



The King's Student Law Review

Title: **REFORMING PARASITIC ACCESSORY LIABILITY IN ENGLISH LAW**

Author: Jonathan Lee

Source: *The King's Student Law Review*, Vol. 7, No. 1 (2016), pp. 52-64

Published by: [King's College London](#) on behalf of [The King's Student Law Review](#)

All rights reserved. No part of this publication may be reproduced, transmitted, in any form or by any means, electronic, mechanical, recording or otherwise, or stored in any retrieval system of any nature, without the prior, express written permission of the King's Student Law Review. Within the UK, exceptions are allowed in respect of any fair dealing for the purpose of research or private study, or criticism or review, as permitted under the Copyright, Designs and Patents Act 1988.

Enquiries concerning reproducing outside these terms and in other countries should be sent to the Editor in Chief.

KSLR is an independent, not-for-profit, online academic publication managed by students of the [King's College London School of Law](#). The KSLR seeks to publish high-quality legal scholarship written by undergraduate and graduate students at King's and other leading law schools across the globe. For more information about the KSLR, please contact: kclstudentlawreview@gmail.com.



©King's Student Law Review 2016

REFORMING PARASITIC ACCESSORY LIABILITY IN ENGLISH LAW

Jonathan Lee

The doctrine of parasitic accessory liability can be best explained by a simple scenario of two defendants, D1 and D2. They have a common intention to commit crime A, and they, in fact, go on to commit crime A. D1, as an incident of committing crime A, then commits crime B. If D2, still an active participant of crime A, had foreseen a possibility that D1 might commit crime B, with the relevant mens rea and in a way that is not fundamentally different to what was foreseen by himself, he too would be liable for crime B.

The basis of joint enterprise liability, or indeed any crime, should be moral culpability, determined by the subjective mental state of the perpetrator. Regrettably, the current state of parasitic accessory liability has departed substantially from this, despite various laudable proposals of reform.¹ This essay will look into the landmark cases over the course of history in joint enterprise liability and the problems which accompany such development. I will then draw inspirations from various common law jurisdictions, with hopes of identifying a beneficial way for English law to develop. Finally, I will gather and further some of the criticisms of the basis of parasitic accessory liability and argue that the unifying factor of their criticisms is beyond the structural and practical but a doctrinal. This trend of development of parasitic accessory liability strikes at the very heart of the individualistic nature of English criminal law. It is a draconian and unreasonable principle and potentially provides the breeding ground of a thought crime, where D2 would be convicted of a crime committed by another solely because the idea of it happened to cross her mind. The scope of secondary liability for D2 of a joint enterprise must be further narrowed down.

THE CURRENT POSITION OF JOINT ENTERPRISE LIABILITY

The principle behind joint enterprise liability is derivative liability: the doctrine that others, apart from the immediate perpetrator of the actus reus, may also be held responsible for the offence because he or she *derives* liability from the principal perpetrator. However unusual or incompatible to individualistic values the concept may seem, as a matter of public policy, the criminal law must include derivative liability in order to deter people from partaking in unlawful enterprises and to punish those who had decided to be involved in such enterprises. However, the arguments in favour of and against the recognition of derivative liability will lie beyond the purpose of this essay. So, for the ease of argument, this principle will not be challenged substantially.

¹ The bulk of this article was written prior to the handing down of the judgment of *R v Jogee* on 18th February 2016 by Lord Neuberger PSC at the Supreme Court where it was held that the law of joint enterprise liability had taken a wrong turn 30 years ago since the Privy Council decision of *Chan Wing-Siu v The Queen* [1985] 1 AC 168. Although the Supreme Court's stance coincides with much of what is being argued in the current article, there are nevertheless several subtle differences.

The most important case to date is *R v Gnango*,² whose final judgment was handed down by the Supreme Court in 2011.³ The facts of the case are straightforward, though most unfortunate. In 2007, a 26 year old Polish care worker, Magda Pniewska, who was speaking to her sister on the phone, was shot in the head and killed while she was walking home from her nursing home through a car park in South London. The fatal shot came from an exchange of gunfire between “Bandana man” and Gnango. There was clear evidence that the bullet came from “Bandana man’s” gun and not Gnango’s. However, “Bandana man” was nowhere to be found and Gnango was charged with and convicted of murder at the age of 17.

The court of appeal overturned the conviction and held that joint enterprise liability for murder simply could not arise from the facts upon which he was convicted. The prosecution appealed and the point of law of general public importance presented before the Supreme Court was such:

*If (1) D1 and D2 voluntarily engage in fighting each other, each intending to kill or cause grievous bodily harm to the other and each foreseeing that the other has the reciprocal intention, and if (2) D1 mistakenly kills V in the course of the fight, in what circumstances, if any, is D2 guilty of the offence of murdering V?*⁴

The Supreme Court allowed the appeal by a 6-1 majority, with Lord Kerr dissenting, and restored Gnango’s conviction for murder.

