CASE NOTE
Complicating Complicity: Aiding and abetting causing death by dangerous driving in *R v Martin*

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The law of complicity, particularly relating to joint enterprise liability, appears to becoming more and more complicated. Cases on secondary liability for murder in the Court of Appeal demonstrate that this area of law is difficult to interpret and to apply. Even more complex is the question of how to apply these cases to offences other than murder. This case note attempts to address the Court of Appeal’s questions in the case of *R v Martin* as to how the jury ought to be directed in a case of aiding and abetting causing death by dangerous driving.

Introduction

Those who aid, abet counsel or procure an offence will, by virtue of s 8 of the Accessories and Abettors Act 1861, be liable to conviction for that offence. Cases on complicity in recent years have focused on the doctrine of joint enterprise liability, leaving the law in some confusion and raising questions as to whether the doctrine operates as a head of liability distinct from other modes of participation. The vast majority of cases on joint enterprise, and thus (because of their number) on complicity in crime, relate to murder charges. Very few cases in recent years have explored the requirements for convicting aiders and abettors beyond the context of joint enterprises resulting in murder.

The leading case on joint enterprise murder is, of course, *Powell and English*, more recently having undergone an (unsuccessful) attempt at clarification in *Rahman*. The House of Lords in these appeals was dealing with cases in which the deceased was killed by one of a group of people who participated in an attack on the victim with a variety of weapons, one of whom caused death in so doing. Alongside the important questions of exactly what the guidance given for such cases amounts to, is the question of the extent to which this guidance is applicable to cases other than one involving group violence resulting in death. If the courts are unable to provide straightforward directions to jurors in cases of murder (hence 15 appeals in 11 years), how can they be expected to do any better in relation to other offences?

*Powell and English*

Although, as noted above, there is some disagreement as to whether joint enterprise liability is a separate doctrine to other forms of complicity, what can be said is that it becomes important in cases beyond what Lord Hoffmann has labelled the ‘plain vanilla’ criminal plan to commit an offence, where participants in crime X become liable for crime Y, committed

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1 In his comment on *Mendes and Thompson* [2010] EWCA Crim 516, Dyson reports that there have been more than 15 Court of Appeal and House of Lords decisions in the last 11 years on joint enterprise liability: M. Dyson, ‘More Appealing Joint Enterprise’ (2010) 69 CLJ 425.

2 See, for example, B. Krebs, ‘Joint Criminal Enterprise’ (2010) 73 MLR 578.


4 [2009] 1 AC 129.

5 *Brown v The State* [2003] UKPC 10 at [13].
by the principal offender. The authorities, including *Powell and English* set out what needs to be proved in order to find secondary parties liable for murder in a case of an assault, robbery, burglary or similar which ends with one of the participants (the principal offender) causing the death of the victim with malice aforethought. The two issues involved in such cases can be broken down into (1) the ‘fundamental difference’ rule; and (2) the *mens rea* requirement.

*Powell and English* were two cases which were combined on appeal from the Court of Appeal to the House of Lords. In the *English* appeal (which considered the ‘fundamental difference’ rule) the House of Lords held that D was not guilty of murder and allowed the appeal. Although D had foreseen death or GBH he had only foreseen that such injuries would be inflicted through hitting the victim with a wooden post as part of the joint enterprise. When the principal offender produced a knife which D had no idea about, this took him outside the scope of the joint enterprise, so he escaped liability for murder. The ‘fundamental difference’ rule warrants no further discussion here.

The issue of the *mens rea* of the secondary party required in cases where the principal offender acts within the scope of the joint enterprise was dealt with in the *Powell* appeal. Powell and Daniels were convicted of murder on the basis that they realised that the principal offender might use a gun to kill or seriously injure the victim with intent to kill or cause GBH. The House of Lords dismissed Powell’s appeal because of this foresight. Although Powell did not intend death or GBH the justification for the rule is that a secondary party who takes part in an armed robbery knowing that another party has a gun which he will use if necessary should not escape liability just because he, unlike the principal party, is not suddenly confronted by the security officer so that he has to decide whether to use the gun or have the robbery thwarted and face arrest. This justification for the rule makes it seem less objectionable than it is. It implies that D would probably have committed the crime himself if he had been the one to confront the victim, whereas it actually allows D to be convicted for murder even if it was something D would not have done himself. Lord Hutton’s argument, however, was that policy demands that D is liable if he merely has foresight of the harm.

