Is the test for extended common purpose over-extended?

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INTRODUCTION

Imagine the following hypothetical case:

> A group of three people are engaged in a scheme whereby they steal clothing from a department store and later return the clothing to obtain a refund, claiming they have lost the docket. The agreement is that two of them will enter the department store and one will stay outside and act as lookout. Of the two who enter the shop, one will take clothing into the change room, while the other keeps a lookout inside the shop. The one in the change room will put the clothes on underneath her own clothes. Then they will leave the store without paying for the items. Later, each of them will take the items of clothing to various stores in the city to seek refunds. They will all share in the money obtained.
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> The group has been functioning for some months without apprehension. All three in the group are well known to one another. One of the group is known to them all as having a quick temper. He has a previous conviction for assault causing grievous bodily harm arising out of a pub brawl in which he had punched a person in the head (causing serious injury). Knowing this, the other two tell him that there is to be no violence in the course of the thefts. He agrees.
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> On one occasion, in accordance with their agreement, two of the group members enter a shop and the third takes his position outside. The quick-tempered member is acting as lookout inside while the other takes the clothes and puts them on underneath her own. In the course of leaving the shop, a security guard, who has become suspicious, confronts them verbally and an argument ensues. At this point, two of the group

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run away. The quick-tempered one wrestles the security guard to the floor and, with the intention of subduing him, kicks him in the head. He then flees on foot. The security guard dies of head injuries.

Under the criminal law in New South Wales, all three members of the group are potentially liable for the murder of the security guard. The man who kicked the deceased is liable because he did an act causing death with intention to cause serious injury.[1] The others are potentially liable under the doctrine of extended common purpose or extended joint criminal enterprise.

For many, including ourselves, this result would be unacceptable. At the very least it is morally counterintuitive. Given the moral culpability of the quick-tempered one, what is the moral culpability of the other two members of the group? Each of them agreed to, and participated in, the offence of shoplifting. Neither wanted, nor intended, nor participated in, any violence. Yet, if a jury could be persuaded that they *foresaw the possibility* that one of them *might* use violence with the intention of inflicting serious injury, they can be convicted of murder. They certainly did foresee that possibility, because they alluded to it in their warning to the quick-tempered one. From his history, and the terms of their warning, a jury could infer that they foresaw the possibility of violence like that used in his previous conviction. But they did not intend, nor want, nor expect there to be any violence whatsoever. They simply wanted to steal the clothes, and, if caught, were prepared to avoid apprehension by running away. Should they be labelled and punished as murderers?

The wide scope of the doctrine of extended common purpose has been criticized. Justice Michael Kirby, for example, has made numerous criticisms of it in a number of cases.[2] The New South Wales Law Reform Commission is conducting an inquiry into the law of complicity, with particular focus on the law of extended common purpose in homicide cases. The Commission's Consultation Paper provides a summary of the criticisms and poses some alternative reform models.[3]

This article is a contribution to that discussion. We agree with the criticism that the scope of the doctrine is too wide. That criticism has been widely made, but is not universally accepted. We do not intend to canvass all of the criticisms in the literature and the cases. Instead, we aim to appeal to the doubters, by showing, with reference to recent decisions and hypothetical examples, how the doctrine operates at the extremes. We argue further that recent developments in the cases have combined to make the doctrine's

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1 *Crimes Act 1900* (NSW) s18.

2 See Kirby J in *Gillard v The Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 231 ALR 500; *R v Taufahema* (2007) 228 CLR 232.

3 New South Wales Law Reform Commission, *Complicity*, Consultation Paper 2, January 2008.

application unclear. We submit that whatever policy reasons there might be for retaining the doctrine as it is now, its lack of clarity and the potentially absurd results of its operation, require its reform.