We begin with this case because it sets out the current position on the law of joint enterprise liability. There are three routes a defendant could be convicted of a crime under the doctrine of joint enterprise liability. The first one is to be a joint principal of the crime committed. Lord Kerr highlighted the importance of causing the actus reus in *Gnango*,

*To speak of joint principal offenders being involved in a joint enterprise is, at least potentially, misleading. The essential ingredient for joint principal offending is a contribution to the cause of the actus reus. If this is absent, the fact that there is a common purpose or a joint enterprise cannot transform the offending into joint principal liability.*⁵

This is hardly controversial. It has always been accepted that the actus reus of a single crime could be perpetrated by two or more persons. The two or more perpetrators have committed the crime pursuant to their common unlawful purpose. Thus, we are not particularly concerned with this possibility.

The second route is known as ‘plain vanilla joint enterprise’, its essence being D2’s assisting or encouraging D1 to commit a crime.⁶ The idea is succinctly and helpfully summarised in *Gnango* by Lord Phillips and Lord Judge,

Where two persons, D1 and D2 agree to the commission of an indictable offence, where both are present at the place where the criminal act is to be performed and where one of them, D1, commits that act, both will be jointly liable for the crime. The act will have taken place

² *R v Gnango* [2011] UKSC 59, [2012] 1 AC 827

³ In *Jogee* mentioned at n (1). The Supreme Court held that the correct rule and the present state of the law is that foresight of a possibility to commit the incidental crime is simply evidence (albeit strong evidence) of intent to assist or encourage but it does not automatically lead to liability for the incidental crime. The restatement of this principle can in particular be found in paras 8 – 12, 14 – 16 and 94 of the judgment.

⁴ *ibid* [1] (Lord Phillips P and Lord Judge CJ)

⁵ *ibid* [129] (Lord Kerr SCJ)

⁶ cf. Serious Crime Act 2007 Part 2 ss 44-49, which contains the inchoate offences of encouraging or assisting an offence. These can be committed without the primary offences being committed in reality.

*pursuant to their joint criminal purpose and D2 will be equally guilty with D1, having aided, abetted, counselled or procured D1 to commit the crime.*⁷

This moves officially into the territory of derivative liability. Although D2 had not committed the act of the crime, it had taken place pursuant to their joint criminal purpose. As a result of that, D2 derives liability of the crime committed from D1 on the basis that he has, in one way or another, assisted or encouraged D1 to commit the crime. Again, this route sparks little contention, if one accepts the principles of derivative liability. The culpabilities of D1 and D2 are morally equivalent and have both acted in pursuant to their common unlawful purpose.

So we arrive at the final and third route, which is the most contentious and also the one we are most concerned with – ‘parasitic accessory liability’, where D2’s crime is considered a departure from the common unlawful purpose. Again, Lord Phillips and Lord Judge explained this concept in their judgment,

*Parasitic accessory liability arises where (i) D1 and D2 have a common intention to commit crime A (ii) D1, as an incident of committing crime A, commits crime B, and (iii) D2 had foreseen the possibility that he might do so.*⁸

A trend has arisen among academics, which is inclined towards incorporating joint enterprise liability into general accessorial liability and abandoning it as a separate doctrine completely. Whilst it would be beyond the scope of the present essay to comment extensively on this trend, it is worth noting Hughes L.J.’s analysis in *A, B, C and D v R*, where he attempts to differentiate parasitic accessory liability from the earlier two,⁹

*The third scenario depends upon a wider principle than do the first and second. The important difference is that in the third type of scenario, D2 may be guilty of an offence (crime B) that he did not want or intend D1 to commit, providing that he foresaw that D1 might commit it in the course of their common enterprise in crime A.*¹⁰

Indeed, Hughes L.J. made the crucial observation that the connection between crime B and D2 in a case of parasitic accessory liability is far weaker than in the other two cases. In the previous two cases, one can still, albeit marginally, regard the crime committed by D1 to be within the scope of the common unlawful purpose which all the parties involved have agreed to. In the third case, it would simply be an affront to common sense to regard crime B, the incidental crime, as part of the common unlawful purpose. The reasoning behind the development of this third route is that the incidental crime cannot be interpreted as being part of the common unlawful purpose shared between the perpetrators. So why has it remained part of joint enterprise liability?

