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Abstract
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Keywords
Common Law, Foresight of Consequences, Criminal Law, Murder

FORESIGHT OF MURDER AND COMPLICITY IN UNLAWFUL JOINT ENTERPRISES WHERE DEATH RESULTS

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In this article, the central or principal issue for consideration is the appropriate standard that should be adopted at common law for foresight of consequences at common law where death has arisen out of an unlawful joint enterprise and the complicity or otherwise of a secondary party is in issue. Although the discussion is focussed upon the common law, the same issues of principle and policy arise in relation to potential reforms of the 'common purpose' rule under the Criminal Codes.

The matter has been considered and determined in two Australian High Court cases, *Johns v R*[1] and *Miller v R*,[2] and further by the Judicial Committee of the Privy Council in *Chan Wing-Siu v R*.[3] In those cases, it was held that, at common law, a secondary party is guilty of murder where death or grievous bodily harm is foreseen as a possible rather than a probable consequence of the common enterprise. In *Mills v R*,[4] the High Court declined to grant leave to reconsider Johns since it had been accepted as correct in other jurisdictions and was not considered complex law. It is submitted here, with respect, that this is unfortunate because for reasons that will be advanced it may be argued that the decisions of the High Court and that also of the Privy Council, are incorrect and have a potential to achieve injustice.

In order, however, to place the arguments in their true perspective, it is necessary first to consider the common law in England and in Australia relating to murder and foresight in cases where the killer acts alone. Attention will be directed to English decisions subsequent to the leading case of *Hyam v DPP*;[5] in particular the decisions of the House of Lords in *R v Moloney*[6] and *R v Hancock*.[7] In this regard also, important

1 (1979-1980) 143 CLR 108.
2 (1980) 55 ALJR 23.
3 [1985] AC 168.
4 (1986) 68 ALR 445. Note, Deane J appeared to express some reservation. The only other jurisdiction referred to as adopting *Johns* above, was *Chan Wing-Siu v R* [1985] AC 168.
5 [1975] AC 55. See also, Lanham 'Murder, Recklessness and Grievous Bodily Harm' (1978) 2 CrimLJ 255.
6 [1985] AC 905. For a discussion of the mental element in murder, see Lord Goff (1988) 104 LQR 31; but cf, Williams 'The Mens Rea for Murder: Leave it Alone' (1989) 105 LQR 387.
7 [1986] AC 455; see further *R v Nedrick* [1986] 1 WLR 1025.

decisions of the High Court of Australia in *Pemble v R*,[8] *La Fontaine v R*[9] and *R v Crabbe*[10] will be discussed.

From this analysis, it will become apparent that courts in both England and Australia have striven to insist upon a high level of foresight and contemplation of death or grievous bodily harm as a probable consequence, before a person who kills another can be found guilty of murder. It has been repeatedly held that foresight that death or grievous bodily harm might follow upon a course of unlawful conduct is insufficient to constitute murder. Rather, in those circumstances the appropriate verdict is manslaughter. Such an approach is entirely consistent with that espoused long ago by Stephen in his *Digest of Criminal Law.*[11]

Having discussed this issue, it is appropriate to consider the issue of foresight of death or grievous bodily harm at common law in the context of joint unlawful enterprises and the liability of secondary parties for any death that arises. Attention here will be directed at the appropriate standard that should be applied to govern a party's responsibility for murder. Closely related to this issue, is the subject of intermediate verdicts of manslaughter in cases involving secondary parties to joint unlawful enterprises where death results. Courts have had to resolve issues of the availability of manslaughter in this kind of case both at common law and under Codes, or statutory provisions, which define responsibility in terms of probable or likely consequence. In this regard, the common law cases of *R v Reid,*[12] a decision of the English Court of Criminal Appeal, and the High Court of Australia in *Markby v R,*[13] are important precedents. Of interest also is the New Zealand Court of Appeal decision in *R v Tomkins,*[14] a decision turning on the provisions of the New Zealand Criminal Code as it relates to joint enterprise.

Finally, of considerable relevance to the discussion is the tendency today of superior courts to sanction the use of phrases such as 'real' or 'substantial' risk, or an 'event that might well happen' as synonyms explaining or in substitution for the words probable or likelihood where those expressions have been used in statutory provisions or Codes governing either the definition of murder, or the issue of complicity in joint enterprises. In this regard, cases such as *R v Gush,*[15] *R v Tomkins*[16] and *R v Pirie,*[17] decisions of the New Zealand Court of Appeal, will be considered. Also of importance, in this regard, are the conflicting opinions on this topic in *Boughey v R,*[18] a decision of the High Court of Australia. For reasons which will be advanced in the final section of this article, it is also submitted that the use of these expressions is incorrect in principle and is liable to lead a jury into error and occasion injustice.

8 (1971) 124 CLR 107.
9 (1976) 136 CLR 62.
10 (1985) 59 ALJR 417.
11 Stephen, 'Digest of Criminal Law' (1877, 1st edn) art 230.
12 (1975) 62 CrAppR 109.
13 (1978) 140 CLR 108.
14 [1985] 2 NZLR 253.
15 [1980] 2 NZLR 92.
16 [1985] 2 NZLR 253.
17 [1987] 1 NZLR 67.
18 (1986) 65 ALR 609.

Foresight of Death, Murder and Probable Consequence

In *Hyam v DPP*,[19] the House of Lords approved the approach advocated by Stephen in his Digest of Criminal Law, that it was murder not only if a person intended to kill or cause grievous bodily harm to another, but also, where it was established that a person had knowledge or foresight that the act which caused death would probably cause death or grievous bodily harm to another, and proceeded indifferent to the consequence.

The facts of Hyam are well known. The heartless Mrs Hyam was jealous because her lover had left her and had become engaged to a Mrs Booth. Mrs Booth had a number of children who were together in a house which Hyam set alight by pouring petrol in the letter box of the front door, and igniting it by means of a newspaper and match. Prior to setting the house alight, Hyam had ascertained that her former lover was at home and not in the house with Mrs Booth. The consequences were tragic. Although Mrs Booth escaped with her son, the two young girls perished in the fire. Hyam maintained that her motive was merely to scare Mrs Booth.

The trial judge directed the jury that the prosecution had to prove beyond any reasonable doubt that the appellant had intended to kill or do serious harm to Mrs Booth and, if they were satisfied that when she had set fire to the house she had known that it was highly probable that the fire would cause death or serious bodily harm, then the prosecution had proved the necessary intent and it mattered not if her motive had been to frighten only.

Though disagreeing on the issue of whether it was sufficient to intend serious bodily harm, rather than harm endangering life, their Lordships agreed that Hyam would be guilty of murder, not only if death was intended but also if she foresaw it as a probable consequence. In arriving at this view the House approved the view expounded in 1839 by the Commissioners on Criminal Law[20] which included Sir James Stephen. The Commissioners said:[21]

> it appears to us that it ought to make no difference in point of legal distinction whether death results from a direct intention to kill or from wilfully doing an act of which death is a probable consequence.

Lord Diplock said of the respective states of mind:[22]

> What is common to both these states of mind is willingness to produce the particular evil consequence: and this, in my view, is the mens rea needed to satisfy a requirement, whether imposed by statute or existing at common law, that in order to constitute the offence with which the accused is charged he must have acted with "intent" to produce a particular evil consequence or, in the ancient phrase which still survives in crimes of homicide, with 'malice aforethought'.

Mrs Hyam accordingly lost her appeal against conviction for murder.

19 [1975] AC 55.
20 Fourth Report (1839)
21 Referred to by Lord Hailsham in *Hyam v DPP* [1975] AC 55, 77.
22 [1975] AC 55, 86.

