COMMON INTENTION AND MURDER UNDER THE CRIMINAL CODES

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Introduction

The doctrine of common intention makes parties to a criminal plan liable for not only the crime which is the object of that plan but for any crime committed in furtherance of that plan or in the course of its execution by one or more of the parties. This common law principle is stated in section 21(2) of the Canadian Criminal Code.[1] The large majority of the cases on section 21(2) have involved situations where the common intention had been to commit an offence involving danger to human life like robbery, arson or assault and deaths resulting in the course of commission of the planned offence. In such cases, reliance has been placed on the principle in section 21(2) to involve all the participants in joint and equal liability for the culpable homicide. Yet, in interpreting the section and its operation in homicide cases, the Canadian courts have shown a divergence of views on fundamental matters. There is disagreement as to whether the Canadian provision is an exact statement of the common law doctrine and would permit the use of English precedents.[2] There is disagreement as to whether, in determining whether the homicide could be regarded as a probable consequence of the commission of the

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[1] R.S.C., 1970, c. C-34, as am. S. 21 reads as follows: "21. (1) Every one is a party to an offence who *(a)* actually commits it, *(b)* does or omits to do anything for the purpose of aiding any person to commit it, or *(c)* abets any person in committing it. (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

[2] Two cases, *Cathro* (1956), 113 C.C.C. 225 and *Eng Git Lee* (1956), 18 W.W.R. 272, were interpreted as showing that the law under the code was different. E.P. Hart, Parties to the Offence of Murder: Discrepancies between the Common Law and the Criminal Code (1958-59), 1 Crim. L.Q. 60, 178. Yet, in several cases there are dicta that the law on common intention in Canada is the same as the English law, *e.g. Vawryk and Appleyard* (1979), 46 C.C.C. (2d) 290, at p. 306 but see *Emkeit* (1971), 3 C.C.C. (2d) 309, at p. 336. In *Johns* (1980), 54 A.L.J.R. 166, Stephens J. thought that decisions from Canada and West Australia cited had little relevance in deciding a case from a common law jurisdiction. But Mason, Murphy and Wilson JJ. held that "the code provisions reflect the common law" and hence the decisions were relevant.

crime that was agreed upon, the courts should use an objective or a subjective test.[3] Since such disagreements relate to basic matters, they call for a reappraisal of the application of the doctrine of common intention in cases involving culpable homicide.

In making such a reappraisal, from the point of view of Canadian criminal law, it would be unwise to ignore the case law that exists on this area in the other Commonwealth jurisdictions which, like Canada, have adopted codes based on the English Draft Code of 1879. With few exceptions, Canadian courts have seldom made reference to the case law in these jurisdictions.[4] The sections containing the doctrine of common intention in the criminal codes of three Australian states,[5] New Zealand and other jurisdictions[6] have much in common with the Canadian provision and the experience in these jurisdicitons must not be ignored. Likewise, it must be recognised that the vitality of English case law continues undiminished under the codes of all these jurisdictions[7] and, assuming that the doctrine of common intention stated in the codes is the same as that in English law, the position in England becomes relevant.[8] The task then is to appraise the scope of the doctrine of common intention in the Canadian criminal law and its applicability in cases of murder in the light of the experience in cognate jurisdictions. Such an appraisal would help in the resolution of the disagreements that have arisen in some areas and confirm the solutions that have been reached in others.

Before approaching this task, it is necessary to point out two mutually exclusive interests which underlie the conflicting views that have been stated by the courts. The first interest is that violent crime,

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[3] *E.g.* in *Henry and Bezanson* (1974), 19 C.C.C. (2d) 112, the Nova Scotia Supreme Court preferred a subjective view whereas in *Joyce* (1978), 42 C.C.C. (2d) 141, the British Columbia Court of Appeal preferred an objective test.

[4] An exception in *Tennant and Naccarato* (1976), 23 C.C.C. (2d) 80. In *Guay and Guay*, [1957] O.R. 120, Roach J. relied on the Australian decision, *Brennan* (1936), 55 C.L.R. 253. *Brennan* has not been followed in later Australian decisions, *Stuart* (1974), 4 A.L.R. 545; *Johns, supra*, footnote 2, which is a decision based on the common law.

[5] Three Australian states, Queensland, Western Australia and Tasmania have codes. Victoria, New South Wales and South Australia are common law jurisdictions.

[6] Papua New Guinea and Northern Nigeria have codes based on the English Draft Code.

[7] H. Calvert, The Vitality of Case Law under a Criminal Code (1959), 22 Mod. L. Rev. 621.

[8] The case law of the jurisdictions based on the Indian Penal Code (which provided the inspiration for the English Draft Code) would also be relevant. S.34 of the Indian Penal Code states the doctrine of common intention in the following terms: "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if the act were done by him alone".

particularly when committed by a group, creates alarm in society and must be deterred with all possible severity. This objective would favour an expansive interpretation of section 21(2) as such an interpretation would involve all participants in the plan in which the killing occurred in equal liability for the homicide and thus secures the objective of the deterrence of the use of violence by groups. The second interest is that the individual offender should not be held criminally liable to an extent beyond that reflected in the guilty mind with which he agreed to enter into the criminal endeavour with his co-participants. The doing of individual justice requires a nice examination of each participant's mental state. The doctrine of common intention combines these inconsistent aims within it. Lord Kilbrandon's statement[9] that "the doctrine of joint responsibility for the carrying out of a common intention is necessary both for protection of the public and for the fair trial of accused persons", reflects the judicial awareness of this conflict of interests.

The effective application of the doctrine of common intention depends on the reconcialiation of these conflicting interests. In resolving the conflict, courts in different jurisdictions would have regard to different variables such as the degree of incidence of violent crimes, the frequency with which such crimes are committed by groups, the acceptance or rejection of deterrence as a valid aim of criminal punishment and the limits prescribed by the statutory statement of the doctrine of common intention. In a jurisdiction where there is a high incidence of violent crimes committed by groups the first interest of public protection would outweigh the second interest of assessing each individual's guilt according to his mental state and extent of participation. Hence comparison of the position relating to common intention in homicide in the different jurisdictions is not a device to induce uniformity in the law for, given the existence of these variables, such uniformity may be undesirable. The purpose of comparison is to indicate the possible alternatives and suggest that certain solutions, provided the variables coincide, are preferable to others.

I. *The Common Law Prior to Codification.*

Though principles of interpretation of a code forbid resort being had to the law that existed prior to codification or the law on which the code is based,[10] an understanding of such law could facilitate the

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[9] In *Farquarson*, [1973] A.C. 786, at p. 797; a similar statement was made by the Royal Commission on Capital Punishment (1953), Cmnd 8932, when it justified the continued existence of the doctrine on "considerations both of equity and of public protection": p. 43.

