

COMPLICITY

RELEVANT SECTIONS

s.323 Interpretation

1. For the purposes of this Subdivision, a person is involved in the commission of an offence if the person –
 - a. Intentionally assists, encourages or directs the commission of the offence; or
 - b. Intentionally assists, encourages or directs the commission of another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence; or
 - c. Enters into an agreement, arrangement or understanding with another person to commit the offence; or
 - d. Enters into an agreement, arrangement or understanding with another person to commit another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence

2. In determining whether a person has encouraged the commission of an offence, it is irrelevant whether or not the person who committed the offence in fact was encouraged to commit the offence

Note: A person who committed an offence may include 2 or more persons who entered into an agreement, arrangement or understanding to commit the offence

3. A person may be involved in the commission of an offence, by act or omission –
 - a. Even if the person is not physically present when the offence, or an element of the offence, is committed; and
 - b. Whether or not the person realises that the facts constitutes an offence

s.324 – Persons involved in the commission of the offence taken to have committed the offence

1. Subject to subsection (3), if an offence (whether indictable or summary) is committed, a person who is involved in the commission of the offence is taken to have committed the offence and is liable to the maximum penalty for that offence
2. Despite subsection (1), a person is not taken to have committed an offence if the person withdraws from the offence.

Note: The common law recognises that in certain circumstances, a person may withdraw from an offence in which the person would otherwise be complicit: E.g, *White v Ridley* [1978]; *R v Tietie, Tulele and Bolamatu* (1988); *R v Jensen and Ward* [1980].

3. Nothing in this section imposes liability on a person for an offence that, as a matter of policy is intended to benefit or protect that person.

s.324A – Other offenders need not be prosecuted or found guilty

A person who is involved in the commission of an offence may be found guilty of an offence whether or not any other person is prosecuted for or found guilty of the offence

- *Note however that per s324(1) P must still prove the elements*

s.324B – Offender's role need not be determined

A person may be found guilty of an offence by virtue of section 324 if the trier of fact is satisfied that the person is guilty either as the person who committed the offence or as a person involved in the commission of the offence but is unable to determine which applies

s.324C – Abolition of complicity at common law

1. The law of complicity at common law in relation to aiding, abetting, counselling or procuring the commission of an offence is abolished
2. The doctrines at common law of acting in concert, joint criminal enterprise and common purpose (including extended common purpose) are abolished.

Note, however, that the common law relating to withdrawing from an offence **is not abolished.**

s.325 – Accessories after the fact

1. When a PO has committed a **serious indictable offence**, and D in **knowing or believing the principle offender to be guilty**, does any **positive act** with the **purpose of imending apprehension, prosecution, conviction or punishment** of the principal offender shall be guilty of an indictable offence
 - The indictable offence need NOT be the specific one charged

CHECKLIST

A person who is involved with the commission of the offence is also guilty of that offence (**s.324**)

1. Identify the principal offence

2. Identify the principal offender: *The principal offender in this case is ____/ The distinction between a 'person involved' in s.323 and 324 and principal offender is not always clear*

- a. The person with the MR & substantially caused the offence (can be more than one i.e. Joint criminal enterprise) (*Osland v R*)
 - i. Even if only one performed acts constituting crime, each guilty as PO if acts performed in presence of all & pursuant to precon plan (*Lowery & King No 2* [1972])
- b. If it is uncertain whether the person was a 'personal involved' or was actually the person who committed an offence, s.324B provides that the person may be found guilty
- c. Consider if **innocent agency** case: D does not commit AR but still liable by initiating an innocent agent (underage/lacks MR/insane/under duress) to act & D still has control and is manipulating the agent (*Cogan and Leak; R v Hewitt*)

Osland v R (1998) 197 CLR – PRINCIPAL OFFENDER – PRECONCERT

FACTS:

- Husband murder case – H convicted but son acquitted. Argued inconsistent

HELD:

- STILL CONVICTED – in 'joint criminal enterprise' – no AR but agreement + presence. Sons acquittal = no relevance. His AR not crime was applied to her → each independent of another's MR findings