The issue of foresight of death or grievous bodily harm, as opposed to intention to kill or effect grievous bodily harm, was further considered by the House of Lords in *R v Moloney.* [23] In that case, the appellant had been drinking heavily with his stepfather to whom he was deeply attached. The men had been drinking after a family party. The stepfather claimed that he could outdraw his stepson and had requested him to take two shotguns that were in the house, so that his claim could be put to the test. The appellant declared that he did not aim the gun; 'I just pulled the trigger and he was dead.'

The trial judge had directed the jury in a manner which the House of Lords ruled did not fully advance the defence. In addition, however, he said:[24]

> When the law requires that something must be proved to have been done with a particular intent, it means this: a man intends the consequences of his voluntary act (a) when he desires it to happen, whether or not he foresees that it will probably happen, (b) when he foresees that it will happen, whether he desires it or not.

Their Lordships, unanimously, held that this direction was inadequate. Lord Hailsham remarked:[25]

> I conclude with the pious hope that your Lordships will not again have to decide that foresight and foreseeability are not the same thing as intention although either may give rise to an irresistible inference of such, and that matters which are essentially to be treated as matters of inference for a jury as to the subjective state of mind will not once again be erected into a legal presumption. They should remain, what they always should have been, part of the law of evidence and inference to be left to the jury after a proper direction as to their weight, and not part of the substantive law.

Further, it was the opinion of their Lordships that only in exceptional cases should judges direct by reference to foresight of consequences. On the issue of what constituted a natural and probable consequence, Lord Bridge said of the word, natural:[26]

> This word conveys the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it. One might almost say that, if a consequence is natural, it is really otiose to speak of it as also being probable.

Lord Bridge also suggested that the jury should be invited to answer the following questions, in cases of this kind:[27]

> First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case), a natural consequence of the defendants voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence.

23 [1985] 1 AC 905.
24 *Ibid,* p917.
25 *Ibid,* p913.
26 *Ibid,* p929.
27 *Idem.*

However, in *R v Hancock*[28] a subsequent decision of the House of Lords, it was held necessary to direct a jury where foresight was involved that the greater the awareness of the probability of a consequence, the more likely it was that the consequence was foreseen; and that, if it were foreseen, the more likely it was that it was intended. The guidelines postulated by Lord Bridge in *Moloney*[29] and the phrase natural consequence were not by themselves sufficient to imply probability.

Hancock[30] was a classic case involving foresight and murder. There, the respondents who were miners on strike pushed a block of concrete and a concrete post over a highway from a bridge. The block hit the windscreen of a taxi in which a miner was being taken to work. The taxi driver died. The respondents claimed that they did not intend to harm anybody, since they thought that the block and post were positioned over the middle lane when the taxi was being driven to the nearside lane. Their intention, they claimed, was only to block the road or to frighten.

In the opinion of Lord Scarman, the *Moloney*[31] direction had left the jury[32] 'plainly perplexed' because of their request for a further direction particularly with regard to intent and foreseeable consequences. The complaint of Lord Scarman was that the *Moloney* guidelines[33] 'offered the jury no assistance as to the relevance of weight of the probability factor in determining whether they should, or could properly, infer from foresight of a consequence (in this case, of course, death or serious bodily harm) the intent to bring about that consequence'.

In the view of Lord Scarman:[34]

> This was . . ., a particularly serious omission because the case law, as Lord Bridge of Harwich in *Moloney* had recognised indicated 'that the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent'.

Further, Lord Scarman said:[35]

> In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences, the probability of death or serious injury resulting from the act done may be critically important.

The appeal brought by the Director of Prosecutions against the decision of the Court of Criminal Appeal, which had quashed the conviction for murder, was dismissed essentially because the words 'natural consequences' did not adequately convey to the jury the high standard of awareness that would be required before a jury could fairly infer an intent to kill or cause grievous bodily harm.

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28 [1986] 1 AC 455.
29 [1985] 1 AC 905.
30 [1986] 1 AC 455.
31 [1985] 1 AC 905.
32 [1986] 1 AC 455, 471.
33 *Ibem.*
34 *Idem.*
35 [1986] 1 AC 455, 473.

Australian courts have arrived at a similar conclusion. In *R v Jakac,*[36] the Full Court of the Supreme Court of Victoria referred to Stephens Digest and ruled that a person would be guilty of murder if he foresaw death or grievous bodily harm as a 'natural and probable consequence of his act'. In *R v Hallet*[37] a decision of the Supreme Court of South Australia, the issue of whether the degree of foresight was of possible or probable consequences was considered. The Court opted for the standard of probability or likelihood, rather than possibility.

It was not, however, until 1971 in the case of *Pemble v R*[38] that the question of murder and foresight was considered in the High Court. In that case, the appellant claimed that in discharging a rifle which he claimed not to know was loaded, he intended only to frighten the deceased. He also claimed to have stumbled, holding the rifle in the air when it had discharged. The conviction was quashed because the trial judge had not fully directed on recklessness. Barwick CJ emphasised that this kind of direction should be given only sparingly. He appeared, however, to suggest a lower standard, namely foresight of possible consequences.[39] On this point, however, McTiernan J[40] described the standard as likely or probable; and Menzies J[41] as likely.

The matter came once more before the High Court in *La Fontaine v R.*[42] In that case, the appellant claimed also that he had shot at the accused only to scare him. The High Court upheld the conviction and the judges decision to direct on foresight and recklessness.

Barwick CJ[43] made no reference to possibility on this occasion; but used the expression a 'likelihood or probability'. Gibbs J said that he could not accept that foresight of a mere possibility of death or grievous bodily harm would be sufficient. In a statement, central to the theme of this article, Gibbs J went on to say:[44]

> There is a great difference between the state of mind of an accused who is prepared to risk the consequences of death or grievous bodily harm that he foresees as probable and that of an accused who does no more than take the chance that death or serious injury may ensue although it seems an unlikely consequence. The act of the former is much more worthy of blame than that of the latter. To treat knowledge of a possibility as having the same consequences as knowledge of a probability would be to adopt a stringent test which would seem to obliterate almost the distinction between murder and manslaughter. I therefore respectfully agree with the view expressed by McTiernan and Menzies JJ in *Pemble v R* that in cases of this kind an accused will not be guilty of murder unless he foresaw that death or grievous bodily harm was a probable consequence of his behaviour.

36 [1961] VR 367. Referred to with approval in *Hyam v DPP* [1975] AC 55, 75. See also *Nydam v R* [1977] VR 430; *R v Sergi* [1974] VR 1.
37 [1969] SASR 141.
38 (1971) 124 CLR 167. See also *R v Windsor* [1982] VR 89.
39 *Ibid,* p118.
40 *Ibid,* p118.
41 *Ibid,* p137.
42 (1976) 136 CLR 62.
43 *Ibid,* p68.
44 *Ibid,* p76.

Mason J[45] preferred not to decide the issue, noting however that the view of Barwick CJ was inconsistent with that of McTiernan J or Menzies J in *Pemble*, and at odds with the views in Hyam. Jacobs J, however, considered that:[46]

> Reckless indifference to a consequence of death or serious bodily injury which is not expected to occur, but which it is appreciated may possibly occur, is in my opinion properly treated as manslaughter.

Stephen J preferred the view of Barwick CJ in *Pemble* that foresight of the possible consequences of death or grievous bodily harm was sufficient to constitute responsibility for murder.[47] As we shall see, this is a view which he also subsequently adopted in regard to foresight and the responsibility for murder of parties to joint unlawful enterprises.

The most recent decision of the High Court is *R v Crabbe*.[48] In that case, a disgruntled truck driver, who was heavily intoxicated, had been physically ejected from a hotel in Alice Springs. In the early hours of the morning, he drove his prime mover through the wall of the hotel and into the bar killing five persons and injuring others. In a redirection, the judge had suggested to the jury that a person could be guilty of manslaughter if he foresaw the possibility that people might be in the bar. Gibbs CJ[49] once again emphasised the approach of the English common law since Stephen, and said that the test of foresight when reckless and murder was in issue was foresight of probable consequence. His Honour, when delivering the judgment of the court, said:[50]

> If an accused knows when he does an act that death or grievous bodily harm is a 'probable' consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word probable means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm. There is a difference between the case in which a person acts knowing that death or serious injury is only a possible consequence, and where he knows that it is a likely result.

