Jogee, parasitic accessory liability and conditional intention

By Christopher Cowley, School of Philosophy, University College Dublin

Final draft, before eventual inclusion in: Krebs B. (2019) *Accessorial Liability after* Jogee*,* Hart Publishing.

In *R v Jogee* [2016] the UK Supreme Court (SC) rejected so-called parasitic accessory liability (PAL) as a 'wrong turn'.[1] As part of their rejection of PAL, the SC sought to make room for conditional intention. In the facts of the case, Jogee and Hirsi seem to have been engaged in a 'common plan' of assault, during which Hirsi committed a more serious 'collateral' offence (murder) against a man named Fyfe. Under PAL Jogee was also held liable for the murder since, according to the trial judge, it could be reasonably inferred that, before carrying out the common plan, Jogee had *foreseen* the *possibility* (not just the likelihood) that Hirsi might murder, and despite such foresight Jogee had continued with the common plan. Instead of this PAL conception of the facts, the SC now claimed that Jogee's foresight of Hirsi's murder of Fyfe was to be taken as defeasible *evidence* of Jogee's prior *conditional intention* that the collateral offence be committed. The SC ordered a re-trial, at which Jogee was found to have lacked such a conditional intention, and was therefore guilty not of murder but of manslaughter (under a different logic).

This paper will examine the *Jogee* case, and the SC's arguments for the rejection of PAL in favour of conditional intention. I argue that conditional intention is too problematic a notion for the facts of *Jogee*, and indeed for group offences generally, and even in its more natural home of single-agent crimes such as theft, it remains ambiguous in various ways.

1. From PAL to conditional intention

Since one of my claims will be that conditional intention does not sit comfortably with the facts of *Jogee*, let me postpone a discussion of that case until later, and concentrate instead on one of the SC's own schematic example in *Jogee*, which I shall call the Bank Robbery:

> The bank robbers who attack the bank when one or more of them is armed no doubt hope that it will not be necessary to use the guns, but it may be a perfectly proper inference that all were intending that if they met resistance the weapons should be used with the intent to do grievous bodily harm at least.[2]

What is the difference between PAL and conditional intention in this context? Let us assume that there are only two robbers, D and P, with a common plan to commit the Bank Robbery. In terms of the robbery, I shall assume that both D and P will be uncontroversially guilty as co-principals. During the robbery P carries a gun, and D knows that P carries it. Everything goes according to plan during the robbery, until the unarmed security guard takes a lunge at P; P pulls his gun and shoots the guard dead. (Even if P's intention had only been to disable the guard to safeguard the robbery and the getaway, nevertheless he acted with the intention to cause serious injury, and following *Moloney* and *Woollin* this is sufficient mens rea for murder.[3]) The killing is the collateral offence, and P is uncontroversially liable for murder. The question then concerns the link between D and the murder.

---

[1] The term PAL was coined by JC Smith, 'Criminal liability of accessories: law and law reform' (1997) LQR 455. The term has also been called 'joint enterprise liability', but I will avoid this because it is misleading.

[2] *Jogee* [2016] UKSC 8, [2017] AC 387 para [92].

[3] *R v Moloney* (1985) 1 AER 1025; *Woollin* [1999] AC 82.

According to PAL, if (i) it can be inferred that D foresaw the possibility – a possibility that he thought more than negligible, but perhaps improbable – of P murdering the security guard, and (ii) despite such foresight D continued with the common plan, then D will also be found guilty of the murder. One way for the prosecution to discover the relevant foresight would be by establishing that D had knowledge of the weapon which P was bringing to the scene, assuming that P had no other plausible reason for bringing such a weapon (i.e. he was not a butcher bringing a carving knife to her workplace). Even if D genuinely and reasonably believes that P has brought the weapon merely to frighten the bank employees and customers into docile compliance, still the possibility of the weapon's use with lethal consequences is foreseeable. Importantly, under PAL, D's *attitude* to the presence of the weapon is irrelevant: D may be indifferent about whether it will be used, or indeed she may positively *oppose* its use, but the important fact is that D continued with the common plan despite such knowledge and opposition; that is enough for full liability.[4]

Under the SC's rejection of PAL in *Jogee*, D's foresight of the possibility of P committing the collateral offence is still relevant, but only as evidence – essentially insufficient and defeasible evidence – of D's prior *conditional intention* that the collateral offence be committed 'if the occasion arose';[5] as such the potential collateral offence is brought into the scope of the common plan, to which D and P signed up in advance. This focus on intention is particularly important in the Bank Robbery example, where the collateral offence is murder: focusing on intention brings the legal treatment more in line with the general thought that the highest mens rea should be necessary to establish an act as the worst of offences.