EXTENDED COMMON PURPOSE

The principle of extended common purpose was articulated in *McAuliffe v The Queen.*[4]

> The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. ... [A] common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.
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> Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. ... [The test of what falls in the scope of the common purpose is] a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.[5]

We might express the formula in summary form as follows. For extended common purpose to apply, there must be the following:

1. An agreement between the accused and the primary offender to commit an offence (foundational offence);

2. The commission by the primary offender of another offence (the incidental offence) as an incident of, or in the course of, or as a consequence of committing the foundational offence; and

3. Subjective foresight by the accused of the possible commission by another group member of the incidental offence.

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4 *McAuliffe v The Queen* (1995) 183 CLR 108 (*'McAuliffe*).

5 Ibid 114 (footnotes omitted).

Case decisions with respect to each of these elements have combined to cause a degree of uncertainty in the doctrine and to lead potentially to morally unacceptable results. Let us take each in turn.

AGREEMENT TO COMMIT A FOUNDATIONAL OFFENCE

The foundational offence

The first issue of concern regarding the formula for extended common purpose is the *nature* of the foundational offence. Must the foundational offence be in any sense proportionate to the incidental offence? Could the foundational offence be merely an unlawful act in the sense of a mere regulatory offence (for example, a traffic offence), or a minor crime, or a crime generically different from the incidental offence?

In our hypothetical example above, we have already suggested part of the answer to this question. Our reasoning is drawn from the case of *Taufahema*,[6] the brief facts of which follow.

Motekiai Taufahema was picked up in a car by his brother John and two others, Lagi and Penisini. Taufahema took over the driving. All four men were on parole, and Taufahema was unlicensed. Police had seen the car speeding and being driven erratically, and knew that the car had been reported as stolen. Police alerted Senior Constable McEnallay who was driving a police car in the area. He saw the car, and followed it, ultimately turning on his siren and flashing lights. At this point, Taufahema announced to the others in the car that he was going to drive away from the police and that they should put their seat belts on. None of the occupants made any verbal or other objection to this. The car fled, but within a very short time (around 20 seconds), hit a gutter and stopped. Immediately, all four men alighted from the car. One of them, Penisini, fired five shots into the windscreen of the police car, killing Senior Constable McEnallay. The other three, including Motekiai Taufahema fled on foot. There had been four firearms in the car. Taufahema was caught while trying to hide one of them in a garden bed as he fled.

In a trial before Sully J in 2004, in the New South Wales Supreme Court, Taufahema was convicted of the murder of the police officer through the jury's application of extended common purpose. The foundational offence relied on by the Crown at trial was the failure to stop when signalled to do so by the police.

On 8 May 2006, the Court of Criminal Appeal ('CCA') allowed Taufahema's

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6 *R v Taufahema* (2007) 228 CLR 232 ('*Taufahema*').

appeal,[7] finding that the trial judge made an error of law in his directions on extended common purpose. The Court quashed his conviction and ordered a verdict of acquittal. It determined that failing to stop when signalled to do so by pursuing police is not a criminal offence or does not amount to what *is* an offence, namely, 'hinder police', (and, therefore, it could not form the foundational offence for the purposes of extended common purpose). We take issue elsewhere with this aspect of the Court of Criminal Appeal's decision, but the finding does not matter for our purposes here. What matters is that, apparently, had there clearly been an offence in New South Wales of failure to stop for police, that offence would have been a sufficient foundational offence for the purposes of extended common purpose and liability for murder. The Court of Criminal Appeal by implication found no difficulty in the idea that an offence radically less serious or generically different from the incidental offence could constitute the foundational offence for the purposes of extended common purpose.

Similarly, no concern about disproportionality as between the foundational and the incidental offence arose when the case went on appeal to the High Court of Australia. The High Court's decision in *R v Taufahema*[8] was ultimately about the appellate process of the criminal justice system. However, in the course of commenting on the doctrine of extended common purpose, the justices made no adverse comment on the interpretation of the doctrine by the trial judge or the Court of Criminal Appeal.

The agreement

The second issue of concern is the question: Under what circumstances may it be inferred that an agreement to commit the foundational offence exists?