Further, he emphasised that actual foresight of risk was required. Knowledge or awareness of risk could not be imputed.

From these cases, the following principles emerge, namely:

a) Considerable care should be taken before a judge at common law in regard to murder directs on the basis of foresight of death or grievous bodily harm, in addition to intention to kill or cause grievous bodily harm.

b) If a judge so directs, he should be careful not to suggest that foresight of the consequences may be imputed. It is subjective appreciation of the consequences that matters.

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45 *Ibid*, p91.
46 *Ibid*, p98.
47 *Ibid*, pp85-86.
48 (1985) 59 ALJR 417. See further Reader Elliot 'Recklessness and Murder-The Facts of the Case' (1986) 10 CrimLJ 389.
49 *Ibid*, p419.
50 *Idem*.

c) A person may be guilty of murder only where his foresight of the consequences involves foresight of the probable consequences of his actions, not the possible consequences. The rationale for murder is his reckless and callous indifference to life which renders him very closely compatible in moral terms with one who intends to kill or cause grievous bodily harm. His moral culpability is greater than one who takes the chance of death, thinking it be an unlikely consequence. In the latter situation, a person is guilty of manslaughter.

d) Probable in this context means an expectation that something is likely to happen.

Complicity for Murder and Secondary Parties to Joint Enterprises at Common Law

If the above approach of the courts at common law in regard to murder, is correct, as it is submitted it is, then it would seem logical that a similar approach should be adopted at common law in regard to joint unlawful enterprises and the complicity of secondary parties. The reason for this is that the secondary party, who embarks upon a joint enterprise involving a prospect of violence, has less control over the ultimate death than the person whose actions directly cause death. If the law insists on a high standard in relation to the latter, in cases involving foresight as opposed to actual intention, then so it should require a high standard in the case of secondary parties. That is not to say, however, that the secondary party who contemplates that a person may be killed, or seriously injured during the course of a hazardous and unlawful enterprise should escape the consequences of embarking upon the enterprise entirely. For having embarked upon an enterprise that envisaged violence, he should be found guilty of manslaughter if death arose as a consequence of the common venture, albeit that it might be an unlikely consequence.

Further, even if he did not appreciate that death or grievous bodily harm was a possible consequence, or did not turn his mind to the question, he should be found guilty of manslaughter if death be fairly within the scope of the joint enterprise because he voluntarily embarked on a venture which had the potential for violence. Only if death was a total departure from the common purpose should he be acquitted of both murder and manslaughter, at common law.

Yet, decisions at common law in both Australia and elsewhere have not adopted this approach. In two decisions of the High Court of Australia *Johns v R*[51] and *Miller v R*,[52] and in the Judicial Committee of the Privy Council in *Chan Wing-Siu v R*,[53] an appeal from Hong Kong, the approach has been taken that a secondary party will be guilty of murder even though he only foresaw death or grievous bodily harm as a possible consequence of the common enterprise.

In *Johns v R*[54] two men, Johns and Watson, set about robbing a jeweller Morris who, they believed, carried large amounts of money and

51 (1979-1980) 143 CLR 108.
52 (1980) 55 ALJR 23.
53 [1985] AC 168.
54 (1979-1980) 143 CLR 108.

jewellery with him. Watson had informed Johns that he was going 'to hold him up, tie him up and take the money and stuff'. To Johns knowledge, Watson always carried a pistol. The plan involved Watson returning to Johns car, depositing the stolen property and making his 'get-away'. Johns knew that Watson was quick-tempered and capable of becoming violent. Watson had told him that he would not stand for any nonsense and that Morris was always armed and would not stand mucking around if it came to a showdown. Johns left Watson and one other to carry out the robbery. They accosted Morris whom they discovered was not carrying any money or jewellery. During a struggle, Watson drew his gun and shot Morris dead.

The trial judge directed the jury that they might find Johns guilty of murder as an accessory before the fact, if the parties must have had in mind the contingency that for the purpose of carrying their joint enterprise out or attempting to carry it out, the firearm might be discharged and kill somebody. The jury were also informed that they would be entitled to hold that all parties must be taken to have had in mind the possibility of the lethal use of the firearm when they assented to and encouraged the joint enterprise of robbery with violence.

The High Court upheld these directions. Barwick CJ[55] distinguished two cases *Brennan v The King,*[56] a decision of the High Court on appeal from Western Australia, and *R v Guay,*[57] a decision of the Ontario Court of Appeal, as being cases involving liability under statutory codes which expressly related liability as secondary parties to the probable consequence of the common venture. It was otherwise in his view at common law. This was a view also shared by Mason, Murphy and Wilson JJ in their joint judgment.[58] It was, however, Stephen J who provided the most critical examination of principle and policy, in a judgment which will be considered shortly.

Unfortunately, the appellant's argument appeared to involve a concession that the principal in the second degree as opposed to the accessory before the fact, Johns, was liable for the possible consequences of the common purpose. It is not immediately apparent why this concession was made.

The High Court rightly saw no merit in drawing any distinction between a principal in the second degree and an accessory before the fact. On the issue, however, of the appropriate test to be applied, Stephen J [59] agreed with the other members of the court that liability of a secondary party was contingent upon foresight of the possible consequences of the joint venture. *Inter alia,* he cited English cases such as *R v Smith*[60] and *R v Anderson and Morris*[61] in support of this view. He also referred to a decision of the New South Wales Court of Appeal in *R v Vandine.*[62]

55 *Ibid,* pp112-113.
56 (1936) 55 CLR 253.
57 [1957] OR 120.
58 (1979-1980) 143 CLR 108, 129.
59 *Ibid,* p118.
60 [1963] 1 WLR 1200.
61 [1966] 2 QB 110.
62 [1970] 1 NSWR 252.

In arriving at his decision, Stephen J described the test of probable consequence as being 'singularly inappropriate'.[63] In saying this, he was motivated by what he conceived to be a difficult task for the jury should they have to assess the contingencies that could follow upon a joint enterprise in terms of 'more probable than not'.[64] Quoting from Professor Howard's[65] *Criminal Law*, he considered that a secondary party should bear responsibility for murder if the killing was within the contemplation of the parties as a 'substantial risk'.[66] In his view, Foster[67] and Stephen,[68] even though they said complicity was to be based on probable consequence, meant no more than possible.[69]

As we have seen in *La Fontaine v R*,[70] Stephen J was also of the view that a person was guilty of murder in a sole venture, if he foresaw death or grievous bodily harm as a possible contingency. We have seen however that this view was decisively rejected, subsequently, in *Crabbe v R*.[71]

On the issue of policy and the public interest, Stephen J said of the criterion of possibility:[72]

> If applied, it would mean that an accessory before the fact, to say, armed robbery, who well knows that the robber is armed with a deadly weapon and is ready to use it on his victim if the need arises, will bear no criminal responsibility for the killing which in fact ensues so long as his state of mind was that, on balance, he thought it rather less likely than not that the occasion for the killing would arise. Yet his complicity seems clear enough; the killing was within the contemplation of the parties, who contemplated "a substantial risk" that the killing would occur: Howard, Criminal Law, 3rd ed (1967), p276.

In a subsequent decision of the High Court in *Miller v R*,[73] this passage was cited in support of the view also expressed that a secondary party to a common unlawful enterprise was guilty of murder if death or grievous bodily harm was contemplated as a possible consequence of the common venture.

