Accessorial Liability in the Criminal Law: A Common Law Perspective

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Abstract

When crimes are being organized, there are often more than one person involved in the planning, setting up and execution of the offence. The person who performs the *actus reus* of the offence is the principal perpetrator of the crime. Such person often has accomplices who assist or encourage him or her in the commission of the offence, who are known as secondary parties or accessories to the crime. In criminal law, the doctrine of criminal complicity consists in the body of principles governing the joint implication of each of two or more persons in a criminal offence. The chief focus of this paper is on the discussion of the main aspects of the law relating to criminal complicity in New Zealand. The analysis of the substantive law relating to accomplices includes

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consideration of the subjective and objective requirements for accessorial liability as expressed in the relevant legislation and judicial decisions, as well as the substantive and procedural reasons for distinguishing the traditional categories of criminal participation. The references to leading authorities from England and other common law jurisdictions add a useful comparative perspective to the discussion of the issues.

Distinguishing between principals and accomplices

In criminal law we often speak of the distinction between principals and secondary parties or accomplices or accessories. It is important to distinguish the principal from the secondary party for several reasons:

(a) The mental element for a secondary party is often different from that of the principal offender – as a general rule, accessories need specific intent or, in some cases, subjective recklessness even for strict liability offences.

(b) There must be a proven principal (though not necessarily a convictable one) before there can be a conviction of an accessory.

(c) Certain offences can only be committed by members of a specified class (e.g. incest),[1] but other persons can be accomplices to such an

1 In New Zealand the offence of incest is provided for by s. 130 of the Crimes Act 1961. It is defined as a sexual connection between 2 people whose relationship is that of parent and child, siblings, half-siblings, or

offence.

(d) Where it is unclear whether an accused is the principal or merely an accessory, the accused may be convicted of the crime provided that the court is satisfied that the accused must have been one or the other and provided that the prosecution has framed the charge in the alternative alleging that the accused is a principal or an accessory.[2] The same may be the case where two or more people are charged with a crime, and it is not clear which of them was the principal offender.[3]

When a criminal offence is committed the person who perpetrates the offence is referred to as the principal offender. The principal offender is the person who actually commits the offence or, in other words, the person whose conduct is the most immediate cause of the *actus reus* of

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grandparent and grandchild.

2 See, e.g., *Gaughan* [1990] Crim LR 880, CA; *Giannetto* [1997] 1 Cr App R 1, CA.

3 See, e.g., *R v Mohan* [1967] 2 AC 187. In this case the two defendants attacked and killed the victim by stabbing him with knives. The evidence indicated that only one wound actually caused the victim's death, but it could not be established who actually inflicted the fatal wound. The accused were both found guilty of murder and appealed on the grounds that, as there was no pre-arranged plan to attack the victim, the prosecution had to show which of them actually inflicted the fatal wound. The Privy Council dismissed the accused's appeals. The court held that as the two defendants were attacking the victim at the same time, with similar weapons and with a common intention to inflict serious injury, each of them may be held guilty of aiding and abetting the other in the commission of the offence. There was no need to prove a pre-arranged plan, or common purpose, on the defendants' part.

the crime. There can be more than one principal offender, in which case we speak of joint principals. This would be the case where two or more persons each bring about all the elements of an offence; or where two or more persons acting together bring about different elements of the same criminal offence. For example, A and B, acting independently or in pursuance of a pre-arranged plan (it does not matter), shoot the victim in the head at the same time. If the victim dies, both A and B may be regarded as principal offenders to the crime of murder.[4]

One might envisage a case where a person may be held liable as a principal offender, even though the *actus reus* of the offence was brought about by another person. For instance, a person may be liable as a

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4 There are also cases where the courts have considerably (and, according to some critics, unacceptably) extended the notion of principal offender because the application of accessorial liability would not have been possible in the situation at hand. Consider, for example, the case of *Rogers* [2003] 2 Cr App R 160, CA. In this case the victim died from an overdose of heroin he had bought and injected into himself. In this process he was helped by D, who held a belt tightened around the victim's arm in order to raise a vain to facilitate the injection. Although this appeared to be a typical instance of assisting the victim to administer a noxious substance to himself, the court held that D actually administered the noxious substance as perpetrator contrary to s. 23 of the Offences Against the Person Act 1861. The court adopted the view that a person who actually participates in the injection process commits the *actus reus* of the relevant offence. The real reason for this rather far-fetched approach to the matter was that it was not an offence for the victim to administer a noxious substance to himself so that D could not have been criminally liable as an accessory. Only if D administered the substance himself, albeit jointly and in conjunction with the victim, could he be found liable. On this issue consider also *Kennedy (No. 2)* [2005] EWCA Crim 685. And see R. Heaton, "Principals? No Principles!", [2004] Crim LR 463.

principal if he/she used another person to commit the offence and that other person is excused on grounds of mistake. For example, A gives B a parcel and asks B to deliver it to another person V, telling B that the parcel contains a birthday present. In fact the parcel contains a bomb, which explodes and kills V. In this case A may be held liable as the principal offender, as B did not know (and presumably had no reason to suspect) what was in the box and thus lacked the knowledge required for the offence. In a similar way, if A asks his 3-year-old daughter to steal items from a super-market, A may be found guilty of theft as the principal offender – his daughter is not criminally liable due to her age. In both the above cases, the offence is said to have been accomplished through the use of an 'innocent agent'. In the New Zealand case of Paterson [1976] 2 NZLR 504, the accused asked a friend to pick up a television set from another person's flat pretending that the flat belonged to him. The friend did as was asked, but after a while he became suspicious and went to the police. The accused was found guilty of burglary as the person who had actually committed the offence.

