

Chapter 12: Complicity

Problem Questions

Below is an example of a problem question and a worked answer. The answer is written in bullet-point form, highlighting how the structure for answering problem questions (discussed in the 'eye on assessment' section of every chapter) can be applied in this area. Remember that when you write your essays, you should use full prose (ie, not bullet-points).

James and Dave have been trying to become members of a local gang for some time. The gang operates in the area they live, and they realise that non-membership may lead to problems in the future for themselves and their families.

In order to demonstrate his loyalty to the gang, James goes along with a group of gang members on the planned attack of someone (Paul) from a rival gang. James is nervous as he does not like violence, but does not expect the attack to go beyond causing serious (but non-fatal) harm. However, shortly after the attack begins James realises that the gang might kill Paul, and sees a few gang members with knives. Worried that he might get into real trouble, James runs away. A few minutes later Paul is killed by a fatal stab wound.

Dave is approached by one of the leaders in the gang (Steve) and asked if he can have a ride in Dave's new sports car. Dave agrees to let Steve drive the car even though he is not sure if Steve has a driving licence. Steve does not have a driving license.

Discuss the potential liability of James and Dave.

Introduction: This question involves potential liability as a secondary party, and you should highlight your understanding of this within your introduction. You should also make clear how you are going to structure your analysis – the most obvious approach to this question would be to take each defendant separately.

Step 1: The first potential criminal event arises where James (J) goes along with others when they kill Paul (P).

Step 2: The most serious potential offence would be murder, as a secondary party.

Step 3:

- **Principal offence:** If the other gang members killed J with the intention of causing serious harm then murder has been committed.
- **Actus reus:** Has P aided, abetted or counselled (assisted or encouraged) the principal offence?
- This is very likely on the facts, as P accompanies the others and thereby provides support.
- **Mens rea:** Does P intend to assist or encourage, and for the others to commit the principal offence?
- P does not intend the others to kill J, but it could be argued that he at least obliquely intends serious harm (GBH) to be caused. This will satisfy the mens rea for complicity in murder.
- P may claim that the use of knives was a supervening event from what he expected, and he should therefore avoid liability for anything done with those knives. This is possible, but will depend upon what P foresaw the others using as weapons, as well as how soon into the venture P saw the knives. This route out of liability has been narrowed by the Supreme Court in *Jogee*, making it much less likely to succeed.

Step 4: P is likely to raise a defence of withdrawal, claiming that he withdrew his assistance or encouragement before J was killed. However, simply running away is very unlikely to be sufficient for this, and therefore the defence will not apply. P may alternatively apply a form of duress by circumstances, claiming that living in the area safely requires gang membership and therefore participation. However, again, this is very unlikely to apply, and cannot apply to murder.

Step 5: P is likely to be liable for murder as a secondary party.

Step 1: The second potential criminal event arises where Dave (D) allows Steve (S) to drive his car without a licence.

Step 2: The most likely potential offence is driving without a licence as a secondary party.

Step 3:

- **Principal offence:** S clearly commits the principal offence on the facts.
- **Actus reus:** Has D aided, abetted or counselled (assisted or encouraged) the principal offence?
- This is very likely on the facts. Even where D does not actively assist or encourage S to drive the car, his omission to stop S (where he has the authority as owner of the car to prevent) will be sufficient.
- **Mens rea:** Does D intend to assist or encourage S, and for S to commit the principal offence?
- This is unlikely on the facts. D is 'not sure' if S has a license, he is reckless as to this fact. There is nothing to suggest that D intends P to commit the principal offence. However, we you may highlight the continued uncertainty about exactly what mens rea is required for complicity post-*Jogee*, and so raise the possibility of a court still finding liability.

Step 4: The only possible defence for D would be duress of circumstances. As with P, D could claim that living in the area safely requires gang membership and therefore participation. However, again, this is very unlikely to be accepted.

Step 5: D is unlikely to be liable for driving without a license as a secondary party due to lack of mens rea.

Conclusion: Your conclusion should provide a brief overview of the where you did/did not find likely liability. You may also comment critically on the law you have applied, although this (if included at all) should be kept short, as it is not the focus of the question.

Essay Questions

There are several areas of interest for essay-type questions in relation to complicity. For example, the fair boundaries of complicity, existence/role of joint enterprise as a separate form of complicity, Law Commission reform recommendations, and so on.

Below is an example of an essay-type question, and a bullet-point plan for a possible answer. This is for illustration purposes only. When writing an essay of this kind yourself, there will usually be alternative ways you could structure your answer, alternative points of discussion that could be raised, and you would certainly be expected to write in full prose (i.e., not in bullet-point form). The most important point to take from these plans is how they focus on identifying and discussing the subject matter of the debate within the question, not simply listing information about the relevant topic.

It is often said that convictions for criminal offences arising from involvement with the principal offender as an accomplice can be unjust and that this is particularly true when the conviction is for murder. Do you agree?

Introduction:

- Your introduction should focus your reader within the topic of complicity, onto the potential for unfair convictions. Thus, we are discussing the potential for complicity to be over-inclusive.
- You then need to explain to your reader how you are going to structure your essay. The most obvious structure for this essay would be to begin with the general potential for over-inclusiveness within complicity, and then to discuss the same issue in relation to complicity in murder in particular.

Body of the essay:

- We may begin with the general issue of complicity being unjust (there is a lot of material and academic comment to draw on for this). For example:

- The general idea of being labelled and punished as a principal offender despite not committing the offence as a principal;
- The relatively minor actus reus requirements within the current law – any assistance or encouragement, even if it has no effect on P (e.g., 'oh goody'), omissions liability even where D does not have a duty to act but has the authority to control the actions of P, etc.;
- The continued uncertainty post-*Jogee* as to the mens rea of complicity, and the extent to which it has been narrowed to an intention requirement.
- Moving to the particular case for complicity in murder. There are several issues that can be discussed here. For example:
 - The fact of the mandatory life sentence makes punishing D as a principal seem particularly harsh;
 - Murder as an example of a constructive liability offence – so D will be liable as a secondary party even where she only intends P to cause serious (but non-fatal) harm.
- As well as examples in line with the question statement, it is also useful to create discussion. For example:
 - We could say that the main issue with murder as a secondary party is due to the injustice of constructive liability offences (such as murder) as opposed to the complicity rules;
 - We could argue that a wider net for complicity is essential in order to protect society from group crime, which poses a particular danger.

Conclusion:

- Your conclusion should summarise your discussion, and conclude whether (in broad terms) you agree with the statement or not.
- Particularly where you do agree, you may also want to reference reform proposals which have sought to narrow the current law.