

Joint criminal enterprise

Elements: (set out into these 4 elements in: *McEwan, Robb and Dambitis (2013)*)

1. **Understanding or Agreement (“Common Purpose”) to commit a crime**
2. **Participation in the JCE**
3. **Defendant(s) had the MR** to carry out the act
4. **Someone does the AR**
5. **For conclusion** consider *Osland* in definitions below: accused is guilty regardless of judicial outcome of others

Definition:

Liability is **PRIMARY** (not derivative). The accused is guilty regardless of the judicial outcome of the other participants, it is the act, not the outcome, which is attributed to the other defendants - *Osland v R (1998)*

1. “Agreement”

- There must be an **arrangement or understanding** amounting to an agreement
 - *Osland (1998), Tangye*
- Agreement can occur at **any time before the offence** (*Osland*) and can be spontaneous (*Hawi*)
- May **be inferred** from conduct or words *Osland (1998)*
 - **Need not be confined to writing or formality** - *Kanaan [2006]*
- Mere **presence does not constitute an agreement** (but if there is already an agreement, it can constitute participation – *Huyng*), some form of encouragement is required (*Chishimba, 2010*)

2. Participation

- Can be inferred from doing **some part of the AR**
 - *Osland (1998)*
- Can also be inferred by **presence at the scene** of the crime
 - Presence at the scene is not a **stand-alone requirement**, but just one of the ways that a party can participate in JCE (*Huyng, [2013]*)
- Where the co-accused is **not at the scene**, but still party to JCE, **participation can occur from ‘some other event’** (*Sever, 2010*)

- **Huyng**: presence one form of participation, **Sever**: there can be others (**Sever** is relevant provided there is an agreement, if no agreement = accessorial liability)

3. Mens Rea:

- As it is only the AR which is shared, the MR of each defendant must be proven (**Osland, 1998**)
- Must be the **state of mind required for the commission of the relevant offence** (e.g. if murder, MR for murder, you do not need to explain what the actual MR is, just state what it is and that it's required) – (**McEwan**)

4. Someone must commit the relevant AR

- **Look to the facts**
- All elements of the offence must be completed by the enterprise (**McEwan, 2013**)

Withdrawing from JCE

- **Must withdraw completely and be timely. Must make it known to others that he was withdrawing, and he must, by such acts or words as may be appropriate, do what he reasonably can to dissuade the others from continuing with the unlawful purpose** (**Tietie, 1988**) – (**very high bar, facts in PRQ probably won't pass this bar**)
- The withdrawal is not timely if it was given when it was too late to stop the chain of events which defendant's presence and actions had encouraged (**Tietie, 1988**)
- **BOP**: Defence has evidentiary burden (must raise enough evidence to make it sufficient for the Crown to have to rebut it), Crown has onus to negate effective withdrawal of involvement in common enterprise BRD

Extended joint criminal enterprise

DEFINITION:

- Liability for Extended Joint Criminal Enterprise is **DERIVATIVE** (not primary). It rests upon the guilt of the principal offender who committed the AR.

Elements:

1. **Joint Criminal Enterprise (Foundation Offence – can be any offence – in PRQ the foundational offence will not be murder, it will be something like assault)**
2. **Foresight/Intention of the possibility of the offence occurring**
 - a. **Foresight of Actus Reus**
 - b. **Foresight of Mens Rea**

1. Foundational Joint Criminal Enterprise

- There must have been a **foundation offence** pursuant to the J.C.E (*McAuliffe*), but it does not need to be completed *Taufahema v R [2007]*
 - If foundational crime hasn't been committed yet, need to allege that actual crime was going to happen (cannot just be mischief) (not necessary to prove where, when, just that it was going to happen). - *Taufahema v R [2007]*

2 Foresight – of the Actus Reus and Mens Rea

- Must have foresight of the **possibility** of another offender to commit the AR and MR of a crime beyond the foundational crime, and they continue to participate regardless of this foresight, subjective test
 - *McAuliffe, Gillard*
- The 2nd offender does not need to foresee the precise way the harm is inflicted, but only has to foresee the magnitude of harm
 - *Keenan*

Murder Cases:

- Where the prosecution seeks to convict the accused of murder, it must be shown that he or she **foresaw BOTH the infliction of injury causing death and the intention to inflict such injury**
 - *Gillard v R [2003]*
- Where foresight of **intention cannot be proven, manslaughter** is still available for prosecution - *Gillard v R [2003]*

Accessorial liability

ONLY USE WHEN: There is no agreement

Elements:

1. **AR:** aiding, abetting, counselling or procuring
2. **MR:** D intended to assist the commission of an offence
3. **MR:** D had knowledge of the essential elements of the offence
4. **Commission of the actual offence**

liability of the accessory is **DERIVATIVE**, the crime of the principal offender is what is attributed to others, not the act (but does not matter if primary offender is not convicted)