The person or persons who contribute in some way to the commission of an offence without being principals are referred to as 'secondary parties' or 'accessories' or 'accomplices'. It is important to note that there is no offence of 'being an accomplice' – any indictment must specify to what full offence the defendant is alleged to have been a party.[5] In other words, secondary parties will be found guilty of the crime they helped the principal to commit as if they were principals.

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5 A person can be an accomplice to all offences, including attempts. But a person cannot be found guilty of an attempt to aid and abet an offence, i.e. an attempt to be an accessory.

Furthermore, the substantive offence itself must have been committed, although this does not mean that there has to be a convicted principal.[6] As this suggests, an accomplice's criminal liability is essentially derivative – it is derived from that of the principal offender.[7] Generally

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6 It is not even necessary that the principal should ever be identified, as confirmed by the English Court of Appeal in *A, B, C and D* [2010] EWCA Crim 1622. However, if the person charged as a principal is acquitted on the grounds that he committed no offence, then no liability can attach to the secondary party. See, e.g., *Thornton v Mitchell* (1940) 1 All ER 339. On the other hand, if the principal offender is acquitted on grounds of an excuse (e.g. duress), the secondary party will remain liable. See on this matter *R v* Bourne (1952) 36 Cr App R 1251; *R v Cogan and Leak* [1976] QB 217.

7 As S. Kadish remarks, "the secondary party's liability is derivative … it is incurred by virtue of a violation of law by the primary party to which the secondary party contributed." "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine", (1985) 73 *California Law Review* 323, at 337.

A controversial question here is whether the liability of the accessory is derived from the principal offender's liability (narrow view) or, rather, from the wrongfulness of the principal's act (broad view). The narrow view was expressed by McHugh J in *Osland v The Queen* (1998) 197 CLR 316 as follows: "[The liability of those who aided the commission of a crime but were not present at the scene of the crime] was purely derivative and was dependent upon the guilt of the person who had been aided and abetted in committing the crime. …Those who were merely present, encouraging but not participating physically, …could only be convicted of the crime of which the principal offender was found guilty. If that person was not guilty, the [secondary parties] could not be guilty. Their liability was, accordingly, also derivative." (pp. 341-342). On the other hand, as P. Alldridge (1990) comments, the broad theory of accessorial liability "draws a distinction between the wrongfulness of the act and its attribution to a particular perpetrator … [W]hile the wrongfulness is a feature of acts considered abstractly, culpability is always personal … [I]n a prosecution against the

speaking, participating in a crime as an accomplice is regarded as less morally blameworthy than committing the crime as a principal offender. This is shown by the fact that the sentence imposed on the secondary party is usually less severe than that imposed on the principal offender. This is not always the case, however. One might envisage a case in which the secondary party plays a more significant role than the principal perpetrator in the commission of the crime – e.g. when it is the secondary part that actually conceives of and plans the offence.

Criminal complicity may take many diverse forms and may be of different degrees in terms of seriousness. Consider this imaginary scenario: A decides that he/she wants V killed. A hires D, a professional assassin, to commit the murder. B supplies D with a knife to do the killing. C supplies D with information about V's movements. E drives D and his assistant F to V's house. F helps D to kill V by holding V while D stabs him. At the time of the killing G, V's discontented butler, encourages D and F as they attack the victim. H acts as a lookout

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accessory, it is the latter's culpability that is relevant; the perpetrator's culpability is incidental… [T]hus the broad theory allows conviction of an accessory where the perpetrator cannot be convicted, so long as the latter did what is forbidden by law… [A]ccessorial liability is derivative not from a convictable crime but from a wrongful act." "The Doctrine of Innocent Agency", (1990) 2(1) *Criminal Law Forum* 45, at 46-47. The current law on accessorial liability follows this approach to the matter. As stated by Gummow JJ in ***Osland***, expressing the view of the majority of the High Court of Australia, "The conviction of a person charged as an accessory is not necessarily inconsistent with the acquittal or failure to convict the person charged as the principal offender. That is because the evidence admissible against them concerning the commission of the offence may be different. Even so, an accessory cannot be convicted unless the jury is satisfied that the principal offence was committed." (pp. 323-324)

outside V's house and drives D and F away from the scene of the crime. K hides D and F in the basement of his house and keeps them informed about the movements of the police. In this example, only D is the principal perpetrator of the crime – only D's actions can be seen as the immediate cause of the V's death. All the other persons involved are secondary parties or accessories. Depending on the time of the secondary party's contribution, a distinction may be drawn between accessories before, at and after the commission of the offence – a distinction recognized at common law. For a person to be found guilty of an offence as an accomplice, the prosecution must always establish that he or she performed the *actus reus* of a secondary party with the necessary state of mind or *mens rea*.

In New Zealand criminal complicity is covered by Section 66 of the Crimes Act 1961. This Section provides:

(1) Every one is a party to and guilty of an offence who—
  (a) actually commits the offence; or
  (b) does or omits an act for the purpose of aiding any person to commit the offence; or
  (c) abets any person in the commission of the offence; or
  (d) incites, counsels, or procures any person to commit the offence.

(2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

We may now proceed to take a closer look at the various elements of criminal complicity as contained in this provision.

