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<b>Author(s)</b>	<b>Brabyn, J</b>
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## SECONDARY PARTY CRIMINAL LIABILITY IN HONG KONG

■

Janice Brabyn\*

*The article sets out the current law relating to secondary party criminal liability in Hong Kong, beginning with joint enterprise and then considering accessorial liability in the absence of prior agreement. The object is to ensure that any adoption of recent changes of approach in England, specifically those in and arising from Rahman and Bryce, is a matter of deliberate and informed choice. The article concludes that taking the subjective mens rea requirements for secondary party liability seriously requires taking Hong Kong's current strong agreement/intention/knowledge requirements with respect to target offences seriously and guarding against dilution of actual foresight of possible collateral offences requirements by excessive abstraction of foreseen and committed acts. In other words, Rahman, Bryce and their progeny should be rejected.*

### Introduction

In Hong Kong (HK), the law governing secondary party liability remains the common law, in this area indistinguishable from English/Welsh (EW) common law until this century.<sup>1</sup> Indeed, one of the most influential decisions in the modern EW law relating to one form of secondary party liability remains *R v Chan Wing Siu*,<sup>2</sup> a Privy Council Appeal from HK. However, in the last six years the EW Law Commission,<sup>3</sup> government ministries,<sup>4</sup> parliament,<sup>5</sup> some commentators<sup>6</sup> and even

\* Department of Law, University of Hong Kong. I would like to thank my student researcher, Frankie Tam and the anonymous reviewer for helpful comments.

<sup>1</sup> *R v Mok Wai Tak and Another* [1990] 2 AC 333, 343H (PC).

<sup>2</sup> [1985] 1 AC 168.

<sup>3</sup> Inchoate Liability for Assisting and Encouraging Crime LC 300 (2006), Murder, Manslaughter and Infanticide LC 304 (2006), Participating in Crime LC 302 (2007) Cm 7094 (hereinafter "Participating in Crime").

<sup>4</sup> Consultation Paper (Murder, manslaughter and infanticide: proposals for reform of the law CP 19/08 (Home Office), Murder, manslaughter and infanticide: proposals for reform of the law: summary of Responses & Government position CP19/08, published 14 Jan 2009, Ministry of Justice.

<sup>5</sup> Serious Crime Act 2007 (C.27) Part 2, Encouraging and Assisting Crime.

<sup>6</sup> A. Simester, "The Mental Element in Complicity" (2006) 122 LQR 578 (hereinafter "Mental Element"), G. Virgo "Making Sense of Accessorial Liability" (2006) 6 *Archbold News*, 6–9, W. Wilson, "(1) A Rational Scheme of Liability for Participating in Crime" (2008) *Crim L R* 3, G.R. Sullivan, "(2) Participating in Crime: Law Com No. 305 – Joint Criminal Ventures" (2008) *Crim L R* 19, R. Taylor, (3) "Procuring, Causation, Innocent Agency and the Law Commission" (2008) *Crim L R* 32, R. Buxton, "Joint Enterprise" (2009) *Crim L R* 233, G.R. Sullivan, "First Degree Murder and Complicity – conditions for parity of culpability between principal and accomplice" (2007) 1 *Journal of Criminal Law and Philosophy* 271.

judges<sup>7</sup> have proposed, enacted and decided redirections for the law of secondary party criminal liability. Since HK is still often influenced by EW developments, now is a good time for a clear and accessible statement of the current HK position before the results of this latest flurry of EW activity crystallise here. Any effect upon HK law is then more likely to be a matter of conscious and reasoned choice rather than absorption through the interconnected web of the common law.

The common law begins with the proposition that people are only accountable for their own chosen conduct and not for the conduct of others. Hence, most criminal offences in HK are defined in terms of commission by a principal or perpetrator (hereafter P), that is, a single person with respect to whom both the *mens rea* (necessary P fault elements) and *actus reus* (all other elements) of an offence are satisfied.<sup>8</sup> A principal may use an innocent agent.<sup>9</sup> Where the specified conduct elements may be split between,<sup>10</sup> or a consequence caused by,<sup>11</sup> more than one person, there may be joint principals.

In addition, it was recognised long ago that persons other than P may be complicit in or in some way jointly responsible for P's offences.<sup>12</sup> Numerous statutory offences punish complicity in specific crimes<sup>13</sup> but no general statutory or common law offence of complicity in another's offence was created. Instead, the common law developed and HK retains a set of principles and rules whereby such persons, here called secondary parties or simply "D",<sup>14</sup> could be found guilty of the same offence, and punished in the same way as P.<sup>15</sup> Hence, where the member of a group who caused a single fatal wound cannot be identified,

<sup>7</sup> *R v Bryce* (2004) 2 Cr App R 35 (CA), *R v Rahman* [2009] 1 AC 129, *R v Yemoh (Kurtis)* [2009] EWCA Crim 930, [2009] Crim LR 888.

<sup>8</sup> Michael Jackson, *Criminal Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2003), pp 63–67.

<sup>9</sup> Suppose P intentionally causes a person without criminal capacity or a sane adult without *mens rea* (innocent agent or IA) to commit the *actus reus* of a criminal offence. The IA may be regarded as an extension of P, rather like a robot. Since P has the necessary *mens rea*, P commits the offence through the IA's agency. Status offences cannot be committed through IAs. The EWLC has proposed removing this limitation by statute, see LC 300, Part 4, discussed by Taylor, n 6 above.

<sup>10</sup> As where P1 threatens V with the knife, P2 steals V's bag, together supplying the *actus reus* of robbery.

<sup>11</sup> The classic case is murder where death is caused by a combination of injuries inflicted by P1 and P2.

<sup>12</sup> Also the cover up or evasion of liability for, an offence, in HK now the subject of statutory offences, Criminal Procedure Ordinance, ss 90, 91, see Jackson (n 8 above), pp 385–387.

<sup>13</sup> For example, Crimes Ordinance, s 56 as to anyone who "... procures, counsels, aids, abets, or is accessory to ..." any offence as provided in Part VII Explosive Substances.

<sup>14</sup> Other terms include "accomplices" and "accessories", today largely used interchangeably.

<sup>15</sup> Jackson (n 8 above), pp 335–336.

proof that a particular defendant was surely either D or P is sufficient for conviction.<sup>16</sup>

The common law approaches the criminal liability of secondary parties in two ways: one is grounded in participation with others in a joint enterprise/venture or common purpose to commit an offence(s) (joint enterprise liability), the other in an individual's actual contribution amounting to assistance, encouragement or procuring a principal's offence (accessorial liability). All judges and commentators accept that there is substantial practical overlap between joint enterprise and accessorial liability with respect to crimes both P and D *intend or know will be committed*, here called "target crimes", including lesser, subordinate crimes committed in order to achieve the target crime, with either analysis achieving the same result.<sup>17</sup> The difference in result, if any, only arises with respect to offences committed by P that are not target offences, here called collateral offences, for which D is also responsible, and solo offences, which are P's concern alone. Some argue that joint enterprise is merely a convenient way of talking about a common form of assistance and encouragement and that either analysis marks the same offences as collateral and solo.<sup>18</sup> Others argue that joint enterprise and accessorial liability are two doctrinally and normatively distinct forms of secondary party liability and that liability for collateral offences is only possible, or is at least much wider, under joint enterprise liability.<sup>19</sup> Since the Hong Kong Court of Final Appeal (CFA) has said that accessorial liability and joint enterprise liability are distinct,<sup>20</sup> the discussion here will begin by accepting that position.

Most discussions of common law secondary liability first discuss accessorial liability, then joint enterprise. This article reverses that order for two reasons. First, joint enterprises are the most common form of secondary party liability in practice. Secondly, once the boundaries of joint enterprise liability are established, it is only necessary to consider the

<sup>16</sup> Jackson (n 8 above), pp 360–361, *HKSAR v Sung Pak Lun and Another* CACC 215/2005, 22 Aug 2006 at paras 26, 27, David Ormerod, *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 12th edn, 2008), p 179. Of course, if this is not possible, though one was surely the killer, both must be acquitted, *HKSAR v Habib Ahmed* CACC 400/2007, 16 Apr 2009 at para 8.

<sup>17</sup> Jackson (n 8 above), p 337; Simester, "Mental Element" (n 6 above), pp 598–599 and see *R v Clayton*, *R v Hartwick*, *R v Hartwick* (2006) 23 1 ALR 500 at n 11.

<sup>18</sup> Ormerod (n 16 above), pp 206–208; J. C. Smith, "Criminal Liability of Accessories: Law and Law Reform" (1997) 113 *LQR* 453. Buxton (n 6 above), pp 243–244 argues that this is the view of the majority of the EW judiciary and see *R v Mendez and Another* [2010] EWCA Crim 516, [2010] 3 All ER 231, [17].

<sup>19</sup> Simester, "Mental Element" (n 6 above), pp 592–598, Jackson (n 8 above), pp 337, 360–361, *HKSAR v Sze Kwan Lung and Others* (2004) 7 HKCFAR 475 (CFA), *R v Stewart and Schofield* [1995] 1 Cr App R 441, p 447, *Clayton v The Queen* (n 17 above) at para 20.

<sup>20</sup> *Ibid.*, paras 19, 34.

liability of persons who aid, encourage or procure where an agreed course of conduct did not exist. This will assist in preventing unintentional leakage of any possible wider aspects of joint enterprise doctrine into accessorial liability.

### Joint Enterprise Liability

The paradigm concept of joint enterprise liability is an agreement or common purpose shared between two or more persons that a course of conduct be pursued which, if carried out, would amount to the commission of target offences. That agreement or common purpose is then acted upon, resulting in the commission of offences, usually target offences, sometimes collateral offences.

In many instances, members of the joint enterprise participate in the commission of offences as P.<sup>21</sup> Common illustrations include fights where parties to an agreement to attack V all join in the assault<sup>22</sup> or burglaries where two burglars both enter the premises as trespassers with intent to steal together. Prosecutors should always be alert to possible alternative charges for which a defendant is personally liable in this way.<sup>23</sup> However, joint enterprise doctrine is only concerned with the secondary party liability of D for any enterprise related offences committed as P by other enterprise members.

### The Doctrine

Bokhary PJ recently restated the nature of HK joint enterprise secondary party liability in *HKSAR v Sze Kwan Lung*:<sup>24</sup>

“‘Joint enterprise’ is an expression used to denote the conduct of two or more persons who take part together in a course of criminal conduct ... Each participant is criminally liable for all the acts done in pursuance of the joint enterprise. And whether or not he intended it, he will be criminally liable for any such act if it was of a type which he foresaw as a possible incident of the

<sup>21</sup> That is, P used in the limited sense identified above. Cf *Osland v R* (1998) 197 CLR 316, Sullivan (n 6 above), p 23 and Buxton (n 6 above), p 237 for wider uses of the term.

<sup>22</sup> *HKSAR v Pun Ganga Chandra (No 2)* [2001] 2 HKLRD 151, leave to appeal refused [2002] HKEC 8 (CFA), *HKSAR v Lin Siu Lum* CACC 10/2006, 4 Feb 2008, *R v Uddim* [1999] QB 431.

<sup>23</sup> *Attorney-General's Reference (No 3 of 2004)* [2005] EWCA Crim 1882, *R v Greatex* [1999] 1 Cr App R 126, *R v Powell and Daniels*, *R v English* [1999] AC 1.

<sup>24</sup> See n 19 above, paras 33–35. This passage has since been cited in *HKSAR v Wu Wai Fung* CACC 523/2004, 9 Dec 2005 at para 54 and *HKSAR v Cheung Chi Keung* FACC 9/2008, 9 Mar 2009, at para 22.

execution of the joint enterprise and he participated in the joint enterprise with such foresight.”

He said that this had been the law in HK at least since *Chan Wing Siu* mentioned above, that *Chan Wing Siu* was applied by the HL in the leading EW case of *R v Powell, R v English*<sup>25</sup> and he emphasised the following extract from the HK case:<sup>26</sup>

“The test of *mens rea* here is subjective. It is what the individual accused in fact contemplated that matters ... If, at the end of the [trial] ... the jury concludes that there is a reasonable possibility that the accused did not even contemplate the risk that ... [P would commit acts of the type P did commit, that accused would not be liable for those acts or their consequences.]”