It is clear from *McAullife* that the agreement to commit a foundational offence (the agreement to engage in a joint criminal enterprise) need not be express – it may be a merely tacit understanding or arrangement that is inferred from all the circumstances.[9]

The agreement may also be reached "on the spur of the moment". The case of *R v Bosworth*[10] arose out of a car chase instigated by a group of men known as "Caddies" who were driving in two vehicles, a Mazda and a utility. They had stopped their vehicles directly behind the appellants, who were driving a Commodore. The men in the Commodore attacked the Caddies group and

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7 *Taufahema v The Queen* (2006) 162 A Crim R 152.

8 *R v Taufahema* (2007) 228 CLR 232.

9 *McAullife v The Queen* (1995) 183 CLR 108, 113 (Hayne J).

10 *R v Bosworth* (2007) 97 SASR 502.

one member was killed. The trial for murder of some of the members of the gang who attacked Caddies relied on extended common purpose liability. On an appeal to the South Australian Court of Criminal Appeal, the Court did not disagree with the trial judge's statement that the necessary agreement could be reached on the "spur of the moment". All that needed to be shown was that when the group emerged from the Commodore on that night there was an understanding between them that they would attack the occupants of the utility and the Mazda.[11]

Again, the case of *Taufahema* illustrates the idea that a "spur of the moment" agreement may be sufficient to ground a conviction under extended common purpose. If we assume, for the sake of argument, that the offence of failure to stop is an offence amounting to "hindering police", then one question in *Taufahema* is when precisely the group members including Taufahema were supposed to have come to the decision jointly to commit that offence? As observed in the High Court, by Gleeson CJ and Callinan J, the whole episode took a very short time, and that might have created doubt in the minds of the jury as to the formation of an agreement:

> The total time that elapsed between the first observation of Senior Constable McEnallay by the four men in the Holden and the fatal shooting was less than one minute. According to the applicant, it was probably closer to 20 seconds. ... Bearing in mind the sequence of events and the time frame, the development of a plausible case of extended common purpose was not without its problems. If four criminals, suddenly confronted by a police officer, flee, it is not self-evident that they are doing so in pursuance of an understanding or arrangement to flee. It is at least possible that they have decided individually that flight is a good idea.12

The point is that, although we agree with the High Court that the case of extended common purpose "was not without its problems", there is nothing in either the CCA or High Court decisions to suggest that, as a matter of law, the jury were *not* entitled to draw the inference that there was a tacit understanding between the occupants of the car. They could draw the inference that all four had agreed that they would jointly avoid apprehension or hinder police if the occasion arose.

Such an inference was open on the basis of the following evidence:

- To each of the group members' knowledge, they were on parole;
- There were four loaded firearms in the car (although Taufahema denied knowing this);

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11 Ibid 509.

12 *R v Taufahema* (2007) 228 CLR 232.

- They all knew that none was licensed to drive, and that apprehension would result in revocation of the driver's parole;
- When the police officer activated his siren and lights, the accused announced that he intended to speed off, there was no apparent objection to this course of action;
- When the car stopped, all fled the scene (although Penisini fled only after firing the fatal shots at the police officer).

All four occupants of the car had very good reason to avoid or hinder their apprehension. One of them, Taufahema, indicated to the others, on being signaled to pull over, that he intended to avoid apprehension by speeding away. None of the occupants objected to that course of action. When the car stopped, they all fled on foot in different directions. As suggested both in the CCA and in the High Court, it is not self-evident that their actions were the result of a common understanding or arrangement jointly to flee – it is possible that they each individually decided to flee.

However, it might be argued that the best way of carrying out a joint plan of hindering police is to scatter in all directions. At least that was a finding open to the jury. The jury could find that the tacit understanding came into effect from the time that Taufahema commenced driving the car with all of the other offenders as passengers. Alternatively, the inference was open from the moment that the police officer sounded his siren, that Taufahema had agreed with the others to two successive acts of hindering, the first, to keep driving and thereby hinder or evade the police by car, and the second, if forced to stop, to hinder or evade police by scattering on foot in different directions.