The conduct element in criminal complicity

As the wording of s 66 makes clear, when someone commits an offence he is guilty of it under s 66(1)(a); if others have intentionally helped or provided encouragement in the commission of that offence, they are deemed by s 66(1)(b) - (d) to have committed that offence also. Those others, however, are secondary parties; their guilt arises from the assistance they provide to the principal.[8] Thus, what must be proved when a principal is charged with an offence is different from what must be established against any secondary parties, even though all are charged with, and may be convicted of, the same offence. Only the elements of the very offence charged must be established for the principal to be convicted; but, for secondary parties, it must be proved

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8 As already noted, a person cannot become a secondary party to a crime until that crime is either committed or attempted to be committed by the principal. New Zealand law recognizes certain exceptions to this rule, however. According to s 311 (2) of the Crimes Act 1961, "Every one who incites, counsels, or attempts to procure any person to commit any offence, when that offence is not in fact committed, is liable to the same punishment as if he had attempted to commit that offence, unless a [different punishment is provided by the Crimes Act] or by some other enactment". Moreover, under s 174 of the Crimes Act, "Every one is liable to imprisonment for a term not exceeding 10 years who incites, counsels, or attempts to procure any person to murder any other person in New Zealand, when that murder is not in fact committed".

that they aided, abetted, incited, counselled or procured the principal, and did so with knowledge of the essential matters of the principal's proposed conduct and with the intention of assisting the principal. So if, for example, the relevant offence is one of strict liability, intention or knowledge need not be proved as against the principal, but a party to a principal's offence must know of the principal's conduct and intend to assist or encourage it. Thus, although principal and accomplice may ultimately be convicted of the same offence, their respective guilt may result from conduct respectively comprising quite different ingredients.

As already noted, the conduct or *actus reus* element of the accomplice is expressed by the words aiding, abetting, counseling, inciting and procuring. An accused will be found guilty as a secondary party if it is proved that he/she participated in the commission of an offence in any one of these ways.[9] It is important at this point to explain the meaning of these terms.

'Aiding' is defined as helping or giving assistance to the principal offender in the commission of the offence, whether before or at the time of the offence and whether or not the aider is present at its commission.

'Abetting' refers to the conduct of a person who instigates, encourages, countenances or exhorts the principal to commit the crime. The view has been expressed that abetting normally implies presence at the scene of the crime. In a number of cases it has been recognized, however, that a person may be an aider and abettor even though he was not present during the actual commission of the offence but gave his

9 It is permissible to frame the charge in such language as includes all these terms and so long as the evidence shows that the accused has acted in a manner that satisfies at least one then he/she is guilty.

assistance before the crime.[10]

'Counseling' and 'inciting' cover the same type of activity as abetting, but these terms generally refer to conduct which takes place *before* the commission of the offence. Incitement implies persuasion, inducement or exerting pressure on the principal to commit the offence. Counseling refers to providing advice or information that helps the principal to commit the crime. The same term may also be interpreted as meaning 'urging' someone to commit a crime – in this sense it is synonymous with 'inciting'.[11] Usually counseling implies that there must be some form of agreement between the secondary party and the principal. This does not mean, however, that a causal connection must be established between the secondary party's conduct and the commission of the offence by the principal.

The term 'procuring' has given rise to some difficulties. The meaning of this term was considered in *Attorney-General's Reference (No. 1 of 1975)* [1975] 2 All ER 684, CA. In this case the accused secretly laced his friend's non-alcoholic drink with alcohol knowing that his friend would shortly be driving his car home. The friend was stopped and found to be driving with excess alcohol in his blood.[12] The accused was charged and convicted as an accomplice to that offence. The Court of Appeal held that the accused's conduct amounted to procuring because the accused had set out to cause a particular state of affairs and had taken steps to

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10 See, e.g., *NCB v Gamble* [1958] 3 All ER 203.

11 In *Calhaem* [1985] 2 All ER 266, the English Court of Appeal held that the word 'counsel' should be given its ordinary meaning, which is 'advise', 'solicit' or something of that sort.

12 He was convicted under s. 6 of the Road Traffic Act 1972 of driving while intoxicated.

produce it. The court adopted the view that 'to procure' means 'to produce by endeavor'. As this suggests, 'procuring' means causing the commission of an offence or bringing about its commission. In this case, the adding of alcohol into the driver's drink by the accused was a direct cause of the driver's offence. The court held that procuring is different from abetting and counseling in two important respects. First, for procuring (and also aiding) no meeting of minds between the principal and the accomplice is required; for abetting and counseling, on the other hand, this would appear to be essential at least in the sense that the principal was aware of the secondary party's encouragement. Second, with respect to procuring, the question of causation is crucial. As was pointed out in *Attorney-General's Reference*, one cannot procure an offence unless there is a causal link between what one does and the commission of the offence. In contrast to procuring, aiding, abetting and counseling do not require proof of any causal connection between the offence and the secondary party's conduct.[13]

The mental element of accessories

As previously noted, although the legal consequences of conviction as a principal or as a secondary party are the same, the *actus reus* and

13 The meaning of the various terms is neatly summarized by J. Smith and B. Hogan as follows: (a) 'procuring' implies causation but not consensus; (b) 'abetting' and 'counseling' imply consensus but not causation; and (c) 'aiding' requires actual assistance, but neither consensus nor causation. *Criminal Law* (10th edn, London, Butterworths, 2002), p. 147. And see *Luffman* [2008] EWCA Crim 1752.

mens rea required for conviction as a secondary party are different from the *actus reus* and *mens rea* required for conviction as a principal. Suppose that A and B are charged with a crime and it is alleged that A is the principal offender and B is the secondary party. Against A it must be proved that he/she caused the *actus reus* of the offence charged with the requisite *mens rea*. Against B it must be proved that he/she knew or believed that A would commit a crime and intentionally helped A to commit the crime, being aware that his/her conduct would be of assistance to A. If B is charged with procuring, he must also intend, by his acts, to bring about the commission of the offence. Moreover, as the discussion of the doctrine of joint unlawful enterprise below will demonstrate, under certain circumstances it may be enough for the prosecution to establish that the accused was no more than reckless in the sense of adverting to the probability that that the principal offender might offend or use assistance provided by the accused. Under the current law, a person may become an accomplice if he or she only suspects that he or she may assist the principal offender in one of a number of offences that he or she contemplated the principal might commit.

