Before the High Court

IL v The Queen: Joint Criminal Enterprise and the Constructive Murder Rule: Is This Where Their 'Logic Leads You'?

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Abstract

IL v The Queen involves the prosecution for murder, on the basis of the constructive murder rule, of a participant in a joint criminal enterprise to manufacture methylamphetamine — in circumstances where the actual perpetrator of the killing was quite possibly the deceased. Whatever the views of the justices of the High Court of Australia about whether the appellant ('IL') was sufficiently culpable justifiably to be convicted of murder, it is unlikely that the Court will accept her argument that she can be convicted of that offence only upon proof that she foresaw the possibility that the relevant conduct would result in death. It is not always easy for the courts to accept invitations to develop the law so as to make it more compatible with progressive notions of criminal responsibility. Given the apparent public support for the constructive murder rule, the High Court would need a firm basis for acting as IL wishes it to act; however, textual and historical considerations support the Crown's position — as do the relevant precedents.

I Introduction

In 1983, David Lanham expressed the hope that Parliament would abolish the 'felony murder rule' 'wherever it exists'.[1] The New South Wales ('NSW') Parliament has not yet acted on this recommendation. According to Lanham, however, this should not be the end of the matter. In the face of such legislative obduracy, he argued, *the courts* should act. In jurisdictions such as NSW, where the rule stands on a legislative foundation, judges should give it 'as narrow a scope as possible ... by restrictive interpretation of the relevant statute'.[2]

In *IL v The Queen*, the High Court of Australia has an opportunity to do precisely this. It seems unlikely, however, that their Honours will accept the invitation of the appellant ('IL') to develop the law so as to ensure that a passive participant in a joint criminal enterprise ('JCE') can be convicted of murder on the basis of the constructive murder rule only if the Crown can prove that he/she foresaw the possibility of death.

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1 David Lanham, 'Felony Murder — Ancient and Modern' (1983) 7(2) *Criminal Law Journal* 90, 101.

2 Ibid.

In so arguing, I am not seeking to distance myself from the views of those commentators who, like Lanham, oppose the constructive murder rule.[3] Indeed, even the person whom IL envisages — the individual who foresees the *possibility* that conduct for which he/she is responsible will cause death — is not self-evidently culpable enough to be justifiably stigmatised as a murderer.[4] Still less am I arguing that *IL* exhibited sufficient blameworthiness to warrant being convicted of murder. On the contrary, in circumstances where the actual perpetrator of the relevant killing was quite possibly the deceased, it is easy to see why IL is seeking to persuade the Court to alter the law in the manner set out above. Nevertheless, four things must be borne in mind.

First, the public apparently does not share some academics' views that it is unjust to convict a person of murder because he/she, or an accomplice, unintentionally killed somebody while committing a very serious offence.[5] Second, when deciding cases, the courts are cognisant of the views that they perceive the public to hold.[6] Certainly, as Bell J has argued extra-judicially, judges' concern to act in accordance with the 'values of ... society'[7] has not always caused the law to develop adversely to accused persons' interests. *R v Jogee*[8] is perhaps a recent example of this. But where society seems to support a harsh criminal law rule, it is difficult for the judiciary to modify that rule significantly. That the extended joint criminal enterprise doctrine ('EJCE') is not as 'highly controversial'[9] in South Australia and NSW as 'parasitic accessory liability'[10] became in the United Kingdom, is one reason why it was never going to be easy for the High Court in *Miller v The Queen*[11] to alter the law in the manner desired by some commentators.

Third, the High Court has recently acted cautiously when deciding controversial cases involving offenders'/accused's rights.[12] And, fourth, because of this judicial anxiety to avoid creating any perception that their Honours are willing undemocratically to substitute their own views for those of Parliament,[13] a litigant who argues that the law should be developed to conform to progressive notions of criminal responsibility[14] has a heavy onus to discharge. IL appears not to have discharged it here. There is an insufficient textual, historical and precedential basis for her argument, however normatively desirable the position that she advocates might be.

