminally responsible for an offence 'which [was] committed *in consequence* of [his] counselling, procuring or commanding.'¹⁰⁰ Notwithstanding this firm declaration, it must be conceded that, unlike procuring and commanding, counselling does not sit particularly well within the concept of 'central type' causation. 'Central type' causation can only be applied correctly 'when the accused intends the intervening actor to do what he does and the intervening actor's conduct is not wholly voluntary'¹⁰¹. This effectively limits its application to cases of innocent agency and secondary party deceit, pressure or superior order. On the other hand, 'reason-based' causation where the counselling provides the primary party with the motivation for his action might be applicable. Thus, in the nineteenth century case of *Wilson*¹⁰², the accused was held to have 'caused' a noxious thing to be taken by a woman with intent to procure a miscarriage when she gave mercury to the pregnant woman and advised her to take half of it in a glass of gin: advice which the recipient duly followed and so made herself very ill.

As for the present state of English law, there have been mid- to late-twentieth century cases that mention causation in relation to both common purpose and non-common purpose cases. However, all are problematic, and none provide a definitive solution to the search for a general rule. Returning to the possible inter-relationships between primary and secondary parties,

⁹⁹ KJM Smith *op cit.* n.74 at 664 and *Treatise* at 54.

¹⁰⁰ Stephen, *Digest* article 39. Emphasis added.

¹⁰¹ Hart & Honoré at 364.

¹⁰² (1856) 23 LJMC 18, cited in Hart & Honoré at 372. Cf. *Fretwell* (1862) Le. & Ca. 161 Martin B observed that acts of D charged with counselling murder "were too remote from the death ... in order to make him guilty of murder" (at 165) and, on appeal, *Benford v Sims* [1898] 2 QBD 641 at 642, where the magistrate reported to have dismissed an information against B for counselling the ill-treatment of a horse, purported counselling 'was the remote cause of cruelty in some degree, and not the proximate cause of cruelty in any degree, and therefore, not the cause of the cruelty within the meaning of the statute...' The Court for Crown Cases Reserved, however, found that the act was sufficient to found the charge.

depicted in fig.5, *NCB v Gamble*¹⁰³ provides support for proposition (a). In this case,¹⁰⁴ it was held that, despite the fact that the weighbridge operator did not intend to further an offence,¹⁰⁵ shared no meaningful understanding with the driver in relation to the offence commission and, in issuing the ticket, was performing his lawful occupation, he had become a secondary party to the driver's offence because 'a person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it'¹⁰⁶.

Indeed, viewing the decision in terms of causation, it is a judgment that reflects secondary liability in terms of potent cause and effect. The driver could not leave the NCB premises without a weighbridge ticket. Therefore, there was a clear causal connection between the NCB employee's issue of the requisite ticket and the traffic offence committed by the contractor, upon reaching the public highway. However, closer consideration reveals that this case presented remarkable facts whereby it was unusually easy to find the specified causal nexus between the conduct of the accessory and the commission of the crime. It is not difficult to find examples where, not only was the causal connection more tenuous, but the secondary parties' contribution was more culpable. For instance, in *Clarkson*,¹⁰⁷ a woman was raped in a military barracks. During her ordeal, she was held down¹⁰⁸: an action which undoubtedly assisted the rapist. Furthermore, it seems incontrovertible that such blameworthy behaviour is subject to more than mere moral censure and would be expected to carry criminal liability. Nevertheless, it is far less clear that the assistance actually caused the rape. Neither is it necessarily true that holding her was 'essential' to the commission of the offence. A determined rapist may well have persevered successfully without such assistance. The conclusion, in this case, must be that the action of the secondary parties, caused the rape to be committed in its particular form and context. The occurrence of a rape by one determined individual would take on an entirely different complexion to the commission of a group rape, even when perpetrated by a single rapist, when the victim was intimidated and incapacitated by the force of numbers.¹⁰⁹

¹⁰³ [1959] 1 QB 11.

¹⁰⁴ For the details of the case, see above, p.36.

¹⁰⁵ Proof of intention to aid involves, merely, 'proof of a positive act of assistance voluntarily done.': [1959] 1 QB 11 at 20.

¹⁰⁶ *Ibid. per* Lord Devlin.

¹⁰⁷ [1971] 3 All ER 344. See below, p.161.

¹⁰⁸ 'There is no doubt that some of those present actively assisted by helping to hold down the unfortunate girl.': *ibid.* at 346.

¹⁰⁹ For the rationale behind public fear of multiple party offence commissions, see above, p.1.

At face value, *Attorney-General's Reference (No. 1 of 1975)*¹¹⁰ appears less fraught with difficulty. Lord Widgery proclaimed that, for procuring at least, causation is an essential element of the secondary party's *actus reus*:

Causation here is important. You cannot procure an offence unless there is a causal link between what you do and the commission of the offence.¹¹¹

However, the perpetrator's driving offence was procured because 'unknown to [him] and without his collaboration, he [was] put in a position in which in fact he... committed an offence which he would never have committed otherwise'¹¹². This fits perfectly with the innocent or non-volitional agent paradigm.¹¹³ The strict liability foundation of the offence obviated the need for the principal's culpability in relation to his intoxication. Meanwhile the secondary party's lacing of his drinks can appropriately be selected as the *sine qua non* of the offence commission. Nevertheless, while the causation requirement for procuring is satisfied, Lord Widgery posited that the usual scenarios for aiding, abetting and counselling, would involve contact and a meeting of minds between the parties.¹¹⁴ Thus, the 'central type' of causation depicted in fig.5(a) would not be established. However, it is essential not to lose sight of the fact that, even in the case of procuring, the defined causation requirement only sits happily when 'procure' is given the technical meaning of 'produce by endeavour'¹¹⁵. In essence, the decision in *A-G's Reference* involves a constrained application that fits comfortably only those situations that merge with innocent agency.

Therefore, where 'procure' is employed in its wider sense, to describe, for example, the recruitment of a knowing and volitional agent, the causal nexus is less clear-cut. In *Rook*,¹¹⁶ a husband hired two men to help him kill his wife, in exchange for £15,000 and some jewellery. There is no obstacle, in the ordinary usage of 'procure' to maintain that the husband produced his wife's murder by endeavour. Neither is there any difficulty in appreciating the causal link

¹¹⁰ [1975] QB 773. For facts of the case, see above p.41.

¹¹¹ *Ibid.* at 779.

¹¹² *Ibid.*

¹¹³ Lanham *op cit.* n.18 at 712-3, submits that where the indirect party causes the commission of the offence he is the principal party and argues that this approach better copes with the problem of non-proxyable offences such as rape: 'In *DPP v K and B* [1997] 1 Cr App R 36 two girls induced a boy under 14 to have intercourse with a girl of 14, whose submission they obtained by threats. The Divisional Court held that the defendant girls could be convicted even if the boy had the defence of infancy. While the court relied heavily on *Cogan and Leak*, it treated the case as one of causation or procurement rather than innocent agency.'

¹¹⁴ [1975] QB 733 at 778.

¹¹⁵ *Ibid.*

¹¹⁶ [1993] 2 All ER 955.

between the recruitment of her murderers and her subsequent death. Despite the hirelings being fully culpable, there is a clear chain of cause and effect: but for the husband's recruitment of the men, they would not have been involved in killing the wife. Nevertheless, there is a theoretical caveat:

We regard a person's acts as the products of his choices, not as an inevitable, natural result of a chain of events. Therefore, antecedent events do not cause a person to act in the same way that they cause things to happen, and neither do the antecedent acts of others. To treat the acts of others as causing a person's actions (in the physical sense of cause) would be inconsistent with the premise on which we hold a person responsible.¹¹⁷

The case of *Calhaem*¹¹⁸ supports this proposition in the sense that it demonstrates that recruiting a knowing and willing perpetrator entails the inherent possibility of unilateral redirection on the part of the hireling. The case also reveals the complexity of defining and attributing a secondary party causal relationship. The facts involved the hiring of a private detective, Zajac, to kill the defendant's love rival, Mrs Rendell. Zajac, accepted the commission and the £5,000 down payment but claimed that, although he originally agreed to the terms, he later changed his mind. However, rather than rescind the agreement, he decided to perform a charade, designed to appear like attempted murder, whilst, in reality, having no intention of killing the proposed victim. In furtherance of this secret plan, he had arrived at Mrs Rendell's house equipped with a knife, hammer and unloaded shot gun, the latter wrapped as a parcel, whereupon the victim had screamed. In response, Zajac had gone berserk, hitting her several times with the hammer and thereby killing her. The argument for the defence was that the victim's death was not caused by the defendant's conduct because Zajac's subsequent action was a supervening event, which broke the chain of causation. To give a slightly different answer to the question of why Mrs Calhaem had not procured the murder, presumably, because the victim's death had not been produced (entirely) by her endeavour. Thus, the Court of Appeal was called upon to decide whether counselling, as well as procuring, required a 'substantial'¹¹⁹ causal connection between the acts of the secondary party and the commission of the offence.

Presenting the leading judgment, Parker LJ stated that '[t]o counsel means to incite, solicit, instruct or authorise'¹²⁰ and '[t]here is no implication in the word itself that there should be any causal connection between the counselling and the offence'¹²¹. Surveying the authorities for

¹¹⁷ Kadish, *Complicity, Cause and Blame* at 333.

¹¹⁸ [1985] QB 808.

¹¹⁹ *Ibid.* at 811.

¹²⁰ *Ibid.*

¹²¹ *Ibid.* at 813.

guidance on the need for a causal connection in counselling,¹²² he ultimately asserted two criteria. There must be 'first contact between the parties, and second, a connection between the counselling and the murder.'¹²³ Quite what the connection should be if not in some way causal, he explained in terms of scope. The offence must be an act that was 'within the scope of the authority or advice'.¹²⁴ Thus, the perpetrator's entirely accidental fulfillment of the counselling would not incur secondary liability. This introduces a new requirement that the principal in committing the offence, must do so with the intention of furthering the accessory's words (or deeds):

For example, if the principal offender happened to be involved in a football riot in the course of which he laid about him with a weapon of some sort and killed someone who, unknown to him, was the person whom he had been counselled to kill, he would not, in our view, have been acting within the scope of his authority; he would have been acting entirely outside it, albeit what he had done was what he had been counselled to do.¹²⁵

However, this is not an entirely convincing illustration to support excluding a causal relationship between Mrs Calhaem's recruitment of Zajac and Mrs Rendell's homicide. Had the scenario in the example occurred, it is conceivable that the defendant would not have been considered blameworthy for the consequent death because there is clearly no connection between Zajac being at a football match and participating in a riot and the terms of the defendant's hiring. On the other hand, Zajac would not have been at Mrs Rendell's house, armed with lethal weapons, without Calhaem's input. To that extent, her instigation was instrumental in bringing about the victim's death and her contribution is blameworthy on a quite different level precisely because there is a more direct casual nexus than in the football riot example. Furthermore, it is possible to tentatively interpret the proposition as providing a negative argument to support the need for a causal connection: accordingly, if the act was not within the scope of the authority it was clearly not caused by it.

Finally, the court's emphasis on the need for the perpetrator's mind to be focussed upon the counsel concurrently with the commission of the crime suggests that the advice should have been influential. This conforms with the extended meaning of a causal relationship whereby the secondary party provides a reason for the principal's act. The ambivalence of the judgment suggests that it is possible that the Court preferred a causal connection despite declaring its

¹²² *Benford v Sims* [1898] 2 QB 641 (even remote cause will suffice); *Croft* [1944] KB 295; *Assistant Recorder of Kingston-upon-Hull, ex parte Morgan* [1969] 2 QB 58; *A-G v Able* [1984] QB 795.

¹²³ [1985] QB 808 at 813.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

irrelevance.¹²⁶ The reason for this is evident. In the final analysis, Calhaem's advice did not provide the reason for Zajac's killing. Thus, despite the intuitive and moral judgment that Calhaem's contribution was deserving of censure, the causal link fell into the theoretical abyss that lies beyond the central type of *sine qua non* and the extended type of reason-based causation:

[T]he judgment appears to suggest that it is sufficient if the principal's actions *coincided* with what was counselled... By implication, if for some other reason, Zajac had already been minded to visit R and carry out similar actions, Calhaem would still have been a party, the demonstrably superfluous character of the communicated act of counselling being immaterial to secondary parties. The principal must simply act 'within the scope of his authority', and apparently not in any way *because* of it.¹²⁷

3.1.3.1 *Minimum Contribution and Effectiveness of Contribution*

So far the case examples have involved contributions from secondary parties that were significant factors in the ultimate crime commission. Arguably, the potent test of a causation requirement in complicity liability, is whether secondary contributions need be either significant or effective. If not, there is clearly no causal connection between the secondary party's conduct and the perpetrator's act. Therefore, it is incumbent upon supporters of the proposition that causation is an integral component of complicity to demonstrate that the minimum contribution resulting in liability involves an inherent requirement that it be significant or effective. Of course, any argument that the contribution needs to be significant and/or effective immediately confronts the problem of definition. How significant is "significant", and how does one draw the demarcation between a significant and a negligible contribution? Similarly, how can it be shown that the secondary party's conduct was effective in bringing about the principal offence? In introductory answer to these questions, it is submitted firstly, that the significance of a contribution is bound up with its ultimate effectiveness, and secondly, a contribution will be effective if it was employed by the perpetrator. In this sense, the contribution is an existing condition in the context of the crime commission.¹²⁸ However, an accessory's participation may involve the provision of assistance or it may comprise goading or encouraging words. Clearly, the demonstration of effectiveness will vary between physical and psychological contributions. Therefore, the following analysis will consider the two possibilities separately.

¹²⁶ The court did not gainsay the trial judge's interpretation of 'procure' as 'to set in train a series of events which she intended would produce the death of Mrs. Rendell and that Mrs. Rendell was killed as a result, in the sense that her action were a substantial cause of the death': *ibid.* at 812.

¹²⁷ KJM Smith, *Treatise* at 60 (italics in original).

¹²⁸ Hart & Honoré at 385.

3.1.3.1.1 Physical Contributions

Essentially, a physical contribution involves the provision of tangible assistance. Consequently, it should be the least problematic element of secondary participation to analyse in terms of effectiveness. As long as the aid provided was in fact used, it was effective. It matters not that the crime could have been effected without employing it. Thus, holding down the victim in order to facilitate a rape would make an effective contribution to the commission of the crime.¹²⁹ However, as long as there is a tangible contribution, there is no need for pre-arrangement or concert. In the Queensland case of *Johnston*¹³⁰, a person who had tapped on the window of a shop to warn his friend of the approach of a third party while the friend was within the shop stealing was convicted of aiding him in the offence of breaking, entering and stealing, in spite of the fact that there was no concert between them, and that the defendant had only come accidentally upon the scene. This was because the offence was a continuous one, complete only upon the completion of the stealing.¹³¹ Conversely, where there is merely an uncommunicated intention to provide aid, should it be needed, as occurred in *Allan*¹³², the passive and silent supporter will not incur liability as an accessory. This leads to an inquiry as to the position when a putative accomplice has provided aid that is unknown and, potentially, undesired by the principal party. To pose a hypothetical example, suppose that a resentful housekeeper leaves her employer's front door unlocked in the hope that the house will be burgled. The question is, would she be an accessory to the burglary that is committed that night? To further assist the investigation into the housekeeper's potential liability, two alternative means of entry need to be considered. In the first scenario, the burglar breaks in by forcing the lock on the back door. In the second, scarcely able to believe his good luck, he gains access via the unsecured front entrance.

Based on the arguments evinced so far, the housekeeper would not incur accessory liability in the first scenario. Despite her intention, which in this example is probably best described as hopeful spite, her attempted contribution to the crime commission has failed.¹³³ It has been rendered entirely ineffective by the burglar's failure to use it. However, the second scenario promises her retributive employer with greater scope. In this illustration, the latent act of assistance has been entirely effective. At this point, it is worth highlighting that secondary liability based upon an act

¹²⁹ See above, p.152.

¹³⁰ [1973] Qd R 303.

¹³¹ Gillies, *The Law of Criminal Complicity* (The Law Book Co. Ltd, 1980) (hereafter Gillies) at 52.

¹³² [1965] 1 QB 130.

of assistance (and, potentially, encouragement) that is proffered without the perpetrator's knowledge does not sit comfortably with the conventional rationale for the imposition of criminal liability.¹³⁴ Here is the clearest instance of a principal party who is completely resolved to pursue his own agenda, regardless of any additional input by a second person. Moral support and peer pressure play no part in the likelihood of the crime consummation. Neither is the victim unduly intimidated by the overwhelming force of numbers. Meanwhile, approaching the dilemma by applying causation theory yields similarly inadequate results. The 'central type' of *sine qua non* causation will not be satisfied but neither will the inter-personal transactions idea of reason-based causation. In short, the conduct of the secondary party provides no causal link with the commission of the offence. Nevertheless, complicity liability has been invoked to ensure secondary liability in cases of this kind.

In *State v Tally*¹³⁵, the defendant, having learnt of a plan to kill the victim, sent a telegram instructing a telegraph operator not to deliver a telegram previously sent by one of the victim's relatives warning the victim of the killers. The operator complied with Tally's instruction and the killers succeeded in their objective, unaware of Tally's contribution. In assessing Tally's liability for the homicide, the court pronounced:

The assistance given... need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it. If the aid in the homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life, which but for it he would have had, he who furnishes such aid is guilty, though it cannot be shown that the dead man, in the absence thereof, would have availed himself of that chance.¹³⁶

This creates a wide-ranging liability which, although not expressed, begins to usurp the territory of the inchoate offences. Tally was held to account because his conduct demonstrated his fault. Nevertheless, these do not define the limit of liability and the boundary is set at potential effectiveness. Yet, it introduces a new potential to the idea of effectiveness. In this judgment, the secondary party's conduct need not provide a reason for the perpetrator's action – as it obviously did not. Instead, effectiveness is judged on the impact that the conduct (might have) had on the victim. Taking this to its logical conclusion, accessorial liability would arise when the secondary party's

¹³³ For an examination of the need for an inchoate aiding offence, see below, pp.181-190.

¹³⁴ I.e. psychic strength in numbers, see above p.1 and below p.213.

¹³⁵ 102 Ala. 25 (1894) cited in Kadish, Complicity, Cause and Blame at 357.

¹³⁶ *Ibid.* at 69.

conduct had the effect of providing the victim with a reason not to resist and thereby reverses the presumption in the following example:

[I]f an individual shouts encouragement to another to attack a third person and the attacker is deaf or otherwise unaware of the encouragement, the putative accomplice could hardly be held liable for the assault as a secondary party.¹³⁷

It is submitted that the conclusion that the supporter should not be held to account as an accessory is correct. The causal connection should arise in the relationship between the secondary and primary parties. Any suggestion that a causal relationship between the secondary party and the victim will suffice, leapfrogs the fundamentals of causation theory and succeeds in creating a vague and onerously wide liability for accessories. Nevertheless, there is force in the argument that it would be unrealistic to cross-examine the principal as to whether and if so to what extent he was influenced by the defendant's acts of encouragement: 'the practical consequence is that in a situation such as [when the principal was not proven to have been generally influenced by the encouragement – he may not have heard the shouts, or if he did then he may have been indifferent to them, his resolve being firm in any case –] it is sufficient that the accessory's act is reasonably capable of being viewed as tending to encourage or assist a crime – it need not do this in fact.'¹³⁸

Ultimately, the criterion of the perpetrator making use of the aid must have its limits. Some aid will be insignificant.¹³⁹ KJM Smith provides the following scenarios for consideration:

1. Knowing *P* was on his way to burgle a house, good natured *A* lends him his bicycle simply to make the aging burglar's life a little less grim. *A*'s good turn enables *P* to carry out the offence a few minutes before he would otherwise have done had he arrived on foot.
2. Or, knowing of her husband's burglarious activities, caring Mrs *P* provides *P* with clean new gloves to make the work more comfortable.¹⁴⁰

He then directs attention to the fact that in the first instance, the cycling is a *sine qua non* of the actual time of offence commission, i.e. earlier than otherwise would have been the case. 'Similarly the gloves might enable *P*'s work to be carried out more efficiently (faster) as well as

¹³⁷ Kadish, *Complicity, Cause and Blame* at 358-9.

¹³⁸ Gillies at 54.

¹³⁹ Or too remote. With regard to remote and proximate relationships between the contribution and the result, Kadish suggests, at 366: 'Complicity and causation are cognate concepts. They fix blame for a result characterized by a but-for relationship to the actor's contribution, although complicity allows a weaker version of that relationship. Since that relationship is not sufficient to establish legal causation when the result is too remote or accidental, or too dependent on the volitional act of another, we should expect the same to be true of complicity. In fact it is, although the considerations analogous to legal cause in causation theory are often obscured by *mens rea* issues.'

¹⁴⁰ KJM Smith *Treatise* at 86.

in greater comfort¹⁴¹ Nevertheless, he argues that both examples demonstrate a tenuous involvement and implies that they should not fall within the ambit of secondary liability.¹⁴²

It is submitted that there is a compelling argument for excluding such negligible contributions. However, the reasons are not easy to define and it is unsatisfactory simply to dismiss it as a 'negligible' contribution because this begs the question why it should be categorised as *de minimis*. It must be conceded that, if *P* uses the bicycle or wears the gloves, the cycling and glove-wearing become conditions in the setting and the actual employment of the items may be categorised as an effective contribution. Perhaps the law of attempt can be mobilised to explain where to draw the line between potent and insignificant contributions. As cycling to the premises is an act of mere preparation, a contribution, at this stage, will not be deemed effective. On the other hand, the same reasoning cannot be applied to the gift of the gloves because they are worn during the burglary itself. Nevertheless, the intuitive reaction is that, in presenting him with new gloves for his greater comfort, the wife's conduct is no more blameworthy than if she had bought him new underwear or laundered the clothing that he was wearing. However, it might be viewed differently, had the gloves been provided so that *P* would not leave finger prints, and so avoid detection. In that case, their use would have been effective in the success of that actual crime commission and of facilitating his future career. Perceived in this way the pair of gloves is no longer an incidental detail. Unfortunately, this observation leads to the pragmatic, if undesirable, conclusion that 'effectiveness' is a matter of interpretation.

3.1.3.1.2 Psychological Contributions

When considering a secondary party's psychological contribution, it is generally accepted that consensus is a requirement, or at least the meeting of minds. The mutuality need not necessarily be based on equal knowledge; so, for instance, Iago's incitement of Othello to kill Desdemona did not involve parity of understanding, but was based on a deliberate deceit. Nevertheless, it provided the reason for Othello's action and was a causal factor in Desdemona's consequent homicide.¹⁴³ For there to be a meeting of minds, the instigation or encouragement must have been communicated to the principal prior to or at the time of the crime commission: communication need not be verbal. No doubt giving the perpetrator the 'thumbs up' signal could

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Of course, Iago's furnishing of a reason for action was based on a malicious lie. For a discussion on whether transmitting an unpalatable truth should be grounds for secondary liability, when it provides the principal with a reason for e.g. murder, see Kadish, Complicity, Cause and Blame at 364-6.

provide just as much encouragement as a loud cheer. This leads into the demarcation point between encouragement, approval and 'immoral' spectating.

*Clarkson*¹⁴⁴ provides the twentieth century authority for the degree of conduct that fails to incur accessory liability. A soldier was indicted for aiding and abetting the rape of a woman in an army barracks. He and a friend had entered the room having heard what they believed was a rape taking place. They then chose to remain and watch. The Court held that non-accidental presence was not in itself evidence of aiding and abetting. Instead some active steps must be made, by word or deed, to instigate the principal. The Court recognised that encouragement may sometimes be unwitting or unintentional if misinterpreted. Thus, the conclusion that 'it is no criminal offence to stand by a passive spectator of a crime, even of murder.'¹⁴⁵ It is not known whether the soldiers watched as a demonstration of their prurience or their approval, but by inference, neither state of mind suffices to incur liability. The court made reference to the nineteenth century case of *Coney*¹⁴⁶ where presence at an illegal prize fight was held not to be conclusive evidence of abetting the battery. By comparing Clarkson's conduct with that of the audience at a prize fight, it is undeniable that Clarkson should have been exculpated. Whereas his presence at the crime scene was apparently incidental to the commission of the crime, an audience was essential for a prize fight as without spectators there would have been no fight. In this sense the presence of the audience was arguably an encouragement and certainly a prerequisite.

A more taxing problem is presented by *Wilcox v Jeffrey*¹⁴⁷ where it was held that the defendant's presence at a public performance by a celebrated jazz musician who had been granted leave to enter the United Kingdom on condition that he take no employment, was sufficient to make the defendant liable for aiding and abetting his musical acquaintance to contravene the Aliens Order 1920. Apparently ignoring the precedence of *Coney*, the court stated:

The appellant clearly knew that it was an unlawful act for [the musician] to play. He had gone there to hear him and his presence and his payment to go there was an encouragement.'¹⁴⁸

¹⁴⁴ [1971] 3 All ER 344.

¹⁴⁵ *Ibid.* at 347, citing Hawkins J in *Coney* (1882) 8 QBD 534 at 557.

¹⁴⁶ (1882) 8 QBD 534.

¹⁴⁷ [1951] 1 All ER 464

¹⁴⁸ *Ibid.* at 466.

As further evidence of encouragement was provided by the fact that the defendant had met the musician at the airport and reported the performance in his periodical, it is open to conjecture that the gaining of benefit may tip the balance out of the defendant's favour. Thus, if, in *Coney*, the inquiry had focussed, not upon the audience, but upon a turf accountant who was taking bets on the outcome of the fight, the Court's decision may have been less lenient. Nevertheless, this is mere speculation and, even if valid, it reveals an unsatisfactory, because vague, ground for secondary liability. One point that is certain is that the slightest word or action can convert someone from a non-participant into an accessory.¹⁴⁹ In *Giannetto*¹⁵⁰ the judge advised the jury that if a man was told, "I am going to kill your wife" and he responded by patting the person on the back and saying, "Oh goody", that would be enough to make him an accessory to the subsequent murder. At first sight, the husband's action seems to be mere approval. Further, it seems unlikely that it would substantially bolster the resolution of the self-confessed latent murderer. Nevertheless, the communicated support might have reinforced the determination of the killer and so provided important encouragement. Everything turns on (effective) communication. So, in *Allan*, the approving onlooker who had intended to assist the assault should his help have been required, would certainly have become a secondary party had he communicated his intention to the principal offender either before or during the attack.¹⁵¹

¹⁴⁹ It is also possible to be liable as an accessory through inactivity in a limited number of circumstances which have the common denominator of the right of control. Where an individual has the right to control the actions of another and deliberately refrains from doing so it will be construed as active encouragement. The kinds of scenarios involved typically include driving offences, licensing offences and offences arising from the employer-employee relationship. In *Du Cros v Lambourne* [1907] 1 KB 40 a car was driven at dangerous speed and although it could not be proved who was driving, the defendant was convicted because even if his friend was driving he had the right as the car owner to direct her manner of driving. His failure to do so was interpreted as encouragement and assent to the dangerous driving offence. Similarly, a licensee of a public house will be an accessory in his customers' offence of drinking after hours if he stands by and watches them do so: *Tuck v Robson* [1970] 1 WLR 741. In *J.F. Alford Transport Ltd and others* [1997] 2 Cr App R 326, the directors of a transport company had been convicted of aiding and abetting their drivers' offences of making false entries on the tachograph record. One of the issues in the appeal was that the trial judge had wrongly indicated that passive acquiescence was sufficient to amount to aiding and abetting. The Court of Appeal held that in order for the directors to be found guilty it was necessary to demonstrate 'knowledge of the principal offence, the ability to control the action of the offender, and the deliberate decision to refrain from doing so.' This decision also confirms that a secondary party need not be present in to incur liability through inaction. Also included are cases that incur omissions liability because there was a duty to act e.g. *Stone and Dobinson* [1977] 1 QB 354. *Khan and Khan* [1998] Crim LR 830, provides a potential route for widening liability incurred through a duty to act to avert a self-created dangerous situation.

¹⁵⁰ [1997] 1 Cr App R 1 at 13.

¹⁵¹ See above, p.157.

3.1.3.2 Common Purpose

Common purpose cases present a conundrum in terms of liability theory. Historically, the secondary parties in joint enterprises were designated principals, so liability was rendered direct rather than derivative.¹⁵² The fact that liability was direct leads to the expectation that, as with primary parties, there needed to be a causal connection between the conduct and the crime and, indeed, this would invariably be present for the foundational offence. However, when there was a collateral crime, the secondary party's status, in reality, changed to become accessory in nature. In this case, the causal link between the secondary conduct and the commission of the further offence becomes vague and tenuous. This point was rendered irrelevant by the fact that, regardless of whether the offence was foundational or collateral, a causal nexus between secondary participation and crime consummation was not needed in common purpose cases:¹⁵³ instead liability was imputed to principals in the second degree on a basis of shared responsibility.¹⁵⁴

Nevertheless, there is a precedent for discussing joint enterprise in terms of causation. In *Anderson and Morris*¹⁵⁵ it was confirmed that a party to a common purpose is liable for 'unusual consequences if they arise from the execution of the agreed joint enterprise' but not for the consequences of a 'unauthorised act' that goes beyond the terms of the tacit agreement.¹⁵⁶ However, Lord Parker CJ then considered it helpful to translate the rule into the language of (legal or proximate)¹⁵⁷ cause:

Considered as a matter of causation there may well be an overwhelming supervening event which is of such a character that it will relegate into history matters which otherwise would be looked upon as causative factors.¹⁵⁸

According to this interpretation, actions by the perpetrator that remain within the parameters of the secondary party's authorisation or agreement provide a direct line of cause and consequence and so impose liability upon the accomplice. Conversely, the perpetrator's act will break the chain of causation when the perpetrator's act is 'unauthorised'. This implicitly accepts that, as in

¹⁵² See above, p.60.

¹⁵³ This division is mirrored in contemporary South African law where it is also the case that a causation criterion applies for accomplices (medepligtiges) but not for co-principals (mededaders) in common purpose cases: *S v Khoza* 1982 (3) SA 1019. See above, pp.31-35.

¹⁵⁴ See above, pp.57-58.

¹⁵⁵ [1966] 2 QB 110.

¹⁵⁶ *Ibid.*

¹⁵⁷ Kadish, *Complicity, Cause and Blame* at 366.

¹⁵⁸ [1966] 2 QB 110 at 120.

non-common purpose accessoryship, an unexpected or unanticipated variation by the primary party will exculpate the accomplice. However, *Anderson and Morris* provides an isolated example of an implicit causation requirement in common purpose cases and the criteria applied specifically in order to define the scope of purpose in joint enterprise require closer investigation.¹⁵⁹

3.1.3.3 *Secondary Liability for Variations by the Perpetrator*

Secondary responsibility for the principal's variations, developed to apply to accessories before the fact, provides a potent example of the inherent difficulties in producing a consistent liability formula. It was recognised by Coke that an accessory should not incur liability for the principal offence unless his conduct was in some way related to it. His attempts to define the limits of an accessory's liability for murder are illustrated in fig. 7. He explained an accessory's liability in terms of command or consent. Thus, consequences that followed directly upon the 'command', be they unintended (illustration 1) or effected by a different means (illustration 2) resulted in accessorial liability. The same applies in existing law, except that a beating resulting in death would incur liability for murder only if the parties intended to cause the victim grievous bodily harm. Otherwise, the requisite offence would generally be constructive act manslaughter.¹⁶⁰ Illustration 2 is most convincingly explained in terms of fault. The accessory's fault encompasses murder, that is, an intentional, unlawful killing, and this is precisely what occurs, the means of effecting the death are an irrelevant factor. The accessory deserves to be held to account for the victim's murder. In fact, liability for variations, can often be explained in terms of the secondary party's fault. However, fault-based scope of purpose will be closely examined during the analysis of joint enterprise.¹⁶¹ The following discussion considers those variations by the principal where an accessory is not held to account, but where a fault-based explanation fails to provide exculpation. In these instances, it is necessary to resort to causation theory to explain the accessory's escape from liability.

Hart and Honoré suggest three theories of variation liability¹⁶²: (i) A is liable provided he and P share the necessary *mens rea* for the completed offence; (ii) A is not liable only when P's act was unlikely; (iii) A's liability is limited by the independent decision of P. All of the theories have

¹⁵⁹ See chapter 6.

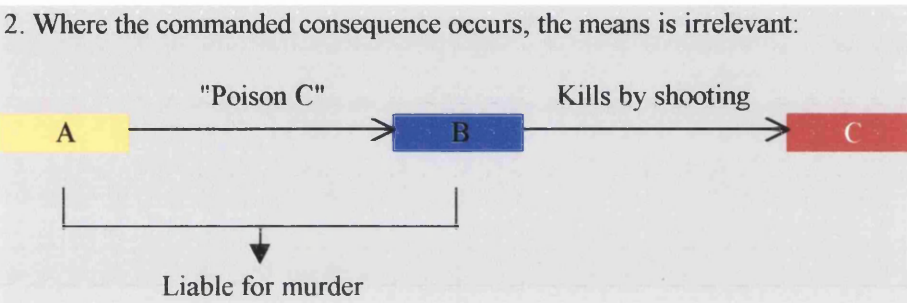
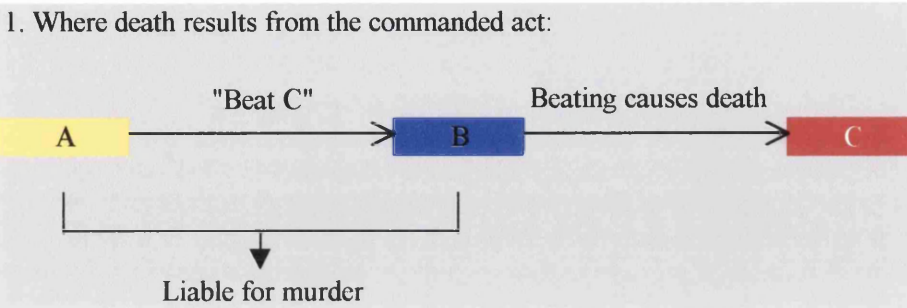
¹⁶⁰ But see *Powell; English* [1997] 4 All ER 545, below, pp.237-250.

¹⁶¹ See n.159.

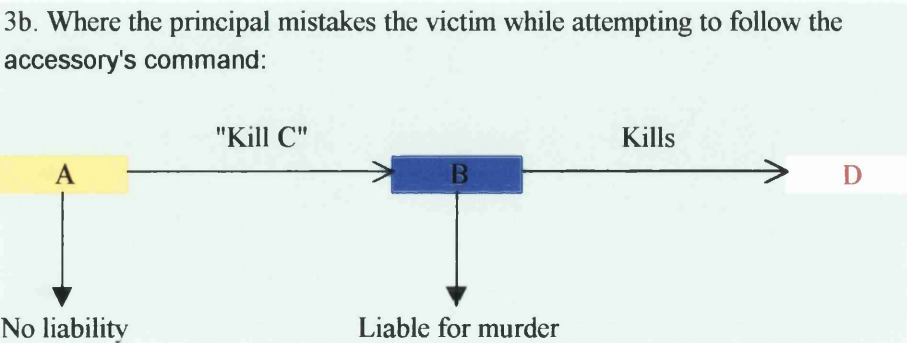
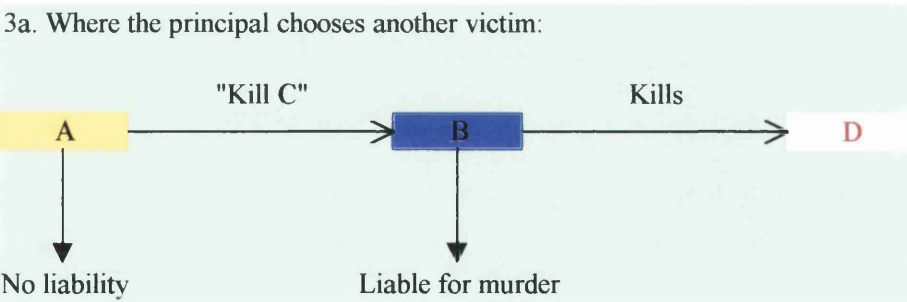
¹⁶² Hart & Honoré at 381.

Fig. 7 Murder Liability of an Accessory in the Seventeenth Century: Coke

Liability is imposed if the death arises as a direct result of the command:-



No liability arises if the accessory does not consent to the principal's act:-



exceptions and qualifications and when scrutinised, the exceptions tend to overlap two or more of the classifications. The inculcating variation does not always operate solely in terms of shared *mens rea*. For example, it is accepted¹⁶³ (in opposition to Coke's illustration 3b.) that, if the perpetrator mistakenly kills V, the accessory, who was a party to the intended murder of X will be liable, under the doctrine of transferred malice, for V's unlawful homicide. On the other hand, if the perpetrator deliberately and knowingly killed V instead of X (illustration 3a), the putative accessory would escape liability, despite having the *mens rea* for murder, combined with a corpse. This result 'feels' right. The accessory is not blamed for the death of the new victim but for his intention to contribute to the death of the original target. Furthermore, the accessory's counsel has clearly been ineffective. Apart from the possibility that it aroused the principal's murderous predisposition, it has been entirely ineffectual in bringing about the subsequent crime. The notorious case of *Saunders and Archer*¹⁶⁴ introduces slightly different considerations. The accessory advised the principal to murder his (the principal's) wife by handing her a poisoned apple, which the principal duly did. However, the wife presented the apple to their child who, in consequence of the principal's obstinate silence, proceeded to eat the apple, then died. In accordance with the doctrine of transferred malice, the principal was held guilty of the child's murder. The accessory, sharing the principal's fault, might also be expected to have shared the principal's liability for the accidental change of victim. Moreover, not only was the fault shared by both principal and accessory, the accessory's counsel had been causally effective. After all, but for the principal following the instigator's advice, the child would not have died. The same result would apply had the accessory provided the poison rather than simply advising its use as a means of murder. Nevertheless, the accessory was acquitted. Modern explanation for the accessory's exculpation focus upon the principal's decision to continue, or at least to take no preventive action, when he became aware of the changed situation.¹⁶⁵ It is argued that this independent decision amounted to a supervening event.¹⁶⁶

¹⁶³ *Ibid.* at 381. Williams, *CLGP* at 101.

¹⁶⁴ 1575 2 Plwd 473

¹⁶⁵ Hart & Honoré at 384 and under South African law in *R v Longone* 1938 AD 532. However Hart and Honoré concede at 384 that '...if a voluntary change of plan relieves from liability, conversely the fact that the principal makes a mistake or accidentally produces a result other than that intended, cannot relieve the instigator of liability provided that the crime is of the same legal category as that agreed.'

¹⁶⁶ Cf. "Complicity, *Powell* and Manslaughter" [1998] Crim LR 556 at 559-60, where Clarkson argues against exculpating an accessory from murder liability when the principal deliberately chooses (rather than accidentally kills) a different victim. In a cogent argument, he reasons that just as with an accidental killing transferred malice ensures the liability of both parties because of correspondence between *actus reus* and *mens rea* of murder, so should an accessory be liable for principal's intentional killing of a intentionally different victim. In both cases a person has been killed with the requisite *mens rea* for murder. Thus, 'a

3.1.3.4 South Africa

South African law, perhaps more than any other jurisdiction, has struggled with a number of vexing difficulties that have arisen with regard to a secondary party causation requirement. In the period where secondary parties were generically termed *socii criminis*,¹⁶⁷ *Longone*¹⁶⁸ presented a similar scenario to that encountered in the sixteenth century English case of *Saunders and Archer*. The judgment demonstrates the number of alternative reasons that can be employed to establish or obviate secondary liability. In *Longone*, the defendant gave poison to P so that P could kill his own wife. In furtherance of his murderous plan, P put the poison into the water of the hut usually occupied by his wife. It was found that P probably knew, but the defendant did not, that the hut was occupied that night by another person who drank the water and died. The defendant's conviction as an accessory to the victim's murder was quashed on appeal. Tindall and de Wet JJ A agreed that the principal's inaction in conjunction with his knowledge that the intended target had been replaced by another putative victim exculpated the accessory.¹⁶⁹ However, De Villiers argued that, although the defendant would not have been liable had the principal decided to murder the new victim, a mere failure to warn the latest inhabitant was insufficient to relieve the accessory of liability.¹⁷⁰ Meanwhile, Watermeyer JA held that an accessory was criminally responsible for the direct consequences of unlawfully providing the poison and, within limits, for its indirect consequences. Those indirect consequences included reasonable foreseeable, but not unforeseeable, acts.¹⁷¹

In more general terms, the judicial developments and theoretical arguments that have arisen under South African law highlight the problems that are encountered at the two extremes of secondary party causation. On the one hand, the jurisdiction has experienced difficulties in defining the nature of the causal requirement that has been deemed necessary for accomplices. On the other, the expressly avowed abandonment of a causal requirement in common purpose cases has served to emphasise the indeterminate basis of common purpose liability.¹⁷² Furthermore, for a number

change of victim is not a substantial variation to the enterprise and liability for a homicide offence should ensue.'

¹⁶⁷ See above, p.88.

¹⁶⁸ 1938 AD 532.

¹⁶⁹ *Ibid.* at 536-7.

¹⁷⁰ *Ibid.* at 541.

¹⁷¹ *Ibid.* at 543.

¹⁷² Parker pinpoints the 'theoretical lacuna' that was created by the vagaries of the secondary causation requirement as the reason for the development of common purpose liability: "South Africa and the Common Purpose Rule in Crowd Murders" *Jo Afr L* [1996] 40 (1) 78 at 80-1 For further examinations of

of years South African law teetered on the brink not only of eschewing the relevance of a causal connection between a secondary party's contribution and the principal's act, but also of consciously disregarding the need for the accomplice's act of participation to take place prior to the commission of a result crime.¹⁷³ This imposition of *ex post facto* homicide liability upon a secondary party who joined in after the infliction of the mortal blow represents the most extreme and pernicious position of dispensing with a causation requirement. However, the following examination will focus upon the more orthodox question of whether there is, or should be, a requirement for the secondary party's contribution to have been effective.

In the landmark case of *Williams*,¹⁷⁴ it was asserted that accomplice liability (as opposed to common purpose liability) must include causation.¹⁷⁵ This contained an express statement that accomplice liability requires a causal connection between the accomplice's conduct and the principal offence.¹⁷⁶ However, the facts involved the situation where A knowingly assisted B to murder V by holding down V while B killed him. This scenario demonstrated such an extremely strong causal nexus between the secondary party's conduct and the offence that A could reasonably be described as a co-principal. Furthermore, it is difficult to comprehend why this was not categorised as a common purpose case. That said, A complied with the definition of an accomplice provided by the Appellate Division:

An accomplice's liability is accessory in nature so that there can be no question of an accomplice without a perpetrator...[A]n accomplice is not a perpetrator or a co-perpetrator, since he lacks the *actus reus* of the perpetrator. An accomplice associates himself wittingly with the commission of the crime ... in that he knowingly affords the perpetrator ... the opportunity, the means or the information, which furthers the commission of the crime.¹⁷⁷

The problems highlighted and debated by commentators are two-fold. The first concerns the result of a logical application of a strict causation requirement to result crimes. It has been forcefully argued that imposing a causation criterion upon a secondary party has the effect of obviating the role of an accomplice in a consequence crime:

But though [in *Williams*] the court expressly recognized that liability as an accessory requires a causal connection between the accessory's conduct and the commission of the offence by the principal, it regrettably failed to appreciate the implications of the

common purpose and causation, see Rabie, "The Doctrine of Common Purpose in Criminal Law" [1971] 88 SALJ 227-245 and 334-345; Hugo, "Common Purpose and Causation" [1969] 86 SALJ 391-396.

¹⁷³ See above, pp.95-105.

¹⁷⁴ 1980 (1) SA 60 (A)

¹⁷⁵ See above pp.33-35 and below, pp.107-120.

¹⁷⁶ 1980 (1) SA 60 at 63 *per* Joubert JA (translation *per* Burchell & Milton *GCL* at 409).

¹⁷⁷ *Ibid.*

principles it was espousing. The court's actual decision on the facts was that, where A knowingly assisted B to murder X by holding him while B did him to death, A was an accessory in B's murder of X. With due respect this conclusion contradicts the very principles on which it purports to be based. Indeed on these principles it is a logical impossibility for there ever to be an accessory in homicide. This is because, if A by his unlawful conduct has furthered B's killing of X, there must be a causal nexus between A's conduct and X's death, so that A will have committed the *actus reus* of murder or culpable homicide. Accordingly, if A acted with *dolus* in relation to X's death, he will be guilty of murder, and if he acted merely with *culpa*... he will be guilty of culpable homicide. In either case, he will be a principal for the simple reason that he will have satisfied all the requirements of the definition of the offence.¹⁷⁸

The second problem develops out of the first. If by 'causal connection' Joubert JA was referring to a nexus between the accomplice's conduct and the principal's commission of the prohibited result rather than requiring that the accomplice directly cause the *actus reus* as defined of the substantive offence proscription,¹⁷⁹ then what is the precise nature of the diluted causality criterion? In light of the considerations examined in the foregoing exposition, it is inevitable that South African commentators and judges should have confronted the same difficulties in defining the nature of the causal connection. Synonymous terms such as 'contributing to' or 'promoting',¹⁸⁰ the offence commission provide guidance and help to create a context of the causal nexus between the parties.¹⁸¹ However, it is always possible to find an illustration that

¹⁷⁸ Whiting, "Joining In" [1986] 103 SALJ 38 at 51.

¹⁷⁹ Botha AJA stated in *Khoza* 1982 (3) SA 1019 at 1054: 'Those authors who have read [*Williams*] to mean that a causal connection is required between the conduct of the accomplice and the death of the deceased have, I consider, misunderstood the judgment. If that were the requirement for a liability as an accomplice, there would be no meaningful distinction between the *actus reus* of a perpetrator and the *actus reus* of an accomplice, and the very foundation of the distinction drawn between the two in the *Williams* judgment would disappear, with the result that the reasoning in the judgment would be self-destructive. It is clear, therefore that, in formulating the requirement of a causal connection in the way it did... the Court... could not have been postulating a causal connection between the conduct of the accomplice and the death of the deceased. What was stated to be required was a causal connection between the conduct of the accomplice and *the commission of the offence* by the perpetrator(s)... which connotes no more than a causal connection between the conduct of the accomplice and the conduct of the perpetrator.'

¹⁸⁰ 'It is submitted that an accessory is distinct from a principal in that the latter satisfies the definitional elements of the offence, while the former does not, but in some way contributes to or promotes the commission of the offence by the principal (and therefore his conduct should be causally linked to the actions of the principal). A person whose liability is based on common purpose, however, may be liable in the absence of any causal connection whatsoever, and therefore falls into a category distinct from that of the accessory': Matzukis, "The nature and scope of common purpose" [1988] 2 SACJ 226 at 229.

¹⁸¹ In *Mahlangu en Andere* 1995 (2) SACR 425 (T), it was held that an accomplice can participate actively or passively in the commission of offence (in this case a robbery and murder). In order to establish liability, it is simply necessary to prove a causal connection between the (passive) assistance and the commission of offence.

fails to meet the requirement. Thus, the guidelines do not adequately encompass the non-common purpose illustration mooted by Schreiner JA in *Mtembu*¹⁸²:

Where, without agreement, an act is done in order to assist the perpetrator but in fact does not help him in any way, difficult questions may arise. Supposing, for instance, that B hears that A is going to lie in wait for C to attack him with a sword and successfully persuades C to leave his weapons at home in order that he may the more easily and certainly be killed by A, B would presumably be guilty of murder if in fact his conduct did help A to murder C even though B had not made any agreement with A on the matter. But supposing that B's persuasion of C to leave his weapons at home turned out to have no bearing on the event because A attacked C with such sudden violence that no weapons possessed by C would have availed him: is B free from liability?¹⁸³

It is implicit in his subsequent musings that he concludes that liability should depend on the potential, rather than the actual, effectiveness of the contribution. Of course, this would also have been the case had A and B agreed that B would persuade the victim to leave his weapons at home. The difficulty lies in the lack of consensus. When one assesses the blame that attaches to B, it is focussed upon his intention rather than the causal link between his conduct and the offence. It is, arguably, more in accordance with inchoate liability.¹⁸⁴

Moreover, in arguing against a causation requirement in common purpose cases, judges have succeeded in further undermining the fragile nature of the causal connection in multi-party crimes. In *Khoza*, Botha AJA launched a scathing attack on 'psychological causation':

Nor does the notion of "psychological causation", favoured in some quarters in an apparent attempt to avoid facing up to the realities of the situation... provide any assistance, for if there was any substance in such a concept, the State would be required to prove that the accused's participation in the attack actually influenced the perpetrators of the murder to kill the deceased, a proposition which I consider to be totally untenable.¹⁸⁵

Whilst on the one hand underlining the problems in pinpointing the effects of secondary party influence upon the principal, Botha JA seems to have fallen into the very trap that he goes on to criticise his legal colleagues for having falling into.¹⁸⁶ In negating the value of a meaningful

¹⁸² *R v Mtembu* 1950 (1) SA 670 (A).

¹⁸³ *Ibid.* at 678.

¹⁸⁴ However, South African law, like English law, does not include an inchoate aiding offence. Cf. Rabie, *op cit.* n.173 at 339, who argues that willingness to assist is in itself sufficient and cites *Mbande & others* 1933 AD 382 where it was decided that a person can be liable as 'aider and abettor' despite the fact that he did not render any physical contribution to the commission of the crime and Clayden's FJ judgment in *Chenjere* 1960 1 SA 473 (FC) that the defendant was liable because prior to and during the act which caused the victim's death, he was ready to render assistance and later on did actually render assistance (after the mortal wound had been inflicted): see above, p.104, for discussion on *Chenjere*.

¹⁸⁵ *Khoza* 1982 (3) SA 1019 at 1052.

¹⁸⁶ See n.180.

causal connection between the accomplice's encouragement and the principal's act, he severely, yet apparently unconsciously, circumscribes the potential scope of accomplice liability to homicide that he later argues was never nullified by the *William's* judgment.

3.1.4 Is Causation an Appropriate Requirement for Complicity?

The previous exposition has amply demonstrated that it is extremely difficult, if not impossible, to provide a formulaic definition of secondary party causation. The main problem arises due to the central position of voluntary human action in the criminal law. Thus, the volitional actions of the principal negate a direct causal nexus between the secondary party and the principal harm. Thus, Professor Kadish has asserted,

We do not view a chain of events that includes volitional human actions as governed solely by the laws of nature. In complicity, the result at issue is another volitional human action, which we perceive as controlled ultimately by that actor's choice, not by natural forces. No matter how well or fully we learn the antecedent facts, we can never say of a volitional action that it had to be the case that the person would choose to act in a certain way...¹⁸⁷

In fact, the laws of causation in the physical world, despite being considered unproblematic by legal theorists, have been recognised by scientists to contain a number of indeterminates that defy accurate prediction; hence the acceptance by quantum physicists that accuracy is necessarily compromised through the experimentation process so that certainty can never be achieved.¹⁸⁸

This awareness throws a new light on Professor Kadish's continuing argument that since,

... every volitional actor is a wild card; he need never act in a certain way... Since an individual could always have chosen to act without the influence [of an accomplice], it is always possible that he might have. No laws of nature can settle the issue.¹⁸⁹

Whilst this is clearly true, it misses the point. Much the same proposition could be made for primary party causation where there are also any number of 'wild cards' to be found. These include subsisting conditions such as haemophilia, congenital heart defects or religious convictions¹⁹⁰; the distance to the nearest hospital; the traffic conditions that challenge the ambulance driver; the availability, alertness and competence of the doctor;¹⁹¹ and the actions of the victim.¹⁹² Moreover, the criminal law employs the laws of physical causation by approaching

¹⁸⁷ Kadish, *Complicity, Cause and Blame* at 359.

¹⁸⁸ Heisenberg's Uncertainty Principle.

¹⁸⁹ Kadish, *Complicity, Cause and Blame* at 359.

¹⁹⁰ *Blau* [1975] 3 All ER 446.

¹⁹¹ *Jordan* (1956) 40 Cr App R 152, *Smith* [1959] 2 QB 35.

¹⁹² *Roberts* (1971) Cr App R 95; *Mackie* (1973) 57 Cr App R 453; *Williams and Davis* [1992] 2 All ER 183.

the question from the opposite end to questing scientists. Under the criminal law, the laws of nature are not employed to predict the result, they are used to ratify it. Used as a predictor, the best that could be said by a scientist, is that given a critical number of conditions and series of events, the victim is likely to die. But, this kind of qualified prophesying is superseded when ascertaining the culprit in a homicide, by the obvious fact that the inquiry commences when there is a corpse. Primary causation is retrospective in approach. Therefore, the search in legal circles for a scientific formula is doomed to produce flawed definitions and criteria. It is submitted, therefore that the better approach is to acknowledge the purpose behind causation in the criminal law.

Causation provides a normative standard by which liability can be attributed to the actor whose behaviour is considered deserving of blame. Furthermore, even though censure will be attached to those whose behaviour threatens harm, there will be a fundamentally different reaction when those actions actually result in harm. Thus, despite the fact that the same action may lie at the root of either eventuality, when the threatened harm is made manifest the judgment passed upon the actor will be harsher for no other reason but that the incipient consequence actually happened. It is the recognition of this fundamental value differentiation that lies at the heart of derivative liability. Deriving secondary liability from the commission of the substantive offence underlines the seriousness of the accessory's responsibility: the harm to which the accessory lent his efforts has been realised. This, in turn, begs for a causal connection, not in the sense that the accessory was the direct cause of the *actus reus* of the substantive offence for then, as has been vividly illustrated by the South African conundrum, the accomplice would become the principal in a result crime. A secondary party is, by definition, one step removed from the commission of the crime. Therefore, there needs to be a relationship between the secondary and primary parties, although it may fall far short of collaboration. Thus, the causal relationship needs to be positioned between the secondary party's participation and the principal's act of perpetrating the offence. At its most potent, the accessory's contribution will have brought about the commission of the crime by providing the perpetrator with a reason for action. However, it is quite conceivable that the principal may have had a mixture of motivating forces. Conceding this fact renders the potency of the secondary party's contribution inscrutable and therefore tenuous. Nevertheless, although it adds a layer of complexity, it does not eliminate the sense that an accessory's responsibility is based on a culpable contribution that may have been influential or may have made a difference. In fact, without the proviso of a causal connection, there is a serious risk that the gravity of the accessory's responsibility will be undermined by the imposition of

liability for a trivial or ineffectual contribution. Furthermore, it is arguable that in cases where there is no consensus between the offending parties, the accessory's causality should be particularly evident. However, it is often easier to appreciate secondary causation by expressing it in the negative:

If the accessory's involvement is *patently* causally superfluous, whether because his help or encouragement fails to reach the principal, or is in some other way ineffectual, no liability follows.¹⁹³

Admittedly, this does little to address the need to define the precise causal connection but, rather like the considerations that pertain to legal or proximate primary cause, the nature of the connection can be appreciated in a value judgment.¹⁹⁴

To return once more to negative definition, it has been suggested that 'complicity cannot be established if the acts of the secondary actor were unsuccessful in influencing or assisting the principal to commit the crime.'¹⁹⁵ It would be satisfying to be able to provide as a positive version a definition comprising "a contribution that created or consolidated the reason for the principal's action". However, there are perhaps too many exceptions to the paradigm of reason-based causation to sustain such an optimistic proposition. Professor Kadish suggested that '[t]he common notion of success is captured in the ordinary locution of something having mattered, of having made a difference.'¹⁹⁶ Thus, a putative accessory's contribution is causally successful if it (may have) made a difference to the crime commission. However, it is submitted that the ultimate question must be whether the secondary party's contribution to the crime commission was significant enough to be considered blameworthy and, if so, whether the accessory deserved to be sentenced to all or part of the designated punishment for the substantive offence.¹⁹⁷ The vagaries that vex its precise nature make it all too easy to criticise the existence or relevance of causation in secondary liability. Nevertheless, it is submitted that a causal requirement lies dormant in the foundations of criminal complicity and provides the fundamental distinction between derivative and inchoate liability.

