Being a Party to the Crimes of an Adversary:

R v Gnango in the New Zealand Setting

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Lastly a recognition that the cases cited within involved real people and often tragic events that changed the lives of all concerned.

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I. Introduction

The use of secondary liability to hold to account those who help, encourage or join together to commit crimes is an important part of New Zealand criminal law. It is, however, an area of law that sometimes sits uncomfortably with New Zealand's traditional notions of culpability. This is because it involves holding someone liable for a crime that they did not directly commit. Hence difficult fact situations can emerge that push the boundaries of the well-established rationales underpinning New Zealand's criminal law. This dissertation will examine the approach the New Zealand courts would take to one such fact situation that arose for the consideration of the Supreme Court of the United Kingdom in *R v Gnango*.[1]

In the case of *R v Gnango,* Armel Gnango (Gnango) was convicted of being a party to a murder that was carried out by his adversary in a gunfight. The practical focus of this dissertation will be to assess whether New Zealand courts, applying the Crimes Act 1961, would hold Gnango liable for murder. The underlying aim however is to examine the interplay between policy and principle in this area and to emphasise that any conclusion reached needs to be in line with the legal principles and rationales of secondary liability. These principles have developed over centuries and New Zealand courts need to ensure they reach decisions consistent with these principles and do not stretch the law in response to public pressure.

To achieve the above aims this dissertation will examine the facts of the murder prosecution resulting from a public shoot out in *R v Gnango,* the directions of the Judge in the Court of first instance and the decisions of the United Kingdom Court of Appeal and Supreme Court under the English law of secondary liability. This dissertation will not consider at length the reasoning of the Law Lords or criticism of the decision in the United Kingdom. It will only do so where relevant to the analysis of the approach a New Zealand court would take.

Secondly, and as the main part of the dissertation, s 66 and s 167 of the Crimes Act will be applied to the facts in *R v Gnango* to determine if a murder conviction could be obtained in New Zealand. Gang violence and reckless public shoot-outs do occur in New Zealand and it is a very real possibility that a New Zealand court may have to grapple with facts such as in

[1] *R v Gnango* [2011] UKSC 59.

this case in the future. The legal issues involved will span transferred mens rea, whether it is possible to intend to encourage your own attempted murder, the *Tyrell* principle (or victim rule), whether the scope of the common purpose under s 66(2) can encompass adversaries, whether acting in concert is enough to be considered a principal party and whether Gnango could be liable as a principal party under s 167(c). Following this discussion a number of hypothetical situations of violence between groups will be considered to assess more fully the potential scope and implications of the use of s 66 and s 167 in situations such as *R v Gnango*.

Thirdly this dissertation will consider to what extent the application of s 66 in the above fact situations complies with the underlying principles of criminal law at play and the danger posed if we begin to move away from these principles.

Finally it will examine the alternative approach of depraved heart liability that is used in some states in the United States of America, to illustrate that some jurisdictions have been willing to move away from the established principles of criminal law to allow defendants such as Gnango to be convicted of murder.

II. The decision in *R v Gnango*

On October 2, 2007 the 17 year old Gnango and another young man, identified only as "Bandana Man" (BM), engaged in a gunfight in a car park in London. There was a pre-existing dispute involving money between the men, and when they came across each other in the car park BM opened fired on Gnango. Gnango then crouched behind an occupied vehicle and returned fire. In the course of the gunfight the innocent passer-by Magda Pniewska was killed by a bullet from the gun of BM. BM was never arrested but Gnango was arrested and in addition to being charged with the attempted murder of BM and firearms offences, he was charged with the murder of the passer-by as a secondary party to BM's crime under the English law of parties to offences.[2] No issues of self-defence arose on these facts.

Clearly BM could be charged with the murder through the doctrine of transferred mens rea which also applies in New Zealand.[3] Transferred mens rea is the general rule that if an offence is committed with the required mens rea but the actus reus occurs in a different unexpected way, the mens rea may transfer to this unexpected result. The most obvious

2 In New Zealand parties to offences or secondary liability is covered by s 66 of the Crimes Act.

3 Section 167(c) of our Crime Act covers this situation. It holds offenders liable for murder, who in the course of attempting to kill one person kills another by accident or mistake.

example is when A shoots at B intending to kill B but misses and kills C. The murderous intent transfers to the act of shooting C and A is guilty of murder despite the fact that they did not intend C's death. However, the charging of Gnango as a party to this murder, carried out not by an associate but by an adversary, raised difficult legal questions.

In the Central Criminal Court, before a jury, Gnango was convicted of murder on the basis that Gnango and BM were in a joint enterprise to commit the public order offence of affray[4] and Gnango realised that in the course of this joint enterprise BM might shoot someone with the requisite intention for murder.

The murder conviction was overturned in the Court of Appeal which held that there could be no common purpose on these facts (absent a shared purpose to shoot and be shot at which was not put to the jury) as their purpose in fighting each other was not shared but rather "reciprocal, or equal and opposite."[5] However, leave was given to appeal to the Supreme Court on the following question of law; "If (1) D1 and D2 voluntarily engage in fighting each other, each intending to kill or cause grievous bodily harm to the other and each foreseeing that the other has the reciprocal intention; and if (2) D1 mistakenly kills V in the course of the fight, in what circumstances, if any, is D2 guilty of the offence of murdering V?"[6]

In the Supreme Court Gnango's conviction for murder was restored by a majority of five to one. This was through two avenues, both different to what was put to the jury in the Central Criminal Court. The first route to liability was that Gnango abetted BM to shoot at him by encouraging him to do so and therefore through the doctrine of transferred mens rea he too was liable for Magda Pniewska's murder. The second was that Gnango and BM were joint principals in a joint enterprise to engage in unlawful violence designed to cause death or serious injury, where death resulted.

The reasoning of the majority on both avenues of liability has been widely criticised in the United Kingdom.[7] This dissertation will only examine this criticism where it is relevant to the

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4 Affray is an old common law offence in England now codified in section 3 of the Public Order Act 1986. It is the use or threat by a person of unlawful violence towards another, the conduct of the person using the violence or making the threat being such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

5 *Regina v Gnango* [2010] EWCA Crim 1691 at [57].

6 *R v Gnango*, above n 1, at [1].

7 See Richard Buxton "Being an accessory to one's own murder" (2012) 4 Crim LR 275; and Graham Virgo "Joint enterprise liability is dead: long live accessorial liability" (2012) 11 Crim LR 850.

examination of s 66, and will not examine the subsequent law reform proposals in the United Kingdom that have arisen as a result of *R v Gnango* and other high profile cases.[8]

One of the main criticisms of the Supreme Court decision in *R v Gnango* was that the judges stretched the law in order to reach a conclusion in line with public opinion. Lord Brown's judgment illustrated this when he stated that "the general public would in my opinion be astonished and appalled if in those circumstances the law attached liability for the death only to the gunman who actually fired the fatal shot."[9] Statements such as this from the judges in *R v Gnango* have led to criticism of this decision as being "more driven by policy considerations than by legal logic."[10] This pressure to convict and punish those involved in violent offences, that was said to have influenced the judges in *R v Gnango*, also exists in New Zealand through general community criticism and from organised groups such as the Sensible Sentencing Trust. This community expectation and criticism can lead to considerable pressure on judges and creates an environment where it is expected that they will convict or leave legally unconvincing avenues for conviction open to a jury. This influence is a cause for concern. As Ashworth notes "seemingly objective criteria such as harm, wrongdoing and offence may melt into the political ideologies of the time."[11] The existence of this public pressure is important to keep in mind when considering the following legal analysis as it can cause judges, when making difficult decisions in novel or finely balanced cases, to move away from the traditionally accepted rationales.

When dealing with this charge of murder, Cooke J in the Central Criminal Court, the Court of Appeal and the Supreme Court all took different approaches and reached different conclusions. This is an indication of the difficult legal questions involved. Just as in the United Kingdom, convicting Gnango as a party to murder raises difficult questions for a court in New Zealand attempting to apply s 66.

III. Section 66 of the Crimes Act 1961

Section 66 of the Crimes Act covers parties to offences and is our equivalent of the English law of secondary liability. Section 66 states as follows:

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8 House of Commons Justice Committee *Joint Enterprise* (HC 1597, 2012); The Law Commission of the United Kingdom *Participating In Crime* (Cm 7084, 2007).

9 At [68].

10 Richard Card *Card, Cross and Jones Criminal law.* (20th ed, Oxford University Press, Oxford, 2012) at 745.

11 Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, Oxford, 2006) at 52.

66 Parties to offences

(1) Every one is a party to and guilty of an offence who—

(a) actually commits the offence; or

(b) does or omits an act for the purpose of aiding any person to commit the offence; or

(c) abets any person in the commission of the offence; or

(d) incites, counsels, or procures any person to commit the offence.

(2)Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

The New Zealand law on parties to offences, unlike that in the United Kingdom, stems from the "elegantly simple statutory reformulation made in the Stephen Code of the old complex rules of complicity in the second degree and of being an accessory."[12] Section 66 is an important provision as it applies to all offences (unless expressly or impliedly excluded) and it treats all relevant participants as parties to the offence, holding them equally liable to the penalties for the substantive offence.

