GUIDE TO ACCESSORIAL LIABILITY IN NEW SOUTH WALES

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INTRODUCTION

Law as at May 2001
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1. This guide does not deal with attempt, conspiracy, incitement, or the offence of concealing a serious offence\(^1\).

2. In this guide we use the terms “mental element” and “physical element” rather than “mens rea” and “actus reus”.

3. Although there are statutory provisions that deal with the topic of accessorial liability\(^2\), the source of the substantive law is the common law\(^3\). The statutory provisions have been held to be merely declaratory and procedural\(^4\).

4. This guide seeks to distil those common law principles into a concise and accessible format to which practitioners are readily able to refer\(^5\).

5. The principles of accessorial liability discussed in this guide apply to both State and Commonwealth offences committed in New South Wales. However, note that it seems that accessorial liability with regard to

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\(^1\) The first three topics are governed by the common law in New South Wales, but see also Part 8A of the *Crimes Act* 1900 (NSW). The offence mentioned is contained in section 316 of the *Crimes Act*.

\(^2\) See Part 9 of the *Crimes Act*, section 100 of the *Justices Act* 1902 (NSW), and section 5 of the *Crimes Act* 1914 (C’th).

\(^3\) The latest High Court case on the topic is Osland. The discussion by McHugh J at paragraphs 69 to 95 inclusive represents the law in New South Wales. The latest NSW CCA cases on the topic are Chai and Kane. With regard to Commonwealth offences, see section 4 of the *Crimes Act* 1914.

\(^4\) Giorgianni at pages 480 and 490.
Commonwealth offences will soon be governed by the Commonwealth Criminal Code\textsuperscript{6}.

6. There are two bases upon which accessorial liability can be founded. The first we call “the classic formulation”. The second is “joint criminal enterprise”. The latter operates \textbf{in addition to} the former\textsuperscript{7}.

\textbf{THE CLASSIC FORMULATION}

7. There are two ways to be liable for a crime\textsuperscript{8}. The first is as a principal in the first degree. The other is as a secondary party\textsuperscript{9}.

8. \textbf{The principal in the first degree is the person who actually commits the crime.}

9. \textbf{Example}: a person who walks into a bank waving a gun, and who demands and receives money, is guilty of armed robbery as a principal in the first degree.

10. Aspects of being a principal in the first degree will be discussed in more detail later.

11. There are three kinds of secondary parties: principal in the second degree, accessory before the fact, and accessory after the fact.

\begin{footnotesize}
\begin{itemize}
\item We have sought to state the law as at May 2001.
\item See the \textit{Criminal Code Act} 1995 (C’th) (Act No. 12 of 1995).
\item See McAuliffe at page 114, quoted in Osland at paragraph 24 and Chai at paragraph 10.
\item The crime of treason is in a special category. There are no degrees of involvement in this offence, presumably due to its seriousness. All who involve themselves in it are guilty as principal in the first degrees.
\item Chai at paragraph 9.
\end{itemize}
\end{footnotesize}
12. **A principal in the second degree is a person present at the commission of the crime who encourages or assists in its commission.**

13. **Example:** the getaway driver at the scene of the armed robbery is guilty of that offence as principal in the second degree, even though he or she personally was not armed and did not rob anyone.

14. **Comment:** the liability of the principal in the second degree is derivative. In other words, the prosecution must prove the commission of the offence by the principal in the first degree in order to prove the offence of the principal in the second degree.¹⁰

15. **An accessory before the fact is a person, not present at the crime, who encourages or assists the commission of the crime.**

16. **Example:** a person who gives the principal in the first degree a gun in the knowledge that it will be used to commit an armed robbery is guilty of being an accessory before the fact to armed robbery if the principal in the first degree proceeds to commit that crime.

17. **Comment:** the liability of the accessory before the fact is derivative. In other words, the prosecution must prove the commission of the offence by the principal in the first degree in order to prove the offence of the accessory before the fact.

18. **An accessory after the fact is a person who assists the principal in the first degree to avoid detection, apprehension or conviction after the offence has been committed.**

¹⁰ Osland at paragraph 14. That does not mean, of course, that the principal in the first degree must be convicted for the principal in the second degree to be proven guilty. It means that the prosecution must prove, in the proceedings against the principal in the second degree, the commission of the crime by the principal in the first degree.
19. **Example**: a person who knows that an armed robbery has been committed and buries the money in order to hide it for the principal in the first degree is guilty of being an accessory after the fact to armed robbery.