[10] *Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107; see however, Pigeon J. in *Popovic and Askov* (1975), 25 C.C.C. (2d) 161, at p. 171.

appreciation of the problems faced in the application of the modern law under the codes.[11] A brief statement of the development of the doctrine of common intention as applied in cases involving murder would indicate the historical continuity of the law under the codes and help in the understanding of the issues that have arisen in the modern law.

The first reported decision in which the doctrine of common intention was used to impose joint liability for murder was *Lord Dacre's Case*[12] where a group of men had planned to hunt in a game reserve and resist anyone who tried to prevent them. One of them tried to kill a game-keeper who tried to kill him. All in the group were held guilty of murder even though some of them were not at the scene of the offence. The doctrine was applied a year later in *Mansell and Herbert*.[13] It was, however, in *Tyler and Price*[14] that the doctrine came to be stated with clarity. The two defendants, along with a band of other men, had been gathered together by one Thom, who was regarded as insane, in order to prevent by force if necessary the execution of a warrant against Thom. Thom killed a companion of the office who had come to execute the warrant. Thom was subsequently shot dead. Lord Denman held that the two accused were equally guilty of murder as it was committed in pursuance of the common design to resist arrest. There were two factors that he stressed. Firstly, he pointed out that the members of the group "had armed themselves with dangerous weapons", thus indicating that they had violent objectives. The carrying of weapons gave rise to the inference of the mutual awareness of the participants of each others violent aims. The significance of the inference to be drawn from the carrying of lethal weapons continues in the modern law and will be dealt with later. The second point that was stressed was that Thom was "a dangerous and mischievous person" and the two accused "knew that he was so and kept with him". The case establishes the proposition accepted in the modern law that voluntary association with someone known to be violent is taken as an indication of a common violent design and that a defendant cannot later argue that he joined in the endeavour as a result of duress or fear exerted by the gang.[15]

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[11] The Canadian Criminal Code, like other codes, has undergone judicial revision on the basis of English case law. The classic instance is the incorporation of a mental element into manslaughter by an unlawful act in response to the English decision, *Church* (1965), 49 Cr. App. R. 206; for Canada, see *Tennant and Naccarato, supra*, footnote 4, at p. 96.

[12] 1 Hale P.C. 439.

[13] (1526), 2 Dyer 128.

[14] (1838), 8 C. & P. 616.

[15] *Fitzgerald*, [1977] N.I.L.R. 20.

The case of *Tyler and Price* was based on a theory of foreseeability. The two offenders could have foreseen, as reasonable persons, having regard to the Thom's character and the fact that resistance to service of process would result in the use of violence, that death was a probable consequence of conduct they had agreed upon. That case indicates that the theory of common intention was based on ojective foreseeability of an incidental crime resulting from the prosecution of the common object and the imposition of joint liability not only for the offence originally planned but also for the incidental crimes. But there were other theories as well. Some cases indicate that existence of a strict causal theory which favoured the attribution of joint liability not only to foreseeable consequences of the prosecution of the planned endeavour but also for all offences flowing from, and causally connected with, the commission of the offence. Evidence for this can be found in the dissenting judgments of Holt C.J. and Pollexen C.J. in *Hodgson.*[16] The majority in that case had held that where in the course of a fight between two gangs, an innocent bystander was accidentally killed by a member of one gang, the other members of the gang could not be found guilty of murder.[17] But Holt C.J. and Pollexen C.J. disagreed, holding that all in the gang were guilty of murder, "especially as the manner in which they originally assembled, with offensive weapons and in a riotous manner was contrary to the law". This strict causal view that once a crime of violence has been jointly initiated, all participants in it are jointly responsible for all the incidents flowing from it has resurfaced in the law of some American jurisdictions.[18]

The common law however had been set firmly on the basis of objective foreseeability in the eighteenth and nineteenth centuries. Even at the time when Coke's doctrine of constructive malice that a homicide resulting from any unlawful act would amount to murder, the doctrine of common intention was used to impose joint liability for murder only in cases where the crime originally planned involved violence. The confines of the applicability of the doctrine of common intention in cases involving charges of murder was stated by Pollock C.B. in *Skeet,*[19] decided ten years before the English Draft Code, in the following terms: "It only applies in cases where the common purpose is felonious, as in cases of burglary: where all parties are aware that deadly weapons are taken with a view to inflict death or commit felonious violence, if resistance is offered."

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[16] (1730), 1 Leach 6.

[17] In *Plummer* (1701), Kel. J. 109, a similar conclusion was reached.

[18] *E.g. Almeida* (1949), 68 A. 2d 595; N. Morris, The Felon's Responsibility for the Lethal Acts of Others (1956), 105 U. Pa L.Rev. 50.

[19] (1866), 4 F. & F. 931, at p. 936, 176 E.R. 854, at p. 857.

By the time the English Draft Code came into existence, the theory of common intention had come to be based on a notion of objective foreseeability. The Code, the common law on the use of the doctrine of common intention to impose liability for culpable homicide, was firmly based on the theory of objective foreseeability and that theory, as will be shown, has been the dominant theory in the modern English law.

II. *The Scope of the Doctrine Under the Codes.*

Having stated the common law origins and foundations of the doctrine as it applies to charges involving murder, the scope of the doctrine under the codes may be stated.

1. *The Proof of Common Intention.*

For there to be joint liability for murder on the grounds of common intention, it is necessary to establish a meeting of minds of the several accused prior to the commission of the offence by one or more of them. The best proof of such a common intention would be evidence of a prearranged plan among the several accused to commit a crime.[20] In situations involving crimes such as robbery or arson, it would usually be possible to provide evidence of prearrangement and preparation but this would be difficult in cases where the several accused had spontaneously engaged in an assault. It has been suggested that in such circumstances a common intention to kill or inflict grievous bodily harm can arise on the spur of the moment.[21] The Supreme Court of Victoria stated that proposition in the following terms.[22]

> For people to be acting in concert in the commission of a crime their assent to the understanding or arrangement between them need not be expressed by them in words. Their actions may be sufficient to convey the message between them that their minds are at one as to what they shall do. The understanding or arrangement need not be of long standing; it may be reached only just before the doing of the act or acts constituting the crime.