Section 66 gives the various ways in which a person can be liable as a party to an offence. *Adams on Criminal Law* breaks s 66(1) the primary provision into two separate categories. Under 66(1)(a) a person is a party to and guilty of an offence if they actually commit the offence (referred to as the principal party) and secondly under s 66(1)(b)-(d) a person is a party if they help or encourage the person who commits the offence (commonly referred to as a secondary party).[13]

Subsection (2) provides an additional basis for liability. It is intended for situations that differ from those contemplated in s 66(1)(b)-(d). As *Adams on Criminal Law* points out "section 66(1)(b)-(d) deals with offences that are intended. Liability arises where one person intentionally helps, encourages or procures another to commit the offence that is committed. On the other hand, s 66(2) is primarily directed at offences not intended by some or one of the parties concerned. It covers any offence which, while not the result aimed at, was known

[12] Justice McGrath (ed) *Laws of New Zealand Part IV Participation in Criminal Offending* (looseleaf ed, LexisNexis) at [65];The Stephen code was a comprehensive rationalisation of English Common law offences that was never adopted in England but was adopted in New Zealand.

[13] Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA66.01].

by the parties to be a probable consequence of prosecuting a common unlawful purpose."[14] Another important general point about s 66 is the derivative nature of secondary liability. "A person cannot be guilty under s 66(1)(b)-(d) as a secondary party unless it is proved that another person actually committed the offence in terms of s 66(1)(a)."[15]

As mentioned in the introduction, holding someone liable for a crime they did not directly commit can sit uncomfortably with our traditional notions of culpability. For this reason it is important that secondary liability is kept within a defined scope based on sound rationales so it is not seen as extending liability too far.[16] Section 66(1) and (2) have different rationales for holding secondary parties liable for crimes committed by the principal party. Aiding and abetting under s 66(1) is grounded in the intentional help or encouragement given to the principal party. The person intentionally contributes to the carrying out of the offence with the necessary knowledge. However s 66(2) is different. As Simester noted "Whereas aiding and abetting doctrines are grounded in S's contribution to another's crime, joint enterprise is grounded in affiliation."[17] The reason a person may be held liable under s 66(2) for a crime that they did not intend or assist in, is that they have joined a criminal undertaking with others and due to the dangerous nature of such groups the law views them as having collective responsibility for the foreseeable acts of the group. Both of these rationales have long been entrenched in the common law. *East's Pleas of the Crown* noted that abetting, counselling and procuring had to be committed with the necessary malice[18] and Kenny recognised the extended and shared liability of those who partake in an unlawful common purpose.[19] It is important when examining culpability in a novel controversial situation such as *R v Gnango* that any decision is in line with these rationales. If it is not, New Zealand law will be open to similar criticisms of inconsistency and knee-jerk reaction that have undermined the credibility of the law of secondary liability in the United Kingdom.

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14 At [CA66.01].

15 Robertson, above n 13, at [CA66.04].

16 This has been a very controversial issue in the United Kingdom with many being critical of cases that have held very minor participants liable as secondary parties to murder. See Diane Abbott "Time to review police use of 'joint enterprise'" (2010) the Guardian <http://www.guardian.co.uk/uk/2010/jul/29/gangs-joint-enterprise-unfair-police>; and Eric Allison "Joint enterprise law questioned by mother of teen convict" (2010) the Guardian <http://www.guardian.co.uk/society/2010/aug/04/joint-enterprise-law-garry-newlove>.

17 AP Simester "The mental element in complicity" (2006) 122 LQR 578 at 599.

18 Edward Hyde East *Pleas of the Crown* (Professional Books Limited, Abingdon, 1803) at 353.

19 Courtney Stanhope Kenny *Outlines of Criminal Law* (15th ed, Cambridge University Press, Cambridge, 1947) at 99.

Moving back to the specific situation in *R v Gnango,* the offence in question is murder under s 167 of the Crimes Act. BM is liable for murder under s 167(c). Section 167 states that culpable homicide is murder in each of the following cases:

> (c) If the offender means to cause death, or, being so reckless, as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed.

This section codifies the transferred mens rea doctrine for the purposes of murder under s 167(c). BM meets the requirements of s 167(c) and therefore if Gnango fulfils the requirements of s 66 he will be liable as a secondary party to BM's offence.

IV. Liability under s 66

The first important issue that arises in applying s 66 and the relevant case law to the fact situation in *R v Gnango* is as follows:

A. Under s 66(1)(c) can you encourage your own attempted murder when in actual fact your aim is to kill the other person?

The United Kingdom Supreme Court found that Gnango could be liable for the murder of Magda Pniewska as a secondary party as he encouraged BM to shoot at him and as a result of those shots she was killed. Could this be a possible avenue to liability for murder for Gnango in New Zealand?

In New Zealand this would most likely fall under s 66(1)(c). Abetting in s 66(1)(c) is generally considered to mean encouragement.[20] There are a number of elements that must be fulfilled to establish liability as a secondary party under s 66(1)(c).

1. Was there encouragement in fact?

At the trial in the Central Criminal Court Cooke J had directed that Gnango could not be convicted as an accessory through encouragement as there was no encouragement in fact. He stated that Gnango "might have provoked further firing, but he did not encourage it."[21] The key question then is, is provocation different to encouragement? Professor David Ormerod wonders if perhaps the trial judge took too narrow a view on this point. He stated that "applying a natural interpretation of the term 'encourage', could it be said that G's shots might be said to have spurred B on, emboldened him, goaded him, stimulated him and

[20] *R v Curtis* [1988] 1 NZLR 734 (HC).
[21] *R v Gnango*, above n 1, at [99] per Lord Dyson.

induced him to shoot back."[22] Does this fit however, with our traditional view of abetting? The traditional case of encouragement involves a group acting together, with one committing a crime surrounded and encouraged by accomplices through their words or conduct. Even some of the rarer cases of encouragement by presence involve deliberate presence intended to show approval for the acts of the offender, not an adversary.[23] Putting it simply it could be said that in general provocation involves opponents, whereas encouragement involves people on the same side acting towards a common end. In the *R v Gnango* context the alleged encouragement comes from an adversary attempting to kill the principal party; this is vastly different to encouragement in the ordinary sense.

In addition to this uncomfortable fit with the traditional view of encouragement the facts do not point towards encouragement here as BM was found to have fired first and it seems odd to say that in firing back Gnango encouraged him to fire a second time. However perhaps it could be argued that his presence armed and ready to fight constituted the provocation or encouragement.

This view on provocation was shared by Lord Dyson in the Supreme Court. He felt that "the judge was right to distinguish between encouragement and provocation."[24] However, Lord Dyson and the other members of the majority in the Supreme Court felt that the encouragement in fact came from a different source than provocation. The majority felt that it was important to distinguish between a fight where each combatant provoked the other and a situation that was more akin to a duel than a fight. The majority held that on the facts of this case the jury had decided that Gnango and BM were engaged in combat that was analogous to a duel and that meant they were both parties to an agreement to shoot and be shot at.[25] The encouragement in fact did not come from provocation but from this agreement to have a shoot-out.

However, the existence of an agreement to shoot and be shot at is questionable. Firstly, as will be discussed further in the context of common intention under s 66(2), an "agreement" to do anything is not clear on these facts. Secondly the analogies drawn by the majority with a

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22 David Ormerod "Joint enterprise: murder- killing of bystander by other party in gunfight" (2011) 2 Crim LR 151 at 154.

23 *R v Pene* CA63/80, 1 July 1980.

24 At [100].

25 At [100], per Lord Dyson.

prize fight and duel are potentially inaccurate and misleading. As Professor Graham Virgo points out:[26]

> Duelling was subject to very strict rules of honour, particularly that, if the participant who fired his shot first missed the other, he would be expected to stand still and wait whilst the other shot at him. This is the essence of a common purpose to shoot and be shot at.

The gunfight in *R v Gnango* was nothing like this. There was no formality and no opportunity offered to the other side to shoot back. Gnango was crouched behind a car and once he missed his first shot he certainly did not allow BM a free chance to shoot back. There were no rules governing the conduct of this gunfight. Professor Virgo's problem with drawing an analogy to a duel on these facts was convincingly supported by the dissenting Lord Kerr in *R v Gnango*. In his view an instantaneous meeting of the minds or engaging in a gunfight:[27]

> ...is quite different from a duel where participants meet at a pre-arranged place and an appointed time. The essence of a duel conducted with firearms is that there should be an exchange of fire. The parties to the duel anticipate- and may be said to impliedly consent to- being fired on as well as firing. But there is no basis on which to infer that such was the intention of the two protagonists here.

This element of formality, absent in *R v Gnango*, but present in duels, is also noted in an article by Professor Jeremy Horder who points out that even spontaneous duels arising from sudden disagreement contained an element of formality not present in the common street fight with or without weapons.[28] Therefore two people shooting at each other does not necessarily constitute a duel. This point was not explored in any depth by the Supreme Court. Using an artificially constructed agreement to have a duel as a basis for the encouragement is therefore misleading. There was no such agreement to shoot and be shot at.

Therefore on balance there was no encouragement in fact in *R v Gnango* and s 66(1)(c) would be unlikely to apply on the same facts in New Zealand. However, even if there were encouragement in fact, the even more conceptually difficult second element of intention to encourage would still need to be proved.

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26 Virgo, above n 7, at 866-867.

27 At [122].

28 Jeremy Horder "The Duel and the English Law of Homicide" (1992) 12 Oxford Journal of Legal Studies 419.

2. Intention to encourage

To establish secondary liability as an abettor in the United Kingdom and New Zealand not only must there be encouragement in fact but the defendant must know the essential matters that constitute the offence and also intend to encourage. Knowledge of the essential matters is not controversial on these facts but whether Gnango intended to encourage BM to shoot at him is. In the Supreme Court Lord Dyson stated that Gnango intended to encourage BM to shoot at him as "persons who agree to shoot at each other must by virtue of their agreement intend to encourage each other to do so."[29] As stated above whether such an agreement was present is questionable. The existence of the intention to encourage was not discussed by the other members of the majority in the Supreme Court. The dissenting judge, Lord Kerr, recognised that either a direct or oblique intention to encourage must be proved but did not decide this point as the jury in the court of first instance was not directed on it.[30] To ascertain whether Gnango could be liable under s 66(1)(c) it is important to analyse whether he could be said to have intended to encourage BM.

