CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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ASSESSMENT PREPARATION

CHAPTER 9

ACTIVE LEARNING QUESTIONS

1. What are the threshold tests for an attempt to pass the preparatory stage, and is any single test applicable?

The nature of the threshold test for an attempt to commit an offence has been the subject of different judicial interpretations. Three main tests have been proposed: (1) the last act test; (2) the unequivocal test; and (3) the substantial step test.

As the name suggests, the last act test posits that the defendant has done the last act prior to committing the offence. Thus, applying such a test, soaking the walls and floor of a house in petrol is merely preparation and the last act is the lighting of the match: *R v Chellingworth* [1954] QWN 35. The difficulty with this test is that there is little scope for attempt provisions if the test is so proximate to the actual completion of the intended offence.

The unequivocal test, perversely referred to in the cases as the equivocality test, posits that 'the *actus reus* necessary to constitute an attempt is regarded as complete if the (defendant) does an act which is a step towards the commission of the specific crime, and that act cannot reasonably be regarded as having any other purpose than the commission of that specific crime': *R v De Silva* [2007] QCA 301 at [20] per Jerrard JA, citing *R v Williams, Ex parte The Minister for Justice and Attorney-General* [1965] Qd R 86.

The substantial step test focuses on the progress made along the spectrum between inception and completion, particularly on what steps remain to be taken: *DPP v Stonehouse* [1978] AC 55; *R v Jones* (1990) 91 Cr App R 351.

There is no single definitive test, and the Queensland Supreme and District Court Benchbook—Attempts No 68.2—sets out the following direction to the jury, which specifically rejects the last act/step test:

> The act relied upon as constituting the attempt must be an act immediately, not merely remotely, connected with the contemplated offence. What is done must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is not necessary that the defendant should have done his best or taken the last steps towards the intended offence.

2. What are the differences and similarities between an attempt and a conspiracy?

The offences of conspiracy and attempt to commit a crime have in common (1) criminal liability is possible even if the principal act is factually impossible, and (2) the impossibility of withdrawal from the inchoate offence. Where conspiracy and attempt differ under the Griffith Codes is in the timing of the crystallisation of the offence: for conspiracy it is the agreement, whereas for attempt there must be an act beyond mere preparation. This is not the case under s 11.5(2)(c) of the *Criminal Code 1995* (Cth), which states that 'the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement'. Thus, under the *Criminal Code 1995* (Cth), attempt and conspiracy have a similar 'trigger' point of a post preparation act.

3. What are the different forms of other party criminal liability?

The law has historically taken a hostile view of crimes committed by multiple offenders. To that end, the law has cast a wide net to encompass accessories to a crime. Such criminal responsibility takes three broad forms: first, complicity before the fact which covers the situation where a person aids, abets, counsels or procures an offence; secondly, common purpose where two or more persons form a common plan to commit an offence; and thirdly, accessory after the fact where a person knowingly assists another to avoid punishment. There is a degree of overlap between the two before the fact forms of extended liability, which is ultimately determined by the evidence as to the level of knowledge of each party involved.

4. In what ways do complicity and common purpose overlap?

The common law surrounding criminal responsibility and other parties to offences has historically evidenced both complexity and controversy. As the High Court has acknowledged in *McAuliffe v The Queen* (1995) 183 CLR 108, 113 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ), '[t]hose terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime'.

The reference to 'an additional means' recognises that liability can attach beyond accessory before the fact (aids, abets, counsels or procures) and principal in the second degree (present at the scene and aids or abets).

5. Are accessories before and after the fact treated differently, and can an accessory be treated more severely than a principal?

Accessories after the fact are generally treated (except to murder or where the court determines their conduct is more reprehensible than the principal offender) more leniently than accessories before the fact: typically, half of the greatest punishment to which an offender convicted of the offence is liable (s 545(3) in Qld and s 562(2)(b) in WA). Accessories after the fact are covered in s 10 of both Codes.

> **10 Accessories after the fact (Qld)**
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> A person who receives or assists another who is, to the person's knowledge, guilty of an offence, in order to enable the person to escape punishment, is said to become an accessory after the fact to the offence.

As far as the difference in treatment between accessory and principal is concerned, an accessory before the fact can be treated more severely than a principal. In *GAS v The Queen* (2004) 217 CLR 198 at [23], Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ stated:

> [A]s the Court of Appeal pointed out in the present case, it is not a universal principle that the culpability of an aider and abettor is less than that of a principal offender … A manipulative or dominant aider and abettor may be more culpable than a principal. And even when aiders and abettors are less culpable, the degree of difference will depend upon the circumstances of the particular case.