20. **Comment**: the liability of the accessory after the fact is derivative, in the sense that the prosecution must prove the commission of the offence by the principal in the first degree in order to prove the offence of the accessory after the fact.

21. However, strictly speaking, the accessory after the fact is not a true accessory. He or she commits another, separate offence after the completion of the principal offence by the principal in the first degree.

22. Aspects of these three kinds of accessorial liability will be discussed in more detail later.

**JOINT CRIMINAL ENTERPRISE**

23. There are two kinds of joint criminal enterprise: straightforward and extended\(^{11}\).

24. **Straightforward joint criminal enterprise** may be relied upon by the prosecution when:
   - the accused
   - reaches an understanding or arrangement amounting to an agreement
   - between the accused and another or others
   - that they (the accused and the other or others) will commit a crime\(^{12}\)
   - the accused is present when the crime is committed\(^{13}\); **AND**

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\(^{11}\) Chai at paragraph 11.

\(^{12}\) Chai at paragraph 10, quoting McAuliffe.

\(^{13}\) Osland at paragraphs 27, 72, 79, 80, and 93. Note that Gaudron J and Gummow J suggest that, on the McAuliffe principles, perhaps even presence is not required.
• the accused possesses the mental element for the crime (this really restates the agreement element above).

25. The accused will be guilty as a principal in the first degree. His or her liability is primary, not derivative. Therefore, the prosecution need not prove, as against the accused, the commission of the crime by the person who carried out the physical elements of the offence. Indeed, whether or not that person is guilty of a crime at all is irrelevant. It is the act, not the crime, of the physical actor that is attributed to the accused.

26. **Example:** The accused, who is aged eighteen years, and his younger brother agree to commit a break, enter and steal. They travel to a house together. The accused is present while the brother breaks in and steals a DVD player. The accused does nothing to assist or encourage (other than, of course, being present and entering into the agreement). The brother is aged less than ten years and so is irrebuttably presumed to be not guilty. The accused is nevertheless not only guilty of break, enter and steal, but also guilty as a principal in the first degree.

27. **Comment:** note that this concept has the potential, in certain situations, to convert a “classic” principal in the second degree into a principal in the first degree.

28. It has been said that a straightforward joint criminal enterprise should be alleged by the prosecution when the crime agreed to is the crime that is

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14 Osland at paragraph 72.
15 Osland at paragraphs 27 and 93.
16 Because of, for example, the physical actor being not guilty on the grounds of mental illness: see Osland at paragraph 75, and the example given immediately below.
17 Quite a bit of the discussion in the judgments in Osland is about whether the appellant was a principal in the first degree or a principal in the second degree.
committed, but the prosecution cannot establish who is the principal in the first degree.\footnote{18} 

29. **Extended joint criminal enterprise**\footnote{19} may be relied upon as follows:
   - a person is liable for any other crime
   - falling within the scope of the common purpose
   - which is committed in carrying out that purpose.\footnote{20}

30. It has been said that an extended joint criminal enterprise should be alleged when the offence charged is not the enterprise agreed.\footnote{21}

31. **Question**: what is meant by “within the scope of the common purpose”? 
   **Answer**: the test was, in the past, objective. However, now it is subjective:
   - the scope of the common purpose is to be determined by
   - what was contemplated
   - by the parties sharing that purpose.\footnote{22}

32. In another words:
   - did the accused
   - contemplate the act
   - as a possible incident
   - in the commission of the crime
   - to which he or she had agreed?\footnote{23}

33. **Example**: the accused and his girlfriend agree to do an unarmed robbery. 
    They confront the victim and assault him with their fists. In the course of the attack, the girlfriend produces a knife and threatens the victim with it.

\footnote{18}{Tangye at page 556, quoted in Chai at paragraph 11.}
\footnote{19}{Also sometimes known as “common purpose”. We have adopted the nomenclature used in Chai.}
\footnote{20}{McAuliffe quoted in Chai at paragraph 10.}
\footnote{21}{Tangye at page 556.}
\footnote{22}{McAuliffe, quoting Johns in the CCA, quoted in Chai at paragraph 10.}
\footnote{23}{Johns in the HCA at pages 130-131.}
34. Clearly, the girlfriend is guilty of armed robbery as a principal in the first degree. As for the accused, if he did not contemplate the possibility of his girlfriend presenting the knife, then he is not guilty of armed robbery. If he did, he is guilty of armed robbery.

