Inchoate Liability

Incitement

Incitement is the common law offence (see *Whitehouse [1977]*) of influencing the mind of another whilst intending him to commit a crime. Its actus reus is the actual communication of an influence with the recipient party understanding it to be an influence. The influence may be advice, encouragement, persuasion, threats or coercion – see *Race Relations Board v Applin [1973]*. In *Invicta Plastics [1976]*, it was held that all circumstances shall be taken into account to determine whether the whole picture amounted to any incitement.

Its mens rea is that the communication was intended and that D intended the recipient to do the acts within the communication or cause any consequence (constituting a crime).

D must believe that the recipient would do it with the requisite mens rea (or none needed if the offence was a strict offence).

D must also believe that the circumstances needed by the crime would also exist at the time of the offence.

It does not matter whether the recipient acts upon the incitement or is influenced by it in any way, although that would provide cogent evidence that there was actual incitement.

Conspiracy

This is the statutory offence (s159A(1) CO) of agreeing with another that a course of conduct shall be followed where that course of conduct *necessarily* involved or amounted to some criminal conduct. There is statutorily no defence of impossibility save for an imaginary offence.

D must be found to have actually intended to agree, to have that mental connection. Simply mouthing an agreement without intending that the course of conduct should be pursued does not satisfy the offence. Further, he need not play any significant role in the furtherance of the criminal design. According to statute, it is sufficient that he agreed and encouraged the criminal design.

D and his co-conspirators need not know that the course of conduct amounted to a crime, suffice that they intended to carry the physical aspects of it out. This applies especially to offences of strict liability. For consequence crimes such as murder, a death must have been intended as intention to inflict GBH will not be enough. For rape, they must have intended the female victim not to have consent.

Attempt

This is the statutory offence (s159G(1) CO) of having intended to commit some offence and was doing an act more than merely preparatory to the commission of that offence.

From the statute, it is clear that specific intent is necessary. However, it is unclear whether reckless as to secondary circumstances of the crime (risk of death, consent) may suffice.

What is more than merely preparatory is a matter of statutory interpretation for the jury based on the facts. Other tests include the last act test and the series test. It has been held that being in a position to commit the crime is merely preparatory.

Secondary Responsibility

Generally, D must have voluntarily done the act of aiding, abetting/counselling or procuring. D must have known that his conduct could assist, encourage or otherwise procure the principal to perform the conduct. D intended his conduct to have that effect – subjective recklessness has been held to suffice – that D knew there was a risk that the principal might perform and D went ahead anyway. This leads to a discussion on what types/range of offences was within D's contemplation. If D, for reasons of stupidity, omitted to think of a crime that might reasonably be seen to be possible, he is not at fault.

D must also have known all the essential matters or circumstances that made the principal's conduct criminal.

Aiding…

Abetting (at scene)/Counselling (before crime)

There must be some sort of mental link between D and the principal (communication and understanding)

These can occur by inactivity and presence, so long as the presence or inactivity was intended and resulted in encouragement. Where D was in a position to control the acts of the principal, e.g. bartender or manager, if he knew the principal was doing something wrong and did nothing, the courts may view that as active encouragement of a crime.

Although there need not be any 'causal' link, it must be proved that the principal acted in the scope of the encouragement. If the act happened by some accident, that will not suffice.

Procuring

Producing by endeavour – setting out to see that it happens and taking appropriate steps to produce that happening. There must be a factual causative link between the act procured and the act of procuring or communication.

The crime of procuring the actus reus is best used where P was not capable of committing the crime – rape, driving offences.

Joint Enterprise

To present the case in a more coherent manner, or where a principal cannot be identified, or where there is an unintended crime committed by one in a joint enterprise, defendants can be labelled as joint defendants. First, it must be proved that there existed a joint enterprise; a mutual understanding to commit some offence where a common purpose is shared. Then it must be proved that D was party to that joint enterprise. Express agreement is not necessary since any agreement can be inferred. So long as there was agreement, D need not be strictly at the scene of the crime, though this is arguable. D needs to agree so any false agreement will not make D party to the joint enterprise.