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3 See, eg, Brent Fisse, *Howard's Criminal Law* (Lawbook Company Limited, 5th ed, 1990) 70–71.

4 *The Queen v Crabbe* (1985) 156 CLR 464, 469.

5 New South Wales Law Reform Commission, *Complicity*, Report No 129 (December 2010) 154–5 [5.56]–[5.59].

6 See, eg, *R v Gnango* [2012] 1 AC 827, 848–9 [61], 850 [68].

7 Justice Virginia Bell AC, 'Keeping the Criminal Law in 'Serviceable Condition': A Task for the Courts or the Parliament?' (2016) 27(3) *Current Issues in Criminal Justice* 335, 339.

8 [2016] 2 WLR 681.

9 Ibid 704 [81].

10 Ibid 685 [2].

11 (2016) 90 ALJR 918.

12 Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2017) 43(1) *Monash University Law Review* (forthcoming); Andrew Dyer, 'Irreducible Life Sentences: What Difference Have the *European Convention on Human Rights* and the UK *Human Rights Act* Made?' (2016) 16(3) *Human Rights Law Review* 541, 561–72.

13 See, eg, *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 593 [23].

14 IL, 'Appellant's Submissions', Submission in *IL v The Queen*, Case No S270/2016, 21 December 2016, [33], [63].

II The Decisions Below

In January 2013, emergency services personnel attended a house where IL and the deceased had together been involved in the final stage of manufacturing a large commercial quantity of methylamphetamine.[15] Upon entering, officers found the deceased severely burned.[16] These injuries had been caused by a fire in the bathroom, where a gas cylinder was connected to a ring burner.[17] On the ring burner was a cooking pot containing methylamphetamine and an inflammable solvent (acetone) that generates inflammable vapours on heating.[18] The offenders had been boiling such mixtures to extract impurities from the drug.[19]

The deceased died ten days later. IL was convicted of manufacturing a large commercial quantity of methylamphetamine. She was also charged with murder and, in the alternative, manslaughter. The Crown alleged that the lighting of the ring burner was the act causing death. Because the Crown could not prove that the accused herself performed any such act, it had to use the JCE doctrine to establish her guilt. But because the alleged conduct was done during the commission of a crime punishable by life imprisonment (the drug manufacturing offence),[20] the prosecution, to secure a murder conviction, did not have to prove that the parties agreed to act with intent to kill or inflict grievous bodily harm,[21] or with foresight of the probability of death.[22] It was instead able to rely on the constructive murder rule.[23]

On 2 December 2014, Hamill J upheld a defence application for directed verdicts of not guilty regarding the homicide charges.[24] His Honour accepted that, if the accused were liable for murder, this was because of her *accessorial* involvement in the killing.[25] After rightly noting that accessorial liability is derivative,[26] Hamill J concluded that, because the actual perpetrator (the deceased) could not be guilty of his own murder, IL also could not be guilty of that crime.[27] The problem with this, however, was that the Crown was not proceeding against IL as an accessory. Rather, as noted above, it was proceeding against her on the basis of the JCE doctrine; and since *Osland v The Queen*,[28] it has been clear that JCE liability is not derivative, but primary. Indeed, Simpson JA, for the NSW Court of Criminal Appeal ('NSWCCA'), noted as much when upholding the Crown appeal against the directed verdict.[29]