So, any party to an agreement that a criminal course of conduct will be carried out will be liable (i) as principal for any offences committed personally by that party and (ii) as secondary party for any (a) target offence committed by other parties<sup>27</sup> and (b) collateral offences of a type D had personally foreseen might be committed in pursuance of the agreed course of conduct when D originally committed to or continued to participate in the enterprise.<sup>28</sup> Conversely, D is not liable for P's unilateral departures from the common purpose so D is not liable for a collateral offence committed by P which was not of a type of offence, or type of act, D had contemplated as even a possible incident of carrying out the enterprise.<sup>29</sup>

#### *An agreement or common purpose shared*

D's voluntary and informed, enthusiastic or reluctant but genuine<sup>30</sup> entry into an agreement that a criminal offence will be committed is both the legal precondition for, and the individual autonomous choice, what

<sup>25</sup> See n 23 above. *R v Powell, English* has been cited in many other HK cases, including *HKSAR v Chueng Moon Keung* [2000] 4 HKC 92, *HKSAR v Sham Ying Kit* [2000] 4 HKC 380, *HKSAR v Mok Tsan Ping and Others* [2001] 2 HKLRD 325, *Pun Ganga Chandra (No 2)* (n 22 above), *Wu Wai Fung* *ibid.* *HKSAR v Kwok Ka-Ming* [2008] 4 HKLRD H3.

<sup>26</sup> *Ibid.*

<sup>27</sup> Ormerod (n 16 above), p 209 calls this “basic accessory liability”.

<sup>28</sup> Ormerod (n 16 above), p 209, following J.C. Smith, “Criminal liability of accessories: law and law reform” (n 18 above), calls this “parasitic accessory liability”.

<sup>29</sup> *R v Anderson and Morris* [1966] 2 QB 110, the leading 20th century case, reaffirmed in *Chan Wing Siu* (n 2 above) and *R v Powell and English* (n 23 above) and see Jackson (n 8 above), pp 369–371, *R v Law Siu Long and Another* [1996] 1 HKC 469.

<sup>30</sup> In the context of modern, subjectivist criminal law, “agreement” involves a subjective concurrence between the parties. A person who outwardly “agrees” to the commission of an offence, secretly intending to thwart it or abandon it has not entered into an agreement at all for the purposes of the criminal law, *R v Hung Man-chit* [1996] 1 HKCLR 157, 159–160 (CA) but cf *EWCA in R v Rook* [1993] All ER 955 and “Participating in Crime” (n 3 above) at paras 3.169 and B.118–120.

Simester calls “the normative shift”, that justifies imposing liability on D for P’s collateral offence. With that choice D gives up part of her autonomy to the group and “... accepts responsibility for the [foreseen] wrongs perpetrated ...” by other members of the group.<sup>31</sup> Absent that decision, mere knowledge of even a chosen companion’s future criminality, without any intended encouragement or assistance, does not, and should not, make D his companion’s keeper or accomplice. To hold otherwise would be to prohibit association with known criminals even for lawful purposes, and to enlist all citizens into active crime prevention vies a vi all other citizens at all times, both socially and personally highly intrusive moves that the common law has always resisted. Of course, if D chooses to accompany P at a time D knows P intends to commit a serious criminal offence, D risks moral condemnation and forensic inferences that D did indeed intentionally encourage or assist P, but that is another point.

The terms “agreement” and “shared common purpose” are often used interchangeably but this can be dangerous if the word “shared” is omitted from the latter term. Such omission risks a blurring of the crucial distinction between two persons who act pursuant to a tacit understanding to join together or co-operate in a common cause and two persons who coincidentally happen to decide to do the same thing and quite independently act upon their own decisions. In the latter case, there is no joint enterprise, that is, no agreement or *shared* common purpose so that each person can only be criminally liable either as principal for the crimes they themselves commit or as a secondary party on the basis of accessory liability.<sup>32</sup>

Of course, as the courts have long recognised, agreements in this context seldom have the formality or detail of a contract. They may be more tacit understanding than express plan, even spontaneous,<sup>33</sup> although as recognised by the EWCA in *Uddin*, agreement analysis:<sup>34</sup>

<sup>31</sup> Simester, “Mental Element” (n 6 above), p 599.

<sup>32</sup> *HKSAR v Moy Wai Fu* HCMA 1212/1998, 30 Apr 1999, [1999] HKLRD (Yrbk) 2001, *R v Alamin Miah and Maruf Uddin* [2004] EWCA Crim 63 and see *R v Petters and Parfitt* [1995] Crim LR 501, discussed in A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine* (Oxford and Portland: Hart Publishing, 3rd edn, 2007), p 221. Cf the inclusion of “a shared common intention” in addition to “agreement” as amounting to participation in a joint venture in “Participating in Crime” (n 3 above) at paras 1.10, 3.123, A.17–A.18, 7.9, correctly criticized by Sullivan (n 6 above), pp 26–28.

<sup>33</sup> Jackson (n 8 above), p 362, citing *R v Lau Sik-Chun* [1982] HKLR 113, 115 (PC on appeal from HK), *Sung Pak Lun* (n 16 above) at para 26, *Mendez* (n 18 above) at para 20.

<sup>34</sup> See n 22 above, p 44E–44F.

“... 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.”

But that is no reason to abandon or weaken the agreement/common purpose foundation. On the contrary, it is just such borderline cases that require the greatest care.<sup>35</sup> The shared common purpose must also have sufficient particularity to enable the identification of target offences. Evidence suggesting a group was “up to no good” is not sufficient.<sup>36</sup>

*“All acts done in pursuance of the joint enterprise”*

Conduct that is steps towards, or amounts to, target offences, that is, offences D agreed and therefore intended, directly or obliquely, should occur, is obviously conduct “done in pursuance of the joint enterprise”. D’s liability for P’s target offences is “the paradigm case of joint enterprise liability.”<sup>37</sup> Liability based upon foresight alone or limitations dependent upon D’s foresight of an act of the same type discussed below have no application here.

As to conduct amounting to collateral offences, that is, offences not agreed to by D, since an unforeseen type of act could not be within the common purpose, some have argued that there is no need to direct juries separately as to whether a collateral offence was within the common purpose. A direction in terms of what D foresaw alone would be sufficient.<sup>38</sup> But, when speaking of unintended acts, Bokhary PJ did not refer to any acts foreseen at large but rather to “any such acts” and this must refer back to “acts done in pursuance of the joint enterprise”. In *Hui Chi-ming*<sup>39</sup> the Privy Council on Appeal from HK expressly said: “... mere foresight is not enough: the accessory ... must have foreseen the relevant

<sup>35</sup> *Lau Sik-Chun* (see n 33 above).

<sup>36</sup> The recent Australian High Court case of *The Queen v Motekiai Taufahema*. (2007) 234 ALR 1, [2007] HCA 11 at para 31 per Gleeson CJ and Callinan J makes the point well.

<sup>37</sup> *Brown v the State* [2003] UKPC 10 at para 8 per Lord Hoffman; *Chan Wing Siu* (n 2 above), p 175E–175F; Ormerod (n 16 above), p 209; *Rahman* (n 7 above), p 145 per Lord Bingham, p 155 per Lord Rodger.

<sup>38</sup> See, for example, “Participation in Crime” (n 3 above) at paras B.133–B.137 (discussion of Stephen J’s decision in *R v Van Hoogstraten* [2003] EWCA Crim 3642), *Rahman* (n 7 above) at para 64 per Lord Brown of Eaton-under-Heywood.

<sup>39</sup> [1991] 2 HKLR 537. See also Simester, “Mental Element” (n 6 above), p 599, “Her responsibility for incidental offences is not unlimited. S cannot be asked to accept the risk of wrongs by P that she does not foresee, or which depart radically from their shared enterprise, and joint enterprise liability rightly does not extend to such cases.” Buxton (n 6 above), pp 238–239 criticizes the LC’s rejection of this aspect of Simester’s position.



offence ... as a possible incident of the common unlawful enterprise.” Sometimes that limitation is crucial.

Consider: D believes P will/foresees P might well shoot a hated rival, V, if an opportunity arises. Such belief/foresight alone would not make D liable for the killing if P did kill V one day. D’s agreement with P to commit a burglary, even if D foresees that P may shoot anyone who resists them, should make no difference where, during the burglary, P (i) looks out the window, sees V on the other side of the street and takes the opportunity to shoot V or (ii) P unexpectedly finds V inside the burgled premises, V does not resist and P takes the opportunity to kill V. P did not kill V “in pursuance of the joint enterprise” in either case.<sup>40</sup>

### *Subjective foresight*

The sufficiency of foresight extends liability beyond D’s intent<sup>41</sup> but the test of what D foresaw is subjective. As Justice Bokhary clearly appreciated, this subjective character of the foresight test for collateral offences is also fundamental to the legitimacy of modern joint enterprise liability. It precludes what was previously the norm, objective determination of the scope of the common purpose or liability based on what D ought to have foreseen, instead confining D’s liability to D’s actual agreements and thoughts.<sup>42</sup> Subjective foresight is a true form of *mens rea*. Applied realistically to the spontaneous, fluid, emotionally charged, often intoxicated circumstances that are typical of criminal violence and notwithstanding such actual foresight can often only be inferred

<sup>40</sup> See “Participating in Crime” (n 6 above) at paras 3.153–3.166. The LC recommendations would extend the limit “within the scope of the venture” to collateral as well as target offences. The LC apparently felt this meant D (probably) ought not be liable in the first situation at least, see discussion of Example 3FF in para 3.155 but cf para 3.162 (“... in the context of collateral offences, the fact that P did not commit the act to secure the success of the joint venture (even if combined with D expressing his or her opposition to P doing the act ...)” should not necessarily mean P’s act was outside the scope of the venture).

<sup>41</sup> That this was a significant move can be seen from the fact that prior to *Chan Wing-Siu* (n 2 above) judges often directed juries in terms of intention and common purpose only, *The Queen v Leung Cheuk-Faw and others* [1984] HKC 374, 387. Interestingly, even after *Sze Kwan Lung*, the possibility of liability based on foresight rather than intent is sometimes missed in HK, see *HKSAR v Yeung Yeung* [2007] 4 HKLRD 1035 at paras 65–66 per Stock JA, *HKSAR v Lee Kwan Kong* CACC 198/2004, 1 Feb 2006, *HKSAR v Wong Hon Sum* Crim App 504/2003, 6 Jan 2005.

<sup>42</sup> Professor J.C. Smith makes the point very clearly in “Criminal liability of accessories: law and law reform” (n 18 above), pp 456–457. In *Attorney-General’s Reference (No 3 of 2004)* (n 23 above) at para 32, the EWCA recognised that *R v Powell, English* (n 23 above) reinforced the truly subjective character of the test and that “[e]arlier cases which talk of ‘must have anticipated’ may ... now be ignored.” See also *McAuliffe v The Queen* (1995) 183 CLR 108, 114.

from D's actions and circumstances,<sup>43</sup> subjective foresight could be significantly narrower than an objective determination of what D should have foreseen.

#### *Participation in the venture*

Participation does not require presence.<sup>44</sup> Enterprise members who complete planning, supply of tools or instigation well before actual commission clearly participate in the completed offence. Even mere agreement without withdrawal may be sufficient. In *Sze Kwan Lung*,<sup>45</sup> Bokhary PJ endorsed the following passage from *Smith and Hogan: Criminal Law* (10th edn, 2002):

“... once a common purpose to commit the offence in question is proved, there is no need to look further for evidence of assisting and encouraging. The act of combining to commit the offence satisfies these requirements. Frequently it will be acts of encouragement which provide the evidence of the common purpose.”<sup>46</sup>

#### *Foresight of a possibility*

That “foresight of a possibility” rather than “probability” is sufficient was the very point determined in *Chan Wing Siu*.<sup>47</sup> In *Hui Chi-ming*<sup>48</sup> the Privy Council emphasized that authorization is not required. Even if D makes D's opposition to the use of guns very clear, provided D foresaw the possibility of someone in the enterprise using a gun notwithstanding and decides to participate or continue to participate nonetheless, D may still be liable.<sup>49</sup>

<sup>43</sup> This was recognised in *Chan Wing-Siu* itself, (n 2 above), p 177H–178A. See also *Pun Ganga Chandra No 2* (n 22 above), 248 per Keith JA. D's special knowledge of P might even justify the inference that D foresaw a possibility P might commit murder that someone without that knowledge would not foresee.