One of the best ways to understand how well a particular concept has sunk into the jurisprudence is to look at directions to juries. Cooke J reaffirms the central role of a common plan or purpose in a case of joint enterprise liability generally. Cooke J explained in his directions:

*Of course, the person who actually does the offence, the act which constitutes that further offence will be guilty of it, but the other person will also be guilty of it if he realised that the act done was something which the first person might do with the necessary intent as part of their planned offence.*¹¹

⁷ *ibid* [15] (Lord Phillips P and Lord Judge CJ)

⁸ *ibid* [42] (Lord Phillips P and Lord Judge CJ)

⁹ *A, B, C and D v R* [2011] QB 841, [2011] 2 WLR 647

¹⁰ *ibid* [10] (Hughes LJ)

¹¹ *ibid*

There is no question as to the clarity of this particular direction, and the jury would be bound by law to make their decision accordingly. However, if one attempts to put oneself into the shoes of a lay member of the public and reads the paragraph above, what would he make of it? The instinctive reaction has to be 'why?' Why should someone be guilty of an offence simply because he has realised, without agreeing to it or encouraging it in any manner, it may happen in the course of the commission of another offence?

THE PROTOTYPE OF PARASITIC ACCESSORY LIABILITY

Joint enterprise liability focuses very much on a common unlawful purpose, thus the name consists of both 'joint' and 'enterprise'. Thus, in *R v Petters and Parfitt*, although both D1 and D2 assaulted and killed the victim in the end, they arrived at the scene independently. It was held that it would not have been enough if D1 and D2 each intended the same consequence. The unlawful purpose must be shared and agreed.¹² Fortunately, this has never been challenged and has remained the pillar of all variations of joint enterprise liability. Contrast this with the dissolution of tangible connection or association between D2 and the incidental crime.

The beginnings of the doctrine of parasitic accessory liability can be found in the case of *R v Anderson*.¹³ In that case, D1 and D2 agreed to search for their victim (V) in a flat in order to frighten him. However, D1 produced a knife which D2 did not realise he had and stabbed V to death. Lord Parker C.J. said the following in his judgment,

*Where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but...if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act...It is for the jury to decide whether what was done was part of the joint enterprise, or went beyond it ...*¹⁴

The position presented here is a straightforward one. There are two separate questions which need to be asked in order for a person to exculpate himself. Firstly, whether the act could be considered part of the joint enterprise. If not, then he must be acquitted. In such cases, there is no requirement for a contemplation of risk or foreseeability of the harm on the part of D2. The person is liable solely on the basis that he has agreed to the unlawful enterprise and is responsible for the unexpected consequences that arise from the enterprise. The essence is whether or not the harm transpired is "attributable to the execution of the common purpose."¹⁵ In other words, this is a question of causation. Thus, in *Anderson*, D2 was not convicted of murder because the death of the victim was not attributable to the common purpose of frightening but only to the deliberate independent deviation of D1 or because D2 had not caused his death.

Secondly, whether the incidental crime is tacitly agreed or 'authorised' by D2 as an incident of the common criminal venture. This involves probing beyond the common unlawful purpose and identifying possible crimes committed by D1 which might have been required to successfully achieve the unlawful purpose. This is different from the first question because the incidental crime in this case is specifically not part of the common purpose. Having regarded the relevant facts and circumstances confronted by D2, would a reasonable person

¹² *R v Petters and Parfitt* [1995] Crim LR 501

¹³ *R v Anderson* [1966] 2 QB 110, [1966] 2 WLR 1195

¹⁴ *ibid* 118 (Lord Parker CJ)

¹⁵ William Wilson and David Ormerod, 'Simply harsh to fairly simple: Joint Enterprise Reform' (2015) Crim LR 3

have concluded that the incidental crime committed by D1 was something that D2 had tacitly agreed to or 'signed up to'.¹⁶ If the answer is in the negative, then he will not be liable. As far as parasitic accessory liability is concerned, D2 is only liable if there is a sound connection or association between the incidental crime and D2.

THE SUBSEQUENT FLUCTUATIONS

Although *Anderson* managed to lay down a clear formulation of parasitic accessory liability, the concept of tacit acceptance remains difficult to apply in reality. How far beyond the common purpose could the incidental crime be to still be considered as tacitly accepted by D2? Instead of clarifying this issue, the Court of Appeal in *R v Hyde* decided to dispense with the concept entirely and replace it with a more elusive concept of realisation of risk.¹⁷ As Lord Lane C.J. writes,

*If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to 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. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder.*¹⁸

This is where the slope begins.¹⁹ Now, there is no requirement of tacit agreement or authorisation of any sort. The basis of liability is merely whether D2 had realised the possibility that D1 might ultimately commit the crime (of murder in the case of *Hyde*) even though this was not, in any conceivable form, part of the common purpose.²⁰ Not only is this a remarkably low threshold for D2's mens rea, D2 could even be liable if he does not agree to the conduct. There is simply no moral basis for such an extension.