The main difficulty with this secondary offence relates to offences committed that were not object of the main enterprise, for example, killings in a robbery, death in fistfights and so on. But so long as the action or consequence was contemplated as a

possibility, parties with the contemplation will be liable. For example, death resulting from common assault. If however, the assault was not contemplated by D, he will not be liable for the death nor the assault.

There is a complication for different types of weapon used and D will not be liable for death if he did not contemplate the weapon used even if he contemplated GBH. E.g. if a gun was used in a fistfight resulting in death, D would not be liable for the shooting or the death if he did not contemplate the use of a gun or equally dangerous weapon. Similarly although more arguable, if a weapon was used in a significantly more lethal way from that contemplated, D may not be liable although it would be difficult for him to refute that he had such contemplation in mind.

However, if D continues with the attack following the production and use of a weapon contemplating that it might be used again, he may be liable as secondary party since he has already accepted the seriousness of the enterprise he was in. the issue is open where D continued the attack contemplating that the weapon would not be used again, e.g. where the knifer or gunner runs away. It might be cogent evidence that D accepted the seriousness of the enterprise he was in, or it might be a contributing cause to the death.

Where D did not have the intention to kill or cause GBH, he may be liable for manslaughter where the principal was liable for murder.

Where D had the proper mens rea but the principal's liability is eroded by some defence, D may be convicted for murder and the principal for a lesser offence.

Mental Abnormality

Insanity

Under the M'Naghten Rules, it must be proved (either on balance or beyond reasonable doubt) that D had a defect of reason arising from a disease of mind.

What may be a defect of reason includes not knowing the physical nature and quality of the act, or if he did, not knowing whether what he was doing was right or wrong.

A disease of the mind must be internally caused, be it arteriosclerosis, diabetes or psychomotor epilepsy. Hyperglycaemia is an internal cause. Hypoglycaemia is caused by injection of insulin, which is an external cause; or a lack of food which might be a self induced automatism. Sleepwalking is an abnormality internally caused.

The verdict is "not guilty by reason of insane".

Automatism

Automatism is an advantageous defence since it only requires an evidential burden and leads to a full acquittal. It involves a total loss of control over one's actions hence negating the actus reus and mens rea of the offence.

It requires a proper evidential burden that even medical evidence may sometimes not satisfy and it must not be a disease of mind, else it would be insane automatism with the effects of insanity.

Self induced automatism, if reckless, is no defence to crimes of basic intent but may be a defence to crimes of specific intent. Where D has induced automatism by himself, the prosecution may charge him with an underlying basic intent offence.

Partial Defences

Provocation

Under s4 of the Homicide Ordinance, on a charge of murder, if there is evidence of provocation whether by things done or words said, to cause D to lose self control and such was enough to make a reasonable man kill, D shall have the conviction of murder substituted by one for manslaughter. The burden is on the prosecution to prove against the evidenceyou .

The first test is whether there is evidence of things done or said that caused D to lose self-control. All relevant evidence of the provoking act and D's characteristics is admissible to see whether D might actually have lost control.

The second test has two parts. First, the gravity of the provocation must be assessed and in doing so, all evidence may be admissible including the defendant's characteristics and in particular, any characteristics that were subject of the provocation. The second part of the test requires that a reasonable man would have killed upon receiving a provocation of such gravity. Here, the reasonable man shall only have the sex and age of the defendant and nothing else. He shall exercise 'normal' standards of self-control.

Note that the statute does not prohibit self-induced provocation, and without more, it must be construed to the benefit of the defendant.

Diminished Responsibility

This statutory partial defence under s3 of the Homicide Ordinance is available, often as a alternative to defendants who did not exercise 'normal' standards of self control in a defence of provocation. The burden is on D to prove on balance.

It requires that the murderer suffered from such abnormality of mind whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced disease or injury as substantially impaired D's mental responsibility in doing or being a part to the killing.

