

THE DEFENCE OF WITHDRAWAL – A UNITARY OR BIFURCATED CONSTRUCT?

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Recent judicial commentary in New Zealand and in England has sought to define the parameters of the common law defence of withdrawal. While the approach of the courts has been towards the view that withdrawal is a unitary construct applicable to the two principal modes of parties liability, the thrust of this article is to suggest that there may be two discrete forms of the withdrawal defence, making withdrawal a bifurcated concept. It is argued that it is possible to discern a substantive withdrawal defence, operating in a temporal space close to the commission of the intended offence, and more directly concerned with the conditions of culpability, and a pre-emptive withdrawal defence, operating in the very early stages of a criminal enterprise, and focussing more on actus reus elements of complicity, in particular causation. The article examines the implications of this binary model of withdrawal and questions whether the possibility of a second withdrawal defence should now be recognised by the common law.

I. INTRODUCTION

The defence of withdrawal from participation as an accomplice in a crime has become a subject of judicial consideration in recent appellate decisions in England and New Zealand. As the defence has evolved in New Zealand, it is clear that a fairly narrowly construed defence may be available to an offender who seeks to withdraw from a criminal enterprise where certain conditions are met. A failure to meet these strict conditions will deprive the offender of the defence. In New Zealand the defence requires proof of communication of the withdrawal and active steps to stop or remediate the effects of encouragement to other accomplices to complete the planned offence. The effect of the defence is that the defendant will lack culpability because he or she no longer possesses the intention to continue to support the principal with the planned crime, and has taken steps to remediate his/her involvement. We might characterise this defence as '*substantive* withdrawal'. It is '*substantive*' in the sense that it operates to negate culpability for the elements of the intended offence at the time of the defendant's communicated withdrawal. By contrast, in England the courts appear to have recognised an additional characterisation of the defence of withdrawal, which does not necessarily depend on timely communication, but may be available where the offender's initial encouragement or assistance has simply ceased to be operative in the commission of the intended offence. In other words, the offender's acts or omissions have ceased to be a causal influence in the commission of the intended offence. We might call this defence '*pre-emptive* withdrawal'. It is pre-emptive in the sense that at the time of withdrawal no definitive steps towards a substantive offence have yet been taken and the accused's actions have not reached the stage where culpability could reasonably attach.

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The question which arises, and which I wish to explore in this article, is whether these defences are of the same character and whether they share the same proof elements in order to exculpate from criminal offending. On one view, since both are concerned to establish the conditions for withdrawal they must share the same elements because, arguably, withdrawal is a unitary construct, the conditions for which are either satisfied or they are not. On this basis the elements for the defence must be the same in each case. On another view, however, it might be argued that both versions of the defence contemplate quite different defence circumstances and are conceptually distinct as regards the way in which each defence is constructed in theoretical terms. This leads to a further question. If the two versions of withdrawal are conceptually distinct, does one version offer a greater prospect of exculpation and acquittal, on the basis that its elements are more readily established than the other version, whose elements, arguably, are narrow and quite prescriptive?

In this article I wish to explore the parameters of each defence, in order to establish whether there is a valid distinction to be made between the two models, or whether, if there is a distinction, it is a distinction without a difference, and not worthy of the categorisation of dual defences.

The article begins with an account of the defence of withdrawal as it is commonly understood by the courts, including a discussion of the elements of the defence as these have been expounded by New Zealand courts. This is essentially an account of *substantive* withdrawal, in that withdrawal occurs in the timeframe in which a substantive offence of accomplice liability may already have been formulated. In the next section I will outline the case for a separate defence of *pre-emptive* withdrawal. I will argue that pre-emptive withdrawal, to the extent that it is a recognised legal construct, depends on an entirely different theoretical foundation than its substantive counterpart. As such, it offers a fundamentally different basis of exculpation, depending not on evidence of communication, but rather on the idea of causal efficacy. In the next section of the article I will examine the scope of both defences under current New Zealand law. I will argue that while New Zealand courts have put their imprimatur on substantive withdrawal, albeit in narrowly bounded terms, pre-emptive withdrawal is nevertheless an available defence to the extent that it is not inconsistent with the Crimes Act 1961 or any other enactment. I will conclude with some general observations about the scope and potential operation of these defences and how their availability may affect the future of accomplice liability.

At the outset of this discussion I want to say that for the purposes of the defence of withdrawal it is my belief that there is no distinction to be made between withdrawal in the context of s 66(1) and withdrawal in the context of s 66(2). Where a common purpose scenario involving s 66(2) is in contemplation, the withdrawal defence, however characterised, should only apply to the "common purpose" element of the alleged s 66(2) liability, but not to the offence known to be a "probable consequence of the prosecution of the common purpose" (the 'collateral' offence). This is because the requirement that the defendant ('D') communicate his or her withdrawal to the principal and take steps to prevent commission of the intended offence is only meaningful if D knows of the offence from which he or she is withdrawing. As the collateral offence is, at the point of withdrawal, unknown to D, given that the context

of its commission has not yet materialised, it is impossible for D to communicate his or her withdrawal from it. If knowledge of the probable consequence were a necessary element for withdrawal it would require the defendant to communicate to the principal in terms, for example: "I am pulling out of this enterprise. I have no intention to be involved any further in X offence, or in any other offences which are likely to follow from your ongoing involvement in this enterprise and which I can foresee as probably occurring as a consequence of X offence." Such a disclaimer simply defies credibility. It is highly improbable that any defendant would rehearse such an elaborate recitation having decided he or she no longer wished to be involved in a planned unlawful purpose. It is for this reason I would argue that the withdrawal offence is generic to both s 66(1) and s 66(2), because liability under both sections depends on proof of knowledge by D of the primary offence intended by the parties. It is also interesting to observe that in the judgment of Elias CJ in *Ahsin v R*, Her Honour notes that the question of probable consequence "...is not one of objective assessment after the event but depends on the actual knowledge of each accused when prosecuting the common intention."¹

