

# JUDICIAL COLLEGE

## A NOTE ON SECONDARY LIABILITY AND JOINT ENTERPRISE AFTER JOGEE

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1. As the recent case of *R v Jogee*<sup>2</sup>; *Ruddock v The Queen*<sup>3</sup> makes clear, the same principles govern every form of secondary liability.

### **(a) Bases of liability**

2. There are only 2 ways in which a defendant can be liable:<sup>4</sup>
  - i. As a principal or joint principal where D has played a part in the commission of the *actus reus* of the offence; or
  - ii. As an accessory under the Accessories and Abettors Act 1861, section 8 where D has aided, abetted, counselled or procured P in the commission of the acts from which the crime was constructed.

### **(b) No separate category of 'joint enterprise' liability**

3. **There is no longer any separate category of parasitic accessory/joint enterprise liability.**
4. D, a secondary party, who aids, abets, counsels or procures P, the principal, to commit an offence or offences is liable as a secondary party to the offence(s) once committed.
5. The Privy Council in *Chan Wing-Siu v R*<sup>5</sup> took a wrong turning in allowing foresight of the offence committed by the principal (P) to be sufficient *mens rea* in itself for the liability of the accessory (D) for that offence, under what became known as parasitic accessory liability (*R v Powell; R v Daniels*<sup>6</sup> was also therefore wrongly decided.) **The so-called "parasitic accessory" approach to liability is no longer to be applied in English law.**
6. The Supreme Court in *Jogee* was influenced to make this significant change for numerous reasons. As a matter of policy the Court was not satisfied that the harsher regime over the last 30 years had served as a deterrent. As a matter of principle, it was wrong to treat D's foresight of what P might do as anything more than evidence from which a jury could infer the presence of a requisite intention. The Privy Council had been wrong to adopt D's foresight of P's likely offences as a sufficient *mens rea* for D. It is wrong, the Court concludes, when directing a jury to equate D's foresight with an intention on his part to assist P. As a matter of law, the correct approach is to treat

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<sup>1</sup> Nothing in the handout should be taken to reflect the views of the Law Commission unless expressly stated.

<sup>2</sup> [2016] UKSC 8

<sup>3</sup> [2016] UKPC 7 <http://www.bailii.org/uk/cases/UKSC/2016/8.html>

<sup>4</sup> I am not dealing here with all forms of liability such as via innocent agency, in conspiracy, or for assisting and encouraging under the Serious Crime Act 2007.

<sup>5</sup> [1985] AC 168.

<sup>6</sup> [1999] 1 AC 1.

D's foresight of P's likely conduct as *evidence* of D's intent. Moreover, as a matter of practice, the law was continuing to create difficulty for trial judges and to generate appeals.<sup>7</sup>

7. The main shift is from it being enough that D "foresaw that P might intentionally do X [intentionally cause GBH or kill] if the circumstances arose" to requiring that D "knew/intended that P will intentionally do X [intentionally cause GBH or kill] if the circumstances arose".

### ***(c) D's liability as a joint principal***

8. Where there are several participants in a crime, D will be a principal offender if his conduct fulfils the *actus reus* element of the crime and at the time of performing the *actus reus* he had the relevant *mens rea*.<sup>8</sup> The crucial question in deciding whether D is a joint principal or an accessory is whether D by his own act (as distinct from anything done by P with D's advice or assistance) performed the *actus reus*. There is no need for D and P to act with a common purpose to commit the crime together although in cases of joint principals they usually will: they may for example both independently engage in attacking V, each intentionally causing him GBH by their blows. If each has by his own acts caused GBH then he is liable as a principal.

### ***(d) D's liability as an accessory***

9. D's liability for criminal offences committed by P is to be based on ordinary principles of secondary liability [76].
10. The jury must be sure that someone committed the principal offence even if not sure who. D's liability as an accessory derives from the commission by someone of the principal offence.
11. The same principles apply where:
- i. D by agreement with P aids and abets P in committing one crime, or more;
  - ii. Without prior agreement D aids and abets P in committing one or more crimes; or
  - iii. Where, with or without prior agreement, D aids and abets P to commit one crime and P also commits a further crime in the course of doing so.
12. D is liable as an **accessory** (and not as a principal) if he assists or encourages or causes another person, P, to commit the offence even if D does not, by his own conduct, perform the *actus reus*.<sup>9</sup> The offence occurs where and when the principal offence occurs.<sup>10</sup> It is not necessary that D's act

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<sup>7</sup> See generally Wilson and Ormerod "Simply Harsh to Fairly Simple" [2015] Crim. L.R. 3.