PRINCIPAL:

- McHugh J: Followed *Lowery* principle present at scene with person committed the acts by reason of a pre-concert or agreement – **liability is not derivative but primary** – equally a PO
- **The acts and not the crime**, of the actual perpetrator is attributed to the person acting in concert.
- Irrelevant that actual perpetrator not convicted because they have a defence (duress etc)
- *No reason in principle why others acting in concert cannot be convicted of the principal offence. They are responsible for the acts (because they have agreed to them being done) and they have the mens rea which is necessary to complete the commission of crime.*

Likiardopoulos v R [2012] HC 37 – PRESENCE NOT NECESSARY

FACTS:

- Group involved in assault on disabled man – died as a result – 7 charged with murder
- P argued: JCE OR intentionally assisted/enc commission of assault
- D argued couldn't be accessory to murder bc Crown accepted pleas of guilt to lesser offences by persons said to be PO – no 'murder' to which he could be an accessory.

HELD:

- HC unanimously agreed that **presence** is not necessary for joint POs **acting in concert**. Courts looked at his age (47) and his position of dominance over other parties to direct and encourage. Party to arrangement to inflict injury → while arrangement on foot – assault occurred by other
- No inconsistencies → evidence differed in each case. Further, acceptance of pleas of guilty to lesser offence **involved an exercise of prosecutorial discretion** → certain decisions are insusceptible of judicial review.

Huynh v R; Duong v R; Sem v R [2013] HCA 6 – PRESENCE + AGREEMENT

FACTS:

- Stabbing at party- JCE – Appealed: TJ didn't tell jury that P to prove each A had participated in JCE

HELD:

- All three appeals dismissed unanimously. HC said although participation in furtherance of agreement to kill of cause SBH was element that had to be proved against each appellant, TJ **had not** erred because participation not a live issue at their trial
- They did not dispute that they were present when the crime was committed. Their **presence pursuant to the agreement constituted participation in the joint criminal enterprise**

R v Cogan and Leak [1976] QB 217 – INNOCENT AGENCY + STILL G OF RAPE EVEN THOUGH IA NG

FACTS:

L intended C to have sex with wife – she refused – both had sex – C thought she consented – C not found G of rape – L argued: Couldn't be G because no underlying offence

HELD:

- GUILTY → Just bc C found to be innocent of rape bc belief of consent – she was still raped.
- Under doc of *innocent agency*, the accessory **may still be convicted for the principal's acts** even when they themselves are exculpated.

FACTS:

- A lured V into vehicle – picked co-accused up along the way – **not in presence of CA**, A insisted V have sex with CA – no AR from A – innocent agency – A set up situation – forced V sex with CA
- The jury acquitted the co-accused on all counts but found the accused guilty of rape on each count.

HELD:

- Doctrine of IA should be considered separate from accessory liability
- What has to be demonstrated in order to support conviction on this basis (per *Cogan and Leak*) is that the A wanted and intended the act of intercourse by 'the agent' to take place and, **by his conduct**, caused the act to occur when he knew that the V was not consenting.
- P was "**merely the instrument used**" (so CAs AR was attributed to A)

ACTUS REAS

Per s.323(1)(___), D ____

s.323(1) A person is involved in the commission of an offence if:

- Assists, encourages or directs the commission of the offence OR
 - Mere **deliberate** presence is enough (*Coney*; *Likiardopolous*)
 - Even an omission where there is a **duty to act** (*Russell*)
- Assists, encourages or directs the commission of another offence OR
 - Provide an alternative to (1)(a) respectively with a standard of recklessness based on foresight of **probability** (not possibility – which was the old standard for extended common purpose)
- Enters into an agreement, arrangement or understanding with another person to commit an offence OR
 - Was it finalised?
 - Express or implied?
 - Must be about *same kind of crime*, not about anything
 - Consider scope of agreement: what in substance was agreed to, any conduct agreed upon at minimum
- Enters into an agreement, arrangement or understand with another person to commit another offence
 - Provide an alternative to (1)(c) respectively with a standard of recklessness based on foresight of **probability** (not possibility – which was the old standard for extended common purpose) (*Miller v R*)

ALSO IF RELEVANT:

s.323(2): Irrelevant whether or not PO was in fact encouraged by D's words.

s.323(3): D can still be involved in commission even if not (a) physically present or (b) did not realise facts constituted an offence

ASSISTS, ENCOURAGES OR DIRECTS COMMISSION OF OFFENCE – s.323(1)a + b

At the highest, it means physical participation. At the least, it means positive intentional encouragement.