The inclusion of the conditional intention within the scope of the common plan may be explicit, or – more controversially – it may inferred by the jury as having been tacitly understood between the two planners. In the Bank Robbery example, the idea is that both D and P share the tacit conditional intention that the security guard be disabled (i.e. perhaps by either of them, perhaps only by the weapon-carrier) 'if the occasion arose', i.e. if and when the guard foreseeably attempts to impede the robbery or the getaway. As *Jogee* put it:

> There can be no doubt that if [D] continues to participate in crime A [the common plan] with foresight that [P] may commit crime B [the collateral offence], that is evidence, and

[4] The most famous defence of PAL is Simester's "change of normative position" argument, which he articulated in 'The mental element in complicity' (2006) LQR 2006, and which was also cited approvingly by the Law Commission in its own defence of PAL in its Report no. 305, *Participating in Crime* (2007) at [3.51]. Here is Simester's argument:

> Through entering into a joint [criminal venture], [D] changes her normative position. [D] becomes, by her deliberate choice, a participant in a group action to commit a crime. Moreover her new status has moral significance: she associates herself with the conduct of the other members of the group in a way that the mere aider and abettor, who remains an independent character throughout the episode does not. Whereas aiding and abetting doctrines are grounded in [D's] contribution to another's crime, joint [criminal venture] is grounded in affiliation. [D] voluntarily subscribes to a cooperative endeavour, one that is identified by its shared criminal purpose. As such, joint [criminal venture] doctrines impose a form of collective responsibility, predicated on membership of the unlawful concert… By offering allegiance to the enterprise, [D] implicitly condones its furtherance. (pp. 598-600)

[5] Jogee at para [94]. (See also para [87].) In the subsequent paragraph [95], the SC used to phrase 'if necessary', which is not quite the same thing as 'if the occasion arose'. The emphasis on an *occasion* implies more detailed foresight, and therefore a more determinate conditional intention. In contrast, 'if necessary' implies a judgement made during the execution of the common plan, and possibly not foreseen at all. That prompts the question of *who* is to make the impromptu judgement, and of whether D and P might disagree about the necessity. I address that question in a later section.

> sometimes powerful evidence, of an intent to assist [P] in crime B. But it is evidence of such intent (or, if one likes, of "authorisation"), not conclusive of it.[6]

Later on in the judgement the SC put it in terms of the 'error' of PAL, introduced by the case of *Chan Wing-Siu* in 1985.[7] They describe *Chan* as a "wrong turn," and express their wish to bring the law back to the evidence-of-intent standard that existed before *Chan*, in cases such as *Wesley Smith* and *Anderson and Morris*.[8]

> The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre *Chan Wing-Siu* practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose.[9]

The expression 'if the occasion for it were to arise' again refers to the conditional intention that we are examining. The important point about this shift from PAL to conditional intention is that, while D could be taken as having foreseen P's killing of V, D might still be able to show that he did not actually intend it, i.e. if she was indifferent or opposed to it.[10]

Let me conclude this section by laying out the main points of the SC's description of conditional intention in *Jogee*:

> In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional. [92]
>
> [...] Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances provided. [93]
>
> [...] If the jury is satisfied that there was an agreed common purpose to commit crime A [the common plan], and if it is satisfied also that [D] must have foreseen that, in the course of committing crime A, [P] might well commit crime B [the collateral offence], it may in appropriate cases be justified in drawing the conclusion that [D] had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which [D] gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances. [94]

Now conditional intention has a separate history in English law, and it is worth turning to that in order to better understand what the SC are proposing.

Conditional intention, single agents, and multiple agents

There was a fair amount of discussion about conditional intention arising from the case of *Easom* [1971].[11] *Easom* is distinctive, however, because it concerns only a single agent. Easom was in a

---

[6] Jogee at para [66].

[7] *Chan Wing-Siu and Others v The Queen* [1985] Cr. App R. 117.

[8] *R. v Smith (Wesley)* [1963] 1 W.L.R. 1200; *Anderson and Morris* [1966] 50 Cr. App. R. 216.

[9] Jogee at para [87].

[10] He may still be found guilty of manslaughter, in accordance with para [27] of *Jogee*. I will discuss this in the final section of this paper.

[11] *R v Easom* [1971] 2 QB 315. More sophisticated contributors to the discussion include Campbell K. 'Conditional intention'. *Legal Studies* vol. 2. 1982; Cartwright J. 'Conditional intention'. *Philosophical Studies* vol. 60 no. 3. 1990; and Finnis J. 'On conditional intentions and preparatory intentions'. Gormally (ed) *Moral*

cinema, noticed a woman's handbag on the seat in front of him, picked it up to examine the contents. He found nothing of value, and replaced it. Unfortunately for him, the bag belonged to a policewoman. He was arrested and convicted of attempted theft, but notoriously the Court of Appeal quashed the conviction: they accepted that because Easom did not know what was in the handbag, he could not be prosecuted for attempting to steal *any particular object*. Legally, he really was just looking into the handbag, and no criminal attempt had yet been launched when he was apprehended.[12]