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15 *R v IL* [2016] NSWCCA 51 (8 April 2016) [8] ('*IL'*).
16 Ibid.
17 Ibid.
18 Ibid [12].
19 *R v IL (No 4)* [2014] NSWSC 1801 (11 December 2014) [8] ('*IL No 4*').
20 *Drug Misuse and Trafficking Act 1985* (NSW) ss 24(2), 33(3)(a).
21 *Crimes Act 1900* (NSW) s 18(1)(a).
22 *Royall v The Queen* (1990) 172 CLR 378 ('*Royall*').
23 *Crimes Act 1900* (NSW) s 18(1)(a).
24 *R v IL (No 2)* [2014] NSWSC 1710 (2 December 2014) ('*IL No 2*').
25 Ibid [82].
26 *Likiardopoulous v The Queen* (2012) 247 CLR 265, 276–7 [27].
27 *IL (No 2)* [2014] NSWSC 1710 (2 December 2014) [82].
28 (1998) 197 CLR 316, 342–50 [72]–[94].
29 *IL* [2016] NSWCCA 51 (8 April 2016) [64].

In other words, in the case of JCE, the acts that the actual perpetrator performs in carrying out the agreed upon enterprise are attributed to his/her co-offender. One consequence of this is that 'scandalously unmeritorious acquittals'[30] are avoided. The other participant can be held liable for the relevant crime even if the actual perpetrator is not guilty because, for instance, he/she lacked the requisite mens rea[31] when he/she performed the actus reus. Consistently with the NSWCCA's reasoning, however, another consequence of this is that, despite the actual perpetrator's non-commission of the actus reus of murder, it would be open to a jury to convict IL of that offence (or manslaughter) — subject to an 'interesting, and novel'[32] argument concerning malice, to which I now come.

Under s 18(2)(a) of the *Crimes Act 1900* (NSW), an accused can be convicted of murder only if the act or omission causing death was 'malicious'. Before its repeal (with effect from 15 February 2008), s 5 of the *Crimes Act 1900* (NSW) defined this term, relevantly providing that an act was 'done maliciously' if it was either 'done of malice'; or done *without* malice, but with (i) 'indifference to human life or suffering'; or (ii) 'with intent to injure some person'; or (iii) 'recklessly or wantonly'. The parties now accept Simpson JA's conclusion[33] that, due to a savings provision,[34] the s 5 definition has been preserved for the purposes of s 18(2)(a).

In the NSWCCA, IL argued that it was not open to a jury to find it proved that the lighting of the ring burner was done maliciously.[35] But Simpson JA disagreed, holding that '[a]t the very least, it would be open to a jury to conclude that [that act] in the circumstances in which it took place, was done recklessly'.[36] Her Honour proceeded on the basis that, for the Crown to establish recklessness in a case such as this, it must prove that the accused realised that his/her act *might* cause some physical harm, and noted that, here, '[a] plainly dangerous chemical operation was being undertaken, in a confined space, in wholly unsuitable premises, with primitive equipment'.[37]

III The Appeal to the High Court

IL now argues that — at least where the foundational offence is 'not a violent one'[38] — an actual perpetrator can be convicted of murder on the basis of the constructive murder rule only if, during (etc) his/her commission of an offence punishable by at least 25 years imprisonment, he/she performed an act causing death with foresight that death might be caused. This is said to be because of the malice requirement in s 18(2)(a). In other words, so the argument goes, death is a different kind of harm from

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30 David Lanham, 'Primary and Derivative Criminal Liability: An Australian Perspective' [2000] *Criminal Law Review* 707, 707.
31 See, eg, *R v Cogan* [1976] QB 217.
32 *IL* [2016] NSWCCA 51 (8 April 2016) [73].
33 Ibid [88].
34 *Crimes Act 1900* (NSW) sch 11 cl 65.
35 *IL* [2016] NSWCCA 51 (8 April 2016) [75].
36 Ibid [95].
37 Ibid.
38 IL, 'Appellant's Submissions', Submission in *IL v The Queen*, Case No S270/2016, 21 December 2016, [54].

bodily injury.[39] That being so, the *R v Coleman*[40] proposition that the accused is 'reckless' within the meaning of the old s 5 if he/she foresaw the possibility of *the particular type of harm in fact done*, means that, in a murder case, where the particular harm is death, it is not enough for the Crown to prove that the accused foresaw the possibility of some physical harm.[41]

