



**Assessing the impact of the Supreme Court's
decision in *R v Jogee* through an exploration of the
Jury's Assessment of '*Inferring Intention*' in
Joint Enterprise cases.**

Jill Molloy (*Barrister*)
Senior Lecturer in Law



Introduction

Part 1

- Overview of the doctrine of Joint Enterprise in English Law, and the UK Supreme Court's decision in *R v Jogee*.

Part 2

- Inferring intention and the concept of intentionality.
- Psychological and social factors impacting on a juror's assessment of evidence to infer intention.



Part 1

Overview of the doctrine of Joint Enterprise in English Law, and the UK Supreme Court's decision in *R v Jogee*.



The Doctrine of Joint Enterprise

- The England and Wales Crown Prosecution Service in 2012 recognised three main types of joint enterprise:
 1. Where 2 or more people embark on a joint venture to commit a single crime – joint principals (*Anderson and Morris* [1966]).
 2. Where D (defendant) assists or encourages P (principal offender) to commit a crime – general accessory liability.
 3. **Where P and D participating together in committing a crime (crime A) and in the course of committing crime A, P commits a further offence (crime B) which D had foreseen as a possibility – parasitic accessory liability (PALs) (*Chan Win-Siu* [1985], and *Powell and Daniels; English* [1999])**



Pre-*Jogee* Criticisms of PALs

Criticisms	Support
Lack of clarity enabled the CPS to over-charge especially in gang related crimes , creating uncertainty and injustice.	Widening the scope of the doctrine of joint enterprise was necessary to reduce the social problems of gang related crimes
Created the potential to convict and sentence people on the basis of peripheral involvement in the crime due to the lower threshold of <i>mens rea</i> being applied.	The doctrine of gang related crimes acts as a deterrent to young people joining or getting involved in gang-related crimes.
Juries were overly willing to find foresight in PAL cases.	
Disproportionately used against young people and Black, Asian and Ethnic Minority groups.	



R v Jogee [2016]





Supreme Court's Decision [2016]

- Held that:
 - (1) the Privy Council in *Chan Wing-Siu* and the House of Lords in *Powell and Daniels; English* had taken a **wrong turn in equating foresight with intention**.
 - (2) D will only be liable for the further offence if he **intended to assist or encourage P in committing the offence**. Foresight of the possibility that the further crime may be committed is not sufficient to satisfy the *mens rea* of secondary participation. **Foresight is merely evidence** from which the jury can infer that D intended to assist or encourage the commission of the further offence with the requisite *mens rea*. In reaching this decision the Supreme Court has returned the law to its position before the 'wrong turn.'



Part 2

- Inferring intention and the concept of intentionality.
- Psychological and social factors impacting on a juror's assessment of evidence to infer intention.



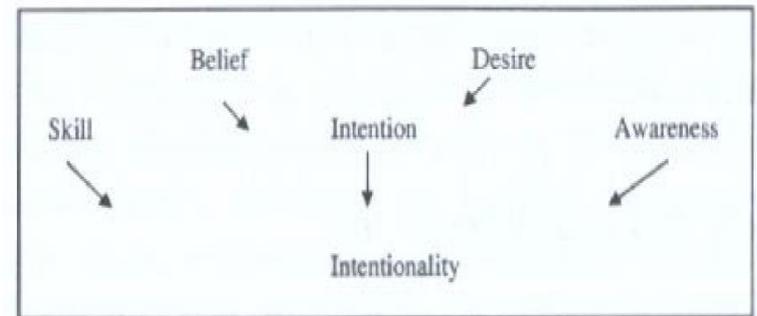
Inferring Intention

- Concept of intention in English law is complicated.
- Lack of clarity of the judge's instructions on the meaning of intention.
- Juror's ability & willingness to understand the Judge's instructions
- Influence of non-legal factors.



What does the lay person understand by “intentionality”?

- Intention, belief, desire, skill and awareness (Malle and Knobe 1997)
- Character of the accused (Sripada 2010)
- Seriousness of outcome, type of act, possible precautions (Duff 1990)





Blame and Moral Considerations

- Solan (2001) recognised that imposing **blame** hinges on whether:
 - the person's act or outcome was viewed to be *good* or *bad*;
 - the person could be said to be *responsible* for the act or outcome.
- Knobe's (2003) empirical study on intention and the influence of **moral considerations** - belief as to whether the behaviour itself was *harmful* or *helpful*.



Judicial Instructions and Weight

- Sommer, Horowitz and Bourgeois (2001)
 - Compliant & non-compliant jurors
 - Maximising & minimising evidence



Influence of Specific Evidence

- Gambetti, Nori and Giusbertu's (2016)
 - (i) motive,
 - (ii) skill in use of weapons,
 - (iii) previous violence against the victim.

Gambetti et al.

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Table 1. Experimental conditions.