Although it was never beyond doubt, *Powell and English* appeared to require foresight of death on the part of the secondary party, since the first of the two questions certified for the opinion of the House of Lords refers to the secondary party having realised that the primary party might kill. What must be foreseen by the secondary party before he or she can be convicted of murder appears now to have been altered following *Rahman*. In that case, each of the judges bar Lord Bingham mention the need for the secondary party to foresee that the principal offender might kill or cause GBH with intent. *Rahman* appears to extend the *mens rea* of the secondary party, in that he or she may be liable for murder even if he or she does not foresee death. Whilst it can be argued that the statements on this in *Rahman* were *obiter*, several subsequent cases have adopted this terminology. To that extent, the law on joint enterprise in murder cases seems fairly straightforward, although it can of course be criticised on the basis that, whilst a principal offender must intend to cause death or GBH in order to be

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6 In fact, Krebs argues that the only job for the joint enterprise doctrine to do is in relation to those cases beyond the ‘plain vanilla’ variety: Krebs, above n 2, at 586.

7 Lord Hutton in *Powell and English*, above n 3, at 26.

8 See, for example, Lewis [2010] EWCA Crim 296.
liable, a secondary party need only foresee GBH as a possibility and yet be convicted of an
offence carrying mandatory life imprisonment as its penalty.

**Aiding and abetting in the absence of a joint criminal enterprise**

In cases where a principal offender commits an offence in the absence of a joint enterprise, normally where group violence is not used, the secondary party will be liable for that offence under the ordinary principles of accessorial liability. Whilst ‘procuring’ an offence requires a particular state of mind (ie intention that the offence be committed),

\[9\] aiding, abetting and counselling merely require that the secondary party intentionally helped or encouraged the commission of the offence in some way, being reckless as to whether the particular offence will be committed. The difference, then, between assisting an offender in the context of a joint enterprise and in other circumstances appears to be located in the absence of the need to prove an intention to assist the incidental or collateral offence in the case of joint enterprise.\[10\]

But is that really the case? The idea that a defendant may be held liable for counselling an offence which is on his or her ‘shopping-list’\[11\] of crimes when supplying the advice or tools used to commit the resulting offence by the principal offender would appear to undermine this distinction. In *Maxwell v DPP for Northern Ireland*\[12\] the House of Lords approved the statement that an accessory is liable where ‘he contemplates the commission of one (or more) of a number of crimes by the principal and he intentionally lends his assistance in order that such a crime be committed’ and it could be argued that this is not so different to a secondary party in a joint enterprise case who intends that one offence (eg burglary) be committed whilst foreseeing that another, collateral offence (eg murder) might result. In both cases there is foresight of more than one offence and the secondary party intends to render assistance in relation to at least one of those offences. As such, it can be argued that the differences between the legal requirements in a case of joint enterprise and in other cases of aiding, abetting and counselling are not so great, and that fundamentally the same principles of liability apply. It is thus fairly immaterial whether a case is argued on the basis of a joint enterprise or some other mode of participation, and explains why cases such as *Powell; English* are referred to by the courts in cases which do not appear to be cases of an obvious joint enterprise.