To be a secondary party one must have some knowledge of the material circumstances that constitute the *actus reus* of the offence the principal is committing or planning to commit. But knowledge of the principal's criminal intent is not sufficient. What is required is a further intention on the part of the alleged accomplice to help the principal in the commission of the offence and an act of assistance of some sort. For example, A learns that B is planning to murder another person or to burglarize another person's house. This knowledge alone is not enough to make A a party to murder or burglary. And it will make no difference

that, on learning of B's intentions, A is secretly delighted because the victim happens to be his enemy. For A to be found guilty as a secondary party it must be proved that, being aware of the principal's criminal intent, A did something to help the principal with the intention or purpose of assisting.

As noted, the secondary party must have some knowledge of the offence the principal offender is committing or planning to commit. Does this mean that the secondary party should know every detail relating to the principal's crime? Consider this example: A plans to steal money from a safe at someone's house and needs cutting equipment to do the job. A contacts B and asks B to sell him the equipment without mentioning anything about his plans. However, B happens to know that A has a criminal record for burglary and that he has no legitimate business for which such equipment may be required. So B assumes, correctly, that the equipment is to be used by A to break into a safe on some premises or other. Nevertheless B goes ahead and sells A the requested equipment. B may be convicted as an accessory to the offence of burglary committed by A, even though B did not know when or where the crime was to be committed. As this suggests, the accessory does not need to know every detail about the principal's offence. All the secondary party needs to know is the material circumstances indicating the *type* of crime the principal is planning to commit.[14] 'Material

14 See ***R v Bainbridge*** [1959] 3 All ER 200, CCA. In this case the accused supplied oxy-acetylene equipment knowing that it was to be used for a breaking and entering type of offence. The Court of Criminal Appeal adopted the view that it was immaterial that the accused did not know that it was to be used to burgle the Middland Bank, Stoke Newington, six weeks later. A similar position was adopted in the New Zealand case of ***R v***

circumstances' here mean all the circumstances required by the definition of the offence, including any consequences necessary for the *actus reus* and any *mens rea* or fault element required by the perpetrator to commit the offence. The secondary party must know that there is a significant risk that the principal is going to do the acts constituting the crime and that all the ingredients or essential matters of the offence will be present.[15]

In *DPP for Northern Ireland v Maxwell* [1978] 3 All ER 1140, the accused drove his car to a public house knowing that he was guiding another car containing Northern Ireland terrorists to the pub. He realized that some kind of attack was to be made, but did not know what form it would take. In the event the terrorists threw a pipe bomb into the pub, which, fortunately, did not explode. The accused was found guilty for being an accessory to the crimes of doing an act with intent to cause an explosion and possession of explosives. He claimed that he could not be convicted as a party to these offences because he did not know what the terrorists' plan was. However, the House of Lords held that these offences were within the range of crimes that the accused contemplated would be committed as he was aware that he was dealing with a terrorist group. It would have made no difference if the terrorists

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Baker [1909] 28 NZLR 536, where it was stated that for a person to be held liable as a secondary party it would be sufficient if he knew that the principal intended to commit an offence of the type that was actually committed.

15 It is submitted that 'knowledge' in this context includes not only actual knowledge but also willful blindness or subjective recklessness. See on this matter *Carter v Richardson* [1974] RTR 314, DC; *Blakeley Sutton v DPP* [1991] Crim LR 763, DC; *Roberts and George* [1997] Crim LR 209, CA; *J. F. Alford Transport* Ltd [1997] 2 Cr App R 326, CA.

had carried out the attack with guns or if the pub had simply been a rendezvous point, the attack being carried out as some other place. A person who voluntarily gives assistance to someone being aware that they are going to commit one of a number of possible crimes, makes himself liable for whatever offence the principal chooses to commit, provided, of course, that it is within the range of the offences contemplated.

A problem may arise in a case where B supplies e.g. cutting equipment to A for use in some criminal activity, such as burglary. Once B has supplied the cutting equipment A can go on using it indefinitely for the type of crime B had in mind. One may ask: will B become a party to all the future crimes A commits with B's equipment? There seems to be nothing that would preclude B's liability as a party for all the crimes committed by A. However, common sense would suggest that when the assistance given to the principal offender is very remote, it would probably be unfair and perhaps unrealistic to hold the helper legally liable as a party to the latter's crime.

A further perplexing question is whether the principal offender needs to know that he/she is being assisted by the secondary party. In *Larkins v Police* [1987] 2 NZLR 282, the accused was at a party where he heard that a burglary was being planned at a bottle store. Without informing the principal offenders of his intention to assist, he went to the store and stood on the street acting as a lookout in case the police arrived. As it happened, the accused contributed nothing as the offenders had been warned about the arrival of the police by someone else. Nevertheless, the accused was charged as an accessory to burglary and, following the trial judge's direction to the jury, was found guilty. The accused appealed against his conviction claiming that the principal

offenders were unaware that he was assisting them and that there was no proof that assistance had actually been given. The High Court held that when a person is charged as an accessory to a crime it must be proved that his/her actions took place before or during the commission of the offence. If they took place after the completion of the crime, the accused may only be liable as an accessory after the fact (a separate offence). The Court accepted that the accused in this case arrived at the scene of the crime after the offence had been completed and, on this basis, quashed his conviction. The Court recognized, however, that a person may be liable as an accessory even though the principal was unaware of his/her assistance. The court pointed out that, although the principal does not need to know that he/she is being assisted, proof of actual assistance is crucial (this can take the form of mere encouragement). If the accused's actions did not help the principal in any way criminal liability cannot be established. One problem here is that, in most cases, if the principal does not know that he/she is being assisted then it would be difficult for the prosecution to prove actual assistance.