This has come to be considered a classic case of conditional intention. Easom had intended to steal if there turned out to be something worth stealing in the bag. However, this description elides important ambiguities. The first is about whether the conditionality governs *intention*, or rather the *execution* of the intention. After all, it is surely more plausible to say that Easom noticed the handbag and already formed the present intention to steal the unknown 'contents', and this intention guided his bodily movements and gaze toward the handbag, as well as his furtive glances around to see if anybody was watching him. Once the bag was open, he would then decide whether to execute the intention or to abandon it. This conception of the facts of *Easom* is what Cartwright calls 'internal': Easom's intention was not conditional at all, and he should have been charged with attempted theft.[13]

John Child goes even further.[14] He thinks conditionality is effectively a red herring. On the one hand an agent may have an intention to act now, as Easom intended to look in the handbag, and such a present intention is *always* unconditional. There may have been conditions, but at the moment of action these have been settled. On the other hand, the agent may have a present intention to act in the future, and such an intention will *always* be conditional, either explicitly (the conditions are named) or implicitly (the agent would admit, under questioning, to refrain from execution if condition X obtains). This is what I have been calling a conditional execution. Importantly, says Child, there is nothing rare or mysterious about such future conduct, and it does not deserve the special category that the SC seems to reserve for it.

Already the notion of conditional intention is more complicated than it first appears. What happens when we move from single-agent to multi-agent cases such as the schematic Bank Robbery described in *Jogee*?

Truth and Moral Tradition. Four Courts Press. 1994. Importantly, most of these discussions concern single-agent scenarios.

[12] *Easom* differs from *Jogee*, of course, in being a matter of theft rather than murder. This difference is important when one considers the mandatory sentence for murder, and this is precisely what has made PAL so controversial in cases when D "didn't kill anyone and didn't want to kill anyone." Insofar as *Jogee* now explicitly recommends manslaughter convictions for certain cases that would previously be PAL for murder, it also allows sentencing discretion, and this will surely help to reduce some of the controversy.

[13] Cartwright (ibid) p. 235. To understand the difference between a conditional intention and a conditional execution such as Easom's, consider two friends Siegfried and Brunhilda, who are planning their evening. Siegfried says: 'I want to go to the cinema, let's see what's showing.' He has formed the intention to go, and he is wondering in which direction to execute (or 'steer') it, whether to screen 1, screen 2 or screen 3. In contrast, Brunhilda says: 'I don't know what I want to do tonight. Let's see if there's anything worth seeing at the cinema. If not I'll stay home to watch the match.' This is a genuine conditional intention, involving what Cartwright calls an 'external' condition, for at the start of the evening Brunhilda has no intention to do anything in particular; but if it turns out there is a good film on, then she will *form* the intention and act on it right away.

[14] Child J. 'Understanding ulterior mens rea: future conduct intention is conditional intention'. 311. Cambridge Law Journal. 2017.

The first obvious problem has to do with individual free will. Easom forms his intention to steal, and insofar as he is physically in control of his movements, it is entirely up to him whether to carry out his intention. In contrast, in a two-agent accessorial situation, D assists or encourages P do commit crime C. D is in control of the assistance or encouragement, but after he has 'launched' that, then her role is over, and she has to *wait on* P do decide one way or the other. D cannot really intend, conditionally or unconditionally, that P do *anything*: P is a free agent, P's actions are essentially unpredictable. As Simester puts it: 'When there is an act of aiding or abetting, [D] has nothing left to do. What lies in the future is P's action. And that action is up to P, not [D].'[15] It would make more sense, to speak of D's attitude to P's possible performance of the future action: D might *desire* or *want* it,[16] she might *approve* of it, she might *authorise* it (to use the term mentioned in the quotation from *Jogee* above),[17] or she might *endorse* it. Krebs has argued in favour of this term, and I will follow her in this.[18]

In the Bank Robbery scenario, however, insofar as D has foreseen and endorsed P's shooting of the security guard, then such endorsement is *not* conditional. Prior to the robbery, she unconditionally endorses the idea, and then waits to see if it comes about. Finnis puts the point thus: 'What needs to be determined by the jury is: had that basic decision been made, or did the person remain, at the time of the alleged offence, in two minds […]?'[19] This idea of D's advance endorsement captures the distinction the SC wants to make between the merely cognitive foresight (or contemplation), and the stronger volitional engagement toward the foreseen act implied by the concept of intention. (D may also harbour the parallel intention – again unconditional – to herself use lethal force on the security guard 'if the occasion arises', e.g. if P drops the gun, and D is in a position to pick it up and use it. As with Easom, this is a case of conditional execution.[20])

The indifferent weapon supplier

So far I have considered the single-agent single-crime scenario (*Easom*) and the double-agent double-crime scenario (the common plan and the collateral offence during the Bank Robbery). I have shown that both have difficulties with the notion of a conditional intention as envisioned by the SC in *Jogee*. For completeness, it is also worth considering a third scenario between the above two, namely a double-agent single-crime scenario of ordinary complicity. Most single-crime complicity scenarios of D assisting or encouraging P to commit the offence are merely extensions of *Easom*. But there remains a problem in trying to square *Jogee* with the *indifferent weapon supplier*.