<sup>8</sup> *Macklin and Murphy* (1838) 2 Lew CC 225.

<sup>9</sup> *Kennedy (No 2)* [2007] UKHL 38.

<sup>10</sup> *JF Alford Transport Ltd* [1997] EWCA Crim 654.

of assistance or encouragement was contemporaneous with the commission of the offence by P.<sup>11</sup> D's acts must have been performed before P's crime is completed. There is no requirement that D and P shared a common purpose or intent.<sup>12</sup> It is immaterial that D joined in the offence without any prior agreement.<sup>13</sup> D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim.

13. D must have played some part in the incident. He must aid, abet, counsel or procure, however there is no requirement that D is present assisting or encouraging at the time that P kills.<sup>14</sup> It is not necessary that D should have met or communicated with P before P commits the crime.

14. It does not matter whether P commits the crime alone or with others.

15. D's liability for **assisting** an offence will depend on proof that the offence was committed (even if the principal offender cannot be identified) and that:

- i. D's conduct<sup>15</sup> assisted the offender, P, in the commission of the offence.<sup>16</sup>
- ii. D intended that his conduct would assist P.<sup>17</sup> There need not be a meeting of minds between D and P.
- iii. D intended that his act would assist P in the commission of: either (i) a type of crime, without knowing its precise details or (ii) one of a limited range of crimes that were within D's contemplation.
- iv. D had not withdrawn at the time of P's offence

16. D's liability for **encouraging** an offence will depend on proof that the offence was committed, even if the principal offender cannot be identified, and that:

- i. D's conduct amounting to encouragement came to the attention of P (it does not matter that P would have committed the offence anyway)<sup>18</sup> but there is no requirement that D's conduct has caused P's conduct.<sup>19</sup> Non-accidental presence may suffice if D's presence did encourage and D intended it to.<sup>20</sup>

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<sup>11</sup> *Stringer* [2011] EWCA Crim 1396.

<sup>12</sup> *A-G's Reference (No 1 of 1975)* [1975] QB 773.

<sup>13</sup> *Rannath Mohan* [1967] 2 AC 187.

<sup>14</sup> *Rook* [1993] Crim LR 698.

<sup>15</sup> Which can, subject to D's mens rea, include an omission when D was under a duty to act *Webster* [2006] EWCA Crim 415.

<sup>16</sup> Following *Jogee* at [12], read literally, the prosecution may not even have to establish this.

<sup>17</sup> *Bryce* [2004] EWCA Crim 1321; *NCB v Gamble* [1959] 1 QB 11; *Jogee*.

<sup>18</sup> *A-G v Able* [1984] QB 795 at p.812; see also *Jogee* para. 12.

<sup>19</sup> *Calhaem* [1985] QB 808, followed in *Luffman* [2008] EWCA Crim 1739.

<sup>20</sup> *Clarkson* [1971] 1 WLR 1402 emphasising that care is needed where D is drunk and might not realise that he was giving encouragement.

- ii. D intended,<sup>21</sup> by his conduct to encourage P. The prosecution do not need to establish that D desired that the offence be committed.<sup>22</sup> P must have been aware that he had D's encouragement or approval.
- iii. D knew,<sup>23</sup> or if the act is preparatory to P's offence, intended the essential elements of P's crime, albeit not of the precise crime or the details of its commission.<sup>24</sup>
- iv. Where it is alleged that D counselled P to commit the offence, that offence must have been within the scope of P's authority i.e. was one which P knew he had been encouraged to commit.<sup>25</sup>
- v. D had not withdrawn at the time of the offence.

17. D's liability for **commanding or commissioning** will depend on proof that D's conduct caused P to commit the offence and that D acted with intent to 'to produce by endeavour' the commission of the offence.

### D's actus reus

18. In all cases D's *actus reus* is satisfied by proof that he did acts to encourage and/or assist P to commit the offence [8]. That conduct may take many forms [89]; it is not necessary to prove D's conduct in fact encouraged or assisted [12].