It would be noted that the notion of common intention arising on the spur of the moment is applicable only to the situation where the intention relates to the causing of death or grievous bodily harm or to

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[20] The Privy Council in an Indian case went so far as to say that proof of a prearranged plan was a condition for the operation of the doctrine (*Mahbub Shah* v. *King-Emperor*, A.I.R. 1945 P.C.) but this is not regarded as an inflexible requirement now: *Rishi Deo Pande*, A.I.R. 1955 S.C. 331.

[21] The Privy Council accepted this in a West Indian case: *Mohan*, [1967] 2 A.C. 187.

[22] *Lowery and King*, [1972] V.R. 560, at p. 563. The Supreme Court of Ceylon recognized the principle more graphically, observing that a common intention can come into being "within the twinkling of an eye": *Mahutun* (1959), 61 N.L.R. 540.

assault. It would obviously be inapplicable to a case of death arising from a violent robbery. The two situations must be distinguished. In the first, death results from the sudden formation of a common intention the direct object of which was death. In the second, death arises indirectly from the prosecution of a common intention the direct object of which was not the causing of death but the commission of a crime like robbery or arson. The notion of the formation of a common intention suddenly can apply in the first situation. It is unnecessary in the second. This distinction is crucial to some of the arguments made later in this paper.

In the code jurisdictions too it must be accepted that, in the first type of situation, a common intention could arise suddenly. The dicta of Robertson J.A. of the British Columbia Court of Appeal in *Miller and Cockriel*[23] seems to preclude this by confining the doctrine of common intention under the Canadian Criminal Code to the second type of situation. The first type of cases would, according to him, fall under section 21(1). If this reasoning is adopted, the possibility of the same intention arising suddenly among the several accused and becoming a common intention as a result of the communication of conduct must be ruled out under the codes. Though the reasoning of Robertson J.A. is supported by a literal interpretation of section 21(2) it is unnecessarily restrictive and unlikely to be supported in the future. It does not have the support of the courts in other jurisdictions.[24] The language of section 21(1), if literally construed, would require that there should be participation in different degrees and would not provide for a situation where there is equal participation by the several accused in the killing.[25] In a situation involving a spontaneous assault on the victim by several offenders, degrees of participation may be difficult to establish. One of the advantages of the common law doctrine is that once a common intention is established, it becomes unnecessary to prove who, in fact, caused the death or in what measure the different accused contributed to it.[26] If the literalist view of section 21(2) be accepted such advantages in the doctrine of common intention would be lost to the prosecution in the first type of cases. It is preferable to hold that in these situations the law in Canada and the other jurisdictions is the same as in English law.

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[23] (1975), 24 C.C.C. (2d) 401, at p. 440. The dictum reads: "That [s.21(2)] deals primarily with the case where A and B form an intention in common to carry out an unlawful purpose and in carrying out that purpose one of them commits an offence. It does not appear to me to be directed at the case where A and B form an intention to commit a particular crime and in carrying out their intent do commit that crime. The latter type of case is covered in s.21(1)."

[24] *E.g. Mohan, supra,* footnote 21.

[25] See *e.g.* the facts of *Raymond,* [1974] 2 N.S.W.L.R. 677.

[26] *Lowery and King, supra,* footnote 22.

2. *The Canadian and Australian Codes.*

Under the doctrine of common intention as stated in the Canadian Criminal Code, once a common design to commit a particular crime has been formed among the several accused, and one of them commits a crime in carrying out that purpose, each of the parties to the common intention "who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence". The statement of the doctrine in the Australian codes is different in that no reference is made to the knowledge of the offender. The section on common intention in these codes states that where an offence is committed in the prosecution of a commonly intended unlawful purpose, each of the parties to the common intention is liable for the crime provided that the "offence was of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose".[27] The crucial question both in the Canadian and Australian formulations is whether the crime that was committed was a "probable consequence" of carrying out the commonly intended unlawful purpose. However, the Australian codes make no reference to the fact that the knowledge of the accused is to provide the test as to whether an offence is to be regarded as a probable consequence or not. A subjectivist may seize upon this difference in order to minimize the relevance of the Australian decisions which favour an interpretation of "probable consequences" based on an objective theory. But such significance should not be attached to the difference. The Canadian provision merely spells out the test that is to be used in determining whether the offence was a probable consequence and it is the same test of knowledge, derived from the common law that is used by the Australian courts in determining whether the incidental offence for which joint liability is sought to be imposed can be regarded as a probable consequence of the common intention.

It is the test of knowledge that is crucial in determining the scope of the common intention. If a purely subjective view is adopted, joint liability can only be imposed to the extent to which each offender's foresight of the probable consequences coincided. If the objective view is adopted, the probable consequences of the common intention would be assessed on the basis of an external standard involving the foresight of an ordinary person.

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[27] S. 4 of the Tasmanian Criminal Code which is the same as s.8 of the Criminal Codes of Queensland and Western Australia and s.66(1) of the New Zealand Code, reads: "Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in prosecution of such purpose a crime 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 crime."

The test of probable consequences.

The Canadian decisions are in conflict on the question whether the accused himself must have had the knowledge that the offence was a probable consequence of the prosecution of the commonly intended unlawful purpose. When it is argued that the Canadian law is different from the English law on common intention, one of the differences suggested is that in Canada, the test of whether the offence with which the offenders are jointly charged could be regarded as a probable consequence of their joint endeavour is subjective.[28] Support for this view could be found in several Canadian decisions. There are frequent references to each offender's foresight as to whether death would occur in the course of the commission of the joint endeavour as the test of the "probable consequences".[29]

The subjective test of "probable consequences" has had adherents in Australia too. In *Tonkin and Montgomery*,[30] Campbell J. cited with approval the statement in Russell *on Crime*[31] "nowadays . . . the test should be subjective and the person charged should not be held liable for anything but what he either expressly commanded or realised might be involved in the project agreed upon". In Australia, the subjective view had been given a powerful impetus by the decision of Dixon C.J. and Evatt J., two distinguished judges of the Australian High Court.[32] In *Brennan*,[33] the accused had stood guard outside a jeweller's shop while the two men with whom he had agreed to rob the shop had gone inside. The caretaker of the shop had resisted the

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[28] Hart, *op. cit.*, footnote 2.

[29] *E.g.* the direction of Whittaker J. in *Eng Git Lee, supra,* footnote 2, at p. 274, where he suggested that for s.21(2) to apply the Crown must prove that "*this* accused knew or ought to have known that murder would probably result from carrying out the robbery"; also see *Cathro, supra,* footnote 2; *Guay and Guay, supra,* footnote 4; *Wong* (1978), 41 C.C.C. (2d) 196, at p. 202.