- In order for a person to be prosecuted for being involved, an offence has to have been committed (s.324). However, it is not necessary that any other person may actually be prosecuted for or found guilty of the offence for someone to be accessory (s.324A)
- Note s.324(3) – a person cannot be an accessory to an offence that is intended for her benefit (i.e. breaching restraining order)

FACTS:

- D watched wife drown herself and children – went home after trying

HELD:

- Convicted of MS of the children and wife. Some circumstances – failure to act may amount to complicit participation in offence.
- SC pointed to Russell's **special relationship** (parent-child) therefore failure to do led to neg MS. Where there is **no relationship** – maybe a moral obligation but no legal one

FACTS:

- Prize fight – D among crowd – not shown that they took part in management or said/did anything – tried for common assault – convicted of aiding abetting as watching prize fight and being present

HELD On case reserve:

- Not guilty → **mere accidental presence** at scene of assault not evidence of aiding and abetting – the jury might, but not bound to, draw conclusion that their presence was encouragement.

R v Clarkson [1971] 3 All ER 334 – NEED INTENTIONAL ENCOURAGEMENT

FACTS:

- D soldiers – German woman rape – didn't encourage but were drunk and went to have a look – presence not accidental.

HELD:

- NOT AN ACCESSORY
- Need not only actual encouragement here, but also **intentional encouragement**.

NOW POST 2014 LAW?

- P would argue that same mental element (RB in consent) ought to be required of the accessory involved as the offender – no moral reasoning to divide these. D would argue that the law still requires s.323 has an element of intention.
- **But** – physical presence not required – encouragement from someone else not required – however, an offence must have actually been committed (may be an accessory to an attempt)

ENTERING AN AGREEMENT, ARRANGEMENT OR UNDERSTANDING s.323(1) c+d

Group activity- CL doctrines like **acting in concert, JCE and ECP**

- If they intentionally assisted or encouraged 'foundational crime', did they **foresee** a more serious offence 'charged offence' as **probable**?
 - *Bouhey (Doc killed woman while engaged in asphyxiation type sex)* – not mathematical – it is for jury to assess whether there was awareness of probability
 - *Faure (D shot V while playing Russian Roulette)* – probable means "substantial and real" and "not remote"
- Foresight must be of the essential elements of the offence (murder = foresight that PO would kill with required intent)

Johns v R (1980) 28 ALR – PROBABILITY OF A DIFFERENT OFFENCE EVENTUATING

FACTS:

- J and W agreed J would drive W to Kings Cross to rob Morris – W told J he would "hold him up, tie him up and get the money and stuff" – J knew W always carried pistol and was "quick tempered and capable of becoming violent". W told J that M was "always armed and wouldn't stand any mucking around if it came to a showdown". W shot M
- J the accessory was not present when crime was committed

HELD:

- J aided/encouraged crime (1st element satisfied) but Q is – J G of murder that W committed
- P may argue inherently dangerous agreement – knowing all the characteristics
- D may argue he might have seen murder as **possibility** not **probability**
- Jury used a case of **possibility**. ← NO LONGER LAW
- **Now:** go to s323 – was John aware that is **probable** that the murder would be committed in carrying out other offence of robbery.
- **These things for jury to decide**

Miller v R (1980) 32 ALR 321 – PROBABILITY OF DIFFERENT OFFENCE EVENTUATING

FACTS:

- Truro murders – M would drive around & look for young girls – would leave them with W. M returned once – W killed girl – helped bury body – M said W always assured him it would not happen again. M went on trial as accessory to murder.