In that case, Miller and a man named Worrall entered into arrangements to pick up girls for Worrall's sexual gratification. They did so on a number of occasions. On some but not all, Worrall proceeded to murder the young women involved. It was argued on behalf of the appellant that only if he foresaw the killing of the girl as a probable consequence, should he be liable to conviction for murder. In a joint judgment, relying on *Johns* and in particular the reasoning of Stephen J, the Court concluded that Miller was guilty of murder if death or grievous bodily harm was foreseen as a possible consequence of the venture.

63 (1979-1980) 143 CLR 108, 118.
64 *Ibid*, p117.
65 Howard, 'Criminal Law' (3rd edn 1967) p276.
66 (1979-1980) 143 CLR 108, 119.
67 Referring to Sir Michael Foster's 'Crown Cases' (3rd edn 1809) p370.
68 Referring to Sir James Stephen's 'Digest of the Criminal Law' (8th edn, 1947) p21.
69 (1979-1980) 143 CLR 108, 120.
70 (1976) 136 CLR 62, 85-86.
71 (1985) 59 ALJR 417.
72 (1979-1980) 143 CLR 108, 119.
73 (1981) 55 ALJR 23, 25. The judgement of the court was a joint judgement of Gibbs, Stephen, Mason, Murphy and Aickin JJ.

In *Chan Wing-Siu v R*[74] the Judicial Committee of the Privy Council, also relying heavily on *Johns and Miller*, rejected an argument that probability was the appropriate criterion in cases of this kind. There, the appellant had, it would seem, also attempted to advance an argument that foresight of probable consequence meant foresight that it was more probable than not that death or grievous bodily harm would occur.

Sir Robin Cooke, in delivering the judgment of the Board, referred to the judgment of the High Court in *Johns* and in particular adopted the phrase a 'substantial risk'.[75] As well as *Miller*, he referred to a decision of the New Zealand Court of Appeal in *R v Gush.*[76] In Gush, the Court[77] had relied heavily also on the opinion of Stephen J in *Johns* and had defined the expression 'probable consequence' in s66(2) Crimes Act, 1961 to mean 'an event that could well happen'. In words, reminiscent of Stephen J, Sir Robin Cooke said:[78]

> What public policy requires was rightly identified in the submission for the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences, by reliance upon a nuance of prior assessment, only too likely to have been optimistic.

The opinion of Stephen J in *Johns* and Sir Robin Cooke in *Chan Wing-Siu* however appears to overlook the fact that the secondary party does not escape complicity altogether. As will shortly be seen, he will only be entitled to an acquittal if the death was a total departure from the scope of the joint enterprise. Otherwise, he will be guilty of manslaughter. Although this may be a more merciful verdict, the court has in a very serious case of manslaughter, a capacity to punish severely, thus protecting the public interest. Nor, it is submitted, is there any great merit in the argument posed by Stephen J, and also Sir Robin Cooke, that to adopt a standard of probability would involve the jury in assessments or nuances of probability that would be difficult to make. If juries are considered capable of making assessments such as these in cases involving foresight and murder in cases involving persons who whilst acting alone cause death, as we have seen in such cases as *Hyam,*[79] *Moloney,*[80] *Hancock*[81] or *Crabbe*[82] then so also they should be able to make them in cases of joint enterprise. In any event, the standard is not an assessment of odds; as the High Court emphasised in *R v Crabbe,* it is for the jury to determine whether death or grievous bodily harm was probable or likely, as opposed to a possible contingency.

74 [1985] 1 AC 169. The Judicial Committee consisted of Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Templeman and Sir Robin Cooke.
75 *Ibid, p176.*
76 [1980] 2 NZLR 72.
77 Ibid, pp94-96.
78 [1985] 1 AC 169, 177.
79 [1975] AC 55
80 [1985] AC 905.
81 [1986] AC 455.
82 [1985] 59 ALJR 417.

Further, it is submitted that it was wrong in *Johns* and *Chan Wing-Siu* to rely on *R v Anderson and Morris*[83] and other English cases such as *R v Smith.*[84] Those cases did not involve responsibility for murder. They were cases involving joint enterprise where the court was concerned with appeals from convictions for manslaughter.

In *R v Smith*, there had been a disturbance in a public house. Smith and one other went outside where they collected bricks which they proceeded to throw through the glass door of the premises, 'in order to tear up the joint.' Whilst they were engaged in this activity, another man, Atkinson stabbed the barman with a knife killing him. At the time of the stabbing, the appellant was outside the premises but he knew that Atkinson had a knife which he habitually carried. The jury found both Atkinson and the appellant guilty of manslaughter. It was from this verdict that Smith appealed.

In delivering the judgment of the Court of Criminal Appeal, Slade J[85] said that the 'whole case for the prosecution was that these four men were acting in concert to tear up the joint, or otherwise make an attack upon the bar and, if necessary, upon anyone, such as the bartender, who attempted to prevent them doing so and tried to drive them out of the public house'. For Smith, it was argued that although a party to an attack upon the barman, he certainly was not a party to the use upon the barman of a knife, which resulted in death. It was argued that this was a departure from the enterprise. Slade J, however, rejected this submission. He considered that:[86]

> it must have been clearly within the contemplation of a man like Smith ... that if the bartender did his duty to quell the disturbance and picked up the night stick, anyone whom he knew had a knife in his possession, like Atkinson, might use it on the barman as Atkinson did.

Slade J also expressed the view that it was difficult to imagine what would have been outside the scope of the concerted action;[87] 'possibly the use of a loaded revolver the presence of which was unknown to the other parties'.

Smith was followed shortly after by another decision of the Court of Criminal Appeal, *R v Betty,*[88] which also involved an unsuccessful appeal against a conviction for manslaughter where the fatal wound had been effected by a knife wielded by the other party to the common affray.

Both *Smith* and *Betty* were further approved by Lord Parker CJ in the Court of Criminal Appeal in *R v Anderson and Morris.*[89] That case also involved a successful appeal by a secondary party to an affray in which a person had been killed by the use of a knife. The trial judge in what was held to have been a misdirection, directed the jury that they could convict Morris of manslaughter, even though he did not know

83 [1966] 2 QB 110.
84 [1963] 1 WLR 1200.
85 *Ibid,* p1203.
86 *Ibid,* p1206.
87 *Ibid,* p1207.
88 (1964) 48 CrAppR 6.
89 [1966] 2 QB 111.

that the other man, Anderson, had a knife and it was an act outside the common design to which Morris was a party. It was in this context that the court approved a statement of principle advanced by counsel for Morris, during his argument:[90]

> where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that, if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act.

In the case of *Vandine*,[91] which was referred to with approval by Stephen J, and Mason, Murphy and Wilson JJ in their joint judgment in *Johns*, the Court of Criminal Appeal of New South Wales also applied *Anderson and Morris*, incorrectly. In *Vandine*, the co-adventurer in a plan to rob had been convicted of murder where death had resulted from the use of an iron bar wielded by one of his accomplices. In upholding the conviction for murder, the Court rejected the assertion raised in argument by the appellant that he did not know that the accomplice was carrying a bar, and emphasised that[92] 'the reasoning in *Smith's* case . . . applied with equal force to the instant case'.

R v Anderson and Morris was, however, with respect correctly applied in the High Court of Australia in *Varley v R.*[93] There, police officers had embarked upon a plan to rough up and intimidate the deceased so that he would pay over part of the proceeds of an illegal transaction in which they had participated. The deceased was killed as a result of one of the conspirators using a baton or cosh. Varley, who did not wield the weapon, was convicted of manslaughter. He argued that the use of the baton was beyond the scope of the common purpose so that he was not criminally liable for the consequences of its use. In any case, he contended that the jury ought specifically to have been told that they must be satisfied that the use of the baton or cosh was within the scope of the common enterprise.