In *Johns v The Queen* (1980) 143 CLR 108 at 117, Stephen J cited Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 404 to similar effect.

> [T]heir respective roles may of course bear upon the sentences to be imposed upon conviction, but not necessarily in a manner favourable to the accessory before the fact, who may prove to be the more blameworthy of the two. As Glanville Williams points out, Lady Macbeth was surely more blameworthy than was her husband and 'The master mind and guiding spirit of a crime ring will probably receive a heavier sentence than his tools'.

In addition to different treatment between accessory and principal, different verdicts are also open. Parties charged under either s 7 Principal offenders and s 8 Common purpose can be convicted of different offences. Specific provision is made for this in s 10A of the *Criminal Code* (Qld).

> **10A Interpretation of ch 2**

> (1) Under section 7, a person's criminal responsibility extends to any offence that, on the evidence admissible against him or her, is either the offence proved against the person who did the act or made the omission that constitutes that offence or any statutory or other alternative to that offence.
>
> (2) Under section 8, a person's criminal responsibility extends to any offence that, on the evidence admissible against him or her, is a probable consequence of the prosecution of a common intention to prosecute an unlawful purpose, regardless of what offence is proved against any other party to the common intention.
>
> (3) This section does not limit any other provision of this chapter.

There is no such provision in the *Criminal Code 1913* (WA), but the position is the same as in Queensland by virtue of judicial interpretation: see *Bardsley v The Queen* [2004] WASCA 251 at [40] – [43] per Templeman J.

PROBLEM QUESTION 1

ASSUME THE FOLLOWING FACTS

Arthur was tired of waiting for his elderly and wealthy Uncle Barnaby to die, because he wanted to start spending his large inheritance. Arthur formed a plan to help his uncle into the afterlife by adding some extra ingredients to his uncle's nightcap of hot milk and marshmallows. Arthur consulted a medical textbook and learned that in the right combination two ingredients that were otherwise harmless could be fatal to someone with a heart condition like Uncle Barnaby. Consequently, Arthur purchased these ingredients and practised mixing them together. Arthur felt he needed to conduct a test to be sure he had the combination correct, so he gave a dose to the family cat, Boris. Sadly for Boris, Arthur had mixed up the potion to perfection.

Uncle Barnaby was distraught at the death of Boris and consoled himself with a few extra glasses of whiskey, knowing his doctor had warned him of the danger to his heart of more than one glass. Meanwhile, Arthur, delighted at the success of his experiment, wasted no time in putting his plan into operation by adding his potion to his uncle's nightcap, which Susan, the housekeeper, placed each evening on the table next to Uncle Barnaby's chair in the lounge room. Arthur handed his uncle the nightcap and feigned an excuse to leave the room.

When Arthur returned to the lounge some time later, he found Susan sobbing and holding his uncle's lifeless hand. The nightcap stood untouched on the table. Susan's subsequent statement to the police was to the effect that she had become suspicious of Arthur's behaviour, especially when Boris, a young and healthy cat, had died so suddenly. Consequently, Susan had decided to check on Uncle Barnaby when she saw Arthur leave the lounge. As a former nurse, she recognised the

symptoms of an impending heart attack and took the hot nightcap from Uncle Barnaby's shaking fingers just before the heart attack struck him down.

Given Susan's suspicions, the police tested the nightcap and discovered its lethal contents. However, the autopsy on Uncle Barnaby confirmed his death was due to a heart attack, and that he had not drunk a single drop of the nightcap.

Discuss Arthur's criminal responsibility. Would it make any difference to your answer if it transpired that the potion mixed up by Arthur would not have been sufficient to kill an elderly man with a heart condition like Uncle Barnaby's?

THE ISSUES

This question raises three issues: (1) the elements of attempts to commit an offence; (2) the nature of the threshold test for an attempt to commit an offence; and (3) factual and legal impossibility.

THE RELEVANT LAW

(1) The elements of attempts to commit an offence

The Codes contain a general attempt provision (s 4) and specific attempt provisions such as attempted murder (s 306 in Qld) and attempt to unlawfully kill (s 283 in WA). A specific attempt provision needs to be read in conjunction with the general provision.

> **4 Attempts to commit offences (Qld)**
>
> (1) When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.
>
> (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on the offender's part for completing the commission of the offence, or whether the complete fulfilment of the offender's intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of the offender's intention.
>
> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.
>
> (4) The same facts may constitute one offence and an attempt to commit another offence.

The elements of the attempts to commit an offence are contained in s 4(1). It can be seen that the elements are: (1) an intention to commit an offence; (2) the beginning of the execution of the

intention by appropriate means; (3) the manifestation of the intention by some overt act; and (4) the intention is not fulfilled.