[30] [1975] Qd. R. 1, at p. 5. In the recent decision of the Australian High Court in *Johns, supra,* footnote 2, Stephen J. and Mason, Murphy and Wilson JJ. said that the test in the modern common law is subjective. But the notion of the subjective test in the judgment of Mason, Murphy and Wilson JJ. is so wide as to make the distinction between the subjective and objective tests meaningless. They observed: ". . . a subjective approach to criminal liability has prevailed in more recent times. In any case, the subjective test may well involve an accused person in criminal liability for an act which is a probable consequence of the execution of the common purpose to which he is a party because, if the act is a probable consequence of the execution of the common purpose, there is evidence from which a jury can conclude that it was within the parties' contemplation."

[31] Vol. 1 (12th ed., 1964), p. 162.

[32] The High Court is a Federal Court to which appeals can be had from the Supreme Courts of the states. With the virtual abolition of appeals to the Privy Council, it now is the highest appellate court in Australia.

[33] *Supra,* footnote 4.

robbery and was killed. For some reason, which does not appear from the report, the three men were found guilty of manslaughter and not of murder.[34] Brennan appealed against his conviction. In allowing the appeal and ordering a retrial, Dixon and Evatt JJ., in a statement that must be regarded as the strongest affirmation of the subject theory, observed:[35]

> . . . under s.8 [which states the doctrine of common intention under the Queensland Code] he would be guilty of manslaughter only if the plan was of such a nature that the use of enough violence to cause death appeared a probable consequence of carrying it out. The practical result is that the applicant would not be guilty of manslaughter unless he knew that his confederates whom he was aiding and abetting intended to commit at least a common attack upon the caretaker or, supposing they had not that actual intention, then unless he foresaw that to carry out the plan of shop-breaking they would probably so injure him that death might be likely to result.

This was an interpretation of "probable circumstances" which was unequivocally based on a subjective theory. However, Starke J., while agreeing with Dixon and Evatt JJ. that a retrial should be ordered in the case of Brennan formulated a test based on the objective theory. He observed:[36]

> A probable consequence is, I apprehend, that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the particular act; though it may be that the particular consequence is not intended or foreseen by the actor.

The adoption of a purely subjective test may accord with the currently fashionable academic theory that the doctrine of *mens rea* does not permit the imposition of liability for an offence which the accused did not intend to commit or did not himself foresee would result from his conduct.[37] It, however, does not reflect the position accepted by the courts in Canada or elsewhere. Neither is the subjective view in accordance with a literal interpretation of section 21(2). The phrase "ought to have known" in section 21(2), as in other sections of the criminal codes,[38] refers to an external standard of

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[34] On the facts, murder seems a possible verdict but the manslaughter verdict against Brennan may be justified on the ground that the killing was outside the scope of the common intention. The agreement was to overpower the caretaker, gag and tie him up. They carried cloth and some rope for this purpose. Hence, the killing could be regarded as being outside the common plan. However, it is difficult to see how the men directly responsible for the death could have escaped conviction for murder. Compare *Brennan* with the recent decision of the Australian High Court in *Johns*, *supra*, footnote 4. The point of distinction may be that in *Johns*, possession by the perpetrator of a lethal weapon was known to the others.

[35] *Supra*, footnote 4, at p. 265.

[36] *Ibid.*, at p. 260.

[37] The modern English texts favour this theory, *e.g.* Smith and Hogan, Criminal Law (4th ed., 1978), p. 48; Williams, Textbook of Criminal Law (1978), p. 83.

[38] The phrase appears in s.212(c) and has been interpreted as containing an objective test of foreseeability. *Tennant and Naccarato*, *supra*, footnote 4. It was

foreseeability and requires that the accused be attributed the knowledge and foreseeability of an ordinary person. That has been the construction placed on the section in the large majority of the decisions in the code jurisdictions and that view accords with the objective of deterrence that underlies the doctrine of common intention. It is the accepted, though undemonstrable, hypothesis in these decisions that the imposition of joint liability for all the incidental violence that is ordinarily foreseeable in the carrying out of a violent crime reduces future joint commission of violent crimes.[39]

In Canadian law, the objective theory on "probable consequences" must now be regarded as well established. In *Trinneer*,[40] a case of robbery where the victim was stabbed to death, the question arose as to the guilt of the appellant who had waited in the car while the victim was being led away. Cartwright C.J. held that it was sufficient to find the appellant guilty of murder, if it could be shown that bodily harm,[41] as distinct from death,[42] was a probable consequence of the robbery. There were dicta in the judgment of Cartwright C.J. that for this result to follow the actual perpetrator must have caused the death intentionally.[43] What was probably meant was that a purely accidental and therefore unforeseeable killing could not be regarded as a probable consequence and joint liability would not exist. The doubt, if any, was cleared up in *Riezebos*[44] where the Ontario Court of Appeal ruled that for the doctrine of common intention to apply, the homicide that resulted from the execution of the joint plan need not be an intentional killing. It held that the clauses in section 213 of the Criminal Code which provide for constructive murder in Canadian law[45] could be read with section 21(2) to impose liability on all the participants in the plan, provided the unlawful object of the plan fell within the clauses of section 213.

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removed from the section on murder in the New Zealand Crime Act by amendment so as to provide for a subjective test only.

[39] Support for the theory of deterrence can be found in recent literature: A. Andenaes, The General Preventive Effect of Punishment (1960), 114 U. Pa L. Rev. 949; Zimring and Hawkins, Deterrence (1976).

[40] [1970] S.C.R. 638.

[41] Unlike s. 228 of the Canadian Criminal Code, 1892, which referred to "grievous bodily harm", s. 213(a) of the amended Code refers to "bodily harm".

[42] The earlier cases which were followed by the British Columbia Court of Appeal had required foreseeability of death. *Cathro, supra,* footnote 2; *Chow Bew* (1956), 113 C.C.C. 337; *Guay and Guay, supra,* footnote 4; *Black and Mackie* (1966), 54 D.L.R. (2d) 674.

[43] *Supra,* footnote 40, at pp. 645-646.

[44] (1975), 26 C.C.C. (2d) 1.