Before analysing intention in the context of s 66(1)(c) it is worthwhile to provide a brief definition of intention in general. Intention is not defined in statute in New Zealand, however it is generally accepted that "intention is D's aim, purpose or objective, and D is said to act intentionally when he acts in order to bring about a specified result."[31] This is what is known as direct intention. Except in a few difficult circumstances a wide definition of intention is not needed as its meaning is a matter of common knowledge and intuition. The famous statement from Lord Bridge is that "the golden rule should be that ... the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent."[32] One such difficult circumstance where further definition is necessary is for what is known as oblique intention. Oblique intention is the second type of intention, "it is outcomes which, in D's eyes, are so closely bound to normally-intended outcomes that they are virtually certain to occur alongside them. They may also be regarded as (indirectly) intended."[33] With this in mind it is now important to consider the relevant intention to encourage under s 66(1)(c).

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29 At [103].
30 At [125].
31 Margaret Briggs "Criminal Law" (2013) NZ L Rev 137 at 137.
32 *R v Moloney* [1985] 1 AC 905 (HL) at 926.
33 WJ Brookbanks and AP Simester *Principles of criminal law* (4th ed, Brookers, Wellington, 2012) at 108; Following *R v Wentworth* [1993] 2 NZLR 450 (HC) and *New Zealand Police v K*

Under s 66(1)(c) not only must the accused do an act of encouragement intentionally, but in doing that act they must "act either in order to help P or being virtually certain that P will be aided (or encouraged) by that act."[34] Firstly looking at direct intention could it be said that Gnango acted in order to, or with the purpose of encouraging BM to shoot at him? This does not seem to fit. Gnangos's aim was to shoot and kill BM not to encourage him to shoot back. The requirement that the secondary party acts for the purpose of encouraging the offender under s 66(1)(c) which is explicit for aiding under s 66(1)(b) was confirmed in *R v Pene*.[35] The appellant's conviction was quashed in *R v Pene* due to the reasonable possibility that he "acted solely to avoid the contempt of his friends and not for the purpose of encouraging them."[36] On this authority then it would seem if Gnango's sole purpose was to kill BM rather than encourage him he could not have the necessary direct intention.

If direct intention to encourage is not possible in this instance could the necessary mens rea be supplied by oblique intention? Justice Fisher in *R v Wentworth* equated the word purpose with intention, and therefore held that it is not necessary to prove that the accused wanted or desired the offence to be committed. Gnango clearly did not desire to be shot at, but could it be said that in shooting at BM he foresaw as a virtual certainty that it would encourage BM to shoot back? Despite the fact that he hoped to kill BM, a jury on these facts may infer that Gnango foresaw with virtual certainty that BM would shoot back as he knew BM was armed and that there was a score to settle. It is slightly artificial to discuss BM firing in response to Gnango's shots as BM had already fired the first shots in the shoot-out. Nevertheless, Professor Dennis Baker is of the view that "a properly directed jury would have had no difficulty in finding that Gnango obliquely intended to encourage BM to kill him."[37] However this conclusion is difficult to accept. As Professor Ormerod indicates, "oblique intention is usually supplied in relation to objectives that the defendant has foreseen as

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[2011] NZCA 533 it is now clear in New Zealand that foresight of virtually certain consequences is not evidence through which intention can be inferred but a substantive type of intention itself.

34 Brookbanks, above n 33, at 185.

35 *R v Pene*, above n 23.

36 At 6; Justice Fisher in the High Court in *R v Wentworth* [1993] 2 NZLR 450 in interpreting this statement in *R v Pene* was quick to indicate that in cases where the defendant knowingly encourages a defendant to commit a crime, this statement should not be seen as adding the requirement that the defendant acts with a particular motive. He saw *Pene* as a case that turned on not enough certainty being present to establish oblique intention rather than the defendant must have a particular purpose or motive if he "knowingly" encourages (i.e. virtual certainty that he encourages).

37 Dennis J Baker "Liability for Encouraging One's Own Murder, Victims, and Other Exempt Parties" (2012) 3(23) Kings Law Journal 256 at 283.

virtually certain as a potential side effect of his purpose".[38] A common academic example is the hypothetical situation where a person places a bomb on a plane to blow it up mid-flight to collect on insurance on goods in the plane. It is not his purpose or aim to kill those aboard but it is a virtually certain consequence that their deaths will occur as a side effect to his purpose of claiming insurance. However here we are not applying oblique intention to a potential side effect of Gnango's purpose. As Ormerod points out "here it would mean applying the extended definition of intention to an object that was directly contrary to Gnango's purpose."[39] This would be a novel and inappropriate use of oblique intention. Professor John Smith's conclusion that "a result which it is the actor's purpose to avoid cannot be intended"[40] supports this view.

This argument is further supported by the practical point illustrated by Atli Stannard when he criticised the majority's use of abetting to find Gnango guilty. He states that "the consequence of the majority's judgment, on this reasoning, is that, had B's fatal shot, missed Pniewska and hit Gnango, wounding him but not fatally, Gnango should, on his recovery, have been tried for the attempted murder of himself. Although Lord Phillips and Lord Judge clearly state there is no bar to such liability, surely this would be a farcical spectacle?"[41]There are some statutory fish hooks, discussed in the next section, that may prevent a person being tried as a party to their own attempted murder in New Zealand but this is nevertheless a good illustration of how it seems counter-intuitive to say that Gnango intended to encourage BM. It is important that our definition of intention remains logical and practical.[42] If we were to leave intention to a jury's good sense in this instance, as Lord Bridge suggests we should in most circumstances, one can only assume the jury would give a resounding no to the question of whether Gnango intended to encourage BM. Due to the above reasons it does not make sense to say that Gnango intended to encourage BM directly or obliquely and even if there were encouragement in fact no conviction could be gained in New Zealand under s 66(1)(c).

To convict Gnango under s 66(1)(c) in this situation where each party intends to kill the other would be at odds with the underlying rationale of intentional help or encouragement. As he does not intend to help or encourage BM he should not be jointly liable for his crime under

38 Ormerod, above n 22, at 154.
39 At 154.
40 John Smith "A note on "intention"" (1990) Crim LR 85 at 88.
41 Atli Stannard "Case Notes- Securing A Conviction in "Crossfire" Killings: Legal Precision vs Policy" (2011) Journal of Commonwealth Criminal Law 299 at 306.
42 See Buxton, above n 7, at 280 for discussion of how legal principles must stand the test of practical reality.

s 66(1)(c). Therefore the English approach should not be followed and we should not extend 66(1)(c) to encompass adversaries in this way.

B. Inciting and procuring s 66(1)(d)

The United Kingdom Supreme Court focussed on abetting for liability as a secondary party. As discussed above this does not fit well with the facts of *R v Gnango.* A further possibility for conviction under our s 66(1)(d) that is not available under the English statute[43] is that Gnango incited BM to fire the fatal shot.

Incitement is defined as urging, encouraging, spurring on or stirring up.[44] Due to this it has some significant overlap with abetting. The difference between the two is that for inciting more substantial pressure or influence is exerted on the principal party than for abetting.[45] Words such as 'stir up' may seem to suggest that inciting includes provocation as in Gnango, however its use in context refers more to stirring up the passions of a crowd with speech towards some unlawful end.[46]As for abetting, the ordinary use of inciting involves a member of a group providing encouragement to another member to go ahead with an unlawful act, not causing an adversary to commit violence against him. For this reason Gnango would not be held to have incited BM to shoot at him.

Even if Gnango were held to have incited BM in fact, the same mental element is required for s 66(1)(d) as for abetting under s 66(1)(c).[47] For the same reasons discussed for abetting, Gnango could not be held to have intended directly or obliquely to incite BM to shoot back when his purpose was to kill him.

Another possibility under s 66(1)(d), available in England but not discussed in *R v Gnango*, is that Gnango procured BM to fire the fatal shots. Procuring means "to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening." [48] Gnango did not set out to have BM shoot at him, his goal was to kill BM. Therefore 'procuring' is not suitable here either. Furthermore even if the definition of procuring were a better fit, as above Gnango does not have the necessary intent.

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43 Accessories and Abettors Act 1861, s 8.
44 *Burnard v Police* [1996] 1 NZLR 566 (HC); *R v Tamatea* (2003) 20 CRNZ 363 (HC).
45 Brookbanks and Simester, above n 33, at 178.
46 See *Young v Cassells* (1914) 33 NZLR 852 (SC). This case involved stirring up a crowd to resist police officers in a strike.
47 *R v Shaw* CA159/05, 22 November 2005.
48 *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773.

In conclusion neither s 66(1)(c) or (d) is appropriate to use in a situation like *R v Gnango* where the two parties are adversaries.

C. Are there any bars, statutory or otherwise, to a conviction of Gnango as a party to his own attempted murder?

1. In light of the "Tyrell Principle" (victim rule) is it legally possible to be charged as a party to your own attempted murder?