A further question requiring consideration is whether presence at the scene of the crime when the crime is being committed may amount to participation. Generally speaking, mere presence at the scene of the crime and failure to intervene to prevent the offence is not sufficient to make a person criminally liable as an accomplice. Such presence might perhaps be regarded as *prima facie* evidence – although not conclusive evidence – of an intention on the part of the person present to encourage the perpetrator.[16] However, if the person present is to be convicted as an

16 At common law this position was adopted in the early case of *Coney* (1882) 8 QBD 534.

accessory, it must be proved that there was encouragement in fact and that there was an intention on the part of the person present to encourage.[17] In *Clarkson* (1971) 3 All ER 344, the defendants entered a room in an army barracks where a woman was being raped. The defendants remained there watching the rape. The court held that their mere presence, even if that presence gave encouragement to the principal offender, was not in itself sufficient. There had to be encouragement in fact – expressions, gestures or actions of some sort – reflecting approval or encouragement. In this case the defendants' appeals against conviction were allowed on the basis that the lower court did not consider whether the intention to encourage the principal and actual encouragement were actually proved.

The same approach to the matter was adopted in the Australian case of *Beck* (1989) 43 A Crim R 135 and [1990] 1 Qd R 30. In this case a man abducted, then raped and finally killed a young girl. The man's *de facto* wife, who had been present at the scene of the crime, was charged as a party to the offences committed. She pleaded guilty to the charges of abduction and rape, but she denied that she had been a party to murder. Her claim was rejected, however, and she was found guilty as a party to murder. She appealed against her conviction but the appeal was dismissed. The court held that the accused's presence at the scene of the crime provided actual encouragement to the principal in the commission of the offence. As was pointed out, "voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of willful encouragement or aiding. It seems that all will depend on a scrutiny of the behaviour of the alleged aider and the

17 And see *Wilcox v Jeffery* [1951] 1 All ER 464 at 465-467.

principal offender and on the existence which might appear of a bond or connection between the two actors and their actions. The accidental and passive presence of a mere spectator can be an irrelevance so far as the active offender is concerned. But, on the other hand, a calculated presence or a presence from which opportunity is taken can project positive encouragement and support to a principal offender." The court also noted that "it is not possible to be an aider through an act which unwittingly provides some assistance to the [principal] offender in the commission of the offence, and it is not possible to be an aider, whatever the intention, unless support for the commission of the offence is actually provided."

There are certain exceptional cases where mere presence during the commission of an offence may be sufficient for the person present to be held liable as an accomplice: (a) where a person shows by his/her conduct either before or after the commission of the offence by the principal that he/she sought by his presence when the crime was being committed to encourage the principal offender; (b) where a person stands in a position of authority to the principal offender, his/her mere presence at the scene of the crime may amount to abetting;[18] (c) where a person is

18 For example, in the New Zealand case of *Ashton v Police* [1964] NZLR 429 it was held that the accused, the owner of a car who was still in charge of it, could have directed the driver to drive more carefully. But he failed to do so and was found guilty as an accessory to the offence of dangerous driving. See also *Du Cros v Lambourne* [1907] 1 KB 40. In general, participation can be by omission where the accused has the duty to control the conduct of others – e.g., the publican who stands back and watches after-hours drinking aids and abets his customers. *See Ferguson v Weaving* [1951] 1 KB 814. In *Cassady v. Reg. Morris Transport Ltd* [1975] Crim LR 398, the employer was aware of the principal's offence, namely failure to keep

under a legal duty to intervene to prevent the commission of an offence, his/her failure to do so may amount to aiding and abetting.[19]

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proper records by a driver. That omission was merely evidence of encouragement to commit the offence.

19 For instance, if a stranger attacks a child in the present of the child's parent, the parent's failure to intervene to protect the child may be a sufficient basis for his/her being held liable as an accessory. One of the most influential views on the issue of accessorial liability by omission is that expressed by J. C. Smith and B. Hogan (1992): "Where D has a right to control the actions of another and he deliberately refrains from exercising it, his inactivity may be a positive encouragement to the other to perform an illegal act, and, therefore, an aiding and abetting. A husband who stands by and watches his wife drown their children is guilty of abetting homicide. His deliberate abstention from action gives encouragement and authority to his wife's act. If a licensee of a public house stands by and watches his customers drinking after hours, he is guilty of aiding and abetting them in doing so." *Criminal Law* (7th edn, London, Butterworhs, 1992). 132. Similarly, B. Fisse (1990) argues that the secondary party's liability for his or her omission is best explained in terms of whether such omission manifests his or her assent to the conduct of the principal offender. According to this commentator, "If [the principal] intimates to D that he intends to steal something from D's employer, receives no reply, interprets this as meaning that D has no objection and duly steals without incident, D's inaction is distinctly suggestive of complicity. Similarly, assent may be sufficiently manifested by silence on the part of a passenger in a car being driven in an illegal manner, at least where the passenger owns or possesses the vehicle, or is supervising or examining [the principal offender's] driving". *Howard's Criminal Law* (5th edn, Sydney, The Law Book Company, 1990), 327. And *see Russell* [1933] VLR 59; ***R v Clarke and Wilton*** [1959] VR 645.

The doctrine of joint criminal enterprise

We may now proceed to consider the situation in which two or more persons decide to embark upon a joint unlawful enterprise based on a common design. Section 66 (2) of the Crimes Act 1961 provides:

> Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

The test that applies under s 66(2) is a subjective one: for an accused to be held liable as an accomplice it must be established that he/she knew that the commission of the further offence was a probable consequence of the prosecution of the common purpose. At common law it has been recognized that, where a further offence is committed by one (or more) of the parties to an unlawful enterprise, the others cannot be held liable unless they have contemplated or foreseen that the commission of the further offence was a possible consequence of the prosecution of the common purpose. That there was such a contemplation or foresight may be inferred from the accused's conduct prior, at or after the commission of the offence and other relevant evidence.