The interesting point is that an "agreement" could have been inferred from, among other things, the parties' passive, silent, on the spur of the moment, acquiescence in the course of the events as they unfolded. Such a conclusion is supported by the reasoning in *Johns v R*,[13] which would allow the conviction for an incidental offence of an accused whose presence at the commission of the foundational offence signalled "encouragement", if not "agreement", based on the foresight of possibility of the development and implementation of the *mens rea* for the incidental offence.[14]

Of course, the jury might also have inferred that the agreement could have been made a long time before. For extended common purpose, although the incidental offence must have been committed in the course of, or as a

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13 *Johns v R* (1980 143 CLR 108.

14 There is a long line of older authority for the proposition that the passive presence of the accused may be evidence of encouragement. See *R v Coney* (1882) 8 QBD 534; *R v Russell* [1933] VLR 59; *R v Clarkson* [1971] 1 WLR 1402. A factor in these cases was a pre-existing relationship between the accused and the principal offender.

consequence of, the foundational offence, the agreement to commit the foundational offence can have been made well before the commission of either offence.[15]

In our hypothetical case above, there is no real issue about the agreement of all to engage jointly in the criminal enterprise of shoplifting. However, if we change the facts, so that the agreement was a spur of the moment one, agreed to tacitly rather than expressly, would that change the participants' legal or moral culpability? Let's imagine the same group of offenders, but, this time, without any prior agreement to steal clothes under the "return for refund" scheme. All three are in a department store, shopping together. One of them, individually, takes clothes into the change room and puts the clothes on underneath her own with the intention of stealing them. She comes out of the change room and tells the others what she has done. She also explains her plan to steal the clothes and to obtain a refund for them later. She says she will share the proceeds with them. All they have to do is to follow her quickly out of the department store and to keep a look out on the way. Knowing of the quick-tempered one's prior criminal history, she tells him, in earshot of the other, that there is to be no violence. Without any further conversation the three walk quickly to the front of the shop. As with the previous example, a security guard has been watching and is suspicious. He confronts the three verbally as they try to leave the shop. Two of them run away, and the quick tempered one wrestles the security guard to the floor and, with the intention merely of subduing him, kicks him in the head, killing him. The security camera outside the change room shows the three offenders clearly. It shows the woman alone talking and the others remaining silent throughout. It shows all three looking around the shop as they walk quickly towards the door.

According to the reasoning in *Taufahema* and *Bosworth*, all three could be liable for murdering the security guard. The jury could be satisfied that all three tacitly, and on the spur of the moment, agreed jointly to help one another to steal the clothes.

What is troubling about this hypothetical case? Even if a jury were satisfied beyond reasonable doubt, in the circumstances, that an agreement to commit the foundational offence came into effect, and that each member foresaw the *possibility* that one of them might assault a person with the intention of causing grievous bodily harm, many of us would still be uncomfortable with convictions of murder for the two who ran away. That is because, we submit, as in the first hypothetical example, there is a significant moral difference between what the quick-tempered one did and what the others did. He deliberately and with the intention of causing enough injury to subdue him,

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[15] *Clayton v R* (2006) 231 ALR 500.

kicked a man in the head to avoid apprehension. The others, with no intention to hurt anybody, simply ran away to avoid apprehension.