II. THE DEFENCE OF WITHDRAWAL

The generic defence of withdrawal was considered in detail by the New Zealand Supreme Court in *Ahsin v R*.² *Ahsin* was a murder prosecution in which the two female appellants had allegedly encouraged the principal by their presence in a car when the principal assaulted with an axe and killed the victim. The issue of withdrawal arose when the appellant Ahsin claimed she had withdrawn from the common purpose of intimidating and assaulting members of a rival gang, of which the Crown alleged a killing was a probable consequence, when she told the other defendants to stop what they were doing and get back into the car. Counsel for the appellant had argued both in the Court of Appeal and Supreme Court that the trial judge should have given a direction on withdrawal under s 66(1) of the Crimes Act 1961. It was argued there was a common law defence, which should be put to the jury where the defendant has satisfied the evidential burden to put the defence 'in play'. It was argued that all the defence required was that it is established that the defendant had in fact withdrawn, and, wherever possible, communicated that withdrawal to the other person involved in the offending. It was submitted that the law did not require that a party seeking to withdraw must also take steps to undo his or her previous actions.

The Crown argued that there must be timely and unequivocal communication of withdrawal, and that the defendant must undo, neutralise or nullify the effects of previous involvement. Accordingly, the Crown argued that there was no "air of reality"³ to the defence of withdrawal and that the minimum threshold for withdrawal was not met for either appellant. The exhortation to get back into the car could not be construed as unequivocal disengagement from the criminal conduct.

¹ *Ahsin v R* (2014) 27 CRNZ 314, at [22].

² *Ahsin v R*, above note 1.

³ *Ahsin v R*, above note 1, at [112].

The majority of the Supreme Court noted that people whose conduct prospectively makes them a party to an offence upon its commission may have “a window of opportunity”⁴ before the offence is perpetrated during which it is conceptually possible to withdraw from involvement before criminal liability attaches. The Court noted that the common law has long recognised that actions of withdrawal may excuse a party from criminal liability, although it was not clear from the early cases whether the absence of liability in successful cases of withdrawal was because an element of party offending has not been established, or because a true defence to liability has been established.⁵ While the majority held that withdrawal is a true defence, William Young J and Elias CJ, in separate judgments, held that withdrawal was simply a denial of an element of party offending. This depended on the view expressed by the minority Judges that an offence by an accessory party constituting encouragement or assistance continues up until the time the offence is committed. Proof of its existence at the time the offence is committed is an element of any offence based on assistance or encouragement and, on this view, is “not dependent on the defence raising an evidential foundation for its consideration.”⁶

For the purposes of this discussion the approach of William Young J - to the effect that withdrawal can do no more than negate the components of party liability - has much to commend it.⁷ In the case of pre-emptive withdrawal it makes more sense to say that withdrawal operates to deny the actus reus elements of liability under s 66(1) (b)–(d) or s 66(2) than to say that withdrawal operates as a distinct defence, when at the point of withdrawal no offence has yet been committed. However, since the majority of the Supreme Court has determined that withdrawal is an authentic defence preserved by s20, I will proceed on the basis that this is a correct understanding of the law.

In holding that a withdrawal defence does exist in New Zealand, the Supreme Court recognised the potential benefit of the defence is that withdrawal by a party may prevent the commission of the crime and thus avoid the harm it would otherwise cause.⁸ In addition to withdrawal by one party dissuading or frustrating a principal from committing an offence, evidence of withdrawal may demonstrate a lack of entrenched purpose or future dangerousness. Furthermore, an additional rationale is that if a person who has become implicated in a criminal enterprise can avoid liability “through extraction” he or she has an incentive to do so.⁹

Given these rationales for the defence of withdrawal, what is the current scope of the defence? It is recognised that at the present time there is little New Zealand authority on the scope of the withdrawal defence. Prior to the decision in *R v Ahsin* the principal

⁴ *Ahsin v R*, above note 1, at [113].

⁵ *Ahsin v R*, above note 1, at [114].

⁶ *Ahsin v R*, above note 1, at [20] per Elias CJ, and [220] per William Young J.

⁷ See *Ahsin v R*, above note 1, at [254].

⁸ *Ahsin v R*, above note 1, at [122].