¹⁹³ KJM Smith, *Treatise* at 87.

¹⁹⁴ cf. Hart & Honoré at 67: 'Morality can properly leave certain things vague into which a legal system must attempt to import some degree of precision.'

¹⁹⁵ Kadish, *Complicity, Cause and Blame* at 356-7.

¹⁹⁶ *Ibid.*

¹⁹⁷ That causation is but one criterion in the imposition of liability and sanctions is emphasised by Hart & Honoré at 66: 'The use of the legal [sanction] of imprisonment... has such formidable repercussions on the general life of society that the fact that individuals have a type of connection with harm which is adequate for moral censure... is only one of the facts which the law must consider in defining the kinds of connection between actions and harm for which it will hold individuals legally responsible.'

CHAPTER 5

INCHOATE LIABILITY AND THE PROPOSALS FOR SECONDARY PARTY REFORM

1 INTRODUCTION

In 1993, having reviewed the complexities of complicity liability, the Law Commission proposed the solution of converting secondary liability to an inchoate basis¹ by the creation of two new substantive offences: assisting crime and encouraging crime.² The rationale behind this change is that ‘an accessory’s liability is, *even in the present law*, essentially inchoate in nature’³. To support this contention it was argued that:

An accessory’s legal fault is complete as soon as his act of assistance [or encouragement] is done, and acts done thereafter by the *principal*, in particular in committing or not committing the crime... cannot therefore add to or detract from that fault... [Furthermore] the actual occurrence of the principal crime is not taken into account in assessing the accessory’s culpability.⁴

Thus, a change of this nature would effectively demolish the twin foundations on which complicity liability has been founded. Criminal liability would no longer derive from the perpetration of an offence. Consequently, due to the fact that there is no need for a principal offence to have been committed at all, there would be no question of the accessory being ‘punished only as a partaker of the guilt of another’⁵. As to the first point of divergence, there is little doubt that the Law Commission’s argument provides a triumph of rationalism over the ‘moral luck’⁶ involved in liability that derives from the actual commission of a substantive

¹ The solution had been posited earlier by Buxton, “Complicity in the Criminal Code” [1969] 85 LQR 252.

² LCCP No. 131 para 4.7: (a) there should be created separate offences of assisting crime and of encouraging crime; and (b) the offence of assisting crime should be put on an inchoate basis.

³ *Ibid.* para 4.24 (emphasis in original).

⁴ *Ibid.* (emphasis in original).

⁵ Hawkins, *A Treatise of the Pleas of the Crown* (London, 1824) (hereafter *PC*) ch 29 s.15.

⁶ A term used by Unterhalter in “The Doctrine of Common purpose: What makes one person liable for the acts of another?” SALJ 105 (1988) 671 at 972.

offence.⁷ However, the Law Commission's assertion that the commission of the principal offence presently has no bearing on the punishment of the accessory is a more controversial claim, which requires closer consideration.

Yet, before embarking upon an analysis of the benefits and drawbacks of the proposals, it is essential to examine the existing inchoate offences because inchoate liability is by no means free from problems. The scope of the work is such that it is not possible to provide an exhaustive analysis of the inchoate offences. Therefore, it is necessary to concentrate on the more pertinent questions. Thus, the areas that will receive attention include the nature and rationale of inchoate liability and the development of the inchoate offences of incitement and conspiracy. The Law Commission too considered incitement in the Working Paper and submitted that, should the reform proposals be implemented, then incitement, having been bereft of an independent

⁷ It would also remove the complicated, possibly even esoteric, inter-relationship between complicity and the inchoate offences. For a definitive examination see JC Smith, 'Secondary participation and inchoate offences' in *Crime, Proof and Punishment* (Butterworths, 1981). However, a summary of the rationale and conclusions follows. Complicity is not a substantive offence but merely a means of incurring criminal liability. Attempted complicity is therefore not a logical possibility (*Ibid.* at 32-34; KJM Smith, *Treatise* at 666 n.18 and LCCP No. 131 para 2.107). Similarly, it is not possible to conspire to aid and abet (*Anderson* [1986] 1 AC 27 at 30; JC Smith at 35-6). On the other hand, the inchoate offences are substantive offences. Thus it is possible to aid, abet, counsel or procure an attempt (*Hagood and Wyatt* (1870) 11 Cox CC 471, cited in JC Smith at 27) It is also logically possible to be a secondary party to an incitement (*ibid.*). The situation with conspiracy is rather more complex: whilst it is logically possible to be complicit in a conspiracy, considered pragmatically, it would be difficult to aid, abet, counsel or procure a conspiracy without becoming a party to it (JC Smith at 28). Thus, although, there are opposing views and authorities, JC Smith concludes, at 44: '(1) A charge will lie for aiding, abetting, counselling or procuring an offence of incitement, conspiracy or attempt. (2) A charge will not lie for incitement, conspiracy or attempt to aid, abet counsel or procure an offence, except perhaps where the offence is to be committed (a) through one who... though the perpetrator of the *actus reus*, is not guilty of the offence, or (b) where the offence is one of strict liability, through a principal who lacks *mens rea*.' The inter-relationship within the inchoate offences is not dictated so much by logic as by realism. As incitement, conspiracy and attempt are all substantive so there is no logical obstacle to any possible combination. Thus it is possible to attempt an incitement (for the most recent case, see *Goldman* [2001] Crim LR 822) but attempt to conspire was abolished by the Criminal Attempts Act 1981, s.1(4)(a). Similarly one may conspire to incite as when two people agree to urge a third to commit a crime. In real terms, inciting a conspiracy may well founder in the same way as aiding, abetting etc. a conspiracy: it is all too easy to become a party to the conspiracy. Inciting an attempt is something of a tautology because it would be expected that the incitement would aim at the completed offence. Similarly a conspiracy would be expected to target the complete offence rather than merely an attempt at it. In both instances the conduct amounting to an attempt would be a necessary step towards committing the target offence, so that an attempt would be within the ambit of the encouragement, instruction, agreement etc., should the principal offence remained incomplete. Nevertheless, since inchoate liability imposes no requirement that the offence be committed the fact is rendered irrelevant. On the other hand, as an attempt is a substantive offence, then just as it is possible to aid, abet, etc. an attempt there is no doctrinal reason to exempt liability for inciting or conspiring towards an attempt. (There may be a policy concern urging the curtailing of inchoate liability for anything less than a harm-based target offence.)

function, would be subsumed within the new offence of encouraging crime.⁸ However, less consideration was given to conspiracy and, due the problems involved in positioning conspiracy and joint enterprise within the new framework, it was ultimately omitted from the proposed restructure.⁹ Yet, the neglect of conspiracy undermines the new structure.¹⁰ Both incitement and conspiracy are offences that involve more than one party and so any argument for rationalising the law of secondary liability by converting complicity into an inchoate form cannot be undertaken without attempting to place the existing conspiracy offence within the new proposals.

Having asserted the exclusive importance of the offences of incitement and conspiracy, it is necessary to briefly reintroduce the third inchoate offence, attempt, in order to examine the rationale behind inchoate liability. It has been suggested that ‘the three inchoate offences [are] but three manifestations of a single principle – the attemptor has intended to perpetrate an offence; the incitor has intended to commit an offence by (aiding or) abetting it; while the conspirator will have intended to do either the one or other, or both’¹¹. Nevertheless, there is no requirement that the intended offence be actually committed and it is this facility for official intervention and imposition of liability prior to the completion of the legally proscribed harm of the intended offence that requires investigation and explanation.

In many ways it is unsurprising that the weight of historical precedent concentrates the censure of the criminal law upon the realisation of harm.¹² There is no room for doubt that the perpetrator or accessory to an actualised harm deserves the requisite censure. On the other hand, inchoate liability concerns, by its very definition, incipient, as yet unrealised, harm. Thus, the *actus reus* of the complete offence will not have been performed. Consequently, while there are forceful policy reasons for permitting intervention prior to the actual production of harm, there are also concerns about the legitimacy of criminalising people who have not consummated the conduct element of the complete crime. Criminal liability involving latent rather than actualised, incontrovertible harm is therefore an innovation of more recent origin.¹³ Shifting the policy

⁸ LCCP No. 131 paras 4.143 and 4.144.

⁹ Although it was conceded that, like incitement, ‘there is likely to be some overlap in [the] practical application between the law of conspiracy and the law of complicity’: LCCP No. 131 para 1.20.

¹⁰ Glazebrook, ‘Structuring the Criminal Code: Functional Approaches to Complicity, Incomplete Offences and General Defences’ in *Harm and Culpability* ed. A.P. Simester and A.T.H. Smith (Clarendon Press, 1996) at 201.

¹¹ *Ibid.* at 202-3.

¹² See above, p.50.

¹³ Incitement can be traced to the beginning of the nineteenth century case of *Higgins* (1801) 2 East 5 at 170 when Lord Kenyon asserted “it is argued that a mere intent to commit evil is not indictable, without an

emphasis to harm endangerment necessarily introduces the need for a delicate balancing act. This arises due to the fundamental doubt that exists when, for as long as the offence has not been consummated, there is always a chance that the crime will be abandoned and the harm will never materialise. English law has never criminalised purely evil intention or “thought crime”. Therefore, in order to justify the intrusion of the law into the premature stages of crime commission, there must be that a degree of surety that the incipient harm manifests a sufficiently potent threat of realisation. Consequently, there is a requirement, not merely for a culpable state of mind, but also for some overt conduct to be performed in furtherance of the complete offence.

The following examination includes a final purpose that influences the order of exposition. It will be submitted that jurisdictions inevitably encounter “hard cases” where the “feeling” is that the defendant should not escape criminal liability. The basic reason that these cases are “hard” is that the defendant’s conduct or culpability fails to slot into the existing offence definitions. Therefore, assuming a judicial determination to impose liability, an existing offence will need to be stretched to accommodate the new and unanticipated species of anti social behaviour. The unwelcome consequence of this kind of *ad hoc* amendment is the widening of the offence’s ambit so that it will now encompass alternative behaviours that are not considered worthy of criminalisation. Under English law, this tendency is demonstrated in the development of both incitement and

act done; but is there not an act done, when it is charged that the defendant solicited another to commit a felony?” However, conspiracy is the most ancient of the inchoate offences. Originating as an administrative offence, its gradual mutation into the currently recognised offence hail back to the seventeenth century and the developments of the Star Chamber. The following introductory exposition derives from the comprehensive history provided by Winfield, “Early History of Criminal Conspiracy” [1920] 36 LQR 240-254; 359-377. Conspiracy began life under the reign of Edward I but in a form unfamiliar with the modern offence. It was originally an offence involving abuse of procedure and included perjury, false accusation and administrative corruption: in essence it comprised ‘combination to promote false accusations and suits before a court’. The iniquities of juries and sheriffs led to the establishment and development of the Star Chamber, which assured ‘ a strong Court... free from a jury’. An illustration of conspiracy, in 1756, is provided by *McDaniel* 19 St Tr 745 where the defendant and others procured two further parties to be indicted and convicted for robbery in order to obtain the statutory reward for the apprehension of highwaymen: ‘They were discharged on an indictment of them as accessories before the fact to this robbery, but were subsequently convicted of conspiracy on an indictment which charged them with unlawfully and maliciously conspiring that one Blee should procure Kelly and Ellis to commit the robbery with intent that McDaniel and his fellow-conspirators should cause Kelly and Ellis to be convicted of robber and so share the rewards.’ Nevertheless, there are earlier examples of cases which involve offences that comply with the later understanding of conspiracy, that is, confederacy and agreement to commit a crime. However it was the latter half of the seventeenth century that witnessed the acceleration of the development of conspiracy into a resemblance of its modern form. By the beginning of the eighteenth century, ‘...we have decisions, or indications in decisions that criminal conspiracy had been extended to include combinations (1) to accuse, but not necessarily before a Court, of some offence; (2) to commit embracery; (3) to cheat; (4) to sell goods at a fixed price...; (5) to extort money; and the combination is the gist of the offence.’

conspiracy. The Law Commission recognised that incitement's ambit has been widened and that the proposed new offence of encouraging crime would restrict it once more.¹⁴ Thus, a final test of the Law Commission's proposals will be whether they adequately address this issue. Moreover, it will be submitted that the exclusion of conspiracy permits the possibility that it would become the catch-all offence that would accommodate any inconvenient cases whilst keeping the offence of encouraging crime doctrinally pure. Indeed, the existing ^{law of} conspiracy has already been developed to serve a similar purpose and for this reason, in addition to the fact that it was omitted from the Law Commission's proposals, conspiracy will be examined following the critique of the proposed new offence of inchoate assistance. Only then will it be possible to appraise the benefits and drawbacks of the reform proposals.

2 INCITEMENT

The conduct element for incitement comprises any of the following synonyms: 'to urge or spur on by advice, encouragement and persuasion.'¹⁵ Thus, the comparison with complicity is readily apparent. The *actus reus* of incitement will satisfy the complicity conduct of encouraging or influencing (and possibly assisting). It has been asserted that incitement should additionally include 'an element of persuasion or pressure, which is not necessary in the case of counselling or abetting.'¹⁶ Whilst this has been contested,¹⁷ it is certainly a convincing argument, in line with the need for the conduct to be sufficiently reprehensible to deserve criminal censure, that behaviour equating to mere suggestion might not seem serious enough. Rather, the conduct should comprise some kind of inducement 'either by dialectic device or by virtue of some special relationship between the parties'¹⁸. If this were so, there would be a more ready difference between incitement and complicity.¹⁹

¹⁴ The *mens rea* for incitement has been extended beyond purpose to commit the crime (LCCP No. 131 para 2.130-2.131) whereas the proposed offence of encouraging crime would reintroduce the fault of intention that the crime be committed (para. 4.163).

¹⁵ *Race Relations Board v Applin* [1973] QB 815 at 825 *per* Lord Denning MR. Under South African law the definition of incitement, in addition to the conduct already covered, is wide-ranging enough to incorporate 'inducement, goading or the arousal of cupidity': *S v Nkosiyana* 1966 (4) SA 655 AD at 658 *per* Holmes JA.

¹⁶ *Smith & Hogan* at 270-2. Spencer also asserts that incitement 'involves an element of persuasion': 'Trying to help another person commit a crime' in *Essays in Honour of J C Smith* at 152.

¹⁷ Williams, *CLGP* at 612: "'incite" does not necessarily mean to originate or initiate' and LCCP No. 131 para 2.132: 'specific authority for this requirement is, however, notably sparse, and descriptions of the conduct that can amount to incitement seem to include conduct that would not be thought to amount to persuasion or pressure, except in the most anodyne sense of those expressions.'

¹⁸ Buxton, *op cit.* n.1 at 256. 'Other legal systems... require more extreme efforts on the incitor's part. Thus in French law liability attaches to an accomplice who has instigated a crime by gift, promise, threat,

3 THE PROPOSED NEW OFFENCES OF ASSISTING CRIME AND ENCOURAGING CRIME

The proposed offence of encouraging crime is intended to subsume the abetment, counselling and procuring²⁰ subsets of complicity and the inchoate offence of incitement. In essence, the new offence would pertain to psychological rather than physical contributions to a putative crime commission. Thus, the suggested offence definition provides that a person commits the offence of encouraging crime if he

- (a) solicits, commands or encourages another (“the principal”) to do or cause to be done an act or acts which, if done, will involve the commission of an offence by the principal; and
- (b) intends that that act or those acts should be done by the principal; and
- (c) knows or believes that the principal, in so acting, will do so with the fault required for the offence in question.²¹

The offence of assisting crime would primarily replace the aiding subset of complicity, although as will be seen, incitement has been deemed to encompass the provision of the tangible means to commit an offence.²² Thus, the proposal provides that

- A person commits the offence of assisting crime if he
- (a) knows or believes that another (“the principal”) is doing or causing to be done, or will do or cause to be done, acts that do or will involve the commission of an offence by the principal; and
 - (b) knows or believes that the principal, in so acting, does or will do so with the fault required for the offence in question; and
 - (c) does any act that he knows or believes assists or will assist the principal in committing that offence.²³

Comparison of the offence definitions reveals that the fault element is narrower for encouraging crime than for assisting crime. The Law Commission explained that purpose was the requisite fault for encouraging crime ‘because the whole notion of encouraging, inciting or exhorting the commission of a crime presupposes that the encourager wishes that crime to be committed’²⁴.

The two-stage fault recognises that accompanying the intention to influence the principal, the

abuse of authority or power, or by blameworthy manoeuvres or tricks or has given instruction for its commission’ (Penal Code s.60, cited *ibid.*).

¹⁹ The Law Commission make the argument that, presently, the only significant difference between incitement and complicity is the theoretical foundation of the two forms of liability: LCCP No. 131 para. 4.12.

²⁰ Except in the restricted *A-G’s Reference (No 1 of 1975)* meaning of ‘producing by endeavour’ without an accompanying need for psychological influence over the principal, see above, p.41.

²¹ LCCP No. 131 para. 4.163

²² *Invicta Plastics Ltd v Clare* [1976] RTR 251.

²³ LCCP No. 131 para. 4.99.

²⁴ *Ibid.* para. 4.153.

encourager will possess a further mental element that relates to the principal's state of mind. In defining that second stage fault as knowledge or belief that the principal will act with the requisite fault of the substantive offence, the Law Commission corrected the misconceived judgment in *Curr*,²⁵ which required that the inciter knows or believes that the incitee has the necessary *mens rea* for the intended offence *and* that the incitee in fact possesses it. The proposed amendment is entirely sensible because the addition of a surrounding circumstance relating to the incitee's actual culpability is an irrelevance in the assessment of the inciter's efforts and therefore should have no bearing upon the inciter's liability.

To appreciate the reason for the extended fault in the definition of assisting crime, it is necessary to consider the liability lacuna that the offence attempts to fill. Moreover, an evaluation of the terms of the proposed offence will be possible only when the inherent problems in the existing law have been examined. The species of secondary participation that creates the difficulties tends to include those cases that involve indifferent suppliers who provide materials or advice that may facilitate a crime. To further complicate matters, indifferent suppliers are found to have been successfully indicted for incitement, for complicity and for conspiracy. Thus, the problems straddle all three areas. The following section considers the impact of widening liability upon incitement and complicity²⁶ and introduces previous suggestions for reform.

3.1 INCHOATE AIDING OR FACILITATION: AN EXPOSITION OF THE LACUNA AND ITS INHERENT PROBLEMS

Whenever the *actus reus* falls short of the consummated target crime, there is a natural expectation that the *mens rea* should be set so as to emphatically demonstrate the culpability of the accused. Thus, the fact that the *actus reus* of incitement and complicity²⁷ is satisfied by conduct that falls so far short of the completed crime leads to the anticipation that, as compensation and safeguard against liability becoming oppressively wide-ranging, the secondary party should be held responsible only when there is direct intention that the projected offence be

²⁵ [1968] 2 QB 944. Cf. *Armstrong* [2000] Crim LR. See further, Holroyd, "Incitement – A Tale of Three Agents" (2001) 65 JCL (6) 515-520.

²⁶ Conspiracy is considered below, p.193.

²⁷ 'Since the act and cause requirements of accomplice liability are so minimal, and since all jurisdictions punish an accomplice the same as the perpetrator of the substantive offense, the *mens rea* requirement becomes more significant.'; Mueller, "The *Mens Rea* of Accomplice Liability" [1988] 61 S Cal LR 2169 at 2171.

committed. However, case law provides otherwise and extends the fault element to encompass subjective recklessness.

The extension of the fault element for incitement originated in the rather complicated case of *Invicta Plastics Ltd v Clare*²⁸. One in a line of “indifferent supplier” cases where the immediate desire or intention of the defendant is the accomplishment of material gain and the ultimate employment of the merchandise a matter of personal irrelevance, it is pertinent to consider the facts in order to arrive at the reason for the extension of liability. The defendant manufactured a device which detected police speed traps and alerted the user accordingly, so permitting motorists to amend their driving, as necessary, to avoid prosecution for exceeding the speed limit. His advertisement in the motoring press made the use of the equipment perfectly plain; however, his purpose was not the commission of an offence but the accumulation of profit. Thus, to ensure the conviction of the defendant²⁹, it was necessary for the Divisional Court to extend the *mens rea* of incitement. Consequently, the defendant need not aim the incitement at a particular person and neither need he intend that an offence be committed; ‘the decision accepts the idea that it is enough to make a person guilty of incitement that he knows his behaviour makes it more likely that someone will commit an offence’³⁰.

Ironically, the extension of the *mens rea* to subjective recklessness makes the law both dangerously wide and unfortunately narrow. Its application remains narrow in cases like *Invicta Plastics* because the appropriate description of the defendant’s conduct is the provision of aid rather than persuasion. Therefore, unless the merchandise is incapable of any legal use it is extremely difficult to sustain the argument that the defendant’s behaviour amounted to incitement. Thus, the fact remains that, but for the existence of the illegally received radio waves, the defendant may have escaped liability altogether. On the other hand, extending liability to scenarios where illegal use is but one possible, albeit known, means of employment for the

²⁸ [1976] RTR 251.

²⁹ The defendant was not prosecuted for inciting others to contravene the speed limit, which was the true nature of the dangerous harm that his supply of the devices threatened; instead, he was prosecuted for the seemingly trifling harm involved in inciting others to use unlicensed equipment for wireless telegraphy contrary to s.1(1) of the Wireless Telegraphy Act 1949. That the defendant posed the kind of menace to public safety that was deserving of criminalisation is not open to serious contradiction. However, the charges brought against him do not reveal the quality of his offence. Spencer suggested, *op cit.* n.16 at 153, that the reason for this apparent flouting of fair-labelling is discovered by realising the fatal weakness of a prosecution argument that the device could not be used without contravening the speed limit. On the other hand, it could be substantiated that using the device necessarily involved an offence under the Wireless Telegraphy Act.

supplied article creates a disconcertingly wide ambit of potential criminalisation. Manufacturers and suppliers of colour photocopiers might be liable for providing the means of producing counterfeit fifty pound notes³¹. Meanwhile, the decision impacts upon the orthodox region of incitement, the realm of encouragement and suggestion. Liability that encompasses awareness that a consequence of the provision of advice might include the risk of an unknown incitee committing an offence, despite the fact that it is not specifically encouraged or is an undesired side-effect, may create potential criminalisation that seriously encroaches upon normal social activity.³² It is possible that it would be wide enough to encompass the garrulous party guest who explains to his friend the deceptive simplicity of the security system he is installing at the local bank, realising that he might be overheard by a dishonest opportunist who will be encouraged to by-pass the system and rob the bank. If this is so, then the controversial element of positive urging or the application of pressure becomes still more vital to limit the burgeoning liability.

It has been argued that cases involving the indifferent, or at least non-purposeful, supply of aid reveal a gap in the existing law, which has been remedied in an *ad hoc* way by the courts extending not only incitement, but also complicity³³ and conspiracy³⁴, beyond their desirable ambits.³⁵ The absent offence which, if introduced, would seal the gap and enable a reversion to a more principled application of the stretched areas of liability, is inchoate aiding. This offence would cover the provision of assistance for the commission of an offence, even when the target offence was not actually perpetrated or even attempted: in keeping with inchoate liability, the aiding offence would be complete upon the provision of the aid, be it equipment or advice. While Spencer argued for the introduction of such an offence of facilitation to be inserted as an addition within the existing legal framework, the Law Commission, despite acknowledging that the question of inchoate aiding only arises when assistance is provided in advance of the principal crime and so, ultimately may not be committed³⁶, proposed 'a single offence of assisting crime,

³⁰ Spencer, *op cit.* n.16 at 153.

³¹ *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 159 involved the supply of cassette recorders. However, the manufacturer advertised that use of the equipment made it possible to record a favourite cassette. This therefore involved the defendant taking the initiative and proffering the illegal use by in active suggestion.

³² Williams levels the same criticism against complicity liability: *CLGP* at 124 and *TCL* at 341.

³³ *Bainbridge* [1960] 1 QB 129, and see later discussion on fault in complicity, at p.184.

³⁴ *Anderson* [1986] 1 AC 27; *Hollinshead* [1985] 1 All ER 850; LCCP No. 131 at 10.

³⁵ Spencer, *op cit.* n.16 at 156-8, also argues that the absence of an inchoate aiding offence has led to an extension in the scope of the offence of obstructing the police.

³⁶ LCCP No. 131 para 4.18.

with the same rules to apply whether or not the principal offence is actually committed or not.³⁷ This offence would thereby supersede complicity liability. Directly confronting this proposition, it has been asserted that,

Even if it were to be accepted that attempted assisting should be criminalised, by definition, as an inchoate offence, it by no means follows, in logic or on policy grounds, that assisting where a principal offence does occur should also be in an inchoate form.³⁸

It is submitted that the challenge is made yet more valid by admissions within the Working Paper. Presumably as a suggestion for limiting a potentially burgeoning liability, the Law Commission pronounced that '[i]n the most usual case the act of assistance will only come to light, or be thought worth prosecuting, where the principal offence has in fact been committed'³⁹. In emphasising the importance of a completed target offence, the Law Commission is in danger of obviating its own reasoning, particularly the argument that liability should not depend upon the fortuity of whether the perpetrator commits the crime or not. Moreover, the declaration renders the scope for secondary liability in unrealised criminal activity decidedly amorphous and the implicit expectation of prosecutorial discretion directly contradicts an earlier exhortation for the setting of certain and deliberated boundaries of liability.⁴⁰

However, the main problem with the proposed change is that introducing inchoate aiding as a new or alternative offence does not overcome the existing difficulty of deciding the appropriate fault element for secondary liability. It has already been seen that the paradigm of intention as the fault for inchoate offences has been extended for incitement. However, in order to appreciate the difficulties more completely, it is necessary to consider the cases that have extended the fault for complicity since it is scenarios of this sort that the inchoate aiding offence must be able to resolve. A useful starting point is the dicta in *NCB v Gamble*, which highlights judicial dissatisfaction with limiting the *mens rea* of an accessory to intention:

No doubt evidence of an interest in the crime or of an express purpose to assist it will greatly strengthen the case for the prosecution, but an indifference to the result of the crime does not of itself negative abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an

³⁷ *Ibid.* para 4.23.

³⁸ KJM Smith, "The Law Commission Consultation Paper on Complicity: (1) A Blueprint for Rationalisation" [1994] Crim LR 239 at 242.

³⁹ LCCP No. 131 para 4.26.

⁴⁰ *Ibid.* para 3.14: 'it can never be safe, or right, to leave undisturbed a law that is potentially very wide, and therefore at least potentially oppressive, in the hope or expectation that it will not be used or not be used oppressively.'

aider and abettor. To hold otherwise would be to negative the rule that *mens rea* is a matter of intent only and does not depend on desire or motive.⁴¹

The policy behind this example is clear: the criminal law would be seriously undermined if it were not possible to impose accountability for such a heinous disregard for the fatally harmful consequences that directly follow the provision of the lethal weapon. However, even within this example there is room for differing interpretations of the gun seller's state of mind. This is brought about, principally, because, where disinterested aid is supplied prior to the commission of the offence, it is unlikely firstly, that the would-be perpetrator will divulge the details of his criminal plan and secondly, that the latent accessory will make pertinent inquiries into the nature of the incipient unlawfulness. Thus, the description of the supply as 'deliberate' suggests that the seller is fully cognisant with the purchaser's murderous intention and, if this were so – if, for example, the purchaser had made clear his intended use of the gun before parting with his money – there is little moral ambivalence in declaring that the seller who simply shrugged and handed over the weapon should be liable as an accessory to the subsequent homicide. However, the recognition of the extreme improbability that the intending murderer would display this degree of foolish openness leads to the acknowledgement that the more accurate state of mind of the seller will normally involve inference of the purchaser's intentions. It is therefore no longer appropriate to speak of his knowledge but instead of his belief.⁴² However, this semantic amendment, is not, in itself, a fatal alteration as it is possible to argue that knowledge is necessarily a species of belief and *vice versa*.⁴³ The problem arises in the overspill from certainty into possibility. As the purchaser's action is a future projection, the supplier can only perceive its occurrence as a foreseen risk. The introduction of foresight transmutes the accessory's fault into subjective recklessness. Furthermore, although the supplier may realise that the risk involves the commission of a particular crime,⁴⁴ he may not be aware of details, such as the time, location or victim. Indeed, there is every reason to suppose that, in normal commercial transactions, the seller will not inquire into the specifics of the use to which the newly purchased item is to be put.

⁴¹ [1959] 1 QB 11 at 23 *per* Devlin J.

⁴² KJM Smith, *Treatise* at 169.

⁴³ Ashworth, 'Belief, Intent and Criminal Liability' ed. J Eekelar and J. Bell in *Oxford Essays in Jurisprudence* 3rd Series (Clarendon Press . Oxford, 1987).

⁴⁴ Or realises the facts that comprise the offence: it matters not that the supplier is unaware that it is a crime as ignorance of the law is no defence (*Johnson v Youden* [1950] 1 KB at 546). See also Lord Goddard's judgment in *Ackroyds Air Travel Ltd v DPP* [1950] 1 KBD 933 at 936: 'In *Wessel v. Carter Paterson and Pickfords Carriers Ltd* this Court said that a person could only be convicted ... as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realised that those circumstances constituted an offence was immaterial. If he knew all the circumstances and those circumstances constituted an offence, that was enough to convict him of being an aider and abettor.'

Just this kind of context arose in *Bainbridge*⁴⁵, where the defendant supplied oxygen-cutting equipment that was used, six weeks later, for breaking into a bank. The defendant admitted that he had suspected the equipment was required for something illegal. However, he had believed that it would be used for cutting up stolen goods and not for stealing from a bank. In response to his appeal, it was pronounced that it was insufficient to prove that the potential accessory 'knew that some illegal venture was intended'⁴⁶. However, while belief of the purchaser's general criminal intent was not enough, it was not necessary that the supplier should know the particulars of the offence. Thus, if he had believed that the perpetrator intended to commit burglary, there was no need for knowledge of the time, date or target. Finally, suspicion was not an adequately reprehensible state of mind to incur liability: 'there must be not merely suspicion but knowledge that a crime of the type in question was intended.'⁴⁷

Various objections have been raised to the potentially wide reach of liability that the judgment permits.⁴⁸ For example, what crimes are of the same type?⁴⁹ Is robbery of the same type as burglary if it was believed that theft was an integral part of the perpetrator's intention? Are the branches of burglary of the same type if the accessory believed that the perpetrator intended to unlawfully enter premises to steal but, once present as a trespasser, he actually committed rape or criminal damage? The second question is particularly pertinent in a case like *Bainbridge* where the oxygen equipment was used to effect the unlawful entry by cutting through bars on a window. It has been argued that the ultimate result goes beyond a fault extension into recklessness⁵⁰ to inflict damage upon the basis of subjective fault:

Bainbridge introduced an erosion of the subjective link that was possible if 'knowledge' was confined to belief in the existence of the 'essential matters'⁵¹ of the principal offence. It could then be reasonably asserted that the accessory's culpability was consciously connected with *that* principal offence from which accessorial liability was derived. *Bainbridge*, whilst retaining subjectivity at the core of liability, decoupled it (or made the direct link unnecessary) from a particular principal offence by substituting a substantially

⁴⁵ [1960] 1 QB 129.

⁴⁶ *Ibid.* at 132.

⁴⁷ *Ibid.*

⁴⁸ The range of liability was still further extended by the House of Lords in *DPP of Northern Ireland v Maxwell* [1978] 3 All ER 1140. However, consideration of this case is included under the examination of the *mens rea* in common purpose cases, see below, p.223.

⁴⁹ *Smith & Hogan* at 139. KJM Smith, *Treatise* at 163-4.

⁵⁰ Buxton, *op cit*, n.1 at 258-261.

⁵¹ The requirement stated in *Johnson v Youden* [1950] 1 KB 544 at 546.

autonomous form of mental culpability together with an objective referential type of 'test'.⁵²

Moreover, despite the judicial protestation that suspicion will not satisfy the accessory fault requirement, in real terms, as the Law Commission conceded, 'a belief as to future possibility collapses into mere suspicion'⁵³. Furthermore, non-specific contemplation of an offence commission permits the introduction of a further complication. If there is no requirement for the accessory to know the particulars of the perpetrator's offence, there is no logical obstacle, in the event of multiple commissions that utilise the same aid, to inculcating the accessory for each of the offences.:

Where D has supplied E with the means of committing, or information on how to commit, a crime of a particular type, is he to be held liable for all the crimes of that type which E may thereafter commit? What if the Midland at Stoke Newington was the second, third or fourth bank which E had feloniously broken and entered with Bainbridge's apparatus?... [O]nce it is conceded that D need not know the details of any specific crime, it is difficult to see why he should be liable for any one crime of the type contemplated and not for others.⁵⁴

More pernicious still, the potential range of accessory liability not only affects commercial suppliers but also impacts upon social interactions. What if Bainbridge had been a keen amateur car mechanic and had lent the cutting equipment to his dishonest neighbour? In the New Zealand case of *Baker*⁵⁵ the social context of the counselling was no obstacle to the imposition of liability. The defendant was held a party to a safebreaking because he told the principal of a technique for blowing open safes. He gave it gratuitously because the principal was a friend.⁵⁶ On the other hand, prior to *Bainbridge* this appears not to have been the case under English law.⁵⁷ Stephen stated quite clearly that:

Knowledge that a person intends to commit a crime, and conduct connected with and influenced by such knowledge, is not enough to make a person who possesses such

⁵² KJM Smith, *Treatise* at 169-170.

⁵³ LCCP No. 131 para 4.84.

⁵⁴ *Smith & Hogan* at 138-9.

⁵⁵ (1909) 28 NZLR 536, cited in Gillies at 61 and 173.

⁵⁶ Williams points out, in *CLGP* at 125, that this case also opens the door to open-ended liability: 'It is submitted that the decision is wrong, because it gives too great an extension to criminal complicity. If the writer of the letter would have been guilty the first time his information was used, he would have been guilty the *n*th time, which is absurd. His conduct was gravely immoral, and the situation might have attracted the attention of the legislature, but it was not a fit case for an extension of the law of accessories.'

⁵⁷ Although see *Bullock* [1955] 1 WLR 1 which preempts the decision by holding that a person who lends anything, such as a car, to another knowing that it will be used to commit a crime is a party to that crime despite not knowing the particular crime, i.e. the details of it. However, Devlin J doubted, at 5, whether it was enough to ground accessory liability if a person 'merely suspects that if he lends something it may be used for a criminal purpose.'

knowledge, or so conducts himself, an accessory before the fact to any such crime, unless he does something to encourage its commission actively.⁵⁸

In *Fretwell*⁵⁹ the defendant, (A), supplied an abortifacient to a pregnant woman, (B), knowing that she intended to use it to induce a miscarriage. He was unwilling that she should do so and only provided the substance consequent to her threat to commit suicide. B's death resulted from ingesting the poison. Stephen concurred with the court's decision: '[e]ven if B is guilty of murdering herself, A is not an accessory before the fact to such a murder.'⁶⁰ Following this reasoning,⁶¹ perhaps it is not surprising that in *Lomas*⁶², the defendant, despite returning a jemmy to its owner whilst knowing that it was wanted for an unspecific burglary, was exculpated from liability.

It was incumbent upon subsequent judgments that sought to amend accessorial *mens rea* from intention (having the purpose of furthering the principal offence⁶³), to recklessness (knowing/believing that an offence is intended by the prospective principal) to distinguish the facts of *Lomas*. Consequently, it was argued that, as the jemmy belonged to the defendant, he had a legal (civil) obligation to return it.⁶⁴ Thus, his provision of aid was not voluntary.⁶⁵ Needless to say, the tenuous technicalities of the argument have been subjected to criticism by

⁵⁸ Stephen, *Digest*, article 54.

⁵⁹ (1862) L. & C. 161.

⁶⁰ Stephen, *Digest*, article 38 Illustration (1).

⁶¹ Cases that impose liability upon a supplier for knowing that the purchaser intends to use the goods to commit an offence/counselling him to commit an offence include: *Cook v Stockwell* (1915) 15 Cox 49 (selling liquor knowing that the buyer intends an unlawful resale); *Cafferata v Wilson* [1936] 3 All ER 149 (sale of an imitation firearm with advice for converting it into a lethal weapon 'Cafferata replied: "They are not dear. You have only to bore the barrel and you have a nice little gun. I would do it only I am not allowed to."' (at 149)).

⁶² (1913) 23 Cox 765.

⁶³ A particularly cogent expressions of the intention of a secondary party in this sense was provided by Learned Hand J who, discussing the potential liability of knowing supply in the course of a lawful business asserted in *US v Falcone* 109 F.2d 579 (1940): 'It is not enough that he does not forego a normally lawful activity, if the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.' See also *US v Peoni* 100 F.2d 401 (1938) which required that the accomplice 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.' However, the US experience also demonstrates the same dilemma of a narrow fault requirement needing to be broadened, for policy reasons, in certain contexts. Thus, in *Backun v US* 112 F.2d 635 (4th Cir.1940) it was stated: 'The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony with the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received the full price of the gun.' (Cited in La Fave and Scott *Criminal Law* 2nd ed. (West Publishing Co., 1986) (hereafter LaFave & Scott) at 582-3.)

⁶⁴ *Bullock* [1955] 1 WLR 1 at 5.

leading commentators⁶⁶, and it was perhaps inevitable that a case would arise that would highlight the unfortunate consequences of creating so wide a liability. The nemesis arrived in *Gillick v West Norfolk and Wisbech Area Health Authority*⁶⁷. Faced with official reluctance, Mrs Gillick, a woman of passionate conviction, decided to initiate a private prosecution.⁶⁸ She argued that a doctor who prescribed contraceptive measures to a girl under the age of sixteen years was an accessory to unlawful sexual intercourse.⁶⁹ The alleged liability is based on the argument that '[a]lthough a girl under 16 does not herself commit any offence⁷⁰ ... by her participation in the intercourse, nevertheless a doctor giving contraceptive advice or treatment to a girl under 16 becomes an accessory to the subsequent unlawful intercourse by abetting the criminally liable male through the innocent agency of the girl.'⁷¹ The appeal judge was confronted with a thorny problem. In accordance with the decisions of *NCB v Gamble* and *Bainbridge*, the doctor would be so liable: he had voluntarily provided essential aid with the knowledge that his assistance might encourage a would-be sexual partner, free from fears of a subsequent pregnancy, to have intercourse with the under-age girl. However, unlike the illustration of the indifferent gun-seller, in this instance, public policy considerations required the converse conclusion about the imposition of criminal liability. Thus, from the selection of cases that asserted the need for direct intention to further the offence, Woolf J cited *Attorney-General v Able*⁷² and stated:

There must be an intention to assist and actual assistance in the commission of the crime. The provision of contraceptive treatment, however, does not assist the commission of unlawful intercourse, but it is a means of alleviating the social consequences of the act. But a doctor who prescribed contraceptive treatment merely to remove the mental inhibitions to the commission of unlawful sexual intercourse could lay himself open to criminal proceedings. The analogies of the provision of poison or of the getaway car are inappropriate.⁷³

⁶⁵ As required by Devlin J in *NCB v Gamble* [1959] 1 QB 11 at 20.

⁶⁶ Buxton, *op cit* n.1 at 264. Williams approves the outcome of *Lomas*: 'It would be too severe to treat as an accessory a man who has done nothing to encourage the crime and whose only act of helping is to return property to its owner': *TCL* at 345. His grievance is with the imposition of liability upon persons, such as the weighbridge operator in *NCB in Gamble*, who are carrying out an otherwise lawful activity (*TCL* at 341-3).

⁶⁷ [1984] 1 QB 581.

⁶⁸ Despite the fact that it was a civil action Woolf J pertinently recognised that the decision involved 'dangers of trespassing upon the jurisdiction of the criminal courts.': *ibid.* at 592.

⁶⁹ In this instance there is a substantive offence: s.28(1) Sexual Offences Act 1956 provides that it is 'an offence for a person to cause or encourage ... sexual intercourse with ... a girl under 16 for whom he is responsible.' However, the application of the conduct and fault elements of complicity is appropriate.

⁷⁰ The victim that the offence is designed to protect cannot be guilty of the offence in question: *Tyrell* [1894] 1 QB 710.

⁷¹ [1984] 1 QB 581 at 584.

⁷² [1984] QB 795.

⁷³ [1984] 1 QB 581 at 587.

This is a convincing argument in terms of an exposition of the policy concerns involved in the facts of the case. Few would quibble with the proposed solution that a doctor should be criminally accountable only when he 'acts with the intention of encouraging [unlawful] sexual intercourse'⁷⁴ However, the proposed solution does not square with the case law and Woolf J virtually admitted as much.⁷⁵ Regrettably, the conduct that he wished to exculpate but (rightly) believed would incur liability involved instances, 'where the doctor decides to give the advice and prescribe contraceptives despite the fact that he was firmly against unlawful sexual intercourse taking place but felt, nevertheless, that he had to prescribe the contraceptives because, whether or not he did so, intercourse would in fact take place, and the provision of contraceptives would, in his view, be in the best interests of the girl in protecting her from an unwanted pregnancy and the risk of a sexually transmitted disease'⁷⁶. Furthermore, it was agreed that, although the doctor acted from good motive, this was not an acceptable defence. Citing *NCB v Gamble*, it was confirmed that '[e]ven if your motives are unimpeachable, if you in fact assist in the commission of an offence ... you are an accessory.'⁷⁷ It was therefore necessary to find an alternative argument to exculpate the doctor's actions and, although unacknowledged, this was found at the expense of the ruling in *Bainbridge*. Despite *Bainbridge's* categorical pronouncement that it was unnecessary for the potential accessory to know the details of the offence, *Gillick* was decided on the basis that,

In order to be an accessory, you normally have to know the material circumstances. In such a situation the doctor would know no more than that there was a risk of sexual intercourse taking place at an unidentified palace with an unidentified man on an unidentified date – hardly the state of knowledge which is normally associated with an accessory before the fact.⁷⁸

3.2 INCHOATE AIDING: A CRITIQUE OF THE REFORM PROPOSALS

This backdrop of the problems that exist with the *mens rea* of complicity provides a purview of the difficulties that the proposed new offence of inchoate aid needs to overcome. Unfortunately, neither the Law Commission nor Spencer have been able to suggest a better alternative because the same dilemma exists whether the basis of liability is derivative or inchoate: intention circumscribes the fault too narrowly to be sufficiently useful in cases where the accomplice has

⁷⁴ *Ibid* at 593.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*. Cf *Steane* [1947] KB 997 where the defendant was exculpated from assisting the enemy during the war via the transmission of favourable radio broadcasts on the basis that he had not acted with the intention of so helping the enemy but with the intention [in fact, the motive] of saving his family from being sent to a concentration camp; *Salford Health Authority, ex p. Janaway* [1989] AC 537.

no interest in the outcome but is considered sufficiently culpable to deserve criminal liability, and recklessness casts the net too wide.⁷⁹ Returning to the provisional definition of assisting crime, it is now evident that the provision attempts to narrow the existing ambit of liability:

- A person commits the offence of assisting crime if he
- (a) knows or believes that another (“the principal”) is doing or causing to be done, or will do or cause to be done, acts that do or will involve the commission of an offence by the principal; and
 - (b) knows or believes that the principal, in so acting, does or will do so with the fault required for the offence in question; and
 - (c) does any act that he knows or believes assists or will assist the principal in committing that offence.⁸⁰

Whilst not limiting the fault to intention or purpose, s.1(a) attempts to refine and curtail the range of the accessory’s recklessness. It introduces the requirement for an element of greater certainty insofar that the accessory must believe that the principal “will”, rather than “may”, commit an offence. Nevertheless, this refinement may still cast the net of liability too wide. It would still result in the liability of the doctor in *Gillick*. The doctor *believes* that an offence will take place and *knows* that his act will assist it. Moreover, the inchoate offence of aiding will be complete whether the girl finds a sexual partner or not. In this sense, the new proposal extends liability.

Arguably, the cases of recklessness to which secondary liability should be attached involve the provision of latently dangerous aid which threatens serious harm. Thus, whilst there might be little ambivalence in considering that a gun seller should be held accountable for the results of his knowing sale,⁸¹ the moral censure becomes more ambiguous when alternative examples are posited. Would we expect the supplier of a computer modem to be held liable as a secondary party if the purchaser confided that his principal reason for buying the modem was to access music sites in order to download the latest singles, in contravention of copyright? Would it make a difference if the buyer admitted that he intended to access child pornography sites on the internet? What if the seller expressed her disgust but sold the modem, anyway, perhaps under the

⁷⁸ [1984] 1 QB 571 at 595.

⁷⁹ LCCP No. 131 paras. 4.76-4.88.

⁸⁰ *Ibid.* para. 4.99.

⁸¹ Sullivan, in “The Law Commission Consultation Paper on Complicity (2): Fault Elements and Joint Enterprise” [1994] Crim LR 252 at 253, uses the gun sale example to argue for a further category of *mens rea*: ‘Arguably, ... explicit provision should be made to include “conditional” knowledge as a form of culpability. D sells a gun to P, aware that P will use the gun to threaten V should V not repay a debt that he owes to P. D is aware of the probability that V will pay when asked; P wants the gun “just in case.” On the face of it D does not know or believe that P *will* do an act involving the commission of an offence; the chances are that he will not do it. But there is something more than suspicion here; if V does not pay, P will threaten him with the gun and D knows this.

misconception that she was under an obligation to make the sale? The difficulty becomes yet more acute when the basis of accessorial liability is subjective recklessness. When the provision of the advice or equipment has a lawful, and, by implication, a socially beneficial use, but may also be misused in an illegitimate way, the imposition of secondary liability based on the belief that there is a risk of the receiver putting the aid to its improper use is particularly fraught. It has been asserted that '[t]he present law makes ordinary people accomplices in crime when they have been merely pursuing their ordinary lawful vocations'⁸², and that the breadth of liability is wide enough to cover social activities, so as to convert party hosts into 'auxiliary policemen' who must ensure that their guests do not drive after drinking too much of the freely provided alcohol.⁸³ A serious objection to the proposals for change is that they do not sufficiently alleviate these current problems.

At present, we are governed by a very broad conception of complicity, considerably tempered by a lack of full enforcement. The acceptability of a proposal for a new offence must be tested against an assumption of full enforcement.⁸⁴

One solution to the problem would be to limit the application of knowing assistance to indictable offences.⁸⁵ Summary offences would be covered by intentional assistance with the requirement that the accessory provide assistance with the purpose of furthering the commission of the target offence. Furthermore, a potent suggestion has been made for the lesser degree of fault involved in knowing assistance to be reflected by a designated reduction in the maximum sentence to half of the term provided for the principal offence.⁸⁶ This would officially acknowledge that the accessory does not share the degree of fault as the principal offender. Nevertheless, whilst, this solution might help remedy the iniquities of the existing law, it does nothing to support the argument for a change in the basis of liability. The point remains that, with regards to the fault element of assisting crime, the proposals to amend the foundation of complicity from derivative to inchoate liability provide neither significantly greater clarity nor remove the potential for oppressive law enforcement.

⁸² Williams, "Complicity Purpose and the Draft Code" [1990] Crim LR at 19.

⁸³ *Ibid.* at.21.

⁸⁴ Sullivan, *op cit.* n.81 at 254.

⁸⁵ This is considered in LCCP No. 131 paras. 4.117-4.173 and supported by Sullivan, *ibid.* at 256. It was originally Glanville Williams' suggestion that summary offences be exempted from complicity: *TCL* at 343 n.8.

⁸⁶ Sullivan, *ibid.*

4 CONSPIRACY

It has been argued that it is not only incitement and complicity that have been extended to accommodate the lacuna created by the absence of a facilitation offence. Conspiracy, too, has been called into service to perform this function.⁸⁷ However, of the three inchoate offences conspiracy has the most uncertain ambit. Historically, it has perhaps been more flexible even than complicity. Furthermore, the elements of conspiracy certainly provide some degree of overlap with complicity. Nevertheless, conspiracy has not been established within the new regime proposed by the Law Commission.⁸⁸ The following analysis is restricted to an examination of the existing convergence between conspiracy and complicity and a consideration of the consequences of eliminating conspiracy from the reform proposals.

Reduced to its simplest form, the prohibited conduct⁸⁹ for conspiracy is an agreement.⁹⁰ Section 1(1) of the Criminal Law Act 1977 provides that a statutory conspiracy occurs when

- (a) a person agrees with any other person or persons that a course of conduct shall be pursued; and
- (b) that course of conduct will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions.

However, at common law the interpretation of a proscribed agreement is wide enough to include an agreement that aims at a non-criminal objective.⁹¹ Historically, 'there was elasticity in the requirement that the agreement include an unlawful act'⁹². This makes conspiracy wider than

⁸⁷ Spencer, *op cit.* n.16 at 154-6.

⁸⁸ LCCP No. 131 para. 1.20

⁸⁹ 'In actuality, conspiracy defies division into the classic elements of criminal act and criminal intent, since the act, being volitional, includes within itself the intent': "Developments in the Law Criminal Conspiracy" [1959] 72 Harv LR 920 at 935.

⁹⁰ 'In the case of conspiracy as opposed to the substantive offence, it is what was agreed to be done and not what was in fact done which is all important.' *Bolton* (1991) 94 Cr App R 74 at 80, *per* Woolf LJ.

⁹¹ It is the ultimate aim of the Law Commission to limit the offence of conspiracy to agreements to commit crimes: Law Commission, *Conspiracy and Criminal Reform* No. 76 (HMSO, 1976) (hereafter Law Com No. 76) para 1.113. In the meantime, common law continue to exist side by side with statutory conspiracies. Common law conspiracies include conspiracy to defraud (which is also a statutory conspiracy) and conspiracies to corrupt public morals or to outrage public decency (which are not statutory conspiracies but are separate heads of conspiracy liability). See *Smith & Hogan* at 273-296. Whilst this also applies in the United States (see LaFave & Scott at 525-6), it is not the case in South Africa, where the agreement must aim at a crime (see below, p.200).

⁹² *Winfield, op cit.* n.13 at 378. *Poulterers Case* produced the landmark, in 1611. Prior to that the writ of conspiracy would only lie when the victim of the malicious falsehood had been indicted and acquitted. In this case, the Star Chamber decided that the agreement itself was punishable, even if its purpose remained unexecuted: *op cit.* n.89 at 923 and La Fave & Scott at 525.

incitement and attempt, which requires that the result incited or attempted must be a crime,⁹³ and it renders the imposition of a convincing rationale behind conspiracy more tricky than the orthodox risk endangerment explanation that supports early intervention at a point of proximity to the manifestation of criminal action.⁹⁴ Indeed, the fact that it is the agreement rather than the object that is the 'gist of the crime'⁹⁵ produces 'a somewhat inharmonious element in a system of criminal law which purports to punish intent only when objectively manifested by action resulting, or likely to result, in socially harmful consequences'⁹⁶. Yet, the rationale is important because without a firm understanding and grounding of the purpose behind the crime, it is only too easy to extend the offence into dangerously amorphous territories. It is therefore appropriate to pause and examine the rationale of conspiracy.

It is tempting to justify criminalising the parties to an agreement by the explanation that conspiracy enables early intervention to prevent commission of an intended offence, and so provides potent social protection.⁹⁷ This is the argument for making attempt an offence. However, it has been suggested that, in the case of conspiracy, this is not an entirely convincing explanation: comparing the seriousness of action required to substantiate the conduct element of attempt, an agreement is an act that is not sufficiently proximate to the completed offence to demonstrate the requisite certainty that the intended crime is on the verge of completion. To provide a direct comparison, a 'declaration by one person of his unshakable resolution to commit a crime and the taking of preparatory steps ... does not amount to a crime'⁹⁸ of attempt. Therefore, why should it be a crime for two or more people to arrive at a potentially unexpressed⁹⁹ agreement to commit a crime without further evidence of its manifestation? Clearly, further clarification is required to disclose the special significance attached to agreement.¹⁰⁰ The usual justification involves the argument that the effect of confederacy

⁹³ *Smith & Hogan* at 273.

⁹⁴ See above, pp.177-178.

⁹⁵ *Op cit.* n.89 at 922.

⁹⁶ *Ibid.*

⁹⁷ E.g. Law Com No. 76 para 1.5.

⁹⁸ *Smith & Hogan* at 305.

⁹⁹ 'Conspiracy is by its nature a clandestine offense. It is improbable that the parties will enter into the illegal agreement openly.': *op cit.* n.89 at 933. In fact agreement is essentially a mental operation. A person might purport to agree whilst secretly intending to have no part or to betray his fellows at the earliest opportunity. Verbal communication is therefore not a criterion although the agreement 'must be manifested by acts of some kind': *Smith & Hogan* at 274. On the other hand, mere discussion or negotiation is not enough; there must be a definite mutual decision to go ahead: *Walker* [1962] Crim LR 458. Once the agreement has been reached with at least one co-conspirator, it is not necessary that further conspirators should ever have been met.