[45] Similar clauses exist in the Australian codes but are not resorted to, *e.g.* in Tasmania, s.157(1) d, e and f. It would appear that cases on s.212(c) in Canada are a recent phenomenon; see Parker's comment in (1979), 57 Can. Bar Rev. 122. Ss 212 and

Another avenue for imposing joint liability for homicides committed in the course of the commission of violent offences on the basis of objective foreseeability is provided by section 212(c) of the Criminal Code. That clause provides for liability for murder in a situation where death is caused by the unlawful conduct of the accused and the accused either knows or ought to have known that such conduct will cause death. In *Tennant and Naccarato*,[46] the clause "ought to know" was held to impose liability for murder where death is caused by conduct which a reasonable man, with the knowledge of the surrounding circumstances, should have foreseen as likely to cause death. Having established that a category of reckless murder based on objective foreseeability exists in Canadian law, the court held that section 212(c) could be read together with section 21(2) to impose joint liability for murder where several persons had formed a common intention to engage in unlawful conduct of the type described in section 212(c) and death is caused by one or more of them in

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213 of the Criminal Code read as follows: "212. Culpable homicide is murder *(a)* where the person who causes the death of a human being (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not; *(b)* where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or *(c)* where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if *(a)* he means to cause bodily harm for the purpose of (i) facilitating the commission of the offence, or (ii) facilitating his flight after committing or attempting to commit the offence, and the death ensues from the bodily harm; *(b)* he administers a stupefying or overpowering thing for a purpose mentioned in paragraph *(a)*, and the death ensues therefrom; *(c)* he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph *(a)*, and the death ensues therefrom; or *(d)* he uses a weapon or has it upon his person (i) during or at the time he commits or attempts to commit the offence, or (ii) during or at the time of his flight after committing or attempting to commit the offence, and the death ensues as a consequence."

[46] *Supra*, footnote 4; *contra, Blackmore* (1967), 1 C.R.N.S. 286. For the subjective view of the same clause in the Tasmanian Criminal Code, see *Phillips*, [1971] A.L.R. 740; however, the view is not supported by *Gould and Barnes*, [1960] Qd. R. 283, where the test was held to be "purely objective"; also see Gibbs J. in *Stuart, supra*, footnote 4, at p. 556.

carrying out the common object. What is necessary is that while the participants in the plan had a common intention to achieve it, they had the common knowledge that death was a probable consequence of carrying out the plan. For, as MacFairlane J.A. pointed out in *Wong*,[47] "the latter part of the subsection [section 21(2)] speaks not of intention but of knowledge, actual or imputed, of a probable consequence".

The proposition is now well established that section 21(2) can be read with section 212(c) to impose joint liability for murder.[48] It would be preferable that section 212(c) rather than section 213 be made the basis of the imposition of joint liability for murder. The drafting of section 213 makes it reminiscent of the notion of strict liability in that it specifically disregards the relevance of a mental state. It would be in the very exceptional situation that a case falls under section 213 does not also fall under section 212(c). Convictions in cases like *Trinneer*[49] and *Riezebos*[50] could have been secured under section 212(c) with greater justification on theoretical grounds. In any event, the objective test of "probable consequences" is now well entrenched in Canadian law.

The Canadian position accords with that reached in other code jurisdictions and also the common law position. In Queensland, as was mentioned, the majority in *Brennan*[51] had favoured a subjective theory but Starke J. had preferred an objective test. It is Starke J.'s view which has prevailed in the Australian code jurisdictions.[52] In *Stuart*,[53] the interpretation of the section 8 of the Queensland Code on common intention which is substantially similar to section 21(2) of the Canadian Code was considered by the Australian High Court. The case for the Crown was that Stuart had secured the services of one Finch to set fire to a night club to establish that his threats to night clubs in Brisbane that he would burn or bomb any night club which did not pay him protection money were not empty ones. It was no part of the plan that anyone should be killed. There were about forty people in the night club when Finch set fire to the place and fifteen of them died as a result of carbon monoxide poisoning caused by the fire. Stuart and Finch were convicted of murder. Stuart appealed against the conviction on the ground that since section 8 of the Queensland Code

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[47] *Supra*, footnote 29, at p. 200.

[48] *Popovic and Askov*, *supra*, footnote 10; *Joyce*, *supra*, footnote 3; *Wong*, *ibid.*

[49] *Supra*, footnote 40.

[50] *Supra*, footnote 44.

[51] *Supra*, footnote 4.

[52] For a survey, see G. Brandis, The Liability of Parties to Unlawful Killing under the Criminal Code (1977), 10 U. Qld. L.J. 1.

[53] *Supra*, footnote 4.

involved a subjective test as to "probable consequences" and he did not know that death was a probable consequence of the plan, as he had contemplated the arson without causing death to anyone, he could not be found guilty of murder. Rejecting this argument, Gibbs J. held:[54]

> The question posed by the section is whether in fact the nature of the offence was such that its commission was a probable consequence of the prosecution of the common unlawful purpose and not whether the accused was aware that its commission was a probable consequence.

This decision of the highest appellate tribunal in Australia must be taken as the final rejection of the subjective theory as far as the Australian code jurisdictions are concerned.[55]

The position in the common law jurisdictions is similar. Though the doctrine of constructive murder has been abolished,[56] it continues to survive in the area of homicides resulting from dangerous acts carried out in pursuance of the common intention of several accused. The 1956 Royal Commission on Capital Punishment which had recommended that the doctrine of constructive malice should be abolished, advocated its retention in cases which involve the application of the rule on common intention. The Commission observed:[57]

> In our view considerations both of equity and of public protection demand the maintenance of the principle of the existing law that when two or more persons are parties to a common design for the use of unlawful violence and the victim is killed, all the parties to the common design should be held responsible and all should be liable to the same punishment.

It would appear that the courts have adhered to this view and the statutory abolition of constructive murder has made no difference to the position.

Thus, the earlier position of the common law stated in cases like *Skeet*[58] and *Betts and Ridley*[59] that where a killing occurs in the course of a jointly planned violent crime, all participants are equally guilty of

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[54] *Ibid.*, at p. 559.

[55] The view taken by the High Court accords with the view in earlier decisions. *Solomon*, [1959] Qd. R. 123, at p. 129; *Nicholas, Johnson and Aitcheson*, [1958] Q.W.N. 29; *Tonkin and Montgomery, supra*, footnote 30. The position is not different in other jurisdictions with codes based on the common law; for Bahamas, see *Farquarson, supra*, footnote 9, [1973] A.C. 786; for India, see *Barendra Kumar Ghosh*, A.I.R. 1925 P.C. 1, for Papua New Guinea, see *Ino Gemai*, [1974] P.N.G.L.R. 1; for Malaysia, see *Wong*, [1972] 2 M.L.J. 75 and Myint Soe, Some Aspects of Common Intention in the Penal Codes of Singapore and West Malaysia (1972), 14 Malaya L. Rev. 163.

[56] The doctrine was abolished by the Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11. Similar legislation was enacted in the West Indies but not in the Australian common law states.

[57] *Op. cit.*, footnote 9, p. 51.