Here on the facts, in Queensland, the specific intent provision is s 306 Attempt to murder.

> 306 Attempt to murder
>
> Any person who—
>
> (a) attempts unlawfully to kill another; or
>
> (b) with intent unlawfully to kill another does any act, or omits to do any act which it is the person's duty to do, such act or omission being of such a nature as to be likely to endanger human life;
>
> is guilty of a crime, and is liable to imprisonment for life.

In Western Australia, the language for the elements in para 1 of s 4 is slightly different.

> When a person, intending to commit an offence, begins to put his intention into execution by doing an act that is more than merely preparatory to the commission of the offence but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence.

Effectively, elements (2) and (3) in s 4 (Qld) above are collapsed into a single element in para 1 of s 4 (WA): the commencement of the execution of the intention by an act that is more than merely preparatory. Practically, the difference in language is not significant as the test is common to both Codes: has the person sufficiently proceeded in executing his or her intention by an act that objectively crystallises the intention.

Here on the facts, in Western Australia, the specific intent provision is s 283 Attempt to unlawfully kill.

> 283 Attempt to unlawfully kill
>
> Any person who —
>
> (1) Attempts unlawfully to kill another; or
>
> (2) With intent unlawfully to kill another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life;
>
> is guilty of a crime, and is liable to imprisonment for life.

<u>(2) The nature of the threshold test for an attempt to commit an offence</u>

The nature of the threshold test for an attempt to commit an offence has been the subject of different judicial interpretations. Three main tests have been proposed: (1) the last act test; (2) the unequivocal test; and (3) the substantial step test.

As the name suggests, the last act test posits that the defendant has done the last act prior to committing the offence. Thus, applying such a test, soaking the walls and floor of a house in petrol is merely preparation and the last act is the lighting of the match: *R v Chellingworth* [1954] QWN 35. The difficulty with this test is that there is little scope for attempt provisions if the test is so proximate to the actual completion of the intended offence.

The unequivocal test, perversely referred to in the cases as the equivocality test, posits that 'the *actus reus* necessary to constitute an attempt is regarded as complete if the (defendant) does an act which is a step towards the commission of the specific crime, and that act cannot reasonably be regarded as having any other purpose than the commission of that specific crime': *R v De Silva* [2007] QCA 301 at [20] per Jerrard JA, citing *R v Williams, Ex parte The Minister for Justice and Attorney-General* [1965] Qd R 86.

The substantial step test focuses on the progress made along the spectrum between inception and completion, particularly on what steps remain to be taken: *DPP v Stonehouse* [1978] AC 55; *R v Jones* (1990) 91 Cr App R 351.

There is no single definitive test, and the Queensland Supreme and District Court Benchbook—Attempts No 68.2—sets out the following direction to the jury, which specifically rejects the last act/step test:

> The act relied upon as constituting the attempt must be an act immediately, not merely remotely, connected with the contemplated offence. What is done must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is not necessary that the defendant should have done his best or taken the last steps towards the intended offence.

On the facts, the intended offence is murder. While the substantive offence of murder encompasses an intent to do grievous bodily harm (s 302(1)(a) in Qld) or an intent to endanger life (s 279(1)(b) in WA), the offence of attempted murder requires an actual intent to kill: *R v Simpson* [2013] QCA 50 at [19] per Atkinson J, citing *R v Butler* [2006] QCA 51 at [26]. In *Simpson*, the Court of Appeal held it was open to the jury to infer the necessary intent to kill given that there were two attackers, the number of injuries suffered by the victim, and the use of the words 'finish him' by one of the attackers.

(3) Factual and legal impossibility

Section 4(2) (Qld) below, (para 2 in s 4 (WA)), sets out that once the attempt to commit an offence has crystallised and proceeded past the point of preparation discussed above, then withdrawal is impossible.

> Section 4(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on the offender's part for completing the commission of the offence, or whether the complete fulfilment of the offender's intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of the offender's intention.

Three alternative possibilities are covered in s 4(2): (1) the final stages remain incomplete; (2) circumstances intervene to prevent completion; and (3) the offender desists from completing voluntarily. It matters not which possibility eventuated to prevent completion of the substantive offence, as once the attempt has crystallised the offence of attempt is complete. Post preparation is immaterial. This situation contrasts with s 8 Common purpose, where withdrawal is possible (see discussion in later section).

Section 4(3) (Qld) below, (para 3 in s 4 (WA)), appears on its face to refer to a factual impossibility rather than a legal impossibility.