**Aiding and abetting the causing of death by dangerous driving**

One such case was the recent one of *Martin*\[13\], a case of causing death by dangerous driving. *Powell; English* was cited in this case,\[14\] despite it being a case which one might expect to have been treated as a case of aiding, abetting or counselling arising from the fact that the secondary party was in a position to exercise control over the principal offender,\[15\] rather than there being a joint enterprise. Whilst, as noted above, most of the cases heard in the appeal

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\[9\] Procuring means to “produce by endeavour” according to the Court of Appeal in *Attorney-General’s Reference (No.1 of 1975)* [1975] QB 773. The Court of Appeal in *Blakely, Sutton* [1991] Crim LR 763 thought that such a statement strongly suggested that the procurer must be shown to have intended to bring about the commission of the principal offence, but did not go so far as to state that procuring requires an intention to bring about the offence, since it was not necessary to decide this in that case.

\[10\] Krebs, above n.2, p.588.


\[12\] *Ibid*.

\[13\] [2010] EWCA Crim 14520.

\[14\] At [33].

\[15\] *Du Clos v Lambourne* [1907] 1 KB 40.
courts on issues of participation relate to murder, this is the second case on causing death by
dangerous driving to reach the Court of Appeal in recent years, the case of *Webster*\(^\text{16}\) having
been decided in 2006.

In both cases the secondary party was in a position to exercise control over the driver of a
vehicle. In *Martin*, this authority emanated from the fact that M, who held a full driver’s
licence, had agreed, albeit reluctantly, to act as supervisor to the principal offender, L, who
only held a learner’s licence and so could not drive in the absence of a supervisor. In *Webster*, W had the authority to exercise control over the principal offender by virtue of the
fact that he was the owner of the car being driven. In this latter case the fact that W knew the
principal offender, C, had been drinking provided one ground for arguing that he was liable
for aiding and abetting dangerous driving, in that when he allowed C to drive he realised that
C might do so in a dangerous manner, due to his drinking. It was highlighted by the court that
this was a subjective test, and required the Crown to prove that W foresaw the likelihood that
C might drive dangerously.

Alternatively, it was argued that having sat in the passenger seat and witnessed the quality of
the principal’s driving once he had allowed him to take the wheel, W should have intervened
to prevent him from continuing to drive in such a manner. The court stated that the jury
would have to be clear that W was aware that the way in which C was driving was dangerous,
but also that at that time W had had an opportunity to intervene. In handing down his
judgment, Moses LJ referred to *Powell and English* once,\(^\text{17}\) in approving counsel’s argument
that W need only foresee that it was possibility that C would drive dangerously, not that it
was inevitable: ‘The very foundation of the decision in R v Powell & English is acceptance of
the principle that a secondary party is criminally liable for the acts of the principal if he
foresees those acts even though he does not necessarily intend them to occur (see e.g. Lord
Hutton at p.282 and 27–28)’. It is perhaps strange that Moses LJ chose to refer to *Powell and
English* here, given that this was not a case where W was involved
in a joint enterprise to
commit one offence, knowing that a second, collateral offence was a possibility. It might
have been possible to argue that there was a joint enterprise to commit the offence of drink-
driving, but this was not argued, and would have required W to have known not only that C
had been drinking, but that he might have exceeded the legal blood alcohol concentration
limit to be able to drive lawfully.\(^\text{18}\) It may well have been possible to make such an argument,
and then suggest that having implicitly agreed to take part in such an offence, W had foreseen
that C might also drive dangerously, and thereby bring the case within the context of a joint
enterprise case. However, the point being made here is that the end result would have been
the same: W would be liable if the jury found, when correctly directed, that he had foreseen
that C might drive dangerously.

In *Martin* little background to the facts of the case is provided, but the allegation was that the
principal offender, L, had been racing with another car, driven by a co-defendant.\(^\text{19}\) L was
following the car driven by the co-defendant when L lost control of the car on a bend, causing
a collision in which L himself and a passenger in L’s the car both died, and the driver of
another vehicle was seriously injured. M was charged with two counts of causing death by

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\(^{16}\) [2006] 2 Cr App R 6.

\(^{17}\) At [23].

\(^{18}\) *Carter v Richardson* [1974] RTR 314.

\(^{19}\) At the time of the Court of Appeal’s judgment in *Martin*, this co-defendant was due to face a retrial on the
same charges as M as a principal offender.
dangerous driving and one count of inflicting grievous bodily harm under s.20 of the Offences against the Person Act 1861.