Concerning other participants' liability, IL argues that, while the Crown could use the JCE doctrine to prove her guilt of drug manufacturing, the acts thus attributed to her were not hers for the purposes of the murder charge;[42] rather, to establish IL's guilt of that offence, the Crown would have to prove that she contemplated the commission of the 'incidental crime [of] ... constructive murder'.[43] Specifically, according to this submission, IL could only be convicted of murder if the Crown could prove that she: (a) agreed with the deceased to commit the drugs offence; and (b) foresaw that: (i) during that offence's commission, an act might be done with foresight of the possibility of death (maliciously); and (ii) death might result.[44] Alternatively, if the Crown does not have to prove her foresight of (ii), it *does* have to prove such foresight of (i).[45]

Concerning manslaughter, IL contends that, contrary to what she understands the prosecution's position to be,[46] it would not be enough for the Crown merely to prove that she and the deceased agreed to manufacture drugs: such conduct is unlawful, but not dangerous. Instead, the Crown would have to prove that: (i) the parties agreed to perform the specific act of 'evaporating acetone over a flame in that room'[47] or (ii) they agreed to manufacture the drugs and IL foresaw the possibility of dangerous activity.[48] According to IL, one problem with this latter, EJCE, case would be that '[m]ethodology of drug manufacturing is something that one knows or does not — it is not "contemplated" like an escalation of violence'.[49]

This manslaughter argument seems unlikely to succeed. Admittedly, that any act of lighting the ring burner was clearly IL's for the purposes of the drugs offence might not necessarily mean that she is guilty of manslaughter: that guilt would apparently depend on whether the parties agreed to,[50] or she foresaw,[51] such unlawful and dangerous conduct. But, contrary to IL's submissions, the Crown's position is seemingly that she and the deceased agreed not simply to manufacture drugs, but to do so by means of the evaporation process detailed

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39 Ibid [48].
40 (1990) 19 NSWLR 467, 475.
41 IL, 'Appellant's Submissions', Submission in *IL v The Queen*, Case No S270/2016, 21 December 2016, [45]–[46].
42 Ibid [74].
43 Ibid [28].
44 Ibid [88].
45 Ibid.
46 Ibid [78].
47 Ibid.
48 Ibid [78], [89].
49 IL, 'Appellant's Reply', Submission in *IL v The Queen*, Case No S270/2016, 28 February 2017, [16].
50 *TWL v The Queen* (2012) 222 A Crim R 445, 455 [36]–[37].
51 *Gillard v The Queen* (2003) 219 CLR 1, 11–12 [19], 13–14 [25].

above.[52] When regard is had to: IL's presence at the time of the fire; her admitted stirring, on the morning in question, of a pot containing methylamphetamine in the process of extraction; and her purchase of acetone three days beforehand,[53] it is difficult to see why it is not open to a jury to find it proved that she and the deceased agreed to perform the unlawful and 'plainly dangerous chemical operation'[54] allegedly performed. Accordingly, I shall address my remaining remarks to IL's murder charge.

IV What Will the High Court Decide?

Even if the High Court doubts whether, to use Gageler J's words, 'in this case [the alleged] criminal responsibility reflects moral culpability',[55] their Honours will not find it easy to discover in the text or history of ss 5 and 18, or in the relevant precedents, a sufficient basis for accepting IL's submissions.

As Windeyer J noted in *Ryan v The Queen*,[56] in the years immediately preceding the enactment of the *Criminal Law Amendment Act of 1883* ('1883 Act') in which the first legislative expression of the current s 18 appeared), the common law felony murder rule had attracted adverse judicial comment.[57] What is important, however, is how the drafters of the 1883 Act chose to respond to the concerns that, to their knowledge,[58] had been expressed. They did not reduce to legislative form even an objective dangerousness requirement of the type suggested in *R v Serné*[59] (at least for killings during (etc) felonies).[60] Rather, they provided in s 9 of that Act that, unlike at common law, only killings during (etc) capital felonies or those punishable by life imprisonment would constitute murder.[61]