> 3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

If there is no substantive offence, such as where the person attempted to import a drug he or she mistakenly believed was prohibited, then clearly there can be no attempt to commit that offence. It is a legal impossibility. Whereas, in the reverse situation, where the person intended to import a drug he or she correctly understood was prohibited but an innocuous drug was actually imported in error, then this would be a factual impossibility and would fall within the immateriality circumstance in s 4(3) above.

The well-known case of *R v White* [1910] 2 KB 124, is an example of factual impossibility. In *White*, the defendant placed poison in his mother's milk intending to kill her. His mother took a few sips, fell asleep and died in her sleep due to a heart attack rather than the poison. The defendant was not liable for her murder as his act of poisoning the milk was not the cause of death. However, he was liable for attempted murder.

Nevertheless, in *R v English* 10 WAR 355 at 359, Franklyn J doubted the distinction between a legal impossibility and a factual impossibility in s 4(3) above.

> The third paragraph of s 4 is said to create for the purposes of the section a distinction between impossibility in fact and impossibility in law. I have difficulty with that proposition. Impossibility in law is a conclusion of law which arises out of the facts. What the paragraph says, in my opinion, is that it is immaterial to the commission of the offence of attempting to commit the intended offence that, by reason of circumstances not known to the offender, it is impossible in fact — whether or not that leads to a conclusion of impossibility at law — to commit the intended offence.

PUTTING THE FACTS INTO THE LAW

Here, on the facts, Arthur will be charged with attempted murder under s 306 of the *Criminal Code* (Qld) or with attempting to unlawfully kill under s 283 of the *Criminal Code* (WA). The critical words in both s 306 and s 283 are: 'attempts unlawfully to kill another.' The first limb to be satisfied contains the elements of 'attempts' under s 4(1) of both Codes: (1) an intention to commit an offence; (2) the beginning of the execution of the intention by appropriate means; (3) the manifestation of the intention by some overt act; and (4) the intention is not fulfilled.

It would appear that Arthur has satisfied each of the above elements in s 4(1). We are told that Arthur intends to kill his Uncle Barnaby in order to secure his inheritance. To that end Arthur had bought ingredients designed to kill an elderly person with a heart condition and had begun the execution of his plan by experimenting successfully on the unfortunate cat, Boris. The manifestation of some overt act is apparent from Arthur adding his potion to Uncle Barnaby's nightcap and then handing the nightcap to his uncle. Arthur's intention to kill Uncle Barnaby through his potion is not fulfilled because Uncle Barnaby died of a heart attack before he could drink the nightcap.

Arthur comes within any one of the three main tests that have been proposed as the threshold test for an attempt to commit an offence: (1) the last act test; (2) the unequivocal test; and (3) the substantial step test.

Arthur also satisfies the criteria set out in the Queensland Supreme and District Court Benchbook—Attempts No 68.2.

> The act relied upon as constituting the attempt must be an act immediately, not merely remotely, connected with the contemplated offence. What is done must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is not necessary that the defendant should have done his best or taken the last steps towards the intended offence.

Arthur has clearly gone beyond mere preparation and was far advanced upon the commission of the crime before death by natural causes intervened.

For the second limb, the offence of attempted murder requires an actual intent to kill: *R v Simpson* [2013] QCA 50 at [19] per Atkinson J, citing *R v Butler* [2006] QCA 51 at [26]. Here, it is open to the jury to infer the necessary intent to kill on Arthur's part given that he knew from the medical textbook he consulted the likely fatal consequences of his potion on an elderly person with a heart condition, and had successfully tested on the cat the right combination of ingredients for his potion.

As to 'unlawfully', Arthur has no authorisation, justification or excuse for his attempt to kill Uncle Barnaby: s 291 of the *Criminal Code* (Qld) and s 268 of the *Criminal Code* (WA). Quite the contrary, his motive is to secure his inheritance early.

The supplementary question asks whether it would make any difference to Arthur's criminal responsibility if the potion would not have killed Uncle Barnaby even if he had taken his nightcap. The facts are on point with the well-known case of *R v White* [1910] 2 KB 124, where the defendant

was liable for attempted murder. This was a case of factual impossibility. Section 4(3) below in both Codes deals with this situation.

> 4(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

On the authority of *R v English* 10 WAR 355 at 359, per Franklyn J there is no distinction to be drawn between a legal impossibility and a factual impossibility in s 4(3) above.

> What the paragraph says, in my opinion, is that it is immaterial to the commission of the offence of attempting to commit the intended offence that, by reason of circumstances not known to the offender, it is impossible in fact — whether or not that leads to a conclusion of impossibility at law — to commit the intended offence.