Secondary liability can be excluded by statute. In this instance it does not appear there is any explicit statutory exclusion to secondary liability under s 167 that would apply to Gnango. However statutory provision is not the only way in which secondary liability can be excluded. One of the arguments that was considered in the United Kingdom Supreme Court was whether it was possible to be a party to your own attempted murder in light of the principle established in the case of *R v Tyrell* [1894] 1 QB 710.[49] In *R v Tyrell* it was held that a girl under the age of 16 could not be a secondary party to unlawful sexual intercourse with herself. The reasoning behind this was the offence was created "for the purpose of protecting women and girls against themselves"[50] As Ashworth points out "although the Court's reasoning was based on statutory interpretation, the decision has subsequently been interpreted as authority for a general principle that victims, particularly victims of sexual offences, cannot be convicted of complicity if the offence was created for their protection."[51] It was argued in *R v Gnango* that this principle made it impossible for Gnango to be charged as a party to Magda Pniewska's murder as he was the intended victim of BM's shots and therefore could not be liable as a party to his own attempted murder or Magda Pniewska's murder through transferred mens rea. However the Supreme Court interpreted the principle from *R v Tyrell* narrowly, in a way which would allow Gnango to be charged as a secondary party. On the majority's interpretation, the *Tyrell* principle is only relevant where the offence is targeted at a specific class of persons that includes the victim. Gnango's murder charge was not thought to be such an offence and therefore there was no bar to his liability. They stated that "there is no common law rule that precludes conviction of a defendant of being a party to a crime of which he was the actual or intended victim."[52]

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49 *R v Tyrell* [1894] 1 QB 710.
50 At 1215, per Lord Coleridge CJ.
51 Ashworth, above n 11, at 429.
52 At [52], per Lord Phillips and Lord Judge.

The question is, would our courts take a similar approach to the United Kingdom Supreme Court and interpret the principle narrowly? Simester and Brookbanks recognise the relevance of the *Tyrell* principle in New Zealand. However, the authors indicate that "the common law principle espoused in *Tyrell* is of uncertain scope and its application may be doubtful in areas other than offences against young persons and persons suffering from a disability."[53] It appears that there needs to be a specific statutory context that aims to protect a specific class of individuals. There is no wider exemption for victims. The most in-depth examination of the scope of this "victim rule" from *Tyrell* was carried out by Professor Glanville Williams. It was his view that "the court must decide in each case, without the aid of a more specific rule, whether the statute was passed primarily on the one hand, for the protection of the defendant and others like him, or, on the other hand, for wider public purposes."[54] This seems in agreement with the approach of the Supreme Court that there is no general exemption for victims of crime. It is logical that the victim rule should be limited to only those offences created for the protection of a specific class of individuals such as those sexual offences protecting minors, and New Zealand already has legislative provision that deals with those special sexual offences where it would be inappropriate to have secondary liability.[55] Gnango is charged with murder. The offence of murder is aimed at stopping and punishing those who engage in homicidal violence. The prevention of violence such as reckless public shoot-outs has a wider public purpose than the protection of specific individuals. As the Court of Appeal noted in *R v Gnango* "in *Attorney General's Reference (No 6 of 1980)* [1981] 1 QB 715, it was made clear that 'it is not in the public interest that people should try to cause or should cause each other harm for no good reason. … It is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended or caused.'"[56] For these reasons the 'victim rule' should not apply and would not be a bar to Gnango's liability in the New Zealand context either.

2. Deeper problem with secondary liability on these facts

In addition to the *Tyrell* principle there is a potential deeper problem with holding Gnango liable as a party to his own attempted murder and the murder of the passer-by through

53 At 208.
54 Glanville Williams "Victims and other exempt parties in crime" (1990) 10 LS 245 at 248.
55 S 131(4) of the Crimes Act 1961 is an example of such a section, where in the offence of sexual conduct with a dependent family member the section provides that the dependent cannot be a party to this offence.
56 At [73].

transferred mens rea. The deeper problem is the possible existence of an implied exclusion of liability for Gnango in the definition of homicide in s 158 of the Crimes Act. The definition in s 158 must be met before a party can be convicted of murder under s 167. Section 158 states that "Homicide is the killing of a human being by another directly or indirectly, by any means whatsoever." The key words for our purpose are "by another". Gnango is being shot at 'by another' and if Gnango were killed this would be a homicide under s 158 and BM could be proceeded against for murder. However, to hold Gnango liable as a party to this attempt to kill him 'by another' is conceptually very difficult. Despite the shot still technically being fired 'by another' an interpretation of s 158 that allows Gnango to be a party to his own attempted murder is difficult as s 158 envisages two distinct parties, with one killing the other. In this situation Gnango is wearing two hats, he is both a party to the attempted killing and also the victim of it. He has been put on both sides of the equation and this seems to be at odds with the words "by another".

Strange practical results could emerge if Gnango and those like him are held to be a party to the offences committed against them. The words "by another" in s 158 exclude liability for suicide and self-manslaughter yet this interpretation would allow a person to be a party to the attempted killing of him/herself by encouraging another. This does not seem like an appropriate result. An example of this is if a person attempted to kill him/herself by intentionally injecting a lethal amount of drugs into their system this would not fall within the ambit of s 158 or s 167. However, if they encouraged another to inject them, in addition to the injector's liability under s 167 or s 179 they could be liable as a party to their acts. That result must be beyond what the legislature contemplated when enacting s 158.

Other sections in the Act give context to and may shed light on legislative intent in this area. The legislature created s 179 to deal with situations where someone aids or abets suicide. This section deals with a different situation to the facts in *R v Gnango*. It is where person A aids or abets person B to kill themself, not like *R v Gnango* where it was claimed Gnango abetted BM to kill him. Nor is it a case of suicide, as Gnango had no intention to die.

A relevant section not involving suicide is section 174 "Counselling or attempting to procure murder". Section 174 states "Every one is liable to imprisonment for a term not exceeding 10 years who incites, counsels, or attempts to procure any person to murder any other person in New Zealand, when that murder is not in fact committed." Section 174 does not apply on the facts of *R v Gnango* as the murder was actually attempted and under s 174 the requirement

that murder is not in fact committed also excludes attempts.[57] However, on a plain reading this section could give support to the claim that the legislature had contemplated the possibility of liability as a secondary party to attempted murder in situations where a person encourages someone else to shoot at them. *Adams* states that "arguably, any other person" may include the person who incites, counsels or attempts to procure another to murder, as where A incites B to murder A."[58] However, although it may be read in this way, the established case law on this section involves three people.[59] The inciter, the person being incited to murder and the intended victim. The inciter of the murder and the victim are different people unlike the situation in *R v Gnango*. A person in conflict with another being charged as a party to his own attempted murder on facts not involving suicide is so far outside what Parliament contemplated that the plain wording of s 174 should not influence the interpretation of "by another" in s 158.

Although the issue of whether one can be a party in these circumstances has not been considered in relation to homicide, similar statutory wording has received detailed analysis in the context of the Misuse of Drugs Act 1975. Section 6(1)(c) makes it an offence to supply an illegal drug "to any other person". The question has arisen in a number of cases whether in light of this wording a person can be a member of a conspiracy to supply drugs to him/herself or whether a person can be a party to the supply of drugs to him/herself. This has been a contentious issue with previous cases and overseas jurisdictions suggesting that this was possible.[60] The Court of Appeal in *R v Lang* took a different view though when faced with the contention that Lang was part of a conspiracy to supply drugs to herself. The court held that:[61]

> ...the use of the words "to any other person" in s 6(1)(c) (the offence which is the subject of the conspiracy), would seem to prohibit such an interpretation. The offence agreed to be committed by A is the supply of a controlled drug to another person, namely A, which on its face is self contradictory. The contention that A is being charged as a party to B's supply to A does not really meet this difficulty. It is still A who is guilty under s 66(1) of the Crimes Act of the offence of supply.

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57 Robertson, above n 13, at [CA174.02].

58 At [CA174.03].

59 Good examples are *R v Patten* CA202/99, 28 July 1999 and *R v Smith* CA256/97, 19 February 1998.

60 The High Court decision of *R v Ngamoki* T5/97, 7 November 1997 found that you could be a party to supply to yourself. However this decision has received criticism from Professor Kevin Dawkins in Kevin Dawkins "Criminal Law" (1998) NZ Law Review 425 at 443. For the English position see *R v Drew* [2000] 1 Cr App R 91.

61 *R v Lang* (1998) 16 CRNZ 68 (CA) at 4.

Although not directly analogous it is a good illustration of the reluctance of a court in New Zealand to put someone on both sides of the equation when the statutory wording points towards two people being required. As in the Misuse of Drugs Act in relation to supply, an interpretation of s 158 that allows Gnango to be a party to his own attempted murder is an inappropriate extension of liability and produces a self contradictory result. As Cooke J stated in *R v Gnango* in the Central Criminal Court "it would be a real oddity for a victim of an attempted murder to be a secondary party to that attempt."[62]

In conclusion, it is likely that a court would find that there is an implied exclusion of liability on these facts and therefore Gnango could not be convicted as a secondary party for the murder of Magda Pniewska. However the interpretation and interplay of sections in this area are not certain, and just as in the interpretation of s 6(1)(c) of the Misuse of Drugs Act, there is space for differing views. In addition the public pressure mentioned previously could lead a court to read the section in a technical way that would allow Gnango to be a party to BM's crime.

D. Under s 66(2) can you have a qualifying common purpose to engage in a gunfight when you are in actual fact adversaries?