HELD:

- GUILTY – Would have foreseen that after first murder – murder would be a possible consequence
- RE: First woman who died – not accessory (no knowledge, no intent) but for women after – jury would state M would at least foresee possibility that murder would occur.
- "It'll never happen again" → perhaps useful for P to show he was aware of possibility of it happening again. Possibility equalled conviction – ECP NOW ABOLISHED

NOW: Analysing it in terms of s.323:

1. S323(1)(b): 1st show **intentional assistance, encouragement or direction**. Perhaps this is the case here – D would argue he never intended – always hoped murder wouldn't occur.
2. Was it a **probability** that it would occur?

Gillard v R (2003) 219 CLR 1 – PROBABILITY

FACTS:

- G and P [PO] – jointly convicted of two killings – G stole van and drove PO to place where killings took place. G believed PO was going to commit an armed robbery
- Appealed as to whether MS an available verdict.

UNDER CURRENT LAW:

- Intentional assistance of armed robbery and murder committed → 1st element satisfied. Q is whether G foresaw as a **probability** that P might murder
- Complicated because it is a constructive murder case – no need to prove intent or recklessness – so what did G actually have to foresee as probability? G guilty if he foresaw **killing** as a probability

McAuliffe v The Queen (1995) 130 ALR 26 – ALL CAN BE G AS POs

FACTS:

- Ds x 3 intoxicated and high - went to Bondi to “rob or bash” someone. 2 had weapons – other unaware – attacked R in cliff area – fell onto puddle near cliff – they left – he rolled off and died.

HELD:

- All denied who actually killed. Under old CP rule – each liable for murder committed by one – foundation offence – assault – charged offence – murder if they subjectively foresaw murder as possible consequence

NOW – GO THROUGH

- Intentional assistance / encouragement → awareness of probability
- If clear that each participated in offence but unclear which physically committed offence **then all can be G as POs**

Clayton v R; Hartwick v R (2006) 231 ALR 500 – ALL CAN BE G AS PO's

FACTS:

- Borg killing – 3 Ds involved – unclear who stabbed V

HELD:

- P argued all G of murder
- This was on the basis either that there was a joint criminal enterprise to inflict serious injury to the deceased (**1. AGREEMENT**), or alternatively, that each foresaw the possibility that death or serious injury might be inflicted by one of them (**2. PROBABILITY, NOT POSSIBILITY**)
- Each of these people foresaw that death or really SI could be inflicted by one of them

KIRBY IN DISSENT:

- Kirby's dissent re: probability is now reflected in s.323
- Kirby J concerned at the possible application of an extended rule to the ‘young, weak-minded, gullible and intellectually impaired’.

MENS REA

New provisions for consistency with general principles – no person to be held liable for unwittingly helping somebody else with their plans.

s.323:

- 1. If (a) or (c): Intention to provide encouragement/agreed to ACTUAL crime charged (Giorgianni)**
 - a. Must have knowledge of **essential facts** of offence (which make up elements of offence)
 - i. But don't need to know precise details like specific locations
 - ii. Having some suspicion of the use of weapons is enough (*Bainbridge*)
 - b. Even if D was present, and assisted offender on spur of moment, even if not their intention to harm V (*Stokes and Difford*)
- 2. If (b) or (d): Intention to provide encouragement/agreed to another offence, but subjectively foresaw [reckless to] the PROBABILITY that offence charged could take place during offence they agreed to**
 - a. *Miller*: enough that D was aware of PO killing someone before – showed that he saw the probability of it happening again
 - b. D will be G regardless of the foresight of other parties (*McAuliffe*)

R v Bainbridge [1959] 3 All ER 200 – GENERAL KNOWLEDGE IS SUFFICIENT

FACTS:

- A brought cutting equipment for an accomplice, suspecting it was to be used to break into a place. Didn't know when or where.