An abnormality of mind is a state of mind so different that a reasonable man would find it abnormal. It factors perception of facts, ability to judge right from wrong, and ability to exercise will power to control physical acts in accordance with rational judgment.

The cause of the abnormality must not be intoxication although chronic alcoholism or drug addiction may be sufficient. The cause must also be endogenous through upbringing, history of violence or submission. Symptoms of these might include jealousy, rage, resentment and battered women's syndrome.

The final question of substantial impairment is a question of fact and perception for the jury.

Duress and Necessity

The Graham test involves asking: was D impelled to do as he did because, as a result of what he reasonably believed someone to have said or done, he had good cause to fear death or GBH; and the prosecution has made the jury aware that a sober person of reasonable firmness, sharing the characteristics of D would not have responded as D did?

Split into two tests, the first involves asking whether D had a reasonable (possibly mistaken) belief that he, or someone close to him would suffer (almost) immediate death or GBH if he did not do as he did. Other questions are whether the threat nominated D's actions and whether D could have taken evasive action.

The second test involves considering whether a reasonable person would have responded as D did. Characteristics attributable to this reasonable man differ from those attributable in provocation. Of course the reasonable man must have reasonable steadfastness, but if D is pregnant, physically infirm or suffers from some recognisable psychiatric illness, those may be attributable since they reduce D's ability to resist the pressure physically or mentally. Other characteristics such as excessive (not chronic) timidity or low IQ are not attributable.

There must have been no voluntary exposure to the duress by voluntary exposure with others in criminal activity where D ought reasonably have foreseen the risk of being subjected to any compulsion by threats or violence.

A duress by circumstances differs in that the nature of the threat is different, arising from the circumstances instead of specifically by things done or said by another.

Self Defence

Under common law, D's use of force will be lawful if it is not disproved that he used such force as is reasonable and necessary in the circumstances as he believes them to be in the defence of himself or other persons.

Determining whether it is necessary to use force is generally a matter of judgement. The force used cannot be a response to 'justified' force, however e.g. arrest. This is because D must use force in defence. An arrest cannot possible be said to provoke any form of self defence unless it was an illegal arrest. D may be mistaken in his perceptions of whether it is necessary, but he need not be reasonable in his mistake as long as it is honestly held. This allows the opportunity for a mentally disabled person to rely on this defence if he held any unreasonable belief that he was under attack.

D must also be aware of the justification for using force – it cannot suddenly dawn on him, after the assault, that the victim was a criminal or doing something to harm D.

The force must be proportionate in the circumstances, but this does not require D to intricately measure the required amount of force in the circumstances since they usually arise as emergencies. The fact that D may use disproportionate force in what he believed were the circumstances will not avail him. There is no duty to retreat but it would be cogent evidence that D was not the aggressor in the circumstances.

'Force' does not have to be any physical force, but the possession of weapons in preparation for imminent attack can also suffice.

Crime Prevention

Under s101A of the Criminal Procedure Ordinance, a person may use such force as is reasonable in the circumstances in the prevention of crime or in assisting or effecting the lawful arrest of offenders, suspected offenders or persons at large.

There need not be a crime being or threatened to be committed so long as D honestly believed there was. However, in the alternative of this defence, to make an arrest lawful without warrant, D must know or reasonably suspect the victim was going to commit some crime or breach the peace.

S101(1) of the CPO provides that to make an arrest lawful without warrant, D must know or reasonably suspect the victim as being guilty of an arrestable offence. An arrestable offence is one with a fixed penalty or more than 12 months imprisonment. If D makes a mistake as to the 'arrestability' of an offence, he cannot rely on this defence.

A breach of the peace is "an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm or which puts someone in fear of such harm being done" – *Yang Yon Ching [1997]*. A breach of the peace is not a crime per se and may arise from lawful conduct if it threatens violent response, e.g. jumping bus queues in *Lavin v Albert [1982 HoL]*.