19. It needs to be made clear to the jury what conduct it is that D is alleged to have participated in and how.

20. D's conduct in assisting, encouraging, or causing P to commit the crime may take different forms. It will usually be in the form of words and/or conduct. Merely associating with P or being present at the scene of P's crime will not be enough; but if D intended by associating with P or being present at the scene to assist/encourage/cause P to commit the crime (e.g. by contributing to the force of numbers in a hostile confrontation, or letting P know that D was there to provide back-up if needed) then D would be guilty [11], [78], and [89].

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<sup>21</sup>This is not restricted to purposive intent: *Bryce* [2004] EWCA Crim 1321.

<sup>22</sup>*Jogee* para. 90.

<sup>23</sup> See recently *ABC* [2015] EWCA Crim 539. Knowledge has been construed to include awareness that a fact might exist and deliberately closing one's eyes to the matter or being reckless as to the risk that it might exist: *Carter v Richardson* [1974] RTR 314; *Webster* [2006] EWCA Crim 415.

<sup>24</sup>*Jogee* [14].

<sup>25</sup>*Calhaem* [1985] QB 808.

## D's mens rea

21. D's *mens rea* is satisfied by proof that

- i. D intended to assist or encourage P;

and

- ii. D intended that P would have the *mens rea* required for the offence. Intention is what is required. As elsewhere in the criminal law that is not limited to cases where D "desires" or has as his "purpose" that P commits the offence ([90]), but, most importantly, intention is not to be equated with foresight: "Foresight may be good evidence of intention but it is not synonymous with it" [73]. The wrong turning in *Chan* was in concluding that foresight by D of P's likely offence B was a sufficient *mens rea* to render D guilty of P's offence B; and

and

- iii. D must have knowledge of any other "existing facts necessary" for P's conduct/intended conduct to be criminal [9], [16]. D's "knowledge or ignorance that weapons generally, or a particular weapon, is carried by P will be evidence going to what the intention of D was, and may be irresistible evidence one way or the other, but it is evidence and no more." [26], [98]. The focus is on intent not on the knowledge of weapons [98].
- iv. D's *mens rea* is intention, that is not limited to proof of purpose or desire that the crime be committed. At para.90 of the judgment, the Court said

"If the crime requires a particular intent, D must intend (it may be conditionally) to assist P to act with such intent".

## A critique...

### (a) *Jury Burden*

22. Jury carry a greater burden as they must differentiate murder and manslaughter boundary. They have more "elbow room" to decide who falls on which side. They need even better guidance.

### (b) *Foresight – what degree of foresight?*

23. Proof of intention is what is now required. As elsewhere in the criminal law that is not limited to cases where D "desires" or has as his "purpose" that P commits the offence ([90]). Most importantly, intention is not to be equated with foresight: "Foresight may be good evidence of intention but it is not synonymous with it" [73].

24. There is a danger here and care must be taken to understand how the new approach that “foresight as evidence of intent” sits alongside the law of murder more generally. After a rather tortuous 20 years or so the House of Lords finally agreed in *Woollin*<sup>26</sup> that (1) someone can be guilty of murder as a principal offender where he intended to kill or do GBH; (2) intention is not limited to purpose or desire; (3) a jury may find that D intended if they conclude that D foresaw the death/GBH as a virtually certain consequence; and (4) there is a threshold on foresight - anything less than foresight of virtual certainty will not be sufficient for the jury to find intention.
25. In *Jogee*, the Supreme Court has concluded that: (1) someone can be guilty of murder as a secondary offender where he intended that P kill or do GBH with intent; (2) intention is not limited to purpose or desire; and (3) a jury may infer that D intended if they conclude that D foresaw P’s intentional conduct; but (4) there is no explicit statement of any threshold limit on the foresight – will D’s foresight of even the slightest possibility of P acting be sufficient for a jury to find that D intended?
26. Does there have to be foresight of a virtual certainty by D (that P will intentionally cause GBH etc) before the jury can conclude that D had the requisite intention? I would suggest not: (i) The SC did not say so; (ii) the HL in *Woollin* expressly noted that its decision applied only to murder. Indeed, Lord Steyn prefaced his decision in *Woollin* by remarking that intention does not necessarily have the same meaning in every context of the criminal law; and (iii) the directions to a jury would be absurd, particularly where it is unclear which of the 2 (or more) was the killer. The jury would have to be told that intention has two different meanings depending upon whether the defendant whose guilt they are considering is the principal or accessory.
27. Can the jury be directed: “you (the jury) are entitled to conclude that the greater the likelihood or chance of X happening that you are sure that D foresaw, the more weight you can place on this conclusion when you come to decide, as a matter of fact, whether D intended X. So if you conclude that D either did not foresee X or thought it a remote possibility only, you may conclude that he did not intend X to happen; if he foresaw that it was virtually certain to happen but carried on assisting, it may not be difficult to conclude that he intended X. How you weigh up that evidence to decide what D intended is a matter for you.”
28. The direction on intention needs to be universally applied. In murder, the “golden rule” – per Lord Bridge in *Moloney*<sup>27</sup> – is that intention is an ordinary English word and the jury need no elaboration unless absolutely necessary. In *Jogee* cases, do the jury always get a foresight direction, or does an equivalent golden rule pertain? The *Woollin* direction is only given if D denies that he intended to