It is possible to think of other hypothetical cases. What about an offender who not only remains silent but who also remains passive? In our shoplifting hypothetical, the participants arguably all took active steps to participate in the foundational offence, by trying to leave the shop without paying for the goods. Can an offender be taken to have agreed to and "participated" in the foundational offence by doing nothing, except failing actively to object to the course of events? Consider again the facts of *Taufahema*, but only up until the point when they all got out of the car and ran away. Imagine instead that only one got out of the car (and shot the police officer) and the rest stayed in the car. A jury might infer that the agreement was well and truly complete by that stage, and the foundational offence had been committed (failing to stop or "hindering police"). Although the actual fleeing on foot by the offenders in *Taufahema* was evidence that could be taken into account in determining whether there was an agreement to avoid apprehension, *that fact* was not crucial in that determination, especially as it might just as well have been evidence that there was no joint agreement, but rather individual decisions, to flee. If we are right, then, presumably, the failure of two of the passengers in the car to take positive steps to stop the car while the officer was in pursuit may be taken to be participation in, or at least, encouragement of, the foundational offence. The result is that the scope of extended common purpose is potentially very wide: it can encompass offenders who, by silence or passivity or both, can be taken to have both agreed to, and participated in, a joint criminal enterprise or common purpose.

We have been arguing that there is a disparity evident in the moral culpability of primary and secondary offenders in cases relying on extended common purpose liability. So far, we have based this argument on consideration only of the *actus reus* and *mens rea* for the *foundational* offence.

Let us now consider the remainder of the test for extended common purpose – the requirement that the accused have subjective foresight of the possible commission by one of the group of another offence as an incident of the commission of the foundational offence. We suggest that the disparity in moral culpability is more acutely observed in the consideration of this element of the doctrine.

COMMISSION AND FORESIGHT OF THE INCIDENTAL OFFENCE

Foresight of the nature of the incidental offence

In New South Wales, the mental element for extended common purpose liability is expressed as subjective foresight of the *possible* commission of the

incidental offence.[16] The test has been criticized on the basis that the scope of foreseeable *possibility* is too wide.[17] We agree that this aspect of the test is objectionable and we take up this criticism below. But first, we consider another aspect of the test that, we argue, contributes to its potentially wide scope. The question is what precisely is it about the incidental offence that the secondary offender must foresee as a possibility to be liable for it? Must he or she foresee the possibility of the actual offence that is committed, or will foresight of a similar offence be sufficient? Where the principal offender has used a particular weapon to commit the incidental offence, must it be shown that the accused knew of the existence of that weapon and of its accessibility, or is it sufficient that the accused foresaw as a possibility that the principal offender might form the *mens rea* to commit the incidental offence, and use means of some kind to implement it?

It will be helpful to consider another hypothetical. Imagine the same facts as in our first hypothetical - (prior agreement jointly to commit the shoplifting offence; foresight that it is *possible* that the quick-tempered one might use violence with intention to cause serious injury; a warning not to use any violence and so on) but this time, imagine that, instead of wrestling the security guard to the ground and kicking him in the head, the quick-tempered one pulls out a knife and stabs the guard? Imagine also that his companions, although knowing of his previous conviction for assault with intent to cause grievous bodily harm, have never known him either to have carried or used a knife, or any other weapon, to commit a violent crime.

Would the two offenders who ran away be liable for the murder of the security guard? We suggest that under the present law in New South Wales, they could be liable. The mental element of extended common purpose liability is framed in general terms, so that, if the two offenders here simply had foresight of the possibility that the quick-tempered one might possibly commit an assault with intention to cause serious injury, that will be sufficient. It will not be necessary for the prosecution to prove that they knew of the manner in which the incidental offence might occur or of the existence of the weapon.

In *Chan Wing-Siu v The Queen*,[18] the test (approved by the Privy Council[19]) is stated in general terms:

> If B realizes (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to

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16 *McAullife v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1.

17 For example, see Kirby J in *Gillard v The Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 231 ALR 500; *R v Taufahema* (2007) 228 CLR 232.

18 *Chan Wing-Siu v The Queen* [1985] AC 168 (*'Chan Wing-Siu*).