Section 14 of the 1883 Act did provide, as s 18(2)(a) does today, that only 'malicious' acts or omissions could found a murder conviction. Further, s 7 defined the term 'malicious' in the same way as s 5 did before its repeal. But it is difficult to accept that the Parliament, by including ss 14 and 7, intended to require the Crown to prove that the actual perpetrator foresaw the possibility of death, if it were successfully to use the constructive murder rule. Rather, as the plurality noted in *R v Lavender*,[62] the primary[63] purpose of s 14 was to assuage some parliamentarians' (seemingly unfounded) concerns that, without s 14, the provision in s 9 for reckless indifference murder could facilitate the execution of negligent killers.

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52 Crown, 'Respondent's Amended Submissions', Submission in *IL v The Queen*, Case No S270/2016, 17 February 2017, [56].

53 *IL (No 4)* [2014] NSWSC 1801 (11 December 2014) [22].

54 *IL* [2016] NSWCCA 51 (8 April 2016) [95].

55 Transcript of Proceedings, *IL v The Queen* [2016] HCA Trans 279 (16 November 2016).

56 (1967) 121 CLR 205, 241 ('*Ryan*').

57 See, eg, *R v Greenwood* (1857) 7 Cox CC 404, 404; *R v Horsey* (1862) 3 F & F 287, 288–91.

58 *Ryan* (1967) 121 CLR 205, 241.

59 (1887) 16 Cox CC 311, 313.

60 Section 9 did separately provide that it was murder to kill during (etc) the accused's or an accomplice's commission 'of an act obviously dangerous to life'. Parliament has since abolished this type of murder: *Crimes and Other Acts (Amendment) Act 1974* (NSW) s 5(a).

61 Sir Alfred Stephen and Alexander Oliver, *Criminal Law Manual* (Government Printer, 1883) 201.

62 (2005) 222 CLR 67, 85 [48].

63 Stephen and Oliver, above n 61, 9.

It has since become clear that, where the Crown seeks to prove reckless indifference murder, the malice requirement adds nothing.[64] Might the same essentially be true of constructive murder? That is, should the High Court in *IL* accept the Crown's argument that, in constructive murder cases, the s 18(2)(a) requirement is satisfied by the malice involved in the foundational offence?[65]

Mraz v The Queen[66] supports this contention. There, Fullagar J implied that the first, 'question-begging'[67] part of s 5 simply gave statutory effect to the common law regarding murderous malice. What exactly was the common law position? The answer is, relevantly, that '[a]n intent to commit any felony whatever' amounted to 'malice aforethought'[68] (an accused who killed while possessed of such intent acted with 'constructive malice').[69] Accordingly, as Toohey and Gaudron JJ observed in *Royall v The Queen*, *Mraz* 'is authority for the proposition that, in the case of the murder-felony rule, the commission of the felony satisfies any requirement of malice'.[70]

In *Mraz*, the foundational offence was rape. Might the courts have to look beyond the initial part of s 5 where the underlying offence, as Nettle J put it at the special leave hearing in *IL*, 'do[es] not involve violence'?[71] In contending that the courts need *not* do this, the Crown observes that offences that could be committed without violence have always qualified as foundational offences.[72] But that such *crimes* qualify as foundational offences does not obviate the need for the Crown to prove that the *act* causing death was done maliciously. And it might be argued that, given that (i) the common law did not stand still after 1883; and (ii) statutory words do not always retain their original meaning,[73] the first part of the s 5 definition now embraces what the common law came in the 20th century to regard as constituting constructive malice.

Even if this is so, it is not clear that the latter parts of the s 5 definition are enlivened in a case such as *IL*. For though it has been said that the common law developed so that an accused acted with constructive malice only if the act causing death was a violent one done in the course or furtherance of a felony of violence,[74] it is doubtful whether this is true.[75] For example, where the woman died during an

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64 *Royall* (1990) 172 CLR 378, 428, 454; *R v Coleman* (1990) 19 NSWLR 467, 474.

