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**EXECUTING A U-TURN: WITHDRAWAL AND
SECONDARY PARTY LIABILITY FOLLOWING
*AHSIN v R***

Submitted for the LLB (Honours) Degree

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2015

This article analyses the conceptual nature of withdrawal from secondary participation in crime under section 66 of the Crimes Act 1961. The majority in Ahsin v R held the recognition of withdrawal must be as a 'true' defence, and was unable to negate the elements of s 66 because it could not undo the completed actus reus at the point of participation. This required the majority to clarify or alter the legal elements of section 66, which then indicate the derivative basis of s 66 liability to be on an association of the secondary party to the principal. This view is questionable in light of underlying principles of secondary liability and criminal law generally. This article advocates that in order to establish sufficient moral culpability and fault, some connection from the secondary party to the offence should be required. This connection can be broken if the secondary party fully neutralises his participation before the offence is committed. Withdrawal would therefore be able negate the elements of the offence. Policy reasons may have motivated the majority to reject this conclusion, however this approach is arguably more consistent with secondary party liability in New Zealand and in other jurisdictions.

Key words: Criminal law; withdrawal; secondary party liability.

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I Introduction

The New Zealand Supreme Court in *Ahsin v R* by a majority of McGrath, Glazebrook, and Tipping JJ held that the true conceptual nature of withdrawal from secondary participation in a crime was a ‘true’ or ‘authentic’ defence to liability under s 66 of the Crimes Act 1961.¹ They rejected the view of the minority, comprised of Elias CJ and William Young J, that acts of withdrawal could negate the elements of the offence.² Under an authentic defence, the evidentiary onus rests on the defendant during trial to make withdrawal a live issue.³ Conversely, the minority’s view would impose a burden on the prosecution to prove beyond reasonable doubt that the accused had not withdrawn.⁴

The timing of liability of a secondary party relative to the principal offender dictated the conceptualisation of withdrawal by both the majority and the minority. The majority denied that withdrawal could negate the elements of s 66, as the actus reus of s 66(1) was complete when the acts of assistance or encouragement occurred.⁵ Similarly under s 66(2), the actus reus was complete when a common purpose was established between the secondary party and the principal.⁶ As observed by William Young J, “the majority, by treating withdrawal as irrelevant to the actus reus of party liability, creates space for the operation of the common law defence of withdrawal which they adopt.”⁷

The majority held that the actus reus is completed when the secondary party provides their assistance or encouragement and in doing so, clarifies or alters the elements of s 66. Under s 66(1), the legal element of actual assistance can occur or be confirmed before the commission of the offence, hence indicating that the assistance can *expire*. Under s 66(2), the principal needs to commit the crime in prosecution of the common purpose, but that

¹ *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493, at [116]-[118] per McGrath, Glazebrook and Tipping JJ.

² See at [20]-[21] per Elias CJ dissenting, and at [254] per William Young J dissenting.

³ At [120] per McGrath, Glazebrook and Tipping JJ.

⁴ At [253] per William Young J dissenting.

⁵ At [116] per McGrath, Glazebrook and Tipping JJ.

⁶ At [117] per McGrath, Glazebrook and Tipping JJ.

⁷ At [252] per William Young J dissenting.

common purpose is not required to be *current* between the parties at the point in time the crime is committed. As a result the majority's reasoning implies that the derivative nature of secondary liability is based on *association* to the *principal*.

In contrast, precedent and authority indicates the manifestation of the derivative nature of s 66 is *some connection* to the *offence* through a continuing connection between the secondary party and the principal's offence under s 66(1), or a common purpose that is current between the parties at the time the principal commits the offence under s 66(2).

The minority carefully analysed the requirements of s 66,⁸ and concluded that a continuing connection must be made from the secondary party's initial participatory action to the principal's offence under s 66(1), and the common purpose must be current between the parties at the time of the commission of the principal's offence under s 66(2).⁹ This is consistent with precedent and authority that indicates something more than mere association is required for liability to derive. Withdrawal can occur in the window of time between the secondary party's initial participatory action and the commission of the offence by the principal offender under both s 66(1) and (2). Conversely, acts of withdrawal at the same time as the principal offence generally will not prevent conviction.¹⁰ The minority also considered that the majority's authentic defence is inconsistent with s20 of the Crimes Act 1961.¹¹

II The Conceptualisation of Withdrawal is Determined by the Timing of Secondary Party Liability

Section 66 prescribes the statutory structure of secondary liability.¹² The liability of a secondary party *derives* from an offence committed by a principal offender by satisfying

⁸ *Ahsin*, above n 1, at [246] and [248] per William Young J dissenting.

⁹ At [244], [246] and [248] per William Young J dissenting.

¹⁰ *R v Witika* [1993] 2 NZLR 424, (1992) 9 CRNZ 272 (CA). See also Peter Gillies *The Law of Criminal Complicity* (Law Book Company, Sydney, 1980) at 176. See also discussion in KJM Smith "Withdrawal in Complicity: A Restatement of Principles" [2001] Crim LR 769 at 778-779; AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 6.6.6.

¹¹ *Ahsin*, above n 1, at [255]-[269] per William Young J dissenting.

¹² Crimes Act 1961.

the legal elements s 66.¹³ Section 66(1)(b)-(d) describes that a party who aided, abetted, incited, counselled, or procured an offence is equally liable with the principal who actually committed the offence. Section 66(2) describes that where two people form a common intention to prosecute an unlawful purpose, both will be liable for the offence encompassed in the unlawful purpose, and any collateral offences foreseen as a probable consequence of pursuing the common purpose.¹⁴ The secondary party's involvement must occur before or during the commission of the principal offence.¹⁵ If the assistance occurs after the offence is complete, the accused will be considered an accessory after the fact, rather than a secondary party.¹⁶

During the majority's conceptualisation of withdrawal, they assessed when the *actus reus* of party liability is complete.¹⁷ This is essentially *conditional* liability, as the *mens rea* must also occur at the time of assistance,¹⁸ yet liability is conditional on the successful commission of the offence by the principal.¹⁹ *Unconditional* liability attaches upon the completion of the principal's offence.²⁰ For simplicity 'conditional liability', will hereby be referenced simply as 'liability'. The distinction of unconditional and conditional secondary liability has no impact to the conceptualisation of withdrawal. The majority hold that upon the confirmation of conditional liability, the secondary party is unable to withdraw. The minority would not consider *conditional* liability to exist in these circumstances; liability remains inchoate until the commission of the principal's offence.²¹ The main focus is determining when the secondary party is in a position where they cannot undo their actions.

¹³ Crimes Act, s 66(1)(a). See Simester and Brookbanks, above n 10, at 6.1.

¹⁴ *Ahsin*, above n 1, at [102](a)-(e) per McGrath, Glazebrook and Tipping JJ.

¹⁵ *Larkins v Police* [1987] 2 NZLR 282, (1987) 3 CRNZ 49; Gillies, above n 10, at 51; Simester and Brookbanks, above n 10, at 6.1-6.2.

¹⁶ Crimes Act, s71.

¹⁷ *Ahsin*, above n 1, at [116]-[117] per McGrath, Glazebrook and Tipping JJ.

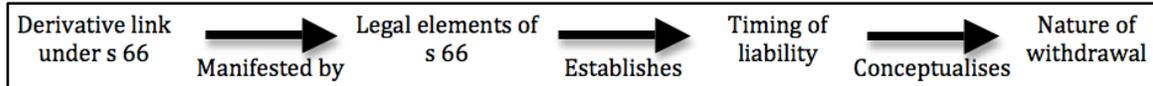
¹⁸ David Ormerod *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, Oxford, 2011) at 8.4.2.

¹⁹ See *Ahsin*, above n 1, at [20] per Elias CJ dissenting.

²⁰ At [113] per McGrath, Glazebrook and Tipping JJ.

²¹ *Ahsin*, above n 1, at [21] per Elias CJ dissenting.

The majority and Elias CJ constructed a framework, using the legal elements of s 66, to analyse *when* the secondary party's liability was complete.²² This dictated whether withdrawal was able to affect the participation already given. The relationship of the various legal concepts is demonstrated in the diagram:



Hence, the legal elements of s 66 established the timing of liability. In doing so, the timing of liability is used to conceptualise withdrawal. If secondary party liability attaches when the act of assistance occurs, withdrawal must be an authentic defence to the already completed actus reus.²³ If liability attaches when the principal commits the offence, acts of withdrawal could negate the secondary party's involvement.²⁴ Exactly what type of acts that are required to successfully negate the elements of the offence would depend on the type of the secondary party's acts; mere encouragement could be countermanded by a clear declaration of dissent. In some cases it may be impossible to negate the elements of the offence; for example where the secondary party has provided the code to a safe.