However, the emergence of the fundamental difference rule may offer some consolation to those disheartened by the decision of *Hyde* because, at least prima facie, it provides an exception to the foreseeability or realisation rule. D2 would only be liable for the incidental crime committed by D1 if it was committed in a manner not fundamentally different from that which D2 foresaw as a possibility. The first manifestation of the doctrine appeared in the case of *R v Uddin*.²¹ Beldam L.J. writes the following:

If the jury concludes that the death of the victim was caused by the actions of one participant which can be said to be of a completely different type to those contemplated by the others,

¹⁶ *ibid*

¹⁷ *R v Hyde* [1991] 1 QB 134, [1990] 3 WLR 1115

¹⁸ *ibid* [139] (Lord Lane CJ)

¹⁹ This is where the slope begins as a matter of domestic English law. However, as early as in 1985, the Privy Council had already decided in *Chan Wing Siu v The Queen* [1985] AC 168 that if two people set out to commit an offence (Crime A), in the course of that joint enterprise one of them (D1) commits another offence (Crime B), the second person (D2) is guilty as an accessory to crime B if he had foreseen the possibility that D1 might act as he did.

²⁰ It is worth noting the Supreme Court case of *R v Rogee* mentioned at n (1), where the issue was whether the prosecution must prove that a secondary offender, who encouraged the primary offender to commit some harm, foresaw the primary offender's acquisition and use of a weapon for murder as "probable" rather than "possible" in order to establish joint enterprise. But semantics cannot save a doctrine which is morally dubious, namely that of parasitic accessory liability. It is therefore encouraging to see that the Supreme Court has gone beyond the confines of this issue to assess the soundness of the doctrine itself. It is perhaps more encouraging to see that the Supreme Court has come to a satisfactory conclusion.

²¹ *R v Uddin* [1999] QB 431, [1998] 3 WLR 1000

*they are not to be regarded as parties to the death whether it amounts to murder or manslaughter.*²²

This was reaffirmed in the case of *R v Powell*, albeit with a few extra qualifications.²³ D2 and D1 devoted themselves to a joint enterprise of attacking V with wooden posts. In the course of the assault, D1 produced a knife, unbeknownst to D2, and stabbed V to death. It was held that D2 was not liable for murder because he had only contemplated D1 might attack V with the intention to cause grievous bodily harm, and the use of the knife was not contemplated and therefore fundamentally different from what D2 had contemplated. Lord Hutton cited the case of *R v Gamble* for further illustration.²⁴ In *Gamble*, D2 and D1 both agreed to punish V by kneecapping him (shooting V's kneecap with a bullet). However, D1 departed from the agreed enterprise and slit V's throat with a knife, killing him as a result. D2 was held not to have murdered V. Nevertheless, there is little guidance provided by the court as to how the fundamental difference rule would affect liability.

R v Rahman provided a helpful yet, upon closer scrutiny, rather unnecessary summary and clarification of the fundamental rule.²⁵ Lord Brown explains if B realises, without agreeing, that A may commit an offence but nevertheless continues with the venture, B will have sufficient mens rea to be guilty of A's offence unless,

*(i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B.*²⁶

Although these exceptions manifest themselves as likely safeguards for D2, the reality is that they do not add anything to the existing substantive law. Since the threshold mens rea of D2 is realisation of a possibility, if the weapon used by D1 is sudden, not known by D2, more lethal than that contemplated by D2 and therefore fundamentally different, then D2 simply would not have realised it as a possibility in the first place. The clarifications on the conditions of the fundamental rule are much ado about nothing.

Even if we were to take the formulation in *Rahman* seriously, its main problem is that whether or not D1 deviates from the common unlawful purpose is not solely dependent on the type of weapon. If D2 had only contemplated that P would produce a knife in order to threaten the victim, either because this had been previously agreed or because D2 had foreseen that D1 would produce a weapon of similar lethality, but D1 stabbed the victim in the heart and killing him as a result, would it be fair to hold D2 liable for D1's murder simply because he had contemplated that the weapon was carried by D1?