The prosecution’s case was that over the last 150-200 yards, M should have intervened to stop L from driving as he was driving at that time in a dangerous manner. M had at earlier stages in the journey warned L about his driving, but did not do so immediately prior to the collision. The Court of Appeal noted that it would have been open to the Crown to argue that the earlier bad driving of L was such that the jury could be sure that M foresaw that L was likely to drive dangerously during the remainder of the journey, but this was not how the case was put.20

It is clear from the Court of Appeal’s judgment that the trial judge’s directions to the jury on what was required to convict M of either causing death by dangerous driving or inflicting grievous bodily harm were woefully inadequate. The question which then arose for the court to answer was what would amount to a satisfactory direction in such a case? ‘Such a case’ was defined as one where the allegation of dangerous driving is based on the standard of driving rather than on the dangerous condition of the vehicle, and when:

i) it is not the prosecution's case that the qualified supervising driver D anticipated the likelihood that the driver P would drive dangerously in advance of him driving dangerously; and  

ii) D's liability is based on his failure to act when under a duty by reason of his position as the qualified driver to do so (rather than active encouragement).21

As such, the court was not seeking to provide guidance on the first of the two routes to conviction for an accessory to causing death by dangerous driving suggested in Webster. This leaves open the question of how the jury are to be directed in a case where it is argued that the driver encouraged the commission of the offence at the time that he allowed the principal offender to take the wheel. For example, one where the secondary party knows that, in being asked to act as a supervising driver, he will be enabling a race to take place and foresees that during the course of the race the driving may become dangerous or, as in Webster, where the owner of a car allows someone he knows to have been drinking to take to the wheel, with foresight that dangerous driving might take place. It would be useful to have a model direction that would incorporate such scenarios, given that the Crown might in any one case make their case on alternatives, as was done in Webster.

The court suggested that a direction in cases falling within its restricted classification could take the following form:

You must be sure that P committed the offence of causing death by dangerous driving and-

(i) D knew that the driver, P, was driving in a manner which D knew fell far below the standard of the a competent and careful driver;

(ii) D, knowing that he had an opportunity to stop P from driving in that manner, deliberately did not take that opportunity;

20 n 13 above, Aat [19].
21 At [30].
(iii) by not taking that opportunity D intended to assist or encourage P to drive in this manner and D did in fact by his presence and failure to intervene encourage P to drive dangerously;

(iv) D foresaw that someone might be killed by P driving in this manner.

Each point warrants some consideration and requires some reference to the law on causing death by dangerous driving. Causing death by dangerous driving is a constructive crime requiring that P drove a mechanically propelled vehicle on a road or other public place dangerously, and in so doing caused the death another person.\textsuperscript{22} Driving is dangerous if the way P drives falls far below what would be expected of a competent and careful driver and it would be obvious to a competent and careful driver that driving in that way would be dangerous.\textsuperscript{23} ‘Dangerous’ means that it creates a risk of injury to any person or of serious damage to property.\textsuperscript{24} For a principal offender, then, there is no requirement that P had knowledge that the way in which P was driving was dangerous, or that P realised that a competent and careful driver would deem P’s driving to be dangerous. It is an entirely objective test.\textsuperscript{25} Should there be a requirement, then, that D, as a secondary party sitting in the passenger seat rather than the driver’s seat, have such knowledge? It might be suggested that given the objective test, (i) would be better drafted to read: ‘D knew that the driver P, was driving in a manner fell far below the standard of the competent and careful driver’. The omission of ‘which D knew’ would signify that D must have awareness of P’s manner of driving (eg that it is at a speed too fast for the prevailing conditions), but that he is not required to know that such a manner is far below the standard of the competent and careful driver. The case of \textit{Johnson v Youden}\textsuperscript{26}, as recognised in \textit{Webster},\textsuperscript{27} states that D must have knowledge of the essential matters that constitute the offence of dangerous driving. That is not the same thing as knowing that P was driving in a manner which D knew fell far below the standard of the competent and careful driver.