III Analysing the Elements of s 66(1) and their Effect on Withdrawal

The legal elements of s 66(1) indicate the timing of secondary liability. Section 66(1) requires:

66 Parties to offences

- (1) Every one is a party to and guilty of an offence who—
 - (a) ...
 - (b) does or omits an act for the purpose of aiding any person to commit the offence; or
 - (c) abets any person in the commission of the offence; or
 - (d) incites, counsels, or procures any person to commit the offence.

²² Contrast Smith, above n 10. See also CMV Clarkson, HM Keating and SR Cunningham *Clarkson and Keating Criminal Law: Text and Materials* (6th ed, Sweet & Maxwell, London, 2007) at 579.

²³ *Ahsin*, above n 1, at [116]-[117] per McGrath, Glazebrook and Tipping JJ.

²⁴ At [21] per Elias CJ dissenting.

Aiding, more commonly known as assistance, under s 66(1)(b) will be the focus of the following analysis, but also applies to encouraging under s 66(1)(c).

A Elements of s 66(1)(b) Liability as Explained by the Majority and Minority

The legal elements of s 66(1)(b) are: the principal must commit the primary offence from which liability is derived; the secondary party must have assisted the principal offender in that crime; the secondary party intended to assist in that offence; and the secondary party knew the essential facts of the offence.²⁵

In light of the second element, s 66(1)(b) requires “an act done *for the purpose* of aiding.”²⁶ On a strict interpretation, the secondary party does not *in fact* need to assist the principal in the commission of the crime.²⁷ However, *Larkins v Police* affirmed the principal must be *actually* assisted in the commission of the offence, thereby establishing that s 66 liability is not inchoate.²⁸

1 The construction of liability by the majority

The majority creates a construction of liability featuring ‘actual assistance’ during their discussion of withdrawal.²⁹

“[A]lthough s 66(1) requires proof that the defendant has in fact aided or encouraged the principal offender, s 66(1) does not stipulate a requirement that the assistance or encouragement provided remain operative, whatever that concept may entail, at the time the offence is committed by the principal. On the language of s 66(1)(b), (c), and (d), the actus reus is complete when the actual assistance or encouragement, counsel, procurement or incitement occurs provided the principal offender subsequently commits the relevant offence. On this approach, the completed actus reus is not negated by subsequent acts of withdrawal.”

As seen in the diagram below, the secondary party’s actus reus (SP actus reus), or [conditional] liability, is complete upon the act of assistance.³⁰ The Crown is not required

²⁵ *Ahsin*, above n 1, at [83](a)-(d) per McGrath, Glazebrook and Tipping JJ.

²⁶ Crimes Act, s 66(1)(b).

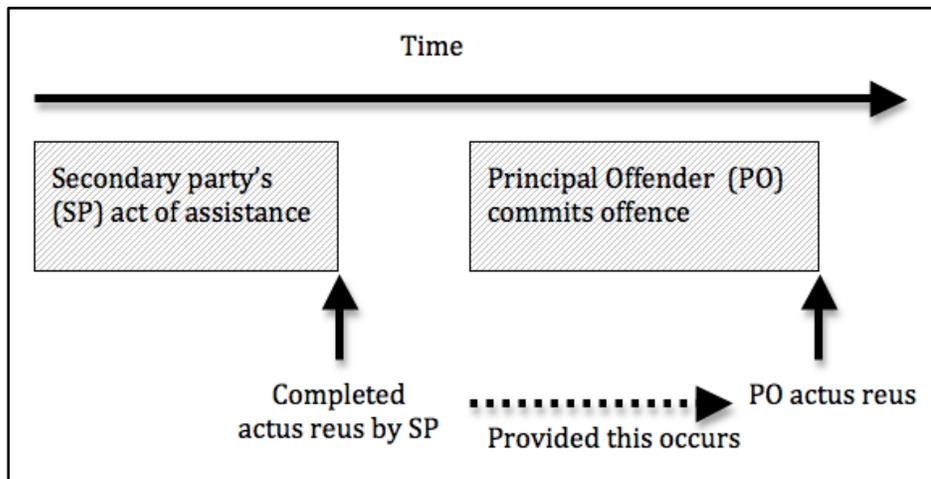
²⁷ See *Larkins*, above n 15, at 288; *Ahsin*, above n 1, at [116] per McGrath, Glazebrook and Tipping JJ.

²⁸ *Larkins*, above n 15, at 290; *Ahsin*, above n 1, at [83](b), n 55, and [116] per McGrath, Glazebrook and Tipping JJ and at [246] per William Young J dissenting.

²⁹ *Ahsin*, above n 1, at [116] per McGrath, Glazebrook and Tipping JJ.

to show any continuing connection between the assistance and the eventual offence. However liability still derives from the principal's offence (PO actus reus).³¹ The secondary party's assistance forms the actus reus instantaneously, only dependent on the principal committing the relevant offence. Withdrawal is unable to negate the elements of the offence.

Diagram of the majority's construction of s 66(1) liability by assistance



2 *The construction of liability by the minority*

The minority took a complicated approach.³² The secondary party's actus reus is not complete until actual assistance is proven at the time of the offence.³³ A continuing connection, manifested by actual assistance, must be made from the secondary party's participation and the offence.³⁴ The time gap between the assistance and the commission of the crime provides the secondary party an opportunity to stop his actions from *actually* assisting the offender,³⁵ i.e. the secondary party is able to break his connection to the offence. The fulfilment of liability is therefore precluded until actual assistance is

³⁰ *Ahsin*, above n 1, at [116] per McGrath, Glazebrook and Tipping JJ.

³¹ At [244](b) per William Young J dissenting.

³² At [20]-[21] per Elias CJ and [245]-[247] per William Young J dissenting.

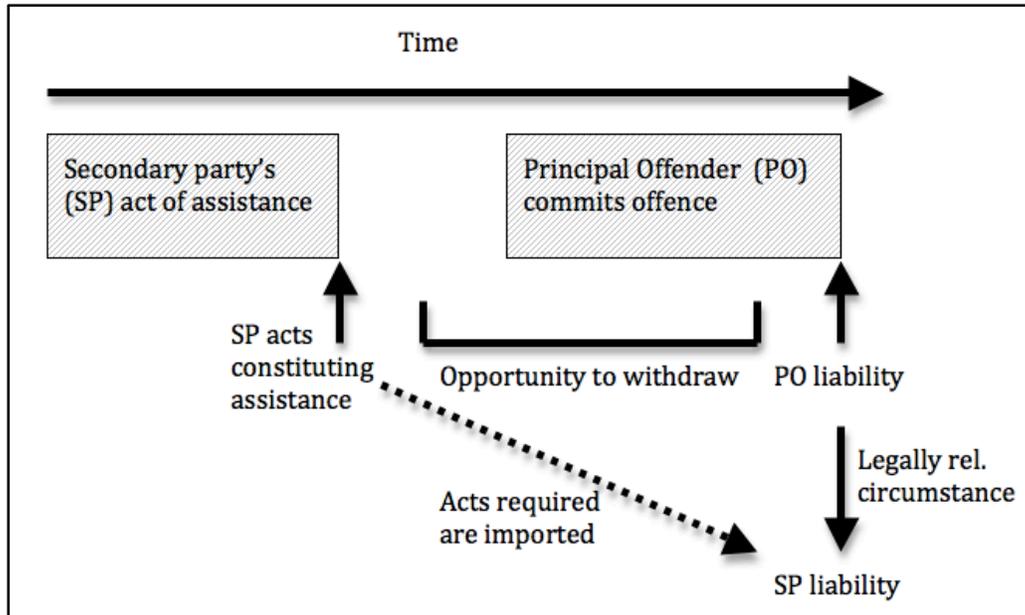
³³ At [21] per Elias CJ dissenting.

³⁴ At [244](b) and [245] per William Young J dissenting.

³⁵ At [251] per William Young J dissenting.

confirmed at the time of the offence.³⁶ Withdrawal between the participation and principal's offence is able to negate the elements of the offence.

Diagram of the minority's construction of s 66(1) liability by assistance



Under the reasoning of both the majority and the minority, *no further secondary party involvement is required following the initial assistance to satisfy liability*. The key difference is the majority consider that [conditional] liability attaches upon the act of assistance, while the minority, despite the assistance completed earlier, do not consider liability can attach until actual assistance is confirmed at the time the offence was committed. The crux of the s 66(1)(b) debate is the definition of actual assistance and its impact on the timing of the secondary party's liability relative to the principal's offence.