¹⁰⁰ See Dennis, "The Rationale of Criminal Conspiracy" (1977) 93 LQR 93.

increases the risk of the offence being actually committed.¹⁰¹ However, pause for thought reveals that this argument is not particularly sustainable. There is no greater probability of ultimate criminal activity when it originates in an agreement between two or more parties rather than with the resolve of a determined individual. It has been suggested instead that the decision to criminalise the establishment of an agreement involves a belief or fear¹⁰² that it is inherently wicked to plot the commission of a crime. In accordance with this line of reasoning, 'the uneasiness produced by the consciousness that such groupings exist is in itself an important antisocial effect'¹⁰³. The potential for anti-social behaviour is exacerbated by two distinct possibilities that do not exist when an individual acts alone. The first is that social pressure not to offend is offset by the imposition of peer pressure within the group of conspirators urging the commission of the crime.¹⁰⁴ The second is the fact that the group provides both the focal point for the shared mischievous intent and a source of potential communal creativity and refinement, unavailable to a solitary, though determined, individual. Perhaps this apprehension over the latent effects of escalating clandestine and anti-social associations goes some way towards explaining the rise of the possibility to include within the offence of conspiracy a confederacy towards an act which is not a crime. Nevertheless, it contains the kernel for a sweeping liability, the fruits of which have been plucked in the United States where conspiracy has been exploited to combat the growth of organised crime and in the last century, for political ends, to curb the growth of trade unions. In the United States, it has been established that conspiracy is a continuing crime, which is a sensible conclusion. After all, the threat posed by the conspiracy is not the communicated decision but 'the act of the agreement itself, that is, the continuous and conscious union of wills upon a common undertaking'¹⁰⁵. However, as LaFave and Scott concede, under these terms, the rationale for conspiracy needs to comprise two separate headings:

¹⁰¹ 'The heart of this rationale lies in the fact – or at least the assumption – that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end... [Thus] [w]hen the defendant has chosen to act in concert with others, rather than to act alone, the point of justifiable intervention is reached at an earlier stage... The agreement itself, in theory at least, provides a substantially unambiguous manifestation of intent; it also reduces the probability that the defendant can stop the wheels he has set in motion, since to restore the status quo would now require the acquiescence and co-operation of other wills than his own. More important, the collaboration magnifies the risk to society both by increasing the likelihood that a given quantum of harm will be successfully produced and by increasing the amount of harm that can be inflicted.'; *op cit.* n.89 at 923-4.

¹⁰² Williams, *TCL* at 420: 'The only possible explanation is that the law (or, if you prefer, the Establishment) is fearful of numbers, and the act of agreeing to offend is regarded as such a decisive step as to justify its own criminal sanction'.

¹⁰³ *Op cit.* n.89 at 925. See also Dennis, *op cit.* n.100 at 51-52.

¹⁰⁴ *Op cit.* n.89 at 924.

¹⁰⁵ *Ibid.* at 926

(1) as with solicitation and attempt, [conspiracy] is a means for preventive intervention against persons who manifest a disposition to criminality; and (2) it is also a means of striking against the special danger incident to group activity.¹⁰⁶

However, before returning to the utilisation of conspiracy in other jurisdictions, it is useful to consider the cases under English law that create noteworthy problems or interface with the law of complicity. Despite declining to incorporate conspiracy¹⁰⁷ within its reform proposals for secondary party offences, the Law Commission admitted that ‘there is likely to be some overlap in the practical application between the law of conspiracy and the law of complicity¹⁰⁸. Certainly, the elements of conspiracy may also satisfy the conduct requirements for complicity in that the agreement may be interpreted as providing encouragement or mutual support.¹⁰⁹ Thus, there is a linear relationship with complicity in the sense that, once the conspired offence has actually been committed, the non-perpetrator becomes an accessory to it. However, it has also been argued that the law of conspiracy, in common with incitement and complicity, has been distorted to plug the gap left in the law by the non-existence of a facilitation offence.¹¹⁰

In *Anderson*¹¹¹ the defendant, in return for a sum of money, agreed to supply a prisoner with diamond wire and other provisions for effecting a jail break. In the event, having received a down payment, Anderson was injured in a road accident and took no steps towards pursuing his part in the escape plan. However, he admitted that his intention had been to hand over the diamond wire then to demand further payment and abscond without providing the outstanding supplies. He argued that he had never intended that the plan should be carried through; neither did he believe that the escape was feasible. The Court of Appeal was asked to decide whether these facts produced liability for conspiracy or for aiding and abetting and chose to apply the former offence. In interpreting conspiracy to fit the facts of the case, Lord Harwich divided the offence definition into three parts:

(1) “if a person agrees with any other person or persons that a course of conduct shall be pursued” (2) “which will necessarily amount to or involve the commission of any offence

¹⁰⁶ LaFave & Scott at 530.

¹⁰⁷ LCCP No. 131 para. 1.21.

¹⁰⁸ LCCP No. 131 para. 1.20.

¹⁰⁹ KJM Smith, *Treatise* at 9: ‘The language of complicity often supports a complicity charge where there has been a confederacy or common purpose between parties; but agreement is not an essential ingredient of complicity, merely one possible (albeit uncertain) mode.’

¹¹⁰ Spencer, *op cit.* n.16 at 154-6.

¹¹¹ [1986] 1 AC 27.

or offences by one or more of the parties to the agreement (3) “if the agreement is carried out in accordance with their intentions”¹¹².

The first two requirements offered no difficulty. It was not necessary that Anderson, personally, have committed a substantive offence. He need only to have known that the course of conduct to which he had agreed, involved the commission of an offence by one of the parties to the agreement. With regard to the third clause, it was decided that the parliamentary draftsman could not have meant the word “intentions” to refer to the individual aim or motive of the parties. Instead it referred to the terms – interpreted in a loose, non contractual manner – of the agreement¹¹³ and Anderson was accordingly held guilty. In support of this contention, Lord Harwich provided the following illustration:

The proprietor of a car hire firm agrees for a substantial payment to make available a hire car to a gang for use in a robbery and to make false entries in his books relating to the hiring to which he can point if the number of the car is traced back to him in connection with the robbery. Being fully aware of the circumstances of the robbery in which the car is proposed to be used he is plainly a party to the conspiracy to rob. Making his car available for use in the robbery is as much a part of the relevant agreed course of conduct as the robbery itself. Yet, once he has been paid, it will be a matter of complete indifference to him whether the robbery is in fact committed or not. In these days of highly organised crime the most serious statutory conspiracies will frequently involve an elaborate and complex agreed course of conduct in which many will consent to play necessary but subordinate roles, not involving them in any direct participation in the commission of the offence or offences at the centre of the conspiracy. Parliament cannot have intended that such parties should escape conviction.¹¹⁴

This provides the template for the kind of scenario that Spencer maintains should be remedied by the introduction of a facilitation offence.¹¹⁵ However, the implications run deeper and require a conscious amendment to the risk-endangerment rationale of conspiracy. It is no longer possible to argue that the object of the offence is limited to enabling early intervention during the incipient stages of the offence commission. As in the United States, conspiracy is also being utilised to control anti- social group activity.

In the United States, conspiracy has been subjected to severe criticism, not least by the judges themselves. Thus, conspiracy has been described as an ‘elastic, sprawling and pervasive offense ... so vague that it almost defies definition [and also] chameleon-like [because it] takes on a

¹¹² *Ibid.* at 37.

¹¹³ *Ibid.* at 38.

¹¹⁴ *Ibid.*

¹¹⁵ See also *Hollinshead* [1985] AC 97 where the defendants were found liable for conspiracy to defraud when they marketed and manufactured devices that, when fitted to electricity meters caused the meters to under-record.

special coloration from each of the many independent offenses on which it may be overlaid¹¹⁶. In fact, the usefulness of conspiracy charges to the prosecution¹¹⁷ arises not only from the vagueness of the legal concept but also from the special rules of procedure and evidence that apply in a conspiracy context.¹¹⁸ With regard to the interpretation of the offence, there has been a blurring of the distinction between the parties involved in the agreement and the agreed objective with the term 'conspiracy' being used to refer to either.¹¹⁹ By focussing the conspiracy on the fellow conspirators and their actions, a person may be held liable for the substantive offences committed by the other parties due, in effect, to the association rather than the terms of the agreement. However, it must be conceded that this is not necessarily an inappropriate result. As long as the crimes committed are encompassed within the original agreement, there is, in theory, no problem in holding all parties to the agreement accountable for them. However, there is no requirement for the terms of the agreement to be enunciated: 'a mere tacit understanding will suffice, and there need not be any written agreement or even speaking of words which expressly communicates agreement'.¹²⁰ This is a practical recognition of the way in which criminal understanding and collusion arises. Consequently, 'the evidence from which a jury may infer a criminal conspiracy is almost invariably to be found in the conduct of the parties'¹²¹. However, the scope for burgeoning liability is realised when it is appreciated that it is necessary, therefore, to infer the terms of the agreement. Furthermore, Lord Harwich asserted that it is not inappropriate 'to ask whether the further inference can be drawn that a crime would necessarily have been committed if the agreed course of conduct had been pursued in accordance with the *several* intention of the parties'¹²². It is submitted that this verges upon damning by association.¹²³

¹¹⁶ *Krulewicz v US* 336 U.S. 440, S.Ct. 716, 93 L.Ed. 790 (1949) cited in LaFave & Scott at 527.

¹¹⁷ Judge Learned Hand called conspiracy 'the darling of the modern prosecutor's nursery': *Harrison v US*, 7 F.2d. 259 (2nd Cir. 1925).

¹¹⁸ For details, see LaFave & Scott at 527-30.

¹¹⁹ *Op cit.* n.89 at 927-933

¹²⁰ *US v Hartley*, 678 F.2d. 961 (11th Cir. 1982); *O'Neil v. State*, 327 Wis. 391, 296 N.W. 96 (1941); *American Tobacco Co. v US*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); *State v Gillespie*, 336 S.W.2d, 677 (mo. 1960), cited in LaFave & Scott at 532.

¹²¹ *Anderson* [1986] 1 AC 27 at 38, *per* Lord Harwich.

¹²² *Ibid.* (emphasis in original)

¹²³ The inferential drawing up of the agreement (combined in the United States with the lenient admission of permissible evidence) may permit the imposition of liability upon a party to a nebulous agreement for all of the substantive offences which his co-conspirators go on to commit. Furthermore, it results in the logical possibility of open-ended liability, similar to that deduced from *Bainbridge*. Indeed, the logic has been applied and upheld. Thus, in *Pinkerton v US* 328 U.S. 640 (1946), Pinkerton was indicted both for conspiring with his brother to evade taxes and for the substantive offences committed by his brother while Pinkerton was in prison. Similarly, in *Anderson v Superior Court* 78 Cal. App. 2d 22, 177 P2d 315 (1947)

Indeed, the Law Commission accept that the net result of the *Anderson* decision is to melt the boundaries of conspiracy and complicity so that the two routes of liability not only begin to merge, but potentially cross-contaminate each other with innovative and insidious influences. Discussing Lord Harwich's illustration of the indifferent car hirer, the Commission makes three pertinent observations:

First the conduct described is most naturally thought of as that of an assister, rather than as of one who *agreed* that the principal crime should be committed: yet, if the robbery is not committed, for whatever reason, the law that specifically punishes assisters is not available. Second, it is a strongly contested question whether "complete indifference" to the actual commission of the principal crime should save an accessory to a completed crime; that question is however ignored where the principal crime is *not* committed *provided* that the exchanges between accessory and principal can be characterised as conspiracy. Third, in *Anderson* an alleged assister was found guilty of conspiracy even though he did not think that his contribution would assist the commission of the principal crime. That involved not only a controversial interpretation of the statute defining the crime of conspiracy, but also the application of a more severe rule than would have been applied if the principal crime had been committed and the accused in *Anderson* had been charged as an accessory. In those circumstances it would have had to be shown that he knew that his acts were capable of assisting and would assist in the commission of the principal offence.¹²⁴

Theoretically, if the Commission's proposals were to be implemented, future *Andersons* could be charged for assisting crime, but conviction would depend upon the eventual designation of the fault element for the new offence.¹²⁵ In the event that indifference to the crime commission or lack of belief in its success should exculpate the defendant, it is feasible that the prosecution might resort to a conspiracy charge. In that case, the fact that the future employment of conspiracy is left unclear provides no certainty that the courts would circumscribe it so as to make conspiracy liability inapplicable. The overlap with the inchoate offence of conspiracy and the suggested new offences of assisting and encouraging crime make prosecutorial choice almost inevitable. The Law Commission justifiably bemoan the existing confusion asserting that:

It might ... be argued that, even when the rules as to conspiracy are properly applied, it is preferable for the misconduct of those who assist or encourage others to commit crimes to be controlled by offences specifically directed at that category of conduct, rather than for those assisters or encouragers to be wrapped together with the intended principal offender in a more generally defined offence of conspiracy.¹²⁶

the defendant, who procured patients for an abortionist, in return for payment, was held liable for all the abortionist's subsequent operations, including those in which she had played no part.

¹²⁴ LCCP No. 131 para. 3.25 (emphasis in original).

¹²⁵ See above, pp.190-193.

¹²⁶ LCCP No. 131 para. 1.21.

It is submitted that, having failed to position conspiracy within the proposed new regime of inchoate secondary liability, the Law Commission proposals threaten to exacerbate the situation.

4.1 CONSPIRACY IN SOUTH AFRICA

Unlike in Anglo-American jurisdictions, Roman-Dutch law did not impose criminal liability for a mere agreement to commit a crime 'without some act being done in pursuance thereof'¹²⁷. However, the utility of criminalising the act of agreement was recognised and translated into South African law by statute. Accordingly, '[a]ny person who ... conspires with any other person to aid or procure the commission of or to commit ... any offence ... shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable'¹²⁸. The interpretation of the definition results in similar criteria to conspiracy in English law. The agreement comprises the unlawful conduct¹²⁹ and may be tacit.¹³⁰ Whilst the parties need not have planned the details,¹³¹ they must have gone beyond the point of negotiation.¹³² Furthermore, there must be a shared intention or 'meeting of minds'¹³³ so that duplicity on the part of one of the potential conspirators will obviate the subjective agreement that is required.¹³⁴ However, it is not necessary for co-conspirators to know each others' identities.¹³⁵ Interestingly, the *mens rea* for conspiracy is a potential source of vagueness under South African law. The courts have not decided whether one or more of the conspirators must have intended to commit the substantive crime.¹³⁶ Usually, the English dilemma of whether direct/indirect intent or recklessness will suffice is avoided under South African law by the application of *dolus*. As *dolus* effectively encompasses direct intent (*directus*) and subjective recklessness (*eventualis*), it is normally the case that a defendant will possess the necessary fault if he foresees the possibility that an offence will be committed. And it has been suggested¹³⁷ that *dolus eventualis* should

¹²⁷ Burchell & Milton at 454.

¹²⁸ S.18(2)(a) Riotous Assemblies Act (17 of 1956).

¹²⁹ *S v Cooper* 1976 (2) SA 875 (T) and *S v Sibuyi* 1993 (1) SACR 235 (A).

¹³⁰ Snyman, *CL* at 281.

¹³¹ *S v Alexander* 1965 (2) SA 818 (C) at 822.

¹³² Burchell & Milton cite the English case of *Walker* [1962] Crim LR 458 to support this proposition.

¹³³ Burchell & Milton at 456.

¹³⁴ *R v Harris* (1927) 48 NLR 330.

¹³⁵ Snyman, *CL* at 282.

¹³⁶ Burchell & Milton at 456.

¹³⁷ Burchell & Milton at 456.

suffice for conspiracy.¹³⁸ Consequently, open-ended liability is a potential hazard for conspirators.¹³⁹

The offence definition of conspiracy does not distinguish between situations where the intended offence is committed and situations where it is not¹⁴⁰ so although it would be logical to indict the parties as accomplices once the substantive crime has been committed, there is no legal requirement that this be adhered to. Consequently, there is a potential for conspiracy to be employed for uses similar to those permitted in the United States and in England and Wales. In fact, criminal conspiracy has rarely been used by prosecutors in South Africa 'probably because the common-purpose rule has served as a far more vigorous sanction against group criminal activity'¹⁴¹. This is an fascinating observation, made still more interesting by the following, albeit tentative, prediction:

Perceptions of the political dimensions of the common-purpose rule may lead to its disfavour in a new South Africa and conspiracy liability, which traditionally has been relatively untainted by perceived political influences, may provide the obvious back-stop for those who feel that group criminality should be curbed by punishing agreements to commit crimes.¹⁴²

Indeed, there has since been a concerted attempt to distinguish conspiracy from common purpose. In *Nooroodien*¹⁴³, it was stressed that common purpose has no application where conspiracy has been proved and that the two forms of liability should not be equated.¹⁴⁴ *Nooroodien* compared conspiracy with the active association form of common purpose. However, in the following year,

¹³⁸ With the qualification, that the defendant must have known that the conduct agreed upon was a crime. Ignorance of the law is available as a defence under South African law, but not in Anglo-American legal systems.: *S v De Blom* 1977 (3) SA 513 (A).

¹³⁹ 'As in the case of the accomplice and the inciter, where X and Y conspire to commit, say, a single theft and Y commits an assault or a series of thefts, X's liability for conspiracy depends upon his intention, that is his foresight of the possibility of the commission of the crime or crimes by Y.': Burchell & Milton at 457.

¹⁴⁰ The same applies to the offence of incitement see above, p.179.

¹⁴¹ Burchell & Milton at 454.

¹⁴² *Ibid.*

¹⁴³ *S v Nooroodien en Andere* 1998 (2) SACR 510 (N).

¹⁴⁴ A meeting was held where the victim was condemned to death prior to the actual killing. However, it was not proved that all the attendees of the meeting agreed with the decision to execute the victim even though they found themselves among the crowd that eventually killed him (*ibid.* at 521). The *Mgedezi* criteria for active association were upheld (above, at p.118). As to conspiracy, it was held that there must be a meeting or assembly at which the decision to commit the offence was taken, that the terms of the decision were clear and that the defendant was present at the meeting and participated in the making of the decision. Mere presence or silence at the meeting will not suffice (at 520).

*Mhkize*¹⁴⁵, a case considering common purpose arising by prior agreement used the term “conspiracy” to denote the content and scope of the common purpose.¹⁴⁶

The salient point is that each jurisdiction needs to develop an offence to combat the specific socio-political problems of group crime. In English law resort has sometimes been made to joint enterprise liability as a means of combating the consummated activities of terrorist organisation¹⁴⁷ but it is conceivable that, as in the United States and, potentially, the future South Africa,¹⁴⁸ conspiracy could be further developed for the purpose. By failing to incorporate conspiracy or joint enterprise within the reform proposals, the Law Commission’s framework leaves open the possibility that either route might be employed to provide a mop-up liability for group activity that is perceived to be anti-social or dangerous yet is not accommodated within the definitions of assisting and encouraging crime. Moreover, the hazard was not unappreciated by the Commission but was implicitly recognised in the following admission: ‘[w]e remain conscious of the potential width of the crime of conspiracy, and of concerns that that crime should not be used unnecessarily.’¹⁴⁹

5 THE BENEFITS OF AMENDING COMPLICITY TO AN INCHOATE BASIS

The essential appeal of the Law Commission’s proposal is the clarity of the doctrinal structure that would be imposed upon secondary liability.¹⁵⁰ The present overlap between criminal complicity and incitement would be absorbed within the new framework and the basis of liability would better reflect the culpability of the contribution by secondary parties. Moreover, there is a compelling validity in the assertion that a secondary party’s liability should be judged at the completion of contribution rather than at the completion of the principal offence. The accomplice has control over his own conduct whilst the actual offence commission is entirely in the hands of the prospective perpetrator. As the accessory has done all that he can at the time of completing

¹⁴⁵ *S v Mhkize* 1999 (2) SACR 632 (W).

¹⁴⁶ *Ibid.* at 638.

¹⁴⁷ *DPP for Northern Ireland v Maxwell* [1978] 3 All ER 1140; *Gamble*[1989] NI 268; *Crooks* [1999] NI 226; *Gilmour* [2000] 2 Cr App R 207.

¹⁴⁸ Burchell & Milton, at 454, make the specific caveat that should criminal conspiracy be adopted to replace the utility of common-purpose liability it would have to be carefully circumscribed in order to prevent the crime being used to punish political dissent and to fetter freedom of expression.

¹⁴⁹ LCCP No. 131 para. 1.2

¹⁵⁰ KJM Smith, *op cit.* n.38 at 250: ‘Indeed, the Law Commissions proposals were inspired less by practical considerations than by the claimed conceptual appeal of remodelling complicity into an inchoate form, thereby achieving a rationalised expression of complicity’s true nature.’

his own contribution, it is wholly sensible that his liability should crystallise at that point. In consequence the law would reap the benefit in two further areas where the application of derivative liability discloses inherent complications. Firstly, the move to inchoate liability would at once solve the problem of open-ended liability for the provision of advice or assistance. Thus, the liability of future Bainbridges would depend upon their compliance with the definition of assisting crime. However, as the inchoate offence requires no consideration of the subsequent perpetration of the target offence, once satisfied, there would be no question of secondary liability for the principal's multiple crime commissions. Secondly, the crystallisation of liability for the target offence at the point of providing the encouragement or assistance would eliminate the difficulties attached to determining an accessory's liability for variations by the perpetrator.¹⁵¹ Even a deliberate departure by the principal would fail to exculpate the secondary party who would remain liable for assisting or encouraging the unconsummated crime.

6 THE DRAWBACKS OF AMENDING COMPLICITY TO AN INCHOATE BASIS

Despite having enunciated a number of attractive arguments in favour of amendment, it is important to recognise that the Law Commission's proposals harbour a number of significant drawbacks. The most fundamental disadvantage, and the one that underpins the majority of objections, is the fact that, whilst the proposed reform involves a sound and rational doctrinal basis, it fails to square with the orthodox expectation of blame. Inchoate liability offends the public sense of justice when a secondary party has contributed to an offence that has actually been committed. At this point theory is defeated by experience; however doctrinally illogical, there is little doubt that people 'react quite differently when an act causes [or contributes to] harm from when the same act does not'¹⁵². However, even when the harm has been actualised, the implementation of the Law Commission's proposals would result in secondary party liability no longer being judged in terms of harm-creation, but merely of harm-endangerment.¹⁵³ This is inevitable if the Law Commission's suggestion that prosecutions would generally arise only when an offence has been committed were to eventuate.¹⁵⁴ From the viewpoint of political acumen, the possibility that the reform proposals might founder beneath clamours of public denunciation, condemns them to parliamentary oblivion:

¹⁵¹ See above, pp.164-167.

¹⁵² JC Smith, "Reform of the Law of Offences Against the Person" [1978] CLP 15 at 17.

¹⁵³ KJM Smith, *op cit* n.38 at 244-5.

‘[T]he idea that guilt depends on whether an act causes the harmful result, irrational though it may be, is deep-seated in our law... It seems that the public attaches enormous and apparently increasing importance to the result which the criminal act causes, and Parliament reacts to that.’¹⁵⁵

Moreover, there is a further objection to the proposals. In addition to the argument that a change to inchoate liability will fail to fulfil public demand for proper censure, there are significant areas of difficulty in existing complicity law that would not be satisfactorily resolved by the change.

At face value inchoate liability appears to solve liability dilemmas in scenarios such as those provided in *Cogan*¹⁵⁶ and *Bourne*.¹⁵⁷ This anticipation arises from the realisation that under inchoate liability, there would be no need to tweak traditional derivativeness to permit liability to be grounded in the performance of the *actus reus* rather than the complete offence definition. However, closer scrutiny of the new offence of encouraging crime reveals that this is not the case. It will be remembered that the proposed definition provides liability for a person who,

- (a) solicits, commands or encourages another (“the principal”) to do or cause to be done an act or acts which, if done, will involve the commission of an offence by the principal; and
- (b) intends that that act or these acts should be done by the principal; and
- (c) knows or believes that the principal, in so acting, will do so with the fault required for the offence in question.¹⁵⁸

Applying the facts of *Cogan*, Leak would be required not simply to have intended that his wife be raped but also to have known or believed that Cogan knew that she was an unconsenting victim.¹⁵⁹ However, the very purpose of Leak’s deception was to ensure that Cogan was not aware of this essential circumstance. Similarly, the new offence fails to fix the appropriate degree of secondary liability when a semi-innocent agent is procured. It is useful to repeat the illustration provided in *Howe*:

A hands a gun to D informing him to go and scare X by discharging it. The ammunition is in fact live, as A knows, and X is killed. D is convicted only of manslaughter, as he might be on those facts. It would seem absurd that A should thereby escape conviction for murder.¹⁶⁰

¹⁵⁴ LCCP no. 131 para. 4.26: ‘In the most usual case the act of assistance will only come to light, or be thought to be worth prosecuting, where the principal crime has been committed.’

¹⁵⁵ JC Smith, “Secondary participation in crime – can we do without it?” [1994] NLJ 679 at 679.

¹⁵⁶ [1976] 1 QB 217, see above, pp.130-133.

¹⁵⁷ (1952) 36 Cr App R 125.

¹⁵⁸ LCCP No. 131 para. 4.163.

¹⁵⁹ KJM Smith, *op cit.* n.38 at 245.

¹⁶⁰ *Howe* [1987] 1 AC 417 at 458 (see above, p.136).

Nevertheless, it appears that the absurdity will eventuate based upon the application of the new offence definition. A must believe that D is not acting with the fault required for murder because any other belief obviates the need for his duplicity. Consequently, the possibility of imposing the greater liability upon a secondary party disappears. Murder liability fails at the final requirement imposed by subsection (c). Indeed, it is also arguable that, by similar reasoning, the potential for differential verdicts where the accessory is liable for a lesser offence than the principal is also extinguished. Consider the following example: A encouraged D to beat V in a fist fight, foreseeing the risk of grievous bodily harm to V, but not intending it. D, on the other hand, beat V with the specific intention of causing him grievous bodily harm. V died as a result of the beating. D clearly has the required fault for murder. However, if A foresaw the infliction of grievous bodily harm but did not know or believe that it was D's specific intention to cause such serious injury, the requirement of subsection (c) is not fulfilled. Of course, it is open to argument that the greater fault includes the lesser, thus A should incur liability for manslaughter. On the other hand, it must be subject to debate whether intention is a qualitatively different state of mind to recklessness. Assessed on the basis of risk-taking, the reality is very different to A's perception. Assuming that the efficiency of D's actions match his purpose, D's intention elevates the chance that V will suffer grievous bodily harm to complete certainty that he will. Hence, A, has unknowingly embarked upon risk-taking with loaded dice: he believes that there is a possibility D will inflict grievous bodily harm but his awareness of the real situation is seriously awry. In fact, there is no doubt that D will so act because it is the very object of his endeavour. If this interpretation is accepted, A is not liable for murder or manslaughter because neither offence fits squarely within the framework of the new offence definition.

In addition, not only would a change to an inchoate basis fail to satisfactorily address the *mens rea* dilemma for the provision of assistance, but it also cannot answer the case where it is uncertain which of the implicated persons was a secondary party and which one a principal. Under complicity liability the difficulty is not insuperable: it simply requires the designation of a principal offence, not a principal offender. Thus in *Swindall and Osborne*¹⁶¹, two drivers were racing each other along the highway and executing a series of dangerous overtaking manoeuvres. During the course of the race a pedestrian was killed but it was impossible to attribute the cause of death to the blow by one particular cart. Nevertheless, both men were held liable because it was established that they had encouraged each other in the commission of the dangerous driving.

¹⁶¹ (1846) 2 Cox 141.

Once this was established, derivative liability permitted the imposition of liability for the causing death by the dangerous driving. Applying the logic of inchoate liability, if the perpetrator was unknown, neither party could be held to account. Swindall and Osborne would be liable only for encouraging the other's dangerous driving (and as a principal in their own dangerous driving). However, they could not be held liable for encouraging the causing of death by dangerous driving because it cannot be substantiated that the actions assisted or encouraged "will involve" the commission of that offence. Moreover, a similarly inadequate solution results when the principal can be identified:

Where we can identify the person who caused death, the other driver will be guilty only of dangerous driving. It is doubtful if this will be regarded as satisfactory in the present climate regarding road traffic offences. A strong case can be made for holding that neither should be liable for a consequence which was unintended, unforeseen and perhaps not easily foreseeable; but it is difficult to see how one and not the other can fairly be held liable for that consequence.¹⁶²

The difficulty persists in all of the offences that involve constructive fault. These include offences where liability for the subsequent result is constructed out of a fault that does not correspond with the ultimate degree of harm, for example, involuntary manslaughter when death is neither intended nor foreseen but results from a reckless assault.¹⁶³ It also encompasses murder under the intention to cause grievous bodily harm limb of the fault element. Under the present framework, a secondary party who foresees that the principal will intentionally cause serious harm, will be liable for murder, should death result. However, the point at which liability crystallises under an inchoate scheme negates this conclusion. The secondary party would be liable for the s.18 offence only.¹⁶⁴ Indeed there is reason to argue that such constructive liability should have no legitimate place within the criminal law.¹⁶⁵ However, if valid,

the argument applies with equal force to secondary and primary parties. The salient point at this juncture is that inchoate liability creates an additional iniquity by imposing constructive liability

¹⁶² JC Smith, *op cit.* n.152 at 680.

¹⁶³ Also the non fatal offences provided for by s.47 and s.20 Offences Against the Person Act where the intention or foresight of the assailant need not encompass the degree of harm actually caused.

¹⁶⁴ JC Smith, *op cit.* n.152 at 680.

¹⁶⁵ See below, pp.256-260, 295-305.

upon only one party. Thus, in public policy terms, the new offences introduce a new set of challenges.¹⁶⁶

7 CONCLUSION

These considerations lead to the conclusion that the creation of an inchoate aiding (or facilitation) offence is to be welcomed, but as an additional offence rather than a replacement for derivative-based complicity. With the introduction of this supplementary alternative, it would be possible to restrict the ambit of complicity, incitement and conspiracy since these means of incurring liability would no longer be required to gap fill. Regrettably, in the final analysis the reform proposals fail to provide an adequate replacement for the overall structure of secondary liability: there are simply too many anomalies. Not least of these is the status and application of joint enterprise. Inchoate liability fails to cater for joint enterprise liability where a collateral offence is committed during the course of the foundational offence. Where the collateral crime is homicide, it is extremely unlikely that an accessory 'will know or believe that ... the principal ... will'¹⁶⁷ cause the death of the victim; the accessory's mental state will not usually exceed foresight of the possibility of death eventuating. Adding further layers of complexity are situations where it may not be possible to confidently identify the perpetrator,¹⁶⁸ whilst cases may arise where it is simply impossible to meaningfully separate joint enterprise from counselling or procuring.¹⁶⁹ Finally, whilst it has been suggested that jurisdictions have a tendency to use a particular offence or liability route to encompass 'hard cases', that is not to imply that such a contingency should be encouraged. Yet, it seems that the reform proposals provide just such a possibility in the proposition that joint enterprise could be established as a separate doctrine. The latent danger of this suggestion has been seen by the examination of South African developments. If joint enterprise were to be decisively uncoupled from the theory of accessory liability, it would provide an opening to pursue similar doctrinally tenuous routes of imposing criminal liability upon secondary parties.

¹⁶⁶ KJM Smith, *op cit.* n.38 at 245: 'Not only does relocating complicity in inchoate territory fail to solve some of the existing problems; it also heightens a few existing difficulties and even generates fresh problems.'

¹⁶⁷ The *mens rea* requirement under subsection (a) for assisting crime (emphasis added), see above, pp.180, 191.

¹⁶⁸ E.g. *Powell; English* [1997] 4 All ER 545; *Hyde, Sussex and Collins* [1991] 1 QB 134.

¹⁶⁹ See below, pp.262-264.

CHAPTER 6

FAULT IN HOMICIDE: PRIMARY AND JOINT ENTERPRISE LIABILITY

1 INTRODUCTION

Unlawful homicide incorporates any unjustified killing that is not deemed to be accidental. Under English law, unlawful homicide is divided into murder and manslaughter. Manslaughter is further divided in voluntary manslaughter, which is essentially mitigated murder, and two forms of involuntary manslaughter, which involve a lesser degree of fault than murder: constructive act manslaughter and gross negligence manslaughter.¹ The object of this chapter is to compare the current fault requirements for primary and secondary parties with relation to murder and manslaughter liability. Secondary party liability for homicide has been most closely considered and refined in joint enterprise cases but, nevertheless, remains, in many ways, inherently unsatisfactory. Furthermore, the uncertain theoretical status of joint enterprise liability adds to the difficulties. The following examination considers the fault required for primary parties compared with that required for joint-enterprising non-perpetrators of homicide. It permits an evaluation of the question raised earlier in the work of whether parties to a joint enterprise should be judged by a more severe standard than secondary parties to a non-common purpose offence. In other words, whether joint enterprise deserves the status of a separate doctrine or head of liability.²

2 JOINT ENTERPRISE LIABILITY

It is useful to begin by returning to the facts of the two appeal cases in *Powell; English*³ to provide access into the typical joint enterprise scenarios. Joint enterprise scenarios typically include a homicide that follows on from the planned and intended offence that lies at the heart of the common purpose. Thus, in *Powell*, the foundational offence was an illegal drugs transaction. In the case of *English*, the intended crime involved a combined physical assault. English's

¹ For the development of the substantive law of homicide see above, pp.69-84.

² Below, pp.262-264.

³ [1997] 4 All ER 545.

offence, by its very nature, involved violence that could feasibly escalate into a life-threatening injury.⁴ However, the foundational offence in *Powell* did not necessarily encompass force or violence.⁵ To that extent, it may be argued that the homicide was collateral in a more discrete sense than is the case where the homicide results from an aggravated form of the original offence. Nevertheless, regardless of the ease with which the transition from foundational crime to homicide eventuates, the liability remains the same.⁶ However, the role of participants may vary. The participant might be a co-perpetrator in the foundational offence or he might be an accessory to it, such as in the case of a getaway driver for a burglary. Where the foundational offence is a violent assault that subsequently escalates causing the victim's death, the same distinction applies. The participant may physically contribute to the assault, striking or holding the victim, or may stand some distance away, watching for the appearance of police or witnesses. Thus, English was a co-perpetrator in the assault upon the police officer when he and his friend attacked the victim with wooden posts. However, at the time the fatal knife wound was inflicted, English had been apprehended and thereby became an accessory offering encouragement. Thus, even at this elementary stage, it is evident that the designation of the parties has the potential for creating complications in assigning standards of liability.

The following hypothetical argument will logically apply the theoretical bases of liability to reveal the tensions in joint enterprise liability. Developing the example of the fatal assault, a participant who jointly contributes to the cause of death is a co-perpetrator of the homicide. As such, his liability is direct, not derivative. The expectation that logically follows is that both of the co-perpetrators will be judged by their individual fault with no relevance needing to be

⁴ For other cases where the foundational offence involved physical force or violence see e.g. assault: *Reid* (1975) 62 Cr App R 109; *Baker* [1994] Crim LR 444; *Carberry* [1994] Crim LR 446; *Chan Wing-Siu v The Queen* [1985] AC 168; *Betty* [1963] 3 All ER 602; *Anderson and Morris* [1966] 2 All ER 644; *Smith (Wesley)* [1963] 3 All ER 597; *Uddin* [1998] 2 All ER 745; *Hui Chi-ming v R* [1992] 1 AC 34; *Gamble* [1989] NI 268; *Greatrex and Bates* [1999] 1 Cr App R 126; *Crooks* [1999] NI 226; *Gilmour* [2000] 2 Cr App R 207 (petrol-bombing); *Day* [2001] EWCA Crim 1594; and robbery: *Bamborough* [1996] Crim LR 744; *Perman* [1996] 1 Cr App R 24; *Slack* QB 775; *Maxwell* [1990] All ER 801; *Roberts* (1993) 96 Cr App R 291; *Betts and Ridley* (1930) 71 Cr App 148; *Penfold* (1980) 71 Cr App R 4.

⁵ For other cases where the foundational offence did not necessarily involve force or violence see e.g. *Beccara and Cooper* (1975) 62 Cr App R 212 (burglary); *Wakely, Symonds and Holly* [1990] Crim LR 119 (burglary); *Barr* (1989) 88 Cr App R 362 (burglary); *Mahmood* [1995] RTR (dangerous driving) *Baldessare* (1931) 22 Cr App R 70 (reckless driving).

⁶ *Hyde, Sussex and Collins* [1991] 1 QB 134 at 138: 'There are, broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where the primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause physical injury to any victim but, for example, to commit burglary. The victim is assaulted and killed as a possibly unwelcome incident of the burglary. The latter type of case may pose more complicated questions than the former, but the principle in each is the same.'

attached to their shared culpability in regard to the killing. On the other hand, the non-contributor to the physical assault, who agrees to assist the offence by standing guard, is an accessory and his liability is derivative rather than direct. Nonetheless, on the face of it, there is no reason why his liability for the homicide cannot also be based upon his own fault. If he agreed to assist the enterprise in the secret hope and expectation that the victim would be killed by his brutal and heavy-handed associates, there is no ostensible reason to exculpate the accessory from murder liability. However, it has already been seen that accessorial liability has been extended, in cases like *Bainbridge*,⁷ to encompass subjective recklessness. Applying this fault standard to the hypothetical sentry, he would be liable for murder if he assisted the offence, foreseeing that the co-perpetrators would, or might, kill the victim during the course of the attack. In contrast, if one of the co-perpetrators, assessed by direct liability, had recklessly, rather than intentionally, caused grievous bodily to the victim, he would be liable, not for murder, but for involuntary manslaughter. The salient question is whether these different conclusions matter and certainly, from a sentencing standpoint, the consequences may be insignificant. Convicted of murder, the accessory would receive a mandatory life sentence. Meanwhile, it is possible that a discretionary life sentence would be imposed upon the co-perpetrator to reflect the gravity of his manslaughter conviction.⁸ Moreover, it is wholly possible that the accessory would be released more quickly than his associate. However, viewed from the different angle of the labelling function of the criminal law, the outcome is profoundly unsatisfactory. The accessory ends his days a convicted murderer, burdened with all of the cultural associations that are attached to this most reviled of crimes. On the other hand, the co-perpetrator who did not intend his own efforts to cause really serious harm will be labelled a manslaughterer. This is so even though he might equally well have believed that his fellow assailant would kill the victim.

Professor John Smith derives the present difficulty from the time of Coke and refers to the judgment in *Macklin*⁹ where it was asserted that ‘...if several persons act together in pursuance of a common intent, every act in furtherance of such intent by each of them is, in law done by them

⁷ [1960] 1 QB 129, see above, pp.189-190.

⁸ Between 1990 and 1999, the longest sentence imposed upon a secondary party found guilty of involuntary manslaughter when the perpetrator was convicted of murder was 19 years in 1992 (case number 920444). Other high manslaughter (where the perpetrator was convicted of murder) sentences within the same time span include 14 years (case number 930537), 154 months (case number 970577) and 12 years (case numbers 920604 and 940041). Data provided by Research Development and Statistics Directorate, Crime and Criminal Justice Unit, Home Office, St Anne’s Gate, London.

⁹ (1832) 2 Lewin CC 159.

all'¹⁰. He argues that if this were true all parties to a joint enterprise would be principals, as indeed was considered the case in *Stewart and Schofield*¹¹ where Hobhouse LJ distinguished a joint enterpriser from a 'mere aider and abettor, etc' or 'secondary party' and pronounced: '[i]n contrast, where the allegation is joint enterprise, the allegation is that one party participated in the criminal act of another'. The case considered the liability of Schofield who had kept watch outside a shop to enable his partner to execute their common design of robbing the proprietor. Whilst outside, the principal unexpectedly killed the shop owner in a racist attack. Professor Smith asks: 'When [the killer] in the shop, struck a fatal blow and the question of liability for homicide arose, did Schofield cease to be a 'mere aider and abettor' or secondary party and change into a 'joint enterpriser'? Or is the true explanation that any liability which the law imposes for foreseen acts outside the common purpose is an incident of accessory liability, whether as an aider and abettor or counsellor or procurer?'¹² It is possible to quibble that Schofield was a "joint enterpriser" from the outset due to the common intent to rob and the question is rather whether the homicide was part of that common design. However, this is to miss the point of the argument which is crystallised in the following passage where Professor Smith argues against the classification of all common purpose adventurers as joint principals:

But if A, B, and C agree, and set out together, to kill V – a joint enterprise – and A shoots V dead, A alone is the principal. He, and only he, committed the *actus reus* of murder – killing another person – and B and C can be convicted of murder only because they have aided, abetted, counselled or procured A's act. It is difficult to know what 'the attribution to them of the *actus reus*'¹³ means in such a case unless it is that we have to pretend that B and C killed V, which they did not. Fictions should not, and it is submitted, do not, have any place in the modern criminal law.¹⁴

The following examination considers the judicial endeavours to define an appropriate fault element for an accessory in a common purpose, where the criminal enterprise results in an unlawful killing by the principal offender. Before embarking upon the quest, it seems sensible to take a cogent tangent by considering the social context and public policy considerations that pervade this area of the law. A final remark on the designation of the parties highlights a further layer of difficulty in the attribution of blame to the parties in a joint enterprise and also provides a chamfer with the public policy considerations. Having discussed the different roles that a

¹⁰ *Ibid.* at 159 per Alderson B.

¹¹ [1995] 3 All ER 159.

¹² JC Smith, *Commentary to Stewart and Schofield* [1998] Crim LR 735.

¹³ *General Bank Nederland NV v Export Credits Guarantee Department* [1998] 1 Lloyd's Rep at 42-44 where Hobhouse LJ, despite being a civil action returns to the subject of joint enterprise and refers to *Macklin*.

¹⁴ *Op cit.* n.12 at 735.

participant might play in the course of the venture, it is important to stress that it will not always be possible to identify the actual perpetrator of the homicide.¹⁵ In these cases, the criminal law is faced with two options. Clearly all of the parties must be judged by the same standard but that standard could be the *mens rea* of either a primary offender or a secondary party. In fact, the issue of proving the *actus reus* provides the logical conclusion to the dilemma. The inability to categorically attribute the *actus reus* of homicide to any one participant leads to the necessity for all parties to be assessed as putative accessories against the lesser conduct criteria of complicity.

2.1 SOCIAL CONTEXT AND PUBLIC POLICY CONSIDERATIONS

Before commencing an analysis of joint enterprise liability, it is important to be aware of the public policy issues that are at stake in this area of the law. The first area of social concern involves the effects of group psychology upon the eventual outcome of the criminal enterprise, particularly where the collaborating parties are present at the scene of the crime. Thus, Beldam LJ was at pains to emphasise the pernicious nature of spontaneous and concerted attacks in the recent case of *Greatrex and Bates*¹⁶:

Facts similar to those in the present case are unfortunately even more common today than in 1981 when Lord Griffith described them as “all too frequent”. From the behaviour of individuals joining together as a group in a concerted attack on a single victim, it is often the only reasonable inference that they individually and collectively unite with each other in an assault on the victim with the intent to do him really serious harm. In pursuance of that intent one, or usually all, attack the victim and do acts with the necessary intent to make them all individually guilty of inflicting grievous bodily harm with intent. But it is also the case that by combining together in their attacks each encourages and assists that others in the commission of similar offences. *It is well known that group behaviour may differ markedly from the behaviour of individuals acting apart.* Thus where the participants in a united attack individually inflict serious harm, by taking part with the others at the same time they encourage and assist them to commit a similar crime on the victim.¹⁷

This leads into a second point, which is that the participants in a joint enterprise are already engaged in criminal activity when the collateral crime occurs, so there is a sense that their action is already tainted and deserves a less sympathetic judgment when events escalate into a more

¹⁵ E.g. *Powell*; *English* [1997] 4 All ER 545 *Hyde* [1991] 1 QB 134; *Chan Wing-Sui v The Queen* [1985] AC 168.

¹⁶ [1999] 1 Cr App R 126. Also see *Hyde* [1991] 1 QB 134 at 137: ‘...common assault can easily escalate by encouragement of mutual support’. The underlying concerns are reminiscent of those expressed in the South African ‘joining in’ cases, see above, pp.95-120.

¹⁷ [1999] 1 Cr App R 126 at 138 (emphasis added).

serious offence.¹⁸ Moreover, particularly in group attacks, the actions and states of mind of the parties tend to develop in accordance with mob psychology, which results in fears for the social order.¹⁹ Finally, where a homicide has been perpetrated during the commission of the foundational offence, it is not always possible to identify the perpetrator. Consequently, it is eminently useful to have the means to impose liability upon participants in a fatal enterprise regardless of the inability to pinpoint the principal offender.²⁰

The fact that the judicial statements contain so many references to the public policy considerations provides warning of the theoretical tensions in the delimitation of joint enterprise liability. In the following analysis, it is as well to remember that these additional policy concerns invariably accompany, and frequently conflict with, any quest for doctrinal consistency in the law of joint enterprise.

2.2 SCOPE OF PURPOSE

In 1997, the House of Lords, for the first time, gave judgment on the homicide liability of participants in a joint enterprise, where the purpose of the venture was not the unlawful killing that actually transpired, but a different offence. On face value, so recent and authoritative a

¹⁸ Beldam LJ clearly had little sympathy with plight of the accused in *Greatrex*, declaring *ibid.* at 139-40: 'In describing the conduct of those who unite in a concerted attack on a chosen victim, judges often use the epithet that it is "mindless" violence in the sense that it is irrational and without purpose. More often than not, as the participants rush to take part in the attack, they give no thought to the means by which they will overwhelm the victim not do they have any particular foresight whether one or other of them may in the course of the ensuing violence pick up or use any weapon which may conveniently come to hand. Nor do they care precisely how the victim is harmed and in the course of the attack it is often a matter of chance whether the blow from a weapon or a kick inflicts the fatal injury. Numerous are the ways in which a weapon other than the shod foot is wielded: it may be a piece of wood or bar, a piece of furniture, a billiard cue or spanner, a tyre lever or even a large stone which is picked up to press home the attack. As it develops, encouraged by the actions of the others, all the participants take part with increasing aggression.' This is also the rationale behind Williams' claim in "Complicity Purpose and the Draft Code - 2" [1990] Crim LR 98 at 102 that joint enterprise cases create a 'distinctive culpability' whereby the fault element may be widened to subjective recklessness.

¹⁹ 'The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed.': *Powell; English* [1997] 4 All ER 545 at 551 *per* Lord Steyn.

²⁰ 'The Crown does not have to prove which accused inflicted the fatal blow. You may convict any accused of murder if you come to the conclusion that he either personally inflicted the fatal wound on the deceased with the intention of causing at least serious bodily injury or that one of his companions inflicted the wound and that the accused contemplated that either of his companions might use a knife to cause serious bodily injury on any one or more of the occupants of the flat.': *per* the trial judge in *Chan Wing-Sui v The Queen* [1985] AC 168 at 175. Beldam J justifies the imposition of liability in *Uddin* [1998] 2 All ER

decision seems to offer the chance simply to state and analyse the House of Lords' judgment of *Powell; English*²¹ That this is not a satisfactory proposition is demonstrated by the fact that in 1999 and 2000, despite the apparently definitive House of Lords decision, the Court of Appeal in Northern Ireland, in one case²² felt the need to revisit the history of joint enterprise decisions, even extending back as far as the sixteenth century case of *Saunders and Archer*,²³ and in another²⁴ distinguished *Powell* and reverted to the reasoning of an earlier Court of Appeal decision.²⁵ In referring to the history of joint enterprise Carswell LCJ declared:

It seems to me from consideration of the authorities that some degree of conflict does exist, but it is very difficult to fit all the decided cases into a coherent set of principles, and perhaps an unprofitable task to attempt to do so, not least because in the older cases the courts were still feeling their way to the principles that have now been more clearly defined.²⁶

Be that as it may, and bearing in mind, the reversion to previous pre-*Powell* liability in the Northern Irish cases, it would be very remiss to attempt any examination of the existing tenets of joint enterprise liability without examining the conflicting authorities, the development of the alternate bases of liability and the rationale behind them.

Traditionally, joint enterprise – or common purpose – liability has been delimited by the scope of purpose. Accordingly, a participant is liable for the crimes that fall within the scope of the purpose but is not responsible for further offences committed by his criminal colleagues which fall outside, or go beyond, that scope. However, whilst it is possible to elicit the basic rationale that underpins the concept, in terms of practical application, the choice of terminology is as deceiving as it is helpful. It certainly begs for a definition of the common purpose since without an understanding of what precisely the common purpose encapsulates it is an exercise in futility to attempt to determine the actions that might fall beyond its perimeter. As to the terminology, it is submitted that the natural meaning of “purpose” suggests “intention” – and not the extended kind of intention of foreseeing as a virtual certainty²⁷ that a risk will eventuate. Rather, “common purpose” suggests a shared objective, an end aimed at by all participants. It is, however, wide

745 at 751: ‘Because it is often a matter of chance whether one or other of them inflicts a fatal injury, the law attributes responsibility for the acts done by one to all of them...’

²¹ [1997] 4 All ER 545.

²² *Crooks* [1999] NI 226.

²³ 1575 2 Plowd. 475.

²⁴ *Gilmour* [2000] 2 Cr App R 207.

²⁵ *Stewart and Schofield* [1995] 3 All ER 159.

²⁶ *Crooks* [1999] NI 226 at 228.

²⁷ Such as suffices for primary (oblique) intention, see above, p.19.

enough to incorporate those consequences that, though not desired, are known to be certain to happen, in the natural course of events.²⁸ Therefore, it becomes immediately apparent that, where a group of burglars aim to steal the valuables from a house, this definition of common purpose is too narrow to include a collateral homicide that is committed during the course of the intended burglary. On the other hand, it might have been the case that, suspecting the owner to be at home, the co-adventurers had chosen one of their number to intimidate the occupant with a gun and tie her up while the other parties ransacked the house. The criminal strategy now contains a contingency plan, one which, though not expected to arise, has been accepted by all parties. Thus, in order to reach the objective of the burglary, the “joint enterprisers”, having reconciled themselves to the possible need for unlawful physical coercion, have added those offences within the scope of their purpose. It now becomes clearer that a common purpose comprises not merely the ultimate aim of the joint venture but also any offences that need to be committed during the course of the criminal venture in order to achieve the intended end.

In the example, the uncertainty and vagueness of the terms of the enterprise have been deliberately avoided. There is an express agreement as to who will immobilise the house owner and the means to be employed. Consequently, it does not seem incongruous to assert that the remaining have “authorised” or “ratified” the actions of the appointed guard and the idea that liability is based on authorisation²⁹ and ratification³⁰ has been expounded by English and South African judiciary. But what if there is no express agreement? What if nothing has been said and the victim is killed by one of the party following nothing more than a tacit understanding that one of the participants may need to disable the victim during the course of the burglary? Or, what if the appointed guard fails to check that the safety catch is on before he threatens the owner, then panics and fires the gun, killing the house owner? Amending the scenario still further, what if he deliberately takes aim and shoots the victim in the head? Is it appropriate to describe the action of the killer as having been authorised in any of the scenarios? And, if not, are the non-perpetrators liable for the homicide, perhaps on some other ground?

²⁸ For further discussions on the meaning of intention see above, pp.15-19.

²⁹ *Anderson and Morris* [1966] 2 All ER 644 states that an “unauthorised act” results in the exculpation of the putative accessory. *Chan Wing-Sui v The Queen* [1985] AC 168 equates “authorisation” with “contemplation”.

³⁰ *R v Duma* 1945 AD 410. In *R v Mgxwiti* 1954 (1) SA 370 (A) the term “mandate” was employed instead. Both “ratification” and “mandate” were criticised as unsatisfactory terms, see above, pp.95, 101-102.

The idea that liability is founded on authorisation was effectively challenged and amended,³¹ and agreement became the popular alternative.³² In *Slack*,³³ the Court of Appeal asserted that secondary liability stems from an express or tacit agreement³⁴ but as an alternative, it was enough if the accused 'lent himself to a criminal enterprise involving, if necessary, the infliction of harm or death'³⁵. However, the use of terminology has still not been consistent. In *Wakely*³⁶, it was held that, whilst it could be argued that the trial judge had misdirected the jury by concentrating on foreseeability rather than tacit agreement or understanding, in the present case foreseeability that the pickaxe handle might be used as a weapon of violence was practically indistinguishable from tacit agreement that the weapon should be so used. That there could be a difference between the two concepts was acknowledged by Lord Mustill³⁷. He believed that the existing law of joint enterprise was being superseded by the House of Lords judgment, which replaced the concept of agreement with 'a test of foreseeability', and he provided an illustration of the limits of using agreement as the basis of liability:

Intellectually, there are problems with the concept of a joint venture, but they do not detract from its general practical worth, which has proved itself over many years. In one particular situation there is, however, a problem which this time-honoured solution cannot solve. Namely, where S foresees that P may go too far; sincerely wishes that he will not, and makes this plain to P; and yet goes ahead, either because he hopes for the best, or because P is an overbearing character, or for some other reason. Many would say, and I agree, that the conduct of S is culpable, although usually at a lower level than the principal who actually does the deed. Yet, try as I may, I cannot accommodate this culpability within the concept of joint enterprise. How can a jury be directed at the same time that S is guilty only if he was a party to an express or tacit agreement to do the act in question, and that he is guilty if he not only disagreed with it, but made his disagreement perfectly clear to P? Are not the two assertions incompatible?³⁸

The transition whereby the basis of liability is openly avowed to comprise foresight clearly creates an overlap with the *mens rea* of secondary parties. However, this should not obscure the fact that deciding upon the requisite degree of fault for a common purpose accomplice has provided a number of judicial challenges. This is so because the secondary fault can be limited to the unilateral *mens rea* of the secondary party or it can be related to the secondary party's

³¹ *Hui Chi-ming v The Queen* [1992] 1 AC 34 explains – and amends – the reference to authorisation in *Chan Wing-Sui*.

³² See n.30.

³³ [1989] QB 775.

³⁴ Also *Smith (Wesley)* [1963] 3 All ER 597 at 601 where a selection of terms are used to provide context and understanding: 'The term "agreement," "confederacy," "acting in concert," and "conspiracy," all presuppose an agreement express or by implication to achieve a common purpose...'

³⁵ [1989] QB 775 at 781.

³⁶ [1990] Crim LR 119.

³⁷ *Powell; English* [1997] 4 All ER 545 at 548.

awareness or understanding of the principal's state of mind. The fact that the substantive law of homicide contains a number of ambivalent elements, such as the implied malice limb of murder where intention to cause grievous bodily harm suffices for murder, only serves to exacerbate the situation. In fact, the whole vexed question of whether the secondary party's foresight of the principal's intention to cause serious injury is sufficient *mens rea* to impose murder ^{liability} ~~liable~~ on the accessory is a relatively new problem. Prior to the Homicide Act³⁹ and the abolition of constructive malice, a joint enterpriser would have been guilty of felony-murder.⁴⁰ However, s.1(1) of the Homicide Act retained "express and implied" malice as sufficient *mens rea* for murder. That "implied malice" meant intent to cause grievous bodily harm was conclusively decided for primary parties as recently as 1982.⁴¹ It was inevitable that it would take longer to be assimilated into complicity law. Furthermore, owing to the fact that a secondary party is one step removed from the *actus reus* of the substantive offence and may be held liable on the diluted fault requirement of contemplation rather than intention, any criticisms and objections to extending murder liability via the implied malice provision are aggravated when applied to accomplices.