There may be good reason why a subjective test ought to be imported in relation to this particular element of the offence of aiding and abetting dangerous driving, however. The second and third requirements of the direction appear sound, in highlighting that D must intend to provide assistance to P.\textsuperscript{28} If the law on aiding and abetting requires that D intended to afford assistance to P in committing an offence, it must surely be the case that D knows that P is behaving in such a way that would amount to a criminal offence, even if there is no requirement in law that P has such knowledge. The law does not require P to know that P’s driving is dangerous, but surely if D is to intentionally encourage such an offence, D must know that P is doing something that would amount to an offence and, according to \textit{Bainbridge},\textsuperscript{29} should at least know the type of offence committed. This is not to undermine the general principle that ‘ignorance of the law is no defence’: D need not know that the legal definition of dangerous driving is driving that falls far below the standard of the competent

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\textsuperscript{22} Road Traffic Act 1988, s 1.
\textsuperscript{23} Road Traffic Act 1988, s 2A.
\textsuperscript{24} Ibid.
\textsuperscript{25} See, for example, \textit{Bannister} [2009] EWCA Crim 1571 [2010] 1 WLR 870.
\textsuperscript{26} [1950] 1 KB 544.
\textsuperscript{27} At [21-22].
\textsuperscript{28} ‘Intention’ here includes both direct intention (where it is D’s purpose or desire to assist P) and oblique intention (where it is not D’s purpose or desire to assist P, but where the jury is entitled to find intention if D foresees as virtually certain that his action would result in such assistance, applying \textit{Woollin} [1999] 1 AC 82). If D is indifferent as to the result of his assistance, that is no defence (\textit{NCB v Gamble} [1959] 1 QB 11).
\textsuperscript{29} [1960] 1 QB 129.
and careful driver,\textsuperscript{30} D need only know that P is driving in a particular manner, and D need not know, but it must be the case, that that manner is such that it falls below the standard of a competent and careful driver. D must, however, at least know that P is doing something illegal and know the type of offence; in this case, presumably, that P is committing a driving offence.\textsuperscript{31} D might not realise that legally P’s driving could be classed as ‘dangerous’; it would surely be enough for D to know that it was at least ‘careless’, for example.

It is the last requirement as set out in the model direction which is erroneous, however. Counsel for the Attorney General queried requirement (iv) during the appeal, and the point was not argued.\textsuperscript{32} The Court of Appeal was rightly ambivalent about the inclusion of this requirement, stating that it would leave the matter to be decided on another day with the benefit of academic comment on the point.\textsuperscript{33} Such an invitation from the Court of Appeal for academic comment is unusual and is to be welcomed by the academic community. The question is whether the required \textit{mens rea} of the aider and abettor to an offence of causing death by dangerous driving involves some knowledge or foresight of death. It is at this stage of the judgment that the court then refers to \textit{Powell and English}: ‘On proof of (i), (ii) and (iii) D would be guilty of aiding and abetting dangerous driving and applying \textit{Powell and English} [1999] AC 1 he could (arguably) be guilty of aiding and abetting causing death by dangerous driving if he has this foresight’. The requirement that D have foreseen that P’s driving might cause somebody’s death will be crucial to the outcome of a case such as this. If there is such a requirement, a prediction can be made that securing a conviction for complicity in the causing death offence will become virtually impossible.

Causing death by dangerous driving is a constructive offence that requires only that P drove dangerously, as defined above, and that in doing so P caused death. We have already seen that there is no requirement that P knew that P’s driving was dangerous; similarly there is no requirement that P be aware that P’s driving might cause death. So is there a requirement that D, as a secondary party, have such knowledge? This was an issue ignored by the court in \textit{Webster}, and that the Court of Appeal in \textit{Martin} at least recognises it as a question requiring an answer is a welcome development.