Statutory basis: A secondary participant may be indicted and sentenced as if he or she were the principal offender - *Crimes Act 1900* (NSW) ss 345-351

1. AR: conduct which amounts to aiding, abetting, counselling or procuring the commission of the offence

Aiding and Abetting (*refer to this as principal in the 2nd degree, an accessory at the fact*):

Write this: To aid (assist) or abet (procure), the defendant must be present at the scene (*McCarthy & Ryan v R (1993)*), but this does not in itself amount to assistance or encouragement (*Al Quazzium*), there must be positive steps taken to encourage which render the offence more likely to occur (*Phan*)

- **Aid:** assist
 - Principal offender does NOT have to know of the assistance, be in the presence of the assistance, nor does the act(s) ACTUALLY have to be assisting, so long as D2 is contributing (*Lam*)
- **Abet:** encourage
 - Must be in presence, D1 does not need to ACTUALLY be encouraged by D2, D1 does not need to hear the encouragement of D2 but the encouragement only needs to be CAPABLE of being heard (*Lam*).
 - May be in the form of expressions, gestures or actions intended to signify approval (*Beck*)
- There must be **positive steps taken** to encourage which render the offence **more likely to occur** (*Phan*). **However: Russel – in certain circumstances, silence/mere presence can amount to encouragement – depending on the facts – (husband stood there watching while wife drowned children – nature of special relationship meant his silence was encouraging)**

Counselling or Procuring (*refer to this as ‘accessory before the fact’*):

- **Procuring** – taking steps towards making the offence happen (no words required, does not require meeting of the minds) (*AG REF 1975*)
- **Counsel:** discuss the offence
- **No need for presence at the scene** – (*Giorgianni v R (1985)*)

Where the Principal Commits a More Serious Offence:

- Where the principal commits a more serious offence than that for which assistance was given, the accessory is nevertheless liable for the lesser offence (this is when there is similar circumstances to EJCE, but no agreement)
 - *Chai v R [2002]*

MR: 2A. D Intended to assist the commission of the offence and 2B. had knowledge of the essential elements of the offence

- **Write this (summary of everything below): There must be intent to aid, abet, counsel or procure the offence, expressed as actual knowledge of the AR and MR elements (*Giorgianni, Stokes & Difford*). It is necessary to prove D had knowledge of the type of offence, but not necessary that they how the offence will be done (*Bainbridge*) or that they wanted the crime to occur (*Gamble*),**
- Intent to assist or encourage, expressed as **ACTUAL knowledge of the essential elements that constitute the offence is necessary**. **Recklessness is not sufficient, nor is wilful blindness**
 - *Giorgianni v R (1985)*
- Stokes & Difford goes one step further (clarifies above): The offender must have actual knowledge of the AR and the MR
 - *Stokes & Difford (1990)*
- D must have **actual knowledge of the type of offence**, but not how it is going to be done. I.e.: specifics are not necessary
 - *Ancuta v R (1990), Bainbridge (1960)*
 - **FACTS: *Ancuta*:** defendant supplied principal with compliance plates which were later fixed to a stolen car. D appealed, but appeal dismissed on the grounds that D knew the TYPE of crime (motor vehicle) that would be committed.
- The prosecution **need not establish that the accused wanted the crime to occur**, as long as they wanted to assist and had knowledge of the essential elements of the offence
 - *NCB v Gamble [1959]*

Withdrawal

The rules governing withdrawal in a case where the Crown case is based on accessorial liability **are the same rules that apply in the case of joint criminal enterprise.**

In **Sully (2012)**, Vanstone J noted that;

- What will suffice as withdrawal will vary according to the case
- It will involve an assessment of what was **reasonable and practical in those circumstances**
- **The more the defendant has done by way of planning or providing information or items to enable completion of the crime, the more is likely to be required of him by the way of the withdrawal or countermand, if he is to avoid criminal responsibility**

INNOCENT INSTRUMENT (INNOCENT AGENCY) AND ACCESSORIAL LIABILITY

- Liability may be **extended to encompass those who use an ‘innocent agent’** to perform the offence.
- The party used as an **innocent agent** is not liable
 - ***Pinkstone v R [2004]***. (*Facts: Innocent agent used in supply of drugs, appellate inherited the AR to be charged with supply of methamphetamine*).
- JUST BECAUSE YOU DONT CRIME, DOESN'T MEAN YOU'RE FREE FROM LIABILITY, AN INNOCENT AGENT CAN BE USED TO INHERENT THE AR ONTO THE PERSON WHO USES THE AGENT