35. **Comment**: the accused need not desire or intend the act contemplated as being a possibility. He may indeed have tried to dissuade the girlfriend from bringing a knife. But so long as the prosecution can establish beyond reasonable doubt that he contemplated the presentation of the knife as a possible incident of the unarmed robbery, the accused will be guilty of armed robbery.

36. **Question**: what exactly must the accused contemplate as a possibility in order to be guilty of the extended offence? Certainly, the accused must contemplate the performance of the act as being possible. But what about the consequences of that act? Must the accused contemplate the possibility of them as well? One would think not, in accordance with what has been said about the classic formulation of the liability of a principal in the second degree (see paragraph 46 below). Furthermore, must the accused contemplate as a possibility the mental element of the principal in the first degree with regard to the extended crime? Or is contemplation of the possibility of the act, without regard to the state of mind of the actor, sufficient?

37. **Answer**: although it is by no means absolutely clear, we think that the position is as follows:

- the accused must foresee the possibility of the act; **AND**
- the accused must foresee the possibility of the requisite mental element of the principal in the first degree; **BUT**

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24 Note the different terminology (“act” cf “crime”) in paragraphs 29 and 32 above.
• The accused NEED NOT foresee the possibility of the consequence of the act\textsuperscript{25}.

38. \textbf{Question}: with what degree of particularity must the principal in the second degree foresee the act of the principal in the first degree?

39. \textbf{Example}: the principal in the second degree and the principal in the first degree agree to do a home invasion. The principal in the second degree foresees the possibility that the principal in the first degree may use his fists with intent to do grievous bodily harm. In fact, the principal in the first degree uses a knife with intent to do grievous bodily harm. The victim is stabbed and dies. Is the principal in the second degree guilty of murder?

40. \textbf{Answer}: we think not. It seems that the act contemplated as a possibility by the principal in the second degree and the act carried out in reality by the principal in the first degree must be of the same “kind” or “type”\textsuperscript{26}. Again, we accept that the position is far from clearly settled.

\textbf{ASPECTS OF PRINCIPAL IN THE FIRST DEGREE}

41. A person who commits the whole or part of the physical elements of the offence will be a principal in the first degree. There may be more than one principal in the first degree.\textsuperscript{27}

\textsuperscript{25} Sharah at pages 297E and 298A, and Kane at paragraphs 54 and 58. But compare McAuliffe at page 118 paragraph 2, which seems to suggest that foresight of the possibility of consequences (here, grievous bodily harm) is necessary as well.

\textsuperscript{26} See Johns (HCA) at page 131 paragraph 1: “the common purpose involved resorting to violence of this kind” and McAuliffe (discussing Chan Wing-Siu v the Queen [1985] AC 168) at page 116 paragraph 1: “liable for acts done by the primary offender of a type which the secondary party foresees”. See also the discussion of this aspect of Johns in Fisse at pages 343 and 344.

\textsuperscript{27} Osland at paragraph 70.
42. **Example**: two persons enter a bank. One waves a gun around and threatens people. The other takes the money. Both are guilty as principals in the first degree, even though neither one of them personally committed the whole offence.

43. A person is a principal in the first degree pursuant to the classic formulation so long as his or her act “substantially contributes” to the relevant result\(^\text{28}\).

44. **Example**: a person who holds the victim down while another person bashes the victim to death is a principal in the first degree of the crime of murder, not a principal in the second degree.

45. As noted above, pursuant to straightforward joint criminal enterprise, a person may be a principal in the first degree without any physical act on his or her part.

**ASPECTS OF PRINCIPAL IN THE SECOND DEGREE**

**The classic formulation:**

46. The prosecution must establish\(^\text{29}\):
   - the commission of the crime by the principal in the first degree
   - the accused was present
   - the accused knew all of the essential elements necessary for the prosecution to succeed against the principal in the first degree (including any mental element of the principal in the first degree) EXCEPT: consequences; eg grievous bodily harm, death, etc.

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\(^{28}\) This is really just an application of the test of causation propounded in Royall v the Queen (1991) 172 CLR 378.

\(^{29}\) Difford at page 37.
• (Or, to put this dot point another way: the accused must know of all of the physical and mental elements of the crime of the principal in the first degree, except consequences); **AND**

• the accused, with that knowledge, intentionally assisted or encouraged the principal in the first degree to commit the crime.

47. In this context, “present” means that the principal in the second degree is near enough to be readily able to come to the aid of the principal in the first degree if the need arises.\(^{30}\)

48. The intention that must be proved against the principal in the second degree is to assist and encourage the principal in the first degree.