⁹ *Ahsin v R*, above note 1, at [122]. However, at [282] William Young J criticised the majority’s policy rationale for the defence as being ‘unrealistic’ on the basis (1) that it assumes an implausible level of knowledge of criminal law amongst people in that situation, and (2) that on the majority’s approach ineffective attempts to stop the offending are more likely to provide a defence.

authority on withdrawal was *R v Pink*,¹⁰ a decision of the New Zealand High Court. *Pink* had itself been followed in a number of more recent Court of Appeal decisions.¹¹ *Pink* had tried to dissuade the co-offenders during a car journey to the planned robbery scene, by saying he wanted nothing to do with the robbery, challenging his co-accused that they were “crazy”, “a pack of bloody idiots”, that it was a “dumb idea” and absented himself from the scene of the crime.¹²

Hammond J noted that with inchoate offences an offender cannot undo his crime. Once the elements of such an offence are concurrently satisfied the offence is complete and cannot be “uncommitted”.¹³ This is certainly the case with a principal offender. This might be taken to extend to the most common inchoate offences, namely attempts, conspiracy and incitement. But equally, the Court held that secondary *participation* can be undone before the commission of an offence. This may occur where X withdraws from participation in the crime, provided this occurs before the crime is attempted or committed.¹⁴ Repentance is not enough, however. The participation must not merely be discontinued. It must be countermanded.¹⁵

In *R v Pink* Hammond J held that because the burden of proof is on the Crown, where withdrawal is raised by a party the onus is on the Crown to negative any such ‘defence’.¹⁶ This raises the difficult question of the precise conditions of withdrawal needing to be in place for the withdrawal doctrine to apply. Early authorities cited in the judgment appear to establish that to be efficacious withdrawal must be both *timely* and *effective*, and that where timely communication is not practicable, so that withdrawal by a countermand would not then be possible, there is a question of whether the defence would be available to an accomplice at all. Hammond J does not attempt to answer this question, but it is relevant to the issue of whether a separate defence of pre-emptive withdrawal exists, and I will come back to it in due course.

In *R v Pink* Hammond J accepted, for reasons of public policy, that whether it be called a “defence”, a plea of this type should be open to an accused person, since it is in the public interest that someone who has contemplated a criminal endeavour and changed their mind should be able to withdraw. However, by way of qualification, His Honour also noted that where a crime is about to happen, withdrawal from it may not be sufficient because the accomplice’s prior act may have had “some very distinct impact” on what then eventuates.¹⁷ Efficacious withdrawal by D may have become, in effect, impossible.¹⁸ In other words, the defendant will be judged to be, in effect, ‘on the job’

¹⁰ [2001] 2 NZLR 861.

¹¹ See *R v Ngawaka* CA111/04, 6 October 2004; *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299, (2007) 23 CRNZ 420; *R v Vaituliao* [2007] NZCA 525.

¹² *R v Pink*, above note 10, at [12].

¹³ *R v Pink*, above note 10, at [14].

¹⁴ *R v Pink*, above note 10, at [14].

¹⁵ AP Simester and GR Sullivan, *Criminal Law - Theory and Doctrine* (2nd ed, Hart Publishing, Oxford, 2003) at 236.

¹⁶ *R v Pink*, above note 10, at [15].

¹⁷ *R v Pink*, above note 10, at [21].

¹⁸ See eg *White v Ridley* (1978) 140 CLR 342.

and any attempt at withdrawal will be pointless. Hammond J, nevertheless, went on to suggest the conditions to be met for a defence of withdrawal:¹⁹

- (1) A notice of withdrawal, by words or actions;
- (2) An unequivocal withdrawal;
- (3) Withdrawal communicated to all the principal offenders;
- (4) Withdrawal effected by taking all reasonable steps to undo the effects of the party's previous actions.

In the event the accused in *R v Pink* was discharged. This was on the basis that he had issued an unequivocal countermand, by saying he was "out of" what was happening and by his observations, noted earlier, that what his co-accused were doing was "crazy", that they were "a pack of idiots" and that the planned robbery was "a dumb idea".²⁰ Furthermore, he never went to the scene of the crime. In the view of the Court, the Crown had been unable to establish that the accused had not withdrawn from participation in the crime.²¹

In commenting on the *Pink* categorisation of the conditions for withdrawal, the Supreme Court in *Ahsin* noted that whether acts of withdrawal are sufficient to exculpate a secondary participant "is an intensely contextual one".²² This was said to have been exemplified in *R v O'Flaherty*,²³ where a question for the Court was whether D had withdrawn from the common purpose before fatal injuries were inflicted on the victim. In *O'Flaherty* the English Court of Criminal Appeal held that for there to be withdrawal, mere repentance is insufficient. It said:²⁴

To disengage from an incident a person must do enough to demonstrate that he or she is withdrawing from the joint enterprise. This is ultimately a question of fact and degree for the jury. Account will be taken of ... the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal.

The Court doubted whether the taking of reasonable steps to prevent the crime was necessary for an effective withdrawal, a proposition implicitly endorsed in earlier Canadian authority, *R v Whitehouse*,²⁵ which had been approved by the English Court of Appeal on at least three previous occasions.²⁶ The Court recognised that a "mere mental change of intention" or a "physical change of location" by accomplices who "wish to disassociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime," is sufficient for an effective withdrawal.²⁷

¹⁹ *R v Pink*, above note 10, at [22].

²⁰ *R v Pink*, above note 10, at [12].

²¹ *R v Pink*, above note 10, at [25].

