



## Précis Paper

### The Common Law Doctrine of Extended Joint Criminal Enterprise Liability

This is an interesting presentation on the High Court's recent consideration of the doctrine in light of its abolition in the United Kingdom.

#### Discussion Includes

- United Kingdom position in *R v Jogee* [2016] UKSC 8
- Attempts to revisit the common law doctrine in Australia
- Accessorial liability and joint criminal enterprise
- In what circumstances does the doctrine arise?
- Policy considerations

## Précis Paper

### The Common Law Doctrine of Extended Joint Criminal Enterprise Liability

1. In this edition of BenchTV, Stephen Odgers SC (Barristers, Forbes Chambers, Sydney) and Gabriel Wendler (Barrister, Seven Windeyer Chambers, Sydney) discuss the recent decision of the High Court of Australia in *Miller v The Queen* [2016] HCA 30.
2. The case arose in the context of Miller, Smith and Presley's convictions for murder. The deceased was fatally stabbed by Joshua Betts in the course of an assault to which Miller, Smith and Presley were said to be parties. Liability for the murder of the deceased was left in each case on the basis of either joint criminal enterprise or extended joint criminal enterprise. The question that arose before the High Court was whether the doctrine of complicity in the criminal law known as "extended common purpose" or "extended joint criminal enterprise" should be abolished.

#### Liability as a secondary party to a joint criminal enterprise

3. To understand the principle of extended joint criminal enterprise, it is important to first understand the broader principles of secondary liability. The underlying question to be considered is whether, where one person commits a crime, another person can be held criminally responsible for that crime. Two doctrines apply in rendering a person secondarily liable: 1) complicity or accessorial liability; and 2) joint criminal enterprise.
4. Accessorial liability arises where a person intentionally assists or encourages the perpetrator to commit the crime. The fault element is the intention to assist or encourage the commission of the crime.
5. Joint criminal enterprise renders two people criminally liable where they agree to commit a crime and one of those people then commits the crime. The fault element here is the agreement that the crime be committed, which Mr Odgers SC suggests is functionally the same as intending a crime to be committed.
6. "Conditional intention" is also relevant to understanding the extended joint criminal enterprise theory. Conditional intention entails an agreement or an intention that a crime be committed if certain conditions arise. For example, if parties agree to commit a robbery, they may agree that if a security guard comes across them, lethal force should be used against him. In that case, the intention to use lethal force is conditional upon the arrival of the security guard during the robbery.

7. Extended joint criminal enterprise liability arises in the following circumstances: If A and B agree to commit one crime, and if, during the commission of the crime, B commits another crime, A will be held criminally responsible for that crime if he contemplated the possibility that the crime would be committed.
8. Thus, under the doctrine, liability is imposed even if A has no intention that the crime be committed. In addition, even if A took steps to prevent the crime being committed, the mere fact that A was aware of the possibility that it still might occur renders him criminally liable.
9. Mr Odgers SC noted that the terms "extended joint criminal enterprise" and "extended common purpose" have been used interchangeably over the years, leading to some of the difficulties that he perceives in the doctrine.
10. The common law doctrine only applies in NSW and South Australia. In the Commonwealth Criminal Code, the requisite state of mind has been modified from the common law position, and it must be shown that the accused had an awareness of a significant risk that the crime would be committed and that it was unjustifiable to take that risk. In other jurisdictions, an objective test applies.

#### Position in the United Kingdom

11. The appeal in *Miller* allowed the High Court to consider recent developments in the common law of joint criminal enterprise in the United Kingdom. In *R v Jogee* [2016] UKSC 8, the UK Supreme Court, also sitting as the Privy Council, abolished the doctrine of extended joint criminal enterprise liability. The Supreme Court held that the doctrine was erroneous, and was a result of a wrong turn in the development of the law that occurred in the case of *Chan Wing-Sui v The Queen* [1985] 1 AC 168.
12. The Court held (at [87]):

*We consider that the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before the law took a wrong turn. The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre Chan Wing-Siu practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose*

#### The Australian Approach

13. Australia chose to follow the UK decision of *Chan Wing-Siu* of the 1980s, first in *McAuliffe v The Queen* [1995] HCA 37; 183 CLR 108, which was in turn followed by the High Court in *Gillard v The Queen* [2003] HCA 64; 219 CLR 1 and *Clayton v The Queen* [2006] HCA 58. In *Clayton* the majority adopted the theory (at [20]) that extended common purpose liability differs as a matter of jurisprudential foundation from secondary liability as aider or abettor, the first being grounded in common embarkation on crime A and the second in contribution to another's crime. There was a dissenting judgment by Kirby J, who pointed, among other considerations, to the disparity between the mental element required of an aider or abettor and that required by the rule of extended common purpose ([102]). The UK Supreme Court made reference to the dissent of Kirby J in abolishing the doctrine in *R v Jogee*.