Although \textit{Powell and English} is cited by the Court of Appeal in \textit{Martin}, there is no discussion of how it should apply in a case such as this. As we have seen, it is questionable whether \textit{Powell and English} is the appropriate authority to refer to in such cases, which do not involve the commission of a collateral offence in the course of a joint enterprise. Nevertheless, if it is to be applied, some analysis of how it could be adapted to an offence other than murder is required. The relevant principle to be applied from \textit{Powell} is that the secondary party is liable for murder if he realises that the principal offender might kill or seriously injure the victim with intent to kill or cause GBH. The case of \textit{Rahman} confirms that D must foresee death or GBH. The emphasis here is important: if the position was that D would be liable only if he foresaw that P might kill, and that foresight of GBH was insufficient, it could be said that the principle was that D must foresee the commission of murder, ie the causing of death (\textit{actus reus} of murder) with intention to cause death or GBH (\textit{mens rea} of murder). There might be an argument, then, for saying that if D were to be held liable for causing death by dangerous driving, D would have to foresee the causing of death by dangerous driving (the

\textsuperscript{30} Road Traffic Act 1988, s 2A.
\textsuperscript{31} Applying \textit{Bainbridge} [1960] 1 QB 129.
\textsuperscript{32} n 13 above, at [33].
\textsuperscript{33} Ibid.
actus reus) and nothing more would be required in terms of foresight for mens rea since the offence is one of negligence. However, that does not appear to be the current position. It is interesting that in drafting an appropriate direction for the s 20 offence the court did not include the equivalent of requirement (iv) above; the direction merely requires D to know that P was driving in a manner likely to cause some harm to another and intended, by deliberately failing to take the opportunity to intervene to prevent such driving, to assist or encourage P to drive in this manner. Why was there not the suggestion that D must have foreseen that someone might have suffered serious injury as a result of P’s driving? If the same approach were to be taken to s 20 as was taken to causing death by dangerous driving, such foresight on the part of the secondary party would be necessary. It can be submitted that since causing death by dangerous driving does not require any foresight on the part of the principal offender that P’s driving might cause death, it would be anomalous to create such a requirement for secondary parties. That in itself might not be a convincing argument, however, given that there are numerous anomalies within the criminal law, and within the case law on participation in particular. However, it is submitted that rather than seek to establish how Powell and English is to be applied to causing death by dangerous driving, it would be more germane to look again at what cases can be relied upon in this context. We are not looking at a case of a joint enterprise; rather a simple case of aiding and abetting or counselling. But then again, the case law is of little help to the current issue, in that the rule that D must have had an offence ‘within his contemplation’ when rendering assistance to a driver by providing the latter with a supervisor does not explain whether having ‘dangerous driving’ within ones contemplation is sufficient for D to be held liable for causing death thereby, or whether causing death must have been foreseen in order to bring causing death by dangerous driving within D’s contemplation. In addition, the court was making it clear that it was not considering a case of counselling (in terms of providing assistance or encouragement in advance of the commission of the offence), but rather aiding and abetting whilst being present at the scene of the crime (and, beyond Clarkson there are very few non-joint enterprise cases on this). The Law Commission, in its report on Participating in Crime, stated that the rule relating to the need or otherwise for D to foresee the outcome of a constructive crime such as causing death by dangerous driving, murder, or even s 20, is ‘that D, like P, is not required to “know” the consequence element if the principal offence is one of constructive liability’. Murder is a constructive offence in that the principal offender need not intend to cause death; intention to cause GBH will suffice. Thus, a secondary party in a murder case need not foresee the consequence of death and one assumes, likewise, neither would a secondary party in a causing death by driving case. It was noted by the Law Commission that the same is not true of the need for a secondary party to have knowledge of the relevant circumstances element of an offence, however. For example, where D encourages P to have sexual intercourse with V, thinking that V is 15 years old, when in fact she is 12, D is not liable for P’s offence of rape of a child under the age of 13. D would only be liable in such a case if D knew V was under 13, despite no such knowledge being necessary to establish P’s liability. The Law Commission observed that the common law could have adopted a similar, more generous

34 [1971] 1 WLR 1402.
36 Under the Sexual Offences Act 2003, s 5.
position in relation to D’s liability for constructive liability offences by requiring that D have knowledge of the consequence element of such offences, but states that it has failed to do so.\textsuperscript{37} What is not clear, however, is why the common law has failed to take that approach. Whilst Lord Hutton’s hypothetical scenario in \textit{Powel and English} of an unarmed participant in a robbery-turned-murder suggests that policy requires a more stringent approach, surely the courts’ preference for subjective blameworthiness in cases such as \textit{R v G}\textsuperscript{38} should translate to require at least foresight of the consequences (that the robber with the gun would shoot and kill) before finding a secondary party liable for murder?