These difficulties are brought into sharp perspective by the Northern Irish case of *Gamble*⁴². Cases from Northern Ireland have played a significant role in developing the law of joint enterprise. They highlight the particular problems faced by the criminal law and justice system⁴³, where the subsisting social conditions involve sectarian violence. Rather like the South African cases, they involve scenarios where a particular threat to the social order is posed by the existence

³⁸ *Ibid.*

³⁹ The Homicide Act 1957 provides: 1 (1) Where a person kills in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence. (2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course of furtherance of another offence.

⁴⁰ *Betts and Ridley* (1930) 22 Cr App R 148.

⁴¹ In the meantime there was room for argument that the Homicide Act had also abolished this head of murder liability: 'The argument was that the only reason why intention to cause grievous bodily harm was malice aforethought before 1957 was that in 1803 Lord Ellenborough's Act created a felony of causing grievous bodily harm with intent to do so. If death resulted, that was murder because, and only because, the killing was in the course or furtherance of that felony. The argument was rejected in *Vickers* [1957] 2 QB 664 but accepted by Lords Diplock and Kilbrandon in *Hyam* [1982] AC 566 where the matter was left open because Lord Cross was not prepared to decide between the conflicting views. In *Cunningham* [1982] AC 566 the House confirmed that intention to cause grievous bodily harm survived the Homicide Act as a head of *mens rea*, having ante-dated Lord Ellenborough's Act as a form of malice aforethought, distinct from constructive malice.' : *Smith & Hogan* at 350.

⁴² [1989] NI 268.

of paramilitary organisations and the associated, invariably extremely unpleasant, acts of violence. Moreover, *Gamble* involves many of the elements that will be examined in the following analysis. In the appeal, the Court was required to decide whether a secondary party was liable for murder on the following facts: the appellant had accompanied a group of men intent on giving another man a punishment beating. He had believed, and therefore, foreseen that in addition to punching and kicking, this punishment would comprise the “kneecapping” of the victim, which would be accomplished by discharging a firearm into the knee joint. In the event, the principal deliberately cut the victim’s throat. The question before the court was whether the accomplice was liable for murder on the basis that he had contemplated the intentional causing of grievous bodily harm, which was necessarily encompassed within the “kneecapping”, because this was sufficient *mens rea* for murder liability. At this time, there was no authority on whether an accessory was liable for murder when he contemplated the intentional causing of grievous bodily harm but not killing,⁴⁴ although *Cunningham* had decided the point in relation to primary liability. Ultimately, Carswell J concluded that the killing of the victim by cutting his throat ‘was a crime of a different kind from the beating or kneecapping contemplated or authorised by [the accessories] and that the killing did not follow directly as a result⁴⁵ of the crime to which the latter lent themselves as accessories’⁴⁶. However, it is instructive to quote, at length, the musings of Carswell J on the appropriateness of applying the contemplation of implied malice to impose secondary party murder liability:

[W]hen an assailant “kneecaps” his victim, ie discharges a weapon into one of his limbs, most commonly into the knee joint, there must always be the risk that it will go wrong and that an artery may be severed or the limb may be so damaged that gangrene sets in, both potentially fatal complications. It has to be said, however, that such cases must be very rare among victims of what is an abhorrent and disturbingly frequent crime. Persons who take part in inflicting injuries of this nature no doubt do not generally expect that they will endanger life, and I should be willing to believe that in most cases they believe that they are engaged in a lesser offence than murder.

The infliction of grievous bodily harm came within the contemplation of [the appellants], and they might therefore be regarded as having placed themselves within the ambit of life-threatening conduct. It may further be said that they must be taken to have had within their contemplation the possibility that life might be put at risk. The issue is whether it follows as a consequence that they cannot be heard to say that the murder was

⁴³ Courts sit without a jury in both the Northern Irish ‘Diplock courts’ and in the South African Criminal Courts (Abolition of Juries Act 34 of 1969).

⁴⁴ [1989] NI 268 at 282.

⁴⁵ Here is another suggestion that causation, in particular supervening acts, affect (joint enterprise) secondary liability, see above, p.163.

⁴⁶ [1989] NI 268. At 284-5. The accessories were acquitted of murder and found guilty only of wounding with intent.

a different crime from the attack which they contemplated, and so cannot escape liability for the murder on the ground that it was outside the common design.

To accept this type of reasoning would be to fix an accessory with consequences of his acts which he did not foresee and did not desire or intend. The modern development of the criminal law has been away from such an approach and towards a greater emphasis on subjective tests of criminal guilt... Although the rule remains well-entrenched that an intention to inflict grievous bodily harm qualifies as the *mens rea* for murder, it is not in my opinion necessary to apply it in such a way as to fix an accessory with liability for a consequence which he did not intend and which stems from an act which he did not have within his contemplation.⁴⁷

For the moment, this passage provides a background to the factors that pervade this area of the law. It also introduces a number of issues that will need to be considered at length. One of them implicitly goes as far as to suggest that the intentional causing of grievous bodily harm is too wide a type of harm to incur murder liability. Therefore, as death is not necessarily foreseen or even expected in many cases of serious injury, the requisite type of harm should be limited to intentional life-endangering injury. However, the argument for enacting such an amendment is just as strong in the case of principal offenders. Therefore, it is better considered as a possible reform to the substantive law of murder.⁴⁸

Returning to the decision in *Gamble*, two potent questions remain: firstly, what would have been the situation regarding the accessory's liability had the principal killed the victim by shooting him in the head or chest? Secondly, would the accessory have been liable for murder if the kneecapping had resulted in the victim's death? The first question is particularly vexed and will be frequently revisited during the course of the following analysis. For now, it is submitted that, applying the reasoning of Carswell J that a shooting in the head or chest is 'a crime of a different kind' to that contemplated, the accessory would not be liable for the unforeseen deliberate act of killing.⁴⁹ As to the second question, it was expressly pronounced that 'if [the victim's] death had occurred as an unforeseen consequence of the kneecapping, all four defendants would be guilty of murder'.⁵⁰ Thus, it can be seen that there are two different strands of secondary liability in joint enterprise cases. Homicide liability will flow from an unforeseen consequence but not (always) from an unforeseen act. In the following analysis these two bases of liability are termed "unusual consequences" liability⁵¹ and "contemplation" liability⁵² respectively.

⁴⁷ *Ibid.* at 283-4.

⁴⁸ See below, pp.268-292.

⁴⁹ cf. *Gilmour*, below, pp.252-254, and the question of whether firing a gun is the contemplated act on which liability is based in both situations.

⁵⁰ [1989] NI 268 at 284.

⁵¹ From the defining case of *Anderson and Morris*.

2.2.1 “Unusual Consequences” Liability

Although the abolition of constructive malice and the redefinition of murder (and, by default, involuntary manslaughter) is of relatively recent origin, the two strands of common purpose liability have a far longer history. Thus Foster, writing in the latter part of the eighteenth century⁵³ was already able to assert:

Much has been said by writers who have gone before me, upon cases where a person supposed to commit a felony at the instigation of another hath gone beyond the terms of such instigation, or hath in the execution varied from them. If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt.. but if the principal in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present a principal.⁵⁴

The critical point from the view of divergent liability, is that, for the accessory to be implicated in the offence, the principal is required to perform the incited or assisted act. When a consequence is an integral element of the crime then, usually, that consequence will be the object of the incitement/assistance. Thus, when an accessory wants the victim dead and gives the principal room to exercise his ingenuity in assassination, the act is rendered merely a means to the end. Accordingly, the accessory would not escape murder liability by arguing that he foresaw that the deceased would be killed by an act of shooting rather than decapitation. However, in more general terms, it is not the consequence but the planned/foreseen act that founds the accessory's liability. This is particularly relevant in substantive offences where the principal need not foresee the manifested consequence to incur liability for its eventuation. Thus, in the offences of involuntary manslaughter, causing death by reckless driving and, later, causing death by dangerous driving, there is no requirement that the ultimate death have been either intended or foreseen by the offender. It is only necessary that the unlawful and (objectively) dangerous act⁵⁵

⁵² From *Chan Wing-Sui*.

⁵³ See timeline, above p.85.

⁵⁴ Foster, *Crown Law* (Classical English Law Texts, 1982) at 369 (cited in *Gamble* and also in *Betts and Ridley* (1931) 22 Cr App R 148 at 155).

⁵⁵ As stated in the headnote of *DPP v Newbury and Jones* [1977] AC 500 at 501 ‘an accused was guilty of manslaughter if it was proved that he intentionally did an act which was unlawful and dangerous and that that act inadvertently caused death... it was unnecessary to prove that the accused knew that the act was unlawful or dangerous; that the test was still the objective test, namely whether all sober and reasonable people would recognise that the act was dangerous and not whether the accused recognised its danger. The unlawful act must be one which, objectively assessed, is dangerous, that is to say subjects the victim to at least some risk of harm, albeit not serious harm’. (See also *Church* [1996] 1 QB 59.)

from which the fatal consequence flowed was performed intentionally or recklessly⁵⁶. As far as the application of secondary liability is concerned, it is not overtly unjust to impose the same degree of responsibility on the accomplice as is imposed upon the principal and there is certainly no inconsistency in the approach. If the principal is to be held liable for the bad luck that stems from his action, it seems reasonable that the accomplice who supported it should share the responsibility for the misfortune. Any criticism that can be levelled at this result is more properly directed at the constructive fault element contained in the relevant substantive law.

Foster's words were given contemporary expression in *Anderson and Morris*⁵⁷ where it was declared that,

... where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, and that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter)... if one of the adventurers goes beyond what has tacitly been agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act.⁵⁸

It is not difficult to comprehend the essential distinction between the rationales of the two different heads of liability but the fact that the application of the two approaches has caused problems in the trial courts is amply demonstrated by two examples. In *Lovesev and Peterson*,⁵⁹ the Court of Appeal quashed the appellant's murder conviction because the jury had been incorrectly told that the counts of robbery and murder stood or fell together. The Court elucidated the direction in *Anderson and Morris* in the following terms: 'It is clear that a common design to use unlawful violence, short of the infliction of grievous bodily harm, renders all of the co-adventurers guilty of manslaughter, if the victim's death was an unexpected consequence of the carrying-out of that design. Where, however, the victim's death is not a product of the common design but is attributable to one of the co-adventurers going beyond the scope of that design, by using violence which is intended to cause grievous bodily harm, the others are not responsible for that unauthorised act'⁶⁰. Consequently, the Appeal judges refused to substitute a manslaughter conviction because it was possible that the jury would have chosen the latter interpretation of the events.

⁵⁶ For the driving offences, recklessness was extended to include an objective assessment of the risk entailed within the act: *Lawrence* [1982] AC 510; *Reid* [1990] RTR 276, see above, p.20.

⁵⁷ [1966] 2 QB 110.

⁵⁸ *Ibid.* at 118 *per* Lord Parker.

⁵⁹ (1969) 53 Cr App R 461.

In *Mahmood*⁶¹, the trial judge could be forgiven for having fallen into the error of enunciating “unusual consequences” as the relevant route of liability. In this case, the fifteen year old appellant was a passenger in a stolen car driven by his fourteen year old co-defendant. The car was travelling and swerving at high speed when the police tried to stop it. Both boys abandoned the car when it had slowed to a walking pace. However, the driver left the car in gear and the vehicle continued moving onto the pavement where it struck a pram, killing the infant occupant. The appellant had been found guilty of the infant’s manslaughter on the basis that the driver had been guilty of manslaughter by driving recklessly, and the appellant, in participating in the “joyride” had both contemplated his reckless driving and ‘wilfully and intentionally’⁶² encouraged it.⁶³ However, the Court of Appeal held that two further questions were crucial: ‘Did the obvious and serious risk⁶⁴ of causing physical injury to another road user include a possibility that the car might, when still in motion, be abandoned by its driver and that a person might be injured by the empty vehicle thereafter?’⁶⁵ Furthermore, ‘[d]id [the appellant] now a passenger in the vehicle... contemplate that [the driver] might drive in that sense recklessly?’⁶⁶. Referring to both the “unusual consequences” test of *Anderson and Morris* and the “contemplation test”⁶⁷ of *Chan Wing-Sui*, it was concluded that, had a fatality been caused by a collision with a pedestrian or another car, then the appellant would have been liable for manslaughter because he would have foreseen that type of reckless driving. However, the driving and the abandonment, although they both demonstrated reckless driving, were acts of a ‘very different character’⁶⁸ and the act of abandonment had not been contemplated by the appellant. Thus, he was not responsible for its consequences. In other words, although consequences need not be foreseen, the act preceding and causing the consequence must have been within the secondary party’s contemplation.

Despite the fact that the primary fault for causing death by dangerous driving comprises both a subjective and an objective limb, the Court applied only subjective recklessness to the secondary party. Arguably, therefore, the test for manslaughter liability favours the secondary party over the primary party in a case such as this. On the other hand, where the primary fault for

⁶⁰ *Ibid.* at 465.

⁶¹ [1995] RTR 48.

⁶² *Ibid.* at 50.

⁶³ The same basis of liability as in *Baldessare* (1931) 22 Cr App R 70; *Swindall and Osborne* (1846) 2 Cox 141.

⁶⁴ Applying the *Lawrence* test of recklessness.

⁶⁵ [1995] RTR 48 at 51.

⁶⁶ *Ibid.*

⁶⁷ See below, p.223.

⁶⁸ [1995] RTR 48 at 52.

manslaughter is framed in terms of subjective recklessness,⁶⁹ the principal is held responsible for having intentionally or recklessly performed the particular act, so it is reasonable that the secondary party be implicated only when he foresaw the risk of the particular fatal act being performed. This has the effect of concentrating the mind upon the specific risk that might have been foreseen (and implicitly accepted). Thus, Mahmood foresaw and was held to be reconciled to the risk of the car striking another vehicle or a pedestrian when being erratically driven at excessive speed, but he had not contemplated the risk of his partner aborting the venture in the fatal act that actually transpired.

To summarise, once the foreseen act has been completed, accomplice liability will be incurred for the unforeseen consequence. Conversely, the consequence of an unforeseen act imposes no liability. The essential difference is that the accessory must have contemplated the act that causes the consequence.

2.2.2 “Contemplation” Liability

It has already been seen that secondary liability for the principal offence may be imposed upon an accessory for assisting or encouraging the perpetrator to commit an offence when the putative accomplice neither intends to collaborate in a common purpose nor to purposefully further the offence that he contemplates might be committed.⁷⁰ In *Bainbridge*,⁷¹ liability was framed in terms of knowledge of the offence. Whilst mere suspicion of a criminal intent was insufficient to ground secondary liability, the putative accomplice became fixed with criminal responsibility if he knew of the *type of offence* that would be committed, despite being unaware of the details of time and place. This basis of liability was both refined and extended by the House of Lords in *DPP for Northern Ireland v Maxwell*⁷². In this case, the appellant, a member of the U.V.F., a proscribed terrorist organisation, had driven a lead car to direct his associates to an inn, which was then attacked with a bomb by occupants of the pursuit car. He attempted to evade liability by arguing that he had not known of the offence intended, having been given no information but simply having been instructed to take his fellow terrorists to the inn. Unsurprisingly, the Court of Appeal had refused to accept the validity of his submission arguing,

⁶⁹ i.e. where the defendant foresaw the risk but not so certainly as to be evaluated as having (indirectly) intended its occurrence: see below, p.19.

⁷⁰ See above, p.186-188.

⁷¹ [1960] 1 QB 129.

⁷² [1978] 3 All ER 1140.

The facts shown here show that the appellant, as a member of an organisation which habitually perpetrates sectarian acts of violence with firearms and explosives *must*, as soon as he was briefed for his role, *have contemplated* the bombing of the Crosskeys Inn as not the only possibility but one of the most obvious possibilities among the jobs which the principals were likely to be undertaking and in the commission of which he was intentionally assisting. He was therefore in just the same situation, so far as guilty knowledge is concerned, as a man who had been given a list of jobs and told that one of them would be carried out.⁷³

This assertion accepts that knowledge of a future occurrence necessarily involves belief that it will occur, or, in this more diluted interpretation, contemplation of the possibility that it will eventuate. Furthermore, it creates the situation where lack of specific knowledge, rather than exculpating a participant, may serve to extend the scope of liability. The House of Lords upheld the idea of liability being established through contemplating a list of possible jobs. This extended *Bainbridge* where it was held not to be necessary for the details of the crime, such as the time and place, to be known just so long as the type of offence was known; *DPP for NI v Maxwell* established that it was unnecessary for the type of offence to be known. It was sufficient if the putative accessory had a series of potential 'operations' in mind and 'intended to assist in any one or more of these types of operations, with all that it necessarily involved, while being content to leave the choice of the actual operation to others, perhaps members of the gang or some higher command'⁷⁴. It was conceded that this formulation opened the way to 'blank cheque'⁷⁵ liability whereby an accessory who gave his fellows carte blanche in the range of offences or operations that he was prepared to support became liable for every one of the committed crimes. However, it was submitted that this type of blanket liability would be an exceptional occurrence.⁷⁶ Furthermore, it was not suggested that there was anything inherently incongruous in the potential for such wide-reaching liability and, in concurrence, it is submitted that an accomplice who is prepared to give his principal this kind of unlimited and undiscerning licence is fully deserving of the resultant censure and liability that ensues.

Whilst the ruling in *Bainbridge* was extended to impose liability based on contemplation of the type of operation rather than knowledge of the type of offence, limitations to secondary liability, in line with *Anderson and Morris*,⁷⁷ were discussed. Thus, it was stressed that 'the possible extent of [Maxwell's] guilt was limited to the range of crimes any of which he must have known

⁷³ *Ibid.* at 1162 *per* Lowry CJ (emphasis added).

⁷⁴ *Ibid.* at 1150 *per* Lord Fraser.

⁷⁵ *Ibid.* at 1162.

⁷⁶ *Ibid.*

⁷⁷ Although neither that case nor any other joint enterprise cases were cited.

were to be expected that night'; however, 'if another member of the gang had committed some crime that the appellant had no reason to expect, such as perhaps throwing poison gas into the inn, the appellant would not have been guilty of using poison gas.'⁷⁸ This suggests that the crux of liability is the contemplation of the actual act rather than the consequence. Using explosives was held to be within the range of contemplated offences so, although it was not explicitly enunciated by Lord Fraser, it logically follows that, had someone died in the bomb attack, the appellant would have been liable for homicide. However, if the act of using poison gas was not contemplated, the defendant would not have been liable for any deaths that resulted from that unforeseen action.

Another, more tentative, hint of limiting the burgeoning liability of an accessory appeared in the suggestions that the likelihood of the contemplated operation occurring might be a pertinent factor in the imposition of accomplice liability. Thus, there was mention of the contemplation of an 'obvious possibility'⁷⁹, although whether it need have been obvious to the defendant or to a prudent man is uncertain. Lord Scarman, staying firmly within the boundaries of subjective recklessness, suggested that Maxwell 'must have appreciated that it was very likely'⁸⁰ that his associates would be carrying explosives. Thus, the House of Lords preempted some of the considerations undertaken by the Privy Council in *Chan Wing-Sui v The Queen*,⁸¹ the definitive case on the application of contemplation liability for parties to a common purpose.

Chan Wing-Sui, unlike *DPP for NI v Maxwell*, called for a statement on accomplice liability for a collateral homicide and therefore comprised the considerations required to distinguish liability for the degree of homicide. That joint enterprise liability stems from the secondary conduct of aiding and encouraging the principal, regardless of presence or absence at the scene, was made patently clear in the following oft-quoted pronouncement of Sir Robin Cooke:

a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case of that class, the same or the same type of offence is actually intended by all the parties acting in concert... This case must depend rather on the wider principle whereby a secondary party is liable for acts by the primary party of a type which the former foresees but does not necessarily intend. 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

⁷⁸ [1978] 3 All ER 1140 at 1148.

⁷⁹ *Ibid.* at 1144.

⁸⁰ *Ibid.* at 1151.

⁸¹ [1985] AC 168.

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.⁸²

Although not alluded to by the Privy Council, *DPP for NI v Maxwell* had confirmed that this wider principle existed in English law. However, *Chan Wing-Sui* achieved the necessary further stage of elucidating the basis of secondary liability for a collateral homicide (or any other offence) and nailing the requisite fault element as subjective: the defendant's contemplation or foresight was posited as the relevant secondary *mens rea*. As for the basis of liability, Sir Robin Cooke cited *Anderson and Morris* where it was stated that 'it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise'⁸³. This permitted the regrettable introduction of the terminology of "authorisation" that allowed the continuation of uncertainty in the foundation of liability in subsequent joint enterprise cases. Notwithstanding the scope for confusion, it seems relatively clear from the reasoning that Sir Robin Cooke intended to amend the scope of purpose test to one of the defendant's contemplation. Arguing that this was in line with the 'modern emphasis on subjective tests of criminal guilt' he turned to Australasian decisions to support his proposition; in particular he relied on *Johns v The Queen*⁸⁴ and agreed with the judgment of the High Court of Australia:

What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself⁸⁵ 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 a reliance upon a nuance of prior assessment, only too likely to have been optimistic. On the other hand, if it was not even contemplated by the particular accused that serious bodily harm would be intentionally inflicted, he is not a party to murder.⁸⁶

This pronouncement uncovers two separate, but related, areas of joint enterprise liability. The one is expressly avowed to be the public policy dimension and it is not particularly problematic to comprehend the reluctance of the courts to exculpate an accessory who participated in a criminal adventure fully cognisant of the potential that it would result in a fatality. The second is the doctrinal dimension of applying the law of homicide to the secondary party and this is rather more fraught. Adjectives such as "murderous", whilst clearly demonstrating the policy

⁸² *Ibid.* at 175.

⁸³ *Ibid.* at 176.

⁸⁴ (1980) 143 CLR 108.

⁸⁵ The idea of an accessory 'lending himself' to an enterprise is reiterated in later joint enterprise cases, thus introducing yet another possible foundation/rationale for liability, see *Slack* [1989] QB 775 at 781.

⁸⁶ *Johns v The Queen* in turn cites English precedent, expressly *Davies v DPP* [1954] AC 378 at 401.

perspective, provide little guidance for setting the parameters between murder and manslaughter liability. After all the use of a “potentially murderous weapon” could result in conviction for either homicide offence. Light is cast on the solution to the imposition of liability when the discussion moves to describe the fault element, which is the decisive factor in the substantive law. Thus, if secondary liability is to be based on the accomplice’s contemplation of the principal’s offence, that contemplation must include a comprehension of the principal’s fault. At least, that is the logic encompassed within the conclusion that an accessory will not be liable for murder if he did not contemplate that the principal would intentionally inflict serious bodily harm. On the other hand, there is not necessarily any consistency to the application of this logic in the previous assertion: murder liability follows when the accessory knows that the principal is carrying “potentially murderous weapons” and they are in fact used with the requisite intent for murder. The qualification that there is not necessarily any doctrinal consistency in the illustrations has been included because it is quite possible that the High Court intended the adjective “murderous” to include an implicit finding that the accessory knew that the weapons would be used to murder. However, there is room for a different interpretation and that is that the secondary party’s knowledge of the nature of the weapons implicates him in the murder when the principal uses them to intentionally kill or cause serious harm. The fact that the Privy Council did not interpret the passage in this way does not entirely remedy the latent problems of introducing such ambiguous statements into the law. They have a habit of returning to haunt the criminal law with arbitrary vagueness, usually when the case facts are such that the resurrectionist has a particular axe to grind.⁸⁷

However, in *Chan Wing-Sui*, Sir Robin Cooke provided the following guidelines for ascertaining the appropriate degree of homicide liability for an accomplice in a joint enterprise. He argued that combining the “unusual consequences” test with the “contemplation” test would result in liability when the defendant contemplated the possibility that the principal, with the requisite fault, would perform the specific act that in fact caused death. Thus, it was confirmed that, if the accused thought that knives would be used only to frighten the victims, then he would be guilty, not of murder, but of manslaughter.⁸⁸ Therefore, it is not the murderous nature of the weapon so much as the murderous intention of the principal that creates the accessory’s liability. Furthermore, the illustration consolidates the embryonic idea found in *DPP for NI v Maxwell* that the accessory’s contemplation must relate to the specific act rather than the often more nebulous

⁸⁷ E.g. *Gilmour*, below pp.252-254.

substantive offence definition; certainly the act must fall within the parameters of the proscription but, when the consequence flowed from an un contemplated act, it is not sufficient simply to argue that the substantive offence eventuated. The potential for a distinction between the specific act and the *actus reus* of the offence has already been seen in *Mahmood*⁸⁹. A further example was provided in *Hui Chi-ming*

Let's say three men decide to go and burgle a house and, whilst two of them go around looking for things to steal, the third man comes across a woman and he there and then rapes her. Now all three men would be guilty of burglary but the other two would not be guilty of rape because that was never in their contemplation. Their intention would be to steal and it was not within their contemplation that anyone should be raped.⁹⁰

This illustration is particularly potent because limiting the scope to the contemplation of the crime rather than the acts that comprise the *actus reus* of the offence might lead to the two putative thieves being implicated in their associate's rape. In accordance with the offence definition, a person is guilty of burglary if he enters any building or part of a building as a trespasser and with intent to steal, inflict grievous bodily harm, rape or cause criminal damage.⁹¹ Therefore, assuming that the rapist had secretly intended to ravish a woman once inside the building, leaving the theft to his two companions, the conduct and fault of all three men would fall within the definition of burglary. However, the rapist's clandestine purpose would be not be encompassed within the shared intent (or contemplation) of his associates, which, although categorised as burglary comprised simply the theft limb of the offence definition.

The Privy Council considered a further suggestion that, as the secondary party could be found liable for murder on the basis of the less culpable fault of subjective recklessness, there should at least be a provision to ensure that liability was imposed only when the accessory foresaw that the risk of the contemplated act occurring was more likely than not. However the Court wisely fought shy of attempting to enunciate a probability test and firmly declined the proposition that the test should be more probable than not: '[v]arious formulae have been suggested, including a substantial risk, a real risk, a risk that something may well happen. No one formula is exclusively preferable.'⁹² The gist of the test therefore seems to be whether the defendant foresaw the

⁸⁸ [1985] AC 168 at 178.

⁸⁹ See above, pp.222-223.

⁹⁰ [1992] 1 AC 34 at 45.

⁹¹ S.9 Theft Act 1968.

⁹² [1985] AC 168 at 179.

possibility of the risk but continued regardless.⁹³ In other words, the continued collaboration embraced the accessory's reconciliation with the risk occurring. Thus, instead of trying to formulate a positive test, the Privy Council concentrated on evaluating when the defendant's foresight of the risk would not be sufficiently culpable to incur liability. Consequently, it was agreed that there may be situations where the accomplice's realisation of the risk might be considered too remote. In cases where there is 'an evidential foundation for a remoteness issue'⁹⁴, the secondary party will not be held responsible for the principal's offence. In elaboration of the exemption Sir Robin Cooke suggested:

Although the risk of a killing or serious bodily harm has crossed the mind of a party to an unlawful joint enterprise, it is right to allow for a class of case in which the risk was so remote as not to make that party guilty of a murder or intentional causing of grievous bodily harm committed by a co-adventurer in the circumstances that in the event confronted the latter.⁹⁵

Presumably as well as such 'fleeting' contemplation dismissed as negligible by the accused, this exculpation would also encompass situations where the accused contemplated the risk eventuating up into point X in the crime commission and concluded that once point X had been passed without incident, no further risk remained. However, Sir Robin Cooke submitted that this occurrence would succeed only rarely. Furthermore, it was for the jury to decide in each instance.

2.2.2.1 *Contingent Acts within Scope of Purpose*

The remoteness exculpation reinforced a further point explicitly addressed in *Chan Wing-Sui*, that an accessory will be liable for the performance of contingent acts which, though not expected to eventuate, are accepted by the parties to the joint enterprise. Another Australian case was cited in support of the decision. In *Miller v The Queen*⁹⁶, it was confirmed that the accused was guilty of murder if the common plan included the possible murder of girls, so that the parties to the plan contemplated as a substantial risk the murder of any girl that was picked up, even though it was not contemplated that murder would occur in the course of every drive.⁹⁷ However, the most common type of scenario was enunciated in the later case of *Hui Chi-ming*:

Let it be supposed that two men embark on a robbery. One (the principal) to the knowledge of the other (the accessory) is carrying a gun. The accessory contemplates

⁹³ '[T]o realise something may happen is surely to contemplate it as a real not fanciful possibility': *Roberts* (1993) 96 Cr App R 291 at 298.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ (1980) 55 ALJR 23 (the primary criminal purpose was an intention to rape the victims).

⁹⁷ [1985] AC 168 at 179.

that the principal may use the gun to wound or kill if resistance is met with or the pair are detected at their work but, although the gun is loaded, the only use initially contemplated by the principal is for the purpose of causing fear, by pointing the gun or even discharging it, with the view to overcoming resistance or evading capture. Then at the scene the principal changes his mind, perhaps through panic or because to fire for effect offers the only chance of escape, and shoots the victim dead. His act is clearly an incident of the unlawful enterprise and the possibility of its occurrence as such was contemplated by the accomplice.⁹⁸

Applying *Chan Wing-Siu*, the Privy Council asserted that both parties would be guilty of murder. However, a further potential is that the accessory might be convicted of murder when the principal is convicted of the lesser offence of manslaughter. That the dichotomy is possible is demonstrated by the procedural context of the case itself where, notwithstanding that the principal had pleaded guilty to, and been convicted of manslaughter, the accessory was held to be liable for the more serious offence of murder. Amending the illustration, so the principal had pointed the gun intending only to frighten the victim and had accidentally fatally fired it, he would be liable for manslaughter. However, the accessory, assessed by his belief that the principal might use the gun to kill, would be liable for murder.⁹⁹

2.2.3 Reversions to alternative bases of liability

Although the cases of *Anderson and Morris* and *Chan Wing-Sui* provided the most consistently used tests of secondary liability in subsequent joint enterprise cases, the law was by no means

⁹⁸ [1992] 1 AC 34 at 52. There has never been any doubt that contingent acts are considered to be within the scope of the common purpose and therefore impose liability on the secondary party. Further examples, both before and after *Hui Chi-ming* include the following: *Maxwell* [1978] NI 42 at 58 (the Court of Appeal case that preceded *DPP for NI v Maxwell*): 'The situation has something in common with that of two persons who agree to rob a bank on the understanding, either express or implied from conduct (such as the carrying of a loaded gun by one person with the knowledge of the other), that the violence *may* be resorted to. The accomplice knows, not that the principal *will* shoot the cashier, but that he may do so and, if the principal does shoot him, the accomplice will be guilty of murder. A different case is where the accomplice has only offence A in contemplation and the principal commit offence B. Here the accomplice although morally culpable (and perhaps guilty of conspiring to commit offence A), is not guilty of aiding and abetting offence B.' (*per* Lowry LCJ). *Slack* [1989] QB 775 at 781: 'B, to be guilty, must be proved to have lent himself to a criminal enterprise involving the infliction of serious harm or death, or to have had the express or tacit understanding with A that such harm or death should, if necessary, be inflicted.' *Penfold* (1980) 71 Cr App R 4 at 8: 'Robbers who burst into a house can hardly fail to contemplate the possible necessity of some degree of force to overcome or silence the occupants. While they might not desire to inflict any real harm, they do agree, by implication, to put themselves under the dictates of any arising.

⁹⁹ *Hawkins*, PC ch. 29 s.7: '... if there was malice in the abettor and none in the person who struck the party, it will be murder as to the abettor and manslaughter only as to the other'; *Howe* [1987] 1 AC 417 at 458: 'the mere fact that the actual killer may be convicted of the reduced charge of manslaughter for some special reason to himself does not, in my opinion, in any way result in a compulsory reduction for the other participant.' (*per* Lord Mackay).

settled prior to the House of Lords judgment in *Powell; English*.¹⁰⁰ The circumstance came about through the application of alternative fault elements upon the secondary party. This, in turn, resulted in the creation of new routes by which the resulting degree of homicide liability could be reached. In essence, the alternative fault element involved applying the *mens rea* of the substantive offence to both primary and secondary parties. There are essentially two branches that develop as offshoots to this approach. The first is that as the secondary party's fault is assessed on an individual and unilateral basis, he may be rendered liable for manslaughter even though the principal's deliberate and unforeseen act incurs murder liability. Unilateral is being used in the sense that the accessory's *mens rea* is unconnected with the principal's fault but is judged in the same way as stand alone primary liability. Thus, the second manifestation of assessing the accessory by his individual fault is a reluctance to impose a secondary party *mens rea* that is lesser than the one required by the substantive offence. This inevitably leads to the argument that a secondary party can only incur murder liability if he himself intended the requisite degree of harm. The argument in both cases turns upon the fact that the accessory's liability is assessed, not by any interrelationship with the principal's fault such as knowing of or contemplating the partner's intention, but by the accessory's own unilateral culpability with regard to the crime commission.

2.2.3.1 Assessing the Degree of Homicide Liability by the Secondary Party's Individual, Unilateral Fault

It should perhaps be conceded firstly that the employment of this approach will not necessarily arrive at a different result to that reached by the "unusual consequences" or "contemplation" tests. So, for example, having said in *Mahmood*,¹⁰¹ that the accomplice needs to have foreseen the occurrence of the particular act from which the fatal consequence flows, it is possible in most cases of constructive act manslaughter simply to apply the substantive fault to both individuals and obtain the same result. This arises because it is generally the case that the act from which the unforeseen consequence flows has been performed (or supported) intentionally or recklessly by both parties and that is exactly what the offence definition requires. It is simply necessary to demonstrate an intention to commit the unlawful and dangerous act that caused the victim's death. However, the inherent danger with this approach is that concentrating upon what the secondary party intended may short circuit the scope of purpose parameters by deflecting

¹⁰⁰ [1997] 4 All ER 545.

¹⁰¹ [1995] RTR 48, see above, pp.222-223.

attention away from what the secondary party actually foresaw.¹⁰² When considering homicide liability, it is insufficient merely to talk about a particular act without recognising that the act is coloured by the mental element that accompanies its perpetration, and the resulting degree of homicide liability is similarly coloured by the requisite fault. Thus, whilst the accessory might have intended to wound the victim, it does not follow that he also intended the wounding to cause grievous bodily harm. On the other hand, the principal may have intended just that. Applying *Anderson and Morris* and *Chan Wing-Sui*, the secondary party should only be liable for murder if he contemplated that the perpetrator would intentionally inflict serious injury. If he did not, he is not liable for homicide because the fatal act was beyond his contemplation. Instead, he may be liable for intentional wounding or reckless grievous bodily harm in accordance with s.20 Offences Against the Person Act 1861. However, applying the unilateral substantive fault element to both parties, opens the way for the logical imposition of manslaughter liability upon a co-enterpriser who intended to join in a dangerous act even though he did not contemplate that his associate intended to cause grievous bodily harm or even to kill. The co-enterpriser's individual fault is sufficient for manslaughter. Furthermore, as it is arguable that he is a co-principal in the fatal assault, it is possible to justify the application of the primary fault requirement as the most appropriate factor in delimiting his degree of homicide liability.

This basis of liability is encountered in *Betty*¹⁰³ where the Court of Appeal upheld the trial judge's contention that,

'...if two men attack a third without any intention of killing in the mind of either of them, and as the fight develops, one or other conceives in his mind an intention to kill and does kill, of course, that does not make the other man guilty of murder, because he never contemplated what was going to be done, he did not intend it; and in fact, did not do the act of killing... [but] it does not absolve that man of... manslaughter.'¹⁰⁴

Betty expressly followed *Smith (Wesley)*¹⁰⁵, a case that involved a spontaneous bar room brawl that involved assaults to both property and people, and during the course of which, the barman was fatally stabbed. In deciding upon the liability of the defendant it was argued:

...a person who takes part in or *intentionally encourages conduct* which results in a criminal offence will not necessarily share *the exact guilt of the one who actually shares the blow*. His *foresight of the consequences will not necessarily be the same as that of the man who strikes the blow*, the principal assailant, so that each may have a different

¹⁰² The imprecision of discussing "what" was intended or foreseen is used to avoid using still more ambiguous terms.

¹⁰³ (1963) 48 Cr App R 6.

¹⁰⁴ *Ibid.* at 10.

¹⁰⁵ [1963] 3 All ER 597 at 601.

form of guilty mind, and that may distinguish their respective criminal liability. *Several persons, therefore, present at the death of a man* may be guilty of different degrees of crime – one of murder, others of unlawful killing which is called manslaughter. **Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results.**¹⁰⁶

In accordance with this line of reasoning the important factor in imposing liability is the participation in an assault that ultimately results in a person's death. There is no consideration of the possibility that the principal's deliberate act of killing or causing grievous bodily harm was outside the scope of the purpose, thereby absolving the fellow assailants of homicide liability. On the other hand, there is evidence that the Court believed the appellant had contemplated the perpetrator's knife attack¹⁰⁷. Nevertheless he was convicted, on the basis of his individual fault,¹⁰⁸ of manslaughter.

In fact, the cases of *Smith (Wesley)* and *Betty* preceded both *Anderson and Morris* and *Chan Wing-Sui*; however, the subsequent decisions failed to successfully block the earlier route to liability. In *Reid*¹⁰⁹, the confusion between the sufficiency of primary party *mens rea* and the delimitation of secondary liability by the scope of purpose was patently evident. Misinterpreting the *Anderson and Morris* rule it was held that the perpetrator's 'deliberate firing of the revolver'¹¹⁰ was merely an "unforeseen consequence" of his possession of the weapon. Therefore, the Court of Appeal upheld the appellant's conviction for manslaughter despite the perpetrator's conviction for murder. The apparently unconscious merging of the liability distinction between the manifestation an "unusual circumstance" and an "unauthorised act" is clearly evident in the following reasoning:

When two or more men go out together in joint possession of offensive weapons such as revolvers or knives and the circumstances are such as to justify an inference that the very least they intend to do is to use them to cause fear in another, there is... always a likelihood that, in the excitement and tensions of the occasion, one of them will use his weapon in some way which will cause death or serious injury. If such an injury was not intended by the others they must be acquitted of murder; but having started out on an

¹⁰⁶ *Ibid.* citing trial judge, Thesinger J (italic emphasis in original, bold emphasis added).

¹⁰⁷ *Ibid.* per Slade J: 'It must clearly have been within the contemplation of a man like Smith... that if the bar tender did his duty to quell the disturbance and picked up the night stick, anyone whom he knew had a knife in his possession, like Atkinson, might use it on the barman, as Atkinson did.'

¹⁰⁸ 'Manslaughter is unlawful killing without an intent to kill or to do grievous bodily harm.': *ibid.* at 600-601.

¹⁰⁹ (1975) 62 Cr App R 109.

¹¹⁰ (1975) 62 Cr App R 109 at 112 (emphasis added).

enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter.¹¹¹

The argument here is that the secondary party contemplated the occurrence of an act which if death ensued would render him liable for manslaughter.¹¹² Thus, despite not contemplating that the perpetrator would deliberately kill or inflict grievous bodily harm and so become guilty of murder, the secondary party will be liable for manslaughter on the basis that a lesser degree of harm, sufficient to establish manslaughter liability, was contemplated. It must be conceded that this argument has a number of attractions. It ensures that the participants in a fatal enterprise are all held complicit in the unlawful killing but it allows a lesser degree of guilt to be imposed upon those parties who did not intend the infliction of serious harm. Where the actual killer cannot be identified¹¹³ the allure of this solution is especially appealing. If no party can be held liable for murder, the imposition of manslaughter convictions upon the reckless participants provides the justice system with a consolation prize that is perhaps expected by the public. Certainly, there will often be a palpable sense of public betrayal if the collaborators in a criminal enterprise that resulted in an unlawful killing were exculpated from the homicide liability and received alternative non-fatal offence convictions. Nevertheless, whilst it may satisfy public policy requirements, it is submitted that this means of imposing manslaughter liability on the non perpetrator is achieved by a doctrinal synapse. Certainly, the secondary party would be liable for manslaughter if the unlawful killing had resulted from the contemplated infliction of lesser harm. However, the cause of death was the unforeseen, and so unrelated, deliberate infliction of serious harm by the principal. This fatal act is unrelated because, through its potency, death results from a different offence to the one that the secondary party believed he was participating in.

Perhaps in an attempted answer to this doctrinal difficulty, the Court of Appeal, in *Stewart and Schofield*¹¹⁴, declared that joint enterprise was a separate doctrine, so the liability for a “joint enterpriser” stood alone from that of an aider and abettor:

¹¹¹ *Ibid.*

¹¹² Further confusion and inconsistency was revealed when Lawton LJ dismissed Reid’s appeal against his sentence asserting, ‘knowing of the murderous intent which his co-accused had, he accompanied them and was in joint possession with them of the murder weapons’: *ibid.* On the basis of the later case of *Chan Wing-Sui*, this would have rendered the appellant liable not for manslaughter but for murder.

¹¹³ *Uddin* [1998] 2 All ER 745 confirms that where it is impossible to identify the perpetrator and impossible to demonstrate the knowledge and foresight of the parties regarding the use of the lethal weapon, none are guilty of homicide but all are guilty only to the extent of their individual contributions. See below, p.245.

¹¹⁴ [1995] 3 All ER 159.

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 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 an entirely 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.¹¹⁵

Putting to one side the difficulties inherent in trying to make any meaningful sense out of the difference, particularly in conduct, between a secondary party and a “joint enterpriser”, the aim of this declaration seems clear enough. Despite not expressly enunciating the intention, Hobhouse LJ sought to implement a return to the idea of the principal in the second degree. Thus, as the non-perpetrating joint enterprisers are not deemed to be accessories, they are to be treated as principals. Accordingly, their criminal responsibility ‘will depend upon what individual state of mind or intention has been proved against them’¹¹⁶. This judicial sleight of hand permitted the confirmation of a manslaughter conviction against the participant in a robbery who had not anticipated that his co-adventurer would deliberately kill the victim in a deliberate attack that had been motivated, not by the dictates of the common purpose to rob, but by racial hatred – an act both unauthorised and unforeseen by the non perpetrator.¹¹⁷

2.2.3.2 Restricting Secondary Party Murder Liability to the Mens rea of the Substantive Offence

It is submitted that it is possible to find two impetuses in the reiterated appeals that argued for the instatement of intention as the requisite secondary fault for murder. The presage of the development is found in the earlier case of *Smith (Wesley)* and the subsequent cases that urged for the assessment of liability based on unilateral fault. Thus, in *Smith (Wesley)* it was asserted that ‘only he who intended that unlawful and grievous bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results’.¹¹⁸ However, the additional stimulus was the developing law of primary intention which had slowly tightened the fault for indirect intention until it reached its present definition that intent will be found if the defendant foresaw as a virtual certainty the risk

¹¹⁵ *Ibid.* at 165.

¹¹⁶ *Ibid.*

¹¹⁷ cf. *Lovesey and Peterson* (1969) 53 Cr App R; *Dunbar* [1988] Crim LR 693.

¹¹⁸ [1963] 3 All ER 597 at 602, citing trial judge, Thesinger J.

of the prohibited consequence eventuating.¹¹⁹ In effect, whilst it is still possible to argue that foresight falls into the territory of subjective recklessness, the intention cases certainly restricted the fault to the upper echelons of subjective recklessness and introduced afresh arguments of whether there should be a degree of probability test, that is, whether the risk should have been foreseen as more probable or likely to occur than not. Thus, the questions addressed by the Privy Council and dispensed with by *Chan Wing-Sui*, were reintroduced by the prompts to apply a consistent fault element to both primary and secondary parties to murder.

A series of appeal cases alternated between imposing murder liability upon an accessory either on the basis of the *Chan Wing-Sui* contemplation test or on the basis of requiring the secondary party to have had the specific intent defined by the substantive law. In *Ward*¹²⁰, it was decided that the current intention cases had no impact upon joint enterprise liability¹²¹ and dismissed the suggestion that the Privy Council decision was not in accordance with the House of Lords decisions of *Moloney* and *Hancock and Shankland*¹²². However, in *Smith*¹²³, the Court of Appeal distinguished *Chan Wing-Sui* and held that to be liable under s.18 Offences Against the Person Act 1861, it was necessary for the secondary party to himself have had the specific intent and it was insufficient – although it provided evidential grounds for finding the specific intent – that the accessory foresaw a real risk that his partner would cause grievous bodily harm with intent. Subsequently, in *Barr*¹²⁴, the intention cases were again applied to secondary parties¹²⁵. However, when those conclusions were reversed in *Slack*¹²⁶, the question of the appropriate

¹¹⁹ See above, p.19.

¹²⁰ (1987) 85 Cr App R 71.

¹²¹ 'It is enough to say that we do not consider that the cases of *R v Moloney* and *R v Hancock* have had any effect at all upon the well-known and well-established principles of joint enterprise.'; *ibid.* at 76.

¹²² *Ibid.* at 77.

¹²³ [1988] Crim LR 616.

¹²⁴ (1989) 88 Cr App R 362.

¹²⁵ The Court of Appeal distinguished *Chan Wing-Sui* where all appellants were heavily armed. Except for one party possessing a knife which was not used, the parties in *Barr* were unarmed. The asphyxiation of the victim occurred as result of her being smothered in, albeit violent, efforts to silence her. The trial judge had directed that co-enterprisers were guilty of murder if they had contemplated that the violence would be accompanied by an intention to kill or seriously injure the victim. In response the Court of Appeal introduced the intention cases, pronounced them relevant to secondary party liability and concluded, *ibid* at 369, that: 'Unwittingly, the judge with regard to a time prior to the burglary, unaided by these authorities [*Moloney* and *Hancock*] because they were decided after he had directed the jury in the present case, seems to have directed them as though it was not necessary for a defendant charged with murder himself to possess one of the necessary intents: it was enough to convict him if he contemplated that one of his co-accused had one of those intents and that he no more than foresaw the possibility of that intent being carried into effect by that person.' Consequently, the murder convictions were substituted with convictions for manslaughter.

¹²⁶ (1989) 89 Cr App R 252.

secondary fault element once more arrived before the appeal court. The appellant objected that foresight and contemplation did not equate with the necessary intent required to be proved against the primary party. The Court considered *Nedrick*¹²⁷, the current case defining intention but ultimately upheld *Chan Wing-Sui* and *Ward*, confirming the different *mens rea* requirements of primary and secondary parties:

A must be proved to have intended to kill or do serious harm at the time he killed. B may not be present at the killing; he may be a distance away, for example waiting in the getaway car; he may be in another part of the house; he may not know that A has killed; he may have hoped (and probably did) that A would not kill or do serious injury. If however, as part of their joint plan it was understood between them expressly or tacitly that if necessary one of them would kill or do serious harm as part of their common enterprise, then B is guilty of murder¹²⁸

The recurring seesawing between Court of Appeal decisions provides little surprise that, in 1997, the House of Lords accepted the opportunity to provide a definitive statement on the basis of joint enterprise liability and the scope and degree of secondary party liability for a collateral homicide.

2.2.4 The House of Lords Judgment – *Powell; English*

Two cases had been admitted for appeal. The first to be considered was Powell's appeal, where three men, including Powell, had been engaged upon a joint criminal enterprise to purchase drugs from a dealer. Having arrived at the appropriate house, the dealer was shot dead when he appeared at the door. The killing was not the purpose of the joint enterprise and the prosecution were unable to prove which of the three men fired the gun that killed the dealer.

The House of Lords concurred in the judgment that, having lent himself to the drug purchasing enterprise Powell had provided assistance and encouragement. Thereafter, his liability rested on whether he knew that his co-enterpriser possessed the gun and foresaw the possibility that he might use it during the course of the joint enterprise to kill or cause grievous bodily harm. In considering whether intention was the requisite fault element for a secondary party to be liable for murder, Lord Hutton considered the lines of authority that establish that foresight will suffice. He began by citing *Smith (Wesley)* as authority that where a secondary party foresees that, during the execution of an ^mcommon purpose a co-adventurer will perform an unlawful act with the requisite *mens rea*, then the secondary party is liable for that offence.¹²⁹ He upheld the "unusual

¹²⁷ *Nedrick* [1986] 3 All ER 1.

¹²⁸ (1989) 89 Cr App R 252 at 257.

¹²⁹ Unfortunately he did not address the inconsistency contained in *Smith (Wesley)* where Thesinger J, was quoted, apparently with approval (see n.104): 'Only he who intended that unlawful and grievous bodily

consequences” liability and the exculpation from an “unauthorised act” guidelines in *Anderson and Morris*¹³⁰ and, in elucidating the exact foundation of joint enterprise liability, tackled academic criticism that tacit agreement did not equate with contemplation¹³¹:

In many cases the distinction will in practice be of little importance... Nevertheless, it is possible that a case may arise where a party knows that another party to the common enterprise is carrying a deadly weapon and contemplates that he may use it in the course of the enterprise, but, whilst making it clear to the other party that he is opposed to the weapon being used, nevertheless continues with the plan. In such a case, it would be unrealistic to say that, if used, the weapon would be used with his tacit consent.¹³²

The preferred test was therefore that stated in *Chan Wing-Sui* that ‘a secondary party is criminally liable for acts by the primary offender which the former foresees but does not necessarily intend’¹³³. As to the question whether the primary *mens rea* for murder, intention to kill or to cause grievous bodily harm, should be applied to a secondary party, the argument was decisively rejected¹³⁴ and the previous decisions of *Smith*¹³⁵ and *Barr*¹³⁶, expressly overturned. Lord Hutton argued:

In my opinion, there are practical considerations of weight and importance related to considerations of public policy which justify the principle stated in *Chan Wing-Sui v R* and which prevail over considerations of strict logic.¹³⁷

This view was roundly endorsed by Lord Steyn. Following the line that had met with success in *Smith* and *Barr*, the appellant’s argument was that the secondary party in a joint enterprise should only be guilty of the murder committed by the perpetrator if he, too, had the full *mens rea* for murder. There were three parts to the argument. The first, which has already been illustrated, was that there was disharmony between two streams of authority. The second was that the accessory principle involves a form of constructive liability and the third that it is anomalous that

harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results.’ This oversight permitted the Northern Ireland Court of Appeal to distinguish *Powell; English in Gilmour*, see below p.252-254.

¹³⁰ [1966] 2 All ER 644, see above, p.221.

¹³¹ JC Smith’s commentary on *Wakely, Symonds and Holly* [1990] Crim LR 119 at 120.

¹³² [1997] 4 All ER at 556.

¹³³ *Chan Wing-Sui* [1985] AC 168 at 175. He also cited the more recent judgment by the High Court of Australia in *McAuliffe v The Queen* (1995) 130 ALJR 26 at 30: ‘... in accordance with the emphasis which the law now places on the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.’

¹³⁴ *Slack and Ward* were upheld. *Gillick v West Norfolk and Wisbech Area Health Authority* [1984] QB 581 was distinguished as being a civil action.

¹³⁵ [1988] Crim LR 616.

¹³⁶ (1986) 88 Cr App R 362 – ‘insofar as it relates to the liability of a secondary party who is a participant in a joint enterprise.’

¹³⁷ [1997] 4 All ER 545 at 562.

a lesser form of culpability suffices for a secondary party than for a primary party. Lord Steyn agreed with the third proposition but disputed the second, arguing that the subjective standard in the contemplation test obviates the validity of the objection. He also cited the reasoning of Professor John Smith in support of his proposition that the subjective recklessness required of an accessory is of a more refined and more culpable nature than is the case in primary party recklessness:

Recklessness whether death be caused is a sufficient *mens rea* for a principal offender in manslaughter, but not murder. The accessory to murder, however, must be proved to have been reckless, not merely whether death might be caused, but whether murder might be committed; he must have been aware, not merely that death or grievous bodily harm might be caused, but that it might be caused intentionally, by a person whom he was assisting or encouraging to commit a crime. Recklessness whether murder be committed is different from, and more serious than, recklessness whether death be caused by accident.¹³⁸

In response to the anomalous result that the secondary party requires a lesser degree of fault than the principal, Lord Steyn pointed to 'practical and policy considerations'¹³⁹ and justified the position by arguing that 'if the law required proof of the specific intention on the part of the secondary party, the utility of the accessory principle would be gravely undermined'¹⁴⁰. Therefore, whilst acknowledging the validity of the complaint, he emphasised that the social function of the criminal law take precedence over its theoretical consistency¹⁴¹. Thus, to summarise the House of Lords decision so far, a secondary party will be liable for murder 'if he realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm'¹⁴² (see fig. 8).

In the *English* appeal the purpose of the joint enterprise was to attack and cause injury to a police officer. English and his friend, Weddle, had jointly assaulted a police constable using wooden posts as weapons. During the course of the assault, Weddle produced a knife and stabbed the

¹³⁸ "Criminal Liability of Accessories: Law and Law Reform" (1997) 113 LQR 453 at 464.

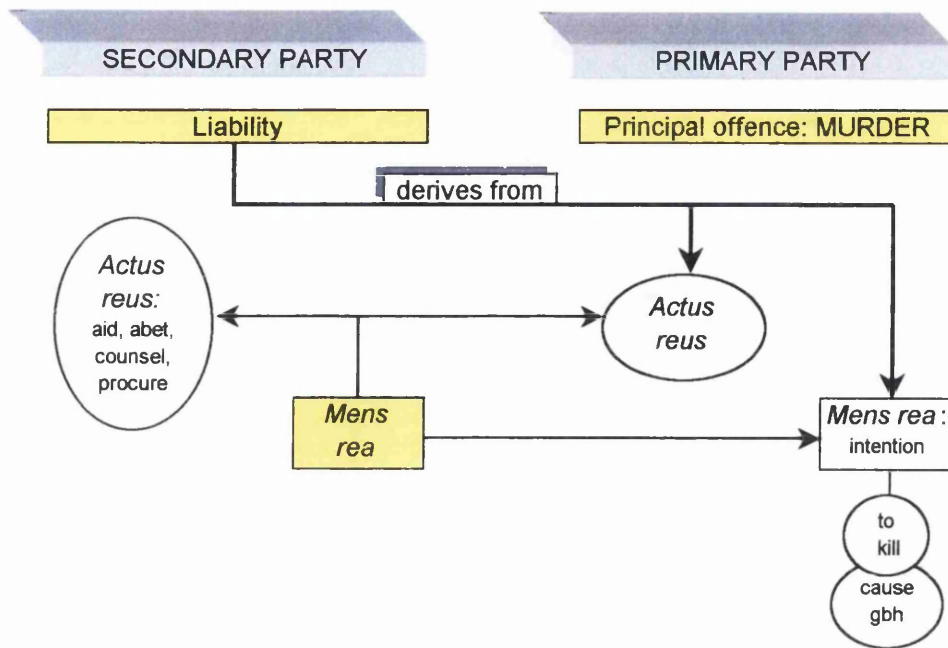
¹³⁹ [1997] 4 All ER 545 at 551.

¹⁴⁰ *Ibid.*: 'In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases.'