R v Mendez seemed to fill in the gaps created by *Rahman* quite well.²⁷ In that case, D2 and D1, aged 17 and 15 respectively at the time of the murder, had been involved in a spontaneous group attack on V after an incident at a party. Amidst the frenzy, D1 stabbed V and killed him. D2 was held to be not guilty of D1's murder. Toulson L.J. took the opportunity to clarify the issue:

In cases where the common purpose is not to kill but to cause serious harm, D is not liable for the murder of V if the direct cause of V's death was a deliberate act by P which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind

²² *ibid* 441 (Beldam LJ)

²³ *R v Powell* [1999] 1 AC 1, [1997] 3 WLR 959

²⁴ *R v Gamble* [1989] NI 268

²⁵ *R v Rahman* [2009] 1 AC 129, [2008] 3 WLR 264

²⁶ *ibid* [131] (Lord Brown)

²⁷ *R v Mendez* [2011] QB 876, [2011] 3 WLR 1

*intended or foreseen by D.*²⁸

The difference between *Mendez* and *Rahman* lies in the contemplations of D2. Toulson L.J.'s passage essentially boils down to a point of logic – just because D2 knows that D1 carries a weapon and might use it does not necessarily mean that D1's use of the weapon coincides with the one contemplated by D2. In order to be convicted, D2 would be required to have foreseen D1 using the weapon performing the act intended or foreseen by D2. The focus is on the *kind* of act.

Yet, what *Mendez* failed to do is to question the requirement of foreseeability in the fundamental difference rule in cases such as *Rahman*. Tacit acceptance or authorisation used to be the required connection between the incidental crime and the mens rea of D2. Now, these requirements have been replaced by more questionable ones such as realisation, contemplation and foreseeability. But foreseeability is a neutral and somewhat loose concept. This widened the scope of parasitic accessory liability to an unprecedented level and was subsequently, rather unfortunately, adopted in many other cases without question. For now, as long as a crime is foreseeable and not fundamentally different from that foreseen by D2, then D2 would also be liable.²⁹

INSPIRATION FROM OTHER JURISDICTIONS?

The issue identified in the aforementioned cases is related to the concept of association or connection between the mental state of the D2 and the incidental crime and when it is fair and just to hold D2 liable for the crime. The English cases have, unfortunately, morphed from tacit acceptance or authorisation to realisation or foreseeability. Not only does this depart from the central idea of joint enterprise liability or common unlawful purpose, it also verges on becoming akin to a thought crime, where a person would be held liable simply by contemplation. Whilst most of the common law jurisdictions rely greatly on the English cases, some of them have developed their own doctrines of joint enterprise liability, which may shed light on how the English law should develop in the future.

The South African common-purpose rule is slightly different from that of English joint enterprise liability. It applies in situations 'where two or more persons agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime.'³⁰ The prosecution is not required to prove beyond reasonable doubt that each of the persons involved in the joint enterprise committed conduct which made causal contribution to the unlawful crime. There are two crimes involved in these situations. The first is known as the basic offence, which is agreed by all to commit. The second is known as the collateral offence. A party to such an unlawful venture would only be held liable of the collateral offence if he associated himself with the commission of this collateral offence with the requisite fault element on the basis of their participating in the collateral offence.³¹

Clearly, the common-purpose rule is more akin to the original understanding of parasitic accessory liability in *Anderson*, where the connection between D2 and the incidental crime is

²⁸ *ibid* [45] (Toulson LJ)

²⁹ For a more detailed and more authoritative discussion of the relevant authorities and principles which have developed over the years, the paragraphs under the sub-heading 'Analysis' (paras 61 – 87) in the judgment of *R v Jogee* have proven to be immensely helpful.

³⁰ Jonathan Burchell J, 'Joint Enterprise and Common Purpose: Perspectives on English and South African Criminal Law' (1997) *South African Criminal Law Journal* (SACL) 125, 131

³¹ *ibid*

that of tacit acceptance. In South Africa, it is the concept of association. In the case of *S v Mgedezi & others*,³² the Appellate Division listed out the prerequisites which the prosecution will have to prove before D2 could be held liable for the murder of another by D1,

*In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen that the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.*³³

We turn our attention to the fifth requirement. The requisite mens rea included foreseeability of the possibility of the deceased being killed but it does not stop there. D2 must then have 'performed his own act of association', reckless as to whether death ensues or not. In contrast with the position in England, there is a much stronger requirement of association or connection between the incidental crime, or collateral offence as it is known in South Africa, and D2. Mere foreseeability of the crime is insufficient for D2 to be held liable. This position was affirmed in the more recent case of *Dewnath v S*, where Mocumie AJA explains the level of association required for one to be considered a party under the common purpose rule,³⁴

*To my mind, therefore, the State had to prove some form of active participation on the part of the appellant than just the words he uttered. Mere approval of the commission of the murder sought by the perpetrators does not suffice... what he said does not amount to active association with the common purpose of his parents and Sithole. On the accepted evidence his 'participation' was insignificant. It was limited and removed from the actual executive action. It can best be regarded as evidence that he had some knowledge of the plan that was in the process of being hatched to kill the deceased.*³⁵

The strong association required under the South African common purpose rule may even compel one to argue that the concept of parasitic accessory liability is simply not part of it. The focus is, instead, very much on the common purpose of parties involved. The incidental crime is considered as part of the common purpose. If D2 is unable to show active participation in associating himself with the incidental crime, then he would not be convicted. This is, arguably, more straightforward in application and sensible in doctrine than parasitic accessory liability, where a person could be convicted simply because the crime which was committed had crossed his mind.