²² *Ahsin v R*, above note 1, at [125].

²³ [2004] EWCA Crim 526, at [60].

²⁴ *R v O'Flaherty* [2004] EWCA Crim 526, at [60].

²⁵ (1941) 4 WWR 112.

²⁶ See *R v Becarra and Cooper* (1975) 62 Cr App R 212; *R v Grundy* [1977] Crim L Rev 543; *R v Whitefield* (1983) 79 Cr App Rep 36.

²⁷ *R v Whitehouse* (1941) 4 WWR 112, at 115, per Soan JA.

Of interest, for the purposes of this discussion, was the observation of Soan J in *Whitehouse*, that he was unwilling to attempt a close definition of what is required in cases involving participation in a common unlawful purpose to “break the chain of causation and responsibility.”²⁸ This may suggest, consistently with a central argument in the present discussion, that the defence of withdrawal may be as much about legal causation as it is about communicative efficacy, a point only obliquely acknowledged in the developing case law.

In emphasising the importance of context in assessing whether an effective withdrawal has occurred, the Supreme Court in *Ahsin* noted the observation of Wilson J in a dissenting judgment in *R v Kirkness*,²⁹ to the effect that a defendant “will be held to a different standard depending on the degree of his participation in the crime” and that “where a defendant has acted positively to assist a crime beyond merely inciting or encouraging it, he must do his best to prevent its commission in order to escape liability.”³⁰ In Wilson J’s opinion, the principal question was whether in all the circumstances the withdrawing conduct negated participation in the crime, a proposition not challenged by the majority of the Supreme Court in *R v Ahsin*.

The majority in *Ahsin* also referred to the recent decision of the Supreme Court of Canada in *R v Gauthier*,³¹ a case where a woman was charged as a party to the murder by her husband of her three children, arising from a murder-suicide pact. The husband and three children died but the appellant claimed that she had abandoned the pact early in the afternoon on the day they died. The Canadian Supreme Court upheld the trial judge’s decision not to put the defence of withdrawal to the jury, on the grounds that while there was some evidence of withdrawal by the appellant, the appellant had to do more than communicate she was no longer willing to be involved in the pact. Examples given included hiding the medication used to kill the victims, take the children away, or call the authorities.

The Court in *Gauthier* identified four elements necessary to establish a defence of withdrawal. The defence required evidence to show:³²

- (1) An intention to abandon or withdraw from the unlawful purpose;
- (2) Timely communication of the abandonment or withdrawal from the person in question to those who wished to continue;
- (3) That the communication served unequivocal notice on those who wished to continue;
- (4) That the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps either to neutralize the effects of his participation or to prevent the commission of the offence.

²⁸ *R v Whitehouse*, above note 27, at 115.

²⁹ [1990] 3 SCR 74.

³⁰ *R v Kirkness* [1990] 3 SCR 74, at 115, cited in *Ahsin v R*, at [128].

³¹ 2013 SCC 32, [2013] 2 SCR 403.

³² *R v Gauthier* above note 31, at [50].

Against this backdrop of authority the Supreme Court in *Ahsin* stated what is required for the common law defence of withdrawal in New Zealand. The Court identified two elements:³³

- (1) There must be conduct, whether words or actions, that demonstrate clearly to others withdrawal from the offending;
- (2) The withdrawing party must take reasonable and sufficient steps to undo the effect of his or her previous participation or to prevent the crime.

These conditions exclusively state the law in New Zealand, in contrast to the four conditions outlined in *Pink*, which the Court held do not correctly state the law in New Zealand.³⁴ If, however, the Supreme Court rejects *Pink* as wrongly stating the law, what does it make of the highly persuasive authority of *Gauthier*, which like *Pink*, lays down a fourfold categorisation of the conditions for the defence of withdrawal? The Court is silent on its assessment of the authority of *Gauthier*, even though it identifies that decision as part of the 'background' of the case law on withdrawal.³⁵ But without indicating its reasoning the Court's approach seems highly selective of the elements of *Gauthier* and the other decisions canvassed which it adopts as representing the common law defence of withdrawal in New Zealand without further explanation.

To the extent that the Court only requires conduct "demonstrat[ing] clearly"³⁶ to others withdrawal, it appears to have rejected any requirement for *unequivocal* communication, a feature of both *Pink* and *Gauthier*. And since a *clear* demonstration would seem to be a lesser requirement than an *unequivocal* communication of abandonment, the threshold for withdrawal in New Zealand would now seem to be less onerous than in comparable common law jurisdictions, notably Canada. Furthermore, insofar as the Supreme Court requires only "reasonable and sufficient steps" taken to undo the effects of previous participation and prevent the crime, it appears to have rejected the need for withdrawal to be communicated specifically to the principal offenders, again a requirement of both *Pink* and *Gauthier*. However, its discussion on what might constitute "reasonable and sufficient steps", might have benefitted from more detail. It is arguable, for example, that what is 'reasonable' and what is 'sufficient' may represent different aspects of the contribution of the secondary party to the principal's conduct. It is possible that a person could make a reasonable attempt at withdrawal which is insufficient, whatever such insufficiency might mean. Does it mean insufficient *effort* or insufficient *means*? One is an evaluative judgment the other a pragmatic assessment. If sufficiency implies a threshold at which the secondary party's contribution to the principal's conduct is negated, what are the determinants as to whether the threshold has been met? Furthermore, how is sufficiency measured in relation to subjective considerations like age, mental impairment, previous criminal experience etc? The Supreme Court notes that while some actions will be relevant to both the first and second requirements of the defence, clear communication to the other participants of withdrawal from the offending, could demonstrate withdrawal and also be a step towards prevention of the offence, on the

³³ *Ahsin v R*, above note 1, at [134].