19 See *Hui Chi-Ming v The Queen* [1992] 1 AC 34, 51.

> participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture.[20]

In *McAuliffe* the test is stated more generally (without reference to any particular type of incidental crime):

> A party is also guilty of a crime which falls outside the scope of the common purpose if that party contemplated as a possibility the commission of that offence by one of the other parties in the carrying out of the joint criminal enterprise and continued to participate in that enterprise with that knowledge.[21]

In *Clayton v The Queen,*[22] in the context of a homicide case, the test was expressed in terms of the elements of that crime:

> If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight."[23]

The authorities suggest that the scope of the extended common purpose can be very wide: it is not necessary as a matter of law for the secondary offender to foresee the precise manner in which the principal offender might carry out the incidental offence. Of course in some cases, the practicalities of proof might require that the jury be satisfied that the accused knew of the existence of a weapon. That is because, in some contexts, that might be the only evidence on which an inference of foresight of the possibility of the incidental offence might be made.

That issue arose in *Taufahema*, where it could not be shown beyond reasonable doubt that Taufahema knew that there was a firearm in the car, Penisini having used a firearm to implement his intention to kill. It also arose in *R v Bosworth,*[24] because the accused did not know that a knife was available for a co-accused to use to inflict grievous bodily harm should the possibility of the development of an intention to inflict grievous bodily harm eventuate.

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20 *Chan Wing-Siu* [1985] AC 168, 178.

21 *McAuliffe* (1995) 183 CLR 108, 109.

22 *Clayton v The Queen* (2006) 231 ALR 500.

23 Ibid 504-505.

24 *R v Bosworth* (2007) 97 SASR 502.

In *Bosworth*, there was some disagreement in the South Australian Court of Criminal Appeal about the precise formulation of the test. Justice White differed from Justices Duggan and Gray on the issue of whether the extended common purpose doctrine requires the accused to have foreseen the specific type of act committed by the principal offender, or merely that a co-offender might possibly develop the required mens rea and implement it by any means to hand.

Duggan J with whom White J agreed, cited *Woolley, Woolley, Whitney & Rayment,*[25] which held that if an intention to inflict grievous bodily harm was within the contemplation of the appellants, knowledge of the manner in which such harm was to have been caused would not have been essential for liability for the crime of murder. However, Duggan J also said that knowledge of the existence of weapons might be important in determining whether an intention to inflict harm was in fact contemplated. [26]

In other words, while knowledge of the existence of a weapon which a gang member could possibly use to kill or inflict grievous bodily harm is relevant and highly significant on the issue whether an inference could be drawn by the jury that a group member might develop and implement an intent to kill or inflict grievous bodily harm, its absence is not conclusive of the issue.

In contrast, Gray J would, in some circumstances, make knowledge of the particular weapon used by the principal offender to commit the incidental offence an essential element of the accused's liability for that offence. In holding that the prosecution was required to show that each of the offenders contemplated *the use of a knife*,[27] he applied *R v Powell*[28] where the use of an unknown knife was considered to be fundamentally different from the use of a known wooden post. [29]

It is suggested that the approach of Justices Duggan and White better reflects the weight of authority. As stated in *Chan Wing-Siu*, cited with approval in *McAullife*, the act which the principal offender ultimately performs in committing the incidental offence need only be "of a type which the secondary party foresees".[30] The act that might have been foreseen is the intentional infliction of serious bodily harm, in some way or other, resulting in the death of the victim.

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25 (1989) 42 A Crim R 418, 438.

26 *R v Bosworth* (2007) 97 SASR 502; [2007] SCSA 150, [81]-[84].

27 Ibid.

28 *R v Powell* [1999] 1 AC 1, 30.

29 Ibid 214.

30 (1985) AC 168, 175, quoted in *McAullife v The Queen* 183 CLR 108, 109.

If we apply the law to our hypothetical case, we see that the two co-offenders who ran away could be liable for the stabbing murder of the security guard, even though they did not know of the existence of the knife. They are potentially liable in these circumstances because of their knowledge of the quick-tempered one's prior violent history (a conviction for assault with intent to cause grievous bodily harm). That would be sufficient to warrant the jury's inference that they foresaw the *possibility* that their quick-tempered companion might, in the course of committing the theft, lose his temper and commit an assault with the intention of seriously injuring a person.