<sup>44</sup> *Sze Kwan Lung* (n 19 above) at para 36.

<sup>45</sup> *Ibid.* at paras 36–37.

<sup>46</sup> This was said in rejection of Stock JA's statement in the CA below that, “It cannot be that if this [D] took no physical part and offered no encouragement and no advice and no instructions, that he is nonetheless guilty of the substantive offence ... by mere reason of some prior agreement.” Note also Bokhary PJ's position that D was in any case present for the purposes of the criminal law.

<sup>47</sup> See n 2 above, 175–177, also *The Queen v Yau Sau-kam* CACC 948/1983, 10 Aug 1984 and “Participating in Crime” (n 3 above) at paras 3.147–3.150.

<sup>48</sup> See n 39 above, 548–549.

<sup>49</sup> *R v Powell, English* (n 23 above), p 20 per Lord Hatton, *Rahman* (n 7 above), p 156 per Lord Roger of Earlsferry, *Kwok Ka-Ming* (n 25 above) (consider the case of D3).

*Foresight of a possible offence*

In *Chan Wing Siu*, Sir Robin referred to both foresight of a *crime* and foresight of *acts*.<sup>50</sup> Bokhary PJ refers to “act(s)” only. Does this mean that, in HK, foresight of P’s acts alone is enough to impose liability on D, that foresight that P will act with the fault necessary to commit the offence is not required? It is submitted that the answer is, emphatically, “no”. In *R v Powell, English*, Lord Steyn<sup>51</sup> specifically endorsed Professor Sir John Smith’s statement as to the *mens rea* required of a secondary party to joint enterprise murder:<sup>52</sup>

“The [secondary party] 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 an accident.”

The need for foresight that P would act *with the requisite mens rea* was specifically noted by Keith JA in *Pun Ganga Chandra (No 2)*.<sup>53</sup> Notwithstanding some overbroad language and suspect use of precedent by Lord Bingham of Cornhill in *Rahman*,<sup>54</sup> there is no reason to doubt that this remains the law in HK, and at least beyond liability for offences of violence where the *mens rea* does not run with the *actus reus*, also EW.<sup>55</sup> The point is mentioned here merely to pre-empt any misunderstanding.

The above requires some qualification with respect to the need for foresight of consequences. If the definition of an offence requires intent or foresight as to a consequence, foresight that P may act with *mens rea* would include *mens rea* with respect to that consequence. However, in HK and EW the common law offence of murder is defined as causing the

<sup>50</sup> Compare, for example, at p 174G “crimes of the type charged” and at p 175G “secondary party is criminally liable for acts by the primary offender” and “meets the case of a crime foreseen as a possible incident”.

<sup>51</sup> See n 23 above, pp 13C–14A. The emphasis is Lord Steyn’s own. Lord Steyn was at pains to explain why the lesser *mens rea* for the accessory was justified.

<sup>52</sup> “Criminal Liability of Accessories: Law and Law Reform” (n 18 above), p 464. Note that the neutral term “secondary party” was inserted to avoid confusion with accessorial liability as used in this article.

<sup>53</sup> See n 22 above, pp 395–396. Keith JA also recognized that Lord Hutton’s statement in *Powell* (n 23 above), p 21E–21F is not entirely clear on this point.

<sup>54</sup> See n 7 above at paras 21–23.

<sup>55</sup> Buxton (n 6 above), p 235. Note also “Participation in Crime” (n 3 above) at paras 3.167–3.169 which make it clear that the LC intended not only foresight of P’s acts would be required but also foresight that P might do those acts with the requisite *mens rea*, expressed by the LC as a requirement that D foresee that P may actually commit the offence.

death of a human being either intending to cause death or intending to cause grievous bodily harm,<sup>56</sup> that is, really serious harm (GBH).<sup>57</sup> Since “serious harm” need not be likely to cause death,<sup>58</sup> an uncertain form of *objective* recklessness as to the consequence of death is a sufficient *mens rea* for murder as P. Subjective recklessness as to the possibility of causing some harm may be a sufficient *mens rea* for manslaughter.<sup>59</sup> Again, P is liable although the possibility of death was unforeseen. The courts in both EW and HK have long determined that D is liable for the unforeseen consequence of death to the same extent as P.<sup>60</sup>

#### *An act of the same type*

Here we encounter the real reason why “act(s)” rather than “offence” is used in many joint enterprise cases. As noted above, common law murder and manslaughter may be committed by a wide range of conduct with varying degrees of risk of death or serious harm. D’s contemplation of one type of act might not justify imposing responsibility on D for P’s free choice of acts with a significantly higher risk of death. “Act” rather than “offence” was used to enable this narrowing of liability.

The starting proposition, then, is that liability for P’s collateral offences *both extends and is restricted to* P’s commission of an act of the same type as acts D actually foresaw P might commit in the context of the joint enterprise. This requires classification of acts into different types. Generally, this can be done at the level of different offences. In ordinary English, “type” means a class of thing with a significant common characteristic(s) that can be distinguished from another class of thing that does not have that significant common characteristic(s). In the context of the criminal law, significant characteristics include the nature of harm the criminal conduct causes. For example, robbery is not an offence of the same type as rape. Therefore, D’s participation with P in a joint enterprise to commit robbery would only make D liable for P’s rape of V during the course of the robbery if D had actually foreseen a real possibility that P would commit such a penetrative sexual assault.<sup>61</sup>

<sup>56</sup> *HKSAR v Coady* [2000] 2 HKLRD 195, *R v Cunningham* [1982] AC 566.

<sup>57</sup> *R v Smith* [1961] AC 290, *R v Man Wai-keung* [1992] 1 HKCLR 89 and see Jackson (n 7 above), pp 497–498.

<sup>58</sup> *R v Vickers* [1957] 2 QB 664, *Cunningham* (n 56 above), *Coady* (n 56 above), *Mendez* (n 18 above) at paras 26–30, *HKSAR v Hui Chi Wai and Others* [2001] 3 HKC 531 and see Archbold Hong Kong 2010 (Hong Kong: Sweet and Maxwell, 2009) at para 20–222.

<sup>59</sup> See discussion of “unlawful and dangerous act manslaughter” in *R v Church* [1966] 1 QB 59, *Attorney-General’s Reference (No 3 of 1994)* [1998] AC 245, Jackson (n 8 above), pp 527–536.

<sup>60</sup> Jackson (n 8 above), pp 356, *R v Anderson*, *R v Morris* (n 29 above) approved in *Chan Wing Siu* (note 2 above).

<sup>61</sup> *The Queen v Szeto Kwok hei* [1991] 2 HKLR 178 at para 31.

Homicide is also not an inevitable incident of robbery, or of street fights or assaults, but determining whether acts of violence intended or foreseen by D were of the same type as the lethal acts committed by P can be complicated. The positions so far established or likely to be uncontroversial in HK may be summarised as follows:

- (i) If D is party to an agreement involving the intended killing of V, D will be liable for any killing of V carried out pursuant to that agreement by whatever act.<sup>62</sup>
- (ii) Otherwise, in the context of personal violence, whether an act is of the same type as or fundamentally different from another depends upon the relative dangerousness of each, that is, the relative likelihood of each to cause the relevant degree of harm.<sup>63</sup>
- (iii) Whether P's act is of the same or different type to acts contemplated by D is a question of fact.<sup>64</sup> However, the courts may determine as a matter of law that no reasonable jury could fail to find a particular difference sufficient or that some factual differences are not sufficient to determine, or even relevant to, the jury's decision.<sup>65</sup>
- (iv) Use of a weapon not foreseen by D is usually "a significant factor" but not necessarily the only nor always a decisive factor in assessing relative dangerousness.<sup>66</sup>
- (v) If D may have contemplated only a standard assault of relatively short duration<sup>67</sup> and without weapons (that is using bare hands or fists, feet with light shoes only, no kicks to or stomping on an unprotected head),<sup>68</sup> certainly if contemplating only bodily harm but probably even if intending to cause GBH by

<sup>62</sup> *Rahman* (n 7 above) at para 33 at pp 155–156 per Lord Rodger of Earlsberry, *Mendez* (n 18 above) at para 44.

<sup>63</sup> Jackson, (n 8 above), p 377, *R v Powell, English* (n 23 above), p 30F–30G per Lord Hutton, *Uddin* (n 22 above), pp 441C–441D ("propensity to cause death"), *Rahman* (n 7 above), pp 152–154 at paras 22, 26 per Lord Bingham ("in a different league"), *Mendez* (n 18 above) (altogether more life threatening).

<sup>64</sup> *The Queen v Lam Yeung Ching* CACC 378/1983, 7 Nov 1983 at paras 38, 40–42, *R v Greatrex* (n 23 above), *Rahman* (n 7 above), p 159 per Lord Rodger, cf *R v Powell, English* (n 23 above), p 30 per Lord Hutton, *Mendez* (n 18 above) at paras 47, 48.

<sup>65</sup> *R v Powell, English, ibid. Attorney-General's Reference (No 3 of 2004)* (n 23 above) at para 53, *Rahman* (n 7 above) as explained in *Yemoh*, (n 7 above) at paras 140–142.

<sup>66</sup> *Uddin* (n 22 above), p 441C. *Lam Yeung Ching* (n 64 above) at para 42 is expressly on point but pre *R v Powell, English* and must be approached with care on the facts and incorrect use of "unusual consequence".

<sup>67</sup> As to the implications of sustained or prolonged beatings even without weapons, see *HKSAR v Chan Man Lok and Others* Crim App No 522 of 2000, 2 May 2003, *Lee Kwan Kong* (n 41 above).

<sup>68</sup> As to the dangers of kicks with shod feet in general, kicks to or stomping on the head, see *R v Greatrex* (n 23 above), p 140D–140E (question whether a metal bar was fundamentally different from a shod foot should have been left to the jury), *R v Roberts, Day and Day* [2001] EWCA Crim 1594, [2001] Crim LR 984, *Mendez* (n 18 above) at para 41, *R v Lewis (Rhys Thomas) and Others* [2010] EWCA Crim 496.

such means, no reasonable jury could find that P's unforeseen use of weapons significantly more likely to prove lethal such as heavy blunt weapons, knives, arrows, guns, explosives, corrosives or fire, at least if intended to cause GBH or death were acts of a type contemplated by D.<sup>69</sup>

- (vi) The unforeseen use of knives or guns is conduct a reasonable jury could, often should, find of a type fundamentally different from the foreseen use of blunt force weapons such as wooden sticks, boards or bats, rubber or plastic hoses or bars, perhaps even unsharpened steel bars if not applied to the head.<sup>70</sup>
- (vii) Where D foresees the possible use of a knife to cause at least GBH, P's unforeseen use of a gun, or vice versa, may not be an act of a fundamentally different type to any act foreseen by D by virtue of difference in weapon alone.<sup>71</sup>
- (viii) If D may have foreseen only that P will use a known weapon to frighten or cause minor injury, P's use of the weapon to attack V in a manner that will (probably) cause serious injury or death is an act of a fundamentally different type. If D foresaw that P would cause GBH in a very specific limited manner, such as knee capping or slashing a cheek to cause scarring, a jury could find P's unforeseen use of the weapon to shoot or stab V in the head or heart "fundamentally different".<sup>72</sup>
- (ix) The requisite foresight may be present at the time D first joins the joint enterprise or it may be acquired as the joint enterprise is being carried out, as where D sees P produce or use a previously concealed weapon and then contemplates the possibility of its *future* or *continued future* use. If at that stage D continues to participate in the venture, subject as always to foresight also of P's possible *mens rea*, D may share P's liability for such future use.<sup>73</sup>

Obviously, the above depends much upon how contemplated and committed acts are perceived and defined. *Attorney-General's Reference (No 3 of 2004)*<sup>74</sup> provides a useful illustration. There, D and P were parties to a

<sup>69</sup> *Mok Tsan Ping* (n 25 above), *Kwok Ka Ming* (n 25 above), *Sham Ying Kit* (n 25 above), *Lam Yeung Ching* (n 64 above), *Davies v DPP* [1954] AC 378, *R v Powell, English*, (n 23 above), 27–28, *Uddin* (n 22 above), 441.