³⁴ *Ahsin v R*, above note 1, at [134] and fn 97.

³⁵ *Ahsin v R*, above note 1, at [134].

³⁶ *Ahsin v R*, above note 1, at [134] (emphasis added).

basis that it may dissuade the principal from continuing on the criminal activity alone.³⁷ Similarly, the Court suggests that a clear and communicated countermand which revokes earlier instruction, encouragement or advice “will often clearly convey that the party is withdrawing his or her participation and, at the same time, be a step directed at undoing the effect of a prior command or support.”³⁸ However, as Justice William Young hints at in his criticism of the majority’s policy on the withdrawal defence as being “unrealistic”,³⁹ few defendants *in situ* will have the legal knowledge or mental disposition to be thinking about how their withdrawal might prevent the commission of crime and its consequent harm, or how it might dissuade the principal from committing the crime. ‘Reasonable and sufficient’, at least on this view, is something of a moveable feast.

The question now arises to what extent are the conditions proposed by the Supreme Court in *Ahsin* actually representative of the common law, as represented in the case law? This is not clear from the majority judgment.

Nevertheless, this two-fold requirement now represents the law in New Zealand. However, the Supreme Court has offered additional commentary on how these conditions might work in practice. It notes, for example, that clear communication of withdrawal may serve both requirements of the defence by acting as a demonstration of withdrawal and act as a step towards prevention, by dissuading the principal from continuing with the criminal activity alone. Similarly, a “clear and communicated countermand” which revokes earlier instruction, encouragement or advice, will often be an indication that the party is withdrawing his or her participation and also amount to a step directed at undoing the effect of a prior command or support.⁴⁰

In summarising the defence of withdrawal the Supreme Court said:⁴¹

The common law defence of withdrawal must be put to a jury in relation to s66(1) and (2) where there is evidence that indicates the reasonable possibility of the availability of the defence. It is for the trial judge to decide if an evidential basis for both requirements of the defence exists. If that is so, the jury should be directed as to the defence. The defendant will then be liable as a party only if it is proved beyond reasonable doubt that he or she had *not* withdrawn from involvement. If there is a reasonable possibility that the defendant has withdrawn from the offending, he or she has a defence to criminal liability under s66.

The Court then offered four questions for a jury to consider in deciding whether the defence has been made out. They are whether it is reasonably possible that:⁴²

- (a) the defendant demonstrated clearly, by words or actions, to the principal offender that he or she was withdrawing from the offending before the offence was committed?
- (b) the defendant took steps to undo the effect of his or her previous involvement or to prevent the crime?

³⁷ *Ahsin v R*, above note 1, at [134].

³⁸ *Ahsin v R*, above note 1, at [134].

³⁹ *Ahsin v R*, above note 1, at [282].

⁴⁰ *Ahsin v R*, above note 1, at [134].

⁴¹ *Ahsin v R*, above note 1, at [139].

⁴² *Ahsin v R*, above note 1, at [140].

(c) the steps taken by the defendant for those purposes amounted to everything that was reasonable and proportionate, having regard to the nature and extent of the defendant's previous involvement?

(d) the steps taken by the defendant were timely, in the sense that the defendant acted at a time when it was reasonably possible that he or she may be able either to undo the effect of his or her prior involvement or to prevent the crime?

These questions, together with the two requirements identified earlier as constituting the common law defence of withdrawal, are described as "legal requirements" that must be tied to the particular facts of a case as against each defendant once the evidential burden has been met.⁴³ If these are in fact legal requirements, why are they not tied together in a compendious form as describing the minimum elements for withdrawal in New Zealand? Since they are legal requirements it seems an inescapable conclusion that the elements of withdrawal are somewhat more expansive than the two-fold test laid down by the Court, and seem to come close to reinstating the four conditions identified in *R v Pink*.

III. THE DEFENCE OF PRE-EMPTIVE WITHDRAWAL

I suggested at the outset of this article that instead of one common law defence of withdrawal, based broadly on extinction of the elements of party liability, including *mens rea* and *actus reus* components, and framed around effective communication of abandonment, there may also be another defence, better characterised as defeating the conduct requirements of complicity and framed around lack of causal efficacy.

It is the latter defence, which I have earlier characterised as 'pre-emptive withdrawal', that I want to consider now. The importance of this discussion is that if such a defence is found to exist, then the parameters of exculpatory withdrawal may need to be revisited to take account of this additional defence claim.