This question moves on from secondary liability in the traditional sense and into the area of joint enterprise covered by our s 66(2). The recent New Zealand Supreme Court decision of *Edmonds v R*, when dealing with the use of weapons in s 66(2) cases, stated that "The approach of the New Zealand courts to common purpose liability must be firmly based on the wording of s 66(2)."[63] It is important to bear this in mind when examining potential liability under this section.

The first issue that needs to be assessed in s 66(2) is whether Gnango and BM could be said to share "a common intention to prosecute any unlawful purpose." Their acts were both clearly for an unlawful purpose, but can it be said that in engaging in this gunfight they had a "common intention"?

When two people fight each other intending to kill the other, does this constitute a common intention to fight? The Court of Appeal in *R v Gnango* examined this question and came to the conclusion that "Ordinarily, the purposes of two people who fight may be similar, and they may be coincident, but they are not shared; rather they are reciprocal, or equal or

62 *R v Gnango*, above n1, at [21].
63 *Edmonds v R* [2011] NZSC 159 at [47].

opposite."[64] This seems to be the logical conclusion on our s 66(2) as well. Ordinarily s 66(2) is used in circumstances where at least two people join together to rob a bank or for some other criminal purpose, not a situation where they face off as adversaries. The fact that each wanted to kill the other is not enough for a common intention. As the authors of Simester and Brookbanks point out under s 66(2) "it is not enough that S and P both happen to have the same intention at the same time. That intention must be shared."[65]

After ruling out the individual intentions to fight each other as a possible common intention, the Court of Appeal raised a possible alternative common intention. This was the earlier mentioned agreement to shoot and be shot at. In assessing the possibility of such an agreement the Court of Appeal stated:[66]

> ...if two persons agree to a duel with the use of guns, they have agreed to shoot at each other with the intention of killing or seriously harming the other. That activity, as a matter of ordinary language, could be described as an agreement to shoot and be shot at. To that extent it is arguable that they have a shared common purpose.

The majority of the Supreme Court accepted that the jury had found such a shared purpose with little examination. Lord Clarke found that "the victim was shot and killed in the course of the respondent carrying out the agreement between the two men as principals to shoot and be shot at, just as in a duel."[67] This was supported by Lord Dyson. In his view, "a shootout pursuant to a plan must mean an exchange of fire pursuant to an agreement to shoot and be shot at."[68] However as discussed above it is questionable whether such an agreement is plausible on the facts of *R v Gnango* or in most shoot-outs.

Firstly, was there an agreement at all? On the facts it appears that both parties anticipated the meeting but it is unclear if they arranged to meet at a certain time or place, or if either party knew of the violence that the other party intended. Lack of a pre-arranged or formally agreed upon fight does not preclude the finding of an agreement. Agreements can arise spontaneously at the time of the offence.[69] It is also possible to reach an agreement even if the thing agreed to is unlawful, as the gunfight obviously was.[70] A spontaneous agreement can be indicated by a "nod and a wink or a knowing look. An agreement can be inferred from the

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64 At [57].
65 At 193.
66 At [73].
67 At [76].
68 At [103].
69 Robertson, above n 13, at [CA66.23].
70 *Regina v Gnango*, above n 5, at [73].

behaviour of the parties."[71] This inference usually arises from a joint attack by a group on an individual not from two individuals fighting each other as in *R v Gnango*. In the case of *R v O'Flaherty* which involved a spontaneous fight with weapons between opposing gangs the possibility of an agreement that would constitute a joint enterprise or common intention between the opposing sides was not considered. The offending of the groups constituted separate opposing enterprises. Lord Kerr in his dissent found it very difficult to infer the existence of a spontaneous agreement in *R v Gnango*. He stated that:[72]

> Where there has been what is described as a "spontaneous agreement" to engage in a shoot-out, the question arises whether this can truly be said to be the product of an agreement in any real sense. Is it not at least as likely to be the result of a sudden, simultaneously reached, coincident intention by the two protagonists to fire at each other?

This argument by Lord Kerr is very persuasive and it appears that to say that there was a spontaneous agreement on these facts, when they are adversaries, is not clear and would be stretching the law of joint enterprise or common intention beyond the rationales of affiliation and coming together that ground liability under s 66(2). However, even if a spontaneous agreement could be inferred here, as discussed above, this was not an agreement to shoot and be shot at.

The third possibility for a common intention on these facts is if there could be found to be some common intention to commit a lesser offence such as affray and in the course of carrying out this common intention a murder that was known to be a probable consequence occurred. All parties to this common intention with the necessary foresight could be held liable for murder under s 66(2). This was the route taken by Cooke J in his directions in the Central Criminal Court in *R v Gnango*. Due to the artificiality of separating the offences discussed later, this is not a viable option on the facts of *R v Gnango*. However in a slightly different fact situation it was recognised as a possibility by Lord Dyson in the Supreme Court. He gave the example of a group of youths involved in a fist fight with each other that amounted to a common intention to commit affray. They are all aware that one member is armed with a knife and in the course of the fight he draws the knife stabbing and fatally wounding another participant. It appears that Lord Dyson would find no bar on the liability for murder of all those who foresaw the use of the knife.[73] However while in this situation anyone on the side of the knife-wielder may have the necessary common intention required to

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71 *R v O'Flaherty* [2004] 2 Cr App R 20 at 8.
72 At [121].
73 At [97].

fulfil the elements of s 66(2), for the reasons stated above the opponents would not have the necessary common intention and therefore despite the fact they foresaw the use of the knife could not be liable under s 66(2). To hold otherwise would be a drastic extension of s 66(2) and could hold people liable to offences committed against them of much greater violence than they ever intended to engage in themselves. It would move New Zealand closer to an American approach to gang violence called 'depraved heart liability', which will be discussed later, which in certain circumstances holds adversaries liable as parties to each other's offences. This is not consistent with the principles of secondary liability on which the law has traditionally been based.

Finally, even if a common intention were to be found between adversaries such as Gnango and BM, the wording of s 66(2) provides another obstacle to a conviction for murder of the party who did not fire the fatal shot. Section 66(2) states that the parties must form a common intention to prosecute any unlawful purpose and *to assist each other therein.* Simester and Brookbanks suggest that "this requirement in s 66(2) would seem to foreclose a joint-enterprise analysis in New Zealand of the pre-arranged duel in *R v Gnango* [2011] UKSC 59."[74] This argument appears to be correct. Even if Gnango were held to have been a party to a common intention to shoot and be shot at, it does not make sense on the facts to stretch this further to say that the parties intended to assist each other therein. They both intended to kill the other not to help or aid him.

E. Assuming there was a common intention, does s 66(2) exclude the offence that was the object of the common intention? Does it only apply to situations where two people join together to commit crime A and in the process one of them commits a separate crime B that was known to be a probable consequence?

Despite the fact that the Supreme Court found there was a common intention to shoot and be shot at, they did not hold Gnango liable for murder under the law of joint enterprise (our s 66(2)). The Supreme Court using the somewhat confusing term "parasitic accessory liability" to discuss the situation covered by our s 66(2) stated:[75]

> Parasitic accessory liability arises where (i) D1 and D2 have a common intention to commit crime A (ii) D1, as an incident of committing crime A, commits crime B, and (iii) D2 had foreseen the possibility that he might do so. Here there was no crime A and crime B. It cannot be said that the two protagonists had a joint intention to commit

[74] At 193. I would question the use of the words 'pre-arranged duel' by the authors it does not appear to be correct on the facts.

[75] At [42] per Lord Phillips and Lord Judge.

> violence of a type that fell short of the violence committed. Either Bandana Man and the defendant had no common intention, or there was a common intention to have a shoot out.

The Supreme Court considered that it was artificial to hold that there was a common intention to commit a lesser public order offence such as affray, as this intention really was just to have a shoot out in a public place which is what occurred.[76] Canadian courts take a similar approach to the Canadian equivalent of s 66(2). Under their section the Supreme Court of Canada has held that the unlawful purpose ("common intention" in our wording) must be different from the offence they are charged with.[77]

Would New Zealand courts take the same approach under s 66(2) and even if a common intention were found refuse to hold Gnango liable? The first issue is whether the United Kingdom Supreme Court was correct in deciding that there was only one offence here.

The death of Magda Pniewska was as a result of the "common intention" to have a homicidal shoot-out. There was no separate offence, such as where there is a common intention to rob a bank and in the course of this a security guard is murdered. It would be artificial to hold that there was a lesser common intention. Therefore the United Kingdom Supreme Court was correct in holding that the only possible common intention was the intention to shoot and be shot at.

Therefore there was only one offence here. In England and Canada this would mean only the area of secondary liability covered by s 66(1) in New Zealand could be used, not the area of joint enterprise/parasitic accessory liability. However in New Zealand s 66(2) has been interpreted differently. The inclusion of the words "to every offence committed by any one of them" has been interpreted as including the offence that was the object of the common intention.[78] Therefore under s 66(2) there need not necessarily be a collateral offence. Professor Gerald Orchard has summarised two key situations where New Zealand courts have used s 66(2) when the offence was the offence that was the object of the common intention. He summarised it thus:[79]

> Where a number of offences have been committed (and these might or might not have been of the same kind), and a number of parties were involved, s 66(2) also provides

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76 At [43] per Lord Phillips and Lord Judge.
77 *R v Simpson* (1988) 46 DLR (4th) 466 (SCC) at [14].
78 *R v Currie* [1969] NZLR 193 (CA).
79 Gerald Orchard "Crimes Update" (Paper presented at New Zealand Law Society Seminar, 1990) at 60.