B Defining 'Actual Assistance' According to Precedent and Authority

Terminology such as “a real assistance”³⁷, “effect of aiding”³⁸ and “the actual effect [of the assistance]”³⁹ was used in *Larkins* to describe actual assistance. The requirement

³⁶ At [21] per Elias CJ dissenting.

³⁷ *Larkins*, above n 15, at 288.

³⁸ At 288. See also *Hewit v Police* HC Hamilton AP83/00, 9 October 2000 at [35].

³⁹ *Larkins*, above n 15; *Attorney-General v Able* [1984] 1 QB 795 (CA).

of ‘actual assistance’ has not had extensive discussion, yet actual assistance is not required to make a substantial or material difference to the offence.⁴⁰ *Larkins* held that if abetting requires actual encouragement, s 66(1)(b) should require actual assistance.⁴¹ Actual assistance should therefore be considered in light of *R v Schriek*,⁴² where the judge was considering the requirements of actual encouragement. He held that at one bound a causal connection is not required, while some connection between the encourager and the principal must be established.⁴³ He expressly omitted to construct an exhaustive definition of the ‘middle ground’, implying that *more* than some connection to the *principal himself* is required.⁴⁴ This middle ground is likely some connection from the secondary party (and his encouragement) to the offence itself. The *Schriek* connection has also been directly linked with assistance under s 66(1)(b) in case law.⁴⁵ Despite contention surrounding the derivative nature of secondary liability,⁴⁶ New Zealand authority establishes that s 66(1) derives liability from the principal’s offence, hence the secondary party’s conduct must somehow be *connected to the offence* by the principal.⁴⁷ For avoidance of doubt, a causative link for assistance or encouragement is not required,⁴⁸ and the principal can be unaware of the secondary party’s assistance.⁴⁹

Similarly in English and Canadian authority, a connection from the secondary party to the principal’s offence is necessary for secondary party liability. The equivalent

⁴⁰ Gillies, above n 10. See also KJM Smith “The Law Commission Consultation Paper on complicity: Part 1: A blueprint for rationalism” (1994) Crim LR 239, at 245-247.

⁴¹ *Larkins*, above n 15, at 290.

⁴² *Garrow and Turkington's Criminal Law in New Zealand* (online looseleaf ed, LexisNexis) at [CRI66.4] and [CRI66.8(viii)].

⁴³ *R v Schriek* (1997) 14 CRNZ 449 at 459.

⁴⁴ At 459.

⁴⁵ *R v Zizov* HC Auckland T031264, 7 April 2004.

⁴⁶ See Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, Oxford, 2006) at 10.6; See generally Law Commission *Assisting and Encouraging Crime* (Law Com CP131, 1993).

⁴⁷ Simester and Brookbanks, above n 10, at 6.1 and 6.4.2. See also A P Simester and others *Simester and Sullivan's Criminal Law* (5th ed, Hart, Oxford, 2013) at 213.

⁴⁸ *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773 (CA); Simester and Brookbanks, above n 10, at 6.4.2. See also *Larkins*, above n 15; *Schriek*, above n 43, at 459; Ormerod, above n 18, at 194; Card, Cross and Jones *Criminal Law* (20th ed, Oxford University Press, Oxford, 2012) at 17.17-17.18.

⁴⁹ *Larkins*, above n 15, at 287. See also *R v Mendez* [2010] EWCA Crim 516 at 23; *Able*, above n 39; *R v Calhaem* [1985] QB 808.

provision of assistance under the Accessories and Abettors Act 1861 (UK) requires actual assistance.⁵⁰ Ormerod comments “there must be *some link* between D and P in the sense that D must have provided assistance or encouragement *in fact*.”⁵¹ In *R v Mendez*, the English Court of Appeal held that “in both *Attorney-General v Able* and *R v Calhaem* the court recognised that there must be a *connecting link* between D’s assistance or encouragement and P’s act...P’s *act* must be done within the scope of D’s authority or advice.”⁵² Card, Cross and Jones suggest that the secondary party’s actions must have had some relevance to the offence in that there must be some “connecting link”.⁵³ *R v Dooley*, in the Ontario Court of Appeal, sets out that the *necessary connection* between the secondary party and the commission of the offence is any act before or during the commission of the offence that somehow assists or encourages the principal in the commission of the crime.⁵⁴ The *necessary connection* is captured by the phrase ‘actual assistance’ or ‘assistance in fact’.⁵⁵

Upon these authorities, actual assistance is described to be real assistance or of some effect; it does not need to be substantial. *Some connection* must be made from the *assistance to the offence itself*. This connection is the same as the ‘continuing connection’ *not* required by the majority.⁵⁶ Assistance under these authorities can only be confirmed to be of actual effect at the time of the principal’s offence.

⁵⁰ Ormerod, above n 18, at 191-192.

⁵¹ Ormerod, above n 18, at 193.

⁵² *Mendez*, above n 49, at [23]; *Able*, above n 39; *R v Calhaem*, above n 49. See also *R v Stringer* [2011] EWCA Crim 1396 at [48], and Law Commission *Participating in Crime* (Law Com No 305, 2007) at 2.33.

⁵³ Card, Cross and Jones, above n 46, at 17.18. See also *R v Stringer* above n 52, at [48]; Ormerod, above n 18, at 191-192.

⁵⁴ *R v Dooley* 249 CCC (3d) 449, at [123]. Application for leave to appeal to the Supreme Court of Canada refused in *Dooley v R* 276 OAC 396, and *Dooley v R* 276 OAC 397. Considered or followed by *R v Truong* 2010 SKQB 127; *R v Alcantara* 2012 ABQB 521; *R v Pavalaki* 2013 BCSC 990; *R v Vu* 2015 BCSC 1073.

⁵⁵ *R v Dooley*, above n 54, at [123].

⁵⁶ *Ahsin*, above n 1, at [244](b) per William Young J dissenting.

C ‘Actual Assistance’ Manifests the Derivative Nature of Secondary Liability

Secondary party liability is derivative.⁵⁷ Conviction of a secondary party is possible by attributing liability from an offence committed by another party to the secondary party by some method. In New Zealand, the derivative nature of liability under s 66(1)(b) is manifested by the requirement of actual assistance.⁵⁸ This does not, however, identify the precise ‘link’ required to successfully pass liability to the secondary party. Below are five (non-exhaustive) categories on the possible legal conduct the secondary party must perform in order to derive liability from the principal:

- [Category 1: **Attempting to assist** (Inchoate/non-derivative basis of liability) by providing assistance to a (potential) principal but the principal does not actually commit the offence; similar to inchoate incitement under s 311(2).⁵⁹]
- Category 2: **Association** of the secondary party to the principal *offender*, but of no effect to the *offence* itself.⁶⁰
- Category 3: **Some Connection** to the *offence* committed by the principal, by providing actual assistance of ‘some effect’ to the commission of the offence.⁶¹
- Category 4: **Substantial effect** to the way the offence is committed (substantial, tangible or material difference to the commission of the offence.)⁶²
- Category 5: **Causation**; the participation of the secondary party caused the principal to commit the offence⁶³

The difficulty of the legal requirement in each category increases moving down the list. Conduct that satisfies a category will also satisfy those above. The definition of actual

⁵⁷ Simester and Brookbanks, above n 10, at 6.1.

⁵⁸ Simester and Brookbanks, above n 10, at 6.4.2. Contrast AP Simester “The mental element in complicity” (2006) 122 LQR 578.

⁵⁹ Law Commission, above n 48.

⁶⁰ See *Ahsin*, above n 1, at [116] per McGrath, Glazebrook and Tipping JJ; Graham Virgo “Joint Enterprise Liability is Dead: Long Live Accessorial Liability” (2012) Crim L R 850 at 860.

⁶¹ See *Ahsin v R*, above n 1, at [20] per Elias CJ dissenting, at [246] per William Young J dissenting; *R v Schriek*, above n 43, at 459; *Stringer*, above n 52, at [48]; Simester and Brookbanks, above n 10, at 6.4.2; *R v Dooley*, above n 54, at [123].

⁶² American Law Institute’s Proposed Official Draft of the Model Penal Code as discussed in Gillies, above n 10.

⁶³ See KJM Smith *A Modern Treatise on the Law of Criminal Complicity* (Oxford University Press, Oxford, 1991).

assistance proposed earlier would indicate that the required conduct to derive liability under s 66(1)(b) falls into category 3; to demonstrate actual assistance there must be *some connection* to the offence by the secondary party.