<sup>70</sup> *R v Powell, English* (n 23 above) (D, armed with a fence post may not have been foreseen by D's use of a knife), *Mok Tsan-ping ibid.* (folded wooden chairs).

<sup>71</sup> *R v Powell, English* (n 23 above), p 30F–30G per Lord Hutton, approved *Rahman* (n 7 above), p 165 at para 67 per Lord Brown and see pp 169–170, para 92 per Lord Neuberger.

<sup>72</sup> *Attorney-General's Reference (No 3 of 2004)* (n 23 above), *R v Gamble and Others* [1989] NI 268.

<sup>73</sup> *Pun Ganga Chandra (No 2)* (n 22 above), 251–252 per Keith JA. The majority disagreed on application to the facts only – and note Keith JA's rejection of the need for a separate direction that D must have had realistic time to withdraw.

<sup>74</sup> See n 23 above.

joint enterprise to threaten V which at least extended to the possibility of P discharging a gun near V in order to frighten V. In fact, P intentionally shot V in the head, causing V's death. The prosecution argued that the contemplated and committed acts were the same, discharge of a gun. The physical act was thus abstracted to the highest level and completely separated from the manner (in the air/at V) and purpose (to frighten/ to kill) with which it was done. The prosecution then argued that, as a matter of law, a difference in the state of mind with which D and P contemplated a certain act would be done could not on its own take P's act out of the scope of the joint enterprise, that is, amount to a fundamental difference. D argued that the committed act was the unforeseen, much more dangerous and therefore fundamentally different one of deliberately discharging the gun at V. The EWCA agreed with D's position, finding it more consistent with the words of Lord Hutton in *Powell, English*.<sup>75</sup>

“... there will be cases giving rise to a fine distinction as to whether or not the unforeseen use of a particular weapon *or the manner in which a particular weapon is used* will take a killing outside the scope of the joint venture, but this issue is one of fact for the common sense of the jury to decide.”  
(emphasis added)

The EWCA also stated that *Powell, English* does not include the principle that an act cannot as a matter of law, be outside the scope of joint enterprise if the only difference between the contemplated and committed acts was the state of mind of P.<sup>76</sup> That too was a matter for the jury to determine on the particular facts, although the court did say that, in their view, it was unlikely that a jury would find P's act of deliberately causing V's death by shooting was a fundamentally different type of act to the contemplated shooting of V with intent to cause some injury. A similar trust in the common sense of the jury has been expressed in HK.<sup>77</sup>

Then came the HL decision in *Rahman*. The narrow ratio of *Rahman* may be stated as follows: where D foresees that P may use a known weapon with intent to cause GBH to V, P's subsequent use of that weapon with an intention to kill cannot as a matter of law in and of itself make P's act fundamentally different from any type of act contemplated by D.<sup>78</sup>

<sup>75</sup> See n 23 above, p 31E–31F.

<sup>76</sup> See n 23 above at paras 55–56, 71.

<sup>77</sup> See *Lam Yeung Ching* (n 64 above), *Lin Siu Lun and Others* (n 22 above).

<sup>78</sup> See n 7 above, p 154 at para 28 per Lord Bingham of Cornhill, at para 30 per Lord Scott of Foscote, pp 159–160 at paras 47–49 per Lord Rodger of Earlsferry, p 164 at paras 65–66 per Lord Brown of Eaton-under-Haywood, p 167 at para 77, p 168 at para 87 per Lord Neuberger of Abbotsbury. Note the qualification, “in absence of special circumstances” at para 77.

Four of the Lords also endorsed Lord Brown's<sup>79</sup> constraining interpretation of *English*, embodied in a rewriting of Lord Lane CJ's statement in *Hyde*:<sup>80</sup>

"If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."

The EWCA applied *Rahman*'s narrow ratio in *Lewis*.<sup>81</sup>

If adopted in HK, the combined *Rahman* approaches would drastically reduce the case-specific flexibility built into *R v Powell*, *English* and recognised in *Attorney-General's Reference (No 3 of 2004)* and *Gamble* and the HK cases. This is an unnecessary and unfortunate move. The Lords in *Rahman* felt that respect for the inclusion of intent to cause GBH as a possible *mens rea* for murder required at least the narrow ratio.<sup>82</sup> With respect, this is not so. Practical difficulty in determining D's foresight of P's intentions beyond mere speculation<sup>83</sup> does not justify the rule either. Remembering the potential for disconnect between what may amount to GBH and probable death and the extreme generality with which "acts" are typically described, such as hitting, stabbing or shooting at V with no reference to parts of V's body, as between two people who attack V, both hitting, stabbing or shooting, one who is trying to kill V may be considerably more likely to achieve V's death than one who is only trying to cause lower end GBH and wishes V to live. Therefore, a move from a common intention to cause GBH of a lesser kind to an individual clear intention to kill could involve a substantial increase in the risk of death to V.

<sup>79</sup> *Rahman* (n 7 above), pp 135–136 at para 68. The Lords were particularly hostile to *Gamble* but cf *Rahman* (n 7 above), p 154 at para 29 per Lord Bingham and pp 169–170 at paras 92–93 per Lord Neuberger, both explaining *Gamble* as a "different weapon" case, but also pp 170–171 rejecting the legal possibility of fundamental difference if V is shot in the head rather than kneecapped.

<sup>80</sup> [1991] 1 QB 134, 139.

<sup>81</sup> See n 68 above.

<sup>82</sup> See n 7 above at para 25 per Lord Bingham of Cornhill, para 50 per Lord Roger.

<sup>83</sup> See n 7 above at para 24 per Lord Bingham of Cornhill, endorsed by Lord Roger at para 50. Lord Brown at paras 66, 70 and Lord Steyn at paras 32–33 are similar.



Lord Brown's rejection of any possibility that a change to a significantly more dangerous manner of use of a known weapon could amount to a fundamental difference is even more problematic. Whilst unforeseen use of a significantly more dangerous weapon may be a valid proxy for P shifting gear from risk of death as a possibility to a significantly higher level of risked or even intended death – a gear change not contemplated by D – it is not the only possible manifestation of, or a necessary step in, such a change. It is not at all clear why a change of weapon may be decisive but changes in chosen manner of use and/or intended consequences, often closely connected, as recognised in the *Attorney-General's Reference (No 3 of 2004)*, must *always* be irrelevant.

It is submitted that the restrictive approach of *Rahman* should not be adopted in HK. *R v Powell, English and Sze Kwan Lung* clearly recognise that the justification for imposing liability on D for the conduct of P that causes V's death is D's participation in the enterprise whilst subjectively reckless as to the possibility P will behave in a particular way which, whether D appreciates it or not, would create a degree of risk of V's death. Therefore, D should not be liable when P makes a unilateral switch to unforeseen conduct involving a significantly higher risk of V's death for whatever reason. The law currently recognises that "fundamental difference" has no relevance to liability where D intends P to kill V. Conversely, fundamental difference should apply when D does not even foresee the possibility P will act with intent to kill but P clearly has done so.

If further guidance as to what amounts to "act of a fundamentally different type" is thought necessary, the EWCA recently suggested the following:<sup>84</sup>

"D is not liable for the murder of V if the direct cause of V's death was conduct by P which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than conduct of the kind intended or foreseen."

Any differences in weapon, method of use or intent could all be considered by the jury in that context.

### *Residual manslaughter*

As used here, the term "residual manslaughter" refers to the possible conviction of D for manslaughter where P kills V with murderous intent in circumstances where D would have been a secondary party to the killing

<sup>84</sup> See *Mendez* (n 18 above), para 45. "Act" has been replaced by "conduct" to counter arguments that differences in intent are always insignificant. *Mendez* contains an unusually sensitive analysis of the trial court's presentation of the issues.

on the basis of joint enterprise if things had gone according to plan but the nature and extent of P's deviation from the plan means D is not guilty of murder. Prior to *R v Powell, English*, in *R v Anderson and Morris*<sup>85</sup> some EWCA courts said that if P's killing of V involved suddenly forming an intent to kill, using a weapon and acting in a way D could not have suspected, D was not responsible for P's act of killing and could not be convicted either of murder or manslaughter.<sup>86</sup> Other EWCA decisions, asserting that P's use of a known weapon in almost any manner was within the scope of the joint enterprise, sustained convictions of P for murder and D for residual manslaughter notwithstanding D did not intend or even foresee that P would use the weapon in a murderous manner or with murderous intent.<sup>87</sup> HK courts followed both lines of authority,<sup>88</sup> sometimes convicting of residual manslaughter,<sup>89</sup> sometimes applying *Anderson and Morris*.<sup>90</sup>

Then, in *R v Powell, English*<sup>91</sup> the HL, citing *Anderson and Morris*, held that since P's unforeseen use of a fundamentally different weapon caused V's death, English, who was not responsible for P's act, was also not responsible for the killing and therefore was not guilty of residual manslaughter even with the *mens rea* for murder. EW<sup>92</sup> courts, including the Lords in *Rahman*,<sup>93</sup> have accepted this position in the context of fundamentally different weapons. However, in *R v Roberts, Day and Day*<sup>94</sup> the EWCA upheld a residual manslaughter conviction, where the jury could have found that D foresaw the possibility of V being kicked in the head, as he was, but may not have foreseen the intentional infliction of GBH.<sup>95</sup>

<sup>85</sup> See n 29 above, 120.

<sup>86</sup> See also *R v Lovesey and Petersen* (1969) 53 Cr App R 461, *R v Dunbar* [1988] Crim LR 693.

<sup>87</sup> *R v Betty* (1963) 48 Cr App R 6, *R v Reid* (1975) 62 Cr App R 109, *Stewart and Schofield* (n 19 above), *R v Li and Others* [1997] EWCA 1975.

<sup>88</sup> *Tsang Wai Keung and Others v The Queen* [1973] HKLR 432 (FC), esp McMullen J's excellent dissent.

<sup>89</sup> *Siu King-him and Others v The Queen* [1980] HKLR 126 (CA), para 45, *Leung Cheuk-fan and Others* (n 41 above) at paras 52–53.

<sup>90</sup> *R v Li Chi-wing and Others* [1972] HKLR 315, *Law Siu Long* (n 29 above), *Lam Yeung Ching* (n 64 above) at paras 36, 37–42, 44 (P convicted of manslaughter and D foresaw possibility of some harm so no room for fundamental difference, if P convicted of murder, D not have been responsible for death at all).

<sup>91</sup> See n 23 above, p 30.

<sup>92</sup> *Attorney-General's Reference (No 3 of 2004)* (n 23 above) at paras 24, 52, *Uddin* (n 22 above), *R v Mitchell and King* [1999] Crim LR 496.

<sup>93</sup> See n 7 above but Lord Scott seems skeptical, p 155 at para 31.

<sup>94</sup> See n 68 above. Jackson (n 8 above), p 377 describes a similar earlier conclusion in *Gilmour* [2000] 2 Cr App R 407 (CA Crim Div NI), [2000] Crim LR 763 as controversial but does not discuss *Day* or explain why – though apparent inconsistency with *English* may well be the reason.

<sup>95</sup> *Day* was discussed in *Attorney-General's Reference (No 3 of 2004)* (n 23 above) at paras 57–61 (authority for the proposition that failure to foresee murderous intent does not of itself mean P's act was fundamentally different – but D was a case where P's conduct was of a type foreseen) and *R v Parsons* [2009] EWCA Crim 64. The treatment of *Day* by the HL in *Rahman* was variable. Compare Lord Bingham, p 153 at para 23 with Lord Brown, p 163 at para 63 (if from the beginning P intended to kill but D did not, there is no common purpose whereas in *Day* such D convicted of manslaughter).