[58] *Supra*, footnote 19.

[59] (1930), 22 Cr. App. R. 148.

murder continues to be good law.[60] Joint liability in such circumstances is imposed on the basis that the homicide is a foreseeable consequence of the plan.

The Canadian position that the test as to "probable consequences" in section 21(2) is objective accords with the view accepted in other jurisdictions.[61] The position taken by the Canadian courts has been criticised as an ". . . erosion of the doctrine of *mens rea* unaccompanied by any discernible social or ethical gains".[62] The criticism is unjustified. Despite the efforts dating from the time of Fitzjames Stephen to displace the objective theory of *mens rea*, the doctrine of *mens rea* has continued to retain an element of objectivity which the courts have resorted to when they felt that murder was the proper verdict in the circumstances of a case. The Canadian Code provisions on murder, whatever the position in the English law may be, can hardly be said to be based on a subjective theory. The views of English academics that the modern doctrine of *mens rea* is based on a subjective theory can hardly be fitted into a code which contains sections like sections 213 and 212(c). However great the urge may be to pay sacerdotal reverence to English academic thinking, the code provisions do not permit the accommodation of those views.

The criticism that no social or ethical purpose is served by adhering to the present position proceeds from the standpoint of a retributivist penal philosophy which does not permit the imposition of punishment beyond the actual guilt of the offender, which is to be measured by the offender's intention or state of knowledge at the time he committed the offence.[62] But, from the point of view of deterrence of crime which is a valid social and ethical aim, the imposition of joint liability on the basis of an objective theory may be justified.[63] There is

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[60] *E.g. Lovesey*, [1969] 3 W.L.R. 213; Smith and Hogan, *op. cit.*, footnote 37; p. 127; for Australia, see *Vandine*, [1970] 1 N.S.W.L.R. 252; *Varley* (1977), 51 A.L.J.R. 243; *Markby* (1978), 52 A.L.J.R. 626; *Raymond, supra*, footnote 25.

[61] Important distinctions between Canadian law and the law under the Australian code jurisdictions must be noted. They are: (1) in Canada foresight of serious injury would suffice but in Australia foresight of death or at the least of grievous bodily injury likely to cause death would be required; (2) in Canada there seems to be no hesitation to use s.213; in Australia, corresponding provisions have never been used. Also, indecent assault was added to the list of offences in s.213 in 1947. Under the 1947 amendment, a homicide caused by a person in possession of a weapon amounts to murder, s.213(d). There must be a causal connection between the possession and homicide, *Rowe* (1951), 100 C.C.C. 97, [1951] 4 D.L.R. 238. The question whether, where the perpetrator is guilty of murder under this provision, his participants are also guilty of the crime has not been settled. It would appear that such a result would follow only if the possession of the weapon was known to the others.

[62] P. Burns and R.S. Reid, From Felony Murder to Accomplice Felony Attempted Murder (1977), 55 Can. Bar Rev. 75, at p. 93; similar criticisms are to be found in Weiler, In the Last Resort (1974), p. 114.

[63] See generally, H.L.A. Hart, Punishment and Responsibility (1968).

no empirical evidence either way as to the effectiveness of imposing liability in such a manner in reducing crime by groups.[64] In the absence of such evidence, the assumption of the courts not only in Canada but throughout the common law world that the imposition of joint liability for culpable homicide on the basis of an objective test of probable consequences cannot be faulted.[65]

3. *The Inference from the Type of Weapons Used.*

The nature of the weapons used by the accused and the knowledge which the other participants had of the fact that the actual perpetrator was in possession of a weapon are important factors in determining whether the homicide was a probable consequence of the plan. In the old common law relating to murder, the type of weapon used in the killing played an important role so much so that if an injury was caused on a vital part of the body by the use of a lethal weapon, the offender would be guilty of murder.[66] There is no such inflexible doctrine in the modern law.[67] However, in homicides committed in the course of furthering the common intention of several persons, the type of weapons carried by each one of the participants and their mutual awareness of the nature of the weapons each possessed plays an important role in the determination of the scope of the common intention and the application of the objective test of "probable consequences".

Where a common intention to commit a violent offence has been formed and a participant, who to the knowledge of the other parties to the plan was carrying a lethal weapon, uses the weapon to cause death while prosecuting the common intention, all the parties to the original plan would be equally guilty of the homicide. This common law principle has been recognized in a series of Canadian decisions.

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[64] There are incidental references to the effectiveness of the felony-murder rule in studies on capital punishment but conclusions in such studies (*e.g.* T. Sellin, The Death Penalty (1959)) relate to the deterrent effect of capital punishment and have no relevance to the present issue.

[65] It is interesting to note that in many jurisdictions, judges have discarded notions of foreseeability and used tests of causality. Such tests, however, would in fact be destructive of the doctrine of *mens rea*, *e.g.* in the United States, *Commonwealth* v. *Redline* (1958), 137 A. 2d 472; *State* v. *Canola* (1977), 374 A. 2d 20; in South Africa, *Thomo*, 1969 (1) S.A. 385; also see M.A. Rabie, The Doctrine of Common Purpose in Criminal Law (1971), 885 A.L.J. 334, at pp. 339-345.

[66] W.E. Oberer, The Deadly Weapon Doctrine—The Common Law Origin (1962), 72 Harv. L. Rev. 92.

[67] However, references to the type of weapon used are made in modern cases, *e.g.* in *Smith*, [1960] 3 W.L.R. 92, at p. 97 (C.A.).

In *Joyce*, where the deceased was killed during a robbery, the British Columbia Court of Appeal made the following observations which contain the statement of the rule:[68]

> . . . if Peter Joyce together with Richard Joyce formed an intention in common to carry out a robbery of the Lumberland Store in Burnaby and to assist each other therein, and Peter Joyce knew that Richard Joyce was going to have a weapon upon his person during the time that he committed or attempted to commit the robbery and death ensued as a consequence, then Peter Joyce is guilty of murder as well as Richard Joyce. It does not matter whether the death was caused intentionally by accident.