¹⁴¹ Although in response to the complaint of inconsistency it has been argued that there is no doctrinal reason to expect it: '...since the source of culpability as an accessory is not the offence definition, there is no logical imperative that the mental element for an accessory should be the same as that required for a principal.': Dennis, 'The Mental Element for Accessories' in *Essays in Honour of JC Smith* at 41. 'In the nature of things, the *mens rea* of the secondary party must differ from that of the principal. The definition of an offence specifies the state of mind with which the act causing the *actus reus* must be done. The principal does that act but the secondary party does not.': JC Smith [1988] Crim LR 618.

¹⁴² [1997] 4 All ER 545 at 563.

Fig. 8 The Construction of Secondary Party Liability for a Collateral Murder



policeman thereby inflicting the injuries that caused the victim's death. At first instance, English had been found guilty of murder. The trial judge had summed up by asking the jury to consider whether English had known that there was a substantial risk that Weddle might cause some really serious injury, if not with the knife then with the wooden post. He continued that, if English had 'joined in an unlawful attack on the sergeant realising at that time that there was a substantial risk that in that attack Weddle might kill or at least cause some really serious injury to the sergeant'¹⁴³, then he would be liable for murder. However, all five Lords found that English was not liable for murder, reasoning that he was not criminally responsible because it had not been proved that he knew of Weddle's possession of the knife. Without this knowledge, English could not have foreseen that his cohort would stab the deceased and the act of stabbing was different to the act of beating the victim with a wooden post. However, the significance of the difference between the contemplated act and the actual act was that there was increased risk of life-endangerment in the use of a knife rather than a post. Support for the argument was assembled from *Chan Wing-Sui*, where it was required that the 'type of act' had been foreseen, and also from the proposition in *Anderson and Morris* that a secondary party will not be guilty of manslaughter 'when one of them has completely departed from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way that no party to that common design could suspect'¹⁴⁴. Perhaps more convincing is the authority of *Gamble* which tackles murder rather than manslaughter liability. Endorsing Carswell's J decision, Lord Hutton agreed that a secondary party who foresees grievous bodily harm caused by "kneecapping" with a gun should not be liable for a murder caused by throat-cutting. However, he was ambivalent about extracting a general rule of murder liability where a secondary party foresees the use of a gun to "kneecap" the victim and the principal deliberately kills the victim by firing into the head or body.¹⁴⁵ With no such difficulty in English's case, it was concluded that, to incur liability for the murder, English needed to have foreseen the possibility that the knife may be used rather than the post, due to the far greater potential for fatality in the case of a knife attack. As to the relevance of the weapon, Lord Hutton was emphatic in delivering the following caveat:

...if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not

¹⁴³ *Ibid.* at 553.

¹⁴⁴ [1966] 2 QB 110 at 120.

¹⁴⁵ Whilst it is evident that Lord Hutton was trying to avoid pronouncing a legal rule that might prove inflexible, this uncertainty about the exact liability that follows secondary foresight of the same act but with a different intention leaves open the possibility of distinguishing the facts along the lines followed in *Gilmour*, below p.252-254.

escape liability because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill or vice versa.¹⁴⁶

Yet, if English was not guilty of murder, then for which criminal offence did he remain liable? Endorsing *Anderson and Morris* and applying strict logic, it was held that, as the murder was effected by an act unforeseen by the defendant, he was not liable for it. Neither was he liable for manslaughter because the un contemplated act resulting in the homicide was not an “unusual consequence” but a deliberate act that limited liability to the principal offender. Thus, the appellant remained criminally responsible for his own contribution in the assault, presumably, causing grievous bodily harm with intent¹⁴⁷. The possibility of a differential murder/manslaughter verdict for primary/secondary parties in accordance with *Barr* and *Smith* was expressly excluded.¹⁴⁸ Furthermore, it is arguable that this decision implicitly¹⁴⁹ overturned the Court of Appeal decision in *Stewart and Schofield*, that, based on the fact that the secondary party’s *mens rea* is sufficient to fulfill the requisite fault for manslaughter, an accomplice will be liable for the lesser homicide offence when the principal deliberately murders the victim.¹⁵⁰

In summary, the House of Lords clarified the homicide liability of a secondary party in a joint enterprise and established that liability is determined by the secondary party’s contemplation or foresight, not exclusively by his intention. Thus, a secondary party who contemplates that, during the course of the enterprise, a fellow participant will intentionally kill or cause grievous injury to the victim by the very act that is actually used, will be guilty of murder. However, if the deliberate lethal act of the perpetrator has not been contemplated, then the secondary party may not be liable for murder, even though the accomplice intended to cause grievous bodily harm – a state of mind that in the primary party is sufficient for murder. When the fatal act has been

¹⁴⁶ [1997] 4 All ER 545 at 566.

¹⁴⁷ s.18 Offences Against the Person Act 1861.

¹⁴⁸ [1997] 4 All ER 545 at 560-1. The possibility of a differential murder/manslaughter verdict between parties may still arise in the case of an accessory procuring a “semi-innocent agent” as in the illustration provided in *Howe*, see above p.204. It is interesting to note that there has been a decrease in the number of differential verdicts since 1997: 1999 saw 3 cases and 1998, 7 cases, compared with 1991: 11; 1992: 9; 1993: 14; 1994: 12; 1995: 9; 1996:11; 1997: 10. However, the numbers are so small that the apparent decrease must be treated with caution until further statistics become available. Figures extrapolated from data provided by the Research Development and Statistics Directorate, Crime and Criminal Justice Unit, Home Office.

¹⁴⁹ However, the judgment in *Stewart and Schofield* was not expressly addressed – a fact utilised and expounded upon in *Gilmour* [2000] 2 Cr App R 207.

¹⁵⁰ ‘I am by no means convinced that we have heard the last in England of arguments that the secondary party should be convicted of manslaughter where the principal has gone beyond the joint enterprise and committed murder.’: JC Smith [1998] Crim LR 232. This precognition came to fruition in *Gilmour* below p.252 and the criticisms of Clarkson, below p.154.

unforeseen, the decisive test of secondary murder liability, is whether the means used can be equated, in terms of its lethal potential, with the means contemplated. In the case under consideration, the use of a knife was held to be a materially different act to striking the victim with a wooden post because of the propensity for a stabbing to cause fatal injury. However, it was suggested that the use of a gun is just as likely to result in fatality as the use of a knife, and so there is no fundamental difference between the two.¹⁵¹ Therefore, as the two weapons carry an equal risk to life, a secondary party would not escape murder liability if he foresaw the use of one weapon and the principal employed the other. By the same token and although not expressly confirmed by the Lords, where a secondary party intends the victim to be killed, the contemplation of the actual means used is entirely irrelevant.¹⁵² With regard to the liability of a secondary party who did not contemplate the materially different act that caused the victim's death, as the manifested homicide offence was beyond his contemplation, he is not liable for the homicide at all; therefore a manslaughter charge is not an alternative verdict. Unfortunately the House of Lords did not enunciate the actual offence for which English remained liable¹⁵³. However, logically he is responsible only for his individual contribution or for an alternative offence that he contemplated the principal might commit and that was in fact committed. Thus, it seems that English was liable for causing grievous bodily harm with intent. In accordance with this evaluation of the decision, the results of applying *Powell; English* to a fatal physical assault are summarised in the following table:

<i>Variations in the Fault Relationship Where the Victim Dies after a Physical Assault</i>	
<i>Secondary Party Mens rea</i>	<i>Primary Party Mens rea</i>
Vertical hatching	– within scope of purpose under ‘unusual consequences’ liability
Unshaded	– within scope of purpose under contemplation test
Horizontal hatching	– outside scope of purpose under contemplation test.
1. S intended or foresaw the infliction of, at most, actual bodily harm.	P intended or foresaw the infliction of, at most, actual bodily harm.
<i>Manslaughter</i>	<i>Manslaughter</i>

¹⁵¹ Cf. *Smith (Wesley)* [1963] 3 All ER 597; when a knife was used to fatally stab a barman, it was suggested that the use of a loaded revolver, the presence of which was unknown to the other parties, might have been outside the scope of the concerted action.

¹⁵² ‘Unlike g.b.h., there are no degrees of death.’: JC Smith [1998] Crim LR 50.

¹⁵³ ‘English was guilty of a very serious attack on Sergeant Forth, striking him a number of violent blows with a wooden post at the same time as Weddle attacked him with a wooden post. Therefore English was fully deserving of punishment for that attack, but it is unnecessary for your Lordships to give any further consideration to this point as English has already served a number of years in detention pursuant to the sentence of the trial judge.’: [1997] 4 All ER 545 at 566 *per* Lord Hutton.

Variations in the Fault Relationship Where the Victim Dies after a Physical Assault

Secondary Party Mens rea

Primary Party Mens rea

Pale grey shading	–	within scope of purpose under ‘unusual consequences’ liability
Unshaded	–	within scope of purpose under contemplation test
Dark grey shading	–	outside scope of purpose under contemplation test.

2. S foresaw, but did not intend, the infliction of grievous bodily harm

P foresaw, but did not intend, the infliction of grievous bodily harm

Manslaughter

Manslaughter

3. S foresaw the infliction of grievous bodily harm upon the victim.

P killed the victim having unexpectedly evolved an intention either to kill the victim or to cause the victim grievous bodily harm.

S.20 OAPA

Murder

4. S intended some injury less than grievous bodily harm (or an offence that involved no offence against the person) but foresaw that the perpetrator might intentionally kill the victim.

P intentionally killed the victim.

Murder

Murder

5. S intended some injury less than grievous bodily harm (or an offence that involved no offence against the person) but foresaw that the perpetrator might intentionally cause grievous bodily harm to the victim.

P intended to cause grievous bodily harm.

Murder

Murder

6. S intended to cause grievous bodily harm, but not death to the victim, knowing or contemplating the means by which the fatal injury was inflicted.

P intended to cause grievous bodily harm.

Murder

Murder

7. S intended to cause grievous bodily harm to the victim but by a means less likely to cause death than the one subsequently, and unexpectedly, used by the perpetrator.

P intended to cause grievous bodily harm.

S.18 OAPA

Murder

8. S intended the death of the victim but contemplated a different means of killing to the one used by the perpetrator

P intended to kill the victim

Murder

Murder

2.2.4.1 *The significance of Weapons*

Powell; English focussed attention on the significance of the fatal weapon in establishing secondary liability. However, although weapons may become a critical factor in establishing joint enterprise liability, the possession and use of weapons is a matter of evidence¹⁵⁴ rather than of substantive law. Knowledge of possession becomes a critical question in establishing the contemplation of the secondary party and it is the contemplation that defines the scope of the common purpose and the accessory's liability. In fact, this is nothing new.¹⁵⁵ In *Caton*¹⁵⁶, B contemplated an assault with fists and A caused the victim's death by striking him with a heavy piece of timber. Similarly, in *Davies v DPP*¹⁵⁷ the fist fight contemplated by B was superseded by A's fatal use of a knife. In both cases, the unforeseen use of the lethal weapon were held to fall outside the scope of the enterprise and resulted in homicide liability for A alone, the remaining parties being convicted of common assault offences.¹⁵⁸ However, as *Powell; English* emphasised that the nature of the weapon used affected the liability issue of the materially different nature of the act, one of the questions that remained unsolved by the House of Lords was how to prioritise and /or equate weapons in order of their lethal nature.

Two subsequent Court of Appeal cases provide supplement and elucidation to *Powell; English*. Both involved spontaneous attacks by a group of individuals joining into a mob and using weapons that were either obtained or used opportunistically.¹⁵⁹ The first was *Uddin*¹⁶⁰, where the appellant was one of six individuals who joined in a spontaneous attack on another man following an argument about a driving incident. Some of the participants used what appeared to be snooker cues to hit the victim and others punched, kicked and stamped upon him. Unable to offer any resistance in the face of the onslaught, the victim was quickly beaten to the ground. At some

¹⁵⁴ *Caton* (1874) 12 Cox CC 624

¹⁵⁵ *Gamble* [1989] NI 268 at 282 *per* Carswell J: 'There is a discernible current of thought in the authorities that the use by one conspirator of a deadly weapon such as a gun, without the knowledge or consent of the other, takes the case into a different category and absolves the latter from responsibility for the consequences'. See such cases as *Caton* (1874) 12 Cox CC 624 *per* Lush J, and *Smith (Wesley)* [1963] 3 All ER 597 at 602 *per* Slade J.

¹⁵⁶ (1874) 12 Cox CC 624 *per* Lush J (cited in *Gamble, ibid.* at 282 and KJM Smith *Treatise* at 230-1).

¹⁵⁷ [1954] AC 378.

¹⁵⁸ 'I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest should be treated as accomplices in the use of the knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack by one of their number, as opposed to a common assault.': *ibid.* at 401 *per* Lord Simonds LC.

¹⁵⁹ For the public policy issues of using the criminal law to control this type of assault, see above, p.213.

¹⁶⁰ [1998] 2 All ER 744.

point one of the participants, T, stabbed him in the head with a flick knife. The attack was fatal with death resulting from head injuries. The stab wound was the most serious injury and the cause of death, although two other head wounds produced by blows with a blunt instrument could not be ruled out as contributory causes. Apart from the evidence of one witness who heard someone shout, 'Stab him!' there was no evidence that any of the five knew that the perpetrator had a knife. In a case tried prior to the House of Lords ruling in *Powell English*, five of the participants including Uddin and T were tried for murder. Uddin and T were found guilty of murder and the other three were acquitted of murder but convicted of manslaughter. Endorsing and applying *Powell; English*, the Court summarised the law of joint enterprise liability as follows:

1. Where all parties intend to cause grievous bodily harm and the death of the victim results, all are liable for murder unless the fatal injury was inflicted 'solely by the actions of one participant of a type entirely different to actions which the others foresaw as part of the attack'.¹⁶¹
2. In deciding whether the action is entirely different the use of weapon is a 'significant factor'¹⁶². If the character of the lethally employed weapon, for example, its propensity to cause death, is different from that of any weapon used or contemplated by the co-adventurers, those other parties are not liable for the homicide. Instead, they are guilty of the offences of wounding or grievous bodily harm that they have individually committed.
3. However, if the alternative weapons used or contemplated could be regarded as equally likely to cause fatal injury, 'the mere fact that a different weapon was used is immaterial'¹⁶³ and the co-adventurers are responsible for murder.
4. If during the course of the attack the lethal weapon has been produced and the other parties are aware of its existence and join the attack or continue to participate in it, they are guilty of murder.
5. Where after a concerted attack the victim dies but it is impossible to identify the perpetrator, the parties who knew of and contemplated the use of the murder weapon will be responsible for murder. However, where it is also impossible to demonstrate that the parties had knowledge of the weapon and foresight of its use none of them will be guilty of murder, although they will be liable for the individual offences committed during the course of the assault.

¹⁶¹ *Ibid.* at 751.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

The final conclusion that situations might arise where no one is held responsible for homicide but only, in accordance with their contribution, for individual assault offences,¹⁶⁴ may be particularly unpalatable from a retributionist standpoint. It may seem to the public that a deliberate unlawful killing has gone unavenged and that the criminal justice system has therefore failed to punish the deserving or to send out a strong message to other would-be mob assailants. Furthermore, it may seem to obviate the main attraction of common purpose liability whereby guilt can be imputed and shared among all of the participants in a criminal enterprise. However, historically, common purpose liability was never intended to affix a contributor with criminal responsibility that exceeded his own fault¹⁶⁵ and, whilst he did not shy away from reaching the logical conclusion required by the application of *Powell; English*, Beldam LJ was clearly cognisant of the social context of the case:

... an analysis of the risk [that is] appropriate in the case of criminals who agree together in advance to commit an offence such as armed robbery, does not readily fit the spontaneous behaviour of a group of irrational individuals who jointly attack a common victim, each intending severally to inflict serious harm by any means at their disposal and giving no thought to the means by which the others will individually commit similar offences on the same person.¹⁶⁶

In effect, this realisation confronts the “different” nature of a scenario that under South African law was refined into a sub-category of common purpose and subsequently known as joining in.¹⁶⁷ There is surely no doubt that it would be possible to provide a similar set of criteria, such as the need for presence at the scene, to create a new division of joint enterprise. However, there would be little point in doing so. The basis of liability is contemplation and that applies whether the participant is present or absent. Clearly, where he is actually present and actively contributing to the crime commission, certain aspects of liability will become more potent. In *Uddin*, this was implicitly understood in the proviso that if the previously unknown, more lethal weapon is produced during the course of the attack and the non-wielding participant joins or continues in the assault, that will render him liable for the homicide. It seems likely that this will effectively limit the number of situations where none of the participants can be implicated in the homicide. Furthermore, it encompasses the South African joining in liability without needing to resort to legal fictions. As Beldam LJ explained, it is often the case that participants in this type of scenario cannot be clearly divided into primary and secondary parties:

¹⁶⁴ For dissatisfaction with the result see below, p.251.

¹⁶⁵ See e.g. *Salisbury's Case* Hale 1 PC 438.

¹⁶⁶ [1998] 2 All ER 745 at 751.

¹⁶⁷ See above, p.95.

In truth, each in committing his individual offence assists and encourages the others in committing their individual offences. They are at the same time principals and secondary parties. Because it is often a matter of chance whether one or other of them inflicts a fatal injury, the law attributes responsibility for the acts done by one to all of them...¹⁶⁸

Uddin, however, was concerned with weapons similar to those in *English*, that is, a knife, which is more obviously lethal than a wooden post or cue. In *Greatrex and Bates*¹⁶⁹, Bates and at least three others, including Greatrex upon noticing a friend engaged in a fight with the victim, had run to join in, allegedly to assist their friend. B picked up a bar on the way to the affray and it was a strike to the head with this weapon that floored the victim and caused the fatal injury. Meanwhile, the victim was repeatedly punched and kicked before and after the blow with the bar. The appeal was allowed to clarify the question, 'Can a defendant be convicted of murder, if notwithstanding his intent to cause really serious injury to the deceased, he neither intended nor foresaw the act by which death was caused, nor knew of the weapon by which it was caused?' During the course of the ruling (given prior to the House of Lords decision) the trial judge had asserted:

The [defence] submission [that a joint enterprise aiming to inflict serious harm without weapons does not encompass the unforeseen use of a weapon by one of the group in order to inflict harm] depends upon treating the joint intent not as an intent to do serious harm but as an intent to do serious harm in a particular and limited way. While one can appreciate the broad sense of justice underlying the submission, it is both clearly contrary to authority and, in my view capable in its turn of producing injustice.¹⁷⁰

Relying on *Powell; English* it was argued for Greatrex that the striking of a heavy blow to the head with a metal bar was a 'qualitatively different and more dangerous act'¹⁷¹ than kicking with ordinary shoes. The Court of Appeal held that ultimately it is for the jury to decide¹⁷². Nevertheless Beldam LJ proffered a strong argument for differentiating and equating the relative lethal qualities of different weapons by analysing their dangerousness. Thus, he concurred that, although in reality a different weapon, in terms of dangerousness, a blunt instrument such as wooden post or metal bar is the equivalent of a kick with shod feet.¹⁷³ However, none of these means of assault are as dangerous as a knife or gun. In *Powell; English*, too, Lord Hutton made a similar distinction referring to the case of *Hyde*¹⁷⁴ where the victim's skull was crushed by a

¹⁶⁸ [1998] 2 All ER 745 at 751.

¹⁶⁹ [1999] 1 Cr App R 126.

¹⁷⁰ *Ibid.* at 131.

¹⁷¹ *Ibid.* at 135.

¹⁷² *Ibid.* at 140.

¹⁷³ *Ibid.* at 136-7.

¹⁷⁴ *Hyde, Sussex and Collins* [1991] 1 QB 134.

heavy “penalty kick” to the head.¹⁷⁵ Thus, kicking and striking with a wooden post were contrasted with employing a knife or gun. It is submitted that there is also room for argument whether a knife and a gun can be equated in terms of lethality: it was certainly implicit in *Smith (Wesley)* that a loaded gun is more lethal than a knife or cut-throat razor.¹⁷⁶ However, further complexity is disclosed when there is a question of how the gun may be used. It may be used to fire a bullet or cartridge but may also be used as a blunt weapon. This actually occurred in *Bamborough*¹⁷⁷. B and another party T entered V’s flat with intent to commit robbery, T carrying a gun. V was beaten with the gun then fatally shot by T. B asserted that, although he knew that T was carrying the gun, he believed that it was unloaded and it was argued that the trial judge ought to have directed that if B was found to be a party only to the pistol whipping which was not the cause of death, he ought to be convicted only of manslaughter. In other words, a distinction was to be drawn between fatal and non-fatal grievous bodily harm. It was held that the crucial question on a murder charge was whether the secondary party contemplated that the principal might kill or intentionally inflict grievous bodily harm on the victim, and nevertheless continued in the venture. In other words, rather like the pre-House of Lords versions of *English*, B’s contemplation of the intentional causing of grievous bodily harm (during the pistol whipping) was held sufficient *mens rea* to incur murder liability.

It has been pointed out that this decision fails to take into account the divorce between the contemplated act and the fundamental difference in the contemplated scenario where P intends to kill by shooting but B believes that the weapon will be used as a blunt instrument.¹⁷⁸ Certainly, the use of the gun *per se* is not sufficient if the secondary party did not contemplate the specific intent of the perpetrator. Thus, a secondary party’s belief that his associate will use an unloaded gun to simply to threaten and so cause fright or hysteria would not implicate him in a deliberate killing by shooting the victim with the covertly loaded weapon.¹⁷⁹ However, where the secondary party contemplated the intentional infliction of serious injury *and* the use of the weapon, albeit in a different form, the question is more vexed. *Powell; English* agreed with the decision in *Gamble*¹⁸⁰, that a secondary party would not be liable for the perpetrator’s use of a knife to cut the victim’s throat if he had merely foreseen the infliction of intentional grievous bodily harm by

¹⁷⁵ [1997] 4 All ER 545 at 564.

¹⁷⁶ [1963] 3 All ER 597 at 602 *per* Slade J.

¹⁷⁷ [1996] Crim LR 744.

¹⁷⁸ *Ibid.*: commentary by JC Smith.

¹⁷⁹ *Perman* (1996) 1 Cr App R 24.

¹⁸⁰ See above, pp.218-219.

“kneecapping”. However, this begs the question whether it is not the specific employment of the weapon rather than simply its potential for lethal harm that is the point at issue. If the murderer in *Gamble* had used the gun to shoot the victim in the head rather than “kneecap” him, would this not be on a par with his using a knife in a way un contemplated by the secondary party? It has been argued that despite the employment of the known weapon, this is a materially different type of act¹⁸¹. Unlike involuntary manslaughter where there is no requirement that the consequence of the action be realised, murder, at least for the primary party, incorporates the need for the consequence to have been aimed at or foreseen as a virtual certainty. That consequence need not be death, but it must be very serious injury. In the illustration suggested, the act contemplated by the secondary party (kneecapping) would entail the foresight of a very different consequence to that expected to follow from shooting someone in the head. Of course, it is always open to argument that foresight of the consequence of causing serious injury suffices for murder and it is exactly that which is encompassed within this scenario. However, that is to lose sight of the fact that the reason posited for differentiating between contemplated and qualitatively, materially or fundamentally different acts is the greater likelihood of death resulting from the manifested act compared to the likely act foreseen by the accused.¹⁸² If it is true that the emphasis is better placed on the contemplated/manifested act dichotomy rather than the fact that, either the two acts satisfy the conduct element of the same offence definition, or that the acts involve the use of the same weapon, then presumably there is scope to correct a future appearance of the facts of *Bamborough*.

This conclusion about the use of the same weapon in a fundamentally different way is based on following the logic of the liability rationale; the projected results are pure conjecture.¹⁸³ What is certain is that ‘if the acts of A, which caused the *actus reus* of an offence, were fundamentally different from any act foreseen by his accomplice, B, B is not responsible in law for those acts or their consequences.’¹⁸⁴ However, whilst the theoretical basis of this conclusion is solid, the practical application of the results may be fraught with difficulty. Professor Smith admits that ultimately this may be seen as disadvantaging the accomplice because manslaughter is left out of the choice of conviction options and so, when asked to choose between murder and affray, a jury

¹⁸¹ JC Smith Commentary on *Powell* [1998] Crim LR 49.

¹⁸² ‘It is not simply a question whether B was aware that A had the type of weapon with which the deed was done. An industrial boot may be as deadly as a cosh or a knife and, whatever the weapon is, much depends on the manner and the intention with which it was used.’: JC Smith [1998] Crim LR 736.

¹⁸³ Cf. the reasoning and findings in *Gilmour*, below p.252.

¹⁸⁴ JC Smith Commentary on *Greatex* [1998] Crim LR at 734-5.

may decide on the former: 'they might more readily find that B foresaw the fatal act and was guilty of murder, if the alternative was to acquit him of homicide.'¹⁸⁵

2.2.5 TENSIONS AND REVERSIONS TO PRE-POWELL LIABILITY

Objections to the House of Lords decision have been broached by both the judiciary and academic commentators. It is the *English* limb that has sustained most criticism, provoking discontent with the consequence that an accessory cannot be convicted of manslaughter in cases where the principal is guilty of an unforeseen murder. However, there has also been protest against the *Powell* limb, that an accessory's' murder liability is based on contemplation that the principal may intentionally kill or intentionally cause grievous bodily harm; the force of this argument revisits the contention that it is iniquitous to base a secondary party's liability on a lesser fault element than that required for the perpetrator.

2.2.5.1 Unfavourable Judicial Responses

The judicial breakaway from the *English* limb has arisen in Northern Ireland, where the nascent rebellion in *Crooks*¹⁸⁶ eventually met with victory in *Gilmour*¹⁸⁷. *Crooks* involved a punishment beating and, at first instance, the appellant had been found guilty of manslaughter on the basis that, although he did not foresee that the principal would intentionally cause grievous bodily harm, he was a party to a criminal enterprise, the purpose of which was to inflict harm on the victim. The Court of Appeal ultimately upheld *Powell; English*: having found that the perpetrator's lethal actions went beyond the bounds of the defendant's contemplation they confirmed that he was not guilty of the homicide. However, it was considered necessary to repeat the principle underlying the decisions which lay down the rule that an accessory in the circumstances of the present case should not be convicted of manslaughter. The reasons for feeling the need to do so are particularly enlightening and reveal that it is not only juries that may find the law of joint enterprise a sticking point:

The learned [trial] judge held... that the appellant... certainly knew that an attack of some significance would take place on [the victim], that a baseball bat would be used in it, and that it was planned that [he] would either participate in or assist the attack. He therefore concluded that the attack resulted in the unlawful killing, which made the accessories guilty of murder. *It clearly did not satisfy his sense of justice that where the accessory fully intended that some measure of physical harm should be inflicted on the*

¹⁸⁵ *Ibid.* at 735

¹⁸⁶ [1999] NI 226.

¹⁸⁷ [2000] 2 Cr App R 207.

victim he should escape [homicide] liability when the measure inflicted went beyond his contemplation.¹⁸⁸

The seed of dissent found more fertile ground in *Gilmour*.¹⁸⁹ The facts of the case were more than usually emotive because it involved the deaths of three children in a conflagration that resulted from the sectarian petrol-bombing of their house, an offence to which the defendant had been a party.¹⁹⁰ Returning to *Stewart and Schofield*¹⁹¹ to find authority for the reasoning,¹⁹² the Court of Appeal decided that it could not be substantiated that the defendant was aware that the principals intended to cause grievous bodily harm, so he must therefore be exculpated from the murder of the three victims. However, the Appeal judges went on to assert that 'there was no reason, however, why a person acting as an accessory to a principal who carried out the very deed contemplated by both should not be guilty of the degree of offence appropriate to the intent with which he acted.'¹⁹³ Thus, the appellant, who had intended the throwing of the petrol bomb to cause a fire, foreseeing the damage of property and the creation of fear¹⁹⁴, was convicted of manslaughter.¹⁹⁵ The case was distinguished from *Powell* on the grounds that, although an accessory was not liable for the unforeseen acts of the principal, a different result could apply where the principal carried out the very act contemplated by the accessory, but with a different intention. In this circumstance, the accessory should be liable for the degree of offence appropriate to his own individual fault.¹⁹⁶ This line of reasoning reveals a lacuna in the *Powell* judgment: in cases where a principal 'perpetrates a more serious act of a different kind unforeseen by the

¹⁸⁸ [1999] NI 226 at 232 (emphasis added).

¹⁸⁹ [2000] 2 Cr App R 407.

¹⁹⁰ The appellant had driven the principals to the house and waited in the car with a further man. *ibid.* at 410-411.

¹⁹¹ [1995] 3 All ER 159, see above, p.211.

¹⁹² [2000] 2 Cr App R 407 at 415.

¹⁹³ *Ibid.*

¹⁹⁴ The trial judge maintained that '[a]ny one sleeping upstairs in a house in which a petrol bomb has been ignited is certain to suffer some inhalation of smoke, runs the considerable danger of suffering burns and may suffer injuries in a hasty escape. Failure to warn the occupants shows that [the victims] were intended to awake in a burning house.': *ibid.* at 412. However, on appeal, Carwell LCJ pronounced, at 413: 'It would be difficult to attribute to [the appellant] with any degree of certainty an intention that the attack should result in more than a blaze which might do some damage, put the occupants in fear and intimidate them into moving from the house.'

¹⁹⁵ In fact, the comparative reasoning applied for the imposition of a manslaughter conviction is flawed. Carswell LCJ cites an example, *ibid.* at 414, 'where the principal and accessory agree that the principal will post an incendiary device to the victim, the accessory contemplating only superficial injuries but the principal foreseeing and hoping that the injuries will be serious or fatal'. In this case, according to Blackstone's *Criminal Practice*, 2000 ed., para. A5.5 at 75, the accessory will be guilty of manslaughter. However, while the trial judge believed that the appellant had foreseen the infliction of some harm to the victims, Carswell argued that mere fright, not superficial injuries, was the full extent of his foresight: n.194.

¹⁹⁶ *Ibid.* at 415.

accessory¹⁹⁷ the accessory escapes liability for the consequences of the unforeseen act. However, it was argued, 'it does not follow that the same result should follow where the principal carries out the very act contemplated by the accessory, though the latter does not realise that the principal intends a more serious consequence from the act'¹⁹⁸. That the House of Lords had intended to imbue the differentiation with any significance is a moot point. Indeed, it is arguable that the Court of Appeal misunderstood or, at least, glossed an element of the *Powell* judgment in the following assertion:

The cases in which an accessory has been found not guilty both of murder and manslaughter all concern a departure by the principal from the *actus reus* contemplated by the accessory, not a difference between the parties in respect of the *mens rea* of each.¹⁹⁹

It is particularly unfortunate to find the misleading implication that the *actus reus* of homicide comprises the act, rather than the consequence, of causing an unlawful death, but presumably that is the meaning that the assertion was intended to convey. Certainly, *Powell* considered the central relevance of the contemplated act and the effect of a departure by the principal in the sense that the act causing death was fundamentally different to the risks foreseen and taken into the bargain by the secondary party. However, the *English* limb did not categorically dismiss the possibility that English and Weddle shared the *mens rea* of intending grievous bodily harm to their victim, and the jury at the trial court clearly believed the English had this requisite fault for murder. Nevertheless, countering the decision in *Gilmour*, certainly raises further considerations that relate to the central relevance of the context of an act.

Pursuing the context of an act in relation to the facts of the case, it may be argued that the throwing of the petrol bomb is an action that only gains colour and substance when a mental element is superimposed upon it. This is not to suggest that the action will normally be morally ambivalent – although it is possible to conceive of scenarios where the throwing of a petrol bomb might be the action of a selfless hero, such as when he acts to remove a latent danger from his proximate fellows. However, it is possible, when taking into account the surrounding context, for a secondary party to perceive an act as being fundamentally different to the one intended, even when the physical manifestation of the behaviour is the same. Applied to the case facts, throwing a large petrol bomb²⁰⁰ designed and catapulted with the intention of endangering life is

¹⁹⁷ *Ibid.* at 414.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.* at 414-415.

²⁰⁰ A 1¾ litre whiskey bottle containing petrol was used: *ibid.* at 409.

intrinsically and morally different to using a less potent petrol bomb as a missile to cause a relatively small fire. On the other hand, it is conceded that the actualities of rapid and uncontrolled fire spread might quickly obviate the differences in real terms. That said, the Appeal judges conceded that injury to occupants resulting from the throwing of a petrol bomb is, in fact, a rare occurrence.²⁰¹

Perhaps a similar but clearer scenario might be where an accessory contemplates that his partner will terrify the victim by trying to fire a gun but, believing that a faulty firing mechanism has rendered it inoperable, is reconciled only to the risk of the weapon being used as a cudgel. If the partner, who knows that the gun is operable, deliberately takes aim and fires then the accomplice may have contemplated the act of (impotent) firing. However, it is arguable that the lethal nature of the weapon makes the actual circumstance of the act fundamentally different to anything he foresaw.²⁰² Presumably, if the accomplice had not foreseen the, in his mind, perverse firing of the gun and had only contemplated that it would be used as a blunt instrument, the contemplated act would be fundamentally different to the principal's employment of the weapon to discharge a bullet at high velocity.²⁰³ By the same token, it is also possible to interpret as a different weapon a petrol bomb that is unusually large and life-endangering, compared to a smaller one designed only to set a fire and to intimidate the occupants without causing physical injury.²⁰⁴

In the final analysis, it is not especially astonishing that in a case with the social context of *Gilmour*, the Appeal judges should demur to interpret the facts so as to exculpate the defendant from homicide liability. However, the judgment succeeds in highlighting the reality that future difficulties and inconsistencies in joint enterprise liability have not been eradicated by *Powell*; *English*. Moreover, the effect of *Gilmour* is to reinforce any sense of frustrated justice that was provoked by the *English* judgment. Direct comparison makes it extremely difficult to reconcile

²⁰¹ 'Throwing petrol bombs at dwelling houses is regrettably common and always contains an element of potential danger to the occupants. It is right to say, however, that it has fortunately been only a rare occurrence that occupants have been injured in such attacks, and the majority of them appear, so far as judicial notice can take us, to cause only minor fires.': *ibid.* at 413.

²⁰² JC Smith, in Commentary to *Day* [2001] Crim LR 985, provides the following example where the culpability of the parties to the same objective act takes colour from the differing understanding of the likely outcome: 'P administers to V a particular drug, call it XYZ, which P knows is certain to kill and is assisted and encouraged by A who knows the drug is XYZ but believes XYZ's only effect will be to give V a headache. V is killed.' He goes on to argue, *ibid.*, that the 'administration of a deadly drug is fundamentally different from the administration of a drug which will cause mere discomfort'.

²⁰³ Cf. *Bamborough*, above p.250.

how a party who participates in a murderous attack and whose fault is sufficient to incur responsibility for murder²⁰⁵ should escape homicide liability altogether. Furthermore, the bemusement does not end there. In the English case of *Day*²⁰⁶, the Court of Appeal considered an attack where the deceased was punched and kicked. Two of the participants were found guilty of murder on the basis of intending (or foreseeing that the principal might cause) grievous bodily harm. However, the appellant foresaw only the infliction of some harm. Thus, the trial court's direction: 'If there was a common plan here to cause some harm to [the victim] but not really serious harm, and if you are satisfied that the defendant whose case you are considering was part of that plan and that [the victim's] death was caused in carrying out that common plan and if the defendant that you are considering intended that harm might result – if the answer to all those questions is 'yes' than the defendant would be guilty of manslaughter.'²⁰⁷ Again a constructive manslaughter charge is made possible by the application of the substantive fault to all parties. To avoid the manslaughter charge, the appellant argued the directions were inadequate – that participation in the common plan was insufficient in itself. Instead, the question of whether he contemplated kicking as well as punching should have been addressed because a kick was 'an act of a different quality from throwing a punch'.²⁰⁸ In fact, the Court of Appeal decided on the evidence that the appellant had contemplated both punching and kicking which led to the further question whether his fellow participants' intention to inflict grievous bodily harm altered the scope of purpose so as to exclude him from the ambit of their joint enterprise.²⁰⁹ In other words, the appellant relied on the contention that when a perpetrator evinces a unilateral intention to kill or, as in this case, cause grievous bodily harm, the resulting homicide falls outside the common purpose of assault and the secondary party is liable for neither murder nor manslaughter. The Court of Appeal disagreed, arguing that there is no requirement for the secondary party to share the perpetrator's mens rea²¹⁰ and went on to propose a solution to 'a class of case, which is not... distinctly the subject of any authority'²¹¹:

²⁰⁴ See JC Smith's Commentary to *Gilmour* [2000] Crim LR 765: 'It is true that the envisaged act and the act done both consisted in throwing a petrol bomb – but that is all. The divergence seems at least as great as that between using a shotgun to "kneecap" V and using the same gun to blow his brains out.'

²⁰⁵ The jury were clearly convinced that English foresaw the substantial risk that Weddle would intentionally kill or cause gbh, albeit with the wooden post not the knife. *Powell; English* [1997] 4 All ER 545 at 563.

²⁰⁶ [2001] EWCA Crim 1594; [2001] Crim LR 984.

²⁰⁷ [2001] EWCA Crim 1594 para. 11.

²⁰⁸ *Ibid.* at para. 44.

²⁰⁹ *Ibid.* at para. 50.

²¹⁰ *Ibid.* at para. 52.

²¹¹ *Ibid.* at para. 52.

Suppose that the participants in a joint enterprise all propose or foresee the same kind of violence being inflicted on their victim, let it be punching with a possibility of kicking to follow. On that they are as one. But two of them harbour a subjective intention to inflict really serious injury by means of such violence. The third harbours only, or foresees or intends only, that some harm might be done. One of those actuated by an intent to do grievous bodily harm punches or kicks the victim just as three foresaw. The victim falls and suffers a subdural haemorrhage and dies. The principal is guilty of murder as he had the mens rea required. So also is the accessory who, like him, intended or contemplated the infliction of serious injury. What of the third adventurer? [The appellant] submits he must escape altogether because he did not foresee a murderous state of mind would be harboured by his fellows. Yet if his fellows had entertained only an intention to do some harm and otherwise the facts were the same, all three would be guilty of manslaughter. It does not seem to us that this can be right. In such a case there was a joint enterprise at least to inflict some harm, and that is not negated by the larger intentions of the two adventurers. In our judgment in such a case there is no reason why the participants should not be convicted and sentenced appropriately as their several states of mind dictate.²¹²

Despite academic protests about the unreality of the example²¹³, the logic is valid. Furthermore, judicial reluctance to exculpate an accessory from homicide liability when he has lent support to a fatal attack is a very real obstacle to a uniform application of *Powell; English*. Moreover, such anomalies serve to highlight a further inequality in joint enterprise cases. Day, contemplating only the infliction of some harm, was labelled a manslaughterer whereas English, who foresaw or intended to cause grievous bodily harm escaped a homicide conviction. Admittedly, there is scope to punish an English more severely than a Day but this misses a fundamental point. From a labelling perspective, Day's contribution to a fatal attack is labelled whereas English's label is restricted to a non-fatal assault.²¹⁴

2.2.5.2 ACADEMIC CRITICISMS

Whilst support for the House of Lord decision has been expounded by Professor John Smith, Professor Clarkson²¹⁵ has criticised both limbs of the appeal, arguing that the *Powell* appeal produces over-inclusive secondary murder liability while the *English* appeal, in limiting the secondary liability choice to murder or a non-fatal offence, introduces under-inclusive homicide liability. Discussing the iniquity of over-inclusiveness, Professor Clarkson takes issue with Professor Smith's contention that the difference between foreseeing the possibility of death

²¹² *Ibid.*

²¹³ JC Smith, *Commentary to Day* [2001] Crim LR 985.

²¹⁴ For further considerations of labelling and the relative culpability of killing during a deliberate assault, see below, pp.295-306.

²¹⁵ Clarkson, "Complicity, *Powell* and Manslaughter" [1998] Crim LR 556.

occurring and foreseeing the possibility of murder being committed²¹⁶ succeeds in adequately elevating the degree of subjective recklessness so as to justify the diluted *mens rea* of murder in a secondary party:

‘In fair labelling terms there is a moral distinction between the accessory who helps the principal wanting or foreseeing as virtually certain the death (or grievous bodily harm) of the victim and the accessory who provides similar help foreseeing only the risk of a murder occurring and perhaps hoping desperately that it will not happen. It is a matter of regret that the House of Lords did not take the opportunity to mark this moral distinction.’²¹⁷

As foresight of anything less than virtual certainty is ‘still a species of recklessness which is traditionally regarded as the territory of manslaughter’²¹⁸ the secondary party should be liable for manslaughter not murder. There is great cogency in the argument, particularly when it is remembered that the conduct element of complicity is so minimal and so easily satisfied.²¹⁹ As the accessory is one step removed from the *actus reus* of the substantive offence, it might be expected that there be a requirement for a higher degree of *mens rea* to ensure just inculcation in the crime commission; an equivalent *mens rea* is the very least that might be anticipated. However, decreasing the fault for a secondary party will inevitably result in the imposition of murder liability upon accessories whose fault is sufficient only for manslaughter and it is this that creates the over-inclusive murder liability perpetuated by *Powell*.²²⁰

On the other hand, Professor Clarkson bemoans the *English* appeal for the opposite reason: it allows the escape of secondary parties who ‘should be convicted of a homicide offence (probably manslaughter)’²²¹. He argues that that the approach to secondary homicide liability that relies on whether the accessory foresaw the actual lethal act ‘is the natural consequence of the refusal to consider manslaughter as an alternative’²²². Furthermore, he questions whether the method of killing, including the weapon used, should make a fundamental difference to liability²²³:

Suppose in the *English* appeal, the accessory had foreseen that the principal offender might beat the officer to death with a wooden post. If this had happened the accessory

²¹⁶ See above, n.136.

²¹⁷ Clarkson, *op cit.* n.215 at 558. A recent manifestation of the unfairness of the lesser *mens rea* that suffices for secondary murder liability is found in *Concannon* [2002] Crim LR 213, where the defendant (unsuccessfully) applied for leave to appeal against conviction on the basis of unfairness within the meaning of Article 6 of the European Convention of Human Rights.

²¹⁸ *Ibid.*

²¹⁹ See above, pp.36-40 and below, pp.263-264.

²²⁰ Clarkson, *op cit.* n.215 at 558.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ ‘English law has long regarded the mode of execution of crimes of violence as irrelevant.’: *ibid.*

would be liable for murder. However, because the same result is achieved by a different method, the accessory escapes all liability for homicide. A knife is, of course, intrinsically more dangerous than a wooden post. It is nevertheless difficult to understand why the method of killing, or the instrument used, should make such a fundamental difference.²²⁴

Professor Clarkson's argument and preferred solutions are encapsulated in the following reasoning:

Participation for a criminal enterprise that results in death may suggest that there should be criminal liability for all the participants – but that does not obviously mean liability for murder. What is required is that the accessory be liable for an appropriate offence, with appropriateness being related to the culpability of the accessory.²²⁵

He proposes that this will be achieved by limiting liability for murder so that it only follows when the secondary party wants or foresees as virtually certain the death or grievous bodily harm of the victim.²²⁶ Liability for manslaughter will encompass the *mens rea* that presently results in murder liability, that is, when the accessory foresees the risk of death or grievous bodily harm of victim²²⁷. Additionally, manslaughter liability will follow when he 'foresees a risk that the principal might intentionally or recklessly (the *mens rea* of battery) inflict a dangerous (objectively likely to cause some physical harm) battery on the victim'²²⁸.

This solution has an elegance that combines fair labelling and consistency of fault across primary and secondary parties. However, it is submitted that a problem still lurks with regard to murder liability and that problem involves the fact that intent to cause grievous bodily harm suffices as the *mens rea* of murder.²²⁹ It will be argued ultimately that this fault is a vexed issue in primary liability too²³⁰ and that there is an inevitability that difficulties in the substantive law will become exacerbated when applied to secondary parties. For the moment, it is appropriate to limit the

²²⁴ *Ibid.*

²²⁵ *Ibid.* at 557.

²²⁶ *Ibid.* at 558.

²²⁷ *Ibid.*

²²⁸ *Ibid.* at 560. Thus the accessory in *Stewart and Schofield* would remain liable for manslaughter.

²²⁹ Under South African law, Clarkson's preferred result is achieved because *dolus eventualis* involves a further requirement that the possibility of harm must have been foreseen as occurring in substantially the same way as it actually did. When this eventuality fails to materialise, although murder is excluded, *culpa* can be used to fulfill the homicide fault. Thus, in *Mkize* 1946 AD 197 it was held, at 206, that a party to a common purpose was 'at least guilty of culpable homicide' when a co adventurer 'unexpectedly and without prior consultation ... uses a different kind of weapon and causes death'.

²³⁰ See below, pp.268-277.

examination to accessories and consider whether there is an equally strong argument in favour of the *Powell; English* judgment.

Unlike Professor Clarkson, Professor John Smith argues that an accessory who has the *mens rea* of murder is not necessarily guilty of murder when death results.²³¹ This is a step beyond declaring that foresight of the principal's intention to cause serious injury is insufficient to ground murder liability; the claim is that, even if the secondary party shares the principal's *mens rea* that, in itself, is not necessarily enough to justify the result that the accessory is liable for murder. Essentially the basis for this superficially surprising position is that there is a vast difference in the range and type of grievous bodily harm (gbh). Thus, in contrast to intentional killing when the objective is the same whatever the means used, intentional gbh is not all the same: 'B may have contemplated with equanimity one type of gbh when he would recoil with horror from another'²³². Professor Smith provides an example where B agrees with A that A should break V's arm. In the event, A does not touch V's arm but deliberately puts out his eyes. B has agreed to gbh and gbh has been done but, he argues, it is outrageous to hold B liable for the brutal act if it was one that was never been contemplated and to which he would never have agreed.²³³ The common sense of the argument seems incontrovertible. Of course, in this type of scenario, there is scope to sentence B taking into account the context of the case and his actual intention. With murder, the mandatory life sentence obviates this possibility. Furthermore, the iniquity of the imposition of secondary liability becomes more critical when the unforeseen type of intentional gbh results in death.

Returning to the *English* appeal, suppose that English had intended to cause gbh by breaking the victim's arm with a wooden post or wanted/foresaw as a virtual certainty (or simply as likelihood) that his friend would break the victim's arm. This might well convert into the *mens rea* of murder, but only when death resulted from the injury. However, when the actual cause of death was neither wanted nor foreseen, such as when death followed an unexpected stabbing in the chest, it seems unjust to hold the accessory liable for murder. Moreover, it is submitted that holding him liable for manslaughter²³⁴ further blurs the *men rea* of homicide. In this example the accessory has not simply foreseen the intentional or reckless infliction of dangerous harm, he has acted with the *mens rea* of murder: however, death resulted from an act that he did not intend or

²³¹ Smith, Commentary to *Powell* [1998] Crim LR 49.

²³² *Ibid.*

²³³ *Ibid.*

foresee. Put slightly differently, the act that he intended or foresaw did not satisfy the *actus reus* of murder. Thus, the accessory is not liable for the homicide. Instead, he is liable for his own contribution, or for the offences committed by the principal that he did, in fact, contemplate.²³⁵

It is submitted that it would have been significantly different if the secondary party had foreseen that the beating with the post would kill the victim or would result in life-threatening injury. In such an eventuality, the accessory knowingly risks death rather than serious but non-fatal injury and, it is suggested, any party who deliberately and knowingly runs the risk of causing the death of another person deserves the imposition of murder liability. Thus, this degree of culpability, in common with intentional killing, is sufficiently serious to negate the distinction between the means of contemplated and actual infliction. However, this conclusion brings into question the substantive law of murder. If there is a case for amending the basis of liability for a secondary party, is there not a similarly cogent argument for also applying it to primary parties?

²³⁴ As proposed by Clarkson, *op cit.* n.215 at 559.

²³⁵ Smith, Commentary to *Powell* [1998] Crim LR 49.

CHAPTER 7

ESTABLISHING THE APPROPRIATE FAULT REQUIREMENT FOR HOMICIDE

In this final chapter it is possible to draw together the elements of the previous examinations. It has been submitted that, despite the complications in the present law of criminal complicity, secondary liability would not be greatly improved by a wholesale amendment from a derivative to an inchoate basis.¹ Furthermore, on the related topic of causation, although it is not possible to precisely enunciate a universal secondary causal requirement, the attribution of blame and punishment to an accomplice is keenly associated with the sense of the accessorial contribution having made a difference to the eventual outcome.² The main questions that remain unanswered and will be addressed in this final section are two-fold. The first inquiry involves whether joint enterprise should be established as a separate doctrine. This question remains valid despite the eschewing of the Law Commission's proposed reform framework. The historical exposition of English complicity developments³ and the South African experience⁴ have provided insights into the possible consequences of dividing secondary liability. Nevertheless, the extended imposition of liability for a collateral crime provides the superficial appearance of a rationale for developing joint enterprise into a separate doctrine or head of liability. Associated with the first inquiry, but also independently valid, is the question of the appropriate fault for secondary parties to an unplanned homicide which, in turn, involves scrutinising the substantive fault of homicide. However, the question of whether joint enterprise should be a separate doctrine will be tackled before returning to the specifics of the appropriate fault element.

¹ Above, chapter 5, in particular, pp.190-192, 203-206.

² Above, chapter 4, in particular, pp.141-174.

³ Above chapter 2, in particular, pp.56-65.

⁴ Above chapter 3.

1 ESTABLISHING JOINT ENTERPRISE AS A SEPARATE DOCTRINE OR HEAD OF LIABILITY

In supporting the argument that joint enterprise represents a form of liability 'that is separate from and extends beyond the boundaries of secondary liability'⁵, the Law Commission argued that in joint enterprise cases there is no assistance or encouragement of the collateral homicide but only of the foundational offence:

... any attempt to explain the joint enterprise cases in terms of the law of complicity fails on a simple factual basis. Any assumption that a person who lends himself to an enterprise, with foresight of a collateral crime, *necessarily* provides assistance or encouragement in relation to *that* crime, as is required if he is to be liable for aiding and abetting, is simply not correct. Evidence of an agreement between the parties might indeed be the basis of a strong suggestion that they had assisted or, more likely encouraged each other. However, since the decision in *Hyde* it is clear that no agreement is needed. In addition, the principle in *Hyde* was formulated primarily to deal with circumstances where the crime is "a possibly unwelcome incident of the [enterprise]".⁶ In such cases, the notion that one adventurer has necessarily assisted or encouraged the other must be unsupportable.⁷

Firstly, it must be pointed out that whilst agreement is no longer a necessary element in joint enterprise cases, there remains the essential requirement that the parties act in concert. Thus, in *Petters and Parfitt*⁸, it was held to be insufficient that two parties separately intended to commit the same act unlawful acts. Instead, a joint enterprise will be found only where there is a 'common shared intention' where 'each has the same intention as the other and each knows that the other intends the same thing. That gives them a common plan, tacitly or by inference'⁹. Thus, the knowledge that they are co-adventurers will provide a similar encouragement to that which the Law Commission concede might be provided by agreement. Moreover, it may also be possible to elicit a suggestion of encouragement from the existence of a contingency plan to kill or cause grievous harm, if the need arose.¹⁰

But it is submitted that there is another more elusive dimension to the encouragement and one that is rarely alluded to because, once identified, it is open to serious challenge. It is not

⁵ LCCP No. 131 para 2.120.

⁶ [1991] 1 QB at 138.

⁷ LCCP No. 131 para 2.119

⁸ *Petters and Parfitt* [1995] Crim LR 501.

⁹ *Ibid.* A similar requirement was asserted by the trial judge in *Greatrex and Bates* [1999] 1 Cr App R 126. Elucidating the requirement for a 'shared intent' he stated at 132: 'It may of course mean a plan hatched or worked out between the defendants, but more commonly it means an intention which they each of them formed in the same circumstances to do the same thing.'

suggested that the Law Commission framed an explanation in the following terms, but perhaps the commissioners had something similar in mind: the group psychology that is at work during a collaborative criminal effort involves a symbiotic support that exacerbates the chances of a homicide occurring. Thus, whilst the accomplice might not intend to encourage his fellow to kill or cause grievous injury during the course of the enterprise, the mere presence of a criminal collaborator may provide the impetus for the violence by creating an elusive and tacit impression of moral support.¹¹ Furthermore, it is possible to appreciate the argument that a joint adventurer should not escape homicide liability when he foresaw the possibility that the principal might act in a particular way, as being simply a different means of expressing the feeling that his foresight arose from the awareness that his apparently condoning presence might have been a motivating force behind the principal's action. Of course, it is quite likely that, even if there is validity in the claim, many accessories would lack the necessary psychoanalytical skills to appreciate this point, and there is the further difficulty of proving so elusive a concept. Moreover, conceding the rationale behind joint enterprise liability in these terms expressly highlights a constructive fault element that would inevitably meet with vociferous disapproval.¹²

Professor Williams ventured furthest into the quagmire of explaining why joint enterprisers deserve to be judged by a wider fault than non-common purpose accessories. He suggested that joint enterprise liability involves a 'distinctive feature'¹³ that justifies the establishment of a 'wider measure of liability'¹⁴ than is acceptable in general, that is non-common purpose, complicity:

... many of the cases on the liability of accessories (and nearly all of those indicating the liability of accessories for subjective recklessness) are variously said to be cases of joint enterprise, joint expedition, or common purpose – the enterprise, expedition or purpose in question being of a criminal character. Here the parties undoubtedly have a criminal

¹⁰ See above, pp.229-230.

¹¹ The actions of the assailants in *S v Motaung and others* 1990 (4) SA 485 provide an example of the way individuals change their behaviour when in a group context. In this case, the behaviour was further exacerbated by the presence of a filming camera crew: 'Noticing the presence of a cameraman, so accused No 4 testified, he decided 'to do something that will draw people's attention'. Accordingly he fetched a rock and threw it upon the deceased's body. Assisted by another, accused no 4 then dropped the same rock on the deceased a second time. He explained the second episode in the following words: '... because I was very happy and I had consumed liquor, and also when I heard people saying "Linda, Linda, enthloko" meaning "Linda, Linda, on the head," I then thought that people were appreciating what I had done and that I should do it.' (at 500-1). It seems likely that the accused's search for peer approval and notoriety created a bravado that would not have been present otherwise. Furthermore, accused No 11's subsequent behaviour was undertaken 'in imitation' of No 4's actions (at 505).

¹² LCCP No. 131 para 2.110.

¹³ Williams, "Complicity, Purpose and the Draft Code – 2" [1990] Crim LR 98 at 102.