Later, in *Yemoh*<sup>96</sup> the EWCA cited *Rahman* for the proposition that P's use of a knife with an unforeseen intention to kill could not as a matter of law be fundamentally different from the foreseen use of a lesser but, as the court found, not fundamentally different knife<sup>97</sup> to cause some harm by reason of the difference in P's intent alone. Treating both the committed and the foreseen acts as the same action of stabbing, the court consequently upheld D's conviction for residual manslaughter where P deliberately stabbed V with a long bladed knife notwithstanding D may only have foreseen the use of a Stanley pocket knife to inflict some harm.<sup>98</sup> More recently, in *R v Mendez*<sup>99</sup> a differently constituted EWCA accepted that post *R v Powell, English*, residual manslaughter cases such as *Reid*<sup>100</sup> and *Stewart and Schofield*,<sup>101</sup> possibly *Roberts, Day and Day* although that case was not cited, were no longer good law. Clearly, the application of *Rahman* to manslaughter is a work in progress.

In HK the courts appear not to have expressly considered the *Day* limitation on *R v Powell, English*.<sup>102</sup> If contemplated and committed conduct is not artificially abstracted, as it was in *Reid, Stewart and Schofield, Yemoh* and *Rahman* but was not in *English, Attorney-General's Reference (No 3 of 2004)* and *Mendez*, the occasions upon which residual liability for manslaughter would properly be open on the facts under any regime would be very few but, if there were to be such a case, what should the HK position be? Suppose D and P together engage V in a fist fight, both contemplating causing V some harm only. P delivers three quick, very hard punches to V's stomach, causing fatal internal injuries. If P struck the three blows being reckless as to some harm only, D would be liable for manslaughter. Should D still be liable for manslaughter if, unforeseen by D, P suddenly decided to cause GBH to V and struck the blows with that intent? If, as suggested above, *Rahman* is rejected or at least confined, that is, if the "subjective" part of "subjective foresight" is taken seriously, the required answer would be "no". Truly "subjective" foresight leaves no room for residual manslaughter

<sup>96</sup> See n 7 above at paras 123–126. Ormerod, "R v *Yemoh and Others* Commentary" [2009] Crim LR 888 describes this result as "harsh" but Simester and Sullivan (n 32 above), p 227 apparently have no difficulty with the case.

<sup>97</sup> This was so notwithstanding the knife used was likely to be a substantially more effectively fatal weapon than the Stanley pocket knife that was foreseen, in part because, although V was actually killed by a stab to the heart, a Stanley knife, admittedly a poor stabbing tool, could be used to kill by slashing.

<sup>98</sup> The consistency of the decision with the uncited *Roberts, Day and Day* (n 68 above) and *Gilmour* (n 94 above) was noted by Ormerod in "R v *Yemoh and Others*: Report and Commentary" (n 96 above), p 894.

<sup>99</sup> See n 18 above, para 22.

<sup>100</sup> See n 87 above.

<sup>101</sup> See n 19 above.

<sup>102</sup> Or rather the opportunity has not been recognised as in *Yeung Yeung* (n 25 above). Cf para 80 per Stock JA, citing *Day* for the proposition that what must be foreseen is a act of the same type but stressing the *R v Powell, English* foresight rule.

on such facts. Given that trying to cause GBH is more likely to lead P to commit fatal acts than trying to cause harm only, since D did not foresee even the possibility that P would try to cause GBH, from D's perspective, P's change of intent is a change that increases the risk of more dangerous conduct in much the same way as a change to a more dangerous weapon.

### Accessory Liability

Accessory liability is based upon D's voluntary and informed "aiding and abetting", "counselling or procuring" of P's commission of that offence. Procedurally, as stated in s 89 of the HK Criminal Procedure Ordinance (Cap 221):

"[a]ny person who aids, abets, counsels or procures the commission by another of any offence shall be guilty of the like offence"

and so may be charged and convicted as such, although of course D did not actually commit "the like offence."<sup>103</sup> In the *Attorney-General's Reference (No 1 of 1975)*<sup>104</sup> the EWCA said of an equivalent English provision that the forms of complicity enumerated in the section should be given their ordinary meanings if possible, starting with the assumption the four words represent four different ideas. In reality, the goal oriented pragmatism and necessary limits of the criminal law do not permit the meaning of the words to be left to the vagaries of common usage.<sup>105</sup> Furthermore, the four terms now embody three core ideas, not four: aiding, abetting-counselling<sup>106</sup> and procuring, in common parlance loosely corresponding to assisting, inciting/encouraging/compelling (hereafter collectively "encouraging") and intentionally causing.<sup>107</sup> Even these concepts are not mutually exclusive. All four terms are commonly included in the charge.<sup>108</sup>

<sup>103</sup> Jackson (n 8 above), p 335. Nor does the section create a general offence of being a secondary party – secondary party liability remains a matter of common law.

<sup>104</sup> [1975] QB 773 (CA), 779 per Lord Widgery CJ.

<sup>105</sup> Even if "abets" has a common usage in HK, which is doubtful. Historically, "aiding and abetting" tended to refer to the conduct of a principal in the second degree, that is, a secondary party present at the commission of a felony, *Attorney-General v Li Kai-Tung* [1968] HKLR 421. "Counselling and procuring" referred to the accessory before the fact, that is, a secondary party who acted before the felony was committed. The distinction is no longer maintained, *R v Kong Wing-fung* Crim App No 429 of 1990, 1 May 1992, [1992] HKLY 298, Jackson (n 8 above), p 334.

<sup>106</sup> Jackson (n 8 above), p 339 notes that the two terms are generally said to have similar meanings in HK.

<sup>107</sup> Ormerod (n 16 above), p 185.

<sup>108</sup> *The Queen v Kwan Chi Hung* [1993] 2 HKCLR 113 (CA) (Jury need not be unanimous as to whether convicting as counsellor or aider). Charging D as a principal is discouraged, Jackson (n 8 above), p 338. If the prosecution chooses to be more specific and allege, for example, aiding and abetting only, then conviction may require and be confined to proof of that particular form of assistance, *The Queen v Yu Wing and Others* [1986] HKLR 319, paras 40, 49–51, *R v Au Chi Kong* Crim App No 358 of 1986, 31 Oct 1986.

## *Actus Reus*

### *The ordinary case*

There must be some conduct by D capable of helping, encouraging or causing P to commit the offence. That conduct will likely differ from the conduct comprising the offence. It may occur before or during, at the scene of or away from, the actual commission of the offence.<sup>109</sup>

There must also be some connection between the conduct and P's commission of the offence.<sup>110</sup> Clearly if P did not see D's proffered weapon, read D's letter of encouragement or drink the orange juice spiked by D before committing the offence D had in mind, D's moral culpability is clear but D cannot be said to have assisted, encouraged or caused P to commit that offence. D merely attempted to do so and failed.<sup>111</sup> However, the precise nature of the connection required is not always clear and "one size" may not fit all. Certainly, for aiding and counselling the prosecution NEED NOT prove that "but for" D's aid or counselling, P would not have committed the offence at all or in the way P did.<sup>112</sup> In *Bryce* the EWCA explained that:<sup>113</sup>

"[T]he requirement for a causal connection is given a wide interpretation where a secondary party prior to the crime has counselled or assisted the perpetrator in actions taken by him which are directed towards the commission of the crime eventually committed."

In such cases, only the intervention of an "overwhelming supervening event" or D's active withdrawal will preclude D's liability for P's crime.<sup>114</sup> On the facts, *Bryce's* reluctant assistance to P, by arranging and bringing P to a safe house within walking distance of V's house, was not displaced by the passing of 12 hours before the killing of P's indecision and/or further encouragement and assistance from the original instigator during that time.<sup>115</sup>

<sup>109</sup> *Kong Wing-fung* (n 105 above), *Blakely and Sutton v DPP* [1991] RTR 405, 411, *Able* [1984] 1 QB 795.

<sup>110</sup> Ormerod (n 16 above), pp 203–204, *Simester and Sullivan* (n 32 above), pp 203–204, *R v Luffman* [2008] EWCA Crim 1379 at paras 42–43.

<sup>111</sup> Attempting to aid, abet, counsel or procure an offence is not a valid charge in HK, Crimes Ordinance (Cap 200), s 159G(5).

<sup>112</sup> *Kong Wing-fung* (n 105 above) at para 32, *Able* (n 109 above), p 812, *R v Calhaem* [1985] QB 808, *R v Mendez* (n 18 above) at para 23.

<sup>113</sup> See n 7 above, p 612. This is consistent with *Calhaem* *ibid.* 817F-G.

<sup>114</sup> Ormerod (n 16 above), p 186 interprets *Bryce* as importing a true causation element into "aiding" but, with respect, this is not so. The court merely rejects *Bryce's* argument of remoteness on the facts.

<sup>115</sup> Cf *Calhem* (n 112 above), *Luffman* (n 110 above) at para 41. (D counselled P to murder V, P first decided not to kill V but reacted to V's screams or resistance. Even if P's intent formed later, D's belief in P's intent was clear and P was still acting within D's authority).

For aiding specifically, conduct that “might well” have assisted P, including affecting the manner or increasing the possibility, speed, effectiveness or safety of the offence has been found sufficient.<sup>116</sup> Consensus between D and P, though common, it is not required.<sup>117</sup> Actual assistance, such as D’s intentional distracting of a policeman, unforeseen, unwanted and unknown by P may be enough. In contrast, P must have been aware of D’s counselling and have acted within the boundaries of it for counselling to have occurred,<sup>118</sup> but more certain proof that P was actually encouraged by D’s conduct in particular is generally not required, as where D is one member of an audience<sup>119</sup> or P’s commitment to the offence was already strong,<sup>120</sup> although it is possible for D to raise a doubt on the particular facts.<sup>121</sup>

As to procuring, in *AG’s Ref (No 1 of 1975)*<sup>122</sup> Lord Widgery CJ defined procuring as “to produce by endeavour”. Hence, procuring requires both directed effort and “a causal link between what [D] does and the commission of the offence”. P may or may not be aware of D’s contribution,<sup>123</sup> but where P makes a free and informed choice, aiding or counselling may be a more apt characterisation than procuring.<sup>124</sup>

### Omissions

Aid or encouragement may be given by a failure to exercise a *legal* obligation to prevent or control the relevant acts of P.<sup>125</sup> In *HKSAR v Chu Wai San and [1991] 2 HKLR 537, Others*, Stone J, having noted this rule concluded:<sup>126</sup>

“[I]n instances in which a majority shareholder and director of a private company becomes aware that this corporate entity is being used [by another]

<sup>116</sup> Ormerod (n 16 above), p 186.

<sup>117</sup> Jackson (n 8 above), p 341, Ormerod (n 16 above), p 200.

<sup>118</sup> *Kong Wing-fung* (n 105 above) at paras 29–34, *Calhaem* (n 112 above), p 817, *R v Clarkson* [1971] 1 WLR 1402.

<sup>119</sup> *Wilcox v Jeffrey* [1951] 1 All ER 464 but cf *Clarkson* *ibid.* p 1407.

<sup>120</sup> *R v Giannetto* (1997) 1 Cr App R 1 (the “Oh goody” case) but, again, *Clarkson* *ibid.* appears contrary.

<sup>121</sup> “Participating in Crime” (n 6 above) at paras B.62–B.63. See also para B.55 (rebuttable presumption of encouragement arises once conduct capable of encouraging and communication have been proved).

<sup>122</sup> See n 104 above, p 779F–G.

<sup>123</sup> In *Attorney-General’s Reference (No 1 of 1975)* the EWCA found that D who secretly put strong spirit into P’s drink knowing P would soon drive, had a case to answer on a charge of procuring P’s offence of driving with excess alcohol when P, without knowing of the trick, committed that strict liability offence.

<sup>124</sup> *Attorney-General’s Reference (No 1 of 1975)* *ibid.* pp 779–780.

<sup>125</sup> *HKSAR v Chu Wai San and Others* [2008] HKLRD 18 at paras 48–49.

<sup>126</sup> *Ibid.* p 40 at paras 90–91.

as a vehicle for fraud, such person ... can and must move to control the activities of the company in order to preclude further instances of corporate criminality.”

Failure to make such a move could supply the *actus reus* for a finding of secondary liability in subsequent wrong-doing.