Thus, it would make no difference to Arthur's criminal responsibility if the potion could not possibly have killed Uncle Barnaby.

CONCLUSION

Arthur is facing the very real probability that he will convicted of the attempted murder of his Uncle Barnaby under s 306 (Qld) or s 283 (WA). Arthur satisfies all the elements of the offence, and even if the potion could not possibly have killed Uncle Barnaby, s 4(3) of both Codes still sheets home criminal responsibility to Arthur.

PROBLEM QUESTION 2

ASSUME THE FOLLOWING FACTS

Alex and Ben formed a plan to steal 'Mogul' Moffatt's recently acquired Matisse painting worth $50 million, after reading in the Brisbane *Courier Mail* that the painting now hung in the study of Moffatt's mansion. Alex's Uncle Charlie worked as Moffatt's butler, but was leaving to work for a Texas billionaire. Uncle Charlie strongly disliked Moffatt because he treated all his staff badly, and willingly told Alex and Ben all he knew about the Moffatt mansion's security and layout. 'Just don't tell me why you want this information. I can guess, but I don't want to know.'

Uncle Charlie's briefing revealed that Moffatt's security staff were armed. 'We need to go tooled up', said Ben. Alex agreed. Ben's neighbour Dan, who was a professional kangaroo shooter, loaned Ben one of his rifles when Ben indicated he wanted to try his hand at pig shooting. Dan was surprised at Ben's request as Ben had never shown an interest in hunting before, but Dan didn't probe any further.

A short time after collecting the rifle, on one of Uncle Charlie's days off, Alex and Ben, who were wearing identical masks, found themselves standing outside the open French windows of the

Moffatt mansion. Uncle Charlie had told them that these windows never closed properly and would be easy to force, but on this night they were open to take advantage of a cool evening breeze.

Alex and Ben slipped inside and made their way to Moffatt's study. The Matisse picture was in pride of place over the mantelpiece. Alex lifted the picture off its hook and started to cut the canvas from the frame. At this moment, Moffatt's 15-year-old daughter entered the study, and screamed on seeing two masked men. Alex instinctively picked up a vase and threw it at Susan, knocking her unconscious. Alerted by Susan's scream, Max, the security guard arrived on the scene. As Max drew his gun, Ben, deliberately aiming low, shot Max in the knee. Max collapsed in agony.

After finishing cutting out the Matisse canvas, Alex rolled it up and placed it in his bag. Alex then produced a can of petrol and proceeded to soak the carpet and furniture in the study in petrol. Ben protested telling Alex this was not part of their plan. Alex reminded Ben that plans change and it was best to have no witnesses. Ben shook his head, and before fleeing told Alex he wanted no part of murder. Alex lit the petrol and escaped after Ben.

The Moffatt mansion burnt to the ground, and both Susan and Max died in the blaze. The police later arrested Alex and Ben after Uncle Charlie, full of remorse, went to the police having viewed television coverage of the mansion burning down.

Discuss the criminal responsibility of Alex, Ben, Uncle Charlie and Dan.

What difference would it make to your answer if the fire brigade had arrived in time to save both Susan and Max? Assume Max lost his leg, and Alex and Ben blame each other for assaulting Susan and shooting Max.

THE ISSUES

This question raises three issues: (1) the common purpose of Alex and Ben and the test of 'probable consequence'; (2) whether Ben has withdrawn from the common purpose for murder and arson; and (3) the accessorial liability of Uncle Charlie and Dan.

THE RELEVANT LAW

(1) The common purpose of Alex and Ben and the test of 'probable consequence'

Alex and Ben are both principals in the first degree. They have formed a plan to steal 'Mogul' Moffatt's recently acquired Matisse painting worth $50 million. They have therefore formed a common purpose and come within s 8 of the Codes.

> S 8 Offences committed in prosecution of common purpose (WA)
>
> (1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is

committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

(2) A person is not deemed under subsection (1) to have committed the offence if, before the commission of the offence, the person —

(a) withdrew from the prosecution of the unlawful purpose;

(b) by words or conduct, communicated the *withdrawal* to each other person with whom the common intention to prosecute the unlawful purpose was formed; and

(c) having so withdrawn, took all reasonable steps to prevent the commission of the offence.

The probable consequence test in s 8(1) above is objective, as opposed to the twin subjective tests in s 7 of knowledge of the type of offence committed and an intention to aid. As Gibbs J observed in *Stuart v The Queen* (1974) 134 CLR 426, 442 the question is 'not whether the accused was aware that its commission was a probable consequence' but rather the test for probable consequence is 'that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the particular act'.