Barwick CJ,[94] with whom Stephen, Mason, Jacobs and Aickin JJ agreed, said, that 'even on the assumption that the appellant did not know of the availability of the cosh, or of its intended use . . . it could not reasonably be held that the use of such an instrument or weapon as a baton or a cosh was not in all the circumstances within the scope of the common design to beat or "rough up" the deceased'. Even if its use was not foreseen by the appellant, it was 'no more than an unexpected incident in carrying out the common design'. *Anderson and Morris* was distinguished on the basis that a knife was used which was capable of being regarded as outside the common purpose. It was considered that here[95] 'even if not actually contemplated', the use of the baton or cosh

90 *Ibid*, p118.
91 [1970] 1 NSWR 252.
92 *Ibid*, p257. A similar error appears to have been made by the Court of Criminal Appeal in Ward (1987) 85 CrAppR 71.
93 (1976) 51 ALJR 242.
94 *Ibid*, p246.
95 *Idem.*

'was clearly a likely means of carrying out the plan of beating up' the deceased.

Varleys case, rightly, makes it clear that a person will be liable for manslaughter even if he did not turn his mind to the possibility of death arising from the joint enterprise, so long as death could objectively be regarded as an incident fairly coming within the scope of the common purpose. The reason for this is that a person in voluntarily undertaking a joint venture which involves the prospect of violence exposes others to peril or harm. If death should result, then he must accept some responsibility for his part in joining the enterprise which culminates in death.[96]

The approach in *Anderson* and *Morris*[97] was further approved in England in *R v Reid,*[98] a decision of the Court of Criminal Appeal. There, a conviction for manslaughter was upheld where Reid argued that he did not think that the others would use their weapons and carry out a threat to murder. Lawton LJ said:[99]

> When two or more men go out together in joint possession of offensive weapons such as revolvers and knives and the circumstances are such as to justify an inference that the very least they intended to do with them is to use them to cause fear in another, there is, in ourjudgment, always a likelihood that, in the excitement and tensions of the occasion, one of them will use his weapon in some way which will cause death or serious injury. If such injury was not intended by the others, they must be acquitted of murder; but having started out on an enterprise which encouraged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter.

Another case of importance in the High Court of Australia is *Markby v R.*[100] In that case, Markby and his confederate Holden, were convicted of the murder of a man whom they had arranged to meet for the purpose of selling drugs. Holden shot the deceased with a rifle which Markby knew to be loaded. The judge had directed the jury that Markby could be found guilty of manslaughter only if Holden was found guilty of manslaughter. In a judgment delivered by Gibbs ACJ, with whom Stephen, Jacobs, Murphy and Aitken JJ agreed, the Court ruled that this constituted a misdirection. Gibbs ACJ said:[101]

> If... two men attack another without any intention to cause grievous bodily harm, and during the course of the attack one man forms an intention to kill the victim, and strikes the fatal blow with that intention, he may be convicted of murder while the other participant in the plan may be convicted of manslaughter—*R v Smith, R v Betty, R v Lovesay.*

96 See also *R v Ryan and Walker* [1966] VR 553; *R v Lovesay* [1969] 2 All ER 1077; *R v Morrison* [1968] NZLR 156; *R v Larkin* (1942) 29 CrAppR 18, 23 per Humphreys J.
"Where the act which a person is engaged in is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter." Cited by Brennan J in *Boughey v R* (1986) 65 ALR 608, 627. Also in *R v Reid* (1975) 62 CrAppR 109.

97 [1966] 2 QB 111.

98 (1975) 62 CrAppR 109.

99 *Ibid,* p122.

100 (1978) 140 CLR 108, 112-113.

101 *Ibid,* p112.

The dictum of Lawton LJ in Reid was expressly cited by Gibbs ACJ with approval, as were the cases *Anderson and Morris* and *Varley v R.* As to responsibility for murder, Gibbs ACJ also made the following observation:[102]

> if two men go out to rob another, with the common design of using whatever force is necessary to achieve their object, even if that involves the killing of, or the infliction of grievous bodily harm on, the victim, both will be guilty of murder if the victim is killed.

Markby, however, did not involve any discussion of the appropriate standard to be adopted in regard to foresight in order to find a person party to a joint enterprise guilty of murder, when there was no intent to cause death or grievous bodily harm. It was left to the High Court in *Johns* to decide that point. Strangely, in *Johns* Stephen J, when referring to English cases such as *Smith* and *R v Anderson and Morris*, made no mention of cases such as *Varley* or *Markby* where the English authorities were it is submitted interpreted in their proper light.

More recently, the English Court of Appeal in *R v Jubb*[103] had reason to consider the question of secondary parties, joint enterprise and complicity to murder. The appellants had planned to rob an elderly man and each blamed the other for the violence that had resulted in death. Both were convicted of murder. Their appeals against the judges directions were dismissed. The court referred to *Chan Wing-Siu*[104] but observed that in relation to whether what had occurred was in the contemplation or within the agreement of the participants in the joint venture, the trial judges use of the phrase might well involve killing, meant probably involve killing and this had been made clear to the jury. The Court, however, said that in order to avoid uncertainty in the future, it would be preferable if judges were to use a constant phrase and 'probably'[105] would be the proper one to use.

In a comment on *Jubb*, Professor JC Smith,[106] with respect, appeared to fall into the same error as Stephen J in *Johns* and Sir Robin Cooke in *Chan Wing-Siu.* Professor Smith, in his short note, in the *Criminal Law Review*, postulated that insofar as it was suggested that complicity for murder should depend on foresight of probable consequences,[107] 'it might lead to the acquittal of many accomplices who are morally responsible for murder'. It is, however, submitted that the secondary party who does not foresee death or grievous bodily harm as a probable consequence does not entirely escape the consequences of embarking upon the joint venture. That is because, unless death occurred in circumstances amounting to a total departure from the common venture, he will be guilty of manslaughter. In those more serious cases of manslaughter, he can be severely punished.

102 *Idem.*
103 [1984] CrimLR 616.
104 [1985] AC 168.
105 [1984] CrimLR 616, 617. But cf *R v Ward* (1986) 85 CrAppR 71, and see further *R v Smith* [1988] CrimLR 616.
106 *Idem.*
107 *Idem.*

Thus, the argument advanced here, is that cases such as *Johns, Miller* and *Chan Wing-Siu* are fundamentally flawed both in principle and in policy. They are inconsistent with the approach in cases involving sole responsibility for a death like *Hyam, Maloney* and *Hancock* in England and *Pemble, La Fontaine* and *Crabbe* in Australia. Rightly in *Johns, Miller* and *Chan Wing-Siu* the Courts disapproved of a test based on foresight of consequences more probable than not, but they were, it is submitted, incorrect not to adopt a test which emphasised the distinction between a probable consequence, and one that was merely possible.

Finally, on this point, the issue is not merely one of semantics. There is potential for injustice in the law as settled in *Johns, Miller* and *Chang Wing-Siu.* That this is so is demonstrated by the case of *R v Betts and Ridley,*[108] a decision which Stephen J, in *Johns v R,*[109] also appeared to approve. Betts and Ridley had entered into a plan, which involved a measure of violence, to rob an elderly man named Andrews whom they knew to carry large sums of money on behalf of his employer. During the course of the roberry, Betts struck Andrews a blow either with his clenched fist but much more probably with some kind of weapon, as a result of which he died. Meanwhile, Ridley had remained in the car to which Betts returned after the robbery with the cash which was divided up between the two men.

Betts did not give evidence; but Ridley did. He accepted that he had been a party to an agreement that Andrews would be robbed, but said that he anticipated only that the deceased would be pushed down and the bag snatched from him, and he was not a party to any agreement that violence of any kind should be used. Both Betts and Ridley were found guilty of murder and sentenced to death. Avory J[110] in the Court of Criminal Appeal, it is submitted, rightly said that such a scheme to rob a man in such circumstances could not be carried out without the probability at least of violence having to be used in order to get possession of the money.