49. Recklessness is not sufficient for either aspect of the mental element of the principal in the second degree. It must be knowledge (of the elements of the offence of the principal in the first degree, except consequences) and intention (to assist or encourage).

50. **Comment:** in some ways the liability of the principal in the second degree is strictly circumscribed, in that he or she must know of all of the elements (except consequences) of the crime of the principal in the first degree. Furthermore, the assistance or encouragement must be nothing less than intentional.

51. However, in another way, the liability of the principal in the second degree is very broad, in that he or she need have no mental element at all with regard to the consequences of the crime of the principal in the first degree.

\(^{30}\) See Gillies at page 161.
Statutory complications

52. Section 345 of the *Crimes Act* should be noted. It makes principals in the second degree liable to the same punishment as principals in the first degree with regard to serious indictable offences.

53. Section 351 of the *Crimes Act* is to similar effect with regard to minor indictable offences.

54. Section 100 of the *Justices Act* is to similar effect with regard to offences “made punishable on summary conviction”. Presumably this applies to summary offences and to indictable offences dealt with summarily pursuant to the *Criminal Procedure Act 1986* (NSW).

55. Note that although sections 345 and 351 of the *Crimes Act* use different terminology, they are merely dealing with two kinds of indictable offences. Furthermore, even though the third section applies to both indictable and summary offences, it is “buried” in the *Justices Act*. The historical reasons for this state of affairs, and a suggestion for law reform, is discussed below.

ASPECTS OF ACCESSORY BEFORE THE FACT

56. There is no difference in the liability between a principal in the second degree and an accessory before the fact\(^{31}\). The mental elements are the same. In particular, like the principal in the second degree, the accessory before the fact need have no mental element with regard to consequences\(^{32}\).

57. The difference between a principal in the second degree and an accessory before the fact is that the former is present at the crime and the latter is not.

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\(^{31}\) Difford at page 38.

\(^{32}\) Ibid.
58. Note that straightforward joint criminal enterprise cannot apply to an accessory before the fact in order to make him or her liable as a principal in the first degree, because of the requirement of presence within that doctrine\(^{33}\). However, extended joint criminal enterprise can indeed apply to make a person liable as an accessory before the fact to the “extended” offence\(^{34}\).

59. Sections 346 and 351 of the *Crimes Act* and section 100 of the *Justices Act* should be noted.

**ASPECTS OF ACCESSORY AFTER THE FACT**

60. The mental elements of an accessory after the fact are that, with knowledge of the commission of the crime, he or she intends to assist the principal in the first degree to avoid detection, apprehension or conviction.

61. Note that, with regard to State offences, one can only be an accessory after the fact to a serious indictable offence\(^{35}\). A serious indictable offence is defined\(^{36}\) as being an indictable offence that carries a maximum penalty of imprisonment for five years or more. There is no offence of being an accessory after the fact to a summary offence, or an indictable offence that carries less than five years.

62. There are statutory provisions that detail the various maximum penalties for being an accessory after the fact to various offences\(^{37}\).

63. One can be an accessory after the fact to any Commonwealth offence. The maximum penalty is imprisonment for two years\(^{38}\).

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\(^{33}\) See footnote 13 above.

\(^{34}\) The accused in the seminal case was an accessory before the fact, not a principal in the second degree: Johns.

\(^{35}\) See section 347 of the *Crimes Act*.

\(^{36}\) *Crimes Act* section 4.

\(^{37}\) Sections 348, 349 and 350 of the *Crimes Act*.

\(^{38}\) Section 6 of the *Crimes Act* 1914 (C'th).
SUGGESTIONS FOR LAW REFORM

Small idea

64. The statutory provisions in the New South Wales *Crime Act* and the *Justices Act*, and the different terminology used within those statutes, are predicated on the distinction between felony and misdemeanour. That distinction no longer exists in New South Wales. Therefore there is room to “tidy up” these provisions. In particular, sections 345, 346 and section 351 of the *Crimes Act* and section 100 of the *Justices Act* could be restructured and reformulated.

Big idea

65. It can hardly be said to be satisfactory that basic principles of criminal liability can only be discerned by a careful review of the judgments in a large number of cases. We dare say that these principles are not easy for experienced criminal counsel to apply, let alone for interested citizens who wish to know the law.

66. The principles should be expressed clearly and concisely in legislation. Chapter Two of the Model Criminal Code would, at the least, provide a very useful starting point.\(^{39}\)

\(^{39}\) The discussion papers and reports upon which the Code is based are available at: www.law.gov.au/publications/Model_Criminal_Code/index.htm