¹⁴ *Ibid.*

purpose in hand, and the only question is whether the accessory's liability is confined to the initial purpose or whether it extends also to some act enlarging or diverting from the purpose. It is understandable that in these instances the accessory's liability should be more widely defined than when he has not agreed to any criminal enterprise with the perpetrator.¹⁵

There is a superficial appeal to this proposition. The joint enterpriser has 'dirtied his hands' by intentionally lending himself to a criminal expedition and therefore deserves to be allowed less leeway than a non-common purpose accessory who may simply have been carrying out an otherwise lawful occupation. A similar justification has been suggested by the Australian commentator Professor Howard, who grounded the extended liability in the presence of a conspiracy:

If D's state of mind is proved to have amounted to at least recklessness to the use of which his supplies or services are being put, he is guilty of complicity in the subsequent crime; but it is submitted that in practice recklessness on D's part under these circumstances would and should be found only on evidence which would amount to a tacit conspiracy between D and P.¹⁶

However, it has been countered that the 'tacit conspiracy concept' is 'open to the charge of vagueness'¹⁷. Furthermore, the idea of the tainted accessory is inherently vexed and threatens to conceal the imposition of constructive fault upon a secondary party. The dilution of the secondary *mens rea* of a collateral offence is no less iniquitous simply because the accessory has chosen to partake in a criminal venture.¹⁸

Moreover, and perhaps more potently, it is submitted that it is not possible to clearly delineate between 'general complicity' and joint enterprise: the boundary is too tenuous and ambiguous. Commenting on the case of *Marks*,¹⁹ Professor Smith highlights the difficulty in creating a meaningful distinction between joint enterprise and general complicity:

If there was a plan by M and T to kill the deceased (V), that was a joint enterprise. If there was no plan, but M incited T to kill V, that was a case of counselling or procuring murder. If there was a plan, what was that but counselling or procuring murder by the conspirator who was to carry it out? If there was no plan, it may have been incited by M; but it can surely make no difference whose idea it was. The case illustrates the impossibility of drawing a line between aiding, abetting, counselling and procuring on the

¹⁵ *Ibid.*

¹⁶ Cited in Buxton, "Complicity in the Criminal Code" (1969) 85 LQR 252 at 262.

¹⁷ *Ibid.*

¹⁸ However, the idea of 'tainted' culpability applied to primary and secondary parties alike is reviewed in considerations of constructive manslaughter, see below pp.295-307.

¹⁹ [1998] Crim LR 676.

one hand, and joint enterprise on the other. In a case of this kind, they are the same thing.²⁰

The conclusion must therefore be that the refinements of homicide liability that have been developed in joint enterprise cases must equally apply to non-common purpose situations.²¹

2 APPORTIONING AN APPROPRIATE SECONDARY FAULT ELEMENT

There seems to be a strong argument for evaluating the liability of all parties to a joint enterprise, whatever their actual contribution, by the same standard, and based on the analysis of the cases, there are two clearly different options. Firstly, the liability of all parties to a joint enterprise could be assessed by their individual *mens rea* with relation to the commission of the substantive offences, in other words, to be liable for murder, it must be shown that the relevant party intended the death or grievous bodily harm of the victim. Alternatively, all parties could be assessed by their state of mind, not only with regard to the crime commission, but also in relation to their awareness of the *mens rea* harboured by their fellow offenders. Therefore, foresight that one of their number is likely to murder the victim would suffice to impose murder liability, even though that non-perpetrator did not personally intend the homicide. Liability is therefore rationalised as the intention to assist in a likely murder. As a specialised species of fault adapted for secondary parties, it arguably provides no greater injustice than that produced by the imposition of murder liability upon a single perpetrator for causing death when he intended only grievous bodily harm and did not foresee the possibility that the attack would be fatal. Indeed, the rationale behind the two is the same. In these instances, the reckless accessory and the reckless perpetrator risk a death that is considered so culpable that they deserve censure as murderers.

Hardly surprisingly, both propositions create problems. Examining the first proposition reveals that there are two ways that it might be applied. The one involves assigning the fault designated by the offence definition to all parties; in essence, applying direct liability, (albeit modified by the conduct requirement) to all parties. However, this would create a new set of difficulties in situations where the party is clearly an accessory, rather than a perpetrator, because it amends the

²⁰ *Ibid.* at 677.

²¹ 'The *Powell* principle is one of the utmost importance and has the potential to be applied in all cases of complicity. The essence of the wrongdoing in all cases of accessorial liability lies on the assistance or encouragement of crime. Arguably therefore, it is irrelevant whether the accessory is describes as a party to a joint enterprise or, say, a counsellor.': Clarkson, "Complicity, *Powell* and Manslaughter" [1988] Crim LR 556 at 560-1.

basis of accessory liability and it would be fair to anticipate that this change would also be reflected in non-common purpose liability.²² Such an amendment would effectively eradicate derivative liability and the only alternative would be to give joint enterprise the status of a separate doctrine with a different basis of liability. Furthermore, there is a degree of artificiality in the superficially equal status of marrying the *mens rea* for accessories with that of the principal. The exposure of the mismatch becomes apparent when considered in closer detail. The paradigm would impose a structure whereby, if intention is necessary on the part of the principal it is also the standard for the accessory; if subjective recklessness is sufficient then the accessory is liable if he also consciously takes an unjustified risk and the same where negligence is held to result in culpability. However, unlike the principal, the accessory is not intentionally, consciously or negligently taking a risk whilst performing his own actions, but is assuming responsibility for the unjustified or negligent act of another.

A refined alternative, that accepts that there must be a difference between primary and secondary party liability, is for the fault for secondary parties to be elevated to intention. In line with this proposition, it has been argued that, due to the minimal degree of conduct required to incur accessory liability, there is an urgent need for the culpability requirement to be set at the highest level.²³ But what does intention mean? In *NCB v Gamble* secondary party intention was equated with an act of assistance, voluntarily performed.²⁴ However, there is an air of unreality in divorcing the act of assistance from the criminal end. The act of assistance is, in many cases, not an offence until it becomes associated with the commission of the principal offence. Thus, standing on the look-out is a wholly colourless activity unless the conduct is performed *in order for* an offence to be committed. To take another example, lending someone a jumper to conceal his conspicuous tattoos would carry no moral culpability if it was believed that the favour had been conferred to assist the borrower's chances at a job interview. However, the realisation that the sweater is required to ensure anonymity during the infliction of a punishment beating entirely alters the nature of the assistance.²⁵ It is this connection that gives the conduct its criminal complexion. Moreover, as an offence commission is not an abstract occurrence but is dependent upon the action of human agency, it is an inescapable conclusion that the culpability of the

²² See n.21.

²³ Dennis states: 'Indeed it is arguable that [the accessory's] mental state should be more blameworthy. His causal connection with the offence is less direct and may well appear immaterial': 'The Mental element for Accessories' in *Criminal Law Essay in honour of J.C. Smith* ed Peter Smith (Butterworths, 1987) at 41. Also Mueller, "The *Mens rea* of Accomplice Liability" (1988) South Calif. LR 2169 at 2171-2.

²⁴ [1959] 1 QB 11 at 20.

accomplice needs to be related to that of the perpetrator. It might be tempting to dismiss the interrelation by declaring it an irrelevancy akin to motive, but the fact remains that if secondary liability is to be held to derive from the commission of an offence, then, by the same token, secondary party conduct must be psychologically connected to the crime commission. Without that nexus, the accomplice's fault becomes incomprehensible.

Framing secondary fault in terms of an "intention to further an offence"²⁶ implicitly accepts this premise. The accessory's intention to further an offence must incorporate knowledge or belief that the perpetrator will commit the crime and thereby comply with the proscribed elements of the offence definition: as the substantive offence cannot eventuate otherwise, neither should the accessory's liability for its commission.²⁷ This leads to the inevitable acceptance of 'the unusual features of complicity cases, where the referential object of the accessory's *mens rea* is not merely his own acts but also the acts and intentions of the principal'²⁸. However, this in turn gives rise to anomalies. Returning to the offence of murder, in the case of a primary party, an intention to cause grievous bodily harm is sufficient *mens rea* for murder when the death of the victim follows as a consequence. Yet, if the accessory assisted with the intention of furthering only the grievous bodily harm offence would he also be liable for murder? At face value, there is no compelling reason why he should not; he, as well as, the principal actor has deliberately taken a risk that is so unjustifiable and dangerous to the bodily integrity of the victim that it has been deemed worthy of inclusion within the murder category. On the other hand, it is not too taxing to uncover illustrations of secondary party participation where the accessory's intention is not to further a homicide but the accessory is aware that the principal intends to kill.²⁹ In these instances, limiting secondary fault to intention may be seen as unduly restrictive. Nevertheless, it is submitted that in order to meet the charge of inconsistency and iniquity, the *mens rea* of the secondary party should at least equate with that of the primary party and the substantive offence.

²⁵ *Crooks* [1999] NI 226.

²⁶ The MPC limits accomplice liability at s.2.06.(3)(a) to the fault: 'with the purpose of promoting or facilitating the commission of the offense'. This follows the fault in *US v Peoni* 100 F.2d 401 (1938) accomplice *mens rea* was framed in equivalent terms whereby it was required that the accomplice 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.' Cf. *Backun v US* 112 F.2d 635 (4th Cir.1940) where knowledge was deemed a sufficient secondary fault.

²⁷ Except in the case of innocent agency. See above, p.28.

²⁸ Ashworth, "The Draft Code, Complicity and the Inchoate Offences" [1986] Crim LR 304 at 308.

²⁹ Such as the indifferent gun seller introduced in *NCB v Gamble*, above pp.184-185.

Following this line of reasoning it is suggested that, in the sphere of homicide liability, the problems of secondary liability arise largely due to the dubious parameters of the substantive offence. Indeed, the accusation can be extended to include the non-fatal offences against the person and, therefore, to joint enterprises that involve a physical assault, where the particular difficulties of enunciating the necessary multilateral dimension to secondary fault and the effect on the scope of purpose and resulting liability are aggravated by vexatious offence definitions. The Offences Against the Person Act 1861 entails a ladder of offences that is differentiated by gradations of harm and increasingly culpable, but sometimes overlapping, species of fault. Thus, whilst it is relatively obvious that, where B encourages A to inflict minor injury on V and A deliberately kills V, B does not share A's homicide liability, it will tend not to be so clear where A ignores B and deliberately inflicts grievous bodily harm. That is not to suggest that the legal principle differs in the two scenarios. It remains the same and B is no more liable for B's deliberate infliction of serious injury than he is for B's murder. The difference is the ease of application. Expressed pithily, 'an intention to kill is quite clearly distinct from an intention to injure, however severely; but the boundary between abh and gbh is much less precise'³⁰. It is the application of the principles against the backdrop of amorphous harm infliction and the accompanying shared or contemplated culpability of the accessory that presents a significant challenge to a jury.

3 AMENDING THE SUBSTANTIVE LAW OF HOMICIDE

Homicide offences have the common denominator of the same prohibited consequence – the causing of another's unlawful³¹ death. The differentiation between degrees of homicide is achieved by defining two further elements. The first is the fault: the degree of culpability that is held to provide a distinction in the blameworthiness of the killing. The second is the type of harm that the requisite fault is related to. Thus, the fault may include intention, recklessness, or negligence. Furthermore, there is scope to develop distinguishing characteristics within each broad class; for example, recklessness may be divided to include foresight of degrees of risk ranging from slight to highly probable. It might additionally include objective tests of, say, an obvious, serious or unjustified risk and also a state of indifference to a risk. The type of harm might include degrees of harm ranging from death to slight injury or anything prejudicing the

³⁰ JC Smith Commentary to *Wan and Chan* [1995] Crim LR at 299.

³¹ Under English law the unlawfulness of the result tends to be decided on the basis that the defendant lacks a valid defence. Under South African law unlawfulness is a proscribed element in its own right: see above, p.21.

victim's health. It will be submitted that the present law of murder is in one way too narrow and in another too wide, whilst the range of involuntary manslaughter is simply too expansive.³²

The paradigm for murder, and the definition most likely to be given by the layman, is intentionally causing death, that is aiming to kill the victim. However, English law also categorises as murderers those who cause death having intended to cause grievous bodily harm.³³ Thus, a primary party will be liable for murder having killed with the intent to cause death or to cause grievous bodily harm. The secondary party, however, will be liable for murder having aided or encouraged the principal foreseeing a more than remote risk³⁴ that the principal will intentionally kill or intentionally cause grievous bodily harm. The extension of murder liability³⁵ in the case of a secondary party is graphically illustrated in fig. 9(a). Comparison with South African law (fig. 9(b)) reveals several points. Firstly, the law of substantive murder is defined by different criteria. The prohibited type of harm is limited to death³⁶ but the proscribed fault is significantly extended. Under South African law, legal intention (*dolus*) includes realisation and reconciliation to the occurrence of a foreseen (and more than remote) risk (*eventualis*).³⁷ The effect of this alternative substantive definition is to equalise the murder liability of all parties.³⁸ However, this laudable result is not sufficient in itself to urge an equivalent amendment to the basis of English murder. A closer examination of the rationale for the imposition of murder, rather than manslaughter/culpable homicide liability is required.

³² HL Paper 78-I para 46: 'The history of the law of homicide from the seventeenth century to some very recent decisions of the House of Lords has been one of contraction of the law of murder resulting in a corresponding expansion of manslaughter.' For the details of this development see below, pp.83-85. In 1992, Lord Lane CJ commented in *Walker* (1992) 13 Cr App R 474 at 476: 'It is a truism to say that of all the crimes in the calendar, the crime of manslaughter faces the sentencing judge with the greatest problem, because manslaughter ranges in its gravity from the borders of murder right down to those of accidental death.'

³³ *Cunningham* [1982] AC 566.

³⁴ *Chan Wing-Siu*, see above, pp.228-229.

³⁵ This is the over-inclusiveness criticised by Clarkson, above p.256.

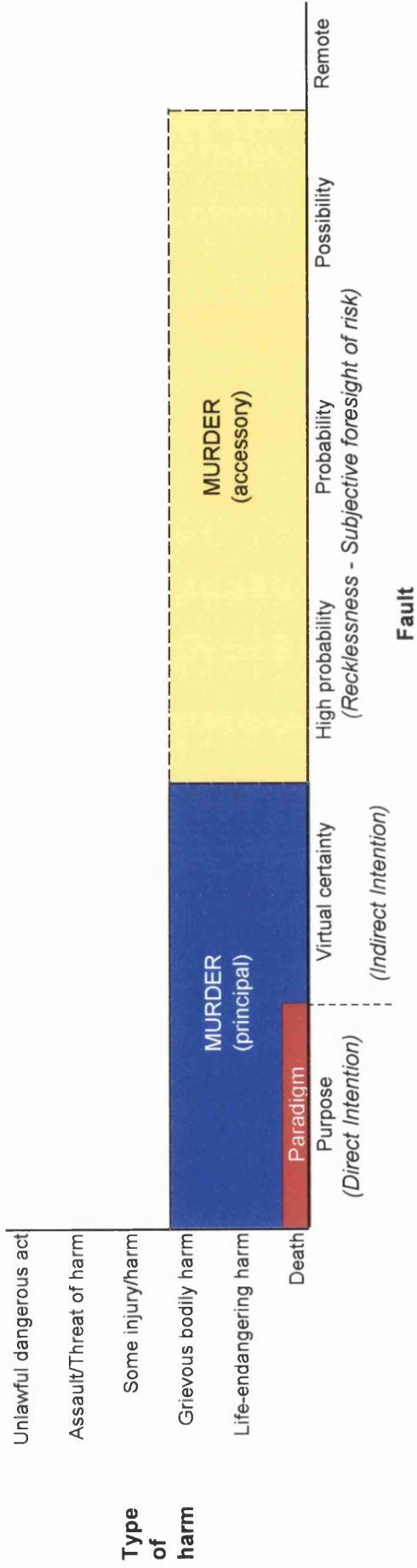
³⁶ Although, at least in evidential terms, awareness of life-threatening injury will create a strong case for foresight of death. Thus, Burchell & Milton explain in *PCL* at 470: '*Dolus eventualis* exists where the fatal conduct is done foreseeing that it may cause the death of a person.'

³⁷ See above, p.25.

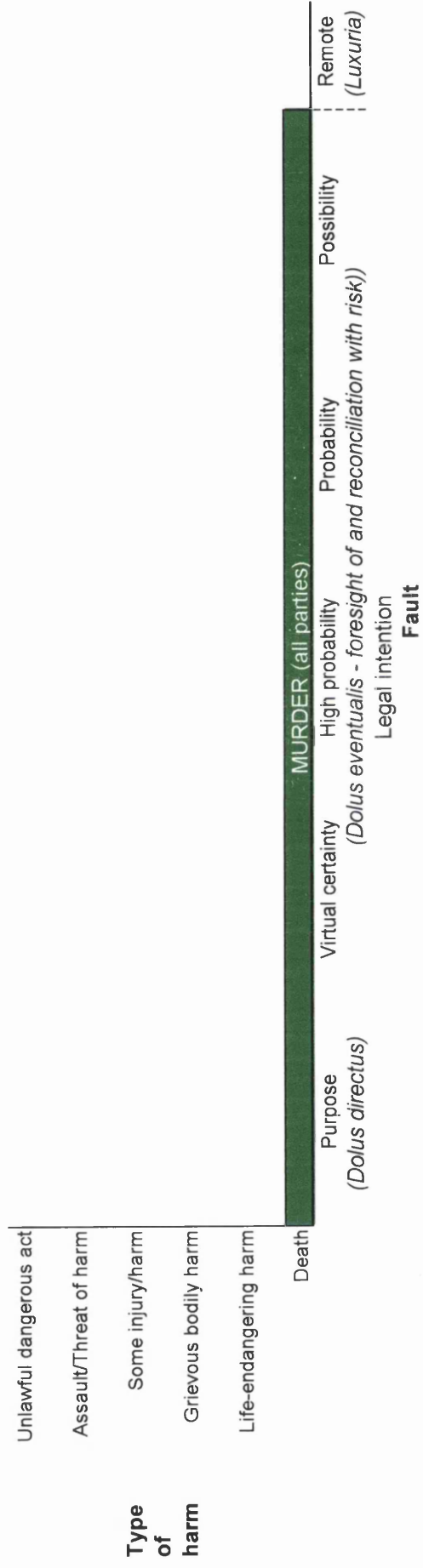
³⁸ For further details on the structure of homicide under South African law, see below, pp.279-287

Fig. 9 Scope of Murder Liability

(a) THE SCOPE OF MURDER LIABILITY UNDER ENGLISH LAW



(b) THE SCOPE OF MURDER LIABILITY UNDER SOUTH AFRICAN LAW



3.1 EXTENDING MURDER BEYOND THE PARADIGM

English law is not alone in extending murder beyond the paradigm of purposeful killing.³⁹ It is argued, with a great deal of justification, that to circumscribe murder to such a limited class of killer would significantly curtail the number of unlawful killings categorised as murder⁴⁰ so, it is further argued, exculpating deserving killers from the murderer label.⁴¹ Thus, the extension of murder to those killers who intended grievous bodily harm is usually justified with the following reasoning:

There is one category of reckless killing where we believe that there would be general agreement that the stigma of murder is well merited. That is where the killer intended unlawfully to cause serious bodily injury and knew that there was a risk of causing death. The intention to cause serious bodily injury puts this killing into a different class from that of a person who is merely reckless, even gravely reckless. The offender has shot, stabbed or otherwise seriously injured the victim, and the circumstances are so grave that the jury can find that he must have realised that there was a risk of causing death... The line between this and an intentional killing is so fine that both cases are justifiably classified as murder.⁴²

³⁹ E.g. In accordance with s.210.2 of the MPC a culpable homicide is designated murder when '(a) it committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.' S.300 of the Indian Penal Code defines murder as follows: '...culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or *secondly* if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or *thirdly*, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or *fourthly*, if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.'

⁴⁰ Lord Steyn in *Powell*; *English* [1997] 4 All ER 545 at 552: 'The Home Office records show that in the last three years for which statistics are available mandatory life sentences for murder were imposed in 192 cases in 1994; in 214 cases in 1995; and in 257 cases in 1996. Lord Windlesham, writing with great Home Office experience has said that a *minority* of defendants convicted of murder have been convicted on the basis that they had an intent to kill.'

⁴¹ Such as terrorists, see CLRC 14th Report para 30.

⁴² CLRC 14th Report para 28. Cf. Lord Mustill's dicta in *Attorney-General's Reference (No. 3 of 1994)* [1997] 3 All ER 936 at 938 and 946: 'Murder is widely thought to be the gravest of crimes. One could expect a developed system to embody a law of murder clear enough to yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual basis. This is not so in England, where the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning. One conspicuous anomaly is the rule which identifies the 'malice aforethought' (a doubly misleading expression) required for the crime of murder not only with a conscious intention to kill but also with an intention to cause grievous bodily harm... Many would doubt the justice of this rule, which is not the popular conception of murder... [T]he grievous bodily harm rule is an outcropping of old law from which the surrounding strata of rationalisations have weathered away.'

In fact, this argument reveals that there are two mental components that combine to create the deserving stigma of “murderer”. The first is the intentional act and the second is the foresight that the act will or may cause death. It is submitted that this is correct. The intent to indulge in a dangerous action is not sufficiently reprehensible without the accompanying awareness that it is potentially life-threatening – although callous indifference towards the consequences may well be considered equally deserving of denunciation.⁴³ Having distilled the essence of the censure, it is difficult to comprehend why the criminal law should exclude from the murder category those who cause death having intentionally performed a dangerous act that they are aware is life-endangering and will probably result in death.⁴⁴ However, this is the present position under English law, which is well demonstrated by a number of cases that involve arsonists with a grudge. Thus, in *Hyam*⁴⁵ the defendant poured petrol through the letterbox and ignited the house of a rival. The intended victim escaped but two of her children died in the resulting conflagration.⁴⁶ The defendant was found to have foreseen that it was highly probable that someone would die in the fire she had deliberately set and she was found guilty of murder. However, the House of Lords subsequently decided that foresight of a high probability did not equate with the degree of culpability required to satisfy the fault of intention.⁴⁷ It seems that the perceived need to limit the *mens rea* of murder to intention superseded any consideration of the type of harm requirement or of a second level of fault such as foresight of life-endangerment accompanying an intentionally committed dangerous act. The House of Lords eventually established that intention should include foresight of a virtual certainty⁴⁸ – a fault that arguably slides into recklessness, albeit its upper reaches – but balked at amending the *mens rea* of murder

⁴³ There are difficulties in accommodating indifference within the traditional fault framework. As Mitchell points out in “Culpably Indifferent Murder” (1996) (1) 25 Anglo-Amer LR 64 at 67: ‘Unlike the traditional concepts of intention, recklessness and negligence, indifference describes a person’s attitude or feelings, rather than his aims, desires or awareness.’ Furthermore, it is not a simple task to equate the attitude to any one fault. Indifference takes different forms which may straddle a number of states of mind; Thus, ‘...a person may be indifferent and at the same time either subjectively or objectively reckless, or negligent with regard to the consequences or circumstances of his action, but neither recklessness... nor negligence necessarily implies indifference. He may be aware of the risk he runs whilst simultaneously either hoping that it will not materialize or not caring whether it does or not. Alternatively, he may be unaware of the risk, but even had he known about it he might not have altered his behaviour. Similarly negligence may be co-extensive with indifference without necessarily implying it. A person may have thought about the question of risk and negligently concluded there wasn’t one. At the same time, he may or may not have cared whether the risk materialized.’ (At 68.)

⁴⁴ This type of killing fulfilled the murder category prior to 1957, see above pp.80-82.

⁴⁵ [1975] AC 905.

⁴⁶ Similar facts surround *Nedrick* [1986] 3 All ER 1; *Palma* (1986) 8 Cr App R 148; and *Archer* (1988) 2 Cr App R 76.

⁴⁷ See above, pp.15-17.

⁴⁸ See above, p.16.

to foresight of a highly probable risk. In fact, it is arguable that anyone who foresees a risk as highly probable is reconciled to its occurrence: the natural sense of this phrase must be that the person expects the consequence to eventuate and certainly believes that its manifestation is far more likely to occur than not. Once this reasoning is accepted, it is difficult to understand why a person who believes that their dangerous act will be, at least, life-endangering should escape murder liability whereas a person who intends grievous bodily harm but believes that the intended injury poses no threat to life should be so liable. Of course, in many cases of intentionally causing serious injury, the perpetrator may be aware that the nature of the harm is life-threatening. In such an instance, there is no difference between his fault and that of the arsonists.

However, the definition of murder suggested by the Draft Criminal Code⁴⁹ despite introducing a two stage *mens rea* for those who do not intentionally kill, limits the type of harm to serious personal harm. Clause 54 provides:

- (1) A person is guilty of murder if he causes the death of another –
 - (a) intending to cause death; or
 - (b) intending to cause serious personal harm and being aware that he may cause death ...

The *Report of the Select Committee of the House of Lords on Murder and Life Imprisonment*⁵⁰ supports this recommendation stating:

A person is not generally liable to conviction of a serious crime where the prohibited result was not only unintended but also unforeseen. This seems to the Committee to be a good rule of moral responsibility which should certainly apply to the most serious crime of all, murder. While the law continues to have two categories of homicide, unforeseen but unlawful killings are properly left to the law of manslaughter.⁵¹

However, this reasoning also supports a proposal that the second limb of murder be amended to 'intending to commit an unlawful act and being aware that it may cause death'. This would encompass the infliction of serious injury but would also permit the inclusion of killers who, whilst not intending to cause grievous bodily harm, intentionally and knowingly perform an inherently dangerous act, fully cognisant its potential for life-endangerment.

Before the passing of the Homicide Act 1957, which abolished constructive fault,⁵² it was generally accepted⁵³ that a person had malice aforethought where, in the absence of any excusing, mitigating or justifying circumstance he killed with one of the following mental states:

⁴⁹ Law Com No. 177.

⁵⁰ HL Paper 78-I, 1989.

⁵¹ *Ibid.* para 68.

⁵² For constructive malice, see above, p.81.

1. an intention to kill;
2. an intention to cause such serious injury as to put the victim's life in peril;
3. an intention to do an act intrinsically likely to kill but without an intention to cause any form of physical injury;
4. an intention to commit a felony or resist or prevent a lawful arrest, during the commission of which a killing occurs.

The fourth fault is constructive malice and as express and implied malice were left intact by s.1 of the Act, it may be deduced that the second and third faults comprise implied malice and the first express malice. The suggested amendment therefore returns to and accepts the validity of equating the blameworthiness of the second and third states of culpability.

3.2 CIRCUMSCRIBING INVOLUNTARY MANSLAUGHTER

In 1980, the Criminal Law Revision Committee highlighted three areas where the law of involuntary manslaughter might be considered iniquitous in its range.⁵⁴ The first involves intentionally or recklessly causing injury (even slight injury) and actually causing death. The unfortunate consequences are revealed in the following illustrations:

Suppose that A strikes B and gives him a bleeding nose; B, unknown to A, is a haemophiliac and bleeds to death. Or A, strikes B who falls and unluckily hits his head against a sharp projection and dies. Or, A chases B with the object of chastising him; B runs away and trips and falls into a river in which he drowns. In each of these cases, although A is at fault and is guilty of an assault or of causing injury, his fault does not extend to the causing of death or to the causing of serious injury which he did not foresee and in some cases could not reasonably have foreseen.⁵⁵

Secondly, causing death by gross negligence is designated manslaughter. Since the Criminal Law Revision Committee considered the question, the House of Lords refined the test in *Adomako*⁵⁶ and limited it to scenarios where the defendant owed the victim a duty of care and caused death through "criminal" negligence.⁵⁷ However, the undertaking of a duty of care would include cases like *Stone and Dobinson*⁵⁸, where the following observation seems particularly apt:

⁵³ Kenny, *Outlines of Criminal Law* (1952) at 153-7. For an analysis of the development of culpability, see Horder, "Two Histories and Four Hidden Principles of *Mens Rea*" (1997) LQR 95.

⁵⁴ For an examination of the scope and range of involuntary manslaughter, see Peiris, "Involuntary Manslaughter in Commonwealth Law" (1985) 5 (1) LS 21-55.

⁵⁵ CLRC 14th Report para 120. The paragraph continues by pointing out that, in 1901, judges recommended ignoring the death in the sentencing and concludes: 'If the offence is treated for sentencing purposes as an assault... there seems to be no reason for calling it manslaughter.'

⁵⁶ [1995] 1 AC 171, see above, p.21.

⁵⁷ However, the *Adomako* criteria have not conclusively removed further judicial difficulties in defining gross negligence manslaughter. See further, Elliot, "What Direction for Gross Negligence Manslaughter?:"

But sometimes the jury may not be able to find more than that the defendant was extremely foolish; and although the foolishness may amount to gross negligence we do not think that it should suffice for manslaughter in the absence of advertence to the risk of death or serious injury.⁵⁹

The third area involves causing death by an unlawful act and contains scenarios that fall outside the other two subsets. Whilst negligent driving offences have been held to escape the draconian clutches of the offence,⁶⁰ ordinary negligence (as opposed to gross negligence) was implicitly reintroduced as a fault element in *DPP v Newbury and Jones*⁶¹; where 'a person who kills as a result of an unlawful and dangerous act is guilty of manslaughter although he did not know that the act was unlawful or dangerous.'⁶²

In each area, it may be objected that the 'fault falls too far short of the unlucky result'⁶³ to warrant the imposition of manslaughter liability. The Law Commission's solution included the proposal for two new offences: reckless killing and killing by gross carelessness.⁶⁴ Reckless killing would include causing death where the defendant:

- (a) is aware of a risk that his conduct will cause death or serious injury; and
- (b) it is unreasonable for him to take that risk having regard to the circumstances as he knows or believes them to be.⁶⁵

Killing by gross carelessness would apply where:

- (a) a risk that his conduct will cause death or serious injury would be obvious to a reasonable person in his position;
- (b) he is capable of appreciating the risk at the material time; and
- (c) either –
 - (i) his conduct falls far below what can reasonably be expected of him in the circumstances; or
 - (ii) he intends by his conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so.⁶⁶

R v Lidar (LTL 12/11/99) and *Attorney-General's Reference (No. 2 of 1999)* ([2000] 3 All ER 182) (2001) Jo Crim L 65 (2) 145.

⁵⁸ [1977] 1 QB 354.

⁵⁹ CLRC 14th Report para 120.

⁶⁰ *Andrews v DPP* [1937] AC 576.

⁶¹ [1977] AC 500. For the facts of the case, see above, p.84.

⁶² CLRC 14th Report para 122. Para 133 states somewhat emotively: 'All the applications of the unlawful act doctrine... are pale survivors of a savage early doctrine by which every killing in the course of an unlawful act was murder and as such capital.'

⁶³ *Ibid.* para 120.

⁶⁴ Law Com No. 237. In addition, the Commission proposed a further new offence of corporate killing, see Part VI.

⁶⁵ *Ibid.* Draft Involuntary Homicide Bill cl. 1(1). The Criminal Law Revision Committee proposed limiting manslaughter to when 'a person causes death with intent to cause serious injury, or being reckless as to death or serious injury' but went further and recommended the abolition of all other forms of manslaughter including manslaughter by gross negligence: 14th Report para 124.

This clause incorporates the present gross negligence manslaughter and constructive manslaughter while amending the criteria of each. Gross negligence manslaughter is limited by the requirement that a defendant possess the capacity to have appreciated the risk of death or serious harm at the material time. However, serious injury suffices as the type of harm and this widens rather than narrows, the existing law⁶⁷. Constructive manslaughter is limited by the requirement that, while the defendant need only have intended, or been (subjectively) reckless to the extent of some injury, death or serious injury needs to have been a foreseeable risk and one that the defendant was capable of appreciating.⁶⁸

3.3 POSSIBLE APPROACHES TO AMENDING THE LAW OF HOMICIDE

The model discussed so far involves the assumption that both fault and type of harm can be graded in terms of relative grievousness (Fig. 10). In accordance with this model, intentional harm is regarded as more culpable than reckless or negligent harm. It has been argued that:

There is generally no controversy over regarding intentional harm-doing as a more serious form of fault than reckless or negligent harm-doing. A person who acted with the purpose of achieving a harmful result would normally have displayed a higher degree of culpability than one who acted knowing of the risk of causing harm.⁶⁹

In fact, it does not take a great deal of thought to realise that the parameters of moral evaluation and censure cannot be so neatly strait-jacketed. Thus, the indifferent perpetrator of a terrorist bombing will be denounced more roundly than the well-meaning perpetrator of an intentional mercy killing. If the delimitation between intention and recklessness is not clear-cut, the moral boundary between recklessness and negligence is yet more vexed. The common denominator to both is risk-taking and it is usual to distinguish between them by focussing upon the party's state of awareness at the time of taking the risk. However, applying awareness to recklessness and inadvertence to negligence is a crude distinction that may fail to take into account such states of mind as latent awareness⁷⁰ – that is, the knowledge possessed by the person at the moment of temporary inadvertence, had he only stopped to think – or inadvertence due to indifference or

⁶⁶ Law Com No. 237 Draft Involuntary Homicide Bill cl. 2(1).

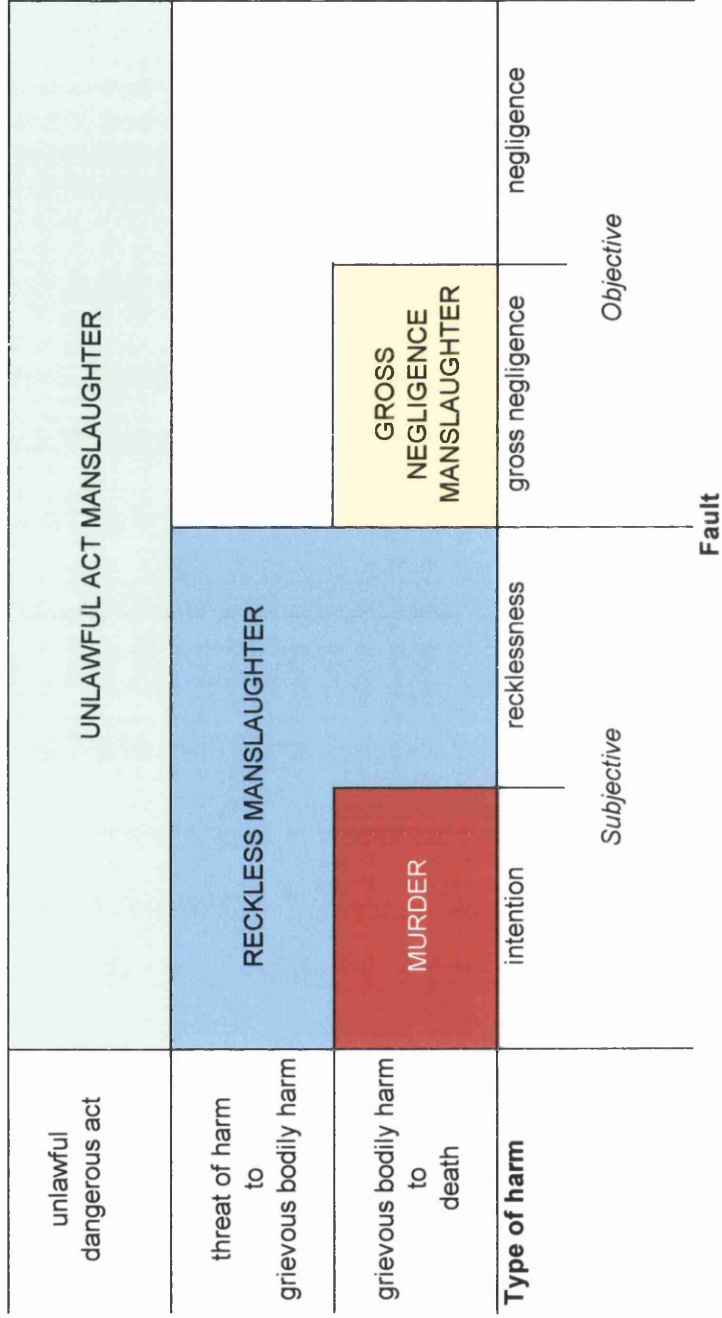
⁶⁷ 'The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a *risk of death* to the [victim], was such that it should be judged criminal': *Adomako* [1995] 1 AC 171 at 187 *per* Lord Mackay of Clashfern LC (emphasis added).

⁶⁸ For a more detailed analysis of the proposals and the submission of new offence suggestions, see below, pp.289-309.

⁶⁹ Yeo, *FH* at 11

⁷⁰ See above, p.20.

Fig. 10 The distinctions between murder and involuntary manslaughter according to fault element and type of harm



lack of concern over the manifestation of the risk; so, for example, the person who performs an act knowing of a slight risk of causing some injury, has arguably shown less moral culpability than the person who is grossly callous of the safety and welfare of others and acts without appreciating that it exposes another to an obvious and high risk of very serious injury.⁷¹

The model also assumes the perpetuation of delimiting the homicide offences, which necessitates setting the boundary between, on the one hand, murder and manslaughter and, on the other, manslaughter and non-culpable killings. The consequence of limiting the murder definition, the abiding theme in the historical development of homicide, is that the more closely the scope of murder is circumscribed, the wider becomes the range of involuntary manslaughter. This reality is made inevitable because the rejected murder cases either fall, by default, into constructive manslaughter or create a new category of (reckless endangerment) manslaughter. Furthermore, as English law does not include a specific offence of negligent killing,⁷² unlawful killings committed through gross negligence are also categorised as manslaughter.

One possibility for amending the law of homicide would be to create and add to a range of specific homicide offences such as negligently causing death, causing death by driving and corporate killing.⁷³ This would obviate the need to extend or utilise the manslaughter label but could foreseeably create future difficulties in interpretation or in attempting to control a mushrooming of petitions for new categories. A more radical solution to the structure of homicide would be simply to have one class of culpable homicide with the ultimate sentence decided on an individual basis in accordance with the specific context and facts of the case.⁷⁴ Despite appearing a historical reversal by returning to one degree of culpable homicide,⁷⁵ there are a number of attractions to this solution. Removing the fault ladder would remove the difficulties of equating different contexts of killings. To take an obvious example, intentionally assisted

⁷¹Ashworth, *PCL* at 185-6 and 198-200.

⁷² South African law limits culpable homicide to the fault of negligence (*culpa*). The Indian Penal Code goes further: s.304A provides for an offence of causing death by negligence which lies outside the ambit of the culpable homicide alternatives: accordingly, 'whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment... for a term which may extend to two years, or with fine, or with both.' (cited in Yeo, *FH* at 109).

⁷³ One factor that makes a specific offence an attractive option is where the conduct that causes death involves a socially acceptable risk. Driving and performing surgery provide examples where the conduct involves a reasonable risk of causing harm/death when performed within prudent or socially acceptable boundaries. Thus an aggravating factor amends the conduct to render it sufficiently culpable to involve homicide liability. Specific offences avoid the overlap with murder/manlaughter where the risk of death or harm is appreciated but not necessarily unreasonable or unjustified.

⁷⁴ Keane, "Murder: The Mental Element" (2002) 53 *NILQ* (1) 1 at 7-8.

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3.4 THE STRUCTURE OF HOMICIDE IN SOUTH AFRICA

Before proposing a new structure for homicide under English law, it is instructive to pause and consider the homicide offences in South Africa. South African law demonstrates a superficially simple and rational approach in its structure of substantive homicide. There are two offences: murder and culpable homicide. Murder entails the intentional and unlawful causing of death and culpable homicide the negligent, unlawful causing of death. Both offences limit the type of harm to death (Fig. 11) so the distinguishing feature between the two crimes is the fault element. A comparison with English law reveals that while the type of harm is more restrictive in the South African model, the fault for both offences is considerably more extensive than the fault for murder or manslaughter under English law.⁷⁶ In South Africa, the fault for murder encompasses *dolus eventualis*, which roughly equates with subjective recklessness (although exactly how far the necessary foresight of possible consequences extends and the nature of the additional elements required to distinguish *eventualis* from recklessness is a matter for further examination⁷⁷). Similarly, culpable homicide includes not merely gross negligence, but ordinary negligence for consequences that the reasonably prudent person would have foreseen and, therefore, the defendant ought to have foreseen. Thus, the test for criminal negligence is the same as the civil standard.⁷⁸ This certainly avoids the charges of vagueness that vex the definition of fault in English gross negligence manslaughter but it raises concerns about the scope of the

⁷⁵ See below, p.69.

⁷⁶ See above, pp.271-278.

⁷⁷ See below, p.282-283.

⁷⁸ *S v Van As* 1976 (2) SA 921 (A) at 927 (citing *R v Meiring* 1927 AD 41): 'In civil actions we have adopted as a simple test that standard of care and skill which would be observed by the reasonable man. And it seems right as well as convenient to apply the same test in criminal trials. ... The problems of defining culpable negligence apart from some such test is very great.'

Fig. 11. The Structure of Homicide Liability under South African Law



criminal law. The South African judiciary have countered the putative alarm with the following reassurance:

The State only intervenes in serious cases, for it is only in regard to them that intervention is called for in the public interest. That fact, the importance of the possible consequences to the accused, and the high degree of assurance required will always invest criminal proceedings with a higher degree of gravity than would surround a civil suit for the same act. But the test of liability should always be the same.⁷⁹

Of course, it is arguable that cases involving death are, by the very nature of the fatal consequence, 'serious' and 'in the public interest' and in this sense, the ambit of culpable homicide requires closer examination.⁸⁰

As a final point of introduction, there is no constructive fault under South African law and neither does the jurisdiction recognise transferred malice⁸¹. It is therefore of interest to discover how South African law deals with the killings that are designated unlawful act manslaughter under English law.

3.4.1 Setting the Boundary between Murder and Culpable Homicide

As with English law, the boundary between the degrees of homicide provides insight into the structure of the offences. At the delimitation of murder and culpable homicide South African law encounters two aspects that cause recurring difficulties and resorts to appeal. The one involves the adequacy of culpability for murder. While South Africa avoids the semantic debates about intention that have dogged English law, the lower edge of legal intention (*dolus*) provides fertile ground for argument. This comes about due to the fact that South Africa recognises as a separate fault conscious negligence (*luxuria*), and, in order to delimit the scope of murder, this degree of culpability satisfies the fault for culpable homicide but not murder. Essentially, *luxuria* involves subjective recklessness insofar as a person is conscious of, that is foresees, the possibility of the prohibited consequence occurring.⁸² However, the risk is foreseen as remote⁸³ and is therefore

⁷⁹ *Ibid.* at 929, Rumpff CJ endorsing Innes CJ.

⁸⁰ Below, pp.285-287.

⁸¹ Where the prohibited act was directed at X and caused Y's death, the question (1) for murder liability is whether the consequence of Y's death was foreseen (and accepted) as a possible risk (*dolus eventualis*) and (2) for culpable homicide is whether the defendant ought to have foreseen the risk of death to the victim and failed to take the necessary preventative action to mitigate the risk.

⁸² See above, p.27.

⁸³ Cf. *S v Mini* 1963 (3) SA 188 (A) and Holmes' JA dissenting (minority) view, at 191, that *dolus eventualis* is satisfied when the defendant 'did foresee the possibility, *even if slight*, of death resulting from what he was about to do and was doing. And he did it reckless of the consequences' (emphasis added).

distinguished from *dolus eventualis* on the grounds that reconciliation with the occurrence of the harm is absent.⁸⁴ Instead, a defendant's culpability lies in failing to take reasonable steps to avoid the occurrence of the risk, and this places the fault in the sphere of negligence. The second area that creates difficulty involves the admissibility of inferential reasoning in deciding upon the existence of *dolus eventualis*.⁸⁵ As will be seen, although the two issues are discrete, there is scope for a potent blending of *luxuria* and inferential reasoning to create a significant widening of murder liability.

To reiterate, *dolus eventualis* may be satisfied by inferential reasoning and this entails the thought chain that the defendant "ought to have foreseen" the consequences and thus "must have foreseen" and, therefore, by inference, "did foresee" them. There have been judicial attempts to explain the thought process:

In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try to mentally project himself into the position of that accused at that time. He must of course be on his guard against the insidious subconscious influence of *ex post facto* knowledge.⁸⁶

This explanation is careful to stress the subjective nature of the culpability. However, it will readily be recognised that the starting point "ought to have foreseen" belongs in the territory of negligence, so there is a very real possibility of the fault overspilling from *culpa* into *dolus*. Consequently, along with the final caveat of the previous passage, there have been numerous warnings against drawing the inference too easily:⁸⁷

[T]he courts should guard against proceeding too readily from "ought to have foreseen" to "must have foreseen" and thence by inference to "by necessary inference in fact foresaw" the possible consequences of the conduct being inquired into. The several thought processes attributed to an accused must be established beyond any reasonable

Also see *S v De Bruyn* 1968 (4) SA 498 (A) at 509 *per* Holmes JA: 'if [a defendant] foresees the possibility, *however remote* of resultant death, and is reckless of its fulfillment, persisting in his conduct, he has the requisite *dolus*, and the law calls it murder' (emphasis added). In Judge Holmes' view foreseeing the risk as remote and therefore unlikely to occur is an extenuating circumstance affecting the sentence but not the verdict (at 511). For an more detailed examination of the arguments and cases regarding basing *dolus eventualis* on a real/concrete possibility or a remote/faint possibility, see Burchell & Hunt at 231-245.

⁸⁴ Below, p.283.

⁸⁵ *S v Sigwahla* 1967 (4) SA 566 (A) at 570.

⁸⁶ *S v Mini* 1963 (3) SA 188 at 196 *per* Williamson JA.

⁸⁷ In addition to the passages quoted below, see also *S v Stingling en'n'Ander* 1989 (3) SA 720 (A) at 722-3; *S v Sephuti* 1985 (1) SA 9 (A) at 121; *S v Mamba* 1990 (1) SACR 227 (A) at 236-327; *S v Lungile* 1999 (2) SACR 597 at 602-603.

doubt, having due regard to the particular circumstances which attended the conduct being inquired into.⁸⁸

Expressing the presumption still more strongly, it has been stressed that any doubt relating to the defendant's foresight dooms the finding of *dolus eventualis* and permits only a finding of negligence:

To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so.⁸⁹

Rather like the boundary of intention under English law, in South Africa, the line between *dolus* and *culpa* is a spectre that refuses to be laid to rest. It has recently risen again in cases demonstrating how the two aspects – *luxuria* and inferential reasoning – combine to cause confusion and dissent.

In 1996,⁹⁰ a policeman appealed having been found guilty of murder when a suspect, tied to his armoured police vehicle and ordered to run in front of the truck, was subsequently pulled under the wheels and killed. Taking into account a number of factors – none of the appellant's seniors, also on the scene, had cautioned or countermanded him, the vehicle had good brakes and was being driven slowly by a proficient driver who was shocked at the fatal outcome of the incident – the Appellate Division found that the trial court had proceeded too readily from the inference "ought to have foreseen" to "in act foresaw" and amended the conviction to culpable homicide. Van den Heever JA repeated the warnings from past cases⁹¹ and, in marking the boundary between *dolus eventualis* and *luxuria*, cited the distinction provided in *Ngubane*⁹²:

Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself to it", he "takes it into the bargain". Our cases often speak of the agent being "reckless" of that consequence, but in this context it means consenting, reconciling or taking into the bargain and not the "recklessness" of the Anglo-American system nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to

⁸⁸ *S v Bradshaw* 1977 (1) PH H60 (A). Also *S v De Bruyn* 1968(4) S 498 at 507 *per* Holmes JA. 'One must eschew any tendency towards legalistic armchair reasoning, leading facilely to the superficial conclusion that the accused "must have foreseen" the possibility of the resultant death.'

⁸⁹ *S v Sigwahla* 1967 (4) SA 566 (A) at 570.

⁹⁰ *S v Maritz* 1996 (1) SACR 405 (A).

⁹¹ Including *S v Bradshaw* 1977 (1) PH H60 (A) and *S v Sigwahla* 1967 (4) SA 566 (A): *ibid.* at 417.

⁹² *S v Ngubane* 1985 (3) 677 (A).

the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.⁹³

The introduction of reconciliation with the risk-taking to mark the more blameworthy mental state is a helpful addition to the fault element that arguably encompasses, not merely volition but attitude, especially callousness and indifference. However, to return to the issue of inferential reasoning, it is surely understandable that such reasoning, taking as a starting point “ought to have foreseen” (unconscious negligence), will find greater conviction in the ultimate finding of “in fact foresaw” when the defendant admits to having foreseen the risk of death as an, albeit, remote possibility (conscious negligence). Indeed, if the distinction between *dolus eventualis* and *luxuria* is to be equated with the thought processes of inferential reasoning, there needs to be a final stage of “not simply foresaw, but was reconciled with the risk of producing the prohibited consequence”. In fact, Van den Heever concluded that a person does not take a foreseen risk into the bargain when he is convinced that he can prevent its occurrence⁹⁴ and the requisite intention cannot be inferred simply because the actual occurrence combines with hindsight to provide evidence of his error.⁹⁵ Therefore, the appellant’s murder conviction was reduced to culpable homicide.

Even the new century witnessed the disinterment of an objective test of murder liability. In March 2002, the Supreme Court considered the murder conviction of a mother for causing the death of her six month old baby. In *Campos*,⁹⁶ the trial court had referred to a judicial passage from 1957 that ‘if an assault... is committed upon a person which causes death, either instantaneously or within a very short time thereafter, and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in the drawing the inference that it was of such an aggravated nature that the assailant knew *or ought to have known* that death might result’⁹⁷. Considering the trial judge’s application of the passage, Mpati JA admitted that the conclusion may have been reached without resort to the objective test of “ought to have known”. However,

his general approach as to what inferences could and should be drawn as to the appellant’s state of mind took as its point of departure the wrong approach reflected in the quoted passage. That was a serious and material misdirection which leaves this court

⁹³ *Ibid.* at 685.

⁹⁴ *S v Maritz* 1996 (1) SACR 405 (A) at 416.

⁹⁵ *Ibid.*

⁹⁶ *S v Campos* 2002 (1) SACR 233 (SCA) at 240.

⁹⁷ *R v Mlambo* 1957 (4) SA 727 (A) at 737 (emphasis added).

at large, and indeed obliged, to consider afresh the guilt of the appellant on the murder charge.⁹⁸

In reexamining the facts, Mpati JA stressed that the question to be answered during the inquiry is whether the State proved beyond a reasonable doubt that the appellant in fact did foresee that her actions could result in [the victim's] death. Moreover, that alone would not be enough. It would also have to be the only reasonable inference that she did not care (ie was reckless to) whether death would in fact result and, as it is sometimes put in the cases, reconciled herself to such a result. While, that further element is often capable of being inferred beyond reasonable doubt simply from the fact that, with knowledge that a risk of death was inherent in the contemplated act, the act was committed, it will not always be so.⁹⁹

In the final analysis, he concluded that the appellant 'ought reasonably to have foreseen that death could result from her actions' and accordingly upheld a conviction for culpable homicide. However, while Marais JA concurred with the conclusion, Conradie JA disagreed, arguing that murder was the correct conviction. His conclusions demonstrate that the drawing of inferences will not necessarily lead to a definitive or unanimous solution.¹⁰⁰

3.4.2 The Outer Reaches of Culpable Homicide

Rather like the English manslaughter offence, the next important consideration is the boundary between culpable homicide and accidental death. To reiterate, under South African law, while the type of harm that ought to have been foreseen is always death, the fault of *culpa* extends to normal negligence. In order to situate culpable homicide between murder and accidental death, it is worth quoting at length the components of the offence:

- (i) Culpable homicide is the unlawful, negligent causing of the death of a human being...
- (ii) Basically there must be some conduct on the part of the accused involving *dolus* (such as an assault), or *culpa* (such as an operation by a surgeon without due care, or the driving of a motor vehicle without keeping a proper look-out).
- (iii) Such conduct must cause the death of the deceased.
- (iv) In addition there must be *culpa* in the sense that the accused ought reasonably to have foreseen the possibility of death resulting from the conduct...

⁹⁸ *S v Campos* 2002 (1) SACR 233 (SCA) at 240.

⁹⁹ *Ibid.* at 243.

¹⁰⁰ 'I agree that it has not been established that the appellant assaulted her child in order to kill her. I also agree that, as a reasonable person, she ought to have realised that what she was doing to the child might cause her death. In my view, however, one can confidently say that she must have known, and therefore by inference did know, that there was a grave risk that the viciousness of her attack on the baby might cause her death and that she acted regardless of the consequences.' *Ibid.* at 247. Consequently, he went on to state, at 249: 'Save that I would have reduced the appellant's sentence on the murder count to acknowledge the fact that she was not guilty of murder with *dolus directus*... I would not have allowed the appeal.'

- (v) It follows from the foregoing that causation of death, even as the result of an unlawful act which was criminally punishable, is not of itself sufficient to constitute the crime of culpable homicide. To disregard the additional requirement of the reasonably foreseeable possibility of resultant death, would be to restate the doctrine of *versari in re illicita*,¹⁰¹ which was outmoded by *S v Bernadus*¹⁰².
- (vi) If an accused does foresee – as distinct from ought to have foreseen – the possibility of such resultant death and persists in his conduct with indifference to fatal consequences ... the crime would be that of murder... Having regard to the requirements of foresight and persistence the dividing line between (a) murder with *dolus eventualis* and (b) culpable homicide, is sometimes rather thin.¹⁰³

Comparing South African and English law, it can readily be appreciated culpable homicide is wide enough to encompass gross negligence manslaughter¹⁰⁴. However, it also covers many scenarios that are caught within the net of constructive manslaughter, which typically involve a physical assault and the risk of harm. Indeed, in South Africa, it has been claimed that ‘he who purposely assaults another must be deemed to have foreseen that death as the greatest injury might result as a result of the assault, even if the intervention of death was an unexpected or indeed an unusual consequence, provided there is a causal connection between the deed and the death’¹⁰⁵. Consequently, culpable homicide convictions have been imposed for inflicting injuries both with¹⁰⁶ or without¹⁰⁷ weapons, and also for discharging firearms in the vicinity of the victim with the intention simply of causing fright¹⁰⁸. Therefore, as culpable homicide seems capable of stretching the ambit of homicide liability just as far, if not farther than manslaughter, it of particular interest to discover where and how South Africa places the outside limits on so expansive a liability.

Prior to *Berdardus*¹⁰⁹ an unlawful assault without any culpability was sufficient to render the assailant liable for culpable homicide. Furthermore, ‘the view was also held that the mere foreseeability of bodily injury (not death) was a sufficient base for a finding of negligence for the

¹⁰¹ Constructive fault whereby all the consequences of an illegal act are imputed to the person who performed the act.

¹⁰² 1965 (3) SA 287 (A).

¹⁰³ *S v Burger* 1975 (4) SA 877 (A) at 878 per Holmes JA.

¹⁰⁴ E.g. *S v Maritz* 1996 (1) SACR 405 (A) and *S v Campos* 2002 (1) SACR 233 (SCA).

¹⁰⁵ *S v Bernadus* 1965 (3) SA 287 (A) at 302 (translated by Young J in *R v Mara* 1966 (1) SA 82 (SR) at 82).

¹⁰⁶ *S v Mini* 1963 (3) SA 188 (A).