65 Crown, 'Respondent's Amended Submissions', Submission in *IL v The Queen*, Case No S270/2016, 17 February 2017, [21], [79]–[82].

66 (1955) 93 CLR 493.

67 Ibid 510.

68 Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan and Co, 4th ed, 1877) Article 223. See also Courtney Stanhope Kenny, *Outlines of Criminal Law* (Cambridge University Press, 1st ed, 1902) 133.

69 See, eg, *Hyam v DPP* [1974] AC 55, 87.

70 *Royall* (1990) 172 CLR 378, 428.

71 Transcript of Proceedings, *IL v The Queen* [2016] HCA Trans 279 (16 November 2016).

72 Crown, 'Respondent's Amended Submissions', Submission in *IL v The Queen*, Case No S270/2016, 17 February 2017, [28]–[29].

73 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 8th ed, 2014), 156–60.

74 *Crimes Act 1958* (Vic) s 3A(2). See also *DPP v Beard* [1920] AC 479, 493.

75 Fisse, above n 3, 68–9.

abortion, the Crown did not have to prove that the act causing death was violent;[76] it was enough that it was dangerous.[77] Further, it was murder to kill in the course or furtherance of arson; and yet, as Fisse has observed, 'it is not a violent act to set fire to a buiding'.[78] In short, it appears that Windeyer J was right to say in *Ryan* that, at common law, 'an unintended killing in the course of or in connexion with a felony is murder if, but only if, the felonious *conduct* involved violence *or danger* to some person'.[79] If so, common law developments since 1883 — even if they are relevant when construing s 5 — do not support the view that the conduct in *IL* was malicious only if it fitted within the 'expansionary content'[80] of that provision. Rather, because any lighting of the ring burner was dangerous conduct done during the commission of the drugs offence, it was performed with what the common law would regard as 'constructive malice' — and, thus, 'done of malice' within the meaning of s 5.

It is quite possible, then, that the High Court will acccept the Crown's primary argument. If so, does this mean that the malice requirement can never play a role in a constructive murder case? Not necessarily. Justice Button and Lloyd Babb SC provide two examples — which they assure us are not too far-fetched[81] — of an accused performing a well-intentioned act causing death, during or immediately after the foundational offence, but which has no real connection with that offence.[82] Consistently with this argument, it might be that only acts 'done in furtherance of, or in association with, the foundational offence'[83] can automatically be regarded as malicious. But that does not assist IL.

If the High Court does not accept the Crown's primary argument, however, it seems unlikely to reject Simpson JA's view that, to establish recklessness within the meaning of repealed s 5, it is enough for the Crown to prove foresight that the relevant conduct might cause some physical harm. IL's argument that death is a legally distinct harm from physical injury — just as physical injury is a legally different type of harm from property damage[84] — is dubious. It does not sit harmoniously with the references to grievous bodily harm or serious injury in the mental elements for murder[85] and involuntary manslaughter.[86] Moreover, IL's foresight of death standard is not consonant with at least two of the other mental states (intent to injure; indifference to human life or suffering) mentioned in s 5.[87]

What does this mean for an accused, like IL, who is prosecuted for 'constructive murder' on the basis of JCE? If the Court accepts IL's incidental crime

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76 Cf John Willis, 'Felony Murder at Common Law in Australia — The Present and the Future' (1977) 1(5) *Criminal Law Journal* 231, 235.

77 *R v Brown* [1949] VLR 177, 181.

78 Fisse, above n 3, 68.

79 (1967) 121 CLR 205, 241 (emphasis added).

80 *IL* [2016] NSWCCA 51 (8 April 2016) [101].

81 Richard Button and Lloyd Babb, 'Some Aspects of Constructive Murder in New South Wales' (2007) 31(4) *Criminal Law Journal* 234, 237–8 (examples 3–4).