In *R v Jogee*⁴⁴ the UK Supreme Court reconsidered the law on parasitic accessory liability. As part of its overview of the common law it considered the conduct element of encouragement or assistance in the commission of an offence. It noted that while the act of assistance or encouragement may be infinitely varied, two recurrent situations need mention. Firstly, that association between D2 and D1 may or may not involve assistance or encouragement. Secondly, the same is true of the presence of D2 at the scene when D1 perpetrates the crime. Yet both association and presence are likely to be very relevant evidence in relation to the question whether assistance or encouragement was provided. But neither association nor presence is necessarily proof of assistance or encouragement, since it depends on the facts in each case.⁴⁵

IV. CAUSATION

An important question when addressing the issue of withdrawal concerns the place of causation in assessing the liability of secondary parties. Because liability as a

⁴³ *Ahsin v R*, above note 1, at [142].

⁴⁴ [2016] UKSC 8.

⁴⁵ *R v Jogee*, above note 44 at [11]. See also *R v Coney* (1882) 8 QBD 534, 540, 558.

secondary party for aiding, abetting or counselling does not require proof that D2's conduct actually caused D1 to commit the crime, it is tempting to argue that causation is irrelevant to this form of liability. However, causation is a necessary element in any discussion concerning the relationship between legally proscribed harms and criminal conduct, and is fundamental to a proper understanding of actus reus in the criminal law.⁴⁶

In *R v Jogee* the UK Supreme Court noted that once encouragement or assistance is proved to have been given, it is not incumbent on the prosecution to prove that it had a positive effect on D1's conduct or on the outcome.⁴⁷ It referred to *R v Calhaem*⁴⁸ where the English Court of Appeal rejected an appeal against conviction for murder, where the appellant had counselled the principal to murder the victim. On appeal it was argued that the judge had failed to put to the jury a defence that counselling required a "substantial causal connection"⁴⁹ between the acts of the counsellor and the commission of the offence and that no such causal connection existed on the facts. In rejecting the argument the Court held that causation has never been required for aiding or for counselling. It held that the offence of counselling to murder was committed if there was counselling and the principal offence was committed by the person counselled acting within the scope of his authority and not by accident. This is surely correct. Because parties liability is derivative, in the sense that helping and encouraging crime are only modes of committing an offence if someone else actually commits the offence, the actus reus of offending by helping is necessarily different from the actus reus of offending by committing.⁵⁰ As the authors of Smith & Hogan note, when the offence has been committed by the principal, it is still true to say that D2 counselled it, even if his counsel was ignored by D1; and that the same is true of abetting.⁵¹ And while the counselling need not be a cause of the commission of the offence, there must be some *connection* between the counselling and the commission of the offence.⁵² I would suggest that this connection is necessarily a *causal* connection, though perhaps not in the conventional way in which causation is understood in criminal law theory. In the context of accessorial liability 'cause' is used in the sense of giving a motive or incentive. In one of its many meanings:⁵³

[C]ause" means giving a person a motive to act – to cause a responsible person to act means to persuade or coerce him to act or to proceed in other ways which foreseeably give him a ground or incentive for action.

As an example of this form of causation, Hall refers to the editor of a newspaper who advertised obscene literature and photographs, leading to their dissemination. Here

⁴⁶ Jerome Hall, *General Principles of Criminal Law* (2nd ed, Bobbs- Merrill, Indianapolis/New York, 1960) 247.

⁴⁷ *R v Jogee*, above note 44 at [12].

⁴⁸ [1985] QB 808.

⁴⁹ *R v Calhaem*, above note 48, at 808.

⁵⁰ Simester and Sullivan, above note 15, at 237.

⁵¹ Smith & Hogan, *Criminal Law* (7th ed, Butterworths, London, 1992) at 127.

⁵² Smith & Hogan, above note 51, at 128.

⁵³ Hall, above note 46 at 251.

the causation consisted of influencing the readers of the paper by providing a motive for their purchases.⁵⁴

This sense of causation as applicable to accessories is also evident in the reasoning of Lord Widgery in *Attorney-General's Reference (No 1 of 1975)*.⁵⁵ His Lordship notes that in the great majority of instances where a secondary party is sought to be convicted of an offence, there has been contact between the principal offender and the secondary party:⁵⁶

Aiding and abetting almost inevitably involves a situation in which the secondary party and the main offender are together at some stage discussing the plans which they may be making in respect of the alleged offence, and are in contact *so that each know what is passing through the mind of the other ...* In the same way it seems to us that a person who counsels the commission of a crime by another, almost inevitably comes to a moment when he is in contact with that other, when he is discussing the offence with that other and when, ... he counsels the other to commit the offence. (emphasis added).

The point is that while aiding, abetting and counselling do not require proof of causation in the sense of producing a particular result or consequence, they nevertheless require some evidence of causation in that the principal must at least be aware "that he has the authority, or the encouragement, or the approval, of D2 to do the relevant acts."⁵⁷

In *Jogee* the Court noted that in many cases it would be impossible to prove that encouragement had a positive effect on D1's conduct or on the outcome, particularly where, for example, many supporters may have been encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference.⁵⁸ Further, the encouragement might have been given, but ignored, yet the counselled offence may have been committed. The Court then made the following observation, which is critical to the case I am making for an additional withdrawal defence:⁵⁹

Conversely, there may be cases where anything said or done by D2 has *faded to the point of mere background*, or has been *spent of all possible force* by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it. (emphasis added).