	Previous violence	Skill	Motive
Condition 1	Present	Present	Present
Condition 2	Absent	Absent	Present
Condition 3	Absent	Present	Absent
Condition 4	Present	Absent	Absent
Condition 5	Absent	Present	Present
Condition 6	Present	Absent	Present
Condition 7	Present	Present	Absent
Condition 8	Absent	Absent	Absent



Gang Evidence

- Eisen, Dotson and Olaguez (2014)
 - It is highly likely that affiliation or suggested affiliation with a gang will have a prejudicial effect on the juries determination of culpability.
 - This was even true when there was clear evidence of reasonable doubt.



Implicit Racial Bias

- ***Implicit*** racial bias exists within individuals regardless of their *explicit* racial attitudes.
- Jurors do not leave their implicit racial bias at the doors of the courtroom (Kang et al 2012)
- Racial bias may result in a juror forming a decision on guilt *prior* to hearing the evidence, and filtering the evidence heard during the trial *through that preconception*.



Conclusions

- Juries are likely to continue to infer intention in joint enterprise cases where all or a combination of these factors are present:
 - Involvement in the joint venture to commit a different offence.
 - Knowledge or suspicion that an additional offence may be committed by P.
 - Bad character.
 - Experience at using weapons.
 - Race and/or class.
 - Affiliation with a gang.



What next?

- Mock jury study:
 - Juror's comprehension of the judges' direction on intention in joint enterprise cases.
 - Juror's likelihood of convicting based on the type common purpose agreed.
 - Juror's reliance on proper evidence e.g biases.
 - Juror's consideration of other variables.
 - The effect of juror's heuristic reasoning i.e. hindsight bias on inferring intention in joint enterprise cases.



References

- Allen *Structuring Jury Decision Making in the Criminal Law Cases: A Unified Constitutional Approach to Evidential Devices* (1980) 94 Harv LR 321
- Borstein and Greene *Jury Decision Making: Implications for and from Psychology* (2011)
- Coffey *Codifying the Meaning of 'Intention' in the Criminal Law* (2009) 73 JoCL 394
- Duff *The Politics of Intention: A Response to Norrie* (1990) CLR 637
- Eisen, Dotson and Olaguez *Exploring the Prejudicial Effect of Gang Evidence: Under what Conditions will Jurors Ignore Reasonable Doubt* (2014) 2 Cri. L. Prac. 41
- Elek and Hannafor-Agor *Racial Bias and the American Juror* (2015) 51 Ct. Rev. 116
- Gambetti, Nori, Giusberti *Intentional or Negligent Homicide? Evidence for Juror Decision Making* (2016) 119(2) Psychol. Rep 395
- Gorr *Should the Law Distinguish Between Intention and (Mere) Foresight?* (1996) 2 Legal Theory 359
- Horder *Intention in the Criminal Law: A Rejoinder* (1995) 58 MLR 678
- Kang et al *Implicit Bias in the Courtroom* (2012) 59 UCLA L. Rev 1124
- Kaveny *Inferring Intention from Foresight* (2004) 120 LQR
- Khan *Intention in Criminal Law: Time to Change?* (2002) 23(3) Statute Law Review 235
- Knobe *The Concept of Intentional Action: A Case Study in the uses of Folk Psychology* (2006) 130 Philosophical Studies 203
- Kobick & Knobe *Interpreting Intent How Research on Folk Judgments of how Intentionality can Inform Statutory Analysis* (2009) Brooklyn Law Review



- Kugler *Conditional Oblique Intention* [2004] Crim LR 284
- Kugler *The Definition of Oblique Intention* (2004) 68 JoCL 417
- Lacey *A Clear Concept of Intention: Elusive or Illusory?* (1993) MLR 621
- Lacey *In(de)terminable Intentions* (1995) 58 MLR 692
- Levison, Cai and Young *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test* (2011) 8 Ohio St. J. Crim. L. 187
- Malle and Knobe *The Folk Concept of Inetntionality* (1997) 33 The Journal of Experimental Social Psychology 101
- Malle and Nelson *Judging Mens Rea: the Tension between Folk Concepts and Legal Concepts of Intentionality* (2003) 21(5) Behav. Sci Law 563
- Norrie *Oblique Intention and Legal Politics* (1989) CLR 793
- Parsons *Intention in Criminal Law: Why is it so Difficult to Find?* (2000) 4 Mountbatten Journal of Legal Studies 5
- Simester *Moral Certainty and the Boundaries of Intention* (1996) 16 OJLS 445
- Solan *Cognitive Foundations of the Impulse to Blame* (2003) 68 Brook. L. Rev. 1003
- Sommer et al *When Juries Fail to Comply With the Law: Biased Evidence Processing in Individual and Group Decision Making* (2001) 27 Personality & Soc. Psychol. Bull 309
- Spirada *The deep self model and asymmetries in folk judgement about intentional action* (2010) 151(2) Philosophical Studies 159
- Stark *It's only Words: On Meaning and Mens Rea* [2013] CLJ 155
- Williams and Dingwall *Inferring Intention* (2004) 55(1) NI Legal Quarterly 69
- Williams *Oblique Intention* (1987) 46 CLJ 417