82 Ibid 237–8.

83 Ibid 239–40.

84 *R v Pembliton* (1874) LR 2 CCR 119.

85 *Crimes Act 1900* (NSW) s 18(1)(a).

86 *Nydam v The Queen* [1977] VR 430, 445; *Wilson v The Queen* (1992) 174 CLR 313, 332–3.

87 Concerning the s 5 mental states, see *R v Lavender* (2004) 41 MVR 492, 544–8 [229]–[253], 569 [331].

argument, this is not a basic JCE case at all: on that analysis, she can be guilty of murder only if the Crown is able to prove that she contemplated this further offence's commission as a possible incident of her and the deceased's execution of the drug manufacturing enterprise. But, if that is right, what precisely must IL have foreseen? Clearly, the Crown would have to prove that she foresaw that an act might be done with whatever malice is required for 'constructive murder'. As just argued, however, the only malice for that crime might be that involved in the foundational offence. If so, it becomes crucial whether the Crown must prove foresight not only of an act being done maliciously, but also that death might result.

The relevant High Court authorities provide no clear answer to this question.[88] But the South Australian Court of Criminal Appeal has held that it is enough for the accused to have foreseen the possibility of the actual perpetrator's acting with the requisite mens rea.[89] Further, there is academic support for such a view[90] and this approach is consistent with the rule that, to be convicted of a homicide offence as an accessory, an accused need not have intentionally assisted or encouraged the principal with knowledge that death would result.[91] In *Giorgianni v The Queen*, the plurality suggested that, without this last rule, it would be impossible to be an accessory to manslaughter[92] — even though the person who has aided and abetted an unlawful and dangerous act might be just as, or more,[93] culpable than the principal. A similar concern applies here. Offenders might foresee that, in the course of their committing a lesser crime, one of them might perform an unlawful and dangerous act; but it would be less usual for them to foresee that death might result. Yet if the actual perpetrator can be convicted despite his/her failure to foresee this consequence, it is difficult to see why his/her co-offenders' lack of foresight should make any difference.

Therefore, even if the Court accepts IL's incidental crime analysis, the Crown might not be required to prove that she foresaw that: (i) the deceased might act with malice beyond that involved in the drugs offence; or (ii) death might result from the JCE. But it is questionable whether the Court *will* accept that analysis. First, the authorities[94] that IL claims are consistent with this approach fall well short of explicitly endorsing it. Second, while two crimes have been committed in a constructive murder scenario, the same is true of unlawful and dangerous act manslaughter. Yet, where multiple accused have agreed to perform an unlawful and dangerous act, there is no room for EJCE liability. This is because, by agreeing to 'bash' somebody, for example, the participants have at once formed the mens rea for the foundational assault offence and manslaughter. If the Crown need prove only the malice involved in the foundational offence to secure the actual perpetrator's conviction in a constructive murder case, a similar analysis suggests itself. By

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88 *Clayton v The Queen* (2006) 81 ALJR 439, 442 [11] cf 443 [17].
89 *R v Presley* (2015) 122 SASR 476, 487 [76].
90 William Wilson and David Ormerod, 'Simply Harsh to Fairly Simple Joint Enterprise Reform' [2015] *Criminal Law Review* 3, 5.
91 *Giorgianni v The Queen* (1985) 156 CLR 473, 502–3.
92 Ibid 502.
93 *Likiardopoulous v The Queen* (2012) 247 CLR 265, 281 [39].
94 See, eg, *R v Sharah* (1992) 30 NSWLR 292.

agreeing to commit the foundational offence, the other participants have also agreed that the actual perpetrator will act with the malice required for murder.