STRICT LIABILITY

Introduction:

- Professors Andrew Ashworth and Jeremy Horder in 'Principles of Criminal Law' commented, "The essence of the principle of MR is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and consequences", thus the general requirement of *mens rea* is one of the most fundamental protections in criminal law.
- **Or:** In his *Commentaries on the Laws of England* (1765), William Blackstone wrote that, to 'constitute a crime against human laws, there must be first a vicious will, and secondly an unlawful act consequent upon such vicious will'.
- However, for offences of strict and absolute liability, intention, recklessness and negligence are not necessary to prove. It is almost entirely left in the hands of the courts to interpret statute where a *mens rea* is not specified.
- Contention 1: The concept of strict liability has been the subject of detailed consideration. Given proof of criminal liability has traditionally focused on proof of a guilty mind, this form of liability distorts the considered basis of criminal law as requiring proof of both *actus reus* and requisite *mens rea*, creating undesirable inconsistencies.
- Contention 2: The concept of strict liability has led to mass criminalisation of offences without the need to prove *mens rea*. These crimes sometimes include ones that carry both heavy penalties and a severe social stigma, resulting in varied injustices.

Current law:

- In order to make out a strict liability offence, the common law presumption that offences require a subjective fault element must be displaced.
- Per *Sherraz v De Rutzen*, this presumption is strong and will not lightly be displaced.
- In determining whether that presumption is rebutted, the HC in *He Kaw Teh* created a tripartite test
- From here, the courts will first interpret the words of statute to see whether or not there is a *mens rea* requirement. The second limb requires an examination of the subject matter of the offence. The more serious the offence, the more likely that a *mens rea* element would have been intended. Per Brennan J in *Allen v United Carpet Mills Pty Ltd*, "The purpose of the statute is the surest guide of the legislature's intention as to the mental state to be implied". The final limb of this test looks at the utility of imposing strict liability by deciding whether having no *mens rea* requirement would assist in the enforcement of the law.
- Lord Reid in *Sweet v Parsley* outlined that it is necessary to go outside the Act and examine all relevant circumstances in order to establish that it was the intention of Parliament to create a strict liability offence.
- Once the proof of fault presumption has been rebutted through the tripartite test, there is then a presumption that all offences that do not require *mens rea* are strict liability offences, to which the defence of 'honest and reasonable mistake of fact' (HRMF) applies. The defendant has the evidential burden to prove that this mistake (i) was honest and reasonable, (ii) it was a mistake of fact and not law and (iii) involved a belief in facts which if true, would have made the act innocent. If this presumption is found to be rebutted, the offence is one of absolute liability.

Reasons for imposing strict liability:

Administrative expediency

- Common reason to support a conclusion that a statute imposes strict, or even absolute liability often rests on a floodgates argument. The prosecution needing to prove *mens rea* even for the smallest regulatory offences will place an administration burden on the courts. Only requiring causative responsibility eliminates those hindrances.
- Professor F B Sayre in 'Public Welfare Offences' (1993) – "[S]wamped with such appalling inundations of cases of petty violations, the lower criminal courts would be physically unable to examine the subjective intent of each defendant, even were such determination desirable".
- It ensures petty crimes are dealt with swiftly and efficiently, lessening the burden on the courts
- Waller & Williams stated that the matter of 'administrative convenience' for the courts is even more pressing today, with the lower courts hearing 523,168 individual matters (in the 2011-2012 year), around 97% all criminal matters.
- From an economic perspective, proof of *mens rea* can impose prohibitively high administration costs, whereas strict liability supports enforcement efficiency by "lowering the cost of regulator investigation, intrusion on business, prosecution and defence effort and reducing trial length" (DERA, 'Review of Enforcement in Environmental Regulation, Report of Conclusion, 2006).

Promotion of care

- "The removal of the common law requirement for a mental element in 'public welfare' legislation has been justified on the basis of protecting the community by enforcing a high standard of care" (Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 2002).
- The role of the criminal law is not only to punish those who transgress, but also to encourage careful and community minded behaviour. The rationale for strict liability is summed up by Barbara Wootton in *Crime and the Criminal Law* (1981) – "If the objective of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which were due to carelessness, negligence or even accident. The question of motivation is in the first instance irrelevant." Therefore, by easing the burden on the prosecuting authorities, the system of strict and absolute liability supports the role of the criminal law in protecting fundamental social interests.