The underlying philosophy for extending criminal liability to foreseen crimes hinges on culpability as derived from conscious risk-taking. In keeping with the notion of freedom of choice as the basis of criminal liability, the view adopted by legal commentators and judicial

authorities tends to oppose the extension of liability for further offences except where the individual concerned is found to have been aware of the risk involved and freely chosen to involve himself or herself in the joint criminal venture. The absence of prior intention that the further or incidental offence be committed on the part of the accessory here does not necessary mean that the outcomes of the venture are undesired or unwanted. Culpability in such cases is based on the individual's choice to place himself or herself in a situation where he or she foresees that it is likely his or her conscious risk-taking to produce a wrongful and unlawful outcome. In other words, culpability here is grounded in the individual's capability to avoid such a situation, having been aware of its undesirable but probable consequences.

In *Chan Wing-Siu* (1985) 1 AC 168, three persons A, D, and E, armed with knives, went to a flat intending to steal from the occupant of that flat. When the occupant refused to give them the money they were demanding, they stabbed him to death. All three offenders were charged with murder. A claimed that he did not take any part in the killing; he said that at the time the killing took place he was in another room restraining the victim's wife. He argued at the trial and again on appeal that it had to be proved that he foresaw that death or serious injury would probably occur as a result of the carrying out of the unlawful common purpose. The jury were directed that A should be found guilty if he had contemplated that a knife might be used on the occasion by one of his accomplices with an intention of inflicting serious bodily harm. All three defendants were found guilty of murder and the Privy Council upheld their convictions. The Privy Council stated the rule that applies at common law with respect to joint unlawful enterprises as follows: "A secondary party is criminally liable for acts by the primary offender of a

type which the [secondary party] foresees but does not necessarily intend … [This principle] turns on contemplation … [and] meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal liability lies in participating in the venture with that foresight."[20]

Another leading English authority on the issue of joint unlawful enterprise has been the House of Lords' decision on the conjoined appeals of *Powell and Daniels and English* [1997] 4 All ER 545. In *Powell and Daniels*, D and P went to V's house to buy drugs. On arrival, P shot and killed V. The trial judge directed the jury that his partner D was guilty of murder

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20 In the earlier case of *R v Anderson and Morris* (1966) 2 QB 110, the principles that apply in such cases were stated (by Lord Parker) as follows: "Where two persons embark on a joint enterprise each is liable criminally for the acts done in pursuance of the joint enterprise, including unusual consequences arising from the execution of the agreed joint enterprise; but if one of them goes beyond what has been tacitly agreed as part of the joint enterprise, the other is not liable for the consequences of the unauthorised act.". In *Davies v DPP* [1954] 1 All ER 507, the accused was a willing participant in a pre-arranged gang fight which ended with a member of the rival gang being stabbed to death. It was held that the accused was not liable as an accessory to manslaughter because he did not know that the perpetrator was carrying a knife and the scope of the joint enterprise was limited to assaulting their opponents with fists. Consider also *R v Hui Chi-Ming* [1992] 1 AC 34. In this case, Lord Lowery recognized that in many cases the contemplation of the principal offender and the secondary party is likely to be the same, although it does not follow from this that joint contemplation is required in every case before the secondary party can be proved guilty of the offence. Drawing on the principle laid down in *Chan Wing-Siu*, Lord Lowery noted that foresight of the possible consequence of the carrying out of a joint venture by the secondary party alone is sufficient to establish his or her liability. And see *R v Stewart* [1995] 3 All ER 159.

if D foresaw that P might intentionally kill or cause serious bodily harm to the victim. D was found guilty of murder as an accomplice. The House of Lords, following *Chan Wing-Siu*, upheld the conviction. In *English*, D and P agreed to attack V by assaulting V with wooden posts. As far as D was concerned, the common intention was to cause bodily injury to, but not to kill, the victim. In the course of the assault, P pulled out a knife, which D claimed he was unaware that P had, and killed V. The trial judge directed the jury that D should be convicted of murder if he had foreseen that P might attack the victim intending to kill or cause serious bodily harm to him. This direction enabled the jury to convict D irrespective of what specific act he foresaw P might perpetrate as long as they were sure that D had foreseen that P might attack the victim with an intention of killing or causing serious bodily injury. D was found guilty of murder. However, the House of Lords quashed D's conviction. In doing so, Lord Hutton pointed out that an accused charged as an accomplice would be liable if he or she foresaw the act causing the victim's death as a possible incident of the joint criminal venture. He recognized that: "to be guilty under the principle stated in *Chan Wing-Siu* [the defendant] must foresee an act of the *type* which [the principal] committed and that in the present case the use of the knife was *fundamentally different* to the use of a wooden post." In *English* D was not liable for murder because, although he had intended or foreseen that P might attack V intending to cause serious injury, the act that killed the victim was 'fundamentally different' from the act that D had anticipated. In other words, the principal's lethal act was outside the scope of the joint criminal enterprise.

The House of Lords revisited the issue in the case of *Rahman* [2007] EWCA Crim 342. In this case, Lord Justice Hooper said that the correct

approach to the matter is reflected in the four following questions. (1) What was the principal's act that caused the victim's death? (e.g. stabbing, shooting, kicking, beating). (2) Did the accused realize that one of the attackers might do *this* act? If yes, he should be found guilty of murder; if no, one needs to proceed to the next question. (3) What act or acts did the accused realize that one of the attackers might do to cause the victim really serious bodily harm? And (4) is this act or are these acts that the accused realized that one of the attackers might do of a fundamentally different nature to the principal's act that caused the death of the victim? If yes, the accused is not guilty of murder; if no, he is guilty of murder. In the subsequent case of ***R v A*** [2011] QB 841, the English Court of Appeal commented that the case of ***Rahman*** did not change the law with respect to the requirements of ***mens rea*** in cases of murder by joint criminal venture and reiterated that the law requires proof that the accused foresaw that the principal offender might act with an intention to kill or cause grievous bodily harm. Finally, in the recent case of ***Jogee*** [2013] EWCA Crim 1433, the Court of Appeal recognized that the principles on joint enterprise as stated in ***Rahman*** applied in cases in which the secondary party had given encouragement, as well as in cases of active participation.