D Defining ‘Actual Assistance’ in light of Ahsin v R

1 The effect of not requiring the assistance to ‘remain operative’ on the definition of ‘actual assistance’

The majority note that s 66(1) does not stipulate a requirement that the assistance ‘remain operative’ in order to affect the *nature* of the assistance required to prevent the secondary party from negating their assistance.⁶⁴ They omitted to define what ‘remain operative’ means and provided no accompanying authority on the phrase,⁶⁵ but essentially this observation allowed the majority to assert that liability is formed upon the act of assistance. The derivative nature of s 66 is manifested in requiring *actual assistance*.⁶⁶ Therefore when the majority described the nature of actual assistance, they established the type of derivative link needed to establish secondary liability. In context of the categories set out above, they are performing a line drawing exercise to exclude categories with more stringent legal requirements. In other words, defining what is and is not actual assistance dictates the way liability is derived. If the requirements of actual assistance are modified, then the way liability derives is also modified. Similarly, if the majority commented that liability was to derive by a precise type of link, the nature of actual assistance would need to reflect that precise link. They are interdependent concepts.

2 Altering (or clarifying) ‘actual assistance’

The majority do not require a continuing connection between secondary party’s assistance and the offence.⁶⁷ Therefore the derivative link described in category 3 (some

⁶⁴ *Ahsin*, above n 1, at [116] per McGrath, Glazebrook and Tipping JJ.

⁶⁵ Compare *Clifford v R* [2012] NZCA 134 at [18]-[19]; *R v Williams* CA101/00, 31 July 2000 at [18]; and *R v Atonio* [2009] NZCA 359 at [33].

⁶⁶ *Simester and Brookbanks*, above n 10, at 6.4.2. See also *R v Dooley*, above n 54, at [123].

⁶⁷ *Ahsin*, above n 1, at [116] per McGrath, Glazebrook and Tipping JJ, and at [244](b) per William Young J dissenting.

connection) is not required to satisfy the secondary party's liability. This clarification or alteration of the necessary derivative link would therefore suggest that 'actual assistance' was clarified or altered so that something less than 'some connection' needs to be proved.

Elias CJ made observations regarding the necessity of the assistance to operate at the time of the offence. She notes that "[w]hether earlier-provided assistance or encouragement *continues to operate* at the time the offence is committed is intensely fact-specific."⁶⁸ An element of liability is the *existence* of the assistance at the time of the offence.⁶⁹ She substitutes the phrase 'continues to operate' with 'existence', and observes that "the Crown must exclude the view that any steps taken to remove encouragement or assistance mean that such encouragement or assistance *no longer operated at the time* the offence was committed."⁷⁰ Therefore in terms of the majority's reasoning, assistance that does not "remain operative" is actual assistance that does not *continue to* and *exist* at the time of the offence; excluding a requirement of a continuing connection under category 3 and implying some lower category is necessary to derive liability.⁷¹

The wording of the majority suggests actual assistance can be satisfied when the assistance is provided; "the actus reus is complete when the actual assistance...occurs provided the principal offender *subsequently* commits the relevant offence."⁷² The principal's offence can be committed *after* the *already* completed actual assistance i.e. assistance that actually assists earlier, but is not required to at the time of the offence.⁷³ Therefore actual assistance has been clarified or modified so that the secondary party is able to assist the principal during the period of preparation before the crime, which would encompass any earlier provided assistance that may have *expired* by the time the offence was eventually committed.⁷⁴ This clarification or alteration of actual assistance from the definition of actual assistance provided earlier seems consistent with s 66(1) and with the

⁶⁸ *Ahsin*, above n 1, at [20] per Elias CJ dissenting.

⁶⁹ At [20] per Elias CJ dissenting.

⁷⁰ At [21] per Elias CJ dissenting.

⁷¹ At [244](b), per William Young J dissenting.

⁷² At [116] per McGrath, Glazebrook and Tipping JJ.

⁷³ See *Ahsin*, above n 1, at [253] per William Young J dissenting.

⁷⁴ Contrast *R v Dooley*, above n 54, at [123].

majority's explanation of the legal elements of s 66(1)(b),⁷⁵ though there is doubt whether it is consistent with *Larkins*.

Due to the interdependency of 'actual assistance' and the derivative link of s 66, the majority have also clarified or altered the derivative basis of liability to only require an *associative* link to the *principal* to derive liability (category 2), while suggesting that s 66(1) does not stipulate a requirement of *some connection* to the *offence* itself (category 3). Whether this is a clarification or alteration is unclear; no direct comparison was made from the requirement of actual assistance in *Larkins* to the discussion of actual assistance during the conceptualisation of withdrawal. The law on 'actual assistance' has likely been altered due to the contrasting authorities above, and the approach of the majority has been described as 'novel'.⁷⁶ A mere associative link would allow [conditional] liability to be complete when assistance is given. Withdrawal would be unable to negate the elements of the offence.

3 *Questioning an associative basis of derivative liability*

As a result of the alteration of 'actual assistance' the derivative basis s 66(1) rests on association (category 2); this needs to be questioned. Graham Virgo has proposed culpability by association for s 66(1)-type situations.⁷⁷ He argues unlike causation or connection, association does not require establishing some effect on or link to the commission of the crime, as the focus is on the conduct of the secondary party solely and whether an association with the crime committed by the principal in some way can be established.⁷⁸ None of the examples provided by Virgo of s 66(1)-type liability by association were where the secondary party provided assistance before the principal's

⁷⁵ *Ahsin*, above n 1, at [83] per McGrath, Glazebrook and Tipping JJ.

⁷⁶ *Ahsin*, above n 1, at [254] per William Young J dissenting. See also Don Stuart *Canadian Criminal Law: A Treatise* (6th ed, Carswell, Toronto, 2011) at 9, as cited in *R v Gauthier* 2013 SCC 32, 360 DLR (4th) 1 at [95].

⁷⁷ Virgo, above n 60.

⁷⁸ Virgo, above n 60, at 860; Herring, above n 70, at 904-908.

offence.⁷⁹ Associative derivative liability in the context of s 66(1) has had little, if any express discussion in New Zealand.⁸⁰

The ability of assigning legal fault of the offence to an expired assistor or associate is unclear. In 1993, the United Kingdom Law Commission wrote a consultation paper advocating for an offence of attempting to assist that manifests a non-derivative basis of liability (category 1 above) to replace traditional secondary party liability.⁸¹ They considered an accessory's legal fault was complete upon the act of assistance; the commission of the crime by the principal could not add or detract from that fault.⁸² Similarly an *associative* basis of liability would regard legal fault as complete upon the act of assistance.⁸³ The Law Commission did not consider however whether the secondary party's assistance must have made some difference to the principal's actions.⁸⁴ An associative basis of liability also does not require any contribution to the offence itself. Therefore whether an associative party should be treated as a secondary party, rather than an attempted assistor, is questionable

An associative basis of liability blurs the line between a secondary party who actually assists, and someone who attempts to assist. Smith notes that a claim of no actus reus (negation of the elements of the offence) distinguishes derivative based liability from the inchoate offence of incitement⁸⁵ because liability for inchoate offences attaches at the point of participation.⁸⁶ An inchoate offender's liability attaches instantaneously because it does not have to derive from any other party or action, which *should* set it apart from s 66. However under an associative basis of s 66, [conditional] liability also attaches at the point of participation. Smith continues: "More generally, unlike incitement liability, complicity is conceptually grounded on the notion that the accessory's actions carry at

⁷⁹ Virgo, above n 60, at 860-861.

⁸⁰ Comapre *R v Gnango* [2011] UKSC 59.

⁸¹ Law Commission, above n 48.

⁸² Law Commission, above n 48, at [4.24].

⁸³ *Ahsin*, above n 1, at [116] per McGrath, Glazebrook and Tipping JJ.

⁸⁴ Smith, above n 40.

⁸⁵ Crimes Act, s 311(2). Contrast s 66(1)(d).

⁸⁶ Smith, above n 10.

least the potential to affect the principal's behaviour (or consequences). Therefore encouragement or assistance must *still exist* at the time of the principal offence"⁸⁷ A secondary party with only an associative link provides expired assistance that has no potential to affect the principal's behaviour at the time of the offence.

While the secondary party does not actually cause the harm, they have been linked to the harm element in the principal offence.⁸⁸ Secondary participation requiring *some connection* is 'harm-based', while conviction for attempting to assist would confer a mere 'harm-threatening system'.⁸⁹ An associative basis of liability is also harm-threatening; the assistance must be able assist an offence, but is not required to. Imposing liability on the harm-threatening secondary party equally with the principal's harm-based conviction would seem unfair. In *R v Stringer*, the English Court of Appeal held the moral justification for holding the secondary party responsible for the offence is his involvement, which presupposes some connection between the secondary party's actions and the offence.⁹⁰ The connection provides the moral justification for liability. Merely requiring *association* to the principal fails to show the requisite moral culpability or responsibility for holding the secondary party liable for that specific crime. This is not to say someone who has provided expired assistance isn't deserving of conviction at all, only that such persons should not be liable for the 'substantive offence' equal to the principal.⁹¹ Addressing culpability at the sentencing stage does not sufficiently reflect the lack of direct involvement in the offence, especially where mandatory sentences are imposed.⁹² As held in *Dooley*, "the aider or abetter's liability is for the substantive crime and is not for some preparatory step toward the commission of that crime, there must be a connection between the alleged act of aiding or abetting and the actual commission of the crime."⁹³ People who take such preparatory steps, such as those who provide assistance

⁸⁷ Smith, above n 10, at 771, n 11.