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<sup>26</sup> [1998] UKHL 28, <http://www.bailii.org/uk/cases/UKHL/1998/28.html>. One of the certified questions in *Jogee*’s case related to the level of foresight that was required in relation to the *Chan Wing-Sui* [1985] AC 168, [http://www.bailii.org/uk/cases/UKPC/1984/1984\\_27.pdf](http://www.bailii.org/uk/cases/UKPC/1984/1984_27.pdf) test (ie, foresight of harm that was more likely than not, rather than just some non-trivial foresight). Unsurprisingly in light of its conclusions, the Supreme Court did not address the question in its judgment.

<sup>27</sup> [1985] AC 905, <http://www.bailii.org/uk/cases/UKHL/1984/4.html>.

kill. If a similar rule were to apply in the present context, the jury will almost always need further elaboration, as post *Jogee* presumably D's defence will often be that whilst he foresaw that P might kill or cause GBH, he did not intend for him to do so

(c) *Weapons*

29. The shift from foresight as sufficient to render him liable for murder and foresight as mere evidence of intent will impact little on the issue of D's awareness of P's weaponry. D must be shown to have intention or knowledge, and that can be inferred from D's foresight of what P might do, that foresight can in turn be inferred from what D knew about P's weapons. D's "knowledge or ignorance that weapons generally, or a particular weapon, is carried by P *will be evidence* going to what the intention of D was, and *may be irresistible* evidence one way or the other, but it is evidence and no more" [26], [98].

(d) *No intention that the crime be committed*

30. There is no need for D to intend that the crime be committed: the SC approved *NCB v Gamble*<sup>28</sup> on this point. In that case Devlin J said "if one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor".

31. So in this example, the seller was indifferent as to the murder being committed but it would, we assume, be open to a jury to convict him as having intended the offence based on his foresight.

(e) *Maxwell cases*

32. The principle in *Maxwell v DPP for NI*<sup>29</sup> is narrowed slightly. The express statements from the Supreme Court are that D will be liable only if he intentionally assists/encourages/causes P to commit one of a range of offences which D *intends* P will commit, so long as P commits an offence within that range [10], [14] and [90]. That represents a narrowing from the position under *Maxwell* which had been interpreted to mean that it was sufficient that P commits one of a range of offences that D had in mind as possibilities.

(f) *P's intent graver than D intended it to be?*

33. In the case of murder it is now sufficient that D intended to assist or encourage P intentionally to commit GBH [95], [98]. Thus, if D intends that P intentionally cause GBH, but P intentionally kills,

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<sup>28</sup> [1959] 1 QB 11.

<sup>29</sup> [1978] 1 WLR 1350.

D is still liable for murder. This principle, from *Rahman*,<sup>30</sup> is I submit unaffected by the decision in *Jogee*, particularly given the retreat from the “fundamentally different” acts test first introduced by *English*.<sup>31</sup>

(g) *Fundamental difference – now “supervening event”*

34. Whether the crime P committed in a fundamentally different manner is usually irrelevant, but if P’s conduct amounts to “some overwhelming supervening act by the perpetrator which nobody in the defendant’s shoes could have contemplated might happen and is of such a character as to relegate his acts to history” will D not be liable for it [97]–[98].
35. It is unclear what will constitute some “*some overwhelming supervening act*”. It is easy to see the problems that may arise in this scenario. Does this only apply if D has a specific victim in mind for example? If D intends P to murder whoever is in the house and D murders the policeman who comes to investigate the burglary, is D guilty?
36. A more theoretical question is why the use of causal language is used. The language implies a defence if there is a break in the chain of causation between D’s act and the death, but D’s liability is not based on causation at all (see *Kennedy No 2*<sup>32</sup>) so why should his defence?