In the New Zealand case of ***Morrison*** [1968] NZLR 156 the accused was convicted as a party to the murder of a police officer. The accused and another man, while in custody, formed the common intention to escape, and in trying to do so the accused's companion killed the officer. Both the accused and his associate struck the victim who died the next day as a result of the blows he received from the accused's associate. The accused appealed against his conviction on the grounds that the trial judge should have told the jury that if they found that the killing of the

officer by the principal offender was the result of an independent murderous intent then the accused should have been found not guilty of murder. However, the Court of Appeal held that, as the accused had struck the officer with an intention to inflict serious bodily harm, his claim that his companion had acted with an independent murderous intent could not be accepted and the accused's appeal was dismissed. The court recognized that, as there was a common intention to escape by the use of force, the accused must have contemplated the police officer's killing as a probable consequence of their actions. In this case court adopted an all or nothing approach to the issue of the secondary party's liability and confirmed the accused's conviction of murder. 'All or nothing' here means that the person convicted as an accomplice should be criminally liable for the full offence committed by the principal.

However, it is now recognized that where the principal is charged with murder for a killing committed in the prosecution of a joint criminal enterprise, the person or persons charged as secondary parties may be guilty of the lesser offence of manslaughter. This departure from the 'all or nothing' approach to the secondary party's liability was confirmed in the New Zealand case of *Hamilton* [1985] 2 NZLR 245 CA.[21] In this case the two defendants were driving around looking for members of a rival gang who had, on a previous occasion, insulted them. When they spotted the car of that gang, they drew up beside it. Offensive words were exchanged and one of the defendants pulled out a gun and shot and killed the leader of the enemy gang. Both were charged with murder, the shooter as the principal and the other as a secondary party under s 66 of the Crimes Act. They were found guilty of murder and appealed. The

21 Consider also *R v Hartley* [1978] 2 NZLR 199.

principal's appeal was dismissed by the Court of Appeal. At the same time the court ordered a new trial for the secondary party on the grounds that the trial judge failed to direct the jury on the offence of manslaughter as an alternative verdict. The court in this case recognized that an accomplice may be guilty of manslaughter even though the principal perpetrator is convicted of murder.[22]

In *Tomkins* [1985] 2 NZLR 253 the accused and his two associates robbed a taxi driver by threatening him with knifes and a barbecue fork. After robbing him, they forced him to drive to an isolated spot. When they arrived there they ordered the victim to get out of the car. Then the victim was thrown to the ground and one of the three offenders stabbed him to death. The Court of Appeal recognized that where an accused is charged as a secondary party, he may be found guilty of murder if he intentionally helped or encouraged it or if he foresaw murder by one of his associates as a real risk. On the other hand, a verdict of manslaughter should be returned where the secondary party knew only that at some stage in the course of the carrying out of the

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22 In *Day* [2001] Crim LR 984 A participated with D and others in a joint enterprise to cause injury to V. While A was fighting with V's friend, D was kicking V about the head with an intention of causing him grievous bodily harm. V died and D was found guilty of murder. The jury acquitted A of murder recognizing A did not foresee that D might intentionally kill or cause grievous bodily harm, but convicted him of manslaughter. A had admitted that he foresaw that D might kick V about the head in the course of any fight. The Court of Appeal held that such foresight of the physical acts which led to the victim's death made A responsible for D's acts and the fatal consequences. However, because he contemplated only that some harm might be caused and not grievous bodily harm, he could be convicted of manslaughter and not murder. Consider also *Lewis* [2010] EWCA Crim 496.

criminal plan there was a risk of killing short of murder (i.e. killing occurring as an unintended consequence of the group's actions); or where the secondary party foresaw the risk of murder but the killing was in fact committed at a time or in circumstances that she/he had never contemplated; or where the common intention was only to scare the victim or to use non lethal force but one of the parties went beyond that and committed murder; or where the secondary party foresaw some risk of murder but that risk appeared too remote.[23]

The issue of withdrawal

A further question requiring attention is whether a person who encourages or assists another in the commission of an offence may escape criminal liability if he/she withdraws from the unlawful activity before the offence is completed. It is recognized that an accomplice may avoid liability only if he/she communicated his intent to withdraw in a clear, timely and unequivocal way. In other words, the secondary party's withdrawal from the joint criminal enterprise must be *effective*; a mere change of heart without more will not be sufficient.

In *Becerra and Cooper* (1975) 62 Cr App R 212 the three defendants A, D and E decided to break into a house to steal. A gave D a knife and told him to use it on anyone who would try to stop them. While they were in the house stealing they heard the sound of steps coming their way. At that moment A told the others: "I hear someone coming; I think we should leave now"; and then he jumped out of a window. But the others

23 It should be noted here that the position the principal and the accessory may be convicted of different offences is not confined to homicide.

remained in the house and when the victim came downstairs D stabbed him with the knife, killing him. A was convicted of murder as an accessory and his conviction was upheld by the Court of Appeal. The court held that what A said and did, did not amount to effective withdrawal from the joint criminal enterprise. For A's withdrawal to have been effective, he had to take steps to prevent the commission of the crime, for example by warning the victim or alerting the police.[24]

In the Australian case of *Menitti* [1985] 1 Qd R 520 the accused was charged with being an accessory to the offence of supplying cannabis to another person. He had allegedly facilitated the commission of the offence by arranging the crucial meeting between the supplier and the buyer. At