---

[15] Simester A. 'Accessory liability and common unlawful purposes'. *Law Quarterly Review*. 2017, p. 85.

[16] Most often I will intend to do something that I desire. However, *Jogee* [91] says: 'It will therefore in some cases be important when directing juries to remind them of the difference between intention and desire.' If I am under duress to perform X, for example, then I can intend to perform X without desiring to perform X.

[17] *Jogee* [66]: "But it is evidence of such intent (or, if one likes, of "authorisation"), not conclusive of it." Authorisation is problematic, because it implies legal or moral authority to authorise, whereas in our Bank Robbery example, there is no more than a contingent partnership.

[18] Krebs B. 'Joint Criminal Enterprise'. *The Modern Law Review*, Vol. 73, No. 4 (July 2010).

[19] Finnis J 'On conditional intentions and preparatory intentions'. Gormally (ed) *Moral Truth and Moral Tradition*. Four Courts Press. 1994. p. 164

[20] The Bank Robbery concerned two equal partners. If we move away from this scenario to one where D is in a position to issues threats, commands or incentives to P, then it would make more sense to speak of D intending P to do something, and this will also include conditional execution: 'go and rob the bank. If the cops come, I want to run.' There is a separate question of whether, in such cases, D is adequately described as an *accomplice* – rather than a joint principal – when she is the operation's prime mover.

In a paragraph just before those on conditional intention cited above, the SC in *Jogee* described the following scenario:

> [D] supplies a weapon to [P], who has no lawful purpose in having it, intending to help [P] by giving him the means to commit a crime (or one of a range of crimes), but having no further interest in what he does, or indeed whether he uses it at all.[21]

Just to be clear: D does not actively endorse P's commission of the crime, which would make her straightforwardly complicit ('before the fact', as used to be said). Instead, D is primarily motivated by profit or by friendship, even though she knows that P is very likely to use the weapon to commit a crime. The scenario is reminiscent of Devlin J's example in *National Coal Board v Gamble*:

> if one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor.[22]

I mention these two scenarios because this situation *might* be describable as D having a conditional intention that P commit the crime, as if D were saying to P: 'here's a gun in case you need it for a robbery.' And yet it seems counter-intuitive to describe it as an intention: it seems more like a kind of recklessness instead. On the assumption that English law would treat both scenarios as generating straightforward accessorial liability, then such a minimum mens rea of recklessness would seem to contradict the overall direction of *Jogee*, which tried to establish intention (including conditional intention) as the minimum mens rea.

Indeed, both weapon suppliers lack intention in three senses. First, as we saw, there is a general difficulty of speaking of one person 'intending' the other to perform an action, even when the other's action is nearby in time and space. (The exception would be when the one controls the other, which is not the situation here.) Second, however, since P's planned crime is in the vague future, D cannot be sure (and is certainly not 'virtually certain') that P will commit it at all, and this impedes the ascription of an intention to D. D intentionally give P the weapon that P asks for; D knows that the weapon *would* be useful for the crime(s) that P *seems* to be preparing (i.e. she knows how the weapon works and she knows how it could be useful for certain types of crime), and as such D supplies the weapon *in order to* assist P's possible future crime -- and this makes her culpable as an accessory. But this does not seem focused enough for an intention.

Simester makes the same point, as part of his wider argument charging the SC in *Jogee* with 'mishandling conditional intention'. He introduces the example of a builder who lends a jemmy to P.

> In order to intend X, one must either act in order to bring X about or act knowing (i.e. being virtually certain) that one will bring X about. The same applies to aiding and abetting. In order to intend 'to assist P to commit a burglary', [D] must either act in order to assist P to commit a burglary (i.e. because for some reason [D] has an interest in P's committing it), or act in the practical certainty that his or her conduct will assist P to commit a burglary. Will, not may.[23]

The third way in which our weapon suppliers resist the ascription of a conditional intention has to do with their indifference to the crime. Such indifference is not merely a matter of uncertainty about the future. Simester considers a variation on the scenario that would allow the supplier strong

[21] Jogee at [90].

[22] *National Coal Board v Gamble* [1959] 1 QB 11

[23] Simester 2017 ibid p. 83.

grounds for virtual certainty that the crime would be committed if condition X obtains.[24] Perhaps the client is a notorious local gangster, and is overheard saying something like "if he doesn't pay up by tonight, he's a dead man." Simester argues that even here, we cannot ascribe an intention to the supplier, not only because of the attitude of indifference, but also because the virtual certainty still only applies to a future hypothetical.