Ridleys counsel, however, argued that before they could convict Ridley of murder, they should have been directed that there existed between the two men a common design that such violence should be used as, in the contemplation of a reasonable man, would be likely to result in death or at least in grievous bodily harm to the intended victim. Insofar as the test for complicity argued for was objective, that is clearly inconsistent with modern notions of criminal responsibility based on subjective foresight; but what is important here is the argument (based as it was on authorities such as Easts *Pleas of the Crown*[111] and *Russell on Crime*)[112] that death had to follow as a likely consequence of the common purpose. Avory J said:[113]

> Even if Betts did vary in the manner of execution of this agreed plan to rob, and obviously it must have been a plan to rob with some degree of violence, Ridley being present as a principal in the second degree, was equally responsible.

108 (1930) 29 Cox CC 259.
109 (1979-1980) 143 CLR 108, 122.
110 (1930) 29 Cox CC 259, 262.
111 1, East, 'Pleas of the Crown' pp 256-257 cited in argument.
112 'Russell on Crimes' (7th edn), pp 124-125 cited in argument.
113 (1930) 29 Cox CC 259, 264.

The question, however, that must be asked is this; did Ridley's actions merit a conviction for murder and sentence of death for his participation in this unlawful escapade? The common plan did not even appear to conceive of the use of a weapon which the medical evidence tended to suggest Betts used. What ultimate control could Ridley have had over Betts actions, given that he was not at the scene of the crime, but in a car nearby? The appropriate verdict in the case of Ridley should have been manslaughter and a severe sentence of imprisonment. A conviction for murder and a sentence of death was as unjust as it was unnecessary in the public interest.

Thus, it is submitted that at common law in joint unlawful enterprise cases, a secondary party should not be found guilty of murder where a death arises during the course of carrying out the plan unless death or grievous bodily harm was intended, or was foreseen as a probable consequence. If the jury found that he did not so intend or foresee death or grievous bodily harm as a probable consequence, then unless the death could fairly be described as a total departure from the common purpose, he should be found guilty of manslaughter. That is so even if death was an unusual occurrence, to which he did not really turn his mind. This is because in voluntarily associating himself in an unlawful activity which envisaged violence, he exposed another to the risk of injury, and so should not be permitted to entirely escape the consequence of his actions.[114]

Complicity in Joint Enterprise Cases Involving Death in Jurisdictions which have Codes or Statutory Provisions Rendering Secondary Parties Liable for the Probable Consequences of the Common Unlawful Venture

In relation to the responsibility or complicity of secondary parties for collateral crimes arising out of a joint enterprise situation, statutory provisions, whilst generally defining responsibility in terms of the criterion 'probable consequences', may vary greatly in relation to the issue of whether there is a requirement for the secondary party to have foresight at all.

In New Zealand, s66(2) *Crimes Act*, 1961 embodies an entirely subjective test of foresight. Section 66(2) provides:

> Where two or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

Australian jurisdictions by comparison tend to adopt an objective approach. A party will be held responsible for a crime in Queensland, Tasmania and Western Australia under the Codes in force there if the commission of the crime was a probable consequence of the common

114 See *R v Larkin* (1942) 29 CrAppR 18 and fn 96 above.

unlawful purpose.[115] These provisions are inconsistent with any modern concept of criminal responsibility based on subjective theory. As such they have the potential to work injustice, and should be the subject of reform. Murder, for example, may objectively be viewed as a probable or likely consequence of the common venture, yet subjectively not be regarded as likely or probable by the secondary party. In many cases involving joint enterprise, even those where weapons are carried, death or harm is regarded as no more than a possible or unlikely consequence by the confederates. Many may give no really serious thought to it at all. If death arises, it is argued here that those responsible should be guilty of manslaughter and be rightly liable for heavy penalty, but should not be convicted of murder.

The New Zealand provision of s66(2) *Crimes Act*, 1961, were considered recently by the Court of Appeal in *R v Tomkins*.[116] This case had an unusual twist to it. Tomkins was one of three teenagers who robbed a taxi driver at knife point. At the end of a lengthy drive, the taxi driver was taken from the car by Tomkins and his friend Tai, at a remote spot. Another youth, found guilty of manslaughter by the jury, remained in the car. Tomkins and Tai walked the taxi driver to some adjacent bush where Tai stabbed him to death. Tai pleaded guilty to murder. Tomkins maintained that he thought that the weapons they had taken with them were only to be used to scare. A jury at his first trial convicted him of murder, but on a retrial he was found guilty of manslaughter. Towards the end of his sentence, he appealed in person on the basis that the trial judge should not have put the option of manslaughter to the jury.

In delivering the judgment of the Court of Appeal, Cooke P[117] approved of *R v Reid*[118] and *Markby v R*[119] and held that a verdict of manslaughter was possible, as an intermediate verdict. Cooke P said:[120]

> Accordingly in joint enterprise cases where an accused is charged with murder as a party it may be appropriate to direct as follows. He will be guilty of murder if he intentionally helped or encouraged it. He will also be guilty of it if he foresaw murder by a confederate, in the kind of situation which arose as a real risk. But if he knew only that at some stage in the course of carrying out of the criminal plan there was a real risk of killing short of murder, he will be guilty of manslaughter. So too if he foresaw a real risk of murder but it was committed at a time or in circumstances very different from anything he ever contemplated: so different that the jury are not satisfied that the murder should fairly be regarded as occurring in the carrying out of the plan. In the latter case they can still convict of manslaughter if satisfied that he must have known that, with lethal weapons being carried, there was an ever-present real risk of a killing in some way.

These guidelines, however, appear somewhat confusing and uncertain in a number of respects; possibly because the court strained to strictly

115 On the distinction between liability under a Code and the common law, see the judgment of Derrington J in *R v Beck* [1990] 1 QdR 30, 52. Also, *Stuart v R* (1974) 134 CLR 426.
116 [1985] 2 NZLR 253.
117 *Ibid,* p254.
118 (1975) 62 CrAppR 109.
119 (1978) 140 CLR 108.
120 [1985] 2 NZLR 253, 256.

apply the wording of s66(2) which requires knowledge that 'the commission of the offence was known to be a probable consequence of the prosecution of the common purpose'.

First, there is the use of the terminology or phrases such as 'real or substantial risk' in substitution for probable consequence, an issue which will be considered shortly: secondly, the phrase a 'real risk of killing short of murder'. The latter would seem to suggest a killing by the principal party that was other than intentional or was the subject of provocation in law. Finally, it is uncertain what is meant by a murder which is foreseen as a real risk, but which 'was committed at a time or in circumstances very different from anything he ever contemplated', such that it could not fairly be regarded as occurring in the carrying out of the common plan, so entitling a secondary party to manslaughter. In this regard, it is difficult to see how a murder could be seen as a real risk and yet, at the same time, be outside the scope of the common plan.

Guidelines such as these are, with respect, at best apt to confuse juries more than assist. It is submitted that the better approach is for the jury to decide whether murder in the sense defined in the legislation was a probable consequence of the common purpose. If it was, then the next question for the jury to decide was did the accused appreciate that murder was a probable consequence? If he did not, but conceived of it only as a possible consequence he will be guilty of manslaughter. Even if, as is very often the case, he did not turn his mind to the issue at all at the time, he will be liable of manslaughter if death or serious harm was within the scope of the common venture. That is as we have considered because liability of a person for manslaughter, does not require foresight of consequences, only the voluntary embarking on a course of unlawful conduct which exposes others to a risk of violence and injury.[121] In order to accommodate the express provisions of s66(2) *Crimes Act*, 1961 a person who at least voluntarily joins a plan where weapons are taken must, as Cooke P stated, be taken to know that there is an 'ever present real risk' or a possibility that somebody could be seriously injured or killed. Only where death arose in a manner constituting a total departure from the common purpose, as for example where weapons were unexpectedly introduced into an affray, could a secondary party expect an acquittal.