Similar relevance has been attached to the mutual knowledge of the type of weapons carried by the participants in other cases. In *Vawryk and Appleyard*[69] a retrial was ordered by the Manitoba Court of Appeal in the case of Appleyard because there was a possibility that, though he was a party to the common design to assault the deceased, he was unaware of the fact that the actual perpetrators of the homicide were carrying a hammer and a razor and therefore could not be credited with the knowledge that death was the probable consequence of the assault. The rule was referred to in *Emkeit*[70] and in *Casutte*.[71]

In the case of a premeditated plan to commit a violent crime, the knowledge that one or more participants were in possession of lethal weapons is often conclusive proof that the use of violence to cause death was within the scope of the common intention. Since such violence is an inevitable incident in offences like robbery or rape as the resistance of the victim is to be expected, the mutual knowledge of possession of lethal weapons upgrades the common intention to commit the violent offence into a common intention to use violence even to the extent of causing death to overcome the resistance.[72] In the alternative, such knowledge makes the homicide foreseeable as a probable consequence. In such circumstances the burden of avoiding a conviction for murder shifts on to every participant. This can be done only by proof on the part of each participant that he had joined in the endeavour only upon the promise of the others that no violence beyond a limit would be used and that he was not aware of the fact that the perpetrator of the homicide was carrying a lethal weapon. Such a person however would be found guilty of manslaughter as he had

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[68] *Supra*, footnote 3, at p. 148.

[69] *Supra*, footnote 2.

[70] *Supra*, footnote 2, at p. 333.

[71] (1972), 9 C.C.C. (2d) 449; see also *Paquette* (1974), 19 C.C.C. (2d) 154, at p. 155.

[72] *E.g.*, *Lovesey*, *supra*, footnote 60; *Vandine*, *supra*, footnote 60.

joined in the common intention to commit an inherently dangerous unlawful act in the course of which a homicide occurred.[73]

Different considerations however may apply in situations where a common intention to assault arises among several persons without premeditation. Here, the open carrying of weapons assumes an even greater significance. Since the Canadian courts have in these situations followed the view taken in the English decision, *Smith*,[74] an examination of the position in the English law is warranted.

In *Smith*, four men were involved in a brawl at a bar and one of them, Atkinson, stabbed a man. They were all convicted of manslaughter. Smith appealed against the conviction on the ground that the stabbing went beyond the common intention which was to cause damage to the bar. The trial judge had directed the jury that the common intention was not only to damage the bar but also to cause injury to the barman and that all the parties to that common design would be guilty of manslaughter. In upholding the conviction of Smith for manslaughter, Slade J. observed:[75]

> It must have been clearly within the contemplation of a man like the appellant who, to use one expression, had almost gone berserk himself, and who had left the public house only to get bricks to tear up the joint, that if the barman did his duty to quell the disturbance and picked up the night stick, anyone who knew that he had a knife in his possession, like Atkinson, might use it on the barman as Atkinson did. By no stretch of imagination, in the opinion of this court, can that be said to be outside the scope of the concerted action in this case. In a case of this kind it is difficult to imagine what would have been outside the scope of the concerted action, possibly the use of a loaded revolver, the presence of which was unknown to the other parties . . . .

The dictum was approved in *Betty*,[76] where Lord Parker pointed out that the only limit to the doctrine was where the participant had no knowledge of the possession of the weapon. The Lord Chief Justice had occasion to apply the exception in *Anderson and Morris*.[77] Morris had fought with the deceased and had later accompanied Anderson to find the deceased. Anderson had stabbed the deceased. Anderson was found guilty of murder and Morris of manslaughter. Morris appealed against the verdict. The argument advanced on his behalf was that the stabbing exceeded the joint enterprise as Morris was unaware that

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[73] The decision of the Manitoba Court of Appeal in *Puffer, McFall and Kizyma* (1976), 31 C.C.C. (2d) 81 is contrary to this analysis. There no weapons were carried and the homicide seemed unnecessary to the achievement of the objective of the plan. Hence the dissent of O'Sullivan J.A. is preferable to the view taken by the majority.

[74] [1963] 3 All E.R. 597; the case was followed in these Canadian decisions: *Wong, supra,* footnote 29; *Emkeit, supra,* footnote 2.

[75] *Ibid.*, at p. 602.

[76] (1963), 48 Cr. App. R. 6.

[77] [1966] 2 Q.B. 110; for discussion of these English cases, see R. Buxton Complicity in the Criminal Code (1969), 85 L.Q.Rev. 252.

Anderson had a knife in his possession. Lord Parker upheld that contention and ordered a retrial.[78]

The reasoning developed in these English cases would be followed in Canada.[79] The rule developed in the English cases may seem illogical in that a homicide could be regarded as a probable consequence of an assault.[80] But, in the cases in which the common intention to assault was formed without premeditation, courts must infer that the assault was limited to a physical assault except in the situation where lethal weapons were openly carried or where their possession was known to the participants.

Where there had been premeditation the situation may be different. Here, it could be expected that the possibility of death resulting from the assault would have been contemplated by the participants and it could, with justification, be argued that they should have defined the extent of their intention and excluded the use of lethal weapons or excessive violence if they are to escape conviction for murder.

The scope of the common intention.

The rule relating to the inference as to the extent of the common intention from the mutual knowledge of the possession of weapons is one aspect of defining and limiting the scope of the common intention. However, there are indications in Canadian law of an emerging trend that once a course of violence had been jointly initiated, the courts may not look too closely at the scope of the common intention and find all the offenders guilty of the consequences of the violence. The decision of the Manitoba Court of Appeal in *Puffer, McFall and Kizyma*[81] evidences the trend. Freeman C.J. in rejecting the argument that the perpetrator's act of asphyxiating the victim with a pillow went beyond the common intention to rob, observed:[82] "Distinctions of this kind could lead to findings that a blow above the belt was within the scheme to rob, while a blow below the belt was not. The violence involved in the carrying out of a robbery ought not later to be measured or tested by Marquis of Queensbury rules or anything of that nature."

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[78] The case was distinguished in an Australian decision, *Varley, supra,* footnote 60, on the ground that the use of a baton in the course of an assault could not be regarded as an unexpected consequence.

[79] As pointed out, *Smith, supra,* footnote 74, has been cited and followed in many Canadian decisions.

[80] Lord Parker in *Anderson and Morris,* [1966] 2 All E.R. 644, at p. 648 accepted that the rule was illogical.

[81] *Supra,* footnote 73.

[82] *Ibid.,* at p. 94.

Such a strict view is, of course, supportable on the basis that if section 21(2) is read with section 213, there would be joint liability for a homicide resulting in the course of a robbery. But such a result is based more on notions of causality than objective foreseeability. In the absence of possession of weapons, the killing of a person, particularly when it was unnecessary for the completion of the robbery, could be regarded as an act in excess of the joint plan and the proper result should have been to convict only the actual perpetrator of the murder.