Whether failure to exercise a mere power to control or intervene amounts to assistance or encouragement is more doubtful.<sup>127</sup> The starting point is that the common law knows no general legal obligation on the part of bystanders to discover, intervene to prevent or to report criminal activity. Therefore failure to report, discourage, prevent or report P's known criminality may not amount to encouragement or aiding.<sup>128</sup> Similarly, mere presence, not prearranged and without any outward manifestation of approval or prior agreement generally does not amount to encouragement either.<sup>129</sup> However, informed intentional presence without opposition or even mere failure to object may be cogent evidence of wilful encouragement,<sup>130</sup> perhaps amount to actual encouragement, especially where control is a real option as with employers,<sup>131</sup> landlords or licensees<sup>132</sup> and vehicle owners or driving instructors.<sup>133</sup> In *Chu Wai San* the Court of Appeal concluded that findings of liability based on omissions were “peculiarly fact specific” and needed to be determined case by case. This seems too uncertain a starting point. At least beginning with a presumption that D's informed failure to exercise a specific legal power to intervene and prevent the crime encouraged or assisted would be a better reflection of current decisions.

<sup>127</sup> See “Participation in Crime” (n 3 above) at para 3.41, recommending that failure to exercise the general power we all have to prevent crime should not be a sufficient *actus reus* even if P is encouraged by that failure and see Andrew Ashworth, *Principles of Criminal Law* (Oxford, Oxford University Press, 6th edn, 2009), pp 411–412.

<sup>128</sup> *Chu Wai San* (n 125 above), p 29 at para 47, *Tse Wan Yuen v The Queen* [1969] HKLR 261, *R v Tilley* [2009] 2 Cr App R 511.

<sup>129</sup> *The Queen v Lau Mei-wah and Lam Chi-kwan* CACC 550/1991, 13 Oct 1992, *R v Lee Chi Wai* (1993) Cr App R No. 306 of 1992, 18 Aug 1993 at paras 42–43, *R v Yeung Kit Yung* (1993) Cr App No. 15 of 1993, 13 Oct 1993, *Coney* (1882) 8 QBD 534, *R v Allan* [1965] 1 QB 130, *Clarkson* (n 118 above), *R v Evans* [2001] EWCA 730, *S v DPP* [2003] EWHC 2717, *R v Rose* [2004] EWCA Crim 764.

<sup>130</sup> *HKSAR v Lam Wai Leung* CACC 207/2000, 10 Apr 2001 at paras 37–38, citing *Coney ibid*.

<sup>131</sup> *R v JF Alford Transport* [1997] 2 Cr App R 326.

<sup>132</sup> *R v Chan Wing Hang* [1996] 3 HKC 225, *HKSAR v Tsang Wai Chung* CACC 527/2002, 19 Dec 2003, *Tuck v Robson* [1970] 1 WLR 741 (DC), cf *HKSAR v Sze Siu-kin* CACC 125/1998, 24 Nov 1998.

<sup>133</sup> *Du Cros v Lambourne* [1907] 1 KB 40, *Rubie v Faulkner* [1940] 1 KB 571 (perceived as a duty case but D was only as instructor), *R v Webster* [2006] 2 Cr App R 6, [2006] EWCA Crim 415. *Webster* is a strong case on the requirement that D must realise the need for intervention when this was a practical possibility.

## Mens Rea

### *The strongest case*

Where there is no agreed or shared common purpose between D and P, the *mens rea* requirements for P and D can not be the same. D must be proved to have some form of *mens rea* with respect to (i) D's own conduct and circumstances said to amount to assisting, encouraging or procuring P's offence and (ii) the present and/or future circumstances, conduct, consequences (if relevant) and *mens rea* required for the commission of P's offence (commonly referred to as "the essential matters" for commission of the offence).<sup>134</sup>

The strongest form of *mens rea* known to the common law is direct intention. Surely, D will be liable as an accessory to P's murder of V if D commits the *actus reus* of aiding and abetting P to commit murder while *intending* in the sense of desiring (i) that P *will*, acting with the *mens rea* for murder, cause the death of V and (ii) that D's conduct *will* aid and abet P in such killing of V. It is submitted that this is so even if D does not know or believe the required circumstances, conduct, *mens rea* and consequence *will* occur but only *hopes* that this will be so.<sup>135</sup> In all such cases there is a true parity of culpability between D and P even if P knows nothing of D's hopes or conduct.

But, granted direct intention will always be enough, is it always required?

### *Mens rea as to essential matters for commission of the offence*

The modern starting point must be Lord Goddard's statement in the EW case of *Johnson v Youden*: "Before a person can be convicted of aiding and abetting the commission of an offence, he must at least know all the essential matters which constitute that offence."<sup>136</sup> "Knowledge" may include "wilful blindness",<sup>137</sup> that is, deliberating refraining from inquiry to avoid knowing what is strongly suspected to be the truth,<sup>138</sup> but certainly not subjective recklessness, let alone mere negligence.<sup>139</sup>

<sup>134</sup> Jackson (n 8 above), pp 347–348, Simester and Sullivan (n 32 above), p 207, "Participation in Crime" (n 3 above) at paras B.67–B.68.

<sup>135</sup> See "Participating in Crime" (n 3 above), p 73, Example 3S and p 74 at paras 3.96–3.97.

<sup>136</sup> [1950] 1 KB 544, 546.

<sup>137</sup> *Chu Wai San* (n 125 above), p 34 at para 59, *Li Ping-Lun and Another* [1977] HKDCLR 32, *JF Alford Transport Limited* (n 131 above), *R v Roberts (David Geraint)* [1997] RTR 462, 471.

<sup>138</sup> *Roper v Taylor's Garages (Exeter)* [1951] 2 TLR 284 and see Simester and Sullivan (n 32 above), pp 143–144.

<sup>139</sup> *Chu Wai San* (n 125 above), 33–34 at paras 60–63, cf Ashworth (n 127 above), pp 184–185 and *Li Ping-Lun* (n 137 above) who refer to willful blindness as "reckless knowledge" and "recklessness".



Lord Goddard's statement has been accepted in EW<sup>140</sup> and HK.<sup>141</sup> It applies also to counselling and procuring. So Lord Widgery concluded in *Attorney-General's Reference (No 1 of 1975)* that D could have been guilty of procuring P's offence of driving with excess alcohol if D knew that P was going to drive and "... also knew that the ordinary and natural result of the additional alcohol added to [P's] drink would be to bring [P] above the recognised limit ..."<sup>142</sup>

As to whether knowledge here includes belief, Simester argues that committed belief that a circumstance will exist or conduct will be committed in the future is knowledge in this context.<sup>143</sup> Ormerod disagrees but accepts that the courts have taken a "relaxed" approach to the issue.<sup>144</sup> Certainly, no EW or HK court has found D's committed belief that essential matters will exist in the future to be insufficient where D's expectations have been fulfilled.

As to the level of detail D must know, in *Bainbridge*<sup>145</sup> D supplied oxyacetylene cutting equipment to P who used it to break into a bank. The court held that to be an accessory to the break-in by virtue of such supply, D must have known the type of crime that would be and was in fact committed – in this case breaking and entering for the purpose of theft. Belief the equipment would be used for a different type of crime (cutting up stolen goods) or merely for "something illegal" was not sufficient. However, D need not know the precise details of time and place.

On its facts, *Bainbridge* was a limited pragmatic accommodation of realities but still insisting upon substantial *knowledge* of P's offence as a foundation for liability.<sup>146</sup> HK courts have accepted it as such.<sup>147</sup> Potential

<sup>140</sup> "Participating in Crime" (n 3 above). para 2.48, B.81–B.100, *Webster* (n 133 above), *Bryce* (n 7 above), *Director of Public Prosecutions for Northern Ireland v Maxwell* [1978] 1 WLR 1350, *R v Clarke and Another* [2010] NICC 13, *R v Roman Sterecki* [2002] EWCA Crim 1662, para 9, *Ferguson v Weaving* [1951] 1 KB 814, *JF Alford Transport Limited* (n 131 above).

<sup>141</sup> *Chu Wai San* (n 125 above), p 31 at para 52, *R v Chung Yuk Kuen* [1987] HKEC 107, *Tse Wan-Yuen* (n 128 above), *Chan Bun v The Queen* [1967] HKLR 545, *Li Ping-Lun* (n 137 above).

<sup>142</sup> See n 104 above, 779. See also *Giorgianni v The Queen* (1995) 156 CLR 473, pp 487–488 per Gibbs CJ, 493 per Mason J (knowledge required for all forms of accessory).

<sup>143</sup> Simester, "Mental Element" (n 6 above), p 587. Suspicion of any degree is insufficient, *R v Moys* (1984) 79 Cr App R 72, *R v Forsyth (Elizabeth)* [1997] 2 Cr App R 299.

<sup>144</sup> Following *R v Saik* [2007] 1 AC 18, [2006] UKHL 18, Ormerod (n 16 above), p 199 insists that "... knowledge of circumstances means true belief as to those circumstances and where the circumstances have yet to arise or materialize, D cannot know them because they are not yet in existence."

<sup>145</sup> [1960] 1 QB 129.

<sup>146</sup> See "Participating in Crime" (n 3 above) at paras B. 83–B.89.

<sup>147</sup> *R v Lau Chi Kin* [1988] HKLR 282, *The Queen v Ng Wai Hung* Crim Appeal No 479 of 1990, 12 June 1991 at para 6 ("there must not be merely suspicion, but knowledge that a crime of the type in question was intended"), *R v Fok Kau* [1994] 1 HKCLR 122 (where D counseled the theft of a car, knowledge stolen car would be LEXUS not required).

problems of classification of types of offences have been left to the academics.<sup>148</sup> Subject to standard transferred malice doctrine, just as a joint enterprise may be made narrow and precise so may D make specific details, such as the identity of a target, essential matters, precluding D's liability for P's deliberate choice of a different target.<sup>149</sup>

In *Director of Public Prosecutions for Northern Ireland v Maxwell*,<sup>150</sup> the House of Lords held that when D guided P to the location of a fire-bombing offence, *knowing* that a "military" operation involving either a bomb, shooting or incendiaries *would* take place at or near that place that night, that is, *knew* that one or more of a contemplated range of offences *would be committed*, D aided and abetted the offence within that range that P actually chose. Lord Scarman, acknowledging a widening of *Bainbridge*, said:<sup>151</sup> "An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory *contemplates* the choice *will* be made." (emphasis added).

Up to this point we have talked only of accessorial liability for target offences as that term is defined at the beginning of this article. Does accessorial liability stop there or is there general accessorial liability for merely risked offences?

In the opinion of this writer, and the Law Commission,<sup>152</sup> Lord Scarman's use of "*will* be made" rather than "*might* be made" in *Maxwell* is vitally significant. However, the case<sup>153</sup> has been cited in support of claims that subjective foresight of the possible existence or occurrence of essential matters is sufficient for secondary party liability.<sup>154</sup>

Recklessness as to a matter of detail was raised directly in *Carter v Richardson*.<sup>155</sup> D, a driving instructor, was charged with aiding P, the student, to drive with excess alcohol. D did not know P's actual blood/alcohol level but D did know P had drunk enough to make it virtually certain P was over the legal limit – enough for liability on ordinary principles.

<sup>148</sup> See Jackson (n 8 above), p 348, Ormerod (n 16 above), pp 203–204, LC Participating in Crime (n 3 above) at paras 2.55–2.56.

<sup>149</sup> See "Participating in Crime" (n 3 above) at paras 2.53, B.90–B.92.

<sup>150</sup> See n 140 above.

<sup>151</sup> *Ibid.* p 1362.

<sup>152</sup> "Participating in Crime" (n 3 above) at para B.108.

<sup>153</sup> See especially Sir Robert Lowry CJ's formulation at (n 140 above), p 1374G.

<sup>154</sup> See, for example, *Blakely and Sutton* (n 109 above), *Rook* (n 30 above), *Bryce* (n 7 above). Contrariwise, none of the few HK citations of *Maxwell* accept this interpretation of the case: *R v Lee Yiu-Kwong* [1985] HKLR 184, *The Queen v Mok Wei Tak* Crim app No 196 of 1985, 15 Aug 1986, *Ng Wai Hung* (n 147 above), *Fok Kau* (n 147 above), *Chu Wai San* (n 125 above).

<sup>155</sup> [1974] RTR 314.

