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Précis Paper

Criminal Complicity: Part II

Part II of this discussion explores the law on extended joint criminal enterprise liability

Discussion Includes

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Précis Paper

Criminal Complicity: Part II

1. In this edition of BenchTV, Andrew Dyer (Colin Phegan Lecturer, The University of Sydney Law School, Sydney) and Tim Smartt (Associate, NSW Attorney General's Office, Sydney) discuss the common law of criminal complicity – which continues to operate in New South Wales and in South Australia – with particular focus upon extended joint criminal enterprise liability in this second part.

Extended joint criminal enterprise liability

2. Part I of this discussion explored how the holding of *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75 was essentially an attempt to extend criminal liability beyond where the limits of the law traditionally lay to people who deserve criminal liability, but could not otherwise be attributed with it. Another extension of the law in this way has arisen out of the doctrine of extended joint criminal enterprise.

3. Extended joint criminal enterprise arises where a further crime - a crime beyond that which parties to a joint criminal enterprise have agreed to commit - has occurred. The typical case of extended joint criminal enterprise arises where two or more parties agree to commit a burglary, for example, and during the enterprise, one of the participants shoots somebody dead, for example, thus committing murder. A question therefore arises over whether the passive participants can be convicted of murder.

Foresight of a possibility

4. Since *McAuliffe v The Queen* (1995), the law has stated that the passive participants to a joint criminal enterprise can be convicted of a crime on the basis of the doctrine of extended joint criminal enterprise if they foresaw the possibility of the commission of that further crime, but nevertheless continued with the enterprise.

5. The Crown must prove that the relevant person 'foresaw the possibility'.

6. The doctrine appears to be a harsh one. Indeed, the doctrine has been loudly criticised for its harshness.

7. The response of the law that logic would seem to mandate is that a person can only be convicted of a further crime committed during the course of a joint criminal enterprise *if that person conditionally intended that crime to be committed.*

8. Traditionally, the response of the common law was that a person could only be convicted of murder if he or she intended the actual perpetrator to kill someone with an intent for murder if the occasion arose.

9. This position is rather different to the 'foresight of a possibility' position espoused in *McAuliffe v The Queen,* and the High Court retreated from this position in the latest extended joint criminal enterprise case of *Miller v The Queen* [2016].

10. As was established in the High Court case of *Zaburoni v The Queen* [2016], foresight of a possibility is very different from intention.

11. At [20] in the judgment of the High Court decision in *Clayton v The Queen* [2006], the majority appeared to endorse the justification for extended joint criminal enterprise liability that had been promoted in an article written by Professor Simester.

12. Professor Simester justifies the doctrine by reference to normative position reasoning, saying that joint criminal enterprise liability and extended joint criminal enterprise liability differ from accessorial liability insofar as there exists an agreement to commit an offence in the case of the former. In other words, he argues that once a person agrees with another to commit an offence, that person's normative position changes, and it is therefore fair for the law to hold that person liable for other harms that result from the enterprise, so long as they were foreseen as a possibility by that person.

13. To Andrew's mind, this justification - properly analysed - is very unpersuasive. It is unpersuasive because it draws a distinction between *assisting* someone to commit a crime and *agreeing* with someone to commit a crime, where in essence the two can hardly be said to be different to each other, i.e. agreeing and assisting in this context seem to be equally morally culpable activities.

14. To Andrew's mind, the justification provided for in *Miller* by Keane J is equally unpersuasive. Keane J in *Miller* more or less adopts an agency justification, saying in essence that a person engaged in a joint criminal enterprise with another is taken to have authorised all of the acts performed by that other person, i.e. the latter is taken to be the former's 'agent'.

15. *R v Jogee* was the reason why *Miller* was decided in the way that it was.

<u>Abandonment of parasitic accessorial liability</u>

16. In *Jogee,* the doctrine of parasitic accessorial liability was abandoned. Parasitic accessorial liability is really just the English equivalent of extended joint criminal enterprise liability.

17. Their Lordships in this case abandoned the doctrine, reasoning that it was merely a new rule introduced by the Privy Council case of *Chan WingSiu v The Queen* [1985], despite the age-

old English common law position that said otherwise, and only by reason of an erroneous reading of past case law and arguably questionable policy arguments.

A 'wrong turn' in English common law

18. Essentially, the UKSC and the Privy Council held in *Jogee* that the common law had taken a 'wrong turn' in *Chan Wing-Siu*.

19. Following this English ruling, the High Court in *Miller,* unsurprisingly, was asked to find that extended joint criminal enterprise should similarly be abandoned in Australia, which the majority of the High Court refused. They did so because there did not exist the same body of public opinion in Australia as there did in England before *Jogee* that was hostile to the doctrine.