Regrettably, the High Court of Australia has followed rather closely with the English development, as manifested in *Clayton v R*,³⁶ which concerned a murder under the doctrine of joint enterprise liability. Six of the concurring judges decided that 'the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight.'³⁷

The repetition of the concept of foresight only points towards the fact that the Australian High Court has largely accepted and applied the English developments in parasitic accessory liability. However, Kirby J's dissent presents itself as a breath of fresh air as he acknowledges

³² *S v Mgedezi & others* 1989 (1) SA 687 (A)

³³ *ibid* [705I-706C]

³⁴ *Dewnath v S* (269/13) [2014] ZASCA 57

³⁵ *ibid* [16] (Mocumie AJA)

³⁶ *Clayton v R* [2006] HCA 58, 81 ALJR 439. Kirby J's dissenting judgment is also mentioned briefly in the judgment of *Jogee* at para 60.

³⁷ *ibid* [17]

the need for change in what is known in Australia as ‘extended common purpose liability’. He writes the following:

*The test adopted by the common law to constitute what is, in effect, the subjective element in crimes established by extended common purpose liability, falls short of obliging proof of actual intent. All that is required is that the relevant outcome must be foreseen by the accessory as a possibility...It follows that this form of secondary liability is disproportionately broad. It tilts the scales too heavily in favour of the prosecution.*³⁸

It is encouraging that Kirby J. realises the problem associated with the current English development of parasitic accessory liability, which is that foreseeing a possibility of an outcome happening should not be adequate basis to find D2 guilty for the incidental crime, in this case, homicide. Indeed, its scope becomes unjustifiably broad, but this is not the only problem. It also treads destructively upon some of the most fundamental values of criminal law and begins to wear the trappings of a thought crime.

THE FUNDAMENTAL FEAR OF THOUGHT CRIMES AS THE UNIFYING FACTOR

The current law of parasitic accessory liability is no doubt punctuated by a series of problems on both doctrinal and practical levels. The requisite relationship between D2 and the incidental crime committed by D1 has been rather unfortunately and inevitably expanded from that of tacit acceptance to that of foreseeability. Academics and practitioners alike have either recognised this change or personally experienced its impacts in the administration of the law. Although prima facie, their individual perspectives on the problem seem to differ, it is worth identifying a shared concern that elucidates itself amidst the debates.

Professor Graham Virgo argues that joint enterprise liability should be rejected as its essential considerations and principles fall within general accessorial liability, which does not necessarily coincide with the purpose of this essay but some of his analysis may be useful to this discussion.³⁹

Firstly, he rejects the notion of causation as the basis of liability in joint enterprise liability. The notion of causation is quite simply to hold D2 liable for D1’s crime because he has in some way assisted or encouraged D1 and thereby causing him to commit that offence. He rejects this as a basis on the fact that its coverage is far too narrow and does not account for cases of deliberate departures from the common purpose, which is what we are concerned about:

*Outside of the limited doctrine of procuring, causation cannot explain how liability for assisting or encouraging a crime can be established. Some other explanation needs to be identified.*⁴⁰

He then goes on to consider connection, subsequently rejecting it based on the fact that the scope of the common purpose should not be invariably extended:

This notion of presumed connection might even be deployed to explain how D2 might be liable for the commission of crime B in departure from a common purpose to commit crime A. But where D1 has intentionally departed from the common purpose it is surely stretching the

³⁸ *ibid* [94] (Kirby J)

³⁹ Graham Virgo, ‘Joint Enterprise Liability is Dead: Long Live Accessorial Liability’ (2012) *Crim LR* 850

⁴⁰ *ibid* 856

*notion of even a presumed connection too far to say that D1 was influenced by D2 to commit crime B.*⁴¹

As he has eloquently put it, the principle of connection does not account for incidental crimes committed by D1, which are not foreseen by D2 in cases of parasitic accessory liability.