### The High Court's Decision

14. The High Court in *Miller* declined to follow the approach of the United Kingdom and opted to maintain the doctrine in Australian common law. With the exception of Gaegler J in dissent, the majority of the High Court advanced various reasons why the doctrine should be maintained in Australia, following their previous decision in *McAuliffe v The Queen* [1995] HCA 37; 183 CLR 108. The Court held (at [43]):

*It is not appropriate for this Court to now decide to abandon extended joint criminal enterprise liability and require, in the case of joint criminal enterprise liability, proof of intention in line with Jogee. For the same reasons, it is not appropriate to depart from McAuliffe by substituting a requirement of foresight of the probability of the commission of the incidental offence. As Johns explains, the difficulty with such a requirement is that it "stakes everything on the probability or improbability of an act, admittedly contemplated, occurring". This is not to accept the submission that since "anything is possible", the secondary party may bear liability for a crime contemplated by him or her as no more than a fanciful possibility.*

### Discussion

15. Mr Odgers SC commented on a line of authorities that indicate that intention can be inferred from something happening. In the security guard example above, for instance, these authorities would suggest that an intention to kill the security guard can be inferred from the awareness of the possibility that the security guard might show up.
16. Mr Odgers SC indicated his disagreement with this concept: rather than inferring intention based on the circumstances, he considered that the correct view is that the two states of

mind – awareness and intention – might co-exist. Thus the two offenders might agree, either tacitly or overtly, that in the event that the security guard does show up, lethal force will be used. In certain circumstances, a jury may be satisfied that there was an awareness of the possibility, and the continued participation in the joint criminal enterprise necessarily meant that the person intended for the crime to occur.

17. The critical point is that although there may be situations in which intention and awareness of a possibility co-exist, Mr Odgers SC's fundamental disagreement with the principle of extended joint criminal enterprise arises where there is *not* this co-existence. That is, in some circumstances, a person may be aware of the possibility of something occurring (e.g. the security guard showing up), but *not* intent for it to occur (e.g. intend to "make a run for it" if the security guard does show up). In that situation, it cannot be said that the person intended that a murder occur.
18. On this basis, Mr Odgers SC asked: as a matter of justice, should a person be held liable for a serious crime like murder that they did not commit, without a state of mind of intending that the crime occur? Can we justify a doctrine that relies upon mere foresight? To this end, he considered that the approach of the UK Supreme Court in insisting upon intention was correct.
19. Although there may be difficulties in proving that the necessary intention exists, this does not, in Mr Odgers SC's opinion, obviate the need to abolish the doctrine, as just because a law is difficult to prove does not mean that it should be changed to facilitate convictions. This was one rationale relied upon by the High Court in *Miller* in maintaining the doctrine.
20. Mr Odgers SC also considered that this state of mind almost guarantees conviction, as it is easy for a jury to assume that the accused must have been aware of at least a possibility of the crime occurring. There is a temptation for the jury to consider the fact that the crime ultimately occurred and work backwards to assume the necessary awareness.
21. Mr Odgers SC also commented on the High Court's view in *Miller* that it had not been demonstrated that the doctrine has caused injustice. Mr Odgers SC considered that this position is problematic, as it is impossible to go behind a jury verdict to determine the justice or otherwise of a conviction.
22. Finally, the most commonly advanced rationale for the doctrine is that it will discourage criminal gangs. However, Mr Odgers SC saw no evidence that the doctrine is known in the wider community to achieve this deterrent effect.



## **BIOGRAPHY**

### Stephen Odgers SC

Forbes Chambers, Sydney

Stephen was admitted to practice in 1981, called to the NSW Bar in 1989 and appointed Senior Counsel in 2000. His area of practice is criminal law, specialising in criminal appeals. He is a chair of the Criminal Law Committee, NSW Bar Association; member of the National Criminal Law Liaison Committee, Law Council of Australia; and Adjunct Professor, Faculty of Law, University of Sydney.

### Gabriel Wendler

Barrister, Seven Windeyer Chambers, Sydney

Gabriel Wendler was called to the SA Bar in 1982, before being admitted to the NSW Bar in 1988. He is also a member of the Bars of Victoria, Queensland, Tasmania, the ACT, the Northern Territory, and also the New Zealand Bar. In addition, Gabriel is on the panel of Legal Aid NSW and is a member of the Criminal Law Committee of the NSW Bar Association.

## **BIBLIOGRAPHY**

### Focus Case

*Miller v The Queen* [2016] HCA 30

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/weekly\\_criminal/benchmark\\_02-09-2016\\_weekly\\_criminal\\_law\\_review.pdf](https://benchmarkinc.com.au/benchmark/weekly_criminal/benchmark_02-09-2016_weekly_criminal_law_review.pdf)

### Judgment Link

<http://www.austlii.edu.au/au/cases/cth/HCA/2016/30.html>

### Cases

*R v Jogee* [2016] UKSC 8

*Chan Wing-Sui v The Queen* [1985] 1 AC 168

*McAuliffe v The Queen* [1995] HCA 37; 183 CLR 108

*Gillard v The Queen* [2003] HCA 64; 219 CLR 1

*Clayton v The Queen* [2006] HCA 58