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24 See also ***R v Mitchell*** [2008] EWCA Crim 2552. In this case M was the instigator of a violent attack on V after M's group took over V's taxi. The violence subsided for a short time, during which M went looking for her shoes in a car park. She then returned and the violence started up again with weapons, resulting in the victim's death. One of the perpetrators was convicted of murder. M was also found guilty of murder as a participant in a joint criminal enterprise. Although M had stopped playing a direct part in the violence, her continued presence meant that she was still a party to it and had done nothing to withdraw from the joint enterprise. M appealed against her conviction on the basis that she had only participated in the early phase of the violence, and at that time there was nothing from which it could be inferred that weapons would be later used. She argued that either the fatal attack was a separate joint enterprise in which she played no part, or she had withdrawn from it. However, her conviction was upheld by the Court of Appeal. The court recognized that she had played a leading role in the whole incident and it had been open to the jury to infer that she foresaw that one of he co-offenders might attack the victim with the intention of killing or causing serious bodily harm. It was also open to the jury to find that the joint criminal enterprise was still continuing and that M had not withdrawn from it during the brief lull.

the time the transaction was about to take place, the accused showed signs of nervousness and expressed alarm about the presence of the police in the area. He then expressed a desire to withdraw from the operation. However, the others went ahead with the transaction and were arrested by the police. The accused was found guilty as an accessory to the offence and his appeal against conviction was dismissed by the Court of Criminal Appeal. The court held that the accused's belated attempts at withdrawal did not amount to an effective withdrawal. His conduct at the time fell a long way short of reversing the effect of his earlier contribution to the commission of the offence. The court recognized that: "A man who has given assistance in the early stages of preparation for a crime may change his mind and attempt to frustrate the venture to such an extent that he counterbalances whatever assistance he gave in the early stages. If he effectively counterbalances his earlier acts before the offence is committed, it would be very difficult to say in the end that he has aided another person in committing the offence."

As the above statement suggests, what amounts to effective withdrawal depends upon the form of assistance or encouragement the person accused as an accessory has given to the principal. The greater the accused's contribution to the principal's actions, the more he/she must do to withdraw. Thus, if the accused has merely incited the principal to commit the offence, he may withdraw by clearly revoking his encouragement. But in some cases some form of actual physical intervention may be necessary.[25]

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25 In *O'Flaherty* [2004] EWCA Crim 526 D1, D2 and D3, armed with a cricket bat, a bottle and a hammer respectively, had joined with others in a

Accessories after the fact

Those who help an offender after the commission of the crime are not treated as secondary parties to that offence under s 66. They are criminally liable as accessories after the fact under ss 71 and 312 of the Crimes Act 1961. According to s 71(1):

> An accessory after the fact to an offence is one who, knowing any person to have been a party to the offence, receives, comforts, or assists that person or tampers with or actively suppresses any evidence against him or her, in order to enable him or her to escape after arrest or to avoid arrest or conviction.[26]

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spontaneous attack on V, a member of a rival gang. V had managed to run off and was pursued by others but not by D2 and D3 to a nearby street, where he was beaten and stabbed to death. D1 did follow but, although present at the fatal incident, did not participate. The court held that D2 and D3 had withdrawn from the enterprise even though they did not tell the others but simply failed to follow the rest of the group. On the other hand, D1 had clearly not withdrawn because he was still encouraging the principal offenders by his presence at the scene. In this case Mantell LJ expressed the requirements for effective withdrawal as follows: "To disengage from an incident a person must do enough to demonstrate that he or she is withdrawing from the joint enterprise. This is ultimately a question of fact and degree for the jury. Account will be taken of inter alia the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal."

26 The punishment imposed to a person found guilty as an accessory after the fact is prescribed by s 312 CA 1961: "Every one who is accessory after the fact to any imprisonable offence … is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence is

To gain a conviction, the prosecution must prove, first, that an offence has been committed. However, for a person to be held liable as an accessory after the fact it is not required that someone has been convicted of that offence. Further, it would be no defence for the accessory after the fact to claim that the principal offender was for some reason exempt from prosecution. Second, the prosecution must establish that the accused knew or believed that the principal offender had committed a crime. Third, the prosecution must show that the accused has done an act with the intention of enabling the principal perpetrator to escape arrest, prosecution and punishment. Proving such an intention is a necessary condition for establishing liability; it is not sufficient that the accused realised that what he/she was doing may have the effect of impeding the arrest of the offender – this must be his/her motive in acting as he did. Finally the prosecution must prove that there was no lawful authority or reasonable excuse for the accused's action.[27]

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imprisonment for life, and not exceeding 5 years if such maximum punishment is imprisonment for 10 or more years; and in any other case is liable to not more than half the maximum punishment to which he or she would have been liable if he or she had committed the offence." As this suggests, the amount of punishment imposed on the accessory after the fact depends upon the seriousness of the offence committed by the principal perpetrator.

27 In this connection reference may be made to s 71(2) CA 1961: "No person whose spouse or civil union partner has been a party to an offence becomes an accessory after the fact to that offence by doing any act to which this section applies in order to enable the spouse or civil union partner, or the spouse, civil union partner, and any other person who has been a party to the offence, to escape after arrest or to avoid arrest or conviction."

Concluding remarks

In this discussion it was noted that accessorial liability under s 66 of the New Zealand Crimes Act 1961 presupposes an intention on the part of the accused to assist or encourage the principal offender in the commission of the crime. This intention involves his or her knowledge of the ingredients of the type of offence the principal is 7committing or planning to commit; with that knowledge he or she proceeds to aid, abet, incite, counsel or procure the commission of the offence. It was also noted that an individual's omission to act may in certain circumstances be construed as actual assistance or encouragement capable of supporting a finding of accessorial liability. With respect to the doctrine of joint criminal enterprise, the position adopted is that a person may be liable for the commission of additional or incidental offences by his or her co-offenders if he or she had contemplated this as a probable outcome of the carrying our of their primary criminal venture. In such cases, recklessness appears to be a sufficient basis of criminal liability. The extension of criminal liability to foreseen offences committed in the course of carrying out a primary criminal venture can be understood in terms of the accused's free choice to participate in the joint enterprise, being aware of its undesirable but probable unlawful consequences.