Foresight of possibilities

Although it is not entirely clear what precisely must be foreseen by the secondary offender to be liable under extended common purpose, one thing is very clear – foresight of the mere *possibility* of the commission of an incidental offence is all that is needed.[31] The arguments against a test of foresight of *possibility*, rather than, say, a test of foresight of *probability* have been set out elsewhere.[32] The arguments are compelling. They might be referred to as (1) the misalignment of moral culpability and criminal responsibility argument and (2) the logical consistency of the criminal law argument.

First, the argument from moral and criminal culpability: we have tried to show by our hypothetical examples how the present test is morally counter-intuitive. What is troubling about these hypothetical examples is that we find it difficult to label these shoplifters as murderers. Murderers are people who intentionally kill a person, or intentionally inflict grievous bodily harm on a person causing the person's death, or who kill a person with reckless indifference to human life.[33] The relevant offenders in our examples are shoplifters, whose mistake is to carry out their joint purpose of shoplifting with a person they know to be quick-tempered and sometimes violent. Their liability for murder rests on the fact that they could foresee as a mere *possibility* that their companion might act violently with intent. But that possibility need not be a strong one, or one that is even at all likely. But as long as it is possible, they are liable. To put the problem colloquially: "anything is possible". We might change the facts of our hypothetical case again to illustrate the point. Imagine that the quick-tempered one's sole conviction for assault with intent occurred 15 years previously, at a time when he was young and had less control of his emotions. Since then he has successfully completed counselling and treatment for anger

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31 *McAuliffe v The Queen* (1995) 183 CLR 108, 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).

32 See for example, Kirby J in *Gillard v The Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 231 ALR 500; *R v Taufahema* (2007) 228 CLR 232; and New South Wales Law Reform Commission, *Consultation Paper 2: Complicity*, January 2008.

33 *Crimes Act 1900* (NSW) s 18.

management. His companions do not at all expect that he would act violently again, but, knowing of his past, they warn him anyway. If, in the unlikely, but possibly foreseen event, he does in fact kill, his companions will be equally liable.

But what are their mental states? The *mens rea* for murder in New South Wales is expressed as various forms of *intent*. The first is obvious: the *intent to kill*. It extends also to *intent to cause serious injury* because of the high risk that serious assaults could result in death, and so the offender can be taken to have intended death because of the obvious foresight of that high risk. Similarly, the *mens rea* extends to reckless indifference to human life on the same principle. Reckless indifference to human life involves the foresight of the *probable* risk of death. If a person is willing to take that risk, he or she can be taken to have *intended* the death, if the probable risk in fact eventuates. But in what sense can a person be taken to have *intended* a person's death when that death was merely a remote possibility?

Many of our daily activities are attended with that degree of risk. Driving, for example, even careful and lawful driving of a motor car, holds the remote but possible risk of death to a person (for example, by hitting a small child who runs straight out onto the road unexpectedly). Critics will say that the reason we should hold the hypothetical shoplifters responsible is because they, unlike the driver, are doing something illegal. It is true that they are responsible and should be punished for that crime – shoplifting, but, we submit, it is not self-evident that they should be morally or criminally responsible for murder.

The problem is stated clearly by Kirby J in *Clayton*:

> Foresight of what might possibly happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite *intention*. Its adoption as a test for the presence of a mental element necessary [for a secondary participant] to be guilty of murder amounts to a seriously unprincipled departure from the basic rule that is now generally reflected in Australian criminal law that liability does not attach to criminal conduct of itself, unless that conduct is accompanied by a relevant criminal intention.[34]

Of course, our argument that moral culpability and criminal responsibility should be aligned may not be shared by everyone. For example, Justice Hayne, in *Gillard v The Queen*, said the following:

> If liability is confined to offences for the commission of which the accused has previously agreed, an accused will not be guilty of any form of homicide in a case where, despite foresight of the possibility

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[34] *Clayton v The Queen* (2006) 231 ALR 500; [2006] HCA 58, [97].