In summarising authority on the meaning of the words 'probable consequence' in s 8, extension of criminal responsibility is confined to only such offences as are objectively the probable consequence of the common intention. Thus, foresight of the offence is immaterial; rather, the meaning of probability varies with the context and is to be contrasted with possibility. The focus in *Darkan v The Queen* (2006) 227 CLR 373 was on a meaning of a probability of less than 50/50 but must be probable as distinct from possible, which was refined in *R v Keenan* (2009) 236 CLR 397 to refer to the probable consequences of the common plan as opposed to what the parties might have foreseen.

(2) Whether Ben has withdrawn from the common purpose

It seems clear that the onus of disproving termination and lack of taking all reasonable steps to withdraw rests with the prosecution but that an evidential onus (a reasonable possibility) needs to be satisfied by the defendant (*R v Menitti* [1985] 1 Qd R 520, 530 per Thomas J). There is authority for the proposition that the accessory's withdrawal must be communicated to the principal offender (*White v Ridley* (1978) 140 CLR 342, 350-351 per Gibbs J), and s 8(2)(b) *Criminal Code* (WA) above goes further in requiring communication with 'each other person' who was part of the common intention. The well-known passage from the judgment of Sloan JA in *R v Whitehouse* (1941) 1WWR 112, 115–116 is apposite where His Honour defines 'timely communication' as serving 'unequivocal notice' that the other party proceeds without further aid and assistance from the person who is withdrawing.

The meaning of reasonable steps was discussed by Hammond J in *R v Pink* [2001] 2 NZLR 860 [22]:

> [T]he withdrawal may only be effected by taking all reasonable steps to undo the effect of the party's previous actions. As with any test of 'reasonableness', it is impossible to divorce that consideration from the facts of a given case. The accused's actions may have been so overt and influential that positive steps must be taken by him to intercede, and prevent the crime occurring.

On the question of taking reasonable steps, there is a conflict between the interpretation that it is sufficient to have taken reasonable steps to undo previous participation, or whether a more demanding test is required eradicating the accused's conduct as a factor in the commission of the offence. In Queensland, where the *Criminal Code* makes no provision for timely withdrawal, the courts have applied the former test (*White v Ridley* (1978) 140 CLR 342, 350 per Gibbs J; *R v Menitti* [1985] 1 Qd R 520, 530 per Thomas J) which is mirrored in s 8(2)(c) *Criminal Code* (WA) above (*Seiffert and Stupar* (1999) 104 A Crim R 238, 254-259; *Willis* (2001) 25 WAR 217, 243).

(3) The accessorial liability of Uncle Charlie and Dan

The issue here is whether Uncle Charlie and Dan have aided Alex and Ben under ss 7(1)(b) and (c) below.

Extended liability in the form of complicity is found in s 7 of both Codes, which is entitled 'Principal offenders'.

> S 7 Principal offenders (Qld)
>
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.

The most important word in s 7(1) above is 'deemed'. Clearly, the person who actually does the act in sub-section (a) is the principal offender. A person who falls within sub-sections (b) and (c) is a principal in the second degree provided he or she is present at the scene and aids or abets, such as a getaway driver or lookout. However, sub-section (b) would also cover a person who provided

materials such as equipment, weapons, or inside information for use in committing the offence, and who would not necessarily be present.

In *Scafetta v Western Australia* [2010] WASCA 209 at [12] McLure P interpreted ss 7(b) and (c) above such that to fall within the reach of s 7 an 'aider' must (1) have actual knowledge, not knowledge of a mere possibility or suspicion of the offence; (2) have intended to aid the principal; and (3) actually aided the principal. This interpretation was affirmed in *Bomford v Western Australia* 2014 WASCA 43 [63] per Mazza JA.

The requirement that the 'aider' have actual knowledge was underlined in *R v Witsen* [2008] QCA 316. The appellant had been convicted of murder. Keane JA at [51] confirmed that under 7(1)(c) 'the prosecution was required to prove that the appellant had actual knowledge that Brown's [one of the principals who actually inflicted the beating and therefore was covered by s 7(1)(a) above] state of mind involved an intent to kill or do grievous bodily harm to the deceased: it is not enough if the prosecution prove that the appellant knew only of the possibility that the offence of murder might be committed', citing *R v Lowrie & Ross* [1999] QCA 305 at [12] per McPherson JA in support.

The Queensland Supreme and District Court Benchbook—Parties to an Offence, s 7, No 71.1 and 2—set out the requirements for aiding.