> what might be a convenient single test for assessing their liability, particularly if there is uncertainty as to the precise part played by each (*R v Currie* [1969] NZLR 193 (CA)); or when there are a number of participants in one offence and uncertainty as to who did what (*R v Nathan* [1981] 2 NZLR 473).

However the facts of *R v Gnango* do not come within either of these situations where New Zealand courts have seen fit to use s 66(2) without a collateral offence. There are not a number of offences or participants or confusion as to who did what.

Despite not falling within either of these situations, assuming a common intention is present, the death of Magda Pniewska does fit within "every offence committed by any one of them" and the death of a bystander in a public shoot-out is likely "known to be a probable consequence" so perhaps a court may go further and find that s 66(2) could apply to reach a conviction based on the wording of s 66(2). However a recent New Zealand Court of Appeal decision shows in actual fact New Zealand courts may be moving in the opposite direction towards the English and Canadian approach.

In the recent decision of *Baird v R* the Court made some interesting observations in response to the defence counsel's concession that the Crown could put its case on the basis of s 66(2) as *R v Chen*[80] "had confirmed that s 66(2) does not exclude the offence that is the object of the unlawful common purpose."[81] Firstly the Court in *Baird* noted that the above proposition was not considered at any length in *R v Chen* or *R v Currie* and they also felt that "further, *R v Chen* did not refer to *R v Curtis* [1988] 1 NZLR 734 (CA) (or the decisions cited therein of *R v Gush* [1980] 2 NZLR 92 (CA) and *Chan Wing-Siu v R* [1985] AC 168 (PC)) which suggest that s 66(2) does not apply to the offence that is the immediate object of the unlawful common intention."[82] However, as the issue was not raised by the appellant they did not reach any conclusions on this issue or discuss it further.

These comments perhaps exaggerate the statements in *Curtis*. The relevant statements in *Curtis* were directed at cases where the prosecution had used s 66(2) in the absence of a common intention and therefore it was thought to be an inappropriate use of s 66(2). *Curtis* also did not deal with the statutory interpretation of the words "every offence committed by any one of them" and nor did it examine the reasoning in *Currie* and *Nathan*.

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80 *R v Chen* [2009] NZCA 445.
81 *Baird v R* [2012] NZCA 430 at [9].
82 At [9].

Whether the court will move to the English approach if given the opportunity is unclear, however these statements do perhaps at the very least indicate a likely unwillingness to extend the use of s 66(2) further beyond the limited situations where it has been used with no collateral offence recognised by Professor Gerald Orchard. Therefore, even if a common intention is present, as there are not two separate offences, and it is not one of those situations where s 66(2) provides a convenient single test, s 66(2) would not apply.

However, as mentioned above there is likely no common intention on these facts so the above analysis would not be strictly necessary in examining a situation like *R v Gnango*. The above observations though, could be important in a situation more closely analogous to a duel than *R v Gnango* where a common intention could be found. On these facts though, as there is no common intention, the courts would not accept the use of s 66(2).

V. Avenues for conviction other than secondary liability

A. Could a participant such as Gnango be held to be a principal party to murder through participating in concert?

In addition to holding Gnango liable for murder through abetting, a number of members in the majority of the Supreme Court identified another potential route to liability. Lord Brown and Lord Clarke would have preferred to hold Gnango liable not as a secondary party but as a principal party. Lord Brown stated that "it seems to me that A is liable for C's murder as a principal - a direct participant engaged by agreement in unlawful violence (like a duel, a prize fight or sado-masochism) specifically designed to cause and in fact causing death or serious injury."[83] This reasoning has received criticism in the United Kingdom.[84]

Would it be possible to hold Gnango liable as a principal party to murder in New Zealand? Under s 66(1)(a) the principal party is the person who "actually commits the offence". On the traditional view of the law in New Zealand to be a principal party "there must be some contribution to the occurrence of the actus reus before one can be held to have committed the offence as a principal."[85] However Gnango has not contributed to the actus reus. It is BM who fulfils the actus reus of the offence by shooting the innocent passer-by. Therefore on a traditional view of the law Gnango could not be liable for the murder as a principal party.

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83 At [71].
84 Buxton, above n 7, at 278-279; Stannard, above n 41, at 306.
85 Brookbanks and Simester, above n 33, at 172.

Despite this traditional view a new avenue for liability as a principal party was opened up in the case of *R v Harawira*.[86] In *Harawira* the Court of Appeal refused to overturn the conviction of the appellant as a principal party under s 66(1)(a) for injuring with intent. They held this despite the fact that the appellant had not caused bodily harm to the victim and therefore had not contributed to the actus reus of injuring with intent. The Court decided that it was sufficient that she "participated in concert" during an ongoing attack by the participants who actually injured the victim. Perhaps in New Zealand if Gnango were held to be participating in concert with BM in this ongoing gunfight he could be held to be a principal party to murder under s 66(1)(a) despite the fact that he did not directly contribute to the actus reus himself. In reality though it is unlikely that a New Zealand court would apply *Harawira*. It has been widely discredited by commentators and appears to be contrary to the wording of s 66(1)(a) and long established principle. In response to *Harawira* Professor Gerald Orchard stated "with respect the idea that a person "actually commits" an offence (such as injuring with intent) even though his or her conduct does not actually contribute to the actus reus, and there is no question of innocent agency, is a serious distortion of the words of the Act, and might be thought to be untenable."[87] As mentioned earlier the words of s 66 are paramount, and this appears to be an inappropriate and unnecessary extension. In *Harawira* itself a conviction could have been reached through secondary liability for aiding or abetting under s 66(1)(b) or (c).

Finally even if a court were to accept this approach it would still have to be proved that Gnango and BM were participating in concert. Participating in concert appears to be similar to a common purpose under s 66(2) and as already concluded there is no such common purpose in this adversarial encounter. Gnango and BM were not acting in concert at any time, each was attempting to kill the other.

B. Could Gnango be liable under S 167(c)?

In addition to considering the approach in *Harawira* it is also interesting to examine whether there is any possibility of finding Gnango liable under New Zealand's wide definition of murder in s 167 and 168 of the Crimes Act 1961. Murder is defined more broadly in New Zealand than the United Kingdom, therefore it is worth examining whether the broader definitions could encompass Gnango and those like him.

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86 *R v Harawira* [1989] 2 NZLR 714 (CA).
87 Orchard, above n 79, at 54.

The only real possibility for liability seems to be s 167(c). It states as follows;

> Culpable homicide is murder in each of the following cases: (c) If the offender means to cause death, or being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed.

This is a statutory codification of the transferred mens rea principle and could be used to convict BM. Before examining the wording of this section itself it is important to note that an act cannot be murder under s 167 or s 168 unless it meets the definition of homicide under s 158 and culpable homicide defined in s 160. Therefore to examine Gnango's liability under s 167(c) one must first examine whether his act of firing at BM, as part of a gunfight that led to Magda Pniewska's, death meets the definition of homicide under s 158.

Homicide is defined in s 158 as "...the killing of a human being by another, directly or indirectly, by any means whatsoever." To meet the definition of s 158 it would have to be shown that Gnango's actions were an operating cause and a substantial cause of the death of the passerby.[88] It does not need to be the only substantial cause and need not be the main cause.[89] Without Gnango the shoot-out would not have occurred and in shooting at BM perhaps it could be said that he caused him to shoot back.[90] It was reasonably foreseeable that he would shoot back and therefore Gnango's action would be a substantial cause of the death of Magda Pniewska. However there are a number of ways the chain of causation can be broken, and if the chain of causation is broken then Gnango would not have killed another directly or indirectly and would not have committed a homicide under s 158.

In some circumstances intervening acts of another may break the chain of causation. The law in the United Kingdom and New Zealand has developed along similar lines on this point. *Adams on Criminal Law* cites *R v Latif* for the statement that "The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."[91] This statement was cited with approval by the House of Lords in *R v Kennedy (No 2)*[92] and was recently approved in New Zealand by the High Court in *R v*

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88 *R v Kirikiri* [1982] 2 NZLR 648 (HC) at 651.

89 Robertson, above n 13, at [CA158.04]; *R v Myatt* [1991] 1 NZLR 674 (CA).

90 This proposition would have more strength if Gnango fired first. The first shot was fired by BM. This makes it hard to argue that in firing back Gnango caused him to fire a second time.

91 *R v Latif* [1996] 1 WLR 104 (HL) at 115.

92 *R v Kennedy (No 2)* [2008] 1 AC 269 at [14].

Leaitua.[93] Was BM's action such a free, deliberate, and informed action that it broke the chain of causation? BM could have fled, but he chose to fire back (in fact as we know, he instigated the shoot-out). He was not induced or compelled, nor was this a case of self-defence. As *Kennedy (No 2)* recognised "the criminal law generally assumes the existence of free will".[94] Therefore BM's action was free, informed and deliberate and broke the chain of causation.

The facts of *R v Gnango* and reckless public shoot-outs like it can be distinguished from the case of *R v Pagett*.[95] Pagett had used a young woman as a shield and fired at police officers in the dark. They returned fire and the young woman was killed. The question of causation arose at trial and on appeal. In upholding Pagett's conviction for manslaughter the English Court of Appeal held that a reasonable act done for the purpose of self-preservation or in the furtherance of a legal duty did not constitute a novus actus interveniens and therefore Pagett's shots were a substantial and operating cause of death. The act of firing back by the police officers was said to be involuntary as an act of self-defence. This is clearly different from the situation in *R v Gnango*. BM was under no legal duty and was not firing back out of self-defence or preservation. Therefore the approach of *Pagett* would not apply here. It is more like *Kennedy (No 2)* where, although Kennedy provided the environment in which the offence could occur by supplying the syringe containing heroin, it was a free, informed decision of the deceased to inject himself.