⁸⁸ See Clarkson, Keating and Cunningham, above n 22, at 586.

⁸⁹ Smith, above n 40, at 244.

⁹⁰ *Stringer*, above n 52, at [48].

⁹¹ *R v Dooley*, above n 54, at [120].

⁹² See Crimes Act, s 172.

⁹³ *R v Dooley*, above n 54, at [120].

that subsequently expires, are better treated as inchoate offenders and are not deserving of conviction equal to that of the principal.

An associative offender under the majority's approach, and an attempted assistor perform generally the same actions with the same legal fault,⁹⁴ however conviction would fully depend on whether the principal commits the offence. There is some tension whether a party can be liable for attempting to assist under current law.⁹⁵ If it were not an offence, under the majority's approach a party attempting to assist, unlike an associative secondary party, would escape conviction where the principal does not commit the offence. Even if it were an offence, the sentence imposed on an attempted assistor would likely be considerably smaller than that of a secondary party.⁹⁶ A possible solution may be to expand s 311(2) to include those who attempt to assist. This would capture all offenders performing conduct intending to assist in, or any preparatory steps towards an offence, including parties with an associative link.⁹⁷

4 Conclusions on associative liability and the definition of 'actual assistance' not needing to 'remain operative'

The majority's reasoning clarifies or alters actual assistance to allow the assistance to *expire before* the commission of the offence. Section 66(1) does not require the assistance to continue to or exist at the time of the offence. The majority only requires an *association* to the principal by actual assistance provided earlier (as described by category 2 above); a continuing connection is not necessary (as described by category 3).

⁹⁴ See Law Commission, above n 48, at [4.24].

⁹⁵ See *Garrow and Turkington*, above 42, at [CRI66.10(i)] and [CRI70.2]; *R v Bower* (1915) 34 NZLR 696 (CA); Criminal Attempts Act 1981 (UK) s 1(4)(b); *R v Dunnington* [1984] QB 472; 1 All ER 676 (CA); *R v Kenning* [2008] 2 Cr App R 32 (CA). Contrast Bruce Robertson (ed) *Adams on Criminal Law - Offences and Defences* (online looseleaf ed, Brookers); *Larkins* above n 15; *Drewery v Police* (1988) 3 CRNZ 499 (HC).

⁹⁶ See Crimes Act, s 311(1); Contrast s 172 and s 173.

⁹⁷ Contrast Criminal Attempts Act (UK), s 1(4)(b)

The UK Law Commission in their 2007 report considered a secondary party must in fact assist the principal at the time of the offence,⁹⁸ which cannot be established until the offence is committed. Liability does not rest simply on the actions of the secondary party; it stems from the participation in the offence itself.⁹⁹ Regarding the timing of liability, Card, Cross and Jones say that “[f]or [the secondary party] to be guilty as an accomplice...[his] conduct must (objectively) have constituted assistance or encouragement *at the time of P’s act*”.¹⁰⁰ In this writer’s view of s 66(1) liability, actual assistance should be required to assist at the time of the offence. Actual assistance inherently requires a *connection* from the assistance to the offence. This provides sufficient responsibility for conviction of a substantive offence. A party that provides assistance that *expires prior* to the offence should only be liable for an attempt to assist, if such an offence exists.

E Conceptualisation of Withdrawal: Requiring Actual Assistance under s 66(1)

The clarification or alteration of ‘actual assistance’ by the majority allows the conclusion that the secondary party is unable to negate their participation. However due to the reasons outlined above, actual assistance should be read according to precedent and authority which would require some connection to the offence. Actions that prevent assistance provided by the secondary party to have ‘some effect’ at the time of the offence would prevent a finding of actual assistance. Withdrawal therefore would, and should be able to negate the elements of the offence.

⁹⁸ Law Commission, above n 52, at 3.24.

⁹⁹ Simester and others, above n 49, at 213; Simester and Brookbanks, above n 10, at 6.4.2.

¹⁰⁰ Card, Cross and Jones, above n 48; *Mendez* above n 49. See also *Ahsin* above n 1, at [246] per Williams Young J.

IV Analysing the Elements of s 66(2) and their Effect on Withdrawal

A Elements of s 66(2) Liability as Explained by the Majority and Minority

Similar to s 66(1), the legal elements of s 66(2) will indicate the timing of secondary liability required to conceptualise withdrawal. Section 66(2) requires:¹⁰¹

66 Parties to offences

...

(2) Where 2 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.

The majority explained the five legal elements to establish liability under s 66(2).¹⁰² Two elements are important to conceptualising withdrawal, being the secondary party and the principal must form a common intention to prosecute an unlawful purpose, and the principal offender must commit the offence in the prosecution of the common purpose.¹⁰³

1 The construction of liability by the majority

The majority created a construction of s 66(2) liability during their discussion of withdrawal:¹⁰⁴

“...under s 66(2) the actus reus for party liability is complete at the time the defendant forms or joins a common purpose. Liability is then contingent only on commission of the offence by the principal offender in prosecution of that purpose.”

As seen in the diagram below, the majority held that the secondary party’s actus reus (SP AR), or [conditional] liability is complete upon formation of the common purpose. Requiring the principal to commit the offence *in prosecution of the common purpose* was outside the secondary party’s actus reus. Liability is contingent on the principal offender (PO) committing the offence (PO AR) in prosecution of that purpose. There is no

¹⁰¹ Crimes Act 1961, s 66(2).

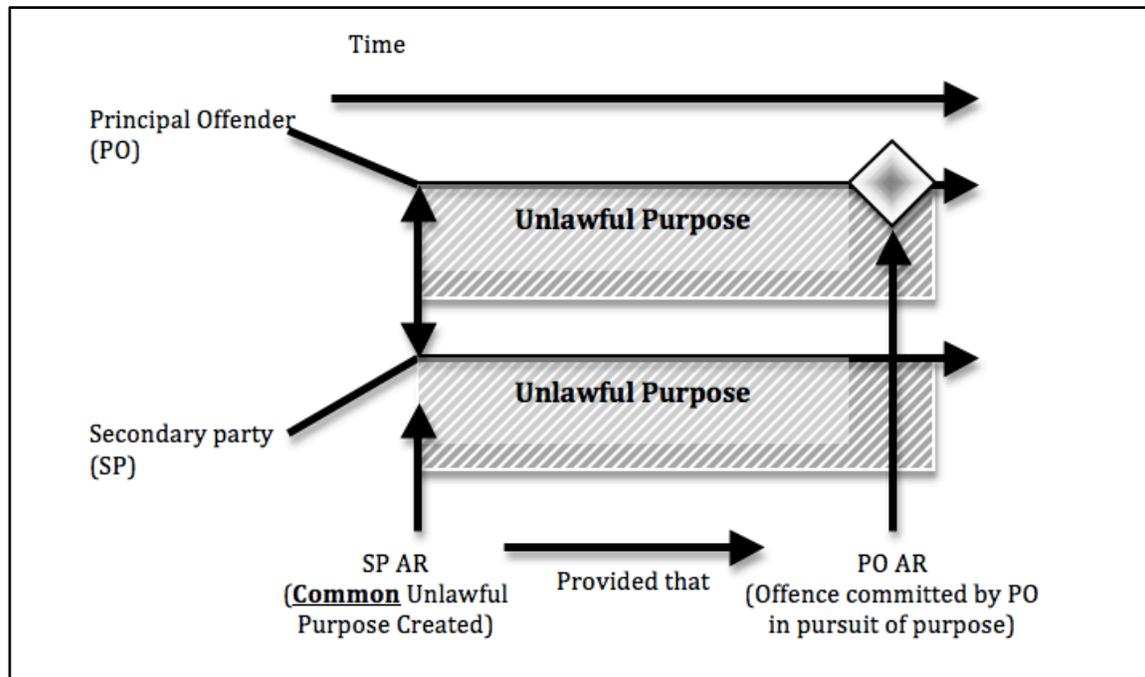
¹⁰² *Ahsin*, above n 1, at [102] per McGrath, Glazebrook and Tipping JJ.