¹⁰⁷ *S v De Bruyn* 1968 (4) SA 498 (A); *S v Burger* 1975 (4) SA 877 (A).

¹⁰⁸ *R v Horn* 1958 (3) SA 457 (A); *S v Du Preez* 1972 (4) SA 582 (A): The victims were killed by ill-directed gunshot wounds not by, for example, heart attacks induced by the frightening experience.

¹⁰⁹ *S v Bernadus* 1965 (3) SA 287 (A).

purposes of culpable homicide¹¹⁰. Since then, there has been a gradual softening of the harshness of culpable homicide liability.¹¹¹ The present position is that the court must be satisfied that the principal was negligent in causing the death of the deceased¹¹² and, while it may be easy to draw this conclusion in cases of assault resulting in death, there is no general presumption that in every fatal assault the assailant ought to have foreseen that death might result, and was therefore negligent.¹¹³ Thus, in *Van As*¹¹⁴, where the defendant slapped the victim's cheek and the victim, a very fat man, fell backwards, hit his head and died, it was found on appeal that the defendant could not have foreseen the fatal result. This ruling also permits scope for exculpating a defendant in the event of the victim dying as a result of a subsisting medical condition such as a thin skull, haemophilia or weak heart following a mild assault, and so alleviates the burgeoning of homicide liability to discomfortingly harsh breadths when death is the unusual consequence of a minor assault.

3.4.3 Punishment for Homicide

An examination of substantive homicide law is left inadequately anchored within the socio-political context without some consideration of the subsequent sanctions for unlawful killings. Consequently, it is necessary to take a brief look at the South African approach to the punishment of convicted killers.

¹¹⁰ Snyman, *CL* at 202.

¹¹¹ There has been an introduction of subjective factors that take into account the defendant's capacity and do not necessarily square with that of the reasonable man. ("The reasonable man test" encounters particular difficulties in Southern Africa. In *R v Nkomo* 1964 (3) SA 128 (SR) Beadle CJ described the problems: 'In England, with its relatively homogenous population, the test of "the reasonable man" in other contexts has caused enough difficulty in attempting to define the standard. In a country such as this, with its diverse multi-racial community, whose social and educational standards vary over almost the widest possible range, the task is well-nigh impossible. To strike a mean between the Bantonka fisherman living his primitive life in some remote spot on the Zambesi, and the professor at the University College of Rhodesia, is to set a task which even an arch-exponent of the "reasonable man test" would shrink from attempting.') see Burchell & Hunt at 278-281. In addition, it was posited in *S v Goosen* 1989 (4) SA 1013 (A) that where death is unintended (in the direct sense of intention) it must occur in a way that does not differ markedly from the way(s) foreseen as a possibility. However, Snyman takes issue with the ruling and argues, at 203, that in the case of culpable homicide, '[i]t is not necessary for the reasonable person to have foreseen the precise way in which Y would die. It is sufficient that he would have foreseen the possibility of death in general.'

¹¹² In addition to the requirement that the defendant ought to have foreseen the tragic result, negligence also incorporates considerations of preventative steps that could and should have been taken to avoid it. See Snyman, *CL* at 199-203. Burchell & Hunt at 275-279.

¹¹³ Snyman, *CL* at 202.

¹¹⁴ *S v Van As* 1976 SA 921 (A) 927.

Prior to the enactment of the Constitution¹¹⁵, the Criminal Procedure Act¹¹⁶ governed the punishment for murder. Accordingly, section 277(1) permitted the imposition of the death sentence upon convicted murderers. However, the death sentence was not mandatory but optional depending upon the presence or absence of aggravating or mitigating circumstances. In 1995¹¹⁷, the Constitutional Court declared the death sentence to be inconsistent with s.12(1)(e) of the Constitution¹¹⁸ and therefore invalid.

Sentence for unlawful killing whether murder or culpable homicide reflects the accused's culpability. Thus, in murder the existence of *dolus directus* receives greater punishment than the presence of *dolus eventualis*.¹¹⁹ Similarly, in culpable homicide the degree of negligence is decisive in fixing the sentence.¹²⁰

3.4.4 The Role of Secondary Participation in the Amendment of Substantive Homicide Liability

As a final point, it is noteworthy that, in South Africa, secondary participation in offences resulting in unlawful killings played a significant part in reshaping the substantive law of murder. The fault of *dolus eventualis* was developed as a form of intention to accommodate the rising common purpose scenarios where victims were killed during the execution of the purported foundational crime. The history of the development was described in *De Bruyn*:

For many years Courts in this country drew scant attention, if any, between *dolus directus* and *dolus eventualis* in murder cases. In deciding the issue of intention to kill, they were content to apply the so-called presumption that a person intends the natural and probable consequences of his act. It is only in comparatively recent years that Courts have begun to apply the principle of *dolus eventualis* in murder cases. It was the prevalence of housebreaking with intent to steal and theft, after World War II, which brought to the fore the application of the principle of such *dolus*, for burglars, on encountering resistance sometimes caused death, although they did not set out with that actual intention.¹²¹

¹¹⁵ Act 2000 of 1993.

¹¹⁶ Act 51 of 1977.

¹¹⁷ *S v Makwanyane and Mchunu* 1995 (2) SACR 1 (CC)

¹¹⁸ The guarantee of freedom from cruel, inhuman or degrading punishment.

¹¹⁹ See n.24 and the dicta of Conradie JA in *Campos*.

¹²⁰ *S v Maritz* 1996 (1) SACR 405 (A) provides an insight into sentences for murder (*dolus eventualis*) and culpable homicide. The Appellate Division reduced the original sentence of 8 years (for murder) to 2 years when the conviction was reduced to culpable homicide. However, due to the aggravating presence of the appellant's abuse of police authority, he was denied a correctional supervision order, which he requested in place of a custodial sentence.

¹²¹ *S v De Bruyn* 1968 (4) SA 498 (A) at 509. Consequently the common purpose cases develop the concept of *dolus eventualis*: e.g. *S v Malinga* 1963 (1) SA 692 (A); *S v Madlala* 1969 (2) SA 637 (A); *S v Mjoli and Another* 1980 (3) SA 172 (D); *S v Shaik* 1983 (4) SA 57 (A); *S v Dlamini and Others* 1984 (3)

The 'presumption that a person intends the natural and probable consequences of his act' refers to the older objective test. However, it is interesting that in moving towards a subjective approach to murder liability, South African criminal law did not limit the substantive offence to the paradigm of a principal offender. By taking into consideration the common purpose scenarios and the desire to incorporate deserving secondary parties under the umbrella of murder liability, South Africa avoided limiting the fault of murder to direct (or indirect) intention as occurred under English law. Consequently, by seeking to accommodate secondary participation a uniform fault was applied to both primary and secondary parties. This fortuitous circumstance obviated the need to develop and apply an extended or specialised form of culpability to accomplices and avoided the creation of unequal murder liability between parties.

3.5 PROPOSED AMENDMENTS TO SUBSTANTIVE HOMICIDE IN ENGLISH LAW

There is an appeal in the South African solution of applying the substantive offence fault to all parties and attributing the resultant homicide liability in accordance with the parties' individual *mens rea*, not least because such an approach would avoid the over-inclusiveness of murder liability that presently exists. It would also circumvent the need to define the limits of liability via the scope of the common purpose and, in so doing, would categorically equate complicity liability in joint enterprise and non-common purpose cases.

It may be argued that the crystallisation of secondary liability via unilateral individual fault lacks psychological elegance or credence. The psychological process differs when more than one party is involved in a crime commission. Whilst it is still possible to directly connect the primary party's *mens rea* to the *actus reus*, the secondary party's actions contribute to the consummation of the offence but fall short of actual perpetration. Consequently, as the offence cannot commit itself, the secondary party's liability must involve a relationship with the perpetrator. Therefore, while a primary party's recklessness may be limited to his own volitional act; a secondary party's recklessness must be extended to include the primary party's act and, as the act will not be morally colourless, part of the risk assessment will inevitably turn upon the accessory's appreciation of the principal's state of mind at the time the act was performed. Therefore, when

360 (N); *S v Safatsa and Others* 1988 (1) SA 868 (A); *S v Mgdezi and Others* 1989 (1) SA 687 (A); *S v Memani* 1990 (2) SACR 4 (TK); *S v Nzo* 1990 (3) SA 1 (A); *S v Majosi and Others* 1991 (2) 532 (A); *S v Singo* 1993 (1) SACR 226 (A); *S v Lungile* 1999 (1) SACR 597 (A); *S v Mkize* 1999 (2) SACR 632 (W); *S v Maelangwe* 1999 (1) SACR 133 (NC).

considering the risk that the secondary party believed was being run, it is necessary to introduce as an intrinsic element, the accessory's understanding of the principal's state of mind.

However, while this fact needs to be appreciated it is by no means fatal to the proposition of liability based on unilateral *mens rea*. The secondary party's interpretation of the principal's mental state is part of the context of his or her understanding/belief of the range and extent of the overall risk undertaking. Therefore, it is suggested that, like the accessory's knowledge and foresight of weapon possession and use, the secondary party's appreciation of the principal's mental state should be presented in evidential terms rather than as a matter of substantive law. Moreover, it is submitted that the fault of recklessness should, under certain circumstances, be extended to include latent awareness, in other words, the capacity to appreciate the risk even though it may not have been adverted to at the time of acting.¹²² It is arguable that the subjective approach is a rational approach to culpability that is compromised by its necessary assumption of a rational approach by defendants. In fact, it is open to question whether, with the exception of intentional, planned, or coldly executed murders, many of the actions leading to a victim's death might be performed on the spur of the moment where situations arise spontaneously. In other words, crimes of violence are just as likely, if not more likely to occur as a result of reactive rather than proactive responses. This is particularly likely in situations where mental acuity is dulled by permutations of drink, drugs and adrenaline. Cases of joint enterprise to an assault evidence further aspects of heightened irrationality. Where multi-party assaults are aggravated by peer pressure, knowledge of support and approval and the arousal of the primal instinct to inflict pain or injury on an outsider or perceived enemy the violence is likely to escalate as more parties add support and encouragement.¹²³

If this argument is valid then it becomes increasingly unrealistic to superimpose secondary liability based on a secondary party's (S) awareness of the principal's *mens rea*, at a time when S's own appreciation of risk was blurred by intoxication, anger, arousal, etc. S's liability should reflect the overall context of the violence he is supporting rather than being limited to his own

¹²² This refinement to the purely objective application of *Caldwell/Lawrence* recklessness (see above, p.19) applied in *Elliott v C* (1983) 77 Cr App R 103 is suggested in *Reid* [1992] 1 WLR 791. See also Keating, "The Law Commission Report on Involuntary Manslaughter (1) The Restoration of a Serious Crime" [1996] Crim LR 535 at 539-541

¹²³ See e.g. the English cases of *Hyde* [1991] 1 QB 134, *Uddin* [1998] 2 All ER 745 and *Greatrex* (1999) 1 Cr App R 126 and the South African cases of *Mgxwiti* 1954 (1) SA 370; *Safatsa* 1988 (1) SA 868 and *Motaung* 1990 (4) SA 485.

acts¹²⁴ while S's culpability is encapsulated by a mental state that includes an awareness or understanding of P's *mens rea*, whether real or perceived, incisive or vague. Furthermore, if negligence is to be retained as a fault element in homicide, it is essential that unilateral *mens rea* be applied to avoid further iniquity in the application of homicide liability to primary and secondary parties. There is no compelling reason for secondary party to advert to the principal's negligence in order to be liable for the same offence. Indeed if parity is to be sought the secondary party should be equally unappreciative of the risk, despite the fact that he ought to have foreseen it.

Having chosen to adopt the South African approach of applying the substantive fault to primary and secondary parties alike, the following proposals in the structure of homicide follow the South African model only insofar as they continue to differentiate between murder and less culpable unlawful killings. The reason for retaining murder as a separate and "special" species of homicide is an acknowledgement of the fact that the stigma involved in labelling a killer a "murderer" involves social and cultural expectations that are too deep-rooted to be abandoned.¹²⁵ Nevertheless, it is submitted that the mandatory life sentence be discarded and replaced with a maximum sentence of life imprisonment in order to permit the reflection of any possible mitigating circumstances. This also follows the latest South African approach.¹²⁶ However, the conglomeration of all of the remaining unlawful killings under the umbrella of one offence, be it manslaughter or culpable homicide, is not followed. Having attached such importance to the labelling function of the criminal law, it seems a reasonable proposition to separate further species of unlawful homicides and grade them in terms of relative seriousness.¹²⁷

Whilst it will be possible to attach labels of intention, subjective or objective recklessness etc. to the following fault elements, the proposed offence definitions avoid the use of these terms, providing description of the mental state to avoid presumption and possible confusion.

¹²⁴ E.g. where the joint enterprise contains a contingency plan, where S may not actually inflict violence himself but supports a plan where his associates will do so, as and when required. See above, p.229.

¹²⁵ Wilson, in 'Murder and the Structure of Homicide' ed. Ashworth and Mitchell *Rethinking English Homicide Law* (OUP, 2000) at 24 describes the social expectations as a 'moral culture' that seeks to differentiate between murder and other homicides. He continues: 'At its simplest that culture has sought to identify a particular class of killings which separates itself from the pack of unlawful killings by the unique quality of the deed from which it issues.'

¹²⁶ See above, p.287.

¹²⁷ For an examination of the relevant considerations in differentiating between possible homicide offences so as to ensure symbolic and meaningful labelling, see Clarkson, 'Context and Culpability in Involuntary

3.5.1 Amendment to Murder

It is submitted that, as a second limb to murder, recklessly engaging in conduct foreseeing that it may cause death or life-endangering injury would be a preferable alternative to the present intent to cause grievous bodily harm. Thus:

A person is guilty of murder if he causes death by committing an unlawful act or omission and –

- (a) intends to kill; or
- (b) is aware of the likelihood that his conduct may cause death or life-endangering injury; or
- (c) is capable of appreciating that his conduct posed a serious risk of causing death or life-endangering injury and would not have changed his conduct had the risk been appreciated at the time; and
- (d) where (b) or (c) apply, it is unreasonable for him to take that risk having regard to the circumstances as he knows or believes them to be.

Clearly, this definition takes murder beyond the paradigm but it is submitted that the second and third limbs are appropriate in incorporating within the murder label ‘those who manifest contempt for the value of life’¹²⁸. The introduction of ‘likelihood’ within the second limb is intended to mark the boundary between those who foresee a remote or slight risk of death or life-endangerment and those who, believing either outcome to be likely, evidence their resignation or reconciliation with the risk by continuing with their chosen conduct.¹²⁹ The third limb provides an attempt to bring extreme indifference within the murder definition. As indifference is an attitude rather than a cognitive state¹³⁰ it is difficult to describe it as a fault term. This is particularly true when utilising the conventional fault labels since indifference may occupy the territory covered by subjective recklessness or negligence depending on whether the indifferent person ‘can be bothered’ to think about the risk or not.¹³¹ The introduction of a person’s capacity to appreciate a risk circumvents the difficulty. Rather more controversially, it also incorporates those people whose capacity was clouded, not by an attitude of indifference but by such cognitive

Manslaughter: Principle or Instinct?’ ed. Ashworth and Mitchell, *Rethinking English Homicide Law* (OUP, 2000) at 141-148.

¹²⁸ Wilson, *op cit* n.125 at 26.

¹²⁹ For the incorporation of reconciliation/ resignation within the concept of *dolus eventualis* under South African law, see above, p.23. See also Wilson, *op cit* n.125 at 30: ‘A willingness to run risks is not the same as being reconciled to their outcome – it is this latter attitude which displays more forcefully the moral hallmark of the murderer.’

¹³⁰ Wilson, *ibid.* at 30. For further accounts of indifference, see Mitchell, *op cit.* n.43; Duff, *Intention, Agency and Criminal Liability* (Blackwell, 1990) and ‘Subjectivism, Objectivism and Criminal Attempts’ ed. Simester and Smith in *Harm and Culpability* (Clarendon Press, 1996).

¹³¹ See n.43.

blurs as intoxication and anger. In order to elevate the mental state to the equivalent moral fault of the second limb, the qualification of continuing regardless of actual awareness has been added. It is suggested that, whether the cognitive process was dulled by indifference, anger or any other element, a person who would have been undeterred by an actual awareness of the risk of causing death or life-endangering harm manifests sufficient fault to be labelled a murderer.

Finally, the inclusion of (d) is a necessary qualification if undeserving cases of conscious risk-takers are to be eliminated from the scope of the definition. To take a clear example, surgeons will generally perform operations in the awareness of the risk of death to the patient. Indeed, life-saving operations are just that due to the probability of the patient's death without medical intervention, which inevitably translates into a serious attendant risk that the patient may ^{die} during or soon after the required surgery. However, as long as the surgeon acted with professional competence¹³² and manifested no malicious intentions¹³³ towards the patient, the social utility of the surgeon's risk-taking is entirely reasonable, even in the event of the patient's death.¹³⁴

3.5.2 Amendments to Existing Involuntary Manslaughter

The following definitions suggest amendments to the existing manslaughter offence and to the Law Commission's proposals of reckless killing and killing by gross carelessness.¹³⁵ Reckless killing is retained although in a slightly different form which complements the new murder definition. Killing by gross carelessness is divided in two: killing by gross negligence and a separate form of constructive manslaughter which takes into account the Government's response to the Law Commission's dilution of existing unlawful act manslaughter. Rather more space and attention is devoted to considering constructive act manslaughter and the issues that surround its retention and redefinition. The section concludes with a suggested gradation of seriousness by which to rank the proposed new offences.

¹³² Failure to comply with the required level of competence may result in liability for killing by gross negligence, see below, p.294.

¹³³ See further, Yeo, *FH* at 79-81.

¹³⁴ The introduction of a similar criterion would have exculpated the doctor in *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112. Arguably, it would not be unreasonable for a doctor to prescribe contraceptives to an underage girl when he believed her circumstances to include the risks of pregnancy, the contraction of sexually transmitted diseases etc., even though he was also aware of an attendant risk of encouraging other men to have unlawful intercourse with her.

¹³⁵ See above, p.275.

3.5.2.1 *Reckless Killing*

Reckless killing is the next step down from murder. As such, the following definition contains the overspill from the second and third murder limbs as well as two additional components.

Thus:

A person is guilty of reckless killing if he causes death and –

- (a) is aware of a slight possibility that his conduct will cause death or life-endangering injury; or
- (b) is capable of appreciating that his conduct posed a ^{serious} risk of causing death or life-endangering injury and would have changed his conduct had the risk been appreciated at the time; or
- (c) is aware of a risk that his conduct will cause serious injury; or
- (d) is capable of appreciating that his conduct posed a risk of causing serious injury; and
- (e) it is unreasonable for him to take that risk having regard to the circumstances as he knows or believes them to be.

The first and second limbs contain finely worded distinctions that differentiate reckless killing from murder. Consequently, those persons who foresaw a remote or slight risk of causing death or life-endangering injury are excluded from the murder definition and captured within the lesser offence of reckless killing. Similarly, those who had latent awareness of the risk of causing death or life-endangering injury and would have acted differently had they appreciated the risk at the time are not deemed appropriately blameworthy to be liable for murder and are therefore accommodated within reckless killing. These niceties are not included in the third and fourth limbs because, it is submitted, the moral threshold, in labelling terms, is not significant enough to warrant distinction. However, it would be anticipated that sentencing would take account of differences in parties aware of a slight rather than a likely risk of causing serious injury, or people with latent awareness who would have modified their behaviour had they appreciated the risk at the time of acting.

3.5.2.2 *Killing by Gross Negligence*

It is submitted that, whilst there is a case for differentiating between negligent and accidental killings, the South African template for culpable homicide where ordinary negligence suffices as the fault element creates too extensive a liability. It is sufficiently unusual to encounter negligence as a fault for grave crimes to urge that the species of negligence should be

appropriately serious in quality to justify the imposition of homicide liability. However, since the rationale behind the following definition is the need to censure, or at least label, an extreme risk of harm that ought to have been foreseen and avoided, it is submitted that, as in South Africa, the type of harm should be limited to death rather than serious (or even life-threatening) injury.¹³⁶

Thus:

A person is guilty of killing by gross negligence if he causes death and

- (a) ought reasonably to have been aware of a significant risk that his conduct could result in death; and
- (b) his conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring, or in preventing the risk, once in being, from resulting in the prohibited harm.

Unlike the Law Commission proposal, this definition does not limit liability to those who had the capacity to appreciate that their conduct involved a significant risk of death¹³⁷. It is readily conceded that this approach runs counter to the efforts to subjectivise criminal liability and is therefore open to vehement criticism. However, it is submitted that people incapable of appreciating a significant risk of causing death pose a sufficient public danger to justify the intervention of the criminal law.

3.5.2.3 Considerations for Retaining Constructive Act Manslaughter

The Law Commission took the view that a person should be liable for unintentionally causing death only

- (1) when she unreasonably and *advertently* takes a risk of causing death or serious injury; or
- (2) when she unreasonably and *inadvertently* takes a risk of causing death or serious injury, where her failure to advert to the risk is culpable because
 - (a) the risk is obviously foreseeable, and
 - (b) she has the capacity to advert to the risk.¹³⁸

It is noteworthy that the type of harm that should be foreseen or obviously foreseeable is limited to death or serious injury. Consequently, in accordance with section (1) the optimistic defendant (D) who punched the victim's nose foreseeing only a minor injury would not be liable for homicide if the victim (V) died as a result of the blow. Furthermore, in accordance with section

¹³⁶ As suggested by the Law Commission's reform proposal, see above, p.275.

¹³⁷ The South African experience (i.e. the problems encountered in accomodating *luxuria* within culpable homicide rather than murder) suggests that there needs to be a firm demarcation between foresight (actual or latent) and foreseeability: see above, pp.281-284.. In fact foresight of a remote risk of causing death would be accomodated in this framework within the offence of reckless killing.

(2) the defendants's inadvertence would be overruled only if the risk of serious injury or death was obviously foreseeable and she had a latent appreciation of that fact. There are probably an infinite number of scenarios that can be superimposed upon the nose-punching to add to the context of the killing to test the obvious foreseeability test. For example, without specific knowledge, it would not be obviously foreseeable that V was a haemophiliac. Therefore, D would be exculpated when V died from uncontrolled and excessive blood loss resulting from the bloody nose. However, if D had been aware of V's affliction then, despite the outcome remaining unforeseeable in the objective sense, D would have possessed the capacity to appreciate the risk of serious injury or death and, it is submitted, should be held liable for the unlawful killing. However, whether this liability is the logical outcome of section (2) is a moot point but since it is possible to paraphrase the liability that D, with her special knowledge, ought to have foreseen the result, it is suggested that this scenario may fit into the second limb.

A second example, involves a chain of events rather than a subsisting condition. Say V was standing in front of an open window on the second storey and the blow, whilst only hard enough to cause severe pain and swelling, caught V off balance and toppled her towards the open window. V died as a result of falling out of the window and striking the pavement below. Was this result obviously foreseeable? Or rather, was the risk of death or serious injury obviously foreseeable in this scenario? And should D be liable for V's death?

The Law Commission provide a similar, though less potent example and suggested outcome, which arguably involves a technical battery rather than actual bodily harm:

D, in the course of a fight, slaps V once across the face. V loses her balance and falls to the floor, cracks her skull and dies.

D would *not* necessarily fall within our criteria because, arguably, there is not an *obvious* risk of causing death or serious injury inherent in her conduct.¹³⁹

The Government response to the Law Commission's proposals¹⁴⁰ takes issue with the position that deaths resulting from an unlawful act risking a foreseeable degree of harm less than serious injury should be excluded from the homicide offence definitions.¹⁴¹ Interestingly, the objection

¹³⁸ Law Com No. 237 para. 4.43 (emphasis in original).

¹³⁹ *Ibid.* para. 4.28 (emphasis in original). See also the South African case, *S v Van As*, above, p.287.

¹⁴⁰ *Reforming the Law on Involuntary Manslaughter: the Government's Proposals* (HMSO, 2000), (hereafter *The Government's Proposals*).

¹⁴¹ *Ibid.* para. 2.10: 'The Government is concerned that the Law Commission's approach would mean that behaviour which may be regarded as seriously culpable because it involves intentional or reckless criminal behaviour which results in death, would no longer attract an appropriate charge.' However, the Law Commission's Draft Bill (cl.2(4)) incorporates the criterion that the conduct causing the injury must be an offence and thus retains within the proposed new structure a constructive homicide offence, albeit in a diluted form that sets the degree of foreseeable harm at serious injury, see above, p.275.

echoes protests about the failure to impose an appropriate level of liability on a secondary party who, having participated in a violent attack, was exculpated by reason of failing to foresee the principal's use of a more lethal weapon¹⁴²: 'It might be viewed as unacceptable if the law permitted only a charge of assault where that assault had in fact resulted in death.¹⁴³ The Government's proposals remove the requirement for foreseeability¹⁴⁴ and the restriction of risking serious injury but suggest instead, an additional homicide offence to cover situations where:

- a person by his or her conduct causes the death of another;
- he or she intended to or was reckless as to whether some injury was caused; and
- the conduct causing, or intended to cause, the injury constitutes an offence.¹⁴⁵

This recommendation implicitly accepts the suggestion that 'manslaughter's own paradigm case includes a death attributable to an act of violence falling short of mortal injury'¹⁴⁶ Moreover, it rejects the implication of the Law Commission's offence boundary whereby a fatality caused by an unlawful act that does not pose a foreseeable risk of serious injury is designated an accidental death. Therefore, before attempting to provide a concluding position on the opposing approaches, it is necessary to consider the distinguishing features of accident and fault, in other words, the role of luck in the criminal law.

3.5.2.3.1 The Role of Luck in the Criminal Law

It was submitted earlier that the popular conception of blame has a relevant part to play in the allocation of responsibility in the criminal law.¹⁴⁷ Furthermore, it was suggested that blame – and the allocation of liability – interlaces the rationale underlying criminal causation, in the sense that a person is more strongly condemned for causing a harmful consequence than for threatening a result that, in the event and for whatever reason, does not ultimately materialise.¹⁴⁸ Following this line of reasoning derivative liability will impose heavier sanctions than inchoate liability

¹⁴² See above, pp.257-259.

¹⁴³ *The Government's Proposals* para. 2.10.

¹⁴⁴ *Ibid.*: 'The Government considers that there is an argument that anyone who embarks on a course of illegal violence has to accept the consequences of his act, even if the final consequences are unforeseeable.'

¹⁴⁵ *Ibid.* para. 2.11.

¹⁴⁶ Wilson, *op cit.* n.125 at 37.

¹⁴⁷ See above, p.126.

¹⁴⁸ In fact, despite its avowed aversion to constructive manslaughter, the Law Commission concedes that the actual causing of death is marked as an occurrence which is blameworthy: 'The fact that a person has caused death must clearly be a major factor in determining what offence if any, he has committed, and our recommendations would make no change in this respect. They would mean, for example, that a person who through gross carelessness causes death would be guilty of a serious offence, whereas a person who is equally careless but causes non-fatal injury only, or no injury, would in general be guilty of offence at all.'

because the criminal law reserves its most severe censure and punishment for actualised harm. And indeed, sentencing regimes reveal this to be an accurate picture of existing law.¹⁴⁹ However, the exposition does not end there. The argument outlined has been cast as the objective view, which ‘encompasses the belief that “outcomes ought to be regarded as morally significant”’¹⁵⁰. The opposing view, and the one gaining prominence in recent years,¹⁵¹ is the subjectivist approach to liability, which places central importance upon an actor advertent to the risks of harmful and unjustified consequences at the time of acting. In accordance with the subjectivist view, it is this awareness – this subjective culpability – that imbues the criminal law with the moral authority to punish the transgression. At the heart of the subjectivist approach is the claim that fair labelling arises only when there is correspondence between the defendant’s fault and the harmful consequence caused. Thus, ‘on the subjectivist view, the [correspondence] principle limits criminal liability to harms and wrongs that are intended or consciously risked’¹⁵². Expressed in these terms the subjectivism-objectivism debate can be seen to comprise viewpoints that remain entrenched in polar opposition. Furthermore, it has been contended that

The attraction of one view rather than the other may have much to do with intuition. There is certainly no foundational moral theory which can serve as an authoritative arbiter between them.¹⁵³

The result of this opposition is a dichotomy in the preferred approach to assigning criminal responsibility and punishment. That in itself is unfortunate insofar as purists from either camp will inevitably be dissatisfied by any judicial or legislative espousal of the conflicting approach. On the other hand, the contest provides a fertile battle ground which helps to test and refine the relevant arguments and permits the following rehearsal of opposing contentions in considering the role of luck in criminal responsibility.

There are two areas where problems arise. The first concerns the validity of ascribing moral significance to fortuitous luck in deciding the extent of punishment due to a defendant who effects an unsuccessful attempt. In this case, the defendant who fails to cause a harmful result is

It is the fact of death that justifies the imposition of ... liability for carelessness falling short of mens rea. (Law Com No 237 para 5.48 emphasis added.)

¹⁴⁹ Ashworth, “Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law” (1988) 19 Rutgers LJ (3) 725 at 738-744.

¹⁵⁰ Ashworth, ‘Taking the Consequences’ in *Action and Value in the Criminal Law* (Clarendon Press, 1993) at 110.

¹⁵¹ Espoused by Law Commission, and urged in the works of, most notably, Williams, JC Smith and Ashworth.

¹⁵² Horder, “A Critique of the Correspondence Principle in Criminal Law” [1995] Crim LR 759 at 760.

¹⁵³ Ashworth, *op cit.* n.150 at 110.

just as morally blameworthy as a counterpart more adept or successful in converting intention into actuality. However, the avoidance of the fatal consequence in one case, and the consummation of the intended harm in the other, produces a fundamentally different reaction, particularly where the offence is homicide and the mortuary houses the victim of the successful perpetrator whereas the would-be victim of the putative killer lives on. Thus, subjectivists, focussing upon the moral significance of the defendant's culpability rather than the ultimate harm, argue that, as both defendants have demonstrated equal culpability, they deserve an equivalent punishment. On the other hand, objectivists, while conceding the validity of equivalent culpability, place greater moral significance upon the difference in outcome and argue that lesser punishment is appropriate for an unsuccessful attempt due to the failure of the defendant to irreversibly alter the universal order by producing harm and, in the case of attempted murder, extinguishing life. However, since the law of attempts is peripheral to the scope of this thesis except insofar as it provides insight and illumination upon one aspect of the issue, no further examination of the contrary arguments will be undertaken.¹⁵⁴ It is the second area, where a defendant encounters detrimental luck, that is of direct relevance to the substantive law of homicide.

In this case, the defendant's action causes the victim's death but the defendant neither intended nor foresaw the fatal consequence. The defendant's intention or recklessness was confined to some lesser harm and although, under the present law of manslaughter, the conduct must have been objectively dangerous, there need only have been a remote risk of death. Indeed it is possible that the death need not even have been foreseeable. Consequently, the question posed and debated is whether the defendant should be held responsible for the (unforeseen) death or merely for the (intentionally/recklessly performed) unlawful conduct which caused the death. To a large extent the problems raised in this scenario produce a mirror image of the ones attending the unsuccessful attemptor. Should the defendant's sentence reflect the fact that death resulted from the conduct? And should the criminal label attaching to the defendant encompass the killing? However, before tackling these queries, it is necessary to take a step back. The thorny issue central to both responses is the significance of the defendant's luck in the imposition of liability: the defendant did not intend or foresee the risk of causing death – death occurred

¹⁵⁴ For an exhaustive analysis of the issues and arguments, see Ashworth, *op cit.* n.149 and n.150; Horder, *op cit.* n.53 and n.152; Honoré, "Responsibility and Luck" (1988) 104 LQR 530; Mandil, "Chance, Freedom and Criminal Liability" (1987) 87 Col LR 125. Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law" (1974) 122 Univ Pennsylvania LR 1440.

through bad luck. Thus, the underlying question is, should the defendant be penalised for his bad luck?

It has been suggested that luck plays an integral part in human existence, the inescapable price of free choice.¹⁵⁵ As such, 'we live under a system by which a community allocates responsibility according to outcomes'¹⁵⁶ and "outcome-responsibility" is 'more fundamental than either moral responsibility... or legal responsibility'¹⁵⁷. Furthermore,

Given certain conditions outcome-allocation can be defended as fair. The necessary conditions are that the system must in its operation be impartial, reciprocal and over a period beneficial. It must apply impartially to all those who possess a minimum capacity for reasoned choice and action. It must be reciprocal in that each such person is entitled to apply it to others and they to him. It must work so as to entitle each person to potential benefits which are likely on the whole to outweigh the detriments to which it subjects him. This makes it unfair to apply the system to the incapable, for whom there is no likely surplus of benefit over detriment. But for the capable the three conditions are normally satisfied.¹⁵⁸

It has been pointed out that while this line of reasoning works well for the law of tort, it is less compelling when applied to the criminal law.¹⁵⁹ Consider the following conclusion, which refers to lack of fault and strict liability. On the basis that the greater includes the lesser, this should extend to encompass scenarios of restricted fault and the imposition of liability for unforeseen consequences:

[I]n a wider perspective strict liability when the shortcomer is not at fault must be weighed not merely against a preponderance of successful outcomes, but against its obverse: the occasions on which by good luck our ill-judged action have a happy outcome and we undeservedly escape discredit or even manage to obtain unmerited credit.¹⁶⁰

Personal experience admits to the accuracy of the contention. However, the criminal justice system law is not set up to examine it in a principled manner. The emphasis on weighing unfortunate outcomes against fortuitous ones seems to imply that a person must frequently engage in conduct risking the unfortunate outcome. Thus, intuition and experience suggests that

¹⁵⁵ Honoré, *op cit.* n.154 at 540.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* at 541.

¹⁵⁸ *Ibid.* at 540-541.

¹⁵⁹ Ashworth, *op cit.* n.150 at 111: 'Even if the empirical proposition [that good and bad luck evens out over a lifetime] be granted there seems no reason why the effect of luck should be compounded by endowing it with legal significance, especially in the criminal law', and at 112: '... in terms of moral theory there may be distinct questions of at least three kinds – casual responsibility, responsibility to compensate and moral blame – and... the arguments for one may not conclude the case for the other.'

¹⁶⁰ Honoré, *op cit.* n.154 at 542.

this may be convincing when applied, for example, to driving offences, possibly even to causing death by dangerous driving¹⁶¹. Since, in many cases driving is a frequently performed occupation, it is more likely that speeding, reckless overtaking, jumping traffic lights etc., will become habitual, and that the risk taking will usually enjoy a happy outcome. However, for the same argument to work for constructive manslaughter, it would be necessary to demonstrate that the defendant habitually engaged in unlawful and dangerous conduct that usually ended without fatalities. And indeed, this may be so, but the criminal justice system does not operate in a way that tests the proposition. Therefore, either the system requires amendment to permit the presentation of a defendant's chequered history as evidence of the just desert of this particular piece of bad luck, or an alternative argument is required to justify the attachment of criminal liability to unforeseen consequences.

Returning to the subjectivist-objectivist debate, this is clearly an objectivist approach that centres attention on the significance of the outcome. In keeping with this focus, the consequence of causing death is an event that should be signified:

The imperative is connected with the communicative and censoring functions of the criminal law: a law which failed to mark the death might be taken to give official approval to the view that deaths do not matter, which would be morally the wrong message.¹⁶²

Added to this is the acknowledgement that the public expectation includes labelling as a killer a defendant who has caused a non accidental death.¹⁶³ The alternative subjectivist approach argues that this kind of application produces a label so skewed as to be both inequitable and virtually meaningless in content:

The fault and the result are simply too far apart for a manslaughter label to communicate anything other than the misfortune that befell both the victim and [defendant]. The criminal law is a censoring institution. It should censure people for wrongs, not misfortunes, and should censure them fairly and proportionately.¹⁶⁴

¹⁶¹ S.2 Road Traffic Act 1991.

¹⁶² Ashworth, *op cit.* n.150 at 119.

¹⁶³ Although this position has been subjected to criticism. Mandil, *op cit.* n.154 at 132: 'unprincipled deference to community sensibilities is rarely a satisfying solution to apparent conceptual incoherencies.' Ashworth, *ibid.* at 123: 'Some objectivists place considerable emphasis on the concordance of their approach with popular sentiments and public opinion. If intuitions lie at the foundation of both the rival approaches this will be a significant consideration but it cannot be conclusive unless it is also claimed that moral and legal responsibility should follow popular sentiments even when they can be shown to harbour elements of irrationality.'

¹⁶⁴ Ashworth, *ibid.* at 120.

Furthermore, it is not readily apparent that sentencing should reflect unhappy circumstances which are unintended and unforeseen. If people are to be punished for consequences they could not have foreseen, any view of punishment as a deterrence is effectively obviated. Indeed only the retributive¹⁶⁵ approach retains currency and it seems rather draconian and ineffectual to base a sentence on the unforeseen causing of death rather than limiting the sanction to the intended/reckless unlawful conduct, particularly when the censuring function has already been satisfied by the label of manslaughter. Nevertheless, this is an accurate reflection of current practice¹⁶⁶ and, it is submitted that, if any form of constructive killing is to be retained, the sentencing structure should be addressed to differentiate between killings where the death was foreseen and those where it was not.

So far, it is suggested, neither set of arguments from the subjectivist-objectivist divide have been sufficiently compelling to provide an adequate solution to the “nonparadigmatic crimes”¹⁶⁷ of attempt and constructive manslaughter, each of which include a component of consequential luck. Thus, an affiliation to either cause is largely a matter of partiality and intuition. It has been argued that the reason for the unsatisfactory result is that these cases provide examples of offences where ‘the value of freedom and other social values do not align’.¹⁶⁸ Consequently,

Normative theory has been largely unsuccessful in offering an adequate account of the role of chance in criminal law. Similarly, both subjectivist and objectivist descriptive models of criminal liability have not been equal to the task.¹⁶⁹

¹⁶⁵ And possibly the rather anachronistic view of punishment as expiation. For a detailed analysis of punishment theories in the context of actualised harm, see Shulhofer *op cit.* n.154.

¹⁶⁶ For further details and arguments opposing the imposition of sentences for unintended consequences, see Ashworth, ‘Transferred Malice and Punishment for Unforeseen Consequences’ in *Reshaping the Criminal Law* ed. PR Glazebrook (Stevens & Sons, 1978).

¹⁶⁷ A term used by Mandil, *op cit.* n.154 who argues at 137: ‘The paradigmatic crime involves an intentional act causing harm for a certain defined class of harms. ... Certain crimes, however, depart from the paradigm – some by reason of the absence of harm [e.g. attempts], some by the absence of intent [e.g. constructive manslaughter].’

¹⁶⁸ *Ibid.* at 139.

¹⁶⁹ *Ibid.* at 128, where the following account of the differences between normative and descriptive theories is provided: ‘Normative theories assert that the existence and degree of criminal liability depend on the moral culpability of the actor. As a result these theories maintain that criminal theory is ineluctably value-laden and that efforts to strip criminal theory of moral terminology and concepts in an effort to create a value-free science of criminal law are misguided and doomed to failure. Descriptive theorists, in contrast, assert that only through minimizing the use of normative concepts can the criminal law maintain the standards of rigor and neutrality dictated by principles of fairness in the criminal process. These theorists claim that the existence and degree of criminal liability should depend on conceptual arguments about criminal law as a general system rather than on the conclusions of a particular moral theory.’

Unfortunately, this conclusion results in a uncomfortable stalemate in the question of whether constructive fault for manslaughter should be retained. The following section queries whether there can be any kind of marriage between the opposing views.

3.5.2.3.2 An Alternative Approach to the Subjectivism-Objectivism Polarisation of Fault

With an approach favouring objectivism, Horder questions the foundational assumptions of subjectivist theory¹⁷⁰ and provides an historical analysis to argue that the development of the criminal law, rather than progressing inexorably towards ideal subjectivism, demonstrates a refining of a pragmatic amalgam of the contending approaches of recent years.¹⁷¹ He considers that the correspondence principle, the cornerstone of subjectivism, is very much an ideal¹⁷² and argues that the correspondence principle is, necessarily, underlain by the autonomy principle which presumes and attributes actors with choice and, more significantly, control.¹⁷³ However, luck undermines the autonomy principle because, whilst an actor might control an action, the chain of consequences flowing from the act is beyond human control.

This circumstance introduces into the law of homicide a two-step *mens rea*: the first mental state refers to the perpetration of the act (or omission) and the second to the occurrence of the consequence of causing death. When the fault for perpetrating the relevant act is limited to intention or subjective recklessness, there are a number of variations in *mens rea* with regard to the consequence of death (see fig. 12). Clearly, with the exception of the (ii)1 combination in Fig. 12, the correspondence principle is thwarted when the offence moves beyond the paradigm. However, Horder introduces alternative foundations on which to build homicide liability, the primary two of which he describes as the ‘malice principle’ and the ‘proportionality principle’:

The malice principle: the essence of malicious conduct is conduct wrongfully directed at a particular interest (personal say, or proprietary) of the victim. When D wrongfully directs his conduct at a particular interest of V’s, such malice justifies criminal liability for harm done in consequence of that interest, whether or not D foresaw that harm done to the interest of the degree suffered by V would result.

See also

¹⁷⁰ Norrie, in “From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer” [2002] MLR 538, who expresses doubt about the efficacy of orthodox subjectivism and the idea that greater culpability is necessarily associated with a defendant’s intention of foresight: ‘There is something missing in terms of moral judgment from the kind of factual, psychological forms of cognitive responsibility the law deploys. The law misses the underlying contextual and substantive moral concerns that alone permit a sense of justice’ (at 553).

¹⁷¹ Horder, *op cit.* n.53 and n.152.

¹⁷² Horder, *op cit.* n.152 at 759, 761.

¹⁷³ *Ibid.* at 760.

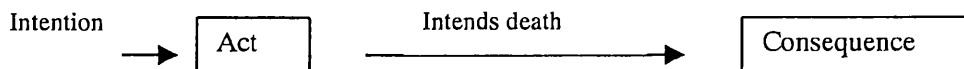
Fig. 12

In an a result crime, such as homicide, the proscribed element of the *actus reus* refers to the consequence of death. However, the consequence can only be brought about by an act (or, where a potentially lethal context is unfolding, abstention from acting):



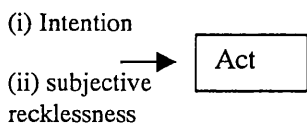
Paradigm

The paradigm for murder involves intentionally committing the act (or omission) intending that the victim's death should follow as the consequence:



Non-Paradigmatic Alternatives

Applying *mens rea* to this two-fold progression reveals that, even when the act causing death is performed intentionally or recklessly, there are a number of possible mental states that might be applied to the consequence:

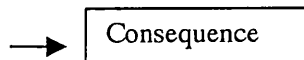


1. Foresees risk, and:

- a. is reconciled/resigned
- b. is indifferent
- c. hopes to avoid

2. Does not advert to, but:

- d. Has capacity to appreciate, and
 - (i) would have changed action with hindsight
 - (ii) is indifferent, i.e. would not have changed action
- e. could not appreciate (no capacity), but
 - (i) consequence was foreseeable
 - (ii) consequence was unforeseeable.



The proportionality principle: Where D acts maliciously towards V, and causes worse harm than anticipated, the greater the injury intentionally done to V, the greater the crime for which D may be criminally liable respecting the harm done, whether or not that harm was anticipated by D; but the harm done must not be disproportionate to the harm intended, if criminal liability for the harm done is to be justified.¹⁷⁴

In accordance with this view, the intentional direction of an unlawful act against a victim taints the defendant's culpability with regard to the consequences that flow from it. Thus, the actor encounters a morally different species of consequential luck. In place of the pure bad luck of blameless accident, the defendant, by setting in motion a chain of events via a malicious and unlawful act, creates his own bad luck and therefore deserves censure for the unlucky consequence, even when unforeseen.¹⁷⁵ Horder argues that it is the malice principle rather than the correspondence principle which underlies the evolution of the offences against the person.¹⁷⁶ However, in the development of homicide, the malice principle was circumscribed and refined by the proportionality principle¹⁷⁷ so that 'the greater the wrong D *intended* to inflict on V, the worse the crime for which D would be convicted, whether or not D foresaw the harm (unlawful killing) actually suffered by V'¹⁷⁸. However, approaching the principle from the opposite end, there needs to be proportion between the original malice and the ultimate consequence. To take an extreme example, it would be entirely disproportionate to impose murder liability upon the perpetrator of an intentional battery¹⁷⁹: the intended act/foreseen result and the actual consequence are simply too far removed. In other words, in order to censure a person as the author of his own misfortune, the gap between the fault and degree of the act/foreseen result and the unforeseen fatal consequence must sufficiently approximate the original script. The question still to be answered is how to draw the equation, particularly in refining the existing involuntary manslaughter offence in circumstances where the perpetrator intended to cause, or was reckless as to causing, personal harm but did not foresee causing the victim's death.

¹⁷⁴ Horder, *op cit* n.53 at 96.

¹⁷⁵ Horder, *op cit*. n.152 at 764: 'I "make my own luck" ... where my efforts are directed towards the end in question. ... Where I deliberately fire the gun close to the unsuspecting V, I have made my own luck (or rather, made V's bad luck my own) when V is killed by the shock, by directing my efforts towards harming V. This is not so in the case where V is killed when the gun goes off while being cleaned. Such cases are "pure" (bad) luck. For further details on moral luck see 763-766.

¹⁷⁶ Horder, *op cit*. n.53 at 100-105.

¹⁷⁷ And the "indirect malice" principle which requires that the harm caused in the ultimate consequence must be of the same genus as the harm intended by the original act, i.e. for liability to flow from the original act must have been an offence against the person. Harm directed against property will not suffice as a foundation for homicide liability unless it was specifically foreseen by the defendant: *ibid.* at 113-118.

¹⁷⁸ *Ibid.* at 107. See also Wilson, *op cit*. n.125 at 27: 'Once one has decided to inflict a harm of a given gravity one crosses a moral threshold which disables one from denying responsibility for the consequences although these may be more serious than those intended or foreseen.'

¹⁷⁹ S.39 Criminal Justice Act 1988.

3.5.2.3.3 Killing by Attack or Violent Act

It will be remembered that the Law Commission drew the equation by requiring that the defendant intended or foresaw the causing of some injury while serious injury or death was a foreseeable consequence of the defendant's conduct.¹⁸⁰ The Government suggested retaining the requirement for the foundational offence to have caused some injury but removed any criterion referring to the foreseeability of serious injury or death.¹⁸¹ In fact, it is probable that most of relevant cases will be neatly encapsulated within the Law Commission's proposal. 'Fairly typical of constructive manslaughter cases is the fight scenario outside a pub or club where the victim is kicked to death'¹⁸² and joint enterprise cases provide a welter of examples of deaths caused by the escalation of violent assaults.¹⁸³ It seems certain that in the majority of cases involving a violent assault, particularly where more than one party is involved, serious injury, and probably death, is a foreseeable occurrence. In fact, the issue of foreseeability is rarely encountered in English homicide law, but in South Africa, culpable homicide provides an insight into possible findings. In *Hedley*¹⁸⁴ the defendant fired his rifle at a cormorant near the edge of a dam. The bullet ricocheted off the water surface near some huts, which had been seen by the defendant before he fired. A woman, struck by the bullet, was killed. Explaining the decision to convict the defendant of culpable homicide, Broome JP stated: 'He knew that the bullet he was firing would strike the water and might ricochet and that if it did ricochet it might pass near the huts and so might hit someone. It is true that the likelihood of harm was small, but on the other hand the harm, if it resulted, would be very serious.'¹⁸⁵

By comparison, the likelihood of fatal harm where a violent attack is directed at the victim is much greater and indeed is arguably, more culpable:

The essential point about constructive manslaughter is that the defendant has chosen to engage in criminal, dangerous activity: usually violence. Such a person is deliberately engaging in a morally different course of action compared to those who act lawfully and inadvertently cause death.¹⁸⁶

¹⁸⁰ Law Com No. 237, Involuntary Homicide Bill, cl. 2(1), see above, p.

¹⁸¹ *The Government's Response*, para 2.11. See above, p.297.

¹⁸² Clarkson, *op cit.* n.127 at 146.

¹⁸³ See ch.6 n.4.

¹⁸⁴ *R v Hedley* 1958 (1) SA 362 (N).

¹⁸⁵ *Ibid.* at 363. In fact, the fact that defendant foresaw the remote possibility of the ricochet places the fault within the territory of *luxuria*. However, it follows that, if the defendant foresaw the possibility, the reasonable person would also have been aware of the risk.

¹⁸⁶ Clarkson, *op cit.* n.127 at 158-9.

On this basis, 'it is only those who attack their victims in the sense of *assaulting* them *intending* or *foreseeing some injury* who alter their normative position relevantly to bring themselves within the family of violence'¹⁸⁷. Thus, it has been argued that, as death is the extreme consequence of the offences against the person, homicide liability should stem from an act of personally directed violence and consequently, 'not every unlawful [and dangerous] act should suffice for constructive manslaughter as it does under the present law' because when defendants have 'departed too far from the family of violence the connection between their fault and the death is too tenuous'¹⁸⁸. This argument results in accepting the Law Commission's requirement of intending or foreseeing the risk of 'personal injury' rather than the Government's more wide-reaching alternative of 'unlawful conduct'¹⁸⁹ or 'illegal violence'¹⁹⁰. It is submitted that, in the majority of cases, the violence will be directly aimed at the victim, or, at least another person and it is conceded that an attack against property resulting in an unforeseen death is too tenuous to satisfy the malice or proportionality principles.¹⁹¹ However, the case of *Hedley* provides an interesting conundrum because, although the violence was directed at the cormorant, the defendant foresaw/ought to have foreseen the risk of killing a person in the execution of his action. A similar situation is encountered in *Gilmour*, where, despite directing the petrol bomb towards property damage, the defendants were aware that the house was occupied at the time of the attack. In this case, a criterion limiting the proscribed conduct to the infliction of some injury or to unlawfully directed personal violence may fail to encompass the actions of the petrol bombers. Yet, it is submitted that their conduct, coupled with their awareness of the risk of causing personal harm, is equally culpable to those defendants who bring about a victim's death through kicks and punches.

Consequently, it is submitted that a separate homicide offence should be incorporated into the homicide structure to cover cases where a person kills during the course of a personal attack,¹⁹² or

¹⁸⁷ *Ibid.* at 159 (emphasis in original).

¹⁸⁸ *Ibid.* at 159-160.

¹⁸⁹ *The Government's Response* para. 2.11.

¹⁹⁰ *Ibid.* para. 2.10.

¹⁹¹ Clarkson provides *Kennedy* (1994) 15 Cr App R(S) 141 and *England* (1995) 16 Cr App R(S) 777 as examples where the defendants' intent to commit burglary and criminal damage respectively should not result in homicide liability since the defendants were completely unaware that their conduct posed any risk to life, *op cit.* n.127 at 160-161. See also *Church* [1966] 1 QB 59: in its requirement that death was caused via an unlawful and dangerous act, this case is founded largely on an objective test and fails to meet the criteria of either the malice or proportionality principles.

¹⁹² Clarkson, *ibid.* at 164 suggests the term 'killing by attack' and, while it is possible that 'attack' is wide enough to cover instances of violence against property as well as against people, it is not clear that ambit of the label was intended to be so stretched.

during the perpetration of an act of violence, intending or foreseeing some injury to a person. The argument against the validity of a constructive manslaughter offence is that the role of chance, rather than subjective *mens rea*, labels the defendant. However, it is submitted that it is not inappropriate to label to mark the crossing of the threshold from assailant to killer when the victim's death is caused by unlawful and dangerous violence. Whilst manslaughter is a fairly meaningless label, the causing of death should be included within the censure and a label of killing by unlawful attack or violent act reflects the responsibility of the defendant. Surely, an unlawful and unjustified killing is an indelible moment in human experience that is perversely ignored by the criminal law, if left unacknowledged.

The following definition is proposed:

A person is guilty of killing by attack or violent act if he –

- (1) commits an intentional, unlawful and violent act; and
- (1) intends or foresees the risk of causing some personal injury; or
- (2) possesses the capacity to appreciate that the conduct posed the risk of some injury; although
- (3) death need not be foreseen.

In accordance with this definition, Gilmour would have been guilty of the offence if he had foreseen, or was capable of appreciating, the causing of some harm, such as smoke inhalation or burns to the inhabitants of the targeted house. However, he would not have been guilty had he foreseen that the inhabitants would be merely frightened or intimidated. Similarly, D would be liable for punching V's nose and tipping her out of the window. However, if D had lunged at V with a raised hand and V, stepping back in alarm, fell out of the open window, D would not be liable for the killing. Neither would D be liable if the same fatal consequence resulted from D slapping V's face¹⁹³ unless the blow was severe enough to cause actual injury (and D was capable of appreciating that fact).

In response to the proposed definition, it may be objected that there is too wide a chasm between foreseen injury and unforeseen death, and indeed, it is conceded that due consideration was given to suggesting the following alternative:

A person is guilty of killing by attack or violent act if he –

¹⁹³ The same result was reached in the South African case of *Van As*, see above, p.287, but via a different route. However, unlike the South African precedent, the proposed new offence is not limited by foreseeability but by the degree of harm that suffices as the founding criterion.

- (1) commits an intentional, unlawful act; and
- (2) intends or foresees the risk of causing some personal injury; or
- (3) possesses the capacity to appreciate that the conduct posed the risk of some injury; and
- (4) serious bodily injury is foreseeable; although
- (5) life-threatening injury or death is not necessarily foreseeable.

While extending the Law Commission's recommendation of limiting liability to the foreseeability of serious injury *or* death, this version provides a closer equation between the injury intended or foreseen by the defendant and the harm actually incurred. The reason for rejecting this version involves a decision on the liability of a defendant whose unlawful violence causes the victim's death via an unknown subsisting condition, such as haemophilia or a serious heart condition. In such an instance, the victim's death will be unforeseeable without prior knowledge of the condition. However, if the D possesses the requisite knowledge, then the risk of death arguably becomes a risk that would have been, (actual foresight), or could have been, (latent appreciation), foreseen and so falls within the offence of reckless killing. In the final analysis, acceptance or rejection of this reasoning will depend upon an individual assessment of whether such deaths should be termed accidental or culpable. In this version, the degree of harm has been set at intention or awareness of causing some injury. Thus, in order to extend the ambit of unlawful killings so as to encompass deaths resulting from unknown, subsisting conditions, the risk of death must be defined as unforeseeable.

3.5.2.4 Grading the Homicide Offences

The Law Commission graded its proposed alternative involuntary manslaughter offences and suggested maximum sentences in accordance with the seriousness of the worst degree of culpability in each class. Thus, reckless killing would be a step down from murder, attracting a maximum sentence of life imprisonment.¹⁹⁴ Killing by gross carelessness would be the lesser homicide offence¹⁹⁵ but, after due consideration, the Law Commission chose not to suggest a maximum sentence.¹⁹⁶

¹⁹⁴ Law Com No. 237, Draft Involuntary Homicide Bill cl. 1(2).