However, the EWCA said that knowledge that P was “probably” over the limit would have been sufficient for liability.<sup>156</sup>

The language of recklessness and foresight has also been used in the context of aiding or procuring dangerous driving offences<sup>157</sup> – but “dangerous” as a concept involves risk of harm and, in the context of vehicular homicide offences P and D are constructively liable for the unforeseen consequence of death anyway so that loose talk of recklessness is not surprising. Significantly no case has suggested that anything less than knowledge of the relevant vehicle or driving defect and of its potential for harm is sufficient. *Lee Yiu-Kwong*<sup>158</sup> provides a good HK example.<sup>159</sup>

More recently, several EWCA cases, *Rook*,<sup>160</sup> *Reardon*,<sup>161</sup> *Bryce*<sup>162</sup> and *Webster*,<sup>163</sup> have expressly held that D’s contemplation or foresight that P *probably will, might or is likely to* commit a particular offence, that is, subjective recklessness as to P’s future commission of the offence, is sufficient for this aspect of accessory liability. These decisions implicitly assume there is only one foundation for secondary party liability but that does not mean, as the court in *Bryce* recognised,<sup>164</sup> that decisions setting out the test to be applied in deciding whether P’s conduct in committing an offence had gone beyond the scope of a joint enterprise are of assistance in deciding whether D had joined the joint enterprise in the first place. Nevertheless, these decisions all eventually applied the joint enterprise collateral offence liability test of “foresight of a possibility” to accessorial liability for any offence. Paradoxically, if accepted, this move would certainly mean that accessorial liability and joint enterprise liability are not the same.

Academic opinion as to the legal significance of these decisions is mixed. Graham Virgo, whilst making the important concession that knowledge may continue to be an appropriate standard for existing facts,

<sup>156</sup> See also *Blakely and Sutton* (n 109) above (objective recklessness as possibility P would commit the target offence clearly insufficient but sufficiency of subjective recklessness left open) and *Lynch v DPP for Northern Ireland* [1975] AC 653, 698G-699B per Lord Simon, cited in *Bryce* (n 7 above), p 610 at para 69 (“foreseen that the object or service supplied will probably (or possibly and undesired) be used for the commission of a crime” – a terrorist case involving a reluctant driver unable to rely on duress).

<sup>157</sup> *Robert Millar (contractors) Ltd and Robert Millar* (1970) 1 All ER 577, *Webster* (n 133 above).

<sup>158</sup> See n 155 above and commentary in Jackson (n 8 above), pp 351–352.

<sup>159</sup> See also *Mok Wei Tak* (CA) (n 154 above) in which the HKCA said that if D knew P’s standard of living, “... [recklessness] as to whether or not an explanation satisfactory to the court could be given ...” would be sufficient *mens rea* for aiding and abetting an offence under section 10(1)(a) of the Prevention of Bribery Ordinance (Cap 201). On appeal, the PC noted that the trial judge had not used “reckless” nor counsel argued the point but the PC would decline to express an opinion as to whether such recklessness was sufficient, *Mok Wei Tak* (n 1 above), p 349D–349E.

<sup>160</sup> See n 30 above. Both *Maxwell* and joint enterprise collateral offence cases were cited.

<sup>161</sup> [1998] EWCA Crim 613. Only *Maxwell* and *R v Powell, English* were cited.

<sup>162</sup> See n 7 above at para 58. CA relied on *Rook* (n 30 above) but also cited *Johnson v Youden* and *Maxwell*.

<sup>163</sup> See n 133 above. *Johnson v Youden* and *R v Powell, English* were cited.

<sup>164</sup> See n 7 above at para 54.

sees these decisions as indicating a clear and rational structure based upon subjective recklessness as to future facts – including the future state of P’s mind – “fighting to get out”.<sup>165</sup> Simester argues that the decisions went further than needed to decide the issues on appeal and inappropriately assimilated accessorial target and joint enterprise collateral offence liability while ignoring the crucial importance of D’s responsibility generating commitment to the initial joint enterprise in the latter.<sup>166</sup> The Law Commission also disapproves of these decisions.<sup>167</sup>

Happily, in HK, the matter is presently settled by the emphatic reaffirmation of a full knowledge requirement for accessorial liability in *Chu Wai San*,<sup>168</sup> the CA expressly approving *Johnson v Youden* and *Giorgianni v The Queen*,<sup>169</sup> a 1995 decision of the High Court of Australia concerning culpable driving causing death. The HKCA approved the High Court’s “line in the sand” between specific intent, knowledge and wilful blindness (virtual knowledge), which are “the necessary and requisite intent for secondary liability”, and recklessness and negligence, which are insufficient.<sup>170</sup>

Subject to what is said below as to an intention to aid and abet, this is consistent with the 1980 HK case of *Lam Tai-lit and Another v The Queen*<sup>171</sup> in which it was said that a professional person who prepares legal documents *knowing* they are to be used in a fraud or a shopkeeper who supplies a customer with a mask *knowing* it will be used in the burglary of a factory that evening will be parties to a conspiracy to defraud and conspiracy to burgle, respectively, to the completed offences if they occur. The fact that the professional and the shopkeeper appear to be acting in the ordinary course of their employment or business makes no difference – they know so they must not assist.<sup>172</sup>

Finally, a word about consequences. It is accepted that, as with joint enterprise, D is liable for unforeseen fatal consequences in homicide cases to the same extent as P.<sup>173</sup>

<sup>165</sup> “Making Sense of Accessorial Liability” (n 6 above).

<sup>166</sup> “Mental element” (n 6 above), p 586, Simester and Sullivan (n 32 above), pp 215–216. This results from treating cases such as *Rook* and *Bryce* as accessorial rather than joint enterprise cases.

<sup>167</sup> “Participating in Crime” (n 3 above) at paras B.109–B.121. The LC correctly recognised *Rook* as a joint enterprise case and the error of the *Bryce* interpretation of *Rook* as authority for the proposition that foresight of a real risk that P may commit an offence is a sufficient *mens rea* for secondary liability for that offence if committed even when no joint enterprise exists.

<sup>168</sup> See n 125 above.

<sup>169</sup> See n 142 above.

<sup>170</sup> *Ibid.* at paras 60, 63.

<sup>171</sup> CACC 248/1980, 22 Oct 1980.

<sup>172</sup> This result has caused some disquiet amongst academics, see Jackson (n 8 above), pp 349–350, but need not be the impediment to commerce or threat to generous hosts that some have feared if it is remembered that “knowledge” really means knowledge, and not merely suspicion or foresight of possibilities.

<sup>173</sup> “Participating in Crime” (n 3 above) at paras B.96–B.99, Simester and Sullivan (n 32 above), pp 219–220.

As to offences requiring intent as to a consequence such as causing GBH with intent to cause GBH or at least foresight of the possibility of a certain consequence, such as recklessly causing criminal damage, the principle behind *Johnson v Youden* would suggest D is only liable if D intends or believes the relevant consequence *will* occur, although no consequence was involved in that case. The Law Commission agrees.<sup>174</sup> Ormerod suggests consequences cannot be known before they occur but foresight of consequences is generally required.<sup>175</sup>

*Mens rea with respect to D's own conduct*

All agree that D need not be proved to have encouraged or assisted P, intending in the sense of desiring that P will commit the target offence, although direct intention is of course very common. The paid shopkeeper noted above may be indifferent to or horrified at the prospect but such indifference or horror does not in itself preclude conviction. It is submitted that even for procuring, although D almost always will be trying to cause P to commit the offence, this may not be necessary.<sup>176</sup>

Nevertheless, it is commonly said that D must intend D's conduct to aid, counsel or procure P's commission of this offence, that is, the consequence of assisting, encouraging or causing P to commit the offence must be "intended". If desire that the offence be committed is not necessary, what does this really mean? Certainly, D's conduct must be voluntary in the sense of deliberate and D must know or believe that D's conduct is *capable* of assisting, encouraging or causing P to commit the offence.<sup>177</sup> Must the prosecution go further and prove that D's assistance, encouragement or causing of P's commission of the offence is an object that D is trying to achieve (direct intent) or at least knows/believes is virtually certain to be achieved by D's conduct (oblique intent)?

The Law Commission denied that current law requires that D must act *in order to* assist or encourage P and finds authority as to whether D must believe D's conduct *will* rather than merely *may* assist or encourage P indecisive.<sup>178</sup> The HKCA assumed intent to aid or encourage was required in *Chu Wai San* but the point was not in issue.<sup>179</sup> In *Bryce* the

<sup>174</sup> "Participation in Crime" (n 3 above) at para B.102.

<sup>175</sup> See n 16 above, p 202. Perhaps Ormerod is driven to this position by rejection of belief as a form of knowledge or intent – but the only authorities cited in support are joint enterprise homicide cases.

<sup>176</sup> *General's Reference (No 1 of 1975)* (n 104 above), 779 quoted above refers only to knowledge, not intent, motive or desire.

<sup>177</sup> Jackson (n 8 above), p 349, Simester and Sullivan (n 32 above), pp 207–216, Ormerod (n 16 above), pp 194–198, "Participating in Crime" (n 3 above) at para B.75, *Bryce* (n 7 above) at paras 41 and 70.

<sup>178</sup> "Participating in Crime" *ibid.* at paras B.70–B.76.

<sup>179</sup> See n 125 above at paras 62–63.

EWCA expressly held that where D is charged on the basis of conduct that has<sup>180</sup>

“... assisted steps taken by P in the preliminary stages of a crime later committed by P in the absence of D, it is necessary for the Crown to prove intentional assistance by D in the sense of an intention to assist (and not to hinder or obstruct) P in steps which D knows are steps taken by P towards the commission of the offence.”

In practice, of course, proof of D's knowledge of (i) the essential matters of the offence and (ii) that particular conduct *would*, perhaps merely *could* assist, encourage or cause P to commit the offence, together with D's deliberate choice of that conduct, will generally support an inference that D intended to aid, encourage or procure P's commission of the offence. But the EWCA is surely right to insist, as they did in *Bryce*,<sup>181</sup> that if, on the evidence, there is a reasonable possibility that D did not intend to assist, encourage or cause P to commit the offence in this particular case – a reasonable possibility that D's real intention was to hinder or delay P or facilitate P's arrest – D would not be guilty.

In its recommended scheme, the Law Commission takes a different line: proof that D knew D's conduct was capable of aiding or encouraging P in the commission of the offence would be sufficient for this aspect of liability but it would be a defence for D to prove on the balance of probabilities that D acted with the purpose of preventing P's offence or another offence or harm and it was reasonable for D to act as he did.<sup>182</sup> With respect, it is not at all clear why the legal burden of proving the absence of an intention to assist, encourage or cause should be transferred to D in this way.

### ***Accessory Liability for Collateral Offences***

Consider the following: Without entering into an agreement with P to commit any other offence, D sells information to P, intending that P will use the information to burgle an office block, knowing that P will carry a gun and foreseeing that P may use the gun to cause at least GBH to anyone in the office block; P uses the information to plan a burglary, carries out the burglary and, during the course of the burglary, intentionally shoots and kills a cleaner, V, who interrupts P.

<sup>180</sup> See n 7 above at para 70.

<sup>181</sup> *Ibid.*

<sup>182</sup> See “Participating in Crime” (n 3 above), p 159 (cl 7 of the draft Bill). Note that the defence would also be available to participants in a joint enterprise.

Simester asserts that D is not liable for P's murder of V because, even if mere foresight of a possibility that P might commit murder is sufficient *mens rea* for accessorial liability, which he denies, accessorial liability would require D to actually aid, encourage or cause P's offence of murder and D has not done that.<sup>183</sup> Jackson takes this as the position in HK also.<sup>184</sup> In fact, both commentators assert that joint enterprise liability and accessorial liability are distinct in large part because only joint enterprise liability extends to collateral offences foreseen as possibilities only.

Contrariwise, Ormerod argues, consistent with his view and that of Professor Sir John Smith that joint enterprise liability is only a form of aiding and abetting, that D would be liable for P's murder of V.<sup>185</sup> Sir John explained parasitic liability as dating back to the ancient rule that, "[i]f a person instigates another to commit a crime, and the person so instigated commits a crime different from the one which he was instigated to commit, but likely to be caused by such instigation, the instigator is an accessory before the fact."<sup>186</sup> *Chan Wing Siu* simply narrowed the old objective test of probability to the modern one of what the instigator subjectively foresaw.