If that is right, IL will be guilty of murder merely upon proof that: (i) she and the deceased agreed to commit the drugs offence (which they did); and (ii) the deceased was killed during its commission (which he was).[95] An additional element, deriving from the NSWCCA's decisions in *R v Johns*[96] and *R v Sharah*[97] — namely, that the accused contemplated that the actual perpetrator might perform the act causing death — has rightly been questioned.[98] Certainly, in a constructive murder case where the foundational offence is armed robbery with wounding,[99] the Crown will normally have to prove that the passive participant agreed to commit armed robbery, foreseeing the possibility of wounding.[100] If that is established, he/she will be liable, on the basis of EJCE, for the foundational offence. In turn, the Crown will often be able to prove foresight of wounding if it can prove foresight of the act that the actual perpetrator performed (such as firing a gun).[101] But where the foundational offence is that alleged in *IL*, the Crown need not prove that the accused foresaw anything if it is to establish his/her liability for it: it will be enough to prove that he/she agreed to manufacture a large commercial quantity of drugs. Once that is established, it is not obvious why the prosecution would have to prove that the accused foresaw the act that caused death. It should be enough that that act was within the scope of the common design[102] — which will be so if he/she foresaw it;[103] but he/she need not have done so.[104]

V Conclusion

Despite Lanham's 1983 advice, then, it seems unlikely that the High Court will give the NSW constructive murder rule the 'restrictive interpretation' that IL has urged upon it. Certainly, as IL notes,[105] the Canadian Supreme Court majority in *Martineau v The Queen* struck down a 'felony murder' provision in that country's *Criminal Code*[106] because it provided for deprivations of liberty not in accordance with 'the principle of fundamental justice that subjective foresight of death is required before a conviction for murder can be sustained'.[107] But the NSW Parliament has not granted the judicary the types of powers that Canadian judges enjoy; and, in the past, it has not been easy to persuade Australian courts to use the resources they possess

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95 *R v Surridge* (1942) 42 SR (NSW) 278, 283.
96 [1978] 1 NSWLR 282, 294–5.
97 (1992) 30 NSWLR 292, 297. See also *R v Jacobs* (2004) 151 A Crim R 452, 492–3 [222]–[224]; *R v Spathis* [2001] NSWCCA 476 (29 November 2001) [315].
98 New South Wales Law Reform Commission, above n 5, 148–150 [5.37]–[5.40]; *Batcheldor v The Queen* (2014) 249 A Crim R 461, 475 [79], 483–4 [128]–[132].
99 *Crimes Act 1900* (NSW) s 98.
100 *Sio v The Queen* (2016) 334 ALR 57, 65 [36]–[37].
101 *Batcheldor v The Queen* (2014) 249 A Crim R 461, 483–4 [129].
102 *Markby v The Queen* (1978) 140 CLR 108, 112.
103 *Rich v The Queen* (2014) 43 VR 558, 622 [290]–[291].
104 *Varley v The Queen* (1976) 12 ALR 347, 353.
105 IL, 'Appellant's Submissions', Submission in *IL v The Queen*, Case No S270/2016, 21 December 2016, [53].
106 RSC 1985, c C-46.
107 *Martineau v The Queen* [1990] 2 SCR 633, 644.

to require the Crown to prove subjective (or even objective) fault in constructive murder cases.

Similar arguments to IL's failed in *R v Munro*,[108] *R v Spathis*,[109] *R v Ryan*,[110] *R v Van Beelen*[111] and *R v R*.[112] Accordingly, while Gageler J has expressed some doubt about where the 'logic' of JCE and the constructive murder rule 'leads you'[113] in a case such as this, this history tends to confirm that it is unlikely to lead their Honours particularly close to Ottawa.

[108] (1981) 4 A Crim R 67, 69–70.
[109] [2001] NSWCCA 476 (29 November 2001) [312]–[313].
[110] [1966] VR 553, 563–4.
[111] (1973) 4 SASR 353, 403.
[112] (1995) 63 SASR 417, 420–21.
[113] Transcript of Proceedings, *IL v The Queen* [2016] HCA Trans 279 (16 November 2016).