In jurisdictions which provide an entirely objective test such as Queensland, Tasmania and Western Australia, the jury first have to determine whether murder in the sense defined in the respective Codes was a probable consequence of the venture. If so, conviction for murder will result irrespective of the accused's foresight of the consequences. If the jury, however, conclude that, although an incident within the scope of the venture, it was not a likely occurrence, he will be guilty of manslaughter because he voluntarily embarked on an unlawful venture which was hazardous and exposed others to peril. Only if death is regarded as a total departure from the scope of the common plan, should a secondary party be acquitted, under this kind of provision. For reasons

121 *R v Larkin* (1942) 29 CrAppR 18.

given above such provisions should be reformed to reflect a subjective approach.

Real or Substantial Risk and Responsibility for Murder

We have seen how in *Johns v R*,[122] Stephen J quoting Professor Howards *Criminal Law*, used the expression substantial risk to describe the degree of foresight of risk in regard to the complicity of a secondary party where death arises from an unlawful enterprise. The High Court in *Miller v R*[123] also appeared to approve the use of this expression.

In the Privy Council, in *Chan Wing-Siu*, Sir Robin Cooke, on the issue of remoteness, said:[124]

> In cases where an issue of remoteness does arise it is for the jury (or other tribunal of fact) to decide whether the risk as recognised by the accused was sufficient to make him a party to the crime committed by the principal. Various formulae have been suggested—including a substantial risk, a real risk, a risk that something might well happen. No one formula is exclusively preferable; indeed, it may be advantageous in a summing up to use more than one. For the question is not one of semantics. What has to be brought home to the jury is that occasionally a risk may have occurred to an accused's mind—fleeting or even causing him some deliberation—but may genuinely have been dismissed by him as altogether negligible. If they think there is a reasonable possibility that the case is in that class, taking the risk should not make that accused a party to such a crime of intention as murder or wounding with intent to cause grievous bodily harm.

There is, it is submitted, no objection to the use of these expressions to describe an incident which is a possible consequence. But it is otherwise, where the expression is used to describe an event which is a probable consequence. Attention has already been directed to cases such as *Crabbe*[125] in Australia and *Hancock*[126] in England where the courts have been anxious to preserve the distinction between a probable and possible consequence. Yet, in *Chan Wing-Siu* Sir Robin Cooke referred with approval to the judgment of Richmond P in *R v Gush*[127] in the Court of Appeal of New Zealand. In that case as we have seen Richmond P, relying heavily on the judgment of Stephen J in *Johns v R*, defined probable consequence in s66(2) of the *Crimes Act*, 1961 as meaning an event that 'could well happen'.[128] The appellant in *Gush*, unfortunately, had also argued that the expression meant more probable than not, when the real distinction was between a probable and a possible consequence.

In subsequent cases, the New Zealand Court of Appeal has steadfastly held to the view that expressions such as real risk, substantial risk, or an event that could well happen were appropriate phrases either to describe a probable consequence, or to describe an incident that was a

122 (1979-1980) 143 CLR 108, 119.
123 (1981) 55 ALJR 21, 25.
124 [1985] 1 AC 168, 179.
125 (1985) 59 ALJR 417.
126 [1986] AC 455.
127 [1980] 2 NZLR 92.
128 *Ibid*, p94.

likelihood. In *R v Doyle*[129] the Court of Appeal rejected an argument that a real risk was not an adequate synonym for probable consequence, relying on the earlier decision of *R v Gush*. Shortly afterwards, in *R v Pirie*,[130] objection was taken to the use of the expressions, real or substantial risk, something that might occur, an event that might well happen, in substitution for the word likely to cause death embodied in the extended definition of murder under s167(d) of the *Crimes Act*, 1961. That section provides that an offender is guilty of murder if 'for any unlawful object he does an act that he knows to be 'likely' to cause death, and thereby kills a person, though he may have desired that his object should be effected without hurting anybody'.

The Court of Appeal, however, held that these expressions were adequate to convey the notion of likelihood. Cooke P rejected an argument that cases such as *Moloney or Hancock* were in any way relevant to s167(d) of the New Zealand Crimes Act.[131] In rejecting the appellants argument, the Court had regard to the decision of the High Court of Australia in *Boughey v R*,[132] which had only recently been decided.

Boughey's case involved, *inter alia*, a similar argument as that advanced in *R v Pirie* namely that an event described by the trial judge as 'something that may well happen', was insufficient to describe a likelihood of death in terms of s157(1)(c) of the Criminal Code of Tasmania. Again, it would seem that the applicant attempted to argue that the standard was more likely than not, odds on or more than 50 percent. In a joint judgment, Mason, Wilson and Deane JJ said that invoking such a standard would be liable to mislead or to border on the unreal to direct the jury in terms which required them to convert the knowledge of the accused into some such degree of mathematical probability.[133]

They emphasised further, however, that the gravity of the charge required:[134]

> that the content of the requirement that an accused knew of the probability or likelihood that his acts would cause death be not discounted.

The majority said,[135] 'ordinarily, if it was necessary to explain probability, it should be in the context of a distinction between the possible and probable consequence of this act'. *R v Crabbe*[136] was referred to as authority.

Despite these observations, however, Mason, Wilson and Deane JJ[137] went on to approve of the use of expressions such as a substantial or real chance as phrases that reflected something that was likely to happen.

129 CA 234/85 19 December 1986.
130 [1987] 1 NZLR 66.
131 *Ibid*, p82.
132 (1986) 65 ALR 609. See also *Gallagher v R* (1986) 60 ALR 404 , 406, 412, 414. Also *Kural v R* (1986) 61 ALR 139. *Saad v R* (1987) 61 ALR 243, 244.
133 *Ibid*, p616.
134 *Idem*.
135 *Idem*.
136 (1985) 59 ALR 417.
137 (1986) 65 ALR 609, 618.

In separate judgments on this aspect of the case, Gibbs CJ and Brennan J disagreed. Gibbs CJ[138] agreed that there should not be any gloss put on the ordinary words to express an 'odds on chance'. In his opinion,[139] the jury could be usefully directed to explain that a possible incident, as opposed to a probability was insufficient to convey a likelihood. He said, however,[140] that the word chance should be avoided, even if accompanied by such words as 'good' or 'substantial' or 'risk'. On the facts of the case, he considered that the judge had conveyed the idea that death had to be more than a possibility. Nowhere, in his opinion had a likelihood been equated with a possibility.

Brennan J put the issue succinctly, when he said:[141]

> Knowledge that there is a good chance that an event may happen is a different state of mind from knowledge (or foresight) that the event will probably happen. One state of mind is an appreciation of a risk, perhaps a substantial risk; the other state of mind is an expectation. I do not put this on any basis of mathematical odds. It is simply that one form of words conveys the meaning of a state of mind different from the state of mind meant by the other form of words.

Brennan J, unlike Cooke P in *R v Pirie*,[142] considered that cases such as *Hancock*,[143] *Moloney*[144] and *Crabbe*[145] were relevant insofar as they emphasised that where murder is involved, foresight of death 'must be so probable or likely that the doing of the fatal act is as heinous as if the accused had wished that result'.[146]

It is submitted however that if Judges in the High Court of Australia are in disagreement over the issue of whether expressions such as real risk or substantial risk are adequate expressions to reflect a probability, that in itself indicates how unsatisfactory the expressions are as guides for a jury who have to wrestle with issues of this kind, in cases having very serious consequences.