What this suggests is that there may be situations where the accomplice's conduct has become so attenuated and remote from the allegedly encouraged or assisted offence as to no longer be an operative factor in the commission of the planned offence. While causation is not required for counselling or aiding, in the sense that it need not be proved that the defendant's encouragement actually caused P to commit the offence, the argument advanced here is that the assistance, of whatever nature,

⁵⁴ Hall, above note 46, at 251-2.

⁵⁵ [1975] 2 All ER 684.

⁵⁶ [1975] 2 All ER 684, 686.

⁵⁷ Smith & Hogan, above note 51, at 128.

⁵⁸ *R v Jogee*, above note 44, at [12].

⁵⁹ *R v Jogee*, above note 44, at [12].

has ceased to be an operative, or relevant element, in the commission of the offence. It is as though the assistance, encouragement etc had never been given. It is, in the language of the Court “mere background”, whether or not it may have been rendered inoperative by a *novus actus interveniens*.

To demonstrate the strength of this claim, the Court then gives an early example of the case of *Hyde* (1672) described in both Hale and Foster.⁶⁰ The description given by Foster is as follows:

A, B and C ride out together with intention to rob on the highway. C taketh an opportunity to quit the company, turneth into another road, and never joineth A and B afterwards. They upon the same day commit a robbery. C will not be considered an accomplice in this fact. Possibly he repented of the engagement, at least he did not pursue it; nor was there at the time the fact was committed any engagement or reasonable expectation of mutual defence and support so far as to affect him.

On these facts A and B are regarded as having committed the robbery without the encouragement or assistance of C, on the basis that any original encouragement is regarded as having been spent and there was no other assistance.⁶¹ There is no suggestion that C took steps to communicate his withdrawal or to prevent the commission of the planned offence. He simply ceased to be involved in the enterprise in any further way. It is likely, however, in these circumstances that C’s action in leaving the company he has joined would be regarded as evidence of notice withdrawal by words or actions.⁶²

What this example may suggest is that there is a discrete common law defence of withdrawal which exists beyond the parameters of ‘substantive withdrawal’ and which attaches more particularly to the conduct element of accomplice liability, in particular the secondary party’s ability to influence the principal’s motivation for the crime. It is a claim that whatever conduct the defendant may in the past have participated in by way of counselling, assistance or encouragement of the principal, that conduct has ceased to be an operative factor in influencing the commission of the offence, not simply as a matter of direct causation but as a relevant element in the factual matrix of the offending, notably the principal’s motivation. It can no longer be regarded as a relevant consideration because of the effluxion of either time, opportunity, intention or lack of causal efficacy.

What is also significant about this ‘defence’ is that if successful, it does not share any of the characteristics attributable to communicative withdrawal. There is no requirement for words or actions *demonstrating* withdrawal, nor evidence of *reasonable steps* taken to undo the effect of previous participation. Nor, evidently, need the defendant have directly communicated withdrawal to the principal, provided the principal has no reasonable expectation of support by the defendant. Accordingly, the defence fails to meet the minimum criteria for the common law defence of withdrawal as it has been articulated by the New Zealand Supreme Court. Thus if the

⁶⁰ *R v Jogee*, above note 44, at [13]. See Hale, *Pleas of the Crown* (1682), vol 1, p 537 and Foster’s *Crown Law*, p 354.

⁶¹ *R v Jogee*, above note 44, at [13].

⁶² Simester and Sullivan, above, note 15 at 236.

defence exists at all it must be regarded as providing a wholly different and distinct ground of exculpation to the communicative withdrawal variety.

On the basis of this analysis I would argue that the defence of pre-emptive withdrawal operates as a negation of the requirement for conduct by words or action of accomplice liability. Even if direct causation is not required for aiding or counselling, the defence being advanced here goes one step back by claiming that not only was the aiding or counselling not causal, but rather that it had ceased to exist as an operative element in the *actus reus* of accomplice liability in any meaningful sense. The offence of counselling or assisting is deemed not to have occurred. Since this is a fundamental claim it goes well beyond an analysis of whether the conditions of withdrawal as a common law defence, have been satisfied. They are simply irrelevant.

How might this work in practice? The example given in Foster suggests the expiry of both intention and conduct at such an early stage that they are no longer relevant to the developing fact situation which issues ultimately in the common purpose. A modern example might be the situation where A and B conspire to murder X. It is agreed that B will locate X and bring him to the place where A and B will kill him. A week before the intended killing B, unknown to A, decides to leave the plan to kill X, and departs from the city by bus. A, not having heard from B, decides to carry out the killing himself, and does so after having located X and tricked him into meeting A at an isolated spot. On these facts, while B may well be guilty of conspiracy with A to commit murder, he cannot be guilty as a party to the murder of X because his words and actions have ceased to be an operative factor in A's decision to execute X. Neither his initial encouragement nor his intention expressed when the conspiracy was formed amount to conduct sufficient to constitute his being an accomplice to the crime of murder, and they have ceased to impact the principal's motivation. B's actions are spent. They are merely part of the history, regardless of what has, or has not, been communicated to A.