Rebecca Williams (2017) disagrees with Simester:

> If D sells the bat to P knowing that P may use it to commit an offence or one of a list of offences [in certain circumstances]—and D knows that in those circumstances (a) his sale of the bat will be helpful to P, and (b) P will take the relevant action with the relevant mens rea – and D is nonetheless willing to sell the bat to P, then D has the conditional intent to aid P and will be liable if P does indeed commit the offences.[25]

Williams supports this conclusion by describing the supplier as having *two parallel intentions*: (i) the intention to help the client *play baseball*, and (ii) the intention to help the client *kill the rival*. The first intention is perfectly lawful, but the second unlawful intention is real enough to inculpate the salesman if and when the condition should come to pass – what matters is that the supplier has demonstrated that she is willing to assist murder, amounting to a practical endorsement of the murder, however indifferent she might be about whether the murder take place. (And it may be the supplier's good luck if the potential victim pays up and is not killed.)

My first argument against Williams would be, given the way she describes the scenario, that the supplier's intention is not conditional but unconditional. This follows my earlier argument about Easom's single-agent unconditional intention being subject to a conditional *execution*. I think Williams could accept this. However, because of the complicity relationship, the execution in the weapon supplier scenarios is at one remove. The main intention, at the moment of supply, is to assist P play baseball *or* kill his rival in the future; and, if and when P kills the rival, D's original broad intention to assist P will be retroactively transformed into a narrow *intention to assist P in killing the rival*. Again, I think Williams could accept this since it preserves D's accessorial intention.

Even with this sympathetic reconception of Williams's argument, I would still agree with Simester that the supplier lacks the relevant intention. It is not just that the notion of 'retroactive transformation' a bit dodgy (and in fairness, Williams herself might resist this); the main problem is the essentially indeterminate nature of the future because of the involvement of another free human agent acting on an explicit conditional. However 'virtually certain' D may be of P's hypothetical plans, this is a far cry from the virtual certainty of future *causal* developments described in *Woollin*. Any number of things might transpire to deter P from killing the rival even when the condition is fulfilled.

D's indifference about whether the crime is committed or not further undermines the attempt to ascribe her with an intention; even when we say that D's willing and knowledgeable supply amounts to practical endorsement of the crime, that is too logically distant from the crime to amount to an intention in the *Jogee* sense. To understand this notion of 'logical distance', recall the Bank Robbery, where D harboured the unconditional endorsement of the possibility that P might kill the security guard to safeguard the robbery and their getaway. In that situation, D's endorsement is based directly on her personal *involvement* in the robbery: she too *wants* the robbery to succeed, *wants* to

[24] Simester (2017) (ibid) p. 84. The notion of 'virtual certainty' comes from a single-agent case of *Woollin* [1999] AC 82, where it described a state of knowledge that was to be interpreted as intention.

[25] Williams R. (2017) 'Conditional intent' unpublished paper delivered in Oxford in May 2017. I have slightly emended the punctuation to clarify the logical structure, and have replaced her use of 'D1' and D2' with 'P' and 'D'.

get away, *wants* her share of the proceeds. In contrast, the weapon supplier is not part of the plan to kill the client's rival, has no interest in the rival's death, and is therefore not implicated by the conditionality of the client's intention.

All we are left with, therefore, is the recklessness, and *Gamble*-style complicity, and the contradiction with *Jogee*'s attempt to ground all complicity liability on intention.

Disagreement between D and P about the conditions

Insofar as we can make sense of conditional intention, there is another problem, and that concerns a disagreement between D and P about *which* conditions are in question, about *when* they will be fulfilled, and to *whose* satisfaction. If D endorses P's killing of the security guard as a 'last resort,' D might hold a higher threshold about when to resort to it. Let's say the security guard was armed. P points his gun at him, instructs him to put the gun on the floor and also to lie down; the guard puts the gun down but refuses to lie down. Does that mean that the guard is still actively impeding their plans? P shoots the guard, perhaps in a panic, perhaps because he is angered by the disobedience, perhaps because he really believes in the impediment. In such a case D might well believe that P shot the guard prematurely, and D would say that he had not endorsed *that* premature action (maybe D is a more seasoned robber, and better understands the risks). In such a case we could say that the two robbers did *not* share the same conditional intention, and that P was embarking on a frolic of his own, for which he should be solely responsible, thereby exculpating D for the collateral offence.

On this latter point, I disagree with the Law Commission, in their report entitled *Conspiracy and Attempts*. Although they are writing in the context of conspiracy, their point could be a contribution to a discussion of PAL as well.