¹⁰³ At [102](b) and (d) per McGrath, Glazebrook and Tipping JJ.

¹⁰⁴ At [117] per McGrath, Glazebrook and Tipping JJ.

opportunity of withdrawal between the formation of the common purpose and the offence by the principal. Withdrawal was considered an authentic defence to section 66(2).¹⁰⁵

Diagram of the majority's construction of s 66(2) liability



2 The construction of liability by the minority

As seen in the diagram below, William Young J considered that “the prosecution must establish...that the offence in question was committed in...prosecution of that common purpose.”¹⁰⁶ He required the common purpose to be *current* between the parties at the time of the offence.¹⁰⁷ The elements of liability were not satisfied until the commission of the offence. This created a window of time between the creation of the common purpose and the principal’s offence in which the secondary party had the opportunity to terminate the common purpose by withdrawal.¹⁰⁸ The principal would not be acting within a purpose that is common between the parties at the time the offence occurs. Withdrawal could negate the elements of the secondary party’s liability.

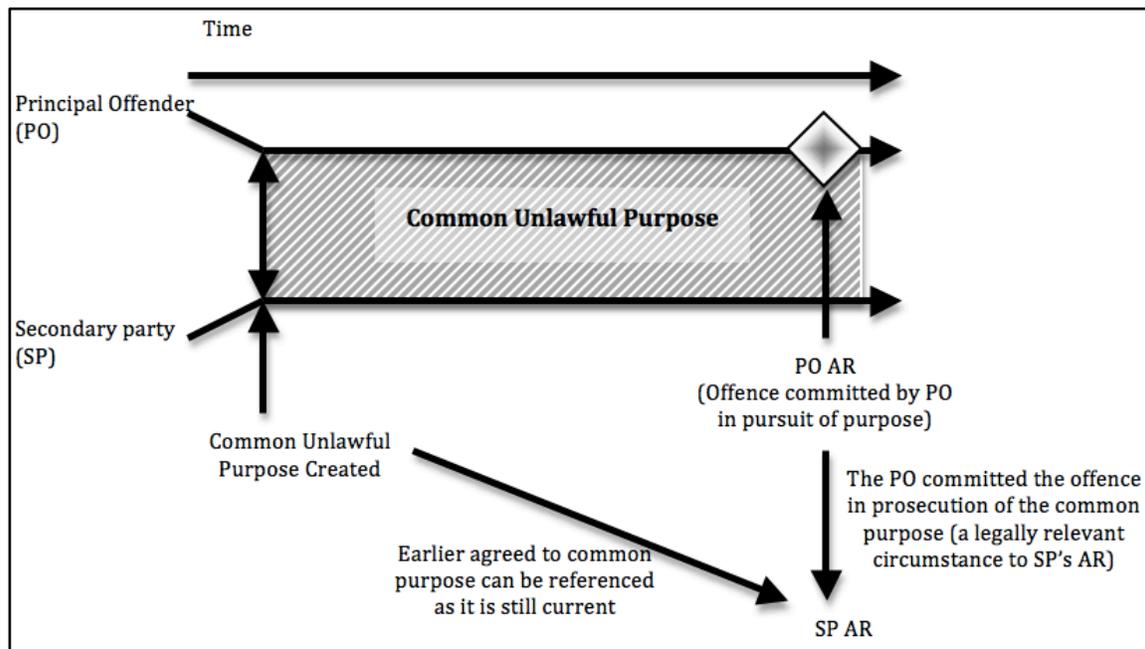
¹⁰⁵ At [117] per McGrath, Glazebrook and Tipping JJ.

¹⁰⁶ *Ahsin*, above n 1, at [248] per William Young J dissenting.

¹⁰⁷ At [248] per William Young J dissenting.

¹⁰⁸ See *Ahsin*, above n ??, at [251] per William Young J dissenting.

Diagram of the minority's construction of s 66(2) liability



The aspect of s 66(2) that affects the timing of liability is the requirement the principal must commit the offence “in prosecution of the common purpose”;¹⁰⁹ there is no clarity of this element in New Zealand case law.¹¹⁰ It is a legally relevant circumstance of the secondary party’s offence because it is a necessary condition or “essential element in making the conduct criminal”.¹¹¹ If this circumstance can be negated by the secondary party’s actions, then the timing of liability will be at the time the offence is committed. In other words, the issue is whether departure from the common purpose by the secondary party *prevents* the principal from acting “in the prosecution of the common purpose”, thereby negating a required legal circumstance of the secondary party’s offence.¹¹² Whether the secondary party’s departure actually prevents the principal from acting within the common purpose depends on the definition of a ‘common purpose’.

¹⁰⁹ At [102](d) per McGrath, Glazebrook and Tipping JJ.

¹¹⁰ Julia Tolmie “Uncertainty and Potential Overreach in New Zealand Common Purpose Doctrine” (2014) 26 NZULR 441 at 459.

¹¹¹ Card, Cross and Jones, above n 48, at 2.19. See generally Clarkson, Keating and Cunningham, above n 22, at 78; Simester and Brookbanks, above n 10, at 3.1.

¹¹² Crimes Act, s 66(2).

B Defining “Common Purpose” in light of Ahsin v R

1 The ‘common purpose’ legal element

The common unlawful purpose has three general requirements. The unlawful purpose must be to commit a criminal offence.¹¹³ A formed purpose must be created, usually by inference from the conduct of the parties, though not necessarily.¹¹⁴ The purpose or intention must be ‘common’ between the parties.¹¹⁵

2 The derivative nature of s 66(2) liability

Similarly to s 66(1), the method of deriving liability under s 66(2) is interdependent to a legal element of the offence, which under this subsection is the requirement of the principal committing the offence in prosecution of the common purpose. This ensures the secondary party is in some way linked to the offence. The possible (non-exhaustive) derivative links manifested by a ‘common purpose’ under s 66(2) can be described as:

- Category 1: [**Conspiracy** (non-derivative/inchoate) being an agreement between two or more people to commit an offence. No actual offence is committed, however an association with another party is inherently required by the agreement.]¹¹⁶
- Category 2: **Association** of the secondary party to the principal by the formation of the common purpose. The principal commits an offence in prosecution of the purpose that may not be common at the time of the offence. [It is irrelevant whether the secondary party is still party to the common purpose.]
- Category 3: **Some connection** to the offence by the secondary party by continuing involvement in the common purpose when the offence is committed. The principal commits the offence with the added presence and support of the secondary party.¹¹⁷

¹¹³ *Iti v R* [2012] NZCA 492 at [95]; *R v Currie* [1969] NZLR 193 (CA).

¹¹⁴ *R v Fa’apusa* above n 93, *R v Chen* [2009] NZCA 445, [2010] 2 NZLR 158.

¹¹⁵ *R v Curtis* [1988] 1 NZLR 734 (CA), *R v Vaitu* [2009] NZCA 111.

¹¹⁶ Crimes Act, s 310.

¹¹⁷ See *R v Rajakumar (Aathavan)* [2013] EWCA Crim 1512, [2014] 1 Cr. App. R. 12; *R v Smith (Dean Martin)* [2008] EWCA Crim 1342, [2009] 1 Cr. App. R. 36. See also *R v O’Flaherty* [2004] EWCA Crim

The majority held that the principal must commit the offence in prosecution of a purpose that was common earlier, but is not necessarily common between the parties when the offence occurs.¹¹⁸ Similar to s 66(1), the majority's reasoning would therefore suggest the ability to derive liability comes from an *association* to the principal *prior to* the offence, yet that association is able to expire (synonymous with category 2). There is no connection, direct or indirect, from the secondary party to that offence at the time that offence occurs if the purpose is not required to be common between the parties. The principal who is no longer acting in concert under a common purpose with the secondary party is not receiving any added support.¹¹⁹ The minority consider the purpose is required to be common or *current* between the parties at the time of the offence.¹²⁰ The ability to derive liability comes from *some connection* under category 3, albeit indirect, from the secondary party to the offence, manifested through his continued involvement in pursuing the common purpose.

3 *Objections against the majority's approach*

Some objections can be made where the common purpose is not required to be current between the parties. The length of time to which the secondary party will be liable for the actions of principal if he continues to act within that purpose would, at least theoretically, be unlimited. In *R v Chen*, the accused was alleged to be party to a common intention to import and sell drugs.¹²¹ Mr Chen, despite being involved in earlier shipments, alleged he had no involvement in subsequent shipments. Under the approach of the majority, the accused would be liable indefinitely as long as the principals were importing and selling drugs in accordance with that earlier agreed to purpose, despite having no continued involvement at all in those shipments.