¹⁹⁵ 'That is not to say that there will not be some cases of killing by gross carelessness which are more serious than some cases of reckless killing.': Law Com No. 237 para. 5.47.

¹⁹⁶ *Ibid.* para. 5.52.

The new submissions include murder, reckless killing, killing by attack or violent act, and killing by gross negligence and it is suggested that they be graded in that order. It is beyond the scope of this work to provide a detailed critique of sentencing considerations. Nevertheless, it is submitted that the mandatory life sentence for murder has outlived its usefulness.¹⁹⁷ As long as a special label is retained for murderers, there is no rational reason for the punitive addition of a special sentence, particularly since, when the context of the killing is taken into account, the paradigm of murder includes killers whose moral culpability and social dangerousness varies over a significantly wide range.¹⁹⁸ On the other hand, reckless killing, the 'near-neighbour'¹⁹⁹ of murder will inevitably include killings of greater moral culpability than some murders. Therefore, it seems sensible to set the sentence for both offences as a maximum of life imprisonment. No attempt will be made to offer precise suggestions for a sentencing maximum appropriate for the proposed offences of killing by attack and killing by gross negligence. Suffice to say that killing by attack incorporates a range of scenarios which, at the upper reaches, evidence greater moral culpability than is generally encountered in killing by gross negligence. In the former offence, the foundation of liability is an unlawful, unjustified and violent act where the defendant appreciates the risk of causing injury. This will not necessarily be the case in killings by gross negligence where defendants will usually be 'engaged in lawful activities, often simply performing their job'²⁰⁰. However, in keeping with the argument posed for amending the punishment for murder, it is submitted that, with the labelling function satisfied, the sentence for killing by attack should be set so as to take account of the defendant's original intention rather than the eventuation of death.

3 CONCLUSION

It has been argued, that joint enterprise liability cannot be effectively distinguished from 'general' complicity, that is aiding, abetting, counselling and procuring an offence. Rather, joint enterprise merely provides a refinement of complicity liability for homicide that tends not to have been explored in non-common purpose cases. As to the difficulties discovered in the joint enterprise cases, it has been submitted that the problems with secondary homicide liability are exacerbated by tensions within the substantive law of homicide. The impact on complicity is two-fold. The

¹⁹⁷ This view has judicial as well as academic support, see, eg. the views expressed by the Chief Justice of Ireland, in Keane, *op cit.* n.74 at 8.

¹⁹⁸ Norrie, *op cit.* n.170 at 542-443, 551-553 and Padfield, "Tariffs in Murder Cases" [2002] Crim LR 192 at 199-201.

¹⁹⁹ A term used by Clarkson, *op cit.* n.127 at 163.

²⁰⁰ *Ibid.* at 164.

restriction of the murder fault to intention has created the problem that, as it is rarely a practical proposition to utilise intention as the fault for a secondary party, it has been necessary to extend the secondary *mens rea* of murder. This involves founding the accessory's murder liability upon an appreciation of the perpetrator's murderous propensities, and, whilst it may be possible to explain the extended secondary fault in terms of public policy, it does not alter the unpalatable fact that an accessory incurs murder liability via the lesser fault of subjective recklessness, whereas a perpetrator sharing the same degree of fault will incur liability for manslaughter. Judicial attempts to narrow the gap and exculpate a secondary party from murder liability have resulted in the possibility of the total exclusion of homicide liability in situations where the secondary party shares or appreciates the principal's intention to cause grievous bodily harm but is unaware of the lethal weapon used to effect the injury. On the other hand, the wide-ranging ambit of involuntary manslaughter allows the possibility of successfully applying the substantive fault to the individual participants rather than reverting to the foresight test to delimit the scope of purpose. This is particularly evident in cases of constructive manslaughter where there is no requirement for death or serious harm to have been intended or foreseen. The policy driven necessities of the first approach and the theoretical possibilities of the second has produced a dichotomy in the theoretical composition of secondary liability in homicide.²⁰¹ Consequently, a final test for the proposed new homicide offences will be whether they can provide an adequate and uniform approach to the imposition of homicide liability on both primary and secondary parties.

The extension of murder to incorporate an acknowledged form of recklessness provides an immediate levelling of culpability between parties: in the case of multi-party enterprises each party's risk assessment will necessarily and legitimately take into account not merely the risk posed by their own contribution but also an understanding of their associates' possible conduct and state of mind. Furthermore, the definitions focus upon the degree of injury rather than the means used to effect it. Consequently, it would not be necessary to resort to the *Powell; English* contemplation test to decide a secondary party's homicide liability.

²⁰¹ See above, pp.213-237.

3.1 APPLYING THE PROPOSED HOMICIDE OFFENCES TO PROBLEM CASES OF SECONDARY LIABILITY

Applying the proposed homicide offences to the English limb of *Powell; English*²⁰², the question of English's murder liability would centre upon whether he foresaw the likelihood that, during the course of the enterprise, the victim would be subjected to the risk of death or life-endangering injury (or, having the capacity to appreciate the risk, would have continued regardless at the material time). This re-focussing on the contemplation of life-endangering injury directs attention away from the means used. Just as in the case of intentional killing where the means used to effect death is an irrelevant consideration, so too the means of causing life-threatening injury should be considered immaterial. Thus, if English foresaw that the principal's intentional striking with the wooden post might endanger the victim's life and nonetheless continued with the enterprise, the fact that the life-threatening injury was inflicted with an unknown knife would have no bearing upon his culpability. His liability would derive from lending support to an assault that he knew, and accepted, involved a risk of death. The use of a different weapon would be relevant only in terms of proving the requisite degree of foresight:

While there is no moral difference between inflicting violence with a knife or a wooden post, the use of a different weapon could be highly significant *in evidential terms*. Where two people agree to beat a victim with sticks or posts and the principal offender produces a gun or knife, it will be much more difficult to prove that the accessory foresaw the risk of the principal offender murdering the victim – but if the requisite evidence were available, a murder conviction... would be appropriate.²⁰³

On the other hand, if English intended or foresaw (or was capable of foreseeing) the infliction of serious injury with the post then that degree of fault, no longer sufficient for murder in either primary or secondary parties, would render him liable for reckless killing. English would also be liable for the lesser offence of reckless killing if he had foreseen the risk of death or life-endangering injury as only a slight possibility or if, possessing latent appreciation of the risk of death or life-endangerment, he would have changed his conduct, had the risk been appreciated at the material time.

Alternatively, English would be liable for killing by attack on the basis of committing (or assisting and encouraging) an intentional unlawful act, intending or foreseeing (actual or latent) the risk of causing some injury, although death was not foreseen. Thus, if English had intended

²⁰² [1997] 4 All ER 545, see above, p.242.

²⁰³ Clarkson, *op cit.*n.21 at 559 (emphasis in original).

or foreseen only that the victim would be beaten, he would still be liable for a homicide offence when his co-assailant deliberately stabbed the victim with an undisclosed knife. The fact that the principal is liable for murder should not obscure the fact that the accessory participated in a unlawful, violent and fatal attack.

As a final clarification, although the suggested solutions involve the application of unilateral fault, it should be emphasised that, in cases involving multiple parties, a person's awareness of the relevant risk involves the context of the fault and actions of his fellows. Suppose that the accessory intended to inflict only a beating (actual rather than serious injury) but knew that the perpetrator possessed a knife and believed he would use it. Despite the fact that the accessory did not foresee that *his* conduct would cause serious injury, he appreciated that he was participating in a joint venture that involved the likely occurrence of serious, even life-endangering, injury, and nonetheless continued to take part. The risk taken by the accessory extended beyond his own conduct. Whilst he knew (or believed) that, taken in isolation, his own actions posed no risk of serious or life-threatening injury, he was aware that his conduct was merely part of the overall risk to the victim and that he was contributing to an end result involving the principal's actions just as much as his own. On this basis, the accessory's risk assessment of his own conduct included his awareness of the principal's weapon and state of mind. Thus, knowing that he was assisting a venture that involved the possible occurrence of serious or life-threatening injury, the accessory's liability would extend to reckless killing or murder, respectively.

It is worthwhile applying the proposals to the judicial example of "semi-innocent" agency provided in *Howe*, where S procures P to discharge a gun at V on the understanding that the bullets are blanks and P will simply frighten V, whereas S knows that the ammunition is live and V will be killed.²⁰⁴ The application of the substantive fault to all parties ensures that S will be liable for murder. However, while Lord Mackay held that P would be liable for manslaughter, P may not be liable for a homicide offence under the new suggestions. If P believed that no actual injury would result and foresaw that V would merely be frightened, P would not be liable for killing by attack. In such a case, S's liability is perhaps best described as being based on the combining of S's culpability with his causing of the *actus reus*.²⁰⁵ Furthermore, facts akin to the

²⁰⁴ *Howe* [1987] 1 AC 417 at 458 *per* Lord Mackay, see above, p.137.

²⁰⁵ See above, pp.131-140.

cases of *Cogan*²⁰⁶ (where P is exculpated) and *Bourne*²⁰⁷ (where P has a defence) are similarly accommodated to ensure that the secondary party may be convicted in accordance with his greater fault.

As a further test of the proposed amendment, it is necessary to return to the vexing problem of the indifferent gun seller who sells the weapon merely for profit but foresees that it might be used to effect a murder. It is submitted that the law should continue to reserve the possibility for the gun seller to be held liable for murder. The pertinent issue does not involve the possibility of imposing liability so much as the safeguards for ensuring that the limits of liability are adequately established; in accordance with the new murder definition, it would not be sufficient merely to know that a gun can be used as a lethal weapon; neither would suspicion of the buyer's murderous intentions suffice. By the same token, it would be entirely inadequate that the seller appreciated the remote or far-fetched possibility of the buyer killing someone with the gun. The gunseller's culpability would need to outbalance the social utility of lawfully selling guns so that the seller's risk-taking became unreasonable and it is submitted that this would apply where the gunseller's awareness was based on knowledge of the buyer's purpose²⁰⁸. In such a situation, there is no difference in culpability between the gun seller and the friend who lends her comrade a shotgun realising that it will be used for murder: both provide a lethal weapon to a putative murderer with full knowledge of the likely result. Similar considerations would apply for the vendor to be liable as an accessory to a reckless killing: the gunseller should know of the buyer's intention to use the weapon to effect a serious injury.

Finally, it is helpful to return to the recent case of *Day*²⁰⁹ to discover the effects of the proposed new offences upon the liability of the three parties. It may be remembered that the Court of Appeal upheld a differential verdict of murder and (constructive) manslaughter in a scenario where the perpetrator intended to cause serious injury by punching and kicking, one accessory foresaw the infliction of serious harm to the victim and the second accessory foresaw that the

²⁰⁶ [1976] 1 QB 217, above, p?.

²⁰⁷ (1952) 36 Cr App R 125.

²⁰⁸ This involves a linguistic return to *Bainbridge* [1960] 1 QB 129, see above p.186. As to the scope for open-ended liability, if the seller knew that the buyer intended to kill more than one victim, she should be liable for the multiple murders. However, despite the possibility of drawing the inference that a person who intends to kill one victim may decide subsequently to kill others, it is submitted that this type of reasoning should be resisted. In the context of her action and knowledge, the vendor is accepting responsibility for contributing to the killing/s she realises the perpetrator is buying the gun with the intention of carrying out.

²⁰⁹ EWCA Crim 1594, see above, p.255.

punches and kicks would inflict some harm. Under the proposed homicide structure, all three parties would be liable for a homicide offence. On the basis of intending or foreseeing the causing of serious injury, the perpetrator and first accessory would be liable for reckless killing. The second accessory, having intended, and lent support to, an unlawful and violent act, foreseeing the infliction of some injury to the victim, would be liable for the lesser offence of killing by attack. It is submitted that this case, in particular, reveals the benefits of the proposed amendments to the structure of homicide. In contrast to the actual finding of murder and manslaughter, the labels of reckless killing and killing by attack better reflect the moral context of the victim's death and the participants' culpability in the fatal assault.

APPENDIX A

HISTORICAL AND CULTURAL CONTEXT OF SOUTH AFRICAN LAW

As the political context was a vital factor in the progress of the criminal law, it is essential to provide an insight into some of the milestones of South African history. An objective account of history, at all times problematic, is made doubly so by the partisanship of the authors discussing such extreme political ideology.¹ Notwithstanding this obstacle, efforts have been made towards producing a factual and objective account, although it is recognised that a particular bias may unwittingly emerge. Moreover, the following exposition is necessarily selective and the contents are chosen to produce a context for the development of complicity law. It is offered not as a definitive history, but as an insight into the Afrikaner culture and attitudes into which the judiciary and legal commentators would have been inculcated. Essentially two areas are explored to establish the context for the developments in the law of criminal complicity. The one involves the Afrikaner attitude to the British and the other, the Afrikaner approach to South Africa's non-white population.

1 THE BOERS AND THE BRITISH IN CONFLICT

1.1 INITIAL SETTLEMENT TO THE SECOND BOER WAR (1652-1899)

Although the first Dutch settlers arrived in the Cape in 1652, it was not until the second half of the nineteenth century that the Boers, later known as Afrikaners, began to establish a sense of nationhood. However, evidence of the Boers' vociferous independence and refusal to defer to the subjugation of external control can be seen from the earliest days. In 1657, the first freeburghers were released by the Dutch East India Company to settle the Cape and establish their own farms. Due to the entirely inadequate administrative presence in the area, the settlers were left to their own devices to execute the, inevitably violent, conquest and retention of land from the indigenous

¹ As one of the main propaganda techniques of an extreme regime includes the production of a selective history and the suppression of any threatening, non-conforming alternatives, the sources tend to be provided by exiles who oppose the regime.

population.² During the eighteenth century, the trekboers (nomadic farmers) extended their land range by radiating north and east from Cape Town.

The first Boer rejection of several efforts to impose authority upon them occurred in 1795, when they expelled the Cape Town government representative and proclaimed the frontier region a republic. After 1814,³ when Britain's occupation of the Cape was recognized as permanent, the priority for many Boers became the escape from British jurisdiction. They resisted attempts to Anglicize them and resented the introduction of English as the only official language. Furthermore, they refused to accept progress towards greater racial equality.⁴ The Boer culture had, from its inception, been based on the exploitation of slaves (originally imported from India, Indonesia and Africa) and when, in 1828, Britain abolished slavery, many Boers chose to migrate further into the interior rather than accede to the ramifications of British colonial rule.⁵ The Great Trek of 1836 to 1854 provided the foundational propaganda material of later Afrikanerdom.⁶

Over ten thousand Boers left Cape Colony and established a succession of independent republics in direct opposition to British rule⁷ until, in the 1850s, the British government recognised the independence of the Transvaal (1852)⁸ and Orange Free State (1854)⁹. Both Boer Republics established ethnically exclusive governments. Meanwhile, in 1853, the constitution of the Cape extended the political mandate to colonists of all races,¹⁰ subject to a property qualification.¹¹ An

² Lapping, *Apartheid A History* (Paladin, Grafton, 1987) (hereafter Lapping) at 27-35.

³ The Congress of Vienna. In the aftermath of the French Revolution, the Netherlands could not protect its colonies and consented to Britain's occupation of the Cape and the Dutch East Indies, in order to prevent them falling into French hands. In 1815 Britain paid the Dutch £6 million and kept the Cape. *Ibid.* at 36

⁴ *Ibid.* at 37-41

⁵ Bunting, *The Rise of the South African Reich* (Penguin, 1964) (hereafter Bunting) at 14.

⁶ 'A hundred years later Afrikaners came to revere the Great Trek, as did the children of Israel their ancestors' flight from Egypt to the Promised Land.' Lapping at 41.

⁷ Natalia, was set up in 1838 but it was refused recognition by the British government, which feared Boer encouragement of intervention by rival European powers. After a brief armed struggle, Britain annexed Natal in 1843.⁷ A similar fate befell Orange Free State and the Transvaal, until a change in British commitment to South Africa in the middle of the nineteenth century. Deciding to reduce costs, Britain chose to withdraw from the interior, but maintained control of the coastal colonies of the Cape and Natal: Lapping at 46-7.

⁸ Sand River Convention.

⁹ Bloemfontein Convention.

¹⁰ Lapping at 48.

¹¹ Natal was given a similar constitution but for whites only, in 1856. From 1860, a significant importation of Indian labour to work in wool and sugar cane production, radically and permanently altered the population constituent of Natal.

economic watershed occurred with the discovery of diamonds in 1868 and gold in 1873.¹² The British government determined to bring the Boer Republics under its rule and, in 1877, annexed the South African Republic.¹³ The consequent Anglo-Boer War (1880-1)¹⁴ resulted in a Boer military triumph.¹⁵ However, the Second Anglo-Boer War (1899-1902) eventually ended in British victory but the cost was high and the effects far reaching.¹⁶

1.2 CONSEQUENCES OF THE SECOND ANGLO-BOER WAR (1899-1914)

In the creation of a pretext for the war and the subsequent military operations, the British were viewed unsympathetically by international opinion¹⁷ and there was some justification in the popular European view of the underdog Boers in an heroic struggle to resist the might of the British Empire.¹⁸ Galvanised into concerted action, Boers from across South Africa met with many early successes¹⁹, although ultimately, the resources available to the British led to their inevitable suppression of Boer opposition. However, it was establishment of concentration camps as one of the means of suppression²⁰ that provided Afrikaners with the source of virulent hatred

¹² However, the most significant mineral find occurred in 1886 with the discovery of the Witwatersrand gold fields. The resulting mining revolution had immeasurable social and economic effects. Critical to Afrikaner-British relations was the fact that many of the mines including Witwatersrand were located within the Boer Republics. Jaded British interest in the territories was ignited by the economic possibilities, and especially the threat to Britain's supremacy, posed by the prospective wealth of the South African Republic or Transvaal.

¹³ For details see Pakenham, Thomas, *The Scramble for Africa* (Abacus, 1993) (hereafter Pakenham, *Scramble for Africa* at 40-56

¹⁴ For details, see *ibid.* at 86-109

¹⁵ The British relinquished the territory by the Pretoria Convention 1881.

¹⁶ Pakenham, *The Boer War* (Weidenfeld and Nicolson, London, 1979) (hereafter Pakenham, *Boer War*) provides a consummate account of the war, its origins and aftermath. The war's origins are exhaustively explored in IR Smith, *The Origins of the South African War 1899-1902* (Longman, 1996). The consequences of the British victory also extend to the establishment of Afrikaner chauvinism and all of its attendant repercussions.

¹⁷ See the reproductions of French and Belgian political cartoons in Pakenham, *Boer War* at 98,103, 134, 251, 286 and 288.

¹⁸ Not least by the Boers themselves: 'For the Boers the war was the climax to 'a century of wrong', a century of British expansion, oppression and meddling which had finally goaded them beyond the limits of endurance. There rose up before them as they fought the memory of the past, of the colony that had been annexed, of the slaves which had been freed, of the Slachter's Nek rebellion and its martyrs, of the battle of Majuba, of the thousand and one defeats and humiliations to which they had been subjected ever since the British presence established itself in South Africa': Bunting at 15-16.

¹⁹ The need for ultimate resistance was made more potent to them because they were by now fighting for their shared political and cultural survival. On the other hand, many of the British strategies were ill-advised or completely inept (e.g. the Natal Campaign and the subsequent siege of Ladysmith).

²⁰ In order to combat the commandos' highly effective guerrilla tactics, Lord Kitchener established the blockhouse system, set up concentration camps to contain Boer woman and children and so prevented the commandos' access to supplies and succour (Pakenham, *Boer War* at 238-272.) He also instigated a "scorched earth" policy which included farm burning – and the burning of the farm inhabitants (Pakenham, *Scramble for Africa* at 577).

for the British. The British government was accused of attempted genocide²¹ and the repercussions of Boer resentment, at what they perceived to be a deliberate effort to annihilate their race,²² were to reverberate through the twentieth century.²³

The Boers were bitter, humiliated and dispossessed. Britain's destruction of their way of life, which began with the annexation of lands restricting their frontier,²⁴ culminated in the British scorched earth policy. The vast majority of Afrikaners were uneducated and spoke only Afrikaans, so migration to urban areas resulted in the establishment of an underclass of Afrikaner poor.²⁵ Their plight was worsened by British policy to import high fliers from Oxbridge and establish them in top jobs to boost the South African economy.²⁶ Furthermore, the education policy was one of anglicization with teaching through the medium of English, and punishment or humiliation as sanctions for the speaking of Dutch.²⁷

²¹ E.g. by the French. See the examples of French political cartoons reproduced in *Boer War* at 250. It is a moot point whether the the condition of the concentration camps was created by negligence or design: Pakenham, in *Boer War* at 249-50, explained that '...administrative problems always bored Kitchener. He had to prevent the guerrillas receiving help from the civilians; and he had to protect the families of surrendered Boers from official Boer wrath. The two sorts of 'refugees' should therefore be concentrated in huge 'laagers', close to the railways and be run on military lines, with reduced army rations... Thus the plan had all the hall marks of one of Kitchener's famous shortcuts. It was big, ambitious, simple – and extremely cheap. Kitchener does not appear to have been alarmed at the prospect of what might happen in his new 'laagers'. In South Africa today, the 'concentration camp' is, to Afrikaners, a symbol of deliberate genocide. In fact, K [sic] did not desire the death of women and children in the camps. He was simply not interested. What he wanted, passionately, was to win the war quickly. To that he was prepared to sacrifice most things and most people.' Whatever the motivation, the reality was that many concentration camps were maintained in appalling conditions with insufficient food and medical supplies. Disease was endemic and many also died from malnutrition (photographic evidence demonstrates the camp conditions and poor health of the camp inmates. See for example, those reproduced in Lapping). To put the disaster into perspective, by the end of the war 7,000 Boer men had died and over 28,000 Boer women and children. (Pakenham, *Scramble for Africa* at 581). Furthermore, measures were taken to alleviate conditions once the Fawcett Commission, the establishment of which was prompted by the report of concerned British civilian, Emily Hobhouse, provided evidence of the appalling conditions in the camps. See Pakenham, *Boer War* at 252-5 and *Scramble for Africa* at 277-9.

²² In addition to the charges of insanitary, disease-ridden and undernourished conditions, 'the British were accused of having poisoned the water supplies and having inserted fish hook and powdered glass into the food.': Bunting at 18.

²³ Lapping at 64-5. See also Bunting who states emotively, at 16: 'In South Africa the Boer War left an indelible scar. The Boer has since exacted his revenge, but has still neither forgiven nor forgotten what was perpetuated against his people by the British during those years.' The *Vrouemonument* in Bloemfontein commemorates the 26,370 women and children who died in the concentration camps.

²⁴ Hoagland, *South Africa Civilizations in Conflict* (George Allen & Unwin, 1973) (hereafter Hoagland) at 25-6.

²⁵ Lapping at 72 and Hoagland at 27-8: 'By 1930, there were at least 30,000 "very poor" whites in South Africa, a special study found. Most of them were Afrikaners.'

²⁶ Lapping at 65.

²⁷ Bunting at 18-19

Nevertheless, within three years, in yet another about turn on the question of the Boer Republics' independence, the British government returned the Transvaal and Orange Free State to Afrikaner control and in 1910, Britain consented to the establishment of the Union of South Africa. For the next 84 years, all of South Africa's Prime Ministers would be Afrikaners. However, the initial government policy was one of Afrikaner reconciliation with Britain, although this failed to prevent the development of strong anti-British feeling. In the meantime, whilst the word "apartheid" (segregation or 'apartness') did not enter the political arena until the 1940s, the foundation of the racist policies began. The price of the Anglo-Boer peace making was 'paid by the blacks'.²⁸ Thus, the year of 1912 witnessed the establishment of two movements that inaugurated the direction of the future South Africa. Unsatisfied with the conciliatory line being taken with their hated enemy, the British, ethically committed Afrikaners founded the National Party. The same year saw the instigation of the movement that would soon become known as the African National Congress (ANC). At this stage, it was the domain of intellectuals who favoured a non-violent approach to the promotion of African interests. The government's refusal to permit a non-white political presence in the Union became overtly apparent in 1913 with the passing of the Native Land Act. The brainchild of Hertzog, a committed Afrikaner nationalist,²⁹ it introduced the seeds of racial containment by setting up reserves for the non-white majority. The land set aside was a mere 7.3 per cent of the country's landmass and excluded the most productive and fertile areas. The Act received all-party support in the all-white government; it was not merely supported by Afrikaner nationalists. One of the objectives of the legislation was to ensure a viable black labour force, so the economics appealed to the vested interests of the English-speaking minority.

2 THE RISE OF AFRIKANER NATIONALISM AND THE PSYCHOLOGY OF APARTHEID

2.1 CONSOLIDATION OF AFRIKANER NATIONHOOD

Although, in the early centuries of Boer settlement there was no evidence of a sense of nationhood, it has been suggested that an embryonic awareness of ethnicity began in the late

²⁸ Lapping at 69.

²⁹ Hertzog set up the National Party after being dismissed from his government post of Minister of Native Affairs for publicly criticising the government line. His attitude was encapsulated in the words of his attack: 'I am not one of those who always have their mouths full of conciliation... South Africa must be governed by the Afrikaner... It can no longer be governed by the non-Afrikaners, by people who do not have the right love of South Africa': *ibid.* at 74.

nineteenth century, leading to a 'century of Boer self-mesmerization'³⁰. The wars against the British added fuel to the folklore and forged stronger links between a people who had previously existed as disparate family groupings across an extensive land mass. Extreme adversity in the seeking of a common goal and shared resentment against a common enemy rarely fail to create bonding. Nonetheless, the concept of Afrikanerdom had still to be consolidated. At the opening of the twentieth century, it was uncertain whether a distinct Boer culture would survive. The fact that it did survive and that its dedicated adherents rose to grasp and retain tight control over the non-Afrikaner majority for half of the twentieth century was due to a number of factors. The underlying motive has been seen: the Afrikaners shared a profound bitterness of the British,³¹ which gave them a strong emotional foundation for a sense of distinctness. This was nurtured during the twentieth century and given vent particularly during the two World Wars, which polarised attitudes in South Africa. Smuts carried his decision for South Africa to enter the First World War in aid of the Allies.³² Ten thousand rose in armed rebellion: one rebel was hanged for rebellion,³³ producing another martyr for the Afrikaner cause. The boost to Afrikaner nationalism reflected in the elected government at the close of both World Wars, with the National Party coming to power in 1948 despite the previous government having given individuals the choice of volunteering to fight in the Second World War.

The position of Afrikaner nationhood had been consolidated during the inter-war years. Hertzog's National Party had made good mileage from the social and economic unrest of the 1920s, in particular the strike of 1922,³⁴ and the support of the trade unions was instrumental in his rise to power in 1924. In 1925, Afrikaans was recognised as an official language, replacing

³⁰ 'As early as 1868 the Boers had in fact started to develop their own propaganda of pioneering martyrdom with the slogan 'Think of Slagstermak'... S.J. du Toit published the first Afrikaner interpretation of history in 1877 and this inaugurated over a century of Boer self-mesmerization': Thompson, *Easily Led: A History of Propaganda* (Sutton Publishing, 1999) (hereafter Thompson) at 245.

³¹ 'The majority of Afrikaners... developed a gnawing resentment against the British Empire, which had arrived uninvited at the start of the nineteenth century to rule what they considered their country. Until the 1930s the terms 'racial conflict' or 'the two races' when used in South Africa did not mean black v white. They meant Afrikaner v British.' Lapping at 17.

³² 'For many Afrikaners their government's decision to support the British meant spilling the blood of young South Africans in the service of their most menacing foe.': *ibid.* at 75.

³³ Jopie Fourie.

³⁴ The strike was induced by the announcement of the mainly British mine owners that blacks would be promoted to semi-skilled positions in the labour force. The move threatened the livelihood of many Afrikaner employees who, fearing a conspiracy to deprive them of their jobs, came out on strike. Mass meetings proclaimed a people's republic and armed bands looted, burned, and murdered blacks. Mediation failed and troops were sent into Johannesburg but the strikers' resistance resulted in a week of civil war. Eventually aircraft and artillery bombardment was employed to bring the town back under state control. See Lapping at 75-76.

Dutch as the second language of South Africa.³⁵ Furthermore, the mythology of a distinctly Afrikaner destiny was given opportunity to bear fruit. Heroic enterprises of the past were celebrated with re-enactments. Monuments and memorials³⁶ were erected to engrave a partisan interpretation of history upon the public consciousness.³⁷ By providing a focus for pride, participation and pilgrimage, these exhibitions created and consolidated a specific emphasis on the distinct meaning and significance of Afrikanerdom that an embittered underclass would embrace and defend with fierce possessiveness.³⁸

One consequence of this rise in Afrikaner nationalism was Malan's formation of the 'Purified National Party' in 1934.³⁹ Malan's vision of Afrikanerdom was nothing short of messianic and he gave his wholehearted support to the Broederbond's⁴⁰ instigation of distorted historical education in schools.⁴¹ According to this version, the Afrikaners were God's chosen people, who had been given a divine mission to rule South Africa. The Calvinism of the Dutch Reformed Church, like the disposition of the early Boers, had been rendered fixed and inflexible by centuries of isolation.⁴² The difficulties met by the Boers and their lack of lasting success were reconciled with the concept of predestination by biblical comparisons.⁴³ Thus, the quest for a nation purged of its non-Afrikaner elements was not merely the cornerstone of the political party, it was God's will. When Malan's party rose to power in 1948, apartheid necessarily involved the twin towers of English-speaking versus Afrikaans-speaking whites and white versus black South Africans.⁴⁴

³⁵ The brainchild of Dr Daniel François Malan. *Ibid* at 77

³⁶ The Vrouemonument was erected in Bloemfontein in 1913, see n.23.

³⁷ Lapping at 104-107.

³⁸ 'The ethnic jealousy of the National Party... was greatly stimulated by the centenary re-enactment of the Great Trek in 1938; the event management of this impressive display, the decorated wagons, the monument put up at Blood River, the singing of 'Die Stem van Suid Afrika' [The Journey of South Africa], all helped to develop a new mythology of Boer heroics.'; Thompson at 286

³⁹ Hoagland at 29

⁴⁰ Since 1918, a secret society of dedicated purists who called themselves the Broederbond had been gaining influence through the manipulation of politics and commerce. 'The Broeders invited into membership those they thought likely to be influential – future politicians, army officers, civil servants, local officials, teachers' and, presumably, judges. Upon joining, members were obliged to pledge to keep the organisation secret and to devote themselves to the support and promotion of Afrikanerdom. For further details on the Broederbond, see Lapping at 99-100, Bunting at 47-53 and Hoagland at 47-48.

⁴¹ Lapping at 101.

⁴² 'For the Afrikaner, whose Calvinism was nurtured in isolation for more than a century, God is not Love, but Power. Politics and governing are exercises of religion'; Hoagland at 15.

⁴³ The Great Trek was compared to the Israelites' release from bondage into the Promised Land, and their further tribulations were holy tests to be endured in order to attain worthiness and God's favour. (Lapping at 103.)

⁴⁴ Bunting at 25.

2.2 MAINTAINING THE AFRIKANER ASCENDANCY

The National Party achieved power under the banner of the black peril or 'swart gevaar'.⁴⁵ The word "apartheid" made its first appearance under Malan's government but in fact, although the average Afrikaner may have believed in the mission of Apartheid, those in power knew from its inception that it was not a viable proposition.⁴⁶ In a country that depended so heavily upon black labour, it was simply not economically sustainable. Nevertheless, for the next forty years the National Party, with characteristic Afrikaner tenacity, was to maintain its grasp on political power and, with varying degrees of enthusiasm, attempt to implement the impossible. In fact, it was the first consideration that dominated all other policies. The Afrikaners' effort to retain the ultimate power that they had struggled so hard to grasp, coloured every aspect of South African life and permeated their collective psyche.

Given the numerical minority of Afrikaners,⁴⁷ it was inevitable that the National Party's preoccupations were essentially defensive. The party looked firstly to promote a certain set of values and interests and, once established, to protect and reinforce them. Consequently, the Afrikaners were continually fighting a rear guard action. Paradoxically, their efforts to progress were pursued with the aim of standing still. Furthermore, despite South Africa's position as a formidable international economic power, the erosion of support and stability at home and overseas resulted in a sense of collective paranoia amongst those Whites with an interest in maintaining the *status quo*. In order to secure its aims, the government placed Afrikaners in positions of power and influence. Malan's cabinet 'was the first in the history of the Union to be composed entirely of Afrikaners and to conduct business entirely in Afrikaans. He set out to secure Afrikaner mastery over all the arms of the state.'⁴⁸ Broeders were placed in top positions and this inevitably included the judiciary:

The bench of judges, long accustomed to the British manner of promotion – by discreet soundings, longevity and mutual approval – were startled to find the new government promoting Afrikaners over the heads of senior English-speakers.⁴⁹

⁴⁵ Lapping at 135.

⁴⁶ *Ibid.* at 135-9, 158-160

⁴⁷ During the twentieth century the White contingent of the South African population did not reach 25%. In 1986, Afrikaners numbered 1.9 million from a total of 28.5 million, i.e. less than 7%. See Lapping p. 24 and Bunting at 296.

⁴⁸ Lapping at 141 and Hoagland at 32.

⁴⁹ Lapping at 143. This trend continued and involved not only Appeal judges. '...the day to day appointments of puisne judges were often politically motivated as well': Bunting at 139-40.

It is putting the case too strongly to suggest that the judiciary's judgments became overtly partisan. However, a clear message was sent out when judges challenged the government's preferred solution. For example, when, in 1954, the judiciary defied the government over a constitutional change that disenfranchised coloured voters, it responded by appointing five new appeal court judges, guaranteed to toe the government line.⁵⁰ Nevertheless, developments in criminal complicity had begun at the beginning of the century. The judiciary had been creative in developing the law of secondary liability since 1917. Perhaps unsurprisingly, given the political context of the time, the Afrikaner minority had been at the receiving end of the imposition of liability during the public disorder of the 1920s.⁵¹

2.2.1 The Apartheid Laws and the Reaction

Despite the government's efforts, the economic influence of the English-speakers proved difficult to break and by Verwoerd's premiership, there was a change in attitude. In 1961, the government made a concerted effort to woo and incorporate the English-speaking whites into the supremacist regime.⁵² In the meantime, the enabling acts for the separation subjugation of the non-white population had begun in 1950.⁵³ Eventually, virtually every aspect of life was controlled by a legal enactment, from political rights,⁵⁴ economic status⁵⁵ and land tenure⁵⁶ to education,⁵⁷ religious worship⁵⁸ and intimate relations⁵⁹ with the net progressively tightened as additional

⁵⁰ Lapping at 144-145

⁵¹ See e.g. *R v Garnsworthy*, above, pp.90-92

⁵² Verwoerd stated 'I see the National Party not as an Afrikaans party, whatever it may have been in the past. I see it as a party which stands for the preservation of the white man, of white government, in South Africa.' : *ibid.* at 185.

⁵³ 'Afrikaner resentment against the blacks was not of comparable intensity [to their resentment of those of British descent]. The Africans after all were subject peoples.... But Afrikaner nationalism was on the march... And since the English-speaking whites remained difficult to displace, particularly from the heights of economic power, the full force of the resentment the Afrikaners had been burnishing for generations was turned against the blacks.' : *ibid.* at 18.

⁵⁴ E.g. 1948: Asiatic Laws Amendment Act, Electoral Laws Amendment Act; 1950: Population Registration Act, Suppression of Communism Act; 1951: Separate Representation of Voters Act, Bantu Authorities Act; 1953: Criminal Law Amendment Act; 1954: Riotous Assemblies and Suppression of Communism Amendment Act; 1959: Promotion of Bantu Self Government Act; 1960: Unlawful Organisations Act; 1961: Urban Bantu Councils Act; 1963: Transkei Constitution Act.

⁵⁵ E.g. 1949: Unemployment Insurance Amendment Act, Native Laws Amendment Act; 1950: Group Areas Act; 1951: Native Building Workers' Act; 1952: Natives (Abolition of Passes and Coordination of Documents) Act; 1953: Native Labour (Settlement of Disputes) Act; 1956: Industrial Conciliation Act.

⁵⁶ E.g. 1948: Asiatic Land Tenure Amendment Act; 1951: Prevention of Illegal Squatting Act; 1952: Native Laws Amendment Act; 1954: Native Resettlement Act, Native Trust and Land Amendment Act; 1955: Native (Urban Areas) Amendment Act; 1963: Bantu Laws Amendment Act.

⁵⁷ E.g. 1953: Bantu Education Act; 1959: Extension of University Act, University College of Fort Hare Transfer Act; 1962: National Education Advisory Council Act.

⁵⁸ E.g. 1957 Native Laws Amendment Act.

restraints passed into law in each parliamentary session.⁶⁰ However, the central problem with segregation had always been the lack of land. The Natives Land Act of 1913 had reserved 7% of the country's total area for tribal ownership, which had been increased to 13.7% in 1936.⁶¹ Blacks were required as a labour force and must therefore be admitted into urban areas in order to work.⁶² The government's quest was to remove the economically unnecessary remainder of the non-white population onto ethnically separate 'self-governing' reserves,⁶³ or 'bantustans'.⁶⁴ The original hope had been to buy from Britain the territories that became Botswana, Lesotho and Swaziland and, in that way, increase the native reserves to 47% of the landmass.⁶⁵ By the mid 1950s it was clear that this arrangement had failed to materialize and, unable to accommodate the subsistence requirements of the black population,⁶⁶ government policy towards non-whites changed to one of 'naked domination' or baaskap.⁶⁷ This change of emphasis is revealed in the fact that there was a significant increase in the apartheid laws that involved defence provisions to protect the regime. The statutes enabled the bolstering of military⁶⁸ and police resources as well as extending their enforcement powers and resulted in the further erosion of civil rights for the non-white population.⁶⁹

⁵⁹ E.g. 1949 Prohibition of Mixed Marriages; 1950 Immorality Amendment Act; 1957 Immorality Act.

⁶⁰ For a list and description of the laws passed between 1948 and 1963, see Bunting at 142-159.

⁶¹ Native Trust and Land Act. See Hoagland at 149.

⁶² The Tomlinson Report (1955) confirmed that 60% of blacks lived in 'white' areas.

⁶³ The 1959 Bantu Self Government Act founded the eight national homelands; See Lapping at 181.

⁶⁴ The political sophistry of terminology to describe black South Africans is revealed in the Acts. Described as 'native' in the 1940s and early 1950s, the term was changed to 'Bantu' in 1953 to avoid any suggestion that 'native' implied 'indigenous'. By the 1970s, 'Bantu' also fell out of favour and was replaced with 'Black'.

⁶⁵ Hoagland at 151. Translated in comparative terms, by 1960, 68.3% of the population had been allocated less than 14% of the land area. Moreover, that land was the most impoverished and infertile in the country. (Population figures from Lapping at. 24)

⁶⁶ The Tomlinson Commission Report detailed the minimum requirements, and concluded that the bantustan programme could not succeed without significant government investment in terms of additional land and money. See Hoagland at 150-2, Bunting at 306-7.

⁶⁷ Lapping at 159-160

⁶⁸ As to the makeup of the defence force: 'In the Second World War over 110,000 black South Africans served with the Allied Forces in Egypt, East Africa, Italy and the Middle East. When the present government came to power in 1948 the military establishment was reorganised and defence became the sole responsibility of white males.': *The Apartheid War Machine: Fact Paper on Southern Africa No. 8* (International Defence and Aid Fund (IDAF), April 1980) (hereafter IDAF) at 35.

⁶⁹ 1961: Defence Amendment Act, Defence Further Amendment Act, Police Amendment Act, General Law Amendment Act, Indemnity Act; 1962: General Law Amendment Act ('Sabotage Act'); 1963: Defence Amendment Act, General Law Amendment Act.

Black South Africans reacted with political protest and demanded the recognition of their Freedom Charter.⁷⁰ Despite the non-violent nature of the protest, 1956 witnessed mass police arrests of ANC members and the beginning of the Treason Trial. The government's arsenal of dedicated laws contained adequate provisions to cope with most of the socio-political problems of apartheid with little need for recourse to more traditional offences and the arrested ANC members were tried under the Suppression of Communism Act. However, in 1961, despite the wide provisions of the Act, the three judges remained unconvinced of the defendants' guilt and discharged them.⁷¹ In the meantime, political protest had continued in the form of strikes, demonstrations and civil disobedience. In 1960, the regime's repressive tactics resulted in sixty-nine people dead and 180 wounded at Sharpeville.⁷² At this point, '[e]ven SABRA (the South African Bureau of Racial Affairs), the National Party's think-tank on apartheid, began to have second thoughts'.⁷³ However, Prime Minister Verwoerd refused to compromise and outlawed the ANC and Pan-African Congress (PAC).⁷⁴ Furthermore, after the debacle of the Treason Trial, Verwoerd 'decided that the courts, in spite of the promotion of Afrikaner judges by Malan and Strijdom, could not be trusted to give the government the backing it needed'.⁷⁵ There were a number of significant developments in 1961. In the year that South Africa broke all ties with the British Commonwealth and became a Republic,⁷⁶ both the ANC and PAC established armed wings to their organisations and fostered violent protest, primarily sabotage. In the same year, B.J. Vorster became Minister of Justice; his appointment heralded the beginning of the police state and the passing of a several of acts permitting the enforcement agencies the use of arbitrary powers.⁷⁷ By 1964 armed resistance had been effectively quashed.⁷⁸ Meanwhile the policies of 'grand apartheid' were being implemented. In 1963, the first homeland was established with the passing of the Transkei Constitution Act⁷⁹ and South Africa was confronted with a barrage of

⁷⁰ The main provisions called for equal political rights and an end to economic and social restrictions. Lapping at 171 and Bunting at 171.

⁷¹ Lapping at 1971-4.

⁷² For further details of the events see Lapping at 186-8 and Hoagland at 132-3

⁷³ Lapping at 189.

⁷⁴ Unlawful Organisations Act.

⁷⁵ Lapping at 191

⁷⁶ May 31 1961. Lapping at 190, Bunting at 156, Hoagland at 59.

⁷⁷ See n.58. The practical manifestation of the political reaction can be elicited from the sudden increases in the defence budget: 1960/1 saw a 9% growth from the previous year but in 1961/2 there was a 64% increase in spending. In 1962/3 the investment grew by additional 79%, the largest increase between 1958 and 1980 (computed from the figures in IDAF at 10).

⁷⁸ Lapping at 192-3.

⁷⁹ The terms of the constitution gave the Transkei its own legislative assembly, cabinet, citizenship (the inhabitants were therefore designated temporary visitors or 'aliens' with no rights in South Africa), flag and national anthem. The Transkei 'government' had powers over finance, justice, forestry, education and

international condemnation. Apart from South Africa, no country recognised the 'independence' eventually granted to the Transkei⁸⁰ (or the later established bantustans⁸¹). In the same year, South Africa was refused admission to the Olympic games, unless it submitted integrated teams.⁸² However, despite international disapproval and the threat of an arms embargo⁸³, the government was able to stand alone, a position that was undoubtedly helped when the economic backlash following Sharpeville reversed and the country recorded 'a major net capital influx'⁸⁴.

A further storm of international protest occurred following the events at Soweto. By 1976, Vorster's premiership⁸⁵ had established a ruthlessly effective police state. One of Vorster's first acts, as Prime Minister, had been the creation of a secret police department, BOSS (Bureau of State Security), which answered directly to him.⁸⁶ His implementation of apartheid was executed on a mass scale, with forcible removals to the unsustainable homelands, where the deportees were destined to probable death from disease or starvation.⁸⁷ One of the unexpected side effects of the brutal state tactics was the rise of Black Consciousness, which led to the demonstration at Soweto, where a schools protest became a national confrontation with the government as public disorder spread.⁸⁸ State repression was again effective in quelling the disturbances but the regime

roads. However, the government of South Africa retained defence, internal security, postal services, railways, banking and foreign policy. Additionally, the laws passed by the Transkei assembly were subject to South African approval. *Ibid.* at 193, 195, 196.

⁸⁰ Granted in 1976. The United Nations General Assembly denounced the establishment of bantustans in 1976 G.A. Resn 31/6, G.A.O.R., 31st Session, Supp. 39, p.10; cited in Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 1991) p. 111

⁸¹ Between 1976 and 1981 four bantustans were granted 'independence': Transkei, Bophuthatswana, Ciskei and Venda. For the British position on Ciskei see Harris, *op cit.* n.79 at 169-170 and Shaw, *International Law* (C.U.P, 1991) at 270-1.

⁸² Lapping at 199.

⁸³ Resn 181 (1963) called for a voluntary arms embargo, which was made reinforced, though not made mandatory, after international outrage regarding Soweto and its aftermath by Resn 418 (1977) S.C.O.R 32nd Year, Resolutions and Decisions, p.5: Harris, *op cit.* n.79 at 890.

⁸⁴ Hoagland at 343.

⁸⁵ 1966-77.

⁸⁶ Lapping at 209.

⁸⁷ *Ibid.* at 204-9

⁸⁸ *Ibid.* at 209-12

sustained further damage to its domestic economy⁸⁹ and on the world stage.⁹⁰ Furthermore, the government faced foreign policy problems closer to home with the Angolan conflict.⁹¹

Publicly denying any involvement,⁹² the government was caught in the web of its own deceit when South African troops, disguised as Portuguese mercenaries, were captured in Angola. The defeat of the South African Defence Force (SADF) impacted upon all parts of society:

The fact that the SADF had been lying created a state of temporary disillusionment within white circles. More significantly the effect of the revelation that whites were being held as prisoners of war by black Africans is symbolic of the psychological blow which apartheid South Africa was forced to take in defeat.⁹³

There was an equally profound effect upon the black population: '[t]he country-wide resistance that began in Soweto on 16 June 1976 was obviously greatly influenced by the SADF's defeat.⁹⁴

As to the impression made upon the government:

Within South African ruling circles, the Angolan debacle can be seen, in retrospect, as a watershed in domestic politics between the "hawks" led by Defence Minister Botha and his generals and the "doves" led by Prime Minister Vorster... By 1975 Mr Vorster's détente initiatives in Africa were well underway.⁹⁵

⁸⁹ 'The Soweto troubles brought South Africa all the economic and financial backlash that had followed the 1960 Sharpeville shootings, only more so. Capital again flowed out of the country. Businesses and the housing market collapsed.': *ibid.* at 216.

⁹⁰ The UN Security Council condemned the South African government for 'its resort to massive violence against and killings of the African people, including school children and students' in Resn 392 (1976) and tried to make mandatory the arms embargo and also the introduction of economic sanctions. However, Western members of the Council vetoed the attempts. Harris, *op cit.* n.79 at 890-1.

⁹¹ 'Until 1974, South Africa was surrounded by a protective barrier of states that were sympathetic to its policies and defence.': IDAF at 2. However, the African continent had witnessed various armed insurrections as the indigenous populations struggled for political supremacy. South Africa had provided aid in the war against the rebels and so manifested her vested interests in bolstering Namibia (*ibid.* at 53-54 and 61-64) and Rhodesia (*ibid.* at 65-6 and Hoagland at 224-252). However, the Angolan conflict was South Africa's nemesis. For details on the involvement of the SADF in Angola (1975-6), see IDAF at 54-61 and Mockler, Anthony *The New Mercenaries* (Corgi, 1986) at 223-4.

⁹² Defence budget figures reveal an increase in spending that coincides with the Angolan conflict (and the internal disorder following Soweto): 1973-4 – 41% increase; 1974/5 – 47%; 1975/6 – 40%; 1976-7 – 39%. To put the figures into perspective 1972/3 revealed a 4% increase and between 1966 and 70 the increase had remained less than 10%. At the other end of the timescale, the defence budget increases following this period were 1977/8 – 22 %; 1978/9 – 15%; 1979/80 – 0.04%. Figures computed from IDAF at 10.

⁹³ *Ibid.* at 61.

⁹⁴ *Ibid.* Furthermore, '...the victories [of black liberation movements] in Mozambique... [and] Angola in 1974-5 provided the Namibian, Zimbabwean and South African liberation movements with vigorous stimulation and inspiration, and more importantly, with political and military support in addition to that already furnished by other "front-line" states.': *ibid.* at 3.

⁹⁵ *Ibid.* at 60.

Although the premiership of Vorster's successor, P.W. Botha, is labelled a period of reform,⁹⁶ the tensions within the country grew. This was unsurprising, mainly because the claim of reform was a bluff. The government intended to dismantle 'petty apartheid' but divide the opposition by promoting collaboration through the creation of a privileged class of blacks with vested interests in maintaining their newly gained socio-economic position.⁹⁷ However, there was no intention that the regime would release political power⁹⁸ and there is evidence that the White population consolidated their "bunker mentality". General Malan, Chief of SADF stated 'South Africa is today... involved in total war. The war is not only an area for the soldier. Everyone is involved and has a role to play'⁹⁹. In addition to the continuation of overt indoctrination of the white population¹⁰⁰, there is evidence that more indirect pressures¹⁰¹ were brought to bear to ensure an appropriate level of commitment to state sanctioned patriotism.

However, Botha was prepared to make one important concession by permitting the coloured and Indian populations access to political rights. In 1983, he announced the introduction of a new constitution where Whites, coloureds and Indians would each have a separate House in a three-chamber parliament.¹⁰² Blacks would be allowed to elect local authorities in the townships.¹⁰³

⁹⁶ Lapping, at 216, designates 1977-87 the era of 'reform' by the National Party.

⁹⁷ *Ibid.* at 219-211.

⁹⁸ The basic tenet of the South African government's philosophy, as expressed in the 1977 White Paper on Defence, is that "the principle of the right of self-determination of the White nation must not be regarded as negotiable": IDAF at 2.

⁹⁹ *Ibid.* at 5.

¹⁰⁰ 'This spreading military mentality is fostered by the State's avowed aim of inculcating allegiance to apartheid in South Africa among young white people through the educational system. The white school system, entitled "National Education", as distinct from "Coloured", "Indian" and "Black" (formerly Bantu) Education", contains elements of indoctrination based on concepts of "Christian National Education" worked out in the 1940's by Afrikaner ideologues. These were re-affirmed during the 1978 debate on the National Education Vote, when a senior Nationalist MP stated ... "we must indoctrinate [schoolchildren] to become true father-landers with a Christian loyalty to their people and their country". The Minister of National education endorsed this view, adding that every teacher "must be trained in a Christian National fashion", that "the correct attitude to patriotism had to be taught to children" and that, "enshrined in the law" was the principle that "the history, language, traditions and national symbols of the country should be held in esteem and promoted." This history, tradition and symbolism belongs unambiguously to the white population only, and is heavily biased towards the Afrikaner nationalism of the government.': *ibid.* at 49.

¹⁰¹ '...an interoffice memo within the General Motors Corporation, one of the largest US interests in South Africa, in July 1977 recognised that "in the event that a National Emergency is declared, there is little doubt that control of GM's South African facilities... would be taken over by an arm of the Ministry of Defence..." The memo also points out that General Motors S.A. has been requested to "supply vehicles... for Defence Force purposes and refusal to offer such might be interpreted as reflecting doubt on the motives of the company.": *ibid.* at 11.

¹⁰² The status of Indians and coloureds had been a obstacle to the implementation of apartheid from the outset. Many Afrikaners were uneasy, particularly about the status of the mulattos who were designated 'coloured' under the Population Registration Act. Both minorities had neither a homeland nor political rights. See Lapping at 224-5.

However, the non-white population refused to co-operate by deferring with subordinate gratitude. Presented with the opportunity to gain political concessions the disenfranchised majority would not make do with half measures. On the other hand, many Afrikaners were appalled by the compromise. In 1984, the perilous situation exploded in violent disorder at a familiar location – Sharpeville – and started the trend for ‘black on black’ violence. Unlike in the 1960s and 1970s, state enforcement was ineffective. The disorder spread until many townships became ‘no-go areas’ for the police.¹⁰⁴ During the 1980s, the judiciary more prominently adopted the mantle of social control and, in so doing, attracted international criticism and vilification.¹⁰⁵ As the cases involved deaths brought about by the participation of several, sometimes numerous, parties, the judges were required to decide on the appropriate scope of the law of complicity in homicide.

2.3 POST APARTHEID

By 1990, the pressures, both internal and external, upon the apartheid regime had become untenable and the National Party called for a negotiated settlement to South Africa’s social and political problems. February 1990 witnessed the lifting of a 30 year ban on the ANC and the release of its leader, Nelson Mandela. However, the negotiation process was inevitably protracted and difficult. Eventually, agreement was reached in November 1993 to institute a nonracial, nonsexist, democratic and unified South Africa. The country’s first multi-racial elections were scheduled for 1994 and a Transitional Executive Council formed to supervise the elections. In furtherance of the aim to establish equality, a new constitution was created in 1993¹⁰⁶. On May 10, 1994 the ANC won a clear victory and Nelson Mandela was inaugurated as the first black president.¹⁰⁷

To a certain extent, the criminal cases in the 1990s and early twenty-first century reflect the manifestation of the country’s socio-economic problems in place of political protest and disturbance. In the new South Africa, common purpose cases tend to mirror their English counterparts, where collateral homicides result from a joint enterprise to commit a different offence, most notably armed robbery.¹⁰⁸

¹⁰³ *Ibid.* at 226. The black population were citizens of their homeland and as foreigners would have no representation in the South African parliament

¹⁰⁴ *Ibid.* at 228-30.

¹⁰⁵ Particularly in respect of *S v Safatsa*, the ‘Sharpeville Six’ case, see above, pp.111-118.

¹⁰⁶ Act 2000 of 1993. It was finally ratified in May 1996, despite the absence of Inkatha representatives.

¹⁰⁷ May 1994 also saw the establishment of the Truth and Reconciliation Commission with the remit to investigate human rights abuses during the apartheid regime.

¹⁰⁸ See above, p.122.

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Journal abbreviations:

(LR	Law Review)
Anglo-Amer LR	Anglo-American Law Review
Arch News	Archibold News
Cal LR	California Law Review
Col LR	Columbia Law Review
CLJ	Cambridge Law Journal
Crim LJ	Criminal Law Journal (Australia)
Crim LR	Criminal Law Review
Harv LR	Harvard Law Review
JCL	Journal of Criminal Law
Jo Afr L	Journal of African Law
Jo CL & Crim	Journal of Criminal Law & Criminology
LQR	Law Quarterly Review
LS	Journal of Legal Studies
MLR	Modern Law Review
NILQ	Northern Irish Legal Quarterly
NLJ	New Law Journal
OJLS	Oxford Journal of Legal Studies
SACJ	South African Journal of Criminal Justice
SALJ	South African Law Journal
Sol Jo	Solicitors Journal
YLJ	Yale Law Journal