> 2.112. [...] if D1 and D2 decide to go ahead with a robbery only if the coast is clear, whether the coast is 'clear' may depend on an element of evaluation or opinion. For D1, the coast being clear may mean that there must be no security personnel in sight at all, whereas for D2 it may mean only that there is no reason to think that the police are there waiting for them. [...] Unless such differences of opinion or evaluation prevent D1 and D2 reaching an agreement to rob in the first place (which they clearly do not), then they are, and should be, irrelevant to their liability.[26]

The problem has to do with the nature of the common plan. Even the most detailed discussions about the plan, about contingencies, and about hypothetical responses to various contingencies, can never achieve descriptions sufficient to cover all eventualities. Differences in the backgrounds and ambitions of the respective conspirators may seem to allow an apparent agreement, which then unravels under the unforeseen tensions and contingent facts of the crime-scene. What is certain is that D was intentionally taking part in the Bank Robbery alongside P; that much can be captured by the CCTV and witness testimony; beyond that certainty there might be too many unknowns about D's mental states before, during and after the murder of the guard. Once again, there would seem to be too much room for moral luck in this situation, as well as too much room for reasonable doubt in a jury.

---

[26] Law Commission Report no. 318 *Conspiracy and Attempts* (2009). For completeness, I should say a bit more about the role of conditional intention in conspiracy. Some cases are not relevant to our discussion. For example, *O'Hadhmaill* [1996] Crim LR 509 involved a group of IRA terrorists who had the conditional intention to plant a bomb if the IRA High Command called off a ceasefire. The case concerned a group effectively acting as one agent, and so this is similar to the *Easom* case. In *Saik* [2006] UKHL 18, the bank teller suspected that the money he was converting might be of criminal origin, but did nothing to check whether it was; as such he could be taken as indifferent to the possibility of being charged with conspiracy to launder. In terms of our discussion above, however, he lacked the intention, conditional or otherwise.

In para [92] of *Jogee*, the Supreme Court offers another schematic example, this time of gang conflict.

> The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.

It is interesting that both *Jogee* and *Chan* concerned small-scale cases (two or three participants), and yet the joint enterprise doctrine is considered to be most useful for prosecutors to deal with large-group urban gang conflict, characterised by widespread confusion, spontaneous complicity, unclear criminal goals, and wildly conflicting testimony. [27] Rarely is it clear enough who did what to whom, let alone who assisted and encouraged whom to do what, and what sort of mens rea. Far easier, say both critics and advocates of PAL, to charge *all* gang members on the basis of membership and/or presence at the rumble.[28]

Does the concept of conditional intention help to deal with the large-group conflict scenario? I would suggest not, precisely because of the inherent messiness of that scenario, and the difficulties about conditional intention already described. Far better to use other legislation to tackle the wider social problem of gangs rather than waiting for gang conflict, together with systematic intervention and support within the education system and from social services;[29] the traditional categories of criminal law – intention and complicity – are too clumsy and crude to deal with it alone, and over the longer term might even make the situation worse. The criminal law is simply not interested in all the different reasons why vulnerable young men get and stay involved in gangs in the first place: the dysfunctional family and community life, the bleak employment prospects in large portions of UK society, the important sense of identity and bonding offered by urban gangs, the youth and immaturity at first recruitment etc.. It is very difficult for some people – even otherwise legally competent people – to avoid getting sucked into a gang, difficult for them to withdraw thereafter, difficult for them to imagine the likely criminal consequences of membership, and especially difficult to withdraw in the period in the immediate run-up to a planned violent conflict with another gang. As such many of the younger members are in such a state of excitement that their acquiescence in the upcoming conflict cannot be described as the fully voluntary adoption of an intention, conditional or otherwise.

Jogee itself

Given the problems of applying the concept of conditional intention in the above cases and scenarios, let us now look at *Jogee*. For most of this paper I have avoided *Jogee* simply because I do not think the theoretical discussion sits well with the facts. Let me start by summarising the legal

---

[27] The classic case of PAL governing gang conflict is *Rahman and others* [2008] UKHL 45, [2008] 3 WLR 264. There a group of 20 youths, carrying poles and sticks, chased and apprehended V, and started beating him. V eventually died from a stab wound. Although the defendants claimed to not know that one of them had a knife, they did admit to the intention to cause GBH, and for this reason the court were not concerned about the precise nature of the weapon administering the fatal strike.

[28] The main lobby group fighting for the rights of those 'unjustly imprisoned' on the basis of PAL is called JENGbA – Joint Enterprise Not Guilty by Association – which claims that most cases of PAL were prosecuted *solely* on the basis of membership. See http://www.jointenterprise.co/ [accessed May 2018]. Interestingly, while many JENGbA members considered *Jogee* a victory, a year later they decided to re-launch their campaign because of their concerns that *Jogee* would end up making little differen.

[29] E.g. the Serious Crime Act 2015 and the Policing and Crime Act 2009. See also the Home Office statement on 12 July 2017: 'Government announces further funding to tackle gang related violence', available at: https://www.gov.uk/government/news/government-announces-further-funding-to-tackle-gang-related-violence [accessed May 2018].

story. Jogee had been convicted of murder via PAL in 2011, sentenced to 20 years, and his appeal was confirmed by the Court of Appeal in 2013, although they reduced the sentence to 18 years. In 2016 the SC quashed the conviction, rejected PAL, and ordered a re-trial on the charge of murder, with the included alternative of manslaughter. In September 2016, Nottingham Crown Court acquitted Jogee of murder but charged him with manslaughter, and sentenced him to 12 years, less time served.