Ultimately it may be impossible to come to a satisfactory conclusion in a causing death by driving case. The reason for this is that the cases of \textit{Webster} and \textit{Martin} are those where two unsatisfactory areas of law come together and, in doing so, highlight the inadequacies of the principles underlying each. The law of complicity is in a mess; Ashworth suggests that the courts are guilty of ‘running wild—there are too many decisions on complicity, so that courts (and/or counsel) tend to pick and choose among the many precedents; and there is no settled set of principles, which means that judicial development of the law does not always conduce to coherence’.\textsuperscript{39} The problem with the offence of causing death by dangerous driving, on the other hand, is that it breaches the principle of correspondence and it is not clear on what basis a dangerous driver deserves to be punished to a greater extent when involved in a fatal collision.\textsuperscript{40} In relation to both the doctrine of participation and the offence of causing death by dangerous driving, the law allows for the punishment of results beyond the offender’s control: secondary parties do not control the behaviour of their principals and drivers have no control over the outcome of their risk-taking. When we then combine these two areas of law it becomes difficult to see the rationale behind punishing a supervisory driver, sitting in the driving seat, who has little control over the manner in which the car is being driven and even less control over the outcome if that driving involves the taking of risks.

\textbf{No offence known to law}

It is alarming that the appellant in \textit{Martin} had been charged with, tried for and convicted of an offence that simply did not exist. It was noted above that M was charged with two counts of causing death by dangerous driving. There were two fatalities occurring from the collision which M is said to have encouraged. Of these, one of the deceased was the principal offender himself, L. Thus, M was charged with aiding and abetting L in causing his own death. Section 1 of the Road Traffic Act clearly states that it is an offence to cause the death of another by driving dangerously. And yet the trial judge failed to realise that M was being tried for an offence that does not exist. What the Court of Appeal’s judgment does allow for, however, is the prosecution of a secondary party (for offences relating to the other victims) where there is no liability of a principal offender owing to the latter’s death.

\textbf{Conclusion}

The cases of \textit{Webster} and \textit{Martin} provide an illustration of where two questionable doctrines of criminal liability collide: constructive liability and complicity. The fact that the Court of Appeal wished to interpret the rules on complicity in such a way as to be generous to the

\textsuperscript{37} Law Com No 305, above n 35, Appendix B, para B96.
\textsuperscript{38} [2004] 1 AC 1034.
\textsuperscript{39} A. Ashworth, commentary on \textit{Bryce} [2004] Crim LR 936 at 937.
\textsuperscript{40} S. Cunningham, ‘Punishing Drivers who Kill: Putting Road Safety First?’ (2007) 27 \textit{Legal Studies} 288–311.
secondary party indicate that there was an awareness that application of the law could result in over-criminalisation. It has been suggested that one way to justify joint enterprise inculpation could be the application of the ‘change of normative position’ rationale.\textsuperscript{41} When D chooses to provide assistance or encouragement to P in a criminal activity, D crosses a moral threshold and can be held liable for the consequences. The same rationale can also be given to justify the conviction of a driver for causing the death of another. Whatever one’s position on the validity of the ‘change of normative position’ theory and the ‘pure luck’ versus ‘moral’ luck argument,\textsuperscript{42} it is rather more difficult to defend what becomes a double ‘change of normative position’ by allowing D to be convicted of an offence committed by P of causing death by dangerous driving. Arguably the secondary party in such cases should be liable for dangerous driving, but his liability should stop there.

\textsuperscript{41} Krebs, above n2.