The breaking of the chain of causation on these facts is supported by two of the three United Kingdom Supreme Court judges who considered it in *R v Gnango* itself and subsequently by prominent English legal commentators. Lord Dyson and Lord Kerr felt that if it was a free, deliberate informed act here then the chain of causation was broken.[96] Professor Graham Virgo and Professor Richard Buxton were inclined to agree with this view on the facts of *R Gnango*.[97]

Therefore on this analysis Gnango has not committed a homicide under s 158, as he did not kill another directly or indirectly, and therefore cannot be liable under s 167(c). However, it is nevertheless worth examining whether s 167(c) could apply to a participant such as Gnango

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93 *R v Leaitua* [2013] NZHC 702.
94 At [14].
95 *R v Pagett* (1983) 76 Cr App R 279.
96 At [106] and [131]-[132] respectively.
97 Virgo, above n 7, at 865-866; Buxton, above n 7, at 278-279.

in a shoot-out where the party who fired the fatal shot was acting in reasonable self-defence (whether a police officer or a member of the public).

Firstly before dealing with s 167 the homicide must be a culpable homicide under s 160 as stated above. Under s 160(2)(a) homicide is culpable when it consists of the killing of any person by an unlawful act. Here the unlawful act would be shooting at (attempting to murder) the person who then fires back in self-defence. The killing would therefore be a culpable homicide under s 160(2)(a).

Now the analysis must turn to the wording of s 167(c). Firstly the mens rea requirement is that the offender "means to cause death" as in s 167(a) or as in s 167(b) "means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death and is reckless whether death ensues or not." In shooting at the police or an innocent self-defender in most circumstances it is likely that the offender means to cause death, therefore he fulfils the mens rea requirement of s 167(c). The next element is that the offender "by accident or mistake kills another person". As mentioned above in a case of reasonable self-preservation, such as we are assuming here, the chain of causation would not be broken and therefore as in the analysis in s 158 the offender could be held to have "killed another person". This is also an "accident" as the offender intended to kill one person but through his actions caused the death of another. And finally in line with the last requirement the offender "does not mean to hurt the person killed". Therefore in this situation an offender could be liable for murder under s 167(c) despite the fact that the fatal bullet did not come from his gun. *Adams on Criminal Law* supports this conclusion when it cites *Pagett* for the proposition that under s 167(c) "In some cases the accused may have intended to kill or injure one person but may be held to have killed or injured another notwithstanding that the most immediate cause of the death or injury was an innocent act of the intended victim, or a third person."[98]

VI. Broader application of the above conclusions

The above section has identified a number of legal issues with, and made some conclusions about, Gnango's liability for murder under the Crimes Act 1961. It is important to consider the effect these conclusions and issues may have on how the courts would treat other situations involving violence between adversaries. This section will examine the potential for liability in a number of hypothetical situations that could arise in New Zealand. The

[98] Robertson, above n 13, at [CA167.09].

situations below will assume that the potential implied exclusion of liability discussed in part IV has not been found to exclude liability.

A. Situation 1: A group of gang A members and a group of gang B members engage in a shoot-out. In the course of the shoot-out a member of gang A is killed by a bullet from a gang B member's gun. Could the surviving gang A members be tried as a party to their gang mate's murder?

This problem was posed by the English Court of Appeal when considering the wider implications of any conclusions in *R v Gnango* to cases of injury resulting from fights between gangs.[99] Traditionally in cases of duelling, if a person was killed the seconds of both combatants and spectators who encouraged it were guilty of aiding and abetting the murder.[100] If an analogy could be drawn with a duel this may be enough to provide a common intention or agreement to exchange fire. This agreement would likely supply the necessary encouragement in fact and intention to encourage required for liability under s 66(1)(c).

Assuming a common intention, if on these facts it were certain whose gun the bullet came from, s 66(2) could not be used as it would be artificial to separate it into two separate offences and as in *R v Gnango* it does not fit within the limited exceptions to this rule recognised by Professor Gerald Orchard. However if the facts were slightly different, perhaps s 66(2) could apply. For example if the parties were held to have a common intention to engage in a fist fight with the knowledge that several members were armed and could use weapons then this would be a situation covered by s 66(2). Secondly if it were unclear who fired the fatal shot or if death were caused by punches or kicks and it were unclear which blows proved fatal, then maybe section 66(2) could be used in the same way it was used in *R v Nathan.*[101] *Nathan* involved one of the situations where s 66(2) may provide a convenient single test despite there being no separate or collateral offence. In *Nathan* a group of men had attacked a man in a bar room fight. The man died, but it was unclear who in the group struck the fatal blow. Prichard J agreed with counsel that if the common intention encompassed the necessary intention for murder, and the act carried out was incidental to this purpose then regardless of who delivered the fatal blow all could be guilty of murder.[102]

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99 At [75].
100 *Regina v Gnango*, above n 5, at [72].
101 *R v Nathan* [1981] 2 NZLR 473 (HC).
102 At 475.

However in reality, just as in *R v Gnango,* the analogy with a duel in any of the above situations is not fitting. Except in the most extraordinary circumstances the parties would not intend to exchange fire or blows but would intend to seek revenge or victory through killing or scaring off the opponent. Therefore there would be no common intention or agreement and although they may be liable for firearms offences and the attempted murder of the gang B members, the gang A members would not be liable as a party to the death of their comrade under s 66. Once again, to hold gang A members liable for the acts of their adversaries is not in line with our traditional rationales.

B. Situation 2: A Pagett style shoot-out between a fugitive and Police in which an innocent bystander is killed by a shot from the Police. Could the fugitive be liable for the murder of the passer-by?

A situation very similar to this arose in 2009 in Auckland when a man being pursued by police exchanged gunfire with the police and in the course of this exchange an innocent courier driver was killed by a shot fired by the police.[103] Assuming the police as in *Pagett* were acting pursuant to a legal duty or in reasonable self-defence, as stated above the fugitive would still be an operative cause of death and could be liable for murder under s 167(c).

This is not a situation where secondary liability is relevant as there is no common intention or agreement when dealing with a scenario involving self-defence and it is definitely not analogous to a duel.

1. Aside from a Pagett situation, can a situation involving reasonable self-defence be imagined in gang warfare?

A judge or jury is always going to be less predisposed to a finding that an accused has acted in self-defence when gang violence is involved and all participants have been carrying deadly weapons. In *R v Gnango* self-defence was not considered relevant on the facts. However it is possible to imagine a situation arising where reasonable self-defence under s 48 of the Crimes Act 1961 could exist even in a case of gang violence. For example if a gang member were ambushed and attacked with lethal force by a group from an opposing gang and responded

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103 NZPA "Courier killed during Auckland shootout" (2009) Stuff.co.nz <http://www.stuff.co.nz/national/807216/Courier-killed-during-Auckland-shootout>. The fugitive Stephen McDonald was not charged with the murder of the innocent man. He pleaded guilty to charges of firing at police, possessing a firearm, aggravated robbery and unlawfully getting into a motor vehicle and was sentenced to 13 years imprisonment. See Rachel Tiffen "Police-pursuit 'coward' goes down for 13 years" (2009) New Zealand herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10599025>.

with equal violence to attempt escape and in the course of doing so killed a passer-by. If that were the case then the same analysis would apply as above and the attacking group could be liable for murder if the self-defender's shots killed an innocent passer-by or a member of their group.

C. Situation 3: The same as situation one except it is two groups throwing stones and bottles at each other (e.g. rival sports team fans) and either an innocent bystander or a member of one of the groups is killed. Who could be liable for murder?

This scenario has the same issues as Situation One with finding a common intention between adversaries, whether adversaries can have an intention to encourage and if there are two separate offences for the purposes of s 66(2). However in addition to these issues there are greater problems around establishing the required mens rea for murder in the absence of a gunfight. Using s 66(1)(c) it would need to be shown that the principal party acted with the necessary intention for murder. This could come under s 167(b), however it would have to be shown that in throwing the bottle the offender meant to cause to the person killed any bodily injury that was known to the offender to be likely to cause death. This may not be straightforward in a riot situation with many participants and no close proximity between assailant and victim.

Any common intention may, as in *Nathan*, encompass the mens rea element of s 167(b) and therefore even if the fatal bottle-thrower were not known perhaps all could be held liable for murder through the use of s 66(2) as a convenient single test. If the assailant were known using s 66(2) may be thought to be inappropriate as there is no collateral offence.

However as in Situation One there would be no common intention between these opposing sides and no intention to encourage, so each side would not be liable for the actions of their adversaries. They would only be liable as a party to murder if it were committed by a member of their own group with the requisite mens rea.

VII. The importance of remaining consistent with principle

As discussed throughout this dissertation it is important to analyse whether holding Gnango and those like him liable for murder is in line with the underlying rationales and principles of secondary liability. This is important, as if a decision is incompatible with these principles the credibility of any outcome and the coherence of the law of secondary liability can be undermined.

As mentioned earlier s 66(1) and (2) have different rationales for holding secondary parties liable for crimes committed by the principal party. Aiding and abetting under s 66(1) being grounded in intentional help or encouragement with the necessary knowledge and s 66(2) being grounded in affiliation and the joining of a criminal enterprise.