So finally, he considers the concept of association. The essential question to be asked is whether or not it can be fairly said that D2 is associated in some way with the incidental crime. He summarises its essence in the following:

*The focus is instead on the conduct of D2 in its own right and whether this can be considered to establish that D2 is associated with the crime committed by D1, without resorting to any artificial presumption of effect on D1.*⁴²

Yet, this offers very little in what he means substantially by the word "association." Peter Mirfield, in a reply to Virgo's article,⁴³ suggests that such a ground for liability would render the scope of liability far too wide since it requires neither causation nor connection in any form between D2 and the incidental crime. He also criticises Virgo for conflating or even confusing association with authorisation, which are indeed quite different concepts,

*Though he accepts that the two older cases use the word "authorisation", he suggests that that word embodies the same idea as association. Yet one may surely be associated with things that one has not authorised.*⁴⁴

If a person would not have agreed to the incidental crime but it happened nevertheless, no doubt he would have foreseen the crime happening. His foreseeing of the crime is logically prior to his disagreement. If the crime did not cross his mind in the first place, there is no way he could have directed his mind to it and form a normative judgment about that crime. In such a case, would it still be fair to make him liable? Based on *Gnango*, as long as the incidental crime was not fundamentally different to that foreseen by D2, it does not matter if he subjectively did not intend or agree to it, he will still be liable.⁴⁵ Professor Virgo recognised the moral fallacy behind this scenario and proposed, at least in cases of murder,

*to restrict what D2 must have foreseen before he can be convicted of the murder committed by D1, so that D2 should only be convicted of murder if he foresaw that D1 might kill with an intention to kill the victim.*⁴⁶

There is no doubt his arguments on the redundancy of joint enterprise liability carry much force, but with all due respect, it is often more convenient to discard completely a portion of substantial law rather than to confront the problems it presents.⁴⁷ It is clear that he realises that the scope of parasitic accessory liability will only widen further after the introduction of

⁴¹ *ibid* 858

⁴² *ibid* 860

⁴³ Peter Mirfield, 'Guilt by association: a reply to Professor Virgo' (2013) *Crim LR* 577

⁴⁴ *ibid* 578

⁴⁵ Sir R. Buxton also questioned the logic of this proposition by using the aiding and abetting analysis in his article 'Being an accessory to one's own murder' (2012) *Crim LR* 275. At 277, He argues that it is much less clear that D2 can be said to encourage D1 to produce consequence X if consequence X is exactly what D2 does not want to occur.

⁴⁶ Virgo (n 32) 869

⁴⁷ Although it is worth mentioning that Sir John Smith also made a similar argument after surveying the landscape of English case law up till 1998 in his article 'Joint Enterprise and Accessory Liability' (1998) *SACL* 337. He concluded that parasitic accessory liability applies also where the basic offence is aided and abetted absent a common purpose. In other words, it applies to the whole law of secondary participation and does not stand out as a separate doctrine.

foreseeability of the incidental crime as a requirement and could see it developing into a quasi-thought crime, as he attempts to minimise its influence.⁴⁸

Hughes L.J.'s conclusion in *R v A, B, C and D* has relied almost solely on the concept of association, which supports Professor Virgo's argument quite directly.⁴⁹ In Hughes L.J.'s view, in order for D2 to be 'associated' with the 'foreseen murder' is for her to have foreseen D1 will 'cause death by acting with murderous intent'.⁵⁰ This coincides almost completely with Professor Virgo's recommendation. However, since Hughes L.J. did not propose to abolish joint enterprise liability altogether, he cannot rely on the redundancy argument and thus his conclusion cannot be advanced without question. Why should it be sufficient to convict D2 for D1's incidental crime merely because D2 foresees that D1 will commit an act with the requisite intent, even if he does not desire it? As Wilson and Ormerod have opposed the idea with great conviction,⁵¹

*What moral principle demands that I take responsibility not simply for the consequences of my own choices and those choices of my co-adventurer which I happen to share but also those which I do not share but happen to contemplate that he may, with a following wind, make at some stage in the future?*⁵²

To accept Hughes L.J.'s conclusion is to accept that one can be responsible for actions committed by another which has the slightest connection with the first person, sailing into the dangerous territories of thought crime. Andrew Simester, however, offers a powerful counter-argument to our concerns of parasitic accessory liability developing into a thought crime.⁵³ He justifies the extension of responsibility to D2 on the basis that he has accepted the risk that in the course of the unlawful enterprise, P or other members of the pact may depart deliberately from the agreed purpose. It is therefore sufficient that the mens rea of D2 is mere foreseeability because the fact that he agreed to be part of the enterprise in the first place has, in a way, supplied the remaining mens rea that would be required by D2, had he been acting as an aider or abettor. In other words, the relationship between D2 and the incidental crime has not, in fact, been diluted over the years but merely distributed differently.