In *Hyde*,<sup>187</sup> Lord Lane LCJ specifically approved Professor Sir John Smith's view of D's continued participation in a venture with P, knowing but not agreeing that P may act with murderous intent in the course of that venture as giving "... assistance and encouragement to A in carrying out an enterprise which B realises may involve murder."<sup>188</sup> Why should one form of assistance and encouragement result in liability for collateral offences but not others?

In *Uddin*, the EWCA said of the participants in spontaneous violence mentioned above:<sup>189</sup>

<sup>183</sup> See "Mental element" (n 6 above), 593–595.

<sup>184</sup> See n 8 above, p 337.

<sup>185</sup> As to Professor Ormerod, see n 16 above at para 8.3.4.4. For Sir John's most comprehensive explanation of his position, see "Criminal liability of accessories: law and law reform" (n 18 above).

<sup>186</sup> This form of words is taken from L. F. Sturge, *Sir James Fitzjames Stephen's A Digest of the Criminal Law* (London: Sweet & Maxwell Ltd., 9th ed, 1950), Article 20. Sir John cited article 41 of Stephen's Digest (4th edn, 1887). See also Glanville Williams, *Criminal Law: The General Part* (London: Stevens and Sons Limited, 1961), 402, describing the responsibility of secondary parties for "probable consequences". J.W. Cecil Turner, *Russell on Crime Volume I* (London: Stevens & Sons Ltd, 12th edn., 1964), 143–145 subsumes all discussion of "common purpose" within his discussion of principals in the second degree but spoke of liability for probable consequences in the context of accessories before the fact, *ibid.* 160–162, recommending a move to a subjective rather than an objective test.

<sup>187</sup> See n 80 above, p 139C–139D.

<sup>188</sup> See *R v Wakely* [1990] Crim LR 119 *Commentary* for Professor Smith's original remarks.

<sup>189</sup> See n 22 above, 440F–G.

“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, unless one of the attackers completely departs from the concerted actions of the others and in so doing causes the victim’s death.”

Sullivan cites *Uddin* for the proposition that “... liability for a collateral offence can be based on an initial act of complicity as an alternative to a joint venture.”<sup>190</sup>

And we have seen that in *Rahman*, Lord Brown strongly approves the words of Lord Lane LCJ in *Hyde*. Lord Brown pointed out that there can be no common purpose if P always intended to kill and D always intended something less before adding:<sup>191</sup>

“Once the wider principle was recognised (or established), as it was in *Chan Wing-Siu* ... and *Hyde* ..., namely that criminal liability is imposed on anyone *assisting or encouraging the principal* in his wrongdoing who realises that the principal may commit a more serious crime than the secondary party himself ever intended or wanted or agreed to, then the whole concept of common purpose became superfluous.” (emphasis added)

If this is right then, since *Chan Wing-Siu* is certainly the law in HK, in HK at least accessory liability does extend to collateral offences on the basis of the foresight principle – but the point has never been recognised.<sup>192</sup>

But, since the effect of these authorities is still disputed, what of principle? D’s voluntary and informed (intentional) giving of assistance or encouragement to P, *knowing* that P *will* commit the target offence of burglary, seems to involve a normative shift different in form but morally comparable to that of D2 who *agrees* with P that the burglary *will be* committed but provides no further assistance or encouragement. If this is accepted then both are equally responsible for the target offence of burglary and should be equally responsible for the possibly unwanted but *foreseen* collateral offence of murder as well. Likewise, Seller who

<sup>190</sup> See n 6 above, 27. Like Ormerod (n 16 above) at para 8.3.4.4. Sullivan also cites *Gilmour and Readon*. See also *Davies v DPP* (n 69 above).

<sup>191</sup> See n 6 above at para 63. See also para 65 in which Lord Hutton’s preference for the use of the “foresight” passage in *Anderson & Morris* is cited in support.

<sup>192</sup> *Pun Ganga Chandra (No 2)* (n 22 above) comes closest to *Uddin* on its facts but uses only the language of joint enterprise.



sells a gun to P, licensed or otherwise, not merely suspecting but knowing P intended to use the gun in an armed robbery, has consciously risked and assisted and should be responsible for the armed robbery – and also any offences involving the foreseen use of the gun by P during the course of that robbery. Granted most retail sellers will not meet the *mens rea* requirements, nevertheless, if they do, they should be liable. The absence of an agreement with P should not save them.

### Secondary Party Liability for a More Serious Crime

In *Sze Kwan Lung*, the HKCFA asserted:<sup>193</sup>

“... the person charged with aiding, abetting, counselling or procuring an offence can only be convicted if the principal offender, charged at the same trial,<sup>194</sup> is found guilty of the relevant principal offence ... [but] a participant in a joint enterprise can be convicted of murder even though the actual killer is acquitted outright or convicted of the lesser offence of manslaughter only.”  
(Footnote inserted by author)

With respect, this statement is suspect in several respects. First, Ormerod,<sup>195</sup> Simester and Sullivan<sup>196</sup> and Jackson<sup>197</sup> all treat the principles involved here as similarly applicable to both types of secondary party – so the CFA’s position of one law for accessories and another for parties to a joint enterprise is surprising.

Curiously, in the first case cited by the CFA in support, *R v Howe*,<sup>198</sup> the question put on appeal was in terms of “inciting or procuring by duress”, that is, accessory liability, and the quotation from Lord McKay is perfectly general:<sup>199</sup>

“where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not ... result in a compulsory reduction for the other participant.”

<sup>193</sup> See n 19 above at para 19.

<sup>194</sup> Even if D can only be convicted if P is guilty, where D and P are tried separately, it may be that, on the evidence presented to them, the jury in D’s trial was satisfied that P was guilty of murder and D a party to it but the jury at P’s trial was not satisfied that P committed murder. The result of whichever trial occurs first is not admissible in the second and both verdicts can stand since any inconsistency is apparent rather than real, see *Hui Chi-ming* (n 39 above).

<sup>195</sup> See n 16 above, pp 220–223.

<sup>196</sup> See n 32 above, pp 234–235.

<sup>197</sup> See n 8 above, p 378.

<sup>198</sup> [1987] 1 AC 417.

<sup>199</sup> *Ibid.* p 458C–458D.

Note also that Lord McKay is concerned only with D who intends the death of V.

Admittedly, the second case, *Osland v R*<sup>200</sup> decided by the High Court of Australia, did concern an alleged joint enterprise involving the killing of Father by blows struck by Son after Mother had sedated Father *for the purpose*. The jury convicted Mother of murder but could not agree on Son. In dismissing Mother's appeal, McHugh J cited Lord McKay's dictum as deciding that:<sup>201</sup>

“[I]t is the acts, and not the crime, of the actual perpetrator which are attributed to the person acting in concert. If the latter person has the relevant *mens rea*, he or she is guilty of the principal offence because the *actus reus* is attributed to him or her by reason of the agreement and presence at the scene. It is irrelevant that the actual perpetrator cannot be convicted of that crime because he or she has a defence such as lack of *mens rea*, self-defence, provocation, duress or insanity.”

With respect, there are serious difficulties with this paragraph also. As a general statement the first sentence is simply false. Furthermore, P, if acquitted because of provocation, duress or diminished responsibility, will have the *mens rea* for the excused offence. To deny D, who intends that P should murder V, the benefit of P's special excuse, is an uncontroversial departure from the derivative character of secondary party liability – and probably as far as Lord McKay intended going.

For a single jury to convict D as a secondary party of any kind to a murder by P that the jury is not sure P committed because they are not sure P intended at least GBH or whether P was acting in lawful self defence is quite another matter. All three commentators noted above are to varying degrees equivocal about this possibility. The CFA accepts this may be the law for joint enterprise D but “not on the basis of accessory liability only”. But why? D's and P's initial intention that the killing would occur would be the same in either case.

As to joint enterprise P there is another point. Suppose P abandons an agreed plan to kill, deciding to cause some harm only and V unexpectedly dies. It is currently believed that P would be guilty of manslaughter, not murder but, if joint D's original intent is sufficient to make D liable for murder, why is P's original intent not similarly sufficient for P?

It is submitted that, if the current inchoate offences are thought insufficient to punish D, the emerging offence of procuring the *actus reus* of

<sup>200</sup> See n 21 above.

<sup>201</sup> *Ibid.* 344.

an offence by another should resolve most difficulties.<sup>202</sup> There may still be the occasional case of a D who supplies information or materials to P, hoping that P will use them to commit murder but without encouraging P to do so and a P who kills but does not commit murder in the end. Surely this very small tail should not be permitted to wag the complicity dog. At most, a very limited inchoate assisting offence could be justified.<sup>203</sup>

## Withdrawal

D may withdraw D's aiding, encouragement or procurement of or agreement to the commission of an offence *before* the offence is completed, remaining liable only for offences D or P has already committed. However, withdrawal requires an effective countermanding or undoing of what D has already done: generally withdrawal of agreement and encouragement clearly communicated to the other parties, aid and procurement undone with proactive steps such as alerting the police or V if necessary.<sup>204</sup> However, recent cases have suggested that communication may not be essential where participants in unplanned violence cease to participate, especially if they leave the vicinity before a fatal attack. Certainly the option of finding that D withdrew should not be withdrawn from the jury. Possible multiple joint enterprises may need to be considered, also whether the fatal attack may have gone beyond any enterprise to which D was party. The resulting directions can be very complex but there appears to be no difference between HK and EW cases in this respect.<sup>205</sup>

## Conclusion

If accessory liability for a target offence cannot be the springboard for liability for collateral offences based upon foresight of possibilities and an accessory tried with P cannot be convicted of a more serious offence than P, then joint enterprise and accessory forms of secondary party liability

<sup>202</sup> Jackson (n 8 above), pp 356, 378, Ormerod (n 16 above), pp 224–225, Simester and Sullivan (n 32 above), pp 231–233.

<sup>203</sup> This is not intended to express any support for the adoption of the equivalent of Part 2 of the Serious Crime Act 2007 in HK, a move this author would oppose. The EW offence is too wide.

<sup>204</sup> Jackson (n 8 above), pp 379–381, Ormerod (n 16 above), pp 226–229, Simester and Sullivan (n 32 above), pp 239–240.

<sup>205</sup> *R v McNamara (Richard) and Another* [2009] EWCA Crim 2530, *R v Campbell* [2009] EWCA Crim 50, *R v Mitchell (Laura) and Another* [2008] EWCA Crim 2552, [2009] 1 Cr App R 31, *R v O'Flaherty* [2004] EWCA Crim 526, [2004] 2 Crim App R 20, *R v Mitchell & King* [1999] Crim LR 496, *HKSAR v Tang Siu Ming* CACC 217/1999, 7 Mar 2000, *Lee Kwan Tong* (n 41 above), *Lin Siu Lun* (n 22 above), Ormerod (n 16 above), p 229.

are distinct and separate. If accessorial liability for a target offence can be a springboard for collateral offence liability, the difference may be a matter of convenient packaging, not real substance. This author tends to favour the latter view but in any case, with respect, it is not this distinction that matters.

The Law Commission takes as the starting point for secondary liability for P's offence that "... if D is to be liable to the same stigma and penalty as P, D's culpability should be at least comparable to that of P."<sup>206</sup> If, as this author believes, this is correct then the really important distinctions are those between (i) the agreement that an offence will be committed/voluntary and informed assistance, encouragement or procuring knowing P will commit an offence that are required for liability for the target offences and the foresight of possibilities that is sufficient for collateral offences and (ii) acts of the type, or fundamentally different from, acts contemplated by D. As to the first it is crucial that foresight of possibilities is not permitted to seep into the foundations of target offence liability of either form. To this extent, *Bryce, Rook* and company must be rejected. As to the latter, it is important that the limit of D's actual foresight be taken seriously. Certainly *Rahman* should not be permitted to reach beyond at the most its narrow ratio. The objective recklessness and constructive liability aspects of common law murder and manslaughter, combined with *R v Powell, English* are already sufficiently wide for public safety.

<sup>206</sup> "Participation in Crime" (n 3 above) at para 1.5. The LC calls the principle "parity of culpability".