(h) *P’s awareness of D’s encouragement*

37. The prosecution does not have to prove that D’s encouragement had a positive effect on P’s conduct or on the outcome: *Calhaem*<sup>33</sup> remains good law on this point. The prosecution do not have to prove that what D did actually influenced P’s conduct or the outcome [12]. This is sensible, as in many cases it would be impossible to prove. There might, for example, have been many supporters encouraging P so that the encouragement of a single one of them could not be shown to have made a difference. But this also begs some questions – for example, must P be aware of D’s encouragement? (The reason that may be important is because it impacts on withdrawal.)

(i) *Withdrawal*

38. The Supreme Court was not called on to address the withdrawal “defence”. The CACD may well need to resolve some issues. There is some dispute about whether this requirement for timely effective unequivocal communication applies equally to cases of spontaneous violence, unless it is not practicable or reasonable to communicate the withdrawal. Some cases say that there is no

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<sup>30</sup> [2008] UKHL 45, <http://www.bailii.org/uk/cases/UKHL/2008/45.html>.

<sup>31</sup> [1999] 1 AC 1, <http://www.bailii.org/uk/cases/UKHL/1997/57.html>.

<sup>32</sup> [2007] UKHL 38, <http://www.bailii.org/uk/cases/UKHL/2007/38.html>.

<sup>33</sup> [1985] QB 808.



difference in spontaneous cases: *Robinson*;<sup>34</sup> *Mitchell and King*.<sup>35</sup> Some say there is, such as *Rajakumar*,<sup>36</sup> where Davis LJ stated at [42]: “[W]hat may suffice to constitute withdrawal in spontaneous and unplanned group violence may not necessarily so suffice in preplanned group violence”.

### Appeals out of time

39. The issue of broader immediate concern that arises from the judgment is what to do about those individuals who were convicted under the “old”<sup>37</sup> law. The Supreme Court states in emphatic terms that it does not follow from the fact that an individual was convicted under the old law that his conviction will now be quashed. The Court points out, when a conviction is based upon the law as it applied at the time, the only option available to the defendant is to apply to the Court of Appeal for exceptional leave to appeal.

“Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years” [100]; emphasis added.

40. The fact of the change of law alone will not suffice: as recognised in the Supreme Court reiterating (at [100]) one of the leading CACD cases on the issue, *R v R*.<sup>38</sup> The period by which the appeal is out of time should have no bearing. An injustice surely does not become more or less substantial because it was perpetrated a long time ago.

41. If, having regard to the direction given to the jury at his trial, D would not (applying the “new” law) have been convicted of murder or manslaughter, then there must surely be a substantial injustice. Such cases may be rare or at least hard to spot.

42. The far more likely scenario is that, having regard to the direction given to the jury the applicant convicted of murder would under the new law have been guilty of at least manslaughter for his foresight of some harm. Is there a substantial injustice based on:

(1) being labelled as a murderer (a unique stigma attaching for life); and

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<sup>34</sup> *Robinson* [2000] EWCA Crim 8, <http://www.bailii.org/ew/cases/EWCA/Crim/2000/8.html>, explaining *Mitchell, King* [1999] Crim LR 496. See further *O’Flaherty* [2004] EWCA Crim 526 <http://www.bailii.org/ew/cases/EWCA/Crim/2004/526.html> at [61] per Mantell LJ.

<sup>35</sup> *Mitchell, King* [1999] Crim LR 496.

<sup>36</sup> [2013] EWCA Crim 1512.

<sup>37</sup> The English courts follow (and have always followed) the practice of retrospective overruling in accordance with the “declaratory theory” of common law; the judges, it is said, do not make or change the law but merely carry out the function of declaring what it has always been.

<sup>38</sup> [2007] 1 Cr App R 10; the case was referred back to the Court of Appeal by the Criminal Cases Review Commission following the decision of the House of Lords in *Saik* [2006] UKHL 18, <http://www.bailii.org/uk/cases/UKHL/2006/18.html>.

(2) sentence, which is not only unique because it is mandatory life, but also because under Schedule 21 it is significantly longer and indeterminate with a life long threat of recall? Is it qualitatively and quantitatively different?