> Proof of aiding involves proof of acts and omissions intentionally directed towards the commission of the principal offence by the perpetrator, and proof that the defendant was aware of at least the essential matters constituting the crime in contemplation: *R v Tabe* (2003) 139 A Crim R 417 at [12]. To aid means to assist or help: *R v Sherrington* [2001] QCA 105.
>
> The prosecution do not need to prove that the person who actually committed the offence has also been convicted: *R v Lopuszynski* [1971] QWN 13. It is enough if the prosecution proves, not necessarily the identity of the perpetrator, but that there was a principal offender or perpetrator, and proof of the commission of an offence by that someone, and that the defendant aided that person to commit it. The prosecution must prove that that other perpetrator was guilty of committing the offence by evidence which is admissible against the defendant: *R v Buckett* (1995) 132 ALR 669 at 676.
>
> The prosecution must prove that the defendant knew that the type of offence which was in fact committed was intended; but not necessarily that that particular offence would be committed on that particular day at that particular place: *R v Ancuta* [1991] 2 Qd R 413. It is not enough if the prosecution prove the defendant knew only of the possibility that the offence might be committed.

Thus, the crucial fact to be determined is the extent of the knowledge possessed by Uncle Charlie and Dan as to plans of the principal offenders Alex and Ben. The greater their knowledge, the more

likely they are to be covered by s 7 and even drawn into s 8, while the less their knowledge, the more likely they will be absolved from any criminal responsibility.

PUTTING THE FACTS INTO THE LAW

(1) Is Ben a co-defendant to murder and arson under s 8?

Alex and Ben formed a plan to steal 'Mogul' Moffatt's recently acquired Matisse painting worth $50 million. They both agreed to go 'tooled up' with a rifle as the security staff were armed. Alex knocked out Susan and Ben shot Max in the knee. At this point, applying the objective test in s 8, these offences were objectively the probable consequence of the common intention. At a minimum Alex and Ben are both facing charges of stealing, burglary/housebreaking and aggravated robbery. The crucial moment is when Alex produced the can of petrol with the stated intention of having no witnesses.

In addition to the list of charges above, Alex is facing charges of murder and arson as the principal who lit the petrol. The question here is whether Ben, also a principal, will be a co-defendant to murder and arson under s 8. Was Alex's decision to burn down the mansion objectively probable given their common purpose to steal a very valuable painting and to go armed knowing they would likely face resistance and witnesses? The test for the jury is whether arson with intent to kill 'had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose': *Darkan v The Queen* (2006) 227 CLR 373 at 398.

The test to be applied under s 8 was identified in *R v Keenan* (2009) 236 CLR 397 at 434 by Kiefel J as referring to 'the probable consequences of the common plan, not what the parties might have foreseen'. Thus, it matters not under such an objective test that the parties did not consider the possibility that the type of offence actually committed would be committed, or be aware that it was a probable consequence.

It is an open question whether a jury would find that Ben satisfied the probable consequence test in s 8. Assuming for present purposes the answer is in the affirmative, can Ben avoid criminal responsibility for murder and arson under s 8(2)?

(2) Whether Ben has withdrawn from the common purpose for murder and arson

The test to be applied under s 8(2)(c) of the *Criminal Code* (WA) and by judicial interpretation in Queensland on the authority of *White v Ridley* (1978) 140 CLR 342, 350 per Gibbs J, and *R v Menitti* [1985] 1 Qd R 520, 530 per Thomas J, is whether Ben took 'reasonable steps' to prevent the commission of the offence.

Given on the facts that Ben simply 'shook his head, and before fleeing told Alex he wanted no part of murder', it is unlikely that Ben satisfies the test identified by Hammond J in *R v Pink* [2001] 2 NZLR 860 at [22].

> As with any test of 'reasonableness', it is impossible to divorce that consideration from the facts of a given case. The accused's actions may have been so overt and influential that positive steps must be taken by him to intercede, and prevent the crime occurring.

Under the circumstances, as Alex had soaked the carpet and furniture in the study where an unconscious girl and a badly injured man lay helpless, to effect withdrawal Ben would have to have interceded and prevented Alex from igniting the petrol. Thus, Ben will not be successful in claiming he withdrew even if he satisfies the evidential onus of a reasonable possibility which is doubtful.

(3) The accessorial liability of Uncle Charlie and Dan

Uncle Charlie

Uncle Charlie's position is more likely to invoke criminal consequences than Dan's situation. On the facts:

> Uncle Charlie strongly disliked Moffatt because he treated all his staff badly, and willingly told Alex and Ben all he knew about the Moffatt mansion's security and layout. 'Just don't tell me why you want this information. I can guess, but I don't want to know.'
>
> Uncle Charlie's briefing revealed that Moffatt's security staff were armed.
>
> Uncle Charlie had told them that these windows never closed properly and would be easy to force.