> of violence by a co-offender, the accused has not agreed to its use. That result is unacceptable. That is why the common law principles have developed as they have.[35]

With respect, Justice Hayne does not explain why that result is unacceptable and we unable to see why it is so. However, even if the argument from moral and criminal responsibility is not shared by all, there is another argument that should meet with greater approval, because it appeals to logic, rather than emotion. Kirby J expresses the argument in *Gillard v The Queen*:

> If a *principal* offender were to kill the victim, foreseeing only the possibility (rather than the probability) that his or her actions would cause death or grievous bodily harm, that person would not be guilty of murder. Yet a *secondary* offender with a common purpose could, on the current law, be found guilty of murder of the same victim on the basis of extended common purpose liability if the jury were convinced that he or she had foreseen the possibility that one of the group of offenders might, with intent, cause grievous bodily harm and if, in the result, one of the group does indeed kill the victim with the intention to cause such grievous bodily harm.[36]

In other words the liability for the principal offender (the one who commits the *actus reus* of killing a person) rests on a less morally culpable *mens rea* than for the secondary offender. This is a serious problem for the logical consistency of our criminal law. The inconsistency lies in holding different people responsible for the same crime but on different standards of culpability. Again, this argument is compelling only in so far as there is agreement in the value of a logically consistent criminal law. But again, not everyone agrees here. For example, in *Powell*, Lord Hutton states,

> I recognize that as a matter of logic there is force in the argument advanced ... and that on one view it is anomalous that if foreseeability of death or real serious harm is not sufficient to constitute *mens rea* for murder in the party who actually carries out the killing, it is sufficient to constitute *mens rea* in a secondary party. But the rules of the common law are not based solely on logic, but relate to practical concerns and, in relation to crimes committed in the course of joint criminal enterprises, to the need to give effective protection to the public against criminals operating in gangs. ... In my opinion there are practical considerations of public policy which justify the principle ... and which prevail over considerations of strict logic.[37]

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[35] *Gillard v The Queen* (2003) 219 CLR 1, [62].

[36] *Clayton v The Queen* (2006) 231 ALR 500; [2006] HCA 58 [100].

[37] *R v Powell* [1999] 1 AC 1, 25.

With respect, our own feeling is that logical consistency is of critical importance to the integrity and legitimacy of the criminal law. The public policy reasons for departing from logic and consistency must be very compelling indeed. The public policy that Lord Hutton was referring to was the protection of the community by deterring gangs from engaging in joint criminal activities. We shall not take up the merits of that argument here, except to say that we suspect that there may be other more effective (and more principled) ways of responding to the problem of gang violence.[38]

CONCLUSION

We have not canvassed all of the criticisms of the doctrine of extended common purpose in this paper. Those criticisms are already so eloquently expressed in the judgments of Justice Kirby in *Clayton*, *Gillard* and *Taufahema*, and in the New South Wales Law Reform Commission's Consultation Paper.

Instead we have tried to demonstrate the practical effect and extent of the doctrine in its present form, in the hope that its deficiencies might become more apparent. We believe that many will agree that the doctrine's scope potentially imposes liability for murder on those whose acts and mental states are inconsistent with such a serious degree of criminal culpability. Of course, our argument will only be as good as the legitimacy of our moral intuitions. However, even if people disagree with those intuitions, then we would argue that the reform of the law of extended common purpose is still justified in the interests of the internal consistency and logic of our criminal law.

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[38] The issue of gang violence has been discussed extensively in the English press in recent months after a series of offences involving gangs of young people. Numerous initiatives (actual and proposed) address the family, social, cultural and environmental issues which lead young people to join gangs. In New South Wales, more limited and tentative initiatives are being taken: see for example, Premier of New South Wales Press Release, "Privacy Reforms to Target Young Offenders", September 26, 2006; Dickie J, "Direction relating to the Anti-Social Behaviour Pilot Project", April 30, 2007: http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ll_pnsw.nsf/pages/PNSW_03_s41asbpp.