526, [2004] 2 Cr App R 20; *R v Mitchell* [2008] EWCA Crim 2552; [2009] 1 Cr App R 31; Andrew Ashworth "Joint enterprise: murder - whether two distinct joint enterprises" (2009) 4 Crim LR 287 at 288.

¹¹⁸ See *Ahsin*, above n 1, at [117] per McGrath, Glazebrook and Tipping JJ and [220](b), n 156, per William Young J.

¹¹⁹ At [102](c) per McGrath, Glazebrook and Tipping JJ.

¹²⁰ At [248] per William Young J dissenting.

¹²¹ *Chen*, above n 114, at [56].

The justification of s 66(2) liability arises from the secondary party's participation in the common purpose,¹²² and acceptance that offences other than the intended purpose could be committed in prosecution of that purpose.¹²³ The formation of the common purpose is the only act they perform towards any crime that provides sufficient *moral culpability* to justify conviction under s 66(2).¹²⁴ If the common purpose was allowed to lapse, the formation of the common purpose is not linked in any way with the offence when it is committed. Secondary liability should also be viewed on the *responsibility* attached to the action of forming a common unlawful purpose.¹²⁵ However where that purpose no longer has to be current, the responsibility that can be assigned to the formation of the common purpose is minimal as a *common* purpose would no longer be the motivation for the offence. The crime would be committed purely on the principal's desire to commit the offence because the destruction of a common purpose by withdrawal would usually have to be effected through communication.¹²⁶

A secondary party's moral culpability or responsibility, where the common purpose does not have to be current at the time the offence, is similar to that of a conspirator. The actus reus under s 66(2) stated by the majority is the forming of the common purpose, while the actus reus for conspiracy is the agreement to execute the illegal conduct, both which are an agreement to pursue an offence.¹²⁷ Regarding mens rea, conspiracy requires both an intention to agree and an intention to pursue the requisite course of conduct.¹²⁸ The mens rea required for s 66(2) is the knowledge of the essential facts of the offence, along with either an intention for the unlawful purpose to be carried out or at least knowledge the offence committed was a probable consequence of pursuing the common

¹²² Tolmie, above n 110, at 451.

¹²³ Simester, above n 58, at 599.

¹²⁴ Tolmie, above n 110, at 450.

¹²⁵ Simester, above n 58, at 600.

¹²⁶ *Ahsin*, above n 1, at [249] per William Young J dissenting.

¹²⁷ See *Ahsin*, above n 1, at [102] per McGrath, Glazebrook and Tipping JJ; Simester and Brookbanks above n 10, at 8.3.4; *R v Gemmell* [1985] 2 NZLR 740 (CA), at 743.

¹²⁸ Simester and Brookbanks, above n 10, at 8.3.5. See also *R v Gemmell*, above n 127, at 743

purpose.¹²⁹ Hence, both conspiracy and s 66(2) require a type of intention to commit an offence in the future, however someone who has the mens rea of conspiracy is likely to be more culpable than someone with the mens rea for s 66(2) because under the latter, the secondary party does not necessarily need to intend the offence that occurs. Hence when the actus reus and the mens rea are assessed together, the moral culpability of two people, one forming a common unlawful purpose under s 66(2), and one joining a conspiracy under s 310 are comparable at a minimum, or possibly an offender under s 66(2) is less culpable. However conviction under s 66(2) would arise where a party other than the accused has committed an offence, meanwhile conspiracy would require no offence at all; liability would fully depend on the actions of a third party. Perhaps those people who form a common purpose, yet depart from that purpose, should fall under s 310 rather than s 66 because the difference of conviction rests not in the actions of the accused, but in the actions of a third party. Despite this similarity, there is a disparity in respective penalties. Section 66(2) imposes the substantive offence and relevant sentence, while conspiracy would attract a maximum of 7 years (or less depending on the offence).¹³⁰ This disparity is justified if the secondary party's continued involvement is required, which is of higher moral culpability and responsibility than that of conspiracy, as the secondary party is participating and continuing to endorse the circumstances that give rise to the actual commission of the offence. However such involvement is not necessary where the common purpose does not have to be current, and therefore conviction on that basis has reduced justification.

Liability for the secondary party should not attach where the principal departed from the common purpose, but also where there was abandonment of the common purpose by the secondary party.¹³¹ However under the majority's approach, a disparity exists between the effectiveness of principal's actions and the secondary party's actions. The principal can negate the secondary party's mens rea by committing an offence unforeseen

¹²⁹ See *Ahsin*, above n ?, at [102](e) per McGrath, Glazebrook and Tipping JJ; *R v Gemmell*, above n 127, at 743. Tolmie, above n 110, at 453, n 64.

¹³⁰ Crimes Act, s310.

¹³¹ *V Gordon Rose Parties to an Offence (The Carswell Company, Toronto, 1982)*, at 73.

by the secondary party as being a probable consequence of the common purpose,¹³² and can prevent liability attaching to the secondary party if, by the principal's departure from the common intention, the offence was not committed "in prosecution of the common purpose".¹³³ Meanwhile, the secondary party cannot negate their actus reus by removing himself from common purpose.¹³⁴ This may be justified as the secondary party accepts liability for all the offences committed in prosecution of that purpose by joining the purpose.¹³⁵ But this would be contrary to our inherent human nature to change our mind.¹³⁶ The secondary party relinquishes control to the principal party by joining the common purpose; by requiring the purpose to be current the secondary party is able to retrieve that control. The appropriate level of culpability of someone who opens themselves up to liability by the actions of others by agreeing to commit an offence, however changes their mind by ceasing involvement, is probably better characterised as inchoate offending such as conspiracy, and not as being a secondary party to a substantive offence.

4 *Adoption of the minority's approach*

The minority has the view that something should be required at the time of the offence to show the secondary party's continued involvement (category 3 above). William Young J noted that the New Zealand approach has been that the purpose had to be to have been *current* at the time of the offence.¹³⁷ While the law on secondary party liability in this context is slightly different in the United Kingdom, the law is consistent with the minority's approach that some type of continued participation in the joint

¹³² Simester and Brookbanks, above n 10, at 6.5.3(1); Smith, above n 10, at 771; *Ahsin*, above n 1, at [117], n 79.

¹³³ *Ahsin*, above n 1, at [117], n 79 per McGrath, Glazebrook and Tipping JJ; Simester and Brookbanks, above n 10, at 6.5.3(1).

¹³⁴ At [117] per McGrath, Glazebrook and Tipping JJ.

¹³⁵ Simester, above n 58, at 599

¹³⁶ See generally Sanford H Kadish "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" 73 Cal L Rev 324 (1985).

¹³⁷ *Ahsin*, above n 1, at [249] per William Young J dissenting; *R v Vaihu*, above n 115, at [97]; See *R v Chen*, above n 114, at [56], see also [29] and [38](e); *R v Te Moni* [1998] 1 NZLR 641 (CA) at 651; *Baird v R* [2012] NZCA 430 at [23]; Robertson, above n 95, at CA66.26.

enterprise or common purpose is required.¹³⁸ This approach would provide sufficient moral justification for conviction of a substantive offence under s 66(2).

C Conceptualisation of Withdrawal: the Offence to be committed “in prosecution of the common purpose” under s 66(2)

The secondary party should have to continue their participation in the common purpose, which can be determined by assessing the common purpose and finding whether they have withdrawn from that purpose.¹³⁹ A withdrawal by termination of involvement would therefore simply show the destruction of the common purpose so no *common* purpose is present when the principal commits the offence. In line with the minority’s approach, Simester and Brookbanks commenting on withdrawal under s 66(2) suggest “[i]n principle, the joint enterprise could itself simply come to an end.”¹⁴⁰ Such a view is preferable, and therefore withdrawal of a secondary party would be able to negate the elements of s 66(2).¹⁴¹

V Jurisdictional Comparisons and Dual ‘Defences’ of Withdrawal

A common law authentic defence of withdrawal has only been established in one other jurisdiction by the Canadian case of *R v Gauthier*; however the majority in that case provided no analysis why an authentic defence should be adopted.¹⁴² New Zealand is unique for providing a justification for a common law defence of withdrawal. Some jurisdictions have enacted a statutory provision within their secondary party provision, separate from general defences, to allow for termination of involvement by withdrawal.¹⁴³

¹³⁸ See *R v Rajakumar (Aathavan)*, above n 117; *R v Smith (Dean Martin)* above n 117. See also *R v O’Flaherty*, above n 117; *R v Mitchell*, above n 117; Ashworth, above n 117, at 288. *R v Rahman (Islamur)* [2008] UKHL 45; [2009] 1 AC 129.

¹³⁹ *R v Mitchell*, above n 117, at [25].