This means that the September Court judgement found that Jogee had *not* had the conditional intention that Fyfe be murdered; instead, his possibility of the manslaughter charge had been foreseen within the SC *Jogee* judgement as follows:

> If the principal had that intent and caused the death of another he would be guilty of murder. Another party who lacked that intent, but who took part in an attack which resulted in an unlawful death, would be not guilty of murder but would be guilty of manslaughter, unless the act which caused the death was so removed from what they had agreed as not to be regarded as a consequence of it.[30]

That seems to be fair. What remains a little odd is that the SC chose *Jogee* as the sort of case where conditional intention could replace PAL as the central analytical concept. Could the facts of *Jogee* have ever lent themselves to an approach that would allow D's conditional intention that P kill V to be sufficient to inculpate D as an accessory to murder?

The first question should have been whether Jogee had intentionally encouraged Hirsi to intentionally inflict serious injury on the victim Fyfe (i.e. straightforward accessoryship under s. 8 of the Accessories and Abettors Act 1861, or at least inchoate assistance liability under the Serious Crimes Act 2007), and the Court accepted that there was not enough evidence that he had (despite Jogee urging Hirsi to 'do something' to Fyfe, and despite Jogee's own expressed desire to smash a bottle over Fyfe's head). Given that Jogee could not be charged with complicity to cause serious injury, the 2011 trial Court relied on PAL. But here it seems that some key elements of PAL are also missing.

For a start, it is not clear what the *common plan* between Hirsi and Jogee was. The fatal stabbing eventually took place at 2 am. Before that time, Hirsi and Jogee had spent several hours consuming alcohol and cocaine, and working themselves into a heightened state of drunken aggression. It is not clear what the disagreement was between themselves and Fyfe.[31] It sounds more as if Hirsi and Jogee were just passing the time, as so many bored unemployed young men do of an evening, channelling their general impotent resentment against a nearby target.

The stabbing seems to me to have been an entirely spontaneous gesture by Hirsi, fuelled by the alcohol and cocaine and testosterone. Certainly, Hirsi could not stand to gain in any way from the stabbing, and was clumsy enough to leave a direct witness to testify against him. Both Hirsi and Jogee were so steeped in hyper-masculine 'tough talk' that their declarations could not be taken seriously as concrete intentions or plans about the future. I am not for a moment suggesting that Hirsi did not deserve his murder sentence; but I am suggesting that the loud-mouth Jogee did not

[30] Jogee at [27].

[31] Fyfe worked as a paralegal and had represented both Hirsi and Jogee in the past, and maybe the two men felt aggrieved about Fyfe's work. In addition, Fyfe's co-habiting partner, Reid, had told Hirsi and Jogee to leave because Fyfe would not want to come home and find them in the house. Some newspaper articles from the time of the original trial suggested that Jogee and Hirsi were annoyed with Reid for abandoning a prior liaison with one of their friends. None of these facts seem to justify a conflict that could only be resolved by the serious injury to Fyfe, I suggest.

have anything as clear and precise as an *intention*, conditional or otherwise, that Hirsi kill Fyfe, or even that Fyfe be killed, on that fateful night.

Here it might be relevant to consider Jogee's criminal record. At the time of the events (2011) he was 22 years old. He had previous convictions for common assault in 2002 and 2003 (aged 13 and 14) and battery in 2009; possession of a prohibited weapon (three times), an aggravated vehicle taking, as well as some drugs convictions.[32] There is nothing coming close to killing. It sounds as if Jogee thought this was just another day in his life, with more noise than action. Similarly, during the evening Jogee proposed to go and 'shank' another person named Rana. Although 'shank' is a slang word for 'stab', it seems to be used in the context of warnings and punishment rather than in a context to intentional serious wounding or killing.[33]

One last thought. There is perhaps a question of Jogee's knowledge of Hirsi's *character*. They seem to have been friends for some time, and so Jogee would know a fair amount about Hirsi's typical behaviour when drunk and high and angry. Jogee might also have foreseen Hirsi's conditional intention to inflict serious injury if Fyfe talked back, or resisted, based on Jogee's experience with Hirsi on similar occasions in the past. As such he might have gone along with Hirsi to Fyfe's house, thereby expressing an unconditional endorsement of whatever extra violence Hirsi might be capable of 'should the occasion arise.' Here is Lord Brown from the PAL case of *Rahman*:

> Suppose that, knowing what A is like and that he tends to carry a gun, B contemplates that A may take a gun and use it in the course of the attack on the victim. Then, even if B is vehemently opposed to the use of a gun and tries to dissuade A from carrying one, nevertheless, if, being aware of the risk, B takes part in the joint assault, he will be guilty of murder if A shoots the victim. [34]

'Knowing what A is like' suggests character knowledge. This goes beyond D's knowledge of what weapon P is carrying, from which the contemplation of possible use could be inferred; instead, what if D also knew something about the principal's irascibility, his need for masculine displays, his familiarity with violence? All this would make it far easier, subjectively, for the secondary to contemplate the lethal possibilities arising from his common plan, and less able to claim ignorance or a failure of imagination. In the case of *Rahman*, such character knowledge reinforced PAL, but Jogee's knowledge of Hirsi's character could have allowed a jury to infer foresight, and this could be further evidence of conditional intention or endorsement.