Uncle Charlie represents the classic 'inside job' character such as those people who provide details of alarms, security codes, building plans, etc. Also, it is irrelevant to criminal responsibility that any aid is not taken up. So the fact that the windows were open to take advantage of a cool evening breeze does not absolve Uncle Charlie criminal responsibility for having provided Alex and Ben with knowledge of a weak entry point to the mansion.

The test to be applied to come within the reach of s 7 as an 'aider' as set out in *Scafetta v Western Australia* [2010] WASCA 209 at [12] per McLure P is as follows: (1) have actual knowledge, not knowledge of a mere possibility or suspicion of the offence; (2) have intended to aid the principal; and (3) actually aided the principal.

Uncle Charlie has exhibited wilful blindness as to the nature of Alex and Ben's plans, which equates to the mental element of knowledge: *He Kaw Teh v The Queen* (1985) 157 CLR 523. Objectively, Uncle Charlie knows that there is a very valuable painting in the mansion which is the likely target of Alex and Ben's plans. The prosecution must prove that Uncle Charlie knew that the type of offence which was in fact committed was intended; but not necessarily that that particular offence would be committed on that particular day at that particular place: *R v Ancuta* [1991] 2 Qd R 413. On the facts, it would appear Uncle Charlie knew that Alex and Ben intended to steal property from

the mansion (the type of offence) which went far beyond the possibility that the offence might be committed.

The provision of the information concerning the mansion's security and layout demonstrates that Uncle Charlie intended to aid the principals, and did actually aid the principals. For example, Alex and Ben knew exactly where the study was located after Uncle Charlie's briefing. Thus, Uncle Charlie is facing being an accessory before the fact to stealing and burglary/housebreaking. Indeed, given that Uncle Charlie provided information that Moffatt's security staff were armed, he could also be charged with being an accessory before the fact to aggravated robbery.

Dan

On the facts:

> Dan was surprised at Ben's request as Ben had never shown an interest in hunting before, but Dan didn't probe any further.

Applying the same test in *Scafetta v Western Australia* [2010] WASCA 209 at [12] per McLure P above, at best Dan could only have knowledge of a mere possibility or suspicion of the offence. Thus, Dan would not be covered by the reach of accessorial liability.

CONCLUSION

Alex and Ben are facing numerous charges that come within their common purpose: stealing, burglary/housebreaking and aggravated robbery. Alex is facing the additional charges of murder and arson. Ben may come under the 'probable consequence' test and also be charged with murder and arson. Ben will not be able to rely on s 8(2) and claim he withdrew from Alex's decision to burn the mansion down.

Uncle Charlie will likely be charged under s 7(1)(b) and (c) as being an accessory before the fact to stealing and burglary/housebreaking, and possibly even aggravated robbery. Dan will be absolved from any criminal responsibility for lending Ben the rifle.

SUPPLEMENTARY QUESTION

What difference would it make to your answer if the fire brigade had arrived in time to save both Susan and Max? Assume Max lost his leg, and Alex and Ben blame each other for assaulting Susan and shooting Max.

The only change to the charge sheet would be the removal of the charge of murder, and the substitution of the attempted murder of Susan and Max. Ben would face the same test for 'probable consequence' for attempted murder and arson. Alex and Ben, who were wearing identical masks, blame each other thereby engaging in a cut throat defence.

The Griffith Codes do not contain a section similar to s 10 of the *Criminal Code 1983* (NT) below, which contains a rebuttable presumption that each is presumed to have caused the death or serious harm until the contrary is proved.

> 10 Death or serious harm caused in the course of violence of 2 or more persons
>
> When a person dies or is found to be dead or to have suffered serious harm after 2 or more persons have used violence against him or his person and it is proved that the death or serious harm was caused as the result or in the course of that violence, but the evidence of the prosecution does not establish by whom it was caused, each of them is presumed either to have caused or aided the other or others to cause the death or serious harm until the contrary is proved if the violence used by him was of such a nature that it was likely to have caused, in the case of death, death or serious harm or, in the case of serious harm, serious harm.

However, as we have seen, under s 8 of the Codes liability is extended to an offence that is a probable consequence of an unlawful purpose entered into by two or more people. For Ben, the only offences that could arguably not come under their common purpose are arson and attempted murder. Ben would still face causing grievous bodily harm to both Susan and Max under their original common purpose, even if he avoided arson and attempted murder under extended common purpose. In any event, as aggravated robbery and burglary/housebreaking committed under circumstances of aggravation carry heavy sentences, both Alex and Ben are facing lengthy terms of imprisonment.