It is, perhaps, useful, in this regard, to examine the case which appears to have been of some influence in the introduction of the expression substantial or real risk in the criminal law. In *Johns v R*[147] Stephen J referred not only to Professor Howards use of the expression substantial risk,[148] in his *Criminal Law*, but also referred[149] to the judgment of Lord Reid in *Overseas Tankship (UK) v The Miller Steamship Co Pty Ltd (the Wagon Mound (No 2))*.[150] In that case, Lord Reid considered how in the law, probable was used with various shades of meaning, an observation,

138 *Ibid*, pp 611-612.
139 *Idem*.
140 *Idem*.
141 (1986) 65 ALR 609, 632.
142 [1987] 1 NZLR 66, 82.
143 [1986] AC 905.
144 [1985] AC 905.
145 (1985) 59 ALJR 417.
146 (1986) 65 ALR 609, 633.
147 (1979-1980) 143 CLR 108.
148 *Ibid*, p119.
149 *Ibid*, p121.
150 [1967] 1 AC 617.

which in *R v Gush*,[151] Richmond P noted. Lord Reid said that 'sometimes it appears to mean more probable than not, sometimes it appears to include events likely but not very likely to occur, sometimes it has a still wider meaning and refers to events the chance of which is anything more than a bare possibility'.[152]

Whilst these observations may be true, this only serves to emphasise how in the criminal law, because of the very serious consequences that may accompany conviction, great care has to be taken with the meaning of expressions, to ensure that they receive their correct emphasis, or nuance.

Indeed, it is educative to consider briefly the facts of the *Wagon Mound (No 2)* because an analysis of those facts does not support the notion of a real risk being regarded as equivalent to a likelihood or a probable consequence.

In that case, oil was discharged into Sydney Harbour as a result of the carelessness of an engineer on the ship, the Wagon Mound, which was docked. As a result, the oil caught fire extensively damaging two ships the property of the appellants that were docked also in the harbour undergoing repairs. The fire was probably caused by hot metal falling from the ship undergoing repairs, on to some flammable material, causing it to ignite the oil. Evidence was given that oil of this character was extremely difficult to ignite in the open.

The trial judge had found that reasonable persons in the position of the officers of the Wagon Mound would regard furnace oil as very difficult to ignite on water. Their personal experience would probably have been that this had very rarely happened. As to the risk of fire from spillage, they would have regarded it as a possibility; but one which would become an actuality only in very exceptional circumstances. The chances of the exceptional circumstances occurring would be regarded as remote.

The Judicial Committee of the Privy Council, however, disagreed with the finding of the trial judge that negligence was not established. Lord Reid considered that some risk of fire would have been present to the mind of a reasonable man in the shoes of the ships engineer. In his opinion, there was a 'real risk'[153] which should not have been discounted. If the fire did start, serious damage to ships or other property was not only foreseeable, but very likely.[154] Thus a reasonable man should have taken steps to eliminate it.

The *Wagon Mound (No. 2)* illustrates that a real risk sufficient to attract negligence, may be one which is very unlikely to occur. Indeed, in a subsequent case *C Czarnikow Ltd v Koufos*[155] Lord Reid said of the *Wagon Mound (No 2)*[156] that it could not have been decided as it was

151 [1980] 2 NZLR 92, 94.
152 [1967] 1 AC 617, 634-635.
153 *Ibid*, p643.
154 *Idem*.
155 [1969] 1 AC 350.
156 *Ibid*, p390.

unless the extremely unlikely fire should have been foreseen by the ships officer as a real danger. Lord Reid went on to say:[157]

> It appears to me that in the ordinary use of language there is a wide gulf between saying that some event is not unlikely or quite likely to happen, and saying that it is a serious possibility, a real danger, or on the cards.

Another more ordinary illustration is of the surgeon who gives advice to a person suffering from a serious health condition, which whilst not life threatening, seriously impairs enjoyment of life. A person may well agree to an operation to enhance the quality of life even though advised that there is a real or substantial risk he may die. But if the advice is that it is likely or it is probable that he will die, he would be unlikely to take the risk.

It is submitted the conflict in the High Court of Australia in *Boughey*[158] is not a mere matter of semantics. The use of terms such as real or substantial risk, an event that might well happen, do not reflect adequately expressions such as likelihood or probability as they have come to be known in the criminal law. They have the capacity to confuse a jury, and further, they have the serious potential to achieve injustice in the criminal law. Finally, there is no necessity to adopt these expressions. It is sufficient as Gibbs CJ said in *Crabbes*[159] case, and in *Boughey*[160] also, to direct a jury in terms of the distinction between a consequence that is probable or likely, and a consequence that is a possibility only.

Conclusions

A person should not be convicted of murder either at common law or under statutory provisions which embody subjective notions of criminal responsibility such as s66(2) *Crimes Act*, 1961 (NZ) where he is a secondary party to a joint enterprise unless he either intends death or serious harm to follow, or proceeds knowing full well that such a consequence is probable. Only if this degree of indifference is exhibited should his conduct be regarded as sufficiently evil to attract the stigma and status of murder.

It is submitted that the common law approach to complicity of secondary parties in joint enterprise cases where a death results should be based upon foresight of probable consequences, and not possible consequences as is reflected in the decisions of the High Court of Australia in *John v R*,[161] *Miller v R*[162] and in the decision of the Privy Council in *Chan Wing-Siu v R.*[163]

It is wrong in principle at common law that a person who participates in a joint enterprise, but does not directly cause the death of another,

157 *Idem.*
158 (1986) 65 ALR 609. See further Anakin and others, 'Case and Comment', (1989) 13 CrimLJ 405, 409-410.
159 [1985] 59 ALJR 417, 420.
160 (1986) 65 ALR 609, 612.
161 (1979-1980) 143 CLR 108.
162 (1981) 55 ALJR 23.
163 [1985] AC 168.

should be at greater risk of conviction for murder than one who whilst acting alone directly causes the death of another. Where the issue of foresight is involved, the approach in joint enterprise cases should be that which is reflected in the decisions of the House of Lords in *Hancock*[164] and of the High Court of Australia in *Crabbe*.[165]

Not only is the approach of the courts wrong in principle, but neither is there any compelling reason why in the public interest a secondary party to a joint enterprise should be at greater risk of conviction for murder than a person who actually kills. In the great majority of cases, manslaughter will be the only alternative verdict available and the sentencing process may truly reflect those cases where, whilst escaping conviction for murder, the actions of a party in voluntarily embarking on a dangerous and unlawful enterprise are deserving of severe punishment.[166]

In so far as a verdict of manslaughter is concerned, this should follow if death is fairly regarded as within the scope of a joint enterprise even if the secondary party does not regard it as possible, or even turn his mind to that eventuality. Manslaughter is appropriate because he has exposed another to the risk of harm as a result of voluntarily embarking on an unlawful venture, which envisages a measure of violence.

Only if death was a total departure from what could be described as the scope of the joint unlawful enterprise should a person be acquitted.

The issue of intermediate verdicts in joint enterprise cases applies also in jurisdictions which have Codes or statutory provisions providing responsibility for participation on foresight of probable consequence. A modern approach to criminal law dictates that those jurisdictions such as Queensland, Tasmania or Western Australia which have provisions entirely objective in nature should reform their laws to accommodate a subjective approach based on the party's knowledge or foresight. Legislative provisions such as these have the potential to achieve injustice and are out of date in terms of any modern subjectivist approach to criminal law. Intermediate verdicts of manslaughter are, however, available where the legislative provisions are entirely objective. If the jury considers that death or serious harm, although not a probable or likely consequence, was nevertheless an incident that could not be regarded as a total departure from the scope of the unlawful enterprise, manslaughter should be the appropriate verdict.

Finally, the courts should avoid confusing juries with phrases such as real or substantial risk, to describe terms well understood in the criminal law such as probable consequence or likelihood. Such expressions do not in any ordinary sense of the words equate with a probable or likely consequence. They are misleading as synonyms and have the potential to expose persons to a greater risk of conviction for murder, than is the case where a judge directs the jury in terms which convey the distinction between a probable or likely consequence and one that is a possibility only.

164 [1986] AC 905.
165 (1985) 59 ALJR 417.
166 R v Larkin (1942) 29 CrAppR 18.