In *Lovesey*,[83] Widgery L.J. stated the position in the English law as follows: "There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification) even if this involved killing or the infliction of grievous bodily harm. . . ." This liberal position is accepted in some code jurisdictions[84] but there are decisions in the common law jurisdictions contrary to it.[85] This difference in the attitude of the courts can only be explained on the basis of their views on the deterrent value of the imposition of joint liability in cases of crimes like robbery and their responses to perceived increases in the rates of violent crimes. In any event, the strict view on the scope of the common intention should be confined to cases involving planned offences like robbery and not those involving spontaneous assaults.

It is generally accepted that the scope of the common intention includes not only the intended crime but whatever is necessary for the successful completion of the objective of the plan. Thus, where the common intention is to commit robbery, it is now established that a killing done while escaping arrest is within the common intention.[86] This would be so even if the participants had separated during flight, for such separation is aimed at facilitating flight.[87] However, where a participant had given himself up voluntarily,[88] he must be regarded as having abandoned the common intention and he would not be liable

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[83] *Supra*, footnote 60, at p. 216.

[84] *Murray*, [1962] Tas. S.R. 170.

[85] *Vandine*, *supra*, footnote 60; *Walker*, [1966] V.R. 553; *Johns*, *supra*, footnote 2.

[86] See the dictum of Lord Widgery in *Lovesey*; for Canada, see *Rowe*, *supra*, footnote 61; *Walker*, [1964] 2 C.C.C. 217; for Scotland, see *Lord Advocate* v. *Graham*, [1958] S.L.T. 167.

[87] Such a view has been taken by the Indian courts. *Punjab Singh*, A.I.R. 1933 Lah. 977; *Shyam Behare*, A.I.R. 1957 S.C. 320.

[88] Where he had been captured by force, there would be no abandonment of the common intention; for the rule on abandonment see *Wong*, *supra*, footnote 29, at p. 203; *Joyce*, *supra*, footnote 3.

for any homicide caused by any of the other participants while in flight.

Differential verdicts.

The doctrine of common intention imposes equal liability on all the parties to a common plan to commit an offence not only for the offence which was the object of the plan but also for any incidental offence necessary for the achievement of the plan committed by any participant, provided the incidental offence can be regarded as a probable consequence of the plan. However, if a crime that was committed by a participant went beyond the scope of the common intention of the parties, the others would not be liable. Since the common intention of the parties depends on the coincidence of their separate intentions, the determination of the common intention should depend on the examination of each offender's intention separately. This would mean that the prosecution has to establish each offender's intention separately, show the point at which they co-incided and, if the crime charged was an incidental offence and not the object of the plan, prove that it was a probable consequence. Given these rules, if the test of the probable consequences of the joint plan is subjective, the scope for the other participants escaping joint liability with the actual perpetrator would be great for each accused could show the extent of his intention and knowledge and claim exemption from the imposition of joint liability.

Transferred to the law of homicide, this would mean that though the actual perpetrator would be found guilty of murder, the other participants could argue that they should not be convicted of murder either on the basis that the killing went beyond the common intention or on the ground that they, individually, did not foresee the homicide as a probable consequence of the plan. They would, however, be guilty of manslaughter as they were parties to the commission of an inherently dangerous unlawful act which resulted in death. But, since the test of probable consequence is not subjective, the scope for the differential verdict is diminished.[89]

However, accepting that the test is objective, there could still be scope for a differential verdict in two circumstances. The first is where no lethal weapons were carried by the participants or where the possession of the weapon by the actual perpetrator was not known to the other participants. Though the decision in *Puffer, McFall and*

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[89] In New Zealand, where the courts and the legislature have shown a greater partiality towards the subjective theory, differential verdicts often result. *Lewis*, [1975] 1 N.Z.L.R. 222; *Hartley*, [1978] 2 N.Z.L.R. 199; *Malcolm*, [1951] N.Z.L.R. 470. In *Hartley*, clearly a subjective test was applied as Woodhouse J. stated that to establish murder against all participants, it was necessary for the Crown "to prove that such a crime was known to each of the accused to be a probable consequence of the prosecution of the common purpose". For Tasmania, see *Murray, supra*, footnote 84.

Kizyma[90] may cast some doubts on this proposition in cases or robbery, it is well established in cases of assault. Even in the case of robbery, there is no reason why, in the absence of surrounding factors giving rise to an inference of homicide being a probable consequence, a differential verdict should not be permitted.[91] Certainly in the case of assault, where the use of a weapon by the perpetrator was not within the foresight of the other participants, a differential verdict would be the proper one. But, since an assault has been held to be an "unlawful object" for the purposes of section 212(c),[92] it may be possible to argue that homicide should be regarded as a probable consequence of every physical assault. Such an interpretation would be an undue extension of the doctrine of common intention. Particularly in a situation where the common intention to assault had arisen on the sudden, the scope of the common intention should not be widened by the application of an inflexible rule. In such situations, differential verdicts based on the knowledge of possession of a lethal weapon by the actual perpetrator of the killing would seem proper.[93]

The second area in which differential verdicts are possible is where one of the participants, though ordinarily equally liable is entitled to a defence which mitigates his offence. Where the defence relates to an incapacity, it could be argued that there is no basis for the application of the doctrine of common intention as the defence negatives the formation of an intention.[94] But the effects of duress,[95] intoxication,[96] provocation[97] and other such pleas are yet to be worked out.

Conclusion

The aim of this article was to show that a great degree of unanimity exists in the application of the doctrine of common intention in homicide cases in the different Commonwealth jurisdictions. The subjective theory advocated by some academic writers has generally been rejected but the courts have limited the application of the doc-

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[90] *Supra*, footnote 73.

[91] See the dissent of O'Sullivan J. in *Puffer, McFall and Kizyma, ibid.*

[92] *Tennant and Naccarato, supra*, footnote 4, disagreeing with the Australian decision, *Hughes*, [1950] Qd. R. 237 but dictum in *Stuart, supra*, footnote 4, a decision of the Australian High Court accords with the Canadian position.

[93] *Emkeit, supra*, footnote 2; *Varywk and Appleyard, supra*, footnote 2. In *Wong, supra*, footnote 29, at p. 202, the possibility of a differential verdict was ruled out altogether.

[94] *Matusevich* (1977), 15 A.L.R. 117.

[95] *Walker* (1964), 2 C.C.C. 217; *Paquette, supra*, footnote 71.

[96] *Tonkin and Montgomery, supra*, footnote 30.

[97] *Remillard* (1921), 59 D.L.R. 340.

trine by formulating rules like the one regarding the knowledge of possession of lethal weapons. However, a trend seems to be emerging in Canadian law to extend the doctrine on the basis of causality in cases involving robbery. Such a trend is not consistent with the views in the other jurisdictions.