Looking at these rationales does Gnango fit within them? Under s 66(1) it is vital the assistance must be intended and with the requisite knowledge, otherwise people who contributed in minor ways to crime such as the taxi driver who dropped the murderer off at the destination could be held liable as a party to that murder. To conclude that Gnango intended the assistance is to conclude that he intended to assist something that was the direct opposite of his purpose. This would be stretching the law and moving away from the underlying reasons for culpability under this provision that have existed for centuries. Equally, holding Gnango liable under s 66(2) would produce the same result. He has not joined with others for a purpose where they intend to act as one and are therefore liable for each other's actions. This is not the standard criminal joint enterprise where "commitment to the common purpose implies an acceptance of the choices and actions that are taken by P in the course of realising that purpose."[104] Their purposes are directly opposing and they do not explicitly or implicitly accept responsibility for each other's actions. It would be contrary to this underlying rationale to hold Gnango liable as a party to the murder committed by BM under s 66(2).

There are several negative consequences that are caused if the law blurs these underlying principles. If the law is stretched to meet complicated facts it undermines the doctrinal consistency, certainty and predictability in the criminal law which is of the utmost importance. Professor Andrew Ashworth has expressed this concern about the English law of complicity. He stated that "it betrays the worst features of the common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence."[105] Holding those such as Gnango liable under s 66 could lead to criticism such as this in New Zealand.

Another problem arises from labelling Gnango as a murderer by holding him liable as a secondary party to his opponent's offence. The problem is that it may breach the underlying

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104 Simester, above n 17, at 599.

105 Andrew Ashworth *Principles of Criminal Law* (4th ed, Oxford University Press, Oxford, 2003) at 441.

principles of fair labelling and parity of culpability. When discussing the principle of fair labelling Simester and Brookbanks stated "the criminal law speaks to society as well as wrongdoers when it convicts them, and it should communicate its judgment with precision by accurately naming the crime of which they are convicted. This requirement is known as the principle of fair labelling."[106] The parity of culpability is "the principle that those facing the same punishment should be equally guilty of the offence."[107] As Gnango does not fulfil the underlying rationales of secondary liability he should not be labelled a murderer and should not be punished as one. Therefore finding him guilty breaches these two principles. This is a concern, as if the criminal law holds individuals liable in circumstances where they do not meet the accepted rationales, it undermines the credibility of the criminal law as a whole. It does this as it moves away from being "a reliable statement of what the community perceives as condemnable and not condemnable".[108]

VIII. Alternative approach from the United States - Depraved Heart Liability

It is important to acknowledge that some jurisdictions do not share the same doctrinal concerns about extending secondary liability in cases such as *R v Gnango*. The Court of Appeal in *R v Gnango* made reference to a doctrine called "depraved heart liability" that has been used in a number of American states when innocent bystanders have been killed in the crossfire between individuals or gangs.[109] This approach is worth examining as it shows how American courts and legislators have created an approach that allows individuals such as Gnango to be convicted of murder. It is no secret that many American states advocate a more punitive approach to violent offenders, and this approach is an illustration of how their policy concerns have led to a move away from the above stated rationales of secondary liability.[110] It is perhaps an indication of where our law will begin to head if individuals such as Gnango are held liable under s 66.

Firstly by way of comparison it is interesting to note the approach some American courts have taken to issues of shared intent between adversaries without the use of "depraved heart

106 Brookbanks and Simester, above n 33, at 32.
107 House of Commons Justice Committee, above n 8, at 7.
108 Brookbanks and Simester, above n 33, at 8.
109 At [76].
110 This punitive focus is illustrated by policies such as the 'three strikes' sentencing approach for violent offenders that is now also being used in New Zealand.

liability". *Commonwealth v Gaynor*[111] dealt with very similar facts to *R v Gnango.* Two men had argued in a store, both left and then returned armed and began to shoot at each other in the busy store. An innocent member of the public was killed. Despite the fact that it was not a bullet from Gaynor's gun that killed the member of the public he was also charged with murder. In discussing the possibility of secondary liability the Supreme Court of Pennsylvania agreed with the conclusions stated above on common intention. They stated that "we agree on these facts the two actors were neither accomplices to each other nor co-conspirators in any acceptable sense. Plainly they were enemies in an adversarial relationship. Shared intent, therefore, was impossible on these facts."[112] They also expressed concerns about comparisons of this situation with a duel. They stated that "the trial court's characterization of the shooting spree as a 'duel' is also troubling. At common law, such combat with deadly weapons was usually carried out by pre-arrangement and in conformity with agreed or prescribed rules."[113] However the doctrine of depraved heart liability avoids some of these tricky issues that prevent a court finding liability for murder in cases of this kind.

Depraved heart liability is present in a number of United States jurisdictions either through statutory amendment or common law development. This doctrine has been used to hold opposing parties liable when it is not possible to work out who fired the fatal shot but it has also been used to hold a party liable for the fatal shot of his opponent. It is based on a theory of 'joint causation'.[114] The mens rea for depraved heart murder is supplied by the participation in the public gun battle, if it meets the standard of "manifesting extreme indifference to the value of human life" or sometimes known as conduct "evincing a depraved heart, devoid of social duty, and fatally bent on mischief."[115] A participant such as Gnango firing over an occupied vehicle in a public courtyard would likely be held to meet this standard. In terms of the causation element "the courts have determined that the combined hail of bullets that result from such a battle are jointly responsible for the fatal injury, such that determination of which bullet 'actually' caused the death is unnecessary."[116] By participating, a person is held to be a contributory cause of the gunfight, if they had not participated it would not have occurred and therefore their actions have made a substantial

111 *Commonwealth v Gaynor* 538 Pa. 258, 648 A. 2d 295 (1994).
112 At 262.
113 At 262.
114 Baker, above n 37, at 272.
115 Wayne R LaFave *Criminal Law* (4th ed, Thomson West, St Paul, 2003) at 739-740.
116 *State v Spates* 779 NW 2d 770,777 (2010).

causal contribution to the passer-by's death.[117] Once again Gnango would fulfil this requirement. This causation theory, not available in New Zealand, has been used in some United States jurisdictions to find defendants similar to Gnango guilty of murder.

While "depraved heart liability" does not apply in New Zealand its use by American courts highlights issues that have the potential to influence the way secondary liability and more specifically agreement, shared intent and encouragement are regarded by courts in New Zealand. It illustrates how the underlying principles of intentional help or encouragement and affiliation can be extended in response to policy concerns to hold people liable for the actions of an adversary. This extension of principle caused by depraved heart liability can be seen in statements made in the case of *David L. Alston v State of Maryland*[118] in the Court of Appeals of Maryland. In terms of aiding and abetting the Court stated that in this context:[119]

> ... there would have been no mutual combat, and no murder of an innocent person, but for the willingness of both groups to turn an urban setting into a battleground. In this sense each participant is present, aiding and abetting each other participant, whether friend or foe, in the depraved conduct.

When looking at whether there was a possible shared intent they refuted the statements from *Gaynor* above and found that despite the fact that this gun battle differed from a duel "the Baltimore City jury in this case had sufficient evidence from which it could find that all of the participants, driven by an unwritten code of macho honor, tacitly agreed that there would be mutual combat".[120] The Court then stated that while they may be adversaries on one level of analysis they were not for the purposes of depraved heart murder.[121]

These approaches avoid the problems faced when looking at s 66(1) and (2), that Gnango and BM were adversaries, and enable a court to find Gnango liable for murder. If in New Zealand, a court were to hold that Gnango and BM had a common intention under s 66(2) or that Gnango's participation or presence in the gunfight constituted abetting under s 66(1)(c) we would be extending our criminal law more towards this American approach, that in the United States is usually covered by statute or has a long history of common law development. As stated above such an approach risks undermining the coherency and consistency of our criminal law. In our system with precise statutory provisions dealing with murder any

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117 Baker, above n 37, at 272.
118 *David L. Alston v State of Maryland* (1995) 339 Md 306.
119 At 13.
120 At 18.
121 At 18.

extension should be made by Parliament, after very careful consideration of the potential implications, and not the courts extending s 66 of the Crimes Act.

IX. Conclusion

Gang violence and public shoot-outs are unfortunately an increasingly common occurrence. It is the role of the law to hold participants in these violent acts to account. However, the determination of which individuals should bear responsibility for the results of these actions is a complicated and controversial question. This dissertation has examined what conclusions a court in New Zealand would reach as to liability for murder on the complicated facts of *R v Gnango*. In doing so it attempted to illustrate the underlying principles and policies at play, which influence these important decisions.

In examining the Crimes Act 1961, the conclusion is reached that contrary to the decision of the United Kingdom Supreme Court on the English law of secondary liability, a defendant like Gnango would not be liable for murder in New Zealand. Firstly, as the words of s 158 impliedly exclude liability but secondly, as the elements of liability as a principal or secondary party are not met on these facts. It is also concluded that in a broader sense an intention to help or encourage under s 66(1) and a common intention under s 66(2) are very unlikely to be found in a situation involving adversaries. As discussed, these conclusions are in line with the underlying rationales of s 66(1) and (2).

Despite the conclusion that Gnango should not be liable for murder on these facts it is important to note that this does not mean he walks free. As in the United Kingdom he is still liable for the attempted murder of BM and firearms offences and would face lengthy sentences of imprisonment for these crimes. It is not necessary to stretch the law to convict him as a secondary party to murder when he is already being held responsible for his actions.

Finally this dissertation notes that the legal conclusions reached on these important questions can be greatly influenced by policy considerations and public pressure. In order to avoid this we need to ensure that we continue to take a principled approach to secondary liability in New Zealand as the consequences are great not only for individual defendants like Gnango facing life imprisonment, but also for the credibility and consistency of our criminal law.

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