However, it is interesting that there were no sustained references to Jogee's knowledge of Hirsi's character in either the 2013 Appeal judgement or the 2016 Supreme Court judgment.[35] This is in line

[32] I am taking this information from the Court of Appeal Judgement *R v Ameen Hassan Jogee* [2013] EWCA Crim 1433 at [28].

[33] The 1950s criminal Billy Hill was careful to distinguish a punishment slashing ['chivving'] from anything that would risk death and attract a murder sentence: "I was always careful to draw my knife down on the face, never across or upwards. Always down. So that if the knife slips you don't cut an artery. After all, chivving is chivving, but cutting an artery is usually murder. Only mugs do murder." Campbell, Duncan 'When crime grabbed the limelight' *The Guardian* 30 July 2008.
https://www.theguardian.com/society/2008/jul/30/biography.billyhill [accessed May 2018]

[34] *Rahman and others* [2008] UKHL 45, [2008] 3 WLR 264. at [36].

[35] The Court of Appeal Judgement *R v Ameen Hassan Jogee* [2013] EWCA Crim 1433 at [29] describes Jogee as knowing 'that Hirsi was drunk and dangerous,' but does not explore this further.

with the general reluctance of the criminal law to rely on knowledge of character, in order to focus on the principal's and accessory's beliefs and intentions at the moment in question.[36]

Conclusion

Conditional intention is already a philosophically problematic notion when dealing with single agents such as Easom, but it seems to become doubly problematic in cases of accessorial liability such as the Bank Robbery, and triply so in cases formerly described as PAL, both the small-scale cases such as *Jogee* or larger-scale gang conflicts such as *Rahman*. There are problems not only with the concept of conditionality, but also with the concept of intention. More promising might be to pursue the idea of endorsement.

As with various other things from the SC's *Jogee* judgement, the precise degree and contours of the changes will only become evident with subsequent caselaw, and we are still in very early days. However, there are already grounds for scepticism about whether the courts are even interested in addressing the problems surrounding conditional intention, or whether this new concept amounts to little more than a cosmetic change to PAL. For example, consider the brief mention of conditional intention in the post-*Jogee* case of *R v Johnson*.[37] This comprised applications for leave to appeal to a group of PAL convictions dating from before *Jogee*. In one segment of the judgment, the Court of Appeal re-examined the PAL murder convictions of two defendants, Terrelonge and Burton:

> the real issue in the defendants' case was whether the prosecution had proved that they knew of the presence and the possible use of the knife and participated with that knowledge in the joint enterprise to attack the deceased.[38]
>
> The judge's directions may not have been in accordance with *Jogee* but, on the jury's findings, this court can safely draw the conclusion that the defendants had the necessary conditional intent (at the very least) that the knife would be used with intent to kill or cause grievous bodily harm should the occasion arise. In other words, the use of the knife with intent to kill or cause grievous bodily harm was within the scope of the plan to which they gave their assent and intentional support.[39]

So the original PAL judgement was about knowledge of the weapon and the defendants' foresight of the possibility that it might be used. Upon re-examination, we find that the defendants had the conditional intention that the weapon be used "should the occasion arise." The original convictions were declared safe, and the appeals rejected. Clearly this concern was enough for JENGbA to re-launch their campaign.[40]

---

[36] Beatrice Krebs argues that this has actually changed with *Jogee* in relation to manslaughter by unlawful and dangerous act. See her paper in the current volume.

[37] *R. v Johnson and Others* [2016] EWCA Crim 1613.

[38] *R. v Johnson and Others* at [81].

[39] *R. v Johnson and Others* at [82]. See also the rejection of the application of Hall at [189].

[40] Simester (2017) also stresses that *Jogee* is keen to support its conclusion about conditional intention by reference to the caselaw from before the 'wrong turn' of *Chan Wing-Siu* [1985], and especially the cases of *Wesley Smith* [1963] 1 W.L.R. 1200, *Anderson v Morris* [1966] 50 Cr. App. R. 216 and *Reid* [1976] 62 Cr App R 109. The thought is that these collateral-offence cases would have been correctly understood in terms of D's conditional intention. But Simester argues persuasively that while each of these cases did indeed involve *foresight*, it is not at all obvious that they could be described as involving D's conditional intention as to P's future conduct. So SImester might be sympathetic to the sceptical view of *Johnson* as merely confirming a cosmetic change.