*Yet her commitment to the common purpose implies an acceptance of the choices and actions that are taken by P in the course of realising that purpose. Her responsibility for incidental offences is not unlimited: S cannot be said to accept the risk of wrongs by P that she does not foresee, or which depart radically from their shared enterprise, and joint enterprise liability rightly does not extend to such cases. Within these limitations, however, the execution of the common purpose--including its foreseen attendant risks--is a package deal.*⁵⁴

Indeed, there is much force in such an analysis yet it presents itself as somewhat artificial and theoretically strained. His first assertion is not adequately justified. The choices and actions taken by D1 can only be subject to consideration by D2 after they have taken place. D2 may very well honestly say that she does not accept or agree to the actions taken by D1. If that were the case, how can it be right to say that the common purpose implied her acceptance? It is a blatant contradiction to the facts.

Secondly, he did not explain why D2 cannot be said to accept the risk of wrongs by D1 that she does not foresee. If we accept his first statement where D2's devotion to the common purpose implies an acceptance of D1's choices and actions to fulfil the purpose, which is

⁴⁸ *ibid*

⁴⁹ (n 6)

⁵⁰ *ibid* 850 (Hughes LJ)

⁵¹ William Wilson and David Ormerod, 'Simply harsh to fairly simple: Joint Enterprise Reform' (2015) *Crim LR* 3

⁵² *ibid* 12

⁵³ Andrew Simester, 'The Mental Element in Complicity' (2006) 122 *LQR* 578

⁵⁴ *ibid* 599

itself quite dubious, then why should something she has not foreseen be a bar to liability? If D1 commits an offence which he believed was necessary for the realisation of the purpose, but it happened that D2 had not personally foreseen its commission, then surely D2 would be convicted as well on the basis that her commitment to the joint enterprise implies tacit acceptance of whatever D1 would do to in the course of realising the purpose. The position is inconsistent.

Michael Moore, for one, has scrupulously recognised that derivative liability is at odds with the fundamental principle that criminal liability should be based on findings of personal responsibility for one's own acts and omissions.⁵⁵ Indeed this is quite right as a matter of doctrine, however strong the policy reasons for it may be. Would it therefore not be correct as well to say that in cases where derivative liability results only because D2 has foreseen the possibility of D1 committing the incidental offence, it is a much more blatant and serious affront to the principle of criminal liability based on personal responsibility?

CONCLUSION

We should not go so far as Professor Virgo and reject the whole notion of joint enterprise liability altogether because as much as its elements appear redundant, it gives criminal pacts a distinct and necessary status in criminal law. Instead, the criminal law should reject the third category of parasitic accessory liability, that is where D2 could be convicted of an offence committed by D1 merely because it had been foreseen by her, even if she disagrees.⁵⁶

This can be adequately encapsulated by the idea of an extended scope of common unlawful purpose, which is similar to the South African concept of common purpose rule. If the second crime committed by D1 happens to lie outside of the extended scope, then D2 should not be liable because there is no legally justifiable connection or association between him and the incidental crime and there is therefore no way to identify him as the legal cause of the incidental crime.

By grounding liability in the importance of a common unlawful purpose, we steer closer to the essence of joint enterprise liability. It would also be easier to apply. To probe the mind of a person by asking what he could have foreseen facing those particular circumstances and facts, which may include the emergency of the situation, the emotions of D2, the emotions of D1, D1's tendency to go beyond what was agreed and commit more serious crimes as an incident, whether D2 was aware of this tendency etc. is a futile exercise as the list goes on for quite a long while. Moreover, the current position in law requires D2 to have foreseen the possibility of D1 committing the act *with the requisite intent*. It will be rather impractical to demand a professionally qualified and experienced judge to take all those factors into account in his direction. It will, consequently, be even more impractical for a jury panel of lay persons to attempt to understand the judge's direction before concluding whether D2 has foreseen both the commission of the act and its accompanying intent.

The notion of extended common unlawful purpose asks two simple questions: Firstly, what was the common unlawful purpose agreed upon by D2 and D1? This is no different to the current inquiry used in determining whether a joint enterprise exists at all. Secondly, and more importantly, instead of asking whether D2 had foreseen the possibility of D1 committing the incidental crime, we ask whether a reasonable person would consider the

⁵⁵ Michael Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (1st ed, OUP 2009) Chapter 13

⁵⁶ This is more or less the conclusion reached by the Supreme Court. But in particular, Lord Hughes and Lord Toulson, writing in *Jogee*, preferred the foresight of a possibility to commit the incidental crime to have some strong evidential value.

extended scope of the common unlawful purpose to include that particular crime? In other words, if the incidental crime could not be interpreted to be part of the common unlawful purpose, then D2 cannot be convicted of that crime. This turns a highly uncertain and speculative test into something that is both easily applicable and morally sound. Fears of a potentially developing thought crime would cease to be a concern and criminal liability would be targeted at those who are rightly deserving of it – those who are morally culpable.