A 'wrong turn' in Australian common law

20. Tim argues in his paper 'The Doctrine of Extended Joint Criminal Enterprise: a "Wrong Turn" in Australian Common Law' that by examining the otherwise overlooked line of Australian authorities in their context as a whole — from the colonial era to today — the doctrine of extended joint criminal enterprise that emerged from *McAuliffe* was a misreading of prior Australian authorities just as *Chan* was of prior English authorities.

21. When all of the Australian authorities on joint criminal enterprise are traced from colonial courts in the early 1800s through to state courts in the 1900s and considered together, they turn out in favour of the proposition that a person's criminal liability should be demarcated by their intention.

22. Tim argues that *McAuliffe* signalled a similar such 'wrong turn' in Australian law as did *Chan* in English law, in the sense that the position taken up by the Court in *McAuliffe* totally diverged from the longstanding Australian common law position to the contrary.

23. The case of *Johns v The Queen* (1980) is considered to be a pivotal one in this area. It is often seen as being a 'conditional intent' case.

24. The position of the court in *Miller* was a bit more ambiguous. There are Australian commentators who have regarded *Miller* as being a 'foresight of possibility' case.

25. Tim, however, regards *Miller* as a 'conditional intent' case, the reason being that on the facts, it was clearly stated that the two participants in this case agreed to commit the incidental offence (murder) if the victim were to cause the participants any trouble throughout the course of the crime they were committing.

26. So in this sense, it is easily distinguishable from foresight of a possibility, in that foresight of a possibility does not entail a desire or a goal to bring about a certain set of events conditional upon something in particular happening. Foresight of a possibility is mere advertence or thinking that something can happen, without intending to contribute to that particular eventuality.

27. The High Court was very clear in *Johns* that these two people had agreed to commit murder. So it was not a case of one participant foreseeing that the other might commit murder. It was instead a case of the murder being instrumental to the plan that the participants had agreed would happen if the victim were to resist.

The differing social contexts in England and Australia

28. *Miller* was decided in a particular social context that was absent in England when the UK Supreme Court decided *Jogee.* The social context in which *Jogee* was decided is crucial.

29. In about the 10 years before *Jogee* was decided, there was a lot of controversy surrounding parasitic accessorial liability. A lot of people in the public, and importantly also in the press, started to suggest that parasitic accessorial liability imposed liability too broadly. Parliamentarians, judges, and family members of people who had been convicted of murder on the basis of parasitic accessorial liability were also critical of it.

30. It seems as if this social context in the UK made it much easier for the judges to acknowledge that simply because the doctrine had been endorsed in the past did not mean that it should be perpetuated any further into the future.

31. There was not the same social context in Australia. There were a handful of people criticising extended joint criminal enterprise, including:
    - a few academics
    - the Hon Michael Kirby
    - the NSW Law Reform Commission
    - the Hon Justice Mark Weinberg

    But the press and the public were not really expressing the same level of hostility to the doctrine as they were in England.

32. So in these circumstances, it was difficult for the judges of the High Court who were being asked to abandon the doctrine (the doctrine that had been endorsed by the very same Court) to do so, in the absence of any real public opposition to it – i.e. the lack of opposition made it difficult for the judges to depart from precedent.

What will it take for the law to change in Australia?

33. When is it, then, that ultimate courts of appeal are willing to change the law and depart from their own precedents? Bell J of the High Court has written quite extensively on this question, saying that judges have a law-making function - and they will change the law – but they will be extremely cautious about doing so where they are not supported by the public.

34. A number of other judicial statements over the years have been made to this same effect. If judges start altering these accepted doctrines willy-nilly, they expose themselves to being accused of being 'rapacious'.

35. So in looking at *Miller* and *Jogee,* the explanation for the differences between the approaches of the two courts might not be as profound as first appears.

36. The judges in *Miller* were merely saying that given the doctrine had been previously endorsed, and in the interests of legal certainty and the absence of any manifest injustice resulting from its operation, they did not see fit to change the law at the time.

37. The differences in approach between the two courts in *Miller* on the one hand, and *Jogee* on the other, are owing, at least in part, to the social context in which the two decisions were reached.

BIOGRAPHY

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Andrew is a lecturer at the University of Sydney Law School and also the Deputy Director of the Sydney Institute of Criminology. Andrew's current research concerns criminal law and human rights law, and the relationship between them.

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Tim is currently Associate to the NSW Attorney-General. Prior to this, he was Tipstaff to Justice Paul Brereton of the Supreme Court of NSW. All opinions expressed in this presentation are entirely personal.

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