However, to be effective the defence of pre-emptive withdrawal does not require a *novus actus*. Evidence that the accused's acts were spent before the commission of the planned offence will negate D's accomplice liability because they were too remote to be regarded as a culpable element of the offence. The best analogy is the difference, in the law of criminal attempts, between acts which are *mere preparation* and acts (or omissions) which are *sufficiently proximate* to amount to a criminal attempt. On this basis it might be argued that conduct which is causally very distant from the planned offence is equivalently in the realm of mere preparation and not part of the crime. The closer, however, the conduct gets to the commission of the intended offence the closer it becomes to sufficiently proximate conduct to amount to an offence at law.

This version of the withdrawal defence has not, to date, been identified as a distinct excusing condition in New Zealand law. As such, it represents a wholly new common law defence in New Zealand. The test of its legal status is whether it is preserved by s20 of the Crimes Act 1961 as a common law defence. That the substantive version is so preserved is clear from comments of the majority in *Ahsin v R*. The Court noted

that common law defences remain available in New Zealand under s20 and may apply to the extent that they are not altered by or inconsistent with legislative provisions.⁶³

We do not see the common law withdrawal defence as being excluded by the Crimes Act. Recognition of withdrawal as a defence does not conflict with the language of s66, and it would not undermine the operation of the elements of party liability as identified above.

I would argue that what is true of substantive withdrawal must also be true of the defence of pre-emptive withdrawal, in respect of which there is no inconsistency or conflict with legislative provisions. This would suggest, therefore, that while New Zealand courts have approved the existence of a common law defence of withdrawal, based on communication of abandonment and steps to prevent the commission of crime, they have yet to address the question of the existence of a separate defence based on inchoate causation.

V. TWO DEFENCES OR A UNITARY CONCEPT?

The issue for determination is, if a separate defence beyond substantive withdrawal does exist, what are its elements and how do they differ from those of the substantive withdrawal defence.

The first thing to be said is that to the extent that such a defence does exist, it is likely to arise very rarely. This is because the essence of the defence is the claim that the defendant's conduct did not proceed to the point of having a causal impact on the principal's motivation and therefore had a nugatory impact on the crime eventually committed. It is as though the defendant's initial acts of embarking on a criminal enterprise with others had ceased to have any legal significance whatsoever. This suggests a high level of disengagement that not only renders the defendant's initial involvement otiose, but defeats any criminal culpability whatsoever.

For the defence of pre-emptive withdrawal to apply it is suggested that the following elements must be established:

- (1) Withdrawal by the defendant at an early stage of the common enterprise.
- (2) The absence of any causal efficacy in respect of acts or omissions done by the accused in the commission of the crime.
- (3) The absence of any involvement in any form by the accused in the planned offence.
- (4) The absence of any engagement or reasonable expectation of support by the principal.
- (5) The planned offence committed without the accused's knowledge or capacity to influence.

Expressed in these terms it is clear that the defence of pre-emptive withdrawal is conceptually distinct from its substantive counterpart. In particular, because withdrawal occurs at a very early stage there is no requirement for communication of withdrawal because the intended criminal enterprise has not reached a stage where the accused's initial acts of involvement have had any impact on intended offence. The principal has simply not been influenced in any way by the accused's actions. Furthermore, because the ultimate offence will have been committed without the accused's knowledge there can be no requirement that he or she take action to

⁶³ *Ahsin v R*, above note 1, at [118].

prevent the commission of the offence. A person cannot prevent something they are not privy to or of which they have no knowledge.

VI. EVIDENTIAL ISSUES

Following the Supreme Court's directions concerning the defence of 'withdrawal'⁶⁴ the common law defence of pre-emptive withdrawal should be put to the jury in any prosecution involving s66(1) and (2) of the Crimes Act 1961 where there is any evidence that indicates a reasonable possibility of the defence. The trial judge must decide if an evidential basis for the nominated requirements of the defence exist. If an evidential basis is established the jury should be directed as to the defence. The defendant will be liable as a party only if it is proved beyond reasonable doubt that he or she had *not* withdrawn from involvement. If there exists a reasonable possibility that the defendant has withdrawn from the offending, he or she has a defence to criminal liability under s66.

VII. CONCLUSION

It is perhaps a bold claim to suggest that there exists a new defence that the courts have not yet recognised, or which has been presumptively subsumed under another recognised defence. With regard to the defence of 'pre-emptive withdrawal', this is what appears to have happened. While New Zealand courts have for some time recognised the existence of a general defence of withdrawal, it has been characterised in terms which suggest that at the time of withdrawal the offender had been engaged in a measure of criminality such that, without active withdrawal on his or her part, liability as a party would likely have been established. For these reasons, the courts have insisted on a clear demonstration of withdrawal and reasonable and sufficient steps to undo previous participation or to prevent the crime. However this approach, with respect, fails to recognise that there may be situations, albeit rare, where an accused's involvement in a criminal enterprise is so remote and early withdrawal so complete that it cannot be said that there is any criminal conduct from which withdrawal must be communicated or steps taken to prevent the offence. It is as though anything said or done by the defendant has "faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed."⁶⁵ It is this situation, as has been contended for in this article, that constitutes the separate defence of pre-emptive withdrawal and for which separate provision should now be made in the common law.

⁶⁴ See *Ahsin v R*, above note 1, at [139].

⁶⁵ *R v Jogee*, above note 44, at [12].