¹⁴⁰ Simester and Brookbanks, above n 10, at 6.6.6(1). See also *R v Campbell (Andre)*, above n 117.

¹⁴¹ *Ahsin*, above n 1, at [248] per William Young J dissenting.

¹⁴² *Gauthier*, above n 76, at [50] and see generally [35]-[52]. Contrast [94] per Fish J dissenting.

¹⁴³ Criminal Code Act 1995 (Cth) s 11.2(4), s 11.2A(6); Criminal Code 2002 (ACT) s 45(5), s 45A(6); Crimes Act 1958 (Vic) s 324(2), s 324C note; Criminal Code Act Compilation Act 1913 (WA)(CI) s 8(2); American Law Institute *Model Penal Code* (American Law Institute, Philadelphia, 1962) § 2.06(6).

Some courts provide ambiguous descriptions of withdrawal,¹⁴⁴ and some have indicated that withdrawal can simply negate the elements of the offence.¹⁴⁵

An authentic defence may still be available, even where withdrawal is able to negate the elements of the offence. The majority in *Ahsin* holds that the key inculpatory moment of a secondary party, who provides assistance that subsequently expires, is at the act of assistance, hence withdrawal operating as an authentic defence will occur after the *completed* actus reus.¹⁴⁶ Contrastingly, Smith regards the actus reus as *incomplete*, or merely having the *'potential'* to be the actus reus until it is shown that the assistance in fact assisted at the time of the offence, after which it becomes the *complete* actus reus of the offence.¹⁴⁷ Where given assistance is subsequently undone by the secondary party by withdrawal, the secondary party cannot be liable as “the *actus reus* of complicity was absent at the crucial time.”¹⁴⁸ An authentic defence of withdrawal is therefore premised on the elements of secondary liability being satisfied (or complete) at the “key inculpatory moment”, being *when the principal offence was committed*.¹⁴⁹ In other words, an authentic defence would apply where the elements of secondary liability were satisfied at the time of the offence; acts of withdrawal would occur “after the accessory’s commission of the incomplete or potential actus reus.”¹⁵⁰ An authentic defence of withdrawal could therefore operate even where the elements of liability are satisfied, and therefore where acts of withdrawal could negate the elements of liability but do not.¹⁵¹

This idea of adopting dual ‘defences’ could be a possible solution to the operation of withdrawal, however this would increase the complexity of jury instructions and would broaden the availability of exculpation by withdrawal. An underlying concern of the

¹⁴⁴ *R v Becerra* (1976) 62 Cr App R 212 (CA); *R v Rook* [1993] EWCA Crim 3; [1993] 2 All ER 955; *R v Whitehouse* [1941] 1 WWR 112; [1941] 1 DLR 683 (BCCA).

¹⁴⁵ *O’Flaherty*, above n 117. *R v Mitchell*, above n 117; *R v Rajakumar (Aathavan)*, above n 117, at [42].

¹⁴⁶ *Ahsin*, above n 1, at [116] per McGrath, Glazebrook and Tipping JJ.

¹⁴⁷ Smith, above n 10, at 771-772

¹⁴⁸ At 771.

¹⁴⁹ At 772.

¹⁵⁰ At 772.

¹⁵¹ David Lanham “Accomplices and Withdrawal” (1981) 97 LQR 575; Smith, above n 10. Also cited in *Ahsin*, above n 1, at [115], n 77, per McGrath, Glazebrook and Tipping JJ;

majority may have been in some circumstances it is impossible for an individual to negate participation in an offence, however those individuals should still be exculpated if they perform certain actions. This can be achieved through an authentic defence as its requirements can be adapted and changed, unlike the view of the minority where only acts that fully neutralise prior participation will exculpate the individual.

The majority considered policy reasons in favour of a true defence. An authentic defence can reflect the aims and rationales of the defence's existence,¹⁵² it would avoid complex jury directions where both s 66(1) and (2) are relied upon,¹⁵³ and places the evidentiary burden on the accused.¹⁵⁴ Conversely the minority seem to place weight on consistency with the scheme provided in the Crimes Act¹⁵⁵ and the accepted approach to s 66 in New Zealand.¹⁵⁶ However, William Young J considered that an authentic defence was not available under s 20 of the Crimes Act,¹⁵⁷ and commented on the majority's approach saying it; "leaves rather more scope than I would for withdrawal arguments in relation to liability under s 66(1)(b)."¹⁵⁸

The minority's approach to secondary party liability is arguably more consistent with the law held in New Zealand and other jurisdictions on secondary party liability. Such a view, when analysed through the lens of the timing of liability adopted by both the majority and minority, conceptualises withdrawal as being able to negate the elements of the offence and therefore should be the bottom line approach to withdrawal. The appropriateness of an authentic defence of withdrawal and consistency with s 20 of the Crimes Act are separate issues that need to be explored.¹⁵⁹

¹⁵² See *Ahsin*, above n 1, at [122]-[123] and [124]-[142] per McGrath, Glazebrook and Tipping JJ.

¹⁵³ *Ahsin*, above n 1, at [119] per McGrath, Glazebrook and Tipping JJ.

¹⁵⁴ At [120] per McGrath, Glazebrook and Tipping JJ.

¹⁵⁵ At [21] per Elias CJ dissenting.

¹⁵⁶ At [246] and [249] per William Young J dissenting.

¹⁵⁷ At [255]-[269] per William Young J dissenting.

¹⁵⁸ At [252] per William Young J dissenting.

¹⁵⁹ See *Ahsin*, above n 1, at [254] per William Young J dissenting.

VI Conclusion

Under s 66(1), the majority's reasoning clarifies, though more likely alters actual assistance to be able to satisfy the actus reus of s 66(1) prior to the principal's offence being committed. The derivative basis of secondary liability would rest on *association* to the principal, instead of *some connection* to the offence. This is directly contrary to the precedent and authority on 'actual assistance'. There are a number of reasons outlined that would suggest this approach is not best suited for s 66. The minority's construction of liability, featuring actual assistance that requires a connection to the offence should be adopted. Withdrawal should be able to negate the elements of s 66(1).

Under s 66(2), the majority's reasoning clarifies, though more likely alters s 66(2) to *not* require the common purpose to be current at the time the offence is committed by the principal. Similarly to s 66(1), this would also clarify or alter the derivative nature of liability to lack a link to the offence at the time the offence occurs. Withdrawal would be unable to negate the elements of the offence. However in line with the minority, and accepted precedent and authority, the common purpose should be required to remain current between the principal and the secondary party at the time the offence occurs. A secondary party can withdraw by removing themselves from that common purpose which negates an element of the offence.

Under the majority's reasoning, both s 66 (1) and (2) are based on a type of associative link, which has had little, if any discussion as a possible basis for establishing secondary liability in New Zealand. The moral justification or degree of responsibility the secondary party has through his actions would be diminished by not requiring any direct participation in the offence itself under s 66(1), or any continued endorsement of the circumstances in which the offence occurred under s 66(2). The ability to link the participation to the harm of the primary offence in any way is compromised. The moral culpability and responsibility attributed to the participation in the reasoning of the majority is similar, if not the same as the conduct required for inchoate liability. However, there is a disparity in respective penalties. A solution could be to expand s 311(2) to cover situations anticipated by the majority's construction of s 66(1)(b)

liability. The offence of conspiracy may adequately cover the circumstances contemplated by the majority's construction of s 66(2) liability.

Simester notes "complicity liability is notoriously difficult, both doctrinally and conceptually, in part because its underlying principles are themselves in tension."¹⁶⁰ These principles are the major conflicts that develop during the conceptualisation of withdrawal in *Ahsin*. Only with clearer explanations of the principle of derivative liability and how it is manifested in the elements of s 66 could withdrawal be definitively conceptualised as being able (or not able) to negate the elements of the offence.

The majority's clarification or alteration of the legal elements of s 66 and the way they operate to derive liability seem to be undesirable in view of basic principles of criminal law, and inconsistent with the authorities cited in this paper. The object of the majority's description of s 66 liability may have been to find that withdrawal was unable to negate the elements of the offence; potential policy reasons regarding the rationales and practical implications of withdrawal may have overridden the need for consistency of the law surrounding secondary liability.¹⁶¹ Hence, denying that acts of withdrawal could, or should be able to negate the elements of s 66 is questionable.

¹⁶⁰ Simester, above n 49, at 600.

¹⁶¹ *Ahsin*, above n 1, at [120]-[121], per McGrath, Glazebrook and Tipping JJ.

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Word count

The text of this paper and substantive footnotes (excluding the abstract, table of contents, bibliographic footnotes, and bibliography) comprises approximately 7,979 words.